



POSITION PAPER ON WITNESS INTIMIDATION

Defendants deserve due process in a fair and impartial criminal justice system. Ensuring these rights however, does not require compromising safety for victims, witnesses or communities. “It is the duty and the right, not only of every peace officer of the United States, but of every citizen to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States” according to the U.S. Supreme Court. This duty, described in 1895, recognized that the judicial system requires participation of witnesses and victims to accomplish justice.¹ The Court explains, “[t]he right of the private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice, stand upon the same ground” and “it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.”²

This paper will discuss reform needed to accomplish those goals as applicable to rules of discovery, specifically Missouri Supreme Court Rule 25.03. While reform to this particular rule will not solve every problem the criminal justice system encounters concerning witness and victim participation, it is a very important piece of restoring community trust. We must address the chilling effect, especially in the current climate, created by disclosing personal information, including the home addresses of victims and witnesses. Demonstrating that law enforcement and the courts are not cavalier with citizens’ safety will help revive trust in the criminal justice system.

Fear of retaliation is prevalent and self-perpetuating. When victims and witnesses don’t come forward for fear of retaliation, justice cannot be secured. When law enforcement cannot hold offenders responsible, it undermines the community’s confidence in the system and further entrenches the belief that witnesses cannot be protected. The criminal justice system can only

It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.
American Bar Association Criminal Justice Standard 3- 1.2(d)
The Function of the Prosecutor

work as intended when crime is reported. In 2014, 53% of violent victimizations, 44% of serious violent victimizations and 18% of violent crimes involving firearms were never reported to police.³ Even when witnesses and victims do report crime, their continued participation in the investigation and eventual prosecution is usually contingent on whether or not they feel safe and secure.

Protecting the personal information of victims and witnesses of crime is one of the most important steps in securing their cooperation. Release of personal information, including a home address, further undermines the sense of safety and security already shaken by the trauma of victimization.⁴ Victim and witness involvement in the criminal process should not come with an additional cost of losing privacy. No one chooses to become a victim or witness to a crime; instead, their roles are forced upon them. Compromising personal safety for those who must participate in the judicial process for it to work is not the path to a sustainable criminal justice system.

Supreme Court Rule 25.03

Rule 25.03.1 states, “the state shall...disclose to defendant's counsel: (1) The names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements.”⁵

Supreme Court Rule 25 was adopted and enacted nearly 40 years ago before the internet was invented, before “snitches get stitches” became a cultural phenomenon and before the realities of vicious retaliations targeting State witnesses and their families dominated headlines.⁶ The internet and social media have changed information sharing and rules and laws must also evolve to ensure a sustainable criminal justice system.

Rule 25.03.1 also conflicts with the Missouri Constitution, Article I §32 and the Crime Victims’ Rights Statute RSMo. §595.209. Both the Missouri Constitution and the statute provide for “reasonable protection” against the defendant or someone acting on behalf of the defendant. Automatic disclosure of victim and witness addresses required by Rule 25.03 denies a victim’s right to “reasonable protection.” While a change to this rule could protect victim or witnesses’ rights to privacy, it would not change a prosecutor’s constitutional and ethical obligation to disclose exculpatory evidence to the defense.⁷

Online Information Sharing Poses New Challenges to Privacy

The internet and knowledge of a person’s address can bring access to the person like never before. Programs such as Facebook, Twitter, Instagram and even Google’s search engine can assist in gathering photos and other personal or identifying information about a person. Facebook allows access to an individual’s “Friends” and family. Google Maps easily allows anyone to input an address and retrieve a photo of, and precise directions to, a home.⁸ Many real estate company websites even include what schools the children at that home may attend⁹ and a list of neighbors, including addresses.¹⁰

With a name *and* address, simple, free internet searches can instantaneously provide information about:

- Family members,¹¹ including in-laws¹²
- Email address and phone numbers and the purchase date and price of their home¹³
- Place of employment¹⁴
- Age¹⁵

Social media has also changed how quickly information can spread and allows anonymous harassment and threatening behavior to thrive. Behind the anonymity of computer screens, those acting in concert with, or even independently of the defendant can harass and intimidate victims. Witness intimidation through social media can take several forms. Examples include: (1) Grand Jury testimony being posted on Facebook the eve of trial,¹⁶ (2) a high-school student posting court documents and photos on Instagram with captions such as “EXPOSE ALL RATS,”¹⁷ and (3) posting a photo of a sexual abuse victim on the witness stand on Twitter.¹⁸

If a defendant has access to the home address of a victim or witness, that defendant or his or her associates could post that name and address on a social media account such as Facebook or Twitter. Hundreds, possibly thousands, of people would then have access to that name and address and all of the accompanying information a simple, free internet search provides. While

providing the home address of a victim or witness allows defense counsel access to that victim or witness, it also allows a defendant and countless other individuals the ability to compromise the sanctity of that victim or witness' home, neighborhood, and workplace. There are other, safer ways to give defense counsel access to witnesses and victims and allow them to prepare for trial.

