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APPENDIX

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This case presents a critical issue that will determine how the newly revised Ohio Crim. R. 16 should be interpreted and applied in conjunction with R.C. 149.43, the Public Records Act. This case affects the discovery process for every criminal case in the State of Ohio and therefore, impacts the operations of every law enforcement agency, governmental unit, and court in the state. Defendants are increasingly attempting to circumvent the revisions of Crim. R. 16, because the new rule requires both sides to provide a more complete disclosure than previously required. Plaintiffs, defendants, victims, and society as a whole have an interest in ensuring that opposing parties are treated fairly and equally during the adjudication of criminal cases. If the First District Court of Appeals' decision is left unchanged, every criminal defendant will be entitled to seek discovery through public records requests without being required to provide the reciprocal discovery called for under the revised Crim. R. 16.

Crim. R. 16 was revised July 1, 2010, to "provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties." Crim. R. 16(A) Staff Notes. The new Crim. R. 16 "balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts." *Id.* The principle behind the discovery rules is to remove the element of gamesmanship from a trial. *State ex rel. WHIO-TV v. Lowe, et al.*, 77 Ohio St.3d 350, 354, 673 N.E.2d 1360 (1997). Discovery is an important procedural tool in criminal cases, as it eliminates "trial by ambush" as a result of deceitful conduct on behalf of either party. Baldwin's Oh. Prac. Crim. L. 49:3 (2011).

While it is clear that the Commission on the Rules of Practice and Procedure intended a more "open discovery" process among the parties, it is doubtful they considered the common

trend by defendants who desire to avoid their reciprocal discovery obligations by filing a public records request to receive information on their pending criminal case, instead of filing a formal demand for discovery. Since the Court revised Crim. R. 16, defense attorneys have increasingly begun making public records requests in an effort to obtain discovery without triggering their reciprocal duties. This process has accelerated since the decision of the First District Court of Appeals, causing law enforcement to be inundated with new public records requests. The abuse of the Public Records Act to circumvent the open discovery process attacks the spirit of the revised Crim. R. 16, as it impacts the fair and impartial administration of justice. This case offers the Court its first opportunity to restore the balance that it sought when revising Crim. R. 16.

In 1994, the Ohio Supreme Court addressed the “chaos” created when a defendant, rather than file a demand for discovery, makes a public records request to obtain the contents of a prosecutor’s file or the records accumulated and maintained by a police department regarding a pending criminal case. *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 431, 639 N.E.2d 83 (1994). Highlighting the recurring problems and unfairness, the Court in *State ex rel. Steckman v. Jackson* stated:

Upon full consideration, a majority of this court now feels that some of our past decisions have not served well the criminal justice system. *The playing field is not level as there is no reciprocal right of prosecutors to obtain additional discovery beyond Crim.R. 16(C)*. Witness intimidation is now more real than imagined. Criminal trials are now regularly being disrupted while R.C. 149.43 procedures are pursued. It would seem that the people also have a right to a speedy trial—a speedy trial of an indicted defendant. Trial courts, courts of appeals, and this court are consuming tremendous time and resources to review, in

some cases, boxes and boxes full of records alleged to be public. *Id.* at 428, 429.

(Emphasis added).

The Court's main focus in *Steckman*, was on the issue of what type of materials are deemed 'work product' and therefore, not subject to release as a public record. However, while addressing the issue of defendants making public records requests to receive materials not discoverable under Crim. R. 16, the Court in *Steckman* held that "a defendant may use *only* Crim. R. 16 to obtain discovery." *Id.* at 429. (Emphasis added). Since *Steckman*, the rules on the exchange of discovery have been revised to require an even more liberal exchange of information. The rule did so by providing for a more "open discovery" for defendants and the State equally. Most noteworthy among the changes is the new obligation imposed on the State and defense equally to provide "a written report summarizing the testimony, findings, analysis, conclusions, or opinions" of an expert witness. *Crim. R. 16(K)*. The use of expert witnesses is a common practice in OVI cases like the one before the Court.

