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## Out in the Open: State ex rel. Caster v. City of Columbus and the Expansion of Ohio Public Records Law

Andrew S. Radin

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OUT IN THE OPEN: *STATE EX REL. CASTER V. CITY OF COLUMBUS* AND THE EXPANSION OF OHIO PUBLIC RECORDS LAW

*Andrew S. Radin\**

I. INTRODUCTION

Public records have not always been so public. Since 1993, a defendant's ability to pursue postconviction relief has been stifled because of an inability to retrieve and review certain public records.<sup>1</sup> In *State ex rel. Steckman v. Jackson*, the Supreme Court of Ohio decided that Ohio Revised Code §149.43(A)(2)(c) (specifically, "R.C. § 149.43(A)(2)(c), and Ohio Revised Code § 149.43, generally, "R.C. § 149.43") and Ohio Criminal Rule 16 ("Ohio Crim.R. 16") precluded organizations and persons from discovering investigatory reports through public records requests due to the fact that those records were "confidential law enforcement investigatory records."<sup>2</sup> In pertinent part, *Steckman v. Jackson* held "information assembled by law enforcement officials with a probable or pending criminal proceeding is, but the work product exception found in R.C. § 149.43(A)(2)(c), exception from required release as said information is compiled in anticipation of litigation."<sup>3</sup> In *State ex rel. WLWT-TV5 v. Leis*, the Supreme Court of Ohio determined that those records were exempt from release until *all* trials and proceedings were completed, a near impossible standard to meet.<sup>4</sup> While some cities and departments were willing to part with such records when the convicted sought appellate relief, others stonewalled at every turn.<sup>5</sup>

After twenty years of spawned progeny and changes to the Ohio Criminal Rule at issue, the exception finally met its demise. A public records dispute between Donald R. Caster, an attorney for the Ohio Innocence Project, and the City of Columbus, Ohio, resulted in the Supreme Court of Ohio's decision in *State ex. Rel. Caster v. City of Columbus*, the case that would overturn *Steckman* and *Leis*, and change

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\* Andrew S. Radin, University of Cincinnati College of Law 2018. For purposes of transparency, I worked for the Ohio Innocence Project when this case was decided.

1. *State ex rel. Caster v. Columbus*, 89 N.E.3d 598 (Ohio 2016).

2. *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83 (Ohio 1994). Confidential Law Enforcement Investigatory Records are most commonly referred to in Ohio as the CLEIRS exception. This author will spell it out each time to ensure consistency between quotes and the author's own thoughts.

3. *Id.* at 94-95.

4. *See State ex rel. WLWT-TV5 v. Leis*, 673 N.E.2d 1365 (Ohio 1997).

5. *Caster*, 89 N.E.3d 598.

the face of Ohio public records law.<sup>6</sup>

This article analyzes the history leading up to the case, including the Ohio Revised Code sections, the Ohio Rules of Criminal Procedure (“Ohio Crim.R.”) at play, and *Steckman* and its progeny it spawned. It argues that although *Steckman* needed to be overturned, it was not necessarily decided incorrectly in 1993. This article further discusses the factors that lead to *Steckman* needing to be overturned. The article concludes with an analysis of *State ex. Rel. Caster v. City of Columbus*, and the implications of the Supreme Court of Ohio’s decision moving forward.

## II. BACKGROUND

This section explores the background behind *State ex rel. Caster*, beginning with an introduction to criminal discovery, followed by Ohio Revised Code § 149.43(A)(2)(c), Ohio Crim.R. 16 and the role it played in the history of the case, and the case law that was eventually overturned, including the principal case, *State ex rel. Steckman v. Jackson*, as well as *State ex rel. WLWT-TV5 v. Leis*, and *State v. Athon*. The last section of the Background explores are the records still excepted from discovery in the wake of *State ex rel. Caster v. City of Columbus*.

### A. A Sky-High Review of Ohio Criminal Discovery

Ohio Crim.R. 16 governs criminal discovery in Ohio. 16.<sup>7</sup> Its intent is “to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts.”<sup>8</sup> This includes defendants, witnesses, victims, and society at large.<sup>9</sup> The defense makes demands for discovery at the earlier of two possible dates, those being within twenty days of arraignment or seven days before the date of trial.<sup>10</sup> Once demanded by the defense, discovery begins.<sup>11</sup>

In those demands, defense counsel, presuming an adequately pleaded demand, may request certain statements, criminal records, laboratory or hospital records, physical or mental exams, any evidence favorable to the defendant, reports by officers, or written or recorded statements by

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6. *Id.*

7. OHIO R. CRIM. P. 16.

8. OHIO R. CRIM. P. 16(A).

9. *Id.*

10. OHIO R. CRIM. P. 16(M).

11. *Id.*

witnesses in the case-in-chief.<sup>12</sup> Exceptions apply, including the designation of counsel-only material, work product, transcripts of grand jury testimony, and privilege, among others.<sup>13</sup>

Once discovery is initiated, there is now a reciprocal obligation to supplement disclosures to ensure fairness in proceedings.<sup>14</sup> For example: when prosecution provides witness lists, the defense must provide any witness lists.<sup>15</sup> It is within the discretion of the trial court to address non-compliance with Crim.R. 16.<sup>16</sup> When a party refuses to produce the requested information, the opposing party may move to compel disclosure of certain evidence.<sup>17</sup> The court may issue orders compelling discovery or inspection to ensure equity.<sup>18</sup>

### B. Ohio Revised Code §149.43(A)(2)(c)<sup>19</sup>

Section 149.43 of the Ohio Revised Code deals with the “[a]vailability of public records of inspection and copying.”<sup>20</sup> At issue in this discussion is R.C. § 149.43(A)(2)(c), which excludes “confidential law enforcement investigatory record[s],” from release, though only those that would “create a high probability of disclosure of . . . [s]pecific confidential investigatory techniques or procedures or specific investigatory work product,” among other exceptions.<sup>21</sup> What constitutes such a record was one of the issues in *Steckman*, and the court included in the definition “information assembled by law enforcement officials in connection with a probable or pending criminal proceeding.”<sup>22</sup> Obviously, such a definition significantly broadens the already broad exception.

