

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

State ex rel. John Roe,)	
Relator,)	
)	
v.)	No. _____
)	
Honorable Steven H. Goldman,)	
Circuit Judge, Division Twelve,)	
Twenty-First Judicial Circuit,)	
St. Louis County, Missouri,)	
)	
Respondent.)	

Suggestions in Support of Relator's Petition for Writ of Prohibition

I. Relator was removed as foreperson of the Grand Jury without statutory authority and in violation of Relator's constitutional right to continue his service.

Relator was selected by Respondent to serve as the Foreperson of the Grand Jury of St. Louis County September 2015 Term. He was sworn in and served as the foreperson beginning on September 16, 2015. Relator meets all of the qualifications to serve as a grand juror. No misconduct is alleged.

On September 28, 2015, however, Respondent removed Relator from Grand Jury service. Respondent did so at the behest of the Prosecuting Attorney for St. Louis County. The Prosecuting Attorney intimated to Respondent that he would not present cases to the Grand Jury so long as Respondent remained a grand juror. The proffered explanation for the Prosecuting Attorney's urging that Relator be removed was that, in his previous employment as a lawyer for a nonprofit advocacy organization, Relator had

represented parties in cases against the Prosecuting Attorney (in his official capacity only)¹ and St. Louis County. Although not finding any actual conflict, Respondent opined this created a potential conflict of interest such that Respondent “ha[d] to, pursuant to statute, remove [Relator] from the grand jury.”

No statute authorizes—much less requires—removal of a grand juror under these circumstances. Section 540.060 allows that:

[b]efore a grand juror is sworn, any person held to answer a criminal charge may object to the competency of the grand juror on the ground that the grand juror is the prosecutor or complainant upon any charge against such person, or that the grand juror is a witness on the part of the prosecutor and has been summoned or bound in a recognizance as such.²

“If such objection is established, the person so challenged shall be excused.” *Id.* This section is inapplicable because Relator had already been sworn, the Prosecuting Attorney is not a “person held to answer to a criminal charge,” and none of the reasons provided in

¹ These cases were brought pursuant to 42 U.S.C. § 1983. “A [section 1983] suit against a government officer in his official capacity is functionally equivalent to a suit against the employing governmental entity.” *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010).

² All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

the section are present. Moreover, nothing in sections 494.400 to 494.505, which describe juror qualifications and selection, disqualifies Relator from serving as a grand juror. The statutes are explicit: No challenge to a grand juror is allowed for any other reason other than provided by statute. Mo. Rev. Stat. § 540.070 (“No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed except as provided in section 540.045 and in section 540.050.”); *see also State v. Holcomb*, 86 Mo. 371, 376 (1885) (“Challenge to the array, or to any one of the grand jurors, is no longer allowed, except on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution.”). Thus, there is no statutory authority for Respondent’s order removing Relator from the Grand Jury.

It is not surprising that Missouri statutes make it difficult to remove a grand juror who has been sworn and is serving.

First, as Respondent recognized, denying a person participation in jury service can itself violate the Constitution. *See Powers v. Ohio*, 499 U.S. 400, 407-10 (1991) (recognizing juror has right to “significant opportunity to participate in civic life” that may not be taken away for unconstitutional reasons). And Relator’s involvement in litigation with a nonprofit advocacy organization is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 451, 428-29 (1963); *see also In re Primus*, 436 U.S. 412, 425 n.16 (1978). Even if removal of Relator from the Grand Jury were permitted by statute—which it is not—because the removal is premised on Relator’s constitutionally protected activity, the removal “must withstand that ‘exacting scrutiny applicable to limitations on core First Amendment rights’” *In re Primus*, 436 U.S. at 432 (quoting *Buckley v.*

Valeo, 424 U.S. 1, 44-45 (1976)). Removing Relator from the Grand Jury violates Relator's constitutional rights.

Second, and more fundamentally, tampering with an empanelled Grand Jury defeats the very purpose of grand juries, which is to be “a primary security to the innocent against hasty, malicious, and oppressive persecution [and serve] the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.” *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The Grand Jury's “responsibilities . . . include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.” *United States v. Calandra*, 414 U.S. 338, 343 (1974); *see also Powers*, 499 U.S. at 412 (“The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors.”). Removing Relator from the Grand Jury violates the rights of persons whom the Prosecuting Attorney seeks to indict in front of the altered Grand Jury panel.

But even if a conflict of interest with the Prosecuting Attorney could be a basis for removing the Grand Jury Foreperson in the midst of its term, there is no conflict here. It is unremarkable that an attorney practicing in the St. Louis area would have litigated against St. Louis County. Respondent seemed troubled with the notion (reported to him by the Prosecuting Attorney) that Relator had been involved in a suit “against [the Prosecuting Attorney] for not handling the grand jury properly.” There was such a lawsuit, but neither Relator nor his former employer was involved. That misinformation

seems to be conflated with accurate information: Relator did work as a staff attorney at the American Civil Liberties Union of Missouri when the ACLU's attorneys began representation of a former grand juror who is challenging certain Missouri statutes related to grand jury secrecy.³ And, as an ACLU staff attorney, Relator also represented plaintiffs subjected to unconstitutional policies of the St. Louis County Police prohibiting individuals from standing still on public sidewalks and recording the activities of the police as well as reporters who were arrested although there is no probable cause to believe they have committed a crime.⁴ Although Relator's involvement in these cases might suggest that Relator would not be a pushover if the Prosecuting Attorney attempted to force his will upon the Grand Jury, he took his oath seriously and served as foreperson of the Grand Jury for more than fifty cases without "any particular problem[.]" It is likely that Relator would not have gone along with a prosecution effort to indict the proverbial ham sandwich, but nothing in the record or elsewhere suggests that he could not continue

³ The Prosecuting Attorney is named as a defendant in his official capacity in this suit only because his office is charged with enforcement of the challenged statutes.

