IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

In re Grand-Jury Transcripts Evidencing Mahoning County Prosecutorial Misconduct	Case No. 17–CV–_____ Grand Jury Judge Administrative Judge

PETITION OF MARTIN DESMOND TO UNSEAL GRAND-JURY TESTIMONY AND PRODUCE TRANSCRIPTS (HEARING REQUESTED)

Petitioner Martin Desmond petitions the Court to unseal and produce transcripts of grand-jury testimony in the following cases:

- *State v. Dominique Lucky* (Case No. 08-CR-329), Oct. 9, 2008;
- *State v. Christopher Hill* (Case No. 08-CR-372), Oct. 9, 2008;
- *State v. Tyrell Ravnell* (Case No. 08-CR-373), Oct. 9, 2008;
- *State v. Emmanuel Dawson* (Case No. 11-CR-804), July 28, 2011, and Jan. 5, 2012; and
- *State v. James Woods* (Case No. 12-CR-1261), Jan. 10, 2013.

The needs of justice demand the release of these records, and there are no grounds for continued secrecy. The reasons for the Petition are set forth in the below Memorandum in Support.

TABLE OF CONTENTS

Memorandum in Support

Issue presented

A court may disclose grand-jury proceedings when the needs of justice outweigh the reasons for secrecy. Petitioner Martin Desmond reported prosecutorial misconduct and was subsequently terminated in retaliation. Desmond seeks grand-jury transcripts to verify some of the misconduct he reported and impeach his retaliator's claims of having investigated it. The factors supporting secrecy do not exist because witnesses were disclosed and charges were filed. Should the Court order the transcripts' release?

I. Introduction and Summary

This matter arises out of Petitioner Martin Desmond's identification of a pattern of misconduct in the Mahoning County prosecutor's office[1] and the office's failure to adequately investigate and address that misconduct.[2]

As will be shown below, the prosecutor's office had a practice of indicting individuals without sufficient evidence—including where the only "evidence" arose from those individuals invoking their constitutional rights—in some cases to compel them to cooperate. The transcripts Desmond seeks are necessary not only for his personal employment-law claims, but also for the broader public interest in ensuring accountability within the prosecutor's office.

***

Desmond is a former Assistant Prosecuting Attorney (APA) for Mahoning County who served with distinction for 13 years. He has a total of 18 years of law-enforcement experience. He prosecuted approximately 1,000 criminals and received

---

[1] Desmond emphasizes that it is the prosecutor's office, and not the police, who were responsible for the misconduct.

[2] This petition is supported only by information available through public records and sources outside of the prosecutor's office.

numerous recognition letters and awards, including from the Ohio Attorney General, the FBI, and the Mahoning Valley Chiefs of Police. He was also selected to the National District Attorneys Association Marijuana Policy Panel.

In 2016, Desmond became aware of misconduct within the prosecutor's office—specifically, that prosecutors indicted Kalilo Robinson for tampering with evidence and obstruction of justice based on Robinson's lawful invocation of his Fifth Amendment privilege to remain silent. In August 2016, Desmond informed Chief of the Appellate Division APA Ralph Rivera of his concerns, and was told the information was shared with supervisors. In December 2016, Desmond alerted Mahoning County Prosecuting Attorney Paul Gains to the misconduct and followed up in January 2017 with a detailed written report. In the same report, Desmond also mentioned earlier cases of similar misconduct within the prosecutor's office.

Soon after Desmond submitted this report, however, Gains terminated Desmond in retaliation, and held a press conference in which he unjustly criticized Desmond's conduct; denied wrongdoing by any other member of his staff; stated, falsely, that Desmond had lied about conducting certain legal research; and insinuated, again falsely, that Desmond had provided legal research to an adverse party. These unjust statements tarnished Desmond's reputation.

Desmond now seeks the grand-jury transcripts to support his legal challenges to the retaliatory termination, intimidation, and defamation, and to Gains's misfeasance, malfeasance, or nonfeasance, whether through the State Personnel Board of Review (SPBR) or otherwise. First, the transcripts will help establish that the misconduct he reported was a real concern, which will support his retaliation

claim. Second, the transcripts will help impeach Gains's claim that the reported misconduct was investigated, and no wrongdoing found, and otherwise undermine Gains's credibility regarding his false accusations of Desmond. Third, importantly, the transcripts will help support Desmond's pending appeal to Mahoning County Common Pleas Court from the SPBR, as they will support Desmond's argument that the SPBR wrongly dismissed his appeal without allowing an evidentiary hearing to test Gains's credibility on the bases for the SPBR dismissal. Fourth, disclosure will promote accountability in the prosecutor's office, a matter of public interest. Preventing prosecutorial abuse is one of the very reasons grand-jury proceedings are recorded.

Without the transcripts, Desmond's ability to prove his claims will be hampered. Meanwhile, the prosecutorial misconduct Desmond reported will be permitted to go on unabated, to the public's detriment. There is *no* continuing need for secrecy here, as the criminal proceedings have long concluded and the witnesses have previously been disclosed. Justice and the strong public interest in prosecutorial integrity thus require disclosure.

II. Background

While American prosecutors have broad discretion to charge, they may not charge people without sufficient evidence that a crime occurred and that the person charged committed it. As the U.S. Supreme Court held long ago in *Berger v. United States*, "[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to

produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[3] Ohio professional-conduct Rule 3.8 similarly states that "[a] prosecutor in a criminal case shall not . . . pursue or prosecute a charge that the prosecutor knows is not supported by probable cause" (emphasis omitted). Comment 1 to Rule 3.8 provides that a "systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4," *i.e.*, professional misconduct.

In *State v. Grewell*, the Ohio Supreme Court listed some examples of prosecutorial abuse that may occur before the grand jury: "selective prosecution, vindictive prosecution, the use of perjured testimony, excessive use of hearsay, and prosecutorial appeal to the passions of the jurors."[4] As the Ohio appellate court in *State v. Lykins* observed, prosecutors also engage in misconduct when they mislead the grand jury as to the applicable law.[5] Absent certain conditions being met, moreover, a prosecutor may not charge someone for invoking his or her constitutional rights. In *State v. Leach*, the Ohio Supreme Court stated that using "a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination."[6] Nor may a prosecutor charge an

---

[3] 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

[4] *State v. Grewell*, 45 Ohio St.3d 4, 7, 543 N.E.2d 93, 96 (1989) (citing *United States v. Hogan*, 712 F.2d 757 (2d Cir.1983); *United States v. Serubo*, 604 F.2d 807, 818 (3d Cir.1979); *United States v. Basurto*, 497 F.2d 781 (9th Cir.1974); *United States v. Estepa*, 471 F.2d 1132 (2d Cir.1972)).

[5] *State v. Lykins*, 6th Dist. Wood No. 93WD076, 1994 WL 240277, *4, 5 (June 3, 1994).

[6] 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 38. The prosecutor's office should be aware of this case, not only because it is an Ohio Supreme Court case, but also because it is cited in *State v. Chaney*, a case handled by APA Dawn Cantalamessa, which reversed a conviction obtained by the Mahoning County prosecutor's office because the prosecutor

innocent person in order to compel that person's cooperation. Under long-established U.S. Supreme Court law, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' . . . [A person] may not be punished for exercising a protected statutory or constitutional right."[7]

Yet as described next, prosecutors in the Mahoning County prosecutor's office appeared to be engaging in just the type of misconduct mentioned above. Desmond reported the misconduct, and Paul Gains, who had signed off on all the indictments, denied it.

A. Mahoning County prosecutors appear to have sought indictments without sufficient or admissible evidence, including using the individual's invocation of his constitutional rights as evidence. In some cases, prosecutors sought these indictments to compel the individuals to cooperate.

1. Christopher Hill and Dominique Lucky

In 2008, a Mahoning County grand jury indicted three men—Christopher Hill, Dominique Lucky, and Tyrell Ravnell—for a single murder.[8] Months later, the prosecutor's office moved to dismiss the indictments against Hill and Lucky, noting the lack of evidence against these two defendants and admitting that the charges

---

improperly cross-examined the defendant based on his constitutional right to remain silent and commented on it again in closing argument. 7th Dist. Mahoning No. 08-MA-171, 2010-Ohio-1312, ¶¶39, 41, 2010 WL 1208299, at *7–8.

[7] *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (citation omitted). *See United States v. LaDeau*, 734 F.3d 561, 569–70 (6th Cir.2013).

