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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

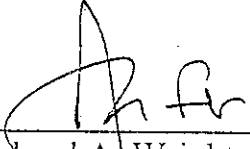
STATE OF ARIZONA,)	NO. CR-2007-743
)	
Plaintiff,)	DEFENDANT JEFFS'
)	MOTION FOR REMAND
vs.)	
)	:
WARREN STEED JEFFS,)	[Oral Argument Requested]
)	
Defendant.)	[Hon. Steven F. Conn]
)	


The defendant, Warren Jeffs, by and through his undersigned attorney, hereby respectfully requests this Court, pursuant to Rule 12.9 of the Arizona Rules of Criminal Procedure, to issue its order remanding his indictment due to improprieties in the grand jury presentation. This motion is based on the legal reasoning and authorities set forth in the attached Memorandum of Points and Authorities

1 RESPECTFULLY SUBMITTED this 13th day of May, 2008.

2 WRIGHT STANISH & WINCKLER

PICCARRETA DAVIS PC

3
4 By 
5 Richard A. Wright
6 Attorney for Warren Jeffs

By 
Michael L. Piccarreta
Jefferson Keenan
Attorneys for Warren Jeffs

7
8 MEMORANDUM OF POINTS AND AUTHORITIES

9 I. STATEMENT OF FACTS

10 The defendant, Warren Jeffs, stands charged as an accomplice to the crimes
11 of sexual conduct with a minor and incest. Count 1 arises from an incident that,
12 according to the indictment, occurred on or between May 1, 2002, and June 30,
13 2002, wherein Allen Steed had sexual conduct with () who was under
14 18 years of age. Count 2 arises from the very same incident and alleges that the
15 sexual conduct constituted incest. Count 3 of the indictment refers to an incident
16 that allegedly occurred on or between August 15, 2002, and September 15, 2002,
17 between Mr. Steed and _____ Count 4 arises from this same incident and also
18 alleges that the sexual conduct constituted incest. Mr. Jeffs is not charged with
19 personally engaging in any type of sexual conduct with anyone, rather he is
20 charged as an accomplice to the allegedly illegal sexual activity between these
21 other individuals.
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26 It is a matter of common knowledge that Mr. Jeffs and the practices of the
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1 Fundamentalist Church of Latter Day Saints (FLDS) have been the subject of
2 extensive adverse media coverage throughout Mohave County. This already
3 extensive coverage was exacerbated before, during, and after Mr. Jeffs' criminal
4 trial in Utah. Despite the vast extent of this publicity, the prosecutor conducted no
5 inquiry into the nature of the publicity to which the grand jurors were exposed,
6 and no meaningful inquiry to determine whether they could truly remain unbiased.
7
8 In addition, even though Mr. Jeffs stands charged as an accomplice, the
9 prosecutor inexplicably failed to instruct the grand jury on the statutory definition
10 of accomplice that the grand jury was to apply. Accordingly, the grand jury was
11 not instructed on the key statutory definition in the case. Moreover, the State also
12 presented inaccurate testimony to the grand jury and failed to present clearly
13 exculpatory information in several areas. The prejudicial conduct of the grand
14 jury presentation usurped the grand jury's role and denied Mr. Jeffs his right to
15 have a fair and unbiased grand jury base its decision on whether or not to indict
16 him on accurate information coupled with accurate instructions on the applicable
17 legal statutes. These facts will be addressed in detail in the discussion of the issues
18 to which they pertain.

23 II. DISCUSSION

24 In *Maretick v. Jarrett*, 204 Ariz. 194, 62 P.3d 120 (2003), the Arizona
25 Supreme Court discussed the historic role of the grand jury and the unique
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1 responsibility of the prosecutor who serves it:

2 The Supreme Court has described the grand jury as “a primary
3 security to the innocent against hasty, malicious and oppressive
4 persecution; it serves the invaluable function in our society of
5 standing between the accuser and the accused. to determine whether
6 a charge is founded upon reason or was dictated by an intimidating
7 power or by malice or ill will.” *Wood v Georgia*, 370 U.S. 375, 390
8 [] (1962). The grand jury’s mission is “to bring to trial those who
9 may be guilty and clear the innocent.” *Marston’s, Inc. v. Strand*, 114
10 Ariz. 260, 264, 560 P.2d 778, 782 (1977). To do its job effectively,
11 the grand jury must receive a fair and impartial presentation of the
12 evidence. *Crimmins [v. Superior Court]*, 139 Ariz. [39], 41, 668
13 P.2d [882], 884 [(1983)]; *State v Emery*, 131 Ariz. 493, 506, 642
14 P.2d 838, 851 (1982). Because defendants enjoy few procedural
15 rights before the grand jury, grand juries must be unbiased and
16 independent and must act “independently of either prosecutor or
17 judge.” *Marston’s*, 114 Ariz. at 264, 560 P.2d at 782.

