

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

vs.

JAMISON D. GODFREY

Defendant-Appellant.

Supreme Court
Case No. 2009-0552

On Appeal from the
Mercer County Court
Of Appeals, Third Appellate
District

Court of Appeals
Case No. 10-08-08

MEMORANDUM OF THE STATE OF OHIO
IN OPPOSITION TO CLAIMED JURISDICTION

Matthew K. Fox (#0056112)
Mercer County Prosecuting Attorney
119 N. Walnut Street
Celina, Ohio 45822
Telephone: (419) 586-8677

James A. Tesno (#0007416)
Attorney at Law
100 N. Main Street
Celina, Ohio 45822
Telephone: (419) 586-6481

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

ATTORNEY FOR APPELLEE

ATTORNEY FOR APPELLANT

FILED
APR 23 2009
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
APR 23 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page No.
Table of Contents	i, ii
Table of Authorities	iii
Summary of Assignments of Error Presented for Review	iv
Statement of Why this Case Lacks Substantial Constitutional Questions and Is Not a Matter of Great Public or General Interest	1, 2
Statement of Case and Facts	3,6
Law and Argument	7,14
Appellant’s Assignment of Error I	7

IT IS WITHIN THE PROVINCE OF THE TRIAL COURT TO DETERMINE WHETHER TRANSCRIPTS OF GRAND JURY TRANSCRIPTS SHOULD BE MADE AVAILABLE TO A DEFENDANT.

RESPONSE OF THE STATE OF OHIO:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THE DEFENDANT ESTABLISH A PARTICULARIZED NEED FOR PROTECTED GRAND JURY TRANSCRIPTS BASED SOLELY UPON SPECULATION.

Appellant’s Assignment of Error II	11
--	----

IT IS A VIOLATION OF THE DEFENDANT’S DUE PROCESS RIGHTS TO REQUIRE HIM TO GO THROUGH A TRIAL TO TEST THE SUFFICIENCY OF THE STATE’S CASE.

RESPONSE OF THE STATE OF OHIO:

THE STATE HAS WIDE LATITUDE IN ESTABLISHING SYSTEMS OF DISCOVERY IN CRIMINAL CASES.

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

Appellant's Assignment of Error III 13

NOT EVERY MOTION MUST BE SUBMITTED TO AN EVIDENTIARY HEARING. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION WHEN IT DETERMINES DISCOVERY MATTERS ON THE STATEMENTS OF COUNSEL.

RESPONSE OF THE STATE OF OHIO:

DEFENDANT FAILED TO ESTABLISH PARTICULARIZED.

Conclusion 14

MERCER COUNTY
PROSECUTING ATTORNEY

119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

TABLE OF AUTHORITIES

CASE LAW

<u>Blakemore v. Blakemore</u> (1983), 5 Ohio St.3d 217, 219.	12
<u>Brady v. Maryland</u> (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194	13
<u>Deacon v. Landers</u> (1990), 68 Ohio App.3d 26, 29	12
<u>Kyles v. Whitley</u> (1995), 514 U.S. 419, 433	13
<u>Nakoff v. Fairview Gen. Hosp.</u> , 75 Ohio St.3d 254, 256, 1996 Ohio 159, 662 N.E.2d 1	12
<u>State v. Anderson</u> , Third Dist. No. 2-98-09	9
<u>State v. Burroughs</u> (2005), 165 Ohio App. 3d 172	7
<u>State v. Cherry</u> (1995), 107 Ohio App.3d 476, 479	9
<u>State v. Davis</u> (1988), 38 Ohio St.3d 361	9
<u>State v. Greer</u> (1981), 66 Ohio St. 2d 139.	7
<u>State v. Mack</u> (1995), 73 Ohio St.3d 502, 508	9
<u>State v. Mullins</u> 2002 Ohio 5181 (7 th App. Dist.)	8
<u>State v. Newberry</u> , (1991) 77 Ohio App. 3d 818	12
<u>State v. Pope</u> No. 35425, Eighth Dist, Cuyahoga County, December 30, 1976	12
<u>State v. Colburn</u> , No 04-CA-44, Fifth Dist, Fairfield County, March 9, 2005	12
<u>State v. Webb</u> (1994), 70 Ohio St.3d 325, 337	9
<u>United States v. Bagley</u> (1985), 473 U.S. 667	13
<u>United States v. Calandra</u> (1974), 414 U.S. 338, 344-345, 94 S.Ct. 613, 38 L.Ed.2d 561.	10
<u>United States v. Salerno</u> (1987), 481 U.S. 739, 746	12
<u>Wardius v. Oregon</u> (1973), 412 U.S. 470.	12

**SUMMARY OF ASSIGNMENTS OF ERROR
PRESENTED FOR REVIEW**

APPELLANT'S ASSIGNMENT OF ERROR NO. I

IT IS WITHIN THE PROVINCE OF THE TRIAL COURT TO DETERMINE WHETHER TRANSCRIPTS OF GRAND JURY TRANSCRIPTS SHOULD BE MADE AVAILABLE TO A DEFENDANT.

