May 24, 2017

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

SYLLABUS: 2017-016

1. Exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that was seized pursuant to a search warrant or was otherwise in the custody of a law enforcement agency shall be retained at the conclusion of a criminal trial by the court of common pleas or an appropriate law enforcement agency.

2. Exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that was not seized pursuant to a search warrant or was not otherwise in the custody of a law enforcement agency shall be retained at the conclusion of a criminal trial by the court of common pleas, either in the possession of the court reporter or the clerk of the court of common pleas.

3. Once an appeal and a transcript have been filed, exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that were in the possession of the court of common pleas shall be retained by the clerk of the court of appeals, in accordance with Ohio R. App. P. 10.

4. A court, prosecuting attorney, or law enforcement agency that retains exhibits that consist of biological evidence or evidence likely to contain biological material shall secure those exhibits in accordance with R.C. 2933.82. (2005 Op. Att'y Gen. No. 2005-009, syllabus, paragraphs 1 and 2, overruled as a result of statutory amendment.)

5. A local rule of practice of a court of common pleas that requires a party to retain in his possession exhibits he has offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material and that declares that the court's admission of those exhibits into evidence shall not be construed as taking custody, possession, or control of the evidence

impermissibly affects a substantive right and conflicts with statutes enacted by the General Assembly and rules promulgated by the Ohio Supreme Court.

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OPINION NO. 2017-016

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

Dear Prosecutor Will:

You have requested an opinion about the authority of a court of common pleas to adopt a local rule of practice that addresses the custody or possession of exhibits that have been marked and admitted into evidence by a court during a hearing or trial. You have explained that the Lorain County Court of Common Pleas adopted Local Rule 2(IV) ("Local Rule 2(IV)"), which provides, in pertinent part:

> Evidence which is not admitted or which has not been specifically identified herein shall be retained and kept by the party, person, agency, office or department offering such evidence pursuant to all applicable rules governing the retention of such evidence.
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> ….
>
> Additionally, the Court's receipt and admission of other types of evidence shall not be construed as taking possession, custody or control of said evidence. Possession, custody, or control at all times shall remain with the offering party, person, agency, office or department.[1] (Footnote added.)

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[1] In its entirety, paragraph IV of Local Rule 2 of the Lorain County Court of Common Pleas provides:

> The following evidentiary materials which have been proffered and admitted into evidence will be retained by the Court in accordance with the appropriate period of retention:
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> - papers, documents, photographs, diagrams, blueprints (all must be 8 ½ x 11 in size);
> - CDs, DVDs.
>
> Evidence which is not admitted or which has not been specifically identified herein shall be retained and kept by the party, person, agency, office or department

In essence, the pertinent part of Local Rule 2(IV) requires the party offering an exhibit that consists of physical evidence[2] to keep the exhibit at the conclusion of the trial, regardless of whether the exhibit was or was not admitted into evidence by the court. Local Rule 2(IV) also declares that even though the court has admitted an exhibit consisting of physical evidence into evidence, the court shall not be deemed to have taken possession of the evidence.

You have asked the following questions:

1. Does Lorain County Court of Common Pleas Loc. R. 2 conflict with Ohio's public records law or other legal authority?

2. Who is the appropriate custodian or holder of evidence which has been marked and admitted during court proceedings (both trial and appellate stages)?

3. Does a court of common pleas have authority to order[3] admitted evidence held by someone other than the person identified in the second question? (Footnote added.)

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offering such evidence pursuant to all applicable rules governing the retention of such evidence.

All exhibits must conform to the standards for retention set forth in this rule. By way of example, oversized demonstrative exhibits, such as presentation boards, shall be substituted with an exact duplicate copy 8 ½ x 11 in size.

Additionally, the Court's receipt and admission of other types of evidence shall not be construed as taking possession, custody or control of said evidence. Possession, custody, or control at all times shall remain with the offering party, person, agency, office or department.

Upon the expiration of the appropriate period of retention, evidence or records in the custody of the Clerk and/or Court may be destroyed after notice and in accordance with the relevant rules.

[2] For the purpose of this opinion, we use the term "physical evidence" to refer to evidence that is a physical object and that is not documentary evidence or evidence that is recorded on an electronic medium such as a CD or DVD. Examples of "physical evidence" are clothing, weapons, substances, or equipment. *See generally Black's Law Dictionary* 677 (10th ed. 2014) ("real evidence" is "[p]hysical evidence (such as clothing or a knife wound) that itself plays a direct part in the incident in question").

[3] A member of your office clarified that this question contemplates that the authority to "order" admitted evidence to be held by someone is through the application of Local Rule 2(IV), rather than through a direct order against a specific party in a case.

4. If a court of common pleas has authority to order evidence held by someone other than it or the clerk, what recourse is there against that third party if they fail to maintain the evidence or it is lost, damaged, or otherwise destroyed?

