

JAN 21 2009

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

MARY RAMEY, Court Clerk
BY _____ DEPUTY

In Re: Grand Jury of Kay County
Empanelled on the 9th day
Of December, 2008.

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Case No. CV-2009-2B

PETITION FOR WRIT OF MANDAMUS AND BRIEF IN SUPPORT

Comes now, Petitioners Greg Deffner and Get L.L.C. an Oklahoma Limited Liability Company, and hereby requests this Court issue a Writ of Mandamus requiring: (1) the expungement of certain portions of the *Final Report of the Grand Jury* filed in this Court on December 18, 2008 in Kay County District Court Case Number CV-2008-28 and (2) the recalling or re-empanelling of said Grand Jury due to improper instruction. In support of their request, Petitioners submit the following:

Brief in Support of Writ of Mandamus

In this Court, on August 12, 2008, an ~~amended~~ petition was filed requesting a grand jury be empanelled and charged with investigating all public offenses against the State committed within this county. Said petition was deemed proper and a Grand Jury of Kay County was duly empanelled on December 9, 2008 ("Grand Jury").

Said Grand Jury immediately began its investigation, reviewing "over eighty (80) written inquiries... substantial documentation... testimony of seven (7) witnesses... [and] 92 exhibits..." (See *Final Report of the Grand Jury*, p. 1, Attached hereto as Exhibit "A"). After reviewing said materials over "seven (7) working days," Grand Jury issued its *Final Report of the Grand Jury* ("Final Report") to this Court, the same being filed on December 18, 2008. The Grand Jury issued no indictments, nor did it make any "official accusations against public officials [in] Kay

County. *Id.* at p. 1. To Petitioner's knowledge, the Grand Jury proceedings were conducted in secrecy in accordance with Oklahoma law.¹ However, portions of the Grand Jury's *Final Report* indicate that it was not conducted in accordance with Oklahoma law.

Specifically, the *Final Report* makes reference to Petitioner Get L.L.C. ("Get Real") and a civil matter in which it is currently involved. Petitioner contends that such statements are outside the jurisdiction of the Grand Jury and are improper. Additionally, the *Final Report* makes several representations in regard to its duties and obligations under Oklahoma law. Petitioner contends that these representations indicate that the Grand Jury was either improperly instructed or misunderstood the procedures available to it and that it must be recalled or re-empanelled such that proper instructions may be given.

I. A Writ of Mandamus should be issued expunging any and all mention of Petitioner Get L.L.C. in the Grand Jury's *Final Report*.

As noted above, the Grand Jury investigated many complaints provided by members of the community as well as substantial documentation provided with the same. The bulk of these materials were provided by a relatively small group of community members. It is apparent from the language in the *Final Report* that this fact influenced the Grand Jury's deliberations as it noted specific events, ongoing in the community, related to those who contributed the bulk of the materials to the Grand Jury. Any mention of Get L.L.C. in the *Final Report* is inappropriate and should be expunged.

¹ 22 O.S. §§ 341 indicates that members of the grand jury must keep information regarding grand jury deliberations and voting secret. 22 O.S. § 342 enumerates the circumstances wherein a member of the grand jury may disclose testimony presented. Moreover, 22 O.S. § 340(B) indicates that the only persons entitled to a transcript of grand jury proceedings are the accused and the district attorney.

The jurisdiction of a grand jury in Oklahoma extends to “all public offenses committed or triable in the county or subdivision, and to present them to the court, by indictment or accusation in writing.” 22 O.S. § 331. Additionally, grand jury must investigate every inmate incarcerated within the county or subdivision, who has not yet been indicted, into the general “condition and management” of public detention facilities, and into the “willful and corrupt misconduct” of all public officials in the county or subdivision.” 22 O.S. § 338.

Upon completion of a grand jury’s investigation, it may take one of several options. If the evidence before them would warrant the criminal conviction of any person investigated, the grand jury “ought to find an indictment.” 22 O.S. § 336. Certainly if the grand jury finds that no person investigated would be convicted of a crime it is not obligated to do anything. Regardless of its determination as to criminal wrongdoing in the county, the grand jury may submit a formal written report to the court. 22 O.S. 346.