### C. Criminal Rule 16

Criminal Rule 16 looks markedly different now than it did at the time

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12. *Id.* Both sides have the authority to not disclose information if there is an insufficient/non-particular demand.

13. OHIO R. CRIM. P. 16(C) & (J).

14. *Id.*, at (A) & (H).

15. *Id.* at (J).

16. *Id.* at (F).

17. *Id.* at (M).

18. *See id.*

19. OHIO REV. CODE ANN. § 149.43 (West 2017).

20. *Id.*

21. OHIO REV. CODE ANN. § 149.43(A)(2)(c).

22. *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 94-95 (Ohio 1994); OHIO R. CRIM. P. 16 (1973).

of *Steckman*.<sup>23</sup> As such, what follows is an analysis and explanation of (1) Crim.R. 16 as it stood in 1993 at the time of *Steckman*, and (2) Crim.R. 16 as it looks after the 2010 amendments.

### 1. Criminal Rule 16 (1973 Version)

The old rule Crim.R. 16 was less equitable than its modern counterpart, which is to blame for the eventual litigation of *Steckman*. Crim.R. 16 did not “provide for what is often called ‘full,’ ‘complete,’ or ‘open file’ discovery.”<sup>24</sup> This meant that defense attorneys could not readily obtain all files the prosecution had access to, as was laid out in Crim.R. 16(B)(2).<sup>25</sup> This included “reports, memoranda, or other internal investigation documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.”<sup>26</sup> Defense attorneys frequently wanted access to such documents through Crim.R. 16, but were often steadfastly denied.<sup>27</sup>

To circumvent the roadblock, defense attorneys went outside the bounds of Crim.R. 16(C), and instead pursued discovery by other means, including requesting public records to get information they otherwise would not have access under the rule. Defense attorneys requested public records to get information they otherwise would not have access under the rule.<sup>28</sup> The benefits of this were that (1) defense attorneys had access to information that would otherwise not be disclosed under Crim.R. 16(C); (2) there was no reciprocal obligation triggered that allowed inspection by the prosecution; and (3) the prosecution had no similar ability to get information outside the scope of the rule.<sup>29</sup>

Because the defense’s records were not public record, there was no reciprocal ability for the prosecution to engage in the same practice.<sup>30</sup> This meant that defense attorneys had access to records outside the scope of Crim.R. 16, but prosecutors did not. This lack of reciprocal discovery became a contentious issue, ultimately resulting in the litigation to be discussed at length below.

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23. See *State ex rel. Caster v. Columbus*, 89 N.E.3d 598 (Ohio 2016).

24. *Steckman*, 639 N.E.2d at 89-91.

25. *Id.*

26. *Id.* at 95.

27. See *id.*

28. *Id.* at 89-91; *State ex rel. Wlwt-Tv5 v. Leis*, 673 N.E.2d 1365 (Ohio 1997).

29. See *Steckman*, 639 N.E.2d at 89-90.

30. *Id.*

## 2. Criminal Rule 16 – 2010

The 2010 amendments to Crim.R. 16 marked a sweeping overhaul of discovery in Ohio, and a departure from the rule that once plagued Ohio courts.<sup>31</sup> The new Crim.R. 16(A) addressed and amended the lack of reciprocity absent in the old rule.<sup>32</sup> In pertinent part, the rule states: “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.”<sup>33</sup> The staff notes for Crim.R. 16(A) expand upon this, stating, “Nothing in this rule shall inhibit the parties from exchanging greater discovery beyond the scope of this rule . . . and expands the reciprocal duties in the exchange of materials.”<sup>34</sup>

The new rule gives the judge similar and more expansive regulatory authority.<sup>35</sup> Whereas the old rule had discretion to deny, restrict, or defer discovery within the *bounds* of the rule, the new rule allows the court to make orders when “a party has failed to comply with this rule or with an order pursuant to this rule.”<sup>36</sup> This includes the ability to order “discovery or inspection, grant a continuance, or prohibit [a] party from introducing in evidence the material not disclosed.”<sup>37</sup> While facially similar to the 1973 Crim.R. 16, the new rule creates an efficient way of dealing with evidence obtained outside the bounds of the Crim.R. 16.

### D. Case Law

The following section examines the case law leading up *State ex rel. Caster v. City of Columbus*. First, an examination of *State ex rel. Steckman v. Jackson*, the principal case overturned by *State ex rel. Caster*; second, an examination *State ex rel. WLWT-TV5 v. Leis*, a subsequent Supreme Court of Ohio case that expands upon principles laid out in *Steckman v. Jackson*; lastly, an examination of *State v. Athon*, a case dealing with issues following the 2010 Amendment to Ohio Crim.R. 16.

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31. See *State ex rel. Caster v. Columbus*, 89 N.E.3d 598 (Ohio 2016); see also Paul Aker, *Towards Darkness: Ohio’s Presumption of Openness Under the Public Records Act*, 41 CAP. U.L. REV. 361 (2013).

