

January 5, 2015

Via First Class Mail and Facsimile (314) 615-8280

The Honorable Maura McShane
Presiding Judge
21st Judicial Circuit
St. Louis County Court Building
7900 Carondelet Avenue
Clayton, Missouri 63105

RE: State of Missouri v. Darren Wilson Grand Jury Proceedings

Dear Judge McShane:

The NAACP Legal Defense and Educational Fund (LDF) is the nation's oldest civil rights law organization.¹ Founded in 1940 by Thurgood Marshall, LDF's mission is to achieve racial justice, equality and an inclusive society. Since its inception, LDF has worked to ensure that the nation's criminal justice laws are administered fairly and without regard to race by partnering with lawyers and community organizers across the nation in litigation and public policy advocacy. For the reasons stated below, LDF respectfully requests that you investigate the recent grand jury proceedings in the case of *State of Missouri v. Darren Wilson*, and consider taking action to restore public confidence in the St. Louis County justice system, including but not limited to, convening a new grand jury and appointing a special prosecutor pursuant to Missouri law.

The killing of Michael Brown, Jr. by former Ferguson Police Officer Darren Wilson has ignited protests and conversations nationwide about the integrity of this country's – and St. Louis County's – criminal justice system. Following the grand jury's decision not to indict Mr. Wilson, St. Louis County Prosecuting Attorney Robert McCulloch fulfilled his promise to release the transcripts of the grand jury proceedings and other case-related materials. In response, LDF assembled a team of lawyers and legal experts from Missouri and across the country to study and analyze the grand jury transcripts, and review the materials in *State v. Darren Wilson*, with the sincere hope that doing so would provide insight into how and why the grand jury reached its decision.

¹ LDF has been a separate organization from the NAACP since 1957.

As officers of the court who took an oath to uphold the integrity of the legal process, we were struck by the deeply unfair manner in which the proceedings were conducted by Prosecuting Attorney McCulloch and his assistant prosecutors. Our review of the proceedings yielded grave concerns about a number of significant issues, including the knowing presentation of false witness testimony, erroneous instructions on the law, and preferential treatment of Mr. Wilson by the St. Louis County Prosecuting Attorney's Office. These and other issues call into question both the integrity of the process and the lawfulness of the prosecutors' conduct.

The Missouri Constitution provides that the presiding judge of a circuit has "general administrative authority over the court and its divisions." Mo. Const. Art. 5, § 15, subdiv. 3. *See also* Mo. Rev. Stat. § 478.240(2) ("[T]he presiding judge of the circuit shall have general administrative authority over all judicial personnel and court officials in the circuit. . . ."); Local Rule 100.1.2 (setting forth the duties of the presiding judge). Additionally, the supervisory jurisdiction of the court includes a duty to ensure the grand jury's "orderly procedure and proper functioning within the limits of its authority as prescribed by law."² Thus, Missouri law vests this Court with the general administrative and supervisory authority over the Twenty-First Judicial Circuit Court, and this Court can initiate an investigation of the *State v. Darren Wilson* grand jury proceedings and take further action as warranted for the reasons outlined below.

St. Louis County Prosecuting Attorney Robert McCulloch and Assistant Prosecuting Attorneys Kathi Alizadeh and Sheila Whirley Knowingly Presented False Witness Testimony to the Grand Jury and Failed to Take Required Remedial Measures

On December 19, 2014, Prosecuting Attorney McCulloch publicly admitted that he and his assistant prosecutors presented false witness testimony to the grand jury.³ In describing the grand jury proceedings, Mr. McCulloch confessed that "[t]here were some people who came in and, yes, absolutely lied under oath."⁴ He also stated that he allowed witnesses to testify "[e]ven though their statements were not accurate," and that some witnesses "clearly were not telling the truth. No question about it."⁵

His admissions are confirmed by a close review of the proceeding transcripts. In particular, the transcript reveals that Mr. McCulloch and his assistant prosecutors knowingly presented the false testimony of Witness 40, without taking reasonable steps to disclose to the grand jury that the testimony was untruthful.⁶ Given the fact that Mr. McCulloch's public

² *State ex rel. Hall v. Burney*, 84 S.W.2d 659, 664 (Mo. Ct. App. 1935).

