

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

AUSTIN GREGORY MYERS,

Defendant-Appellant.

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Case No. 2014-1862

**STATE OF OHIO'S RESPONSE TO DEFENDANT-APPELLANT'S NOTICE OF
DOCUMENTS MISSING FROM THE RECORD**

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Counsel for Defendant-Appellant,
Austin Gregory Myers

Plaintiff-Appellee, State of Ohio, herein responds to Defendant-Appellant, Austin Gregory Myers, pursuant to S.Ct.Prac.R.¹ 11.03(E), regarding Defendant-Appellant's notice of documents missing from the record.

In Defendant-Appellant's notice, he lists 18 documents that he claims are missing from the record in this appeal. As to documents 1 through 16 and document 18, the State cannot dispute Defendant-Appellant's assertions that these documents are not in the record. Thus, the State does not object to the record being supplemented pursuant to S.Ct.Prac.R. 11.03(E) regarding documents 1 through 16 and document 18.

However, the State does object to the record being supplemented regarding document 17, the transcript of the grand jury testimony.

On March 28, 2014, Defendant-Appellant moved the trial court for an order transcribing the grand jury testimony in this case. See Attachment 1: Defendant's Motion 10-Defendant's Motion to Transcribe the Grand Jury Proceedings Prior to Trial, T.d. In this tenth motion, he argued that he was unquestionably entitled to access to the prior statements of the State's witnesses who had testified at grand jury. *Id.* at 2. And he argued that, because this case is a capital case, the Federal Constitution and the Ohio Constitution required the transcription of the grand jury testimony. *Id.* He cited to no case law, either from the State of Ohio or from the federal courts, to support his assertion that he was constitutionally entitled to the grand jury transcript.

On the same day, Defendant-Appellant moved the trial court to furnish him with

¹ Rules of Practice of the Supreme Court of Ohio.

a copy of the grand jury transcript prior to trial. See Attachment 2: Defendant's Motion 11-Defendant's Motion for a Pre-trial Copy of the Transcript of the Grand Jury Proceedings, T.d. He argued that he had a particularized need for the transcript because the testimony of unnamed State's witnesses "may be inconsistent with the other statements that they have made; their testimony at the Grand Jury may contain exculpatory or impeachment information." *Id.* at 3. Defendant-Appellant failed to point to any specific exculpatory evidence and failed to point to any specific impeachment evidence. He also cited to Crim.R.² 16(B)(1)(g) and strongly implied that it entitled him to access to the grand jury transcript. *Id.* at 3-4.

Further, citing nothing, Defendant-Appellant argued that forcing him to show "a detailed 'particularized need'" was the same as a blanket denial of access to the grand jury transcripts in all cases. *Id.* at 4. He complained that he could not describe with particularity what he needed from the grand jury transcript because the grand jury proceeding was secret. *Id.* He further complained that his burden of showing a particularized need was logically impossible, and said burden constituted an arbitrary and capricious act that violated his constitutional rights because, ultimately, "[d]eath is different[.]" *Id.*

Also on March 28, 2014, Defendant-Appellant moved the trial court for disclosure of the names of the State's grand jury witnesses. See Attachment 3: Defendant's Motion 12-Defendant's Motion to Disclose Names of Grand Jury Witnesses, T.d. In this twelfth motion, he cited nothing and argued that he was not

² Ohio Rules of Criminal Procedure.

required to demonstrate a particularized need in order to gain access to the names of the State's grand jury witnesses. *Id.* at 2. Moreover, he argued that he "would be entitled to inspect the Grand Jury testimony of any State witness presented at trial pursuant to Ohio R. Crim. P. 16(B)(1)(g); therefore, these names will become known during the course of the trial anyway." *Id.* at 3.