[8] *See State v. Hill*, C.P. No. 08-CR-372, Indictment (Oct. 9, 2008), attached as **Exhibit 1**; *State v. Lucky*, C.P. No. 08-CR-329, Indictment (Oct. 9, 2008), attached as **Exhibit 2**; *State v. Ravnell*, C.P. No. 08-CR-373, Indictment (Oct. 9, 2008), attached as **Exhibit 3**.

against them "may have been brought . . . to apply pressure on" them for their cooperation.[9] Both indictments were dismissed.[10]

The dismissal motions admitting improper motives raise questions about what facts and "evidence" were presented to the grand jury in the first place to secure meritless charges. In moving to dismiss the Hill indictment, the prosecutor's office admitted that it had not charged the three defendants "in a single indictment or as acting in concert" with one other.[11] Although a prosecutor does not have to charge someone as an accomplice, by admitting that they were not "acting in concert," the prosecutor's office admitted that it had charged and pursued each defendant as a principal offender, i.e., the actual shooter.

But as the prosecutor's dismissal motions also showed, the evidence against Hill suggested only that he provided a gun to the shooter several hours before the shooting, not that he shot the gun himself; similarly, the evidence against Lucky suggested only that he was present and may have encouraged the shooting.[12]

While this evidence may support complicity, it would not have supported indicting and pursuing each of them as the principal offender. Further, the prosecutor's motions suggest that the victim died from a single gunshot wound and

---

[9] *See Hill*, State's Motion to Dismiss, at 2 (Jan. 28, 2009), attached as **Exhibit 4**; *Lucky*, Motion to Dismiss, at 2 (Mar. 11, 2009), attached as **Exhibit 5**.

[10] *See Hill*, Dismissal Order, at 1 (Jan 28, 2009), attached as **Exhibit 6**; *Lucky*, Dismissal Order, at 1 (Mar. 12, 2009), attached as **Exhibit 7**.

[11] *See Hill*, Mot. Dismiss, at 2 (Ex. 4).

[12] *See Hill*, Mot. Dismiss, at 1–2; *Lucky*, Mot. Dismiss, at 1.

that the indictments were based on the word of a single eyewitness.[13] A single eyewitness would hardly identify three separate principal offenders for firing a single gunshot.

The above evidence thus indicates that the prosecution indicted Hill and Lucky without evidence establishing even probable cause that they had committed the crime for which they were indicted (the actual shooting)—and by the state's own admission, that the prosecution had done so only to compel these individuals' cooperation.

Desmond was not involved in presenting these cases to the grand jury. Prosecuting Attorney Paul Gains signed both indictments.

2. Emmanuel Dawson

Police records suggest that, in 2011, the prosecutor's office took the same approach with Emmanuel Dawson (Case No. 11-CR-804) as it had in *Hill* and *Lucky*—lacking sufficient evidence to indict him for a murder but securing an indictment anyway simply to gain his cooperation (in this case, after he invoked his constitutional rights).

In March 2011, Dawson spoke to police, implicating Dario Correa in a New Year's Day fatal shooting.[14] Although Dawson admitted to being present at the time, there was no evidence suggesting he was involved in the murder as either a

[13] *Hill*, Mot. Dismiss, at 2; *Lucky*, Mot. Dismiss, at 2.

[14] *See* Youngstown Police Department Detective Notes (redacted), Incident No. 11-112, at 7–8, attached as **Exhibit 8.**

principal or an accomplice. Dawson did admit to returning to the scene with Correa where, he said, Correa set fire to the victim's vehicle after the murder.[15] As a result of this conduct, in July 2011, the grand jury indicted Dawson for tampering with evidence.[16]

In November 2011, at APA Dawn Cantalamessa's request, the police attempted to administer a polygraph test to Dawson. Dawson, however, refused and asked for counsel, thus invoking his Fifth Amendment privilege against self-incrimination (and his Sixth Amendment right to counsel).[17] In January 2012, despite the lack of any new evidence implicating Dawson in the murder,[18] the prosecutor's office nevertheless obtained a superseding indictment charging him with murder after he invoked his constitutional rights.[19] The Sixth Circuit has held such conduct—i.e., where the initial and superseding indictments rely on the same conduct, and "the prosecution obtained no evidence supporting the superseding indictment that it did not already possess prior to obtaining the initial indictment"—establishes a presumption of prosecutorial vindictiveness.[20]

Dawson eventually relented and testified against Correa at trial; the Mahoning County prosecutor's office then dismissed Dawson's murder and

---

[15] *Id.* at 8.

[16] *See State v. Dawson*, C.P. 11-CR-804, Indictment (July 28, 2011), attached as **Exhibit 9.**

[17] *See* YPD Detective Notes, at 9 (Ex. 8).

[18] *See generally id.* at 8–9 (presenting no new evidence in entries between July 2011 and January 2012).

[19] *See Dawson*, Superseding Indictment at 1 (Jan. 5, 2012), attached as **Exhibit 10.**

[20] *United States v. LaDeau*, 734 F.3d 561, 570 (6th Cir.2013).

tampering charges.[21] Desmond was not involved in presenting this case to the grand jury. Gains signed the indictments.

3. James Woods

In 2013, similar to the situations above, the Mahoning County prosecutor's office again sought to indict a defendant without evidence on critical elements of the offense. The prosecution also appears to have misled the grand jury as to the law. Specifically, James Woods (Case No. 12-CR-1261) was indicted for engaging in a pattern of corrupt activity,[22] without evidence that he had engaged in two or more separate incidents of corrupt activity, i.e., a *pattern*. As argued in Woods's motion to dismiss, regarding the engaging-in-a-pattern offense, the indictment alleged only that Woods was involved in one of five aggravated robberies, but that single incident could not support a claim of engaging in a *pattern* of corrupt activity.[23]

At the motion-to-dismiss hearing, the prosecutor (Cantalamessa) attempted to argue that the "separate" incident constituting a pattern was Woods's offense of carrying a concealed weapon (CCW).[24] Although the CCW offense was included in the indictment, however, it was *not* listed as a predicate offense for the engaging-in-

---

[21] *See Dawson*, Dismissal Order, (Feb. 4, 2013), attached as **Exhibit 11**; *State v. Correa*, 144 Ohio St.3d 1506, 2015-Ohio-3955, 45 N.E.3d 1051, ¶3 (7th Dist.).

[22] *See State v. Woods*, 12-CR-1261, Indictment, at 2, 4–5 (Jan. 10, 2013), attached as **Exhibit 12.**

[23] *See Woods*, Def.'s Mot. Dismiss, at 2 (Mar. 20, 2015), attached as **Exhibit 13.**

[24] *See Woods*, Hearing Tr., Mot. Dismiss, at 6:4–6, 7:4–5 (Mar. 23, 2015), attached as **Exhibit 14.** (The transcript's date of 2017 is a typo. *See id.* at 1:18.)

a-pattern offense.[25] Nor did the prosecution file a bill of particulars providing notice that this was the predicate offense,[26] which it could have done to cure the defect.[27]

The CCW offense, moreover, did not meet the statutory requirement under R.C. 2923.31(E), which states that to constitute a pattern, the two predicate offenses may not be "so closely related to each other and connected in time and place that they constitute a single event." As the court determined at the hearing, the CCW offense was too close in time to the first offense (approximately three minutes after the robbery) to constitute a separate event.[28] And Cantalamessa presumably knew it was not a separate offense. The indictment itself shows the possession of the weapon—which formed the basis for the CCW offense—was also *part of* the aggravated-robbery charge. The indictment alleges Woods possessed a deadly weapon "in attempting or committing a theft offense," or "in fleeing immediately after the theft offense,"[29] both acts contained in R.C. 2911.01(A)(1)(C) (aggravated robbery).

Once the court rejected CCW as a predicate offense, Cantalamessa immediately tried to claim an alternative basis for a pattern, namely that Woods

---

[25] *See id.* at 7:6–7; *Woods*, Indictment, at 2-4 (Counts Two to Six).

[26] *See generally Woods*, Docket, attached as **Exhibit 15**.

[27] *See, e.g., State v. Siferd*, 151 Ohio App.3d 103, 2002-Ohio-6801, 783 N.E.2d 591, (3d Dist.); *State v. Franklin*, 2d Dist. Montgomery Nos. 24011, 24012, 2011-Ohio-6802, ¶¶ 46, 48, 2011 WL 6920727, at *9–10.