32. OHIO R. CRIM. P. 16(A).

33. *Id.*

34. *Id.*

35. *Id.*

36. Compare OHIO R. CRIM. P. 16.; with OHIO R. CRIM. P. 16 (1973).

37. OHIO R. CRIM. P. 16.

1. *State ex rel. Steckman v. Jackson*

*Steckman* was a consolidation of three cases.<sup>38</sup> The purpose of the case was to address the ever-increasing use of R.C. § 149.43 to obtain records unobtainable under Crim.R. 16.<sup>39</sup> The strategy utilized by defense attorneys caused undue delay in criminal proceedings and gave defense attorneys a leg-up by providing access to prosecutor files.<sup>40</sup>

The scheme orchestrated by defense attorneys to obtain records they were not entitled to under Crim.R. 16 was admittedly cunning. Ohio Crim.R. 16 did not allow for open file discovery.<sup>41</sup> This left defense attorneys yearning for more.<sup>42</sup> Given that a prosecutor's file contains numerous public records and because there was not a statutory limitation on an attorney's ability to request such records, defense attorneys went outside the bounds of Crim.R.16 and requested public records.<sup>43</sup> When those public records requests were denied, lawyers could use mandamus to force legal action to obtain those records.<sup>44</sup> This, in turn "[brought] about interminable delay in [] criminal proceedings."<sup>45</sup>

While this arguably was a useful tactic, it was inequitable because prosecutors lacked the reciprocal right to obtain the same investigatory records from its opposition.<sup>46</sup> For that reason, among other policy considerations, the court held that in a "criminal proceeding itself, a defendant may use only Crim.R. 16 to obtain discovery."<sup>47</sup> The decision did not end there, however, as the court needed to determine at what point certain records would become available.<sup>48</sup>

"Because of our cases, the exceptions to required disclosure found in R.C. § 149.43(A)(2)(c)—'specific investigatory work product'—and R.C. § 149.43(A)(4)—'trial preparation record'—have virtually been rendered meaningless."<sup>49</sup> Further, the court noted that they "just about [wrote] Rule 16 out of the Criminal Rules."<sup>50</sup> Exceptions that were once meant to ensure equitable discovery, secure witness protection, and to address a host of other policy considerations, now lacked luster.<sup>51</sup>

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38. *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 83-89 (Ohio 1994).

39. *Id.* at 88-89.

40. *Id.* at 89-95.

41. OHIO R. CRIM. P. 16 (1973).

42. *See Steckman*, 639 N.E.2d 83.

43. *See Steckman*, 639 N.E.2d at 89-95.

44. *Id.*

45. *Id.* at 89-90.

46. *Id.*

47. *Id.* at 90-91.

48. *See id.*

49. *Id.* at 91-92.

50. *Id.*

51. *Id.*

The work product excepted from disclosure by the court in *Steckman* includes “information assembled by law enforcement officials in connection with a probable or pending criminal proceeding . . . as said information is compiled in *anticipation of litigation*.”<sup>52</sup> The court deemed “ongoing routine offense and incident reports, including . . . records relating to a charge of driving while under the influence and records containing the results of intoxilyzer reports,” as not work product.<sup>53</sup> Further limiting the ability of criminal defendants to access public records, the court stated, “A defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. § 149.43 to support a petition for postconviction relief.”<sup>54</sup> Taken as a whole, *Steckman* disallowed the disclosure of any investigatory work product under R.C. § 149.43(A)(2)(c).<sup>55</sup>

Although not immediately apparent in *Steckman* itself, the court’s ruling on trial preparation records under R.C. § 149.43(A)(4) and R.C. § 149.43(A)(1)(G) would have severe limiting effects in subsequent court decisions.<sup>56</sup> In its opinion, the court noted that “[trial preparation records do] not lose . . . exempt status unless and until all ‘trials,’ ‘actions’ and/or ‘proceedings’ have been fully completed.”<sup>57</sup> The court found no conclusive definition of “trial,” and therefore indicated that there should be no distinction between “an initial court proceeding, [a] direct appeal[] and/or postconviction relief.”<sup>58</sup> Although limited to records under R.C. § 149.43(A)(4), the court would only further expand the exceedingly broad scope of its power to except records.<sup>59</sup>

## 2. *State ex rel. WLWT-TV5 v. Leis*

*State ex rel. WLWT-TV5 v. Leis* (“*Leis*”) is one of the progeny of *Steckman*. Following *Steckman*, there were still some ambiguous issues regarding how long certain public records were exempted from disclosure under R.C. § 149.43.<sup>60</sup> WLWT, a local TV station, sought to compel the Ohio Brotherhood of Deputy Sheriffs to release records relating to a case in which several of its members were indicted and

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52. *Id.* at 94-96.

53. *Id.*

54. *Id.* at 95-96.

55. *Id.*

56. *State ex rel. Caster v. Columbus*, 89 N.E.3d 598 (Ohio 2016).

57. *Steckman*, 639 N.E.2d at 92-93.

58. *Id.*

59. *See State ex rel. Wlwt-TV5 v. Leis*, 673 N.E.2d 1365 (Ohio 1997).

60. *See id.*

charged.<sup>61</sup> WLWT claimed the “work product and trial preparation records [were] inapplicable” because all of the involved defendants had already been charged, and two defendants were already convicted and sentenced.<sup>62</sup>

The court was quick to dismiss the argument, using *Steckman* as its principal reason for denying the disclosure of the records.<sup>63</sup> In arguing why *Steckman* applied despite the trial and sentencing having already occurred, the court cited the exemptions found in R.C. § 149.43(A)(2)(c) and R.C. § 149.43(A)(4).<sup>64</sup> The court lumped them both under the umbrella heading of R.C. § 149.43(A)(1) and found no issue in labeling the work product as trial preparation records.<sup>65</sup> Because the investigatory work product was located in the prosecutor’s file, it was also considered part of the trial preparation record under R.C. § 149.43(A)(4).<sup>66</sup> This exempted from disclosure all investigatory work product until all “proceeding[s], direct appeals and/or postconviction relief” had been completed.<sup>67</sup>

As we know from *Steckman*, it is a high bar for all proceedings, direct appeals, and postconviction relief to be completed under the standard. As the court in *Leis* stated, “further proceedings on these offenses are possible because they could be granted a new trial pursuant to (1) Crim.R. 32.1, permitting the withdrawal of their guilty and no contest pleas, or (2) a petition for postconviction relief under R.C. 2953.21.”<sup>68</sup> In short, there were very few, if any, ways for a defendant to compel disclosure of these records.

