

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Grand Juror Doe,)	
)	
Plaintiff,)	
)	
v.)	No. 4:15-cv-00006
)	
Robert P. McCulloch, in his official capacity)	
as Prosecuting Attorney for St. Louis)	
County, Missouri,)	
)	
Defendant.)	

Complaint for Prospective Relief

Introduction

1. In this civil rights action under 42 U.S.C. § 1983, Plaintiff, Grand Juror Doe,¹ seeks declaratory judgment that Missouri laws criminalizing speech by Doe, about Doe’s experiences as a state grand juror for the investigation of the matter known as *State of Missouri v. Darren Wilson*, are unconstitutional as-applied. Doe also seeks preliminary and permanent injunctive relief enjoining Defendant, Robert P. McCulloch, the official charged with enforcement of the challenged laws, from taking any action to enforce the challenged laws against Doe.
2. Although there is a long tradition of grand jury secrecy, the Supreme Court has “recognized that the invocation of grand jury interests is not ‘some talisman that dissolves all constitutional protections.’” *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973)). Thus, when

¹ Grand Juror Doe is a pseudonym. A motion for leave to proceed under a pseudonym is filed with this Complaint.

faced with a First Amendment challenge to grand jury secrecy rules, the Court determined that it “must thus balance [the] asserted First Amendment rights against [the state]’s interests in preserving the confidentiality of its grand jury proceedings.” *Id.* Under the particular circumstances of this case, permitting Defendant to prosecute Plaintiff for speaking about Plaintiff’s perspective on the grand jury proceedings in *State of Missouri v. Darren Wilson* does not advance the interests served by the confidentiality of grand jury proceedings and, further, defeats the interests secured by the First Amendment.

Jurisdiction and Venue

3. This action arises under the Constitution of the United States and the provisions of 42 U.S.C. § 1983.
4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a).
5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in St. Louis County, Missouri.
6. Venue is proper in the Eastern Division pursuant to E.D. Mo. L.R. 2.07(A)(1).

Parties

7. Plaintiff is a resident of St. Louis County, Missouri.
8. Defendant is the Prosecuting Attorney for St. Louis County, Missouri. As Prosecuting Attorney, Defendant is charged with enforcement of the statutes challenged here, as-applied, and is the individual responsible for initiating prosecutions for any violation of those statutes. He is named as a defendant in his official capacity only.
9. As relevant to this Complaint, Defendant acts under color of state law.

Facts

10. Plaintiff began serving as a grand juror in the circuit court for St. Louis County in May 2014, for a term originally scheduled to end on September 10, 2014.
11. Several weeks prior to the scheduled end of Plaintiff's service as a grand juror, that service was extended to no later than January 2015.
12. The purpose of extending Plaintiff's service was to have the grand jury investigate Darren Wilson, a former police officer of the City of Ferguson, who on August 9, 2014, while still working as a police officer, shot and killed Michael Brown, an unarmed teenager.
13. Defendant is the government official with the authority to initiate a criminal prosecution of Wilson for his actions and omissions related to the events of August 9, 2014.
14. Defendant decided to delegate to the grand jury the decision about whether there was probable cause to believe that Wilson violated any state criminal laws.
15. Defendant was responsible for deciding what evidence would be presented to the grand jury, what evidence would be withheld, how evidence would be presented, and what the State's counsel to the grand jury would be.
16. Defendant promised the grand jurors and the public that the grand jury investigation would be transparent.
17. Defendant told the grand jurors, "If your determination is that there are no charges to be filed, then everything will be released immediately or as close to immediately as we can get, and that's everything. Your deliberations aren't, as I said, your deliberations are not recorded and never will be recorded, notes won't be released, but every bit of evidence

that you have, the testimony of the witnesses who come in, the statements of the witnesses, the physical evidence, the photographs, everything that you have seen and heard will be released to the public. That is as transparent as we can get short of putting a pool TV camera in here and that's not going to happen.”

18. Once before, in the investigation of a June 12, 2000, police shooting, Defendant had promised transparency and to release all evidence presented.
19. From Plaintiff's perspective, the presentation of evidence to the grand jury investigating Wilson differed markedly and in significant ways from how evidence was presented in the hundreds of matters presented to the grand jury earlier in its term.
20. From Plaintiff's perspective, the State's counsel to the grand jury investigating Wilson differed markedly and in significant ways from the State's counsel to the grand jury in the hundreds of matters presented to the grand jury earlier in its term.
21. From Plaintiff's perspective, the investigation of Wilson had a stronger focus on the victim than in other cases presented to the grand jury.
22. From Plaintiff's perspective, the presentation of the law to which the grand jurors were to apply the facts was made in a muddled and untimely manner compared to the presentation of the law in other cases presented to the grand jury.
23. In Missouri, an indictment is returned only when at least nine out of twelve grand jurors concur in finding that an indictment should issue. Mo. Rev. Stat. § 540.260.
24. The decision of a grand jury to return no true bill of indictment means that as few as four out of twelve grand jurors did not concur in finding that an indictment should issue. *Id.*
25. None of the charges presented to the grand jury investigating Wilson resulted in an indictment.

26. On November 24, 2014, Plaintiff was discharged from grand jury service.
27. Defendant has announced that no future grand jury will be convened to further investigate Darren Wilson's killing of Michael Brown.
28. Plaintiff and other grand jurors were provided a copy of three Missouri statutes at the conclusion of their service. A true and correct copy of the papers handed to Plaintiff is attached as Exhibit A.
29. Immediately after the grand jurors were discharged, Defendant gave a lengthy oral statement about the grand jury's investigation of Wilson to the public at a press conference. A transcription of the statement is attached as Exhibit B.
30. Defendant publicly released some evidence presented to the grand jury, including transcripts, reports, interviews, and forensic evidence. A copy of the documents made public by Defendant is filed herewith as Exhibit C.²
31. Defendant contends that the records of the criminal investigation that are created or retained by his office are subject to disclosure under Missouri's Sunshine Law. Those records include the transcribed testimony before the grand jury, photographs, investigative and other reports, and video and audio recordings. Defendant set forth his view of the Missouri Sunshine Law in a Memorandum in Support of Motion for Public Disclosure of Materials Considered by the Grand Jury, which was filed in *In the Matter of the Grand Jury Investigation of the Incident of 8/9/2014*, docketed as cause number 14SL-MC15812 in the Circuit Court of St. Louis County, Missouri. A copy of that filing is attached as Exhibit D.

² Because Exhibit C is too large to attach and file electronically, it will be filed on a disc with the Clerk.