RESPONSE OF THE STATE OF OHIO:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THE DEFENDANT ESTABLISH A PARTICULARIZED NEED FOR PROTECTED GRAND JURY TRANSCRIPTS BASED SOLELY UPON SPECULATION.

APPELLANT'S ASSIGNMENT OF ERROR NO. II

IT IS A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS TO REQUIRE HIM TO GO THROUGH A TRIAL TO TEST THE SUFFICIENCY OF THE STATE'S CASE.

RESPONSE OF THE STATE OF OHIO:

THE STATE HAS WIDE LATITUDE IN ESTABLISHING SYSTEMS OF DISCOVERY IN CRIMINAL CASES.

APPELLANT'S ASSIGNMENT OF ERROR NO. III

NOT EVERY MOTION MUST BE SUBMITTED TO AN EVIDENTIARY HEARING. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION WHEN IT DETERMINES DISCOVERY MATTERS ON THE STATEMENTS OF COUNSEL.

RESPONSE OF THE STATE OF OHIO:

DEFENDANT FAILED TO ESTABLISH PARTICULARIZED.

MERCER COUNTY
PROSECUTING ATTORNEY

119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

**STATEMENT OF WHY THIS CASE LACKS SUBSTANTIAL CONSTITUTIONAL
QUESTIONS AND IS NOT A MATTER OF GREAT PUBLIC OR GENERAL
INTEREST**

On August 13, 2008, the Mercer County Common Pleas Court issued an order to the Mercer County Prosecutor's Office to have transcribed and then provide to Defendant's counsel certain Grand Jury testimony in this case. This order violated the secrecy of the Grand Jury contrary to clear and undisputed Ohio Law.

Appellate Rule 5(C) permitted the State of Ohio to seek leave to appeal the erroneous order of the trial court. The Court of Appeals reversed the decision of the trial court. In so doing, the Court of Appeals restored and validated clear Ohio authority preserving the sanctity and secrecy of grand jury procedures.

Neither of Defendant's speculative claims in seeking the grand jury transcripts were supported by any evidence. There were no affidavits submitted to the Court on behalf of his proffered claims. Despite such failures the trial court found defendant had established a "particularized need" for grand jury testimony based solely upon supposition, speculation and conclusory statements. The Court of Appeals properly found the trial court abused its discretion in granting such claim. The Court of Appeals further properly found that had Defendant established a particularized need at trial, then an in-camera inspection by the Court would be the proper next procedure to follow, not direct release of the transcript to the Defendant.

After remand, this matter is now set for trial in the Mercer County Common Pleas Court to begin the week of May 18, 2009. Defendant has not even requested that this Court issue any stay of proceedings so that this so called "issue of great public interest and concern," can be addressed by this Court before the jury is empaneled in this case.

The law protecting the secrecy of grand jury proceedings is clear in Ohio. Ohio laws and procedures are sufficient safeguards to protect defendants throughout the court proceedings. The Criminal Rules regarding discovery protect Defendants. The burden of proof protects Defendants. Criminal Rule 29 protects Defendants. Quite simply, Defendant's "claims" are not of great general interest or public concern. They merely serve the Defendant's own interests. Ohio law in this area does not need to be further clarified.