If written, a formal written report of the grand jury, may not “charge any public officer, or other person with willful misconduct or malfeasance, nor reflect on the management of any public office as being willful and corrupt misconduct.” 22 O.S. 346. The statute further indicates that the policy underlying these parameters is to “preserve every person the right to meet his accusers in a court of competent jurisdiction and be heard, in open court, in his defense.” *Id.* Moreover, any written report made by the grand jury is subject to oversight by the district court in the county where the grand jury is empanelled. *Burke v. Territory*, 37 P. 829 (Okla. 1894). Among the tasks of overseeing the written findings of a grand jury is ensuring that the subject matter set forth in the written report is properly within the grand jury’s jurisdiction. *Stonecipher v. Taylor*, 1998 OK 122, 970 P.2d 182.

In *Stonecipher*, a grand jury in Pittsburg County was empanelled, conducted an investigation and, without issuing indictments, presented a written report to the court. Said report contained several portions which criticized certain public officials calling for the firing of one and accusing another of acting exclusively in her own political interests. In examining the matter, the court stated that “[T]he grand jury may not, under cover of the power to inquire, employ a report to accuse an individual of misconduct or laxity in public office any more than it may do so to charge him with misbehavior in private life.” *Stonecipher*, at par. 16, quoting *Wood v. Hughes*, 9 N.Y.2d 144, 212 N.Y.S.2d 33, 173 N.E.2d 21 (1961) at p. 25-6. The court went on to note that the court maintains a duty to keep such accusations out of the public record and that when it “fails to do so, it may upon Petition for Writ of Mandamus do so, and if it does not [the Oklahoma Supreme Court] may require expungement so as to conform with the statute.” *Id.* at par. 19.

Here, the Grand Jury made comments similar to those made by the grand jury in *Stonecipher*. Contained in the Grand Jury’s *Final Report* is the following language:

“Many of the complaints and allegations presented to the Grand Jury appear to be a result of, or at least influenced by, the ongoing litigation and disputes between Get Real Cable System and the City of Blackwell. We recommend that the right of citizens to seek redress of grievances through the Grand Jury System should not be used to influence or replace the civil process of the judicial system.” *Exhibit “A”, p. 2.*

Although Get L.L.C. is not a public official, as were the parties in *Stonecipher*, it is within the investigative powers of the Grand Jury to review its actions for criminality. In its report, the Grand Jury makes the above statement that tends to indicate that Get Real, has in some way, acted inappropriately in regard to the impaneling and presentation of materials to the Grand Jury. However, no indictment was issued against Get L.L.C.

The language quoted above is improper and should be expunged from the court record. The implication from the above language is that Get L.L.C. it has in some way wronged the public. As indicated above, the expressed intention of the parameters set forth in 22 O.S. § 346 is to allow any non-indicted party the opportunity to respond to allegations launched by a grand jury. Get L.L.C. has had no opportunity to appear in open court and answer as to the grand jury's allegations. In fact, the statement within the Grand Jury's *Final Report* is entirely foreign to the subject matter of it's investigation and accordingly, should be removed from the public record.

II. A Writ of Mandamus should be issued recalling or re-empanelling the Grand Jury such that it may be properly instructed before re-examining the evidence previously presented.

In its *Final Report*, the Grand Jury makes several statements about its duties which Petitioners contend are untrue. Petitioners also contend that these misunderstandings in regard to the operation of a grand jury are sufficient cause to recall or re-empanel the body such that they can reexamine the issues presented with proper instruction.

As noted above, a grand jury is charged with investigating certain criminal matters within its county or subdivision. A grand jury should issue an indictment "when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." 22 O.S. § 336. Further, in it's investigation a grand jury may receive evidence in the form of "written testimony of witnesses taken in a preliminary examination of the same charge," "sworn testimony prepared by the district attorney without bringing those witnesses before them," and "legal documentary evidence," in addition to sworn

testimony before the grand jury. 22 O.S. § 333. Additionally, a grand jury may seek other evidence it deems necessary via the attorney present for the state. 22 O.S. § 335.