18 *Id.* at 197, ¶ 8, 62 P.3d at 123.

19 In addition,

20 The prosecutor’s role before the grand jury is unique in our system.
21 The prosecutor acts not simply as an advocate, but as a “minister of
22 justice,” who assists the jurors in their inquiry. See Ariz. R. Sup. Ct.
23 42, ER 3.8 cmt. Prosecutors bear a “particularly weighty duty not to
24 influence the grand jury because the defendant has no representative
25 to watch out for his interests” before the grand jury. *State v Hocker*,
26 113 Ariz. 450, 454, 556 P.2d 784, 788 (1976). The prosecutor
27 therefore “must not take advantage of his or her role as the ex parte
28 representative of the state before the grand jury to unduly or unfairly
influence it.” 1 *ABA Standards for Criminal Justice*, Ch. 3, Std. 3-
3.5 cmt. (2d ed 1980).

Id. at ¶ 10.

A. Mr. Jeffs Was Denied His Right To A Fair, Impartial And Unbiased
Grand Jury Because The Prosecutor Made No Inquiry Into The Type
And Extent Of Adverse Publicity To Which The Grand Jurors Were

1 Exposed And No Meaningful Inquiry To Determine Whether They
2 Could Truly Remain Unbiased

3 Under Rule 12.9 of the Arizona Rules of Criminal Procedure, a defendant
4 has the substantial due process right to a fair, impartial, and unbiased grand jury.
5
6 *Marston's*, 114 Ariz. at 264, 560 P.2d at 782; *Crimmins*, 137 Ariz. at 41, 668 P.2d
7 at 884.

8
9 “Every man, whatever the offenses of which he may be suspected, is as
10 much entitled to the just, impartial, and unbiased judgment of a grand jury as he is
11 to that of a petit jury on his final trial.” *State v. Good*, 10 Ariz. App. 556, 559, 460
12 P.2d 662, 665 (1969) [citations omitted]. Because Mr. Jeffs is entitled to the same
13 impartiality from the grand jurors as from petit jurors, the prosecutor assisting the
14 grand jury was required to take “adequate measures to ensure that prospective
15 jurors’ exposure to the publicity did not in fact deprive defendant of a fair trial”
16
17 *State v. Befford*, 157 Ariz. 37, 40, 754 P.2d 1141, 1144 (1988). Because a
18 defendant has neither his counsel nor a judge to look out for his interests,
19 *Maretick, supra*, it falls upon the prosecutor to conduct “individual voir dire to
20 assess the extent of the prospective jurors’ knowledge of the case and their ability
21 to set aside any preconceived notions they had formed.” *Befford*, 157 Ariz. at 40,
22 754 P.2d at 1144. *See also State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576
23 (1987) [approving this procedure]

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27 Because the extensive nature of adverse pretrial publicity was an obvious
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1 issue, there were several methods available to the prosecutor for dealing with the
2 matter. The prosecutor, at a minimum, could have contacted the presiding judge
3 and requested the judge's assistance in determining the qualifications of the jurors
4 and/or guidance on how to proceed in the matter. The prosecutor could have had
5 the prospective grand jurors fill out a written questionnaire, or made a record in
6 some other fashion, to show exactly the nature and extent of the publicity to which
7 the grand jurors were exposed, in order to determine whether further examination
8 of the grand jurors on the subject was necessary, either through individualized voir
9 dire or some other method. Instead, the prosecutor did nothing. He allowed the
10 grand jurors to self-select -- to determine for themselves whether they were
11 qualified to sit as jurors. The result is that there is no record whatsoever as to the
12 extent of the jurors' knowledge of adverse pretrial publicity and there is no
13 opportunity for meaningful analysis or review as to the ability of the jurors to sit
14 fairly on the case. The only remedy now is a remand.

