STATE OF MISSOURI CIRCUIT COURT
FOR THE COUNTY OF SAINT LOUIS

State of Missouri *ex inf.* Montague Simmons, *et al.*,	
v.	Cause No. 15SL-_____
Robert McCulloch, St. Louis County Prosecuting Attorney.	Division No. 2

MEMORANDUM OF LAW IN SUPPORT OF AFFIANT MONTAGUE SIMMONS'S REQUEST FOR APPOINTMENT OF A SPECIAL PROSECUTOR TO INVESTIGATE WHETHER ST. LOUIS COUNTY PROSECUTING ATTORNEY ROBERT MCCULLOCH FAILED TO FULFILL HIS DUTIES OF OFFICE REGARDING HIS CONDUCT IN THE GRAND JURY PROCEEDINGS OF *STATE OF MISSOURI V. DARREN WILSON*

This memorandum of law supports affiant **MONTAGUE SIMMONS**'s[1] request for appointment of a special prosecutor, pursuant to Missouri Revised Statutes §§ 106.220–.290, to investigate St. Louis County Prosecutor Robert McCulloch's conduct towards the grand jury proceedings in *State of Missouri v. Darren Wilson* (grand jury proceedings). The purpose of said investigation would be to determine whether Mr. McCulloch's conduct constituted a failure to perform the duties of his public office. If so found, the special prosecutor would have authority to file a *writ of quo warranto* action seeking ouster of Mr. McCulloch from office. Based on Mr. Simmons's sworn statements in his affidavit, enough irregularities occurred in the grand jury proceedings to merit investigation into Mr. McCulloch's conduct by a special investigator.

[1]All references to Montague Simmons include the other affiants who have filed in this matter, Redditt Hudson, Juliette Jacobs, and Tara Thompson.

I. Factual Statement

This memorandum hereby incorporates by reference the facts related in Mr. Simmons's affidavit.

II. Basic Legal Framework

By Missouri statute, "any person" who has information tending to show an elected public officer has "knowingly or willfully" failed to fulfill her duties of office may file an affidavit with the clerk of court stating such. Mo. Rev. Stat. §§ 106.220, .230. Normally, the court clerk would refer the affidavit to the prosecuting attorney for investigation, Mo. Rev. Stat. § 106.230; if the investigation found that the official failed to fulfill her office's duties, the prosecutor could file a *writ of quo warranto* action in circuit court seeking her ouster from office, *see* Mo. Rev. Stat. § 106.270; Mo. R. Civ. P. 98.02.

A conflict of interest exists when the challenged public official is the prosecuting attorney. The Missouri legislature addressed this issue by providing Missouri circuit courts the authority to appoint a special prosecutor to take on the duties normally ascribed to a prosecuting attorney under Missouri Revised Statute section 106.230. *See* Mo. Rev. Stat. § 106.240. In other words, when an affiant asserts that a prosecuting attorney has failed to fulfill her duties of office, a court may appoint a special prosecutor to investigate the allegations and, if appropriate, file a *writ of quo warranto* action seeking the prosecutor's ouster from office. *Id.* Missouri courts have a long history of such challenges. *See, e.g.*, *Missouri on Inf. of Reed v. Reardon*, 41 S.W.3d 470 (Mo. Sup. Ct. 2001); *State ex inf. Dalton v. Moody*, 325 S.W.2d 21 (Mo. 1959); *State on Inf. of McKittrick v. Graves*, 144 S.W.2d 91 (Mo. Sup. Ct. 1940).[2]

[2]Not all Missouri cases involving *writs of quo warranto* invoke the statutory framework of Missouri Revised Statute sections 106.220–.290. Some cases come under the common law *writ of quo warranto* doctrine, which allows the state attorney general to bring an action

