

**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**

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**STATE OF OHIO'S RESPONSE TO DEFENDANT-APPELLANT'S MOTION TO MAKE  
GRAND JURY TESTIMONY/TRANSCRIPTS PART OF THE RECORD ON APPEAL**

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Plaintiff-Appellee, State of Ohio, herein responds to Defendant-Appellant, Austin Gregory Myers, regarding his motion to supplement the record with the grand jury transcript.

As this Court knows well, the seminal case about the disclosure of grand jury transcripts is *State v. Greer*, 66 Ohio St. 2d 139, 420 N.E.2d 982 (1981). In *Greer*, 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. Further, to garner said transcript, a criminal defendant must demonstrate a particularized need for disclosure which outweighs the need for secrecy. *Id.* 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 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.* 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.

To show a particularized need, Defendant-Appellant argues that his co-defendant, Timothy Mosley, had serious credibility issues at trial, so Defendant-Appellant requires the grand jury transcripts. Defendant-Appellant makes no attempt to explain what those "serious credibility issues" were. First off, Mosley did not testify

at grand jury. Given that, the grand jury transcript simply will not help Defendant-Appellant to attack Mosley's credibility on appeal, meaning he has failed to demonstrate the requisite particularized need. Secondly, this Court has previously held that a claim that a witness's testimony at grand jury may differ from his or her trial testimony is not sufficient to establish a particularized need. *State v. Hennes*, 79 Ohio St. 3d 53, 62, 679 N.E.2d 686 (1997). So Defendant-Appellant's speculations regarding inconsistencies are not sufficient to establish a particularized need.

Also, to demonstrate a particularized need, Defendant-Appellant argues that "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." Defendant-Appellant's Motion to Make Grand Jury Testimony/Transcripts Part of the Record on Appeal, T.d., p. 2. This is the entirety of Defendant-Appellant's second argument regarding particularized need. And, as can be seen, Defendant-Appellant does not specify what the "potentially serious issue" is, nor does he specify to which "fact of the timeline of events" the unspecified and unexplained "potentially serious issue" relates. An allegedly serious issue that is unexplained, unspecified, and merely potential (and that relates to a fact that is also unexplained and unspecified) cannot, by its very nature, constitute a particularized need.

Further, this Court should not supplement the record with the grand jury transcript under seal because Defendant-Appellant has yet to demonstrate the necessary particularized need. If this Court does supplement the record with the

transcript sealed, Defendant-Appellant's various attorneys will certainly request this Court to unseal them or request to review those sealed transcript. Either way, Defendant-Appellant must still establish a particularized need; a requirement that Defendant-Appellant has yet to meet. Until Defendant-Appellant has met his burden, it is premature for this Court to supplement the record with the grand jury transcript, whether sealed or unsealed.

### CONCLUSION

Absent a demonstration of a particularized need, the State strenuously objects to supplementing the record with the grand jury transcript, strenuously objects to supplementing the record with the grand jury transcripts under seal, and strenuously objects to giving Defendant-Appellant access to the grand jury transcript.

Respectfully submitted,

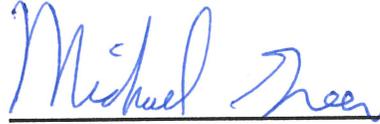


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**CERTIFICATE OF SERVICE**

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 4<sup>th</sup> day of November, 2015.



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