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20 In the present case, the prosecutor asked only if anyone on the grand jury
21 had read or heard anything about Warren Jeffs. Without inquiring into any
22 particulars about any such publicity, the prosecutor then asked the jurors if they
23 could assure him that they could still be fair and impartial.

24
25 Has anybody read anything about a man named Warren Jeffs?

26 Okay. I don't want anybody to indicate that they've read or to talk
27 about anything you've read during the pendency of the
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1 proceedings today, whether it's the testimony or during any
2 deliberations.

3 Does anybody feel that anything they've read about Warren Jeffs
4 or anything they've heard about him, whether it's been through
5 television or radio, would make where they could not be able to sit
6 on this case and be fair and impartial?

7 [Grand Jury Transcript, May 10, 2007, p 11].

8 Only two of the prospective grand jurors were candid enough to admit
9 that they could not be fair and impartial, and they were excused. [Grand Jury
10 Transcript, May 10, 2007, p. 12]. The prosecutor then asked the remaining
11 grand jurors not to discuss anything they may have read or heard, and asked the
12 remaining grand jurors to raise their hands if they could set aside everything
13 they may have seen or heard and decide the case on the evidence presented in
14 the grand jury proceeding. The result was not surprising. "Let the record
15 reflect that all 12 of the grand jurors have in fact raised their hands" [Grand
16 Jury Transcript, May 10, 2007, p 13].

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20 The Arizona Supreme Court has discussed the type of protective measures
21 that a trial court must undertake in cases involving extensive pretrial publicity and
22 inflammatory charges. The trial court has the responsibility of producing a "fully
23 developed oral voir dire record in deciding whether pretrial publicity actually
24 prejudiced the jury." *State v. Bible*, 175 Ariz. 549, 566, 858 P.2d 1152, 1169
25 (1993). Indeed, given the extensive volume of pretrial publicity and the
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1 inflammatory nature of the charges in the present case, the jurors should have
2 been subjected to individual voir dire:
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4 Voir dire examination of a juror or jurors apart from the others is
5 designed to prevent panel contamination by inflammatory
6 answers. In camera voir dire, most useful in cases involving
7 massive publicity or “unusually sensitive subjects,” is designed to
8 encourage full disclosure “when the prospective juror might be
9 embarrassed to confess his true opinion before an audience.”

10 *Id.* at 570, 858 P.2d at 1173 [quoting comment to Ariz. R. Crim. P. 18.5(d)]

11 In *Bible*, the court found no error in the trial court’s decision not to
12 engage in individualized or in camera voir dire because each of the members of
13 the jury panel had completed, under oath, a questionnaire containing 56
14 questions with numerous subparts covering a total of 30 pages, with many of
15 the questions specifically directed at news media coverage. The questionnaire
16 was written by defense counsel and submitted to the jury panel with no changes.

17 The trial court also conducted voir dire of the panel, asking questions he had
18 previously discussed with counsel for defendant and the state. *Id.* at 569-70,
19 858 P.2d at 1172-73. Even with all of these precautions, the Arizona Supreme
20 Court noted that “[g]iven the nature of the case, including extensive pretrial
21 publicity and a small population, it might have been appropriate to have a more
22 extensive follow-up through oral voir dire.” *Id.* at 570, 858 P.2d at 1173.
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26 In contrast, it is clear that there was no meaningful voir dire in the present
27 case. There was no written questionnaire, no individualized voir dire, no
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1 attempt to ascertain the juror's knowledge, and thus no meaningful
2 determination as to whether the individual was fit to sit as an impartial grand
3 juror
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5 The Arizona Supreme Court has further recognized that media publicity
6 can be "so unfair, so prejudicial, and so pervasive that we cannot give any
7 credibility to the jurors' answers during voir dire affirming their ability to
8 decide the case fairly." *Bible*, 175 Ariz. at 565, 858 P.2d at 1168. Obviously,
9 there must be an inquiry into the type of publicity that potential jurors were
10 exposed to in order to determine whether the jurors can ignore the effect of that
11 publicity and decide the case fairly, and whether their promises to do so can be
12 believed.
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16 Again, because Mr. Jeffs was entitled to the same impartiality from the
17 grand jurors as from the jurors who will be deciding his fate at trial, the
18 prosecutor cannot disregard these protective measures simply because this is
19 only a grand jury presentation. "The right to an impartial jury applies to both a
20 grand jury and a trial jury." *Herrell v. Sargeant*, 189 Ariz. 627, 631, 944 P.2d
21 1241, 1245 (1997). Indeed, the prosecutor must scrupulously safeguard the
22 defendant's rights. *Maretick, supra*. The lack of meaningful voir dire in the
23 present case would never pass muster in the context of a trial for all the reasons
24 set forth in *Bible, Befford, and LaGrand, supra*. Accordingly, it does not pass
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1 muster in the grand jury context and Mr. Jeffs was denied his right to a fair,
2 impartial and unbiased grand jury. This matter was very important in the
3 present case because there were two votes against the indictment (10-2) and the
4 State garnered only one vote more than the minimum required to indict. A fair,
5 impartial, and unbiased grand jury may well have voted not to indict. This
6 matter must be remanded.
7