The question thus becomes, when does a prosecuting attorney fail to fulfill her duties? Prosecuting attorneys are charged with upholding the laws of Missouri in their county, including those of homicide. Mo. Rev. Stat. § 56.060. To be sure, prosecutors enjoy discretion as to which criminal cases warrant pursuit. However, "prosecutorial discretion is not absolute." *In re Grand Jury Proceedings*, 617 F. Supp. 119, 203 (S.D.N.Y. 1985); *see, e.g.*, *Wayte v. United States*, 470 U.S. 598 (1985); *Powell v. Katzenbach*, 359 F.2d 234, 235 (D.C. Cir. 1965). The Missouri Supreme Court delineated the limits of prosecutorial discretion in *State on inf. McKittrick v. Wallach*, 182 S.W.2d 313 (Mo. Sup. Ct. 1944). There, the Court explained that prosecutors abuse their discretion, and thus fail to fulfill their duties of office, when they act arbitrarily, in bad faith, or corruptly. *Id.* at 319. This abuse of discretion limitation applies to a prosecutor's conduct toward a grand jury proceeding. *State, on Inf. McKittrick v. Wymore*, 132 S.W.2d 979, 987 (Mo. Sup. Ct. 1939). Therefore, under Missouri law a prosecuting attorney fails to fulfill her duties of office in grand jury proceedings by acting arbitrarily, in bad faith, or corruptly.

Admittedly, a prosecutor should have discretion to determine which criminal cases are worthy of pursuit in light of the resources available to her. Yet prosecutors are not kings and queens; they must be held accountable when they fail to fulfill their duties of office. *See Peirson v. Ray*, 386 U.S. 547, 565 (1967) ("The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work, is but a more sophisticated manner of saying 'The King can do no wrong.'"). Such reasoning is deeply embedded in the fabric of the U.S. and Missouri Constitutions, and is well supported by the concerns of our Founders.

---

requesting a public official's ouster. For our purposes, the two actions run parallel to each other, and thus are equally applicable when interpreting the law regarding ouster. Mo. R. Civ. P. 98.02 (establishing same procedure for *writ of quo warranto* actions brought by state attorney general and prosecuting attorneys).

III. Legal Analysis

This court has jurisdiction in this matter; Mr. Simmons has standing to request a special prosecutor in this case; the standard for appointment of a special prosecutor is a low bar; and publicly available facts tend to show Mr. McCulloch acted arbitrarily and in bad faith in how he handled the grand jury proceedings.

A. This Court Has Jurisdiction over this Matter

Missouri Revised Statute section 106.230 permits an affiant with knowledge of a public officer's failure to fulfill her duties of office to file an affidavit with "the clerk of the court having jurisdiction of the offense." "Upon the filing of the affidavit as provided in section 106.230, against any prosecuting attorney, the judge of the circuit court of said county may appoint a special prosecutor, who shall have power and authority to file a complaint, as provided in section 106.230, against said prosecuting attorney." Mo. Rev. Stat. § 106.240. All events asserted within Mr. Simmons's affidavit occurred within St. Louis County, giving this Court jurisdiction herein.

B. Mr. Simmons Has Standing to Request a Special Prosecutor in this Case

Whether a litigant has standing to pursue a case in circuit court is a threshold issue. *State ex rel. St. Louis Retail Group v. Kraiberg*, 343 S.W.3d 712, 715 (Mo. Ct. App. 2011). Normally, someone must have suffered a particularlized harm to have standing to bring suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). However, a legislature may override this requirement by statute. *City of New Johnsonville v. Handley*, No. M2003-00549-COA-R3-CV, 2005 WL 1981810, at *15 n.23 (Tenn. Ct. App. Aug. 16, 2005) (discussing how a legislature's decision to "authorize private citizens to challenge the legality of the actions of public officials" trumps the "judge-made doctrine" of standing). The Missouri legislature has done just that,

granting "any person" standing to file an affidavit asserting a prosecuting attorney's failure to fulfill her duties and to request appointment of a special prosecutor to investigate. Mo. Rev. Stat. §§ 106.230, .240.

A recent decision from the Missouri Circuit Court for St. Louis County bears out this analysis. On December 2, 2014, Georgia resident Cleve Molette filed an affidavit under Missouri Revised Statute section 545.250 requesting that the prosecuting attorney file third-degree assault charges against Ferguson Police Officer Darren Wilson. The affiant's request was based on the facts related to the grand jury proceedings involved in this case. Section 545.250 allows for "any person" with information of a crime having been committed in Missouri to file an affidavit so stating. This Court dismissed Mr. Molette's affidavit on its merits, determining that "[t]his matter has been investigated and completed on the state level." *State of Missouri ex. inf. Molette v. Wilson*, No. 14SL-MC16056, slip op. at 2 (Mo. Cir. Ct. Dec. 4, 2014). Importantly, this Court did not dismiss the case on standing grounds, even though standing is a threshold issue; Mr. Molette was a Georgia resident, and Mr. Molette did not witness the alleged assault. The implication is that Mr. Molette had standing under section 545.250 based on its "any person" language. Section 106.230's "any person" language should read in the same way. Therefore, Mr. Simmons, as "any person," has standing to file an affidavit asserting that Mr. McCulloch failed to fulfill his duties and requesting a special prosecutor to investigate his conduct in the grand jury proceeding.

