

1 jurors were exposed. The State's response makes essentially two arguments in an
2 attempt to excuse this failure. First, the State points out that the standard of proof
3 in grand jury proceedings is probable cause, not proof beyond a reasonable doubt
4
5 However, the Arizona Supreme Court has made it quite clear that this makes no
6 difference at all with respect to the need for unbiased jurors: "The right to an
7 impartial jury applies to both a grand jury and a trial jury." *Herrell v. Sargeant*,
8 189 Ariz. 627, 631, 944 P.2d 1241, 1245 (1997). "Every man, whatever the
9 offense is of which he may be suspected, is as much entitled to the just, impartial,
10 and unbiased judgment of a grand jury as he is to that of a petit jury on his final
11 trial." *State v. Good*, 10 Ariz. App. 556, 559, 460 P.2d 662, 665 (1969) [citations
12 omitted]. Indeed, in an *ex parte* proceeding such as a grand jury presentation, the
13 prosecutor bears a "particularly weighty duty" to ensure that the proceedings are
14 fair and that the jurors are unbiased "because the defendant has no representative
15 to watch out for his interests." *State v. Hocker*, 113 Ariz. 450, 454, 556 P.2d 784,
16 788 (1976).

21 Second, the State contends that the prosecutor did not inquire into the
22 nature of the publicity to which the grand jurors were exposed because the
23 prosecutor did not want the grand jurors "to state anything in front of the other
24 grand jurors . . . in order to avoid tainting the grand jury panel." [Response, p. 2].
25 The easy response is that the prosecutor could have simply obtained this
26
27
28

1 information on the record outside the presence of the remaining grand jurors. This
2 is not an either-or situation where the only choices are do not find out of the grand
3 jurors' prejudice or ask him in front of all remaining grand jurors. The State's
4 response completely ignores the defendant's argument that the circumstances of
5 the present case called for, at a minimum, individual voir dire:
6

7
8 Voir dire examination of a juror or jurors apart from the others is
9 designed to prevent panel contamination by inflammatory
10 answers. In camera voir dire, most useful in cases involving
11 massive publicity or "unusually sensitive subjects," is designed to
12 encourage full disclosure "when the prospective juror might be
13 embarrassed to confess his true opinion before an audience"

14 *State v. Bible*, 175 Ariz. 549, 570, 858 P.2d 1152, 1173 (1993) [quoting comment
15 to Ariz. R. Crim. P. 18.5(d)] [emphasis added].

16 In order to ensure that this grand jury was unbiased in this matter, it was
17 incumbent upon the prosecutor to conduct at least some kind of inquiry and make
18 some kind of record so that the matter could be subjected to meaningful review.

19 As noted in defendant's motion, there were several methods available to the
20 prosecutor for addressing the issue of possible prejudice due to adverse publicity.
21 The prosecutor, at a minimum, could have contacted the presiding judge and
22 requested the judge's assistance in determining the qualifications of the jurors
23 and/or guidance on how to proceed in the matter. The prosecutor could have had
24 the prospective grand jurors fill out a written questionnaire, or made a record in
25 some other fashion, to show exactly the nature and extent of the publicity to which
26
27
28

1 the grand jurors were exposed, in order to determine whether further examination
2 of the grand jurors on the subject was necessary, either through individualized voir
3 dire or some other method. Instead, the prosecutor did nothing. He allowed the
4 grand jurors to determine for themselves whether they were qualified to sit as
5 grand jurors without any inquiries as to what knowledge they possessed. The
6 result is that there is no record whatsoever as to the extent of the jurors'
7 knowledge of adverse pretrial publicity and there is no opportunity for meaningful
8 analysis or review as to the ability of the jurors to sit fairly on the case. The only
9 remedy now is a remand.
10
11
12

13 The defendant is well aware that the matter of possible prejudicial pretrial
14 publicity will not be an issue in every grand jury presentation. However, the
15 State's prosecution of Mr. Jeffs is unique in many respects¹ and the possible
16 prejudice to Mr. Jeffs in this case was evident from the outset. Mr. Jeffs is entitled
17 to the same impartiality from the grand jurors as from the jurors who will be
18 deciding his fate at trial. The lack of any meaningful voir dire in the present case
19 would never suffice to protect a defendant's rights in the context of a trial, and did
20 not protect Mr. Jeffs' rights before the grand jury. Again, the only remedy now is
21 remand.
22
23
24