On July 2, 2014, the Warren County Court of Common Pleas addressed Defendant-Appellant's tenth motion regarding transcribing the grand jury testimony. See Attachment 4: Order Granting Defendant's Motion #10 to Transcribe the Grand Jury Proceedings Prior to the Trial, T.d. As can be seen from the title of the entry, the trial court granted the motion but stated that "[t]he issue of whether the Defendant is entitled to a copy is addressed in a separate Order." *Id.*

On the same day, the trial court denied Defendant-Appellant's request for a pre-trial copy of the grand jury transcript. See Attachment 5: Order Denying Defendant's Motion #11 for Pre-trial Copy of the Transcript of the Grand Jury Proceedings, T.d. The trial court determined that

[T]here has been no evidence that a failure to disclose the grand jury testimony will deny the defendant a fair trial, only limited arguments regarding the impossibility for the defendant to show a particularized need. The defendant has not pointed to any circumstances that would lead to a probability that the failure to disclose the grand jury testimony would deny the defendant a fair trial.

Id. at 1. However, the trial court stated it would reconsider the issue if Defendant-Appellant, in a subsequent motion, specifically demonstrated a particularized need for the grand jury testimony. *Id.* at 2.

As for Defendant-Appellant's twelfth motion, the trial court denied it as well.

See Attachment 6: Order Denying Defendant's Motion #12 to Disclose Names of Grand Jury Witnesses, T.d. As with its prior order, the trial court determined that Defendant-Appellant had failed to demonstrate a probability that a failure to disclose the names of the grand jury witnesses would deny him a fair trial. *Id.* at 1. Like its previous order, the trial court stated it would reconsider the issue if Defendant-Appellant, later, specifically demonstrated a particularized need for said names. *Id.* at 2.

In 1981, this Court laid down the law regarding the disclosure of grand jury transcripts in the seminal case of *State v. Greer*, 66 Ohio St. 2d 139, 420 N.E.2d 982 (1981). This Court initially held that disclosure of grand jury transcripts is controlled by Crim.R. 6(E) and such disclosures fall within a trial court's sound discretion. *Id.* at paragraph 1 of the syllabus. The Court specifically held that Crim.R. 16(B)(1)(g) does not control disclosure of grand jury transcripts. *Id.* This Court held that grand jury proceedings are secret and a criminal defendant is not entitled to a grand jury transcript unless the ends of justice require it. *Id.* at paragraph 2 of the syllabus. This Court held that, to garner said transcript, a criminal defendant must demonstrate a particularized need for disclosure which outweighs the need for secrecy. *Id.* This Court held that whether a criminal defendant has demonstrated a particularized need is a question of fact for the trial court, and the trial court must consider all of the surrounding circumstances. *Id.* at paragraph 3 of the syllabus. And this Court held that the criminal defendant must show that there is a probability that failure to disclose the grand jury transcript will deprive the defendant of a fair trial. *Id.* This Court held that, once a particularized need has been shown, the trial court, the defense counsel, and counsel

for the State shall inspect the transcript *in camera* and the defendant shall receive any part that is relevant to the testimony of the State's witnesses at trial barring any other orders of the trial court. *Id.* at paragraph 4 of the syllabus.

As can be seen from the record, the grand jury testimony was transcribed. But nothing in the record suggests that the trial court inspected it. Further, Defendant-Appellant did not receive a copy because the trial court determined that he had failed to demonstrate the requisite particularized need. However, Defendant-Appellant is now asking this Court to supplement the record with the grand jury transcript and to, presumably, give him access to it. The State strenuously objects to this since Defendant-Appellant has made no attempt to demonstrate to this Court a particularized need for disclosure of the transcript and has made no attempt to demonstrate a particularized need for access to said transcript. While Defendant-Appellant can, most certainly, argue to this Court that the trial court abused its discretion when it denied his request for the transcript. He should not be given access to the grand jury transcript in order to craft such an argument since the trial court was not privy to the transcript in making its decision and because a criminal defendant must demonstrate a particularized need for a transcript independent of the transcript itself.

And, since Defendant-Appellant has failed to demonstrate a particularized need, he should not be given access to the transcript so the Assistant State Public Defenders, who currently represent him before the trial court, can use it to craft an argument in an anticipated petition for postconviction relief pursuant to R.C.³ 2953.21.

³ Ohio Revised Code.

See Attachment 7: Notice of Appearance of Counsel and Co-counsel for Petitioner Austin G. Myers, T.d.

CONCLUSION

The State does not object to supplementing the record with documents 1 through 16 and document 18 as set forth in Defendant-Appellant's notice. But the State strenuously objects to supplementing the record with the grand jury transcript and/or giving Defendant-Appellant access to the grand jury transcript absent a demonstration of a particularized need.