The *Molette* decision has not closed the door on the grand jury proceedings and related court actions; after all, Mr. McCulloch's office could convene a new grand jury at any time. More to the point, an action for ouster of a prosecuting attorney is separate and distinct from any case or grand jury proceeding underlying it. Thus this action is not an attempt to reopen grand

jury proceedings in *State of Missouri v. Darren Wilson*. Instead, it is a separate action requesting appointment of a special prosecutor to investigate Mr. McCulloch's conduct during those grand jury proceedings, in an effort to determine whether his conduct constituted an abuse of his prosecutorial discretion—i.e., a failure to fulfill his duties of office.

C. Standard of Review

The Missouri statutory framework fails to provide a standard of review for when appointment of a special prosecutor under section 106.240 is appropriate. Case law provides some guidance, however. If a court-appointed special prosecutor pursued a *writ of quo warranto* action post-investigation in this case, she would need to show by a preponderance of the evidence that Mr. McCulloch failed to fulfill his duties of office. *See State ex rel. Coleman v. Trinkle*, 78 P. 854, 856 (Kan. Sup. Ct. 1904) (explaining that in a *writ of quo warranto* proceeding to oust a county prosecutor, the burden is on the state to show by a preponderance of the evidence that the prosecutor failed to fulfill her duties of office).

The showing required for appointment of a special prosecutor must necessarily be less stringent; otherwise, the statutory mechanism for a special prosecutor's appointment and investigation would be rendered a moot exercise. The affiant's burden cannot be the same as that of the special prosecutor. To hold otherwise would turn the affiant's request into a full-blown *writ of quo warranto* proceeding without the benefit of the investigation promised by statute.

In light of this, if the court believes it must address the appropriate standard of review, we suggest the appropriate standard for appointment of a special prosecutor under section 106.240 is either reasonable suspicion or probable cause. A reasonable-suspicion standard would require that the affiant show "[a] particularized and objective basis, supported by specific and articulable facts," for suspecting that a public official has failed to fulfill her duties. *See* Black's Law

Dictionary (9th ed. 2009). A probable-cause standard would require that the affiant show "[a] reasonable ground to suspect that a" public official has failed to fulfill her duties. We believe the reasonable-cause standard is most appropriate, given the investigatory nature of Mr. Simmons's request. However, sufficient publicly available evidence exists to meet either standard of review.

D. Publicly Available Facts Suggest Mr. McCulloch Failed to Fulfill His Duties of Office Regarding His Conduct in the Grand Jury Proceedings

i. Mr. McCulloch Acted Arbitrarily in the Grand Jury Proceedings

From the outset of Mr. McCulloch's investigation into the killing of Michael Brown on August 9, 2014, he publicly announced his plan to provide a grand jury with "all available evidence" to determine whether probable cause existed to bring criminal charges against Mr. Brown's killer, Officer Darren Wilson. *See, e.g.*, Case: *State of Missouri v. Darren Wilson*, Transcript of: Grand Jury Testimony (hereinafter "Grand Jury Testimony"), Volume 1 at 12. His plan was widely described as "unusual." *See, e.g., Obama calls for rule of law, but whose law?*, Des Moines Register, at OP (Nov. 30, 2014). Normally a prosecutor provides a grand jury with the bare minimum amount of evidence needed to support probable cause. *See, e.g.*, Jennifer Mann, et al., *Full airing of evidence in Brown shooting was overwhelming task*, St. Louis Post-Dispatch, at A1 (Nov. 30, 2014). Mr. McCulloch has provided no reason for treating this case differently than other killings. On this basis alone, Mr. McCulloch acted arbitrarily, as his plan was "'without rational basis' and "'without cause based upon law.'" *D.L. Develop., Inc. v. Nance*, 894 S.W.2d 258, 260 (Mo. Ct. App. 1995) (quoting *Canal Nat'l Bank v. United States*, 258 F. Supp. 626 (D. Me. 1966)).