In the present case, the Defendant submitted a public records request to the Ohio State Highway Patrol to obtain discoverable information in aid of his defense. T.p. 51, 52. The trial court ordered Defendant-Appellee (hereafter "Defendant") to provide reciprocal discovery to the Plaintiff-Appellant (hereafter the "State"), since he had received all documents and video he would ordinarily receive pursuant to Crim. R. 16. The appellate court reversed the order that Defendant provide reciprocal discovery. *State v. Athon*, 1st Dist. No. C-110236. 2012-Ohio-765. The First District Court of Appeals acknowledged this recurring problem in its decision, but was reluctant to apply this Courts ruling in *Steckman* to address it. *Id.* The First District Court of Appeals determined that a defendant's duty of disclosure to the State under Crim. R. 16(H) is not triggered when the defendant, or someone on behalf of the defendant, makes a

public records request for information pertaining to his pending criminal case. *Id.* The appellate court's ruling in the present case, reversing the trial court's decision, deters the thorough, effective, and just prosecution of criminal acts sought by the Commission on the Rules of Practice and Procedure. This decision of the Court of Appeals effectively allows a defendant to bypass the discovery process, giving him the unfair advantage of surprising the State with evidence or witnesses. The State is expected to produce information whenever a defendant chooses to request it. However, if the defendant labels his request for discovery a "Public Records Request", the defendant is not required to reciprocate. The State is not afforded the opportunity to hide discoverable information from a defendant, thus a defendant should not be given this advantage either. Creating this unfair advantage is in direct conflict with the purpose and spirit of the revised Crim. R. 16 – fairness, equality, and reciprocity amongst opposing parties as well as the integrity of the justice system as a whole.

The public has a major interest in the fair and efficient administration of justice, which is greatly affected by the discovery process. Discovery rules, including Crim. R. 16, facilitate the exchange of relevant information between opposing parties and have evolved to favor broad discovery, ensuring that all pertinent facts are available. This creates a level playing field for both parties to adequately and fully prepare their cases. It also gives the court the ability to make an informed decision based on all the available information and the best legal arguments, rather than choosing a winner in a game of surprise with ambushed evidence and witnesses. The rules governing discovery do not affect solely plaintiffs and defendants. Society is affected by the decisions of the court and those decisions will undoubtedly be skewed if discovery rules are interpreted and applied to give defendants an unfair advantage over the State. The public has a

critical interest in parties having a level playing field on which to argue their case because it will inevitably influence the decision of the court.

Furthermore, lower courts need guidance from the Court on how to balance an individual's right to receive public records with the orders of this Court and the new Crim. R. 16. Courts like the First District recognize the unfairness and injustice occurring, but seem uncertain on how to address it. Therefore, an interpretation of the new Crim. R. 16 from the Ohio Supreme Court, as it relates to R.C. 149.43, would provide clarity for lower courts and practitioners.

For the reasons stated, this case is a matter of public or great general interest. The decision made by the First District Court of Appeals gives defendants an unfair advantage in criminal cases by allowing them to bypass the discovery process and the duty of reciprocity through the use of public records requests. This interpretation of Crim. R. 16 gives the defense the ability to surprise the State with evidence and witnesses; the state is not given this same opportunity. The public has a great interest in the fair and impartial administration of justice, and thus has an interest in the interpretation and application of court rules that affect the State's ability to adequately prosecute criminal cases.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

For purpose of this limited discovery issue before the Court, the Procedural Posture is the same as the Statement of Facts provided below.