9 B. Mr. Jeffs Was Denied His Substantial Due Process Rights Because
10 The Prosecutor Failed To Instruct The Jury On The Applicable
11 Law.

12 The State drafted a proposed indictment alleging that Mr. Jeffs
13 “committed the crime of sexual conduct with a minor as an accomplice” and
14 that he “committed the crime of incest as an accomplice” [Emphasis added].
15 The grand jury returned the indictment, indicating their finding that there was
16 probable cause to believe that Mr. Jeffs was an “accomplice” to the sexual
17 activity that may or may not have occurred between _____ and Allen
18 Steed. However, the proposed indictment was accepted by the grand jury even
19 though the grand jury had never been instructed as to the elements of the
20 statutory definition of “accomplice” under the Arizona statutes. While the
21 prosecutor instructed the grand jury on criminal liability based upon conduct of
22 another pursuant to A.R.S. § 13-303, [Grand Jury Transcript, pp. 9-10], he
23 never instructed the grand jury on the meaning of “accomplice” under A.R.S. §
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1 13-301.

2 Arizona's statutory definition of "accomplice" is complex:

3
4 In this title, unless the context otherwise requires, "accomplice"
5 means a person other than a peace officer acting in his official
6 capacity within the scope of his authority and in the line of duty,
7 who with the intent to promote or facilitate the commission of an
8 offense:

9
10 1 Solicits or commands another person to commit the
11 offense; or

12 2 Aids, counsels, agrees to aid or attempts to aid another
13 person in planning or committing the offense.

14 3 Provides means or opportunity to another person to
15 commit the offense.

16
17 A.R.S. § 13-301. This statutory definition contains numerous subparts and sub-
18 elements, and varies significantly from the common usage or ordinary meaning
19 of the term which is defined merely as "one associated with another especially
20 in wrongdoing." *Merriam-Webster's Online Dictionary*. Accordingly, it was
21 incumbent upon the prosecutor to instruct the grand jury on the specialized
22 meaning of the term under the Arizona statutes.

23 It is axiomatic that the members of the grand jury must be instructed on
24 the law they are to apply. *State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38,
25 43 (1980) [conspiracy count remanded because the prosecutor failed to instruct
26 the grand jury on the overt act requirement of Arizona law of conspiracy]. In
27 *Crimmins, supra*, the grand jury indicted the defendant for kidnapping a
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1 suspected burglar, but the prosecutor never instructed the grand jury on the
2 defendant's right to restrain a person and make a citizen's arrest under Arizona
3 law. The Arizona Supreme Court reversed the trial court's denial of the
4 defendant's challenge to his indictment:
5

6 We hold that the citizen's arrest statutes were part of the applicable
7 law given the facts of the case, and it was the duty of the
8 prosecutor as legal advisor to the grand jury to instruct on that law.

9 *Crimmins*, 137 Ariz. at 42, 668 P.2d at 885. The court concluded:

10 Properly informed as to the facts and instructed as to the citizen's
11 arrest statutes, the grand jury could have decided the propriety and
12 legal effect of *Crimmins*' reliance on the right of a private
13 individual to arrest a criminal suspect. This is a decision that
14 should have been made by the grand jury in weighing the question
of probable cause

15 *Id* at 43, 668 P.2d at 886. The court clearly reiterated "the proposition that
16 instruction on all the relevant statutes satisfies due process." *Id* [emphasis
17 added].
18