Most salient, Mr. McCulloch provided the grand jury with evidence of Officer Wilson's affirmative defense, including Officer Wilson's own testimony, unchallenged by prosecutors. In Missouri, it is extremely unusual for a prosecutor to call the target of a grand jury investigation

to testify. As the U.S. Supreme Court has explained in an opinion authored by Justice Antonin Scalia, grand jury proceedings are not meant to test the sufficiency of a grand jury target's affirmative defense. *United States v. Williams*, 504 U.S. 36, 51–52 (1992) ("[I]t is the grand jury's function not 'to enquire . . . upon what foundation [the charge may be] denied,' or otherwise to try the suspect's defenses, but only to examine 'upon what foundation [the charge] is made' by the prosecutor. . . . As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented.").

Because defendants are not normally afforded a grand jury hearing on their affirmative defenses in Missouri, Mr. McCulloch acted arbitrarily by granting Officer Wilson that opportunity. *See* Grand Jury Testimony, Volume XXII at 101–04 ("[T]his investigation . . . is not typical on how we would present cases to the grand jury. This is an investigation and I believe . . . that your determination of whether or not force was justified either as self defense or use of force to affect an arrest is a 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.") (statement of Prosecutor Alizadeh to Grand Jury).

Mr. McCulloch treated this case in a special manner without reason or justification. Other Missouri defendants are not afforded an opportunity to present defenses to the grand jury—much less have prosecutors present their defenses for them. That Officer Wilson killed Mr. Brown in his capacity as a police officer is of no import; no special considerations require prosecutors to pursue criminal investigations against police officers differently than those against non-police officers. To hold otherwise would provide police officers with an impermissible and unjustified

favored status under the law. *In re Nofziger*, 938 F.2d 1397, 1402 (D.C. Cir. 1991) (holding that criminal law applies equally to public officials and private citizens).

Finally, the prosecutors admitted to the grand jury not only that their approach was atypical, but that as a result they too were confused about how the grand jury process should occur. Prosecutor Alizadeh admitted to the grand jury on November 11, 2014, eighty-three days into the grand jury investigation, that the prosecutors did not know how to instruct the grand jury regarding its consideration of Officer Wilson's affirmative defense. "The question we don't really know is [whether you must find Officer Wilson acted in self defense] beyond a reasonable doubt, [or] what is the standard by which you have to consider that." She continued, stating, "I don't know, we don't know what kind of instruction to give you on . . . . 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." Grand Jury Testimony, Volume XXII at 101–04.

Given that the prosecution itself did not know how to address Wilson's affirmative defense demonstrates that they acted arbitrarily; not only did Mr. McCulloch act "unusually" by providing all the available evidence, including that of Officer Wilson's affirmative defense, but the unusualness created great confusion among the prosecutors on Mr. McCulloch's staff presenting evidence to the grand jury. This most likely affected the grand jury's weighing of evidence in this case. Such confusion, a result of treating this case differently from others, is a hallmark of arbitrariness.

In sum, publicly available facts exist tending to show Mr. McCulloch acted arbitrarily in his approach to the grand jury proceedings. Therefore, Mr. Simmons has met his burden for appointment of a special prosecutor to further investigate this matter under section 106.240.

ii. Mr. McCulloch Acted in Bad Faith in the Grand Jury Proceedings

The Missouri Supreme Court has described bad faith as follows:

> [B]ad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

*State ex rel. Twiehaus v. Adolf***,** 706 S.W.2d 443, 447 (Mo. Sup. Ct. 1986) (quoting *Catalina v. Crawford*, 483 N.E.2d 486, 490 (Ohio Ct. App. 1984). The facts supporting arbitrariness also support that Mr. McCulloch acted in bad faith. Additional publicly available facts support this inference as well.

