IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 07-1611**
Appellant,	:	**On Appeal from the Greene County Court of Appeals, Second Appellate District**
-vs-	:	
JOSE A. RIVAS,	:	**Court of Appeals Case No. 2005 CA 147**
Appellee.	:	

MERIT BRIEF OF APPELLEE JOSE A. RIVAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN OPPOSITION 9

PROPOSITION OF LAW NO. 1: A TRIAL COURT PROPERLY DENIES A MOTION TO COMPEL DISCOVERY OF A CONFIDENTIAL LAW ENFORCEMENT INVESTIGATORY RECORD ABSENT A SHOWING OF PARTICULARIZED NEED.

A. A TRIAL COURT'S ERRONEOUS DETERMINATION OF THE SCOPE OF CRIM. R.16 IS REVIEWED DE NOVO. 9

B. THE STATE'S DISCOVERY OBLIGATIONS TO A CRIMINAL DEFENDANT ARE GOVERNED EXCLUSIVELY BY CRIM. R.16. 10

C. A DEFENDANT'S ENTITLEMENT TO DISCOVERY UNDER CRIM. R.16(B) DOES NOT REQUIRE A SHOWING OF "PARTICULARIZED NEED." 11

D. EVEN IF MR. RIVAS *IS* REQUIRED TO SHOW A "PARTICULARIZED NEED," THE RECORD ESTABLISHES HE DID. 14

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

STATUTES

R.C. 149.43 ..... 10, 11

PROCEDURAL RULES

Crim.R. 6..... 1, 12

Crim.R. 16..... 1, 2, 5, 9, 10, 11, 12, 13, 14, 15, 18

CASES

Raceway Video and Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals (1997), 118 Ohio App.3d 264, 692 N.E.2d 656..... 9

South Central Bell Telephone Co. v. Barthelemy (La. 1994), 643 So.2d 1240 13

State v. Bidinost (1994), 71 Ohio St.3d 449, 644 N.E.2d 318..... 13

State v. Brewster (Jun. 11, 2004), 1st Dist. Case No. C030224, unreported, 2004-Ohio-2993..... 13

State v. Burroughs, 165 Ohio App.3d 172, 2005-Ohio-6411, 845 N.E.2d 540 15

State v. DeLeon (1991), 76 Ohio App.3d 68, 600 N.E.2d 1137..... 10

State v. Earley (1975), 49 Ohio App.2d 377, 361 N.E.2d254..... 16

State v. Gillard (1997), 78 Ohio St.3d 548, 679 N.E.2d 276..... 9

State v. Green (Apr. 7, 2000), 2nd Dist. No. C-990625, unreported, 2000 WL 353165 ..... 15, 16, 17

State v. Greer (1981), 66 Ohio St.2d 139, 420 N.E.2d 982..... 12, 15, 18

State ex rel. Carpenter v. Tubbs Jones (1995), 72 Ohio St.3d 579, 651 N.E.2d 993 11

State ex rel. Dillery v. Icsman (2002), 92 Ohio St.3d 312, 315 750 N.E.2d 156 11

State ex rel. Morgan v. New Lexington, 112 Ohio St.3d 33, 857 N.E.2d 1208, 2006-Ohio-6365 11

State ex rel. Steckman v. Jackson (1994) ,70 Ohio St.3d 420, 639 N.E.2d 83 ..... 1, 10, 11, 18

State v. Rivas, 172 Ohio App.3d 473, 2007-Ohio-3593, 875 N.E.2d 655... 8, 16, 18

United States v. Proctor & Gamble, Co. (1958), 356 U.S. 677, 78 S.Ct. 983 15

University Hosp. Univ. of Cincinnati College of Medicine v. State Emp. Rel. Bd. (1992), 63 Ohio St.3d 339, 587 N.E.3d 835 9

SUMMARY OF THE ARGUMENT

The appellate court's decision is firmly grounded in due process, the Ohio Rules of Criminal Procedure and basic fairness: Where the State offers evidence against a defendant in the form of a paper printout purportedly generated from electronic data, Crim.R. 16 and due process guarantee the defendant the opportunity to objectively ensure that the printout accurately reflects the electronic data from which it was purportedly derived. This Court should affirm this holding for three reasons:

First, the State's contention that Ohio law permits a prosecutor to circumvent mandatory disclosure under Crim.R. 16(B) based upon an unrelated provision of the Ohio Public Records Act contradicts this Court's holding in *State ex rel. Steckman v. Jackson*.[1] The *Steckman* Court held that criminal discovery is governed **exclusively** by Crim.R. 16, not the Ohio Public Records Act. Just as a criminal defendant cannot use the Ohio Public Records Act to obtain **more** discovery than that to which he is entitled under Crim.R. 16, the State cannot use the Ohio Public Records Act to provide a criminal defendant with **less** discovery than that required by Crim.R. 16. To do so would impermissibly alter the balance that the *Steckman* Court held is essential to fair and efficient criminal discovery.

Second, the State's suggestion that Mr. Rivas be required to show a "particularized need" as a condition precedent to obtaining discovery under Crim.R. 16(B) because of police-created "security concerns" specific to this case is the equivalent of asking this Court to ignore Crim.R. 16 just this one time. The State's attempt to analogize Mr. Rivas' entitlement to mandatory discovery under Crim.R. 16(B) to that of a defendant who seeks to unseal grand jury testimony under Crim.R. 6(E) is specious at

[1] (1994) 70 Ohio St.3d 420, 639 N.E.2d 83.

best. Grand jury testimony is subject to a "particularized need" under the express language of Crim.R. 6(E). The evidence at issue here, however, falls under the mandatory disclosure provision of Crim.R. 16(B). Mr. Rivas did all that Crim.R. 16(B) required: he demanded to inspect and copy the hard drive containing the electronic data of his alleged crime. The trial court had **no** discretion to ignore or permit the State to ignore its obligations of mandatory disclosure under Crim.R. 16(B).

Third, even if this Court *were* to adopt a "particularized need" requirement, either generally or just for this case, Mr. Rivas nevertheless met this burden for two reasons. First, the State used the evidence at issue as substantive evidence of Mr. Rivas' guilt. Such use shifted the balance between Mr. Rivas' due process rights and the State's need for secrecy in Mr. Rivas' favor. Second, the testimony offered by both Mr. Rivas and his computer expert identified specific concerns about accuracy of the State's paper printout that could be easily and definitely resolved by comparing the State's paper printouts with the electronic evidence from which they were purportedly generated. Under these circumstances, the trial court was obligated to balance Mr. Rivas' right to discovery and a fair trial against the State's "security concerns" in a manner that would serve *both* interests. The trial court, however, ignored Mr. Rivas' side of that equation and instead remedied the State's self-created "security concerns" at the expense of Mr. Rivas' right to discovery and due process.

For these reasons and based upon the facts and authorities cited below, Mr. Rivas respectfully requests this Court affirm the appellate court's decision.

STATEMENT OF THE CASE AND FACTS

A. MR. RIVAS IS ARRESTED FOR A COMPUTER-BASED CRIME.

In January 2005, City of Xenia police arrested Mr. Rivas for allegedly attempting to arrange a sexual encounter with a minor female over an internet chat room.

The "minor female" was, in fact, Det. Alonzo Wilson, a 41-year-old male police detective allegedly posing online as a 14-year-old female. (Trial Tr. 21). Mr. Rivas "met" Det. Wilson in a general AOL chat room and contacted him via instant messenger. (Id.). After "chatting" with Det. Wilson for several hours on two consecutive days – largely back and forth on matters of a sexual nature – the two arranged to meet at a hotel bar in Xenia. (Tr. Exhibit 3; Trial Tr. at 40).

Det. Wilson testified that he had identified himself during the chats as a 14-year-old female. (Trial Tr. 24; Tr. Exhibit 3). Mr. Rivas, however, testified that the individual with whom he had been communicating indicated that she was 41 years old, not 14 years old. (Tr. Exhibit 8; Trial Tr. 80-81, 133-34, 138, 142, 145, 154, 158). Det. Wilson **was** 41 years old at the time the chats took place. (Trial Tr. 67).