B. Statement of Facts

On December 20, 2010, Defendant was arrested and charged with operating a motor vehicle with a concentration of seventeen-hundredths of one gram or more, by weight of alcohol per 210 liters of his breath, in violation of R.C. 4511.19(A)(1)(h), operating a motor vehicle while under the influence of alcohol and/or drugs (“OVI”), in violation of R.C. 4511.19(A)(1)(a), a speeding violation under R.C. 4511.21, and failure to reinstate license in violation of R. C. 4510.21. On January 11, 2011, Attorney Christopher Finney sent a public records request to the Ohio State Highway Patrol (“OSHP”), Public Records Division, an agent of the State. T.p. 51, 52. Attorney Finney requested all information on an OVI arrest made on December 19, 2010 to December 20, 2010, by Sergeant Corey Wright of the OSHP. Sergeant Wright made one OVI arrest within that period of time and that was the arrest of Defendant. T.p. 18, 19. At a pre-trial conference on January 12, 2011, City of Cincinnati Senior Assistant Prosecutor Marva Benjamin, on behalf of the State, attempted to provide Attorney Steve R. Adams, counsel of record for Defendant, with discovery information, including a video of the alleged incident. Attorney Adams refused to accept the discovery information, and stated on the record that he needed a continuance for another pre-trial, because he was doing his own “research” on the case. The OSHP then prepared hundreds of pages of documents and provided them to Attorney

Finney, along with a video recording of the incident. T.p. 52, 53. Mr. Finney then gave all items provided by the OSHP to Attorney Adams. T.p. 55-58.

The State filed a Motion for Discovery on March 21, 2011, stating that the public records request submitted to the OSHP by Attorney Christopher Finney, at the request of Defendant's counsel, was in effect a discovery demand that triggered Crim. R. 16 reciprocal discovery duties in Defendant's pending criminal case. On April 8, 2011, the trial court held a hearing on this issue, which included testimony of the State Troopers as agents of the State who prepared the documents and video and gave them to Attorney Finney. Attorney Finney also testified about his request and receipt of these items and how he provided them to Attorney Adams. T.p. 55-58. The trial court granted State's motion for discovery on April 20, 2011, and ordered defendant to provide reciprocal discovery to the State. The Defendant appealed to the First District Court of Appeals. The State filed a motion to dismiss the appeal on the grounds that the trial court's ruling on the discovery issue was not a final appealable order. The First District Court of Appeals denied State's motion to dismiss and accepted jurisdiction over the case. The Court of Appeals then reversed the trial court's decision, holding that Defendant's serving a public records request upon the State and receiving all materials relevant to his pending criminal case does not trigger Defendant's duty of reciprocity under Crim. R. 16(H). *State v. Athon*, 1st Dist. No. C-110236, 2012-Ohio-765. It is from this decision that the State now respectfully requests that the Supreme Court of Ohio grant jurisdiction, vacate the ruling of the Court of Appeals, and reinstate the decision of the trial court requiring Defendant to provide reciprocal discovery.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

The primary issue in this case is whether Defendant owes a reciprocal duty to provide discovery to the State when he receives, pursuant to a public records request, documents from the State he is entitled to receive pursuant to Crim. R. 16. The State contends that Defendant has a reciprocal duty of discovery under those circumstances, and offers two propositions of law in support of its position: (1) Defendant may use only Crim. R. 16 to obtain discovery for his pending criminal case, and (2) Where the Defendant has obtained “discoverable” materials/information on his pending criminal case directly (or via straw person) from the State, pursuant to a public records request, Defendant owes a reciprocal duty to provide discovery under Crim. R. 16.

PROPOSITION OF LAW NO. 1: A DEFENDANT MAY USE ONLY CRIM. R. 16 TO OBTAIN DISCOVERY FOR HIS PENDING CRIMINAL CASE.

The Ohio Supreme Court held in *Steckman*, that Defendant may use *only* Crim. R. 16 to obtain discovery for his pending criminal case. *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420,429, 639 N.E.2d 83 (1994). Making a public records request to receive materials and information provided under Crim. R. 16, instead of filing a formal demand for discovery with the court, is not permissible. Crim. R. 16 and the general principles of statutory construction support this interpretation. Crim. R. 16 (A) states:

This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. *All duties and remedies are subject to a standard of due diligence, apply to the defense*

and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures. *Crim R. 16(A)*. (Emphasis added).

