

DISTRICT COURT LA PLATA COUNTY, COLORADO 1060 EAST SECOND AVENUE DURANGO COLORADO 81301	DATE FILED: September 20, 2018 1:55 PM FILING ID: 26A7077EA94A8 CASE NUMBER: 2017CR343
THE PEOPLE OF THE STATE OF COLORADO, v. Mark Redwine Defendant	o COURT USE ONLY o
Douglas Wilson, Colorado State Public Defender Justin Bogan 33827 John Moran 175 Mercado Suite 250 Durango Colorado 81301	Case No.: 17CR343
CORRECTED: [D-15(A)] MOTION TO DISMISS INDICTMENT DUE TO PRE-INDICTMENT PUBLICITY PUBLIC ACCESS	

Mark Redwine moves this Court to enter an Order dismissing the indictment returned by the La Plata County Grand Jury on July 20, 2017, for the following reasons:

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 partial 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) against his son, Dylan Redwine.

2. Dylan Redwine's disappearance on November 19, 2012, and the allegations concerning Mark Redwine's involvement in her death created a media firestorm. From November 19, 2012, to the date the Indictment was returned on July 20, 2017, newspapers in Durango and Bayfield, as well as radio and television stations in New Mexico and Colorado have repeatedly reported at length concerning Dylan Redwine's death and Mark Redwine's alleged involvement in his death. Social media pundits have also clamored for the execution of Mr. Redwine.

3. The evidence of massive pre-indictment publicity is contained in D-11, Motion for Change of Venue and attendant exhibits to that motion. That motions exhibits and arguments

are incorporated into this motion. Counsel would draw the Court's attention to several of the most sensational and incendiary publications regarding this case:

- a. 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.
- b. 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] till he's dead". See Exhibit G.
- c. 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.
- d. 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.
- e. Klismet was also cited in a Pine 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.
- f. 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.

5. In light of the potential power of the grand jury over the criminally accused, the Due Process Clauses of the Constitutions require a state grand jury to be fair, impartial and unbiased. See Goldberg v. Kelly, 397 U.S. 254 (1970) (once State chooses to bestow administrative benefits, due process requires that administrative decisionmakers be unbiased); Moore v. Dempsey, 261 U.S. 86, (1923) (holding, many years before Federal Constitution was held to require state jury trials, that state jury must be unbiased); see also Beck v. Washington, 369 U.S. 541, (1962) (the Court states that "[i]t may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury"; the Court however does not decide this question); People v. Lewis, P.2d 416, 418 (Colo. 1973) (instructions to grand jury are designed to assure an orderly development and presentation of evidence in a calm and dignified atmosphere); U.S. Const., amends. V, XIV; Colo. Const., art. II, § 23, 25.

6. The prosecution elected to proceed by way of a grand jury Indictment rather than by the filing of an Information in order to commence the criminal prosecution of Mark Redwine. See C.R.S. § 16-5-101. Having elected to so proceed, Mark Redwine had a due process right to a grand jury that was fair, impartial and unbiased. See Goldberg v. Kelly, supra; Moore v. Dempsey, supra; cf. Peters v. Kiff, 407 U.S. 493 (1972) (held that under the Due Process Clause the State cannot subject an accused to indictment by a grand jury or trial by a petit jury that has been selected in an arbitrary and discriminatory manner regardless of any showing of actual bias); People v. Cerrone, 854 P.2d 178 (Colo. 1993).

6. History has taught us that grand juries "do not, in fact, provide a buffer between the accused and the charging authority. The presentation of evidence is under prosecutorial control, and the grand jury generally agrees to the actions of the prosecutor." Losavio v. Kikel, 529 P.2d, 306, 308 (1974) (citations omitted). Since the grand jury is not considered as a "buffer between the accused and the prosecution, the grand jury must at least therefore be a "buffer" between the accused and the public in order that it may be considered fair, impartial, unbiased and a legitimate criminal proceeding.

The question is not whether one who receives large-scale adverse publicity can escape grand jury investigation nor whether the hue and cry attendant on adverse publicity must have died down before the grand jury can make its investigation. . . . [T]he need [is] to make sure as is as is humanly possible that one after whom the mob and public passion are in full pursuit is treated fairly, that the grand jury

stands between him and an aroused public, that the judge uses the necessary procedures to insure dispassionate consideration of the charge.

Beck v. Washington, 8 L.Ed. at 128 (Douglas, J., dissenting). The Due Process Clauses require nothing less.