25
26 ¹ For example, the defendant is not aware of any cases, reported or unreported, in which the
27 state has prosecuted an individual as an accomplice to criminal behavior, but has chosen not
28 to prosecute any of the principals engaged in the criminal behavior

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

3 The State drafted, and the grand jury returned, an indictment alleging that
4 Mr. Jeffs “committed the crime of sexual conduct with a minor as an accomplice”
5 and that he “committed the crime of incest as an accomplice.” [Emphasis added].
6 Therefore, the grand jury returned an indictment, finding probable cause to believe
7 that Mr. Jeffs was an “accomplice,” even though the grand jury had never been
8 instructed as to the elements of the statutory definition of “accomplice” under the
9 Arizona statutes. In other words, the grand jury returned an indictment containing
10 a key legal term on which the grand jury was never instructed.

11 In its response, the State concedes that, while it did instruct the grand jury
12 on criminal liability based upon the conduct of another under A.R.S. § 13-303, it
13 did not instruct the grand jury as to the specialized definition of “accomplice”
14 under the Arizona statutes, A.R.S. § 13-301. However, the State contends that it
15 read A.R.S. § 13-303(B) to the grand jurors and that “the language of A.R.S. § 13-
16 303(B) is in most respects identical with the definition of accomplice as found in
17 A.R.S. § 13-301.” [Response, p 3]. The obvious problem with the State’s
18 argument is that the grand jury had no way of knowing whether A.R.S. § 13-303
19 defined the term “accomplice,” or not. Instead, the grand jury was instructed in
20 the disjunctive, i.e. that they could find Mr. Jeffs criminally accountable for the
21 conduct of another if certain provisions of A.R.S. § 13-303 applied, or if he was
22 23 24 25 26 27 28

1 “an accomplice,” with no further definition of that term:

2 MR. SMITH: The other statute I need to read is A.R.S. section 13-
3 303. It’s the accomplice liability statute. It’s when you are
4 accountable for the criminal conduct of another.

5 13-303, criminal liability based upon conduct of another. A person is
6 criminally accountable for the conduct of another if number one, the
7 person is made accountable for such conduct by the statutes defining
8 the offense.

9 Or two, acting with the culpable mental state sufficient for the
10 commission of the offense, such person causes another person,
11 whether or not such other person is capable of forming the culpable
12 mental state, to engage in such conduct.

13 Or three, the person is an accomplice of such other person in the
14 commission of an offense. Subsection B further explains the statute.

15 If causing a particular result is an element of an offense, a person
16 who acts with the kind of culpability with respect to the result that is
17 sufficient for the commission of the offense is guilty of that offense
18 if, number one, the person solicits or commands another person to
19 engage in the conduct causing such result;

20 Or two, the person aids, counsels, agrees to aid, or attempts to aid
21 another person in planning or engaging in the conduct causing such
22 result.

23 [Grand Jury Transcript, June 21, 2007, pp 10-11] [emphasis added]

24 Because the grand jury was instructed in the alternative, it would be natural
25 for the grand jurors to think that there must be some other meaning for
26 “accomplice” than that which was already covered by A.R.S. § 13-303. Indeed, as
27 noted in defendant’s motion, the common meaning of the term “accomplice” is
28 much broader and varies significantly from the statutory definition. The common

1 usage or ordinary meaning of accomplice is defined merely as “one associated
2 with another especially in wrongdoing” *Merriam Webster’s Online Dictionary*.

3
4 In the present case, the grand jury was never instructed on the statutory definition
5 of “accomplice,” and there is no way of knowing whether the grand jury merely
6 found that Mr. Jeffs was “associated with” Barlow and Leonard Barlow.