Xenia police arrested Mr. Rivas at the hotel after he checked in. (Trial Tr. 56). Mr. Rivas testified that he encountered several men in the hotel elevator, later identified as Det. Wilson and other police officers. (Id. at 133). After exchanging pleasantries, the detectives asked Mr. Rivas if he was at the hotel to meet someone. (Id.). Mr. Rivas answered yes and stated he was going to the bar to meet a woman. (Id.). Det. Wilson asked Mr. Rivas how old the person was that he was meeting to which Mr. Rivas answered "41." (Id. at 133-134). Det. Wilson then grabbed Mr. Rivas' arm and stated, "No, she's 14, you're under arrest." (Id.).

Mr. Rivas consented to police searching his hotel room and his vehicle. (Trial Tr. 72). At the police department, Mr. Rivas gave a statement to Det. Wilson reiterating that he believed he was meeting a 41-year-old woman at the hotel. (Tr. Exhibit 8; Trial Tr. 80-81).

B. THE TRIAL COURT ORDERS THE STATE TO ALLOW MR. RIVAS TO INSPECT AND COPY THE ELECTRONIC DATA OF THE "CHATS."

Following Mr. Rivas' arraignment, defense counsel moved for discovery under Civ. R. 16(B) and for the preservation of all electronic evidence in the possession of the police pertaining to the charges against Mr. Rivas. (Defendant's Rule 16 Demand for Discovery (Feb. 9, 2005) and Defendant's Motion for Preservation Order (Feb. 9, 2005)). The State did **not** object.

The trial court granted both of defendant's motions, ordering that Mr. Rivas "will be given the opportunity to review, photograph, copy or print such items, however, original computer files, spreadsheets, documentation, hardware, software or any other related computer items will be inspected and/or printed or copied or photographed only in the presence of and under the control of Xenia Police Department." (Judgment Entry (Mar. 11, 2005)).

C. THE STATE REFUSES TO COMPLY WITH THE COURT'S DISCOVERY ORDER.

In reliance upon this order, defense counsel retained a police computer expert to examine the electronic evidence of the internet communications between Mr. Rivas and Det. Wilson. In the seven years Xenia police have conducted "online stings" similar to the one which resulted in Mr. Rivas' arrest, Mr. Rivas was the **first defendant** of the more than 600 defendants similarly charged by Xenia Police Department to request to view the original electronic data. (Trial Tr. 79-80; Motion to Suppress Tr. 6).

Citing non-specific "security concerns," the State refused to permit Mr. Rivas' expert to copy or otherwise inspect the electronic data. Instead, the State provided defense counsel with paper printouts purporting to be transcripts of the chats between Det. Wilson and Mr. Rivas and a computer disk containing the same. (Id.; Motion to Suppress Tr. 48-50, 53, 72). Neither format the State provided contained the original and complete electronic data of the internet conversations between Mr. Rivas and Det. Wilson or the images purportedly depicted in the printouts. (Id.)

After exhausting informal efforts to persuade the State to comply with its duty under Crim.R. 16(B), defense counsel filed a motion to compel inspection of the original electronic data consistent with the trial court's discovery order. (Defendant's Motion to Compel Discovery (June 24, 2005)).

D. THE TRIAL COURT DENIES MR. RIVAS ANY OPPORTUNITY TO VERIFIY THE PRINTOUT WITH THE ELECTRONIC DATA.

The trial court conducted a hearing on the motion to compel during which Mr. Rivas presented testimony from a police computer expert, Ofc. Mark Vassel, explaining that an examination of the electronic data contained on the hard drive was the **only** way to discern whether the printouts provided by the State were accurate, reliable and unaltered. (Motion to Suppress Tr. 48-50, 53, 72). The trial court denied the motion, stating he saw "nothing within [Rule 16] that would require the State of Ohio to provide a 'mirror image' of its hard drive to the Defendant as a result of criminal discovery in the absence of allegations and some evidence that what has been provided [printouts] is not accurate." (Judgment Entry (July 12, 2005)).

Mr. Rivas moved the Court to reconsider, pointing out that he satisfied the extrinsic evidence requirement with his statement to police that Det. Wilson had

identified himself as 41 years old, not 14 years old as the printouts indicated. (Defendant's Motion for Reconsideration (July 18, 2005)). The trial court denied Mr. Rivas' motion for reconsideration. (Judgment Entry (Aug. 16, 2005)).

E. THE TRIAL COURT DENIES APPELLANT'S MOTION TO SUPPRESS DESPITE TESTIMONY ESTABLISHING THAT SLOPPY POLICE PRACTICES COMPROMISED THE ELECTRONIC DATA.

Mr. Rivas also moved to suppress the printouts. (Defendant's Motion to Suppress (Mar. 7, 2005)). During a hearing, Det. Wilson conceded that he did not make a copy of the electronic evidence relating to Mr. Rivas' arrest or otherwise segregate it from other electronic data of other investigations. (Motion to Suppress Tr. 7-8, 81). Instead, Det. Wilson testified that he continued to engage in "chats" with numerous individuals on the same hard drive as that allegedly containing the electronic data of Mr. Rivas' chats. (Id.). Det. Wilson also testified that following Mr. Rivas' arrest, he routinely "booted" the hard drive and acknowledged that he did so **knowing** that it would alter the electronic information contained in the computer files. (Id. at 20). Det. Wilson estimated that he had "booted" the computer at least 50 times between Mr. Rivas' arrest in January 2005 and the August 2005 hearing date. (Id.).

Mr. Rivas again offered the testimony of Ofc. Vassel, who explained that police have the same responsibilities to ensure the integrity and reliability of electronic evidence as they do for other physical evidence of a crime. Specifically, once police affect an arrest based upon electronic evidence, Ofc. Vassel explained that the accepted practice is to copy the hard drive as it exists at the time of the arrest onto a clean and sterile external hard drive, then store the external hard drive in an evidence locker. (Id. at 37). As result, police have an exact replica of the complete and original electronic data as it existed at the time of the arrest. Ofc. Vassel testified that this practice is consistent

with procedures recommended by the International Association of Computer Investigative Specialists and the United States Secret Service. (Id. at 38).

Ofc. Vassel further noted that Det. Wilson changed anywhere from 2,000 to 10,000 files within the hard drive each boot (multiplied by some 50 bootings), potentially including numerical information such as dates and times. (Id.). Ofc. Vassel stated that the **only** way for him to determine if computer information relating to Mr. Rivas' case was damaged or compromised by the booting was to examine the electronic information contained on the hard drive. (Id. at 40).

Ofc. Vassel testified that in an "internet sting" case such as this, rather than have police prepare a transcript directly, accepted law enforcement practice is to subpoena the internet provider (here, AOL) directly for its records. (Id. at 48). When specifically questioned about Xenia police's handling of the hard drive in this case, Ofc. Vassel opined that "the continued usage of that hard drive after the date in which you affect an arrest ruins the ability to consider that as best evidence." (Id. at 58). He also stated that Xenia police's continued booting of the computer compromised the chain of custody, noting that "[i]it's the same as recording over a DUI stop on a tape." (Id.).

Notwithstanding, the trial court denied Mr. Rivas' motion to suppress, emphasizing that Mr. Rivas had failed to meet the court-imposed burden of proving through extrinsic evidence that State's printouts were inaccurate as compared to the electronic data. (Judgment Entry (Aug. 16, 2005)). The trial court also noted that Mr. Rivas had failed to enter into evidence the computer on which *he* engaged in the transcript "which would have given [him] some basis to claim an inaccuracy, if one in fact did exist." (Id.). Notably, neither the State nor the police **ever** sought to obtain Mr. Rivas' computer as evidence in the State's case. (Tr. at 93).

F. A JURY CONVICTS MR. RIVAS AT TRIAL.

During a two-day jury trial, the State's case relied chiefly upon the testimony of Det. Wilson as well as the paper "transcripts" and images purportedly generated from the electronic data of Mr. Rivas' internet conversations with Det. Wilson, notably over the objection of Mr. Rivas' trial counsel. (Tr. Exhibits 1, 2, 3, 4).

A jury convicted Mr. Rivas on both counts of the indictment. (Jury Verdict (Sept. 29, 2005)). The Court sentenced Mr. Rivas to six months in jail and classified him as a sexually-oriented offender. (Judgment Sentencing (Nov. 28, 2005)).

G. THE APPEALS COURT REVERSES THE TRIAL COURT.

Mr. Rivas filed a timely notice of appeal raising two assignments of error: (1) the trial court erred in denying [Mr. Rivas'] motion to compel inspection and copying of the computer hard drive; and (2) the trial court erred in admitting into evidence at trial the State's unauthenticated paper printouts of electronic data.