[28] *Woods*, Tr. on Mot. Dismiss, at 11:4–6 (Court: "That's not a separate offense. I just don't see that as a separate offense.").

[29] *Woods*, Indictment, at 4 (Count Six); *see also id.* at 5 (Count Eight).

allegedly had been part of a conspiracy to commit the aggravated robberies.[30] But the grand jury never indicted Woods (or any of the defendants) for conspiracy. Nor does the indictment list conspiracy as a predicate offense for the pattern. These omissions indicate that the grand jury had no evidence before it sufficient to indict on the basis of conspiracy, if that theory was presented to it at all. This then raises the question: what evidence exactly did the prosecution present to the grand jury to secure the pattern-of-corrupt-activity indictment? Either the prosecutor presented the CCW offense as a predicate offense, which, for the reasons stated above, would have required misleading the grand jury about what the law required to establish a pattern; *or* the prosecutor presented the conspiracy argument and the grand jury rejected it (on the basis of insufficient or nonexistent evidence) and the prosecutor nevertheless pursued the engaging-in-a-pattern count in the indictment. Either scenario constitutes prosecutorial misconduct.[31]

The court dismissed the engaging charge.[32] (Incidentally, Woods was later acquitted of the aggravated-robbery charge.[33]) Again, Desmond was not involved in presenting the case to the grand jury. Again, Gains signed the indictment.

---

[30] *See Woods*, Tr. on Mot. Dismiss, at 11:7–9 (Cantalamessa: "Well, he is part of their conspiring for the other agg (sic) robberies too.").

[31] *See, e.g., State v. Lykins*, 6th Dist. Wood No. 93WD076, 1994 WL 240277, *4, 5; Ohio Prof.Cond.R. 3.8.

[32] *See Woods*, Tr. at 14:10–12.

[33] *See Woods*, Docket (Ex. 15); *see* Judgment Entry of Trial (Apr. 10, 2015), attached as **Exhibit 16.**

B. After Desmond reports the latest in a line of such unlawful indictments, as well as earlier ones, he is terminated.

1. In 2016, the prosecutor's office unlawfully indicts witness Kalilo Robinson.

In 2015, Marquan White was indicted for murdering Antwon Martinez on November 17, 2014.[34] Kalilo Robinson was a witness to the murder.[35]

In 2016, APA Dawn Cantalamessa threatened to charge Robinson with *committing* the murder if Robinson would not cooperate with the prosecution.[36] Cantalamessa made this threat despite the lack of any evidence that Robinson was involved in the murder. She admitted on the record, **"he hasn't given any sort of incriminating statement against himself except for being present and knowing about it. That's about it."**[37] Even defense counsel for White stated on the record, "I know of nothing — nothing that says this man in any of the evidence is implicated and could be found guilty of that case anyway. I mean, they have to give us that evidence so that we could impeach this man, and we have received nothing saying that he is guilty of anything in that case."[38] Cantalamessa further

---

[34] *See State v. White*, 15-CR-538, Indictment (June 18, 2015), attached as **Exhibit 17.**

[35] *See State v. Robinson*, 16-CR-342, Grand Jury Tr., at 3:20–4:1 (April 7, 2016), attached as **Exhibit 18.**

[36] *See* Affidavit of Tom Zena (submitted in connection with *Robinson* Motion to Dismiss), ¶¶ 3–6, attached as **Exhibit 19;** *see also White*, Immunity-Hearing Tr., at 7–11 (April 5, 2016), attached as **Exhibit 20.**

[37] *See White*, Immunity-Hearing Tr., at 11:9–12.

[38] *Id.* at 8:6–12.

confirmed his lack of culpability in her discovery disclosures, answering "NONE" under "Evidence favorable to the accused/Brady material."[39]

Faced with the threat of prosecution for the murder, Robinson invoked his Fifth Amendment privilege to remain silent.[40] Cantalamessa offered Robinson immunity in accordance with R.C. 2945.44(A),[41] which states that, unless it finds doing so would not further the administration of justice, a court shall compel an uncooperative witness's testimony only if both of the following conditions are met: the prosecutor's office makes a written request, and the court informs the witness on the record that he will receive immunity. Then, under R.C. 2945.44(C), if the witness is "granted immunity" but continues to refuse cooperation, he can be subject to criminal penalty or contempt for failing to comply "with the order."

In this case, however, the **court refused to grant immunity, and never ordered** Robinson to testify.[42] As shown next, the prosecutor's office nevertheless had Robinson indicted for obstruction and tampering with evidence, based solely on his having invoked his Fifth Amendment privilege to remain silent.

The grand-jury transcript in that case, relevant portions of which are reproduced below, shows that the indictment was unlawfully obtained—first because the prosecutor's office used Robinson's lawful invocation of his Fifth

---

[39] *See White*, State's Crim.R. 16(E) Disclosure of Evid., at 1 (Aug. 25, 2015), attached as **Exhibit 21.**

[40] *See, e.g.*, *White*, Immunity-Hearing Tr., at 9.

[41] *See id.* at 4–5.

[42] *See id.* at 16–17; *see id.* at 16:17–21 (Cantalamessa: "For the record, your Honor, did you order Mr. Robinson to testify and did he actually say he is refusing to testify?" Court: "No.").

Amendment privilege as the only substantive evidence of guilt, when this invocation is evidence of nothing; second because even though the judge never granted immunity, the prosecutor implied that the mere offering of immunity was sufficient to overcome Robinson's invocation of his privilege; and third because the prosecutor misrepresented that that testimony had been "ordered" and that there was a "trial":

> Q: [The prosecutor, referring to the testimony at issue in the charge for tampering with evidence:] In this case it would be the testimony that he was **ordered to give**.
>
> . . .
>
> Q: Let's talk a little bit about more in detail what happened yesterday. We brought him into court and he was put on the witness stand and put under oath; is that correct?
>
> A: Correct. And he invoked his Fifth Amendment right, which was kind of crazy 'cause he's a witness, so.
>
> Q: And then once he invoked his Fifth Amendment right, what happened next?
>
> A: The prosecutor's office **gave him immunity—offered him immunity**.
>
> Q: Was that done in writing?
>
> A: Yes. I believe you gave it to him, his attorney, the defense attorney for the actual shooter, and the judge, so. And he still refused to testify.
>
> Q: Anything else you'd like to add as far as the facts surrounding the incident from yesterday?
>
> A: No, that's about it. The only thing is that I was kind of taken back [*sic*] when he invoked his Fifth Amendment right because he is a witness. **Usually when you invoke your Fifth Amendment right, you have something to hide.** And that kind of stopped it right there. The trial was done right there at that point.
>
> . . .
>
> Q: And just so we're clear finally, the evidence that we're talking about that he's concealing in this matter, is it the physical testimony that he was to provide in court?

A: Yes. . . . [43]

Thus, the grand-jury transcript in the *Robinson* case confirms that the prosecution unlawfully secured an indictment by misrepresenting facts and law and indicting Robinson for invoking his right to remain silent. In the Bill of Particulars signed by APA Cantalamessa, the state likewise refers to Robinson's invoking his Fifth Amendment privilege to remain silent and fails to disclose that immunity was never granted and testimony never ordered.[44]

The prosecutor's office, moreover, implicitly admitted the impropriety of the Robinson indictment. In August 2016, Robinson's counsel moved to dismiss the indictment for prosecutorial vindictiveness.[45] Faced with this motion, the prosecutor, APA Cantalamessa, attempted to obtain Robinson's cooperation in exchange for the dismissal.[46] Defense counsel, however, objected.[47] Cantalamessa then moved to dismiss the indictment with, as the judge stated, "no strings attached."[48] Had the prosecutor's office believed this was a proper indictment, it would not have moved to dismiss it in exchange for nothing, for no reason at all.

---

[43] *State v. Robinson*, 16-CR-342, Grand Jury Tr., at 3:9–11; 5:11–6:10; 6:22–7:3 (emphasis added).

[44] *See, e.g., Robinson*, Bill of Particulars, at 1, attached as **Exhibit 22**.

[45] *See generally Robinson*, Def. Mot. Dismiss (Aug. 9, 2016), attached as **Exhibit 23**. (To avoid burdening the Court with repetitive exhibits, Desmond has not attached the motion's exhibits to Ex. 23. The exhibits are otherwise cited in this petition.)

[46] *Robinson*, State's Mot. Leave to File Dismissal Entry, at 1 (Aug. 15, 2016), attached as **Exhibit 24**.