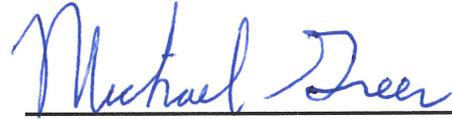
Respectfully submitted,



MICHAEL GREER, #0084352
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(513) 695-1325

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail to Defendant-Appellant's counsel: Mr. Timothy J. McKenna, 125 East Court Street, Suite 950, Cincinnati, Ohio 45202, and Mr. Roger W. Kirk, 114 East Eighth Street, Cincinnati, Ohio 45202 on this 6th day of October, 2015.



MICHAEL GREER, #0084352
Assistant Prosecuting Attorney

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

14 MAR 28 PM 1:25

JAMES L. SPAETH
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO**

STATE OF OHIO	:	CASE NO: 14CR29826
Plaintiff	:	
vs.	:	DEFENDANT'S MOTION <u>10</u>
AUSTIN GREGORY MYERS	:	
Defendant	:	JUDGE ODA
	:	
	:	
	:	

**DEFENDANT'S MOTION TO TRANSCRIBE THE
GRAND JURY PROCEEDINGS PRIOR TO TRIAL**

Defendant, through counsel, respectfully requests that this Court order the court reporter to transcribe the Grand Jury proceedings in the above-named case.

MEMORANDUM IN SUPPORT

This Motion is filed in conjunction with Defendant's Motion to Disclose Names of Grand Jury Witnesses and Defendant's Motion for a Pre-Trial Copy of the Transcript of the Grand Jury Proceedings. The arguments and authority cited in those motions is incorporated by reference as if fully re-written herein. However, the instant motion stands separate and apart from this Court's ruling on Defendant's companion motions asking for pre-trial disclosure of the Grand

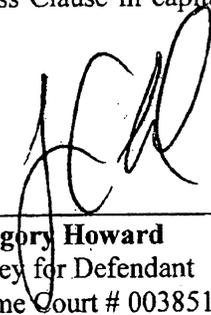
A-1

Jury transcript and the names of the witnesses who appeared before the Grand Jury. Once Defendant's trial is underway, he will unquestionably be entitled to access the prior statements of witnesses who testify at trial and who also testified before the Grand Jury. Ohio R. Crim. P. 16(B)(1)(g). Therefore, ordering the pretrial transcription of the Grand Jury proceedings will avoid lengthy trial delay during which the Court will have to stall the jury while the relevant witnesses testimony is being transcribed for review under Rule 16.

Recording Grand Jury proceedings is now mandated by the Ohio Supreme Court. State v. Grewell, 45 Ohio St. 3d 4, 543 N.E.2d 93 (1989). Thus, unless this rule was violated here, Defendant's capital Grand Jury proceedings were recorded and are available for transcription.

Failing to transcribe the Grand Jury proceedings pre-trial will cause trial delays inimical to Defendant's constitutional rights. Since this is a capital case, the pre-trial transcription of the Grand Jury proceedings is mandated by Defendant's Ohio and United States constitutional rights to a fair trial, effective assistance of counsel, confrontation of witnesses, presumption of innocence, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Even assuming, arguendo, that the requirement of transcribing Grand Jury proceedings and the Rule 16(B)(1)(g) procedures do not emanate directly from clear constitutional provisions, nevertheless, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). This is all the more so when a petitioner's "life" interest (protected by the

“life, liberty and property” language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct “life” interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT'S MOTION TO TRANSCRIBE THE GRAND JURY PROCEEDINGS PRIOR TO TRIAL was served by U.S. Mail upon the Prosecuting Attorney for Warren County, 500 Justice Drive, Lebanon, Ohio 45036, this 28th day of March, 2014.



