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| DISTRICT COURT<br>LA PLATA COUNTY, COLORADO<br>1060 EAST SECOND AVENUE<br>DURANGO COLORADO 81301                                 | DATE FILED: August 3, 2018 9:13 AM<br>FILING ID: 882C8BF97B1DA<br>CASE NUMBER: 2017CR343 |
| THE PEOPLE OF THE STATE OF COLORADO,<br><br>v.<br><br>Mark Redwine<br>Defendant  | σ COURT USE ONLY σ   |
| Douglas Wilson, Colorado State Public Defender<br>Justin Bogan 33827<br>175 Mercado<br>Suite 250<br>Durango<br>Colorado<br>81301 | Case No.: 17CR343<br><br><br>Division: One   |
| <b>[D-14]</b><br><b>REQUEST FOR GRAND JURY MATERIALS</b>   |  |

Mark Redwine moves this Court to enter an Order requiring the preparation of all transcripts and gathering of certain materials relating to the grand jury proceedings, on the following grounds:

1. This criminal prosecution was instituted against Mr. Redwine as a result of an Indictment returned by a grand jury impaneled and sitting in La Plata County, Colorado. Per the transcripts that were provided to defense counsel, Grand Jury Proceedings were initiated on July 17, 2017. The Grand Jury returned an indictment against Mark Redwine on July 20, 2017. The indictment alleges Mr. Redwine committed the crimes of Second Degree Murder (F2) and Child Abuse Resulting in Death (F2).
2. The Prosecution moved for release of the Grand Jury transcripts and exhibits to the prosecution and defense counsel on October 6, 2017. This Honorable Court entered an order on October 20, 2017 authorizing the release of only testimonial transcripts and exhibits on October 20, 2017. Defense Counsel has received copies of the exhibits and copies of the testimony at the Grand Jury proceedings.
3. The three transcripts defense counsel have received state "This matter came on for Grand Jury Proceedings on July [17, 18, 19] 2017, in Durango, Colorado. This is a transcript of the TESTIMONY ONLY pursuant to Court Order to Provide Grand Jury Testimony and Exhibits." Throughout all three transcripts there are redactions, with the statement inserted "Colloquy was had."

4. Mr. Redwine moves for full disclosure of all proceedings relating to the grand jury so that any meritorious motions and challenges directed to the legal and constitutional validity of the grand jury and the return of the Indictment can be pursued.

5. Mr. Redwine therefore moves for the preparation, disclosure, inspection and copying of the following information and materials:

- A. All grand jury transcripts in any way relating to this indictment, including, but not limited to, the following:
- a. Transcripts of the testimony of all witnesses who testified concerning this matter that have not already been disclosed;
  - b. Any and all transcripts of testimony taken or given before any other grand jury, or in connection with any other legal proceeding, which were submitted to the grand jury which returned this indictment, or which were summarized or referred to in any way before this grand jury, or which were reviewed or examined by grand jury investigators or any other person authorized or designated by the grand jury to act on their behalf relating to any of the persons noted in paragraph one.
  - c. All remarks of the prosecutors in introducing the case to the grand jury, in presenting or commenting on the evidence and in charging the grand jury with respect to the facts and/or applicable law, including but not limited to all colloquies;
  - d. All remarks, questions or statements made by any of the grand jurors concerning Mr. Redwine, or any transaction involving Mr. Redwine that have not already been disclosed;
  - e. The transcript of the impaneling and voir dire of the grand jury and any court instructions conveyed during that process, any instructions from the district attorney or her designate during the impaneling of the grand jury, and any and all statements by the court or the district attorney to the grand jury during the impaneling and voir dire of the grand jury;
  - f. The transcript of any comments, explanations or instructions made by any prosecutor or any other person to the grand jury relating to Mr. Redwine and the alleged offenses;
  - g. The transcript of the proceedings, on or about July 20, 2017, wherein the indictment was returned;
  - h. The list of jurors who served and the list of potential jurors for the grand jury.

