THE THIRTEENTH JUROR

Ferguson: A Personal Look at the Grand Jury Transcripts

(Copyright)

For Dale and Larkin,
and a new generation

(Epigraph)

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Preface

In producing this book, it has been my purpose to become, as closely as possible, a thirteenth juror in the grand jury investigation into Michael Brown Jr.'s death in Ferguson, Missouri.

This was made possible by the release of 6,466-plus pages of transcripts and documents released by St. Louis County Prosecutor Robert McCulloch following the "no true bill" decision in the grand jury case of *State of Missouri v. Darren Wilson.* "No true bill" meant there would be no indictment and no public trial of the defendant.

With minimal assistance from the public realm of news about this case, utilized for scattered verification of facts and not analysis, I undertook what any person could undertake through the availability of these documents. I read them in their entirety, attempting to grasp the grand jury's charge, the conduct of its proceedings, and the outcome of its deliberations.

I came to my own conclusions about aspects of the case—not so much in pursuit of assessing the outcome itself, but in an attempt to understand the process that moved these twelve people toward that outcome.

To accomplish this, I spent months "inside" the grand jury's hearings, poring over testimony and forensic reports, compiling statistics, developing a personal feel for the various individuals involved, particularly the witnesses, and noting the tenor of their interactions with the two prosecuting attorneys (and vice versa).

My study of these transcripts could not, of course, attain the reality of being in that grand jury room itself. I could not know the names of the witnesses or the specifics of where they lived; I could not see their body language—gestures or facial expressions or posture—or any physical illustrations of the points they were making on maps or diagrams; I could not see the videos that were played; I could not have the benefit of private dialogue with other jurors, and I could not feel the tensions, empathies, hostilities present except as they were remotely echoed in the transcript texts. Perhaps most importantly, I could not ask questions of the witnesses or the two supervising attorneys.

But I could at least explore some of those questions here, where I am allowed to review and discuss many elements of the twenty-four days of grand jury hearings. I commend the twelve

citizens who were given this charge as grand jurors, and who obviously served diligently. And I offer my personal observations in the spirit of exploring a total process, set apart from the daily news cycle.

I also offer, in the Epilogue, a brief overview of the remarkable history and, to a very modest extent, the current efficacy of the grand jury system. It was not a familiar subject, and its importance in our developing society as an enabling body for power of the citizenry has been edifying.

I believe the study of this grand jury's workings provides a pathway for understanding some of the recent calls and arguments for grand jury reform. It illuminates the impetus for criminal justice reform in general. In that light, I encourage readers to explore the resources included in the Epilogue and Appendix B. Overall, I hope this story and these resources will serve as a contribution to public dialogue.

In addition, I wish to extend sincere gratitude to a wide community of friends and professionals who have supported this work, but I must recognize in particular my editor, A.D. Reed, and my in-process readers and cheering squad: Dr. Judith Quick, Dr. Marian Spencer, and inveterate researcher Lynn Vogel. They kept my belief in this work from flagging. Finally, I have dedicated this book to Dale Holder Clemmons and Larkin Meade Clemmons in the hope that it will somehow contribute to a future for their generation that comes closer to manifesting the ideal of justice, in our country and the world, that we hope for and work towards.

Nelda Holder, Author

Editor's note: Although the text of this book follows the publisher's standard style, the transcripts of the grand jury proceedings include occasional quirks of spelling, word usage, and use of numerals in place of words. We have not made editorial "corrections" but, when necessary for clarity, have, indicated with "[sic]" the departure from the norm.

Chapter 1

Day One

Wednesday, August 20, 2014

High temperature 91 F, wind high 38 mph

The room is hot.

It is filled by twelve jurors, two assistant prosecutors, a court stenographer, audio-visual equipment plus screen, and will include—one at a time—a stream of sixty-two different witnesses over the next fourteen weeks. There is a plan to bring in extra fans.

It is late summer in Missouri, and the St. Louis County Courthouse in Clayton is hosting the biggest show in the country, although it is happening behind closed doors. From today until November 13, this will be the setting for the St. Louis County grand jury investigation into the homicide of Michael Brown, Jr.

From the beginning, the jurors are coached on how to avoid the press as they arrive and leave. As with all grand jurors, their anonymity is being protected, but this county grand jury is at the national nexus of law, order, race relations, and rioting in the streets. It is the job of these twelve people, chosen from the standard jury pool by a circuit judge, to investigate the manner in which an eighteen-year-old black man has died and to determine whether the policeman who killed him will face criminal charges and a public trial.

