No. ED105181

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

GRAND JUROR DOE,
Plaintiff-Appellant,

v.

ROBERT P. MCCULLOCH,
in his official capacity as Prosecuting Attorney for
St. Louis County, Missouri
Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
Case No. 15SL-CC01891

Appellant's Brief

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Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of St. Louis County entered on December 13, 2016. Notice of Appeal was filed on January 3, 2017.

This case does not involve any issues within the exclusive jurisdiction of the Supreme Court of Missouri. Pursuant to Missouri Constitution, article 5, section 3, the Court of Appeals has jurisdiction over this appeal. The judgment from which the appeal is taken was entered within the territorial jurisdiction of the Eastern District of the Court of Appeals. § 474.050.

Statement of Facts

From May 2014 through November 24, 2014, Doe served as a grand juror in the Circuit Court of St. Louis County. LF 8, ¶¶ 1-2, 24. Doe's term on the grand jury was originally scheduled to end on September 10, 2014, but was extended to end no later than January 2015 for the purpose of investigating Darren Wilson. *Id.* ¶¶ 9-10. Wilson, who was then a Ferguson, Missouri police officer, had shot and killed Michael Brown, an unarmed teenager, on August 9, 2014. *Id.* at ¶ 10. As the government official with the authority to initiate a criminal prosecution of Wilson, Robert McCulloch delegated to the grand jury on which Doe was serving the decision about whether there was sufficient probable cause to believe Wilson violated any state criminal laws when he killed Brown. *Id.* ¶¶ 11-12.

McCulloch decided what evidence would be presented to or withheld from the grand jury and what the State's counsel would be. *Id.* ¶ 14. He promised the public and the members of the grand jury this investigation would be transparent *Id.* ¶ 15.

Doe believes the presentation of evidence in the Wilson investigation differed significantly from how evidence was presented in the hundreds of other matters presented to her and the other empaneled grand jurors earlier that same term. *Id.* ¶ 17.[1] Doe also

[1] Doe is proceeding under a pseudonym. The United States District Court referred to Doe using the pronouns "she" and "her," a convention Doe repeats here. *Doe v. McCulloch*, 106 F. Supp. 3d 1007, 1008 n.1 (E.D. Mo. 2015), *vacated and remanded*, 835 F.3d 785 (8th Cir. 2016).

believes the State's counsel in the Wilson investigation differed significantly from the State's counsel in the hundreds of other matters presented to the same grand jury. *Id.* ¶ 18. Doe believes the Wilson investigation focused on the victim more than the other investigations did, that the evidence was presented in a way that implied Brown was the wrongdoer and not Wilson, and that the presentation of the applicable law was muddled and delivered in an untimely manner as compared to the other cases. *Id.* ¶¶ 20, 33.

McCulloch publicly spoke about the grand jury's investigation of Wilson at a press conference and released some of the evidence presented to the grand jury, which McCulloch did not do in any of the other cases heard by this same grand jury. *Id.* ¶¶ 27-29. McCulloch repeatedly, in a variety of forums, discussed the evidence presented to the grand jury, the State's counsel, and the purported views of the grand jurors. *Id.* ¶ 32. Doe, as one of the grand jurors who heard the evidence, does not believe McCulloch's characterizations of the grand jurors' opinions and views accurately reflect her own opinions and views. *Id.* ¶ 31.

Doe would like to speak publicly about her experience on the grand jury, including her opinions about the evidence and investigation. *Id.* ¶ 33. Doe believes that if she could speak about her experience, she could contribute to the current dialogue concerning race relations. *Id.* Moreover, Doe disagrees with the implication that all of the grand jurors believed there was no probable cause to indict Wilson on any charges. *Id.* As Doe has alleged, McCulloch's public characterization of the grand jurors' views does not accord with her own view. *Id.* Doe would like the opportunity to speak publicly about her opinions and experience and privately, with family members and others. *Id.* ¶ 38. Doe has

not and is not speaking publicly or privately because she fears she will suffer criminal penalties or other punishment. *Id.* ¶¶ 39-40, 44.

