

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,
STATE OF OHIO,

Plaintiff-Appellant,

v.

GARY ATHON,

Defendant-Appellee.

:

:

:

:

:

Case No. 12-0628

On Appeal from the
Hamilton County Court of Appeals
First Appellate District

REPLY MERIT BRIEF OF APPELLANT STATE OF OHIO

JOHN P. CURP
(0064782)
City Solicitor

CHARLES A. RUBENSTEIN
(0017870)

MARVA K. BENJAMIN (Counsel of Record)
(0066606)
Senior Assistant City Prosecutor
801 Plum Street
City Hall, Room 226
Cincinnati, Ohio 45202
(513) 352-1565
Fax (513) 352-5217
marva.benjamin@cincinnati-oh.gov

COUNSEL FOR APPELLANT,
CITY OF CINCINNATI

RECEIVED
OCT 15 2012
CLERK OF COURT
SUPREME COURT OF OHIO

STEVEN R. ADAMS (Counsel of Record)
(0052743)
8 West 9th Street
Cincinnati, Ohio 45202
(513) 929-9333
Fax (513) 929-9337

JOHN C. GREINER (Counsel of Record)
(0005551)
Graydon, Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202
(513) 629-2734
Fax (513) 333-4316

COUNSEL FOR APPELLEE,
GARY ATHON

FILED
OCT 15 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
ARGUMENT.....	2
I. REVERSING THE FIRST APPELLATE DISTRICT’S DECISION WILL NOT LIMIT THE PUBLIC’S ACCESS TO PUBLIC RECORDS.....	2
A. Public Records are the people’s records.....	2
B. Only criminal defendant’s seeking to circumvent discovery rules will be affected by the Court’s ruling.....	2
II. THE COURT’S RULING IN <i>STECKMAN</i> IS APPLICABLE, STILL GOOD LAW, AND SHOULD NOT BE OVERTURNED.....	3
A. The legal principles of the <i>Steckman</i> decision apply in this case.	3
B. The revisions to Crim.R. 16 support the Court’s ruling in <i>Steckman</i> and do not necessitate overturning it.....	4
C. The <i>Steckman</i> decision established a level playing field in criminal cases.....	5
III. REQUIRING DEFENDANT TO USE CRIM.R. 16 TO RECEIVE DISCOVERABLE INFORMATION ON HIS PENDING CRIMINAL CASE DOES NOT VIOLATE DEFENDANT’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	5
A. Requiring defendants to use Crim.R. 16 to obtain discoverable information will not limit their ability to conduct an “investigation” in their case.....	6

B. Requiring defendants to use Crim.R. 16 to obtain discoverable information does not violate a defendant’s right to effective assistance of counsel.....	7
IV. REQUIRING DEFENDANT TO PROVIDE RECIPROCAL DISCOVERY IS THE RIGHT REMEDY IN THIS CASE.....	8
A. Permitting defendants to use the Public Records Act to obtain discoverable information contradicts the purpose and spirit of Crim.R. 16.....	8
B. Trial courts and society have a legitimate interest in there being a level playing field in criminal proceedings.....	9
CONCLUSION.....	10
PROOF OF SERVICE.....	12

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>CASES:</u>	
<i>City of Toledo v. Spicuzza</i> , 6 th Dist. No. L-05-1038, 2005-Ohio-4875.....	5-8
<i>State v. Adams</i> , 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).....	9
<i>State ex rel. Patterson v. Ayers</i> , 171 Ohio St. 369, 371, 171 N.E.2d 508, 509 (1960).....	2.
<i>State ex rel. Rasul-Bey v. Onunwor</i> , 94 Ohio St.3d 421, 760 N.E.2d 421 (2002)...	5, 7
<i>State ex rel. Steckman v. Jackson</i> , 70 Ohio St.3d 420,429, 639 N.E.2d 83 (1994).....	1-7, 9, 10
<i>State ex rel. The V Voc.</i> , 810 Ohio St.3d 467, 692 N.E.2d (1998).....	8
<i>State ex rel. WHIO-TV v. Lowe, et al.</i> , 77 Ohio St.3d 350, 673 N.E.2d 1360 (1997).....	8
<i>Svoboda v. Clear Channel Commc'ns</i> , 156 Ohio App.3d 307, 2004 Ohio 894, at P9, 805 N.E.2d 559.....	8
 <u>CONSTITUTIONAL PROVISIONS, RULES & STATUTES:</u>	
Crim.R. 16 (generally).....	1-10
Crim.R. 16(A).....	5, 6
Crim.R. 16(H).....	1
Crim.R. 16(L).....	8, 9
Crim.R.16 (M).....	8
R.C. 149.43.....	1-4, 7

