

<b>DISTRICT COURT, LA PLATA COUNTY, COLORADO</b> 1060 East Second Avenue Durango, Colorado 81301	DATE FILED: July 26, 2018 2:47 PM FILING ID: 885B80764A145 CASE NUMBER: 2017CR343
<b>THE PEOPLE OF THE STATE OF COLORADO,</b> Plaintiff,  v.  <b>MARK REDWINE,</b> Defendant	σ COURT USE ONLY σ
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<b>MOTION FOR CHANGE OF VENUE AND REQUEST FOR EVIDENTIARY HEARING PRIOR TO <i>VOIR DIRE</i> EXAMINATION BECAUSE MR. REDWINE CANNOT RECEIVE A FAIR TRIAL BY AN IMPARTIAL JURY IN LA PLATA COUNTY DUE TO PREJUDICIAL PRE-TRIAL PRESS COVERAGE [D-11]</b>	

PUBLIC ACCESS

Mark Redwine, through counsel, respectfully moves this Court to order a change of venue. It will be impossible for Mr. Redwine to receive a fair trial in La Plata County due to massive, pervasive, and prejudicial pre-trial publicity, and because there is a nexus between the prejudicial pre-trial publicity and the local jury pool. A change of venue is required to protect Mr. Redwine's federal and state due process rights to a fair trial by an impartial jury.

From the inception of this case, when Dylan Redwine was reported missing on November 19, 2012, local news sources have been publishing prejudicial and sensationalized articles. The relentless and frenzied media coverage of the last five and half years has irreparably damaged the jury pool in La Plata County and a change of venue is therefore required.

#### Summary of Procedural History

1. Mark Redwine reported Dylan Redwine missing on November 19, 2012. Discovery page 3.
2. On June 23, 2013 Dylan Redwine's left and right femurs, his right clavicle, and his right tibia were discovered on Middle Mountain. Discovery page 571. On June 27, 2013 the Colorado Bureau of Investigation confirmed that the remains matched Dylan Redwine's DNA profile. Discovery page 569.

3. On November 3, 2015 a human skull was found on Middle mountain. Discovery page 5995. On May 25, 2016 the University of North Texas Center for Human Identification confirmed that the skull was a match for Dylan Redwine. Discovery page 6019.
4. On July 20, 2017 an indictment was returned and a warrant was issued for Mr. Redwine's arrest. Mr. Redwine was arrested in Bellingham, Washington on July 21, 2017. Discovery page 14,666.
5. Mr. Redwine entered a plea of not guilty on June 29, 2018.

### Argument

#### **MR. REDWINE CANNOT RECEIVE A FAIR TRIAL IN LA PLATA COUNTY DUE TO THE MASSIVE, PERVASIVE, AND PREJUDICIAL PRE-TRIAL PUBLICITY, AND BECAUSE THERE IS A NEXUS BETWEEN THE PREJUDICIAL PRE-TRIAL PUBLICITY AND THE LOCAL JURY POOL**

1. A defendant is entitled to apply for a change of venue in any criminal case. *Groppi v. Wisconsin*, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971).
2. Procedural rules relating to applications for change of venue should be liberally construed. *Sollitt v. District Court In and For Routt County*, 1972, 502 P.2d 1108, 180 Colo. 114.
3. A defendant who believes venue is improper must challenge venue in advance of the trial or any objection is deemed waived. Any challenge to the place of trial must be made by written motion filed no later than twenty days after arraignment, except for good cause shown. C.R.S.A. § 18-1-202(11); *People v. Burgess*, 946 P.2d 565 (Colo.App.1997), cert. denied (Colo.1997).
4. The Due Process clauses of the Colorado Constitution and United States Constitution guarantee every defendant in a criminal case the right to a fair trial. U.S. Const. amend. XIV; Colo. Const. art. 2, § 25. An impartial jury is fundamental to the exercise of a criminal defendant's due process and fair trial rights. *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000).
5. The constitutional standard of fairness requires that a defendant have a panel of impartial and unbiased jurors. *People v. McCrary*, 549 P.2d 1320 (1976). An impartial jury renders a verdict free from outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966)(stating, "The theory of our system is that the conclusions to be reached in a case will be inducted only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.").
6. A defendant's state and federal due process rights are violated when any member of the jury relies on outside information in its conclusions. *People v. Harmon*, 284 P.3d 124 (Colo. App. 2011); *See also Marshall v. United States*, 360 U.S. 310, 313 (1959)(setting aside a conviction when jurors were exposed through media to evidence that was inadmissible at trial).