Doe initially filed a complaint in federal district court, Case No. 4:15-cv-00006, alleging only that her First Amendment rights were being violated by §§ 540.080, 540.120, 540.310, and 540.320, as well as any other provision of Missouri law prohibiting Doe from discussing or expressing an opinions related to her grand jury service. LF 118-28. Instead of ruling on Doe's federal claim, the district court abstained after indicating its belief there may be state-law questions obviating the need for the federal court to reach the First Amendment issue because resolution of the state-law issues could relieve Doe from any obligation to remain silent. LF 129-144 (noting at LF 134 that, "[a]t issue in this case is the delicate balance between the secrecy of grand jury proceedings as required by Missouri state law and the First Amendment free speech rights of the individual grand jurors").

By the time Doe filed her state-court petition on June 2, 2015, the investigation of Wilson was over, Doe and the other grand jurors had been discharged from service, and McCulloch had announced no grand jury would be convened in the future to further investigate Wilson's killing of Brown. *Id.* ¶¶ 23-25. Thus, there is no risk that Doe's expressive activity would cause prospective witnesses to hesitate before coming forward; witnesses would be less likely to testify fully and frankly; Wilson would flee; individual grand jurors would vote against indictment; or, Wilson would be publicly ridiculed (the public already knows Wilson was investigated for his actions, the grand jury proceeding

has concluded and will not be repeated, and the circumstances of this case are highly unusual). *Id.* ¶¶ 46-49.

Doe's petition contained three counts based on the potential state-law claims that the federal district court identified.

In Count I, Doe claimed a violation of the Free Speech Clause of the First Amendment in that Doe is reasonably chilled from engaging in expressive activity because of §§ 540.080, 540.310, 540.320, as well as any other law prohibiting her from discussing or expressing her opinion about her grand jury service, the witnesses and evidence, state's counsel, and McCulloch's characterizations of the grand jurors' views. LF 15. The petition is explicit that Doe pleaded Count I for the sole purpose of allowing the circuit court to construe the relevant statutes challenged in state court against a backdrop of Doe's federal constitutional challenge, which is stayed by the federal district court pending resolution of the state-court claims. LF 15, 16.

In Count II, Doe sought a declaratory judgment that § 540.320 is not applicable to her under the unique circumstances of this case. LF 17.

In Count III, Doe sought a declaratory judgment that, because of McCulloch's own disclosures of grand jury materials and views and the unique circumstances of this case, Doe should be released from her oath to keep the grand jury proceeding secret. LF 17.

On July 16, 2015, Defendant filed a motion to dismiss pursuant to Rule 55.27(a)(6) arguing that Doe failed to state a claim upon which relief could be granted.

LF 50. After briefing and argument, the circuit court granted Defendant's motion and dismissed all of Doe's claims with prejudice. LF 177-91. This appeal follows.

Points Relied On

I. The circuit court erred in granting the motion to dismiss because declaratory relief was proper where such relief would have a practical effect on Doe in that Respondent, in the absence of a declaratory judgment, could pursue criminal contempt actions against Doe for violating §§ 540.080 or 540.310 and it is undisputed that Respondent is responsible for enforcing § 540.320.

RSMo § 56.060

RSMo § 540.080

RSMo § 540.310

RSMo § 540.320

Ex parte Creasy, 148 S.W. 914 (Mo. 1912)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo. banc 1994)

II. The circuit court erred in granting the motion to dismiss because the circuit court had no authority to make any findings related to or to dismiss Doe's federal First Amendment claim, which is pending in federal court, in that Doe properly reserved her federal First Amendment claim to be litigated in federal court.

Doe v. McCulloch, 835 F.3d 785 (8th Cir. 2016)

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)

III. The circuit court erred in granting the motion to dismiss because the circuit court misconstrued §§ 540.080, 540.310, 540.320, and the applicable law in that an exception applies to the general rules of grand juror secrecy in this case and the

statutes are therefore inapplicable to Doe.

