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LAW AND ARGUMENT

A. RECONSIDERATION OF THE MERITS OF THE DECISION

Appellee-Defendant Jose Rivas respectfully requests the Court reconsider the merits of this decision for two reasons: (1) because the Court's decision was premised upon a materially different question than that raised in the State's proposition of law, the parties did not have the opportunity to address – nor this Court to fully consider – the issues and authorities relevant to the ultimate holding; and (2) the majority's holding was premised upon an error of fact.¹

1. **THE COURT DID NOT CONSIDER TWO IMPORTANT LEGAL ISSUES RELATED TO THE ISSUE OF “MATERIALITY” UNDER CRIM.R. 16.**

The State's proposition of law asked the Court to create an exception to the otherwise mandatory disclosure provisions of Crim.R. 16 because the electronic data at issue was co-mingled with other law enforcement investigatory records which the State claimed were protected from disclosure under R.C. 149.43(A)(1)(h). *State v. Rivas*, slip opinion, 2009-Ohio-1354 at ¶8. The majority's holding, however, addressed a materially different question, namely whether the electronic data was “material” to Mr. Rivas' defense so as to confer *any* right to pretrial discovery under Crim.R. 16. The majority ultimately imposed a new burden for “materiality” that required a defendant to show, through extrinsic evidence, that the State's evidence was “false, incomplete, adulterated, or spoliated.” *Id.* at ¶16.

Because neither party had the opportunity to adequately address this issue, the Court did not fully consider two important issues: (1) whether evidence that the State

¹ Although Sup.Ct.R. IX, Sect. 2 does not set forth a substantive standard for granting reconsideration, Justice Moyer has previously set forth an analogous test for reconsideration under App.R.26, “whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.” *Matthews v. Matthews* (1982), 5 Ohio App.3d 140, 143, 450 N.E.2d 278.

intends to use against a defendant in its case-in-chief is *per se* discoverable under Crim.R. 16 notwithstanding a showing that it is otherwise “material” to the defense; and (2) whether *Rivas* is consistent with this Court’s unanimous 2008 holding in *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, recognizing that where the government uses a printout of electronic evidence against a defendant at trial, a defendant has a right to expert assistance to “view and analyze the state’s evidence and offer an opinion as to its content (i.e. whether it is what the state purports its to be).” *Id.* at ¶48.

a. Evidence the State *actually* uses against a defendant at trial is *per se* discoverable under Crim.R. 16.

Mr. Rivas respectfully submits that the majority’s standard for “materiality” improperly conflates the standard for “materiality” for proving a due process violation where the State loses or destroys evidence that *may* have possessed exculpatory or impeachment value with the standard for discovery under Crim.R. 16. This heightened “materiality” standard is inapplicable to the electronic evidence at issue here for two reasons: (1) the evidence at issue here has not been lost or destroyed; and (2) the State actually used the evidence against Mr. Rivas at trial.

The State has *never* asserted here that the electronic data cannot be disclosed because it has been lost, destroyed or otherwise spoliated. To the contrary, the State’s position is that electronic evidence *is* available, but should be exempted from disclosure because it is co-mingled with “confidential law enforcement investigatory records” under R.C. 149.43. *See* Appellant’s Memorandum in Support of Jurisdiction (August 27, 2007); Appellant’s Merit Brief (February 26, 2008). As such, this case is materially different than those cases relied upon by majority such as *State v. Geeslin*, 116 Ohio

St.3d 252, 2007-Ohio-5289, 878 N.E.2d 1 at ¶14 (trooper inadvertently recorded over cruiser video showing erratic driving by defendant charged with DUI) and *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31 at ¶338 (prosecutor failed to disclose that a jailhouse informant who testified against defendant at trial had subsequently violated his probation). Indeed, **none** of the cases upon which the majority relied involved evidence that the State *actually used* against a defendant at trial.