[47] *Robinson*, Hearing Tr., at 2:21–22. (Aug. 16, 2016), attached as **Exhibit 25**.

[48] *Id.* at 3:5–8.

Following the indictment's dismissal, Robinson remained in the county jail without just cause, which led Robinson to file a petition for writ of habeas corpus.[49] The Seventh District Court of Appeals granted this petition and ordered him released. [50]

2. After Desmond reports prosecutorial misconduct, he is suspended and subsequently terminated. Gains makes false statements about Desmond at a press conference.

Desmond learned of the *Robinson* indictment's unlawfulness, as well as the facts underlying Robinson's habeas petition. In August 2016, he reported his concerns about prosecutorial misconduct to Chief of the Appellate Division APA Ralph Rivera, who told Desmond that he discussed the matter with others in the office, including supervisors.[51] If anyone conducted an investigation, however, they did not contact Desmond. No one followed up with him.

In December 2016, Robinson filed a federal civil-rights lawsuit alleging prosecutorial misconduct.[52] Also in December, Desmond reported his concerns about Cantalamessa's mishandling of the case directly to Prosecuting Attorney Paul

---

[49] *Robinson v. Green*, 7th Dist. Mahoning No. 16 MA 0134, 2016-Ohio-5688, 2016 WL 4697962, ¶ 10; *see also* 1/27/17 Desmond Memo, at 6.

[50] *Robinson v. Green*, at ¶ 12.

[51] Memorandum of Martin Desmond (Jan. 27, 2017), at 6, attached as **Exhibit 26**. This memorandum is a public record. The prosecutor's office produced it with minimal redactions in response to a public-records request.

[52] *See Robinson v. Mahoning County*, et al., N.D.Ohio No. 4:16-CV-3011 (filed, Dec. 16, 2016). Although the lawsuit was dismissed on immunity grounds, *see Robinson v. Mahoning County*, N.D.Ohio No. 4:16-CV-3011, 2017 U.S. Dist. LEXIS 59683, *15, 18-19 (Apr. 19, 2017), that did not mean that the misconduct did not take place or that the conduct was excusable.

Gains, following up with a formal memo on January 27, 2017.[53] The memo not only reported Cantalamessa's misconduct in the *Robinson* case,[54] but also highlighted other instances of misconduct within the prosecutor's office. Specifically, Desmond's memo mentioned the *Lucky* and *Hill* cases discussed above:

> ...I remembered the cases of State v. Dominique Lucky (08-CR-829) and State v. Christopher Hill (08-CR-372). From my recollection, both of these defendants were charged with the same murder after they refused to cooperate against Tyrell Ravnell (08-CR-373), who was also accused of the same murder. The cases were handled by former Assistant Prosecuting Attorney Kasey Shidel and we spoke about them. In the motions to dismiss the indictments against Lucky and Hill, part of the basis for the dismissals was the belief that they were charged to compel their cooperation.[55]

At no point did anyone follow up with Desmond as part of any investigation into the reported misconduct, although Gains later claimed to have done one.

Rather, on March 23, 2017, Gains suspended Desmond and scheduled a disciplinary hearing based on a number of false allegations, without providing any factual basis or evidence.[56] After the hearing, Gains terminated Desmond without explanation.[57]

---

[53] *See generally* 1/27/17 Memo (Ex. 26).

[54] *Id.* at 4–7.

[55] *See id.* at 5 n.6.

[56] *See* Affidavit of Martin Desmond, at ¶ 42 (prepared as part of opposition to motion to dismiss before SPBR), attached as **Exhibit 27.**

[57] *Id.* at ¶ 46.

Immediately after the termination, Gains called a press conference in which he claimed to have "investigated" Desmond's allegations[58] and claimed he "found no evidence of wrongdoing by any other member of his staff."[59] He then falsely accused Desmond of concealing Robinson's plans to sue the county.[60] He also stated, falsely, that Desmond had lied about conducting certain legal research; and insinuated, again falsely, that Desmond had provided legal research to an adverse party.[61] (Separately, Gains also indicated he was terminating Desmond because Desmond was a witness to Robinson's civil lawsuit.[62])

---

[58] Michelle Nicks, Assistant Mahoning County Prosecutor fired, WFMJ.com (April 05, 2017, 1:46 PM), http://www.wfmj.com/story/35078139/assistant-mahoning-county-prosecutor-fired (accessed Dec. 19, 2017), attached as **Exhibit 28** ("His claims against Assistant Prosecutor Dawn Cantalamessa as the claims in the civil lawsuit were investigated before then and I have determined and so has Attorney Linnette Stratford that she did not engage in any improper conduct.").

[59] Amanda Smith and Tyler Trill, Mahoning County's assistant prosecutor fired, WKBN.com (April 5, 2017, 2:10 PM), at 1:28–1:32, http://wkbn.com/2017/04/05/mahoning-countys-assistant-prosecutor-fired/ (accessed Dec. 19, 2017), attached as **Exhibit 29**.

[60] *See, e.g.*, WKBN News at 6 (WKBN television broadcast April 5, 2017), at 1:02–1:08, attached as **Exhibit 30.** ("Gains also says Desmond didn't want the County to know it was about to get sued. . . ."). (Desmond tried as part of his SBPR appeal to obtain full coverage of the press conference, but was denied the ability to request a subpoena for that purpose.)

[61] Nicks, *above*, WFMJ.com, http://www.wfmj.com/story/35078139/assistant-mahoning-county-prosecutor-fired (accessed Dec. 19, 2017) ("Gains says he had a hearing to ask [Desmond] about a list of computer searches he made on his County Westlaw Account on the morning of December 16th, 2016, the same morning that defense Attorney Wise's federal lawsuit was filed. Desmond denied making any of those searches[,] according to Gains. . . . Prosecutor Gains says, 'And there is no reason why he as a prosecutor assigned to the criminal division should be conducting any of this research whatsoever. These are civil matters, not criminal.'"); *see also* Smith and Trill, *above*, WKBN.com, at 1:08–12, http://wkbn.com/2017/04/05/mahoning-countys-assistant-prosecutor-fired/ (accessed Dec. 19, 2017).

[62] Desmond Aff., ¶¶ 44–45.

In truth, Desmond told Wise to contact Gains before filing suit, thus belying any intention to keep the information from the county.[63] In addition, at his predisciplinary hearing, Desmond explained that the research he had conducted the morning Robinson's suit was filed was for his own cases.[64] This was corroborated by documents, including Westlaw research trails that the prosecutor's office showed the media.[65]

3. Desmond challenges Gains's actions and statements, including Gains's SPBR affidavit, which contains several material inaccuracies.

Desmond filed a whistleblower appeal before the SPBR. Based on a motion to dismiss supported by Prosecuting Attorney Gains's affidavit, however, the SPBR dismissed Desmond's appeal on jurisdictional grounds, without providing Desmond a hearing either on the merits or on the factual issues at play on the jurisdictional question. As a result, Desmond had no opportunity to challenge Gains's credibility, even though this would have been relevant to the jurisdictional issue: as Desmond noted in his motion to strike[66] and explained below, for various reasons, Gains's affidavit failed to comply with OAC 124-11-07. That provision states: "Motions to

---

[63] *Id.* at ¶62.

[64] *Id.* at ¶¶54–61.

[65] *See, e.g., id.* at ¶ 58. In the retaliation matter, Desmond plans to further corroborate with witness statements, affidavits, and other documents.

[66] *See Desmond v. Mahoning County Prosecuting Attorney, et al.*, 17-REM-05-0058, 17-SUS-05-0059, 17-WHB-05-0060, 17-INV-05-0061, Appellant's Mot. Strike (SPBR, June 29, 2017), attached as **Exhibit 31.** (To avoid burdening the Court with repetitive exhibits, Desmond has not attached the motion's exhibits in Ex. 31. The exhibits are otherwise cited in this petition.)

dismiss an appeal shall be supported by affidavits, made on personal knowledge, setting forth facts as would be admissible in evidence." "'Personal knowledge' has been defined as 'knowledge of factual truth which does not depend on outside information or hearsay.'"[67] Under well-established Ohio law, "[i]f particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts, then . . . something more than a conclusory averment that the affiant has knowledge of the facts would be required."[68]

In this case, Gains's affidavit failed to establish personal knowledge for material facts related to the *Robinson* matter and contained several inaccuracies that "suggest that it is unlikely" that he had personal knowledge of the facts. He failed to establish how he knew, for example, that APA Cantalamessa "immediately presented" Robinson's motion to dismiss to Chief Assistant Linette Stratford,[69] or that Stratford "determined that there were no improprieties."[70] These averments were inadmissible hearsay. And they are just two out of multiple examples of how, throughout the affidavit, Gains makes factual assertions as if he had first-knowledge, without establishing how he obtained the information.

