

In the Supreme Court of Ohio

THE STATE OF OHIO,	:	
	:	Case No. _____
Plaintiff,	:	
	:	On Appeal from the Eighth Appellate
v.	:	District, Cuyahoga County, Ohio
	:	Case No. CA-24-114031
JAN KRIWINSKY,	:	
	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF VICTIM-APPELLANT JOHN DOE

VORYS, SATER, SEYMOUR AND PEASE LLP	Jillian J. Piteo
James A. Wilson (0030704)	Assistant Prosecuting Attorney
<i>Counsel of Record</i>	The Justice Center
John J. Kulewicz (0008376)	1200 Ontario Street
52 East Gay Street, P.O. Box 1008	Cleveland, Ohio 44113
Columbus, OH 43216-1008	Telephone: (216) 443-7800
Telephone: (614) 464-5606	Facsimile: (216) 698-2270
Facsimile: (614) 719-5039	jpiteo@prosecutor.cuyahogacounty.us
jawilson@vorys.com	<i>Attorney for the State of Ohio</i>
Karey E. Werner (0095685)	Larry W. Zukerman
200 Public Square, Suite 1400	S. Michael Lear
Cleveland, OH 44114	Adam M. Brown
Telephone: (216) 479-6150	Zukerman, Lear & Murray, Co., L.P.A.
Facsimile: (216) 479-6150	3912 Prospect Ave., East
kewerner@vorys.com	Cleveland, OH 44115
<i>Counsel for John Doe</i>	Telephone: (216) 696-8800
	Facsimile: (216) 696-8800
	lwz@zukerman-law.com
	sml@zukerman-law.com
	amb@zukerman-law.com

Marisa T. Darden (0098583)
Allyson Cady (0098830)
Benesch, Friedlander, Coplan &
Aronoff, LLP
127 Public Square
Suite 4900
Cleveland, OH 44114
Telephone: (216) 363-4500
Facsimile: (216) 363-4588
mdarden@beneschlaw.com
acady@beneschlaw.com

Rachel L. Hampton (0104099)
Benesch, Friedlander, Coplan &
Aronoff, LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215
Telephone: (614) 223-9322
Facsimile: (614) 223-9330
rhampton@beneschlaw.com

Attorneys for Defendant

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I. This Case Presents Two Issues of Substantial Constitutional Significance or of Public or Great General Interest.

This case arises from the Defendant's sexual abuse of John Doe, and the failure of the courts below to protect his state and federal constitutional rights as a citizen and crime victim. Fundamentally, it raises the question of whether a victim of crime forfeits the rights every other citizen of Ohio holds when faced with a subpoena in a criminal case. The voters of Ohio said no to this question in enacting Article 1, Section 10a of the Ohio Constitution. The Court has the opportunity, in accepting this case, to affirm the unambiguous will of Ohio voters that victims of crime do not become the victims of the judicial system. The Court should exercise jurisdiction over this appeal because it presents two questions of substantial constitutional significance and of public or great general interest: whether a crime victim loses all right to the privacy of his or her cell phone by reporting the crime to law enforcement and whether victims of crime have less rights than every other Ohio citizen in challenging a subpoena for pretrial discovery under Crim.R. 17.

A. May the victim of a crime be required to turn over a forensic image of the entirety of his or her cell phone to the State at the demand of a criminal defendant?

The *first* issue of substantial constitutional significance or of public or great general interest to Ohio citizens is whether a victim of crime can have the entirety of his or her cell phone seized and turned over to the state without a finding of probable cause or any balancing of the victim's privacy rights against a defendant's right to confront his accuser.

1. Article I, Section 14 of the Ohio Constitution and the Fourth Amendment to the United States Constitution protect victims of crime, and all Ohio citizens, from the seizure of the content of their cell phones absent a finding of probable cause.