J. Gregory Howard
Attorney for Defendant

#131258

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

14 MAR 28 PM 1:25

JANICE L. SPAETH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

STATE OF OHIO	:	CASE NO: 14CR29826
Plaintiff	:	
vs.	:	DEFENDANT'S MOTION <u>11</u>
AUSTIN GREGORY MYERS	:	
Defendant	:	JUDGE ODA
	:	
	:	
	:	

**DEFENDANT'S MOTION FOR A PRE-TRIAL COPY OF
THE TRANSCRIPT OF THE GRAND JURY PROCEEDINGS**

Defendant, through counsel, respectfully requests that this Court order the transcription of the Grand Jury proceedings and that a copy of the transcript be provided to defense counsel.

MEMORANDUM IN SUPPORT

This Motion is filed in conjunction with Defendant's Motion to Transcribe the Grand Jury Proceedings Prior to Trial and Defendant's Motion to Disclose Names of Grand Jury Witnesses. The arguments and authority cited in those motions is incorporated by reference as if fully re-written herein.

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Recording Grand Jury proceedings is mandated by the Ohio Supreme Court decision in State v. Grewell, 45 Ohio St. 3d 4, 543 N.E.2d 93 (1989). Thus, unless this rule was violated here, Defendant's capital Grand Jury proceedings were recorded and are available for transcription. While it is true that Ohio courts have historically protected the secrecy accorded the Grand Jury proceedings, see State v. Rhoads, 81 Ohio St. 397, 91 N.E. 86 (1910), over the years, there has been a significant broadening of the law of the discretionary use of Grand Jury testimony by criminal defendants for discovery purposes. State v. Greer, 66 Ohio St. 2d 139, 144, 420 N.E.2d 982, 985-986 (1981).

The standard for inspection of Grand Jury testimony prior to trial is whether the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. Grewell, 45 Ohio St. 3d at 9, 545 N.E.2d at 98. In State v. Laskey, 21 Ohio St. 2d 187, 191, 257 N.E.2d 65, 67-68 (1970), the Ohio Supreme Court held that an accused may inspect Grand Jury transcripts either before or during trial when the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. In State v. White, 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968), the court acknowledged that a defendant's rights to inspection and due process may, in certain instances, outweigh the interest in keeping Grand Jury proceedings secret:

The reasons for the right of a defendant in a criminal case to inspect a statement of the prosecuting witness vary from the recognition that it is a procedural safeguard against the suppression of evidence material and capable of exculpating the accused to the idea that it provides additional material for impeaching the credibility of the prosecuting witness.

Id. at 155, 239 N.E.2d at 72. The United States Supreme Court has determined that to "impeach a witness, to refresh his recollection, to test his credibility and the like . . . are cases of

particularized need where the secrecy of the proceedings is lifted discreetly and limitedly.”
United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).

There are no viable secrecy considerations present here: an indictment has been filed vitiating Defendant’s privacy interests. The principle of Grand Jury secrecy arises first and foremost out the policy of protecting suspects’ rights to privacy and their presumption of innocence – people should not be stained by what turns out to be an unfounded allegation of felonious conduct. These same principles simply do not apply to witnesses called before the Grand Jury.

In the instant case, the ends of justice require that defense counsel be permitted to have a copy of the Grand Jury transcript prior to trial. Based on the voluminous documents disclosed on discovery, it seems apparent that persons who testified before the Grand Jury have also given statements to Law Enforcement Officers or others who in turn have given the information to the State’s agents. Their testimony at the Grand Jury may be inconsistent with the other statements that they have made; their testimony at the Grand Jury may contain exculpatory or impeachment information. If such is the case, defense counsel needs to know prior to trial in order to effectively prepare a defense. If counsel does not receive the statements until trial, see Ohio R. Crim. P. 16(B)(1)(g), they cannot render effective assistance of counsel. If inconsistencies exist, counsel will need time pre-trial to investigate and prepare to effectively confront the State’s case.

Since this is a capital case, this Court should guard against unfair surprise and possible delay when an alternative remedy is available. There is no need for the secrecy traditionally reserved for Grand Jury proceedings because the witnesses will be testifying at trial. Preventing defense counsel from reviewing the Grand Jury testimony simply allows the State the

opportunity to obtain an indictment based upon testimony that may be inconsistent with that presented at trial. The jury has the right to know this information prior to deciding the fate of Defendant's life.