As a result of conversations with members of your office, we understand that the physical evidence with which you are concerned are exhibits consisting of biological evidence or evidence likely to contain biological material that have been marked and offered for admission into evidence in criminal trials. Accordingly, we address your questions with only that type of physical evidence in mind.[4]

Authority to Promulgate a Local Rule of Practice

A court of common pleas may adopt a local rule of practice to address matters of procedure that do not affect substantive rights. 2005 Op. Att'y Gen. No. 2005-034, at 2-356 ("[l]ocal rules of a court of common pleas are limited to procedural matters, and may not affect substantive rights"); *see also Century Nat'l Bank v. Hines*, 4th Dist. No. 13CA35, 2014-Ohio-3901, at ¶ 25 ("trial courts have wide latitude when it comes to following local rules of court because such rules are generally procedural in nature and do not involve substantive principles of law"); *In re Estate of Robertson*, 159 Ohio App. 3d 297, 2004-Ohio-6509, 823 N.E.2d 904, at ¶ 46 ("the Ohio Constitution prohibits the Ohio Supreme Court (and by extension, courts subservient to the Supreme Court) from enacting rules that 'abridge, enlarge, or modify any substantive right'" (quoting Ohio Const. art. IV, § 5(B)); *Patterson v. Loveless*, 2d Dist. No. 18615, 2001 WL 524372, at *2 (May 18, 2001) ("[l]ocal rules of court are procedural, not substantive. They may not be employed to determine substantive rights"); *Woloch v. Foster*, 98 Ohio App. 3d 806, 810, 649 N.E.2d 918 (Miami County 1994).

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[4] In this opinion, when we use the term "biological evidence," we are referring to the same type of evidence that is set forth in R.C. 2933.82(A)(1)'s definition of "biological evidence." R.C. 2933.82(A)(1) provides:

> (a) "Biological evidence" means any of the following:
> (i) The contents of a sexual assault examination kit;
> (ii) Any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.
> (b) The definition of "biological evidence" set forth in [R.C. 2933.82(A)(1)(a)] applies whether the material in question is cataloged separately, such as on a slide or swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups or containers, or cigarettes.

In addition, a court's local rule may not conflict with the Ohio Constitution, any valid statute, or a rule promulgated by the Ohio Supreme Court. *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St. 3d 30, 33, 485 N.E.2d 706 (1985) ("[a] local rule of court cannot prevail when … it is inconsistent with the express requirements of a statute"); *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967) (syllabus, paragraph 3) ("[a] Common Pleas Court has inherent power to make reasonable rules regulating the practice and procedure in such court where such rules do not conflict with the Constitution or with any valid statute"); *Krupansky v. Pascual*, 27 Ohio App. 3d 90, 92, 499 N.E.2d 899 (Lorain County 1985) ("while the courts of common pleas have the inherent power to make reasonable rules regulating practice and procedure in those courts, these rules must not be in conflict with the statutes"); 2005 Op. Att'y Gen. No. 2005-034, at 2-356; 2005 Op. Att'y Gen. No. 2005-014, at 2-137; *see also* Ohio Const. art. IV, § 5(A)(1) ("the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court"); Ohio Const. art. IV, § 5(B) ("[c]ourts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court"); Ohio Sup. R. 5(A)(1) ("[l]ocal rules of practice shall not be inconsistent with rules promulgated by the Supreme Court"). When a local rule and a statute conflict, the statute prevails. 2005 Op. Att'y Gen. No. 2005-014, at 2-137.

Thus, a local rule of practice promulgated by a court of common pleas will control, provided that it does not conflict with the Ohio Constitution, a statute enacted by the General Assembly, or a rule promulgated by the Ohio Supreme Court, and does not restrict or affect a substantive right.

Statutes and Rules Governing Retention of Biological Evidence

Your first question, as we understand it, asks whether Local Rule 2(IV) conflicts with the public records law or other legal authority that addresses the retention of exhibits consisting of biological evidence in criminal trials. Your second question asks who is the appropriate holder or custodian of exhibits consisting of biological evidence that have been marked and admitted into evidence during a criminal trial. For ease of organization, we begin by addressing your second question.

R.C. 2933.82 addresses the retention of biological evidence and biological material by government evidence-retention entities. For the purpose of R.C. 2933.82, "biological evidence" is defined as any of the following:

> (i) The contents of a sexual assault examination kit;
>
> (ii) Any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.

R.C. 2933.82(A)(1)(a). "Biological evidence," as that term is used in R.C. 2933.82, may be "cataloged separately, such as on a slide or swab or in a test tube, or … present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups or

containers, or cigarettes." R.C. 2933.82(A)(1)(b). "Biological material" is defined as "any product of a human body containing DNA." R.C. 2933.82(A)(2) (adopting the definition set forth in R.C. 2953.71(B)). A "governmental evidence-retention entity" is "[a]ny law enforcement agency, prosecutor's office, court, public hospital, crime laboratory, or other governmental or public entity or individual within this state that is charged with the collection, storage, or retrieval of biological evidence" and "[a]ny official or employee" of the entities set forth in division (A)(5)(a) of R.C. 2933.82. R.C. 2933.82(A)(5).