First, Mr. McCulloch has admitted to providing the grand jury with testimony he knew to be perjured—that of grand jury witness 40. *See, e.g.*, Peter Holly, *Ferguson prosecutor says he knew some witnesses were 'clearly not telling the truth.' They testified anyway.*, WashingtonPost.com, http://www.washingtonpost.com/news/post-nation/wp/2014/12/20/ferguson-prosecutor-says-he-knew-some-witnesses-were-clearly-not-telling-the-truth-they-testified-anyway/ (Dec. 20, 2014). Despite this, prosecutors did not challenge witness 40's testimony. *See* Grand Jury Testimony, Volume XV at 84–227. In contrast, prosecutors in effect cross-examined witness 34, whose testimony supported a probable cause finding, by outright stating within questioning that the witness's testimony did not comport with the physical evidence or with his prior statement to law enforcement. *See* Grand Jury Testimony, Volume XIII at 115–37.

Second, prosecutors did not challenge Officer Wilson's testimony even though it conflicted with his prior statements to law enforcement and the physical evidence. Grand Jury Testimony, Volume V at 196–281. Officer Wilson first told police investigators that he did not

suspect Mr. Brown or his companion Dorion Johnson of having committed a crime when the physical altercation between him and Mr. Brown occurred. Statement of Darren Wilson to St. Louis County Police Department (Aug. 10, 2014). Yet in his unchallenged grand jury testimony, he testified that he did suspect the pair of having robbed a nearby convenience store when the altercation occurred. Grand Jury Testimony, Volume V at 209. Officer Wilson also told his supervisor that Mr. Brown ran about 30 to 40 feet away from his vehicle before the fatal shooting occurred. *Id.* at 33. Yet Mr. Brown's body was found over 100 feet from Officer Wilson's police vehicle, indicating that Officer Wilson pursued the fleeing Mr. Brown farther than he first stated to his supervisor. *See* Shaun King, *Why exactly did the police lie for 108 days about how far Mike Brown ran from Darren Wilson?*, Daily Kos, http://www.dailykos.com/story/2014/11/26/1347499/-Why-exactly-did-the-police-lie-for-108-days-about-how-far-Mike-Brown-ran-from-Darren-Wilson.

Officer Wilson further testified that when the struggle occurred between himself and Mr. Brown in the police vehicle, Mr. Brown struck him twice and he believed the next punch could be fatal. Grand Jury Testimony, Volume V at 216–17. Prosecutors did not challenge this account, even though Mr. Wilson suffered only minor injuries to his face. Grand Jury Testimony, Volume V at 94–97; *see also* Pictures of Officer Wilson's Injuries, *available at* http://apps.stlpublicradio.org/ferguson-project/photos.html.

Prosecutors similarly failed to challenge Officer Wilson's testimony that he saw Mr. Brown move his hand "under his shirt in his waistband" prior to firing the fatal shots, *see* Grand Jury Testimony, Volume V at 227, even though no forensic evidence showed smears or smudges around Mr. Brown's waistline that would indicate such a movement occurred. Importantly,

prosecutors did not ask its forensic experts to explain how the physical evidence supported Officer Wilson's version of events. *See* Grand Jury Testimony, Volume XIX at 89–139.

In comparison, prosecutors challenged witness 34's testimony, as related above, focusing on the same deficiencies they ignored in Officer Wilson's testimony. Similarly, they treated Mr. Johnson—another witness whose testimony supported probable cause—in a hostile manner. Prosecutors repeatedly questioned Mr. Johnson in an attempt to corroborate Officer Wilson's testimony that Mr. Brown charged at him just before the fatal shots were fired. Grand Jury Testimony, Volume IV at 158–59. When prosecutors failed to obtain such corroboration, they focused on Mr. Johnson's past criminal history in an attempt to discredit him. *Id.* at 171. In contrast, prosecutors did not question Officer Wilson as to his background, despite that others had previously complained of his use of excessive force, *see* Jason Sickles, *Attorney: Officer Darren Wilson roughed up drug suspect*, Yahoo News, http://news.yahoo.com/attomey-ferguson-police-officerdarren-wilson-roughed-up-drug-suspect-231634921.html (Sept. 5, 2014), and that he had been terminated from his prior police job after the municipality disbanded the police force for excessive force and corruption, *see* Prachi Gupta, *Darren Wilson's Former Police Force was disbanded for excessive force and corruption*, Salon, http://www.salon.com/2014/08/24/darren_wilsons_former_police_force_was_disbanded_for_excessive_force_and_corruption/ (Aug. 24, 2014).