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

STATEMENT OF CASE AND FACTS

On May 15, 2008, the Mercer County Grand Jury issued a Nine Count Indictment against Jamison D. Godfrey. The counts are as follows:

Count One - Murder, ORC 2903.02(A), punishable as provided in 2929.02 of the Revised Code

Count Two - Murder, ORC 2903.02(B), punishable as provided in 2929.02 of the Revised Code

Count Three - Involuntary Manslaughter, ORC 2903.04(A), a Felony of the First (F-1) degree

Count Four - Involuntary Manslaughter, ORC 2903.04(B), a Felony of the Third (F-3) degree

Count Five - Reckless Homicide, ORC 2903.041(A)(1), a Felony of the Third (F-3) degree

Count Six - Felonious Assault, ORC 2903.11(A)(1), a Felony of the Second (F-2) degree

Count Seven - Assault, ORC 2903.13(A), a Misdemeanor of the First (M-1) degree

Count Eight - Assault, ORC 2903.13(B), a Misdemeanor of the First (M-1) degree

Count Nine - Domestic Violence, ORC 2919.25(A), a Felony of the Fourth (F-4) degree

Before presenting the case to the Mercer County Grand Jury, the State had filed a State Complaint on May 6, 2008.¹ The affidavit of the Investigating Officer, Chris Hamberg, was filed in support of the State Complaint. It provides a general summary of facts herein as follows:

On May 16, 2008, the State Complaint was dismissed due to the filing of the above referenced indictment of the Defendant.

Shortly after 11:00 p.m. on Sunday, April 27, 2008, the Mercer County Sheriff's Office received a call for service indicating that an individual, Jessica Reynolds, was en route to Joint Township District Memorial Hospital in St. Marys, Ohio, for injuries to herself and her unborn child that she allegedly received from Jamison Godfrey.

As the investigation commenced it determined that Jessica Reynolds and Jamison Godfrey are live-in boyfriend and girlfriend residing at 5781 Monroe Rd., Celina, Mercer County, Ohio. Ms. Reynolds claimed she was ten weeks pregnant with Godfrey's child. Earlier the evening of April 27th a domestic dispute began between the parties. That dispute included Godfrey choking and punching Reynolds. Reynolds expressed her concern to Godfrey for her unborn child. He continued to assault her including punching her in the stomach. Eventually she was able to free herself from him, and flee. She was assisted by Godfrey's aunt, Teresa Embry and taken to Reynold's mother's residence in St. Marys, Ohio, and then taken to the hospital. At the hospital they were unable to find a heartbeat for the unborn child, and it is anticipated the child will be stillborn in the near future. Godfrey was arrested and the investigation is ongoing.

A copy of the affidavit was attached to the affidavit filed with the State of Ohio's Motion for Leave to Appeal in the Court of Appeals.

In an unrelated matter, Defendant Godfrey was sentenced and incarcerated at the Ohio Department of Rehabilitations and Corrections. Thereafter, he was released to bond in this matter and transported to prison. He has been conveyed back to Mercer County for all hearings in this matter when requested by Defense Counsel.

On June 6, 2008, the defendant filed a Motion for Transcription of Grand Jury Testimony. He made two claims in his motion. The first is that he needed additional information regarding the factual basis for the claims that the fetus died as a result of the incident of violence on April 27, 2008. He claimed he was entitled to know what medical claims were presented to the grand jury and he would be going into trial blind without this information. Secondly, defendant claimed that he "has been advised that exculpatory evidence was presented to the Grand Jury," and that he is "of

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

the belief” that the complaining witness, Jessica Reynolds, recanted in her Grand Jury testimony the statement she made to police officers at the start of this matter.” He then questioned whether or not there was “[O]ther exculpatory evidence given to the Grand Jury that was not provided to the Defendant.” (emphasis added)

To his June 6, 2008, motion, Defendant attached no affidavits, no statement, and no evidence whatsoever to support his claim. He merely made the assertions in his motion as indicated above.

After several informal conferences, the State of Ohio filed a response on July 23, 2008. The response argued that the mere assertions of the defendant failed to establish any “particularized need” as required by clear and un-controverted Ohio law.

On July 31, 2008, the Defendant filed a Defendant’s Response to Prosecutor’s Reply-Grand Jury Transcript. Defendant restated his original claims, and again, failed to support his claim with any evidence whatsoever. Again, no affidavits, or evidence of any kind were proffered, only the conclusions of Defense Counsel from the pleadings.

On August 13, 2008, the Trial Court issued an order granting the Defendant’s Motion. The court found that the defendant had established a particularized need for a transcript of certain of the grand jury proceedings, and concluded that the particularized need was specifically for the reason that the State of Ohio had not demonstrated to defendant what medical evidence it intended to submit to establish that the defendant caused the death of a fetus. The court further found a particularized need had been established since the defendant had represented that the mother of the fetus, Jessica Reynolds, allegedly recanted her grand jury testimony and concluded that the grand jury testimony was crucial to the defendant to present a defense to the charge. Therefore, the court ordered the State to have the grand jury testimony transcribed and to deliver to defendant the transcript of any

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

witness whose testimony related to the cause of death of the fetus of Jessica including but not limited to the testimony of Jessica Reynolds.²

It is from this order that the State of Ohio sought and was granted leave to appeal by the Third District Court of Appeals on October 1, 2008.