7. A trial judge has much discretion to order a change of venue upon a showing of widespread pre-trial publicity and may find it prudent to do so in order to facilitate the process of voir dire, especially when no hardship is thereby imposed on the witnesses. *McCrary*, 549 P.2d at 1325.
8. A defendant is entitled to a change of venue prior to jury selection if he can show either (1) the existence of “massive, pervasive, and prejudicial publicity that created a presumption that the defendant was denied a fair trial,” regardless of bias disclosed in voir dire, or (2) a nexus between the jury panel and extensive pre-trial publicity that created actual prejudice against the defendant, thereby denying him or her a fair trial. *People v. Munsey*, 232 P.3d 113 (Colo. App. 2009).
9. The critical inquiry is whether the publicity has prejudiced the defendant's right to a trial by an impartial jury; that is, whether the publicity has created in the jurors such fixed opinions that they cannot judge the case impartially. *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).

**I. THIS COURT SHOULD PRESUME A VIOLATION OF MR. REDWINE'S RIGHT TO DUE PROCESS OF LAW, BECAUSE OF THE MASSIVE, PERVASIVE, AND PREJUDICIAL PRE-TRIAL PUBLICITY SURROUNDING HIS SON'S DEATH**

1. Courts may presume that a fair trial is not possible in the local jurisdiction when the media coverage is “massive, pervasive, and prejudicial.” *McCrary*, 549 P.2d at 1325. Under this standard, the defendant need not establish actual prejudice because the amount and nature of the media coverage alone is sufficient to justify a change of venue. *See Id.*
2. In *McCrary*, the Supreme Court of Colorado articulated a number of factors that courts need to consider when determining whether there exists massive, pervasive and prejudicial pre-trial publicity. *Id.* Those factors include: (1) the size and type of locale, (2) reputation of the victim, (3) sources of the articles, (4) specificity of the accounts of certain facts, (5) volume and intensity of coverage, (6) extent of comment by the articles regarding the facts of the case, (7) manner of presentation, (8) proximity of the media coverage to the time of trial, (9) and publication of highly incriminating facts not admissible at trial. *Id.*
3. The Court in *McCrary* ultimately denied the defendant's motion for a change of venue, finding that no massive, pervasive and pre-trial publicity existed. *Id.* It specifically relied on the lack of editorial comments regarding defendant's guilt or innocence, the one and a half year time lag between the publicity and the trial, and the small number of prejudicial news stories. *Id.*; *See also Sergeant*, 497 P. 2d at 986 (holding against the presumption that the defendant was denied a fair trial because the amount of coverage was inordinate and defendant initiated some of the coverage himself); *People v. Dore*, 997 P.2d 1214, 1220 (Colo. App. 1999)(finding that the denial of a fair trial cannot be presumed under the massive, pervasive and prejudicial pre-trial publicity standard because the media coverage was balanced and some articles conveyed sympathy to the defendant).

4. Mr. Redwine's trial should not be held in La Plata County because the factors articulated by the Supreme Court of Colorado in *McCrary* demonstrate the presence of massive, pervasive, and prejudicial pre-trial publicity.