- B. All documents, exhibits and/or physical evidence considered by or presented to the grand jury or its investigators with respect to this case that have not already been disclosed.
- C. The file kept by the Clerk of the Court with respect to the grand jury. Mr. Redwine desires to inspect and copy the following documents in said file:
- a. The order impaneling the grand jury and all orders defining or expanding its jurisdiction;
  - b. All written instructions given to the grand jury;
  - c. All orders appointing prosecutors or investigators, or allowing any persons into the grand jury room;
  - d. The jury list from which the grand jury was selected and the names and addresses of the jurors actually selected;
  - e. All attendance records for the grand jury during any dates that this case was considered by the grand jury;
  - f. The summonses issued to potential grand jurors;
  - g. The questionnaires presented to the potential grand jurors;
  - h. All subpoenas or subpoenas duces tecum issued by the grand jury which relate to Mr. Redwine
  - i. All voting records of the grand jury with respect to the indictments returned;
- D. All written instructions or summaries of evidence presented by the prosecutor or the court to the grand jury which relate to this indictment.
- E. The form of the indictment presented to the grand jury.
- F. All notes, reports, memoranda, correspondence, tape recordings or other documents in the possession, custody and control of attorneys or investigators of the District Attorney's Office, in and for the Fourth Judicial District, in the possession, custody or control of any other law enforcement agency which has reported to or consulted with said prosecutor's office with respect to this case, which in any way relates to Mr. Redwine, or the transactions described in this indictment that have not already been disclosed.
- G. All correspondence between members of the District Attorney's Office for the Sixth Judicial District and potential witnesses, and any and all members of the general public concerning Mr. Redwine or the subject matter of the indictment returned in this particular case.

4. Discovery of the foregoing materials and information is necessary in order that the accused may test the legality, constitutionality and fairness of the grand jury proceedings which resulted in the indictment. The materials and information requested are necessary to ascertain whether there are any procedural, legal or constitutional infirmities or other improprieties in the grand jury proceedings leading to the indictment.

5. Crim. P. 6.4 mandates the transcription of all grand jury proceedings, "A certified or authorized reporter shall be present at all grand jury sessions. All grand jury proceedings and testimony from commencement to adjournment shall be reported. The reporter's notes and any transcripts which may be prepared shall be preserved, sealed, and filed with the court. No release or destruction of the notes or transcripts shall occur without prior court approval." *Id.*

6. Crim. P. 6.5(b) provides that "a grand jury investigator shall not comment to the grand jury by word or gesture on the evidence or concerning the credibility of any witness . . ." Indictments have been quashed in Colorado when investigators have assumed the role of an advocate. See, e.g., People v. Lewis, 516 P.2d 416 ( Colo. 1973). Further, the same rule permits only one, not several, investigator to be present in the grand jury room. The grand jury record should be produced so that the accused may ascertain the actual manner in which the proceedings were conducted, and may learn upon what basis, if any, the prosecution claims any exemptions for its conduct.

7. The selection of jurors for a Grand Jury is governed by C.R.S. 13-72-102, 103 and 104. Said process is subject to the same constitutional protections as the process for selecting trial jurors. Colo. Prac., Criminal Practice & Procedure § 2.53 Robert J. Dieter, citing Batson v. Kentucky, 476 U.S. 79, 84 n. 3, (1986); and Campbell v. Louisiana, 523 U.S. 392, (1998).

8. The method of grand jury selection may be the subject of a motion to dismiss the indictment, as it is unconstitutional to exclude from the grand jury selection process persons of identifiable groups, such as racial groups, See United States v. Mechanik, 475 U.S. 66, 70 n. 1, Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972), or economic groups, Thiel v. Southern Pacific Co., 328 U.S. 217, (1946), or on the basis of national origin or descent, Hernandez v. Texas, 347 U.S. 475, (1954). See also People v. Cerrone, 854 P.2d 178 (Colo.1993). Grand juries must be selected at random from a fair cross section of the community and cannot be selected on a racially discriminatory basis. People v. Cerrone, *Id.* To effectively investigate and litigate the grand jury indictment, defense counsel needs the requested materials.

9. The Due Process and Equal Protection Clauses of the Constitutions also prohibit the exclusion of any person from serving on a grand jury on the basis of race, gender or religion. See, e.g., Smith v. Texas, 311 U.S. 128, 130, 85 L.Ed. 84 (1940) (exclusion of African-Americans from grand jury pool); Glasser v. United States, 315 U.S. 60, 85-86, 86 L.Ed. 680 (1942) (exclusion of women from grand jury pool); Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972); U.S. Const., amends. V, VI, XIV; Colo. Const., art. II, § 23, 25. Illegal discrimination in the selection of the grand jury on the basis of race, gender, socio-economic status or religion requires an indictment to be dismissed. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Cerrone v. People, 900 P.2d 45 (Colo. 1995); People v. Cerrone, 854 P.2d 178 (Colo. 1993). The information and materials requested are critical to

review and assert these appropriate and cognizable claims. The accused must be able to review and examine the foregoing information and materials to ensure that § 13-71-104 and the Constitutions were 'strictly' complied with. Production of these records and information to the defense is mandatory in light of the requirements of this section. See *United States v. Test*, 420 U.S. 28, 95 S.Ct. 749, 42 L.Ed.2d 786 (1975) (Supreme Court holds that inspection of records, documents and materials concerning the grand jury were required by the federal jury selection act and by the statute's purpose of insuring that grand juries are selected at random from a fair cross section of the community).