Forcing Defendant to demonstrate a detailed "particularized need" is tantamount to a blanket denial of access in all cases. How can this Defendant or any defendant describe with particularity what is in the transcript of a proceeding that was secretly conducted and which, to date, remains secret? Imposing this logically impossible burden on capital defendants constitutes as arbitrary and capricious act in violation of their constitutional rights as outlined below.

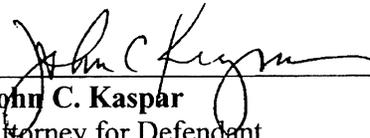
The pre-trial disclosure of the transcription of the Grand Jury proceedings is mandated by Defendant's Ohio and United States constitutional rights to a fair trial, effective assistance of counsel, confrontation of witnesses, presumption of innocence, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Even assuming, arguendo, that Ohio's jurisprudence governing the pre-trial disclosure of Grand Jury proceedings and the Rule 16(B)(1)(g) procedures do not emanate directly from clear constitutional provisions, nevertheless, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life"

interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

For all the foregoing reasons, Defendant asks this Court to provide a copy of the Grand Jury transcript to counsel prior to trial. In the alternative, Defendant requests that this Court conduct an in camera inspection of the Grand Jury testimony and the witnesses' statements to the State; which is necessary to protect Defendant's rights to confrontation, cross-examination, the right to present a defense, and due process of law.



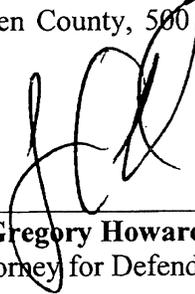
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT'S MOTION FOR A PRE-TRIAL COPY OF THE TRANSCRIPT OF THE GRAND JURY PROCEEDINGS was served by U.S. Mail upon the Prosecuting Attorney for Warren County, 500 Justice Drive, Lebanon, Ohio 45036, this 28th day of March, 2014.



J. Gregory Howard
Attorney for Defendant

#131260

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

14 MAR 28 PM 1:26

SAUL E. SPAETH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

STATE OF OHIO	:	CASE NO: 14CR29826
Plaintiff	:	
vs.	:	DEFENDANT'S MOTION <u>12</u>
AUSTIN GREGORY MYERS	:	
Defendant	:	JUDGE ODA
	:	
	:	
	:	

**DEFENDANT'S MOTION TO DISCLOSE NAMES
OF GRAND JURY WITNESSES**

Defendant, through counsel, respectfully requests that this Court order the Prosecutor to disclose the names of the witnesses who testified at the Grand Jury in the instant case. The reasons for this request are more fully stated in the following memorandum in support.

MEMORANDUM IN SUPPORT

This Motion is filed in tandem with Defendant's Motion to Transcribe the Grand Jury Proceedings Prior to Trial and Defendant's Motion for Inspection of Grand Jury Testimony. The key cases on the issue of disclosing Grand Jury testimony prior to trial are the following: State v. Grewell, 45 Ohio St. 3d 4, 543 N.E.2d 93 (1989); State v. Greer, 66 Ohio St. 2d 139, 91

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N.E.2d 86 (1981); State v. Sellards, 17 Ohio St. 3d 169, 478 N.E.2d 781 (1985); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); Dennis v. United States, 384 U.S. 855 (1966); and United States v. Sells Engineering, Inc., 463 U.S. 418 (1983). The standard for inspection of Grand Jury testimony prior to trial is whether the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. Grewell, 45 Ohio St. 3d at 9, 543 N.E.2d at 98.

Counsel has been unable to find any case that has dealt with the more limited issue of whether the names of those who testified at the Grand Jury can or should be disclosed. Since the disclosure of names is not testimonial in nature, Defendant believes the standard should be relaxed. However, even if this Court uses the standard for inspection of Grand Jury testimony, Defendant believes the names should be disclosed.

First, Defendant has a particularized need for the names of the witnesses. He cannot be expected to show a particularized need for Grand Jury testimony when he does not even know who testified. It is likely the names of those who testified at the Grand Jury are or will be on the State's witness list. However, it is equally likely that only a small subset of those who the State may call at trial actually testified before the Grand Jury. Requiring defense counsel to guess which of the numerous witnesses testified imposes an unfair burden on Defendant and undermines his ability to fully and fairly present issues to this Court arising from the Grand Jury proceedings.