Further, it is the duty of the district court in which the grand jury sits to give the grand jury its charge. 22 O.S. § 326. Also, if it so requests, a grand jury may seek the advice of the court or presiding attorney for the state on matters other than the sufficiency of the evidence. However, neither the court, nor the district attorney may advise the grand jury regarding the sufficiency of the evidence before it. 22 O.S. § 340. Finally, the court's supervisory powers over a grand jury state that it may re-empanel said grand jury if, in its discretion, such action becomes "necessary." 22 O.S. § 321.

The *Final Report* indicates that, "A Grand Jury must have direct evidence of criminal wrongdoing by public officials; it cannot act on hear-say evidence or one's suspicion of wrongdoing." *Final Report*, p. 2. Petitioner believes this statement is untrue.

Hearsay is defined by 12 O.S. § 2801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. As this Court is well aware, many such statements are excepted from the hearsay rule. See 12 O.S. § 2801 et. seq., including those with circumstantial guarantees of trustworthiness, under 12 O.S. §2804.1.

Petitioners contend that the Grand Jury was mistaken as to the evidence it could consider in determining whether or not the subjects of its investigation could be convicted of criminal wrongdoing.

Petitioners first contend that the Grand Jury was mistaken in that it believed that it "must have direct evidence of criminal wrongdoing." As mentioned above, a grand jury should issue an indictment when it believes that a jury would convict a defendant on the same evidence.

Oklahoma law is clear that a criminal conviction may rely exclusively on circumstantial evidence so long as each fact necessary to prove the guilt of the defendant is proved beyond a reasonable doubt. *See Easlick v. State*, 90 P.3d 556 (Okla. Crim. App. 2004).

Petitioners next contend that a grand jury may examine hearsay evidence. First, 22 O.S. § 336 enumerates several types of evidence a grand jury may examine, all of which are hearsay under the general definition given in 12 O.S. 2801, except for sworn testimony before the grand jury. Next, precedent indicates that, during the term of a grand jury, the rules of evidence are not applied as rigidly as they would be in a trial by jury. *Magill v. Miller*, 455 P.2d 715, 716 (Okla. Crim. App. 1969). Although Oklahoma falls within a group of states that generally disallows grand jury indictments based exclusively on hearsay, *See* 37 ALR3d 612, no authority has been found by Petitioners that would disallow wholesale the introduction of hearsay evidence to a grand jury.

Additionally, the *Final Report* indicates that: "A Grand Jury cannot act upon matters that are civil in nature or determine liability of parties in lawsuits or provide an opinion regarding merits of any potential lawsuits." Petitioner's agree that such a statement is true under Oklahoma law, however, the Grand Jury's inclusion of this statement, given the arguments made above, indicates that the Grand Jury was influenced by bias as against Petitioners or was improperly instructed.

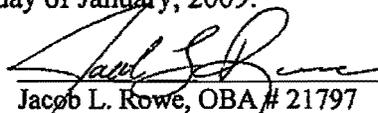
The Grand Jury should not have, nor should it have been instructed to examine the evidence presented to it in light of any civil matter currently pending in State or Federal Court. The subject matter of the Grand Jury should have been separate and distinct from any civil matter. Certainly, Petitioners are known to be opposed to many public officials and public policies in Blackwell; however such matters have no place before a grand jury. The statement

above rationally leads to one of two inferences: (1) the Grand Jury was biased by certain civil actions and looked outside of the evidence presented to it in making its decision not to issue any indictments; or (2) the Grand Jury was allowed or instructed to determine the sufficiency of the materials placed before it based on conjecture regarding the supposed motives of the submitters. In either instance, the results of the Grand Jury are unreliable and it must be recalled or re-empanelled.

Petitioners contend that the misstatements of the Grand Jury, as contained in their *Final Report* prevented them from fully examining the evidence brought before them. Certainly, the Grand Jury's failure to examine materials that were hearsay and / or circumstantial evidence prohibited them from obtaining all of the information available to them under the law. Moreover, the beliefs of the Grand Jury, as written in their *Final Report* indicate that they viewed the evidence presented to them in a false light. The only remedy to these misunderstandings is to recall or re-empanel the Grand Jury and to instruct them as to what evidence they may consider and what weight the evidence should be given.