On July 13, 2007, a Ohio Court of Appeals for the Second District panel unanimously sustained Mr. Rivas' first assignment of error and held the second assignment of error moot. *State v. Rivas,* 172 Ohio App.3d 473, , 2007-Ohio-3593, 875 N.E.2d 655. The appeals court noted that while the State may have had a legitimate interest in protecting information on the police hard drive involving other cases, that interest did not trump Mr. Rivas' rights to discovery and due process. Id. at ¶16. The appeals court held that the trial court's refusal to permit Mr. Rivas **any** reasonable means of verifying the accuracy of the State's paper printouts violated Mr. Rivas' rights to confrontation and a fair trial, stating that "[w]here there is direct evidence of a conversation allegedly constituting the crime with which defendant is charged, we hold that the right to a fair trial includes the right of the defendant to some reasonable means

of verifying that a purported transcript of a conversation, prepared from the direct evidence by the adverse party, is accurate and complete." Id. at ¶¶18-19.

On this basis, the appeals court vacated the judgment and remanded the matter back to the trial court. Id. at ¶24.

ARGUMENT IN OPPOSITION

PROPOSITION OF LAW NO. 1: A TRIAL COURT PROPERLY DENIES A MOTION TO COMPEL DISCOVERY OF A CONFIDENTIAL LAW ENFORCEMENT INVESTIGATORY RECORD ABSENT A SHOWING OF PARTICULARIZED NEED.

A. A TRIAL COURT'S ERRONEOUS DETERMINATION OF THE SCOPE OF CRIM.R. 16 IS REVIEWED *DE NOVO*.

The State incorrectly asserts that the trial court's decision denying Mr. Rivas' motion to compel discovery is reviewed under an abuse of discretion. (Appellant's Merit Brief at 6). The trial court based its decision upon its interpretation of the scope and application of Crim.R. 16, specifically, finding that nothing within [Crim.R. 16] would permit Mr. Rivas to inspect or copy the hard drive "in the absence of allegations and some evidence that what has been provided is not accurate." (Judgment Entry (July 12, 2005)). In so holding, the trial court erred **as a matter of law** in determining the scope and application of Crim.R. 16.

Questions on appeal that relate to the interpretation or application of statutes and rules are questions of law subject to *de novo* review. *University Hosp. Univ. of Cincinnati College of Medicine v. State Emp. Rel. Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835, paragraph one of the syllabus; *State v. Gillard* (1997), 78 Ohio St.3d 548, 552, 679 N.E.2d 276 (holding that a trial court's application of the law to facts is a purely legal question subject to a *de novo* review); *Raceway Video and Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 264, 269, 692 N.E.2d 656

("On matters of law-choice, interpretation, or application – our review is, of course, plenary"). "When the record affirmatively shows that the trial court has made an error of fact or law upon which it has evidently relied in exercising its discretion, the trial court's decision is reversible error." *State v. DeLeon* (1991), 76 Ohio App.3d 68, 78, 600 N.E.2d 83, *jurisdictional motion overruled* (1992), 585 N.E.2d 834.

Accordingly, this Court properly applies a *de novo,* rather than an abuse of discretion, standard of review to the trial court's decision denying Mr. Rivas' motion to compel.

B. THE STATE'S DISCOVERY OBLIGATIONS TO A CRIMINAL DEFENDANT ARE GOVERNED EXCLUSIVELY BY CRIM.R. 16.

The State does **not** argue that the evidence at issue is not subject to mandatory disclosure under Crim.R. 16(B)(1)(c). Instead, the State argues that the mandatory disclosure provision should not apply where the evidence is a "confidential law enforcement investigatory record" as defined by the Ohio Public Records Act. (Appellant's Merit Brief at 7); R.C. 149.43(A)(1)(h).

The State's argument is contrary to this Court's holding in *Steckman*. The *Steckman* Court held that notwithstanding the Ohio Public Records Act, criminal discovery is governed **exclusively** by Crim.R. 16. Id. at 437-439. Indeed, the *Steckman* Court expressly prohibited criminal defendants from exercising the right to obtain public records under R.C. 149.43 where such is used as a tool to gain greater discovery than that permitted by Crim.R. 16 for use in a criminal proceeding. Id. at paragraph two of the syllabus. The *Steckman* Court justified its holding by emphasizing the need to preserve a balance between the rights and obligations of the parties in a criminal proceeding. Id. at 428-429 ("The playing field [between the State and a defendant] is

not level as there is no reciprocal right of prosecutors to obtain additional discovery beyond Crim.R. 16(C)"); see also *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 315, 750 N.E.2d 156; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365 at ¶44, 857 N.E.2d 1208 (declining to extend *Steckman* to civil discovery because, unlike the criminal rules of procedure, the civil rules of procedure provide for reciprocal discovery).

In *State ex rel. Carpenter v. Tubbs Jones* (1995), 72 Ohio St.3d 579, 651 N.E.2d 993, the Court, applying *Steckman*, held that for purposes of criminal discovery, Crim.R. 16 trumps the Ohio Public Record Act. Id. at 580; citing *Steckman* at 435. Moreover, the *Carpenter* Court held that notwithstanding the exceptions set forth in R.C. 149.43(A), "[d]ocuments discoverable under Crim.R. 16...are **always** subject to disclosure upon request by the criminal defendant." Id.

Steckman and its progeny unequivocally establish that with regard to criminal discovery, the rights and obligations of **both** the prosecution and defense are exclusively governed by Crim.R. 16. Just as Mr. Rivas cannot use R.C. 149.43 to obtain **greater** discovery than that to which he is entitled under Crim.R. 16, the State cannot rely upon R.C. 149.43 to provide Mr. Rivas with **less** discovery than that required by Crim.R. 16(B). To hold otherwise would be to undermine the very balance upon which *Steckman* is based. See *Steckman* at 428-429.

Because the State's attempt to circumvent Crim.R. 16 by way of the Ohio Public Records Act is contrary to *Steckman*, the appeals court's decision should be affirmed.

C. A DEFENDANT'S ENTITLEMENT TO DISCOVERY UNDER CRIM.R. 16(B) DOES NOT REQUIRE A SHOWING OF "PARTICULARIZED NEED."

The State alternatively argues that this Court should require Mr. Rivas – and apparently *just* Mr. Rivas for the purposes of this particular case – to show a "particularized need" as a condition precedent to obtaining mandatory discovery under Crim.R. 16(B). Specifically, the State suggests – notably without citing **any** authority – the Court require Mr. Rivas to prove that his discovery rights under Crim.R. 16 outweigh law enforcement's need for confidentiality. (Appellant's Merit Brief at 8). In other words, the State asks this Court to effectively ignore Crim.R. 16 and arbitrarily impose a heightened standard upon Mr. Rivas to alleviate avoidable "security concerns" created by the police. The Court should decline to do so for two reasons: (1) the State's grand jury analogy has no application to Crim.R. 16; and (2) the trial court had no discretion to disregard Crim.R. 16, regardless of the State's "security concerns."

1. The State's grand jury analogy does not apply to discovery governed by Crim.R. 16.

The State's attempt to analogize the electronic data in this case as similar to grand jury testimony is feeble at best. A defendant's access to the otherwise secret proceedings of the grand jury is subject to a "particularized need" standard not despite the Ohio Rules of Criminal Procedure, but **because** of them. See Crim.R. 6, Crim.R. 16(B); *State v. Greer* (1981), 66 Ohio St.2d 139, 149-150, 420 N.E.2d 982. The rules expressly require that grand jury proceedings be kept secret absent a countervailing interest of the defendant that outweighs the need for secrecy. Id. Had the Court intended to implement a similar "particularized need" standard as part of Crim.R. 16, Crim.R. 6 shows that the Court surely knew how to do so. It did not.

This Court should decline the State's prompting to now impose a heightened standard upon Mr. Rivas *post hoc*.

2. Crim.R. 16(B)(1)(c) is mandatory; a trial court does not have the discretion to ignore it.

Crim.R. 16(B)(1)(3) provides that a trial court "**shall** order the prosecuting attorney to permit defendant to inspect and copy or photograph * * * tangible objects * * * available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial * * *" (emphasis added).[2] The language of Crim.R. 16(B)(1)(c) is mandatory, expressly stating that the trial court "**shall**" order discovery when the evidence meets two conditions: (1) it is a "tangible object"; and (2) it is "material to the preparation of [a criminal defendant's] defense or intended for use by the prosecuting attorney as evidence at the trial." Crim.R. 16(B)(1)(c); *State v. Brewster* (Jun. 11, 2004), 1st Dist. Case No. C030224, 2004-Ohio-2993 at ¶36. Where both criteria are met, a trial court has **no** discretion to ignore or permit the State to ignore the mandatory disclosure obligations under Crim.R. 16(B). *State v. Bidinost* (1994), 71 Ohio St.3d 449, 456, 644 N.E.2d 318 (holding that "'the spirit of the law' [is] not fulfilled by anything less than **strict compliance** with [Crim.R. 16]")(emphasis added).