All Ohioans, and particularly the victims of crime such as John Doe, have a constitutionally protected interest in the privacy of their cell phones, a right recognized by the United States Supreme Court and this Court as protected by the Fourth Amendment to the United States

Constitution and Article I, Section 14 of the Ohio Constitution. The Eighth District conflated Doe's consent to the imaging of his phone to preserve potential evidence (which was expressly conditioned on his retaining exclusive possession of that evidence) with consent to the seizure of the content of his cell phone without probable cause. See J. Entry & Op. ¶ 22. In doing so, the Eighth District created an exception to this Court's and the United States Supreme Court's rulings regarding the privacy of cell phone holders.

2. Article I, Section 10a of the Ohio Constitution protects victims of crime from the seizure of the content of their cell phones absent a finding of probable cause.

When Ohio's voters resoundingly approved Ohio Constitution, Article I, Section 10a in the November 2017 election, they enshrined the rule that the rights of crime victims must be no less vigorously enforced than those of criminal defendants. In its Journal Entry, the Eighth District treated Doe as having less rights than the Defendant charged with his sexual assault, who is not and cannot be subject (absent a warrant based on probable cause) to having a forensic image of his cell phone seized and turned over to the State. Such a rule is in direct contravention of Article I, Section 10a(A). The decision of the Eighth District not only ignores the express language of the Ohio Constitution, but perversely incentivizes victims to remain silent if sexually assaulted, by causing their reporting of such a crime to put at risk the victim's fundamental right to personal privacy. As such, this appeal plainly presents an issue of substantial constitutional significance or of public or great general interest.

3. Ohio citizens should be accorded the same privacy protections with respect to the content of their cell phones as the citizens of every other state that has considered this issue.

Ohio has a strong interest in ensuring that victims of crime in this state have no less right to protection of privacy than do crime victims in other states. The Eighth District's Journal Entry denies Ohio crime victims the rights victims in other states have. Every other state to have

considered the issue has rejected the view of the Eighth District. Preventing Ohio from standing alone in failing to protect the privacy of its citizens, and particularly crime victims, from the seizure of their cell phone by their assailant presents an issue of substantial constitutional significance or of public or great general interest.

B. Is a victim of a crime entitled to an evidentiary hearing before a court can order the seizure of his or her cell phone in response to a subpoena issued under Crim.R. 17(C)?

The *second* issue relates to whether crime victims have less rights than any other Ohio citizen when a criminal defendant seeks to seize purported evidence through Crim.R. 17(C).

1. R.C. 2930.071 should be interpreted to give victims of crime at least the same protections as every other Ohio resident has under *In re Subpoena Duces Tecum Served upon Potts*, 2003-Ohio-5234.

The Eighth District held in its Journal Entry that “R.C. 2930.071(A)(2)(b) states: ‘[T]he court shall conduct a hearing....’ It does not state that the trial court shall conduct an evidentiary hearing” (J. Entry & Op. ¶ 23). This Court’s holding in *In re Subpoena Duces Tecum Served upon Potts*, 2003-Ohio-5234, syllabus, granted every subject of a subpoena under Crim.R. 17(C) the right to an evidentiary hearing before the enforcement of any subpoena seeking documentary evidence. Notwithstanding that (a) R.C. 2930.071 legislatively incorporates the prerequisites in *Potts* in mirroring the Court’s holding in the statutory language *and* (b) that the challenge to the subpoena in question was made not only under R.C. 2930.071, but under *Potts* as well, the Eighth District erred in rejecting the requirement of an evidentiary hearing in ordering production of a forensic image of the cell phone to the State. In doing so, the Eighth District returned victims of crime to the status of second-class citizens, in exact opposition to the intent of Ohio voters.

2. Article I, Section 10a of the Ohio Constitution protects crime victims from legislative restriction on their existing rights as Ohio residents.