32. From Plaintiff's perspective, Defendant's statement characterizes the views of the grand jurors collectively toward the evidence, witnesses, and the law, in a manner that does not comport with Plaintiff's own opinions.
33. From Plaintiff's perspective, although the release of a large number of records provides an appearance of transparency, with heavy redactions and the absence of context, those records do not fully portray the proceedings before the grand jury.
34. Plaintiff would like to speak about the experience of being a grand juror, including expressing Plaintiff's opinions about the evidence and the investigation, and believes Plaintiff's experience could contribute to the current public dialogue concerning race relations. In Plaintiff's view, the current information available about the grand jurors' views is not entirely accurate—especially the implication that all grand jurors believed that there was no support for any charges. Moreover, the public characterization of the grand jurors' view of witnesses and evidence does not accord with Plaintiff's own. Plaintiff also wishes to express opinions about: whether the release of records has truly provided transparency; Plaintiff's impression that evidence was presented differently than in other cases, with the insinuation that Brown, not Wilson, was the wrongdoer; and questions about whether the grand jury was clearly counseled on the law.
35. Plaintiff believes that by sharing Plaintiff's experience, Plaintiff could aid in educating the public about how grand juries function.
36. Plaintiff would also like to use Plaintiff's own experiences to advocate for legislative change to the way grand juries are conducted in Missouri.
37. Plaintiff's views would add to the public debate—occurring in Missouri and across the country—about the proper role of state grand juries and whether they continue to serve

their original purpose of protecting the accused, or are now increasingly used to deprive those accused of crimes of due process to which they are otherwise entitled.

38. In Missouri, proposed House Joint Resolution 17 would repeal the state constitutional authorization for grand juries. A copy of HJR 17 is attached hereto as Exhibit E.
39. Plaintiff would also like to be able to discuss Plaintiff's experiences and opinions with close family members in the privacy of Plaintiff's own home.
40. Plaintiff is chilled from expressing individual views and experiences because Plaintiff fears the imposition of criminal penalties or other punishment by government officials.
41. The chilling effect is caused by the following statutes that Defendant enforces:
 - A. Mo. Rev. Stat. § 540.320, entitled "Grand juror not to disclose evidence—penalty," which provides: "No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a class A misdemeanor.";
 - B. Mo. Rev. Stat. § 540.310, entitled "Cannot be compelled to disclose vote," but which more broadly provides that "[n]o member of a grand jury shall be obliged or allowed to testify or declare in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.";

C. Mo. Rev. Stat. § 540.080, entitled “Oath of grand jurors,” which states that: “Grand jurors may be sworn in the following form: Do you solemnly swear you will diligently inquire and true presentment make, according to your charge, of all offenses against the laws of the state committed or triable in this county of which you have or can obtain legal evidence; the counsel of your state, your fellows and your own, you shall truly keep secret? You further swear that you will present no one for any hatred, malice or ill will; neither will you leave unpresented any one for love, fear, favor or affection, or for any reward or the hope or promise thereof, but that you will present things truly as they come to your knowledge, to the best of your understanding, according to the laws of this state, so help you God.”; and

D. Mo. Rev. Stat. § 540.120, entitled “Penalty for violation of oath,” which provides that “[a]ny person having taken the oath required pursuant to section 540.110, who shall willfully violate the same, shall be adjudged guilty of a class B misdemeanor.”

42. Under Missouri law, a class A misdemeanor offense is punishable by up to one year in jail, a fine of up to \$1,000.00, or both.
43. Under Missouri law, a class B misdemeanor offense is punishable by up to six months in jail, a fine of up to \$500.00, or both.
44. There are exceptions to the rules governing grand jury secrecy, including Missouri’s Sunshine Law and Mo. Rev. Stat. § 540.300 (“Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such

court. They may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense.”).

45. In this case, there is no risk that Plaintiff’s expressive activity would result in making public pre-indictment proceedings such that prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony.
46. In this case, there is no risk that Plaintiff’s expressive activity would cause witnesses who appeared before the grand jury to be less likely to testify fully and frankly, by reason of being open to retribution as well as to inducements, because they have already given their testimony.
47. In this case, there is no risk that Plaintiff’s expressive activity would cause Wilson to flee, or to try to influence individual grand jurors to vote against indictment.
48. In this case, prohibiting Plaintiff’s expressive activity does not serve to assure that Wilson will not be held up to public ridicule.

Cause of Action

49. Plaintiff incorporates herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.
50. Plaintiff is reasonably chilled from engaging in expressive activity because of Mo. Rev. Stat. §§ 540.080, 540.120, 540.310, and 540.320, as well as any other provision of Missouri law that prohibits Plaintiff from discussing or expressing an opinion about Plaintiff’s grand jury service, the witnesses and evidence, the State’s counsel to the grand

jury, and Defendant's characterizations of the grand juror's views (collectively referred to as "the challenged laws").

51. The challenged laws operate to permanently and totally prohibit Plaintiff from engaging in any expressive activity related to evidence, witnesses, and counsel before the grand jury.
52. The challenged laws prevent Plaintiff from speaking about matters of public concern.
53. The challenged laws prevent Plaintiff from engaging in political speech.
54. The challenged laws prevent Plaintiff from engaging in expressive activity based on the content of Plaintiff's desired expression.
55. As applied in the circumstances of this case, the challenged laws prevent Plaintiff from engaging in expressive activity based upon the viewpoint of Plaintiff's desired expression.
56. The challenged laws prevent Plaintiff from discussing truthful information about a matter of public significance.
57. As applied in the circumstances of this case, the challenged laws act as a prior restraint on Plaintiff's expressive activity.
58. As applied in the circumstances of this case, any interests furthered by maintaining grand jury secrecy are outweighed by the interests secured by the First Amendment.

WHEREFORE, Plaintiff prays that this Court:

- A. Enter judgment, including declaratory judgment pursuant to 42 U.S.C. § 1983, in favor of Plaintiff and against Defendant;

- B. Upon proper motion, issue preliminary and permanent injunctions enjoining Defendant from enforcing, or threatening to enforce, the challenged laws against Plaintiff;
- C. Award Plaintiff's reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable provisions of law; and
- D. Allow such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Anthony E. Rothert

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540.080. Oath of grand jurors, MO ST 540.080

Vernon's Annotated Missouri Statutes

Title XXXVII. Criminal Procedure

Chapter 540. Grand Juries and Their Proceedings (Refs & Annos)

V.A.M.S. 540.080

540.080. Oath of grand jurors

Currentness

Grand jurors may be sworn in the following form:

Do you solemnly swear you will diligently inquire and true presentment make, according to your charge, of all offenses against the laws of the state committed or triable in this county of which you have or can obtain legal evidence; the counsel of your state, your fellows and your own, you shall truly keep secret? You further swear that you will present no one for any hatred, malice or ill will; neither will you leave unrepresented any one for love, fear, favor or affection, or for any reward or the hope or promise thereof, but that you will present things truly as they come to your knowledge, to the best of your understanding, according to the laws of this state, so help you God.

Credits

(R.S.1939, § 3905. Amended by L.1989, S.B. Nos. 127, 72, 161, 171, 275 & 120, § A.)

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V. A. M. S. 540.080, MO ST 540.080

Statutes are current through the end of the 2014 Second Regular Session of the 97th General Assembly, pending corrections received from the Missouri Revisor of Statutes. Constitution is current through the November 6, 2012 General Election.