The police hard drive containing the electronic data of Mr. Rivas' communications with Det. Wilson meets both criteria for mandatory disclosure under Crim.R. 16(B)(1)(c). First, the hard drive and the electronic data contained thereon are "tangible." See e.g., *South Central Bell Telephone Co. v. Barthelemy* (La. 1994), 643 So.2d 1240, 1248 (electronic data stores on hard drive is a tangible object subject to taxation). Second, the information contained on the hard drive was unquestionably material to the preparation of Mr. Rivas' defense. The hard drive was the **only** source of

[2] Although Mr. Rivas focuses his argument on Crim.R. 16(B)(1)(c), the electronic evidence at the online "chat," at least to the extent it contains Mr. Rivas' statements, is **also** subject to mandatory disclosure under Crim.R. 16(B)(1)(a)(i).

the complete and original electronic data pertaining to Mr. Rivas' internet communications with Det. Wilson. (Motion to Suppress Tr. 48-50, 53, 72; Tr. Exhibits 1, 2, 3, 4). Ofc. Vassel testified that the **only** way to determine whether the State's printouts were authentic, accurate and reliable reflections of the actual electronic data was to inspect the hard drive. (Motion to Suppress Tr. 72). Indeed, the trial court expressly instructed the Jury that during its deliberation it should "consider whether the Exhibits are the same objects and in the same condition that they were originally." (Trial Tr. 297).

As such, the trial court disregarded Crim.R. 16(B)(1)(c) in refusing to permit Mr. Rivas access to the hard drive. In doing so, the trial court reversed its previous order **granting** Mr. Rivas' demand to inspect, print, copy or photograph "original computer files, spreadsheets, documentation, hardware, software or any other related computer items * * * in the presence of and under the control of the Xenia Police Department." (Judgment Entry (Mar. 11, 2005)). Without any analysis or citation to authority, the trial court did an about-face, concluding that it found "nothing within [Crim.R. 16(B)(1)(c)]" that would permit Mr. Rivas access to the hard drive "in the absence of allegations and some evidence that what was provided is not accurate." (Judgment Entry (July 12, 2005)).

Because the trial court's interpretation of the scope and application of Crim.R. 16 to the hard drive was incorrect as a matter of law, the appeals court's decision finding reversible error should be affirmed.

D. EVEN IF MR. RIVAS *IS* REQUIRED TO SHOW A "PARTICULARIZED NEED," THE RECORD ESTABLISHES HE DID.

Assuming *arguendo* that this Court *were* to adopt a "particularized need" standard as condition precedent for obtaining otherwise mandatory discovery under Crim.R. 16, Mr. Rivas established such a need for two reasons: (1) the State intended to use the electronic evidence as **substantive** evidence of his guilt; and (2) the testimony of Mr. Rivas and his computer expert raised specific questions about the accuracy of the paper printout that could be easily and definitively resolved by comparing the paper printout to the electronic evidence from which it was purportedly generated.

1. A defendant has a "particularized need" to discover evidence that the State intends to offer as substantive evidence of his guilt.

In the context of grand jury testimony, "[w]hether particularized need for disclosure * * * is shown is a question of fact; but generally, it is shown where, from a consideration of all the surrounding circumstances, it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication." *Greer* at paragraph three of the syllabus. A defendant must articulate more than just speculation that the disclosure *may* contain some material that *could* be helpful to his case. Id.; see also *State v. Burroughs*, 165 Ohio App.3d 172, 2005-Ohio-6411 at ¶¶13-14, 845 N.E.2d 540 (denying access to grand jury testimony where a defendant's request for grand jury proceedings was "merely a fishing expedition"). Rather, a defendant must articulate a specific need for the testimony, such as "to impeach a witness, to refresh his recollection, to test his credibility and the like." *United States v. Proctor & Gamble, Co.* (1958), 356 U.S. 677, 683, 78 S.Ct. 983.

A defendant's need to discover evidence is undoubtedly heightened where the State intends to offer such as substantive evidence of a defendant's guilt. (Tr. Exhibits 1-4); *State v. Green* (Apr. 7, 2000), 2nd Dist. No. C-990625, unreported, 2000 WL 353165

at *3. In *Green,* the appeals court addressed a scenario where the State intended to submit grand jury testimony as substantive evidence against a defendant in an offender classification hearing. The *Green* Court noted that under such circumstances, the defendant showed a particularized need to inspect the evidence because, absent the opportunity to do so, he "had no way to rebut or counter the evidence without seeing it." Id. at *3. "Weighing the need for the secrecy * * * against the defendant's right to due process and fundamental fairness, the balance weighs in **favor** of allowing [the defendant] to view the transcript of the grand-jury proceedings." Id. at *3.

Like *Green,* the State offered the paper printouts purportedly generated from the electronic data of Mr. Rivas' online interactions with Det. Wilson as affirmative, substantive evidence of his guilt. (Tr. Exhibit 1-4). In the absence of an opportunity to inspect the underlying electronic data, Mr. Rivas "had no way to rebut or counter the evidence without seeing it." *Green,* 2000 WL 353165 at *3; see also *State v. Earley* (1975), 49 Ohio App.2d 377, 382, 361 N.E.2d 254 ("neither the due process right to a fair trial, nor the due process right to confront one's accusers is granted [to] a defendant when he is denied the opportunity to impeach a critical state witness for the lack of a prior impeaching foundation where such requirement is, through no fault of the defendant, impossible to establish").

The paper printouts of the "chat logs" were the State's chief substantive evidence against Mr. Rivas. (Tr. Exhibit 1-4); *Rivas,* at ¶18. The State's argument that the printouts were inconsequential to the outcome of trial because Det. Wilson's testimony was, in and of itself, sufficient to convict Mr. Rivas is disingenuous to the extent it fails to disclose that much of Det. Wilson's testimony was based upon his reading of those transcripts. (Trial Tr. 23-34; 37-43; 46-47). That certainly was not the State's position

during trial when it argued to the Jury that "if you believe what is in [the transcripts], you're going to convict him and there's no reason not to believe in what's in there." (Trial Tr. 283). Moreover, the trial court expressly instructed the Jury that they "may consider whether the Exhibits are the same objects and in the same condition that they were originally." (Trial Tr. 297). The Jury could not fairly reach such a determination where the trial court's refusal to permit Mr. Rivas *any* meaningful opportunity to independently verify whether the exhibits *were*, in fact, the same objects and in the same condition as compared to the electronic data, made impossible for Mr. Rivas to fairly "rebut or counter" the State's testimony and arguments. *Green*, 2000 WL 353165 at *3

Under these circumstances, Mr. Rivas had a "particularized need" sufficient to permit him the opportunity to verify the accuracy of the printouts against the electronic evidence from which they were purportedly generated.

2. The testimony of the defense expert and Mr. Rivas established a "particularized need" to discover the electronic evidence from which the printout was purportedly generated.

During both the motion to compel and the motion to suppress hearings, the defense submitted statements by Mr. Rivas and the testimony of his computer expert which raised specific concerns about the accuracy of the paper printout in relation to the electronic data. In both his statement to police at the time of his arrest and later, at trial, Mr. Rivas stated that the female with which he had "chatted" online had identified herself as 41 years old, not 14 years old. (Trial Ex. 8; Trial Tr. 90-91, 133-134. Mr. Rivas' computer expert testified that the **only** definitive way to resolve the apparent dispute between the State's paper printout and Mr. Rivas' recollection was to examine the

complete and original electronic data of the internet chat to determine whether the data was modified. (Mot. to Suppress Tr. 37-40). Ofc. Vassel further testified that the police department's practices in handling electronic evidence, including routinely "rebooting" the computers, may have altered information – including numerical information – in the computer files. (Id. at 38, 58).