R.C. 2933.82(B)(1) states "[e]ach governmental evidence-retention entity that secures any biological evidence in relation to an investigation or prosecution of a criminal offense or delinquent act that is a violation of [the pertinent Revised Code sections[5]] shall secure the biological evidence for [specified periods of time]." With respect to an offense of aggravated murder and murder, the governmental evidence-retention entity shall secure the biological evidence for as long as the offense is unsolved. R.C. 2933.82(B)(1)(a). If an offense of voluntary manslaughter, involuntary manslaughter or aggravated vehicular homicide, vehicular homicide, or vehicular manslaughter that is a felony of the first or second degree, rape or an attempt to commit rape, sexual battery or gross sexual imposition in violation of R.C. 2907.05(A)(4) or (B) is unsolved, the biological evidence shall be secured by the government evidence-retention entity for thirty years. R.C. 2933.82(B)(1)(b). Biological evidence that is secured in relation to an offense that a person has pleaded guilty to or been convicted of, or a delinquent act that a child has been adjudicated delinquent for committing shall be secured for

> the earlier of the following: (i) the expiration of the latest of the following periods of time that apply to the person: the period of time that the person is incarcerated, is in a department of youth services institution or other juvenile facility, is under a community control sanction for that offense, is under any order of disposition for that act, is on probation or parole for that offense, is under judicial release or supervised release for that act, is under post-release control for that offense, is involved in civil litigation in connection with that offense or act, or is subject to registration and other duties imposed for that offense or act under [R.C. 2950.04, R.C. 2950.041, R.C. 2950.05, and R.C. 2950.06] or (ii) thirty years. If after the period of thirty years the

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[5] R.C. 2933.82(B)(1) applies to biological evidence that is being secured by a governmental evidence-retention entity in relation to an investigation or the prosecution of a criminal offense or a delinquent act in violation of R.C. 2903.01 (aggravated murder), R.C. 2903.02 (murder), R.C. 2903.03 (voluntary manslaughter), R.C. 2903.04 (involuntary manslaughter) or R.C. 2903.06 (aggravated vehicular homicide, vehicular homicide, vehicular manslaughter) when the violation is a felony of the first or second degree, R.C. 2907.02 (rape), R.C. 2907.03 (sexual battery), R.C. 2907.05(A)(4) (gross sexual imposition when the victim is less than thirteen years of age), R.C. 2907.05(B) (gross sexual imposition by touching when the victim is less than twelve years of age and "the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person"), or an attempt to commit a violation of R.C. 2907.02 (rape).

> person remains incarcerated, then the governmental evidence-retention entity shall secure the biological evidence until the person is released from incarceration or dies.

R.C. 2933.82(B)(1)(c).

The periods of retention set forth in R.C. 2933.82(B)(1) also apply to "evidence likely to contain biological material that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case or delinquent child case" for violations of statutes identified in R.C. 2933.82(B)(1).[6] R.C. 2933.82(B)(3). R.C. 2933.82(B)(9) states:

> When retention of physical evidence that otherwise would be required to be retained pursuant to [R.C. 2933.82] is impracticable [due to its size, bulk, or physical character], the governmental evidence-retention entity that otherwise would be required to retain the physical evidence shall remove and preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing before returning or disposing of that physical evidence.

Law enforcement agencies, a prosecuting attorney, and a court, among others, are governmental evidence-retention entities pursuant to R.C. 2933.82(A)(5). Under R.C. 2933.82, those entities, to the extent that they secure biological evidence and evidence likely to contain biological material, have a mandatory duty to secure that evidence for applicable periods of time. R.C. 2933.82 does not, however, designate which of those entities is required to secure biological evidence or evidence likely to contain biological evidence once that evidence has been marked as an exhibit and offered for admission into evidence during a criminal trial.[7] Therefore, to determine which governmental evidence-retention entities are required to secure biological evidence that has been offered for admission into evidence, we look to other sources of law governing the possession of physical evidence presented in a criminal trial.

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[6] R.C. 2933.82 was enacted by Sub. S.B. 77, 128th Gen. A. (2010) (eff. July 6, 2010). That act also amended several statutes, including R.C. 2953.71-.81 and R.C. 2953.83, and repealed R.C. 2953.82, all of which addressed procedures related to DNA testing. In 2005 Op. Att'y Gen. No. 2005-009, at 2-88, the Attorney General answered a question about "the destruction of evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82[.]" Because those statutes have been amended since the issuance of the opinion, syllabus, paragraphs 1 and 2 of 2005 Op. Att'y Gen. No. 2005-009 no longer accurately state the law. Therefore, 2005 Op. Att'y Gen. No. 2005-009, syllabus, paragraphs 1 and 2, are overruled as a result of statutory amendment.

[7] Our use of the phrase "offered for admission" in relation to exhibits is intended to encompass exhibits that are offered and admitted into evidence as well as those exhibits that are offered and not admitted into evidence.

