IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

MONTAGUE SIMMONS, et al.,	)	
	)	
Affiant,	)	
	)	Cause No. 15SL-CC00177
v.	)	
	)	Division 17
ROBERT MCCULLOCH,	)	
	)	
Respondent.	)	

JUDGMENT DISMISSING REQUEST FOR APPOINTMENT OF SPECIAL PROSECUTOR WITH PREJUDICE TO REFILING SAME

This matter came before the Court on the application of Affiants to have the duly elected Prosecuting Attorney for St. Louis County, Robert McCulloch (hereinafter "Prosecutor"), removed from office pursuant to the statutory scheme set forth in §§106.220-106.290 R.S.Mo. The St. Louis County Counselor entered an appearance on behalf of the Prosecutor and moved to have the matter dismissed for failure to state a cognizable claim under the statutory scheme. In response, the Court conducted two separate hearings in this matter to permit counsel for both parties to present their arguments. At the final hearing, the Court granted leave to permit Affiants to supplement the record with an Affidavit of Professor Bennett L. Gershman.

The genesis of this action is the decision of a St. Louis County grand jury to issue a "no true bill" of indictment in the cause of ***State of Missouri v. Darren Wilson***, following an extensive four month investigation and presentation by the Prosecutor's Office of massive amounts of evidence from numerous witnesses, forensic experts, and local and state law enforcement personnel. It is an unstated conclusion that, had the grand jury returned a "true bill" of indictment against Officer Wilson, Affiants would not have filed the present application to have the Prosecutor removed from office. Confronted with the reality that the grand jury did

not reach the decision they desired, however, Affiants have set upon a course to have the Prosecutor removed from office by critiquing the manner and method in which the case was presented to the grand jury by two Assistant Prosecuting Attorneys.

Rather than seeking a Recall Election as permitted by the St. Louis County Charter, Article IX, Affiants have chosen to climb the daunting mountain set forth in §§106.220-106.290 R.S.Mo., providing the very limited and exacting reasons for the forfeiture of office by any person elected to county office who is not subject to impeachment. Section 106.220 provides as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who ***shall be guilty of any willful or fraudulent violation or neglect of any official duty***, or who ***shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state***, shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290. (R.S.1939, § 12828.)"[Emphasis added].

The Missouri Supreme has mandated that "forfeitures are disfavored, and the terms of the statutes governing them are accordingly to be ***strictly construed***." ***State ex inf. Stephens v. Fletchall***, 412 S.W.2d 423, 428 (Mo. 1967); See also ***Taylor v. Cumpton***, 362 Mo. 199, 214(Mo. 1951).

Consequently, the Court must serve as a gatekeeper and is not free to appoint a special

prosecutor unless there exist some reasonable basis or probable cause that tends to establish that the Prosecutor ***willfully or fraudulently violated or neglected*** his ***official duty***; or ***knowingly or willfully failed or refused to perform*** any ***official act or duty*** to ***execute or enforce the criminal laws*** of the state. See *§106.220* R.S.Mo. To hold otherwise would subject elected officials to incessant requests for special prosecutors to engage in witch hunts to determine whether any evidence of wrongdoing could be dredged up against the official under scrutiny at the behest of individuals who disagree with the exercise of judgment by the official or otherwise have a political axe to grind.

In ***State on inf. McKittrick v. Wallach***, 182 S.W.2d 313 (Mo. 1944), the Missouri Attorney General sought removal of the St. Louis County Prosecutor for alleged misconduct involving the failure to prosecute; refusal to prosecute; and/or improper dismissals of liquor-related cases. The Supreme Court dismissed the information of the Attorney General stating that the fact that someone "might have reached a different conclusion" with respect to commencing and/or pursing prosecutions for the alleged offenses is insufficient to convict the prosecutor of any wrong doing. The Court highlighted the fact that a prosecutor is entrusted with wide latitude to exercise his judgment in good faith according to his own sound discretion. Id. at 322-323.

> "Discretion" in that sense means power or right conferred by law upon the prosecuting officer of acting...according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person. Such discretion must be exercise in accordance with established principles of law, fairly, wisely and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard

and fast rule or a mandatory procedure regardless of varying circumstances.... *Id.* at 322-323.