INTRODUCTION

The assertions in Defendant-Appellee's Merit Brief and the Amicus Curiae Briefs of his supporters are an attempt to distract the Court from the main issue in this case: may a defendant in a pending criminal case, use the Public Records Act to receive discoverable information in an effort to avoid the reciprocal discovery duties required under Crim.R. 16? Defendant-Appellee, Gary Athon ("Defendant") and amici curiae make their intentions clear. They believe they have found a way around Crim.R. 16 and they want to exploit it. To do so, they must convince the Court to ignore its intentions when it amended Crim.R. 16 and overturn its ruling in *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). If the First Appellate District's decision is left unchanged, the ongoing practice of circumventing Crim.R. 16 and the abuse of the Public Records Act will only escalate. The level playing field created by the Court will be destroyed, promoting trial by ambush and gamesmanship by defendants- the same problems that the Court identified and resolved in *Steckman*.

Contrary to what is claimed, Plaintiff-Appellant, State of Ohio ("the State") is not requesting that the Court permit it to hide evidence and information from the public. Indeed the exact opposite is true. In this case, the State fulfilled the public records request of Defendant's straw man, providing hundreds of pages of documents. (T.p. 52, 53, 55-58). The State simply asks that Defendant honor his reciprocal discovery duties under Crim.R. 16(H). If the Court reverses the First District Court of Appeals' decision, the public will still receive everything it is entitled to under the Public Records Act. This case deals with the very narrow issue of defendants in a pending criminal case using the Public Records Act to receive their discovery, in an effort to circumvent Crim.R. 16 and avoid their reciprocal duties. Persons not attempting to do so won't be affected by the Court's ruling in this case.

ARGUMENT

I. REVERSING THE FIRST APPELLATE DISTRICT'S DECISION WILL NOT LIMIT THE PUBLIC'S ACCESS TO PUBLIC RECORDS.

A. Public Records are the people's records.

The Innocence Network, the Ohio Public Defender's Office, the Ohio Justice and Policy Center and Mark Miller (who deems himself the "governmental watchdog") filed Amicus Curiae Briefs in this case. Their assertion, that the reversal of the First Appellate District's decision will limit the public's access to information, is without merit. It has been long settled by the Court that "public records are the people's records" and officials in custody of those records are trustees for the people. *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960). As pointed out by members of the Defense Bar in each of their Amicus Curiae Briefs, a person requesting a public record is not required under the Public Records Act to disclose his or her identity or the purpose for making the request. R.C. 149.43(B)(5). But the exchange of information between parties in a pending criminal case is not governed by the Public Records Act, but rather by Crim.R. 16. *See Steckman, supra*, at 429, 639 N.E.2d 83 (1994).

B. Only criminal defendants seeking to circumvent discovery rules will be affected by the Court's ruling.

This case is not about preventing Defendants from conducting "investigations" on their case as asserted in the Amicus Curiae Brief of the Ohio Justice and Policy Center. (p. 1). This Court's ruling will also not affect the post-conviction clients of the Innocence Network as they claim. (Brief of Innocence Network as Amicus Curiae). Nor does the State seek to limit the public's right to information. Only criminal defendant's with pending cases, seeking to misuse the Public Records Act to circumvent the rules of discovery will be affected. Any attempt to misdirect the Court with this assertion should be ignored. The public will still have the same

right to access of public information, subject to the restrictions imposed in R.C. 149.43. Criminal defendants and their lawyers will also have access to the same information. But the vehicle defendants must use to obtain any discoverable items, while their case is pending, is Crim.R. 16. *See Steckman, supra.*