RSMo § 540.080

RSMo § 540.310

RSMo § 540.320

Palmentere v. Campbell, 205 F. Supp. 261 (W.D. Mo. 1965)

Mannon v. Frick, 295 S.W.2d 158 (Mo. 1956)

IV. The circuit court erred in granting the motion to dismiss because the circuit court misconstrued the authority of a circuit court to release a grand juror from her oath of secrecy in that the circuit court retains jurisdiction to release a grand juror from her oath to keep the grand jury proceeding secret.

RSMo § 540.080

Doe v. McCulloch, 106 F. Supp. 3d 1007 (E.D. Mo. 2015)

Palmentere v. Campbell, 205 F. Supp. 261 (W.D. Mo. 1965)

Matter of Grand Jury, N.Y. Cty., 480 N.Y.S.2d 998 (N.Y. Sup. Ct. 1984)

Point I

The circuit court erred in granting the motion to dismiss because declaratory relief was proper where such relief would have a practical effect on Doe in that Respondent, in the absence of a declaratory judgment, could pursue criminal contempt actions against Doe for violating §§ 540.080 or 530.310 and it is undisputed that Respondent is responsible for enforcing § 540.320.

Standard of review and preservation for review

"A trial court's grant of a motion to dismiss is reviewed de novo." *Delaney v. Signature Health Care Found.*, 376 S.W.3d 55, 56 (Mo. App. E.D. 2012). The errors alleged in this appeal were properly preserved because a final judgment dismissing a party's claims with prejudice and the findings made by a circuit court supporting dismissal are appealable and reviewable by the court of appeals. *See State v. Smothers*, 297 S.W.3d 626, 630 (Mo. App. W.D. 2009) (noting that a dismissal with prejudice is a final appealable order).

Relief would have a practical effect on Doe

The circuit court mistakenly concluded that it could provide no relief that would have a practical effect. Three statutes governing grand jury service include secrecy obligations. RSMo § 540.080 (oath of secrecy); RSMo § 540.310 ("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."); RSMo § 540.320 ("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.").

Respondent does not dispute that he is responsible for enforcing RSMo § 540.320, the violation of which is a misdemeanor. While §§ 540.080 and 540.310 do not provide a specific criminal penalty for a violation, the consequence of violating them is nevertheless criminal.[2] These statutes are enforceable only through criminal contempt proceedings, and Respondent, as Prosecuting Attorney, is responsible for representing the state by commencing and prosecuting such proceedings. *See* § 56.060.1 (instructing that prosecuting attorney "shall commence and prosecute all civil and criminal actions in the prosecuting attorney's county in which the county or state is concerned . . . ."). Rules governing grand jury proceedings have long been enforced through criminal contempt actions. *See, e.g.*, *Ex parte Creasy*, 148 S.W. 914, 916 (Mo. 1912). "Criminal contempt is punitive in nature and acts to protect, preserve, and vindicate the authority and dignity of the judicial system and to deter future defiance." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994). McCulloch has the authority to commence or prosecute a criminal contempt action against a grand juror who violates §§ 540.080 or

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[2] In addition to Respondent's statutory obligations, §§ 56.060 and 5.060.06 of the St. Louis County Charter make him responsible for prosecuting criminal contempt proceedings within St. Louis County.

540.310 and is responsible for prosecuting misdemeanors, including violations of § 540.320.

A declaratory judgment prohibiting enforcement would have the practical effect of allowing Doe to speak both publicly and privately about her experience as a grand juror without fear of prosecution. Without a declaratory judgment prohibiting McCulloch from enforcing these statutes, Doe will continue to fear prosecution for contempt and be compelled to remain silent. Therefore, the circuit court erred in dismissing Doe's claims.