³ *See*, Bill Chappell, *St. Louis Grand Jury Heard Witnesses Who Lied*, National Public Radio (Dec. 19, 2014) <http://www.npr.org/blogs/thetwo-way/2014/12/19/371940004/st-louis-grand-jury-heard-witnesses-who-lied-prosecutor-says>.

⁴ *Id.*

⁵ The McGraw Show, *St. Louis County Prosecuting Attorney Bob McCulloch Breaks Silence*, The Big 550 KTRS Radio, (Dec. 19, 2014) available at <https://www.youtube.com/watch?v=dRYeRofVo8Q>.

⁶ Assistant Prosecutor Alizadeh explained to the grand jurors that she would play an audio recording of a prior interview of Witness 40 by representatives from the Federal Bureau of Investigations (FBI) and the Department of Justice (DOJ). *See State of Missouri v. Darren Wilson Grand Jury Transcript Vol. XV* at 85 (Oct. 23, 2014). In the recorded statement, Witness 40 disclosed facts that very closely tracked Mr. Wilson's version of the August 9, 2014 shooting death of Mr. Brown. During the recording, it became clear that the FBI and DOJ representatives believed that Witness 40 was not truthful. Witness 40 stated further that she suffered from memory loss, read news articles about the shooting incident to gather details about it before various law enforcement officers interviewed her, posted

admissions refer to multiple untruthful witnesses, it is highly likely that Witness 40 was not the only person who was allowed to lie under oath before the grand jury. Such conduct fatally compromises the fair administration of justice,⁷ and is deeply disturbing given the ethical obligation of candor toward the tribunal, which requires that a lawyer “not knowingly offer evidence that the lawyer knows to be false” and that a lawyer “take remedial measures, including, if necessary, disclosure” of such false evidence. Mo.R.P.C. 4-3.3(a)(3). The prosecutions actions, thus, merit the scrutiny of this Court.

Prosecuting Attorney McCulloch and Assistant Prosecuting Attorneys Alizadeh and Whirley Presented Incorrect and Misleading Statements of Law to the Grand Jury and Sanctioned Unlawful Juror Practices

Prosecuting Attorney McCulloch and his assistant prosecutors compounded the problems created by the knowing presentation of false testimony to the grand jury by providing inaccurate and confusing legal instructions to the grand jurors. On the day that Mr. Wilson testified before the grand jury, Ms. Alizadeh distributed to the grand jurors copies of Missouri Statute § 563.046 – Law Enforcement Officers Use of Force in Making an Arrest. *See, State of Missouri v. Darren Wilson Grand Jury Transcript* (hereinafter “*Grand Jury Transcript*”) Vol. V at 5 (Sept. 16, 2014). A portion of that law directly contravenes a decision of the United States Supreme Court issued nearly 30 years ago.

Specifically, § 563.046.3 provides that a police officer may use deadly force in effecting an arrest if he reasonably believes such force is immediately necessary because the person to be arrested “[h]as committed or attempted to commit a felony.” Mo. Stat. § 563.046.3 (2014). However, in *Tennessee v. Garner*, the United States Supreme Court held that the use of force against an unarmed, non-dangerous fleeing suspect violates the Fourth Amendment. 471 U.S. 1, 11-12 (1985). Accordingly, Missouri’s jury instructions were revised to advise jurors that a law enforcement officer may use deadly force during the course of an arrest or while preventing an escape only when “he reasonably believes that the person being arrested is attempting to escape by use of a deadly weapon or that the person may endanger life or inflict serious physical injury unless arrested without delay.” MAI-CR § 306.14. Thus, the appropriate jury instruction as adopted by the Missouri Supreme Court, does not allow mere suspicion that someone has committed a felony to justify the use of deadly force in order to make an arrest. Disturbingly, the legal standard provided to the grand jurors immediately before Mr. Wilson testified was

racially-charged rants about the incident on the Internet, such as “they need to kill the [expletive] niggers,” and she collected donations in support of Mr. Wilson. *Id.* at 160-184.