After briefing and oral arguments, the Third District Court of Appeals reversed the erroneous decision of the Trial Court by opinion dated February 9, 2009. The opinion of the Third District Court of Appeals stated that the trial court erred in ordering:

the immediate release of J.R.'s grand jury testimony directly to Godfrey, based solely upon defense counsel's representations that said testimony may be inconsistent with prior undisclosed statement of the witness or that said testimony may be inconsistent with the anticipated testimony of the witnesses at any upcoming trial.

The Court also found that grand jury testimony "can not be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation."

It is from this reversal of the trial court's erroneous decision that Defendant-Appellee Godfrey now appeals and claims jurisdiction to this Court.

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

The Defendant claims that Jessica Reynolds recanted her original statement when at the grand jury. In its decision, the Court misinterpreted this statement and concluded that Jessica Reynolds had recanted her grand jury testimony.

LAW AND ARGUMENT

APPELLANT'S ASSIGNMENT OF ERROR NO. I:

IT IS WITHIN THE PROVINCE OF THE TRIAL COURT TO DETERMINE WHETHER TRANSCRIPTS OF GRAND JURY TRANSCRIPTS SHOULD BE MADE AVAILABLE TO A DEFENDANT.

RESPONSE OF THE STATE OF OHIO:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THE DEFENDANT ESTABLISH A PARTICULARIZED NEED FOR PROTECTED GRAND JURY TRANSCRIPTS BASED SOLELY UPON SPECULATION.

Criminal Rule 6(E) provides in general the secrecy requirements of the grand jury.

It states:

[A] grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

In State v. Burroughs (2005), 165 Ohio App. 3d 172, the Third District Court of Appeals summarized the long understood precedent of State v. Greer (1981), 66 Ohio St. 2d 139. The Court stated as follows:

The Ohio Supreme Court has long held that “[d]isclosure of grand jury testimony, other than that of the defendant and co-defendant, is controlled by Crim.R. 6(E), not by Crim.R. 16(B)(1)(g).” (Emphasis added.) State v. Greer (1981), 66 Ohio St. 2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph one of the syllabus.

The Court stated that “an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

outweighs the need for secrecy citing State v. Greer, paragraph two of the syllabus.

The Court further stated:

A particularized need will be found when, "it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony" citing State v. Coleman, 3rd Dist. No. 9-03-23, 2003-Ohio-6440, 2003 WL 22846053, at ¶ 38 (quoting Greer, supra, at paragraph three of the syllabus).

The Court, in Burroughs, properly concluded that the request for the grand jury transcript was "merely a fishing expedition into the secret grand jury proceedings." and was "at best . . . made on mere speculation". A trial court does not abuse its discretion when denying such a request that is based on speculation. The Court of Appeals in State v. Mullins 2002 Ohio 5181 (7th App. Dist.), further recognized the need for Grand Jury secrecy to protect the Judicial System from abuse by defendant. It stated:

In Costello v. United States (1956), 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397, the United States Supreme Court explained:

In Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 4, 54 L.Ed. 1021, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence 'there was very little evidence against the accused' The Court refused to hold that such an indictment should be quashed, pointing out that 'the abuses of criminal practice would be enhanced if indictments could be upset on such a ground.' 218 U.S. at page 248, 31 S.Ct. at page 4. The same thing is true where as here all the evidence before the grand jury was in the nature of 'hearsay.' If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."Id.

In State v. Hoger, the court further found that " Impeachment through material

inconsistencies may be a proper basis for disclosure of grand jury testimony, but that purpose alone is not sufficient.” Citing State v. Patterson (1971), 28 Ohio St.2d 181 “The claim that a witness's grand jury testimony may differ from trial testimony is insufficient to show a particularized need.” State v. Henness (1997), 79 Ohio St.3d 53, 62, 679 N.E.2d 686.