Point II

The circuit court erred in granting the motion to dismiss because the circuit court had no authority to make any findings related to or dismiss Doe's federal First Amendment claim, which is pending in federal court, in that Doe properly reserved her federal First Amendment claim to be litigated in federal court.

Standard of review and preservation for review

"A trial court's grant of a motion to dismiss is reviewed de novo." *Delaney*, 376 S.W.3d at 56. The errors alleged in this appeal were properly preserved because a final judgment dismissing a party's claims with prejudice and the findings made by a circuit court supporting dismissal are appealable and reviewable by the court of appeals. *See Smothers*, 297 S.W.3d at 630 (noting that a dismissal with prejudice is a final appealable order).

Doe properly reserved her First Amendment claim

The circuit court ruled on the merits of Doe's First Amendment, deciding Doe cannot bring her federal claim in federal court because doing so would circumvent the circuit court's inherent authority to hold Doe in contempt. LF 184.

The circuit court erred in reaching the merits of Doe's federal constitutional claim—and dismissing it with prejudice—because that claim was not before the circuit court. Instead, the First Amendment claim remains pending in the federal district court, and Doe did not present the claim to the circuit court for resolution on the merits. Doe properly reserved her right to have the federal court hear her First Amendment claim.

Doe properly made an *England* reservation, which meant that Doe's First Amendment claim was not presented to the circuit court for a ruling on the merits.

After the federal district court abstained from deciding Doe's First Amendment claim, Doe filed suit in Missouri circuit court. Doe pleaded her First Amendment claim as Count I of the state-court petition using what is known as an *England* reservation, so as to apprise the state trial court she explicitly reserved her right to have the federal court decide her First Amendment claim. *Doe v. McCulloch*, 835 F.3d 785, 787 (8th Cir. 2016) (recognizing Doe's *England* reservation in this case).[3] This notification informed the state court of Doe's federal constitutional claim, allowing the state court to interpret the challenged state statutes in light of the federal constitutional claim while also informing the state court she does not present the federal claim to the circuit court for resolution. *England*, 375 U.S. 419-20; *see* LF 15, 16.

The purpose of an *England* reservation is to avoid exactly what the circuit court did here, because "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal

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[3] This dual-court procedure is set out in and authorized by *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *See Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1142 n.2 (8th Cir. 2005) ("When a federal court abstains under *Pullman*, the party that commenced the action in federal court may reserve its right to return to federal court to litigate the federal issues by making an '*England* reservation.'").

constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England*, 375 U.S. at 415. "Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.'" *Id.* Indeed, the abstention doctrine recognizes "the role of state courts as the final expositors of state law [and] implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Id.* at 415-16. Thus, "abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.'" *Id.* at 416 (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

In this case, the choice whether to litigate Doe's federal claim in federal or state court belongs to Doe alone. Rather than litigate her federal claim in state court, Doe chose to reserve her right to return to federal court to litigate her federal constitutional claim, if necessary.

Because Doe brought her state court suit with an express *England* reservation of her First Amendment claim, informing the circuit court she has a constitutional claim but reserving her right to litigate that claim in federal court (LF 15, 16), the circuit court erred in deciding Doe's First Amendment claim on the merits. The portion of the circuit court's judgment dismissing Doe's reserved First Amendment claim with prejudice should be vacated.

Point III

The circuit court erred in granting the motion to dismiss because the circuit court misconstrued §§ 540.080, 540.310, 540.320, and the applicable law in that an exception applies to the general rules of grand juror secrecy in this case and the statutes are therefore inapplicable to Doe.

Standard of review and preservation for review

"A trial court's grant of a motion to dismiss is reviewed de novo." *Delaney*, 376 S.W.3d at 56. The errors alleged in this appeal were properly preserved because a final judgment dismissing a party's claims with prejudice and the findings made by a circuit court supporting dismissal are appealable and reviewable by the court of appeals. *See Smothers*, 297 S.W.3d at 630 (noting that a dismissal with prejudice is a final appealable order).