Second, there are no secrecy considerations present here. If the witnesses are on the State's witness list, they are already subject to being interviewed, subpoenaed, and asked to testify. More importantly, the principle of Grand Jury secrecy arises first and foremost out the

policy of protecting suspected citizens' rights to privacy and their presumption of innocence – citizens should not be stained by what turns out to be an unfounded allegation of felonious conduct. This same principle simply does not apply to witness called before the Grand Jury. Thus, we are not dealing with a situation where the State has an interest in keeping the identity of a particular witness hidden.

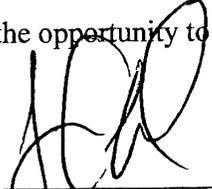
In the alternative, Defendant would be entitled to inspect the Grand Jury testimony of any State witness presented at trial pursuant to Ohio R. Crim. P. 16(B)(1)(g); therefore, these names will become known during the course of the trial anyway.

Finally, since this is a capital case, disclosure of these witnesses names is mandated by Defendant's Ohio and United States constitutional rights to a fair trial, effective assistance of counsel, confrontation of witnesses, presumption of innocence, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests). See also Evitts v. Lucey, 469 U.S. 387, 401 (1985).

For the above reasons the ends of justice require that the names of those who testified at the Grand Jury be disclosed to counsel for the defense. Only then can Defendant make the

showing required to obtain inspection of Grand Jury testimony under the previously cited cases.

It would be unfair to not even allow the defense the opportunity to meet the Grewell standard.



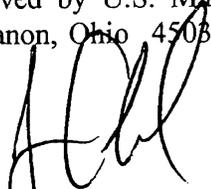
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT'S MOTION TO DISCLOSE NAMES OF GRAND JURY WITNESSES was served by U.S. Mail upon the Prosecuting Attorney for Warren County, 500 Justice Drive, Lebanon, Ohio 45036, this 28th day of March, 2014.



J. Gregory Howard
Attorney for Defendant

#131264

COMMON PLEAS COURT
WARREN COUNTY
FILED

2014 JUL -2 AM 11:19

JAMES L. SPAETH
CLERK OF COURTS

**STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION**

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	ORDER GRANTING
Defendant	:	DEFENDANT'S MOTION #10
	:	TO TRANSCRIBE THE GRAND
	:	JURY PROCEEDINGS PRIOR
	:	TO THE TRIAL

Pending before the Court is the motion of the Defendant to transcribe the grand jury proceedings prior to the trial. The State has filed a memorandum acknowledging that the grand jury proceedings will be transcribed prior to trial but arguing the Defendant is not entitled to a copy of the transcript absent showing a particularized need.

The motion is hereby GRANTED. The grand jury proceedings shall be transcribed prior to trial. The issue of whether the Defendant is entitled to a copy is addressed in a separate Order¹.



JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

WARREN COUNTY
COMMON PLEAS COURT
JUDGE DONALD E. ODA II
100 Justice Drive
Ebanon, Ohio 45036

¹ Order Denying Defendant's Motion #11 for Pretrial Copy of the Grand Jury Proceedings

A 4

COMMON PLEAS COURT
WARREN COUNTY
FILED

2014 JUL -2 AM 11:19

JAMES L. SPALIN
CLERK OF COURT
STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	ORDER DENYING
Defendant	:	DEFENDANT'S MOTION #11
	:	FOR PRE-TRIAL COPY OF THE
	:	TRANSCRIPT OF THE GRAND
	:	JURY PROCEEDINGS

Pending before the Court is the motion of the Defendant for a pre-trial copy of the transcript of the grand jury proceedings. The State has filed a memorandum in opposition, arguing the defendant is not entitled to a copy of the transcript absent showing a particularized need.