19 Following the holdings of *Baumann* and *Crimmins*, other Arizona courts
20 have similarly held that defendants are entitled to a remand when the prosecutor
21 fails to instruct on the applicable legal statutes. In *Korzep v. Superior Court*,
22 172 Ariz. 534, 838 P.2d 1295 (App. 1991), the court held that the defendant
23 was entitled to a remand because the prosecutor failed to instruct the grand jury
24 on justification pursuant to A.R.S. § 13-411. The defendant was entitled to
25 remand due to the deficiency in the legal instructions even though there was no
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1 claim of any problems with the factual presentation to the grand jury. In
2 *Herrell v. Sargeant*, 189 Ariz. 627, 944 P.2d 1241 (1997), the Arizona Supreme
3 Court also held that the defendant was entitled to a remand because the
4 prosecutor failed to instruct the grand jury on justification pursuant to A.R.S. §
5 13-411
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8 Because the grand jury was being asked to determine whether Mr. Jeffs
9 was an “accomplice” under Arizona law, the prosecutor was required to at least
10 instruct them as to the meaning of the term under the Arizona statutes. The
11 prosecutor’s failure to instruct the grand jury on the applicable law entitles Mr
12 Jeffs to a remand. *Baumann, supra; Crimmins, supra; Korzep, supra; Herrell,*
13 *supra.*
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16 C Mr. Jeffs Is Entitled To A Remand Because The State’s
17 Presentation Of False And/Or Misleading Evidence And Failure
18 To Present Clearly Exculpatory Evidence Denied Mr Jeffs His
19 Due Process Right To An Unbiased And Accurately Informed
Grand Jury

20 Under Rule 12.9 of the Arizona Rules of Criminal Procedure, a defendant
21 also has the substantial due process right to a fair and impartial presentation of the
22 evidence in grand jury proceedings. *Crimmins v. Superior Court*, 137 Ariz. 39,
23 668 P.2d 882 (1983); *State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982). A fair
24 and impartial presentation of evidence is precluded by the presentation of
25 erroneous or misleading evidence to the grand jury. *Nelson v. Royston*, 137 Ariz
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1 272, 669 P 2d 1349 (App. 1983); *Escobar v. Superior Court*, 155 Ariz. 298, 746
2 P.2d 39 (App. 1987). Substantial due process in grand jury proceedings protects a
3 criminal defendant from “having an indictment returned against him with the use
4 of misleading testimony . . .” (*Royston*, 137 Ariz. at 277, 669 P.2d at 1354), and
5 being “tried on an indictment based on erroneous testimony” *Escobar*, 155 Ariz.
6 at 301, 746 P.2d at 42. A defendant is entitled to have his indictment remanded
7 whenever “evidence, whether intentionally or unintentionally false, has been
8 presented to the trier of fact and is used as a basis for finding probable cause.”
9 *Royston*, 137 Ariz. at 277, 669 P 2d at 1354.
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13 In addition, a defendant has the substantial due process right to have his
14 grand jury informed of clearly exculpatory evidence. *State v. Coconino County*,
15 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984). “Clearly exculpatory evidence is
16 evidence of such weight that it might deter the grand jury from finding the
17 existence of probable cause” *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235,
18 1239 (1997) [citing *State v. Coconino County, supra*] The State has the
19 obligation to make a meaningful presentation of clearly exculpatory evidence
20 made known to the State. *Trebus, supra; Herrell v. Sargeant*, 189 Ariz. 627, 944
21 P.2d 1241, 1243 (1997) [“on proper request, the prosecutor is obliged to inform
22 the grand jury of any exculpatory matters, thus enabling the jury to make an
23 informed decision under A.R.S. § 21-412”]. In the present case, the State clearly
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1 violated its duty to make a meaningful presentation of exculpatory evidence. The
2 State's failure to meet this obligation entitles Mr. Jeffs to a remand.

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4 1. The State presented false information that _____ and
5 Allen Steed were first cousins and this false information was
6 obviously essential to the grand jury's decision to indict on the
incest counts.