In ***State on inf. McKittrick v. Graves***, 144 S.W.2d 91 (Mo. 1940) the Attorney General brought a *quo warranto* action against the Jackson County prosecutor alleging that he failed to enforce the laws against flagrant, open and notorious gambling, prostitution, and illegal sale of alcohol; for the "willful and corrupt entering of *nolle prosequi* in certain criminal cases in which...there was ample evidence to warrant further prosecution;" and failure to prosecute persons who violated election laws. The Supreme Court removed the prosecutor from office because it was established that he failed to investigate and/or prosecute ongoing and rampant criminality occurring in Kansas City at the time, despite having notice of such criminal activity.

The ***Wallach*** Court distinguished ***Graves,*** *supra,* and two other cases involving quo warranto proceedings against County Prosecutors by stating that:

> However, the facts in those cases are far different from the situation in this case. In the ***Wymore***[1] case, there was a complete failure of the prosecuting attorney to ever commence any prosecution for violation of gambling laws, even after having full information about conditions. This court found that 'he made no effort whatsoever to perform his duties as prosecuting attorney' [345 Mo. 169, 132 S.W.2d 986]; and that he 'never reached the point where he even pretended to exercise discretion', but instead was 'under the influence of evil men.' Obviously that is not the situation here. Both the ***Graves*** and ***Williams***[2] cases involved continuous long existing conditions of flagrant, open and notorious gambling,

[1] ***State ex inf. McKittrick v. Wymore***, 132 S.W.2d 979 (Mo. 1938)
[2] ***State ex inf. McKittrick v. Williams***, 144 S.W.2d 98 (Mo. 1940)

prostitution and illegal sale of intoxicating liquor frequently pointed out by the press. ***State on inf. McKittrick v. Wallach***, 182 S.W.2d 313, 323 (Mo. 1944).

In the case at bar, the Affiants fail to allege that the Prosecutor has ignored the type of systemic "flagrant, open and notorious" criminal activity that has been found to be grounds for ouster under the statutory scheme set forth in §§106.220-106.290 R.S.Mo.

Rather, the criticisms of the Prosecutor involve a grand jury proceeding in a single case that was presented by two Assistant Prosecuting Attorneys over the course of some four months.

Such critiques do not rise to level of constituting the ***willful or fraudulent violation or neglect*** of the Prosecutor's ***official duty.***

With respect to the "violation of an official duty," the Missouri Supreme Court in ***State ex. inf. Fuchs v. Foote***, 903 S.W.2d 535 (Mo. 1995), unequivocally stated that "the mere violation of an official duty will not support a judgment of ouster. The statute instead requires that the misconduct be the 'willful or fraudulent violation' or 'willful neglect' of the official duty at issue." Id. at 538. The Court explained that "'willful or fraudulent violation' is a stronger term than 'willful neglect' and connotes more than just nonfeasance or misfeasance. Rather, it is malfeasance, that is, misconduct in the performance of official duties." Id. Furthermore, the court defined "willful neglect" as "a hybrid between conduct that is wholly willful and conduct that is wholly neglectful." Id. The court concludes that "a public official 'willfully neglects' an official duty when he or she intentionally fails to act, contrary to a known duty." Id.

The Court finds it is clear that the Prosecutor did not "intentionally fail to act" in violation of a known duty. To the contrary, he fulfilled his duty by having two

experienced assistant prosecutors spend countless hours over the course of four months presenting evidence to the grand jury so that they could make an informed investigative decision as to whether to indict Officer Wilson. In fact, the grand jury was invited to question any and all witnesses that appeared before it. Affiants criticize the Prosecutor for presenting too much information to the grand jury. It is hard to imagine a process that would be characterized as fair and impartial if only limited and carefully selective information were presented while other crucial, relevant information was withheld. When viewed in light of the totality of circumstances, the inescapable conclusion is that the Prosecutor faithfully performed his duty, even though some other person may have made the presentation to the grand jury in a different manner. See ***State on inf. McKittrick v. Wallach***, 182 S.W.2d 313 (Mo. 1944).