R.C. 2930.071 must be interpreted to carry out the intention of Article 1, Section 10a of

the Ohio Constitution. Further, pursuant to R.C. 2930.011, “[n]othing in this chapter shall prevent a victim or the victim's other lawful representative from asserting the rights enumerated in Ohio Constitution, Article I, Section 10a.” Denying a crime victim the right to an evidentiary hearing when faced with a subpoena seeking a full copy of the content of his or her cell phone strips those individuals of a right that every other Ohioan has. A public or great general interest exists in rejecting an interpretation of R.C. 2930.071 that strips victims of their rights.

* * * *

Article I, Section 10a of the Ohio Constitution not only protects the rights of victims within Ohio’s criminal justice system, but also promotes the fearless reporting of crimes by giving victims the assurance they will not be treated by Ohio courts like the criminal. A public or great general interest exists in protecting not just victims, but society, by enforcing those rights. Acceptance of this appeal, and reversal of the Eighth District’s Journal Entry is necessary to protect that interest.

II. Statement of Facts.

On December 29, 2023, Defendant Jan Kriwinsky was indicted for sexually assaulting John Doe, when he was fifteen, during a November 14, 2023 medical appointment. R. 2. Shortly thereafter, Doe took pictures of the injuries to his penis caused by Defendant’s assault and turned copies over to the police at their request. Since then, Doe has faced a different assault: an assault launched by Defendant on the privacy of his cell phone by repeated demands that the entire forensic image of that phone be turned over. First, Defendant sought an *ex parte* order for the cell phone in a civil lawsuit against Doe but was rejected. Then, in the administrative proceedings arising from Defendant’s suspension from the practice of medicine, he again sought the phone for copying, but was rejected. Only in Defendants’ criminal case, where Doe’s rights are under R.C. 2930 and Ohio Constitution, Article I, Section 10a, has Defendant’s demand for unlimited access to the phone gained traction. The civil court and the State Medical Board recognized Defendant’s

demand for what it was—an improper fishing expedition designed to intimidate a principal witness against Defendant. Only the criminal court, in the proceedings leading to this appeal, sanctioned this assault on the victim of Defendant’s crimes.

III. Statement of the Case

A. Kriwinsky’s Indictment for Sexual Assault upon John Doe.

On December 29, 2023, Defendant Kriwinsky was indicted on charges of rape, sexual battery, and gross sexual imposition of Patient 1 (Appellant John Doe) and gross sexual imposition of another minor patient, who was less than thirteen years old, by the Cuyahoga County Court of Common Pleas. See R. 1, Indictment. The indictment triggered the protections granted Doe as a crime victim under Ohio Const., art. I, § 10a and R.C. Chapter 2930.

B. Defendant Abused Crim.R. 17 by Issuing 18 Subpoenas to Harass His Victim.

Between January 8 and February 9, 2024, Defendant issued 18 subpoenas demanding records relating to virtually every aspect of his victim’s life, and that of his victim’s family. R. 14, 15, 16, 26, 29, 31, 32. Among this barrage were subpoenas directed to a cell phone Defendant apparently thought belongs to his victim but did not. R. 15. Doe moved to quash each subpoena R. 14, 15, 16, 26, 29, 31, 32. None of the motions were heard within ten days of filing as required by R.C. 2930.19(A)(1), but rather, after several delays, were not heard until April 18. R. 24, 37, 43. On the eve of the hearing, Defendant filed a motion to compel the State to produce Doe’s cell phone, even though the State did not possess it. R. 44.

C. The Court of Common Pleas’ “Evidentiary” Hearing.

On April 18, the trial court held a perfunctory “hearing” regarding the multitude of subpoenas Defendant issued. Defendant did not claim that any of these files showed anything about Doe’s appointment with him on November 14, 2023, or the sexual assault and battery that

occurred at that appointment. Most of the hearing consisted of argument by Defendant's counsel during which he purported to read from medical records related to pharmaceuticals prescribed to Doe several years prior to Defendant's sexual assault upon him, and the argument that these records might be used to impeach Doe's testimony at trial. *See, e.g.*, R. 45, April 18, 2024 Partial Tr. of Proceedings 18, 30-40 ("Partial Tr."). The trial court, over Doe's objections, did not require Defendant to present admissible evidence, nor was any evidence admitted by the trial court. Partial Tr. 19-20, 52, 64-65, 72.