7
8 The grand jury was never instructed that, under Arizona’s definition of
9 accomplice, the grand jury must find that Mr. Jeffs 1) acted “with the intent to
10 promote or facilitate the commission of an offense,” and 2) then engaged in
11 specific factual conduct set forth in A.R.S. § 13-301
12

13 Because the grand jury was being asked to determine whether Mr. Jeffs was
14 an “accomplice” under Arizona law, the prosecutor was required to at least instruct
15 them as to the meaning of the term under the Arizona statutes, rather than
16 permitting the possibility that the grand jurors would rely upon their understanding
17 of the common meaning of the term. The prosecutor’s failure to instruct the grand
18 jury on the applicable law entitles Mr. Jeffs to a remand. *State v. Baumann*, 125
19 Ariz. 404, 610 P.2d 38 (1980); *Crimmins v. Superior Court*, 139 Ariz. 39, 668
20 P.2d 882 (1983); *Korzep v. Superior Court*, 172 Ariz. 534, 838 P.2d 1295 (App.
21 1991); *Herrell, supra*
22
23
24

25 C Mr. Jeffs Was Denied His Substantial Due Process Rights Because
26 The State Presented False And/Or Misleading Evidence And Failed
27 To Present Exculpatory Evidence.
28

1 1. The State misled the grand jury about the blood relationship
2 between Leonard Barlow and _____

3 Mr. Jeffs' motion to remand notes that the State presented false information
4 about the blood relationship between Leonard Barlow and _____. In its
5 response, the State is correct that this Court's dismissal of the incest charges
6 makes it unnecessary for the court to remand the indictment on these grounds.
7 However, Mr. Jeffs submits that the State's conduct in misleading the grand jury
8 in this manner had a prejudicial spill over effect which, combined with the other
9 improprieties, shows that the indictment must be remanded. While the State
10 maintains that "[i]n fact, _____, and Leonard Barlow are first cousins,"
11 [Response, p. 4], the State's conduct is still, at best, highly misleading. The State
12 never informed the grand jury that there is an important distinction between first
13 cousins and first cousins of the half blood, and never informed the grand jury that
14 Leonard Barlow and _____ were, "in fact," only first cousins of the half
15 blood. By withholding all of the pertinent facts from the grand jury, the State kept
16 the grand jury from understanding the legal significance of those facts. The State
17 usurped the grand jury's role by simply taking this issue away from the grand jury.
18 This is precisely the kind of improper conduct that warrants a remand.
19
20
21
22
23

24 2 The State failed to present clearly exculpatory evidence that
25 _____ made patently unbelievable statements in
26 connection with her allegations in this matter

27 In the grand jury presentation, the State went into great detail about claims
28

1 made by _____ about the actions and statements of Warren Jeffs, even
2 _____ claim that Warren Jeffs wanted her and Leonard Barlow to have
3 sex in a room next to an office in the home of _____ [Grand Jury Transcript,
4 June 21, 2007, p. 44]. However, the State intentionally chose to omit the dramatic
5 details in _____'s claims about what happened next, i.e. that she opened a
6 window, cut the screen, and "climbed out" of a window that the State's photos
7 indicate is some 15 to 20 feet above the surface below. [State's Disclosure, p.
8 754]. In its response, the State now claims that the photos disclosed to the
9 defendant apparently do not accurately depict the scene and that the State has
10 some unspecified "evidence" that the window was not so far above the surface
11 below. [Response, p. 4].

12
13
14
15
16 However, the State still offers no explanation for omitting the additional
17 details of _____ story. An obvious inference is that the State, too, found
18 these claims implausible or, at the very least, problematic, and therefore chose to
19 omit them from the grand jury presentation. However, the law is clear that the
20 State is not allowed to "cherry-pick" and present only the evidence that favors its
21 case. In addition to the prosecutor's duty to present exculpatory evidence to the
22 grand jury, a prosecutor in an ex parte proceeding has the ethical obligation to
23 present known adverse facts:
24
25

26 In an ex parte proceeding, a lawyer shall inform the tribunal of all
27 material facts known to the lawyer which will enable the tribunal to
28

1 make an informed decision, whether or not the facts are adverse.