Despite this prior knowledge of the problems with Witness 40’s story, Assistant Prosecutor Alizadeh invited her to present live testimony to the grand jury immediately after the grand jury heard the audio recording, *Id.* at 184-227, and again weeks later. *See State of Missouri v. Darren Wilson Grand Jury Transcript Vol. XVIII* at 96-138 (Nov. 3, 2014); *see also*, Stephen Deere, *Witness 40 in Michael Brown case raises questions about grand jury proceedings*, St. Louis Post-Dispatch (Dec. 17, 2014) available at http://www.stltoday.com/news/local/crime-and-courts/witness-in-michael-brown-case-raises-questions-about-grand-jury/article_4cf83e2e-5241-50ce-a3e5-0097eb9b31dc.html.

⁷ Indeed, a conviction based on perjured testimony imposes upon a court the duty to grant a motion for a new trial. *State v. Mims*, 674 S.W.2d 536, 538 (Mo. 1984)

erroneous as it did not reflect either Supreme Court precedent or the updated Missouri jury instruction.

Weeks later, Ms. Alizadeh informed the grand jurors that the statute did “not comply with the case law.” Ms. Whirley then distributed a statement of the law that purportedly complied with Missouri and U.S. Supreme Court law, but did not satisfactorily answer the jurors clarifying questions about the relevance of the Mo. Stat. § 563.046, which neither assistant prosecutor answered fully:

Ms. Whirley: Did you have a question?

Grand Juror: So we're to disregard this?

Ms. Alizadeh: It is not entirely incorrect or inaccurate, but there is something in it that's not correct, ignore it totally.

Grand Juror: It is because of the federal?

Ms. Whirley: Of a Supreme Court case that we must follow Supreme Court of the United States. It is Tennessee v. Garner, not that that matters much to you.

Grand Juror: The Supreme Court, federal Supreme Court overrides Missouri statutes.

Ms. Alizadeh: As far as you need to know, just don't worry about that.

Grand Juror: All right.

Ms. Alizadeh: Just disregard that statute.

Ms. Whirley: We don't want to get into a law class.

Grand Jury Transcript Vol. XXIV at 135-36 (Nov. 21, 2014).

The assistant prosecutors expressed uncertainty about the legal standards governing the grand jury's deliberations on a number of fronts. In addition, the assistant prosecutors expressed doubt to the grand jurors about whether the grand jury had to decide (1) whether there was probable cause to believe that Wilson used excessive force and, (2) if he did use excessive force, whether he was justified as a matter of self-defense or as a matter of the lawful use force to effect an arrest. *See, Grand Jury Transcript Vol. XXII at 101-03 (Nov. 11, 2014).* Specifically, Assistant Prosecutors Alizadeh and Whirley and the grand jurors had the following exchange:

Ms. Whirley: We [sic] still talking about the probable cause and that standard.

Ms. Alizadeh: We had a conversation with that [sic] even last night and we still have to kind of work that out, we're not really sure.

[Grand Juror]: Probable cause, you are still looking at?

Ms. Alizadeh: We both agree that you can't return an indictment unless you believe there is probable cause to believe that a crime occurred and that the defendant or suspect or the person you're considering committed it. But

the question is, if you're going to consider self-defense and use of [sic] lawful use of force to affect [sic] an arrest are affirmative defenses and they're what we call complete defenses.

And so if you believe that the person acted in lawful self-defense or if you believe the person was justified in the use of force as a law enforcement officer, then it is a complete defense, there would be no indictment on any charge.