By this testimony, Mr. Rivas established a specific need to inspect the electronic data relevant to his crime that that outweighed the State's "security concerns." Under these circumstances, the trial court was obligated to balance Mr. Rivas' constitutional and procedural rights to discovery against the State's "security concerns." See *Greer* at paragraph three of the syllabus. As the appeals court held, the trial court had a spectrum of options available to it which would allay the State's concerns yet at the same time ensure that Mr. Rivas was not materially prejudiced, including its suggestion that the trial court appoint an independent expert to review of the electronic data *in camera. Rivas,* at ¶¶16-17. Instead, the trial court remedied the State's self-created "security concerns" entirely at the expense of Mr. Rivas' rights to due process and discovery.

CONCLUSION

The appeals court holding should be affirmed because it enforces both the letter and spirit of Crim.R. 16(B) and due process, providing that a criminal defendant be given the opportunity to meaningfully verify that the State's evidence is, in fact, what the State claims it to be so that he may fairly and meaningfully prepare his defense. To accept the State's proposition of law to the contrary, this Court would have to both reverse its holding in *Steckman* **and** ignore Crim.R. 16. Indeed, the State's argument is little more than a request for this Court to remedy avoidable "security concerns" created by the police at the expense of Mr. Rivas' rights to discovery and due process.

For these reasons, Mr. Rivas respectfully requests the Court affirm the decision of the appeals court and remand this case for a new trial, one in which the discovery playing field is appropriately leveled and Mr. Rivas is given the opportunity to objectively verify that the State's paper printouts are consistent with the electronic evidence from which they were purportedly generated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic and first-class mail on this 15th day of April to: Stephen K. Haller and Elizabeth A. Ellis, 61 Greene Street, Second Floor, Xenia, OH 45385.

STACY A. HINNERS (0076458)

SUMMARY OF THE ARGUMENT

The appellate court's decision is firmly grounded in due process, the Ohio Rules of Criminal Procedure and basic fairness: Where the State offers evidence against a defendant in the form of a paper printout purportedly generated from electronic data, Crim.R. 16 and due process guarantee the defendant the opportunity to objectively ensure that the printout accurately reflects the electronic data from which it was purportedly derived. This Court should affirm this holding for three reasons:

First, the State's contention that Ohio law permits a prosecutor to circumvent mandatory disclosure under Crim.R. 16(B) based upon an unrelated provision of the Ohio Public Records Act contradicts this Court's holding in *State ex rel. Steckman v. Jackson.*[1] The *Steckman* Court held that criminal discovery is governed **exclusively** by Crim.R. 16, not the Ohio Public Records Act. Just as a criminal defendant cannot use the Ohio Public Records Act to obtain **more** discovery than that to which he is entitled under Crim.R. 16, the State cannot use the Ohio Public Records Act to provide a criminal defendant with **less** discovery than that required by Crim.R. 16. To do so would impermissibly alter the balance that the *Steckman* Court held is essential to fair and efficient criminal discovery.

Second, the State's suggestion that Mr. Rivas be required to show a "particularized need" as a condition precedent to obtaining discovery under Crim.R. 16(B) because of police-created "security concerns" specific to this case is the equivalent of asking this Court to ignore Crim.R. 16 just this one time. The State's attempt to analogize Mr. Rivas' entitlement to mandatory discovery under Crim.R. 16(B) to that of a defendant who seeks to unseal grand jury testimony under Crim.R. 6(E) is specious at

[1] (1994) 70 Ohio St.3d 420, 639 N.E.2d 83.

best. Grand jury testimony is subject to a "particularized need" under the express language of Crim.R. 6(E). The evidence at issue here, however, falls under the mandatory disclosure provision of Crim.R. 16(B). Mr. Rivas did all that Crim.R. 16(B) required: he demanded to inspect and copy the hard drive containing the electronic data of his alleged crime. The trial court had **no** discretion to ignore or permit the State to ignore its obligations of mandatory disclosure under Crim.R. 16(B).

Third, even if this Court *were* to adopt a "particularized need" requirement, either generally or just for this case, Mr. Rivas nevertheless met this burden for two reasons. First, the State used the evidence at issue as substantive evidence of Mr. Rivas' guilt. Such use shifted the balance between Mr. Rivas' due process rights and the State's need for secrecy in Mr. Rivas' favor. Second, the testimony offered by both Mr. Rivas and his computer expert identified specific concerns about accuracy of the State's paper printout that could be easily and definitely resolved by comparing the State's paper printouts with the electronic evidence from which they were purportedly generated. Under these circumstances, the trial court was obligated to balance Mr. Rivas' right to discovery and a fair trial against the State's "security concerns" in a manner that would serve *both* interests. The trial court, however, ignored Mr. Rivas' side of that equation and instead remedied the State's self-created "security concerns" at the expense of Mr. Rivas' right to discovery and due process.

For these reasons and based upon the facts and authorities cited below, Mr. Rivas respectfully requests this Court affirm the appellate court's decision.

STATEMENT OF THE CASE AND FACTS

A. MR. RIVAS IS ARRESTED FOR A COMPUTER-BASED CRIME.

In January 2005, City of Xenia police arrested Mr. Rivas for allegedly attempting to arrange a sexual encounter with a minor female over an internet chat room.

The "minor female" was, in fact, Det. Alonzo Wilson, a 41-year-old male police detective allegedly posing online as a 14-year-old female. (Trial Tr. 21). Mr. Rivas "met" Det. Wilson in a general AOL chat room and contacted him via instant messenger. (Id.). After "chatting" with Det. Wilson for several hours on two consecutive days – largely back and forth on matters of a sexual nature – the two arranged to meet at a hotel bar in Xenia. (Tr. Exhibit 3; Trial Tr. at 40).

Det. Wilson testified that he had identified himself during the chats as a 14-year-old female. (Trial Tr. 24; Tr. Exhibit 3). Mr. Rivas, however, testified that the individual with whom he had been communicating indicated that she was 41 years old, not 14 years old. (Tr. Exhibit 8; Trial Tr. 80-81, 133-34, 138, 142, 145, 154, 158). Det. Wilson **was** 41 years old at the time the chats took place. (Trial Tr. 67).

Xenia police arrested Mr. Rivas at the hotel after he checked in. (Trial Tr. 56). Mr. Rivas testified that he encountered several men in the hotel elevator, later identified as Det. Wilson and other police officers. (Id. at 133). After exchanging pleasantries, the detectives asked Mr. Rivas if he was at the hotel to meet someone. (Id.). Mr. Rivas answered yes and stated he was going to the bar to meet a woman. (Id.). Det. Wilson asked Mr. Rivas how old the person was that he was meeting to which Mr. Rivas answered "41." (Id. at 133-134). Det. Wilson then grabbed Mr. Rivas' arm and stated, "No, she's 14, you're under arrest." (Id.).

Mr. Rivas consented to police searching his hotel room and his vehicle. (Trial Tr. 72). At the police department, Mr. Rivas gave a statement to Det. Wilson reiterating that he believed he was meeting a 41-year-old woman at the hotel. (Tr. Exhibit 8; Trial Tr. 80-81).

B. THE TRIAL COURT ORDERS THE STATE TO ALLOW MR. RIVAS TO INSPECT AND COPY THE ELECTRONIC DATA OF THE "CHATS."

Following Mr. Rivas' arraignment, defense counsel moved for discovery under Civ. R. 16(B) and for the preservation of all electronic evidence in the possession of the police pertaining to the charges against Mr. Rivas. (Defendant's Rule 16 Demand for Discovery (Feb. 9, 2005) and Defendant's Motion for Preservation Order (Feb. 9, 2005)). The State did **not** object.

The trial court granted both of defendant's motions, ordering that Mr. Rivas "will be given the opportunity to review, photograph, copy or print such items, however, original computer files, spreadsheets, documentation, hardware, software or any other related computer items will be inspected and/or printed or copied or photographed only in the presence of and under the control of Xenia Police Department." (Judgment Entry (Mar. 11, 2005)).

C. THE STATE REFUSES TO COMPLY WITH THE COURT'S DISCOVERY ORDER.

In reliance upon this order, defense counsel retained a police computer expert to examine the electronic evidence of the internet communications between Mr. Rivas and Det. Wilson. In the seven years Xenia police have conducted "online stings" similar to the one which resulted in Mr. Rivas' arrest, Mr. Rivas was the **first defendant** of the more than 600 defendants similarly charged by Xenia Police Department to request to view the original electronic data. (Trial Tr. 79-80; Motion to Suppress Tr. 6).