A. The principles of discovery and Ohio case law support a finding that Defendant may not use R.C. 149.43 to receive “discoverable” information from the State.

The First District Court of Appeals erred in ruling that the defendant has no reciprocal duty to provide discovery when he served a public records request upon the State requesting videos and documents he would normally receive under *Crim. R. 16*. The First District Court of Appeal’s ignored the Ohio Supreme Court’s holding in *Steckman*, and made a finding in direct conflict with the stated purpose and goals of the rule – fairness, equality, and reciprocity amongst opposing parties as well as the integrity of the justice system as a whole. *Id.* The Court of Appeals stated that *Crim. R. 16(H)* and *R.C. 149.43* are unambiguous and should be interpreted using their plain meaning. *State v. Athon*, 1st Dist. No. C-110236, 2012-Ohio-765. In attempting to distinguish the Ohio Supreme Court’s ruling in *Steckman*, the appellate court concluded that *Steckman* “did not define how discovery was initiated or when a reciprocal duty of disclosure arose.” *Id.* The appellate court concluded that since neither *Crim. R. 16*, *R.C. 149.43*, nor the Court in *Steckman*, expressly say that defendants receiving discovery through public records request must provide discovery to the State, then no such obligation exists.

If in fact the criminal rules, the Public Records Act or the interpreting case law do not address whether discovery is triggered when a defendant makes a public records request rather than a request for discovery, it is therefore ambiguous on this issue. When a court rule is ambiguous, general principles of statutory construction must be used rather than interpreting the rule using its plain meaning. *Erwin v. Bryan*, 125 Ohio St.3d 519, 523, 2010-Ohio-2202, 929

N.E.2d 1019, *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 585, 651 N.E.2d 995, 998 (1995) HN9 ("The in pari materia rule of construction may be used in interpreting statutes where some doubt or ambiguity exists"); see also, *Thomas v. Freeman*, 79 Ohio St.3d 221, 224, 680 N.E.2d 997, 1000 (1997). The Court of Appeals failed to consider Crim. R. 16's meaning in light of its purpose stated in Crim. R. 16(A), Ohio case law, other jurisdiction's interpretation of similar rules, and public policy. All of these sources support the trial court's finding that Crim. R. 16 does trigger discovery when a defendant makes a public records request rather than a request for discovery.

B. Public policy and judicial fairness mandate that defendants use only Crim. R. 16 to obtain discovery.

In the present case, Defendant, via a straw person, made a public records request for video and hundreds of pages of documents pertaining to his arrest for OVI. T.p. 52, 53. The information requested was discoverable under Crim. R. 16 and could have been provided with the proper discovery request. In fact, when counsel of record for the State attempted to provide defense counsel with discovery at a pre-trial conference on January 12, 2011, counsel for Defendant refused to accept it. This refusal of discovery was done in an effort to circumvent the discovery process so that the defense could avoid its reciprocity duties and ambush the State with experts and supporting documentation. It is common for experts and their written reports to be used in the defense of OVI cases. This information must be provided in the defendant's discovery response to the State. See *Crim. 16(K)*. If the Defendant never requests discovery from the State, he could withhold this pertinent information. Unfairly, Defendant received all he needed to adequately defend his case from the State. Yet, he expects to provide the State with

nothing. The trial court saw through this trickery and gamesmanship and ordered the Defendant to provide discovery to the State. This was the fair and just decision.