Regarding Defendant's request for forensic imaging of Doe's cell phone, Defendant identified "three precise things" that he sought from the phone: (1) metadata regarding two videos that Doe took showing trauma to his penis; (2) an Instagram post from the date of the incident; and (3) Google searches that Doe did around the time of the incident. Partial Tr. 22-25, 27, 58-59. Doe's counsel was clear at the hearing that Defendant's request for an imaging of Doe's cell phone implicates the Fourth Amendment and that John Doe objected to the State retaining a complete imaging of Doe's cell phone. *See* Partial Tr. pp. 10, 60-62. In an effort to avoid unnecessary disputes, Doe was willing to allow his cell phone to be imaged, and the three items that Defendant argued were relevant to his defense to be provided to Defendant, with the remainder of the imaging returned to Doe. He specifically stated that he was not agreeing to have the cell phone produced to the State but was only agreeing to have the phone imaged as long as the copy of any materials he had not agreed to produce was retained by him. *Id.* at 62. The Court did not discuss or resolve the issue of who would retain the copy of the cell phone at the hearing, but rather directed the parties to submit a judgment entry for review. *Id.* at 73.

D. The Common Pleas Court Entry of Kriwinsky's Proposed Judgment Entry in Disregard of John Doe's Limited Agreement to Allow Inspection and Copying of the Cell Phone.

Notwithstanding the fact that Doe stated at the hearing that Defendant's request for imaging

of cell phone implicates the Fourth Amendment and that he objected to the State retaining an image of the cell phone, Defendant submitted a journal entry to the trial court requiring Doe to submit his cell phone for forensic imaging, and for that image to be produced to the prosecuting attorney. R. 47. Doe objected to that proposed journal entry. R. 48. Another pretrial was held on May 9, 2024, but no record was made of the Court's meeting with counsel. R. 62. The same day, Defendant submitted a modified journal entry still requiring that the mirror imaging be produced to the prosecuting attorney. R. 63. Another pretrial conference was held on May 30, at which this case was set for trial on October 28, 2024. R. 68. On June 7, 2024, the trial court entered the journal entry that was proposed by Defendant on April 26, 2024 (R. 47) regarding the cell phone requiring that the forensic imaging of the phone be produced to the prosecuting attorney. R. 73. Doe filed an appeal to the Eighth District on June 10, 2024. R. 76.

E. The Eighth District Compounds the Trial Courts Errors.

In a Journal Entry and Opinion issued on July 15, 2024, the Eight District compounded the errors of the trial court with confusion regarding the record. First, the Court held that "R.C. 2930.071(A)(2)(b) states: '[T]he court shall conduct a hearing....' It does not state that the trial court shall conduct an evidentiary hearing" (J. Entry & Op. ¶ 23). The Court compounded that error by mistakenly finding that Doe's trial counsel conceded that the trial court did conduct an evidentiary hearing, notwithstanding the clear record below that the statement on which the Court based that finding was an objection to the fact that no evidence was admitted at the proceeding. Second, the Court conflated Doe's consent to imaging of his phone for purposes of preserving potential evidence (while retaining exclusive possession of that evidence) with consent to seizure of the content of his cell phone without probable cause. *See* J. Entry & Op. ¶ 22. In doing so, the Eighth District ignored the holdings of this Court, the United States Supreme Court, and the courts of other states that have addressed this issue and failed to protect Doe's rights under the Fourth

Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

Doe sought reconsideration on July 19, 2024, pursuant to Rule 26(A)(1) of the Ohio Rules of Appellate Procedure, asserting that the court erred both in concluding that he was not entitled to an evidentiary hearing and in conflating consent to preservation of evidence with consent to its seizure. The Eighth District denied reconsideration in a one-line entry on August 1, 2024.