Brown, known to friends as "Big Mike" or "Mike-Mike," was killed in Ferguson on August 9, 2014, by a young police officer named Darren Wilson. Ostensibly, the officer made a simple request that Brown and his companion, Dorian Johnson, move to the sidewalk instead of continuing to walk down the double yellow lines in the center of Canfield Drive. But things escalated immediately and exponentially, resulting in a physical confrontation between Brown and Wilson and a hurried radio message that went out on the wrong channel and was not received by dispatch: "Shots fired, send me more cars."[1][V, 71]

The street encounter began around noon, and in approximately two minutes, Michael Brown, who had just graduated from high school and was thinking of attending technical school,

lay prone on his stomach on the sun-baked pavement, at least six bullets having pierced his body. Their penetration was ruthless; their paths tore through his brain, his eye, his lung. And his 289-pound, 6-foot-5 body lay there in the sun as a rapidly growing contingent of neighbors, friends, strangers, and blue-uniformed police officers surrounded it. It lay there, in fact, for almost 4-1/2 hours ... a mute witness to the growing agitation of the people, the reflexes of control-conscious cops, the sounds of random gunfire, the cries of friends and family. "Almost routine," the grand jury would later be told regarding the amount of time it took to remove the body.[2] [II, 70)]

Michael Brown was black.

Darren Wilson was white.

Unrest begins within minutes of the shooting, and there will be demonstrations and riots in the days and weeks that follow, with national attention riveted on Ferguson and federal investigations promised.

This grand jury, convened to investigate the homicide, will render its decision in late November: *no indictment*. The U.S. Department of Justice, which launches its own investigation of potential civil rights violation in the death, will render its decision in March, 2015: *no prosecution*.

The national press and national attention will largely move on. There will be other violent deaths of black men in the news, other investigations of the policemen who kill them. Yet the name of Michael Brown almost invariably leads the growing litany of these contemporary cases. Ferguson is a sad legacy. And it needs revisiting to glean deeper wisdom on behalf of our future.

Becoming a Thirteenth Juror

So here we are—in the hot room in August in the middle of America. It is 91 degrees outside and windy, with gusts of up to 38 miles an hour. Eleven days ago when Michael Brown died, it was 82 degrees and the wind was much calmer.

St. Louis County Prosecutor Robert M. McCulloch is making a highly unusual announcement to the grand jurors assembled that if their determination over the course of this investigation is that no charges are 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 ... 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.[3][I, 21]

Basically true to his word, and with requisite judicial approval, the 6,466 pages of transcripts and supplementary materials are released to the public in November and December. They are missing, however, a few items: respectfully, the autopsy photographs of the victim are not included; regrettably, the final legal notes provided before deliberation are withheld. The notes are of particular import, since the original legal document provided for guidance early in the hearings is proclaimed on the last day to be invalid.

It is the release of these transcripts—an extremely rare act in grand jury proceedings—that enables any of us in the public to become a thirteenth juror. In a rare situation, we are allowed to seat ourselves metaphorically by poring over the transcripts of twenty-four days of testimony and questioning; reviewing the instructions of the legal supervisors; scrutinizing medical and forensic reports; analyzing and weighing the stories of thirty-six people claiming to be eyewitnesses, and twenty-six medical and/or technical or investigative professionals as they appear in this room between August 20 and November 21, 2014.

We get to bring our own unanswered questions to this room, searching the evidence for insight into the "no true bill" decision that means no public trial for the man who shot Michael Brown.

The Charge of the Grand Jury

In the U.S. legal system, grand juries exist at both the federal and state level (although not every state uses grand juries) and are used to determine whether a person under investigation for a serious crime should be indicted and brought to public trial. Indictment means that the grand jury finds that (1) the evidence provides "probable cause" to believe that a crime has been

committed, and (2) the evidence offers probable cause to believe the person being investigated committed the crime or crimes and should stand trial. Such a decision by the grand jury results in a "true bill," or indictment. If the grand jury does not find the probable cause criteria, it returns a no-true-bill decision. In other words, grand juries do not find a person guilty or innocent; their job is to decide the likelihood that a crime has been committed and whether the person(s) before them should be tried for the offense.