Under Ohio law, proceedings before a grand jury are secret. Exceptions have been made when "the ends of justice require it, and the defendant demonstrates a particularized need for disclosure which outweighs the need for secrecy of the proceedings." *State v. Leach*, 12th Dist. No. CA2000-05-033, 2001-Ohio-4203 (February 20, 2001) citing *State v. Greer* (1981), 66 Ohio St.2d 139, paragraph two of the syllabus. "A particularized need exists where the surrounding circumstances reveal a probability that the failure to disclose the grand jury testimony will deny the defendant a fair trial." *Id.*

In this case, there has been no evidence that a failure to disclose the grand jury testimony will deny the defendant a fair trial, only limited arguments regarding the impossibility for the defendant to show a particularized need. The defendant has not pointed to any circumstances that would lead to a probability that the failure to disclose the grand jury testimony would deny the defendant a fair trial.

A-5

The defendant has failed to meet his burden and the motion is DENIED.

The Court will reconsider the issue upon a specific showing of particularized need in a subsequent motion, if necessary.



JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

COMMON PLEAS COURT
WARREN COUNTY
FILED

2014 JUL -2 AM 11:19

JAMES L. SPALIN
CLERK OF WARREN COUNTY
STATE OF OHIO
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	ORDER DENYING
Defendant	:	DEFENDANT'S MOTION #12
	:	TO DISCLOSE NAMES OF
	:	GRAND JURY WITNESSES

Pending before the Court is the motion of the Defendant to disclose names of grand jury witnesses. The State has filed a memorandum in opposition, arguing the defendant is not entitled to disclosure of grand jury witnesses absent showing a particularized need.

Under Ohio law, proceedings before a grand jury are secret. Exceptions have been made when "the ends of justice require it, and the defendant demonstrates a particularized need for disclosure which outweighs the need for secrecy of the proceedings." *State v. Leach*, 12th Dist. No. CA2000-05-033, 2001-Ohio-4203 (February 20, 2001) citing *State v. Greer* (1981), 66 Ohio St.2d 139, paragraph two of the syllabus. "A particularized need exists where the surrounding circumstances reveal a probability that the failure to disclose the grand jury testimony will deny the defendant a fair trial." *Id.*

In this case, there has been no evidence that a failure to disclose the names of the grand jury witnesses will deny the defendant a fair trial, only limited arguments regarding the impossibility for the defendant to show a particularized need. The defendant has not pointed to any circumstances that would lead to a probability that the failure to disclose the names grand jury witnesses would deny the defendant a fair trial.

A-6

The defendant has failed to meet this burden and the motion is DENIED.

The Court will reconsider the issue upon a specific showing of particularized need in a subsequent motion, if necessary.



JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

15 JUL 15 AM 9:54

JAMES L. SPAETH
CLERK OF COURTS

IN THE WARREN COUNTY COURT OF COMMON PLEAS
LEBANON, OHIO

STATE OF OHIO, : CASE NO.: 14 CR 29826
Respondent, :
vs. : JUDGE DONALD E. ODA II
AUSTIN G. MYERS, :
Petitioner. : DEATH PENALTY CASE

NOTICE OF APPEARANCE OF COUNSEL AND CO-COUNSEL FOR PETITIONER
AUSTIN G. MYERS

Kathryn L. Sandford, Assistant State Public Defender, hereby enters her appearance as counsel of record on behalf of Austin G. Myers, Petitioner, for his post-conviction litigation in the above-captioned case. Assistant State Public Defenders Lisa M. Lagos and Jessica L. Carrico also hereby enter their appearance as co-counsel of record on behalf of Petitioner in this same matter.

Respectfully Submitted,

Office of the Ohio Public Defender

By: 

Kathryn L. Sandford - 0063985

Supervising Atty., Death Penalty Division

By: 

Lisa M. Lagos - 0089299

Assistant State Public Defender

A-7

By: J Carrico
Jessica L. Carrico – 0087813
Assistant State Public Defender

Office of the Ohio Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215-2998
Phone: (614) 466-5394
Fax: (614) 644-0708

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **NOTICE OF APPEARANCE OF COUNSEL AND CO-COUNSEL FOR PETITIONER AUSTIN G. MYERS** was served via regular U.S. Mail upon David Fornshell, Warren County Prosecuting Attorney, and Michael Greer, Assistant Prosecuting Attorney, Warren County Prosecutor's Office, 520 Justice Drive, Lebanon, Ohio 45036, this 14th day of July, 2015.

Kathryn L. Sandford
Kathryn L. Sandford
COUNSEL FOR PETITIONER