IV. Argument in Support of Propositions of Law

This case reduces itself to two key propositions of law that the Court should adopt in order to insure that Crim.R. 17(C) is not used to subject Ohio crime victims to unreasonable searches and seizures, to preserve the intent of Ohio voters in adopting Article I, § 10a into the Ohio Constitution, and to give crime victims the same rights as other Ohioans in contesting a subpoena directed to them under Crim.R. 17(C).

Proposition of Law No. 1: The victim of a crime cannot be required to turn over a forensic image of the entirety of his or her cell phone to the State merely at the demand of a criminal defendant.

The Court should establish that the victim of a crime does not lose his or her right to the privacy of his or her cell phone simply by agreeing that a forensic image of the phone be made in order to insure that it is preserved.

A. The Eighth District erred in failing to apply Article I, Section 14 of the Ohio Constitution and the Fourth Amendment to the United States Constitution to protect a crime victim, and all Ohioans, from the seizure of the content of their cell phones.

Cell phones are entitled to the privacy protections that the federal and Ohio constitutions provide against unlawful searches and seizures. Indeed, the U.S. Supreme Court has found that the right to privacy in one's cell phone is even broader than the right to privacy in one's home:

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the

protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Riley v. California, 573 U.S. 373, 403 (2014); *see also State v. Smith*, 2009-Ohio-6426, ¶ 24 (holding that “because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone’s contents incident to a lawful arrest without first obtaining a warrant”); *State v. Deuble*, 2020-Ohio-3970, ¶ 32 (8th Dist.) (“Similar to the Ohio Supreme Court’s holding in *Smith*, the United States Supreme Court determined that cell phone owners have a heightened privacy interest in the data stored on their devices.”).

The Eighth District, rather than address the important issue of the protection of victims from unlawful searches and seizures, conflated an agreement to preserve evidence with satisfaction of the prerequisites to seizure of evidence by the State. Tr. at 60-62. Moreover, the Eighth District further ignored that a citizen may limit the scope of a consent search and may revoke or countermand his consent during a search. *See Florida v. Jimeno*, 500 U.S. 248, 252 (1991); *State v. Ferrell*, 2017-Ohio-9341, ¶¶ 20-21 (11th Dist.); *State v. Brooks*, 2012-Ohio-646, ¶18 (11th Dist.); *State v. Rojas*, 92 Ohio App. 3d 336, 339 (8th Dist.1993). Doe exercised his right to revoke consent to the State’s seizure of the content of his cell phone.

Indeed, the Eighth District ignored its own precedent in failing to order the trial court to balance the Defendant’s proof of his need for access to the cell phone with Doe’s constitutional right to privacy. The same court required precisely this type of balancing in *State v. Counts*, 2022-Ohio-3666, a case in which the defendant sought an order to inspect a victim’s home. Rejecting the request, the court found that under Ohio Const., art. I, §10a, the lower court had to balance the defendant’s need for inspection with the fact that the victim’s right to privacy in her home was protected by the Fourth Amendment right to be free from unreasonable searches and seizures. *Id.*

¶¶ 38-41. This Court should apply the same test to demands for portions of a victim’s private cell phone.

B. The Eighth District erred in failing to apply Article I, Section 10a of the Ohio Constitution to give the victim of a crime the same right against the seizure of the content of his cell phones as the Defendant.

The trial court should not have imposed a requirement upon Defendant to allow the State to image and retain Defendant’s cell phone. Doe is entitled to the same protection. Indeed, Article I, Section 10a(A) of the Ohio Constitution specifically provides that “a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused.” Among those rights, is the right to “refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.” *Id.* at §10a(A)(6). The rulings below ignored this constitutional right of Doe.

This Court, in an opinion written by then-Justice Kennedy, noted:

We agree that the Fourth Amendment does not require a search warrant to specify restrictive search protocols, but we also recognize that the Fourth Amendment does prohibit a “sweeping comprehensive search of a computer’s hard drive.”