a. Size and type of locale: Jefferson County, the locale at issue in *McCrary*, is over ten times the size of La Plata County. Jefferson County is home to 574,613 people in July of 2017, whereas La Plata County is home to 55,589 people. <https://www.census.gov/quickfacts/fact/table/laplatacountycolorado,jeffersoncountycolorado/PST045217> (US Census data on La Plata and Jefferson counties). Historical data from the US Census Bureau shows that Jefferson county had a population of 249,216 in 1971 – the year Mr. McCrary was arrested. That same year, La Plata County had a population of 20,131. In 1971, Jefferson County was twelve times the size of La Plata County. [https://www.google.com/publicdata/explorer?ds=kf7tgg1uo9ude\\_&met\\_y=population&hl=en&dl=en#!ctype=l&strail=false&bcs=d&nselm=h&met\\_y=population&scale\\_y=lin&ind\\_y=false&rdim=county&idim=county:08059:08067&ifdim=county:state:08000&hl=en\\_US&dl=en&ind=false](https://www.google.com/publicdata/explorer?ds=kf7tgg1uo9ude_&met_y=population&hl=en&dl=en#!ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=county&idim=county:08059:08067&ifdim=county:state:08000&hl=en_US&dl=en&ind=false) (Historical US Census data on La Plata and Jefferson counties).

b. Reputation of the victim: The articles about Mr. Redwine's case all read as being sympathetic toward Dylan Redwine who was 13 years old at the time of his disappearance. This is understandable given Dylan's age, but while some published materials have been merely sympathetic toward Dylan, other media outlets – especially social media – have declared that Dylan Redwine is entitled to justice and that justice is defined solely as the conviction of Mark Redwine. This is evidenced by the names users chose for their Facebook groups: Arrest Mark Redwine, Arrest-Imprison Mark Redwine, Dylan Redwine – the Journey to Justice, Dylan Redwine Warriors, Justice for Dylan Redwine, [REDACTED] and People of the State of Colorado VS Mark Allen Redwine. See Attached Affidavit from Colorado State Public Defender Investigator, James Steindler.

c. Sources of the articles: To date, the Durango Herald has printed over 150 articles about Mark and Dylan Redwine. In an article on April 24, 2018 the Durango Herald informed readers that their staff had won first place in the annual Colorado Associated Press Editors and Reporters contest for their series "Mark Redwine". See Exhibit A.

The Pine River Times, whose readership includes Bayfield and the Vallecito communities, has printed almost forty articles about Mark and Dylan Redwine. The Pine River Times was also the recipient of a journalism award in 2015 for their work reporting on Mark and Dylan Redwine. See Exhibit B.

Because articles about this case have been published regularly in the most widely-read publications in the area, La Plata County residents have

undoubtedly been influenced by the cumulative effect. In addition, these articles are all available online or on the publication's Facebook pages. To be sure, the Facebook material was not generated by La Plata County residents in every instance, but La Plata County residents are the group most likely to see and read Dylan Redwine material on their news feeds.

d. Specificity of the accounts of certain facts:

The first article about Dylan Redwine appeared in the Durango Herald on November 20, 2012. Since that time, the local media has not shied away from publishing all purported facts and allegations available to them. With very few exceptions, these articles have all published the facts most favorable to the Prosecution – and set forth many facts that are likely key to the Prosecution's case in chief.

As early as Monday November 28, 2012 the Durango Herald began publishing timelines laying out all the facts known to media that that time. *See* Exhibit C. In an article from March of 2013, the Durango Herald reported that the postal worker had not seen Dylan on November 19, 2012 and that the man seen looking for gas that day had been cleared. *See* Exhibit D.

On July 24, 2017 the Durango Herald published an article that provided many new details gleaned from the indictment. The article reported that Dylan's blood was found in his father's living room; a cadaver dog detected a deceased person had been in the living room and in the bed of Redwine's pickup; Dylan's skull was found in November 2015 just off Middle Mountain Road and had what appeared to be knife markings; and the skull appears to have been moved from a previous location, where earlier remains were found. The article also included a description of surveillance video and text messages Dylan sent; discusses the theory that an animal potentially moved Dylan's remains; states that Dylan's skull had injuries consistent with blunt force trauma and two small markings from a knife. *See* Exhibit E.

Most recently, on July 11, 2018, the Durango Herald published an article outlining the Prosecution's motive and many previously unpublished facts about the case. The article contains quotes from the Prosecution's motions and goes into great detail. Specifically, the article tells potential jurors the content of statements the Prosecution will attempt to introduce at trial. Statements Dylan allegedly made to the family court judge, his brother, and his mother. *See* Exhibit F.