The affidavit, moreover, contains inaccurate statements. Perhaps most egregiously, Gains's affidavit twice inaccurately states that Kalilo Robinson was

---

[67] *Maxum Indemnity Co. v. Selective Ins. Co.*, 9th Dist. Wayne No. 11CA0015, 971 N.E.2d 372, 2012-Ohio-2115, ¶ 18 (citations omitted); *see also* Evid.R. 602 (personal knowledge is that "which has been acquired by perceiving a fact through one or more of [the] five senses").

[68] *Id.* (citations omitted).

[69] Affidavit of Paul Gains, ¶ 8, attached as **Exhibit 32.**

[70] *Id.*

given something in return for his cooperation in the case against Marquan White, which, as discussed above in Part II.B.1, is contrary to the facts. Specifically, first, Gains's affidavit avers that, in return for his cooperation, Robinson received a reduction in an Aggravated Riot charge.[71] But as court documents show, in fact, the Aggravated Riot charge was pleaded down in May and June 2013—*17 months before* the Martinez homicide (which took place in November 2014).[72] Obviously Robinson could not have received the reduced charge in exchange for cooperation regarding a murder that had not yet taken place.

Further refuting Gains's sworn claim that Robinson received a reduced charge is the fact that, as discussed above, the accused killer's counsel stated on the record that he had received no impeachment evidence from the prosecution, i.e., no plea agreements indicating that Robinson had received reduced charges. And the prosecution did not contest this.[73]

Second, Gains's affidavit states that "On August 16, 2016 *State v. Robinson* was dismissed *in an effort* to attempt to again secure his testimony in *State v. White*."[74] But the transcript of the August 16 dismissal hearing, as discussed in Part II.B.1 above, shows that Cantalamessa dismissed the case "with no strings

---

[71] Gains Aff. at ¶3.

[72] *See In the matter of Kalilo Rae Kwon Robinson*, 2013 JA 653 (complaint; plea agreement dated May 21, 2013; plea entry; and sentencing entry dated June 28, 2013), attached as **Exhibit 33** (redacted to remove personal identifying information).

[73] *See White*, Immunity-Hearing Tr. (April 5, 2016), at 8:11–9:11 (Ex. 20); *see also Robinson*, Bill of Particulars (Ex. 22).

[74] Gains Aff. at ¶ 9 (emphasis added).

attached."[75] The prosecution thus apparently moved to dismiss, not because Robinson was cooperating, but instead because Robinson had filed a motion to dismiss the indictment on grounds of prosecutorial vindictiveness and misconduct.[76] Gains's affidavit is simply wrong.

The affidavit, moreover, wrongly states that Desmond did not report the misconduct to his supervisors. As mentioned above, Desmond's January 2017 memorandum indicates that when, in August 2016, he reported to Rivera, Rivera told Desmond he discussed the matter with others in the office, *including supervisors.*[77] And the affidavit inaccurately avers that Desmond's memorandum was seven pages long, when in fact it was nine pages with 29 pages of attachments, thus calling into question whether Gains actually even read the memorandum.

A non-compliant affidavit rife with inaccuracies and inadmissible statements such as those listed above could not, under Ohio's law on personal knowledge, have supported a motion to dismiss Desmond's whistleblower appeal.[78] The affidavit

---

[75] *State v. Robinson*, 16-CR-342, Hearing Tr. on Mot. Dismiss, at 3:5–8. (Aug. 16, 2016) (Ex. 25).

[76] *See above* Part II.B.1.

[77] *See* 1/27/17 Memo, at 6; *see also* Desmond Aff., at ¶ 20 ("APA Rivera told me sometime after [our discussions] that he spoke to several people in the office, including Chief Assistant Stratford[,] regarding these issues and concerns with the Robinson matter.").

[78] For cases finding that an affidavit failed to establish sufficient personal knowledge in the summary-judgment context under Civ.R.56 (which contains language similar to O.A.C. 124-11-07's language regarding the requirement that affidavits be based on personal knowledge), *see, e.g., Deutsche Bank Nat'l Trust v. Dworak*, 9th Dist. Summit No. 27120, 2014-Ohio-4652, 2014 WL 5361375; *Bank of America v. Loya*, 9th Dist. Summit No. 26973, 2014-Ohio-2750, 2014 WL 2918461; *Maxum Indemnity Co. v. Selective Ins. Co.*, 9th Dist. Wayne No. 11CA0015, 971 N.E.2d 372, 2012-Ohio-2115; *Fed. Nat'l Mortgage Ass'n v. Brunner*, 986 N.E.2d 565, 6th Dist. Lucas No. L–11–1319, 2013-Ohio-128.

should have been stricken, taking with it the entire motion to dismiss. At the least, Desmond should have had an opportunity to test Gains's credibility at an evidentiary hearing on the motion to dismiss. But the SPBR did not address these issues, adopting the Administrative Law Judge's report and recommendation, which deemed the motion to strike moot.[79]

Desmond has appealed the order dismissing his SPBR appeal (including the motion-to-strike ruling) to Mahoning County Common Pleas Court.[80] As explained in Part III.B below, the grand-jury transcripts are needed both for this appeal and for the merits hearing. The transcripts are also needed for other legal remedies Desmond intends to pursue, including challenges to Gains's actions on grounds of intimidation, witness retaliation, and defamation, and misfeasance, malfeasance, and nonfeasance.

III. Law and argument

A. Legal Standard

Grand-jury proceedings are recorded in part as a check on prosecutorial abuse,[81] and courts may, under their inherent powers, order grand-jury transcripts

---

[79] *Desmond v. Mahoning County Prosecuting Attorney, et al.*, 17-REM-05-0058, 17-SUS-05-0059, 17-WHB-05-0060, 17-INV-05-0061, Order, at 1 (Sept. 27, 2017); Report & Recommendation to SPBR, 17-REM-05-0058, 17-SUS-05-0059, 17-WHB-05-0060, 17-INV-05-0061, at 10 (July 13, 2017).

[80] *See Desmond v. Mahoning County Prosecuting Attorney*, et al., 17-CV-2675, Amended Notice of Appeal (filed, Oct. 26, 2017), attached as **Exhibit 34**.

[81] *See State v. Grewell*, 45 Ohio St.3d 4, 7, 543 N.E.2d 93, 96 (1989).

be released where justice requires—in *civil* as well as criminal actions.[82] While the proceedings are presumptively confidential,[83] "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[84] The decision whether to grant the petition lies within the court's sound discretion.[85]

A party seeking such disclosure must submit a petition to the court that supervised the grand jury, and that court must determine whether the petitioner's "particularized need" for disclosure outweighs whatever interests in secrecy may still remain, and thus that "justice can only be done if disclosure is made."[86] The standard is a "highly flexible one, adaptable to different circumstances and

---

[82] *In re Petition for Disclosure of Evidence Presented to Franklin County Grand Juries in 1970*, 63 Ohio St.2d 212, 218, 407 N.E.2d 513, 518 (1980).

[83] *See* Crim.R. 6(E) (stating that "[d]eliberations of the grand jury and the vote of any grand juror shall not be disclosed," and permitting disclosure of grand-jury matters "only when so directed by the court preliminary to or in connection with a judicial proceeding").

[84] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940), quoted in *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982, 144 (1981). In *Franklin County Grand Juries*, the Ohio Supreme Court noted that Ohio courts, "under their inherent powers, have essentially the same control over grand juries as federal courts have under Fed.R.Crim.P. 6(e)," and thus looked to U.S. Supreme Court decisions for guidance. 63 Ohio St.2d at 216.

[85] *See, e.g., State v. Owens*, Gallia No. 14CA9, 2015-Ohio-3017, ¶ 7, 2015 WL 4554775, at *2; *see also Carlson v. United States*, 105 F.Supp.3d 1025, 1034 (2015) (court has inherent authority to release grand-jury materials).