II. THE COURT'S RULING IN *STECKMAN* IS APPLICABLE, STILL GOOD LAW, AND SHOULD NOT BE OVERTURNED.

A. The legal principles of the *Steckman* decision apply in this case.

The Court's ruling in *Steckman* firmly established Crim.R. 16 as the vehicle criminal defendants must use to obtain discoverable information in criminal proceedings. *Steckman, supra*, at 429, 639 N.E.2d 83 (1994). The Court viewed the *Steckman* case as an "opportunity to meet head-on the continuing and ever-increasing problem of the use (and attempted use) of R.C. 149.43 (public records law) as a vehicle to obtain records from law enforcement officials and the contents of the files of prosecutors in pending criminal cases." *Id.* at 420, 639 N.E.2d 83 (1994). The Court was aware of the impact that the *Steckman* decision would have, and recognized that its ruling might be a "harsh result". *Id.* at 432, 639 N.E.2d 83 (1994). Still, the Court thought it necessary to take "strong action to correct this ever-increasing problem." *Id.* at 439, 639 N.E.2d 83 (1994). Defendant and his supporters want the Court to believe that the *Steckman* decision is not applicable to the present case. While some of the facts of the *Steckman* case may differ from ours, the legal principle is the same. The trial court in this case was faced with the same chaotic problem as the Court in *Steckman*, and relied on the *Steckman* decision when it ordered Defendant to comply with Crim.R. 16. (See Trial Court's Decision on State's Motion for Discovery). The Court in *Steckman* directed defendants to use Crim.R. 16 to obtain discoverable

information on pending criminal cases and to use the Public Records Act to request information not covered under Crim.R. 16. *Id.* at 429, 639 N.E.2d 83 (1994).

B. The revisions to Crim.R. 16 support the Court's ruling in *Steckman* and do not necessitate overturning it.

In its Amicus Curiae Brief, the Innocence Network stated that it “takes no position on the question of whether a public records request filed by, or on behalf of a, criminal defendant, seeking public records under Section 149.43 of the Ohio Revised Code pertaining to his or her pending criminal case triggers a defendant’s duty of disclosure under Rule 16***.” (Brief of Innocence Network as Amicus Curiae, (p.1, ¶2)). Instead, the Innocence Network urges the Court to “revisit” its decision in *Steckman*, “in light of the changes to Crim.R. 16.” *Id.* at p. 8-10. The Innocence Network provides legal services to incarcerated prisoners post conviction. *Id.* at p.1. The Court’s ruling in this case will not affect the clients of the Innocence Network. Their interest in the *Steckman* decision should have no influence on the Court’s decision in this case, since the discovery process pertains only to criminal defendants of pending cases. *Steckman* does not need to be revisited.

The Court’s ruling was neither erroneous nor ambiguous. The Court held that defendants in pending criminal cases can use only Crim.R. 16 to obtain discoverable information and not the Public Records Act. *Steckman, supra*, at 429, 639 N.E.2d 83 (1994). Additionally, nothing about the revised Crim.R. 16 calls for a reversal of *Steckman* as requested in the Amicus Curiae Brief of the Ohio Public Defender. (p.2, 7). Conversely, the new Crim.R. 16 should make it easier for defendants to abide by the *Steckman* decision, as they are now entitled to receive more information under the new rule than previously permitted. The new Crim.R. 16 makes more information available to defendants through the discovery exchange, dismantling the need to make public records request for volumes of information on pending criminal cases. Like

Steckman, the new Crim.R. 16 calls for an open-file discovery system, preventing the chaos *Steckman* recognized existed.

C. The *Steckman* decision established a level playing field in criminal cases.

The Court's decision in *Steckman*, was made with sound reasoning and thorough consideration of its potential impact. To ease that impact, the Court has modified the criminal rules liberally to protect the rights of the accused and all interested parties of a criminal proceeding. Since the *Steckman* decision, Ohio has recognized that criminal defendants cannot use the Public Records Act to get information or records from law enforcement officers on their pending cases. [See *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 421, 760 N.E.2d 421 (2002); *City of Toledo v. Spicuzza*, 6th Dist. No. L-05-1038, 2005-Ohio-4875. (“[T]he Ohio Supreme Court has clearly stated that discovery requests by defendants in pending criminal cases are governed by Crim.R. 16.”)]. Ohio law clearly identifies the vehicle through which a criminal defendant may obtain discovery as Crim.R. 16. The Court's hope with *Steckman* was “to return to a level playing field between accusers and accuseds.” *Steckman, supra*, at 439, 639 N.E.2d 83 (1994). The Court's ruling in *Steckman* should not be overturned. The First District's ruling undermines the Court's purpose in *Steckman* and in revising Crim.R. 16.

III. REQUIRING DEFENDANT TO USE CRIM.R. 16 TO OBTAIN DISCOVERABLE INFORMATION ON HIS PENDING CRIMINAL CASE DOES NOT VIOLATE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Since the creation of the original discovery rules, the State has been required to preserve and disclose information to the defense. Recently, the rules on the exchange of information between the State and criminal defendants were amended liberally by the Court 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 parties.” Crim.R. 16(A) Staff Notes. In order for the Court’s vision for fairness to be accomplished, the First Appellate District’s decision must be overturned.