7 Before the grand jury, Detective Engels repeatedly testified falsely that
8 _____ and Allen Steed "were first cousins." [Grand Jury Transcript, pp. 33-
9 36, 38, 50-51] In fact, _____ and Allen Steed are first cousins of the half
10 blood, and Arizona law recognizes that distinction as explained in defendant Jeffs'
11 motion to dismiss counts 2 and 4 of his indictment, which is incorporated herein
12 by reference. This distinction is critical. The Arizona legislature has made its
13 policy decision by declaring that marriages between first cousins of the full blood
14 are prohibited, but marriages between other cousins are not. The State was no
15 doubt aware of this distinction and the State was well aware that Allen Steed and
16 _____ were not full first cousins.¹ The State was obligated to present this
17 factual information, together with accurate instructions on the law, so that the jury
18 could determine whether the facts fit the definition of the crime. Instead, the State
19 elected to present false information on the matter to remove the question
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25 _____
26 ¹ Mr. Steed and _____ share a common grandfather, Newell Steed, but they do not share a
27 common grandmother. _____ grandmother is Alice Young and Mr. Steed's
28 grandmother is Eliza Pugh. Mr. Steed and _____ are therefore not first cousins, but rather
first cousins of the one-half blood.

1 completely from the grand jury's consideration.

2 The prosecutor had previously instructed the grand jury that marriages
3 between first cousins were prohibited under Arizona law and that sexual conduct
4 between those individuals would therefore violate Arizona's incest statute. [Grand
5 Jury Transcript, June 21, 2007, p 9] While these instructions were true, they
6 were highly misleading because the case does not involve first cousins. As noted
7 above, a defendant cannot be indicted "with the use of misleading testimony,"
8 *Royston, supra*, and cannot be "tried on an indictment based on erroneous
9 testimony." *Escobar, supra*. A defendant is entitled to remand whenever
10 "evidence, whether intentionally or unintentionally false, has been presented to the
11 trier of fact and is used as a basis for finding probable cause." *Royston, supra*.
12 Accordingly, in addition to all the reasons for dismissal of counts 2 and 4 set forth
13 in Mr. Jeffs' motions to dismiss, those counts must also be dismissed due to the
14 presentation of this false information to the grand jury.

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20 2. The State presented false information that Warren Jeffs could
21 not legally perform marriages

22 On page 64 of the grand jury transcript, Detective Engels states falsely that
23 Warren Jeffs could not legally perform marriages in Nevada, Arizona, or Utah.
24 [Grand Jury Transcript, p. 64] This testimony was false because there is no
25 impediment under Arizona law to Warren Jeffs performing marriages as his
26 religion clearly confers that authority upon him. A R S § 25-124 sets forth the
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1 qualifications of those who are authorized to perform marriage ceremonies:

2 A The following are authorized to solemnize marriages
3 between persons who are authorized to marry:

4 1. Duly licensed or ordained clergymen.

5
6 B. For the purposes of this section, "licensed or ordained
7 clergymen" includes ministers, elders or other persons who by the
8 customs, rules and regulations of a religious society or sect are
9 authorized or permitted to solemnize marriages or to officiate at
10 marriage ceremonies

11 Warren Jeffs was clearly authorized by the customs, rules and regulations of
12 the FLDS to officiate at marriage ceremonies. The marriage between _____
13 and Allen Steed, therefore, would have been legal in all respects if Allen Steed and
14 one of _____ parents had taken the proper steps, i.e., obtaining a license from the
15 state and obtaining authorization from a judge.² This false information was very
16 prejudicial to Mr. Jeffs because the law permits marriages between individuals
17 such as _____ and Allen Steed under certain circumstances, and Mr. Jeffs is
18 legally authorized to perform those and other marriages. The effect of the false
19 testimony was simply to cast this religious ceremony in a sinister and illegitimate
20 light.
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25 ² Detective Engels also provided false testimony about the capacity of underage persons to
26 marry. Persons under 18 require the consent of only one custodial parent, and persons under
27 16 require the consent of one custodial parent and authorization from a superior court judge
28 A.R.S. § 25-102(A). Accordingly, Detective Engel's testimony on these subjects was also
false. [Grand Jury Transcript, pp. 33-34].

1 D. The Prosecutor Improperly Influenced The Grand Jury And Usurped
2 The Grand Jury's Function Thereby Ensuring An Indictment.

- 3 1. The prosecutor improperly injected repeated prejudicial
4 references to religious practices and beliefs as purported
5 evidence of criminal guilt.

6 The grand jury transcript is riddled with discussions of, and references to,
7 the practices and beliefs of the FLDS church and its prophets Mr. Rulon Jeffs and
8 the defendant, Mr. Warren Jeffs. The grand jury was told that the word of God is
9 revealed to the prophet and the prophet then instructs the congregation. The grand
10 jury was then informed, essentially, that everyone has to follow the practices of the
11 church or else they won't be admitted to heaven, and therefore no one has any
12 freedom of choice and/or responsibility for his or her own conduct. These
13 religious themes are central to the State's theory of criminal responsibility.