Physical evidence that has been marked as an exhibit and offered for admission into evidence in a criminal trial that was seized pursuant to a warrant or was otherwise in the custody of a law enforcement agency is maintained in the possession of a court or a law enforcement agency. *See* R.C. 2933.26 ("[w]hen a warrant is executed by the seizure of property or things described therein, such property or things shall be kept by the judge, clerk, or magistrate to be used as evidence"); R.C. 2933.27 ("[i]f, upon examination, the judge or magistrate is satisfied that the offense charged with reference to the things seized under a search warrant has been committed, he shall keep such things or deliver them to the sheriff of the county, to be kept until the accused is tried or the claimant's right is otherwise ascertained"); R.C. 2981.11(A)(1) ("[a]ny property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited and that is in the custody of a law enforcement agency[8] shall be kept safely by the agency, pending the time it no longer is needed as evidence or for another lawful purpose, and shall be disposed of pursuant to [R.C. 2981.12-.13]" (footnote added)); Ohio R. Crim. P. 41(D)(1) ("[p]roperty seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant").[9] Therefore, physical evidence that has been marked as an exhibit and offered for admission into evidence in a criminal trial that was seized pursuant to a warrant or that was otherwise in the custody of a law enforcement agency shall, at the conclusion of the trial, be retained by the court or an appropriate law enforcement agency.

Several statutes and rules, when viewed together, indicate that physical evidence that has been marked as an exhibit and offered for admission, but that was not seized pursuant to a warrant or was not otherwise in the custody of a law enforcement agency, shall be retained by the court of common pleas, either in the possession of the clerk of court or the court reporter. R.C. 2301.20 mandates that "[a]ll civil and criminal actions in the court of common pleas shall be recorded." *See also* Ohio R. Crim. P. 22 (all proceedings in serious offense cases shall be recorded and proceedings of petty offense cases shall be recorded if requested, except for waivers of counsel, which shall be recorded). Generally, a court of common pleas satisfies this requirement by appointing a court reporter. *See* R.C. 2301.18 ("[t]he court of common pleas shall appoint a reporter as the official reporter of the court"); 1989 Op. Att'y Gen. No. 89-073, at 2-334. The court reporter is charged with recording the testimony and collecting the exhibits that have been marked and offered for admission in a trial. *See* R.C. 2301.23 ("[w]hen notes have been taken or an electronic recording has been made in a case as

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[8] For the purpose of R.C. Chapter 2981, a "law enforcement agency" includes "the office of the prosecutor." R.C. 2981.01(A)(7).

[9] Ohio R. Crim. P. 26 provides "[p]hysical property, other than contraband, as defined by statute, under the control of a Prosecuting Attorney for use as evidence in a hearing or trial should be returned to the owner at the earliest possible time. To facilitate the early return of such property, where appropriate, and by court order, photographs … may be taken of the property and introduced as evidence in the hearing or trial." R.C. 2901.01(A)(13) defines "contraband" as "any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense."

provided in [R.C. 2301.20], if the court or either party to the suit requests written transcripts of any portion of the proceeding, the reporter reporting the case shall make full and accurate transcripts of the notes or electronic recording"); *Sauvey v. Ford*, 6th Dist. No. L-02-1227, 2003-Ohio-222, at ¶¶ 6-13 (once a transcript is ordered, it is the court reporter's duty to ensure that the transcript, including the exhibits, is prepared and filed in accordance with the Ohio Rules of Appellate Procedure); *Conway v. Ford Motor Co.*, 48 Ohio App. 2d 233, 237, 356 N.E.2d 762 (Cuyahoga County 1976) ("[t]he transcript of proceedings is a verbatim transcription of the trial proceedings, including the testimony and exhibits, which is prepared and certified by the court reporter").

When a transcript is prepared, exhibits that were admitted and exhibits that were offered but not admitted shall be separately attached to the transcript. Ohio R. App. P. 9(B)(6)(g). The transcript and the exhibits constitute part of the record on appeal, Ohio R. App. P. 9(A)(1), which is transmitted by the clerk of the trial court to the clerk of the court of appeals, Ohio R. App. P. 10(A), (B).[10] *See* 1989 Op. Att'y Gen. No. 89-073, at 2-335 (the stenographic notes of a court reporter and the transcript are records of the court and the property of the court); *see also State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App. 3d 725, 729, 761 N.E.2d 656 (Hamilton County 2001) ("the documents in question did indeed change character – from discovery materials to court documents – when they were introduced in court as exhibits for a motion hearing"); *Yaekle v. Jaeger*, 19 Ohio Dec. 560, 561 (Franklin County C.P. 1909) ("[i]t is clearly the duty of the court to preserve its records. It is important to the rights of parties to suits in court that a record of the proceedings be preserved").[11]

In addition, Ohio Sup. R. 26(F), which governs the destruction of exhibits, depositions, and transcripts, provides:

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[10] Ohio R. App. P. 10(B) states that "[d]ocuments of unusual bulk or weight and *physical exhibits other than documents* shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals." (Emphasis added.) Although physical exhibits are not automatically transferred to the clerk of the court of appeals, this rule, nevertheless, indicates that physical exhibits are kept in the possession of the clerk of the trial court when a transcript is filed.

[11] We recognize that not every case that is tried before a court of common pleas results in an appeal. Although the requirements for the preparation of a transcript are not triggered unless an appeal is filed, Ohio R. App. P. 9 and 10 are relevant in determining in whose custody exhibits shall be placed at the conclusion of a trial. When exhibits are admitted into evidence, neither the court nor the parties know whether an appeal will be filed. It is reasonable that the court retain the exhibits in a manner that places the court and the court reporter in the best position to comply with the requirements of the Rules of Appellate Procedure in the event an appeal is filed. If the exhibits are not maintained by the court reporter in every case at the conclusion of the trial, the exhibits will not be in the possession of the court reporter at the time that an appeal is filed and the court reporter's duty to prepare a transcript that includes the exhibits is triggered.