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540.320. Grand juror not to disclose evidence--penalty, MO ST 540.320

Vernon's Annotated Missouri Statutes

Title XXXVII. Criminal Procedure

Chapter 540. Grand Juries and Their Proceedings (Refs & Annos)

V.A.M.S. 540.320

540.320. Grand juror not to disclose evidence--penalty

Currentness

No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a class A misdemeanor.

Credits

(R.S.1939, § 3924. Amended by L.1989, S.B. Nos. 127, 72, 161, 171, 275 & 120, § A.)

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V. A. M. S. 540.320, MO ST 540.320

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540.310. Cannot be compelled to disclose vote, MO ST 540.310

Vernon's Annotated Missouri Statutes

Title XXXVII. Criminal Procedure

Chapter 540. Grand Juries and Their Proceedings (Refs & Annos)

V.A.M.S. 540.310

540.310. Cannot be compelled to disclose vote

Currentness

No member of a grand jury shall be obliged or allowed to testify or declare in what manner he or any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

Credits

(R.S.1939, § 3923.)

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V. A. M. S. 540.310, MO ST 540.310

Statutes are current through the end of the 2014 Second Regular Session of the 97th General Assembly, pending corrections received from the Missouri Revisor of Statutes. Constitution is current through the November 6, 2012 General Election.

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Statement of St. Louis Prosecuting Attorney Robert P. McCulloch

NOVEMBER 24, 2014 8:15 PM • BY JEREMY KOHLER

To follow is a transcript of the statements by St. Louis County Prosecuting Attorney Robert P. McCulloch on Monday night as he announced the decision of the grand jury not to indict Darren Wilson.

First and foremost, I would like to extend my deepest sympathies to the family of Michael Brown. As I have said in the past, I know that regardless of the circumstances here, they lost a loved one to violence. I know the pain that accompanies such a loss knows no bounds.

On August 9, Michael Brown was shot and killed by police officer Darren Wilson. Within minutes, various accounts of the incident began appearing on social media. The town was filled with speculation and little if any solid accurate information. Almost immediately, anger began brewing because of the various descriptions of what had happened and because of the underlying tensions between the police department and a significant part of the neighborhood. The St. Louis county police conducted an extensive investigation of the crime scene. Under varying trying circumstances and interrupted at least once by gunfire. Continuing after that, they, along with the agents of the FBI at the direction of Attorney General Eric Holder, located numerous individuals and gathered additional evidence and information.

Fully aware of the unfounded but growing concern in some parts of our community that the investigation and review of this tragic death might not be fair, I decided immediately that all of the physical evidence gathered, all people claiming to have witnessed any part or all of the shooting, and any and all other related matters would be presented to the grand jury.: 12 members of this community selected by a judge in May of this year long before the shooting occurred.

I would like to briefly expand upon the unprecedented cooperation of the local and federal authorities. When Attorney General Holder first announced the investigation just days after the shooting, he pledged that federal investigators would be working with local authorities as closely as possible every step of the way and would follow the facts wherever it may take us. We both pledged our separate investigations will follow the trail of facts with no preconceived notion of where that journey would take us. The only goal was that our investigation would be thorough and complete to give the grand jury, the Department of Justice and ultimately, the public all available evidence to make an informed decision.

All evidence obtained by federal authorities was immediately shared with St. Louis county investigators. All evidence gathered by St. Louis county police was immediately shared with the federal investigators. Additionally, the Department of Justice conducted its own

examination of evidence and performed its own autopsy. Another autopsy was performed at request of the Brown family and his information was also shared. Just as importantly, all testimony before the St. Louis county grand jury was immediately provided to the Department of Justice.

Although the investigations are separate, both of the local and federal government have all of the same information and evidence. Our investigation and presentation of the evidence of the grand jury and St. Louis county has been completed.

The most significant challenge encountered in this investigation has been the 24-hour news cycle and the sensational appetite for something to talk about. Following closely behind were the rumors on social media.

I recognize the lack of accurate detail surrounding the shooting frustrates the media and the general public and helps breed suspicion among those already stressed out by the system.

The most closely-guarded details give law enforcement a yardstick for measure the truthfulness of what people said. Eyewitness accounts must always be challenged and compared against the physical evidence. Many witnesses to the shooting of Michael Brown made statements inconsistent with other statements they made and also conflicted with the physical evidence. Some were completely refuted by the physical evidence.

An example -- before the result of an autopsy was released, witnesses claim they saw Officer Wilson stand over Michael Brown and fire many rounds into his back. Others claim that Officer Wilson shot Mr. Brown in the back as Mr. Brown was running away. However, once the autopsy findings were released showing Michael Brown had not sustained any wounds to the back of his body, no additional witnesses made such a claim. Several witnesses adjusted their stories in their subsequent statements.

Some even admitted they did not witness the event at all but merely repeated what they heard in the neighborhood or assumed. Fortunately for the integrity of our investigation, almost all of initial witness interviews, including those of Officer Wilson, were recorded. The statements in the testimony of most of the witnesses were presented to the grand jury before the autopsy results were released by the media, and before several media outlets published information from reports they received from a D.C. Government official.

The jurors were therefore , prior to the release of the information being public and what followed in the new cycle -- the jurors were able to assess the credibility of the witnesses, including those witnesses who statements and testimony remained consistent throughout every interview and were consistent with the physical evidence.

My assistants began presenting to the grand jury on August 23. The evidence was presented in an organized and orderly manner. The jurors gave us a schedule of when they could meet. All 12 jurors were present for every session and heard every word of testimony and examined every item of evidence.

Beginning August 20 and continuing until today, the grand jury worked tirelessly to examine and re-examine all of the testimony of the witnesses and all of the physical evidence. They were extremely engaged in the process asking questions of every witness,

requesting specific witnesses, requesting specific information and asking for certain physical evidence. They met on 25 separate days in the last three months, heard more than 70 hours of testimony from about 60 witnesses and reviewed hours and hours of recordings of media and law enforcement interviews by many of the witnesses who testified. They heard from the three medical examiners and experts on blood, DNA, toxicology, firearms and drug analysis. They examined hundreds of photographs, some of which they asked to be taken. They examined various pieces of physical evidence. They were presented with five indictments ranging from murder in the first degree to involuntary manslaughter. Their burden was to determine, based upon all of the evidence, if probable cause existed to believe that a crime was committed and that Darren Wilson was the person to commit the crime.

There is no question that Darren Wilson caused the death of Michael Brown by shooting him, but the inquiry does not end there. The law authorizes a law enforcement officer to use deadly force in certain situations. The law allows all people to use deadly force to defend themselves in certain situations. The grand jury considered whether Wilson was the initial aggressor in this case, or whether there was probable cause to believe that Darren Wilson was authorized as a law enforcement officer to use deadly force in this situation, or if he acted in self-defense.