The next basis under the statute to remove an elected official requires that there exist some demonstrable probable cause that tends to establish that the Prosecutor ***knowingly or willfully failed or refused to perform*** any ***official act or duty*** to ***execute or enforce the criminal laws*** of the state. The Affiants' criticisms are devoid of any allegation that the Prosecutor failed to execute or enforce any criminal statute. Essentially, the argument advanced by Affiants is that the Prosecutor had to obtain an indictment of Officer Wilson in order to fulfill his duty and enforce the criminal laws of the state. Therefore, his failure to do so constituted a knowing, willful and fraudulent abdication of his official duty such that he should be removed from office. Such circular reasoning is not only logically flawed but contrary to the principles of our criminal justice system.

The affiants presented the Affidavit of Professor Bennett L. Gershman. The

Court finds that the Professor deemed it appropriate to undertake a limited review of the grand jury proceedings. In paragraph 10 of his affidavit, he states that the only grand jury testimony he reviewed and considered was "the testimony of Darren Wilson, and ... several other law enforcement officials." Nevertheless, the Professor concludes that the conduct of the Prosecutor during the grand jury proceedings "constituted a gross deviation from proper and acceptable standards of conduct that a prosecutor should follow in conducting a grand jury investigation." See Paragraph 11 of Professor's Affidavit. He cites to no authoritative standard, rule, statute or case law recognized in Missouri or any other jurisdiction to support his assertion. Nevertheless, even if one were to accept such a conclusion as somehow authoritative on the issue, it does not rise to the level of constituting a ***knowing or willful failure or refusal to perform any official act or duty to execute or enforce the criminal laws of this state*** or the ***willful or fraudulent violation or neglect of the official duty*** of the Prosecutor, as required by the statutory scheme and Missouri Supreme Court case law to have him removed from office.[3] The Court does not find the affidavit persuasive.

Finally, the Professor suggests that the Prosecutor should have been disqualified because his father was a police officer who was killed in the line of duty. There is no legal authority for such a conclusion. It is simply not a basis to appoint a special prosecutor to investigate. However, a second investigation was conducted by the U.S. Department of Justice.

It is instructive to review the entire Justice Department report, but the conclusion provides as comprehensive and succinct of an analysis of all the evidence

[3] At worst, it may be the basis to assert a disciplinary complaint against the Prosecutor. But here again, the Professor fails to cite any disciplinary rule that may have been violated.

presented to the grand jury as any reasonable person could expect. Accordingly, it warrants recounting here:

> "The evidence establishes that the shots fired by Wilson after Brown turned around were in self-defense and thus were not objectively unreasonable under the Fourth Amendment. The physical evidence establishes that after he ran about 180 feet away from the SUV, Brown turned and faced Wilson, then moved toward Wilson until Wilson finally shot him in the head and killed him. According to Wilson, Brown balled or clenched his fists and "charged" forward, ignoring commands to stop. Knowing that Brown was much larger than him and that he had previously attempted to overpower him and take his gun, Wilson stated that he feared for his safety and fired at Brown. Again, even Witness 101's account supports this perception. Brown then reached toward his waistband, causing Wilson to fear that Brown was reaching for a weapon. Wilson stated that he continued to fear for his safety at this point and fired at Brown again. Wilson finally shot Brown in the head as he was falling or lunging forward, after which Brown immediately fell to the ground. Wilson did not fire any additional shots. Wilson's version of events is corroborated by the physical evidence that indicates that Brown moved forward toward Wilson after he ran from the SUV by the fact that Brown went to the ground with his left hand at (although not inside) his waistband and by credible eyewitness accounts.
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> Wilson's version is further supported by disinterested eyewitnesses Witness 102, Witness 104, Witness 105, Witness 108, and Witness 109, among others. These witnesses all agree that Brown ran or charged toward Wilson and that Wilson shot at Brown only as Brown moved toward him. Although some of the witnesses stated that Brown briefly had his hands up or out at about waist-level, none of these witnesses perceived Brown to be attempting to surrender at any point when Wilson fired upon him. These witnesses' accounts are consistent with prior statements they have given, consistent with the forensic and physical evidence, and consistent with each other's accounts. Accordingly, we conclude that these accounts are credible.
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> When the shootings are viewed, as they must be, in light of all the surrounding circumstances and what Wilson knew at the time, as established by the credible physical evidence and eyewitness testimony, it was not unreasonable for Wilson to fire on Brown until he stopped moving forward and was clearly subdued. Sufficient credible evidence supports Wilson's claim that he reasonably perceived Brown to be posing a deadly threat.
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> While Brown did not use a gun on Wilson at the SUV, his aggressive actions would have given Wilson reason to at least question whether he might be armed, as would his subsequent forward advance and reach toward his waistband. This is especially so in light of the rapidly-evolving nature of the incident. Wilson did not have time to determine whether Brown had a gun and was not required to risk being shot himself in order to make a more definitive assessment. Moreover, Wilson could present evidence that a jury likely would credit that he reasonably perceived a deadly threat from Brown even if Brown's hands were empty and he had never reached into his waistband because of Brown's actions in refusing to halt his forward movement toward Wilson.