Citing non-specific "security concerns," the State refused to permit Mr. Rivas' expert to copy or otherwise inspect the electronic data. Instead, the State provided defense counsel with paper printouts purporting to be transcripts of the chats between Det. Wilson and Mr. Rivas and a computer disk containing the same. (Id.; Motion to Suppress Tr. 48-50, 53, 72). Neither format the State provided contained the original and complete electronic data of the internet conversations between Mr. Rivas and Det. Wilson or the images purportedly depicted in the printouts. (Id.)

After exhausting informal efforts to persuade the State to comply with its duty under Crim.R. 16(B), defense counsel filed a motion to compel inspection of the original electronic data consistent with the trial court's discovery order. (Defendant's Motion to Compel Discovery (June 24, 2005)).

D. THE TRIAL COURT DENIES MR. RIVAS ANY OPPORTUNITY TO VERIFIY THE PRINTOUT WITH THE ELECTRONIC DATA.

The trial court conducted a hearing on the motion to compel during which Mr. Rivas presented testimony from a police computer expert, Ofc. Mark Vassel, explaining that an examination of the electronic data contained on the hard drive was the **only** way to discern whether the printouts provided by the State were accurate, reliable and unaltered. (Motion to Suppress Tr. 48-50, 53, 72). The trial court denied the motion, stating he saw "nothing within [Rule 16] that would require the State of Ohio to provide a 'mirror image' of its hard drive to the Defendant as a result of criminal discovery in the absence of allegations and some evidence that what has been provided [printouts] is not accurate." (Judgment Entry (July 12, 2005)).

Mr. Rivas moved the Court to reconsider, pointing out that he satisfied the extrinsic evidence requirement with his statement to police that Det. Wilson had

identified himself as 41 years old, not 14 years old as the printouts indicated. (Defendant's Motion for Reconsideration (July 18, 2005)). The trial court denied Mr. Rivas' motion for reconsideration. (Judgment Entry (Aug. 16, 2005)).

E. THE TRIAL COURT DENIES APPELLANT'S MOTION TO SUPPRESS DESPITE TESTIMONY ESTABLISHING THAT SLOPPY POLICE PRACTICES COMPROMISED THE ELECTRONIC DATA.

Mr. Rivas also moved to suppress the printouts. (Defendant's Motion to Suppress (Mar. 7, 2005)). During a hearing, Det. Wilson conceded that he did not make a copy of the electronic evidence relating to Mr. Rivas' arrest or otherwise segregate it from other electronic data of other investigations. (Motion to Suppress Tr. 7-8, 81). Instead, Det. Wilson testified that he continued to engage in "chats" with numerous individuals on the same hard drive as that allegedly containing the electronic data of Mr. Rivas' chats. (Id.). Det. Wilson also testified that following Mr. Rivas' arrest, he routinely "booted" the hard drive and acknowledged that he did so **knowing** that it would alter the electronic information contained in the computer files. (Id. at 20). Det. Wilson estimated that he had "booted" the computer at least 50 times between Mr. Rivas' arrest in January 2005 and the August 2005 hearing date. (Id.).

Mr. Rivas again offered the testimony of Ofc. Vassel, who explained that police have the same responsibilities to ensure the integrity and reliability of electronic evidence as they do for other physical evidence of a crime. Specifically, once police affect an arrest based upon electronic evidence, Ofc. Vassel explained that the accepted practice is to copy the hard drive as it exists at the time of the arrest onto a clean and sterile external hard drive, then store the external hard drive in an evidence locker. (Id. at 37). As result, police have an exact replica of the complete and original electronic data as it existed at the time of the arrest. Ofc. Vassel testified that this practice is consistent

with procedures recommended by the International Association of Computer Investigative Specialists and the United States Secret Service. (Id. at 38).

Ofc. Vassel further noted that Det. Wilson changed anywhere from 2,000 to 10,000 files within the hard drive each boot (multiplied by some 50 bootings), potentially including numerical information such as dates and times. (Id.). Ofc. Vassel stated that the **only** way for him to determine if computer information relating to Mr. Rivas' case was damaged or compromised by the booting was to examine the electronic information contained on the hard drive. (Id. at 40).

Ofc. Vassel testified that in an "internet sting" case such as this, rather than have police prepare a transcript directly, accepted law enforcement practice is to subpoena the internet provider (here, AOL) directly for its records. (Id. at 48). When specifically questioned about Xenia police's handling of the hard drive in this case, Ofc. Vassel opined that "the continued usage of that hard drive after the date in which you affect an arrest ruins the ability to consider that as best evidence." (Id. at 58). He also stated that Xenia police's continued booting of the computer compromised the chain of custody, noting that "[i]it's the same as recording over a DUI stop on a tape." (Id.).

Notwithstanding, the trial court denied Mr. Rivas' motion to suppress, emphasizing that Mr. Rivas had failed to meet the court-imposed burden of proving through extrinsic evidence that State's printouts were inaccurate as compared to the electronic data. (Judgment Entry (Aug. 16, 2005)). The trial court also noted that Mr. Rivas had failed to enter into evidence the computer on which *he* engaged in the transcript "which would have given [him] some basis to claim an inaccuracy, if one in fact did exist." (Id.). Notably, neither the State nor the police **ever** sought to obtain Mr. Rivas' computer as evidence in the State's case. (Tr. at 93).

F. A JURY CONVICTS MR. RIVAS AT TRIAL.

During a two-day jury trial, the State's case relied chiefly upon the testimony of Det. Wilson as well as the paper "transcripts" and images purportedly generated from the electronic data of Mr. Rivas' internet conversations with Det. Wilson, notably over the objection of Mr. Rivas' trial counsel. (Tr. Exhibits 1, 2, 3, 4).

A jury convicted Mr. Rivas on both counts of the indictment. (Jury Verdict (Sept. 29, 2005)). The Court sentenced Mr. Rivas to six months in jail and classified him as a sexually-oriented offender. (Judgment Sentencing (Nov. 28, 2005)).

G. THE APPEALS COURT REVERSES THE TRIAL COURT.

Mr. Rivas filed a timely notice of appeal raising two assignments of error: (1) the trial court erred in denying [Mr. Rivas'] motion to compel inspection and copying of the computer hard drive; and (2) the trial court erred in admitting into evidence at trial the State's unauthenticated paper printouts of electronic data.

On July 13, 2007, a Ohio Court of Appeals for the Second District panel unanimously sustained Mr. Rivas' first assignment of error and held the second assignment of error moot. *State v. Rivas,* 172 Ohio App.3d 473, , 2007-Ohio-3593, 875 N.E.2d 655. The appeals court noted that while the State may have had a legitimate interest in protecting information on the police hard drive involving other cases, that interest did not trump Mr. Rivas' rights to discovery and due process. Id. at ¶16. The appeals court held that the trial court's refusal to permit Mr. Rivas **<u>any</u>** reasonable means of verifying the accuracy of the State's paper printouts violated Mr. Rivas' rights to confrontation and a fair trial, stating that "[w]here there is direct evidence of a conversation allegedly constituting the crime with which defendant is charged, we hold that the right to a fair trial includes the right of the defendant to some reasonable means

of verifying that a purported transcript of a conversation, prepared from the direct evidence by the adverse party, is accurate and complete." Id. at ¶¶18-19.

On this basis, the appeals court vacated the judgment and remanded the matter back to the trial court. Id. at ¶24.

ARGUMENT IN OPPOSITION

PROPOSITION OF LAW NO. 1: A TRIAL COURT PROPERLY DENIES A MOTION TO COMPEL DISCOVERY OF A CONFIDENTIAL LAW ENFORCEMENT INVESTIGATORY RECORD ABSENT A SHOWING OF PARTICULARIZED NEED.

A. A TRIAL COURT'S ERRONEOUS DETERMINATION OF THE SCOPE OF CRIM.R. 16 IS REVIEWED *DE NOVO*.

The State incorrectly asserts that the trial court's decision denying Mr. Rivas' motion to compel discovery is reviewed under an abuse of discretion. (Appellant's Merit Brief at 6). The trial court based its decision upon its interpretation of the scope and application of Crim.R. 16, specifically, finding that nothing within [Crim.R. 16] would permit Mr. Rivas to inspect or copy the hard drive "in the absence of allegations and some evidence that what has been provided is not accurate." (Judgment Entry (July 12, 2005)). In so holding, the trial court erred **as a matter of law** in determining the scope and application of Crim.R. 16.