Where the State actually uses evidence against a defendant at trial, the plain language of Crim.R.16 states that it is subject to mandatory disclosure – without any qualification that it be “material” to the defense: “[u]pon motion of the defendant the court shall order the prosecuting attorney to inspect or copy or photograph books, papers, documents, tangible objects * * * available to or within the possession 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 trial** * * *.” Crim.R. 16(B)(1)(c) (emphasis added). Similarly, Fed.Crim.R. 16(a)(1)(E) expressly states that the government must permit the defendant to inspect and to copy “**data** [and] tangible objects [if] * * * (i) the item is material to preparing the defense; [or] (ii) **the government intends to use the item in its case-in-chief at trial**” (emphasis added). The underlying logic is clear: if the prosecution intends to use evidence against a defendant, such evidence is *per se* “material” to the defense.

Mr. Rivas requests reconsideration because if the high standard of materiality imposed by the majority in *Rivas* is to stand, it must be limited consistent with the plain language of Crim.R. 16, meaning that such a showing is only required where a defendant seeks evidence that the State does **not** intend to use against the defendant at trial.

Because the State actually used the electronic data at issue here against Mr. Rivas in the form of a paper printout, such evidence was *per se* discoverable under Crim.R. 16(B)(1)(c).

b. *Rivas* is inconsistent with this Court’s holding in *Brady* that a defendant in a computer-based prosecution is entitled to a computer expert to “verify” the State’s electronic evidence.

The second issue the Court failed to consider is whether *Rivas* is consistent with this Court’s unanimous 2008 decision in *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671. In *Brady*, the Court recognized that where the government uses electronic evidence against a defendant at trial, the defendant has a constitutional right to expert assistance to “view and analyze the state’s evidence and offer an opinion as to its content (i.e. whether it is what the state purports its to be).” *Brady* at ¶34; citing *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S.Ct. 1087 (due process and fundamental fairness require a court to provide defendant “access to the raw materials integral to the building of an effective defense”).

Brady involved a child pornography prosecution in which the State presented electronic data which it purported to be photographs of a minor. *Brady* at ¶4. The Court rejected the State’s contention that inspection of the electronic data by an expert was not “constitutionally necessary,” finding that the electronic evidence was a central part of the prosecution. *Id.* at ¶34. In addition, the Court noted that electronic data can be “altered or ‘morphed’ without detection,” thus an expert’s assistance was needed to analyze the data and determine whether the evidence “is what the state purports it to be.” *Id.*; citing *State v. Tooley*, 114 Ohio St.3d, 2007-Ohio-3698, 872 N.E.2d 894 at ¶27.

This Court's reconsideration is needed to reconcile how these rights recognized in *Brady* can exist in light of *Rivas*' holding that "ordering the state to verify its discovery...sends the wrong message to the legal community and does not represent the law of this state." *Rivas* at ¶18.

2. THE MAJORITY'S HOLDING IS BASED UPON AN ERROR OF FACT.

In addition, the majority's holding is premised upon an error of fact, namely that Mr. Rivas "presented no evidence that the state...provided him with false, incomplete, adulterated, or spoliated evidence." *Id.* at ¶17.

To the contrary, Mr. Rivas set forth a specific challenge to the accuracy of the paper printout provided by the State: specifically that the "female" had identified herself as 41 years old rather than 14 years old during the online chat. He supported this contention with two key pieces of evidence presented to the trial court during the hearing on the motion to compel. The first was testimony from Detective Wilson that prior to Mr. Rivas' arrest *and* in a post-arrest interview with police, Mr. Rivas stated that the female who he arranged to meet at a hotel bar had identified herself online as 41 years old (rather than 14 years old). *See* Tr. Exhibit 8; Trial Tr. 80-81, 133-34, 138, 142, 145, 154, 158. Second, Mr. Rivas presented testimony from a police computer expert that an examination of the electronic data was the **only** way to reconcile the specific inconsistencies between the content of the State's paper printouts and Mr. Rivas' statements regarding his recollection of the chat. Motion to Suppress Tr. 48-50, 53, 72.²

² While the expert further testified as to concerns about the integrity of the evidence in light of Det. Wilson's testimony that he routinely rebooted the computer, this was not the sole or even primary basis for his need to see the electronic evidence. To the contrary, the primary reason the electronic data was material to the defense was because it was the only way to resolve the inconsistency between Mr. Rivas' statements and Det. Wilson's testimony.