10. Under C.R.S. § 13-71-136 and § 13-72-103, the jury commissioner or the court must make available the names and addresses of the prospective jurors and of the jurors selected to sit on the grand jury, respectively, upon the request of any party. Mr. Redwine therefore moves the Court to at least verbally communicate to the grand jury commissioner that she should forward the requested juror lists to Mr. Redwine as soon as is practicable. A failure to provide the requested juror lists would violate the clear language of the foregoing statutes and violate Mr. Redwine's right to due process and the equal protection of the laws under the Constitutions. Without inspection of the lists, "a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." See *United States v. Test*, 420 U.S. 28 (1975) (Per curiam).

11. In *Test*, the Supreme Court also stated that "an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community'" under the federal jury selection act. *Id.* Section 13-71-104 also requires that a grand jury be "selected at random from a fair cross section of the population of the area served by the court." Thus, inspection of the jurors lists requested is thus required in light of this purpose of Colorado's Uniform Jury Selection and Service Act.

12. Disclosure of the juror questionnaires is also required. In *Cerrone v. People*, 900 P.2d 45 (Colo. 1995) and *People v. Cerrone*, 854 P.2d 178 (Colo. 1993), the Colorado Supreme Court considered the defendant's claim of illegal discrimination in the selection and impaneling of a statewide grand jury on the basis of socio-economic status and race, respectively. The claims were reviewed under the principles set forth by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Central to the consideration and resolution of the claims in both *Cerrone* cases was the Court's review of the grand juror questionnaires. The opinions are replete with reference to the questionnaires and the manner in which they touched upon the issues underlying the claims.

13. Under C.R.S. § 13-71-104 "no person shall be exempted or excluded from serving as a . . . grand juror because of race, color, religion, sex, national origin, economic status, or occupation". The questionnaires will have information relevant to a determination of each juror's race, color, religion, sex, national origin, economic status, or occupation. Cf. *Cerrone v. People*, supra; *People v. Cerrone*, supra. Disclosure of the questionnaires to the defense is reasonable and necessary to determine whether Mr. Redwine has meritorious claims concerning jury selection. *United States v. Test*, supra. Disclosure of the questionnaires to the defense is also the least intrusive method to obtain relevant information concerning any discrimination and improper

selection claims. Without the questionnaires counsel will be relegated to contacting each juror individually in an effort to gather pertinent information concerning their race, color, religion, sex, national origin, economic status, or occupation. Disclosure of the questionnaires may reduce the need for or extent of any such inquiry. The original questionnaires are required to be completed, sealed and retained by the court and are, therefore, easily accessible to the court for production to the defense. C.R.S. § 13-71-115. While the questionnaires are not public records there does not exist a privilege with respect to questionnaires or to the information contained therein. *Id.*; cf. Cerrone v. People, supra; People v. Cerrone, supra.

14. As with the jury lists, without the questionnaires "a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." See *United States v. Test, supra*. An examination of the questionnaires will be central to a determination of whether the selection and impaneling of the jury comported with due process and equal protection principles announced in the Cerrone decisions. U.S. Const., amends. V, XIV; Colo. Const., art. II, § 25. An examination of the questionnaires will also be central to a determination of whether the selection and impaneling of the jury comported with the requirement that the grand jury be selected at random from a fair cross section of the population under the Constitutions and under C.R.S. § 13-71-104. U.S. Const., amends. VI, XIV; Colo. Const., art. II, § 25; *Cerrone v. People*, 900 P.2d at 52, n.9 citing *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), cert. denied 459 U.S. 1127, 103 S.Ct. 763, 74 L.Ed.2d 978 (1983); see *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

15. Jury service is both a duty and a privilege of citizenship. Broad participation in the justice system is desirable because it reinforces public confidence in the system's fairness. In addition, jury service provides individuals with an opportunity to participate in the civic life of our nation. Discrimination during jury selection undermines these important values. Moreover, discrimination deprives individual defendants of a central right in our system of justice, the right to be judged by a jury of their peers. *Cerrone v. People*, 900 P.2d 51-52 (citations omitted); see *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (racial discrimination inflicts "a profound humiliation" on the excluded juror, and both the juror and the defendant suffer a loss of confidence in the courts and its verdicts).