7. Due to the substantial amount of highly inflammatory pre-indictment publicity generated by this case Mark Redwine's due process right to a fair, impartial and unbiased grand jury has been denied. U.S. Const., amends. V, VI, XIV; Colo. Const., art. II, § 23, 25.

8. The Court has not yet determined whether the jury's finding of probable cause is supported by the record. Mr. Redwine has moved to stay this Court's probable cause review in his Motion To Stay Probable Cause Review. As grounds in support of the stay, Mr. Redwine has requested that the Court consider and resolve the herein motion. Substantial reasons support such a stay until the Court has resolved this motion concerning the publicity generated by this case. The publicity generated by this case has occurred during the term of the Grand Jury that issued the indictment. Given the partial record of the Grand Jury proceedings defense counsel as received, Mr. Redwine does not know if this Court inquired of the grand jury members concerning the publicity and its effects, consistent with the Supreme Court's opinion in Harper v. People, 817 P.2d 77 (Colo. 1991).

9. In Harper the Supreme Court issued a three-step process designed to determine whether the newspaper report at issue in fact prejudiced the deliberations of the jury trying the case. First, the trial court must principally determine whether the media report is inherently prejudicial. *Id.*, 817 P.2d at 84-85. Other relevant factors include whether the report contained information that would not be admissible at trial or that was not in fact adduced at trial as well as how closely related the publicity is to the matters at issue in the trial, the timing of the publication and the likelihood the jury was exposed to it. *Id.* The court should also consider the likely effectiveness of any instruction not to read, watch or listen to reports concerning the defendant or the trial in light of the nature and manner of dissemination of the news reports. "The existence of admonitions, alone, does not sufficiently neutralize news reports in the community where the trial is being held that may reasonably be believed to have come to the attention of the jurors." *Id.*, 817 P.2d at 84. Doubt about the existence of prejudice should be resolved by proceeding to step two and polling the jurors as a group to determine if any juror has read the article in question. *Id.* If a juror discloses that he or she has in fact read the article in question the court should proceed to step three and conduct an in-camera and individualized questioning of the juror about the effect of the article on the juror. "Ultimately, the trial judge, exercising informed discretion, must determine the prejudicial effect, if any, of the publicity." *Id.* These inquiries further must be conducted in the "framework of the facts of each case" and the trial court has broad discretion in deciding the ultimate issue of whether the media report prejudiced the accused's right to a fair trial. *Id.*, 817 P.2d at 83-84.

11. If this Court did not follow Harper with respect to an inquiry into whether the substantial and pervasive publicity generated in this case has denied Mr. Redwine his due process

right to a fair, impartial and unbiased jury, the Court should follow the Supreme Court's decision in Wiser v. People, 732 P.2d 1139 (Colo. 1987), concerning the test to be used to determine the effect of extraneous information or influence on a jury. In Wiser the Supreme Court announced an objective test to determine the whether a jury was tainted or influenced by extraneous information or influence. Wiser v. People, 732 P.2d at 1142-1143. The test requires a determination of whether there is a reasonable possibility that a juror's decision in this case was tainted or influenced by this extraneous information. The accused need not show actual prejudice. *Id.*

12. Applying the objective test announced in Wiser to this case, there is a reasonable possibility that one grand juror's decision in this case was tainted or influenced by this extraneous information. The indictment should therefore be dismissed.

13. Under application of either the Harper or Wiser tests, Mr. Redwine's due process right to a fair, impartial and unbiased grand jury was thus denied. U.S. Const., amends. V, XIV; Colo. Const., art. II, § 23, 25.

14. The grand jury in this case was effectively an extension of a lynchmob mentality prevailing in the community due to repeated exposure to the inflammatory publicity concerning the alleged crimes and the alleged offenders. The grand jury in this case was not fair, impartial and unbiased under the Constitutions. The grand jury proceedings in this case were not constitutional or legitimate proceedings. The Indictment must therefore be dismissed. See Wiser v. People, *supra* (a new petit jury trial on the substantive charges are required where there is a reasonable possibility that the petit jury's decision was tainted by the introduction of extraneous information or influence).

15. Mr. Redwine moves for a hearing on this motion when he may present the substantial amount of pre-indictment publicity that occurred in this case.

16. 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

Certificate of Service
I hereby certify that on, Sept. 20 2018, I served the foregoing document by ICCES to all opposing counsel of record.

Dated: September 20, 2018

/s/ Justin Bogan