The main focus of the article is on the alleged motive. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, the article tells potential jurors that the Prosecution has requested that the future jury be allowed to view the locations where Dylan's remains were found. Interestingly, comments were disabled for this article and it was not posted on the paper's Facebook page.

- e. Volume and Intensity of coverage: As discussed in the preceding paragraphs, Dylan Redwine's disappearance and Mark Redwine's arrest have been covered extensively by local, national, and international media. The coverage has not only been prolific, but also intense. There are thousands of comments on Facebook calling for Mr. Redwine to be hung, given "the chair", tortured, and raped. There are hundreds of comments calling Mr. Redwine [REDACTED] child murderer, premeditated murderer, evil, and much more.

On their Facebook page, People of the State of Colorado VS Mark Allen Redwine, a picture of Mr. Redwine's face posted August 31, 2017 – with no accompanying article – elicited remarks such as "people of the world VS Mark Allen", "Fry F\$@ker!", "I mean how the fuck can a guy do that to their own child. What a piece of shit he'll burn in hell for sure I hope he gets ass raped in prison and more he needs to be castrated and slowly tortured [sic] tell he's dead". See Exhibit G.

When the Facebook group, Dylan Redwine – the Journey to Justice, shared a video of Mr. Redwine's arraignment on June 29, 2018 some of the top comments included "Hope they hang his ass!!!", "I hope he rots in there", and "He will never step free again. I'm sure they have evidence we have no idea about. How could a father do this? Oh wait, he's no father, just a Donor". See Exhibit H. The tenor, and sheer volume, of these comments make clear to the jurors of this county that the world expects them to find Mark Redwine guilty and punish him – or they have failed to bring justice to Dylan Redwine.

- f. Extent of comment regarding the facts of the case: The articles about Mr. Redwine's case almost exclusively paint a sensationalized picture of Mr. Redwine. One particularly egregious source is FBI profiler, Pete Klismet. On July 2, 2015, ABC Denver 7 published an article detailing Mr. Klismet's role in the case. Klismet states in the article "I've been doing this for 30 years, and I have yet to get one wrong," said Klismet. "I don't have this one wrong, either. But I'm not at the point of saying who I suspect is that person of interest." See Exhibit I.

Two years later, in another article for ABC 7 Denver, Mr. Klismet makes additional incendiary remarks about Mr. Redwine. "We're talking about a guy that's probably a registered psychopath narcissist" and "I simply wanted to look at everything I could look at, and try to figure out who did this. And it was an inescapable conclusion that it was Mark". Mr. Klismet goes on to state: "There is no question in my mind that this case

will go to trial. Mark will not plead guilty because he's a narcissist. He believes he can lie his way out of everything" and "Klismet said that Mark Redwine's version of what happened—that Dylan was somehow kidnapped—has a mathematical likelihood of close to zero". *See Exhibit J.*

Klismet was also cited in a Pinc River Times article from June 24, 2017. "Pete Klismet, a former FBI criminal profiler, told the Herald on Sunday that when he was asked to build a profile around a suspect, it did not take him long to identify Redwine." It was an inescapable conclusion," Klismet said. Also in this article, Elaine Redwine, Dylan's mother credits Sheriff Sean Smith and District Attorney Christian Champagne with "giving the case new life". *See Exhibit K.*

In one article from the Durango Herald, *Social Media was Quick to Convict Mark Redwine*, the paper comments on the maelstrom of hate that has hounded Mr. Redwine since November 2012. "Online, social-media users' lust for Mark Redwine's blood has far outpaced the workings of the justice system almost since the day that Dylan went missing while visiting his father near Durango during Thanksgiving break 2012." The article likens Mr. Redwine's case to O.J. Simpson, George Zimmerman, and John Ramsey - JonBenét Ramsey's father. The article goes on to cite forensic psychology professor, Brian Burke of Fort Lewis College. The professor opines that because the "Redwine case has archetypal qualities – including an acrimonious divorce and a child's death – that make it easy for spectators to get invested in its outcome." *See Exhibit L.*