I. Exceptions to the grand jury secrecy laws are available

Doe asked the circuit court to interpret the relevant statutes in a manner that would permit her to speak about her experience given the circumstances of this case. The circuit court refused, rejecting the notion that an exception to grand jury secrecy could ever apply. LF 187.

Although the precise circumstances of this case have not previously been encountered, there is precedent for interpreting Missouri's secrecy rules as applied to both trial jurors and grand jurors as having exceptions. For instance, Missouri has adopted an exception to the no-impeachment rule with respect to "juror statements during deliberations evincing ethnic or religious bias and prejudice," as well as "juror

misconduct occurring outside the courtroom." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 88-90 (Mo. banc 2010).[4] Moreover, an exception to Missouri's grand jury secrecy mandate has been recognized in certain circumstances. *Palmentere v. Campbell*, 205 F. Supp. 261, 268 (W.D. Mo. 1965).

The *Palmentere* court's recognition of an exception to Missouri's grand jury secrecy rules is instructive here. In that case, grand jurors were sued individually for allegedly causing the plaintiff's illegal arrest. *Palmentere*, 205 F. Supp. at 262. The former grand jurors argued they should be freed from their duty of secrecy under §§ 540.120, 540.300, 540.310, and 540.320 so they could reveal details of their experiences on the grand jury in order to defend against the claims. *Id.* at 262-63. Before reaching the specific requests of the grand jurors, the court noted the reasons for the policy of secrecy related to grand jury proceedings:

> "to protect the jurors themselves; to promote a complete freedom of disclosure; to prevent escape of a person indicted before he may be arrested; to prevent the subornation of perjury

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[4] The Missouri Supreme Court's recognition of the exception regarding bias was prescient. On March 6, 2017, the Supreme Court of the United States recognized the same exception to juror secrecy in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017) (recognizing the exception applies to Federal Rule of Evidence 606(b) and noting that Missouri already "recognized an exception to the no-impeachment bar . . . [when there is] juror testimony that racial bias played a part in deliberations").

> in an effort to disprove facts there testified to; and to protect the reputations of persons against whom no indictment may be found."

Id. (quoting Vol. VIII, Wigmore on Evidence, 3d Ed., § 2360). While noting that the previous cases did not directly address secrecy of the grand jurors themselves, the court also observed that "the courts are moving in the direction of relaxing the rigid rules of secrecy." *Id.* at 265 (noting further that "[t]he courts have also relaxed the rule as to the proceedings generally before such grand jury until little remains except as to proceedings in the executive or closed sessions"). "After the indictment has been returned or the investigation ended, there is little or no reason for continuing the rigid rule of secrecy." *Id.* at 266. The district court ultimately held that the grand jurors were released from the secrecy requirements and could reveal what occurred when they were on the grand jury. *Id.* at 268.

II. The reasons for disclosure outweigh the reasons for secrecy

As in *Palmentere*, the court should recognize unique circumstances apply to Doe, allowing her to speak, publicly and privately, about her experiences on the grand jury.

In cases involving requests from grand jurors seeking to be relieved from the secrecy requirements, the circuit court must weigh "the reasons for secrecy against the present need for disclosure." *Mannon v. Frick*, 295 S.W.2d 158, 164 (Mo. 1956) (discussing grand jury witnesses). Here, justice requires Doe be allowed to speak publicly about her experiences on the grand jury to correct the misinformation McCulloch provided to the public. *See State v. McGee*, 757 S.W.2d 321, 326 (Mo. App. W.D. 1988)

(noting that, while the court was assuming that a court could direct a witness to violate his secrecy oath, "the movant seeking the order would be obligated . . . to show the disclosures were necessary to meet the ends of justice").