[86] *Franklin County Grand Juries*, 63 Ohio St.2d at 216, 218.

sensitive to the fact that the requirements of secrecy are greater in some situations than in others."[87] Whether a particularized need exists is a question of fact.[88]

The Ohio Supreme Court has stated that a "particularized need" for grand-jury testimony can be shown where, "from a consideration of all the surrounding circumstances[,] it is probable that the failure to disclose the testimony will deprive the [petitioner] of a fair adjudication . . . ."[89] Federal courts, similarly, consider whether the material "is needed to avoid a possible injustice in another judicial proceeding."[90]

Courts have held that a petitioner meets the "particularized need" requirement, for example, where the information will be used to **"impeach a witness, to refresh his recollection, to test his credibility and the like."**[91] Courts, including the U.S. Supreme Court, have also considered the public interest served in disclosure.[92] As one court has held: "Reestablishing faith in state and city

---

[87] *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 445 (1983). *See also In re petition of American Historical Ass'n*, 49 F.Supp.2d 274, 283 (S.D.N.Y. 1999) ("Assessment of whether a particularized need has been established involves a flexible balancing of the need for secrecy against the need for disclosure.") (citing *United States v. John Doe I*, 481 U.S. 102, 112–17 (1987)).

[88] *Greer*, 66 Ohio St.2d at 139, Syllabus by the Court, ¶3.

[89] *Id.*

[90] *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

[91] *Greer*, 66 Ohio St.2d at 145, 150–51 (emphasis added) (quoting *United States v. Procter & Gamble, Co.*, 356 U.S. 677, 683 (1958)); *id.* at 143 (indicating that "particularized need" was shown where movant sought transcript "to determine any inconsistencies with the witness[es]' testimony at trial"); *Stakich v. Russo*, Cuyahoga No. CA 99488, 2014-Ohio-2526, 2014 WL 2611217, ¶¶ 31–33.

[92] *See, e.g., Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 567 n.15 (stressing that district courts may weigh the public interest in determining whether "the need for disclosure is greater than the need for continued secrecy") (citation omitted); *see also In re Bullock*, 103

governments by proving or disproving the faithfulness of their officials is a goal with enough urgency to carry a major part of a compelling and particularized need."[93]

Courts have also permitted disclosure of grand-jury testimony where "special circumstances" exist, including, in at least one case, where the transcripts were important to an "historical assessment of whether improprieties occurred" during a grand-jury investigation, a matter of importance for public debate.[94]

In determining whether a continuing need for secrecy exists, courts consider the following factors:

> (1) To prevent the escape of those whose indictment may be contemplated;
> (2) to [e]nsure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
> (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;

F.Supp. 639, 643 (D.D.C. 1952) ("Where public interest is superior to the purpose of the secrecy of Grand Jury testimony, the latter protection will be disregarded and the minutes divulged within limits prescribed by law."); *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 898 (7th Cir.1973) (deeming disclosure to discipline those "abusing public offices" a "sufficient public interest to override the policy of shielding the grand jury from public scrutiny").

[93] *United States v. Salanitro*, 437 F.Supp. 240, 245 (D. Neb. 1977), *aff'd by In the Matter of Disclosure of Testimony before the Grand Jury*, 580 F.2d 281, 287–88 (8th Cir.1978) (finding that the "ends of justice" required disclosure, because "[a]t stake is the public's faith and trust in their officials and the integrity of the judicial system").

[94] *See In re Petition of American Historical Ass'n*, 49 F.Supp.2d 274, 297 (S.D.N.Y. 1999); *see also In re Petition of the Grievance Comm. of the Toledo Bar Ass'n*, 47 Ohio St.3d 611, 548 N.E.2d 916, 916 (1989) (allowing grand jury evidence to be disclosed to bar association conducting investigation).

> (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[95]

The Ohio Supreme Court has similarly recognized that, after the grand-jury proceedings have concluded, continued secrecy may be justified to protect witnesses from tampering and retaliation and to protect the privacy of those ultimately never indicted.[96]

The less relevant the considerations justifying secrecy, the lower the burden in showing the need for disclosure.[97] As shown below, in this case, the need for the transcripts far outweighs any need for secrecy. In fact, no secrecy interests remain.

B. Disclosure of the requested proceedings here will serve the needs of justice.

Disclosing the grand-jury proceedings in the requested cases here—*Lucky*, *Hill*, *Ravnell*, *Dawson*, *Woods*—will serve the needs of justice by allowing Desmond to establish facts supporting his challenges to the retaliatory termination, intimidation, and defamation, and others. Specifically, it will help him (1) substantiate the pattern of misconduct that he reported, (2) impeach Gains's claims that the office investigated Desmond's allegations of such conduct, and (3) show that Gains, having allowed such conduct to persist while denying that it existed,

---

[95] *Franklin County Grand Juries*, 63 Ohio St.2d at 219 (citation omitted).

[96] *See In re Special Grand Jury Investigation Concerning Organic Techs.*, 84 Ohio St.3d 304, 307, 703 N.E.2d 790, 793 (1999).

[97] *See Douglas Oil Co.*, 441 U.S. at 223.

lacks credibility regarding any accusations of Desmond or any other claim. This includes showing, for Desmond's pending appeal to Mahoning County Common Pleas Court, that the basis for Gains's motion to dismiss Desmond's SPBR whistleblower appeal—Gains's affidavit—was of questionable reliability and Desmond thus should have been given an opportunity to cross-examine Gains at a hearing. Disclosure will also (4) serve the ends of justice by promoting accountability and preventing further abuse of the grand-jury process by the Mahoning County prosecutor's office, a matter of strong public interest.

1. **Desmond has a particularized need for the grand-jury transcripts: first, to substantiate the prosecutorial misconduct he identified (thus supporting his retaliation claim and his challenge to the SPBR's dismissal).**

Desmond is able to show a "particularized need" for the grand-jury transcripts. Prosecuting attorney Gains terminated Desmond after Desmond reported misconduct within the prosecutor's office. As discussed in Part II.B above, that misconduct included situations where the office had indicted individuals without sufficient or admissible evidence of the crime (including where the only "evidence" arose from their having invoked their constitutional rights[98]), in some cases to compel them to cooperate. As part of his justification for terminating Desmond, Gains indicated to the press that Desmond's accusations had been found meritless.

[98] *See State v. Leach*, 102 Ohio St.3d 135, 143, 2004-Ohio-2147, ¶ 38, 807 N.E.2d 335, 342, ("[U]se of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination").

To challenge his termination and prove retaliation, Desmond must prove, for example, that he had a good-faith basis for reporting "a violation of state or federal statutes, rules, or regulations or the misuse of public resources,"[99] and that Gains took adverse action against him because of this report. The requested transcripts will support Desmond's retaliation claim, as they will substantiate some of the misconduct that Desmond identified.[100]

As explained in depth in the Background section above (II.A), in *Hill* and *Lucky*, for example, the prosecution admitted it lacked evidence to support guilt, and that it may have indicted individuals to compel their cooperation. And the prosecution admitted the individuals were not acting in concert; that there was only one witness; and that there was only one gunshot. This raised the likelihood that each was charged and pursued as the principal offender, but that prosecutors lacked sufficient evidence to support that charge in the first place.

Similarly, in *Dawson*, the defendant was indicted for the underlying murder despite the lack of any evidence against him, and only after he invoked his constitutional rights. As in the Sixth Circuit case *United States v. LaDeau*, "[t]he charge in the superseding indictment was based on the same conduct underlying

---

[99] R.C. 124.341.

[100] While the SPBR dismissed the whistleblower appeal, the SPBR's ruling was on jurisdictional grounds only, not on the merits, and thus Desmond has not yet had an opportunity to present evidence of retaliation. He has, moreover, appealed that dismissal to Mahoning County Common Pleas Court. Desmond has strong arguments for reversal and remand, including those raised in Part III.B.3 below. At a hearing, Desmond will have an opportunity to put forward evidence regarding retaliation. The grand-jury transcripts sought here will be an important part of that evidence, both because they will substantiate some of the misconduct that Desmond identified and because they will help impeach Gains.

the charge in the initial indictment, [and] the prosecution obtained no evidence supporting the superseding indictment that it did not already possess prior to obtaining the initial indictment."[101] Thus, as in *LaDeau*, this led to a presumption of prosecutorial vindictiveness.