The question we don't really know is that beyond a reasonable doubt, what is the standard by which you have to consider that.

Id. at 101-02.

It became clear that the grand jurors, who sought legal guidance and accurate legal instructions, remained confused and needed further direction. The exchange continued as follows:

[Grand Juror]: Will that be outlined in writing for us as well?⁸

Ms. Alizadeh: I don't know because we don't know. If this matter were a trial, it would be different because obviously, in a trial, it is beyond a reasonable doubt. And in trial it is the obligation of the defense to raise the issue, and if the issue is raised, it becomes the obligation of the State to prove beyond a reasonable doubt that the person did not act in lawful self-defense or was not justified in the use of force, but that is a trial setting.

So we don't know how this, this investigation was, we talked about yesterday, is not typical on how we would present cases to the grand jury. This is an investigation and I believe, and I think Sheila agrees, I don't want to speak for you, that your determination of whether or not force was justified either as self-defense or use of force to affect an arrest is part of your decision process.

So that's something for you to consider. I don't think the answer is simply, well, we believe that a crime was committed, you know, probable cause to believe a crime was committed and he did it and not at all talk about those defenses.

But I don't know, we don't know what kind of instruction to give you on, [sic] do you have to believe that there's probable cause to believe that he used excessive force. I don't know, we don't know that. We don't want to tell you the wrong thing. So we're still trying to work that out.

Id. at 102-03. Ultimately, Ms. Whirley gave the following instruction to the grand jurors:

⁸ It appears as though the grand jurors ultimately received written instructions. *Grand Jury Transcript Vol. XXIV* at 137-38.

[I]n order to vote true bill, you must consider whether you believe Darren Wilson, you find probable cause, that's the standard, to believe that Darren Wilson committed the offense and the offenses are what is in the indictment and you must find probable cause to believe that Darren Wilson did not act in lawful self-defense ...you must also have probable cause to believe that Darren Wilson did not use lawful force in making an arrest.

See, Grand Jury Transcript Vol. XXIV at 137.

These excerpts of the transcripts reveal that the assistant prosecutors did not know the legal standard at the time of these grand jury proceedings and were, therefore, unable to articulate a clear legal standard to the grand jury. By initially providing erroneous legal instructions that indicated that Mr. Wilson was authorized to use deadly force under circumstances outlawed by the Supreme Court for nearly thirty years; by following up that false statement of law with confusing and misleading statements regarding the applicable law; and by expressing great uncertainty about the applicable legal standard by which the grand jury was required to weigh the facts, the prosecutors effectively ensured that no indictment could be returned against Mr. Wilson.

These errors were compounded by the fact that some of the grand jurors were engaged in “independent investigation” of the case. On October 6, 2014, an unidentified judge admonished the grand jurors for conducting outside investigations into the case. She asked the jurors to confine their investigation and research to the grand jury room. *Grand Jury Transcript Vol. X at 58-62 (Oct. 6, 2014).* The judge cautioned the jurors that “if there is anything you want, you tell these prosecutors, they will get you that information.” *Id.* at 61. Despite this instruction, weeks later the prosecutors encouraged jurors to conduct their own research. After the prosecutors showed jurors clips of a press conference held by law enforcement officials following Mr. Brown’s death, Ms. Alizadeh told the jurors that:

I know that typically we tell jurors not to do any research on the case, but if there is a clip that you all think that you want the rest of the jurors to view, if you can just bring it to my attention, I can give you my email address and you can email me the link or something and I'll make sure I get it copied so we can show it to everybody.

Grand Jury Transcript Vol. XXI at 182 (Nov. 13, 2014). The grand jurors, properly cautioned by a judge to refrain from conducting research about the matter before them, were then asked to engage in impermissible behavior.

As a whole, the above excerpts raise fundamental questions about the competency of the prosecutors in this case to conduct the proceedings and the fairness of the proceedings overall. As a result of the prosecutors’ actions, the grand jury proceedings and the resulting decision of that body are patently unreliable.