Witness Intimidation Is Pervasive and Effective: The Phenomenon of “Snitches Get Stitches”

“Snitching can get you killed,” writes John W. Fountain in his column for the Chicago Tribune in which he explores his experiences growing up on the West Side of Chicago in the late 1960s. He went on to explain, “many who live in the city's most murderous neighborhoods -- who have also witnessed police and political corruption and a trail of broken promises -- simply don't trust the authorities enough to come forward. By doing so, they could be laying their lives on the line. It isn't that people don't want to tell. They do. And it isn't that they aren't concerned about their neighborhoods. They are. But to come forward is to risk everything...”¹⁹

The phrase “snitches get stitches” has been around for decades.²⁰ It seemed to gain national traction in popular culture through music videos and songs beginning in 2004.²¹ “No Snitch” apparel has also gained national popularity among urban youth.²² There are several social media, YouTube videos and blog sites dedicated to spreading anti-snitch rhetoric and “outing” informants.²³ When the world's eyes were upon Ferguson Missouri, news footage showed the side of the burned up QuikTrip with the words “Snitches Get Stitches” spray-painted in white across one of its walls.



“Snitches get Stitches” spray-painted on the side of the QuikTrip set ablaze in Ferguson in August of 2014 during the rioting and looting in the days following Michael Brown's death. Photo posted on Twitter by local St. Louis television reporter Roche Madden, August 11, 2014

The fear of retaliation is not just regarding a particular defendant in a specific case; victims and witnesses fear retaliation from any member of their own community. “Snitches” are

ostracized, threatened and intimidated by people who live on their block, who attend the same social events and who frequent the same corner store. In the aftermath of Michael Brown's death, the QuikTrip in Ferguson was looted and burned and "Snitches get Stitches" was spray-painted on its side. It had become a target of community retaliation after a rumor spread that Michael Brown was accused of robbing that store.²⁴ A few news sources had also initially reported that same rumor.²⁵ Ensuring personal information is protected for victims and witnesses helps protect them from the stigma of being a "snitch" and all the personal and community repercussions associated with it.

Existing Protections in Missouri Law for Victims and Witness

Missouri has addressed concerns in domestic violence, sexual assault and stalking cases to safeguard the privacy of these special victims,²⁶ but victims of other crimes are not afforded the same protections.²⁷ The rationale behind these protections, particularly in domestic violence cases, has traditionally been that the defendant has access to the victim in a way defendants of other crimes do not. With the use of the internet, however, all defendants can now access information about the victims and witnesses in their cases that was previously unavailable to them.

Progress has been made in Missouri for the safety of all victims of crime²⁸ through a landslide vote in favor of amending the Missouri Constitution²⁹ to include victim rights in 1992. Further, §595.209.1(9) provides safety for victims and witnesses, by giving them the right to reasonable protection from the defendant or any person acting on behalf of the defendant arising out of their cooperation with law enforcement and prosecution efforts.³⁰ Disclosing a person's address to the defense (and therefore the defendant)³¹ does not reasonably protect those victims and witnesses "from the defendant or any person acting on behalf of the defendant."³² Section 595.209.5 further provides that "[t]he rights of the victims granted in this section are absolute and the policy of this state is that the victim's rights are paramount to the defendant's rights."³³ Protecting personal information, including addresses, complies with these rights in the Missouri Constitution. To not do so is to deny victims and witnesses their Constitutional right to "reasonable protection,"³⁴ and creates a chilling effect on a person's desire to assist in prosecution. Victims have a right to access the court system and that right is infringed if the victims' privacy is endangered, thus preventing their access to the courts.

