

ORIGINAL

IN THE SUPREME COURT OF OHIO

HON. MICHAEL J. SAGE, et al., : Case No. 2013-0945  
 :  
 Appellants/Cross-Appellees :  
 :  
 v. :  
 :  
 STATE OF OHIO ex rel. THE :  
 CINCINNATI ENQUIRER, :  
 :  
 Appellee/Cross-Appellant. :

On Appeal from the Court of Appeals for the Twelfth District  
Case No. CA2012-06-0122

MERIT BRIEF OF APPELLANTS/CROSS-APPELLEES HON. MICHAEL J. SAGE, et al.

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## STATEMENT OF THE CASE

This matter commenced on June 28, 2012 with Appellee/Cross-Appellant (“Enquirer”) filing its Complaint for a Writ of Mandamus pursuant to R.C. 149.43(C) against Appellants/Cross-Appellees the Hon. Michael J. Sage, Judge of the Court of Common Pleas of Butler County (“Judge Sage”), and Michael T. Gmoser, Prosecuting Attorney of Butler County (“Gmoser”). (Tr. 1.) On July 9, 2012 the Enquirer filed its First Amended Complaint for Writ of Mandamus and Prohibition. (Tr. 9.)

The Amended Complaint requested an order from the Twelfth District Court of Appeals requiring Judge Sage to dissolve the Protective Order he granted on June 27, 2012 prohibiting the public dissemination of a recording of an outbound call from the Butler County Sheriff’s Department, Dispatch Center occurring at 16:43:59 hours on June 17, 2012. (Tr. 9; Appx. 31.) Gmoser answered the Amended Complaint and Judge Sage filed a Motion to Dismiss. (Tr. 15, 16.) Following Judge Sage’s filing of an Amended Protective Order permitting the dissemination of the recording to the media immediately preceding its admission and publication to the jury in open court, Judge Sage was granted leave to withdraw the Motion to Dismiss. (Appx. 34; Tr. 27.) Appellants/Cross-Appellees subsequently filed a second Motion to Dismiss the First Amended Complaint as moot. (Tr. 23.) The Twelfth District overruled this Motion to Dismiss and ordered Judge Sage and Gmoser to file their Brief in response to the Enquirer’s Merit Brief. (Tr. 33.)

Although no agreed statement of facts was filed in this matter, the Enquirer did file a Notice of Submission of Evidence listing evidence in support of the relief requested in the Enquirer’s First Amended Complaint. (Tr. 24-26.) Judge Sage and Gmoser then filed their Notice of Submission of

Evidence and a Supplemental Notice of Submission of Evidence listing additional evidence for the Twelfth District's consideration. (Tr. 36-37.)

Upon the submission of the briefs and after hearing oral argument in the case, the Twelfth District granted the Writ of Mandamus, denied the Writ of Prohibition, awarded the maximum allowable statutory damages, but denied all attorney's fees. (Tr. 47; Appx. 7, *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012-06-122, 2013-Ohio-2270.) Believing that the Writ of Mandamus should have been denied, and no statutory damages awarded, the Appellants/Cross-Appellees bring the following appeal forward. (Appx. 1, 4.)

#### **STATEMENT OF FACTS**

Debra Rednour began working as a 9-1-1 operator for the Butler County Sheriff's Office in 2007. (Tr. 25 at page 7-8.) Prior to that, Rednour was a paralegal and an office manager at the law firm of Thomas and Thomas. (Id.) Rednour became a Sheriff's Office employee because it was something she always wanted to do based upon her father and three brothers all being police officers. (Id. at page 13-14.)

Rednour was trained by fellow Butler County Sheriff's Office employees, and has taken classes on how to perform Law Enforcement Data Systems criminal history checks, driver's licences informational checks, CPR, and other medical emergency training. (Id. at page 14, 20.) Rednour also stated that calls dealing with medical emergencies have a different set of questions than calls that are related to crimes. (Id. at page 37.) For example, she explained that on a call about a theft, she would ask when the theft occurred, what was taken, how the home or vehicle was accessed, and

if locks were secured. (Id. at page 37.)

On June 17, 2012 Rednour answered an incoming 9-1-1 call at 16:41 (4:41 P.M.) in which an unidentified female caller indicated that there was an accident, her husband was hurt, he was not breathing, and that she needed to have an ambulance sent. (Id. at page 41-42, 45.) Although Rednour repeatedly asked the caller to describe how her husband was hurt, the caller only responded that there had been an accident and that her husband was not breathing. (Id.) Before Rednour could obtain other information, the caller terminated the call. (Id. at page 42.) While Rednour was on the call, she dispatched the St. Clair Township Fire Department, a sheriff's deputy, and her supervisor because she knew they were going to need some extra people at the location from which the call originated.<sup>1</sup> (Id. at page 30, 46.)

After dispatching the first responders and her supervisor, Rednour attempted to call the home from which the call originated because she had knowledge that the injured person was not breathing. (Id. at page 48-49.) After she received no answer, Rednour called the house again. (Id. at page 50.) Rednour's second call-back (hereafter referred to as the "Outbound Call") was answered by a person who identified himself as "Michael;" he later identified himself as Michael Ray. (Id. at page 60.) This second Outbound Call, initiated by Rednour, resulted in the following conversation, the recording of which was requested by the Enquirer:

Voice: Hello?

9-1-1 Operator: Okay, I have help on the way. This is the Butler County Sheriff's Office. I

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<sup>1</sup> Although not specific to this particular call, Rednour testified that the 9-1-1 system has an ANI/ALI system from Cincinnati Bell which will automatically provide the address from which the call originated if the call comes from a residence. (Tr. 25 at page 34.)

need to know what's going on?

Voice: I'm a murderer, and you need to arrest me.

9-1-1 Operator: Okay, what's your name, honey?

Voice: My name is Michael Ray.

9-1-1 Operator: Michael?

Voice: Yes.

9-1-1 Operator: Okay, Michael, what happened?

Voice: I was caught drinking my dad's alcohol, I wasn't drunk, I just drank a few of his beers. He came in and got mad at me, and I just snapped and stabbed him.

9-1-1 Operator: Okay. You stabbed him?

Voice: Yeah, I'm the one who stabbed him.

9-1-1 Operator: Okay. And where did you stab him, honey?

Voice: In the chest.

9-1-1 Operator: Okay. Where is the knife?

Voice: In my room, just laying on the ground.

(Id. at page 60-61.)

After only one question about whether the victim was breathing, which was not followed up with any medical instructions, the victim's wife is heard in the background begging for the victim to open his eyes, and expressing her love for her dying spouse. (Id. at page 61.)

Thereafter, Rednour returned to questioning Michael Ray about the method in which he killed his father:

9-1-1 Operator: Okay, was this just a regular kitchen knife that you stabbed him with?

Voice: A hunting knife.

9-1-1 Operator: It was a hunting knife? Okay. And you said you just snapped?

Voice: Yes.

9-1-1 Operator: Ok. Where is your dad right now?

Voice: He's in the kitchen, laying down in a pile of blood.

(Id. at page 62.)<sup>2</sup>

Rednour later testified that she receives 9-1-1 calls, but that she does not make 9-1-1 calls as part of the duties of her job. (Id. at page 67.) When Rednour was additionally asked if she has any investigative duties in her job, she answered that she does have “questions I am required to have answered.” (Id. at page 70.) And finally, Rednour testified that if a new inbound 9-1-1 call had come into the system before she had made her two return calls, that new 9-1-1 call would have taken priority over the 9-1-1 hang up call. (Id. at page 75.)

Later that day, the Enquirer’s reporter Sheila McLaughlin submitted a public records request to the Butler County Sheriff’s Office. (Tr. 26 at Exh. C, ¶ 2.)<sup>3</sup> In response to said request, Gmoser informed McLaughlin that he was denying the request, and that “When the investigation is completed, I will then seek a protective order against its release.” (Tr. 26 at Exh. C-1.)<sup>4</sup> After the Sheriff provided McLaughlin with a copy of the recording of the incoming 9-1-1 call received by Rednour, McLaughlin submitted a second request on June 19, 2012 for a copy of the recording of the two outbound calls which Rednour had made. (Tr. 26 at Exh. C, ¶ 4, Exh. C-2.) Gmoser responded that he was requesting the Sheriff not to release these two recordings; Gmoser stated that the requested recordings were not incident reports subject to release, but are trial preparation records

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<sup>2</sup> Michael Ray was subsequently indicted and convicted for the murder of his father.

<sup>3</sup> While the Enquirer’s initial public records request was directed to the Butler County Sheriff, the Sheriff is not a party to this action. Thus, whether the Sheriff failed to comply with a duty to disclose the subject recording is not an issue before the Court in this matter.

<sup>4</sup> Although the Enquirer’s Submission of Evidence (Tr. 26) identifies 4 exhibits, each of the affidavits of John C. Greiner (Exh. B) and of Sheila McLaughlin (Exh. C) contain multiple attachments. For purposes of this Brief, Appellants/Cross-Appellees will reference those attachments by appending the attachment number/letter after the cited Exhibit letter.

under R.C. 149.43(A)(1)(g) and confidential law enforcement investigatory records under R.C. 149.43(A)(1)(h) and thus are not public records as defined in R.C. 149.43(A)(2) and R.C. 149.43(A)(4).” (Tr. 26 at Exh. C, ¶ 5.) Gmoser further indicated his intention “to ask for a protective order from the court regarding the release of that recording in further criminal proceedings.” (Id.)

On June 21, 2012 John C. Greiner, as counsel for the Enquirer, reiterated the request to Gmoser for copies of the two recordings requested by McLaughlin. (Tr. 26 at Exh. B, ¶ 3, Exh. B-1.) The next day, Gmoser again expressed his position that the requested copies were not public records, however he authorized the release of the recording of the first outbound call placed by Rednour which had resulted in a “no answer.” (Tr. 26 at Exh. B, ¶ 4.) On the same date, Gmoser filed in the criminal case against Michael Ray a Motion for Protective Order under Crim. R. 16(C) concerning the second Outbound Call placed by Rednour. (Tr. 26 at Exh. B, ¶ 5, Exh. B-2.)

On June 25, 2012 Judge Sage conducted a hearing on Gmoser’s Motion for Protective Order. (Tr. 26 at Exh. D-A.) During the course of the hearing, Ray’s counsel indicated that although he had not heard the recording, he had requested discovery and that he desired to join with Gmoser “in excluding that statement of the defendant to a dispatcher of the Butler County Sheriff’s Department.” (Id. at page 4, 6-7.) After listening to the recording *in camera* and hearing arguments from Gmoser, counsel for the Enquirer, and counsel for the Cox Media Group, the trial court concluded that even if the recording was a public record, Michael Ray’s interest in receiving a fair trial outweighed the public’s interest in the public dissemination of the incriminating statements he made in response to the dispatcher’s questions; Judge Sage’s decision was journalized on June 27, 2012. (Tr. 36 at Exh. 1; Appx. 31.)

Preceding the commencement of the trial in *State v. Ray*, Judge Sage amended the Protective Order to authorize the dissemination of the subject recording to the media just prior to the recording being played for the jury in open court. (Tr. 36 at Exh. 2; Appx. 34.) In compliance with that amended entry, Gmoser provided a copy of the recording to media representatives covering the trial, including the Enquirer. (Tr. 36 at Exh. 3.)

## ARGUMENT

### PROPOSITION OF LAW NO. 1:

When a 9-1-1 dispatcher acts as an agent of a county's sheriff's office by initiating an Outbound Call to a residence for investigative purposes, the Outbound Call does not constitute a 9-1-1 call subject to disclosure under the Ohio Public Records Act.

“Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act.” *State ex rel. Physicians Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6; R.C. 149.43(C). The Public Records Act implements the State's legislative policy that “open government serves the public interest and our democratic system.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. Although R.C. 149.43 is to be liberally construed in favor of broad public access, a person seeking a writ of mandamus to enforce a public office's duty of disclosure must still establish entitlement to the writ by clear and convincing evidence. *State ex rel. McCaffrey v. Mahoning County Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶16. Thus, where a requested item is not clearly and convincingly subject to disclosure, mandamus is inappropriate. *See, Id.*, citing *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954),

paragraph three of the syllabus (“Clear and convincing evidence is ‘that measure or degree of proof which is more than a mere “preponderance of the evidence,” but not to the extent of such certainty as is required “beyond a reasonable doubt” in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.””).

As such, a writ of mandamus can be granted only if the court finds that the relator has a clear legal right to the relief sought, the respondent has a clear legal duty to undertake the requested act, and the relator has no plain and adequate remedy at law. *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 399 N.E.2d 81 (1980), paragraph one of the syllabus.

**A. The 9-1-1 dispatcher’s Outbound Call does not fall under the Ohio General Assembly’s statutory definitions of a 9-1-1 call.**

The Twelfth District Court of Appeals committed reversible error when it held that the dispatcher’s Outbound Call to a private residence constituted a 9-1-1 call, in contra to the Ohio Revised Code. *See, Sage*, 2013-Ohio-2270, at ¶ 13. Under R.C. 5507.01, the Ohio General Assembly provided the bench, bar, and public with multiple definitions of a “9-1-1 system.” Section A defines a “9-1-1 system” to mean “a system through which individuals can request emergency service using the telephone number 9-1-1.” R.C. 5507.01(A). In section B, a “Basic 9-1-1” system is defined as one “in which a caller provides information on the nature of and the location of an emergency, and the personnel receiving the call must determine the appropriate emergency service provider to respond at that location.” R.C. 5507.01(B). Thereafter, section H defines a “Wireless 9-1-1” system to be one in which “the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireless service provider.” R.C. 5507.01(H).

What is critical in all of these definitions is that the Ohio General Assembly has defined each 9-1-1 system with language that clearly requires an individual caller to dial the telephone number 9-1-1 and then request emergency service using the telephone number 9-1-1.

In the present case, the Outbound Call was initiated by a Butler County Sheriff's Office employee, by dialing a residential (513 area code) telephone number, to request investigatory information. Accordingly, the disputed Outbound Call has none of the features of a 9-1-1 call and is therefore, per the Ohio General Assembly's definitions, not a 9-1-1 call. Any other finding would be contrary to the clear language of R.C. 5507.01. As such, the Twelfth District Court of Appeals committed reversible error by failing to mention, cite, and follow the clear definitions of a 9-1-1 call as contained in R.C. 5507.01. The decision finding the Outbound Call to be a 9-1-1 call must be reversed.

**B. The Outbound Call clearly falls outside this Court's definition of a 9-1-1 call.**

In 1996 when this Court was faced with deciding if 9-1-1 calls were public records, it stated in clear and unequivocal language that "Nine-one-one calls that are received by HCCC are **always initiated by the callers.**" *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 377-378, 1996-Ohio-214, 662 N.E.2d 334 (emphasis added) (hereafter referred to as "*Hamilton County*"). In the present case, the Outbound Call was initiated by a Sheriff's Office employee to a non-9-1-1 telephone number. This Outbound Call is outside the definitional parameters set up by this Court.

This Court also foresaw that 9-1-1 calls would be at the center of public records requests in the future. Hence, guidance for future cases was provided by this Court, stating that "The moment

the tapes were made as a result of the calls **(in these cases-and in all other 911 call cases)** to the **911 number**, the tapes became public records.” *Id.*, at 378 (emphasis added). But, in the present case, the Outbound Call was not made to “the 911 number.” Thus, this case does not involve a 9-1-1 call, the Outbound Call was not a public record per se, and the Twelfth District’s decision is in direct contravention to this Court’s definition of a 9-1-1 call.

What is more, there are multiple other distinctions between the calls, people, and purposes of the calls in the present case as opposed to the calls involved in the *Hamilton County* case. In *Hamilton County*, the call center employees did not act under the direction of either the county prosecutor or a law enforcement official when responding to the 9-1-1 calls, the employees were not employed by any law enforcement agency, and they were not trained in criminal investigation. *See, Hamilton County*, 75 Ohio St.3d at 377.

However, in the present case, Rednour is an employee of the Butler County Sheriff’s Office, with her ultimate supervisor being Lieutenant Carrie Shultheiss, a sworn deputy in the Sheriff’s Department. (Tr. 25 at page 31.) At the outset of the Outbound Call, Rednour expressly informed Michael Ray that “this is the Butler County Sheriff’s Office.” (*Id.* at page 60.)<sup>5</sup> And in terms of being directed by law enforcement, Rednour admitted that she has “questions I am required to have answered,” when asked if she has any investigative duties. (*Id.* at page 70.) This duty, combined with the duty to investigate a hang up from a 9-1-1 call, prompted the dispatcher to elicit through past tense questions information from the perpetrator about his past crime. It was clear that Ray was describing his past event of murder while answering past tense questions for Rednour that were

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<sup>5</sup> By contrast, in the actual 9-1-1 call, Rednour identified herself as “Butler County 911.” (Tr. 25 at page 41.)

intended to establish the past events of a crime. Objectively, this is a police investigation, through the use of questions designed to determine past events. *See, generally, Davis v. Washington*, 547 U.S. 813, 831, 126 S.Ct. 2266 (2006). This constitutes an investigatory call that is not a 9-1-1 call as contemplated by either the General Assembly or this Court. As such, the role of Rednour is very different than that of the Hamilton County call center employees in *Hamilton County*.

Yet, the Twelfth District dismissed the idea that Rednour, unlike the employees in *Hamilton County*, had any investigatory duties. This cannot stand. Case law makes clear that a hang up 9-1-1 call imposes a duty or requirement upon law enforcement to investigate. *See, State v. Hodge*, 2nd Dist. No. 23964, 2011-Ohio-633, ¶ 25 (“In our view, the 911 hang-up call created a reasonable belief that an emergency existed, **requiring investigation** by law enforcement officers.”)(emphasis added); *State v. May*, 4th Dist. No. 06CA10, 2007-Ohio-1428, ¶ 17 (“the 911 hang-up calls created sufficient exigent circumstances to impose a **duty on police to investigate** whether someone at the residence needed assistance and further negated any privilege on appellant's part to resist entry into the premises.”)(emphasis added); *State v. Myers*, 3rd Dist. Nos. 9-02-65, 9-02-66, 2003-Ohio-2936; *Stricker v. Twp. of Cambridge*, 710 F.3d 350, 2013 WL 141695, (6th Cir. 2013).

Thus, and although Rednour claims that she was not investigating anything, her subjective intent should not control the objective question of whether investigatory questions establishing past events occurred. To illustrate, the United States Supreme Court, in its decision in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), held that a defendant was not denied his Sixth Amendment right to confront witnesses against him by the admission of a series of questions and answers contained within a recording of a 9-1-1 call. The Court concluded that the witness was merely describing the current circumstances, not some past fact, and that therefore the

statements were nontestimonial in nature; on the other hand, testimonial statements relate to proof of past facts relevant to the commission of a crime. *Id.*, at 822. The Court further stated, “[E]ven when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” *Id.*, at fn. 1. The importance of *Davis* to this case is that the Court acknowledged that a 9-1-1 call can contain a police interrogation.