State v. Castagnola, 2015-Ohio-1565, ¶ 88, quoting *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001). The warrant at issue in *Castagnola* broadly listed the items subject to seizure as including “[r]ecords and documents stored on computers” with no “limitation on what records and documents were to be searched for in Castagnola’s computer.” *Id.* at ¶¶ 76-77. As in *Riley* and *Smith*, this Court recognized, in the words of *Riley*, that cell phones “hold for many Americans ‘the privacies of life.’” This Court insisted on a finding of probable cause to search specific portions of computers and cell phones of defendants, rather than permit a blanket seizure of such electronics. *Castagnola*, ¶ 88. Article I, Section 10a of the Ohio Constitution requires that the same standard be applied to Doe’s cell phone.

C. The Eighth District erred in failing to ensure that Ohioans are accorded the same privacy protections with respect to the content of their cell phones as the residents of every other state to consider this issue.

The Eighth District's Journal Entry also places Ohio squarely at odds with the other states that have addressed the protection of cell phone information. Other states that have addressed this issue have uniformly quashed or limited broad subpoenas for cell phones or similar content from electronic devices. *See State v. Yildirim*, 946 N.W.2d 860, 868-69 (Minn. 2020) (reversing a district court's decision to compel a subpoena of a victim's cell phone because the court had failed to conduct a totality of the circumstances test when determining if the subpoena was unreasonable); *In re State*, 599 S.W.3d 577, 600 (Tex. App. 2020) (finding that a defendant does not "have the authority to conduct an unsupervised search through a complaining witness's cell phone and its data" and that a "complaining witness has the right to privacy" with respect to their cell phone); *R.C. v. Chilcoff*, 2020 Mass. LEXIS 851, *11-14, 17-18 (Mass. S. Jud. Ct. Dec. 15, 2020) (collecting authorities and limiting subpoena to a 1-day period); *Petition of State of New Hampshire*, 169 N.H. 340, 342, 147 A.3d 860 (N.H. S. Ct. 2016) (issuing an extraordinary writ quashing an order that the state gain access to a witness's cell phone based on the finding that "the trial court cannot compel the State to obtain evidence for the defendant."); *People v. Spykstra*, 234 P.3d 662, 671 (Colo. 2010) (finding, in reviewing a subpoena for a personal computer: "Here, the trial court gave the defendant unfettered access to every aspect of the parents' personal lives that is stored on their computer. This cannot be condoned."). *See also United States v. Murray*, 2019 U.S. Dist. LEXIS 75676, *12-*20 (D. Mass May 6, 2019); *United States v. Delay*, 2017 U.S. Dist. LEXIS 162684, *4 (W.D. Wash. Oct. 2, 2017) (denying request for Fed. R. Crim. Pro. 17 subpoena to obtain records and documents from social media service associated with victim witness's email addresses, including her communications with other users of service where defendant's request would sweep in great deal of irrelevant or inadmissible information). This

appeal represents an opportunity to remedy the Eighth District's anomalous rule that denies Ohioans the protections that individuals in other states enjoy from intrusion by criminal defendants into the privacy of their cell phones.

Proposition of Law No. 2: A crime victim is entitled to an evidentiary hearing before a court can order the seizure of his or her cell phone in response to a subpoena issued under Crim.R. 17(C).

The *second* issue relates to whether crime victims have less rights than any other Ohioan when a criminal defendant seeks to seize purported evidence through Crim.R. 17(C).

A. The Eighth District erred in interpreting R.C. 2930.071 to give crime victims less protection than every Ohioan has under *Potts*.