Finally, and perhaps most importantly, prosecutors repeatedly questioned witnesses as to whether Mr. Brown had been smoking "wax"—a new form of concentrated, highly potent marijuana. *See, e.g.*, Grand Jury Testimony, Volume XIII at 233; Volume XIX at 70–79. Prosecutors did so despite a complete lack of evidence suggesting Mr. Brown had ingested wax, as opposed to more traditional marijuana. These lines of questioning were purely speculative,

and they appear to contradict the evidence in the record. Witness 34 explained that when he and Mr. Brown smoked marijuana, they did so by replacing a Cigarillo's tobacco with marijuana and then smoking the cigar. Grand Jury Testimony, Volume XIII at 97–104. One cannot smoke wax in this way; as users must vaporize wax to ingest it. *See, e.g.*, Joe Mozingo, *Blowing Up: Burn clinics are treating dozens of butane hash 'chefs' critically injured by explosions during the dangerous process, a product of California's unregulated marijuana industry*, L.A. Times, at Main News (Feb. 6, 2014).

By contrast, prosecutors did not question Officer Wilson over his toxicology report results, *see generally* Grand Jury Proceedings, Volume V at 196–281, which revealed high levels of creatinine in his system, *see* Darren Wilson Toxicology Report at 2. High levels of creatintine indicate use of anabolic steroids, an illegal substance that is known to increase violent propensity. *See, e.g.*, HealthTap, Top 10 Doctor Insights on Anabolic Steroids and High Creatinine Levels, https://www.healthtap.com/topics/anabolic-steroids-and-high-creatinine-levels; *see also* National Institute on Drug Abuse, *Drug Facts: Anabolic Steroids*, http://www.drugabuse.gov/publications/drugfacts/anabolic-steroids (July 2012). In short, prosecutors went on a fishing expedition to show that Mr. Brown was in some way incapacitated, but did nothing to investigate Officer Wilson's toxicology results, which suggest he was susceptible to bouts of rage when he shot Mr. Brown.

Fourth, the prosecutors initially instructed the grand jury to apply Missouri's now-defunct statute on justification of police use of deadly force to Officer Wilson's affirmative defense—an instruction prosecutors provided to the grand jury just before it heard Officer Wilson's testimony, *see* Grand Jury Testimony, Vol. V at 5 (Sept. 16, 2014). Moreover, even using that defunct statute, the prosecutors failed to produce necessary evidence of justification. According

to Missouri Revised Statute section 563.046, a police officer may use deadly force to prevent someone suspected of a felony from fleeing. The prosecutors presented no evidence suggesting Officer Wilson believed Mr. Brown had committed a felony—as opposed to a misdemeanor—when he shot and killed Mr. Brown. The instruction was not changed to reflect its unconstitutional status until after all evidence had been presented to the grand jury, creating confusion for the grand jurors.

The Missouri statute also allows for use of deadly force if the officer reasonably believes that someone "[m]ay otherwise endanger life or inflict serious physical injury unless arrested without delay." Mo. Rev. Stat. § 563.046.3(2)(c). The only evidence supporting such a finding comes from Officer Wilson's own self-serving, conclusory testimony, which he offered not in response to a specific query but instead as an answer to the prosecutor's following question: "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?" Grand Jury Testimony, Volume V at 280–81.[3] This unsolicited and unchallenged testimony alone cannot justify Officer Wilson's use of deadly force upon an unarmed, fleeing person.

Fifth, the prosecutors did not accurately explain to the grand jury on the record why section 563.046 is unconstitutional and therefore no longer good law. We know that prosecutors provided a new justification standard to the grand jury in written form upon conclusion of the presentation of evidence. Grand Jury Proceedings, Volume XXIV at 135–38. Prosecutors

[3]Officer Wilson's stated justification for pursuing the fleeing Mr. Brown and firing his weapon at him is as follows: "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 Transcripts, Volume V at 281.

intimated that the new justification standard rectified section 563.046 with the U.S. Supreme Court's holding in *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding police officers may use deadly force against someone only if they have probable cause to believe that person presents a threat of death or significant physical harm to the officer or others). However, because those written instructions have not been publicly released, it is not publicly known whether the eventual justification-defense instruction relied upon by the grand jury in fact complied with *Garner*, or whether prosecutors used the appropriate MAI instruction, MAI-CR § 306.14—which they should have used from the beginning of the grand jury process.

