

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Appellee : Case No. 2014-1862
-vs- : On Appeal from the Warren County
Court of Common Pleas,
AUSTIN GREGORY MYERS : Trial Case No. 14 CR 29826
Appellant : **THIS IS A DEATH PENALTY CASE**

**MOTION TO MAKE GRAND JURY TESTIMONY/TRANSCRIPTS PART OF THE
RECORD ON APPEAL (MOTION TO SUPPLEMENT RECORD)**

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RECORD ON APPEAL (MOTION TO SUPPLEMENT RECORD)**

Appellant Austin Gregory Myers respectfully moves this Court, under S.Ct. Prac. R. 5.8 and 19.4, and pursuant to this Court’s October 19, 2015, Entry directing Appellant to show cause “why the grand jury testimony/transcript (identified as item number 17 in appellant’s October 2, 2015 notice of documents missing from the record) should be made part of the record on appeal in this case, and for an order directing the trial court to make part of the record on appeal (supplement the record) a transcript of the grand jury proceedings held in this case. The reasons in support of this motion are set forth in the accompanying Memorandum.

MEMORANDUM IN SUPPORT

Introduction

Appellant, Austin Gregory Myers, moves this Court for an order directing the trial court to make part of the record and supplement the record with a transcript of the grand jury proceedings.

The grand jury transcript should be made a part of the record and supplemented with the grand jury transcript because the ends of justice require it and there is a particularized need.

Although grand jury testimony is not routinely included in the record, this Court has recognized circumstances in which the transcript should be produced:

This court has recognized a limited exception to the general rule of grand jury secrecy: an accused is not entitled to review the transcript of grand jury proceedings "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer* (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus. A particularized need is established "when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial." *State v. Sellards* (1985), 17 Ohio St.3d 169, 173, 17 OBR 410, 478 N.E.2d 781.

State v. Fry, 125 Ohio St. 3d 163, 173 (Ohio 2010). And further:

Once a particularized need for the grand jury material is shown, the necessity of preserving grand jury secrecy is lessened, largely because the witness, in testifying at trial, has given up any anonymity he might have had and has made public the events which are the subject of the grand jury testimony being sought. Under such circumstances, when there is a balancing of the often minimal need to preserve secrecy against the need for the defendant to review certain portions of the grand jury testimony, we conclude that all relevant portions of the transcript should be produced, with the trial court deleting extraneous matters, and issuing protective orders where necessary. *Greer* at 150-151.

In the present case, the ends of justice require the production of the grand jury testimony, and making it a part of the record. The particularized need for disclosure of the grand jury transcript testimony is that there were serious credibility issues of the state's co-defendant witness testimony, Timothy Mosley. Mosley was the principal offender in the alleged crime and testified against appellant Austin Myers, and he received a life-sentence plea deal in exchange. Additionally, there is a potentially serious issue regarding the fact of the timeline of events that counsel would have need the grand jury transcripts to see if it might not have complied with Mosley's testimony.

In light of the important constitutional rights of effective assistance of counsel, confrontation of witnesses and due process at stake, the disclosure and making a part of the record the grand jury transcripts are essential and mandated by U.S. Constitution Amendments V, VI, VIII, and XIV, Ohio Constitution Article 1, 2, 5, 9, 10, 16, and 20. Thus, this Court should order the Warren County Clerk of Courts clerk to supplement and make part of the record the grand jury testimony.

In the alternative, the grand jury transcript should be made a part of the record, but placed under seal, to be used in future litigation, if necessary.

In the alternative, if the Court is not inclined to grant the above motion, Mr. Myers respectfully requests that the Court order that the grand jury transcripts be made a part of the record, but placed under seal for future litigation or appeals if necessary. This would adequately preserve the record and accurately reflect the trial court's intention in this regard which ordered the grand jury transcripts transcribed. In fact, the Ohio Supreme Court took this exact approach and made the grand jury transcripts part of the record by placing it under seal in the capital cases of *State v. Willie Wilks*, Case No. 2014-1035 and *State v. Joseph Thomas*, Case No. 2012-2026.

Conclusion

Accordingly, Austin Myers requests that this Court order that the Warren County Clerk of Common Pleas Court supplement the record with the grand jury testimony and transmit the record to the Ohio Supreme Court, or in the alternative, order it made part of the record under seal for appellate review or in camera inspection.

Respectfully submitted,

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COUNSELS FOR APPELLANT

Certificate of Service

I hereby certify that a true copy of the foregoing **Motion to Supplement Record** was forwarded by U.S. Mail to David Fornshell, Warren County Prosecuting Attorney, c/o Michael Greer, 500 Justice Drive, Lebanon, Ohio, 45036 on the 3 day of November, 2015.

S/ Timothy J McKenna
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