Prosecuting Attorney McCulloch and Assistant Prosecuting Attorneys Alizadeh and Whirley Provided Favorable Treatment to the Target of the Grand Jury Proceedings

Mr. McCulloch and the assistant prosecutors under his supervision displayed preferential treatment toward Mr. Wilson throughout the proceedings, and therefore undermined the function of the grand jury. From the outset, Mr. McCulloch conveyed to the grand jury that Mr. Wilson's case was special. For example, he told the grand jury, which had been hearing criminal matters for the preceding two months, that it would hear the case involving the shooting death of Michael Brown and "[o]bviously, it is going to be different from a lot of the other cases that you've heard...during your term." *Grand Jury Transcript Vol. I* at 5 (Aug. 20, 2014). Mr. McCulloch's admonitions were echoed by Ms. Alizadeh and Ms. Whirley. Ms. Alizadeh noted that, "typically the grand jury will hear a whole case in a matter of maybe 15 minutes, but that's not the case here. . ." *Grand Jury Transcript Vol. II* at 7 (Sept. 3, 2014).

The prosecutors in this matter repeatedly singled out Mr. Wilson's case as special. One difference Mr. McCulloch noted was that the jurors would review "every bit of evidence" that existed in the case. *Grand Jury Transcript Vol. I* at 12. Jurors were also informed that all of the proceedings would be recorded and that all twelve of them would need to be in attendance for the presentation of evidence.⁹ *Id.* at 11-12; *Grand Jury Transcript Vol. II* at 10. As the second day of proceedings began, the jurors were told "in the afternoon today you are going to hear a regular docket of cases that we need to move through the grand jury" before they would be able to focus undivided attention on "the investigation into the shooting of Michael Brown." *Grand Jury Transcript Vol. II* at 14. By singling out this case as different from – and more important than – all of the others, Mr. McCulloch and his assistants signaled to the grand jurors that Mr. Wilson was deserving of special treatment not afforded other criminal defendants.

Disparities in the presentation of witness testimony and questioning of witnesses further evince the preferential treatment afforded Mr. Wilson in this case. As the assistant prosecutors presented witness testimony, their questioning of witnesses often appeared to advocate for defendant Wilson's version of the shooting. For example, Dorian Johnson, who was an eyewitness to Mr. Brown's shooting death, testified before the grand jury. After Mr. Johnson presented his testimony, Ms. Alizadeh asked Mr. Johnson whether it was possible that Mr. Brown moved "20, 22 feet toward the officer before he fell." Mr. Johnson responded "[n]ot 20 to 22, not that far." *Grand Jury Transcript Vol. IV* at 158 (Sept. 10, 2014). She asked again, "he doesn't like run at the officer?" Mr. Johnson responds once again, "No ma'am. At no point in time when he turned around he made a rush towards the officer or anything like he was going to tackle the officer or anything like that. He was standing straight up." *Id.* at 159. When Ms. Alizadeh was unable to persuade Mr. Johnson to change his testimony, and therefore corroborate Mr. Wilson's claimed defense, Mr. Whirley asked Mr. Johnson to say more about his criminal record, which the grand jury "may want to factor," in an effort to discredit Mr. Johnson's testimony *Id.* at 171.

⁹ While we express no opinion regarding the propriety of these instructions, to the extent that they differ from grand jury instructions provided in other cases, they unnecessarily distinguished these grand jury proceedings from all others.

In sharp contrast, the prosecution failed to challenge defendant Wilson's testimony. Instead, the assistant prosecutors asked questions to help defendant Wilson bolster his claim of self-defense:

Ms. Whirley: I was just going, if we are sort of done with your questioning, is there something that we have not asked you that you want us to know or you think it is important for the jurors to consider regarding this incident?

Mr. Wilson: One thing you guys haven't asked that has been asked of me in other interviews is, was he a threat, was Michael Brown a threat when he was running away. People asked why would you chase him if was running away now.