Other States Have Addressed Witness Intimidation

Missouri's Rules for Criminal Procedure provide for broader disclosure in criminal cases than federal courts and many state courts.³⁵ Several other states have successfully preserved defendants' rights while addressing safety and privacy considerations for victims and witnesses.³⁶ Alabama, for example, does not require disclosure of internal reports made by law enforcement agents in connection with the investigation and prosecution or witness statements unless it is a statement of a co-defendant or accomplice,³⁷ and only allows depositions to be taken "due to the exceptional circumstances of the case" and that, "it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial."³⁸ Iowa requires disclosure of witnesses' names and occupations along with minutes of their testimony, but not their address.³⁹ And, similar to Missouri, Maryland's discovery rule includes disclosure to the defendant of "the name and address of each person then known whom the State intends to

call as a witness.”⁴⁰ Additionally, however, Section 11-205 of the Maryland Code of Criminal Procedure states:

On request of the State, a victim of or witness to a felony or delinquent act that would be a felony if committed by an adult, or a victim’s representative, a judge, State’s Attorney, District Court Commissioner, intake officer or law enforcement officer may withhold the address or telephone number of the victim, victim’s representative, or witness before the trial or adjudicatory hearing in a juvenile delinquency proceeding, unless a judge determines that good cause has been shown for the release of the information.⁴¹

During trial or hearing proceedings, on the motion by the State, a court “may prohibit the release of the address or telephone number of the victim or witness unless...good cause is shown...”⁴²

Some states, such as Arizona and Louisiana, have gone even further to protect victims against harassment and violations of their privacy rights by amending their Constitutions to include rights to refuse to be deposed or even interviewed by the defendant.⁴³

The federal courts do not require prosecutors to disclose lay witness addresses unless the defendant can show (1) reasonable diligence in attempting to obtain the requested information without the government’s assistance and (2) that the requested information would lead to the admission of otherwise undiscoverable evidence that is “both material and favorable to the defense.”⁴⁴ The Federal Rules of Criminal Procedure were last updated in 1975 and when given the opportunity to add mandatory disclosure of all witness addresses, as opposed to only requiring disclosure of expert witness addresses, the choice was made to not require such disclosure. This decision was made in spite of the recommendation from the American Bar Association that discovery procedures require disclosures of the names, addresses, and statements of prosecution.⁴⁵ It is clear from review of the committee notes that the main motivation and rationale behind the failure to require address disclosure was discouragement of witnesses and improper contact.⁴⁶

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy. – *Rule 16 Conference Committee Notes, House Report No. 94-414, 1975 Amendment*

The Supreme Court of the United States discussed address disclosure in *United States v. Oliver* in which the court rejected the appellant’s argument that she was entitled to a witness’s address under the Fifth and Sixth amendments.⁴⁷ The Court applied the two-part test discussed above and determined the defense had not shown the witness’s testimony “would have been any more ‘material and favorable’ had a pre-trial meeting occurred.”⁴⁸ This case demonstrates that the adequate opportunity to cross-examine the witness during trial satisfies a defendant’s right of confrontation.

Conclusion

Balancing victim and defendant rights can still ensure adequate representation and thorough preparation for trial while ensuring citizens can avail themselves of their right and duty to participate in the criminal justice system. Under Missouri law, victim rights are “paramount” to defendant’s rights.⁴⁹ Public policy designed to protect witnesses and victims from harassment, intimidation or retaliation, as exercised through Supreme Court rules, could mean victim and witness information is kept confidential by default. The rule could be reformed such that, only after hearing, and by good cause shown, would the information be ordered to be disclosed. Alternatives should still be used in the interest of protecting victim and witness privacy. The Court could allow the use of a liaison such as the prosecutor’s office or any disinterested party the court would deem appropriate, for contact. The Court could order disclosure of personal information be kept under Court seal and accessible to the Defendant’s attorney, but not the defendant. The sustainability of our criminal justice system is at stake. Without victims and witnesses feeling safe to exercise their right and duty to participate, cases cannot proceed. Missouri Supreme Court Rule 25.03 needs to be updated to help achieve justice for all.

The Missouri Association of Prosecuting Attorneys requests that this Court assign this topic for review to a committee comprised of judges, prosecutors, defense attorneys, and victim advocates in order to review and recommended appropriate updates Rule 25.03 and any other appropriate action.

¹ *In re Quarles et al. In re McEntire et al*, 158 U.S. 532, 535 (1895).

² *Id.* at 536.

³ See National Crime Victimization Study, Bureau of Justice Statistics (2014)

<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5366>.

⁴ See <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization#interaction>.

⁵ MO Supreme Court Rule 25 - Rules of Criminal Procedure - Misdemeanors or Felonies - Disclosure and Depositions (adopted 1979).