When the La Plata County Sheriff's office and the District Attorney's office hosted a press conference after Mr. Redwine's arrest local television stations streamed the press conference on Facebook live. Over 13,000 people viewed the press conference and 169 people left comments. *See Exhibit M.*

During the press conference, Sean Smith tells the public "the loss of this young man has been very traumatic for our community and I believe that we all share in the grief that Dylan's mother Elaine and the rest of his loved ones are experiencing. This investigation has often been referred to as the journey to justice for Dylan and I believe that's exactly what it is...the length of the investigation shows just how committed our team of investigators has been. Never giving up and keeping the goal of justice for Dylan each and every day... we would also not be here today without the support we received from the amazing group of volunteers in our community. This tragedy has demonstrated the strength of our community and what we can do when we come together for a common purpose justice for Dylan Redwine." Sheriff Smith's comments clearly state that the arrest – and future conviction – of Mark Redwine is the only way to achieve justice for Dylan. Video of the press conference is

available here: <https://www.facebook.com/kktv11news/videos/live:-the-la-plata-county/10155203899833381/>.

Mr. Champagne released a press statement after the press conference. In the opening paragraph Mr. Champagne states “[t]his case represents a terrible tragedy, a family’s worst nightmare. When Dylan disappeared in 2012, we all lost something very special. The Redwine family lost a special, beautiful young man. And many of us in our community lost our sense of trust, safety, and security for ourselves and our children”. By using the words “we”, “us”, and “our” in his statement designed for publication in local press Mr. Champagne is clearly admitting that the jury pool in this jurisdiction is irreversibly intertwined in the narrative of Dylan and Mark Redwine that has been portrayed in the media.

Denise Hess, who started the Find Dylan Redwine Facebook page – and who was a leader in the campaign to find Dylan until her death in October 2016 - is quoted in the article as saying “The presumption of innocence is a legal thing. It’s human nature for people to form an opinion – of their neighbors, the pope, the president.” *See* Exhibit N.

Another woman, Naomi Beans, was attacked on the internet after she wrote a letter supporting Mark Redwine and criticizing Elaine for filing a wrongful-death lawsuit. <https://durangoherald.com/articles/92570-time-for-hatfield-to-move-on-with-life>. According to the article, members of the Facebook group, Calling Mark Redwine, were calling for a boycott of Ms. Beans’ business for simply expressing her opinion. This group, Calling Mark Redwine, had over 3700 likes in 2015, and featured hundreds of posts accusing Mr. Redwine of killing his son “in terms to disturbing that much of its content in unprintable”. At some point in 2015, Calling Mark Redwine, was no longer on Facebook. A new group, CMR: Calling MR, was started and its stated purpose is “calling out a person we believe murdered Dylan”. The hatred and vitriol on this page is overwhelming. Commenters regularly call for Mr. Redwine’s death – because Mr. Redwine’s death means justice for Dylan. *See* Exhibit O.

g. Manner of presentation: As mentioned in the preceding paragraphs, this case has been covered extensively by local newspapers and television stations. This coverage is continually available online. See, for example, one Facebook group, Justice for Dylan Redwine. *See* Exhibit P. This group shared a video posted by Fox31 KDVR, a Denver based television station that came to Durango to cover Mr. Redwine’s arraignment on June 29, 2018. The video, which features Elaine Redwine speaking in front of the courthouse was viewed 23,399 times, “liked” by 109 people, and shared by 26 people. This group has 8,496 members. The same video was shared by the group, Dylan Redwine – the journey to justice. *See* Exhibit Q. 23,400 people viewed the video. It was “liked” by 136 people and shared 11 times. This group has 31,561 people who follow their page. While it is undoubtedly true that not all members of these groups

reside in La Plata County, the residents of La Plata County are far more likely to seek out information about this case. And, unlike in *McCrary*, which was decided in 1976, anyone curious about this case need only turn on their computer and plug “Redwine” into their search engine.