16. A complete and accurate disclosure of all facts concerning the selection and impaneling of the jury must occur in order that the legality and constitutionality of the process may be scrutinized. A complete and accurate disclosure of all facts and the ability to obtain all of these facts will promote the public's confidence in the system. Shielding the process from scrutiny will damage the public's confidence in the process, will damage the integrity of the process and will fail to protect and preserve every qualified person's right to serve on a grand jury and right not to be excluded for any illegal or unconstitutional reason. Neither the principle of grand jury secrecy nor any so-called protective order should be used to shield an illegal and unconstitutional selection and impaneling of a grand jury. See *Cerrone v. People, supra*; *People v. Cerrone, supra*; *United States v. Test, supra*.

17. A compilation and consideration of an accurate and complete set of facts concerning the prospective and selected grand jurors is necessary, therefore, to a proper and complete inquiry into the selection and impaneling of the grand jury.

18. The voir dire of the prospective grand jurors when the jury was impaneled and selected should also be provided to defense. The production of a transcript of this proceeding is also essential to claims arising under C.R.S. § 13-71-104, Cerrone v. People, supra, People v. Cerrone, supra, and Batson v. Kentucky, supra.

19. Though portions of the grand jury process are subject to some protection, secrecy for secrecy's sake is no longer the rule. There are specific reasons for a certain level of secrecy regarding grand jury proceedings and none of them are applicable in this case. The following reasons have been articulated by the Colorado Supreme Court in People ex rel. Lasavio v. J. L., 580 P.2d 23, 28 (1978), for the principle of grand jury secrecy:

- a. To prevent the escape of those whose indictment may be contemplated; This reason does not apply and did not ever apply since Mr. Redwine is in custody.
- b. To insure the utmost freedom to the grand jury in deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; This reason does not apply because Mr. Redwine is in custody was out of town working during the proceedings. There was and is no allegation by the state that either Mr. Redwine or any "friend" of his attempted to importune the grand jurors.
- c. To prevent the subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; This reason does not apply as all witnesses who testified were police officers or retained prosecution experts. There are no facts or grounds to support any claim that the police officers who testified before the grand jury have been or will be tampered with by Mr. Redwine or defense counsel.
- d. To encourage free and untrammelled disclosures by persons who have information with respect to the commission of the offense; This reason does not apply as all witnesses were police officers who or so called experts retained by the prosecution who testified before the grand jury. The grand jury transcript and the discovery so far produced by the prosecution indicates free and untrammelled disclosures by the police witnesses to the jury with respect to the offenses.

- e. To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt; This reason does not apply because the grand jury returned a true bill and the court affirmed the grand jury's finding of probable cause.

20. Pre-indictment publicity may require that an indictment be dismissed. See Beck v. Washington, 369 U.S. 541, (1962). A court's failure to examine potential jurors concerning the effect of publicity and to take cautionary measures to ensure a fair, impartial and unbiased jury is impaneled may also require an indictment to be dismissed. See *Id.* The information and materials requested are critical to review and assert these appropriate and cognizable claims. Mr. Redwine incorporates all arguments and exhibits in his motion to change venue in this pleading

21. Additional challenges to the indictment may be made following careful and thorough review and examination the requested materials. See C.R.S. § 31-71-101 et seq; § 13-72-101 et seq.; § 13-73-101 et seq; Crim. P. Rule 6 et seq (concerning grand jury rules).

22. Materials and information concerning the grand jury may no longer be hidden from the defense. "Secrecy for secrecy's sake should no longer be the rule in Colorado. Rather, the maintenance of the wall of secrecy should be ground upon sound reason . . . The cloak of secrecy thwarts an indicted defendant's efforts to show necessity and relevancy even when they exist. Parlapiano v. District Court, 176 Colo. 23, 469 P.2d 965, 968 (1971).

23. Mr. Redwine moves for a hearing on this motion.

24. Mr. Redwine makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process, Trial by Jury, Right to Counsel, Equal Protection, Cruel and Unusual Punishment, Confrontation, Compulsory Process, Right to Remain Silent, and Right to Appeal Clauses of the Federal and Colorado Constitutions, and the First, Fourth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution and Article II, Sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution.

/s/ Justin Bogan  
Justin Bogan, #33827  
Deputy State Public Defender  
Dated: August 3, 2018

**Certificate of Service**

I hereby certify that on August 3, 2018, 2018, I served the foregoing document by ICCES to all opposing counsel of record.

/s/ Justin Bogan