Although all fifty states allow grand juries, preliminary hearings before a judge are a frequent alternative. Preliminary hearings are held in open court. Defense lawyers are present (they are not allowed at grand jury proceedings) and may cross-examine witnesses. Alternatively, a defendant may waive the preliminary hearing and go straight to trial.[4]

The probable-cause standard for a grand jury is a lower standard than is used in a public trial by a "petit jury." There, the standard to convict is "beyond a reasonable doubt"—and there must be a unanimous verdict. Reasonable doubt means that the evidence presented at trial is sufficient to offer no "actual and substantial doubt."[5]

Petit juries require a unanimous verdict for a criminal conviction. Grand juries may only require a certain percentage of jurors to indict. In Ferguson, the votes of nine of the twelve grand jurors would have been required for indictment.

Secrecy and the Ferguson Grand Jury

"These are confidential proceedings," McCulloch reminds the St. Louis County grand jurors in his introductory remarks regarding the case of the *State of Missouri v. Darren Wilson*. "Nothing leaves this room unless and until ordered by the court or some other legal method."[6][I, 14]

"You are anonymous," he proclaims.[7][I, 15] Names, addresses, and any other identifying information regarding individual grand jurors are withheld from the public. The transcripts developed from the proceedings offer no identifying factors, and the only information released by the prosecutor's office is demographic: There are seven men and five women on the grand jury; one man and two women are black, and six men and three women are white.[8]

Anonymity is "protected by law that's been litigated," McCulloch assures them.[9][I, 15] He explains that once this case moves from the regular grand jury day—Wednesday—to fit the

schedule of these twelve people, there will be less predictability for the media, but there are also plans to work around the visibility of their coming and going.

"If there is a protest scheduled or the media is going to be here ... we will work with that ... [to] get you in and get you out of the building without worrying about any of that. The only other thing I'd say when you are coming in, don't wear the grand jury badge," the prosecutor advises.[10][I, 16-17]

Somewhat precariously, the twelve jurors have no backup. When one of them asks whether there would be alternates, McCulloch quips, "We are in the hope that all twelve of you are perfect, healthy specimens, who have no plans to leave town or go on vacation for two months," adding more seriously that having alternates sitting in "doesn't work in the grand jury." To assure as much flexibility as possible for having all twelve present, he tells the jurors there will be no set hours or days for them to meet. "Whatever works for you is when we are going to be here. Morning, noon or night, or any day."[11][I, 22]

McCulloch is turning the investigation over to two assistant prosecutors, Kathi Alizadeh and Sheila Whirley. "Kathi was the prosecutor I have on call for the month of August for all homicide calls. So she received the call about this shooting within minutes of the time the County Police were notified by the Ferguson Police. So she has been working with the police and lots of other things on this since the very beginning," says McCulloch. "Sheila, as you know, has been assigned to the grand jury for this term and so she will continue with this grand jury on this case for as long as it does take."[12][I, 5-6] [Alizadeh, who is white, has twenty-seven years experience; Whirley, who is black, has eighteen. -Ed.][13]

"This is the first, last and probably the only time I think that you will see me in relation to this case," McCulloch adds. "Certainly in the grand jury."[14][I, 6]

Before the first witness appears, McCulloch makes sure the jurors, who are allowed to take notes during the proceedings, know that those notes cannot leave the premises. "At the end of the day or end of the session, the notes will be collected and they will be secured," he says. "Any evidence that is presented to you, physical evidence, of course, also will be collected and it will be secured. We have highly secure evidence lockers within the complex here."[15][I, 17]

There will be "massive amounts of information and physical items" presented to them in the next months, McCulloch says. "You're not going to remember everything." But the

transcripts and other evidence will be both before and during their deliberations for as long as they need, and they will have access to their personal notes throughout.[16][I, 17-18]

The Question of Transparency

There is a tight lid on what happens in the hot jury room, while questions are boiling over outside in the real world. McCulloch acknowledges that.

"I know people keep talking about the transparency, at the end of all this, depending on your determination ... if there are charges that you find should be lodged and are lodged, then all of that information will come out pursuant to the course of the case," he tells the jury.[17][I, 20] And if there is no indictment, the transcripts and information will be released as discussed.

"It is, obviously, an awesome burden, but it is going to be an awful lot of work and we will make it as orderly and organized as we can to you," the prosecutor promises. "I'm anticipating, in all honesty, without basing it on a whole lot, that we hope to have this completed by the middle of October."[18][I, 21] (The estimate proves short by a month.)

Before he yields the room to his two assistants, McCulloch stresses the fact that: "The most important thing (is) that you get all the information and all of the evidence and make your determination on that."[19][I, 22]

For more on the history of the grand jury and proposals for reform, see Epilogue.