While the four corners of *Steckman* seemed reasonable to the extent that they allowed for more equitable discovery at trial, *Leis* heightened the standard to compel disclosure of police records to an even higher standard. Although some municipalities and cities in Ohio disclose such records in postconviction settings, others do not because the defense using *Steckman* and *Leis* is so strong.<sup>69</sup> This is due in part to the fact that the court did not want the defendant to have any more information on “retrial than he or she could have gained through Crim.R. 16 discovery for the original trial.”<sup>70</sup> However, the reworking of Crim.R. 16 remedied that concern.

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61. *Id.* at 1365-68.

62. *Id.* at 1368-69.

63. *Id.* at 1369-70.

64. *Id.*

65. *Id.*

66. *Id.* at 1368.

67. *Id.* at 1368-69 (quoting *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83 (Ohio 1994)).

68. *Id.*

69. *Aker*, *supra* note 31.

70. *State ex rel. Caster v. Columbus*, 89 N.E.3d 598, 608 (Ohio 2016).

### 3. *State v. Athon*

*State v. Athon* provided evidence of how the reworked Crim.R. 16 remedied glaring issues in the construction of the rule at the time of *Steckman*. In *Athon*, attorney Steven Adams represented a man charged with “operating a motor vehicle under the influence of alcohol, speeding, and failing to reinstate his driver’s license.”<sup>71</sup> Adams did not participate in discovery pursuant to Crim.R. 16, instead asking another attorney to request the public records related to the case for him.<sup>72</sup> The files requested were all files that could have been compelled under Crim.R. 16.<sup>73</sup>

The attorney requested the files and received them several days later.<sup>74</sup> The State, having found out about the straw man, asked the court to compel discovery because of the reciprocal duty located in Crim.R. 16(H).<sup>75</sup> One way to look at *Athon*’s argument is simply that a third party requesting public records did not amount to a demand to trigger the reciprocal obligation because he did not make a pretrial motion, and since *he* did not make the demand, there was no reciprocal obligation.<sup>76</sup> *Athon* argued he was only prevented from obtaining “evidence that is not subject to discovery pursuant to Crim.R. 16.”<sup>77</sup> The court was forced to answer whether the accused “may request public records to obtain information that could be demanded from the state during discovery, and . . . whether such a request triggers a reciprocal duty of disclosure to the state.”<sup>78</sup>

The court found that “the Public Records Act is neither a substitute nor an alternative to criminal discovery conducted pursuant to Crim.R. 16.”<sup>79</sup> This mimics language used in *Steckman* twenty years prior, further entrenching the precedent that discovery should be kept within the bounds of Crim.R. 16.<sup>80</sup> However, given that Crim.R. 16 was amended since the *Steckman* decision, the court took a step further in its analysis. The accused could make a request for public records that could have been obtained through discovery “directly or indirectly,” but that request would amount to a demand under Crim.R. 16 and the accused

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71. *State v. Athon*, 989 N.E.2d 1006, 1007-08 (Ohio 2013).

72. *Id.*

73. *Id.*

74. *Id.* at 1007-10.

75. *Id.* at 1008-10.

76. *Id.* at 1009-10.

77. *Id.*

78. *Id.*

79. *Id.* at 1011-12.

80. Compare *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83 (Ohio 1994), with *Athon*, 989 N.E.2d 1006.

would then owe a reciprocal duty of disclosure to the prosecutor.<sup>81</sup>

*Athon* was a good case to test the durability of the new reciprocal discovery standard promulgated by the updated Crim.R. 16. Although the case was limited to public records that could have been obtained within the scope of Crim.R. 16, it laid some of the groundwork for further cases to be decided under the new Crim.R. 16.<sup>82</sup> The reciprocal duty of the rule “minimized any perceived advantage a defendant could gain on retrial through the use of a public-records request.”<sup>83</sup> With that, the table was set for further erosion of the standards set in *Steckman* and *Leis*.

#### E. State ex rel. Caster v. City of Columbus

The following discussion of *State ex rel. Caster v. City of Columbus* begins with a short recitation of the facts, followed by an analysis of the legal issues and arguments presented and analyzed by the court.

##### 1. Facts

In the course of its investigation into the murder conviction of Adam Saleh, Donald Caster,<sup>84</sup> through two law students working under his direction, requested police records related to the investigation and subsequent arrest of Saleh.<sup>85</sup> While there was no guarantee the Ohio Innocence Project would litigate the case, the public records were necessary in determining whether or not Saleh’s claim of actual innocence was credible.<sup>86</sup>

Caster’s requests to the Division of Police (“DOP”)—through students working for him—were fully denied.<sup>87</sup> The DOP cited *Steckman v. Jackson* as its rationale for not turning over the files because the information sought fell under the R.C. § 149.43(A)(2)(c) investigatory work product exception.<sup>88</sup> Despite the fact that all appeals had been exhausted, the “DOP stated that no records would be produced until the ‘completion’ of Saleh’s criminal case.”<sup>89</sup> Caster then sent,

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81. *Athon*, 989 N.E.2d at 1011-12.

82. *See State ex rel. Caster v. Columbus*, 89 N.E.3d 598 (Ohio 2016).

83. *Id.* at 607-08.

84. Donald Caster is an attorney for the Ohio Innocence Project and Clinical Professor of Law at the University of Cincinnati College of Law. The Ohio Innocence Project identifies, investigates, and litigates cases in which inmates in Ohio prisons might have been wrongfully convicted.

85. *See Id.* at 600.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 599-600.

through certified mail, a request directly from himself, explaining that there were no ongoing proceedings in Saleh's case.<sup>90</sup> The DOP never responded.<sup>91</sup>

Caster then filed an original mandamus action with the court, at which point the DOP released some, but not all, of the records.<sup>92</sup> The DOP again cited the holdings of *Steckman* and its progeny to deny the records.<sup>93</sup> The case reached the Supreme Court of Ohio.