The majority's resolution of this issue seemed to have less to do with the sufficiency of Mr. Rivas' *prima facie* showing and more to do with an assessment of his general credibility. Specifically, the majority noted that Mr. Rivas' statements regarding the content of the chat were "belied" by certain circumstantial facts including that the "female" mentioned she was doing her homework, lived with her grandmother and had to be home by a certain hour. *Rivas* at ¶6. However, the majority failed to consider *other* circumstantial facts that *supported* Mr. Rivas' statement that the "female" identified herself as 41 years old, including that they arranged to meet inside a hotel bar (presumably not a location where a 14-year-old would even be permitted to enter) and that Det. Wilson, who was posing as the "female," was in fact 41 years old at the time of chat. (Tr. Exhibit 3; Trial Tr. at 40, 67).

There is no need to "guess" as to what transpired during the online chat by connecting circumstantial evidence. The complete, objective and indisputable version of the computer "chat" between Mr. Rivas and Detective Wilson is contained in electronic data on the State's hard drive. Mr. Rivas' defense – the 41 versus 14 debate – could be quickly and definitively confirmed or debunked if his computer expert were only permitted to inspect it. In light of this record, Mr. Rivas respectfully requests reconsideration of the Court's determination of whether he met his *prima facie* burden of establishing the materiality of the electronic data to his defense.

B. ALTERNATIVE RECONSIDERATION OF DISPOSITION

In the alternative to reconsideration of the merits of this decision, Mr. Rivas requests the Judgment Entry be amended to remand the case to the appellate court (rather than the common pleas court) pursuant to App.R. 12(A)(1).

“App.R. 12(A)(1)(c) requires an appellate court to decide each assignment of error and give written reasons for its decision unless the assignment of error is made moot by a ruling on another assignment of error.” *State v. Evans*, 113 Ohio St. 100, 2007-Ohio-861, 863 N.E.2d 113 at paragraph 2 of the syllabus. Where this Court’s decision “unmoots” an issue the appellate court had previously deemed to be moot, the proper disposition of the case on remand is back to the appellate court for determination of the merits of the unresolved issue. *Id.*; see also App.R. 12, Staff Notes (1992).

On direct appeal, Appellee raised two assignments of error: (1) that the trial court erred in denying the Defendant’s motion to compel inspection and copying of the computer hard drive; and (2) that the trial court erred in admitting into evidence the State’s unauthenticated paper printouts of electronic data. *State v. Rivas*, 2007-Ohio-3593 at ¶ 9, 22. The appellate court decided the first assignment on the merits in Mr. Rivas’ favor and held the remaining assignment to be moot. *Id.* at ¶ 23.

Because the second assignment of error has not yet been addressed and can be decided in Mr. Rivas’ favor consistent with the Court’s opinion here, the Judgment Entry previously journalized by this Court should be properly modified to remand this case back to the appellate court (rather than the common pleas court) for a merit-based determination of the yet-unresolved second assignment of error.

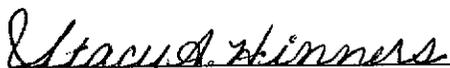
CONCLUSION

For the reasons set forth above, Appellee Jose Rivas respectfully requests the Court grant his motion for reconsideration of the merits and permit additional opportunity for additional briefing and/or oral argument.

In the alternative, Appellee respectfully requests the disposition set forth in the Judgment Entry be amended to remand this case to the appeals court for resolution of the remaining assignment of error on its merits.

Respectfully submitted,

LAW OFFICE OF MARC MEZIBOV

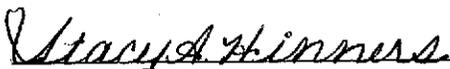


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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic and first-class mail on this 9th day of April 2009 to: Stephen K. Haller and Elizabeth A. Ellis, 61 Greene Street, Second Floor, Xenia, OH 45385.



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