C. Other jurisdictions have held that defendants may not use the Public Records Act to obtain discoverable information.

Faced with the same problems, other jurisdictions have held that a defendant's public records request to law enforcement, on his pending criminal case, constitutes participation in the discovery process, thereby triggering the reciprocal discovery obligation. Specifically, the Supreme Court of Florida held, in *Henderson v. State*, that a letter sent by counsel of the defendant to the local sheriff, requesting copies of all reports relating to the death of the victim and the arrest of his client, is no different than requesting such documents under the discovery rules. *Henderson v. State*, 745 So.2d 319 (Fla. 1999). The court reasoned, under an agency theory, that the information within the possession of the police is considered to be in possession of the prosecution. *Id.* at 323. The court considered the sheriff as an agent of the prosecution for purposes of the defendant's public records request. *Id.* at 323-324. Consequently, the court held that defense counsel's letter to the sheriff did constitute participation in discovery and so the letter triggered reciprocal discovery as required by the rule. The court in *Henderson* went so far as to amend its rule of discovery to prevent this type of circumvention of discovery from occurring in the future, in order to ensure a fair trial. *Id.* at 327. This interpretation is persuasive and supports a finding that discovery is triggered when a defendant makes a public records request in lieu of requesting discovery from the State.

The First District Court of Appeals erred in reversing the trial court's decision. The State now asks this Court to reverse the Court of Appeals decision and hold that Defendant must use Crim. R. 16, and not a public records request, to obtain discovery.

PROPOSITION OF LAW NO. 2: WHERE DEFENDANT HAS OBTAINED DISCOVERABLE MATERIALS/INFORMATION ON HIS PENDING CRIMINAL CASE DIRECTLY (OR VIA STRAW PERSON) FROM THE STATE PURSUANT TO A PUBLIC RECORDS REQUEST, DEFENDANT OWES A RECIPROCAL DUTY TO PROVIDE DISCOVERY UNDER CRIM. R. 16.

The First District Court Appeals erroneously held that discovery can only be triggered when the defendant serves a formal written discovery request with the court. The trial court's interpretation of Crim. R. 16 is supported by the Ohio Supreme Court's ruling in *Steckman*, as well as other jurisdictions like Florida that have dealt with this issue. Like the sheriff's office in *Henderson v. State*, the Ohio State Highway Patrol is an agent of the state and thus in turn is an agent of the prosecution. Citing the First District Court of Appeals, the Ohio Supreme Court stated in *State v. Wiles*, "[t]he police are a part of the state and its prosecutorial machinery." *State v. Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1991), citing, *State v. Tomblin*, 3 Ohio App.3d 17, 18, 443 N.E.2d 529 (1981). Serving this demand for discovery, disguised as a public records request, on the Ohio State Highway Patrol, was the same as serving it on the prosecutor. It is the policing agencies that provide evidence and information to the State for use in prosecuting cases. Making a request directly to the police for the State's information simply eliminated the middle man, the prosecutor. Thus, under Crim. R. 16(H), Defendant was required to provide a reciprocal response. Failure to meet this requirement destroys the level playing field and is a direct attack on the spirit of the newly revised Crim. R. 16. "Open discovery" applies to *all* parties in the interest of justice and fairness. As previously stated, permitting the Defendant to participate in gamesmanship to circumvent the discovery rules and avoid his reciprocal duties does not properly serve the people of the State of Ohio.

Having determined that the abuse of public records requests to obtain discovery is not permissible, what then is the State's remedy for this violation? Requiring the defendant to

provide reciprocal discovery to the State is certainly a good start and is the correct answer under *Steckman*. This was the remedy the State requested and the one granted by the trial court. The discovery to which a criminal defendant is entitled to is provided by Crim. R. 16, and any other vehicle to obtain information and/or records should not be used to circumvent it. *Steckman*, *Supra*.