## 2. Argument and Holding

The court initially noted that the jurisprudence in this area of law is based on expedience, "the idea that a defendant should not be able to have more information on retrial than he or she could have gained through Crim.R. 16 discovery for the original trial."<sup>94</sup> The changes to Crim.R. 16 remedied those concerns, and there is no longer sizable disparity in the discovery process.

The court was most persuaded by the uncanny story of one of the appellants in the consolidated cases of *Steckman*.<sup>95</sup> His convictions were affirmed on appeal.<sup>96</sup> Ronald Larkins sought recovery of investigatory records related to his case, but was steadfastly denied because he could not use them to support a motion for postconviction relief.<sup>97</sup>

Eventually another person filed a public records request that was granted, and the records were turned over.<sup>98</sup> Larkins found exculpatory evidence that was withheld, and he was eventually granted a new trial and his indictment was dismissed.<sup>99</sup> But for the Cleveland Police department accidentally letting the public records request slip through, Larkins would likely be serving time for a crime he did not commit. The

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90. *Id.* at 600-01.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 608.

95. *Id.* at 608-09.

96. *Id.*; State v. Saleh, No. 07AP-431, 2009 Ohio App. LEXIS 1407 (Ohio Ct. App. Mar. 31, 2009).

97. See *Caster*, 89 N.E.3d 598; *Ronald Larkins*, NATIONAL REGISTRY OF EXONERATIONS (April 4, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4415>. (Ronald Larkins was convicted of attempted murder and robbery in 1986, and he was sentenced to life without parole. He filed a postconviction motion for police files in his case, but was denied at the Supreme Court in State *ex rel.* Steckman v. Jackson. Once his records were turned over – for reasons unknown – in 2001, Larkins demonstrated that the prosecution withheld evidence that ultimately would have proved his innocence at trial. After several years of litigation, charges against Larkins were dismissed because of the prosecution's misconduct in failing to disclose exculpatory evidence. A full record of his case is available on the National Registry of Exonerations.)

98. *Caster*, 89 N.E.3d 598.

99. *Id.*

court's thought on this incident was as follows: "Larkins gained access to the records that led to the dismissal of his indictment only through an act of bureaucratic grace. Or a bureaucratic mistake. Whichever the case, a clear rule would be better and is necessary."<sup>100</sup>

This new rule, while informed by anecdotes such as Larkins', was promulgated in the interests of justice and because of the newly leveled disparity between information available through the Public Records Act and through Crim.R. 16 discovery. As such, they held "that the specific-investigatory-work-product exception of R.C. § 149.43(A)(2)(c) does not extend beyond the completion of the trial for the information was gathered."<sup>101</sup> The writ was granted, and Saleh's files should have been turned over to relator Caster.<sup>102</sup> To the extent that *Steckman* and *Leis* held otherwise, they were overruled.<sup>103</sup>

The court's newly promulgated rule is bright line: when a trial ends, the records become available. The parity that now exists under Crim.R. 16 creates an environment in which this rule has the capacity to level the playing field more than it did pre-*Steckman*.<sup>104</sup> As discussed, the issue in *Steckman* was the ability of defense counsel to access through R.C. § 149.43 what they could not access through Crim.R.16. Defense counsel had access to records that the state did not, and time-consuming litigation slowed the courts. With the 2010 amendment to Crim.R. 16, this loophole was effectively shut because of the requirement for reciprocal discovery. After being put to the test in *State v. Athon*, the decision in *State ex rel. Caster* was a sensible next step in adapting to the recently promulgated Crim.R. 16.

If defense counsel seek public records during trial, then that action triggers reciprocal discovery. If defense counsel seeks work-product during trial, that material is exempt from disclosure. Once the trial ends, those public records can be accessed, and that investigatory work-product must be disclosed upon demand. This, in short, is the holding of *State ex rel. Caster v. City of Columbus*. While the dissent acknowledges the change in law, it interprets it much differently.

### 3. Dissent

The dissent's primary focus was on keeping work-product exceptions in place in light of the new Crim.R. 16.<sup>105</sup> Chief Justice O'Connor would

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100. *Id.* at 608-09.

101. *Id.*

102. *Id.* .

103. *Id.*

104. *Id.*

105. *See id.* at 611 ( O'Connor, C.J., concurring in part and dissenting in part).

instead “modify *Steckman’s* definition of the specific-investigatory-work-product exception.”<sup>106</sup>

The dissent’s proposed definition found its footing in the language of *Hickman v. Taylor*.<sup>107</sup> There was recognition that the concerns addressed in *Steckman* no longer exist, but the dissent found the lack of a manageable work product standard under the new rule grossly understated.<sup>108</sup> The crux of the dissent’s proposed definition was the delineation between “fact work product” and “theories, impressions, and strategies.”<sup>109</sup> The specific investigatory work product of law enforcement was, in the dissent’s view, analogous to the attorney-work-product jurisprudence.<sup>110</sup>

The public should have access to facts uncovered during the course of an investigation, but police should not be forced to give up confidential investigatory techniques.<sup>111</sup> Knowledge of such techniques could “empower criminals to avoid detections, [and] is dangerous.”<sup>112</sup> Instead of releasing all records, the decision to release certain records should only come after in camera review.<sup>113</sup>

The dissent also strayed from the majority in finding the specific-investigatory-work-product exception extends past completion of a trial.<sup>114</sup> The dissent agreed trial-preparation records that were part of a law-enforcement file were unnecessary to keep from the defendant following the exhaustion of direct appeals, but found information protected by R.C. § 149.43(A)(2) should be protected even following the dissolution of all direct appeals.<sup>115</sup>

One of the biggest issues the dissent found with the majority’s decision is the recreation of the problem at issue in *Steckman*.<sup>116</sup> While this problem could not occur as the trial level because of the new Crim.R. 16, the disclosures of specific investigatory work product after trial but before the exhaustion of direct appeals were just a recreation of the *Steckman* issue at the appellate level.<sup>117</sup> In pertinent part, the dissent thought the issue was “giving the public (and potentially the defendant) access to information in the investigatory file that was not available to

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106. *Id.*

107. *See id.*

108. *Id.* at 613.