While the initial call was clearly a 9-1-1 call seeking an emergency response, the Outbound Call at issue here involves a police interrogation. To define the nature of the recordings requested in *Hamilton County*, this Court quoted from R.C. 4931.30(B) to describe a system “in which a caller provides information on the nature of and the location of an emergency, and the personnel receiving the call must determine the appropriate emergency service provider to respond at that location.” 75 Ohio St.3d at 377.

Similarly here, in the initial incoming call Rednour received (which was immediately disclosed to the Enquirer), Rednour was told that an ambulance was needed because a man had been hurt and was not breathing; she also obtained the address from which the call originated. (Tr. 25 at page 41-42.) Based on this information alone, Rednour determined that an emergency existed and dispatched both the St. Clair Township Fire Department and Butler County Sheriff’s deputies to respond to the emergency. (*Id.* at page 46.) When Rednour called back, she immediately told the person who answered the phone that she had help on the way. (*Id.* at page 60.) Thus, the basic purpose of the 9-1-1 system to determine the appropriate emergency service provider to respond at the location of the emergency, as described in *Hamilton County*, was satisfied on the initial incoming call placed by the victim’s wife to the 9-1-1 system. This initial incoming call on the 9-1-1 system was promptly released to the Enquirer. (Tr. 26 at Exh. C, ¶ 3.)

When Rednour initiated the Outbound Call to the number from which the incoming call originated, however, she immediately asked Ray to tell her what had happened. (Tr. 25 at page 60.) At this point, Ray began to explain the details surrounding his crime, including: the specific type of knife he used, how the knife was utilized, where the murder took place, his state of mind, and his motive for stabbing his father. (Id. at page 60-64.) Therefore, the recording of the Outbound Call was no longer simply compiling information relayed by a person describing an emergency situation, but rather was recording a defendant's statements, prompted by questions from the dispatcher, about past events establishing the defendant's role in his step-father's murder. Ray's responses to Rednour's questions, including "what happened", were testimonial in nature rather than the non-testimonial statements which are typical of the 9-1-1 calls described by the Supreme Court in *Hamilton County* as being public records per se. Thus, the Twelfth District's decision finding the Outbound Call to be a 9-1-1 call must be reversed.

**C. The Appellate District's characterization of the Outbound Call as a continuation of the actual 9-1-1 call has no support in fact, law or theory.**

While acknowledging that the Outbound Call was not made to the phone number 9-1-1, the Appellate Court declined all of the aforementioned distinctions by holding that the call was a "continuation" of the actual 9-1-1 call. *See, Sage*, 2013-Ohio-2270, at ¶ 19. However, this categorization of the Outbound Call as a continuation does not survive logical scrutiny, and has zero support in case law. Rather, the Twelfth District's continuation theory is created from whole cloth. *See, generally, State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987) (finding procedures should not be created out of whole cloth)(overruled on other grounds). The supposed continuation theory

is also squarely at odds with the Revised Code and this Court's decision that define a 9-1-1 call as being one in which a citizen calls 9-1-1 asking for help. See, R.C. 5507.01(A); *Hamilton County*, 75 Ohio St.3d at 377-378. As such, the Twelfth District's unprecedented continuation theory should be flatly rejected as an unportable judicial creation.

Even if not flatly rejected, the continuation theory is unsupportable by definition and logic. "According to Merriam-Webster Dictionary, 'continuation' is defined as not only a continuous, uninterrupted period, but also as a 'resumption after an interruption.' Merriam-Webster Online Dictionary, continuation, available at <http://www.merriam-webster.com/dictionary/continuation>; see also Webster's New World College Dictionary, continuation, available at <http://www.yourdictionary.com/continuation> (defining 'continuation' in part as 'a taking up or beginning again after an interruption: resumption' and 'a part or thing added to make something reach further or last longer; extension, supplement, sequel, etc.')." See, *Zellmann v. Zellmann*, 79 Va. Cir. 575, 2009 WL 7416540, \*3 (Va.Cir.Ct.,2009).

This definition then begs the question of what constitutes a resumption. "The American Heritage Dictionary defines 'resumption' as the act of resuming or beginning again; it defines 'resuming' as a participial form of 'resume,' which in turn is defined as 'to begin or take up again after interruption.' The American Heritage Dictionary of the English Language 1487 (4th ed.2000)." *Consumers Energy Co. v. United States*, 65 Fed.Cl. 364, 370, Fed. Carr. Cas. P 20,657 (Fed.Cl.,2005), see also *Renzi v. Aetna Life Ins. Co.*, 9th Dist. No. 2547, 1935 WL 3196, \*2 (March 28, 1935) ("The verb 'resume' is defined by the same lexicographer as: '\*\*\* 2. To enter upon or begin again; to recommence \*\*\*.'").

In the present case, the actual 9-1-1 call was placed by a female caller, who stated that her husband was not breathing, that there had been an accident, and that an ambulance was needed. (Tr. 25 at page 41-42.) When Rednour called back, she intended to continue this call with the female. However, when the Outbound Call was answered, the female caller did not answer. Thus, there was no resumption or beginning again of the 9-1-1 call.

Rather, Michael Ray answered the phone. Ray had never before spoken to Rednour. Ray could not resume the earlier conversation that he was not a party to and that he did not know what had transpired during. Rather, Rednour and Ray began a new conversation. It would have been impossible for two people who have never spoken before to “begin again” a conversation. A continuation of a two party conversation cannot be unilateral.

The Court of Appeals never explained how the laws of language bent in this way, or how a party can continue a conversation with a person they have never spoken to. The reason for no explanation is simple: the analysis would break under the definitions of the words used and the logical conclusions that come from it.

In application, the Twelfth District’s theory of continuation is something akin to company ‘A’ negotiating to purchase company ‘B’, having the negotiations break off half way through, and then calling company ‘C’ and saying that they want to continue the negotiations. Company ‘C’ would surely find this idea of continuation to be absurd.

It is similarly absurd to find that Rednour continued an earlier conversation with Ray when they had only one conversation, the Outbound Call. The Outbound Call was a new call, was not between the same parties as the 9-1-1 call, and did not resume any of the earlier conversations. As

such, the call is not a continuation, but rather a tertiary call between Ray and Rednour. The label of this call as a continuation cannot stand.

What is more, the underlying reasons given for the per se dissemination of 9-1-1 calls in this Court's *Hamilton County* decision are not present in the Twelfth District's continuation theory. In *Hamilton County*, this Court stated that:

From the foregoing, it is evident that 911 tapes are not prepared by attorneys or other law enforcement officials. Instead, 911 calls are routinely recorded without any specific investigatory purpose in mind. **There is no expectation of privacy when a person makes a 911 call.** Instead, there is an expectation that the information provided will be recorded and disclosed to the public. Moreover, because 911 calls generally precede offense or incident form reports completed by the police, they are even further removed from the initiation of the criminal investigation than the form reports themselves.

*Hamilton County*, 75 Ohio St.3d at 378 (emphasis added).

However, in the case at bar, Michael Ray was not the initial caller, nor was he reporting an emergency; he merely answered his home phone. He was not warned and did not have any way of knowing that he was being recorded, he had no expectation that his responses to investigatory questions would be released to the public, and there is no information that he knew the Butler County Sheriff's Office was involved in an investigation of the murder at his home. The reasons given for disclosure in *Hamilton County* are not present in the case at bar, and in fact, the scenario is the complete opposite. Thus, the continuation theory has no support in fact or logic. Therefore, the Outbound Call is not a 9-1-1 call, is not a continuation of a 9-1-1 call, and the decision of the Twelfth District should be reversed.

**PROPOSITION OF LAW NO. 2:**

The Twelfth District Court of Appeals abused its discretion when it found the Protective Order prohibiting the release of the Outbound Call to the media failed to satisfy the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*.

**A. The Twelfth District erred in law and fact when balancing Michael Ray's Sixth Amendment right to a fair criminal trial against the media's First Amendment right of access.**

Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution secure to a criminal defendant the right to a fair trial. The United States Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) recognized that pervading, unfair, and prejudicial coverage by the media could, in practical effect, deprive a criminal defendant of their Sixth Amendment right to a fair trial. The High Court observed:

If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

*Id.*, 384 U.S. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 620.

Accordingly, an individual's rights under the Sixth Amendment are of utmost importance and will trump the First Amendment rights of the media. *See, Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 508, 104 S.Ct. 819 (1984) ("*Press-Enterprise I*") ("No right ranks higher than the right of the accused to a fair trial"); *In re Globe Newspaper Co.*, 729 F.2d 47, 53 (C.A. 1, 1984) ("When the rights of the accused and those of the public come irreconcilably into conflict, the accused's Sixth Amendment right to a fair trial must, as a matter of

logic, take precedence over the public's First Amendment right of access to pretrial proceedings.”). Federal courts have also found that privacy interests of third parties, including those of crime victims, may also militate against open proceedings for criminal cases. *See, United States v. Robinson*, Cr. No. 08-10309, 2009 WL 137319 (D.Mass. Jan. 20, 2009) (recognizes the importance of privacy interests of crime victims in relation to the newspaper's request for the court to order the government to disclose the victim's identity); *United States v. Carriles*, 654 F.Supp.2d 557, 566 (W.D.Tex. 2009) (in seeking a protective order, the government may advocate for the privacy interests of third parties.).

Pursuant to *Sheppard*, this Court has found that records that would prejudice a criminal defendant's right to a fair trial under the State and Federal Constitutions would clearly be exempted from disclosure to the media under the Ohio Public Records Act since such records would constitute “records the release of which is prohibited by state or federal law.” R.C. 149.43(A)(1)(v); *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 138, 609 N.E.2d 551 (1993) (“Where a subsequent in camera inspection reveals that release of the records would prejudice the right of a criminal defendant to a fair trial, such information would be exempt from disclosure pursuant to R.C. 149.43(A)(1) during the pendency of the defendant's criminal proceeding.”).

This general directive is also followed throughout the country. *See generally, Huddleson v. City of Pueblo, Colo.*, 270 F.R.D. 635, 637 (D.Colo., 2010) (“The paramount interest justifying limitations on the general rule of access is preservation of a party's right to a fair trial”); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 376, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (noting that the right of the press to access a criminal trial must be “balanced against the constitutional right of defendants to a fair trial”); *United States v. McVeigh* 119 F.3d 806, 813 (C.A. 10 1997) (upholding the trial

court's order sealing evidence ruled to be inadmissible and stating that “disclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction.”).

In criminal cases where the right of the accused to a fair trial might be undermined by publicity, the United States Supreme Court set forth a two-part inquiry for trial courts to use to determine whether the constitutional rights of the accused override the media’s constitutional right of access. In *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S.

1 (“*Press-Enterprise I*”), the High Court established that closure shall be made:

only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.

*Id.*, at 14.

This Court adopted this balancing test in *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 28-29, and the Twelfth District has subsequently applied this test. *See e.g., State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 2009-Ohio-3415, 916 N.E.2d 1090 (12th Dist.); *State ex rel. the Cincinnati Enquirer v. Bronson*, 191 Ohio App.3d 160, 2010-Ohio-5315, 945 N.E.2d 551 (12th Dist.). In the instant case however, the Twelfth District erred in finding that “the protective order in this case did not satisfy the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*.” *Sage*, 2013-Ohio-2270, at ¶ 28.

First, the Twelfth District erred by overlooking the evidence in this case and imposing the burden of expert testimony that would somehow serve as the linchpin to show that releasing the Outbound Call would prejudicially impact Ray’s right to a fair trial. The Appellate Court stated,

“First, other than the recording itself, there was no evidence submitted to the common pleas court as to why disclosure of the Outbound Call recording would endanger Ray’s right to a fair trial. There was no testimony from psychologists, sociologists, communications experts, media experts, jury experts, experienced trial lawyers, former judges, or others as to how pretrial disclosure of the Outbound Call recording would impact Ray’s right to a fair trial.” *Id.* However, these decisions are made by experts on issues of prejudice, and these experts are called trial judges.

There is also no legal basis for needing this type of evidence to demonstrate that a “substantial probability” exists that Ray’s fair trial rights would be prejudiced by the release of this recording. In fact, neither the United States Supreme Court in *Press-Enterprise II* nor this Court in *Bond* held that “specific findings” showing a substantial probability of prejudice require expert statements in order for a decision prohibiting the release of a record to the media to withstand legal scrutiny.

What is more, the trial court did receive and evaluate the expert input that the Appellate Court was seeking but found absent in this case. In deciding this issue, the trial court was given the opinions of multiple experienced trial attorneys, with extensive training in criminal law, constitutional law, and media law. (Tr. 26 at Exh. D-A, page 17-41.) These opinions should not have been overlooked by the appellate court, particularly where both the prosecutor and the defense were uncommonly aligned in their positions in that the release of the recording would unfairly prejudice Ray’s trial rights. The trial court clearly gave the appropriate consideration and weight to these opinions.

Additionally, Judge Sage was certainly permitted to use his own expertise both as a trial attorney and as a judge of 21 years to determine the prejudicial impact of releasing the tape. (*Id.* at

page 42.) Further, serving as a neutral party in the matter also provided Judge Sage with an unbiased perspective that it seems the Appellate Court was desiring to see. But, to ask the burdened party, which in almost all situations will be the State, to provide testimony of former judges, psychologists, sociologists, communications experts, media experts, jury experts, and/or experienced trial lawyers on the issue of pretrial publicity and its prejudicial effect is redundant and unnecessary as that party is already present in the matter - the trial judge. The Twelfth District's focus on the absence of these experts is misguided here.

Because the Appellate Court was so focused on the absence of needless expert testimony to establish the presence of prejudice contained in the call, it abused its discretion when it undervalued the extent of the prejudicial effect the actual content of the call would have on Ray's fair trial rights if released to the media. The Twelfth District found that "Ray's statements to Rednour do not contain salacious or horrific details that might arouse an emotional response in the community against Ray." *Sage*, 2013-Ohio-2270, at ¶ 30. The word "salacious" is defined in *Webster's Third New International Dictionary* as "lascivious, obscene," and the word "horrific" is defined as "inspiring horror or fear: horrifying, horrible." *Id.*, at page 2002, 1092 (Merriam-Webster Inc., 1993).

However, the finding that the call lacked these qualities does not, pursuant to law, mean that prejudice will not result. All that is required is for the content of the call to be of some nature that sways prospective jurors' minds to conclude that Ray is guilty of murder. The details contained in this tape do just that. The recording of Ray's statements that he is "a murderer" and "I stabbed him" do not just constitute an admission to the crime but is the ultimate legal conclusion that jurors are responsible for determining through the use of precise legal definitions. (Tr. 25 at page 60-61.) Ray also admitted to the requisite mental state of the crime when he said that he "snapped." (*Id.* at page

60, 62.) Thus, the Appellants/Cross-Appellees are not just assuming prejudice because of Ray's admissions, but are finding substantial probability of prejudice based upon the legal conclusions that are present in the recording.

In addition, the Twelfth District erred when it found the details of the call were not salacious or horrific. *Sage*, 2013-Ohio-2270, at ¶30. The call does contain salacious and horrific details, as the listener can clearly discern the victim's wife in the background where she is screaming and begging the victim to stay alive, praying to God, cursing, and expressing her love as he is dying in her arms. (Tr. 25 at page 61, 63.) These statements are horrific things to listen to that do raise an emotional response. The trial court even mentioned when it orally granted the Protective Order that, “\* \* \* listening to the tape, and when you listen to its totality, the tape itself is highly inflammatory, it's highly emotional in nature, not only because of the statements that the defendant made, but also statements of other people who were obviously present, and again, those release of those statements, of the - - that call in the Court's mind would - - deny the defendant a right to a fair trial because of the publicity that would, I think, follow as a result of that.” (Tr. 26 at Exh. D-A, page 45.)

The Appellate Court also erred when it found that Ray's statements include expressions of remorse. *Sage*, 2013-Ohio-2270, at ¶ 30. To the contrary, Ray describes in a cold and callous way the manner in which he committed murder. He shows no remorse and cannot reasonably be construed to be remorseful.

Moreover, the Twelfth District points out that “there is nothing to suggest that Ray's statements to Rednour would not have been admissible at trial and submitted to the jury for its deliberations” and “[t]hat the Outbound Call recording would eventually be submitted to a jury certainly mitigates any adverse impact upon Ray's right to a fair trial which might result from its

pretrial disclosure.” *Sage*, 2013-Ohio-2270, at ¶ 29. The Appellants/Cross-Appellees agree that the call is admissible evidence that the State would undoubtedly present to the jury, and that the recording would be prejudicial to Ray because all evidence presented by the State is prejudicial evidence. The problem rooted in the Twelfth District’s rationale, however, is that unless the media publishes content that is inadmissible at trial or is otherwise false reporting, any pretrial publicity that contains admissible evidence in a criminal case can be pre-disclosed to the public prior to the commencement of trial because the citizens who will become the jurors on the case will hear it anyway at trial. This rationale does not square with the concerns expressed by the United States Supreme Court in *Sheppard* and forecloses the idea on other instances where pretrial publicity involving admissible evidence has a prejudicial effect on a criminal defendant’s fair trial rights. A defendant has a right to a jury that hears evidence at trial first when such evidence is prejudicial on the ultimate issue of fact, in a trial court’s opinion.

The Twelfth District also abused its discretion when it found Judge Sage’s consideration of alternatives to closure insufficient to meet the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*. *Sage*, 2013-Ohio-2270, at ¶ 31. The court concluded that, “There was no mention or consideration of why continuances, voir dire, change of venue, cautionary jury instructions, and other protective measures would not have preserved Ray’s right to a fair trial.” *Id.*

However, the United States Supreme Court in *Press-Enterprise II*, and this Court in *Bond*, did not mandate how many alternatives must be considered before closure is granted. In *Press-Enterprise II*, the Court only mandated that “reasonable alternatives” be considered and rejected before closure is granted. *Press-Enterprise*, 478 U.S. at 14. This Court in *Bond* mandated that trial courts make specific findings on the record demonstrating that it “consider[ed] whether

alternatives to total [closure] would have protected the interest of the accused.” *Bond*, 2002-Ohio-7117, at ¶ 30. This Court in *Bond* and the Twelfth District in *Heath* both reversed the trial courts’ decisions that granted closure of public access since the record in those cases were “absolutely devoid of\*\*\* any consideration of less-restrictive alternatives.” *Heath*, 2009-Ohio-3415, at ¶ 20.

By contrast, Judge Sage properly considered the “reasonable alternatives” to closure that existed in this case. Those reasonable alternatives included a transcript of the recording as well as redaction, and he specifically explained on the record his reasoning for rejecting those alternatives. (Tr. 36 at Exh. 1, page 2-3; Appx. 31.) In addition, and contrary to the Twelfth District’s finding, Judge Sage did consider a change in venue as an alternative, but found that alternative not reasonable. (Id.) Such a finding rests with the sound discretion of the trial court. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 59 (“A trial court may change venue ‘when it appears that a fair and impartial trial cannot be held’ in that court. Crim.R. 18(B); R.C. 2901.12(K). Any decision on a change of venue rests in the sound discretion of the trial court. *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 34.”).