Once the Defendant “serves a written demand for discovery *or any other pleading seeking disclosure of evidence* on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state”. Crim. R. 16(H). As indicted in *Steckman*, requiring defendants to use Crim. R. 16 to obtain discovery from the State insures a “level playing field” between the State and the defense, promoting judicial economy and avoiding unnecessary surprise. *Id.* Essentially, if defendants were permitted to receive all information they would be entitled to receive under Crim. R. 16 by way of public records requests, they could avoid ever having to comply with Crim. R. 16 as it pertains to reciprocal discovery, in an attempt to blind side the State with evidence and witnesses of their own. This is an ability the State is not afforded. In the interest of justice and fairness, this rule requires discovery be obtained by a defendant by filing a demand for discovery and providing reciprocal discovery to the State. In *Steckman*, the Court stated,

Relying upon these cases, courts (and the persons and agencies involved with producing and keeping such records) are regularly faced with demands to release the entire contents of a prosecutor’s file and all the records accumulated and maintained by a police department in connection with a particular defendant and his or her criminal proceeding. Because of our cases, the exceptions to required disclosure found in R.C. 149.43(A)(2)(c)-‘specific investigatory work product’ –

and 'R.C. 149.43(A)(4)- 'trial preparation record"-have virtually been rendered meaningless. *Additionally, these cases have, for all purposes, just about written Rule 16 out of the Criminal Rules. Simply put, this chaos cannot be permitted to continue. State ex rel. Steckman v. Jackson, 70 Ohio St.3d 420, 431, 639 N.E.2d 83 (1994). (Emphasis added).*

The State therefore, requests that this Court hold that when a Defendant obtains information on his pending criminal case by directly, or through a third party, making a public records request, Defendant is required to provide the State with reciprocal discovery under Crim. R. 16.

CONCLUSION

For the reasons discussed above, this case involves matters of great public and general interest. The State requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits. Furthermore, the State argues that the decision of the Court of Appeals should be reversed and the Defendant be required to provide discovery to the State as ordered by the trial court.

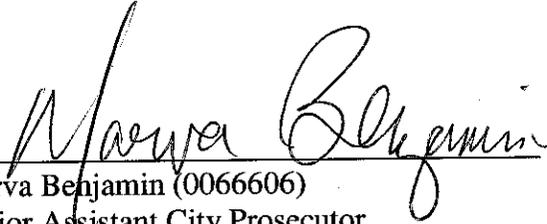
Respectfully submitted,



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CERTIFICATE OF SERVICE

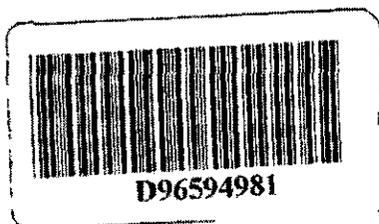
I certify that a copy of this Jurisdictional Brief was sent by ordinary U.S. mail to Counsel for Defendant, Steven R. Adams, 8 West 9th Street, Cincinnati, Ohio 45202, and John C. Greiner, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202, on this 12 day of April, 2012.



Marva Benjamin (0066606)
Senior Assistant City Prosecutor
COUNSEL OF RECORD

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-110236
	:	C-110237
Plaintiff-Appellee,	:	C-110238
	:	C-110239
vs.	:	C-110290
	:	TRIAL NOS. 10TRC-65767B
GARY ATHON,	:	10TRC-65767C
	:	10TRC-65767D
Defendant-Appellant,	:	10TRC-65767E
	:	10TRC-65767A



JUDGMENT ENTRY.

This cause was heard upon the appeal, the record, the briefs, and arguments.

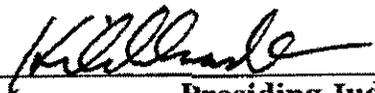
The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on February 29, 2012 per order of the court.

By: 
Presiding Judge

ENTERED
FEB 29 2012

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-110236
		C-110237
Plaintiff-Appellee,	:	C-110238
		C-110239
vs.	:	C-110290
		TRIAL NOS. 10TRC-65767B
GARY ATHON,	:	10TRC-65767C
		10TRC-65767D
Defendant-Appellant,	:	10TRC-65767E
		10TRC-65767A
	:	
	:	
	:	<i>OPINION.</i>

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: February 29, 2012

John R. Curp, City Solicitor, Charles Rubenstein, City Prosecutor, and Marva Benjamin, Assistant City Prosecutor, for Plaintiff-Appellee,

Graydon Head & Ritchey, LLP, and John C. Greiner, and Steven R. Adams for Defendant-Appellant.