I detail this for two reasons: First, so that everybody will know that, as promised by me and Attorney General Holder, there was a full presentation of all evidence and appropriate instruction in the law to the grand jury. Second, as a caution to those in and out of the media who will pounce on a single sentence or witness and decide what should have happened in this case based on that tiny bit of information.

The duty of the grand jury is to separate fact from fiction, after a full and impartial examination of all the evidence involved, and decide if evidence supported the filing of any criminal charges against Darren Wilson. They accepted and completed this monumental responsibility in a conscientious and expeditious manner.

It is important to note here, and say again, that they are the only people, the only people who have heard and examined every witness and every piece of evidence. They discussed and debated the evidence among themselves before arriving at their collective decision. After their exhaustive review, the grand jury deliberated and made their final decision. They determined that no probable cause exists to file any charges against Officer Wilson and returned a "no true bill" on each of the five indictments.

The physical and scientific evidence examined by the grand jury, combined with the witness statements, supported and substantiated by that physical evidence, tells the accurate and tragic story of what happened.

The very general synopsis of the testimony and the physical evidence presented to the grand jury follows -- as I have promised, the evidence presented to the grand jury, with some exceptions, and the testimony of the witnesses called to the grand jury will be released at the conclusion of this statement.

At approximately 11:45 a.m. on Saturday, the ninth of August, Ferguson police officer Darren Wilson was dispatched to the Northwinds apartment complex for an emergency

involving a two-month-old infant having trouble breathing. At approximately 11:53 a.m., while still at the Northwinds call, Wilson heard a radio broadcast of stealing in progress at a market on West Florissant. The broadcast included a brief description of the suspect: a black male, wearing a white t-shirt, who took a box of Swisher cigars. Officer Wilson remained with the mother and the infant until EMS arrived. Officer Wilson left the apartment complex in his police vehicle, a Chevy Tahoe SUV, and drove west on Canfield towards West Florissant. An additional description of the suspect was released at that time: wearing a red hat, yellow socks and khaki shorts, and he was with another male.

As Officer Wilson was attending to his emergency call, Michael Brown and a companion were in the local convenience store. Michael Brown's activity in the store was recorded by the store security cameras. The video, often played following its release in August by the Ferguson police department, shows Michael Brown grabbing a handful of cigarillos and heading toward the exit without paying. As Michael Brown and his companion left the store, someone inside the store called the police.

After crossing West Florissant, the the two walked east on Canfield in the middle of the street, Mr. Brown directly behind his companion. As Officer Wilson continued west on Canfield, he encountered Mr. Brown and his companions walking in the middle of the street. As Wilson slowed or stopped, he told them to move to the sidewalk. Words were exchanged and they continued to walk down the middle of the street.

Wilson observed that Michael Brown had cigarillos in his hand and was wearing a red hat. At approximately 12:02 p.m., Wilson radioed he had to individuals on Canfield and needed assistance. Officer Wilson backed his vehicle at an angle blocking their path and blocking the flow of traffic in both directions. Several cars approached from both east and west but weren't able to pass the vehicle.

An altercation took place with Officer Wilson seated inside the vehicle and Mr. Brown standing at the drivers window. During the altercation, two shots were fired by Officer Wilson while still inside the vehicle. Mr. Brown ran east and Officer Wilson gave chase. Near the corner of Canfield and Coppercreek, Mr. Brown stopped and turned back to Officer Wilson. Officer Wilson also stopped. As Michael Brown moved towards Officer Wilson, several more shots were fired by the officer and Michael Brown was fatally wounded.

Within seconds of the final shot, the assist car arrived. Less than 90 seconds passed between the first contact and the arrival of the assist car.

During the investigation, eyewitnesses were interviewed by media -- by various news outlets. Witnesses were interviewed by local and federal law enforcement, sometimes together and sometimes separately. All the statements were provided to the other party. All previous statements of witnesses who testified before the grand jury for also presented to the grand jury whether they were media interviews or interviews by the FBI or by the county police department.

The statements of all witnesses, civilian, law-enforcement, and experts were challenged in court by other law enforcement, by the prosecutors and the grand jury themselves. A common and highly effective method for challenging a statement is to compare it to the

previous statements of the witness for consistency and to compare it with the physical evidence.

The physical evidence does not change because of public pressure or personal agenda. Physical evidence does not look away as events unfold nor does it blackout or add to memory. It remains constant and is a solid foundation upon which cases are built.

When statements changed, witnesses were confronted with the inconsistencies and conflict between their statements and the physical evidence. Some witnesses admitted they did not actually see the shooting or only saw part of the shooting, only repeating what they heard on the street. Some others adjusted parts of their statements to fit the facts. Others stood by original statements even though their statements were completely discredited by the physical evidence. Several witnesses describe seeing an altercation in the car between Mr. Brown and Officer Wilson. It was described as wrestling, tug-of-war. Several other witnesses described Mr. Brown as punching Officer Wilson while Mr. Brown was partially inside the vehicle. Many of the witnesses said they heard a gunshot while Mr. Brown was still partially inside the vehicle. At least one witness said that no part of Mr. Brown was ever inside the vehicle and that the shot was fired through an open window while Mr. Brown was standing outside.

The vehicle, and Officer Wilson's clothing and equipment, was examined by various technicians and scientists. Mr. Brown's blood and/or DNA were located on the outside of the driver's door. His blood and DNA were found on the outside of the left rear passenger door. Mr. Brown's blood and DNA was found on the inside of the driver's door, the upper left thigh of Officer Wilson's pant leg, the front collar of Officer Wilson's shirt, and on Officer Wilson's weapon. Additionally, a bullet fired from Officer Wilson's weapon was located inside the driver's door. The shot was fired from inside the vehicle striking the door in a downward angle at the armrest. The second bullet was not recovered.

Regarding the gunshot wounds of Mr. Brown, it should be noted that three separate autopsies were conducted -- one by the St. Louis county medical office, one by a private pathologist, and one by the Department of Defense. The result of all three autopsies were consistent with one another in all significant respects. Mr. Brown had a gunshot graze wound on his right hand, on his right thumb. The path of that bullet was away from the tip of the hand. Soot consistent with a close range gunshot was present in that wound. Officer Wilson also had a medical examination which indicated some swelling and redness to his face.

Almost all witnesses stated that after they heard the shots fired while Mr. Brown was at the car, he hesitated and then ran east. Most stated that, almost immediately, Officer Wilson got out of his vehicle and chased after him. Some witnesses stated Wilson fired at Mr. Brown as he chased after him, striking him. At least -- at least one witness said one of the shots struck Mr. Brown. Others stated he did not fire until Mr. Brown turned and came back towards the officer.

At least one witness stated that, as Officer Wilson got out of his vehicle, he shot Mr. Brown multiple times as Mr. Brown stood next to the vehicle. Yet another witness stated that Officer Wilson stuck his gun outside the window and fired at Mr. Brown as Mr. Brown was running. One witness stated there was actually two police vehicles.