The problem with the Twelfth District’s decision that “continuances, voir dire, change of venue, and cautionary jury instructions” should have been considered as reasonable alternatives is that those alternatives, if implemented, would mean that the recording would nonetheless be released to the media and that the State, defense, and the trial court would be left with attempting to implement curative measures in protecting the fairness of the trial. These post-release alternatives, palliative measures as described in *Sheppard v. Maxwell*, would essentially undercut the trial court’s finding under the first prong of the *Press-Enterprise II-Bond* test that Ray’s right to a fair trial would

be prejudiced if the recording was disseminated to the media. The appellate court's finding that these alternatives should have been considered would render the "balancing" of Sixth Amendment and First Amendment rights meaningless, as the release of the prejudicial item would be required every time in a criminal case.

Accordingly, Judge Sage followed the mandates set forth by the United States Supreme Court and by this Court when he considered the reasonable alternatives that balance the prejudicial effect of the tape with the media's right to have it, including limiting the emotional nature of the call through a transcript and limiting portions of call through redaction. Judge Sage on the record then rejected those alternatives with reasoning prior to granting the Protective Order. Thus, the Twelfth District erred in granting the writ of mandamus and should be reversed.

**B. Any discovery labeled "counsel only" under Criminal Rule 16(C) or as "non-disclosed" under Criminal Rule 16(D) in accordance with the Ohio Rules of Criminal Procedure should be considered "state law" that is exempt from being released under the Ohio Public Records Act.**

Where the Twelfth District found that Appellant/Cross-Appellee Gmoser "implicitly designated the Outbound Call recording as 'counsel only'" under Criminal Rule 16(C), and where it found that Appellant/Cross-Appellee "Judge Sage further sanctioned that classification when he issued the protective order," this Court should hold that this classification under Criminal Rule 16 restricts, pursuant to state law, the public's ability to gain access to it. *See, Sage*, 2013-Ohio-2270, at ¶39. This issue is a matter of first impression as divisions (C) and (D) of Crim.R. 16 are new to the amended rule, and resolving the frequent collision of criminal cases with the Ohio Public Records Act is of great importance to the State, defense attorneys, the media, and Ohio's citizens.

The exemption to the definition of a “public record” at issue is contained in R.C. 149.43(A)(1)(v), which excludes “[r]ecords the release of which is prohibited by state or federal law.” It is the Appellants/Cross-Appellees’ position that this exemption applies to items that are labeled “counsel only” or that are “non-disclosed” under Crim.R. (C) and (D).

In support, this Court in *The State ex rel. Beacon Journal Publishing Company v. Waters*, 67 Ohio St.3d 321, 1993-Ohio-77, 617 N.E.2d 1110 held that Crim.R. 6(E) relating to grand jury secrecy is an element of “practice or procedure” within the meaning of this Court’s constitutional authority under Section 5(B), Article IV of the Ohio Constitution to prescribe rules governing practice and procedure and thus, found that Crim.R. 6(E) is a “state law” within the meaning of R.C. 149.43(A)(1)(v). *Id.*, at 323-324.

Like Crim.R. 6(E), Criminal Rule 16 is clearly procedural in nature as it was promulgated into the Ohio Rules of Criminal Procedure. The Ohio General Assembly defined the applicability of these rules stating, “These rules prescribe the procedure to be followed in all courts of this state in the existence of criminal jurisdiction, with the exceptions stated in division (C) of this rule.” Crim.R. 1(A). Additionally, Crim.R. 16 is “procedural” in nature where this Court in *State v. Athon*, 136 Ohio St.3d 43, 2013-Ohio-1956 recently recognized that “Crim.R.16 is specific to the procedure in criminal cases \* \* \*.” *Id.*, at ¶ 18.

Accordingly, as this Court determined that Crim.R. 6(E) is a procedural rule that constitutes a “state law,” this Court should similarly hold that the newly amended Crim.R. 16 is procedural in nature and also constitutes a “state law”. As such, discovery that is designated “counsel only” or “non-disclosed” under Crim.R. 16(C) and (D) is specifically exempted from disclosure under the public records statute because it constitutes a state law that prohibits the release of the records.

In the case at bar, Appellant/Cross-Appellee Gmoser informed the Enquirer from the very outset that he intended to seek a protective order pursuant to the criminal rules. On June 21, 2012 Gmoser filed a Motion for Protective Order under Crim.R. 16(C), which Judge Sage ultimately granted. As such, the recording was prohibited by state law from being released to any party other than Ray's defense counsel. This included defendant Ray himself! That prohibition remained in effect until October 18, 2012 when an Amended Order was issued. Accordingly, during the time the Protective Order was in effect, the release of the contents of the recording was prohibited by state law, and by definition, the recording was not a public record.

It is unfathomable that a defendant charged with murder could be excluded from hearing an audio tape pursuant to Crim.R. 16(C), while at the same time a media outlet would be entitled to its release. In that situation, the defense attorney would be ethically unable to share the audio tape with the defendant. However, the media could play it on the 11 o'clock news. Under this scenario, a defendant would have to watch the evening news to hear the protected discovery in his own criminal trial. Justice cannot be so fickle in Ohio, and the Criminal Rules must be given some meaning and not rendered absurd.

To hold that Crim.R. 16 is a state law and that its protections are exemptions to R.C. 149.43 would alleviate the unpalatable conflict between Crim.R. 16 and R.C. 149.43. Following the *Waters* case, and recognizing Crim.R. 16 as a state law, would allow this Court to bring harmony to this situation that currently sits at an unworkable impasse for lower courts, records custodians, and the media. *See, Waters* 67 Ohio St.3d 321.

**PROPOSITION OF LAW NO. 3:**

Even if this Court finds the Outbound Call to be a 9-1-1 call, this Court's outdated per se rule that all 9-1-1 calls are public records subject to disclosure frustrates the ends of justice, conflicts with the Ohio criminal rules, is disfavored and in direct contravention with the modern stance taken by other jurisdictions, and thus, should be revisited and reversed or modified.

If this Court were to somehow find under Appellants/Cross-Appellee's Proposition of Law No. 1 that the dispatcher's Outbound Call constitutes a 9-1-1 call, this Court's rule of law that all 9-1-1 calls are per se public records should be revisited and reversed or modified. This per se rule has proven to be an inflexible one that impedes the preservation and promotion of justice, directly conflicts with the newly amended rules of criminal law and procedure, and is in direct contravention with other jurisdictions' consideration of, and protection for, the privacy rights and the investigatory duties that are frequently present in 9-1-1 calls.

**A. As per se rules are disfavored, inflexible, and fail to preserve and promote justice, this Court should adopt a totality of the circumstances approach or balancing test to determine whether a 9-1-1 is a public record subject to disclosure.**

In general, courts, including the United States Supreme Court, have looked with disfavor upon per se rules. The problem with per se rules is that they are inflexible and do not allow courts to consider individual situations and scenarios. *See generally, Rock v. Arkansas*, 483 U.S. 44, 56 fn.12 (1987) (disfavoring per se rule of exclusion that left a trial judge with no discretion to admit certain testimony); *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755 (1979) (disfavoring inflexible per se rule as it applies to *Miranda* waivers); *Manson v. Brathwaite*, 432 U.S. 98, 113, 97 S.Ct. 2243 (1977) (favoring a totality approach as compared to a per se rule, noting, "Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm. See, for example, the several opinions in *Brewer*

*v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). See also *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976).”); *Chambers v. Maroney*, 399 U.S. 42, 54, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (“But we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel.”)

Rather than adopting a rigid per se rule, a totality approach or a balancing test is a better avenue to find justice, and this Court should reconsider the appropriateness of this as it relates to 9-1-1 calls. This is especially true when the interest of the safety and privacy rights of Ohio’s citizens and corporations are frequently at issue. *See generally, Brathwaite*, 432 U.S. at 112-113 (“Here the per se approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the per se approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the per se approach but not under the totality approach cases in which the identification is reliable despite an unnecessarily suggestive identification procedure reversal is a Draconian sanction.”)

When evaluating 9-1-1 calls, some actual evaluation and analysis should be accorded to Ohio’s citizens. This Court should release the citizens of Ohio from the Sophie’s choice of either maintaining their privacy during an emergency or summoning emergency services. Either having privacy or having the ability to summon emergency services should not be an “either-or” proposition in Ohio. The per se rule established by this Court over fifteen years ago in *Hamilton County*, 75 Ohio St.3d 374, 1996-Ohio-214, should be lifted.

**B. The per se rule intolerably conflicts with the rules in criminal cases and with Ohio citizens' constitutional right to privacy. This Court should modify its per se rule in favor of a balancing test employed by its sister states that weighs confidentiality issues, privacy issues, and state interests that are frequently involved in 9-1-1 calls.**

The per se rule established in *Hamilton County* should also be reversed or modified because the rule causes an intolerable friction with Criminal Rule 16 and with the preservation of privacy. Even though the Twelfth District Court of Appeals cited *Hamilton County*, 75 Ohio St.3d 374, to support its decision that the Outbound Call is subject to public disclosure, Judge Piper in his concurring opinion noted that, "The legislature continues to deny attention where needed. Justice Kennedy recently urged the Commission on Rules of Practice and Procedure to examine the dysfunction between Crim.R. 16 and R.C. 149.43. *State v. Athon*, Slip Opinion No. 2013-Ohio-1956." *Sage*, 2013-Ohio-2270, at ¶ 67, (Piper, J., concurring) (internal footnote omitted).

This friction dates back to this Court's *Hamilton County* decision itself where Justice Pfeifer wrote a concurring opinion in which he disagreed with the law:

I reluctantly agree with the majority's analysis of the law in this case, but I cannot agree with the law. The General Assembly needs to carefully examine whether audiotapes of 911 calls should be subject to public dissemination. Public records laws exist so that government may be open to the scrutiny of the citizenry. To accomplish that goal is it necessary for families to have their most tragic and personal moments broadcast for all to hear? Does a personal tragedy become a public spectacle simply because a person phones the police for aid? Are the media unable to relate effectively the story of a crime or accident without playing a recording of a victim's or a witness's plea for help? Have the rights of victims become subverted by our society's seemingly boundless morbid curiosity, transforming a moment of despair into a Warholian fifteen minutes?

While the quavering voice of a four-year-old pleading with a 911 operator to make daddy stop hitting mommy may be some station manager's idea of "good television," the broadcast of that voice is not the product of good law. I urge the General Assembly to revisit this area.

*Hamilton County*, 75 Ohio St.3d at 380-381 (Pfeifer, J., concurring); *See, also State ex rel. Dispatch Printing Company v. Monroe County Prosecutor's Office*, 105 Ohio St.3d 172, 824 N.E.2d 64, 2005-Ohio-685, ¶ 20 (Pfeifer, J., concurring).

Judge Piper continued his concurrence by noting other “shortcomings in the interaction of R.C. 149.43 with the criminal justice system.” *Sage*, 2013-Ohio-2270, at ¶ 59, (Piper, J., concurring).

Of note, Judge Piper found that:

\* \* \* [T]he per se rule of [*Hamilton County*] requires immediate release regardless of any intended uses or unintended consequences.FN8 There appears no room to balance fundamental principles.

FN8. For example, in *State v. Adams III*, 12th Dist. No. CA2009–11–293, 2011–Ohio–536, this court affirmed the defendant's conviction for aggravated murder after he was found guilty of killing a man labeled “a snitch.” The victim was riding in a car that was being pursued by the police, and the driver jumped from the car and was not apprehended. The victim surrendered to police, and while in the back of the police cruiser, was videotaped identifying the driver of the car to police officers. The videotape was copied and disseminated within the community, and the victim was murdered for talking to the officer.

\* \* \*

Yet again, neither R.C. 149.43 nor the holding in [*Hamilton County*] permit room for deliberation or the weighing of competing interests.

*Id.*, at ¶ 63-64.

Judge Piper concluded that under the current per se rule of law, “a prosecutor is forced to engage in conduct contrary to the real ethical concern for the preservation of individual rights by disseminating public records. If we expect prosecutors to fulfill ethical responsibilities beyond those of an advocate, we should empower them as well as the media.” *Id.*, at ¶ 67.

The forgoing establishes that the per se rule to disclose 9-1-1 calls eviscerates the privacy of Ohio’s citizens, causes intolerable friction with Criminal Rule 16 and the Sixth Amendment right to a fair trial, and causes Ohio’s prosecuting attorneys to “engage in conduct contrary to the real ethical concern for the preservation of individual rights by disseminating public records.” *Id.* After calling upon the General Assembly for action for over 17 years, is it not time for this Court to revisit and reverse a decision that has not advanced justice?

As the United States Supreme Court stated in *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604 (1940):

[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.” In this case, stare decisis dictates that we correct our previous mistakes and reinstate the reasonable justification standard.

*Id.*, at 119; *See also Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238, 44 S.Ct. 302, 309, 68 L.Ed. 646 (1924) (Brandeis, J., dissenting) (“ \* \* \* [s]tare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. \* \* \* ”)

And in specific regards to a defendant’s Sixth Amendment right to a fair trial, this Court has previously noted that the doctrine of stare decisis “does not apply with the same force and effect when constitutional interpretation is at issue.” *City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St.3d 1, 539 N.E.2d 103, 106 (1989).

The per se rule of 9-1-1 calls is intolerable, unjust, and incongruent with Crim.R. 16 and the Sixth Amendment’s fair trial rights. This Court must adopt a balancing approach that allows trial courts to balance a citizen’s rights and court rules against the need for public dissemination. Without such a ruling, injustice will live on.

A solution to this dichotomy can be found from Ohio’s sister states. Once guidance is found from these sister courts, this Court should modify its per se rule in favor of a balancing test employed by its sister states that weighs confidentiality issues, privacy issues, and state interests that are frequently involved in 9-1-1 calls.

In fashioning the per se rule, this Court found guidance from other states (Connecticut and Missouri) in dealing with 9-1-1 calls. *See, Hamilton County*, 75 Ohio St.3d at 379. However, as 17 years have past, other states have decided to protect their citizens and not limit the abilities of courts

to balance competing interests. This Court should look with a new eye on the decisions of sister states.

In Arizona, the state's Public Records Act creates a presumption of access to all public records. Ariz.Rev.Stat. § 39-121. There is no personal privacy exemption in the act, but the Supreme Court of Arizona has determined that privacy interests of its citizens can overcome the presumption that favors disclosure of public records. *See, Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242 (1984); *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz. 297, 955 P.2d 534 (1998); *A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, 42 P.3d 615, 617 (2002). Arizona's highest court has created the rule that the "public right of inspection may \* \* \* be curtailed in the interest of 'confidentiality, privacy, or the best interests of the state.'" *Scottsdale Unified Sch. Dist.*, 191 Ariz. at ¶ 9, citing *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. As such, it falls to Arizona courts to determine case by case, as the question arises, whether an asserted privacy interest has overcome the presumption of public access.

The premise for this rule is based upon the Arizona Court's belief that the common law limitations to public access, such as the interests of confidentiality, privacy, or best interests of the state, and the common law balancing test that weighs a citizen's right of access to records against the State's interest in preventing disclosure, were not expressly limited by the Arizona Public Records Act statute. *See, Carlson*, 141 Ariz. at 490; see, also 66 Am. Jur. 2d Records and Recording Laws § 18 (2013), citing *Washington Legal Foundation v. U.S. Sentencing Com'n*, 89 F.3d 897 (D.C. Cir. 1996); *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35, 660 A.2d 1163 (1995). As such, the Supreme Court of Arizona in *Carlson* held:

that the common law limitations to open disclosure are not based on any technical dichotomy which might be argued under the “public records” or “other matters” wording of A.R.S. § 39–121, but rather are based on the conflict between the public's right to openness in government, and important public policy considerations relating to protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state. This has been the general basis for the common law rule. The enactment of A.R.S. § 39–121.01 did not expressly limit the doctrine of *Mathews v. Pyle* and we do not believe that the current statutory scheme, which is all-inclusive in its requirements of record keeping, was intended by the legislature to overrule the balancing scheme adopted in *Mathews v. Pyle*.

*Carlson*, 141 Ariz. at 490.

By maintaining a balancing test, the Arizona courts have provided privacy protections for their citizens, and struck a harmonious balance between public records law and criminal law. One example of this balance is demonstrated in *A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, 42 P.3d 615, 617 (2002). “In *A.H. Belo*, a babysitter called 911 to report that the baby she was watching fell from his crib. The babysitter was later indicted on charges of child abuse. A television station sent a request for a copy of the transcript and tape of the 911 call. The transcript was provided, but the Mesa Police Department refused to release the tape. The court held that the police department had a substantial basis — the family's privacy interest — in not disclosing the tape.” *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J.Super. 312, 320, 864 A.2d 446 (2004).

Specifically, the *A.H. Belo* court stated that “we recognized that privacy rights implicate concerns “‘of the most fundamental sort’ to the individual, concerns that implicate ‘autonomy with respect to the most personal of life choices’ and ‘the intimate aspects of identity.’” *State v. Watson*, 198 Ariz. 48, 52, ¶ 8, 6 P.3d 752, 756 (App.2000) (quoting Laurence H. Tribe, *American Constitutional Law* § 15-1 (2d ed.1988)). Precisely such concerns are placed at issue in this case.

Indeed, we cannot imagine a more fundamental concern or one more directly associated with ‘the intimate aspects of identity’ and family autonomy than the desire to withhold from public display the recorded suffering of one's child.” *A.H. Belo*, 202 Ariz. 184, ¶¶ 16-17.

In the case at bar, the privacy rights and Sixth Amendment right to a fair trial for Michael Ray were clearly at issue. However, the rights of the victim’s family were also in the forefront. During the Outbound Call, the wife of the victim is clearly heard pleading for the victim to wake up, and expressing her love for him. (Tr. 25 at page 61.) The suffering in her voice should be withheld from public display as it expresses an intimate aspect of her identity and her relationship with the victim. As the Arizona Court did in *Carlson*, this Court should find that the common law balancing test is still incorporated in conjunction with R.C. 149.43, and should abrogate the per se rule in regards to 9-1-1 calls.

Such a holding would be consistent with the ruling of this Court in *Housh v. Peth*, 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340, (1956), paragraph one of the syllabus, that Ohio's privacy right includes “the right of a person to be let alone \* \* \* and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.” In *Peth*, this Court tracked the history of one’s right to privacy, and stated:

The first recognition of the right by a court of dernier ressort apparently was in the case of *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St. Rep. 104, 2 Ann.Cas. 561. The syllabus in that case reads in part as follows:

2. A right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commentators and writers on the law as well as judges in decided cases.
3. The right of privacy is embraced within the absolute rights of personal security and personal liberty.
4. Personal security includes the right to exist, and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a

deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.

5. Personal liberty includes not only freedom from physical restraint, but also the right 'to be let alone'; to determine one's mode of life, whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him so long as he does not violate the rights of others or of the public.'

Since that decision by the Supreme Court of Georgia, the right of privacy has been recognized by the following jurisdictions: Alabama, Arizona, California, District of Columbia, Florida, Indiana, Kansas, Kentucky, Michigan, Missouri, New Jersey, North Carolina, Oregon, Pennsylvania and South Carolina.

