

DISTRICT COURT, LA PLATA COUNTY, COLORADO Court Address: 1060 E. Second Ave., Durango, CO 81301 Phone Number: (970) 247-2304		ORIGINAL FILED / REC'D IN COMBINED COURT LA PLATA COUNTY, COLORADO SEP 14 2018 DEPUTY CLERK
Plaintiff: PEOPLE OF THE STATE OF COLORADO v.	Defendant: MARK ALLEN REDWINE	
Christian Champagne - District Attorney, #36833 Matthew Durkin, Special Deputy District Attorney, #28615 Fred Johnson, Special Deputy District Attorney, #42479 P.O. Drawer 3455, Durango, Colorado 81302 Phone Number: (970) 247-8850 Fax Number: (970) 259-0200		▲ COURT USE ONLY ▲ Case Number: 17 CR 343
PEOPLE'S RESPONSE TO DEFENDANT'S REQUEST FOR GRAND JURY MATERIALS [D-14] [PUBLIC ACCESS]		

NOW COME the People, by and through Christian Champagne, District Attorney, in the County of La Plata, respectfully respond to the Defendant's request for Grand Jury materials. As support therefore, the People state the following:

Background

1. On July 17, 2017, a Grand Jury was impaneled in La Plata County and began to hear and investigate the murder of Dylan Redwine. On July 20, 2017, the La Plata County Statutory Grand Jury indicted the Defendant for the crimes of Murder in the Second Degree and Child Abuse Resulting in Death.
2. The Defendant is currently set for trial on November 26, 2018.
3. On October 20, 2017, the Court authorized the release of testimonial transcripts and exhibits from the Grand Jury proceedings, and in his Request the Defendant acknowledges being in possession of all of those materials.
4. The Defendant now motions the court to order the disclosure of additional materials related to the Grand Jury process.

Requested Grand Jury Materials

5. In paragraph 5 of his motion, the Defendant requests several items relating to the Grand Jury process in this matter. The People address each of them below.
6. Regarding paragraph 5.A.a., the Defendant is requesting all transcripts of the Grand Jury testimony. These have been provided.
7. Regarding paragraph 5.A.b., the Defendant is requesting any transcripts of testimony to a previous grand jury by any witnesses who testified to the Grand Jury in this case. The People are aware of none, and have no such transcripts in their possession.
8. Regarding paragraphs 5.A.c., 5.A.d., and 5.A.f., the Defendant is requesting various statements made by the prosecutors and by the grand jurors. To the extent that any statements were made on the record, those statements have been provided with the transcripts of testimony.
9. However, the Defendant is not entitled to any statements made in colloquy as explained below in this Response, and therefore the People object to this request.
10. Regarding paragraph 5.A.e., the People have no objection to the Court releasing the transcript of the impaneling and voir dire of the grand jury, which would include any instructions and statements given by the Court or the People during that process. However, pursuant to C.R.S. 13-72-103, the Court has ordered the preservation of the confidentiality of the Grand Jury and the identification of the grand jury members. Therefore, before the transcripts are released they must be redacted to remove any identifying juror information consistent with the Court's order. To effectuate this, the court reporter could replace the juror names with their juror numbers used throughout the Grand Jury process and testimonial transcripts, or the entire panel with their summons numbers.
11. The transcript of jury selection is not in the possession of the People at this time, and the Defendant may request a copy of the transcript from the court reporter who recorded the proceedings, provided that it is appropriately redacted consistent with the Chief Judge's order.
12. Regarding paragraph 5.A.g., the People have no objection to the Court releasing the transcript of the proceedings wherein the indictment was presented. However, the People do not have a transcript of this proceeding and the Defendant can request a copy of this transcript from the Court.
13. Regarding paragraph 5.A.h., 5.C.d., 5.C.f., 5.C.g., and 5.C.i., the People object pursuant to C.R.S. 13-72-103. Pursuant to the Court's Order Re: Motion to Preserve Confidentiality of Grand Juror Information issued on July 14, 2017, the People cannot provide any identifying information of the grand jurors and the Defendant is not entitled to any identifying information of the grand jurors.