109. *Id.* at 613-614.

110. *Id.* at

111. *Id.* at 613.

112. *Id.* at 614.

113. *Id.* at

114. *Id.* at 613.

115. *Id.*

116. *See id.*

117. *Id.* at 614.

the defendant during trial and opening a second level of potential discovery through a public-records request between a trial verdict and defendant's direct appeal."<sup>118</sup>

Further, the dissent tried flipping the anecdote of the innocent man from the majority opinion into an argument as to why records should not be disclosed.<sup>119</sup> The reasoning was that if the defendant were innocent, the actual perpetrator could use public records to evade detection.<sup>120</sup> In its entirety, the dissenting opinion did not want to overhaul *Steckman*.

#### F. What is Still Excepted from Discovery?

Despite the expansive holding of the case, there are a number of exceptions under R.C. § 149.43(A)(2) that allow the state to withhold information for fairly good reasons.<sup>121</sup>

The Division of Police can still withhold information under R.C. § 149.43(A)(2)(a), which pertains to information relating to the identity of a suspect who was not charged.<sup>122</sup> This is sensible to keep intact for the safety of the suspect and to prevent any sort of vigilante justice; however, one downside to this is that investigations on appeal might be stifled by lack of full access to suspects and potential leads. They can also withhold information under R.C. § 149.43(A)(2)(b), which relates to information that could lead to the unmasking of a confidential informant.<sup>123</sup> Also, under R.C. § 149.43(A)(2)(c), *some* specific investigatory techniques are exempt.<sup>124</sup> Lastly, under R.C. § 149.43(A)(2)(d), information that threatens the safety of law enforcement, victims, witnesses, or confidential informants is also exempt from disclosure.<sup>125</sup>

The above Ohio revised Code sections represent sensible exemptions from disclosure, and demonstrate the limitations still placed on discovery in the wake of *State ex rel. Caster v. City of Columbus*.

### III. DISCUSSION AND ANALYSIS

This section analyzes why *State ex rel. Caster* was decided correctly and the implications it has moving forward. The discussion includes

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118. *Id.* at 615.

119. *Id.* at 614.

120. *Id.*

121. *Id.* at 609-10; Ohio Rev. Code Ann. §149.43 (West 2017).

122. *Caster*, 89 N.E.3d 598 at 609-10.

123. *Id.*

124. *Id.*

125. *Id.*

how the decision represents a sensible adaption of jurisprudence to new statutory standards; why the dissent's idea only would have exacerbated issues with discovery; and how police departments could still find ways to exempt materials from disclosure. This is followed by an analysis of the impact the case will have and already had in the area of conviction appeals and the work towards proving innocence.

#### A. *Why the Court was Correct*

The Ohio Legislature passed R.C. § 149.43 in 1963 with the intention of making all records held by Ohio governmental agencies available for public review.<sup>126</sup> The legislature wanted a simple and open process for obtaining records.<sup>127</sup> But, as seen in the facts in *Steckman*, simplicity came at a great cost. The expedient operation of the courts was a central issue in *Steckman*; litigation over public records caused by the tumultuous interplay of R.C. § 149.43 and Ohio Crim.R 16 too often burdened the judicial economy of courts.<sup>128</sup> An already busy criminal justice system was made busier. Instead of relying on the legislature to remedy the statutory issues involved, the court created a judicial remedy to the problems they saw in the system. *Steckman* led to a series of cases that fit a similar mold.<sup>129</sup> What was left was a flawed public records law and jurisprudence that made tighter and tighter restrictions.

Though there were amendments to R.C. § 149.43 and Ohio Crim.R. 16 between *Steckman* and *State ex rel. Caster*, most were not sweeping enough to convince the court to change its position.<sup>130</sup> The court presumably still feared the floodgates would reopen if they returned to pre-*Steckman* standards. The exception comes with the 2010 amendment to Ohio Crim.R. 16, discussed in Section II(B)(2) above. The new rule explicitly allows for discovery outside the scope of Ohio Crim.R. 16, though with the caveat that a reciprocal duty applies.<sup>131</sup> This remedied one of the major issues with the rule at the time of *Steckman*, namely that defense counsel seemingly had greater access to records than the prosecution.<sup>132</sup>

The limits of the rule were tested in *State v Athon*, discussed above, when non-counsel sought public records related to a case to turn over to

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126. Aker, *supra* note 31, at 370.

127. *Id.* at 370-371.

128. *Id.*

129. *Id.* at 370-371.

130. *Id.* at 370-371.

131. OHIO R. CRIM. P. 16.

132. *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83 (Ohio 1994); *compare* OHIO R. CRIM. P. 16; *but compare* OHIO R. CRIM. P. 16 (1973).

the acting counsel.<sup>133</sup> As discussed, the court found a reciprocal obligation in that act. *Athon*, albeit an odd case and fact pattern, was a necessary precursor to *State ex rel. Caster v. City of Columbus*. In demonstrating Crim.R. 16 now has recognizable limits not present pre-*Steckman*, the court could begin reworking precedent set because of pre-*Steckman* issues.

At the time *Steckman* was decided, the major issues with public records were at trial. Once *Steckman* was decided and the equity of discovery was preserved, the court took it further in *Leis* to preserve an advantage in appellate proceedings.<sup>134</sup> While it is certainly arguable that there was an issue with public records litigation pre-*Steckman*, the need to extend such a bar past trial was always set upon rocky footing. *Larkins* is too perfect of an example.

