IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI, STATE OF OHIO, Plaintiffs-Appellants, V. GARY ATHON, Defendant-Appellee.	: : : : : :	Case No. 12-0628 On Appeal from the Court of Appeals for the First Appellate District

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BRIEF OF *AMICUS CURIAE* OHIO JUSTICE & POLICY CENTER IN SUPPORT OF DEFENDANT-APPELLEE GARY ATHON

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I. Statement of Interest of *Amicus* Ohio Justice & Policy Center

Based in Cincinnati, the Ohio Justice & Policy Center ("OJPC") is a non-profit law office that works for productive, statewide reform of the criminal justice system. OJPC operates both the Indigent Defense Reform Project, which improves access to quality public defense services for indigent defendants throughout Ohio, as well as the Indigent Defense Clinic, in which it educates third-year law students in client-centered best practices for representing indigent defendants. Over the past decade, OJPC attorneys have successfully litigated the unconstitutionality of laws restricting the residency of sex offenders,[1] have persuaded the City of Cincinnati to remove its prohibition on employing convicted felons,[2] and have defended hundreds of low-income clients in criminal and collateral cases. In addition, OJPC takes an active role in educating participants in the criminal justice system, including lawyers, judges, and policy-makers, on concepts of redemption and rehabilitation.

OJPC has a particular interest in ensuring that the tools available to defense counsel to investigate potential defenses remain as broad as possible. In its role as a legal educator, and consistent with the prevailing standards of indigent defense representation, OJPC advises its students to diligently pursue all avenues of investigation in assessing the possible defenses to a criminal charge.[3] Among the tools OJPC teaches its students to employ in investigating a case

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[1] *Hyle v. Porter* (2008), 117 Ohio St.3d 165, 882 N.E.2d 899.

[2] See http://www.wcpo.com/dpp/news/local_news/ex-felons-can-now-work-for-city-of-cincinnati (last viewed Sept. 25, 2012).

[3] See, e.g., 1 ABA Standards for Criminal Justice 4-4.1 (2d Ed. 1980); American Bar Association, "The Ten Principles of a Public Defense Delivery System," p. 107, § 8 (Feb. 2002), at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/20110325_aba_resolution107.authcheckdam.pdf (last viewed Sept. 22, 2012). OJPC's Indigent Defense Clinic is modeled after the North Carolina Commission on Indigent Defense Services' Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level, which mandates that "[i]n advance of trial, counsel should take all steps necessary to complete thorough investigation, discovery, and research. See

are discovery requests under Ohio Crim. R. 16, personal and *duces tecum* subpoenas under Ohio Crim. R. 17, public records requests under Ohio Rev. Code Chapter 149, client interviews, witness interviews, crime scene inspection, and legal research. Making use of these broad investigative techniques, OJPC attorneys and the students they supervise have obtained very favorable results for their clients, including the dismissal of criminal charges, acquittals, and plea agreements for reduced charges or sentencing. OJPC therefore advocates for increased availability of information necessary to properly defend a criminal case. As set forth below, OJPC encourages the Court to affirm the decision of the First District Court of Appeals holding that a criminal defendant may investigate his case via a public records request without triggering formal discovery under Crim. R. 16.

II. Argument

Proposition of Law No. 1: Restricting Criminal Defense Attorneys From Investigating Possible Defenses Through Public Records Requests Violates The Constitutional Right To Counsel And The Federal Right To Compulsory Process.

Both the United States and the Ohio Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. See U.S. Const. amend VI; *Strickland v. Washington* (1984), 466 U.S. 668; Ohio Const. Art. I, § 10. This right includes the effective assistance of a lawyer both at trial and sentencing, as well as in the investigatory and preparation phases leading up to trial. See, e.g., *Wiggins v. Smith* (2003), 539 U.S. 510. To ensure a trial that is both fair and appropriately adversarial, defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, the core aspect of the Sixth Amendment right to counsel "has historically

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http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf, at Guideline 7.1(c) (last viewed Sept. 24, 2012).

been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him ***investigate the case and prepare a defense for trial.***" *Kansas v. Ventris* (2009), 556 U.S. 586, 589, *citing Michigan v. Harvey* (1990), 494 U.S. 344, 348. This Court itself noted more than 25 years ago that a defense lawyer "has a duty to investigate 'the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" *State v. Johnson* (1986), 24 Ohio St.3d 87, 89, 494 N.E.2d 1061, 1063, *citing* 1 ABA Standards for Criminal Justice (1982 Supp.), No. 4-4.1.

Separate and apart from the duty of defense counsel to conduct a thorough pretrial investigation, the Sixth Amendment also protects the right of criminal defendants to the compulsory process necessary to mount a defense. See U.S. Const. amend. VI; *Pennsylvania v. Ritchie* (1987), 480 U.S. 39, 55-56. For more than two hundred years, this right has been interpreted by the courts to include not only the right to subpoena witnesses to trial, but also to present favorable documentary evidence to the trier-of-fact. See, e.g., *United States v. Burr* (CC Va. 1807), 25 F.Cas. 30, 35 (No. 14,692d). In addition, Ohio specifically codifies this right in Crim. R. 17(C), which permits the parties to a criminal trial to subpoena documentary evidence to trial. Thus, both the U.S. Constitution and the Constitution and laws of the State of Ohio provide expansive opportunities for a criminal defendant to investigate and obtain the evidence necessary to defend his case.