> At the conclusion of litigation, including times for direct appeal, a court or custodian of exhibits, depositions, or transcripts may destroy exhibits, depositions, and transcripts if all of the following conditions are satisfied:
>
> (1) The court notifies the party that tendered the exhibits, depositions, or transcripts in writing that the party may retrieve the exhibits, depositions, or transcripts within sixty days from the date of the written notification;
>
> (2) The written notification required in division (F)(1) of this rule informs the party that tendered the exhibits, depositions, or transcripts that the exhibits, depositions, or transcripts will be destroyed if not retrieved within sixty days of the notification;
>
> (3) The written notification required in division (F)(1) of this rule informs the party that tendered the exhibits, depositions, or transcripts of the location for retrieval of the exhibits, depositions, or transcripts;
>
> (4) The party that tendered the exhibits, depositions, or transcripts does not retrieve the exhibits, depositions, or transcripts within sixty days from the date of the written notification required in division (F)(1) of this rule.

This rule indicates that a court retains possession of exhibits at the conclusion of the trial, either in the possession of the court reporter or the clerk of court. If the Ohio Supreme Court intended the offering party to retain an exhibit at the conclusion of a trial, there would be no need for a court to send notice to the "party that tendered the exhibits" prior to destroying the exhibits. Therefore, physical evidence that has been marked as an exhibit and offered for admission that was not seized pursuant to a warrant or was not otherwise in the custody of a law enforcement agency is retained at the conclusion of a criminal trial by the court of common pleas, either in the possession of the court reporter or the clerk of court.

Biological evidence and evidence likely to contain biological material, which has been marked as an exhibit and offered for admission into evidence during a criminal trial, is retained at the conclusion of the trial in the same way as other physical evidence that is marked as an exhibit and offered for admission during a criminal trial. Accordingly, exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that was seized pursuant to a search warrant or was otherwise in the custody of a law enforcement agency shall be retained at the conclusion of a criminal trial by the court of common pleas or an appropriate law enforcement agency.[12] Exhibits offered for admission into evidence that consist of biological

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[12] If DNA testing is conducted as a result of a motion for post-conviction DNA testing pursuant to R.C. 2953.73, "[t]he court or a designee of the court shall require the state to maintain the results of the testing and to maintain and preserve both the parent sample of the biological material used and the offender sample of the biological material used." R.C. 2953.81(A). The "parent sample" is "the biological material first obtained from a crime scene or a victim of an offense for which an offender is an eligible offender, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject offender under [R.C. 2953.71-.81]." R.C. 2953.71(M).

evidence or evidence likely to contain biological material that was not seized pursuant to a search warrant or was not otherwise in the custody of a law enforcement agency shall be retained at the conclusion of a criminal trial by the court of common pleas, either in the possession of the court reporter or the clerk of the court of common pleas. Once an appeal and a transcript have been filed, exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that were in the possession of the court of common pleas shall be retained by the clerk of the court of appeals, in accordance with Ohio R. App. P. 10. A court, county prosecuting attorney, or law enforcement agency that retains exhibits that consist of biological evidence or evidence likely to contain biological material shall secure those exhibits in accordance with R.C. 2933.82.[13]

In response to your second question, we conclude that the county prosecuting attorney, a law enforcement agency, the court of common pleas, either in the possession of the court reporter or the clerk of the court of the court of common pleas, or the clerk of the court of appeals are the appropriate holders of exhibits consisting of biological evidence or evidence likely to contain biological material that have been marked and admitted into evidence in a criminal trial.

Conflict between Local Rule 2(IV) and Other Legal Authority

We now turn to your first question, whether Local Rule 2(IV) conflicts with R.C. 149.43, Ohio's public records law, or any other sources of law. Local Rule 2(IV) requires the party who offers an exhibit consisting of biological evidence or evidence likely to contain biological material to retain that exhibit in his possession at the conclusion of the trial, regardless of whether the exhibit was admitted into evidence by the court. Local Rule 2(IV) also declares that "the Court's receipt and admission of other types of evidence shall not be construed as taking possession, custody or control of said evidence. Possession, custody, or control at all times shall remain with the offering party, person, agency, office or department."

Your question asks, in part, whether Local Rule 2(IV) conflicts with R.C. 149.43. Ohio Sup. R. 44 through 47 supplant R.C. 149.43 with respect to requests for records that are directed to a court. *State ex rel. GMS Mgmt. Co., Inc. v. Vivo*, 7th Dist. No. 10 MA 1, 2010-Ohio-4184, at ¶ 25 ("the newly adopted Rules 44 through 47 of the Rules of Superintendence for the Courts of Ohio … set forth specific procedures regulating public access to court records, and replace the public records request procedures contained in R.C. 149.43 with respect to requests directed to an Ohio court"); *Cleveland Constr., Inc. v. Villanueva*, 186 Ohio App. 3d 258, 2010-Ohio-444, 927 N.E.2d 611, at ¶ 17 ("[t]he newly adopted Rules of Superintendence … specifically deal with the procedures regulating public access to court records and supplant R.C. 149.43 vis-a-vis a request for public records as directed to an Ohio court" (footnote omitted)). Accordingly, we will consider whether the pertinent parts of Local Rule 2(IV) conflict with Ohio Sup. R. 44 through 47.