Questions on appeal that relate to the interpretation or application of statutes and rules are questions of law subject to *de novo* review. *University Hosp. Univ. of Cincinnati College of Medicine v. State Emp. Rel. Bd.* (1992), 63 Ohio St.3d 339, 587 N.E.2d 835, paragraph one of the syllabus; *State v. Gillard* (1997), 78 Ohio St.3d 548, 552, 679 N.E.2d 276 (holding that a trial court's application of the law to facts is a purely legal question subject to a *de novo* review); *Raceway Video and Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 264, 269, 692 N.E.2d 656

("On matters of law-choice, interpretation, or application – our review is, of course, plenary"). "When the record affirmatively shows that the trial court has made an error of fact or law upon which it has evidently relied in exercising its discretion, the trial court's decision is reversible error." *State v. DeLeon* (1991), 76 Ohio App.3d 68, 78, 600 N.E.2d 83, *jurisdictional motion overruled* (1992), 585 N.E.2d 834.

Accordingly, this Court properly applies a *de novo,* rather than an abuse of discretion, standard of review to the trial court's decision denying Mr. Rivas' motion to compel.

B. THE STATE'S DISCOVERY OBLIGATIONS TO A CRIMINAL DEFENDANT ARE GOVERNED EXCLUSIVELY BY CRIM.R. 16.

The State does **not** argue that the evidence at issue is not subject to mandatory disclosure under Crim.R. 16(B)(1)(c). Instead, the State argues that the mandatory disclosure provision should not apply where the evidence is a "confidential law enforcement investigatory record" as defined by the Ohio Public Records Act. (Appellant's Merit Brief at 7); R.C. 149.43(A)(1)(h).

The State's argument is contrary to this Court's holding in *Steckman*. The *Steckman* Court held that notwithstanding the Ohio Public Records Act, criminal discovery is governed **exclusively** by Crim.R. 16. Id. at 437-439. Indeed, the *Steckman* Court expressly prohibited criminal defendants from exercising the right to obtain public records under R.C. 149.43 where such is used as a tool to gain greater discovery than that permitted by Crim.R. 16 for use in a criminal proceeding. Id. at paragraph two of the syllabus. The *Steckman* Court justified its holding by emphasizing the need to preserve a balance between the rights and obligations of the parties in a criminal proceeding. Id. at 428-429 ("The playing field [between the State and a defendant] is

not level as there is no reciprocal right of prosecutors to obtain additional discovery beyond Crim.R. 16(C)"); see also *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312, 315, 750 N.E.2d 156; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365 at ¶44, 857 N.E.2d 1208 (declining to extend *Steckman* to civil discovery because, unlike the criminal rules of procedure, the civil rules of procedure provide for reciprocal discovery).

In *State ex rel. Carpenter v. Tubbs Jones* (1995), 72 Ohio St.3d 579, 651 N.E.2d 993, the Court, applying *Steckman*, held that for purposes of criminal discovery, Crim.R. 16 trumps the Ohio Public Record Act. Id. at 580; citing *Steckman* at 435. Moreover, the *Carpenter* Court held that notwithstanding the exceptions set forth in R.C. 149.43(A), "[d]ocuments discoverable under Crim.R. 16...are **always** subject to disclosure upon request by the criminal defendant." Id.

Steckman and its progeny unequivocally establish that with regard to criminal discovery, the rights and obligations of **both** the prosecution and defense are exclusively governed by Crim.R. 16. Just as Mr. Rivas cannot use R.C. 149.43 to obtain **greater** discovery than that to which he is entitled under Crim.R. 16, the State cannot rely upon R.C. 149.43 to provide Mr. Rivas with **less** discovery than that required by Crim.R. 16(B). To hold otherwise would be to undermine the very balance upon which *Steckman* is based. See *Steckman* at 428-429.

Because the State's attempt to circumvent Crim.R. 16 by way of the Ohio Public Records Act is contrary to *Steckman*, the appeals court's decision should be affirmed.

C. A DEFENDANT'S ENTITLEMENT TO DISCOVERY UNDER CRIM.R. 16(B) DOES NOT REQUIRE A SHOWING OF "PARTICULARIZED NEED."

The State alternatively argues that this Court should require Mr. Rivas – and apparently *just* Mr. Rivas for the purposes of this particular case – to show a "particularized need" as a condition precedent to obtaining mandatory discovery under Crim.R. 16(B). Specifically, the State suggests – notably without citing **any** authority – the Court require Mr. Rivas to prove that his discovery rights under Crim.R. 16 outweigh law enforcement's need for confidentiality. (Appellant's Merit Brief at 8). In other words, the State asks this Court to effectively ignore Crim.R. 16 and arbitrarily impose a heightened standard upon Mr. Rivas to alleviate avoidable "security concerns" created by the police. The Court should decline to do so for two reasons: (1) the State's grand jury analogy has no application to Crim.R. 16; and (2) the trial court had no discretion to disregard Crim.R. 16, regardless of the State's "security concerns."

1. The State's grand jury analogy does not apply to discovery governed by Crim.R. 16.

The State's attempt to analogize the electronic data in this case as similar to grand jury testimony is feeble at best. A defendant's access to the otherwise secret proceedings of the grand jury is subject to a "particularized need" standard not despite the Ohio Rules of Criminal Procedure, but **because** of them. See Crim.R. 6, Crim.R. 16(B); *State v. Greer* (1981), 66 Ohio St.2d 139, 149-150, 420 N.E.2d 982. The rules expressly require that grand jury proceedings be kept secret absent a countervailing interest of the defendant that outweighs the need for secrecy. Id. Had the Court intended to implement a similar "particularized need" standard as part of Crim.R. 16, Crim.R. 6 shows that the Court surely knew how to do so. It did not.

This Court should decline the State's prompting to now impose a heightened standard upon Mr. Rivas *post hoc*.

2. Crim.R. 16(B)(1)(c) is mandatory; a trial court does not have the discretion to ignore it.

Crim.R. 16(B)(1)(3) provides that a trial court "**shall** order the prosecuting attorney to permit defendant to inspect and copy or photograph * * * tangible objects * * * available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial * * *" (emphasis added).[2] The language of Crim.R. 16(B)(1)(c) is mandatory, expressly stating that the trial court "**shall**" order discovery when the evidence meets two conditions: (1) it is a "tangible object"; and (2) it is "material to the preparation of [a criminal defendant's] defense or intended for use by the prosecuting attorney as evidence at the trial." Crim.R. 16(B)(1)(c); *State v. Brewster* (Jun. 11, 2004), 1st Dist. Case No. C030224, 2004-Ohio-2993 at ¶36. Where both criteria are met, a trial court has **no** discretion to ignore or permit the State to ignore the mandatory disclosure obligations under Crim.R. 16(B). *State v. Bidinost* (1994), 71 Ohio St.3d 449, 456, 644 N.E.2d 318 (holding that "'the spirit of the law' [is] not fulfilled by anything less than **strict compliance** with [Crim.R. 16]")(emphasis added).

The police hard drive containing the electronic data of Mr. Rivas' communications with Det. Wilson meets both criteria for mandatory disclosure under Crim.R. 16(B)(1)(c). First, the hard drive and the electronic data contained thereon are "tangible." See e.g., *South Central Bell Telephone Co. v. Barthelemy* (La. 1994), 643 So.2d 1240, 1248 (electronic data stores on hard drive is a tangible object subject to taxation). Second, the information contained on the hard drive was unquestionably material to the preparation of Mr. Rivas' defense. The hard drive was the **only** source of

[2] Although Mr. Rivas focuses his argument on Crim.R. 16(B)(1)(c), the electronic evidence at the online "chat," at least to the extent it contains Mr. Rivas' statements, is **also** subject to mandatory disclosure under Crim.R. 16(B)(1)(a)(i).

the complete and original electronic data pertaining to Mr. Rivas' internet communications with Det. Wilson. (Motion to Suppress Tr. 48-50, 53, 72; Tr. Exhibits 1, 2, 3, 4). Ofc. Vassel testified that the **only** way to determine whether the State's printouts were authentic, accurate and reliable reflections of the actual electronic data was to inspect the hard drive. (Motion to Suppress Tr. 72). Indeed, the trial court expressly instructed the Jury that during its deliberation it should "consider whether the Exhibits are the same objects and in the same condition that they were originally." (Trial Tr. 297).

