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Shadow Trial: Prosecutors in Ferguson violated our right to an open criminal justice system

Sonja R. West
University of Georgia School of Law, srwest@uga.edu

Dahlia Lithwick

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By Dahlia Lithwick and Sonja West

St. Louis County prosecutor Robert McCulloch takes questions after announcing the grand jury's decision not to indict Ferguson police officer Darren Wilson in the shooting death of Michael Brown on Nov. 24, 2014, at the Buzz Westfall Justice Center in Clayton, Missouri.

Photo by Cristina Fletes-Boutte-Pool/Getty Images

St. Louis County prosecutor Robert McCulloch's decision to "open up" the grand jury proceedings by including massive amounts of testimony and evidence has been decried as "highly unusual," "deeply unfair," and evidence that police officer Darren Wilson received "special treatment." McCulloch's move to include a good deal of exculpatory evidence and testimony led to a three-month, closed-door proceeding that included 70 hours of testimony, including 60 witnesses and three medical examiners. The breadth of the evidence presented to the grand jury has led many to declare that it turned the entire proceeding into something that walks and quacks an awful lot like a trial, but without many of the procedural rules that would make a trial truly fair.

This move to morph a grand jury inquiry, which is typically a short rundown of the case for the prosecution, into a trial-like parade of mountains of evidence raises serious issues about the rights of Michael Brown's family to have a fair process for their dead son, as well as highlighting concerns about unequal treatment of different kinds of criminal defendants. But seemingly lost in this jumble of legal concerns is the fact that McCulloch's decision to shift the truth-seeking function of a criminal trial into the secret realm of the grand jury room violated another set of constitutional rights—ours. It violated our collective public right to an **open criminal justice system**. And if ever there was a trial to which Americans deserved a meaningful right of access, Wilson's trial was it. Instead, we have a post-hoc document dump.

In the 1980 case of *Richmond Newspapers v. Virginia*, the Supreme Court declared that the press and public have a First Amendment right of access to criminal trials. In the words of Justice William Brennan, "Open trials are bulwarks of our free and democratic government: Public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.' "

This right of open trials belongs not just to the accused but to all of us. It is, the Supreme Court said in the 1986 case *Press Enterprise v. Superior Court*, "a shared right of the accused and the public, the common concern being the assurance of fairness." And while those accused of crimes have a constitutional right to a "speedy and open trial," they do not, the court has said, have a right to a private trial.

In discussing the history and need for open trials roughly three decades ago, it was as if the court were imagining this week's situation in Ferguson rather specifically. The community at large has a massive stake in the criminal justice process, the court said. Whether it is to make sure an innocent person is not imprisoned or a guilty one is not allowed to walk free, "the conduct of the trial is preeminently a matter of public interest." Think about the closed doors in Ferguson these past months as you reflect on what Chief Justice Warren

Burger famously explained: “When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”

The fact that 12 jurors witnessed the proceedings in St. Louis does not cure the constitutional violation. While jurors can function as surrogates for the public and a check on government misfeasance, the court affirmed in *Richmond Newspapers* that by impaneling a jury, the community did “not surrender its right to observe the conduct of trials” or its ability “to satisfy themselves that justice was in fact being done.” Disclosing results alone, the court declared, will not “satiate the natural community desire for ‘satisfaction,’ ” and “an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.”

While the Supreme Court has never declared a right of access to grand jury proceedings, it has held that closure of pretrial proceedings that function like trials is unconstitutional. In *Press Enterprise*, for example, a 41-day probable-cause hearing was closed to the press and the public. Under California law, the probable-cause hearing was designed to determine whether the defendant could stand trial for the charges, much like in a grand jury proceeding. But, the court noted, the state process allowed broad introduction of evidence, meaning that it was “often the final and most important step in the criminal proceeding” and “the sole occasion for public observation of the criminal justice system.”

Closed trials have serious costs. Brennan told us that they “breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.” And Burger explained that “people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” Furthermore, according to Burger, the “crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’ ” Yet that is precisely what this strange shadow trial from Ferguson became. It may as well have been “done in a corner.”

That secrecy was not cured in any way by the after-the-fact document dump with which the prosecutors’ office released the materials considered by the grand jury. Certainly giving all of us access to the materials created the *appearance* of a wholly transparent and open process. But it seems to have had largely the effect of reinforcing people’s beliefs. Michael Brown’s supporters insist he was an unarmed kid, killed by a trigger happy white cop, and Wilson’s supporters insist he was justifiably defending himself from an animal who was poised to kill him. By dumping all of the evidence and allowing us to arrive at our own conclusions, absent any context or process or ability to judge the credibility of witnesses, we have been handed the criminal equivalent of one of those choose-your-own-adventure books, in which we can all find an interpretation that conforms to our pre-existing ideas.

In the end, we all got to bear witness not to a fair and open trial, but to parts of it that do not add up to openness, fairness, or justice. We cannot believe in the fairness of a process we cannot see, and we should not be led to believe in the fairness of a process because a prosecutor’s office asserts that we have seen all we need to.

Read more coverage of Ferguson in Slate.