⁶ In 2002, the Dawson family of seven died when an angry neighbor retaliated after Angela Dawson reported the drug dealing and violence in her East Baltimore neighborhood. See <http://www.baltimoresun.com/bal-te.md.fire18oct18-story.html>; In 2003, a pregnant 17-year old witness for the government was fatally stabbed multiple times by members of the gang she had cooperated against. See <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/17/AR2005051700749.html?referrer=email&referrer=email>; In 2004, a drug lord in Philadelphia ordered the firebombing of an informant’s mother’s home resulting in the deaths of six, including four children. See http://articles.philly.com/2013-05-15/news/39258176_1_steven-northington-kaboni-savage-kidada-savage; In 2005, a community activist’s home was firebombed after she alerted authorities of drug sales in her neighborhood. See http://usatoday30.usatoday.com/news/nation/2008-08-22-3220240914_x.htm;

⁷ See MO Supreme Court Rule 25.03(A)(9) and *Brady v. Maryland*, 373 U.S. 83 (1963);

⁸ See e.g. <http://www.zillow.com>.

⁹ See e.g. <http://www.redfin.com>.

¹⁰ See e.g. <http://blockshopper.com>.

¹¹ See e.g. <http://myrelatives.com>.

¹² See e.g. <http://www.advancedbackgroundchecks.com>.

¹³ See *id.*

¹⁴ See e.g. <http://www.intelius.com>.

¹⁵ See *id.*

¹⁶ “Man convicted of witness intimidation after grand jury testimony is posted on Facebook”, The Buffalo News, October 2013, (<http://www.buffalonews.com/city-region/erie-county-court/man-convicted-of-witness-intimidation-after-grand-jury-testimony-is-posted-on-facebook-20131030>)

¹⁷ See http://articles.philly.com/2013-11-14/news/44033739_1_twitter-account-witness-intimidation-instagram

¹⁸ See http://www.nytimes.com/2012/11/30/nyregion/in-ultra-orthodox-sexual-abuse-trial-4-arrests-for-photos-of-witness.html?ref=nyregion&_r=0

¹⁹ "Snitch and you're a dead man," Chicago Tribune, October 11, 2009, Author: John W. Fountain, professor of journalism at Roosevelt University and author of "True Vine: A Young Black Man's Journey of Faith, Hope and Clarity."

²⁰ Used in the movie "Dangerous Minds" (1995).

²¹ See e.g. Lil' Wayne's song "Snitch" released in 2004, Ice Cube's song "Stop Snitchin'" released in 2006.

²² See <http://www.foxnews.com/story/2005/08/20/stop-snitching-shirts-dont-wear-well-with-cops.html>

²³ (taken and updated in part from "Witness Intimidation Report in Submitted Support of ABA Resolution regarding Witness Intimidation", October 2014 n. 24-129) See e.g., TheKeepitgutta, Keep it gutta presents...Holly Gangsta Grand jury minutes (using official paperwork) part 1, Youtube (Jan. 13, 2011);

<https://www.youtube.com/watch?v=t8972Z4ZTrk>. tyler jones, snitches get beat up,

Youtube;<https://www.youtube.com/watch?v=4JWSUxwB86k>. Snitches R Us, Facebook;

<https://www.facebook.com/pages/Snitches-R-Us/495882637108713?sk=info>. Snitches get stitches, Facebook;

<https://www.facebook.com/indianasnitchwatch> (expressing that the site also has a website:

www.indianasnitchwatch.org); Earth First!, Informant Tracking, Earth First! Newswire,

<http://earthfirstjournal.org/informant-tracker/>; Claire Wolfe, RATS! Your guide to protecting yourself against

snitches, informers, informants, agents, provocateurs, narcs, finks, and similar vermin, Living Freedom Blog,

<http://rats-nosnitch.com/rats.pdf>. Who's a Rat, About Us, Who's a Rat, <http://www.whosarat.com/aboutus.php>.

Daniel Schorn, Stop Snitchin': Rapper Cam'ron: Snitching Hurts His Business, "Code of Ethics", CBS News (Apr.

19, 2007); <http://www.cbsnews.com/news/stop-snitchin/>. tyler jones, snitches get beat up. AstronomyEnt, Nunya

Bizness (Stop Snitchin) Music Video, YouTube (Aug. 6, 2009); <https://www.youtube.com/watch?v=9I3HyrugZmc>.