\* \* \*

In Ohio the lower courts have acknowledged the right, but counsel are agreed that it still is a matter of first impression in this court. However, since both reason and authority are convincingly in favor or recognition of the right, it would seem that Ohio, too, should not hesitate to take the definite step of approving this salutary and progressive principle of law.

*Id.*, at 38-39 (emphasis added).

Ending the myriad of issues and eviscerations of rights that the per se rule of the *Hamilton County* case has brought about and honoring instead the common law, this Court's rationale in *Peth*, and the well reasoned balancing test of the Arizona courts would honor precedent and provide the proper balance between public access and privacy. The *Hamilton County* case should be so modified.

What is more, aside from Arizona, a number of other courts across the country have found that personal privacy exceptions apply to 9-1-1 calls. See, *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J.Super. 312, 864 A.2d 446 (2004) (copy of 9-1-1 tape and copy of redacted transcript of the 9-1-1 call were exempt from disclosure under privacy provision of the Open Public Records Act); *New York Times Co. v. City of New York Fire Dep't*, 3 A.D.3d 340, 770 N.Y.S.2d 324 (2004) (the New York Times requested, among other things, the tapes of the 9-1-1 calls made to the fire departments concerning the September 11, 2001, attacks on the World Trade

Center. The New York Appellate Division held that though the words of the fire department's personnel in the 9-1-1 tapes did not fall within the personal privacy exemption of New York's Freedom of Information Law, the words of the 9-1-1 callers did); *Bowling v. Brandenburg*, 37 S.W.3d 785 (Ky.Ct.App.2001) (the Kentucky appellate court ruled that a 9-1-1 tape should not be released because the right to privacy of a person in seeking police assistance outweighed substantially the public's right to know. In denying the request, the court emphasized the need to protect the identity of 9-1-1 callers because allowing a caller's identity to become public might discourage individuals from calling 9-1-1 to assist others out of fear of retaliation, harassment, or public ridicule.).

While these cases were decided in jurisdictions that had an express provision relating to privacy, the logic and privacy concerns are the same. As such, this Court should find that the common law approach and the privacy rights as espoused in *Peth* still apply to protect Ohio citizens.

As the *Asbury Press* court succinctly stated:

The court has had the unpleasant task of hearing the 9-1-1 tape in camera, and of reading the transcript of the tape at the same time. It was a chilling, wrenching, lingering experience even for one not related to the victim. The content of the tape would, in the court's judgment, offend and disturb any person of normal sensibilities. It is impossible to imagine what the impact would be on the victim's family and loved ones. It is equally inconceivable that the Legislature would have ever intended that OPRA would have been used as the instrument to put those words, either as spoken or transcribed, in the public domain. Therefore, it is beyond doubt that the victims' survivors would reasonably expect that they would never have to share their loved ones' words with an inquisitive media or curious public.

*Asbury Park Press*, 374 N.J.Super. at 330.

Ohio's citizens deserve no less of an expectation of privacy.

**C. The per se rule cannot stand where the highest court in the land has recognized that 9-1-1 calls can have multiple purposes and a parsing out process is required.**

A final problem with the per se rule established in *Hamilton County* is the United States Supreme Court's more recent recognition that 9-1-1 calls can have multiple purposes, and a parsing out process of these calls must take place. If the entirety of every 9-1-1 call is a per se public record, courts in Ohio will be caught in a situation of having to either honor this Court's precedent set forth in *Hamilton County*, or the United States Supreme Court's precedent. A modification of the *Hamilton County* case to a more flexible approach would alleviate this conundrum, and foster a more just outcome for parties willingly - or unwillingly - involved in 9-1-1 recordings.

In *Davis v. Washington*, 547 U.S. 813, 831, 126 S.Ct. 2266, the High Court was faced with the question of whether an interrogation that took place in the course of a 9-1-1 call produced testimonial statements. The first observation that must be called to this Court's attention is that the High Court acknowledged that a 9-1-1 call can contain a police interrogation. This statement itself would seem to eviscerate the underpinnings of the *Hamilton County* holding that, "obviously, at the time the [recordings] were made, they were not 'confidential law enforcement records' (no investigation was underway), they were not 'trial preparation records' (no trial was contemplated or underway, and neither state nor federal law prohibited their release)." *Sage*, 2013-Ohio-2270, at ¶ 22, quoting *Hamilton County*, 75 Ohio St.3d at 378.

The United States Supreme Court in *Davis* continued by finding:

that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, 'evolve into testimonial statements,' 829 N.E.2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded

to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U.S., at 53, n. 4, 124 S.Ct. 1354. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658–659, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial.

*Id.*, at 828-829.<sup>6</sup>

Because the United States Supreme Court has recognized that a 9-1-1 call can have dual purposes, and can contain testimonial statements brought out by interrogations, the confidential law enforcement and trial preparation exemptions should be applicable to 9-1-1 calls. The term "trial preparation record" is defined in R.C. 149.43(A)(4) as "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney." In *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 431-432, 639 N.E.2d 83 (1994), this Court stated in reference to the trial preparation record exception that "[i]t is difficult to conceive of anything in a prosecutor's file, in a pending criminal matter, that would not be either material compiled in anticipation of a specific criminal proceeding or the personal trial preparation of the prosecutor."

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<sup>6</sup> The *Davis* Court found that, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, at 822.

The term “confidential law enforcement investigatory record” is defined in R.C. 149.43(A)(2) to include two requirements. First, the record must pertain to a law enforcement matter. Second, as relevant to the instant matter, the disclosure of the record would create a high probability of the disclosure of “specific investigatory work product.” Although the scope of the work product exception is not statutorily defined, this Court in *Steckman* recognized that the “work product” exception is rooted in cases involving the attorney-client relationship and the Supreme Court’s decision in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) protecting an attorney’s ability to prepare the client’s case “without undue and needless interference.” *Steckman*, 70 Ohio St.3d at 434. The Court concluded that the General Assembly had intended to “transfer” the “work product concept” from “the attorney-client genesis to the area of confidential law enforcement investigatory records.” *Id.* The Court therefore held that “except as required by Crim.R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in R.C. 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation.” *Id.*, at 435.

Based upon these definitions, it is clear that an interrogation can take place during a 9-1-1 call. This interrogation would then naturally produce testimonial statements. As testimonial statements, the statements are clearly intended for use at a future criminal trial, and thus, are then protected from public disclosure as a confidential law enforcement record and/or a trial preparation record.

This logic is present in the current case where the incriminating statements made by Michael Ray in the Outbound Call clearly relate to a pending criminal proceeding. The purpose of discovery under Crim. R. 16(A) is:

[T]o 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.

Crim. R. 16(B) expressly lists “any written or recorded statement by the defendant” as one of the items which the prosecuting attorney is required to provide through discovery. When the Enquirer made its public records request, Gmoser expressly indicated that neither he nor the Sheriff would disclose the subject recording and indicated that upon completion of the investigation, he would take the case to the grand jury and seek a protective order against release of the recording “in further criminal proceedings.” (Tr. 26 at Exh. C, ¶ 5; Exh. C-1.)

In short, Gmoser as the Prosecuting Attorney clearly contemplated criminal proceedings concerning this matter and that the recorded statement of the defendant would be subject to discovery by the defendant. For this reason, the recording in the hands of the Prosecuting Attorney was clearly a trial preparation record which was not subject to public disclosure under R.C. 149.43(B).

Moreover, Michael Ray did not call 9-1-1. Michael Ray did not speak with the Butler County Sheriff’s Office dispatcher with the primary purpose of enabling law enforcement assistance to meet an ongoing emergency. In fact, the Sheriff’s Office dispatcher’s first words to Michael Ray were that help was already on the way. (Tr. 25 at page 60.) Therefore, Michael Ray’s admission to being a murderer, admissions as to how he murdered his father, the means used, his state of mind during the assault, and his admissions as to why he murdered his father were all statements elicited by questions asked by the Butler County Sheriff’s dispatcher whose primary purpose was to establish past events relevant to the later criminal case. The questions were not designed to aid the victim, but were clearly intended to find out how and why Michael Ray committed murder.

This point is further exemplified by Renour's admission that calls dealing with medical emergencies have a different set of questions than calls that are related to crimes. (Id. at page 37.) She provided an example about a call concerning a theft, that she would ask when the theft occurred, what was taken, how the home or vehicle was accessed, and if locks were secured. (Id. at page 37.) This clearly is the type of questioning that could now, under *Davis*, become interrogation and testimonial.

Therefore, at the very least, the questions and answers in the Outbound Call should have been parsed out, as a multitude of them should be protected under the confidential law enforcement records exception, the trial preparation records exception and/or protected from release by state or federal law under R.C. 149.43. However, the *Hamilton County* case and its inflexible per se rule does not permit such a just outcome. This per se rule in *Hamilton County* needs modification to fit the expanding role of 9-1-1 calls, the dual functioning of 9-1-1 calls, the realization that testimonial statements that can be contained in 9-1-1 calls, and the new discovery rules that clearly conflict with mandatory disclosure.

**PROPOSITION OF LAW NO. 4:**

The Twelfth District abused its discretion when it awarded Appellee/Cross-Appellant statutory damages in the maximum amount allowable by law. No statutory damages should be awarded.

The Twelfth District abused its discretion for several reasons when it awarded the Enquirer statutory damages in the maximum allotted amount of \$1,000 to be paid by Gmoser. *Sage*, 2013-Ohio-2270, at ¶ 57; *See, State ex. rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 950 N.E.2d 965, 2011-

Ohio-3093 (this Court applies an abuse of discretion standard to review a court of appeals' decision awarding or denying statutory damages in a public records mandamus action).

First, the Enquirer failed to maintain throughout the original action its claim for statutory damages, and has therefore waived entitlement to them. This Court has held that in mandamus actions, relators who request statutory damages and/or attorney's fees in their complaints but who do not include any argument in support of this relief in their merit briefs have therefore waived these claims. *See, State ex. rel. Data Trace Information Services, L.L.C. et al. v. Cuyahoga County Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 69 (This Court held in a public records mandamus action that, "[a]lthough relators requested attorney fees and statutory damages in their amended complaint and reiterated their request in the conclusion of their merit briefs, they included no separate argument in either brief concerning their request. Relators thus waived this claim"); *State ex. rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174, ¶ 83 ("Although relators requested attorney fees in their complaint, they did not include any argument in support of this relief in their merit brief. Relators thus waived this claim.")

Like in *Data Trace Information Services*, the Enquirer requested statutory damages in its complaint and amended complaint by stating that it seeks a writ of mandamus commanding that "Prosecutor Gmoser be ordered to pay statutory damages pursuant to R.C. 149.43(c)(1)," but then reiterated its request only in the conclusion of its merit brief by stating "[t]his court should award The Enquirer statutory damages under R.C. 149.43(c)(1) and its attorneys fees."<sup>7</sup> (Tr. 1 at page 6;

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<sup>7</sup> In its response to the Appellants/Cross-Appellees' motion to dismiss the action as moot, the Enquirer did state that it was requesting statutory damages from Gmoser, however this response was filed after the filing of the Enquirer's merit brief. (Tr. 22, 28.)

Tr. 9 at page 6; Tr. 22 at page 18.) The Enquirer did not make a separate argument in its merit brief concerning this request for relief. There was no mention of statutory fees under any of its assignments of error headings, nor was there a single argument about statutory damages intertwined in the body of any of the existing assignments of error. In fact, no where in the original action did the Enquirer even make a claim as to the amount of statutory damages it was seeking.

It is clear from the Enquirer's merit brief under its assignment of error number 4 that it was limiting its request for monetary damages in the form of attorney's fees, and by doing so, it waived its claim and entitlement set forth in its complaint and amended complaint for statutory damages. (Tr. 22 at page 17-18.) As this Court found in *Data Trace Information Services*, this Court here should find that the Enquirer waived this claim. Thus, the Twelfth District's decision awarding statutory damages should be reversed.

If this Court finds the Enquirer did not waive its entitlement to statutory damages, the Enquirer is nonetheless not entitled to any statutory damages where it made its initial request for the Outbound Call in a manner inconsistent with the mandatory requirements set forth in the Public Records Act. Pursuant to R.C. 149.43(C)(1), the award for statutory damages is as follows:

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. \* \*

\* The existence of this injury shall be conclusively presumed.

However, a requester is only entitled to statutory damages if the request for the records is specifically made in a manner as set forth in the statute. Under R.C. 149.43(C)(1), the Ohio General Assembly has mandated that:

*If a requester transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requester shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section. (emphasis added).*

In the case at bar, on June 17, 2012 the Enquirer transmitted its initial records request to the “Butler County Dispatch,” which is not a party involved in this mandamus action.<sup>8</sup> (Tr. 26 at Exh. C, ¶ 2.) Gmoser responded to this initial request via email, and while he denied the request, one of the recordings not at issue here was released by the Butler County Sheriff’s Office. (Id. at Exh. C-1.) On June 19, 2012 the Enquirer then transmitted in writing its first follow-up request, which Gmoser denied.<sup>9</sup> (Id. at Exh. C-2.) On June 21, 2012 the Enquirer, through its counsel, sent a second follow-up request to Gmoser via email, but for the first time also sent that same request by certified mail. (Tr. 26 at Exh. B, ¶ 3.) The next day, on June 22, 2012 Gmoser responded via email, which was the same day Gmoser filed a Motion for Protective Order in Ray’s criminal case, citing to Crim.R. 16(C). (Id. at ¶ 4-5, C-2.)

Where there is no evidence that a requester has transmitted the initial public records request in writing by hand delivery or certified mail as prescribed by law, the requester is not entitled to

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<sup>8</sup> It is important to note that the Enquirer’s complaint, amended complaint, submitted evidence, and merit brief all fail to demonstrate that its initial June 17, 2012 records request was sent to Gmoser and whether it was done so in writing, by hand delivery or certified mail.

<sup>9</sup> Again, it should not be overlooked by this Court that the Enquirer’s complaint, amended complaint, submitted evidence, and merit brief all fail to demonstrate that this first follow-up request sent in writing to Gmoser was transmitted by certified mail or hand delivery. The record suggests that it was not. Rather, it appears the request was transmitted by email where it was sent to Gmoser at “2:44 p.m.” on June 19, and where Gmoser responded to this request, and all other requests, by email. (Tr. 26 at Exh. C, ¶ 4-5, C-2.)

statutory damages. *See, The State ex. rel. Mahajan v. State Medical Board of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 59 (This Court held that a relator is not entitled to statutory damages when his public records requests were not transmitted by hand delivery or certified mail as required by R.C. 149.43(C)(1)); *State ex. rel. Morabito v. City of Cleveland*, 8th Dist. No. 98829, 2012-Ohio-6012, ¶ 15 (“there is no evidence before this court that she transmitted her public records request by hand delivery or certified mail. R.C. 149.43(C)(1) conditions an award of statutory damages upon transmitting the request by hand delivery or certified mail”); *State ex. rel. DiFranco v. City of South Euclid*, 8th Dist. No. 97823, 2012-Ohio-5158, ¶ 3 (while the relator made her request for public record through email, “[e]mail does not constitute a written request or certified mail, and thus, [relator] has failed to comply with the mandatory requirements of R.C. 149.43(C)(1).”)

Here, the Enquirer has failed to demonstrate that it transmitted its initial public records request to Gmoser by hand delivery or certified mail. The Enquirer has also failed to demonstrate that its first written follow-up request submitted to Gmoser was transmitted by these required means. While the Enquirer sent its second written follow-up request by email and by certified mail several days after its initial request, this second follow-up request does not “cure” the unsatisfactory means by which the Enquirer chose to send its initial request, at least for statutory damages purposes. *See e.g., State ex. rel. Petranek v. Cleveland*, 8th Dist. No. 98026, 2012-Ohio-2396, ¶ 8 (where the relator transmitted a public record request first by email and then later by certified mail, the court declined “to award statutory damages because [relator] completed her request through email before she completed the request through certified mail, which is a statutory prerequisite for statutory damages.”)

Moreover, this second follow-up request sent by the Enquirer's legal counsel cannot be construed as a new public records request since it merely reiterated the Enquirer's previous requests. (Tr. 26 at Exh. B-1.) The Enquirer also failed to show that Gmoser ever received this second follow-up request by certified mail. To the contrary, the record shows that Gmoser responded to the emailed version of this request. As it is the requester's burden to show that it is entitled to statutory damages, which the Enquirer has failed to do, this Court should reverse the Twelfth District's grant of statutory damages and find that the Enquirer is not entitled to any statutory damages.

If neither waiver nor the Enquirer's chosen means of transmitting its request bar the Enquirer's entitlement to statutory damages, the Enquirer is nevertheless not entitled to statutory damages because the Twelfth District abused its discretion by failing to find that Gmoser sufficiently met the statutory criteria for denying statutory damages. It is clear based upon the record, and based upon the Twelfth District's findings, that Gmoser has satisfied this criteria. Under R.C. 149.43(C)(1)(a)&(b):

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records \* \* \* , a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section

[and]

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

Based upon the ordinary application of statutory law and case law as it existed at the time the Enquirer made its public records request, it was reasonable for Gmoser to believe that the recording at issue was exempt from being labeled a “public record” that required disclosure. First, the call at issue was an Outbound Call made by a Butler County Sheriff’s Office dispatcher. Pursuant to the per se rule established by this Court in *Hamilton County*, it was reasonable for Gmoser to believe that the Outbound Call did not constitute a 9-1-1 call, as this Court noted that “Nine-one-one calls that are received by HCCC are always initiated by the callers.” *Hamilton Cty.*, 75 Ohio St.3d at 377-378. The Twelfth District even noted that the recording at issue was “unusual in that a telephone call was placed by a 911 operator who was employed by a law enforcement agency, and who solicited incriminating statements from a murder suspect.” *Sage*, 2013-Ohio-2270, at ¶ 54.

Second, it was also reasonable for Gmoser to believe that the Outbound Call was exempt from disclosure under R.C. 149.43(A)(1)(v) as it constituted “a record, the release of which is prohibited by state or federal law.” This call contained highly prejudicial statements made by Michael Ray after he murdered his father, including his admissions to the ultimate legal conclusion of murder. It was reasonable for Gmoser to believe that protecting Ray’s Sixth Amendment constitutional right to a fair trial prohibited him from releasing the recording to the media under R.C. 149.43(A)(1)(v). Such reasonableness was even noted by the Twelfth District when it stated in its decision that, “The pretrial disclosure of a murder suspect’s confession raises legitimate issues under the Sixth Amendment guarantee of a fair trial.” *Sage*, 2013-Ohio-2270, at ¶ 54. Therefore, the first criterion for reducing or denying statutory damages was sufficiently met here.

It is also clear from the record that Gmoser sufficiently met the second criterion for reducing or eliminating an award of statutory damages. It was reasonable for Gmoser to believe that

prohibiting the release of the recording would serve the public policy that he asserted to support his position, that is, to protect a criminal defendant's constitutional right to a fair trial. The Twelfth District made this exact finding, noting in its decision that "Gmoser and Judge Sage reasonably believed that withholding the Outbound Call recording and issuing the protective order would promote the underlying public policy of preserving an accused's right to a fair trial." *Sage*, 2013-Ohio-2270, at ¶ 54.