14. Regarding paragraph 5.B., all exhibits have been turned over to the Defendant as noted in his motion, and the transcripts in the Defendant's possession make clear what was shown to the Grand Jury for consideration. Further, all physical evidence in the case is available at the La Plata County Sheriff's Office for inspection by the Defendant, and all documents in the case have been discovered.
15. Regarding paragraph 5.C.a., 5.C.b., and 5.C.c., the People have no objection to the Defendant receiving copies of the Court's orders in the grand jury case. The People have provided the grand jury instructions to the Defendant in discovery. The People will put any orders in their possession and control into discovery.
16. Regarding paragraph 5.C.e., the Defendant is requesting the daily attendance records of all members of the grand jury. The Defendant cites no statutory or case authority for his request and the People are unaware of any such authority. The Defendant doesn't even recite a reason for the request, just merely requests them. In *United States v. Ferrara*, 990 F. Supp. 146 (E. D. N.Y. 1998), the Court held conclusory and speculative allegations about what may have gone wrong in a grand jury proceeding gives no cause to question the regularity of the grand jury's functioning. Thus, a mere request for the information, with no basis listed, is not sufficient. In addition, the People do not maintain or keep this information. The record makes it clear that a quorum was present as required. The People respectfully request the Court deny this request.
17. Regarding paragraph 5.C.E., the Defendant requests "the form of the indictment presented to the Grand Jury." The People are unclear what is being requested in this paragraph because the indictment has been filed with the Court and provided to the Defendant, which reflects the Grand Jury's decision for a True Bill in this case.
18. Regarding paragraph 5.F., the request is a broad discovery request that does not specify any particular documents or evidence, and the People will comply with C.R.Cr.P. 16.
19. Regarding paragraph 5.G., this is another broad request for discovery that does not specify any particular documents or evidence, and the People will comply with C.R.Cr.P. 16.
20. Finally, regarding paragraph 6, the Grand Jury record has been produced in this case, and as explained below the record does not include colloquy. C.R.Cr.P. 6.5 puts no limit on the number of investigators who may be present during grand jury proceedings, and the Defendant cites no case law in support of the proposition that only one sworn investigator may be present. In fact, in *Buchler v. District Court*, 405 P.2d 950 (Colo. 1965) (en banc) the Colorado Supreme Court held that even the presence of "unauthorized persons during grand jury proceedings is, at most, a mere irregularity, not sufficient to constitute a ground for setting aside the indictment returned by the grand jury unless prejudice is shown." This was also followed in *People v. Cerrone*, 867 P.2d 143 (Colo. App. 1993), where the Colorado Court of

Appeals found that even if unauthorized persons had been present during the grand jury proceedings it did not affect the defendant's substantial rights and was therefore harmless.

21. The Defendant cites to *People. v. Lewis*, 516 P.2d 416 (Colo. 1973), but this case stands for the proposition that investigators cannot question witnesses during the Grand Jury proceedings.
22. In this case, the record has been produced and is clear that only the prosecutors questioned witnesses. Further, only authorized persons were present in the courtroom, and the People have recently obtained from the Court and put into discovery the written sworn oaths of the grand jury investigators signed by Chief Judge Wilson appointing them in this case, pursuant to C.R.Cr.P. 6.5.
23. Therefore, any request for further discovery under this paragraph beyond the record in the case should be denied.

Grand Juror Confidentiality

24. C.R.S. 13-72-103 states that “[t]he court upon its own motion or at the request of the District Attorney, *shall* enter an order to preserve the confidentiality of all information that might identify grand jurors when reasonably necessary to protect the grand jury process or the security of the grand jurors” (emphasis added). On July 14, 2017, the Court entered the appropriate order under the statute and the grand juror information is cannot be disclosed to the Defendant or the public.
25. The importance of protecting the identities of the grand jurors goes to the very ability of a grand jury to do its job. Unlike a trial jury, in addition to rendering a decision which is reflected in a True Bill or No True Bill, the grand jury is an investigating body. They are tasked participating in the process, and as lay citizens must be made comfortable and secure in duties that trial juries need not undertake. For this and other reasons they are assigned numbers throughout a grand jury investigation so that their names are not in the transcripts. If grand jurors identities are not protected in appropriate cases it could have a chilling effect on their ability to abide by their oaths and fairly do their jobs. The crime in this case is a violent one, and grand jurors received confidentiality so that they could properly do their job on this case without fear of retribution. Subjecting them to questioning would exceed the appropriately limited scope of the Court's Order for limited release of transcripts and violate grand jury secrecy pursuant to C.R.Cr.P. 6.2 and 6.9. Their deliberations remain subject to secrecy requirements, as does their colloquy discussions as explained in this Response. Further, specific to this case any release of their information poses a risk that media outlets would reach out to jurors and attempt to compromise the process by asking about secret information from the proceedings. Additionally, the Defendant himself notes some of the passionate responses to this case by certain members of the community, and there are certainly some persons who present as though they could pose a security risk or a risk of harassing the jurors if their

identities are not protected. Finally, if the transcripts of jury selection are released to the Defendant, even without the identities of the grand jurors, the Defendant would have access to the discussions during the selection process to see if any jurors expressed inappropriate biases or outside influences.