14 After all, Mr. Jeffs is not accused of engaging in any improper sexual
15 activity with anyone in the present case. He is charged as an "accomplice" strictly
16 because of his position in the church and his conduct in that role. Mr. Jeffs
17 assisted his father, Rulon Jeffs, in performing a marriage ceremony between
18 _____ and Allen Steed that took place with parental consent and the consent of all
19 concerned parties. After the marriage, Warren Jeffs counseled the couple, in
20 accordance with FLDS religious teachings, that married couples should have
21 children. Accordingly, the State's theory is based entirely upon conduct that Mr.
22 Jeffs engaged in in his capacity as the leader of the church
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1 The prosecutor's improper injection of these matters into the grand jury
2 proceeding was relentless and permeated the proceedings. For example, the
3 prosecutor asked the questions eliciting hearsay, and sometimes double and triple
4 hearsay, from individuals such as Carolyn Jessop and Richard Holm who had left
5 the church, but were nonetheless presented as experts on all things FLDS [See,
6 e.g., Grand Jury Transcript, pp. 17-27]. The prosecutor further gratuitously
7 elicited that Detective Engels was not a "popular person up there" in Colorado
8 City, presumably because he did not share the community's religious views and
9 practices. [Grand Jury Transcript, p. 16]. The prosecutor also gratuitously
10 injected Mr Jeffs' statements to his brother wherein he apparently had a
11 temporary crisis of faith about his position in the church [Grand Jury Transcript,
12 pp 57-58].

17 The defendant is aware that, in certain cases, references to religious
18 practices and beliefs are admissible without running afoul of any constitutional or
19 evidentiary prohibitions. However, the defendant submits that, in the present case,
20 it is highly improper to base the entire theory of criminal liability solely upon acts
21 unmistakably performed in a religious capacity. Moreover, the concept that
22 members of religion are expected to follow the teachings of the leader of the
23 church is hardly unique to the FLDS. The "mainstream" LDS also believes that
24 the word of God is revealed to the prophet of their church and they are to follow
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1 his teachings. It is also a feature of mainstream Catholicism that the Pope is the
2 Vicar of Christ, that Catholics are supposed to follow his teachings, and that his
3 pronouncements on religious subjects are infallible. The corollary to all of these
4 precepts is that those that do not obey these teachings will be ostracized from the
5 religious community and will not be admitted to heaven. Presumably the State
6 would not present evidence of the beliefs and practices of the Catholic religion,
7 “mainstream” Mormonism, or any other “accepted” religion in order to prove
8 criminal liability.
9
10
11

12 The point is that, in the grand jury presentation, the beliefs and practices of
13 the FLDS were not afforded the respect to which all religious beliefs are entitled,
14 especially because the key aspect behind the State’s theory – that members of the
15 church have to follow the instructions of the leader – is shared by many other
16 religions. Under these circumstances, the State’s repeated discussions of the
17 beliefs and practices of the FLDS infected the grand jury presentation, and denied
18 Mr. Jeffs his right to a fair and impartial grand jury.
19
20

21 2 The prosecutor improperly controlled and directed the grand
22 jury’s investigation.

23 As noted above, the prosecutor is the servant of the grand jury, not vice
24 versa. *Maretick, supra; Marston’s, supra*. After the prosecutor indicated that he
25 had no further questions for Detective Engels, one of the grand jurors expressed
26 his inability to understand why Mr. Jeffs was the subject of the grand jury
27
28

1 proceeding:

2 GRAND JUROR I haven't heard or read or anything
3 about this case, so the first I heard anything about it. So the girl
4 _____ was married to a 19-year-old, and that's who she had
5 relationships with, but Warren Jeff -- Warren Jeffs is the one that did
6 all the ceremonial, spiritual stuff, right?

7 MR. SMITH: You can answer it.

8 THE WITNESS [Detective Engels]: Yes

9 GRAND JUROR: Okay. Did Warren Jeffs ever have sex
10 with the girl himself?

11 THE WITNESS: No.

12 GRAND JUROR Isn't that what we're -- did he ever --
13 I'm kind of confused. It's says that we're -- Warren Jeffs, sexual
14 conduct with a minor.

