

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2023-008495-002 DT

06/15/2024

HONORABLE GEOFFREY FISH

CLERK OF THE COURT  
M. Mogel  
Deputy

STATE OF ARIZONA

TODD C LAWSON  
NICHOLAS KLINGERMAN  
CASEY BALL

v.

TERRY THOMAS CROSBY (002)

TIMOTHY REGIS GRIMM  
DENNIS I WILENCHIK  
BRIAN RICHARD GIFFORD

JUDGE FISH  
VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

The Court has considered the Defendant's Motion for a New Finding of Probable Cause and to Remand filed February 20, 2024, the State's Response filed March 9, 2024, the Defendant's Reply filed March 27, 2024, review of the grand jury transcripts, review of the exhibits and the oral argument held. The Court notes co-Defendant Judd has joined in the Motion.

The defense challenges the State's presentation to the grand jury on a several grounds including failure to properly provide Grand Jury with applicable law, using impermissible evidence protected by legislative immunity, presenting privileged testimony from the Cochise County Attorney, and allowing the Cochise County Attorney to present misleading testimony.

The role of the Grand Jury is to determine whether probable cause exists to believe that a crime has been committed and that a person being investigated committed it. *State v. Sanchez*, 165 Ariz. 164, 171, 797 P.2d 703, 710 (App. 1990). Expanding the Grand Jury's role beyond that point would put Grand Juries in the business of holding mini trials. *State v. Baumann*, 125

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Ariz. 404, 408-409, 610 P.2d 38, 42-43 (1980). Since the function of the Grand Jury is accusatory, not adjudicatory, the State is under no obligation to present an anticipated defense. Arizona courts will grant a motion for remand to the Grand Jury only if the prosecutor interferes with the jurors' inquiry into the evidence of the essential elements required for a particular crime to have been committed. *Nelson v. Royston*, 137 Ariz. 272, 276, 669 P.2d 1349, 1353 (App. 1983).

Additionally, when courts have remanded cases to the grand jury, they have done so upon findings that the prosecution knowingly used false or misleading testimony, and that the testimony was material to the grand jury's finding of probable cause. Furthermore, it is a "long established rule that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *State ex rel. Collins v. Kamin* 151 Ariz. 70, 725 P.2d 1104, 1106 (1986), quoting *State ex rel. Preimsberg v. Rosenblatt*, 112 Ariz. 461, 462, 543 P.2d 733, 774 (1975). The defendant may not attack the "nature, weight or sufficiency of the evidence" presented to the Grand Jury. *State v. Jacobson*, 22 Ariz. App. 128, 524 P.2d 962 (1974). At the Grand Jury stage, the defendant may not attack the facts or argue the conclusions to be drawn from the evidence. The Grand Jury is not the place to try the case. At trial, the defendant may argue the interpretation of evidence and raise any defenses; he may not do so at the Grand Jury level.

### **Failure to Properly Instruct the Grand Jury**

Defendant's first ground on which this matter should be remanded is based on the State's failure to specifically instruct the jury on the definitions of "with intent to" and "knowingly", both found in A.R.S. §13-105.

As the State points out, and as documented in the grand jury transcripts, these statutes, along with all other criminal statutes, were read to the grand jury when they were empaneled on August 28, 2023. At both panel presentations held on November 13, 2023, and November 27, 2023, the State did remind the grand jurors about prior statutes read and whether they desired any statutes to be reread. "Due process requires only that the prosecutor read all relevant statutes to the grand jury, provide them with a copy of those statutes to refer to during deliberations, and ask if they want any statutes reread or clarified." *O'Meara v. Gottsfeld*, 174 Ariz 576 at 578 (1993).

**THE COURT FINDS** the State properly instructed the grand jury.

### **Use of Evidence Protected by Legislative Privilege**

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Defendant next contends the State improperly presented evidence that was protected by legislative privilege and subject to legislative immunity. The State contends the nature of alleged conduct, administration of elections, is not legislative in nature and therefore not subject to legislative privilege or immunity. Further, Defendant did not waive the privilege even though he testified before the grand jury and presented his own evidence.