*Larkins* was denied access to his public records as a direct result of the *Steckman* decision; he was one of the consolidated cases being presented before the Ohio Supreme Court in *Steckman v. Jackson*.<sup>135</sup> *Larkins* was ultimately set free by the mistaken release of his records. This should have acted as a wake-up call to the courts or the legislature in 2006. The appellate court even noted:

While [the] refusal [to disclose public records] was ultimately found to be justified by the Supreme Court in *Steckman* . . . it could be argued . . . that the state's strenuous opposition to disclosing records was meant to cover its failure to divulge that evidence prior to trial.<sup>136</sup>

Despite such an obvious condemnation of the state's tactics, there was no change in Ohio public records law.<sup>137</sup> According to the National Registry of Exonerations, 56 Ohio men and women were exonerated during *Steckman's* tenure.<sup>138</sup> Some undoubtedly were lucky in their ability to recover public records related to their case, but who knows how many countless more have been denied due process because they could not obtain public records related to their case.

When Donald Caster sought public records for Adam Saleh, he did

133. *State v. Athon*, 989 N.E.2d 1006 (Ohio 2013).

134. *State ex rel. Wlwt-Tv5 v. Leis*, 673 N.E.2d 1365 (Ohio 1997).

135. *Steckman*, 639 N.E.2d 83.

136. *State v. Larkins*, No. 85877, 2006 Ohio App. LEXIS 80, at \*23 (Ohio Ct. App. Jan. 12, 2006).

137. This change, of course, came in 2010 with the amendments to Ohio Rule of Criminal Procedure 16 and the *Caster* case. OHIO R. CRIM. P. 16; *State ex rel. Caster v. Columbus*, 89 N.E.3d 598 (Ohio 2016).

138. *Ronald Larkins*, NATIONAL REGISTRY OF EXONERATIONS (April 4, 2014), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4415>.

not know whether or not Saleh was actually innocent of the crimes he was convicted of committing.<sup>139</sup> The only way Caster and the Ohio Innocence Project could know was by gaining access to those records.<sup>140</sup> I am sure Caster was not entirely optimistic about how the case would be resolved, given that *Steckman* was so engrained in the fabric of Ohio criminal procedure. It was tough but worthwhile not just for Caster, but for those who could not challenge their convictions because not all “‘trials,’ ‘actions’ and/or ‘proceedings’ ha[d] been fully completed.”<sup>141</sup> The ambiguous standards beget pro-State policies that operated to preserve prosecutorial advantage and cover-up official misconduct in the name of judicial efficiency.

*State ex rel. Caster* was decided correctly because it gives power back to those who had all their power taken away. The ruling does not disturb the expedience of trial courts; rather, it acts as a necessary check on the State.

### B. What the Dissent Gets Wrong

As discussed in the earlier section, the dissenting opinion facially appears to call for a return to the status quo. The difference from the status quo is where the argument finds its footing. In the dissenting opinion of *State ex rel. Caster*, the judge used the language of *Hickman v. Taylor* more so than the language of the statute and rules at issue. The three major themes present in the dissent are (1) the court gave defendants too much access to public records between trial and direct appeal, (2) releasing mental impressions implicated work-product issues, and (3) criminals would use public records to their advantage.<sup>142</sup> These will be addressed in turn.

The first issue—defendants would have too much access to information on direct appeal—is an interesting position. The judge stated that allowing access to public records before direct appeals were exhausted would “re-create the problem that *Steckman* sought to address.”<sup>143</sup> The judge would “protect the file either until law enforcement closes a case or until there is no longer a likelihood that a verdict will be reconsidered – after the defendant has exhausted his or her direct-appeal options.”<sup>144</sup> Although there are avenues to find success

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139. *Caster*, 89 N.E.3d at 600. “Actual innocence” is a legal term of art that refers to a situation in which a convicted defendant is innocent of all charges. Actual innocence does not include those who are guilty but were convicted due to an error in the court.

140. *Id.*

141. *Steckman*, 639 N.E.2d at 92-93.

142. *See Caster*, 89 N.E.3d at 611 (O’Connor, C.J. concurring in part and dissenting in part).

143. *Id.* at 615.

144. *Id.*

on direct appeal without public records, many cases rely on the ability to access public records for the likelihood of their verdict to be reconsidered.<sup>145</sup> There is reason to restrict access at trial to preserve the adversarial process, but appeals are meant to correct deficiencies and mistakes at trial, many that might not come to light without access to public records. Much like the majority's opinion in *Steckman*, the dissenting opinion here premised much of its argument on issues of expediency. The legislature has already moved towards a more open-file discovery process, but the dissent seemingly did not want to follow legislative intent.

Second, the releasing of mental impressions was the opinion's most well-grounded argument. Chief Justice O'Connor opined that the majority "opens the door for disclosure well beyond even Crim.R. 16 requires, and it does so without any of the safeguards that the rule and R.C. § 149.43(A)(2) put in place."<sup>146</sup> Instead of such an expansive rule, the judge believes that only facts should be subject to disclosure, not "theories, mental impressions, and thought processes of the investigator as specific investigatory work-product."<sup>147</sup> This is where the Chief Justice found parallels between Ohio public records law and *Hickman v. Taylor*. Work-product doctrine has often been thought of as less of a privilege and more of a protection of the adversarial system.<sup>148</sup> The thought process is much the same here, but, being that this is a criminal law context, the "protection" extends past the adversarial system and into the realm of protecting witnesses and victims. The Chief Justice believed that deference should be given to police departments and the records subject to in camera review when challenged.<sup>149</sup>

While the rule laid out by the dissent seems sensible at first blush, it is no more than a call for a return to the *Steckman* status quo. The delineation between "facts" and "mental impressions" in the course of police investigation seems entirely arbitrary. This would only broaden the amount of investigatory work product exempted from discovery because police departments could easily claim that any resuscitation of the facts was a mental impression exempt from disclosure. If anything, such a sweeping exception would lead to more litigation about what "facts" and "mental impressions" are under the new Crim.R. 16. Particularly in the postconviction context, investigative reports are an integral part of proving official misconduct. When coupled with the

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145. *Id.* at 613-14.