A central underpinning of the Journal Entry and Opinion is the assertion that R.C. 2930.071 does not require the trial court to hold an evidentiary hearing. J. Entry & Op. at ¶ 23. This holding gives crime victims less rights than every other Ohioan when faced with a subpoena under Crim.R. 17(C). In so finding, the Eighth District ignored that R.C. 2930.071 mirrors the specific requirements of *In re Subpoena Duces Tecum Served upon Potts*, 2003-Ohio-5234, which mandates that a defendant opposing a motion to quash bear the burden of showing at an evidentiary hearing that the subpoena is not unreasonable and oppressive. Further, the Eighth District ignored the fact that R.C. 2930.071 is part of a legislative enactment intended to expand the rights of victims, not restrict them. The Court compounded this error of law by asserting that an objection by John Doe's counsel that the trial court was not conducting an evidentiary hearing constituted an admission that the hearing was an evidentiary hearing. The record below clearly belies such a finding. See Partial Tr. at 19.

That *Potts* requires an evidentiary hearing is not subject to serious dispute. The syllabus of *Potts* itself makes that clear: "Pursuant to Crim.R. 17(C), when deciding a motion to quash a subpoena duces tecum requesting the production of documents prior to trial, a trial court *shall hold*

an evidentiary hearing.” (Emphasis added.) 2003-Ohio-5234, paragraph one of the syllabus. *See also id.* at ¶¶ 14-15 (“the record is clear that although the *Nixon* test was conducted by the trial court, it did not occur during a separate evidentiary hearing”). Courts of appeals have reaffirmed this requirement. *See Cincinnati v. Neff*, 2014-Ohio-2026, ¶ 9 (1st Dist.) (holding that, although the trial court “conducted oral argument with respect to the subpoena, it did not receive sworn testimony or other material of evidentiary value,” and so did not meet the requirements of an evidentiary hearing); *State v. Baker*, 2010-Ohio-1289, ¶ 21 (12th Dist.) (the *Potts* decision expressly mandated that a trial court conduct a *separate* evidentiary hearing to determine whether a subpoena duces tecum is unreasonable or oppressive under *Nixon*) (emphasis in original). Given that John Doe’s motions to quash specifically argued that the subpoenas issued were unreasonable under Crim.R. 17(C) and *Potts*, the Court of Appeals’ conclusion that no evidentiary hearing was required flies in the face of precedent from this Court and the other Ohio Courts of Appeals.¹

The Eight District holding necessarily assumes that R.C. 2930.071 gives victims less rights when faced with a subpoena under Crim.R. 17(C) than other Ohioans. However, it is incontrovertible that R.C. 2930.071 is modeled on this Court’s holding in *Potts*. *Potts*, in its syllabus, provides:

At the hearing, which may be held in camera, the proponent of the subpoena must demonstrate that the subpoena is not unreasonable or oppressive by showing “(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’”

¹ Indeed, the ruling is inconsistent with the precedent of the Eighth District itself. *See Parma v. Schoonover*, 2014-Ohio-400, ¶ 14 (8th Dist.) (non-party department of health appealed denial of its motion to quash subpoena, because there was no hearing or *Nixon* analysis, matter reversed); *City of Olmsted Falls v. Bowman*, 2014-Ohio-109, ¶ 11 (8th Dist.).

In nearly verbatim language, R.C. 2930.071(A)(2)(b)(i)-(iv) provides:

(b) Upon the filing of a motion to quash, the court shall conduct a hearing in which the proponent of the subpoena shall **prove** all of the following:

(i) That the documents are evidentiary and relevant;

(ii) That the documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence;

(iii) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial;

(iv) That the application is made in good faith and is not a violation of Ohio Rules of Criminal Procedure.

(Emphasis added). The Eighth District’s conclusion that an evidentiary hearing is not required is completely inconsistent with (1) the virtually identical language of the statute and *Potts*; and (2) the General Assembly’s use of the word “prove” in describing the proponent’s burden.

In short, the conclusion that no evidentiary hearing was required flies in the face of controlling Ohio Supreme Court precedent and Doe’s rights under the Ohio Constitution. Courts have a duty to interpret the law in a way that avoids unreasonable and absurd results. *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, ¶ 58 (citing *State ex rel. Essig v. Blackwell*, 2004-Ohio-5586, ¶ 28). Here, if Doe had not claimed his rights as a victim of Defendant’s crimes, it cannot be doubted that he would have been entitled to an evidentiary hearing on the demand that his phone be imaged and provided to the State. It is unreasonable and absurd for the Eighth District to have held that claiming his rights as a victim stripped Doe of his rights under *Potts*.