The Trial Court concluded that the defendant established a particularized need for the information based solely on the unsupported, and unsubstantiated claims of the defendant through counsel. The Court erred when it speculated about the defendant’s speculation and found such speculation equaled a particularized need. Speculation about what might be in a transcript does not establish a particularized need. In State v. Anderson, 3rd Dist. No. 2-98-09, (citing State v. Mack (1995), 73 Ohio St.3d 502, 508, 653 N.E.2d 329) the Third District Court of Appeals reviewed Anderson’s claims for grand jury transcripts for two witnesses who had not yet testified at trial. The Court concluded that at no point did his “request rise above the mere speculation that the testimony might reveal contradictions useful in cross-examination.”

In State v. Mullins the Court stated that “when a defendant speculates that grand jury testimony might contain material evidence or might aid his cross-examination by revealing contradictions or inconsistencies, a trial court does not abuse its discretion by finding the defendant has not shown a particularized need. State v. Mack (1995), 73 Ohio St.3d 502, 508, State v. Webb (1994), 70 Ohio St.3d 325, 337. The Court stated “These arguments could be made in every case and if the use of grand jury testimony were permitted for such reasons, virtually all grand jury testimony would be subject to disclosure.” Webb at 337; State v. Cherry (1995), 107 Ohio App.3d 476, 479.

Moreover, in State v. Davis (1988), 38 Ohio St.3d 361, the Supreme Court held that attacking the indictment on the basis of inadequate or incompetent evidence does not demonstrate a

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

particularized need to inspect grand jury testimony. “[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence ...” United States v. Calandra (1974), 414 U.S. 338, 344-345, 94 S.Ct. 613, 38 L.Ed.2d 561.

As the Defendant did not establish any particularized need to the grand jury transcripts, as clear precedent required the Defendant to so demonstrate, and since the trial Court speculated based solely upon unsupported assertions of the Defendant, the Trial Court abused its discretion when it ordered the State to produce and provide grand jury transcripts in this case.

The Trial Court further erred and the Court of Appeals properly found that the Trial Court, failed to follow the procedure the trial court must employ, should it conclude that the defendant established a particularized need. That proper procedure calls for the trial to conduct an in-camera inspection of. The State of Ohio claims the trial court further abused its discretion in this matter. Ohio law is crystal clear that an in-camera inspection is the next required step. Assuming the Court’s determination that the Defense established a particularized need, the order compelling the State to review the transcript and hand over parts was obvious and plain error, as well as a further abuse of discretion. As stated in State v. Greer:

When defense counsel asserts and establishes to the satisfaction of the trial court a particularized need for certain grand jury testimony, the trial court, along with defense counsel and counsel for the state, shall examine the grand jury transcript in camera and give to defense counsel those portions of the transcript relevant to the state's witness' testimony at trial, subject to the trial court's deletion of extraneous matter, and issuance of protective orders where necessary.
Id. at 141.

Absent the showing of a particularized need, the trial court judge has no obligation to examine the grand jury testimony of the witness. Id.

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

Even if appellee establishes the probability of inconsistent statements, the trial court must conduct an in camera examination of the testimony to determine whether there is a particularized need for disclosure. Specifically, the trial court should determine whether the failure to disclose the testimony will deny appellee a fair trial or, in the alternative, whether appellee's request for disclosure is a fishing expedition for inconsistent statements that are readily available or could be demonstrated by alternative means sufficient to show the inconsistencies in question. Furthermore, the trial court should consider whether, pursuant to Crim.R. 16(B)(1)(g), the grand jury testimony is more appropriately made available if the child's trial testimony is materially inconsistent with the grand jury testimony and therefore necessary solely for impeachment purposes after the child testifies at trial, rather than for pretrial discovery.

Id.

The trial court was required to determine whether the failure to disclose the testimony will deny appellee a fair trial or whether the request for disclosure is a fishing expedition for inconsistent statements that are readily available or could be demonstrated by alternative means sufficient to show the inconsistencies in question. The Third District Court of Appeals properly answered the questions finding Defendant would not be denied a fair trial.

APPELLANT'S ASSIGNMENT OF ERROR NO. II

IT IS A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS TO REQUIRE HIM TO GO THROUGH A TRIAL TO TEST THE SUFFICIENCY OF THE STATE'S CASE.

RESPONSE OF THE STATE OF OHIO

THE STATE HAS WIDE LATITUDE IN ESTABLISHING SYSTEMS OF DISCOVERY IN CRIMINAL CASES

Section 1, Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]o state shall * * * deprive any person of [*821] life, liberty or property without due process of law." This section both protects the substantive aspects of liberty against unconstitutional restrictions by the states as well as provides a procedural guarantee against the deprivation of liberty.