In addition, any potential juror who visited the Sheriff’s Office, the La Plata County Jail, or the courthouse – where this trial is currently slated to be held - would have the opportunity to view the missing poster that was posted on the front doors of these locations. *See* Exhibit R.

h. Proximity of the media coverage to the time of trial: A significant passage of time between the occurrence of publicity and the trial decreases the prejudicial effect of pre-trial publicity. *See Patton v. Yount*, 467 U.S. 1025, 1032 (1984); *McCrary*, 549 P.2d at 1326. However, the media frenzy surrounding this case has remained pervasive and prejudicial despite the passage of time. It began the day Dylan disappeared and has continued unabated. On July 11, 2018 the Durango Herald published an article titled “Prosecutors hint at Motive in Mark Redwine Homicide Case”. *See* Exhibit F. In this article, the author outlines the Prosecution’s case-in-chief and fails to mention a single fact unfavorable to the Prosecution. Their message, which is readily apparent to any casual reader, is that Mr. Redwine should be found guilty of murdering his son. It would be unreasonable to believe that the pervasive and prejudicial coverage will slow at any point prior to the resolution of this matter.

i. Publication of highly incriminating facts not admissible at trial:

Prior to trial, this Court will have to make several findings of fact and law regarding evidence the Prosecution claims to have implicating Mark Redwine. Because this investigation has languished for five years the admissibility and evidentiary issues are especially complex and convoluted. This has not stopped local press outlets from publishing any and all facts they can find in the public record. [REDACTED]

Throughout this case, [REDACTED]

## II. MR. REDWINE WILL NOT RECEIVE A FAIR TRIAL IN LA PLATA COUNTY BECAUSE UBIQUITOUS AND VITUPERATIVE PRE-TRIAL PUBLICITY HAS POISONED THE JURY POOL IN LA PLATA COUNTY

1. Where there exists a nexus between pre-trial publicity and a panel of jurors which would undermine the defendant's due process right to a fair trial, a change of venue is proper. *See People v. Harlan*, 8 P.3d 448 (Colo. 2000) (reversed on other grounds). A defendant must show that any publicity had an actual, adverse effect on the jury pool in order to warrant a change of venue under the "nexus" standard. *Dore*, 997 P.2d at 1220.
2. If the Court does not find that there has been massive, pervasive and prejudicial pretrial publicity about this case, it nonetheless should still grant Mr. Redwine's motion for a change of venue in this case because there is a nexus between the prejudicial publicity and the jury pool in La Plata County, and Mr. Redwine's ability to get a fair trial in this case has already been prejudiced by the pretrial publicity about his culpability for the alleged murder of his son, Dylan Redwine.
3. There have been literally thousands of articles published in newspapers and on Facebook naming Mr. Redwine a child killer and a liar. As early as November 27, 2012, Denise Hess, who led the campaign to find Dylan, was telling newspaper reporters "[p]eople are worried and scared because we don't know what happened to Dylan. They're worried about their families and what's going on," she said. "It's a scary thing for this community because it's a very small community, and this is one of our children." *See Exhibit V.*
4. There is a nexus between the prejudicial pretrial publicity and the jury pool's attitudes towards Mr. Redwine that they cannot leave at the door of the courthouse prior to filling their duties as jurors. Accordingly, the Court should grant Mr. Redwine's motion for change of venue prior to the *voir dire* examination.

WHEREFORE, Mr. Redwine respectfully moves this Court to order a change of venue. Or, in the alternative, to hold a hearing on this motion as soon as practicable. As this investigation is still developing, and publications are on-going, Mr. Redwine, through counsel, reserves the right to file further pleadings and exhibits related to this issue.

Respectfully submitted,

/s/ Justin Bogan

Justin Bogan, No. 33827  
Deputy State Public Defender  
Dated: July 26, 2018

/s/ John Moran

John Moran, No. 36019  
Deputy State Public Defender  
Dated: July 26, 2018

Certificate of Service

I hereby certify that on July 26, 2018, I served the foregoing document by e-filing same to all opposing counsel of record.

/s/ Justin Bogan

/s/ John Moran