WHEREFORE, premises considered, Petitioner's pray this Court enter a *Writ of Mandamus* expunging certain portions of the Grand Jury's *Final Report* and recall or re-empanel the Grand Jury, such that it may review the matters previously presented to it with proper instruction as to what evidence it may consider and what weight said evidence should be given.

Respectfully submitted on this 20th day of January, 2009.



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Filed in the DISTRICT COURT
Kay County, Oklahoma

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

DEC 18 2008

In Re: GRAND JURY
OF KAY COUNTY)

CASE NO. CV-2008-28

MARY RAMEY, Court Clerk
BY *Mary Ramey*
DEPUTY

FINAL REPORT OF THE GRAND JURY

We, the Grand Jury, duly empaneled on the 9th day of December, 2008, and charged with the responsibility of investigating all public offenses against the State committed or triable within Kay County, as contained in the Petition for the calling of the Grand Jury duly filed in the Office of the Court Clerk of Kay County on the 12th day of August, 2008, and having in a fair and impartial manner, to the best of our abilities and understanding and with due regard to the Court's Instructions and the law of the State of Oklahoma, and after having received over eighty (80) written inquiries and substantial documentation attached thereto which were submitted through the District Court, and after having heard testimony of seven (7) witnesses, and received 92 exhibits and having fully investigated complaints alleged to exist within Kay County, and after having been in session for seven (7) working days, and having heretofore after due deliberation voted according to law, the Grand Jury submits to this Honorable Court its final report as follows:

I. JAILS IN KAY COUNTY

On the 9th day of December, 2008, the Grand Jury visited the Kay County Jail and the Grand Jury finds as follows:

- (A) That the Kay County Jail is clean and very well maintained and the Sheriff is to be commended.
- (B) The Kay County Jail has several serious security concerns due to design flaws in the original construction and an inability to keep pace with needed repairs to security systems due to funding issues.
- (C) That the plans for a new jail which have been approved by the voters of Kay County should alleviate any structural or security problems and the voters of Kay County are to be commended for approving funding for a new facility.

On the 15th day of December, 2008, the Grand Jury reviewed numerous documentation, including jail inspection reports, meal plans and jail prisoner logs, for the City Jails located in Ponca City, Tonkawa and Blackwell, and based upon that review the Grand Jury finds as follows:

- (A) That each of these facilities are being operated in a safe, healthy and secure manner with no reported deficiencies or concerns.

II. PRISONERS CONFINED IN KAY COUNTY AND CITY JAILS WITHIN KAY COUNTY

The Grand Jury has inquired into the legal status of every prisoner confined in Kay County and finds that all of said persons are being lawfully detained.

EXHIBIT A

**III. THE CITY OF BLACKWELL, BLACKWELL MUNICIPAL AUTHORITY AND
BLACKWELL INDUSTRIAL AUTHORITY**

The Grand Jury received over eighty (80) packets of information from various citizens of Kay County, almost all of which concerned complaints, allegations of improper conduct, or requests for investigation of matters involving the City of Blackwell, Blackwell Municipal Authority and the Blackwell Industrial Authority, including commission members, trustees and/or employees of the three organizations. The Grand Jury spent several days pouring over each and every one of the requests and the supporting documents.

Based upon our review of these matters and the testimony of witnesses before the Grand Jury, we make the following observations and recommendations:

This Grand Jury investigated over 80 requests of which the majority of these were submitted by three to four individuals. It should be noted that a Grand Jury has limited authority by State law.

A Grand Jury must have direct evidence of criminal wrongdoing by public officials, it cannot act on hear-say evidence or one's suspicion of wrongdoing. A Grand Jury cannot act upon criminal cases already tried or being tried in court.

A Grand Jury cannot act upon matters that are civil in nature or determine liability of parties in lawsuits or provide an opinion regarding merits of any potential lawsuits.

A Grand Jury has no jurisdiction regarding whether a public official always acts or behaves in the best interest of citizens and not their own political or personal gain.