⁴ Each of these cases was resolved favorably to the plaintiffs. The challenges to policies resulted in injunctions enjoining the policies. The challenges to the arrests resulted in agreements from the County to confess that there is no probable cause to believe the reporters had committed a crime. In these cases, Relator helped ensure that law enforcement officials in St. Louis County abide by the constitution, a position that in no way conflicts with the Prosecuting Attorney's own obligations.

to serve on the Grand Jury without “any particular problem,” as he had been before being removed.

Respondent seemed concerned that those indicted might challenge their indictments because of Relator’s service on the Grand Jury. Indeed, the Prosecuting Attorney told Respondent that he “was thinking about not presenting evidence to the grand jury for fear that the indictments might be compromised in the future.” But it is not plausible that a defendant would be able to challenge an indictment on the basis that a particular grand juror was too adverse to the Prosecuting Attorney.⁵ Neither Respondent nor the Prosecuting Attorney provided any explanation of how the “potential conflict” could manifest itself. Under Respondent’s reasoning, the Prosecuting Attorney could have any lawyer whose previous work involved suing the police or the county—or any criminal defense attorney—removed from a Grand Juror in the middle of a term. Indeed, such reasoning could bar from grand jury service anyone who ever demonstrated against St. Louis County policies, made critical public comments at County Council meetings, or supported the Prosecuting Attorney’s political opponents.

⁵ However, it *is* plausible that challenges to indictments will come from defendants who learn they were indicted after the Prosecuting Attorney successfully persuaded Respondent to remove a Grand Juror for having, as an attorney, challenged unconstitutional actions by the St. Louis County Police and, in the Prosecuting Attorney’s mistaken view, challenged the Prosecuting Attorney’s own conduct.

II. Writ of prohibition that prohibits Respondent from enforcing his order removing Relator from the Grand Jury is appropriate here.

A writ of prohibition is the proper mechanism for Relator to seek review of Respondent's decision to discharge Relator from grand jury service.

Prohibition is appropriate when there is an important legal issue that will otherwise evade review. *In re N.D.C.*, 229 S.W.3d 602, 604 (Mo. banc 2007), *as modified on denial of reh'g* (Aug. 21, 2007) ("A writ of prohibition is appropriate where there is an important question of law decided erroneously that would otherwise escape review."). Although statutes strictly limit when and why a grand juror can be removed, Relator was removed in the midst of a Grand Jury Term on a basis not allowed by statute. Moreover, Respondent's basis for removing Relator during the Term is inadequate, as a matter of law, even if a potential conflict of interest with the prosecutor were a statutory basis for removing a member of an already sitting grand jury.

Prohibition is also appropriate because this case raises important constitutional issues. *State ex rel. St. Louis Post-Dispatch, LLC v. Garvey*, 179 S.W.3d 899, 900 (Mo. banc 2005) ("A writ of prohibition may be issued when a party raises an important constitutional issue and has no other adequate legal remedy to pursue the issue."). The right of a grand juror to continue his service is protected by the Constitution in any case. *See Powers*, 499 U.S. at 407-10. But here there is more at stake because, at the urging of the Prosecuting Attorney, Respondent removed Relator from the Grand Jury solely because of Relator's First Amendment-protected activities as an attorney employed by a nonprofit advocacy organization. *See Button*, 371 U.S. at 428-29; *In re Primus*, 436 U.S.

at 425 n.16. This case raises important constitutional issues for which there is no other adequate legal remedy.

Finally, prohibition is warranted because Relator “may suffer irreparable harm if relief is not granted.” *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. banc 2014). Relator has not only been deprived of the constitutional right to finish his term—an ongoing harm he continues to suffer—he is now ineligible to serve on another grand jury for ten years. Mo. Rev. Stat. § 540.045 (“any person who has served as a member or alternate of a grand jury, or alternate, within ten years next preceding his selection shall not be eligible for service as a grand juror”). What is more, Respondent’s order deprives Relator of his constitutionally protected right *because* he engaged in another constitutionally protected activity. This also constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

III. Conclusion

Respondent improperly removed Relator from his position on the Grand Jury. Because Respondent’s order was made without statutory authority—and in violation of the statutory provision prohibiting challenges to grand jurors except as provided by statute, Respondent should be prohibited from enforcing it. Moreover, prohibition is warranted here because removal from the Grand Jury violates Relator’s constitutional right to continue serving on the Grand Jury and the removal is in retaliation for Relator’s First Amendment-protected activity. Finally, enforcement of Respondent’s order allows

the Prosecuting Attorney to alter the makeup of an ongoing grand jury, which is contrary to the very purpose and function of the grand jury.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a copy of the foregoing was filed electronically on and served upon all counsel of record on October 16, 2015. Also on October 16, 2015, a copy of the foregoing was sent by first class mail to:

The Honorable Steven H. Goldman
St. Louis County Circuit Court
105 South Central Avenue
Clayton, Missouri 63105

/s/ Anthony E. Rothert