The Appellate Court's findings concerning Gmoser's handling and evaluation of the public records request sufficiently met the requirements set forth under R.C. 149.43(C)(1)(a)&(b) for reducing or eliminating completely the award of statutory damages. Moreover, these requirements are the exact same requirements that a court uses to justify a reduction or denial of attorney's fees. *See*, R.C. 149.43(C)(1)(a)-(b) & (C)(2)(c)(i)-(ii). Yet, the Twelfth District in this case utilized its findings only to deny the Enquirer attorney's fees but not to deny it statutory damages. This cannot stand. Where a court properly makes the requisite findings that satisfy the requirements for denying attorney's fees, statutory damages should also be denied.

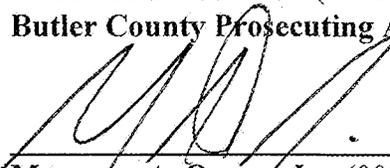
Finally, the Twelfth District abused its discretion when it mandated that "statutory damages be paid by Gmoser in his capacity as county prosecutor." *Sage*, 2013-Ohio-2270, at ¶ 58. Since the Appellate Court granted the writ of mandamus based upon its finding that the Protective Order failed to meet the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*, statutory damages should not be provided by Gmoser. *See, Sage*, 2013-Ohio-2270, at ¶ 28. Once the Protective Order was granted, Gmoser was bound by law from releasing the recording to anyone but Ray's trial counsel. Gmoser should not be punished if it later turns out that the Protective Order is reversed. And, because the Enquirer waived its request for attorney's fees and statutory damages against Judge Sage,

no statutory damages can be applied against him. (Tr. 28 at page 4.) Thus, no statutory damages should be awarded at all. As such, the Twelfth District abused its discretion in awarding the maximum amount of \$1,000 in statutory damages against Gmoser and should be reversed.

**CONCLUSION**

This Court should reverse the Twelfth District Court of Appeals by denying the Writ of Mandamus and ordering no award of statutory damages.

Respectfully submitted,  
**MICHAEL T. Gmoser** (0002132)  
**Butler County Prosecuting Attorney**



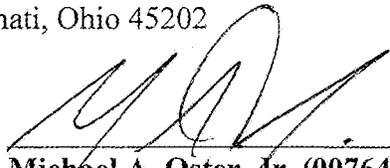
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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing was served upon the following by ordinary U.S. mail this 29<sup>th</sup> day of July, 2013, to John C. Greiner, Esq., Graydon, Head & Ritchey LLP, 1900 Fifth Third Center, 511 Walnut Street, Cincinnati, Ohio 45202



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**Michael A. Oster, Jr.** (0076491)  
Chief, Appellate Division

IN THE SUPREME COURT OF OHIO

HON. MICHAEL J. SAGE, et al.,

CASE NO. ~~2013-~~ **13-0945**

Appellants,

vs.

STATE OF OHIO ex rel. THE  
CINCINNATI ENQUIRER,

Appellee.

On Appeal from the Twelfth District Court  
of Appeals, Case No. CA2012-06-122.

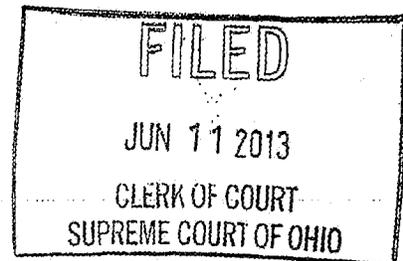
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**NOTICE OF APPEAL OF APPELLANTS.**  
**HON. MICHAEL J. SAGE, et al.**  
-----

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**NOTICE OF APPEAL OF APPELLANTS, HON. MICHAEL J. SAGE, et al.**

Appellant, Hon. Michael J. Sage, et al., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in Case No. CA2012-06-122 (Webcite: 2013-Ohio-2270).

This case involves an appeal of right from a decision of a court of appeals in a writ of mandamus and prohibition case, that originated in the court of appeals, which invokes the jurisdiction of this Court, pursuant to Article IV, Section 2(B)(2)(a)(i) of the Ohio Constitution and S.Ct. Prac.R. 5.01(A)(3).

Respectfully submitted,

**MICHAEL T. GMOSER (0002132)**  
**Butler County Prosecuting Attorney**



**MICHAEL A. OSTER, JR. (0076491)**

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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing Notice of Appeal was sent to:

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**John C. Greiner**  
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by U.S. ordinary mail this 6th day of June, 2013.



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**MICHAEL A. OSTER, JR. (0076491)**  
*[Counsel of Record]*

IN THE SUPREME COURT OF OHIO

HON. MICHAEL J. SAGE, et al.,  
Appellants,

CASE NO. 2013-0945

vs.

STATE OF OHIO ex rel. THE  
CINCINNATI ENQUIRER,  
Appellee.

On Appeal from the Twelfth District Court  
of Appeals, Case No. CA2012-06-122.

\*\*\*\*\*  
AMENDED NOTICE OF APPEAL OF APPELLANTS.  
HON. MICHAEL J. SAGE, et al.

\*\*\*\*\*  
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PROSECUTING ATTORNEY  
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AMENDED NOTICE OF APPEAL OF APPELLANTS, HON. MICHAEL J. SAGE, et al.

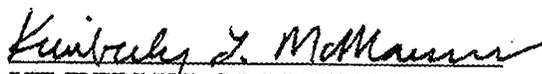
Appellants, Hon. Michael J. Sage, et al., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in Case No. CA2012-06-122 and filed on June 3, 2013 (Webcite: 2013-Ohio-2270).

This case involves an appeal of right from a decision of a court of appeals in a writ of mandamus and prohibition case, that originated in the court of appeals, which invokes the jurisdiction of this Court, pursuant to Article IV, Section 2(B)(2)(a)(i) of the Ohio Constitution and S.Ct. Prac.R. 5.01(A)(3).

Respectfully submitted,

**MICHAEL T. GMOSER** (0002132)  
Butler County Prosecuting Attorney

**MICHAEL A. OSTER, JR.** (0076491)  
[Counsel of Record]

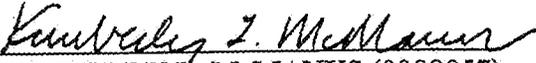
  
**KIMBERLY L. McMANUS** (0088057)  
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**PROOF OF SERVICE**

-----  
This is to certify that a copy of the foregoing Amended Notice of Appeal was sent to:

**John C. Greiner**  
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Cincinnati, Ohio 45202

by U.S. ordinary mail this 12th day of June, 2013.

  
KIMBERLY L. McMANUS (0088057)  
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS

JUN 03 2013 TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO, ex rel.  
THE CINCINNATI ENQUIRER,

CASE NO. CA2012-06-122

Relator,

JUDGMENT ENTRY

- vs -

HON. MICHAEL J. SAGE, et al.,

Respondents.

FILED BUTLER CO.  
COURT OF APPEALS

JUN 03 2013

MARY L. SWAIN  
CLERK OF COURTS

This matter is before the court on a petition for a writ of prohibition and a writ of mandamus filed by Relator, The Cincinnati Enquirer.

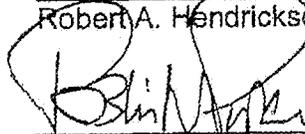
Upon due consideration of the foregoing, and pursuant to the Opinion issued the same date as this Judgment Entry, the petition for writ of mandamus is GRANTED, and the petition for writ of prohibition is DENIED.

Pursuant to the Opinion, Relator's prayer for attorney fees is DENIED and Relator's prayer for statutory damages is GRANTED. \$1,000.00 in statutory damages shall be paid to Relator by Respondent Gmoser in his capacity as Butler County Prosecutor.

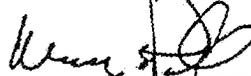
Costs to be taxed to Respondents.



Robert A. Hendrickson, Presiding Judge



Robin N. Piper, Judge



Mike Powell, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO ex rel. THE  
CINCINNATI ENQUIRER,

Relator,

- vs -

HON. MICHAEL J. SAGE, et al.,

Respondents.

CASE NO. CA2012-06-122

OPINION  
6/3/2013

ORIGINAL ACTION IN PROHIBITION AND MANDAMUS

Graydon Head & Ritchey, LLP, John C. Greiner, 1900 Fifth Third Center, 511 Walnut Street,  
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Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government  
Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for respondents

**M. POWELL, J.**

{¶ 1} This is a case in which relator, the Cincinnati Enquirer (the Enquirer), a newspaper of general circulation in southwestern Ohio, seeks a writ of mandamus and a writ of prohibition compelling respondents, Butler County Prosecutor Michael Gmoser and Butler County Common Pleas Judge Michael Sage, to release an audio recording of a telephone

conversation between a Butler County 911 operator and a murder suspect.<sup>1</sup>

**FACTUAL BACKGROUND**

{¶ 2} On June 17, 2012, the Butler County Sheriff's Office Dispatch Center received a 911 call at 4:41 p.m. (the First Call). The female caller informed Sheriff's Office Operator Debra Rednour that her husband was hurt, there had been an accident, and her husband was not breathing. The call then ended abruptly. Rednour dispatched emergency personnel and placed a return call to the telephone number which made the original 911 call. This return call was not answered (the Unanswered Call). Rednour made a second return call (the Outbound Call).

{¶ 3} This call was answered by a male who identified himself as Michael Ray. Ray immediately told Rednour that he was a murderer and needed to be arrested. Rednour asked Ray what had happened. Ray told her that he had been caught drinking his father's beer, his father got mad at him, and he (Ray) just snapped and stabbed his father. In response to further questioning by Rednour, Ray told her he had stabbed his father in the chest with a hunting knife, he had removed the knife from his father's chest, and the knife was now laying on Ray's bedroom floor. The call was disconnected with the arrival of the police to the residence.

{¶ 4} In her deposition, Rednour testified it is her duty to make a return call if a 911 call is dropped so that she can find out what is going on, and that if a weapon is involved, she will make a point to find out its type and location. Rednour testified it was her duty to make a return call after the First Call was dropped because she did not have enough information to ensure a proper medical response and the safety of those responding to the emergency. All she knew after the First Call was dropped was that someone was not breathing. Rednour

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1. Gmoser and Judge Sage will be referred collectively as respondents when necessary.

stated she had no idea that a crime had been committed when she placed the return call and that it was not her intention in making the return call to investigate a crime. Rather, the questions she asked during the Outbound Call were solely to provide for the safety of the first responders and the victim.

{¶ 5} On the day of the incident, Sheila McLaughlin, a reporter for the Enquirer, made a request to the Butler County Sheriff's Office for the recording of the First Call. Gmoser denied the request. Gmoser advised the reporter that he would not release the recording prior to the conclusion of the investigation and any trial of the matter, and that he would seek a protective order against such release. Notwithstanding Gmoser's denial, the sheriff's office released the recording of the First Call to the Enquirer on June 19, 2012. Upon receipt of the recording, the Enquirer realized there were recordings of other calls relating to the incident. Consequently, the Enquirer made a request for "all 911 calls to or from Butler County dispatchers from 4:00 p.m. June 17 until 5:30 p.m. June 17."

{¶ 6} On June 20, Gmoser denied the request on the ground the recordings of the Unanswered Call and the Outbound Call were both trial preparation records under R.C. 149.43(A)(1)(g) and confidential law enforcement investigatory records under R.C. 149.43(A)(1)(h), and therefore not public records. Gmoser further stated, "Independent of this basis for refusing your requests \* \* \* , it is my firm belief that the interest of justice outweighs any public interest in one of the two subject recordings and I shall proceed to ask for a protective order from the court regarding release of that recording in further criminal proceedings."

{¶ 7} By letter dated June 21, 2012, the Enquirer, through its legal counsel, reiterated its request for "all 911 calls to or from Butler County dispatchers from 4:00 p.m. June 17 until 5:30 p.m. June 17." On June 22, Gmoser notified the Enquirer's legal counsel that he would release the recording of the Unanswered Call, but remained steadfast in his refusal to

release the recording of the Outbound Call. That same day, pursuant to Crim.R. 16(C), Gmoser filed a motion for protective order in the Butler County Common Pleas Court (the common pleas court) in the case of *State v. Ray*.<sup>2</sup> In the motion, Gmoser asserted that the Outbound Call was part of an investigation of a 911 incident report. Gmoser reasserted his claim that the Outbound Call recording was both a trial preparation record and a confidential law enforcement investigatory record, and therefore not subject to disclosure as a public record. Gmoser further stated that the recording of the Outbound Call is "so lawfully prejudicial to any theory of [Ray's] innocence" that its disclosure would endanger Ray's right to a fair trial.

{¶ 8} On June 25, a hearing was held on the motion before Judge Sage. Present at the hearing were Gmoser, the Enquirer's counsel, and Ray's criminal defense counsel. The recording of the Outbound Call was played for Judge Sage in his chamber in the presence of Gmoser, the Enquirer's counsel, and Ray's counsel. The recording was neither offered nor received into evidence. Following this in camera hearing, the parties argued the motion in open court without the submission of additional evidence. Following argument, Judge Sage orally granted the protective order from the bench.

{¶ 9} A judgment entry reflecting the granting of the motion was journalized on June 27, 2012. Judge Sage found that because the recording of the Outbound Call contained statements by Ray that related to precipitatory circumstances and evidence, were "highly inflammatory," and were "highly prejudicial" to Ray, Ray's right to a fair trial would be prejudiced by the disclosure of the recording. Judge Sage considered alternatives to the closure of the Outbound Call recording, specifically providing a complete or redacted

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2. Ray was indicted for the murder of his father sometime between June 17 and June 22, 2012. In their brief, respondents state Gmoser filed the motion for protective order on the day Ray was indicted for the murder of his father.

transcript of the Outbound Call recording, but rejected those alternatives.

{¶ 10} The Enquirer subsequently filed a complaint in this court for a writ of mandamus against respondents. Specifically, the Enquirer sought orders that the protective order issued by Judge Sage be vacated, the Outbound Call recording be released to the Enquirer, and Gmoser be ordered to pay statutory damages and attorney fees for his failure to comply with R.C. 149.43. The Enquirer subsequently filed an amended complaint for a writ of mandamus and a writ of prohibition.

{¶ 11} While substantially similar to the original complaint, the amended complaint also sought to prevent the common pleas court from enforcing its June 27, 2012 judgment entry granting the motion for protective order. The amended complaint also alleged that Judge Sage lacked jurisdiction to issue a protective order "in a public records dispute where the record is not before him in the underlying criminal proceeding." In his answer to the amended complaint, Judge Sage denied that the recording of the Outbound Call was subject to disclosure, denied that he had no jurisdiction to issue the protective order prohibiting disclosure of the Outbound Call recording, and set forth various affirmative defenses.

{¶ 12} On October 11, 2012, Judge Sage issued an amended protective order. That order authorized the release of the Outbound Call recording "immediately preceding its admission and publication to the jury in open court at [Ray's murder] trial." Pursuant to the amended protective order, Gmoser delivered the Outbound Call recording to the Enquirer on October 15. Consequently, respondents moved to dismiss the Enquirer's action in mandamus and prohibition as moot. On November 28, 2012, this court denied the motion.

{¶ 13} This case involves the disclosure, pursuant to R.C. 149.43, Ohio's Public Records Act, of the recording of an outbound call made by a 911 operator. For the reasons that follow, we hold that the Outbound Call constitutes a 911 call which is a public record not exempt from disclosure.

THE MANDAMUS ACTION

{¶ 14} To prevail on a petition for a writ of mandamus, "relator must establish (1) a clear legal right to the relief requested, (2) that respondents have a clear legal duty to perform the act or acts requested, and (3) that relator has no plain and adequate remedy [at law]." *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 2009-Ohio-3415, ¶ 11 (12th Dist.), citing *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490 (1994).<sup>3</sup> Mandamus is the appropriate remedy to seek compliance with R.C. 149.43. *State ex rel. Beacon Journal Publishing Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 23. The Public Records Act "must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 8. "[I]nherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it." *State ex rel. Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 171 (1997). The government "bears the burden of establishing that the requested information is exempt from disclosure." *Bond* at ¶ 8.

{¶ 15} The Ohio Supreme Court has held that "911 [recordings] in general \*\*\* are public records which are not exempt from disclosure." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376 (1996); *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685. In ruling that 911 recordings are public records, the supreme court noted certain indicia of 911 calls, including: (1) 911 calls are automatically recorded; (2) 911 calls are always initiated by the callers; (3) 911

3. However, persons seeking public records under R.C. 149.43 need not establish the lack of an adequate remedy at law in order to be entitled to a writ of mandamus. *State ex rel. Dist. 1199, Health Care & Soc. Serv. Union, SEIU, AFL-CIO v. Lawrence Cty. Gen. Hosp.*, 83 Ohio St.3d 351, 354 (1998); *State ex rel. Doe v. Tetrault*, 12th Dist. No. CA2011-10-070, 2012-Ohio-3879, ¶ 21.

recordings are not prepared by attorneys or other law enforcement officials; (4) 911 recordings are not made to preserve evidence for criminal prosecution; and (5) rather, 911 calls are routinely recorded without any specific investigatory purpose in mind. *Cincinnati Enquirer* at 377-378. "The particular content of the 911 [recordings] is irrelevant." *Id.* at 378.

{¶ 16} The supreme court further noted that 911 operators (1) do not act under the direction of a prosecutor or other law enforcement official when receiving or responding to a 911 call, (2) are not employees of a law enforcement agency; (3) are not trained in criminal investigation, and (4) simply compile information and do not investigate. *Id.* at 377. The fact that 911 recordings subsequently come into the possession and/or control of a prosecutor or other law enforcement official "has no significance. Once clothed with the public records cloak, the records cannot be defrocked of their status." *Id.* at 378.

{¶ 17} Respondents first aver that the Outbound Call is not a 911 call, and therefore not subject to the supreme court's holding in *Cincinnati Enquirer*, because (1) it was an outbound call, as opposed to an incoming call; (2) Rednour, the 911 operator placing the outbound call, was an employee of a law enforcement agency; (3) when Rednour dispatched emergency personnel to the scene of the emergency after receiving the First Call, the basic purpose of the 911 emergency system had been fulfilled; and (4) the questions asked by Rednour were, objectively, the same questions that would be asked by a criminal investigator. Rather, respondents assert that the recording of the Outbound Call is both a trial preparation record under R.C. 149.43(A)(1)(g) and a confidential law enforcement investigatory record under R.C. 149.43(A)(1)(h).

{¶ 18} There are factual distinctions between this case and the 911 call indicia noted by the supreme court in *Cincinnati Enquirer*. First, Rednour is an employee of a law enforcement agency (i.e., the Butler County Sheriff's Office). However, we find this distinction to be insignificant in the resolution of whether the Outbound Call is a 911 call.

Rednour testified that although she is employed by the Butler County Sheriff's Office, she is a civilian employee neither trained in criminal investigation nor tasked with criminal investigation duties.

{¶ 19} The other significant distinction advanced by respondents is that the Outbound Call was initiated by Rednour. We decline to accept this distinction. The Outbound Call was initiated when the First Call was abruptly ended. The Unanswered Call and the Outbound Call, while placed by Rednour, constituted a continuation of the First Call so that Rednour could obtain additional information to provide an emergency response that was both effective and safe. When Rednour placed the Outbound Call, she had no idea a crime had been committed, and had no investigatory intent beyond what was necessary to provide an effective emergency response.