Most witnesses agreed that near the corner of Canfield and Coppercreek, Mr. Brown stopped and turned around, facing Officer Wilson. Some said Mr. Brown did not move towards Officer Wilson at all, but was shot multiple times as he stood near the corner with his hands raised. In subsequent interviews with law enforcement or other testimony before the grand jury, many of the same witnesses said they did not actually see the shooting. Some were running for cover, some were relating what they heard from others or they said what they assumed happened in that case.

Several other witnesses maintained their original statement that Mr. Brown had his hands in the air and was not moving towards the officer when he was shot. Others said he was shot -- excuse me -- several witnesses stated that Mr. Brown did not raise his hands at all or that he raised them briefly and then dropped them and turned towards Officer Wilson, who fired several rounds. Other witnesses stated Mr. Brown stopped for a very brief period and move towards Officer Wilson again. One describes his movement as a "full charge."

According to some witnesses, Officer Wilson stopped firing when Mr. Brown stopped moving towards him, and resumed firing when Mr. Brown started moving towards him again. These witnesses did not make any statements to the media.

The description of how Mr. Brown hands, raised his hands, or the position of his hands, is not consistent among the witnesses. Some describe his hands as being out to his sides, some said in front of him with palms up, others said his hands were raised by his head or by his shoulders. Still others describe his hands is being in a running position or in fists.

There are also various witness statements regarding Mr. Brown's movements after he stopped and turned back towards Officer Wilson. Several witnesses said Mr. Brown never moved towards Officer Wilson when he was shot. Most said the shots were fired as he moved towards Wilson. Mr. Brown's movements were described as "walking," "moving fast," "stumbling" or "full charge." The varying descriptions were sometimes provided by the same witnesses in subsequent statements for testimony.

The entire area was processed by the St. Louis county crime scene unit. A total of 12 rounds were fired by Officer Wilson. Two shot at the car, 10 more farther east.

Mr. Brown sustained a graze wound to his thumb while standing next to the vehicle. He sustained six or seven more gunshot wounds, depending upon whether one of the shots was an entry or reentry wound. Mr. Brown sustained a second graze wound, another graze wound, to his right bicep. He also sustained wounds to his right forearm, upper front right arm, lateral right chest, upper right chest, forehead and top of the head.

The top of the head, forehead, and perhaps the upper right chest, were consistent with his body being bent forward at the waist. Except for the first and last wound, the medical examiners were unable to determine the order of the shots. The graze wound of the thumb sustained at the vehicle was likely the first wound. It was the only close range shot. The shot at the top of the head was most likely the last. It would've rendered him immediately unconscious and incapacitated.

Mr. Brown's body was located approximately 153 feet east of Officer Wilson's car. Mr.

Brown's blood was located approximately 25 feet farther east past his body. And a nearby tenant during a video chat inadvertently captured the final ten shots -- 10 shots on tape. There was a string of shots, followed by a brief pause, and then another string of shots.

As I stated earlier, the evidence and the testimony will be released following the statement.

I am ever mindful that this decision will not be accepted by some and may cause disappointment for others. All decisions in the criminal justice system must be determined by the physical and scientific evidence, and the credible testimony corroborated by that evidence, not in response to public outcry. Decisions on a matter as serious as charging an individual with a crime cannot be decided on anything less than complete examination of all available evidence. Anything less is not justice. It is my sworn duty and that of the grand jury to seek justice, and not simply obtain an indictment or conviction.

I do want to say that, during this extremely tense and painful time that we have, the citizens of this community should be, and are, very mindful of the fact that the whole world is watching, and watching how we respond and how we react. I would urge each and every one of them, with the loss of that was suffered by the Brown family, no young man should ever die.

This is a loss of life, and it is a tragic loss, regardless of the circumstances. But it opens old wounds and gives us an opportunity now to address those wounds, as opposed to in the past, where they just fade away.

How many years we have talked about the issues of that lead to incidents like this? And yet, after a period of time, it just fades away. I urge everyone who was engaged in the conversation, who was engaged in the demonstrations, to keep that going. Not to let that go. And to do it in a constructive way, a way we can profit from this. A way that we can benefit from this, by changing the structure, and changing some of the issues, by solving the issues that lead to these sorts of things.

I join with Michael Brown's family, and with the clergy, and with anyone and everyone else; the NAACP, the Urban League, and every government official, and private citizen that you've heard encouraging everyone to continue the demonstrations, continue the discussion, address the problems, but do so in a constructive way, not in a destructive way.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Grand Juror Doe,)	
)	
Plaintiff,)	
)	
v.)	No.
)	
Robert P. McCulloch, in his official capacity)	
as Prosecuting Attorney for St. Louis)	
County, Missouri,)	
)	
Defendant.)	

Notice of Filing

Comes now Plaintiff and gives notice that within twenty-four hours, Plaintiff will file with the Clerk, together with a copy of this notice, a disc that is Exhibit C referenced in the filed Complaint.

Respectfully submitted,

/s/ Anthony E. Rothert
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EXHIBIT
C

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Certificate of Service

I certify that a copy of the foregoing has been send by United States mail on January 5, 2015, to Robert P. McCulloch, St. Louis Prosecuting Attorney's Office, 100 South Central Avenue, Second Floor, Clayton, Missouri 63105.

/s/ Anthony E. Rothert

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

IN THE MATTER OF THE GRAND
JURY INVESTIGATION OF THE
INCIDENT OF 8/9/2014

)
) Cause No. 14SL-MC15812
)
) Division 7
)

**MEMORANDUM IN SUPPORT OF MOTION FOR PUBLIC DISCLOSURE OF
MATERIALS CONSIDERED BY THE GRAND JURY**

INTRODUCTION

Robert P. McCulloch, Prosecuting Attorney for St. Louis County, Missouri, is at the epicenter of one of the most volatile and controversial issues in the history of St. Louis County. He and his Office have the responsibility and obligation to present all of the evidence to the Grand Jury concerning the August 9, 2014 shooting of Michael Brown, while ensuring all citizens that the grand jury process was handled in a fair, just, and impartial manner. Accordingly, Mr. McCulloch publicly announced in August, 2014, that he was having a stenographer transcribe the testimony presented to the Grand Jury, and he assured everyone that he would make available to the public the transcribed Grand Jury testimony, subject to appropriate redactions, together with selected photographs, video and audio recordings presented to the Grand Jury, and other records and reports used to investigate whether a crime had been committed.

As set forth more fully below, Mr. McCulloch, as Prosecuting Attorney, has the authority to have a stenographer “take down and transcribe *for the use of the prosecuting attorney* testimony and evidence before the grand jury. . . .” § 56.190, R.S.Mo. (emphasis added). This transcribed testimony is, therefore, a record of the Prosecuting Attorney. Under Chapter 610 of the Revised Statutes of Missouri (commonly referred to as the “Missouri Sunshine Law”), an

Investigative Report includes records inquiring into a crime or suspected crime. § 610.100.1(5), R.S.Mo. An Investigative Report is a closed record under the Missouri Sunshine Law until the investigation becomes “inactive,” as defined in Section 610.100.2, R.S.Mo.

