

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Plaintiff-Appellee : **Case No. 2010-0854**
vs. : **Death Penalty Case**
ANTHONY KIRKLAND :
Defendant-Appellant :

ON APPEAL FROM THE COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO

JOINT MOTION TO SUPPLEMENT THE RECORD

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NOV 17 2010

**CLERK OF COURT
SUPREME COURT OF OHIO**

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SUPREME COURT OF OHIO**

This is a capital case. Tried together with this case was Court of Common Pleas Case No. B-0904028. That case involved a separately indicted non-capital homicide. When counsel for defendant-appellant reviewed the record, it was discovered that the trial court never generated an entry ordering this case be consolidated for trial in Case No. B-0904028. Furthermore, defendant-appellant opposed joinder of the two indictments at trial. Therefore, an appeal to the First District Court of Appeals was filed for Common Pleas Court Case No. B-0904028. That appeal is Case No. C-100277.

When the State of Ohio reviewed the transcript and caught the error that caused Defendant-Appellant's lawyers to file a separate appeal in the First Appellate District, they filed a motion in the trial court to reflect the fact that the trial court ruled that the two cases should be joined for trial. A *nunc pro tunc* entry, retroactive to August 10, 2009, and initiated pursuant to App. Rule 9(E), was placed of record. When Appellate Case No. C-100277 proceeded to oral argument the three-judge panel indicated that jurisdiction was only appropriate for both cases before the Ohio Supreme Court in singular Case Number 2010-0854.

Counsel for both Plaintiff State of Ohio and Defendant-Appellant Anthony Kirkland agree that pursuant to Sup.Ct.R. 5.8 the Ohio Supreme Court should be jointly petitioned to supplement the record. The complete record is already before the court in trial court Case No. B-0901629, wherein the defendant-appellant was convicted of two capital homicides, and sentenced to death. The transcript for one is the transcript for both cases that were tried together. What is needed is the remainder of the record in Case No. B-0904028, which became First District Appeal No. C-100277. This will allow

each party to properly be before the Supreme Court of Ohio, with a complete record, so that merit briefs may be prepared and oral arguments made.

The State believes that when the trial court, pursuant to Crim. R. 13, consolidated these cases, they became one case for all purposes. That is the specific language of Crim. R. 13, *i.e.*, "The procedure shall be the same as if the prosecution were under such single indictment or information." See also **State v. Smith**, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). **Smith** points out that the Ohio Constitution mandates that appeals from capital cases can only be heard in the Ohio Supreme Court, because the Ohio Constitution places sole appellate jurisdiction in that Court. This applies even to non-capital issues. (**Smith**, *supra*, at ¶ 104).

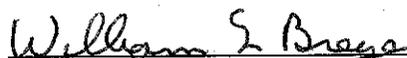
These cases arose out of an indivisible course of conduct, and were consolidated by motion and entry into one indictment for trial. (See **Exhibit 1 attached**.) The State believes that the original notice of appeal, filed in this court, referencing trial court case B-0901629, applies to both consolidated indictments. Because the entire record in case B-0904028, was not transmitted to this Court, the State joins in this motion so that the Court has a complete record and the defendant can raise all claims of error he feels necessary.

Memorandum: S.Ct.R. 5.8.

Respectfully submitted,



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