{¶ 20} Likewise, respondents' other assertions do not convert the essential nature of the Outbound Call into something other than a 911 call. That Rednour dispatched emergency responders after the First Call did not satisfy her duty as a 911 operator. As already mentioned, it was imperative that Rednour obtain additional information as to the nature of the injury so that she could tell emergency responders and let them respond appropriately and expeditiously and be apprised of any danger that might confront them. Additionally, although Rednour's questions to Ray may be useful in prosecuting him, their purpose, and Rednour's intention in asking them, were only to accomplish her duty as a 911 operator.

{¶ 21} Accordingly, we find that the Outbound Call is a 911 call.

{¶ 22} In *Cincinnati Enquirer*, the Ohio Supreme Court also addressed whether 911 recordings qualify as trial preparation records or confidential law enforcement investigatory records under R.C. 149.43. The supreme court held that they did not:

The moment the [recordings] were made as a result of the calls

(in these cases and in all other 911 call cases) to the 911 number, the [recordings] became public records. Obviously, at the time the [recordings] were made, they were not "confidential law enforcement investigatory records" (no investigation was underway), they were not "trial preparation records" (no trial was contemplated or underway), and neither state nor federal law prohibited their release.

*Cincinnati Enquirer*, 75 Ohio St.3d at 378.

{¶ 23} We therefore find that the Outbound Call is not exempt from disclosure either as a trial preparation record or a confidential law enforcement investigatory record.

{¶ 24} Respondents also aver that the Outbound Call recording should not be released because the release would compromise Ray's Sixth Amendment right to a fair trial due to potential jury prejudice. Respondents assert the Outbound Call recording is, pursuant to R.C. 149.43(A)(1)(v), a "record, the release of which is prohibited by state or federal law," and is therefore exempt from disclosure. Based upon this concern, Judge Sage granted Gmoser's motion for protective order which prohibited public dissemination of the Outbound Call recording.

{¶ 25} It is well-settled that while the First Amendment guarantees the public and press a right of access, such right of access is not absolute. *Bond*, 2002-Ohio-7117 at ¶ 15, 17. The "presumption of openness \* \* \* may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at ¶ 17, quoting *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 508, 104 S.Ct. 819 (1984) (*Press-Enterprise I*). In balancing the Sixth Amendment right to a fair trial and the First Amendment right of access, the United States Supreme Court set forth a two-part inquiry to determine whether the presumption of openness has been rebutted.

{¶ 26} Specifically, if closure is sought on the ground that disclosure would jeopardize "the right of the accused to a fair trial," closure shall be ordered "only if specific findings are

made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14, 106 S.Ct. 2735 (1986) (*Press-Enterprise II*). In applying these standards, a trial court must "(1) make specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the [information] and (2) consider whether alternatives to total suppression of the [information] would have protected the interest of the accused." *Bond* at ¶ 30.

{¶ 27} The case at bar presents a situation similar to that before this court in *Heath*, 2009-Ohio-3415. The issue in *Heath* concerned the release of records from a preliminary hearing in a murder case. After the records were ordered to be sealed by a common pleas court, a newspaper filed a complaint for a writ of mandamus seeking vacation of the sealing orders. This court granted the writ of mandamus. This court found that the lower court's sealing orders did not satisfy the criteria for closure recognized by the United States Supreme Court in *Press-Enterprise I* and *Press-Enterprise II*, and applied by our supreme court in *Bond*, 2002-Ohio-7117.

{¶ 28} The protective order in this case did not satisfy the mandates of *Press-Enterprise I*, *Press-Enterprise II*, and *Bond*. First, other than the recording itself, there was no evidence submitted to the common pleas court as to why disclosure of the Outbound Call recording would endanger Ray's right to a fair trial. There was no testimony from psychologists, sociologists, communications experts, media experts, jury experts, experienced trial lawyers, former judges, or others as to how pretrial disclosure of the Outbound Call recording would impact Ray's right to a fair trial. Prejudice cannot be assumed or presumed simply because the Outbound Call recording includes admissions by

Ray.

{¶ 29} Furthermore, there is nothing to suggest that Ray's statements to Rednour would not have been admissible at trial and submitted to the jury for its deliberations. In fact, Gmoser asserted at the hearing on the motion for protective order that the Outbound Call recording would be admissible evidence. That the Outbound Call recording would eventually be submitted to a jury certainly mitigates any adverse impact upon Ray's right to a fair trial which might result from its pretrial disclosure.

{¶ 30} Moreover, Ray's statements to Rednour do not contain salacious or horrific details that might arouse an emotional response in the community against Ray. In fact, Ray's statements include expressions of remorse.

{¶ 31} Finally, there was no mention or consideration of why continuances, voir dire, change of venue, cautionary jury instructions, and other protective measures would not have preserved Ray's right to a fair trial. See *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶ 35. Rather, Judge Sage only considered two alternatives, a complete transcript of the Outbound Call or a redacted version, before rejecting them and noting there were no other reasonable alternatives.

{¶ 32} Respondents have also submitted no other material to this court addressing the evidentiary deficiencies noted above from which this court can conclude that the pretrial disclosure of the Outbound Call recording would jeopardize Ray's right to a fair trial, or that total suppression of the Outbound Call recording is the least restrictive alternative to protect Ray's right to a fair trial.<sup>4</sup>

{¶ 33} We therefore find the presumption of openness has not been overcome in this

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4. As this is an original action, the parties may submit evidence to this court. The evidentiary material submitted by the parties include the transcript of the hearing on the motion for protective order, Rednour's deposition, Gmoser's motion for protective order, the protective order and the amended protective order, a recording of the First Call and the Unanswered Call, a transcript of the Outbound Call, and affidavits from counsel (including email and other correspondence between the parties) and Enquirer reporter Sheila McLaughlin.

case. Accordingly, we grant the writ of mandamus.

**THE PROHIBITION ACTION**

{¶ 34} The Enquirer also seeks a writ of prohibition against Judge Sage.<sup>5</sup>

{¶ 35} To warrant a writ of prohibition, the relator must establish that "(1) the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is clearly unauthorized by law, and (3) denial of the writ will cause injury for which there is no adequate remedy in the ordinary course of law." *State ex rel. Cincinnati Enquirer v. Bronson*, 191 Ohio App.3d 160, 2010-Ohio-5315, ¶ 10 (12th Dist.).

{¶ 36} The Enquirer argues that Judge Sage did not have jurisdiction to issue the protective order because (1) the Outbound Call recording was not before Judge Sage and therefore not subject to his jurisdiction; (2) the mandamus remedy provided in R.C.149.43(C) is the only mechanism for resolving a public records dispute; (3) a public official may not respond to a request for a public record by seeking declaratory relief from a court regarding the availability of the record; and (4) there is no justiciable controversy to support declaratory relief. We will address the Enquirer's arguments separately.

**A. The Outbound Call recording was not before Judge Sage and therefore not subject to his jurisdiction.**

{¶ 37} The Enquirer avers that Judge Sage was without jurisdiction to consider and grant the protection order because the Outbound Call recording was not before him. That is, the Enquirer claims Judge Sage has jurisdiction to make orders solely with regard to documents that have been submitted to his court as filings, evidence or otherwise, and are subject to his direct control. The Enquirer is correct that the Outbound Call recording was not

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5. The Enquirer posits this issue in the context of a declaratory judgment. Gmoser did not seek a declaratory judgment from the court and Judge Sage did not grant one. Except where the Enquirer's argument is applicable only with regard to a declaratory judgment, the court will address the argument within the context of the protection order proceedings.

before Judge Sage in the sense it was not filed with the common pleas court or offered into evidence. However, at the very least, the Outbound Call recording was discovery material over which the trial judge assigned to the case has significant authority. See Crim.R. 16(C), (D), (F), and (L).

{¶ 38} Gmoser filed the motion for protective order pursuant to Crim.R. 16(C). This rule allows a prosecutor to designate certain discovery material as "counsel only." "Counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way." Crim.R. 16(C). Pursuant to Crim.R. 16(F), "[u]pon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of 'counsel only' material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating." (Emphasis sic.)

{¶ 39} Without question, the protective order was not issued in strict compliance with the procedure contemplated by Crim.R. 16(C). Nonetheless, it is clear that Gmoser implicitly designated the Outbound Call recording as "counsel only," defense counsel did not object to that classification, Judge Sage further sanctioned that classification when he issued the protective order, and the designation means that the material is not to be disseminated to anyone other than defense counsel and his or her agents. See *State v. Hebdon*, 12th Dist. Nos. CA2012-03-052 and CA2012-03-062, 2013-Ohio-1729 (oral nondisclosure certification requirement satisfied during a hearing).

{¶ 40} Furthermore, separate and apart from Crim.R. 16, criminal courts have inherent authority to enter orders to preserve the integrity of their proceedings, including closure orders and orders restricting the litigants and their counsel from disclosing certain information relative to the litigation. See *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046; *State*

*v. Bush*, 76 Ohio St.3d 613 (1996) (trial judges are at the front lines of the administration of justice in our judicial system, responding to the rights and interests of the prosecution, the accused, and victims. A court has the inherent power to regulate the practice before it and protect the integrity of its proceedings).

{¶ 41} The Enquirer complains that Judge Sage improperly issued the protection order because there was no evidence before him to support its issuance, and Judge Sage failed to consider alternatives to a total suppression of the Outbound Call recording. However, prohibition does not lay where there is merely an imperfect exercise of jurisdiction, but rather where there is an ultra vires exercise of jurisdiction. Here, there is not "a patent and unambiguous restriction on the jurisdiction of [Judge Sage nor] a complete and total want of jurisdiction which clearly places the pertinent controversy outside the court's jurisdiction." *State ex rel. Lester v. Court of Common Pleas, Div. of Domestic Relation, Butler Cty.*, 12th Dist. No. CA91-05-080, 1991 WL 219669, \*2 (Oct. 28, 1991), citing *State ex rel. Aycock v. Mowrey*, 45 Ohio St.3d 347 (1989).

**B. The mandamus remedy provided in R.C. 149.43(C) is the only mechanism for resolving a public records dispute.**

{¶ 42} Our decision in *Heath* makes it clear that an order of a court in a criminal matter ordering closure or sealing of certain records does not mean that those records are beyond the reach of a writ of mandamus sought pursuant to R.C. 149.43(C). Likewise, that a record may be subject to a public records request, and therefore a R.C. 149.43 mandamus action, does not divest a court of jurisdiction to determine whether the record ought to be sealed in other litigation pending before it.

{¶ 43} As already stated, mandamus is an appropriate remedy to resolve a public records dispute. A dispute regarding the availability of a record under R.C. 149.43 ought to be resolved pursuant to the procedure set forth therein. In such a proceeding, a closure or

sealing order may be evidence that the record is one "the release of which is prohibited by state or federal law" pursuant to R.C. 149.43(A)(1)(v).

**C. A public official may not respond to a request for a public record by seeking declaratory relief from a court regarding the availability of the record.**

{¶ 44} The Enquirer cites the case of *State ex rel. Fisher v. PRC Pub. Sector, Inc.*, 99 Ohio App.3d 387 (10th Dist.1994), in support of its claim that Gmoser could not do an "end around" of his responsibility to respond to a public records request by asking a court to determine if the record was subject to disclosure. In *Fisher*, the Tenth Appellate District held that:

As an initial matter, we note that the court is the *final* arbiter regarding disclosure of public records under R.C. 149.43. *State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 385. Determination of an application for disclosure under R.C. 149.43 must first be made on an *ad hoc* basis by the governmental body holding the requested information. *Id.* See, also, *State ex rel. Toledo Blade Co. v. Telb* (1990), 50 Ohio Misc.2d 1, wherein the court held that governmental bodies could not invoke the court's function as final arbiter in order to avoid their duty to make records available. Declaratory relief may not be used to circumvent the duty to make the initial determination of whether materials are subject to disclosure under R.C. 149.43.

(Emphasis sic; parallel citations omitted.) *Fisher* at 391.

{¶ 45} *Fisher* is factually distinguishable from this case in two important respects. First, Gmoser did not seek to avoid his responsibility to determine the availability of the Outbound Call recording by filing the motion for protective order. The communications between Gmoser and the Enquirer are clear and unambiguous: Gmoser was denying release of the recording pending completion of the criminal investigation and the commencement of Ray's trial. Second, the protective order was issued as an incident within the context of a separate and independent proceeding (i.e., the *State v. Ray* criminal case) that, in turn, was not commenced for the sole purpose of determining the availability of the record in dispute.

{¶ 46} Furthermore, there is authority that a trial court ought to be involved in

determining whether information subject to the control of the court or the litigants and their counsel should be disclosed where such disclosure may jeopardize the right of an accused to a fair trial. In such a case, "[t]hese issues should be determined by the trial court, not merely by a custodian of the record \*\*\*." *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 733 (1st Dist.2001) (granting a writ of mandamus but staying its issuance for ten days to give the trial court an opportunity to determine whether the release of the material would be unfair to the defendant in that case).

**D. There is no justiciable controversy to support declaratory relief.**

{¶ 47} The motion for protective order is not a declaratory judgment action and is not subject to declaratory judgment action analysis.

{¶ 48} The writ of prohibition is denied.

**ATTORNEY FEES, STATUTORY DAMAGES, AND COURT COSTS**

{¶ 49} The Enquirer seeks an award of attorney fees under R.C. 149.43(C)(2)(b) and statutory damages under R.C. 149.43(C)(1). These provisions allow a court to order a person who has failed to provide a public record, to pay statutory damages and attorney fees to the party who has prevailed in obtaining a writ of mandamus for the production of a public record.

{¶ 50} With regard to statutory damages, R.C. 149.43(C)(1) provides that the amount of statutory damages "shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with [R.C. 149.43(B)], beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars." However, the court may reduce an award of statutory damages or not award statutory damages if it determines both of the following:

That, based on the ordinary application of statutory law and case

law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with [R.C. 149.43(B)] and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with [R.C. 149.43(B)];

That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

R.C. 149.43(C)(1)(a) and (b).

{¶ 51} R.C. 149.43(C)(2)(b) governs a court's award of reasonable attorney fees. As with statutory damages, a court may reduce an award of attorney fees or not award attorney fees if it makes both of the above findings. See R.C. 149.43(C)(2)(c)(i) and (ii). With the exception of R.C. 149.43(C)(2)(c)(i) and (ii) (which mandate an award of attorney fees when there is no timely response to a public records request or there is a failure to provide access to the requested records within a prescribed period of time), an award of attorney fees in public records cases is discretionary. *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶ 30-32. A court may consider the reasonableness of a public officer's failure to comply with the public records request in determining whether to award attorney fees. *Id.* at ¶ 34.

{¶ 52} *Doe* involved a police chief's refusal to release records relating to the arrest of a juvenile for aggravated arson after the police chief was notified that the juvenile court had sealed the records relating to the incident. An Ohio citizen (relator) filed a complaint for a writ of mandamus in the Court of Appeals for Clermont County. The court of appeals granted the writ. The relator sought \$16,875 in attorney fees. The court of appeals awarded \$2,000 in

attorney fees.

{¶ 53} The supreme court upheld the court of appeals' attorney fees award. The supreme court found that the police chief (1) had provided "a statutorily sufficient reason for the denial of the request," (2) had acted reasonably and in good faith based upon his reliance on the advice of counsel and the juvenile court's letter instructing the police department not to release information concerning the juvenile, and (3) reasonably believed that his refusal to produce the requested records would serve the public policy underlying the juvenile court's sealing order to protect the welfare of juveniles. *Doe*, 2009-Ohio-4149 at ¶38-40.

{¶ 54} In the case at bar, Gmoser and Judge Sage acted in good faith to protect Ray's right to a fair trial. The pretrial disclosure of a murder suspect's confession raises legitimate issues under the Sixth Amendment guarantee of a fair trial. Gmoser further acted reasonably in promptly bringing the issue to the attention of the common pleas court by seeking the protection order. Additionally, Gmoser had ethical concerns pursuant to Prof.Cond.R. 3.6. The facts confronting Gmoser and Judge Sage were unusual in that a telephone call was placed by a 911 operator who was employed by a law enforcement agency, and who solicited incriminating statements from a murder suspect. Gmoser and Judge Sage reasonably believed that withholding the Outbound Call recording and issuing the protective order would promote the underlying public policy of preserving an accused's right to a fair trial.

{¶ 55} The Ohio Supreme Court has also recognized that a determination as to whether to award attorney fees in a public records case ought to include some consideration of the public benefit conferred by the issuance of the writ of mandamus. *Doe*, 2009-Ohio-4149 at ¶ 33, 43 (in granting or denying attorney fees under R.C. 149.43(C), courts can consider the degree to which the public will benefit from release of the records in question). In the case at bar, there is certainly a public benefit from a disclosure of the Outbound Call

recording as it will inform the public as to the functioning of both the 911 emergency system and the criminal justice system. It will also raise public awareness of domestic violence and substance abuse.

{¶ 56} On the other hand, in this domestic violence case, by the time the Outbound Call was disconnected, the perpetrator had been identified and was quickly apprehended shortly after. The immediate disclosure of the Outbound Call recording would not have enhanced public safety or public awareness of an ongoing threat. Further, this is not a case in which Gmoser was refusing to disclose the Outbound Call recording under all and any circumstances. Rather, Gmoser was delaying disclosure until completion of the criminal investigation and the commencement of Ray's trial. The public benefit from an immediate disclosure of the Outbound Call recording, as opposed to its delayed disclosure, is, at best, marginal.

{¶ 57} Based upon the foregoing, we find that an award of attorney fees is not warranted and we overrule the Enquirer's prayer for the same. However, because disclosure of the Outbound Call recording was denied without a proper legal justification, we award the maximum statutory damages to the Enquirer in the sum of \$1,000 pursuant to R.C. 149.43(C)(1).

{¶ 58} Court costs are ordered to be paid by Gmoser. Court cost and statutory damages shall be paid by Gmoser in his capacity as county prosecutor.

HENDRICKSON, P.J. concurs.

PIPER, J., concurs separately.

**PIPER, J., concurring separately.**

{¶ 59} I concur with my colleagues. The law in regard to matters decided today is inflexible, yet reasonable application of R.C. 149.43(C) would prevent us from awarding

attorney fees. While both sides of this controversy have genuine concerns, the actions and arguments of counsel reveal shortcomings in the interaction of R.C. 149.43 with the criminal justice system.

{¶ 60} In the pivotal case of *Cincinnati Enquirer*, Hamilton County had a blanket policy of automatically denying all public records requests for 911 recorded calls. See 75 Ohio St.3d 374 (1996). While Hamilton County and the Cincinnati Post proposed to the Supreme Court the adoption of a case-by-case, content-based approach to disclosure, the Supreme Court pronounced a per se rule requiring immediate disclosure regardless of content. Among those reasons discussed in our majority opinion today, the court in *Cincinnati Enquirer* determined that 911 calls preceded incident reports and thus could not be considered to be a part of a criminal investigation thereby deserving no confidentiality or exemption pursuant to R.C. 149.43.