Given the prosecutors' confusion on this issue, a reasonable implication is that the written instructions were not appropriate and that the prosecutors did not correct section 563.046 to comply with *Garner*; for instance, did the written instruction keep the "fleeing felon" requirement? If so, it suffers the same evidentiary fault as the inappropriate instruction previously provided to the grand jury. *Garner*, a case decided thirty years ago, is not new law. Mr. McCulloch and his subordinates are all well experienced in criminal law, making it difficult to believe they were unaware of *Garner*'s holding when conducting grand jury proceedings. These questions therefore give rise to reasonable implications that the prosecutors intentionally misled the grand jury regarding the applicable standard for Officer Wilson's justification defense.

Sixth, Mr. McCulloch has shown a bias in favor of police officers throughout his career. Mr. McCulloch has significant ties to the St. Louis police community; his father was a police officer killed in the line of duty. *See* Kimberly Kindy, *Prosecutor faces challenge in Missouri*, Wash. Post, at A04 (Aug. 16, 2014). He is currently an officer of the nonprofit organization The BackStoppers, Inc. (by virtue of being its "immediate past president"), an organization that

provides monetary support for the families of police officers killed in the line of duty. *See* The BackStoppers, Inc., http://www.backstoppers.org/board.html.

In 2000 when two police officers killed two unarmed individuals at a fast food restaurant, Mr. McCulloch publicly maligned the victims' characters, calling them "bums." Greg Freeman, *Questions Still Swirl Around Killings of 2 at Jack In The Box*, St. Louis Post-Dispatch, at B1 (May 7, 2002). In that case, a grand jury returned a no true bill. However, a later federal inquiry revealed significant flaws with the case, including grand jury testimony that undercut the police officers' claims of self defense. *Id.* Despite those facts, Mr. McCulloch stated that "[f]rom my view, (the officers) acted in justifiable self defense and a reasonable fear." *Reaction to Findings*, St. Louis Post-Dispatch, at A11 (Oct. 4, 2001).

Based on these publicly available facts, reasonable grounds exist showing that Mr. McCulloch acted in bad faith in his presentation of evidence to the grand jury. He, and by extension his officers, (1) provided the grand jury with unchallenged perjured testimony; (2) challenged witnesses whose testimony favored a probable-cause finding, but failed to similarly challenge the testimony of witness 40 and Officer Wilson; (3) focused on Mr. Brown's marijuana use without also focusing on Officer Wilson's likely use of anabolic steroids; (4) failed to provide the grand jury with evidence required to show justification under now-defunct section 563.046; (5) failed to explain to the grand jury the constitutional limits on police use of deadly force, and potentially provided the grand jury with unconstitutional instructions; and (6) evinced a bias in favor of police officers in private life and in investigating other police killings.

IV. Conclusion

Based on the foregoing, there is sufficient cause for this Court to appoint a special prosecutor to investigate Mr. McCulloch's conduct towards the grand jury proceedings. This

Court has jurisdiction over this matter, Mr. Simmons has standing in this Court to request appointment of a special prosecutor under section 106.240, and the standard of review is something lower than a preponderance of the evidence. Finally, publicly available facts, as attested to in Mr. Simmons's affidavit, tend to show that Mr. McCulloch failed to fulfill his duties of office during the grand jury proceedings. His conduct towards the grand jury was arbitrary and in bad faith. This Court should therefore appoint a special prosecutor pursuant to section 106.240 to investigate and, if warranted, to bring a *writ of quo warranto* action requesting Mr. McCulloch's ouster from office.

Respectfully submitted,

/s/ Jerryl Christmas
Jerryl T.Christmas, #43570
Christmas & Associates
Bank of America Building
4625 Lindell Boulevard, Suite500
St. Louis, Mo 63108
314-652-2200 24hrs
314-361-2525 Fax
jt@christmaslaw.net

/s/ Maggie Ellinger-Locke
Maggie Ellinger-Locke, #63802
6925 Cornell
University City, MO 63130
(314) 805-7335
Ellinger.Locke@gmail.com