In the event the Grand Jury returns an indictment, Robert McCulloch, as the Prosecuting Attorney for St. Louis County, will not release the records in his possession, including the transcribed testimony, selected photographs, investigative and other reports, and video and audio recordings presented to the Grand Jury pertaining to the incident of August 9, 2014, until the finality of the proceedings. On the other hand, in the event the investigation becomes inactive because an indictment is not returned by the Grand Jury, Movant Robert McCulloch moves this Court to confirm that he is not otherwise prohibited from releasing the transcribed testimony presented to the Grand Jury, and that those records constituting an Investigative Report are open public records subject to redaction in accordance with applicable provisions of the Missouri Sunshine Law.

Section 610.027.6 of the Missouri Sunshine Law provides that any public governmental body can bring an action to ascertain the legality of closing a record. The Office of the State Prosecuting Attorney for St. Louis County has public records that are closed records at this time, and seeks an order confirming that certain records will not be closed once the investigation becomes inactive. In seeking this order, Movant Robert McCulloch acknowledges the general rule that grand jury proceedings are to be kept secret, except as modified by statute. *See Jorgenson et al. v. Brown*, 2006 U.S. Dist. LEXIS 9949 (a copy of which is attached for the Court’s reference). “This secrecy is designed to protect the grand jurors themselves, promote full disclosure by witnesses, prevent escape of an individual indicted prior to arrest, prevent the

subornation of perjury, and protect the reputations of persons against whom no indictment is found. *Id.* (citations omitted). The rule of secrecy, however, is not absolute.” *See Id.*

Movant Robert McCulloch has done everything in his power to make sure that the grand jury proceedings have been kept secret. He will refuse to produce records involved in the investigation if an indictment is returned. On the other hand once the investigation is “inactive,” the Missouri Sunshine Law modifies the general rule of secrecy and obligates Robert McCulloch to make records inquiring into a suspected crime to be made open to the public, subject to certain redactions. As discussed more fully below, the grand jury testimony was prepared for the use of the Prosecuting Attorney and it becomes part of the Investigative Report. It is, therefore, subject to the provisions of the Missouri Sunshine Law. In making these records open, as provided for under the Missouri Sunshine Law, Movant Robert McCulloch will not disclose or produce names of the grand jurors, minutes or notes of any grand juror, nor any documents of the Grand Jury. He will also not produce autopsy photographs.

Movant Robert McCulloch recognizes that the Grand Jury acts in a judicial capacity and, as such, the Grand Jury is subject to the supervisory jurisdiction of this Court. In filing this Motion, there is no suggestion that the Grand Jury is subject to the Missouri Sunshine Law. To the contrary, Movant Robert McCulloch is asking this Court to address a question about the release of certain records in the possession of the Office of the Prosecuting Attorney that were used in the inquiry of whether a crime was committed. This matter is properly brought before this Court in accordance with Section 610.027.6 of the Missouri Sunshine Law, and Movant Robert McCulloch moves this Court to confirm that, pursuant to Section 56.190, R.S.Mo., he has the authority to have a court reporter take down and transcribe the testimony presented to the Grand Jury “*for the use of the prosecuting attorney.*” Based upon that authority, the transcription

is a record of the Prosecuting Attorney that is “inquiring into a crime or suspected crime,” and, therefore, the transcribed testimony is part of an Investigative Report subject to Section 610.100 of the Missouri Sunshine Law. Movant also requests that this Court simply confirm that the Office of the State Prosecuting Attorney for St. Louis County is not prohibited from making the transcribed testimony available to the public, subject to redaction, and that he should follow the provisions of the Missouri Sunshine Law with respect to the release of these records, including the transcribed testimony, selected photographs, investigative and other reports, and video and audio recordings presented to the Grand Jury pertaining to the incident of August 9, 2014, in the event that the Grand Jury does not return an indictment.

ARGUMENT

I. Authority of Prosecuting Attorney to Transcribe Testimony Before Grand Jury

Missouri law clearly provides Robert McCulloch, as the State Prosecuting Attorney for St. Louis County,¹ with the explicit authority to transcribe evidence presented before a grand jury. In pertinent part, Section 56.190, R.S.Mo., states:

In all counties of class one, the stenographers in the office of the prosecuting attorney shall, *when so directed by the prosecuting attorney of such county, take down and transcribe for the use of the prosecuting attorney testimony and evidence before the grand jury of said county* and before any court of said county exercising criminal jurisdiction or before the coroner of said county at any inquest held on any homicide or felony inquiry, and shall perform such other duties in the office of the prosecuting attorney as may be necessary.

§ 56.190, R.S.Mo. (emphasis added).

This statutory provision reflects that the transcribed Grand Jury testimony is a record of the St. Louis County Prosecuting Attorney because it is “for the use of the prosecuting attorney.” While there is no requirement that the testimony presented to a grand jury be transcribed by a

¹ St. Louis County is a county of the first class. Official Manual, State of Missouri, 2013-2014, p. 883.

stenographer in every case, *State ex rel. Dunlap v. Hanna*, 561 S.W.2d 411, 412 (Mo. App. K.C. 1977), it is permissible for the prosecuting attorney to do so, and it is commonly done when the defendant testifies. In fact, there is a discovery rule in the Missouri Rules of Criminal Procedure requiring the prosecuting attorney to disclose the transcript of the defendant's grand jury testimony to the defendant, or any person whom the state intends to call as a witness at a hearing or trial, and which relates to the offense charged. Missouri Rule 25.03(A)(3).

In this case, it is no secret that Robert McCulloch was exercising his authority to transcribe the evidence presented before the grand jury. He publicly announced it before the Grand Jury began hearing evidence, and at least as early as September 16, 2014, Ed Magee, Robert McCulloch's executive assistant, publicly confirmed that the Grand Jury proceedings were being transcribed and that Robert McCulloch intended to release the transcripts when the matter becomes inactive.

II. Grand Jury Testimony, Transcribed at the Direction of the Prosecuting Attorney, is a Record Included in an Investigative Report Subject to Disclosure Under the Missouri Sunshine Law

As set forth above, Movant Robert McCulloch, as Prosecuting Attorney for St. Louis County, acted fully within his authority by transcribing the proceedings before the Grand Jury. As unequivocally stated in Section 56.190, R.S.Mo., the testimony was taken down and transcribed "*for the use of the prosecuting attorney*" and is, therefore, a record pertaining to a crime or suspected crime within the purview of Section 610.100 of the Missouri Sunshine Law. Furthermore, the disclosure of the redacted transcription, pursuant to the Missouri Sunshine Law, is consistent with the policies underlying the secrecy of grand juries as set forth by Missouri case law. Finally, authority from case law outside of Missouri further supports the disclosure of the transcripts. Each of these points is addressed in turn.