{¶ 61} Prosecutor Gmoser, as well as defense counsel, considered the Outbound Call to be crucial evidence in the criminal case and its public dissemination to be highly prejudicial to the defendant in receiving a fair trial from an impartial jury.<sup>6</sup>

{¶ 62} We know today that, depending on the circumstances, the judge presiding over a criminal case may determine that certain evidence disclosed to defense counsel must not be disseminated. Crim.R. 16. The recent amendment to Crim.R. 16 permits a prosecutor in discovery to disclose evidence only to opposing counsel. Despite the demands of due process and constitutional rights that an individual possesses when confronting the

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6. The defendant's right to an impartial jury within the venue where the offense occurred is constitutionally derived, and if denied, may improperly infringe upon the individual's due process rights. *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688. See also *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417 (1963) (finding that a video interview played repetitively on television irreversibly tainted the jury pool); and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507 (1966) (finding failure of a judge to protect the defendant from prejudicial publicity deprived the defendant of a fair trial consistent with due process).

government at trial, such rights may nevertheless be regulated.<sup>7</sup>

{¶ 63} Even though not officially filed with the court, prosecutor Gmoser did submit the Outbound Call to Judge Sage for review. Prosecutor Gmoser also gave a copy of the recording to defense counsel as discovery material. "Information that a criminal prosecutor has disclosed to the defendant for discovery purpose \* \* \* is not thereby subject to release as a 'public record' pursuant to R.C. 149.43." *State ex rel. Vindicator Printing v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶ 28, quoting *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350 (1997). Yet the per se rule of *Cincinnati Enquirer* requires immediate release regardless of any intended uses or unintended consequences.<sup>8</sup> There appears no room to balance fundamental principles.

{¶ 64} Similarly, if there is clear and convincing evidence establishing that a defendant's right to a fair trial would be violated, a judge, after considering alternatives, may seal records in a criminal case overriding the presumption of openness. See *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 2009-Ohio-3415 (12th Dist.); and *State ex rel. Vindicator Printing*, 2012-Ohio-3328 (decided upon rules of superintendence). Yet again, neither R.C. 149.43 nor the holding in *Cincinnati Enquirer* permit room for deliberation or the weighing of competing interests. Relator urges us to find Prosecutor Gmoser acted in "bad faith" and was deliberately attempting to sabotage the media's request. The evidence suggests the contrary. As a minister of justice carrying the responsibility to see that each and

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7. With the increase of gang intimidation and organized crime, Crim.R. 16 was also modified to permit the withholding of witness names when a prosecutor is concerned for the witnesses' safety, with judicial review seven days before trial. Crim.R. 16(F).

8. For example, in *State v. Adams III*, 12th Dist. No. CA2009-11-293, 2011-Ohio-536, this court affirmed the defendant's conviction for aggravated murder after he was found guilty of killing a man labeled "a snitch." The victim was riding in a car that was being pursued by the police, and the driver jumped from the car and was not apprehended. The victim surrendered to police, and while in the back of the police cruiser, was videotaped identifying the driver of the car to police officers. The videotape was copied and disseminated within the community, and the victim was murdered for talking to the officer.

every defendant is accorded justice, Prosecutor Gmoser is prohibited from contributing to even the appearance of impropriety in causing unfair prejudice to a defendant. See Prof.Cond.R. 3.8 comment.<sup>9</sup>

{¶ 65} Concerned with privacy interests, Justice Pfeifer has consistently suggested the need to balance rights in considering the dissemination of 911 recordings. *State ex rel. Dispatch Printing Company v. Monroe County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685; *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374 (1996). Equally important to the public's right to information is the public's interest in protecting individual constitutional rights in the course of administering criminal justice.

{¶ 66} There is no doubt that the public's right to be aware of governmental workings is monumentally important. The press must be empowered to protect the public's interests with a complete and full opportunity to keep the public informed. In this case, Prosecutor Gmoser was not attempting to suppress information about the workings of government or otherwise defeat public awareness, but rather sought guidance from the court to determine the proper timing of such disclosure. The prosecutor, in a timely manner, sought a very brief delay in disclosure so that the trial court could determine if dissemination of records into the public domain would infringe upon the defendant's constitutional rights. Even when the concern is genuine, R.C. 149.43 and established precedent prevent a prosecutor from attempting to protect an individual's constitutional rights. This is inconsistent with a prosecutor's responsibilities in administering justice.

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9. It places a prosecutor between a rock and a hard place to suggest public records should be released because a change of venue might fix the prejudice created by disseminating information into the media mainstream before trial. This, in essence, requires a prosecutor to engage in the misconduct of creating the prejudice only to force the defendant to give up his original, and proper, venue. If a prosecutor deliberately created prejudice to a defendant so that he would be forced to select a different venue, it would undoubtedly be labeled prosecutorial misconduct. See *State v. Depew*, 38 Ohio St.3d 275 (1988), wherein the dissent criticized the prosecutor for the misconduct of expressing a lack of concern for the defendant's fair trial during pretrial proceedings. A prosecutor's responsibilities in seeking that which is just are more than those of an advocate. Prof.Cond.R. 3.8 comment.

{¶ 67} The legislature continues to deny attention where needed.<sup>10</sup> Justice Kennedy recently urged the Commission on Rules of Practice and Procedure to examine the dysfunction between Crim.R. 16 and R.C. 149.43. *State v. Athon*, Slip Opinion No. 2013-Ohio-1956. Similarly, the commission on the Rules of Practice and Procedure should carefully review Crim.R. 16 and make appropriate recommendations so that various interests may be addressed. The dissemination of 911 recordings, and other public records to be used in the criminal proceedings, could be subject to immediate judicial review and disclosure as determined reasonable and appropriate in order to protect everyone's interest. Otherwise, a prosecutor is forced to engage in conduct contrary to the real ethical concern for the preservation of individual rights by disseminating public records. If we expect prosecutors to fulfill ethical responsibilities beyond those of an advocate, we should empower them as well as the media.

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10. Justice Pfeiffer expressed concerns and invited the legislature to review R.C. 149.43 over 17 years ago in *Cincinnati Enquirer*.

**FILED** COURT OF COMMON PLEAS  
BUTLER COUNTY, OHIO

STATE OF OHIO 2012 JUN 27 AM 10:19

Case No. CR12-06-0941

Sage, J.

Plaintiff

MARY L. STAIN  
BUTLER COUNTY  
CLERK OF COURTS

v.

MICHAEL RAY

Defendant

ENTRY GRANTING STATE AND  
DEFENDANT'S REQUEST FOR PROTECTIVE  
ORDER

For good cause shown, and for the reasons stated below, the State of Ohio's Motion For Protective Order is well taken and granted.

On June 22, 2012, Butler County Prosecuting Attorney filed a Motion For Protective Order seeking to prohibit public dissemination of an outbound call from the Butler County Sheriff's Department, Dispatch Center occurring at 16:43.59 hours on June 17, 2012.

A hearing was held on June 25, 2012. The State of Ohio was represented by Butler County Prosecuting Attorney Michael Gmoser, Assistant Prosecuting Attorney David Kash, and Assistant Prosecuting Attorney Daniel Phillips. The Defendant was present at the hearing, represented by Gregory Beane. At the hearing Mr. Beane, on behalf of the Defendant, orally joined the State's Motion.

Also present at the hearing was Lee Geiger of Graydon, Head, and Ritchey on behalf of the Cincinnati Enquirer/Gannett Company; Andrew Reitz of Faruki Ireland & Cox on behalf of the Hamilton Journal-News/Cox Publishing; Karin Johnson of WLWT; and Larry Davis of WKRC. Prior to the hearing, a letter was received by the Court from Counsel for the Cincinnati Enquirer and Hamilton Journal-News opposing the motion. This letter was also sent to Mr. Gmoser.

An in-bound 911 call is a public record subject to disclosure. The State and Defendant seek a protective order solely on an outbound call originating from the Butler County Sheriff's Department, Dispatch Center. There is no known case law on whether an outbound call is subject to the public record law of the State. This court will assume for the purpose of this hearing only that the outbound call would fall under the public record law. Therefore, the court will engage in an analysis set for in *State ex rel. Beacon Journal*

JUDGE MICHAEL J. SAGE  
BUTLER COUNTY COMMON PLEAS COURT

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*Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117 and *State ex rel Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 2009-Ohio-3415.

The State and Defendant seek the protective order in order to preserve Defendant's Sixth Amendment right to a fair trial. However, "[t]he Supreme Court . . . found that the presumption of openness was not rebutted by virtue of the defendant's Sixth Amendment right to a fair trial. The Supreme Court first noted that "[i]n drawing the proper balance between Sixth Amendment right to a a fair trial and the First Amendment right of access, the [United State Supreme Court] set for a two part inquiry to determine whether the presumption of openness has been rebutted:

"If the interest asserted is the right of accused to a fair trial, the . . . hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Heath* at ¶ 15-16, quoting *Bond and Press-Ent Co. v. Superior Court*, 478 US at 14, 106 S.Ct. 2735.

After hearing arguments from the State of Ohio, Defendant, the attorneys representing media outlets, and reviewing the call at issue *in camera* with all interested parties present, this court makes the following specific findings:

- 1) Defendant made statements that are highly prejudicial to himself,
- 2) Defendant made admissions of his conduct in this case and what led to it,
- 3) Defendant made highly prejudicial statements regarding evidentiary matters,
- 4) Defendant made statements regarding circumstances that precipitated his conduct,
- 5) Defendant made statements regarding the location of evidence,
- 6) Defendant made admissions of guilt to a specific crime, and
- 7) The recording is highly inflammatory

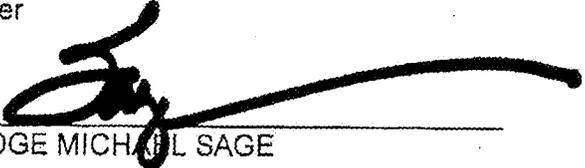
For these reasons, it is clear to this court that the Defendant's right to a fair trial would be prejudiced by publicizing the subject recording. Therefore, the first part of the two-pronged test is met.

Next, this court must determine if there are reasonable alternatives to closure that can adequately protect Defendant's fair trial rights. The first reasonable alternative would

be to provide a transcript of the call. This presents the same problems as listed above. Another reasonable alternative is redaction. Redaction is not practical as it would satisfy no interested party in this case and may still be prejudicial. Therefore, court does not believe there to be any other reasonable alternative. Counsel for the Journal-News suggested that moving the case to another county would be reasonable, however the Court does not find such.

The court recognizes the incredible burden placed on the Movant seeking to prevent certain items which may fall under the public records law from being released. However, in this case, the State has satisfied this burden and finds that the Defendant's right to a fair trial outweighs the public's right to access the subject telephone call. The State of Ohio's Motion for Protective Order is hereby **GRANTED**.

Enter

  
\_\_\_\_\_  
JUDGE MICHAEL SAGE

FILED

2012 OCT 11 PM 2:21 IN THE COURT OF COMMON PLEAS  
BUTLER COUNTY, OHIO

MARY L. SWAIN  
STATE OF OHIO BUTLER COUNTY  
CLERK OF COURTS  
Plaintiff

CASE NO. CR2012-06-0941

SAGE, J.

vs.

AMENDED PROTECTIVE ORDER

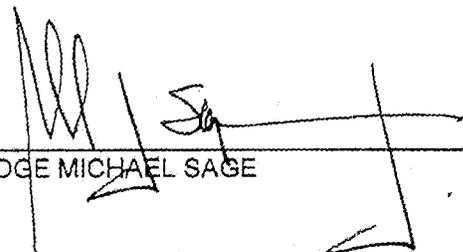
MICHAEL JACOB RAY

Defendant

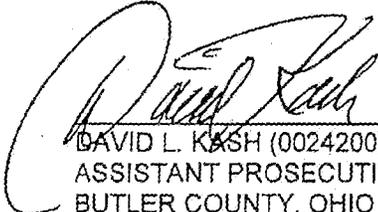
On June 27, 2012, so as to protect the defendant's right to a fair trial guaranteed by the Sixth Amendment, this Court granted a joint request of the State of Ohio and Defendant for a Protective Order prohibiting disclosure of the outbound call occurring on June 17, 2012, at 16:43:59 hours from the Butler County Sheriff's Office Dispatch Center. On October 10, 2012, the parties orally requested that the Protective Order be amended to allow for disclosure of said call immediately preceding it's admission and publication to the jury in open court at the trial of this matter.

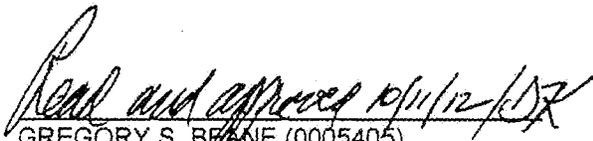
It is hereby **ORDERED** that the Protective Order previously entered herein be amended to allow for disclosure of the subject outbound call as requested. The Court finds that with such amendment all of it's initial concerns remain satisfied. The Court further finds that not only will the Defendant's right to a fair trial shall be maintained, but that said amendment continues to insure the best balance between the rights guaranteed by the Sixth Amendment and the First Amendment's right of access.

Enter,

  
JUDGE MICHAEL SAGE

Approved,

  
\_\_\_\_\_  
DAVID L. KASH (0024200)  
ASSISTANT PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO  
315 High Street, 11<sup>th</sup> Floor  
Hamilton, OH 45011  
Telephone: (513)785-5214

  
\_\_\_\_\_  
GREGORY S. BEANE (0005405)  
ATTORNEY FOR DEFENDANT  
350 North Second Street  
Hamilton, Ohio 45011  
Telephone: (513)867-8000

Westlaw.

A.R.S. § 39-121

C

**Effective:[See Text Amendments]**

Arizona Revised Statutes Annotated Currentness

Title 39. Public Records, Printing and Notices

▣ Chapter 1. Public Records (Refs & Annos)

▣ Article 2. Searches and Copies (Refs & Annos)

→→ **§ 39-121. Inspection of public records**

Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.

CREDIT(S)

Amended by Laws 2000, Ch. 88, § 53.

Current through legislation effective June 20, 2013 of the First Regular Session of the Fifty-first Legislature (2013)

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Crim. R. Rule 1

**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs & Annos)

→ → **Crim R 1 Scope of rules: applicability; construction; exceptions**

**(A) Applicability**

These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in division (C) of this rule.

**(B) Purpose and construction**

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

**(C) Exceptions**

These rules, to the extent that specific procedure is provided by other rules of the Supreme Court or to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) upon extradition and rendition of fugitives, (3) in cases covered by the Uniform Traffic Rules, (4) upon the application and enforcement of peace bonds, (5) in juvenile proceedings against a child as defined in Rule 2(D) of the Rules of Juvenile Procedure, (6) upon forfeiture of property for violation of a statute of this state, or (7) upon the collection of fines and penalties. Where any statute or rule provides for procedure by a general or specific reference to the statutes governing procedure in criminal actions, the procedure shall be in accordance with these rules.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-96)

Current with amendments received through 2/1/2013

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs & Annos)

→→ **Crim R 6 The grand jury**

**(A) Summoning grand juries**

The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

**(B) Objections to grand jury and to grand jurors**

(1) *Challenges.* The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion to dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, if it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

**(C) Foreman and deputy foreman**

The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall upon the return of the indictment file the record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

**(D) Who may be present**

The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

**(E) Secrecy of proceedings and disclosure**

Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote

of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

**(F) Finding and return of indictment**

An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forthwith.

**(G) Discharge and excuse**

A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

**(H) Alternate grand jurors**

The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impaneled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.

CREDIT(S)

(Adopted eff. 7-1-73)

Current with amendments received through 2/1/2013

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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Criminal Procedure (Refs & Annos)

→→ **Crim R 16 Discovery and inspection**

**(A) Purpose, Scope and Reciprocity.** 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.

**(B) Discovery: Right to Copy or Photograph.** Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

**(C) Prosecuting Attorney's Designation of "Counsel Only" Materials.** The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be

disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

**(D) Prosecuting Attorney's Certification of Nondisclosure.** If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

**(E) Right of Inspection in Cases of Sexual Assault.**

- (1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.
- (2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

**(F) Review of Prosecuting Attorney's Certification of Non-Disclosure.** Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

- (1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.
- (2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may

file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

**(G) Perpetuation of Testimony.** Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

**(H) Discovery: Right to Copy or Photograph.** If 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. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

**(I) Witness List.** Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

**(J) Information Not Subject to Disclosure.** The following items are not subject to disclosure under this rule:

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(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

**(K) Expert Witnesses; Reports.** An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

**(L) Regulation of discovery.**

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

**(M) Time of motions.** A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-10)

STAFF NOTES

**2010:**

Division (A): Purpose, Scope and Reciprocity

The purpose of the revisions to Criminal Rule 16 is 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. Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule. The rule accelerates the timing of the exchange of materials, and expands the reciprocal duties in the exchange of materials. The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

The new rule balances a defendant's constitutional rights with the community's compelling interest in a thorough, effective, and just prosecution of criminal acts.

The Ohio criminal defense bar, by and through the Ohio Association of Criminal Defense Lawyers and prosecutors, by and through the Ohio Prosecuting Attorneys Association, jointly drafted the rule and submitted committee notes to the Commission on the Rules of Practice and Procedure. The Commission on the Rules of Practice and Procedure discussed, modified, and adopted the notes submitted in developing these staff notes.

#### Division (B): Discovery: Right To Copy or Photograph

This division expands the State's duty to disclose materials and information beyond what was required under the prior rule. All disclosures must be made prior to trial. This division also requires the materials to be copied or photographed as opposed to inspection as permitted under the prior rule. Subject to several exceptions, the State must provide pretrial disclosure of all materials as listed in the enumerated divisions.

#### Division (C): Prosecuting Attorney's Designation of "Counsel Only" Materials

The State is empowered to limit dissemination of sensitive materials to defense counsel and agents thereof in certain instances. Documents marked as "Counsel Only" may be orally interpreted to the Defendant, or to counsel's agents and employees, but not shown or disseminated to other persons. The rule recognizes that defense counsel bears a duty as an officer of the court to physically retain "Counsel Only" material, and to limit its dissemination. Counsel's duty to the client is not implicated, since the rule expressly allows oral communication of the nature of the "Counsel Only" material.

#### Division (D): Prosecuting Attorney's Certification of Nondisclosure

This division provides a means to prevent disclosure of items or materials for limited reasons. The prosecution must be able to place reasonable limits on dissemination to preserve testimony and evidence from tampering or intimidation, and certain other enumerated purposes. The new rule explicitly recognizes that it is the prosecution's duty to assess the danger to witnesses and victims, and the need to protect those witnesses and victims by controlling the early disclosure of certain material, subject to judicial review.

A nondisclosure must be for one of the reasons enumerated in the rule, and must be certified in writing to the court. The certification need not disclose the contents or meaning of the nondisclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in division (F).

The certification process recognizes the unique nature of sex crimes against children. In the event of a certification of nondisclosure, defense counsel will have the right to inspect the statement no later than the seven-day review hearing provided in subsection (F), which is an improvement from the prior Criminal Rule 16(B)(1)(g).