And in *Woods*, the defendant was indicted for engaging in a pattern of corrupt activity, despite the lack of any evidence of a pattern. The hearing transcript there raises the likelihood that the prosecutor misled the grand jury as to the law, which constitutes misconduct under Ohio law.[102]

In each of these cases, the transcripts will help, in the words of U.S. District Judge James Gwin of the Northern District of Ohio, "once and for all determine exactly what testimony or evidence was presented in order for the [g]rand [j]ury to indict" and show "how a [g]rand [j]ury could have possibly returned an indictment thereby finding probable cause under the factual scenario that was [later] revealed."[103] (And the *Ravnell* transcript will highlight the lack of evidence against Hill and Lucky.)

Desmond's allegations, moreover, are more than speculation or generalized fears; as detailed in the Background section above (II.A), he is requesting the transcripts based on "specific factual allegations of government misconduct."[104]

---

[101] *United States v. LaDeau*, 734 F.3d 561, 570 (6th Cir.2013).

[102] *State v. Lykins*, 6th Dist. Wood No. 93WD076, 1994 WL 240277, *4, 5 (June 3, 1994).

[103] *Rodriguez v. City of Cleveland*, No. 1:08-CV-1892, 2009 WL 864205, at *4 (N.D.Ohio Mar. 30, 2009) (citation omitted).

[104] *State v. Richardson*, 3rd Dist. No. 13-13-54, 2014-Ohio-3541, ¶ 26, 17 N.E.3d 644, 651 (August 18, 2014) (citation omitted).

Just as in the *Robinson* case discussed in Part II.B.1 above, these transcripts will bring to light the insufficiency of the evidence prosecutors presented. And they will support the fact that Desmond was sounding the alarm on an important and dangerous trend within the prosecutor's office[105]—which any factfinder could easily find caused Gains to retaliate against Desmond. Gains, after all, signed off on all these indictments.

2. Desmond has a second particularized need for the grand-jury transcripts: to impeach Gains and undermine his credibility.

Second, especially because Gains has tried to undermine Desmond's claims of retaliation by claiming that the office investigated the allegations and found them unsubstantiated, Desmond needs the transcripts to impeach Gains and any subordinates (such as Stratford) who supposedly conducted that investigation, as well as those (such as Cantalamessa) who wrongfully pursued the indictment against Robinson.

Desmond will use the transcripts to inquire into whether the prosecutor's office, in purportedly undertaking an investigation, ever reviewed the *Hill* and *Lucky* matters or any other proceedings, whether Gains and Stratford agree the conduct constitutes a violation of law or prosecutorial ethics, and why they excused any violations. Indeed, had they actually spoken to Desmond as part of their purported investigation, they would have discovered that the *Robinson* and *Hill* and

[105] Comment 1 to the Ohio Prof.Cond.R 3.8 says that a "systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4," *i.e.*, could constitute professional misconduct.

Lucky indictments were not the only instances in which such unlawful conduct took place—when combined with *Dawson* and *Woods*, those cases show a pattern of prosecutorial abuse. **Yet, as the grand-jury transcripts will help show through impeachment, Gains and Stratford preferred to retaliate against Desmond for bringing this abuse to light rather than investigate and root it out.**

And, given that Gains denied to the public that this conduct existed (yet allowed it to persist), while on the other hand publicly accusing Desmond of wrongdoing, the transcripts will further undermine Gains's credibility regarding those accusations and thus support Desmond's defamation and other claims. It is easier to deflect from one's own responsibility for bad acts when one can smear the person who is bringing those acts to light.

3. **Desmond has a third particularized need for the grand-jury transcripts: to support his pending appeal to the common-pleas court by showing that the SPBR wrongly denied him a hearing to test Gains's credibility before dismissing his whistleblower appeal.**

Similar to Part III.B.2 above, Desmond needs the grand-jury transcripts to show Gains's lack of credibility for purposes of Desmond's pending appeal before the common-pleas court. Desmond will argue on appeal both that the SPBR got the law wrong on the scope of the whistleblower protection statute's protection, and—especially relevant here—that the *SPBR wrongly denied him a hearing on the question of jurisdiction* (if nothing else) before dismissing his appeal.

Regarding the SPBR's denial of a hearing, Desmond will argue that, consistent with his motion to strike, the SPBR should have allowed him to test Gains's credibility. Gains's affidavit, after all, was the entire basis for the state's motion to dismiss Desmond's SPBR appeal. Without it, the motion to dismiss could not have proceeded. *See* OAC 124-11-07 (requiring affidavit made on personal knowledge to support motions to dismiss). Yet, as discussed in Part II.B.3 above, the affidavit failed to comply with the Ohio rule in that it contained statements not made on personal knowledge, including several inaccurate statements such as that Kalilo Robinson was provided something in return for his cooperation in the *State v. White* murder case. These "suggest that it is unlikely that [Gains] ha[d] personal knowledge of those facts."[106]

The grand-jury transcripts here will substantiate that Gains's office was engaged in a pattern of misconduct—misconduct that Gains later denied was happening. That this misconduct happened serially under his watch *and* that he denied it are enough to undermine Gains's credibility. They would make any factfinder question the reliability of Gains's affidavit, which underpinned the motion to dismiss Desmond's SPBR whistleblower action. Desmond thus needs the transcripts to argue to the common-pleas court that Gains's credibility is suspect and the SPBR wrongly denied him a hearing at which to question it before accepting Gains's testimony as gospel and dismissing his appeal.

---

[106] *Maxum Indemnity Co. v. Selective Ins. Co.*, 9th Dist. Wayne No. 11CA0015, 971 N.E.2d 372, 377, 2012-Ohio-2115, ¶ 18 (citations omitted).

Apart from disclosure of the transcripts, Desmond has no way to obtain the prosecutorial-misconduct information he seeks. In sum, without the grand-jury transcripts, Desmond will be hampered in his ability to substantiate the pattern of misconduct he reported—as well as to challenge Gains's claim that the matter was investigated—and thus to impeach Gains regarding the reasons for terminating Desmond. Similarly, Desmond's challenge to the defamation and other claims will be less effective without the transcripts to question Gains's credibility. This includes, importantly, Desmond's pending appeal to common-pleas court—where he is challenging the SPBR's failure to provide him an opportunity to test Gains's affidavit before dismissing the appeal. Justice thus demands the transcripts' disclosure.

4. The public interest in prosecutorial integrity strongly supports disclosure here.

Whether considered under a "particularized need" standard or as "special circumstances," disclosing the grand-jury transcripts is also warranted under the Court's supervisory power because of the strong public interest in maintaining prosecutorial integrity. Uncovering the type of misconduct at issue here is the very reason grand-jury proceedings are recorded. In *State v. Grewell,* the Ohio Supreme Court recognized that "a potential for abuse" exists within the grand-jury system, including "vindictive prosecution" and "prosecutorial appeal to the passions of the jurors."[107] The Court observed, "Recordation is the most effective restraint upon

[107] 45 Ohio St.3d 4, 7, 543 N.E.2d 93, 96 (1989).

such potential abuses."[108] Recording and disclosing such proceedings, the court said, serves purposes including "ensuring that the testimony received by the grand jury is trustworthy" and "restraining prosecutorial abuses before the grand jury."[109]

In *In re American Historical Association*, the court ordered disclosing grand-jury transcripts to expose just those abuses. Regarding the espionage investigation of Alger Hiss, the court observed the transcripts' disclosure was "important to [an] historical assessment of whether improprieties occurred."[110] The court went on, "The materials would materially benefit debate not only about those particular grand jury proceedings but also regarding prosecutorial power and grand jury independence generally."[111]

Here, the transcripts involve a pattern of prosecutorial abuse important to Mahoning County, the region, and the state of Ohio. The grand-jury testimony will show (1) that prosecutors presented little, if any, admissible evidence to support the indictments (including, as in *Robinson*, impermissible evidence such as pre-arrest silence based on the defendant having invoked his constitutional rights); or (2) that prosecutors presented false evidence to support the indictments. They may also show that prosecutors misled the grand jury regarding the law—as in *Robinson*, where the prosecutor wrongly led the grand jury to indict based on an immunity *offer* alone. These scenarios support the claim that these indictments were

---

[108] *Id.* (citation omitted).

[109] *Id.*

[110] *In re Petition of American Historical Ass'n*, 49 F.Supp.2d 274, 297 (S.D.N.Y. 1999).

[111] *Id.*

improper. And the pattern of prosecutorial misconduct persisted over the course of years.

