
Before the Supreme Court of Ohio

Case No. 2007-1611
On Appeal from Case No. 05-CA-147 Before the Second District

State of Ohio

Plaintiff-Appellant

-vs-

Jose A. Rivas

Defendant-Appellee

**Joint Amicus Memorandum in Support of Reconsideration of
The Ohio Association of Criminal Defense Lawyers & The Ohio Public Defender**

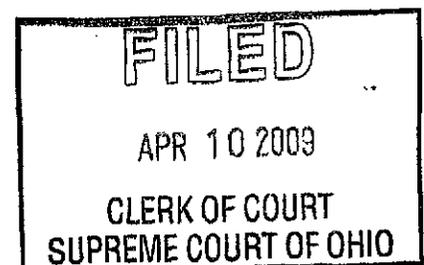
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Statement of the Case and Introduction

When it comes to electronically stored information (ESI), what appears in a paper transcript of the information is but a water molecule on the tip of a very large iceberg. And this Court's *Rivas* opinion, denying production of ESI absent a showing of “false, incomplete, adulterated, or spoliated evidence[,]” creates a slippery circularity that extends far beyond the perimeter of Mr. Rivas' case.¹ Specifically—in order to determine whether evidence is “false, incomplete, adulterated, or spoliated,” one must first review the electronic discovery and its electronic fingerprints (described below) to determine its authenticity.² Moreover, as detailed in the last argument of the amici presented here, the *Rivas* decision conflicts with this Court's 2008 decision in *State v. Brady*.³

Finally, both the Ohio Association of Criminal Defense Lawyers and the Ohio Public Defender are extremely concerned that the Court's interpretation of Crim.R. 16(B)(1)(c) in this case may create significant obstacles to fair discovery in other unrelated cases. For example, could the state simply provide the defendant a transcript of an interrogation, and refuse to allow inspection of the videotape in its possession? Could the state simply refuse to make any alleged controlled substances available for independent analysis unless the defense could demonstrate

¹ *State v. Rivas*, Slip Opinion No. 2009-Ohio-1354 at syl.

² See *Zubulake v. U.B.S. Warburg LLC (Zubulake II)* (S.D.N.Y. 2003), 217 F.R.D. 309, Opinion and Order May 13, 2003; see, also, *Zubulake v. U.B.S. Warburg LLC (Zubulake III)* (S.D.N.Y. 2003), 216 F.R.D. 280; *Zubulake v. UBS Warburg LLC (Zubulake IV)* (S.D.N.Y. 2003), 220 F.R.D. 212; *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422.

³ *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493.

that its own lab analysis was fabricated? The potential for injustice is simple to foresee. For all these reasons, your amici respectfully urge this Court to reconsider *Rivas*.

To review a few facts, Mr. Rivas' case involved an Internet chat with a purported teenager. Following arrest and pre-trial process, he requested the hard drive containing that chat under Crim.R. 16.⁴ The government provided a transcript of the chat.⁵ The defense requested the ESI.⁶ The trial court denied the request.⁷ The Second District reversed, directing production.⁸ This Court reversed the Second District, requiring the defense to make a prima facie showing of less-than-authentic evidence in order to view the ESI.⁹

But as this memorandum details, discovery of “false, incomplete, adulterated, or spoliated evidence” requires a review of electronically stored information in native file format with all metadata intact in order to meet that burden. Accordingly, reconsideration is appropriate. Your amici respectfully request this Court to jettison the test of “false, incomplete, adulterated, or spoliated evidence,” and to allow a prima facie right to examine ESI in criminal cases, and shifting the burden to the state to establish privilege, impossibility, or some other defense to production of discovery.

4 *Rivas*, 2009-Ohio-1354 at ¶ 2.

5 *Rivas*, 2009-Ohio-1354 at ¶ 2-7.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Rivas*, 2009-Ohio-1354 at ¶ 2.

(I)

A paper printout of any ESI can never be a true or authentic copy, and *the* primary opportunity to determine whether evidence is “false, incomplete, adulterated, or spoliated” is to review the ESI—not a paper copy.

(A)

What is ESI—*really*?