2 Rule 42, Rules of the Arizona Supreme Court, ER 3.3(d) [emphasis added]

3
4 Because the State chose to present detailed evidence of Susie Barlow's
5 claims, it was obligated to present known adverse facts so that the grand jury
6 could determine for itself whether these incidents ever occurred. The State's
7 failure to present known adverse facts entitles Mr. Jeffs to a remand

9 D The Prosecutor Improperly Influenced The Grand Jury Through
10 Repeated Prejudicial References To Religious Practices And Beliefs
11 As Purported Evidence Of Criminal Guilt

12 Mr. Jeffs' motion for remand contends that it is improper to use religious
13 beliefs and practices as evidence of criminal guilt. Warren Jeffs is not the
14 originator of the beliefs and practices of the FLDS. It is the culture in which he
15 was raised and to which he has devoted his life. The State's response does not
16 deny that the grand jury transcript is riddled with discussions of and references to
17 the practices and beliefs of the FLDS Church and its prophets Mr. Rulon Jeffs and
18 the defendant, Mr. Warren Jeffs. The State contends, however, that it injected
19 these religious beliefs and practices to "show the control that Warren Jeffs had
20 over _____ and over Leonard Barlow." [Response, p. 5] What the State
21 does not show is how these religious beliefs and practices are relevant apart from a
22 general contention that members of a religion are expected to follow the teachings
23 and practices of the religion and the pronouncements of the leader of the church –
24
25
26
27
28

1 features shared by many, if not all, religions.

2 The defendant submits that just as it would be improper to inject the beliefs
3 and practices of Catholicism, “mainstream” Mormonism, Judaism, or any other
4 “excepted” religion to prove criminal liability, it was improper to inject these
5 FLDS beliefs and practices into the grand jury presentation. After all, all of Mr.
6 Jeffs’ acts that are alleged to be criminal were religious activities – assisting in the
7 performance of a marriage ceremony and providing counseling from the basis
8 tenets of the religion. Under these circumstances, the State’s repeated discussions
9 of the beliefs and practices of the FLDS polluted the grand jury presentation and
10 denied Mr. Jeffs to his right to a fair and impartial grand jury.
11
12
13

14 Conclusion

15 For the foregoing reasons, Mr. Jeffs is entitled to a remand. There were
16 significant problems with the qualifications of the grand jurors, problems with the
17 lack of adequate legal instruction, and problems with inaccurate factual
18 presentations. The prosecutor failed to conduct any meaningful inquiry into
19 whether the grand jurors were biased against Mr. Jeffs because of the vast amount
20 of prejudicial media publicity. The prosecutor failed to instruct the grand jury on
21 the key statutory definition in the case that it was to decide. The State presented
22 inaccurate information, failed to present clearly exculpatory information, and
23 improperly influenced the grand jury. Individually, each of these factors warrants
24
25
26
27
28

1 reversal. Collectively, they mandate it. Mr. Jeffs is therefore entitled to a remand
2 under Rule 12.9 of the Arizona Rules of Criminal Procedure.
3

4 RESPECTFULLY SUBMITTED this 26th day of June, 2008

5 WRIGHT STANISH & WINCKLER

PICCARRETA DAVIS PC

6 By  _____

By  _____

7 Richard A. Wright
8 Attorney for Warren Jeffs

Michael L. Piccarreta
Jefferson Keenan
Attorneys for Warren Jeffs

9
10 Copy of the foregoing FedEx'd
11 this 26th day of June, 2008, to:

12 Clerk of Mohave County Superior Court
13 401 East Spring Street
14 Kingman, AZ 86401

15 Copy of the foregoing faxed and mailed
16 this 26th day of June, 2008, to:

17 Hon. Steven F. Conn
18 Mohave County Superior Court
19 401 East Spring Street
20 Kingman, AZ 86401
21 Fax: 928-753-8938

22 Copy of the foregoing emailed and
23 mailed this 26th day of June, 2008, to:

24 Matthew J. Smith, Esq.
25 Mohave County Attorney's Office
26 315 North Fourth Street
27 P.O. Box 7000
28 Kingman, AZ 86402-7000