I had already called for assistance. If someone arrives and sees him running, another officer and goes around the back half of the apartment complexes and tries to stop him, what would stop him from doing what he just did to me to him or worse, knowing he has already done it to one cop. And that was, he still posed a threat, not only to me, to anybody else that confronted him.

Grand Jury Transcript Volume V at 280-81.

Moreover, unlike the questions posed to Mr. Johnson regarding his criminal record, the prosecutors did not explore any of the use of force reports found in Mr. Wilson's personnel file and attested to by a law enforcement officer during the proceedings. *Id.* at 184-85.¹⁰ Instead, the prosecutors produced what amounted to favorable character evidence for Mr. Wilson by presenting the testimony of his former training officer. *Grand Jury Transcript Vol. XXII* at 20, 22-24. While these instances of preferential treatment are not exhaustive, they exemplify the nature of the intrinsic conflict that infected these proceedings and require action by this Court.

Conclusion

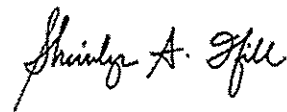
The prosecutors' actions in this case raise serious concerns that the grand jury process relating to Darren Wilson's deadly actions was fatally compromised. The presentation of testimony believed to be false, the provision of outdated and confusing legal standards, and the preferential treatment Mr. Wilson received not only suggest potential ethical violations, but merit prompt and thorough investigation by this Court. The issues outlined in this submission undermine public confidence in the criminal justice system and leave deeply troubling doubts

¹⁰ In fact, Mr. Wilson was not confronted with any allegations of wrongdoing or misconduct, despite the existence of significant reports raising questions about his past. See Jason Sickles, *Attorney: Officer Darren Wilson roughed up drug suspect*, Yahoo News (Sept. 5, 2014) available at <http://news.yahoo.com/attorney-ferguson-police-officer-darren-wilson-roughed-up-drug-suspect-231634921.html>. See also, Prachi Gupta, *Darren Wilson's Former Police Force was disbanded for excessive force and corruption*, Salon, (Aug. 24, 2014), available at http://www.salon.com/2014/08/24/darren_wilsons_former_police_force_was_disbanded_for_excessive_force_and_corruption/.

about whether justice was administered in a fair, impartial, and competent manner. Moreover, a further review of the transcript may yield additional concerns—including evidentiary, forensic, and factual matters—that warrant this Court’s attention and scrutiny. By asking this Court to take action, we seek to vindicate the public’s faith in the criminal justice system. The authority to investigate the grand jury proceedings and take remedial action—through a new grand jury, appointment of a special prosecutor,¹¹ or other means—rests with this Court. It is our hope that the Court will act accordingly.

I, along with LDF’s legal team, am available to answer any questions you may have about this request. Please do not hesitate to contact me at 212-965-2200.

Sincerely,



Sherrilyn A. Ifill
Director-Counsel

Endorsing Organizations

Mound City Bar Association
Ferguson Legal Defense Committee

cc: Judge Carolyn Whittington
Prosecuting Attorney Robert McCulloch

¹¹ Missouri Statute § 56.110 provides that “if the prosecuting attorney and assistant prosecuting attorney be interested. . . the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause.” Mo. Rev. Stat. § 56.110 (2014). Critically, the power to appoint a special prosecutor is not limited by statute, but is “instead a long-standing power inherent in the court, to be exercised in the court’s sound discretion” *State ex inf. Fuchs v. Foote*, 903 S.W.2d 535, 537 (Mo. 1995) abrogated on other grounds by *State v. Olvera*, 969 S.W.2d 715 (Mo. 1998); *see also State v. Copeland*, 928 S.W.2d 828, 840 (Mo. 1996) overruled on other grounds by *Joy v. Morrison*, 254 S.W.3d 885 (Mo. 2008) (noting that the decision to appoint a special prosecutor lies within the discretion of the court).