Ohio has no reported cases that fully address the topic of ESI, and the deeper issue, here, is one of first impression. In fact, Ohio's most recent innovation—and probably only innovation—on the topic of ESI was its amendment of the Civil Discovery Rules to accommodate discovery of electronic documents and correspondence.¹⁰

Nevertheless, a body of jurisprudence—some jurists would call it *the* body of jurisprudence—on the topic of ESI comes from the Sedona Conference, a college of attorneys, judges and academics in complex litigation, who have produced no fewer than three dozen papers on the topic of ESI and electronic discovery.¹¹

Looking to a basic definition, according to the Conference, “[e]lectronic discovery refers to the discovery of electronic documents and data.”¹² That could involve “e-mail, web pages, word processing files, computer databases, and virtually anything that is stored on a

¹⁰ See Civ.R. 34, Staff Note (2008), stating “[t]he title of this rule is changed to reflect its coverage of electronically stored information discovery. The amendment to Civ. R. 34(A) clarifies that discovery of electronically stored information is expressly authorized and regulated by this rule.”

¹¹ See *U.S. v. O’Keefe* (D.D.C. 2008), 537 F.Supp.2d 14, citing favorably The Sedona Conference (2008), *Best Practices Commentary on the Use of Search and Information Retrieval*, 8 The Sedona Conf. J. 189; see, also, *Zubulake I – V* supra at note 61.

¹² Sedona Conference (2005), *The Sedona Principles: Best Practices Commentary on the Use of Search and Information* at pg. 4.

computer.”¹³ The difference is this: “[e]lectronic discovery is [to be] distinguished from “paper discovery,” which refers to the discovery of writings on paper that can be read without the aid of some devices.”¹⁴

Given that distinction, one can see the practical difference between electronic discovery and paper discovery—electronic discovery requires an intermediate aid to review, paper discovery does not. But the key difference is deeper. And particular to the issue here—“false, incomplete, adulterated, or spoliated evidence”—the key is a body of ESI known as *metadata*.

(B)

Metadata makes ESI a distinct product from paper discovery.

There are several examples of what might constitute metadata. But a general survey “includes file designation, create and edit dates, authorship, comments, and edit history.”¹⁵ Truly, “electronic files may contain hundreds or even thousands of pieces of such information.”¹⁶ For example, “e-mail has its own metadata elements that may include, such information as the dates that mail was sent, received, replied to or forwarded, blind carbon copy (“bcc”) information, and sender address book information.”¹⁷

The Conference identified that “an e-mail message may routinely have over a thousand

13 Id.

14 Id.

15 Id. at pg. 8.

16 Id.

17 Id.

different metadata elements.”¹⁸ Looking to documents stored on a regular hard drive, “[t]ypical word processing documents have hidden codes that determine whether to indent a paragraph, change a font, and set line spacing.”¹⁹ So “[t]he ability to recall inadvertently deleted information is another familiar function, as is tracking of creation and modification dates.”²⁰ Looking to another example “electronically created spreadsheets may contain calculations that are not visible in a printed version or completely hidden columns that can only be viewed by accessing the spreadsheet in its native application.”²¹ Likewise, “[i]nternet documents contain hidden data that allow for the transmission of information between an Internet user’s computer and the server on which the Internet document is located.”²²

(C)

Production of non ESI duplicates of electronic documents yields incomplete documents and strips one of the opportunity to determine the authenticity of the original file.

Given the definitions above, there are at least two problems with the theory that a transcript of an electronic document constitutes an authentic copy suitable for production in discovery.

The first problem is that the document is incomplete without its accompanying metadata. With a printout of an electronic document, one could see as little as one-tenth of

18 Id.

19 Id.

20 Id.

21 Id.

22 Id.

what made up the document. But the second and more remarkable problem apropos of “false, incomplete, adulterated, or spoliated evidence” is this: **one's best shot at discovering the authenticity of an electronic document is through examination of the metadata.** Given the discussion of metadata above, one could only determine, for example the true “sent” or “received” dates for a piece of email or the true authorship information for a word processor file from the metadata. Without a review of the metadata, one loses one's true chance to authenticate an electronic document.

(II)

The federal district courts recognized as early as 2003 that thorough discovery of ESI mandated review of the actual ESI (and all accompanying metadata)—not of paper printouts.

On that point, courts and commentators generally recognize the case of *Zubulake v. U.B.S. Warburg LLC*, (*Zubulake II*), which addressed a discovery motion similar to Mr. Rivas motion, as the first shot fired in the electronic discovery revolution.²³ The Southern District of New York ultimately resolved one question—that being, how does one determine whether she received *all* email correspondence germane to her case? The Southern District answered: “[respondent] UBS is ordered to produce all responsive e-mails that exist on its optical disks or on its active servers ... at its own expense.”²⁴

On February 15, 2002, Laura Zubulake filed an employment discrimination action in

²³ See *Zubulake II* supra, Opinion and Order May 13, 2003, the description below paraphrases the Opinion and Order; see, also, Elaine Ki Jin Kim (2006), *The New Electronic Discovery Rules: A Place for Employee Privacy?*, 115 Yale L.J. Pocket Part 161.