Finally, the rule recognizes that not every eventuality can be anticipated in the text of a rule, and allows nondisclosure in the interest of justice.

#### Division (E): Right of Inspection in Cases of Sexual Assault

This division recognizes the intensely personal nature of a sexual assault, and provides a special mechanism for discovery in such cases. It represents an exception to division (B).

The compromise between the interests in the privacy and dignity of the victim are balanced against the right of the defendant to a thorough review of the State's evidence by permitting inspection, but not copying, of certain materials. Upon motion of the defendant, the court may, in its discretion, permit these materials to be provided under seal to defense counsel and the defendant's expert.

In cases involving the sexual abuse of a child under the age of 13, upon motion and for good cause shown, the trial court may order dissemination of the child's statement under seal and pursuant to protective order to defense counsel and the defendant's expert. This provision facilitates meaningful communication between defense counsel and the defense expert, and to permit timely compliance with division (K) of the rule.

Division (E)(2) is intended to give sufficient time for an expert to evaluate the statement, and also to permit defense counsel to consult with the expert on the content of the statement and issues related to it. This division is designed to provide an exception to the nondisclosure procedure sufficient to permit the expert and defense counsel to effectively evaluate the statement. The protective order shall apply to defense counsel and defendant's experts and agents.

Division (F): Review of Prosecuting Attorney's Certification of Non-Disclosure

This division provides for judicial review at the trial court level of a prosecutor's certification of nondisclosure. As in many other executive branch decisions the standard for review, subject to constitutional protections, is an abuse of discretion--that is, was the prosecutor's decision unreasonable, arbitrary or capricious? The prosecution of a case is an executive function. The rule's nondisclosure provision is a tool to ensure the prosecutor is able to fulfill that executive function.

The prosecutor should possess extensive knowledge about a case, including matters not properly admissible in evidence but highly relevant to the safety of the victim, witnesses, or community. Accordingly, the rule vests in the prosecutor the authority for seeking protection by the nondisclosure, and deference when making a good faith decision about unpredictable prospective human behavior.

The review is conducted *in camera* on the objective criteria set out in division (D), seven days prior to trial, with defense counsel participating. If the Court finds an abuse of discretion, the material must be immediately disclosed to defense counsel. If the Court does not find an abuse of discretion, the material must nonetheless be disclosed no later than the commencement of trial. Further judicial review is provided by giving the prosecutor a right to an interlocutory appeal of an order of disclosure as provided for in Criminal Rule 12(K), which is amended to accommodate that process.

Upon motion of the State, the certification of nondisclosure or "Counsel Only" designation is reviewable by the trial judge in the *in camera* proceeding. The preferred practice is to record or transcribe the *in camera* review to preserve any issues for appeal and sealed to preserve the confidential nature of the information.

The *in camera* review is set seven days prior to trial so that it is, in essence, the end of the trial preparation stage. There was substantial debate regarding the time for this review. Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material. The protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review. The Commission anticipated that continuances of trial dates would occur only in limited circumstances.

Division (F)(4) seeks to protect victims of sexual assault who are still in their tender years.

Division (G): Perpetuation of Testimony

This division provides that if after judicial review the Court orders disclosure of evidence, the prosecutor upon motion to the Court is given a right to perpetuate testimony in a pretrial hearing as set forth in the subsection.

Division (H): Discovery: Right to Copy or Photograph

The previous rule allowed for disclosure of specified relevant evidence in the possession of defense counsel to the State upon the State's motion. This division expands defense counsel's duty to disclose materials and information beyond what was required under the prior rule. In this division a reciprocal duty of disclosure now arises upon defense counsel's motion for discovery without further demand from the State. This division requires the materials to be copied or photographed, as opposed to the prior rule that only allowed for inspection by the State. Subject to several exceptions covered in division (J), defense counsel must provide pretrial disclosure of materials as listed in the enumerated subsections. This division seeks to define the defense counsel's reciprocal duty of disclosure while respecting the constitutional and ethical obligations required in representing a client.

For the first time, defense counsel has a duty to provide the State with evidence that tends to support innocence or alibi. This allows the State to properly assess its case, and re-evaluate the prosecution. The Commission believes this provision will facilitate meaningful plea negotiation and just resolution.

Division (I): Witness List

This division imposes an equal duty on each party to disclose the list of witnesses that will be called at trial. It prohibits counsel from commenting on the witness lists but does not prohibit the commenting upon the absence or presence of a witness relevant to the proceeding. See, State v. Hannah, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).

Division (J): Information Not Subject to Disclosure

This division clarifies what information is not subject to disclosure by either party for reasons of confidentiality, privilege, or due to their classification as documents determined to be work product. This division also references that the disclosure or nondisclosure of grand jury testimony is governed by Rule 6 of the Rules of Criminal Procedure.

Division (K): Expert Witnesses; Reports

The division requires disclosure of the expert witness's written report as detailed in the division no later than twenty-one days prior to trial. Failure to comply with the rule precludes the expert witness from testifying during trial. This prevents either party from avoiding pretrial disclosure of the substance of expert witness's testimony by not requesting a written report from the expert, or not seeking introduction of a report. This division does not require written reports of consulting experts who are not being called as witnesses.

Division (L): Regulation of Discovery

The trial court continues to retain discretion to ensure that the provisions of the rule are followed. This discretion protects the integrity of the criminal justice process while protecting the rights of the defendants, witnesses, victims, and society at large.

In cases in which a defendant initially proceeds *pro se*, the trial court may regulate the exchange of discoverable material to accommodate the absence of defense counsel. Said exchange must be consistent with and is not to exceed the scope of the rule. In cases in which the attorney-client relationship is terminated prior to trial for any purpose, any material designated "Counsel Only" or limited in dissemination by protective order must be returned to the State. Any work product derived from such material shall not be provided to the defendant.

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The provisions of (L)(2) and (L)(3) are designed to give the court greater authority to regulate discovery in cases of a *pro se* defendant and addresses the problems that could arise if a defendant terminates the employment of his attorney and then demands everything in the attorney's file. This could frustrate the protections built into the rule to avoid release of material directly to the defendant in some cases.

Section (M): Time of Motions

This division requires timely compliance with all provisions of this rule subject to judicial review. Adherence to the requirements of this division will help to ensure the fair administration of justice.

Rules Crim. Proc., Rule 16, OH ST RCRP Rule 16

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**C**

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Rules of Criminal Procedure (Refs & Amos)

→→ **Crim R 18 Venue and change of venue**

**(A) General venue provisions**

The venue of a criminal case shall be as provided by law.

**(B) Change of venue; procedure upon change of venue**

Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

*(1) Time of motion.* A motion under this rule shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier, or at such reasonable time later as the court may permit.

*(2) Clerk's obligations upon change of venue.* Where a change of venue is ordered the clerk of the court in which the cause is pending shall make copies of all of the papers in the action which, with the original complaint, indictment, or information, he shall transmit to the clerk of the court to which the action is sent for trial, and the trial and all subsequent proceedings shall be conducted as if the action had originated in the latter court.

*(3) Additional counsel for prosecuting attorney.* The prosecuting attorney of the political subdivision in which the action originated shall take charge of and try the case. The court to which the action is sent may on application appoint one or more attorneys to assist the prosecuting attorney in the trial, and allow the appointed attorneys reasonable compensation.

*(4) Appearance of defendant, witnesses.* Where a change of venue is ordered and the defendant is in custody, a warrant shall be issued by the clerk of the court in which the action originated, directed to the person having custody of the defendant commanding him to bring the defendant to the jail of the county to which the action is transferred, there to be kept until discharged. If the defendant on the date of the order changing venue is not in custody, the court in the order changing venue shall continue the conditions of release and direct the defendant to appear in the court to which the venue is changed. The court shall recognize the witnesses to appear before the court in which the accused is to be tried.

*(5) Expenses.* The reasonable expenses of the prosecuting attorney incurred in consequence of a change of venue, compensation of counsel appointed pursuant to Rule 44, the fees of the clerk of the court to which the venue is changed, the sheriff or bailiff, and of the jury shall be allowed and paid out of the treasury of the political subdivision in which the action originated.

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(Adopted eff. 7-1-73)

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Constitution of the State of Ohio (Refs & Annos)

Article I, Bill of Rights (Refs & Annos)

→→ O Const I Sec. 10 Rights of criminal defendants

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

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(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

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Constitution of the State of Ohio (Refs & Annos)

▣ Article IV. Judicial (Refs & Annos)

→ → **O Const IV Sec. 5 Powers and duties of supreme court; superintendence of courts; rules**

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

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(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, adopted eff. 5-7-68)

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Effective: September 28, 2012

Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

Chapter 149. Documents, Reports, and Records (Refs & Annos)

Records Commissions

→ → 149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

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- (m) Intellectual property records;
- (n) Donor profile records;
- (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
- (p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;
- (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
- (r) Information pertaining to the recreational activities of a person under the age of eighteen;
- (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;
- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
- (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
- (v) Records the release of which is prohibited by state or federal law;
- (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;
- (x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;
- (y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;
- (z) Records listed in section 5101.29 of the Revised Code;
- (aa) [FN1] Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;
- (bb) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;
- (cc) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available

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to the public as provided in that division.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

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(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service

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organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

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(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the

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operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person

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responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the

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mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

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(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

CREDIT(S)

(2012 S 314, eff. 9-28-12; 2012 H 487, eff. 9-10-12; 2011 H 64, eff. 10-17-11; 2011 H 153, eff. 9-29-11; 2009 H 1, eff. 10-16-09; 2008 S 248, eff. 4-7-09; 2008 H 214, eff. 5-14-08; 2006 H 9, eff. 9-29-07; 2006 H 141, eff. 3-30-07; 2004 H 303, eff. 10-29-05; 2004 H 431, eff. 7-1-05; 2004 S 222, eff. 4-27-05; 2003 H 6, eff. 2-12-04; 2002 S 258, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 180, eff. 4-9-03; 2001 H 196, eff. 11-20-01; 2000 S 180, eff. 3-22-01; 2000 H 448, eff. 10-5-00; 2000 H 640, eff. 9-14-00; 2000 H 539, eff. 6-21-00; 1999 H 471, eff. 7-1-00; 1999 S 78, eff. 12-16-99; 1999 S 55, eff. 10-26-99; 1998 H 421, eff. 5-6-98; 1997 H 352, eff. 1-1-98; 1996 S 277, § 6, eff. 7-1-97; 1996 S 277, § 1, eff. 3-31-97; 1996 H 438, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1996 H 353, eff. 9-17-96; 1996 H 419, eff. 9-18-96; 1995 H 5, eff. 8-30-95; 1993 H 152, eff. 7-1-93; 1987 S 275; 1985 H 319, H 238; 1984 H 84; 1979 S 62; 130 v H 187)

[FN1] Division (A)(1)(aa) appeared as division (A)(1)(z) prior to the harmonization of 2008 S 248 and 2008 H 214.

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Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2901. General Provisions

▣ Jurisdiction, Venue, and Limitations of Prosecutions

→→ 2901.12 Venue

(A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.

(B) When the offense or any element of the offense was committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in any jurisdiction through which the aircraft, motor vehicle, train, watercraft, or other vehicle passed.

(C) When the offense involved the unlawful taking or receiving of property or the unlawful taking or enticing of another, the offender may be tried in any jurisdiction from which or into which the property or victim was taken, received, or enticed.

(D) When the offense is conspiracy, attempt, or complicity cognizable under division (A)(2) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the conspiracy, attempt, complicity, or any of its elements occurred. If an offense resulted outside this state from the conspiracy, attempt, or complicity, that resulting offense also may be tried in any jurisdiction in which the conspiracy, attempt, complicity, or any of the elements of the conspiracy, attempt, or complicity occurred.

(E) When the offense is conspiracy or attempt cognizable under division (A)(3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the offense that was the object of the conspiracy or attempt, or any element of that offense, was intended to or could have taken place. When the offense is complicity cognizable under division (A)(3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the principal offender may be tried.

(F) When an offense is considered to have been committed in this state while the offender was out of this state, and the jurisdiction in this state in which the offense or any material element of the offense was committed is not reasonably ascertainable, the offender may be tried in any jurisdiction in which the offense or element reasonably could have been committed.

(G) When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any of those jurisdictions.

(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

- (1) The offenses involved the same victim, or victims of the same type or from the same group.
  - (2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.
  - (3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.
  - (4) The offenses were committed in furtherance of the same conspiracy.
  - (5) The offenses involved the same or a similar modus operandi.
  - (6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.
- (I)(1) When the offense involves a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense, in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense.
- (2) As used in this section, "computer," "computer system," "computer network," "information service," "telecommunication," "telecommunications device," "telecommunications service," "data," and "writing" have the same meanings as in section 2913.01 of the Revised Code.
- (J) When the offense involves the death of a person, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in the jurisdiction in which the dead person's body or any part of the dead person's body was found.
- (K) Notwithstanding any other requirement for the place of trial, venue may be changed, upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial otherwise would be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held, or when it appears that trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice.

CREDIT(S)

(2005 S 20, eff. 7-13-05; 1998 H 565, eff. 3-30-99; 1989 S 64, eff. 10-26-89; 1986 H 49; 1972 H 511)

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R.C. § 5507.01

Formerly cited as OH ST § 4931.40

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**Effective: December 20, 2012**

Baldwin's Ohio Revised Code Annotated Currentness

Title LV. Roads--Highways--Bridges (Refs & Annos)

Ⓜ Chapter 5507. Wireline and Wireless 9-1-1 (Refs & Annos)

→→ **5507.01 Definitions**

As used in this chapter:

- (A) "9-1-1 system" means a system through which individuals can request emergency service using the telephone number 9-1-1.
- (B) "Basic 9-1-1" means a 9-1-1 system in which a caller provides information on the nature of and the location of an emergency, and the personnel receiving the call must determine the appropriate emergency service provider to respond at that location.
- (C) "Enhanced 9-1-1" means a 9-1-1 system capable of providing both enhanced wireline 9-1-1 and wireless enhanced 9-1-1.
- (D) "Enhanced wireline 9-1-1" means a 9-1-1 system in which the wireline telephone network, in providing wireline 9-1-1, automatically routes the call to emergency service providers that serve the location from which the call is made and immediately provides to personnel answering the 9-1-1 call information on the location and the telephone number from which the call is being made.
- (E) "Wireless enhanced 9-1-1" means a 9-1-1 system that, in providing wireless 9-1-1, has the capabilities of phase I and, to the extent available, phase II enhanced 9-1-1 services as described in 47 C.F.R. 20.18 (d) to (h).
- (F)(1) "Wireless service" means federally licensed commercial mobile service as defined in 47 U.S.C. 332(d) and further defined as commercial mobile radio service in 47 C.F.R. 20.3, and includes service provided by any wireless, two-way communications device, including a radio-telephone communications line used in cellular telephone service or personal communications service, a network radio access line, or any functional or competitive equivalent of such a radio-telephone communications or network radio access line.
- (2) Nothing in this chapter applies to paging or any service that cannot be used to call 9-1-1.
- (G) "Wireless service provider" means a facilities-based provider of wireless service to one or more end users in this state.
- (H) "Wireless 9-1-1" means the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireless service provider.
- (I) "Wireline 9-1-1" means the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireline service provider.

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- (J) "Wireline service provider" means a facilities-based provider of wireline service to one or more end-users in this state.
- (K) "Wireline service" means basic local exchange service, as defined in section 4927.01 of the Revised Code, that is transmitted by means of interconnected wires or cables by a wireline service provider authorized by the public utilities commission.
- (L) "Wireline telephone network" means the selective router and data base processing systems, trunking and data wiring cross connection points at the public safety answering point, and all other voice and data components of the 9-1-1 system.
- (M) "Subdivision" means a county, municipal corporation, township, township fire district, joint fire district, township police district, joint police district, joint ambulance district, or joint emergency medical services district that provides emergency service within its territory, or that contracts with another municipal corporation, township, or district or with a private entity to provide such service; and a state college or university, port authority, or park district of any kind that employs law enforcement officers that act as the primary police force on the grounds of the college or university or port authority or in the parks operated by the district.
- (N) "Emergency service" means emergency law enforcement, firefighting, ambulance, rescue, and medical service.
- (O) "Emergency service provider" means the state highway patrol and an emergency service department or unit of a subdivision or that provides emergency service to a subdivision under contract with the subdivision.
- (P) "Public safety answering point" means a facility to which 9-1-1 system calls for a specific territory are initially routed for response and where personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider, or transferring the call to the appropriate provider.
- (Q) "Customer premises equipment" means telecommunications equipment, including telephone instruments, on the premises of a public safety answering point that is used in answering and responding to 9-1-1 system calls.
- (R) "Municipal corporation in the county" includes any municipal corporation that is wholly contained in the county and each municipal corporation located in more than one county that has a greater proportion of its territory in the county to which the term refers than in any other county.
- (S) "Board of county commissioners" includes the legislative authority of a county established under Section 3 of Article X, Ohio Constitution, or Chapter 302. of the Revised Code.
- (T) "Final plan" means a final plan adopted under division (B) of section 5507.08 of the Revised Code and, except as otherwise expressly provided, an amended final plan adopted under section 5507.12 of the Revised Code.
- (U) "Subdivision served by a public safety answering point" means a subdivision that provides emergency service for any part of its territory that is located within the territory of a public safety answering point whether the subdivision provides the emergency service with its own employees or pursuant to a contract.
- (V) A township's population includes only population of the unincorporated portion of the township.
- (W) "Telephone company" means a company engaged in the business of providing local exchange telephone service by

R.C. § 5507.01

Formerly cited as OH ST § 4931.40

making available or furnishing access and a dial tone to persons within a local calling area for use in originating and receiving voice grade communications over a switched network operated by the provider of the service within the area and gaining access to other telecommunications services. "Telephone company" includes a wireline service provider and a wireless service provider unless otherwise expressly specified. For purposes of sections 5507.25 and 5507.26 of the Revised Code, "telephone company" means a wireline service provider.

(X) "Prepaid wireless calling service" has the same meaning as in division (AA)(5) of section 5739.01 of the Revised Code.

(Y) "Provider of a prepaid wireless calling service" means a wireless service provider that provides a prepaid wireless calling service.

(Z) "Retail sale" has the same meaning as in section 5739.01 of the Revised Code.

(AA) "Seller" means a person that sells a prepaid wireless calling service to another person by retail sale.

(BB) "Consumer" means the person for whom the prepaid wireless calling service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the prepaid wireless calling service is charged, or to whom the admission is granted.

(CC) "Reseller" means a nonfacilities-based provider of wireless service that provides wireless service under its own name to one or more end users in this state using the network of a wireless service provider.

CREDIT(S)

(2012 H 472, eff. 12-20-12; 2012 H 360, eff. 12-20-12)

Current through 2013 File 24 of the 130th GA (2013-2014).

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United States Code Annotated Currentness

Constitution of the United States

 Annotated

 Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

→→ **Amendment VI. Jury trials for crimes, and procedural rights**

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Current through P.L. 113-13 approved 6-3-13

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