State v. Newberry, (1991) 77 Ohio App. 3d 818 other citations omitted. The concepts of "substantive" and "procedural" due process coexist as dual, but separate, aspects of the Due Process Clause. Id. citing 16A American Jurisprudence 2d (1979) 967, Constitutional Law, Section 812. The purpose behind a procedural due process requirement is to ensure that whenever government action deprives a person of life, liberty or property, such a deprivation is implemented in a fair manner. Id. citing United States v. Salerno (1987), 481 U.S. 739, 746, This would, ordinarily, require notice and the opportunity for a hearing. Id. citing Deacon v. Landers (1990), 68 Ohio App.3d 26, 29.

Godfrey's reliance on the Due Process Clause of the Constitution as the basis for his assignment of error is misplaced. The states have wide latitude in establishing systems of discovery in criminal cases, and "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" State v. Pope No. 35425, Eighth Dist, Cuyahoga County, December 30, 1976 citing Wardius v. Oregon (1973), 412 U.S. 470. Due process requires is that if discovery procedures are made available to the state, they must be equally available to the accused. Id. In Ohio, Criminal Rule 16 provides for equal discovery by the state and the accused. The Due Process Clause does not require more.

The rules of discovery provide the trial court with great latitude in crafting sanctions to fit discovery abuses. State v. Colburn, No 04-CA-44, Fifth Dist, Fairfield County, March 9, 2005, citing Nakoff v. Fairview Gen. Hosp., 75 Ohio St.3d 254, 256, 1996 Ohio 159, 662 N.E.2d 1. "As an appellate court, we review a trial court's discovery sanctions under an abuse of discretion standard. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment." Blakemore v. Blakemore

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

(1983), 5 Ohio St.3d 217, 219.

In Brady v. Maryland (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, the United States Supreme Court held that the failure of the prosecution to disclose upon request evidence favorable to the defendant constitutes a violation of the Fourteenth Amendment's due process guarantee of a fair trial when the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Id.* at 87. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley (1985), 473 U.S. 667. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* The Court of appeals balanced this interest with the secrecy requirements.

Godfrey had the burden of proving there existed a discovery violation which deprived him of his right to due process. Kyles v. Whitley (1995), 514 U.S. 419, 433. "The Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." Bagley at 675. Godfrey did not so prove. No discovery violation occurred.

APPELLANT'S ASSIGNMENT OF ERROR III

NOT EVERY MOTION MUST BE SUBMITTED TO AN EVIDENTIARY HEARING. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION WHEN IT DETERMINES DISCOVERY MATTERS ON THE STATEMENTS OF COUNSEL.

RESPONSE OF THE STATE OF OHIO:

DEFENDANT FAILED TO ESTABLISH PARTICULARIZED NEED.

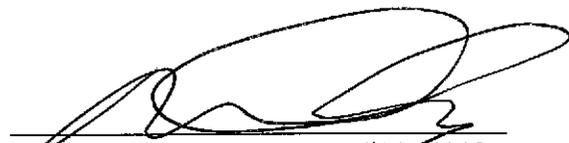
The Defendant has cited no new authority for this proposition of the other than generally referring to the constitution. As such, the State's only response is that the Defendant failed to establish any particularized need for the trial court to violate the sanctity of the Grand Jury under

clear and undisputed law.

CONCLUSION

The trial court ignored long standing and absolutely applicable precedent defining particularized need, found the Defendant established a particularized need without any actual evidence, and failed to order an In-Camera Inspection but instead ordered direct production of grand jury transcripts to Defendant. The Third District Court of Appeals recognized the trial court abused its discretion and reversed the erroneous order of the trial court.

The State urges this Court to decline jurisdiction herein as this matter presents no constitutional questions and no issue of great public or general interest.



Matthew K. Fox, Atty Reg #0056112
Assistant Prosecuting Attorney
119 N. Walnut St.
Celina, Ohio 45822

MERCER COUNTY
PROSECUTING ATTORNEY
119 NORTH WALNUT STREET
CELINA, OHIO 45822
(419) 586-8677
FAX: 586-8747

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Memorandum in Opposition to Claimed Jurisdiction has been sent by regular U.S. mail to James A. Tesno, 100 N. Main Street, Celina, Ohio 45822, on this the 24 day of April, 2009.



Matthew K. Fox