²⁴ *Id.*

federal court in the Southern District of New York against UBS Warburg LLC alleging causes of action for sex discrimination and retaliation. But shortly after she filed, a discovery dispute ensued regarding Zubulake's request that UBS produce "all documents concerning any communication by or between UBS employees concerning Plaintiff."²⁵ UBS produced only 100 printed emails, insisting that its production was complete; but Zubulake soon learned that UBS never searched any of its back-up tapes containing archived emails. This began a two and a half-year discovery battle resulting in significant monetary sanctions against UBS, as well as an "adverse inference" instruction at trial.

The District Court examined the discovery dispute in light of Civ.R. 26(b), which directed that "[p]arties may obtain discovery regarding any ... matter that is relevant to any party's claim or defense—including the existence ... of any documents or other tangible things[.]" This, of course, is similar to Crim.R. 16, at issue here. The Court concluded that Zubulake was entitled to discovery of the requested e-mails so long as they were relevant to her claims, which all concerned agreed, albeit grudgingly on the part of the defense, they were.

And what is the moral of the story apropos to criminal ESI discovery issues in Ohio? It is this: only upon a review of the actual electronically stored information and not on review of printed pages could one have ever discovered what constituted a complete discovery set. The plaintiff's team in *Zubulake* could not have determined what emails they were missing from the discovery set without a review of the tapes and optical disks containing the email back up.

The *Zubulake* case reveals this point: production of non ESI duplicates of electronic

²⁵ Id.

documents yields incomplete documents and strips one of the opportunity to determine the authenticity and completeness of the original file. This Court's decision in *Rivas* will have an identical effect. Without access to the ESI, the defense will have insurmountable difficulty establishing that "the state has provided false, incomplete, adulterated, or spoliated evidence"—the very thing *Rivas* requires the defense to establish prior to obtaining access to the ESI.

(III)

The *Rivas* opinion conflicts with this Court's 2008 opinion in *State v. Brady*.

This Court's 2008 decision in *State v. Brady* is the closest thing in Ohio law to a criminal case analyzing due process rights to ESI.

According to this Court's decision in *Brady*, although "alleged child pornography must remain in prosecutor's or court's custody," it "**must be made available for inspection by defendant's expert.**"²⁶ To summarize the opinion briefly, this Court reached that conclusion by striking a balance between Federal child pornography laws and Ohio's criminal discovery rules—Crim.R. 16 in particular. In balancing those concerns, this Court concluded that where "it [was] possible for Brady's expert to examine and analyze the state's evidence at the prosecutor's office" it followed that "the lack of an exception for expert witnesses in the federal child pornography laws" did not deprive the defendant "of the assistance of an expert and further deprived him of the ability to receive a fair trial."²⁷

²⁶ *Id.*, emphasis added.

²⁷ *Id.* at ¶49.

This Court in *Brady* specifically allowed expert review of the ESI, finding it to be necessary for due process and for the “ability to receive a fair trial.”²⁸ But in *Rivas*, this Court has specifically refused to allow such expert review. The two cases directly conflict.

The holding that the amici propose on reconsideration matches *Brady* perfectly. Where *Brady* allowed expert review of the ESI, the amici, here, propose the same thing—a prima facie right to review. And to maintain consistency in Ohio law, reconsideration is appropriate.

Conclusion

As stated above, this Court's opinion, denying production of ESI absent a showing of “false, incomplete, adulterated, or spoliated evidence” creates a slippery circularity.²⁹ And that circle should be clear and complete now.

In order to determine whether evidence is “false, incomplete, adulterated, or spoliated” often one must first review the electronic discovery and its electronic fingerprints—now apparent as *meta data*—to determine its authenticity.³⁰ Ultimately, denying that opportunity constitutes a breach of due process, demanding that a defendant go to trial with what, as described above, could constitute a fraction of a complete discovery set.

In sum, the OACDL and the Ohio Public Defender respectfully urge this Court to reconsider its decision in *Rivas*, to jettison the test of “false, incomplete, adulterated, or

²⁸ *Id.* at ¶49, emphasis added.

²⁹ *State v. Rivas*, Slip Opinion No. 2009-Ohio-1354 at syl.

³⁰ See *Zubulake I – V* and discussion *supra*.

spoliated evidence,” and to allow a prima facie right to examine the ESI, shifting the burden to the state to establish privilege, impossibility, or some other defense to production of discovery.

Respectfully Submitted,

 ^{Per JAM}
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Proof of Service

I sent a true copy of this Motion to the following persons by regular U.S. Mail on April 10, 2009.

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