15 [Grand Jury Transcript, p. 48]

16
17 The prosecutor then immediately re-instructed the jury on A.R.S. § 13-303,
18 criminal liability based upon conduct of another,³ and then launched into several
19 pages of leading questions propounded to Detective Engels specifically designed
20 to support the State's legal theory, i.e. that no one has any free will, no one has any
21 responsibility for their own actions, everyone must follow the teachings of the
22 leader's church or they will be excommunicated, lose all contact with friends,
23 family members, and other church members, and would be condemned to hell.
24

25
26 _____
27 ³ Once again, however, the prosecutor failed to instruct on the definition of accomplice under
28 A.R.S. § 13-301

1 [Grand Jury Transcript, pp. 49-51]

2 The prosecutor clearly exerted improper influence over the grand jury by
3 commandeering the proceedings in this manner. It is difficult to imagine a more
4 blatant example of a prosecutor taking "advantage of his or her role as the ex parte
5 representative of the state before the grand jury to unduly or unfairly influence it."
6
7 *Maretick, supra* at ¶ 10 [quoting *ABA Standards for Criminal Justice*].

9 In addition, the prosecutor exerted improper influence and directed the
10 grand jury's investigation away from pursuing any charges against Allen Steed.
11 Again, one of the grand jurors expressed his dismay at the fact that the
12 presentation had centered on Warren Jeffs:
13

14 GRAND JUROR — We're charging a man that never put a
15 hand on this person and the whole — basically saying that he —
16 whatever words you used from your book, that he brainwashed — or I
17 hate to use that word.

18 GRAND JUROR — Accomplice.

19 GRAND JUROR — Accomplice, okay. But when it is not
20 only him, just that whole village and the whole way of life of her
21 upbringing, why — why aren't we charging Allen for actually doing it
22 and why are we going after just this one guy?

23 MR. SMITH: Well, I don't think you could charge the whole
24 community, because you have to look at, you know, this particular
25 incident. I mean, you know, you have to look at things like the age
26 of the person involved, what's the relationship involved.

27 But the answer to question is is [sic] that you can charge Allen.
28

1 [Grand Jury Transcript, p. 65]

2 Although the prosecutor assured the grand jury that it could charge Allen
3 Steed, he stated "I'm not really at liberty to tell you --" the "strategic reasons [for
4 not charging Mr. Steed]. But that wouldn't be something that I would be allowed
5 to discuss." [Grand Jury Transcript, pp. 65-66] The obvious result of these
6 statements was to impart to the grand jury that the State had already thought about
7 prosecuting Allen Steed and decided, for unknown reasons, not to, and that should
8 be good enough for the grand jury. This was clearly improper interference with
9 the grand jury's function. "It is not the prosecutor's role to deflect the grand jury
10 from its inquiry." *Maretick*, 204 Ariz. at 197, ¶ 10, 62 P.3d at 123

14 The proof of these improprieties is in the pudding. Despite the novel legal
15 theory involved, the grand jury deliberated only seven minutes before deciding to
16 indict, albeit with two dissenting votes. [Grand Jury Transcript, p. 73]. The
17 defendant submits that the cumulative result of the prosecutor's actions, together
18 with the other improprieties in the grand jury proceedings, simply ensured an
19 indictment. In the present case, the State "effectively control[led] the outcome of a
20 given proceeding, thereby usurping the grand jury's role and depriving the
21 defendant of the due process right to an independent grand jury" *Trebus*, 189
22 Ariz. at 624, 944 P.2d at 1238

26 III CONCLUSION

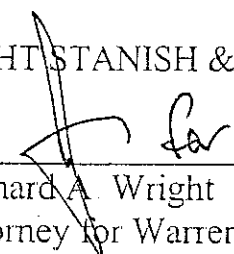
1 The prosecutor failed to conduct any meaningful inquiry into whether the
2 grand jurors were biased against Mr. Jeffs because of the vast amount of
3 prejudicial media publicity. The prosecutor failed to instruct the grand jury on the
4 key statutory definition in the case that it was to decide. The State presented
5 inaccurate information, failed to present clearly exculpatory information, and
6 improperly influenced the grand jury. Accordingly, Mr. Jeffs is entitled to a
7 remand.

8
9
10 RESPECTFULLY SUBMITTED this 14th day of May, 2008.


11
12 WRIGHT STANISH & WINCKLER

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14
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20 Kingman, AZ 86401

21 Copy of the foregoing faxed and mailed
22 this 13th day of May, 2008, to:

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