Interpreting Ohio's newly-revised Crim. R. 16 in the manner advanced by the state would have potentially devastating consequences for these fundamental guarantees. Were the Court to hold that a public records request is the functional equivalent to a request for discovery under Rule 16, the Court would potentially be eliminating a valuable tool for defense attorneys to properly investigate their clients' cases. The list of public records that are potentially relevant to

criminal defendants is lengthy and significant: for example, disciplinary files that call into question an officer's credibility and veracity,[4] client social services and juvenile court records that are useful in mitigation,[5] and, as in this case, calibration and maintenance records for machines used to test an individual's blood alcohol level. See Ohio Rev. Code §§ 149.011(G); 149.43(A)(1). If a request for these records, which are otherwise available to the general public, constitutes a discovery request under Rule 16, then defendants and their counsel may be less likely to fully investigate cases in order to avoid the Rule's reciprocal discovery obligation. If the State is correct that any investigation in essence constitutes a discovery request, then defense counsel will inevitably be compromised in their ability to provide effective assistance to their clients.

To be sure, there are many valid strategic reasons for which a competent defense attorney may advise his client to opt out of the Rule 16 discovery process. For one, in relatively straight-forward cases, defense counsel may be able to obtain the information necessary to prepare a defense through other sources. In a theft case, for example, the complaint likely provides the allegedly stolen items, their value, and the alleged victim.[6] Merely by reviewing the complaint, the defendant may be able to locate and interview the property owner, identify potential witnesses, and inspect the crime scene without triggering Rule 16's reciprocal discovery obligation. In addition, a defendant may elect to forego formal discovery to maximize his chances of entering into a favorable plea arrangement. This exact approach to case investigation

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[4]*Kallstrom v. City of Columbus* (6th Cir. 1998), 136 F.3d 1055 (holding that personnel files of undercover police officers were not confidential law enforcement records exempt from disclosure under Ohio public records law).

[5]*State ex rel. Renfro v. Cuyahoga County Dept. of Human Services* (1990), 50 Ohio St.3d 267, 553 N.E.2d 1052.

[6]For a sample theft complaint containing this information, see *State of Ohio v. Jerry Cross*, Hamilton Cty. Muni. Ct. No. C10/CRB/33062 (filed Oct. 7, 2010).

was not only endorsed by the Supreme Court as strategically reasonable representation, but also fully comports with the Sixth Amendment and other constitutional guarantees. See *United States v. Ruiz* (2002), 536 U.S. 622 (upholding constitutionality of fast-track plea program in which defendants did not receive *Brady* material prior to entering guilty plea). Furthermore, defendants may choose not to request formal discovery to prevent the state from obtaining information on defense witnesses, expert opinions, and trial exhibits. By retaining the option, but not the requirement of formal discovery, Crim. R. 16 expressly acknowledges that not all defendants will seek discovery; the Rule therefore implicitly recognizes that, for some defendants, it is strategically reasonable to forego the discovery process. This means in practice that some defense attorneys will by necessity fulfill their Sixth Amendment obligation to investigate cases through other means.

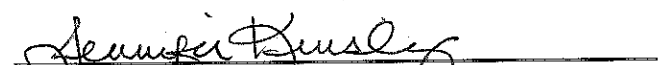
As the right to compulsory process, the right to effective assistance of counsel, and Crim. R. 17 regarding subpoenas make clear, discovery is but one mechanism by which defense counsel obtain the requisite information to defend criminal cases. Defendants may also investigate cases by using other statutory avenues of gathering information or may simply undertake a grassroots investigation by talking to onlookers, visiting crime scenes, and scouring the plethora of online research sites. Blanketly categorizing all investigation by defense counsel as a request for discovery, as the state urges here, could have devastating consequences on the constitutional rights at stake in a criminal proceeding. Defense counsel who strategically elects not to pursue formal discovery may nonetheless be discouraged from investigating the case in other ways, for fear of losing the advantage of being the only party with the information. This result contravenes the Sixth Amendment and Article I, Section 10 of the Ohio Constitution. Consistent with those guarantees, defense attorneys must remain free to conduct investigations

using some, all, or none of the panoply of laws designed to gather information in criminal cases. This Court should accordingly affirm the opinion below and should permit defense counsel to request, obtain, and use public records outside of the Crim. R. 16 discovery process.

III. Conclusion

For the foregoing reasons, *Amicus Curiae* Ohio Justice & Policy Center urges affirmance of the First District Court of Appeals' decision.

Respectfully submitted,



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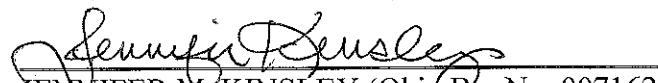
CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing document was provided via regular U.S. mail to all counsel of record on the 26th day of September, 2012.



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