This Court has already addressed the legislative immunity argument in its ruling on Defendant's Motion to Dismiss. The Court has found Defendant is not protected by legislative immunity as the vote canvassing process is not a legislative function.

As to the issue of waiver, Defendant did testify at the grand jury pursuant to a subpoena. Unlike co-Defendant Judd, Defendant did not invoke his 5<sup>th</sup> amendment rights and fully testified answering both the State's questions and questions of the grand jurors. Furthermore, Defendant voluntarily presented his own evidence to support his testimony, which included attorney letters, CCBS meeting minutes and other communications.

While it is impossible for this Court, or anyone for that matter, to know what evidence each grand juror found persuasive or relied upon in finding probable cause, if the Court were to excise Defendant's testimony and evidence from the proceedings, there would still be enough evidence from which the grand jury could find probable cause. This is best demonstrated by the grand jury finding probable cause against co-Defendant Judd as she did not testify nor produce evidence for the grand jury.

**THE COURT FINDS** legislative privilege did not apply to evidence presented to the grand jury, Defendant waived any claim to legislative privilege by his testimony and presentation of evidence to the grand jury and even if not waived, the grand jury could still find probable cause if the testimony and evidence was excised from the presentation.

**Presentation of Privileged Testimony from the Cochise County Attorney**

Defendant's next argument rests on the position the State used Cochise County Attorney Brian McIntyre to present privileged information to the grand jury.

In review of the grand jury transcript, Cochise County Attorney McIntyre was advised not to disclose any attorney/client privileged materials. CCA McIntyre acknowledged the advisement. As the State points out in its response, Defendant fails to identify any specific testimony which violated privilege. Most of CCA McIntyre's testimony did consist of advice or statements made during open board meetings. There was no testimony, for instance, regarding anything stated in executive session.

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In addition, CCA McIntyre's advice and comments to the CCBS are reflected in the public meeting minutes, both from "work sessions" and board meetings.

Defendant argues CCA McIntyre violated Arizona Ethical Rule 1.6 which states, "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3)." However, the Court is not aware of any finding by the State Bar or other disciplinary body which has found or even alleged CCA McIntyre violated E.R. 1.6 by his testimony in this case.

**THE COURT FINDS** the State did not present attorney/client privileged testimony and evidence.

**Presenting Misleading Testimony Through the Cochise County Attorney**

Defendant's remaining position is the State presented misleading testimony and instructions on the law through CCA McIntyre. "Due process compels the prosecutor to make a fair and impartial presentation to the grand jury." *Trebus v. Davis*, 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997).

Most of the argument presented by Defendant on this issue would amount to factual disputes best settled by a trial jury. "Legal conclusions" CCA McIntyre testified to were consistent with prior advisements he gave the CCBS as evidenced by the meeting minutes and other documentary evidence. Defendant makes assumptions of what the grand jurors might have thought or what the grand jury might have relied upon, but this is completely unknown and conjecture.

Defendant also argues exculpatory evidence was not provided. For instance, an email exchange regarding the October 11, 2022, meeting. "Clearly exculpatory evidence is evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *State v. Coconino County Superior Court*, 139 Ariz. 422, 425 (1984). Even assuming that the testimony would be clearly exculpatory, the contention that a grand jury must review all exculpatory evidence clearly misinterprets the Grand Jury's primary function of determining whether probable cause exists to believe that crime has been committed and the individual being investigated was the one who committed it. *State v. Baumann*, 125 Ariz. 404, 610 P.2d 38 (1980).

**THE COURT FINDS** the testimony presented was not misleading.

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**THE COURT FURTHER FINDS** that the presentation of evidence to the Grand Jury was fair and impartial and Defendant's due process was not violated.

Accordingly,

**IT IS ORDERED** denying Defendant's Motion to Remand.