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[13] When a governmental evidence-retention entity secures biological evidence or evidence likely to contain biological material, the entity shall secure it under proper conditions.

Ohio Sup. R. 44 through 47 govern public access to a "court record." Ohio Sup. R. 45(A) provides that "[c]ourt records are presumed open to public access." "A court or clerk of court shall make a court record available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time." Ohio Sup. R. 45(B)(1). For the purpose of Ohio Sup. R. 44 through 47, a "court record" is "both a case document and an administrative document, regardless of physical form or characteristic, manner of creation, or method of storage." Ohio Sup. R. 44(B). A "case document" is

> a *document* and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in [Ohio Sup. R. 44(C)(2)].

Ohio Sup. R. 44(C)(1) (emphasis added). The following are excluded from the definition of "case document":

> (a) A document or information in a document exempt from disclosure under state, federal, or the common law;
>
> (b) Personal identifiers, as defined in division (H) of this rule;
>
> (c) A document or information in a document to which public access has been restricted pursuant to Sup.R. 45(E);
>
> (d) Except as relevant to the juvenile's prosecution later as an adult, a juvenile's previous disposition in abuse, neglect, and dependency cases, juvenile civil commitment files, post-adjudicatory residential treatment facility reports, and post-adjudicatory releases of a juvenile's social history;
>
> (e) Notes, drafts, recommendations, advice, and research of judicial officers and court staff;
>
> (f) Forms containing personal identifiers, as defined in division (H) of this rule, submitted or filed pursuant to Sup.R. 45(D)(2);
>
> (g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;
>
> (h) In a court of common pleas or a division thereof with domestic relations or juvenile jurisdiction, the following documents, including but not limited to those prepared pursuant to R.C. 2151.281, 3105.171(E)(3), and 3109.04 and Sup.R. 48:
>
> (i) Health care documents, including but not limited to physical health, psychological health, psychiatric health, mental health, and counseling documents;
>
> (ii) Drug and alcohol use assessments and pre-disposition treatment facility reports;
>
> (iii) Guardian ad litem reports, including collateral source documents attached to or filed with the reports;

> (iv) Home investigation reports, including collateral source documents attached to or filed with the reports;
>
> (v) Child custody evaluations and reports, including collateral source documents attached to or filed with the reports;
>
> (vi) Domestic violence risk assessments;
>
> (vii) Supervised parenting time or companionship or visitation records and reports, including exchange records and reports;
>
> (viii) Financial disclosure statements regarding property, debt, taxes, income, and expenses, including collateral source documents attached to or filed with records and statements;
>
> (ix) Asset appraisals and evaluations.

Ohio Sup. R. 44(C)(2).

An "administrative document" is "a *document* and information in a document created, received, or maintained by a court that serves to record the administrative, fiscal, personnel, or management functions, policies, decisions, procedures, operations, organization, or other activities of the court, subject to the exclusions in [Ohio Sup. R. 44(G)(2)]." Ohio Sup. R. 44(G)(1) (emphasis added). Ohio Sup. R. 44(G)(2) excludes the following from the definition of "administrative document":

> (a) A document or information in a document exempt from disclosure under state, federal, or the common law, or as set forth in the Rules for the Government of the Bar;
>
> (b) Personal identifiers, as defined in division (H) of this rule;
>
> (c) A document or information in a document describing the type or level of security in a court facility, including a court security plan and a court security review conducted by a local court, the local court's designee, or the Supreme Court;
>
> (d) An administrative or technical security record-keeping document or information;
>
> (e) Test questions, scoring keys, and licensing, certification, or court-employment examination documents before the examination is administered or if the same examination is to be administered again;
>
> (f) Computer programs, computer codes, computer filing systems, and other software owned by a court or entrusted to it;
>
> (g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;
>
> (h) Data feeds by and between courts when using the Ohio Courts Network.

Insofar as Ohio Sup. R. 44 through 47 address access to court records, which are documents and information in documents, the pertinent provisions of Local Rule 2(IV), which address physical

exhibits consisting of biological evidence and physical evidence likely to contain biological material, do not conflict with Ohio Sup. R. 44 through 47.