B. The Eighth District erred in failing to find that Article I, Section 10a of the Ohio Constitution protects crime victims from legislative restriction on their existing rights as Ohioans.

Just as importantly, it is utterly incongruous with the language and intention of Ohio Constitution Article I, Section 10a, to conclude that a victim is not entitled to an evidentiary

hearing on a subpoena for his or her records, while any other recipient of a criminal subpoena is entitled to an evidentiary hearing. Indeed, pursuant to R.C. 2930.011, “[n]othing in this chapter shall prevent a victim or the victim's other lawful representative from asserting the rights enumerated in Ohio Constitution, Article I, Section 10a.” Article I, Section 10a(A) specifically grants crime victims rights inconsistent with assertion that they have no right to an evidentiary hearing prior to an order compelling them to turn an image of their cell phone over to the State in response to a Defendant’s discovery request: “To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused: ... (6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.”² Denying a crime victim the right to an evidentiary hearing when faced with a subpoena seeking a full copy of the content of his or her cell phone strips those individuals of a right every other Ohioan has. A public or great general interest exists in rejecting an interpretation of R.C. 2930.071 that strips crime victims of their constitutional right.

V. Conclusion

The Court should accept jurisdiction of this case of substantial constitutional significance or of public or great general interest.

² Article I, Section 10 of the Ohio Constitution obviously does not give a criminal defendant the right to pretrial discovery, particularly one in which the subject of a subpoena is denied an evidentiary hearing. See *United States v. Rand*, 835 F.3d 451, 463 (4th Cir. 2016) (“The right to defend oneself does not extend to using the power of the Court to compel third parties to provide information that may not even be admissible at trial or at a hearing or that is merely ‘investigatory.’”) (quoting *United States v. Al-Amin*, 2013 U.S. Dist. LEXIS 104177, 2013 WL 3865079, at *8 (E.D. Tenn. July 25, 2013)).

Respectfully submitted,

Vorys, Sater, Seymour and Pease LLP

/s/ James A. Wilson

James A. Wilson (0030704)

Counsel of Record

John J. Kulewicz (0008376)

52 East Gay Street, P.O. Box 1008

Columbus, OH 43216-1008

Telephone: (614) 464-5606

Facsimile: (614) 719-5039

jawilson@vorys.com

Karey E. Werner (0095685)

200 Public Square, Suite 1400

Cleveland, OH 44114

Telephone: (216) 479-6100

Facsimile: (216) 479-6060

kewerner@vorys.com

Counsel for John Doe

CERTIFICATE OF SERVICE

I served a true and correct copy of this Memorandum in Support of Jurisdiction by electronic mail upon the following counsel on August 14, 2024:

Jillian J. Piteo
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
jpiteo@prosecutor.cuyahogacounty.us
Attorney for the State of Ohio

Larry W. Zukerman
S. Michael Lear
Adam M. Brown
Zukerman, Lear & Murray, Co., L.P.A.
3912 Prospect Ave., East
Cleveland, OH 44115
lwz@zukerman-law.com
sml@zukerman-law.com
amb@zukerman-law.com

Marisa T. Darden
Allyson Cady
Benesch, Friedlander, Coplan &
Aronoff, LLP
127 Public Square
Suite 4900
Cleveland, OH 44114
mdarden@beneschlaw.com
acady@beneschlaw.com

Rachel L. Hampton
Benesch, Friedlander, Coplan &
Aronoff, LLP
41 South High Street, Suite 2600
Columbus, Ohio 43215
rhampton@beneschlaw.com

Attorneys for Defendant

/s/ James A. Wilson

James A. Wilson (0030704)