**PRESENTED TO THE CLERK
OF COURTS FOR FILING**

FEB 29 2012

COURT OF APPEALS

Please note: This case has been removed from the accelerated calendar.

ENTERED FEB 29 2012

OHIO FIRST DISTRICT COURT OF APPEALS

SYLVIA SIEVE HENDON, Judge.

{¶1} Defendant-appellant Gary Athon appeals the trial court's order compelling him to take part in discovery under Crim.R. 16. For the following reasons, we reverse the trial court's judgment and remand this case for further proceedings.

{¶2} At the outset, we note that the issue of whether the court's discovery order was final and appealable was disposed of on the court's motion docket. We adhere now to our previous ruling and find that we have jurisdiction over this matter on the authority of R.C. 2505.02(B)(4).

Facts

{¶3} Athon was arrested by the Ohio State Highway Patrol ("OSHP") and charged with alcohol-related traffic violations. Shortly thereafter, attorney Christopher Finney made a public records request of the OSHP and received information pertaining to Athon's arrest. Finney provided these materials to Athon's criminal defense attorney, Steven Adams. Athon did not request discovery from the prosecuting attorney.

{¶4} When the state learned that Athon had received public records from the OSHP, it moved the trial court for an order compelling Athon to take part in discovery. The state contended that the public records request was tantamount to a demand for discovery and that, therefore, under Crim.R. 16(H) Athon had a reciprocal duty of disclosure. Following a hearing, the trial court granted the state's motion. This appeal ensued.

ENTERED
FEB 29 2012

{¶5} In his sole assignment of error, Athon now contends that the trial court erred in concluding that a public records request triggered Athon's reciprocal discovery duties under Crim.R. 16(H).

Standard of Review

{¶6} A trial court's regulation of discovery matters is generally reviewed under an abuse of discretion standard. *State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983). Athon's assignment of error, however, presents a question of law as it requires us to interpret Crim.R. 16 and R.C. 149.43, the public records law. We therefore review Athon's argument de novo without deference to the trial court's decision. *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 6; *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 8.

Crim.R. 16 and R.C. 149.43

{¶1} "[I]t is the duty of the courts to give a statute the interpretation its language calls for if this can reasonably be done.* * *." *Wachendorf v. Shaver*, 149 Ohio St. 231, 236, 78 N.E.2d 370 (1948). "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. The reasoning behind these holdings applies equally to the interpretation of the criminal rules of procedure. Provided the plain language of the rule is clear, we need not resort to the rules of construction.

{¶2} In pertinent part, Crim.R. 16(H) provides "[i]f the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises

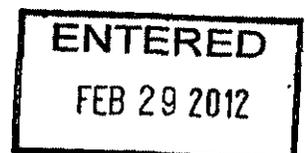
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without further demand by the state.” Thus, discovery is available to the state only if the defendant first requests it in the manner specified in Crim.R. 16(H). *See also* Crim.R.16(A)(discovery is initiated by the defendant). Here, it is undisputed that Athon never served a written demand or other pleading on the prosecuting attorney seeking discovery. So, under Crim.R. 16, Athon had no duty to supply the state with discovery.

{¶3} Nor did such a duty arise under R.C. 149.43. It is well-settled in Ohio that “[a] person may inspect and copy a ‘public record,’ as defined in R.C. 149.43(A), irrespective of his or her purpose for doing so.” *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993), syllabus; *see also* R.C. 149.43(B). The only limitation on who may access public records is contained in R.C. 149.43(B)(8). And that code section pertains to incarcerated persons, only. The legislature has clearly chosen not to place a public-records limitation on a defendant in a pending criminal matter, or on one who supplies a defendant with public records pertaining to the defendant’s case. Nor has the legislature defined such a request as tantamount to a demand for discovery.