We now consider whether Local Rule 2(IV) conflicts with any other provision of law. Local Rule 2(IV) requires the party who offers an exhibit consisting of biological evidence or evidence likely to contain biological material to retain that exhibit in his possession at the conclusion of the trial. To the extent that Local Rule 2(IV) requires a person other than the county prosecuting attorney, a law enforcement agency, the court of common pleas, either in the possession of the court reporter or the clerk of the court of common pleas, or the clerk of the court of appeals to retain exhibits that consist of biological evidence or evidence likely to contain biological material that have been offered for admission, and relinquishes the court's responsibility to take possession, custody, or control of any such evidence, the rule conflicts with R.C. 2933.26, R.C. 2933.27, R.C. 2933.82, R.C. 2981.11, Ohio R. Crim. P. 41(D), Ohio Sup. R. 26(F), and Ohio R. App. P. 9 and 10.[14] As explained above, an exhibit consisting of biological evidence or evidence likely to contain biological material that was seized pursuant to a search warrant shall be retained by the court or an appropriate law enforcement agency in accordance with R.C. 2933.26, R.C. 2933.27, R.C. 2981.11, and Ohio R. Crim. P. 41(D). An exhibit consisting of biological evidence or evidence likely to contain biological material that was not seized pursuant to a search warrant or was not otherwise in the custody of a law enforcement agency shall be retained by the court of common pleas, either in the possession of the court reporter, the clerk of court, or the clerk of the court of appeals depending upon the stage of the proceeding, in accordance with Ohio R. App. P. 9 and 10.

As part of its jurisdiction to hear and decide cases, a court of common pleas has the power to direct the disposition of exhibits. *See State v. Wilson*, 29 Ohio St. 2d 203, 213, 280 N.E.2d 915 (1972) ("the safe custody and control of exhibits, once admitted, is a matter falling largely within the sound discretion of the trial court"); *Cincinnati v. Jasper*, 46 Ohio App. 2d 276, 277-78, 349 N.E.2d 332 (Hamilton County 1975) ("'[t]here is no doubt that a court, having jurisdiction to hear and decide issues of fact, has as a part of that jurisdiction the power and authority to control and dispose of tangible property introduced in evidence and thereby placed in its custody for the purposes of the action'") (quoting *Cincinnati v. Flaherty*, 71 Ohio App. 539, 541, 50 N.E.2d 373 (Hamilton County 1943). *But see State v. Purcell*, 1st Dist. No. C-840577, 1985 WL 6778 (May 1, 1985) at *1 (in *dicta*, the court notes "[o]nce admitted into evidence, the exhibits become part of the record of the case; the court and the court only is thereafter responsible for their safekeeping"). However, a court of common pleas may not exercise its power with respect to the custody of exhibits by adopting a local

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[14] Local Rule 2(IV) also requires evidence that was not admitted to be retained by the offering party. To the extent that Local Rule 2(IV) requires the offering party to retain documentary evidence that was not admitted, Local Rule 2(IV) conflicts with Ohio R. App. P. 9(B)(6)(g), which requires that "documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover [of the transcript] unless attachment is impractical." This rule indicates that exhibits that were offered but not admitted shall also be kept in the possession of the court reporter at the conclusion of the trial.

rule of practice that conflicts with a statute enacted by the General Assembly or a rule promulgated by the Ohio Supreme Court. Likewise, a court of common pleas may not exercise that discretion by adopting a local rule of practice that affects a substantive right.

The preservation of biological evidence that has been presented to a court in a criminal trial involves a substantive right. The Ohio Supreme Court summarized the historical context for the enactment of R.C. 2933.82 as follows:

> R.C. 2933.82 was enacted as a product of the "Innocence Movement," which "refers to a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice in the United States." Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 Alb.L.Rev. 1465, 1468 (2011).
>
> One mission of the movement was to create innocence projects at law schools "to investigate claims of wrongful convictions, especially in cases where DNA testing is not possible but there are serious doubts about the reliability of the conviction." *Id.* at 1497. The innocence projects often rely on modern technology and scientific advancements, considering that one of the best tools modern science has to offer the criminal-justice system is the ability to conclusively and correctly identify a particular individual by the source of DNA found at a crime scene. The innocence projects not only shed light on the fact that biological evidence and DNA are critical components of the criminal-justice system, because they are often the link to solving crimes; they also highlight the need for the preservation and storage of the DNA and biological evidence as a way to exonerate wrongfully convicted individuals.
>
> ….
>
> Despite these changes, there were no statewide procedures for preserving or storing biological evidence, resulting in inconsistent storage techniques by governmental entities throughout the state. The lack of consistency in preserving and storing evidence allowed evidence to be compromised, lost, or prematurely destroyed.
>
> Having recognized that proper preservation promotes justice and prevents injustice and that the lack of guidelines for the preservation and storage of evidence could lead to grave results, on March 24, 2010, the General Assembly enacted R.C. 2933.82, 2010 Sub. S.B. No. 77 ("S.B. 77"). S.B. 77 rectified the inconsistencies for preserving and storing biological evidence by establishing a task force charged with creating a uniform system and standards. At the time it was enacted, S.B. 77 was heralded as a national model for reforms to protect the innocent from wrongful conviction by imposing a duty upon law-enforcement agencies to store and maintain biological evidence. Innocence Project, March 16, 2010 press release, http://www.innocenceproject.org/Content/Ohio_Passes_Major_Package_of_Reforms_on_Wrongf

> ul_Convictions_Governor_Is_Expected_to_Sign_Bill_Making_Ohio_a_National_Model.php (accessed Nov. 27, 2012); S. Michael Lear, *Ohio's Senate Bill 77: A National Model of Reform,* Vindicator (Spring 2011) 8.