26. In his motion, the Defendant cites to C.R.S.13-72-103, *United States v. Test*, 420 U.S. 28 (1975), and *People v. Cerrone*, 854 P.2d 178 (Colo. 1993) (en banc). For the reasons stated below, none of these cases or statutes authorizes the disclosure of grand juror identifying information.
27. C.R.S. 13-72-103 is expressly qualified with the following language: “[t]he court upon its own motion or at the request of the District Attorney, shall enter an order to preserve the confidentiality of all information that might identify grand jurors when reasonably necessary to protect the grand jury process or the security of the grand jurors.” C.R.S. 13-72-103 then goes on to say “[i]n the absence of such an order, upon request, the jury commissioner shall make available for inspection by members of the public a list of grand jurors containing only the grand jurors’ names and juror numbers.” Here, such an order exists.
28. Further, C.R.S. 13-71-136, also cited by the Defendant for the proposition that the jury commissioner must turn over names and addresses of jurors to the parties or counsel, is qualified by the same language of “absent a court order to the contrary.” This provision specifically references the verification that jurors reside in the proper county, therefore including addresses unlike in the other provisions specific to grand jurors or questionnaires.
29. Finally, C.R.S. 13-71-115 which addresses the disclosure of jury questionnaires, reads as follows: “[u]nless the court orders otherwise, the jury commissioner shall provide copies of the appropriate completed questionnaires to the trial judge and counsel for use during jury selection.” Thus, the disclosure of juror questionnaires is also subject to a court order for grand juror confidentiality and appears to reference questionnaires for trial jurors.
30. What the Defendant fails acknowledge in citing to *Test* is that the Supreme Court reached its decision on the basis of a statutory interpretation of an entirely different statute.
31. Because C.R.S. 13-72-103 is the provision specific to grand juror identifying information, a precise reading is important in this case for three reasons. First, the logic and reasoning in *Test* does not apply. In *Test*, the Supreme Court specifically notes that it is a provision in Section 1867(f) of the Jury Selection and Service Act that makes clear that a “litigant has essentially an unqualified right to inspect jury lists.” *Test*, 420 U.S. 29-30. Further, that unqualified right is “required by the statute’s overall purpose of insuring ‘grand and petit juries selected at random form a fair cross section of the community.’” *Id.* The statute at issue here, C.R.S. 13-72-103

contains no such unqualified right, rather, it expressly qualifies the right in a way that protects the confidentiality of the jurors upon the Court's order.

32. Further, in the Grand Jury selection process, it is the Chief Judge who selects the grand jurors on the advice of the District Attorney. In this case, the transcript of that proceeding, which the People believe may be provided to the Defendant at his request, will show whether the procedure was appropriate or whether it calls into question the integrity of the selection process without compromising the confidentiality of the grand jurors' identities.
33. Second, pursuant to C.R.S. 13-72-103 and specific to grand juries, without an order for grand juror confidentiality, "the jury commissioner shall make available for inspection by members of the public a list of grand jurors containing only the grand jurors' names and jury numbers." Allowing the public access to juror names in this particular case would be extremely problematic for the reasons stated above in the request for an order for grand juror confidentiality.
34. Third, nothing in C.R.S. 13-72-103 allows for the disclosure of grand juror addresses as requested in the Defendant's motion; only juror names and juror numbers can be made available under this statute. Further, nothing in this statute provides an exception to the secrecy of the Grand Jury. For that reason, even where the names of grand jurors are made publically available, it is never appropriate for members of the public or the defense team to question those grand jurors as to the grand jury proceedings or deliberations. Only a limited release of the transcripts is available for this purpose. This is even more reason why the confidentiality of grand jurors is appropriate and necessary in this case and the disclosure of the confidential information is not warranted.
35. The Defendant further cites to *Cerrone* for the proposition that he is entitled to grand jury questionnaires for inspection. *Cerrone* does not stand for the proposition that the Defendant may obtain grand juror questionnaires. Rather, it articulates a test for when a Defendant has made a prima facie case of purposeful discrimination based on a selection process that allows the opportunity for discrimination. *Id.* at 188. Notably, there is no indication an order for grand jury confidentiality was requested or even warranted in *Cerrone* as it is in this case. In fact, it is unclear how the defendant in that case came to be in possession of the grand juror questionnaires. *Cerrone* does not hold that the Defendant is entitled to confidential grand juror information.
36. Finally, as explained in detail below in the response to the request for colloquy, because of the compelling interest in grand jury secrecy, C.R.S. 16-5-204 makes clear that "[a]ny other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel, unless there is cause shown for the need for additional evidence." Here, no cause has been shown and the court should rely upon the record before it in determining if the indictment is valid based

on the record of the jury selection process without compromising grand juror confidentiality.

