How the St. Louis prosecuting attorney manipulated the Ferguson grand jury

John Burton
3 December 2014

Over the past week, multiple media outlets and commentators have claimed that Prosecuting Attorney Robert McCulloch's announcement that the St. Louis County grand jury would not indict Ferguson police officer Darren Wilson established that his firing of twelve shots at unarmed 18-year-old Michael Brown, killing him, was not a criminal act.

Some have even referred to the grand jury's conclusion as a "verdict," as if there had been the equivalent of a trial. The *Wall Street Journal*, for example, praised the non-indictment for "the respect it shows for the rule of law." The newspaper also hailed the grand jury process' "transparency."

The only thing transparent here is the fraudulent way the St. Louis County grand jury was manipulated to provide a fig leaf of constitutional "due process" for a prior decision not to prosecute Wilson.

Under the US Constitution and the law, guilt or innocence can be determined only through a public trial, with adversary proceedings. While a provision of the United States Constitution requires grand jury indictments for felony prosecutions by federal authorities, most states, including Missouri, use preliminary hearings.

Grand juries are held in secret. There is no judge and no adversary process. The only lawyers allowed to participate in the process are prosecutors. Rules of evidence do not apply because there is no defense attorney to raise objections and no judge to rule on them.

The rules governing grand juries are so loose and so favorable to prosecutors, the grand jury has often been the preferred route for launching political frame-ups of socialists and working class militants.

In contrast, preliminary hearings are presided over by a judge and open to the public. Counsel for the accused can cross-examine the witnesses, object to the admissibility of evidence, and present exonerating testimony, such as an alibi.

The nominal task of both grand juries and preliminary hearings is the same. They do not determine guilt or innocence, but only whether the prosecuting authority has met the modest burden of producing enough evidence to justify subjecting the accused to a felony trial—in other words, whether the prosecution has "probable cause" to convene a jury trial.

When determining "probable cause," the witnesses whose testimony supports prosecution are assumed to be telling the truth, and conflicts in the evidence are resolved in favor of prosecution. At the subsequent trial, however, the credibility of witnesses is determined and evidence weighed by a jury charged with determining whether the prosecution has met the heavy burden of proving guilt beyond a reasonable doubt.

Prosecutors such as McCulloch, not grand juries or preliminary hearing judges, decide whether to file and pursue criminal charges. Historically, the grand jury arose as a democratic measure to protect an accused "against hasty, malicious and oppressive prosecution," as the Supreme Court once stated (*Wood v. Georgia*, 1962). A decision by arch-conservative Supreme Court Justice Antonin Scalia—widely circulated recently on the Internet—explained that "the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge" (*United States v. Williams*, 1992).

Quoting William Blackstone, the preeminent legal authority of 18th-century England, Scalia held that a grand jury need "only to hear evidence on behalf of the prosecution, for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." Denying the request of a criminal defendant to have an indictment quashed, Scalia emphasized that "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."

Ordinarily prosecutors make brief, one-sided presentations to grand juries, which are generally considered as their rubber stamps. Data support that view. According the United States Bureau of Justice Statistics, federal prosecutors presented 162,000 cases to grand juries in 2010, failing to obtain indictments only 11 times, a success rate greater than 99.99 percent.

Thus, McCulloch's announcement that Wilson will not be prosecuted because of the grand jury's decision is nonsense. The St. Louis County grand jury failed to return an indictment because a decision had been made to allow the killer cop to go free.

The two assistant prosecutors presented no coherent theory of criminal conduct to the grand jurors, with supporting evidence and legal citations. Instead, they presented meandering and largely irrelevant testimony on 24 separate days over a three-month period, along with tens of hours of recorded statements, reams of documents, and hundreds of photographs.

In effect, the St. Louis County Prosecuting Attorney's office backed up a virtual dump truck of unprocessed materials—with plenty of waste burying the important evidence—and emptied it onto the 12 grand jurors, who had no ability to sift through it all.

The proceedings' lack of seriousness was apparent from the outset, when McCulloch introduced the two "assistant prosecuting attorneys" to the grand jurors as "Kathi" and "Sheila," rather than "Ms. Alizadeh" and "Ms. Whirley."