III. Respondent recognized a relaxation to the original rule of secrecy

When McCulloch wanted to publicly disclose grand jury evidence from this same grand jury proceeding despite the fact that such evidence is normally secret, he told the circuit court that "[t]he 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." LF 35 (citing *Mannon v. Frick*, 295 S.W.2d 158 (Mo. 1956) and *Jorgenson et al. v. Brown*, 2006 U.S. Dist. LEXIS 9949, 2006 WL 680947 (E.D. Mo. Mar. 13, 2006)). McCulloch stated further that, "[i]ndeed, there has been an ongoing trend toward transparency and away from the strict, common law rule of secrecy." *Id.* (citing *Palmentere v. Campbell*, 205 F. Supp. 261 (W.D. Mo. 1965), and *Clagett v. James*, 327 S.W.2d 278 (Mo. banc 1959)). And McCulloch concluded, **"[a]t the close of the grand jury investigation . . . the reasons for rigid rules of secrecy no longer exist."** LF 36 (emphasis added). Thus, McCulloch took a position opposite to what he argues in the present case when he would have exclusive control over which information and evidence would be released and how the views of the grand jurors would be characterized. Now that Doe has asserted McCulloch's disclosures do not comport with her own opinions and views of the grand jury proceedings, McCulloch opposes any exception to grand jury secrecy. LF 11.

IV. Respondent's publicity of the grand juror process created unusual circumstances

In his public statement on the evening he announced the non-indictment of Wilson, McCulloch discussed how all twelve jurors were present for every session, heard all of the testimony, and examined all of the evidence presented to them. LF 23. McCulloch said the jurors were therefore "able to assess the credibility of the witnesses, including those witnesses who[se] statements and testimony remained consistent throughout every interview and were consistent with the physical evidence." *Id.* These statements imply all twelve of the jurors found the same witnesses to be credible.

McCulloch publicly announced that the jurors asked questions of every witness, requested specific witnesses, requested certain physical evidence, and asked that certain photographs be taken and presented to them. LF 23-24.

McCulloch then announced that the grand jurors "discussed and debated the evidence among themselves before arriving at their *collective decision*." LF 24 (emphasis added). He stated, "[a]fter their exhaustive review, the grand jury deliberated and . . . 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." *Id.*

While a grand jury consists of twelve jurors, § 540.021.4, the law provides that "[n]o indictment can be found without the concurrence of at least nine grand jurors." § 540.250. Thus, while McCulloch implied all twelve jurors, as a "collective," decided not to indict Wilson on any of the charges, the reality is that eight of the twelve jurors

could have found there *was* probable cause on any or all of the charges—charges ranging from first-degree murder to involuntary manslaughter. *See* LF 24.

V. Respondent's speech purporting to unveil the grand jury's proceedings obviated the need for continued secrecy

Requiring Doe to abide by the secrecy rules at this point, after McCulloch has spoken publicly and released self-selected evidence, does not promote any of the recognized reasons for grand juror secrecy. Like in *Palmentere*, the only concern of the circuit court at this stage should be to protect the jurors themselves. *Palmentere*, 205 F. Supp. at 262-63. Because the grand jurors concluded their duties years ago and there was no indictment of Wilson, the other reasons for secrecy are no longer relevant: the need to promote "a complete freedom of disclosure" is over; preventing the "escape of a person indicted before he may be arrested" is irrelevant; preventing "the subornation of perjury in an effort to disprove facts there testified to" is no longer an issue because proceedings were long ago concluded; and, there is no need to "protect the reputations of persons against whom no indictment may be found." McCulloch's selective release of grand jury evidence implicating Wilson in criminal activity as well as evidence from the case in general were widely publicized both locally and nationally. *See Palmentere*, 205 F. Supp. at 264 (noting the recognized reasons for secrecy of grand jury proceedings).

Moreover, Doe seeks to speak about her own experiences on the jury, not those of other jurors. Unlike McCulloch, Doe would not purport to speak for a "collective," nor would she imply she was doing so by her statements; she would speak only for herself.

The veil of secrecy should be lifted under the circumstances of this case and Doe should be allowed to speak both publicly and privately about her experiences and share her opinions about her service and the manner in which the grand jury was conducted by McCulloch and his office.