146. *Id.* at 613.

147. *Id.* at 613.

148. Sherman L. Cohn, *Work Product Doctrine: Protection, Not Privilege*, 70 GEO. L. J. 917 (1984).

149. See *Caster*, 89 N.E.3d at 611 (O'Connor, C.J. concurring in part and dissenting in part).

duration of the exception, exempting them from disclosure would seriously inhibit the ability of defendants to pursue postconviction relief. Again, the Larkins case operates as a prime example.

Lastly, the idea that criminals will use public records to their advantage was an interesting argument. It is not something this author has ever thought about as an issue with public records, and the dissent's argument was unpersuasive. The line "it prevents the actual perpetrator from accessing information that he or she could use to prevent detection," is one ungrounded in apparent fact.<sup>150</sup> There was no data to support that particular claim, making it appear as a hypothetical masquerading as a public policy argument. Regardless of the truth of the claim, that problem seems to evade another public policy issue: transparency.

Immediately preceding his discussion of criminality and public records, the Chief Justice harped on the need for a judicial system in which the press does not "tr[y] an active case in the news."<sup>151</sup> While there are always concerns about public vigilantism, steadfast reporting is integral in the healthy operation of a government. Availability of public records holds the government accountable for its mistakes. As noted in a law review comment between the 2010 Crim.R. 16 amendment and *State ex rel. Caster*, "[i]n a news world corded by public information officers, press releases, and spin doctors, reporters rely on public documents to expose the unvarnished facts about government activity."<sup>152</sup> This rings particularly true in the postconviction context. Journalists are necessary members of the criminal justice system because of their capacity to hold the government accountable. In Ohio alone, journalists play an integral part in exposing corruption, misconduct, and injustice to the public at large. Several Ohio Innocence Project cases have reached the media to discuss those issues explicitly.<sup>153</sup> There was a particularly large campaign in Ohio in 2006 to

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150. *Id.* at 615.

151. *Id.*

152. Aker, *supra* note 31, at 367.

153. Kyle Swenson, *A Cleveland Man Fights to Prove His Innocence in a System Incapable of Correcting its Own Mistakes: Drug dealer and street hustler? Yes. But killer?*, CLEVELAND SCENE (June 29, 2016), <https://www.clevescene.com/cleveland/a-cleveland-man-fights-to-prove-his-innocence-in-a-system-that-appears-incapable-of-correcting-its-own-mistakes/Content?oid=4906687>; Kyle Swenson, *A Tiny Piece of Evidence Could be the Key to Setting an Innocent Cleveland Man Free. Why Can't Anyone at the Justice Center Find It?*, CLEVELAND SCENE (June 14, 2017), <https://www.clevescene.com/cleveland/a-tiny-piece-of-evidence-could-be-the-key-to-setting-an-innocent-cleveland-man-free-why-cant-anyone-at-the-justice-center-find-it/Content?oid=8017989>; Leslie Blade, *Bloody Shoes and Snitches: Damn the DNA – the State of Ohio says Jerome Campbell has to die*, CITY BEAT (April 9, 2003), <http://www.citybeat.com/home/article/13021608/cover-story-bloody-shoes-and-snitches>.

raise awareness for wrongful convictions.<sup>154</sup> These cases relied heavily on public records. In sum, the dissents' public policy arguments favor an opaqueness that does not necessarily benefit society at large; rather, that opaqueness seems to benefit the prosecution.

The three major themes extracted from the dissent are all rebuttable, though it does not mean they are without merit. The work-product argument is particularly persuasive. Reasonable minds can differ on how and when public records should be exempted, but a return to the status quo only makes it more difficult for defendants to adequately obtain postconviction relief.

### C. Looking Forward

The full effects of *State ex rel. Caster* are yet to be seen. Postconviction work is a long and difficult process. It will likely be several years until courts and attorneys for sure know how the new interpretation of the rule will act in practice.

Regardless, access to public records at an earlier time will undoubtedly have an impact on both direct appeals and postconviction relief. That was, of course, the purpose of the litigation in the first place. Whether the courts become inundated and slowed with public records disputes – as the dissent seemed to imagine – is also a question that there will not be an answer to for several years. There are several hopes as to what can be accomplished.

Better access to public records will hopefully lead to an expanded capacity of appellate attorneys and defense attorneys to access information beneficial to their clients. Given the number of exonerations in Ohio in the past 30 years, it is likely that there are many more innocent people sitting in prison. *State ex rel. Caster* will hopefully lead to more meaningful and effective investigations into these claims of innocence.

Also, such discovery will hopefully be beneficial in holding the State accountable to its citizens. In the same vein as investigating claims of actual innocence, investigating claims of official misconduct will become easier with expanded access to records. All investigations, of course, are in the name of fairness in equity in criminal proceedings.

## IV. CONCLUSION

Public records are now more public in the state of Ohio than they

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154. *Ohio Investigative series identifies 30 inmates in need of DNA tests*, INNOCENCEPROJECT (January 31, 2008), <https://www.innocenceproject.org/ohio-investigative-series-identifies-30-inmates-in-need-of-dna-tests/>.

have been since 1993. *State ex rel. Caster v. City of Columbus* represents an expansive shift in Ohio public records law. Although *State ex rel. Steckman v. Jackson* was a seemingly sensible way to deal with issues plaguing the trial courts, it led to a progeny of cases that limited defendants' abilities to meaningfully pursue relief on appeal.

The passage of the 2010 amendments of Crim.R. 16 created a more equitable discovery process at the trial level, and *State ex rel. Caster* did not set out to disturb that newly found equity. Instead, it opened files at the appellate process to act as a necessary check on the State. Though the effects of the decision are yet to be fully seen, the case will, in theory, lead to more effective appellate assistance and a better pursuit towards justice.