A. Pursuant to Section 56.190, R.S.Mo., the Transcription is an Investigative Report and is, Therefore, Subject to Disclosure Under the Missouri Sunshine Law

An Investigative Report becomes an open record subject to disclosure when the investigation becomes inactive. § 610.100.2, R.S.Mo; *see also Guyer v. City of Kirkwood*, 38 S.W.3d 412 (Mo. banc 2001). Pursuant to the Missouri Sunshine Law, an Investigative Report is a record created by a law enforcement agency to examine a crime or suspected crime in response to evidence or an incident report. § 610.100.1(5), R.S.Mo. The term “Investigative Report” has been interpreted broadly to encompass all materials compiled during an investigation into alleged criminal conduct. *Guyer*, 38 S.W.3d at 415. The Office of the Prosecuting Attorney has been deemed to be a law enforcement agency with respect to records under the Missouri Sunshine Law. *State v. Kalter*, 839 S.W.2d 670, 672-73 (Mo. App. E.D. 1992); *Pitts v. Williams*, 315 S.W.3d 755, 765 (Mo. App. W.D. 2010); *State v. Pullen*, 1992 WL 121791, at *2 (Mo. App. E.D. June 9, 1992).

Once an investigation becomes inactive, the investigative report becomes open and, therefore, subject to disclosure under the Missouri Sunshine Law, subject to redaction pursuant to the protections set forth in Section 610.100.3 of the Missouri Sunshine Law. Section 610.100.3, R.S.Mo., states in pertinent part:

. . . if any portion of a record . . . contains information that is reasonably likely to pose a clear and present danger to the safety of any victim, witness, undercover officer, or other person; or . . . disclose the identity of a source wishing to remain confidential or a suspect not in custody; or which would disclose techniques, procedures or guidelines for law enforcement investigations or prosecutions . . . that portion of the record shall be closed and shall be redacted from any record made available pursuant to this chapter.

§ 610.100.3, R.S.Mo.

Here, the transcribed testimony before the Grand Jury, as directed by the Prosecuting Attorney for his use and benefit, falls within the broad interpretation of Investigative Report as set forth by *Guyer*. Robert McCulloch ordered the testimony presented to the Grand Jury to be transcribed for his use and benefit. The transcription of such testimony was clearly taken during an investigation into alleged criminal conduct.

Furthermore, the public disclosure of the transcription under the Missouri Sunshine Laws would be subject to the protections set forth in Section 610.100.3. These protections will adequately shield any sensitive information from disclosure, including but not limited to: the identities, notes, deliberations, and votes of any grand jurors; the identities of witnesses and individuals who have not made their identity known because release of their identity would pose a clear and present danger; and confidential information and sources. These protections are consistent with, and in no way contradict, the policies underlying the secrecy of grand juries.

B. Policies Underlying the Secrecy of Grand Juries are not Implicated by the Transcription's Disclosure Pursuant to the Missouri Sunshine Law

The original rule of common law secrecy for grand jury proceedings has been substantially modified by statute and case law, and the rule is no longer absolute. *Mannon v. Frick*, 295 S.W.2d 158, 163 (Mo. 1956); *Jorgenson*, 2006 U.S. Dist. LEXIS 9949, *3. Indeed, there has been an ongoing trend toward transparency and away from the strict, common law rule of secrecy. *Palmentere v. Campbell*, 205 F. Supp. 261, 264 (W.D. Mo. 1962) (interpreting Missouri law); *see also State ex rel. Clagett v. James*, 327 S.W.2d 278 (Mo. banc 1959) (permitting the defendant to inspect parts of the grand jury transcript containing the testimony of defendant and of the witnesses endorsed on the indictment); *Mannon* 295 S.W.2d 158 (upholding the admission of grand jury testimony regarding the authenticity of a signature in a subsequent civil case).

That being said, the policies underlying the general rule of have been summarized as follows:

. . . to protect the jurors themselves; to promote freedom of disclosure; to prevent the escape of a person indicted before he may be arrested; to prevent the subornation of perjury in an effort to disprove facts there testified to; and to protect the reputations of persons against whom no indictment may be found.

Palmentere, 205 F. Supp. at 264 (quoting 3 Wigmore on Evidence, 3d Ed., § 2360). At the close of the grand jury investigation, however, the reasons for the rigid rules of secrecy no longer exist. *Palmentere*, 205 F. Supp. at 266; *Mannon*, 295 S.W.2d at 163 (“There remain, therefore, no cases at all in which, *after the grand jury’s functions are ended*, the privilege of witnesses not to have their testimony disclosed should be deemed to continue.”) (citation omitted). The rule of secrecy has been relaxed such that its rigid requirements apply only to the votes and deliberations of the respective grand jurors and to that said and done by the grand jurors themselves in regard to the investigation. *Palmentere*, 205 F. Supp. at 266; *Mannon*, 295 S.W.2d at 163.

Here, the policies underlying the rule of secrecy are not implicated by the public disclosure of the transcribed testimony after the investigation becomes inactive. In fact, the Missouri Sunshine Law’s application to the public disclosure of the transcript, as part of the investigative report of the prosecuting attorney, is fully consistent with the reasons for grand jury secrecy.

While the investigation is ongoing, the Investigative Report is closed and not subject to public disclosure. As such, during the Grand Jury proceedings pertaining to the incident of August 9, 2014, the Investigative Report, including the transcribed testimony, remains closed, and thus the secrecy of the Grand Jury proceedings is maintained. In fact, the provisions in the Missouri Sunshine Law permitting closure of the Investigative Report until it becomes inactive,

closely mirror the policies for maintaining the secrecy for grand jury proceedings until the proceedings are complete. The rationale for nondisclosure of Investigative Reports has been summarized as follows:

To compel investigators to reveal contents of their investigative reports before the culmination of the investigation and, when appropriate, the prosecution, could result in compromising the investigation and prosecution by disclosing the status of the investigation, jeopardizing witnesses, aid the guilty in the destruction of yet undiscovered evidence, promote fabricated evidence by a guilty party, and foster other inhibiting consequences.

News-Press & Gazette Co. v. Cathcart, 974 S.W.2d 576, 579, n. 3 (Mo. App. W.D. 1998). The rationales behind both the secrecy of grand juries and Investigative Reports contemplate the protection of the parties involved – witnesses and jurors; the promotion of fact-finding and freedom of disclosure; the prevention of a guilty party obstructing the process; and the protection of the reputation of those involved until the investigation is over.

Moreover, the Investigative Report will not be subject to disclosure until the investigation becomes inactive – *i.e.*, a decision has been made to stop the investigation or the conviction has become final. § 610.100.1(3) R.S.Mo. By the time this investigation becomes inactive, all functions of the grand jury will have ended, and therefore “the privilege of witnesses not to have their testimony disclosed” will have also ended. *Mannon*, 295 S.W.2d at 163.