Point IV

The circuit court erred in granting the motion to dismiss because the circuit court misconstrued the authority of a circuit court to release a grand juror from her oath of secrecy in that the circuit court retains jurisdiction to release a grand juror from her oath to keep the grand jury proceeding secret.

Standard of review and preservation for review

"A trial court's grant of a motion to dismiss is reviewed de novo." *Delaney*, 376 S.W.3d at 56. The errors alleged in this appeal were properly preserved because a final judgment dismissing a party's claims with prejudice and the findings made by a circuit court supporting dismissal are appealable and reviewable by the court of appeals. *See Smothers*, 297 S.W.3d at 630 (noting that a dismissal with prejudice is a final appealable order).

Courts retain authority to release grand jurors from oaths of secrecy

In abstaining from deciding Doe's First Amendment claim, the federal district court recognized "that [circuit] court generally, and that judge specifically, retain jurisdiction to release [Doe] from her oath to keep the grand jury proceedings secret." *Doe*, 106 F. Supp. 3d at 1014. "[Doe] can file a declaratory action with the St. Louis County Circuit Court seeking to be released from her oath of secrecy based on McCulloch's disclosures and the unique circumstances of this case." *Id*.

Thus, in Count III of her state-court petition, Doe sought to be released from her oath to keep the grand jury proceeding secret. The circuit court misapprehended the nature of the grand juror oath and viewed itself as impotent to excuse Doe from her oath,

despite McCulloch's actions. The court suggested this is merely a case in which Doe "may now regret having sworn her oath and accepted her charge," apparently surmising that swearing the oath and grand jury service are voluntary endeavors. They are not. *See State ex rel. Roe v. Goldman*, 471 S.W.3d 814, 817 (Mo. App. E.D. 2015) (recognizing that "in Missouri, grand jury service is . . . an obligation . . . of any legally qualified person summoned by the presiding judge of a circuit court, until such person is excused or discharged."). The court's analysis of whether to release Doe from her oath under the circumstances of this case was constrained by its conclusion that there are no exceptions to grand jury secrecy. *See Palmentere*, 205 F. Supp. at 261.

There are exceptions to the oath of secrecy. In addition to *Palmentere*, which is discussed above in connection with Point III**,** the question of whether to release a grand juror from the oath of secrecy was discussed in *Matter of Grand Jury, N.Y. Cty.*, 480 N.Y.S.2d 998 (N.Y. Sup. Ct. 1984). In that case the court concluded justice did not require the grand juror be released from his oath of secrecy, but that the appearance of justice required that he be allowed to convey otherwise secret information to the Governor or his designee. *Id*. at 1000. Though the precise circumstances in both cases—*Palmentere* and *Matter of Grand Jury, N.Y. Cty.*—differ from those here, they demonstrate that in at least some situations a court has authority to release a grand juror from her oath when justice requires, as the federal district court suggested in this case.

The circuit court did not address the issue of whether justice required that Doe be released from her oath in light of McCulloch's selective disclosure of secret evidence and his mischaracterizations of the grand jurors' views. Instead, the court merely restated the

general premise that grand jurors are required to maintain their oath of secrecy. Under the circumstances of this case, and taking the allegations in the petition as true, the question is entitled to more than the superficial inquiry afforded by the circuit court.

Conclusion

The circuit court erred when it dismissed Doe's claims. Doe is entitled to relief because the challenged statutes are not applicable and an exception to grand juror secrecy should be granted to Doe due to the unique circumstances of this case. In addition, Doe is entitled to consideration as to whether she should be released from her oath. Moreover, the circuit court should not have ruled on the merits Doe's First Amendment claim, which was properly reserved for litigation in federal court and not presented to the circuit court for a ruling on the merits.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on May 8, 2017, the foregoing brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule 360; (3) contains 5,348 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

/s/ Anthony E. Rothert