Grand Jury Colloquy

37. The record of the grand jury proceedings mentioned above does not include the colloquy between the District Attorney and the Grand Jury. *See People v. District Court*, 610 P.2d 490, 493 (Colo. 1980). The statutory section sets out the limits as to how far the Court should intrude into grand jury proceedings. Rarely will the actions of the District Attorney provide a basis for challenging the grand jury's true bill. *Cf. State v. Fisher*, 112 N.J. Super. 319, 271 A.2d 24 (1970).
38. Further, there is authority in Colorado that “the liberal discovery rights which have been granted to a defendant in Colorado do not guarantee automatic access to everything that transpires before the grand jury.” *People v. District Court*, 610 P.2d 490 (Colo. 1980).
39. Two related Colorado Supreme Court decisions in 1980 addressed the issue of release of Grand Jury colloquy, and both of these confirmed the very limited circumstances in which such materials will be discovered.
40. These were *People v. District Court*, 610 P.2d 490 (Colo. 1980), and *People v. District Court* 619 P.2d 774 (Colo. 1980). In the first of these two cases, the Supreme Court determined that the trial court, when considering disclosure to a defendant of a transcript containing colloquy between the District Attorney and the grand jury, must decide whether there is “more than a speculative basis for overturning an indictment because of improper conduct by the District Attorney in securing a true bill.” The Court further held that this determination:

requires the weighing of a number of conflicting factors, including the traditional requirement that grand jury proceedings be conducted in secrecy. While the defendant's need for access to all materials relevant to his defense should be given great weight, the trial judge must also consider the grand jury's right and need for confidentiality.

Only in those cases where clear examples of inappropriate conduct by the District Attorney may affect the validity of the defendant's indictment or the determination of probable cause, should the trial court sacrifice the confidentiality of the grand jury proceedings and release a transcript of the grand jury colloquy to defense counsel.

Id. at 775.

41. Notably, in *People v. District Court*, 610 P.2d 490, 493 (Colo. 1980), the Colorado Supreme Court specifically rejected similar arguments to the arguments made by the Defendant his Request for Grand Jury Materials: “[t]he [trial] court reasoned that the testimony before the grand jury could be properly evaluated by defense counsel only after the remarks of the District Attorney to the grand jury were disclosed. We disagree.” *People v. District Court*, 610 P.2d at 492.
42. By applying that analysis, the Colorado Supreme Court has held that “unless there is cause shown for the need for additional evidence,” the colloquy is not subject to disclosure to the Defendant. Additionally here, where there is no showing of any misconduct whatsoever, no in-camera review is required because there is no cause shown to consider anything outside of the record and colloquy is not part of the record.
43. In addition, the Court must be guided by C.R.S. 16-5-204(4)(n) which states “any other motions testing the validity of the indictment may be heard by the court based only on the record and argument of counsel; unless there is cause shown for the need for additional evidence.”
44. Finally, even if the Defendant had made a showing of a clear example of prosecutorial misconduct, the proper procedure upon that showing would be an in-camera review and not a release of the transcripts of the colloquy to the defense.
45. In the current case, there are no such “clear examples,” and there is no basis for the Defendant’s request. Indeed, in his filed Motions, there are no assertions of prosecutorial misconduct whatsoever associated with Defendant’s case. The People assert that the attempt to secure transcripts of Grand Jury colloquy are speculative, and merely a fishing expedition.
46. For several decades, a presumption of regularity has attached to grand jury proceedings. *E.g. People v. Clifford*, 98 P.2d 272, 275 (Colo. 1939). The defendant has an affirmative burden to produce distinct evidence to overcome this presumption of regularity and this burden can never shift to the prosecution. *Id.* at 275-276. The People respectfully request the Court deny the defendant’s request for colloquy.

WHEREFORE, the People respectfully request that the Court deny the Defendant’s Request for Grand Jury Materials with the exception of those instances in which the People have either provided the information requested or the information is being provided consistent with the law outlines in this Response.

Respectfully submitted this March 13, 2019.

CHRISTIAN CHAMPAGNE
DISTRICT ATTORNEY
6th JUDICIAL DISTRICT

/s/ Fred Johnson
Fred Johnson, #42479
Special Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I delivered a true and correct copy of the foregoing to the parties of record via e-service.

/s/ Christian Champagne
Christian Champagne