Furthermore, the rule of secrecy’s rigid safeguards as to the votes and deliberations of the Grand Jury are protected by the safeguards contained within the Missouri Sunshine Law. Section 610.100.3 of the Missouri Sunshine Law allows that certain information contained within the transcript remain closed, through redaction by the Prosecuting Attorney prior to public disclosure of the Investigative Report. Specifically, the votes, deliberations, and identities of the Grand Jurors would constitute “information that is reasonably likely to pose a clear and present

danger to the safety of any . . . other person” and/or “techniques, procedures or guidelines for . . . prosecutions” and, therefore, Movant intends to redact such information.

Finally, the Missouri Sunshine Law is to be liberally construed in accordance with a strong presumption of disclosure and open governance, and any exceptions thereto are to be narrowly construed. *Cathcart*, 974 S.W.2d at 578; § 610.011 R.S.Mo. This construction requires the Court to interpret the rule of secrecy for grand jury proceedings narrowly, in so far as it applies to the transcript. The interpretation set forth above, in balancing the public disclosure of the Investigative Report, including the transcribed testimony, with the rule of secrecy, fully achieves these ends.

C. Authority From Other States Supports the Disclosure of Grand Jury Testimony Pursuant to Sunshine Law Requests

In addition to the reasons set forth above, authority from other jurisdictions supports Movant’s request. In *State ex rel. Cincinnati Enquirer v. Hamilton County*, a newspaper requested access to certain 911 tapes pursuant to the Ohio Public Records Law. 662 N.E.2d 334, 337 (Ohio Sup. Ct. 1996). The governmental body, in refusing to turn over the 911 tapes, asserted that the tapes had become part of an ongoing investigation and had been presented to a grand jury, thus shielding the tapes from disclosure. *Id.* at 338. The court rejected the governmental body’s argument and, instead, held that “[o]nce clothed with the public records cloak, the records cannot be defrocked of their status” by merely presenting the record to a grand jury. *Id.* Although unremarkable, the court’s proposition – *i.e.*, a record’s substance, in relation to being subject to public disclosure, cannot be changed merely because it enters the grand jury room – remains important to the situation at hand.

In *Better Government Association v. Blagojevich*, an organization requested that the Illinois Governor, a recipient of a federal grand jury subpoena, disclose the subpoena and related

correspondences, pursuant to the Illinois Freedom of Information Act. 899 N.E.2d 382, 384 (Ill. App. 4th Dist. 2008). The Governor refused to disclose the records requested arguing that the federal grand jury process is secretive and any disclosure in relation thereto is objectionable. *Id.* at 389. In ordering the Governor to disclose the materials, the court stated that “transparency should be the norm, except in rare, specified circumstances.” *Id.* at 391. The court held that absent a specific law prohibiting disclosure, the documents provided to the Illinois Governor by the federal grand jury were subject to the Illinois Freedom of Information Act. *Id.*

There is no law prohibiting disclosure of appropriately redacted Grand Jury testimony. Therefore, the Prosecuting Attorney has the authority to disclose appropriately redacted Grand Jury testimony and the Missouri Sunshine Law calls upon him to do so. Moreover, the opinions in *Cincinatti Enquirer* and *Blagojevich* suggest that records in the possession of a governmental body should be disclosed, pursuant to the state’s disclosure requirements, regardless of whether that record went into or came out of a grand jury proceeding.

It is beyond dispute that an Investigative Report contains a number of records that went before the Grand Jury. However, these materials should be disclosed because their mere presentment to the grand jury does not change their status as public records subject to disclosure. The redacted transcript of testimony before the Grand Jury should be disclosed because it was lawfully transcribed for the use and benefit of the Prosecuting Attorney and now makes up part of the Investigative Report, regardless of the fact that it was presented to the Grand Jury.

A similar situation was addressed by a Connecticut court. In *Division of Criminal Justice v. Freedom of Information, Inc.*, a newspaper requested that the city produce all records and documents turned over to a grand jury pursuant to Connecticut’s Freedom of Information Act. 2010 WL 1233916, at *1 (Conn. Super. Ct. Feb. 25, 2010). The court characterized the request

as an attempt to obtain from the city that which could not be obtained through request to the grand jury. *Id.* at *2. The court found that, although directed to the city, the request raised issues pertaining to the secrecy of grand jury proceedings. *Id.* at *3. The court denied the request because the request for records was sent while the grand jury was still in session. Significantly, the court indicated that if the request were sent after the grand jury had reached a conclusion, the request would have been granted. *Id.* In fact, the court made note that at the conclusion of the grand jury proceedings, agreed upon disclosures were made to the newspaper. *Id.* at *3, n. 4.

The case before the Connecticut court is analogous to the situation before this Court. Movant Robert McCulloch acknowledges that an Investigative Report may remain closed until the investigation becomes inactive. Indeed, the nondisclosure of an Investigative Report is allowed by the Missouri Sunshine Law. However, once the investigation becomes inactive, the records constituting an Investigative Report, including the redacted transcribed testimony, is subject to public disclosure. This is consistent with the disclosures made after the close of the grand jury session in *Division of Criminal Justice* case.


CONCLUSION

For the reasons stated herein, Movant Robert McCulloch respectfully moves this Court confirm that the transcribed testimony and evidence before the Grand Jury is a record of the Prosecuting Attorney. Movant also moves this Court to confirm that the Office of the State Prosecuting Attorney for St. Louis County is not prohibited from making the transcribed testimony available to the public, subject to certain redactions in accordance with the Missouri Sunshine Law, and that he should follow the provisions of the Missouri Sunshine Law with respect to the redaction of information and the release of appropriately redacted records, including the transcribed testimony, selected photographs, investigative and other reports, and

video and audio recordings presenting to the Grand Jury pertaining to the incident of August 9, 2014, when the matter becomes inactive.

Respectfully submitted,

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*Attorneys for Robert P. McCulloch
Prosecuting Attorney or St. Louis County,
Missouri*

FIRST REGULAR SESSION

HOUSE JOINT RESOLUTION NO. 17

98TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE ELLINGTON.

0819L.011

D. ADAM CRUMBLISS, Chief Clerk

JOINT RESOLUTION

Submitting to the qualified voters of Missouri an amendment repealing section 16 of article I of the Constitution of Missouri, relating to grand juries.

Be it resolved by the House of Representatives, the Senate concurring therein:

That at the next general election to be held in the state of Missouri, on Tuesday next
2 following the first Monday in November, 2016, or at a special election to be called by the
3 governor for that purpose, there is hereby submitted to the qualified voters of this state, for
4 adoption or rejection, the following amendment to article I of the Constitution of the state of
5 Missouri:

Section A. Section 16, article I, Constitution of Missouri, is repealed.

2 [Section 16. That a grand jury shall consist of twelve citizens, any nine
3 of whom concurring may find an indictment or a true bill: Provided, that no
4 grand jury shall be convened except upon an order of a judge of a court having
5 the power to try and determine felonies; but when so assembled such grand jury
6 shall have power to investigate and return indictments for all character and grades
7 of crime; and that the power of grand juries to inquire into the willful misconduct
8 in office of public officers, and to find indictments in connection therewith, shall
never be suspended.]

✓

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

EXHIBIT E