A. Requiring defendants to use Crim.R. 16 to obtain discoverable information will not limit their ability to conduct an “investigation” in their case.

In the present case, the State complied with the Public Records request made for all information even remotely pertaining to Defendant’s case. The State provided hundreds of pages of documents and evidence to Defendant through his “straw man.” (T.p. 52, 53) Additionally, the State offered the information requested in the public records request even before the request was made, but counsel for Defendant refused to accept it and indicated to the court he was conducting his own “research”. This is exactly the “chaos” the Court referred to in *Steckman, supra*, at 431, 639 N.E.2d 83 (1994). If Defendant’s purpose in making the public records request was to ensure that he obtained pertinent information about his case, then the mechanism used to request and obtain this information should hold no real importance. It is obvious why Defendant wanted to dictate which State agent provided the information. Under the Defendant’s theory, which was supported by the appellate court’s ruling, bypassing the prosecutor’s office and requesting the information directly from the policing agency (in this case the Ohio State Patrol) allows Defendant to avoid his reciprocal discovery duties. The Court was clear in its ruling in *Steckman* that this is not permissible, when it stated that “***a defendant may use *only* Crim.R. 16 to obtain discovery.” (Emphasis added.) *Id.* at 429, 639 N.E.2d 83 (1994). If the Court intended to allow criminal defendants to circumvent discovery, it certainly wouldn’t have amended Crim.R 16 to favor “open discovery.” The assertion by Defendant and the First Appellate District’s ruling ignores the Court’s intention and promotes gamesmanship.

B. Requiring defendants to use Crim.R. 16 to obtain discoverable information does not violate a defendant's right to effective assistance of counsel.

The Ohio Public Defender's Office and the Ohio Justice and Policy Center assert that overturning the First Appellate District's decision will limit their ability to investigate their client's cases and prevents them from providing effective assistance of counsel. (Amicus Brief of Ohio Justice and Policy Center, p. 2-6; Ohio Public Defender Amicus Brief, p 5, ¶1). These offices deem requesting all information pertinent to their cases from the State "investigation." Under their theory, and according to Defendant, if Defendant makes his request to the State by using the Public Records Act, it is called an "investigation". If however, the request for the same information is made directly to the prosecutor's office, an agent of the State, then, and only then is it considered "participation in discovery." Defendants are entitled to obtain information from the State regarding their pending criminal cases, but the criminal rules created by the Court require them to reciprocate. This fair exchange of information is what makes the playing field level. If it is truly just information about a defendant's case they seek, and not a level up on the State, then the vehicle by which this information is provided to Defendant's is of no concern.

Claims that Defendant's will be denied their constitutional right to effective assistance of counsel if the Court reverses the First Appellate District are untrue. Counsel for defendants may still conduct thorough investigations. Defendants may use Crim.R. 16 to obtain discoverable information and make a public records request for items not covered under Crim.R. 16. *Steckman, supra*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). *Accord, State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 421, 760 N.E.2d 421 (2002); *City of Toledo v. Spicuzza*, 6th Dist. No. L-05-1038, 2005-Ohio-4875. Counsel may interview any and all potential witnesses, inspect physical evidence and have access to everything the State possesses, subject to the existing restrictions in Crim.R. 16 and R.C. 149.43. 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." Crim.R. 16(A) Staff Notes. There are regulations in place to protect the rights of the accused, including sanctions imposed upon the State for failure to preserve and provide discovery. Crim.R. 16(L), (M). Thus, requiring criminal defendants to use Crim.R. 16 to receive discoverable information on their pending cases does not violate their constitutional right to effective assistance of counsel.

IV. REQUIRING DEFENDANT TO PROVIDE RECIPROCAL DISCOVERY IS THE APPROPRIATE REMEDY IN THIS CASE.

A. Permitting defendants to use the Public Records Act to obtain discoverable information contradicts the purpose and spirit of Crim.R. 16.