In addition, even assuming that Wilson definitively knew that Brown was not armed, Wilson was aware that Brown had already assaulted him once and attempted to gain control of his gun. Wilson could thus present evidence that he reasonably feared that, if left unimpeded, Brown would again assault Wilson, again attempt to overpower him, and again attempt to take his gun. Under the law, Wilson has a strong argument that he was justified in firing his weapon at Brown as he continued to advance toward him and refuse commands to stop, and the law does not require Wilson to wait until Brown was close enough to physically assault Wilson.

We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. *Smith,* 954 F.2d at 347 (6th Cir. 1992). *See also Ryburn v. Huff,* 132 S. Ct. 987, 991-92 (2012) (courts "should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation.") Rather, where, as here, an officer points his gun at a suspect to halt his advance, that suspect should be on notice that "escalation of the situation would result in the use of the firearm." *Estate of Morgan* at 498. An officer is permitted to continue firing until the threat is neutralized. *See Plumhoff v. Rickard,* 134 S.Ct. 2012, 2022 (2014) ("Officers need not stop shooting until the threat has ended.")

As discussed above, Darren Wilson has stated his intent in shooting Michael Brown was in response to a perceived deadly threat. The only possible basis for prosecuting Wilson under Section 242 would therefore be if the government could prove that his account is not true – *i.e.*, that Brown never assaulted Wilson at the SUV, never attempted to gain control of Wilson's gun, and thereafter clearly surrendered in a way that no reasonable officer could have failed to perceive. Given that Wilson's account is corroborated by physical evidence and that his perception of a threat posed by Brown is corroborated by other eyewitnesses, to include aspects of the testimony of Witness 101, there is no credible evidence that Wilson willfully shot Brown as he was attempting to surrender or was otherwise not posing a threat."

Nowhere does the Justice Department report criticize any aspect of the grand jury proceedings. In the final analysis, it is reasonable for this Court to rely on the report to substantiate and validate not only the conclusion of the grand jury, but the manner and method that it was conducted by the two experienced Assistant Prosecuting Attorneys assigned to the task.

While the Court is sensitive to the raw nature that this incident has provoked around this community and the country at large, there simply is no legitimate basis under a strict scrutiny analysis to find that there exists probable cause which tends to establish that the Prosecutor is guilty of ***willfully or fraudulently violating or***

neglecting his ***official duty***; or ***knowingly or willfully failing or refusing to perform*** any ***official act or duty*** to ***execute or enforce the criminal laws*** of the state, as required to initiate proceedings under §§106.220-106.290 R.S.Mo.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this matter be dismissed with prejudice to refiling any such further action pursuant to §§106.220-106.290 R.S.Mo., arising out of the grand jury proceedings in the matter of ***State of Missouri v. Darren Wilson.***

SO ORDERED

7/2/15

Judge Joseph L. Walsh, III
Division 17
St. Louis County Circuit Court

Entered this 2nd day of July, 2015