State v. Roberts, 134 Ohio St. 3d 459, 2012-Ohio-5684, 983 N.E.2d 334, at ¶¶ 13-19; *see also State v. Acosta*, 1st Dist. No. C-020767, 2003-Ohio-6503, at ¶ 5 ("[t]he state's failure to preserve materially exculpatory evidence or its destruction of potentially useful evidence in bad faith violates a criminal defendant's right to due process").

Thus, the preservation of biological evidence collected in relation to a criminal offense and the custody of exhibits consisting of biological evidence or evidence likely to contain biological material that have been used in a criminal proceeding are not solely matters of procedure. Rather, the preservation of biological evidence collected in relation to a criminal offense and the custody of exhibits consisting of biological evidence that have been used in a criminal proceeding affect the substantive rights of those accused and convicted of criminal offenses. The General Assembly's enactment of R.C. 2933.82 as part of a comprehensive legislative act reflects the General Assembly's intent that the substantive rights of individuals are protected by uniformity in the collection and preservation of biological evidence. The General Assembly identified specific entities subject to the requirements related to securing biological evidence. Permitting individuals who are not subject to the requirements of R.C. 2933.82 to retain biological evidence thwarts the General Assembly's intent in enacting R.C. 2933.82.

Insofar as Local Rule 2(IV) conflicts with statutes enacted by the General Assembly and rules promulgated by the Ohio Supreme Court, and affects a substantive right, Local Rule 2(IV) is improper. Therefore, a local rule of practice of a court of common pleas that requires a party to retain in his possession exhibits he has offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material and that declares that the court's admission of those exhibits into evidence shall not be construed as taking custody, possession, or control of the evidence impermissibly affects a substantive right and conflicts with statutes enacted by the General Assembly and rules promulgated by the Ohio Supreme Court.

We recognize that the financial and administrative costs incurred by a court or a law enforcement agency that secures biological evidence and evidence likely to contain biological material in accordance with R.C. 2933.82 may be great. Such expenses were contemplated by the General Assembly at the time of the enactment of Sub. S.B. 77, 128th Gen. A. (2010) (eff. July 6, 2010). *See* Ohio Legislative Service Comm'n Fiscal Note and Local Impact Statement, Sub. S.B. 77 (as enacted) (March 24, 2010) ("[a]lthough the one-time and ongoing costs for various jurisdictions to adhere to the required preservation and retention standards are problematic to quantify, it would not be surprising if those costs for certain jurisdictions exceed minimal, with the threshold for minimal being an estimated expense in excess of $5,000 per year"). The Fiscal Note and Local Impact Statement stated:

> It … seems reasonable to assume that most governmental evidence-retention entities will need to modify existing structures, construct new structures, or contract with

> various qualified private vendors in order to properly store biological evidence for the period of time mandated by the bill. It is also possible that certain jurisdictions might construct and maintain "regional" storage locations, or that a statewide repository would be recommended by the [Preservation of Biological Evidence Task Force].

Insofar as those fiscal and administrative burdens were contemplated by the General Assembly, they cannot be grounds for excusing a governmental evidence-retention entity from the requirements of R.C. 2933.82. We find reasonable the suggestion of the Ohio Legislative Service Commission that maintaining regional storage facilities, the support of which is contributed to by many individual governmental evidence-retention entities, may help to disperse the financial and administrative responsibilities.

The remaining questions in your letter are asked based upon an assumption that Local Rule 2(IV) is a proper rule. Insofar as we have concluded that Local Rule 2(IV) impermissibly conflicts with statutes enacted by the General Assembly and rules promulgated by the Ohio Supreme Court, and impermissibly affects a substantive right, it is unnecessary for us to address the third and fourth questions in your letter.

Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised that

1. Exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that was seized pursuant to a search warrant or was otherwise in the custody of a law enforcement agency shall be retained at the conclusion of a criminal trial by the court of common pleas or an appropriate law enforcement agency.

2. Exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that was not seized pursuant to a search warrant or was not otherwise in the custody of a law enforcement agency shall be retained at the conclusion of a criminal trial by the court of common pleas, either in the possession of the court reporter or the clerk of the court of common pleas.

3. Once an appeal and a transcript have been filed, exhibits offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material that were in the possession of the court of common pleas shall be retained by the clerk of the court of appeals, in accordance with Ohio R. App. P. 10.

4. A court, prosecuting attorney, or law enforcement agency that retains exhibits that consist of biological evidence or evidence likely to contain biological material shall secure those exhibits in accordance with R.C. 2933.82. (2005

Op. Att'y Gen. No. 2005-009, syllabus, paragraphs 1 and 2, overruled as a result of statutory amendment.)

5. A local rule of practice of a court of common pleas that requires a party to retain in his possession exhibits he has offered for admission into evidence that consist of biological evidence or evidence likely to contain biological material and that declares that the court's admission of those exhibits into evidence shall not be construed as taking custody, possession, or control of the evidence impermissibly affects a substantive right and conflicts with statutes enacted by the General Assembly and rules promulgated by the Ohio Supreme Court.

Very respectfully yours,

MICHAEL DEWINE
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