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). The trial court conducted a hearing regarding the evidence and information the State provided to Defendant and determined that Defendant owed a reciprocal duty of discovery to the State. (See Trial Court's Decision on State's Motion for Discovery). This is the appropriate remedy in this case. Defendant received everything he was entitled to receive under Crim.R. 16 by way of a Public Records request. (T.p. 52, 53, 55-58). Serving this demand for discovery, disguised as a public records request, on the Ohio State Patrol, was the same as serving it on the prosecutor. Trial courts have "considerable discretion" when managing discovery proceedings. *City of Toledo v. Spicuzza*, 6th Dist. No. L-05-1038, 2005-Ohio-4875, citing, *Svoboda v. Clear Channel Commc'ns*, 156 Ohio App.3d 307, 2004-Ohio-894, at ¶9, 805 N.E.2d 559. "Absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues." *Spicuzza, Id.*, citing, *State ex rel. The V Voc. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d

198 (1998). Abuse of discretion is more than an error of law or of judgment; it implies that the court's decision is unreasonable, arbitrary or unconscionable. *Spicuzza, Id.*, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

Crim.R. 16(L)(1) provides remedies if discovery procedures are not followed, to ensure parties in criminal cases will engage in an open exchange of discovery. Sanctions on noncompliant parties may include an order for discovery or inspection, granting a continuance, exclusion of undisclosed evidence, or any order the court deems just under the circumstances. Crim.R. 16(L)(1). As stated, the manner of disclosure matters only to those defendants seeking to circumvent Crim.R. 16 and avoid their reciprocal duties.

B. Trial courts and society have a legitimate interest in there being a level playing field in criminal proceedings.

Defendant claims he elected not to participate in the discovery proceedings and therefore, owes no reciprocal discovery to the State. (Merit Brief of Defendant-Appellee, page 6, ¶1; p12, ¶1). Defendant not only requested and obtained routine offense and incident reports as he claims, but rather hundreds of pages of documents and video of discoverable information related to his pending criminal case. (T.p. 52, 53, 55-58). However, Defendant believes he is not required to provide the State with reciprocal discovery. 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. 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. This Court has the exclusive authority to promulgate rules to regulate the conduct of the Bar and promote professionalism in adversarial

proceedings in Ohio Courts. Lawyers should not be permitted to coordinate efforts to undermine the Court's rules.

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. 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. *Steckman, supra*, at 439, 639 N.E.2d 83 (1994). Essentially, if defendants were permitted to obtain 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. 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. "Open discovery" applies to *all* parties in the interest of justice and fairness. Permitting the Defendant to participate in gamesmanship by circumventing the discovery rules and avoiding his reciprocal duties does not properly serve the people of the State of Ohio.

CONCLUSION

Reversing the First Appellate District's decision will not limit the public's right to information. Nor will it hamper a defendant's ability to investigate his case or deny his right to effective assistance of counsel. The Court's ruling in *Steckman* is still good law and fair policy. Defendants must use Crim.R. 16 to obtain discovery on their pending criminal case. The trial

court was correct in using its discretion to order Defendant to provide reciprocal discovery to the State. If defendants are permitted to obtain everything pertaining to their case from the State without the duty to reciprocate, then the level playing field created by the Court is destroyed. There will be no fair administration of justice. Trial by ambush will be promoted. Crim.R. 16 will no longer serve a purpose.

For the reasons stated, the First District Court of Appeals decision must be reversed.

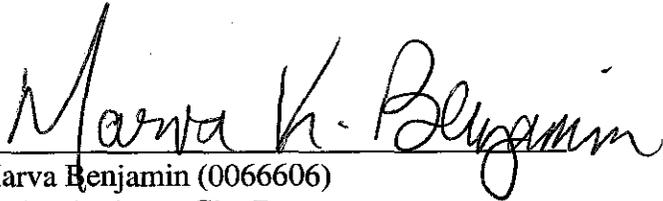
Respectfully submitted,

A handwritten signature in black ink that reads "Marva Benjamin". The signature is written in a cursive style with a large, prominent initial "M".

MARVA K. BENJAMIN (0066606)
Senior Assistant City Prosecutor
801 Plum Street, Suite 226
Cincinnati, Ohio 45202
(513)352-1565
COUNSEL OF RECORD
FOR PLAINTIFF-APPELLANT

CERTIFICATE OF SEVICE

I certify that a copy of this Merit 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, Francisco E. Luttecke, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Jennifer M. Kinsley, 810 Sycamore Street, 2nd Floor, Cincinnati, Ohio 45202, Michelle L. Berry, 114 E. 8th Street, Cincinnati, Ohio 45202, Christopher P. Finney, 2623 Erie Avenue, Cincinnati, Ohio 45208, on this 15th day of October, 2012.



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