Therefore, if there are no criminal violations of the rules as shown by the evidence, the only recourse for those unhappy is through the election process.

1. Many of the complaints and allegations presented to the Grand Jury appear to be a result of, or at least influenced by, the ongoing litigation and disputes between Get Real Cable System and the City of Blackwell. We recommend that the right of citizens to seek redress of grievances through the Grand Jury System should not be used to influence or replace the civil process of the judicial system.

2. We recognize and respect the right of all citizens and taxpayers to expect transparency by all levels of government. We believe that all public and private organizations charged with the responsibility of expending public funds in any form, should be accountable to the public in open meetings for the expenditure of those funds. An informed electorate is a better electorate. We therefore recommend that the City of Blackwell, Blackwell Municipal Authority, Blackwell Industrial Authority, and the Tourism Board of the Blackwell Chamber of Commerce should strive diligently and in good faith to always:

A) Make sure that notice of any and all meetings of public bodies be posted, not only as required by law, but in every manner possible to ensure that the media and the public can easily determine when these bodies will meet.

B) That all agendas of public meetings be as specific as possible so that any citizen can easily understand what public business will be discussed or considered at the meeting.

C) That all open meetings be held in locations easily accessible and comfortable for the public that choose to participate in the meeting.

D) That executive sessions be used sparingly and only when absolutely necessary to protect the interest of the public body and in accordance with laws of the State of Oklahoma.

E) That all effort be made by all public bodies in Kay County to keep its citizens fully informed of the public business. There is no such thing as too much information when it comes to public business.

IV. DISTRICT ATTORNEY MARK L. GIBSON

Based on the evidence presented, the Grand Jury finds no evidence of official misconduct by District Attorney Mark Gibson or his office.

V. ACCUSATION

The Grand Jury has rendered no official accusations against public officials of Kay County.

VI. INDICTMENTS

The Grand Jury has returned no indictments.

VII. EXPRESSION OF APPRECIATION

The Grand Jury wished to express its appreciation for the assistance of District Attorneys John Wampler of District Three and Dennis Smith of District Two, as well as Special Agent Shawn Wright of the Oklahoma State Bureau of Investigation during the course of these proceedings. We also wish to acknowledge the assistance of Court Reporters: Lois Parsons, Lea McBride, Sherrie Powell and Vicky Hamilton and Bailiffs: Carolyn Kahle and Sheratyn Eubank and thank them for making us feel welcome and comfortable during this process.

VIII. CONCLUSION

This final report concludes the investigation of the Grand Jury and we respectfully request that we be adjourned.

Dated this 16th day of December, 2008, in the City of Newkirk, County of Kay, State of Oklahoma.

William D. Shubert
Foreman of the Grand Jury

Jeri Bond

Kathleen R. Harris

Barbara J. Moore

Rhonda L. Rhodes

Loretta Sawyer

Paula K. Surley

Levin W. Wain

Mark W. Smith

Mark Soper

Jan R. Hoff



JAN 21 2009

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

MARY RAMEY, Court Clerk
BY _____ DEPUTY

In Re: Grand Jury of Kay County
Empanelled on the 9th day
Of December, 2008.

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Case No. *CR-2009-2B*

ENTRY OF APPEARANCE

Comes now Jacob L. Rowe and enters his appearance as counsel of record for
Petitioners in the above referenced matter.



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JAN 21 2009

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

MARY RAMEY, Court Clerk
BY _____ DEPUTY

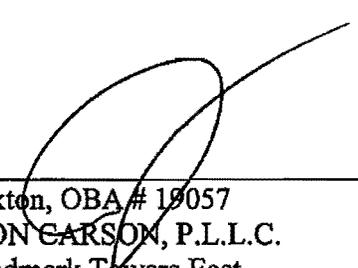
In Re: Grand Jury of Kay County
Empanelled on the 9th day
Of December, 2008.

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Case No. CY-2009-2B

ENTRY OF APPEARANCE

Comes now Jim Buxton and enters his appearance as counsel of record for
Petitioners in the above referenced matter.



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