Snitches R Us. Snitches get stitches. The Snitch List. Indiana Snitch Watch Mission Statement, SnitchWire,

<http://snitchwire.blogspot.com/>

²⁴ <https://www.youtube.com/watch?v=tfy5FiqzWHI>.

²⁵ See e.g.

http://www.slate.com/blogs/the_slatest/2014/08/14/ferguson_running_blog_updates_on_protests_in_missouri.html.

²⁶ See "Safe at Home," an address confidentiality program through the MO Secretary of State's Office for domestic violence victims and §556.226.1 RSMo (2007) requiring identifying information to be redacted from public documents for victims of sexual and domestic violence and stalking allowing for the use of initials in charging documents.

²⁷ U.S. Constitution, 14th Amendment.

²⁸ 595.010.1(5) "Crime," "an act committed in this state which, if committed by a mentally competent, criminally responsible person who had no legal exemption or defense, would constitute a crime; provided that, such act involves the application of force or violence or the threat of force or violence by the offender upon the victim but shall include the crime of driving while intoxicated, vehicular manslaughter and hit and run..."

²⁹ Missouri Constitution Article 1, §32.1(6) The right to reasonable protection from the defendant or any person acting on behalf of the defendant; Amendment garnered 85.49% of votes, See

[https://ballotpedia.org/Missouri_Crime_Victim_Rights,_Amendment_4_\(1992\)](https://ballotpedia.org/Missouri_Crime_Victim_Rights,_Amendment_4_(1992)).

³⁰ RSMo. 595.209.1(9) (2007).

³¹ Pursuant to Professional Rule of Conduct 4-1.15.

³² See RSMo. 595.209.1(9) For victims and witnesses, [of dangerous felonies] the right to reasonable protection from the defendant or any person acting on behalf of the defendant from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts;

³³ RSMo. §595.209.5 (2007).

³⁴ See RSMo. §595.209.1(9).

³⁵ Missouri Supreme Court Rules 25.01-25.18.

³⁶ ALASKA CONST. art. I, § 24 ("[c]rime victims...have the following rights...to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court"); CAL. CONST. art. I, § 28(a) ("rights of victims...encompass[...the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged"); CONN. CONST. art. I, § 8(b) ("shall have ...the right to be reasonably protected from the accused throughout the criminal justice process"); ILL. CONST. art. I, § 8.1(a)(7) ("shall have ... [t]he right to be reasonably protected from the accused throughout the criminal justice

process”); MICH. CONST. art. I, § 24(i) (“shall have ...the right to be reasonably protected from the accused throughout the criminal justice process”); MO. CONST. art. I, § 32(1)(6) (“[t]he right to reasonable protection from the defendant or any person acting on behalf of the defendant”); N.M. CONST. art. II, § 24(A)(3) (“shall have ...the right to be reasonably protected from the accused throughout the criminal justice process”); S.C. CONST. art. I, § 24(A)(6) (“have the right to...be reasonably protected from the accused or persons acting on his behalf throughout the criminal judicial process”) (taken from Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 262 n.45).

³⁷ Alabama Rules of Criminal Procedure, Rule 16.1(a)-(c).

³⁸ Alabama Rules of Criminal Procedure, Rule 16.6(a)-(c).

³⁹ Iowa Rules of Criminal Procedure, Rule 2.20.

⁴⁰ MD. Rule 4-263(b)(1).

⁴¹ MD. Code Ann., Criminal Procedure §§ 11-205.

⁴² *Id.* §§ 11-301.

⁴³ *See e.g.*, Ariz. Const. art. 2, § 2.1(A)(5) (right to refuse interview, deposition, or other discovery request by defendant); La. Const. art. 1, § 25 (right to refuse to be interviewed by accused); Or. Const. art. I, § 42(1)(c) (right to refuse an interview, deposition, or other discovery request by defendant) (taken from *National Law Crime Institute, Victim Law Bulletin*, November 2011, n. 4).

⁴⁴ Federal Rules of Criminal Procedure, Rule 16, *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir., 1990).

⁴⁵ The American Bar Association’s Standards Relating to Discovery and Procedure Before Trial, Section 2.1(a)(i) (Approved Draft, 1970).

⁴⁶ Federal Rules of Criminal Procedure, Rule 16 Conference Committee Notes, House Report No. 94-414, 1975 Amendment.

⁴⁷ *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990).

⁴⁸ *Id.* at 263.

⁴⁹ RSMo. 595.209.5 (2007).