Grand-jury proceedings are recorded to capture and reveal exactly this kind of information, which in this case is also the evidence that Desmond needs to challenge the retaliatory discharge, intimidation, and defamation, and Gains's misfeasance, malfeasance, and nonfeasance. The public interest in exposing the prosecutorial abuse thus weighs in favor of the transcripts' release.[112] (And if the prosecutor's office claims no such misconduct existed, it should welcome the disclosure and the opportunity to refute the allegations. After all, the office's own policy apparently is that failure to be forthcoming and insistence on silence is evidence of guilt.)

C. No reason for continued secrecy justifies withholding the transcripts here.

1. Generally, only three interests remain after the grand-jury proceedings have been completed.

"[T]he interests in grand jury secrecy are reduced, although not eliminated, when the grand jury has ended its investigation."[113] Of the five bases for grand-jury secrecy listed in the Legal Standard section above (III.A), only the fourth and fifth

---

[112] *See Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 567 n.15 (stressing that district courts may weigh the public interest in determining whether "the need for disclosure is greater than the need for continued secrecy") (citation omitted); *United States v. Salanitro*, 437 F.Supp. 240, 245 (D. Neb. 1977), *aff'd by In the Matter of Disclosure of Testimony before the Grand Jury*, 580 F.2d 281, 287–88 (8th Cir.1978); *In re Bullock*, 103 F.Supp. 639, 643 (D.D.C. 1952)

[113] *In re Special Grand Jury Investigation Concerning Organic Techs.*, 84 Ohio St.3d 304, 307, 1999-Ohio-354, 703 N.E.2d 790, 793 (quoting *In re Grand Jury Proceedings Relative to Perl* (C.A.8, 1988), 838 F.2d 304, 307).

and part of the third remain once a grand-jury investigation is complete. (Concerns about (1) escape, (2) influencing grand jurors, and (3) grand-jury witness tampering, all fall away once the investigation is over.) The items that remain, of those the Ohio Supreme Court set forth in *In re Petition for Disclosure of Evidence Presented to Franklin County Grand Juries*, are the following:

> (3) to prevent subornation of perjury or tampering with the witnesses who may . . . later appear at the trial of those indicted by it;
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
> (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[114]

In a different case, the Ohio Supreme Court similarly recognized that once grand-jury proceedings had concluded, the only reasons to maintain the secrecy of proceedings would be to (1) protect witnesses from retaliation; (2) prevent tampering with witnesses who may be called to testify at a resulting trial; and (3) prevent publication of unwarranted charges against an innocent target.[115]

---

[114] *Franklin County Grand Juries*, 63 Ohio St.2d at 219.

[115] *In re Special Grand Jury Investigation Concerning Organic Techs.*, at 307; *see also id.* ("Only the first concern[,to protect witnesses from retaliation,] remains in full effect after the target has pled guilty or no contest to the underlying charges, thereby eliminating both the presumption of innocence and the need for witnesses at trial.").

2. None of the three remaining reasons apply here.

Under either the *Franklin County Grand Juries* test or the *Organic Techs.* articulation of the test, none of the remaining reasons justify continued secrecy in any of the cases involved here.

To begin with, the last reason—to protect an innocent target—does not apply to these transcripts. Whether rightly or wrongly, all the individuals were actually indicted, thus making their charges public and no longer secret.

As to the other reasons: regarding *Lucky* and *Hill*, the charges were dropped; Ravnell, the real killer, pleaded guilty to negligent homicide (M-1, amended from murder – felony/life) in 2009, over eight years ago, and has since completed his sentence. All witnesses, moreover, have already been disclosed through Crim.R. 16 discovery. Thus, the state cannot justify continued secrecy for the *Lucky*, *Hill*, or *Ravnell* transcripts on either the basis of potential witness tampering or witness retaliation.

Similarly, regarding *Woods*, after the state dropped the charge of engaging in a pattern of corrupt activity, a jury acquitted Woods on the underlying aggravated-robbery charge while convicting him of carrying a concealed weapon.[116] And the state already disclosed its witnesses three times: through Crim.R. 16 discovery, by subpoenaing them, and by calling them to the stand during a trial. Given those disclosures, just as in *Lucky* and *Hill*, the state cannot justify continued secrecy on either the basis of potential witness tampering or witness retaliation. As the Ohio

[116] *See State v. Woods*, 12-CR-1261, Judgment Entry (April 10, 2015) (Ex. 16).

Supreme Court observed in *State v. Greer*, "[a] witness, in testifying at trial, has given up any anonymity he might have had and has made public the events which are the subject of the grand jury testimony being sought."[117]

Regarding *Dawson*, the state dismissed all charges against him in exchange for his cooperation, and Correa was convicted at trial.[118] As with *Woods*, the state has already disclosed its witnesses three times—through Crim.R. 16 discovery, by subpoenaing them, and by calling them to the stand during a trial. Again, the state cannot justify continued secrecy on either the basis of potential witness tampering or witness retaliation.

3. The *Organic Techs.* case shows that no secrecy interest remains where convictions have been secured, no further proceedings are likely, and witnesses have been disclosed.

The Ohio Supreme Court's teaching in *In re Special Grand Jury Investigation Concerning Organic Techs.*[119] is instructive here. That case involved a company under investigation for safety violations at its factory. After the company's president entered into a plea agreement with the state, the company sought access to grand-jury information to prove that the state had abused the grand-jury process and illegally disclosed information from its proceedings. The state sought to keep the grand-jury materials secret by excluding the company from the evidentiary hearing, and the trial court granted that motion.

---

[117] *See State v. Greer*, 66 Ohio St.2d 139, 150–51, 420 N.E.2d 982, 989 (1981).

[118] *See, e.g., State v. Correa*, 144 Ohio St.3d 1506, 2015-Ohio-3955, 45 N.E.3d 1051, ¶¶ 3–30 (7th Dist.).

[119] 1999-Ohio-354, 84 Ohio St.3d 304, 703 N.E.2d 790.

But the Ohio Supreme Court reversed, holding that the trial court had abused its discretion in denying the petitioner access to the grand-jury proceedings.[120] Noting that the investigation was over, that a conviction was secured, and that there were no further proceedings likely, the court said that two of the three interests served by grand-jury secrecy no longer applied. And because the grand jury transcripts would not "identify any witnesses against the targets not already disclosed by the state," the court found that there was *no* reason for continued secrecy.[121]

The same is true of the transcripts sought here. Any plausible convictions have been secured, no further proceedings are likely, and all witnesses have been disclosed. Thus the interests served by grand-jury secrecy no longer apply.

4. The court may fashion an order to protect any other interests.

Even if one of the above-mentioned interests were jeopardized—which, as discussed above, they are not—this Court would still be free to review and redact the transcripts or issue a protective order to protect any previously undisclosed witness's identity.

IV. Conclusion

In sum, no need for secrecy exists anymore, while the need for disclosure is great. Disclosing the requested transcripts would serve the interests of justice by

---

[120] *In re Special Grand Jury Investigation Concerning Organic Techs.*, 84 Ohio St.3d 304, 308–09, 1999-Ohio-354, 703 N.E.2d 790, 795.

[121] *Id.* at 307.

allowing a fair adjudication of Desmond's challenges to the retaliatory discharge, intimidation, and defamation, as well as to Gains's misfeasance, malfeasance, and nonfeasance. This includes Desmond's pending appeal of the SPBR's dismissal of his whistleblower appeal, as well as other legal remedies he intends to pursue. Disclosure would also enhance accountability in the Mahoning County prosecutor's office and help audit the office's ethically suspect practices. Because continued secrecy advances no cognizable interest that could outweigh those benefits, the Court should order their release. Desmond requests a hearing to further elaborate on these issues and answer any questions the Court may have.

Respectfully submitted,

The Chandra Law Firm LLC

/s/ _____
Subodh Chandra (0069233)
Sandhya Gupta (0086052)
The Chandra Law Building
1265 W. 6th St., Suite 400
Cleveland, OH 44113-1326
Phone: 216.578.1700 Fax: 216.578.1800
Subodh.Chandra@ChandraLaw.com
Sandhya.Gupta@ChandraLaw.com

Attorneys for Petitioner Martin Desmond

Certificate of service

I certify that on December 20, 2017, my office served the foregoing document by hand delivery on the following, via the prosecutor's office's mailbox in the Mahoning County Common Pleas Court clerk's office:

Paul Gains
Mahoning County Prosecuting Attorney
21 West Boardman St.,
6th Floor, Administration Building
Youngstown, OH 44503

/s/ _____
One of the attorneys for Petitioner Martin Desmond