As such, the trial court disregarded Crim.R. 16(B)(1)(c) in refusing to permit Mr. Rivas access to the hard drive. In doing so, the trial court reversed its previous order **granting** Mr. Rivas' demand to inspect, print, copy or photograph "original computer files, spreadsheets, documentation, hardware, software or any other related computer items * * * in the presence of and under the control of the Xenia Police Department." (Judgment Entry (Mar. 11, 2005)). Without any analysis or citation to authority, the trial court did an about-face, concluding that it found "nothing within [Crim.R. 16(B)(1)(c)]" that would permit Mr. Rivas access to the hard drive "in the absence of allegations and some evidence that what was provided is not accurate." (Judgment Entry (July 12, 2005)).

Because the trial court's interpretation of the scope and application of Crim.R. 16 to the hard drive was incorrect as a matter of law, the appeals court's decision finding reversible error should be affirmed.

D. EVEN IF MR. RIVAS *IS* REQUIRED TO SHOW A "PARTICULARIZED NEED," THE RECORD ESTABLISHES HE DID.

Assuming *arguendo* that this Court *were* to adopt a "particularized need" standard as condition precedent for obtaining otherwise mandatory discovery under Crim.R. 16, Mr. Rivas established such a need for two reasons: (1) the State intended to use the electronic evidence as **substantive** evidence of his guilt; and (2) the testimony of Mr. Rivas and his computer expert raised specific questions about the accuracy of the paper printout that could be easily and definitively resolved by comparing the paper printout to the electronic evidence from which it was purportedly generated.

1. A defendant has a "particularized need" to discover evidence that the State intends to offer as substantive evidence of his guilt.

In the context of grand jury testimony, "[w]hether particularized need for disclosure * * * is shown is a question of fact; but generally, it is shown where, from a consideration of all the surrounding circumstances, it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication." *Greer* at paragraph three of the syllabus. A defendant must articulate more than just speculation that the disclosure *may* contain some material that *could* be helpful to his case. Id.; see also *State v. Burroughs*, 165 Ohio App.3d 172, 2005-Ohio-6411 at ¶¶13-14, 845 N.E.2d 540 (denying access to grand jury testimony where a defendant's request for grand jury proceedings was "merely a fishing expedition"). Rather, a defendant must articulate a specific need for the testimony, such as "to impeach a witness, to refresh his recollection, to test his credibility and the like." *United States v. Proctor & Gamble, Co.* (1958), 356 U.S. 677, 683, 78 S.Ct. 983.

A defendant's need to discover evidence is undoubtedly heightened where the State intends to offer such as substantive evidence of a defendant's guilt. (Tr. Exhibits 1-4); *State v. Green* (Apr. 7, 2000), 2nd Dist. No. C-990625, unreported, 2000 WL 353165

at *3. In *Green,* the appeals court addressed a scenario where the State intended to submit grand jury testimony as substantive evidence against a defendant in an offender classification hearing. The *Green* Court noted that under such circumstances, the defendant showed a particularized need to inspect the evidence because, absent the opportunity to do so, he "had no way to rebut or counter the evidence without seeing it." Id. at *3. "Weighing the need for the secrecy * * * against the defendant's right to due process and fundamental fairness, the balance weighs in **favor** of allowing [the defendant] to view the transcript of the grand-jury proceedings." Id. at *3.

Like *Green,* the State offered the paper printouts purportedly generated from the electronic data of Mr. Rivas' online interactions with Det. Wilson as affirmative, substantive evidence of his guilt. (Tr. Exhibit 1-4). In the absence of an opportunity to inspect the underlying electronic data, Mr. Rivas "had no way to rebut or counter the evidence without seeing it." *Green,* 2000 WL 353165 at *3; see also *State v. Earley* (1975), 49 Ohio App.2d 377, 382, 361 N.E.2d 254 ("neither the due process right to a fair trial, nor the due process right to confront one's accusers is granted [to] a defendant when he is denied the opportunity to impeach a critical state witness for the lack of a prior impeaching foundation where such requirement is, through no fault of the defendant, impossible to establish").

The paper printouts of the "chat logs" were the State's chief substantive evidence against Mr. Rivas. (Tr. Exhibit 1-4); *Rivas,* at ¶18. The State's argument that the printouts were inconsequential to the outcome of trial because Det. Wilson's testimony was, in and of itself, sufficient to convict Mr. Rivas is disingenuous to the extent it fails to disclose that much of Det. Wilson's testimony was based upon his reading of those transcripts. (Trial Tr. 23-34; 37-43; 46-47). That certainly was not the State's position

during trial when it argued to the Jury that "if you believe what is in [the transcripts], you're going to convict him and there's no reason not to believe in what's in there." (Trial Tr. 283). Moreover, the trial court expressly instructed the Jury that they "may consider whether the Exhibits are the same objects and in the same condition that they were originally." (Trial Tr. 297). The Jury could not fairly reach such a determination where the trial court's refusal to permit Mr. Rivas *any* meaningful opportunity to independently verify whether the exhibits *were*, in fact, the same objects and in the same condition as compared to the electronic data, made impossible for Mr. Rivas to fairly "rebut or counter" the State's testimony and arguments. *Green*, 2000 WL 353165 at *3

Under these circumstances, Mr. Rivas had a "particularized need" sufficient to permit him the opportunity to verify the accuracy of the printouts against the electronic evidence from which they were purportedly generated.

2. The testimony of the defense expert and Mr. Rivas established a "particularized need" to discover the electronic evidence from which the printout was purportedly generated.

During both the motion to compel and the motion to suppress hearings, the defense submitted statements by Mr. Rivas and the testimony of his computer expert which raised specific concerns about the accuracy of the paper printout in relation to the electronic data. In both his statement to police at the time of his arrest and later, at trial, Mr. Rivas stated that the female with which he had "chatted" online had identified herself as 41 years old, not 14 years old. (Trial Ex. 8; Trial Tr. 90-91, 133-134. Mr. Rivas' computer expert testified that the **only** definitive way to resolve the apparent dispute between the State's paper printout and Mr. Rivas' recollection was to examine the

complete and original electronic data of the internet chat to determine whether the data was modified. (Mot. to Suppress Tr. 37-40). Ofc. Vassel further testified that the police department's practices in handling electronic evidence, including routinely "rebooting" the computers, may have altered information – including numerical information – in the computer files. (Id. at 38, 58).

By this testimony, Mr. Rivas established a specific need to inspect the electronic data relevant to his crime that that outweighed the State's "security concerns." Under these circumstances, the trial court was obligated to balance Mr. Rivas' constitutional and procedural rights to discovery against the State's "security concerns." See *Greer* at paragraph three of the syllabus. As the appeals court held, the trial court had a spectrum of options available to it which would allay the State's concerns yet at the same time ensure that Mr. Rivas was not materially prejudiced, including its suggestion that the trial court appoint an independent expert to review of the electronic data *in camera. Rivas,* at ¶¶16-17. Instead, the trial court remedied the State's self-created "security concerns" entirely at the expense of Mr. Rivas' rights to due process and discovery.

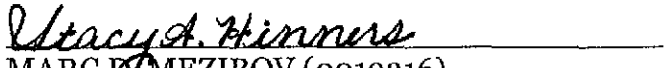
CONCLUSION

The appeals court holding should be affirmed because it enforces both the letter and spirit of Crim.R. 16(B) and due process, providing that a criminal defendant be given the opportunity to meaningfully verify that the State's evidence is, in fact, what the State claims it to be so that he may fairly and meaningfully prepare his defense. To accept the State's proposition of law to the contrary, this Court would have to both reverse its holding in *Steckman* **and** ignore Crim.R. 16. Indeed, the State's argument is little more than a request for this Court to remedy avoidable "security concerns" created by the police at the expense of Mr. Rivas' rights to discovery and due process.

For these reasons, Mr. Rivas respectfully requests the Court affirm the decision of the appeals court and remand this case for a new trial, one in which the discovery playing field is appropriately leveled and Mr. Rivas is given the opportunity to objectively verify that the State's paper printouts are consistent with the electronic evidence from which they were purportedly generated.

Respectfully submitted,

LAW OFFICE OF MARC MEZIBOV



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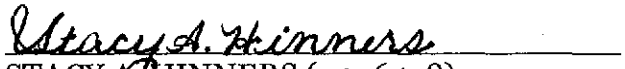
CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic and first-class mail on this 15th day of April to: Stephen K. Haller and Elizabeth A. Ellis, 61 Greene Street, Second Floor, Xenia, OH 45385.



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