Bias in favor of Wilson emerged with the second witness, the detective for the St. Louis County Police Department who processed the crime scene. (Like almost all witnesses, his name is redacted from the transcripts made public.) To explain why his reports referred to the killer, Darren Wilson, rather than the deceased, Michael Brown, as the "victim," and to the crime itself as an assault, rather than a homicide, the detective testified: "Any time I'm involved in an officer involved shooting, be it a fatal one or nonfatal, it is always during my initial investigation listed as an assault on law enforcement."

Repeatedly, the prosecuting attorneys discredited eyewitnesses whose testimony was unfavorable to Wilson—those who said Brown was shot with his hands up, or that he was not charging at the officer—while building up that of witnesses with favorable testimony, especially Wilson himself.

On September 16, "Sheila" gently walked Wilson through his testimony, her first question being: "You want to be here and tell the jurors what happened; is that correct?"

No effort was made to cross-examine Wilson, to bring out the contradictions and absurdities in his testimony. Instead, Wilson—after asking "Sheila," "You want me to just go with the whole thing?"—told his lengthy narrative without challenge.

Wilson, in fact, admitted to actions that were clearly reckless and provocative, the sort of conduct sufficient to prove the crime of manslaughter, if not murder. Without the prosecutors pointing that out to the grand jurors, however, there was little possibility of an indictment.

For example, Wilson described driving up to Brown, who was walking in the street with his friend, Dorian Johnson, and telling the two young men to use the sidewalk. As they walked away, Wilson requested a backup car after they continued walking in the street.

Without waiting for the second officer—a basic rule of officer safety—Wilson threw his SUV in reverse and backed up around the two young men, cutting them off. Wilson testified he called them over to his window while opening his car door directly into them.

All witnesses testified that Brown and Wilson were grappling at the car window. "Sheila" did not ask Wilson why he did not simply drive his car about 10 feet in either direction, which would have ended the altercation without anyone getting hurt. Instead, she allowed Wilson to describe to the grand jury how he grabbed Brown's arm, but "felt like a five-year-old holding onto Hulk Hogan."

Supposedly after getting hit in the face—photographs show no significant injury—Wilson testified he drew his gun and threatened to shoot Brown, who "immediately grabs my gun."

A lawyer seeking a manslaughter indictment would have had a field day with this highly incriminating testimony. Wilson is right-handed, meaning that when Brown was at the window, Wilson's firearm was holstered on the hip furthest away from the window, well out of Brown's reach.

Moreover, all police officers use special retention holsters, making the removal of a firearm other than by the officer wearing it virtually impossible. So, according to Wilson, he pulled his firearm out of its secured location in response to a minor altercation that could have been ended by driving a few feet, and—according to Wilson's description—virtually handed the weapon to his previously unarmed assailant.

A zealous prosecutor could easily convince a grand jury that Wilson's outrageous escalation to deadly force, which directly led to Michael Brown's death, constituted reckless conduct that would support a conviction of manslaughter.

After Wilson fired twice, hitting Brown in the hand, the young man tried to flee to safety. Wilson testified he got out of the car and emptied his clip, firing ten more rounds and killing the unarmed young man, whose remains were found 125 feet away from Wilson's car.

Had the prosecuting attorneys recommended the appropriate criminal charges to the grand jury, there no doubt would have been an indictment. McCulloch has never prosecuted a shooting by police in 23 years as the prosecuting attorney. Four times he convened a grand jury without getting an indictment. Now he can add a fifth.

The travesty of justice in the police murder of Michael Brown is not simply, or primarily, a question of legal procedure. It is a politically motivated act intended to send a clear signal that police have free rein to brutalize and even murder members of the working class. It is the accompaniment in the realm of jurisprudence to the tactics of mass intimidation and repression—including preemptive states of emergency, the indefinite deployment of National Guard troops, and the suspension of civil liberties—seen on the streets of Ferguson.

The legal forms are being altered in accordance with the ruling class' turn to police state methods in defense of a system dominated by colossal levels of social inequality.