Steckman is Distinguishable

{¶4} The state urges us to affirm the trial court on the basis of *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). In *Steckman*, the Ohio Supreme Court held that, in a criminal proceeding, “a defendant may only use Crim.R. 16 to obtain discovery.” *Id.* at paragraph two of the syllabus. *Steckman*, however, addressed the types of materials discoverable under former Crim.R. 16. In that case, the court dealt with the state’s concern that defendants were obtaining materials through public records requests that would not otherwise have been



OHIO FIRST DISTRICT COURT OF APPEALS

available under former Crim.R. 16(C). *Id.* at 428-29, 639 N.E.2d 83. *Steckman* did not define how discovery was initiated or when a reciprocal duty of disclosure arose. We therefore find it distinguishable from the present case.

Conclusion

{¶5} While we are sympathetic to the state's position, we are bound by the plain meaning of Crim.R. 16 and R.C. 149.43. We therefore hold that a public records request by a criminal defendant, or on behalf of a criminal defendant, seeking public records pertaining to his or her pending criminal case is not tantamount to a demand for discovery. Such a request does not trigger a defendant's duty of disclosure under Crim.R. 16(H).

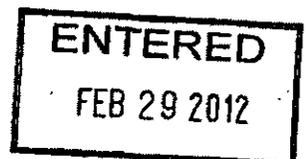
{¶6} For the foregoing reasons, Athon's sole assignment of error is sustained. The trial court's judgment ordering Athon to take part in discovery is reversed, and this cause is remanded for further proceedings.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J. and SUNDERMANN J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.



HAMILTON COUNTY MUNICIPAL COURT
CINCINNATI, OHIO



STATE OF OHIO	:	CASE NO.: 10/TRC/65767(A)(E)
Plaintiff	:	JUDGE BERNIE BOUCHARD
vs.	:	
GARY ATHON	:	<u>DECISION ON STATE'S MOTION</u>
Defendant	:	<u>FOR DISCOVERY</u>

The Defendant in this criminal matter is represented by Steve Adams, Esq. Attorney Chris Finney at the request of a straw person filed a public record request for records relating to a DUI arrest for the Defendant, Mr. Gary Athon, upon the Ohio Highway State Patrol. The OHSP granted the public records request and provided the information to Attorney Chris Finney. Chris Finney then brought the records down to Steve Adam's office and gave them to his secretary. This court finds that Steve Adams has the public records of the DUI stop for Mr. Athon. These include DVD's and hundreds of pages of documents on the arrest and the breath machine involved in this DUI.

The newly enacted Criminal Rule 16 regulates discovery in a criminal case. The first paragraph states "This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are

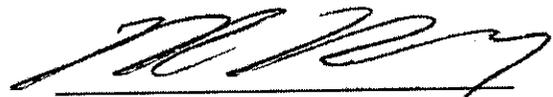
intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures." Crim. R. 16.

It is clear that The Ohio Supreme Court wanted more open discovery between parties in a criminal matter with the new Criminal Rule 16. The Supreme Court of Ohio wants "a level playing field between accusers and accused." *State v. Steckman, et al.* 70 Ohio St. 3rd 420 (1994). Further, the Ohio Supreme Court in *Steckman* states "in the criminal proceeding itself, a defendant may use only Crim. Rule 16 to obtain discovery." This promotes judicial economy and avoids unnecessary surprise. *Id.*

In this case, the Defendant, via straw people and lawyers, requested public information from the OHSP, an agent of the State. The State is not claiming any information received was privileged. Under Ohio Law (ORC 149.43) any person can request public records, that includes this defendant through a public records request.

This court finds that when the Defendant, via other people, requested and received public records from an agent of the State of Ohio in this contested criminal proceeding, the request is in effect, a demand for discovery on the State of Ohio. Therefore, this public record request will trigger Criminal Rule 16, and Criminal Rule 16 will guide the discovery through this case.

It is ordered that the Defendant provide discovery to the State of Ohio pursuant to Criminal Rule 16.



JUDGE BERNIE BOUCHARD

Date: April 20, 2011