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Second Judicial District, Latah County
Julie Fry, Clerk of the Court
By: Deputy Clerk - Mottern, Beth

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, vs. BRYAN C. KOHBERGER, Defendant.	Case No. CR29-22-2805 **ORDER DENYING MOTION TO DISMISS INDICTMENT FOR INACCURATE INSTRUCTIONS TO GRAND JURY**

I. INTRODUCTION

This decision addresses Defendant's Motion to Dismiss Indictment for inaccurate instructions to the grand jury. The question of law posed to the court is whether the standard of proof for a grand jury to justify an indictment is "probable cause" or "beyond a reasonable doubt." Based on history, case law, and Idaho Criminal Rules, specifically Rule 6 through 6.8 I.C.R., the standard of proof for a grand jury to indict is "probable cause." Therefore, the motion is denied.

II. PROCEDURAL BACKGROUND

Defendant Bryan C. Kohberger ("Kohberger") filed on July 25, 2023, a Motion to Dismiss Indictment on Grounds of Error in Grand Jury Instructions or in the Alternative Remand for the Preliminary Hearing. The defense argues that the grand jury's Indictment was flawed because the grand jury was instructed wrongfully that the standard of proof to justify an indictment was "probable cause" instead of the higher standard of "beyond a reasonable doubt." Kohberger's claim is based on legislative history and interpretation of the Idaho Constitution and statutes. The question

of whether the standard of proof to reach an indictment is "probable cause" or "beyond a reasonable doubt" is one of law.

Kohberger's motion included briefing. The State filed an Objection supported by brief and Kohberger provided a Reply to the State's Objection, also with additional briefing.

A hearing on the motion was held on October 26, 2023. Kohberger was represented by Anne Taylor, Jay Logsdon, and Elisa Massoth. The State was represented by Bill Thompson, Ashley Jennings, Jeff Nye, and Ingrid Batey. This hearing was open to the public and media cameras. At the conclusion of the argument, the Court informed counsel, with a brief explanation, that the motion would be denied and that this written opinion would follow.

To avoid confusion, it is important to know that, on the same day, there was also a hearing on Kohberger's sealed motion to dismiss the Indictment based on other grand jury issues. All counsel named above were also involved in this hearing. Because the arguments centered on the grand jury's secret procedures, this hearing was closed to the public. Likewise, the written decision will be separate from this decision and will be sealed. The results, however, will be public.

In order for the Court to assess the arguments in both motions, the Court needed to have access to the grand jury procedures and evidence. To accommodate the need, the State submitted a Motion to Take Judicial Notice of the Grand Jury Record. Without objection, the Court, as requested by the State, takes judicial notice under Rule 201(c)(2) I.R.E of the grand jury transcripts, the audio recording, the exhibits, the jury instructions, and the jury questionnaires. The State has provided the same information to the defense.

III. ANALYSIS

1. A reasonable reading of I.C. § 19-1107 does not require a standard of proof "beyond a reasonable doubt," and Idaho case law and Criminal Rule 6.5 clearly establish a standard of proof of "probable cause" for a grand jury to find an indictment.

Kohberger claims that the standard of proof for a grand jury to return an indictment is "beyond a reasonable doubt." And because the grand jury in this case was instructed that the standard of proof was "probable cause" and found there was probable cause to return an Indictment, Kohberger argues that the Indictment must be dismissed. The State disputes Kohberger's argument and asserts that "probable cause" for an indictment is settled law in Idaho. There is no dispute that, in this case, the standard applied by the grand jury to justify the Indictment was "probable cause."

Kohberger first relies on the Idaho Constitution and the "plain language of the statute" for his argument. Article I, Section 8 of the Idaho Constitution, in part, states that "[n]o person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate…" This language, obviously, does not define the standard of proof for the grand jury, but Kohberger claims the language of Idaho Code Section 19-1107 does. Here is the entire statute:

> The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

Again, this statutory language does not state that the standard of proof is "beyond a reasonable doubt," the legal standard of proof for a criminal jury trial. However, Kohberger asserts that "warrant a conviction" means that to find an indictment a grand jury must find the accused guilty beyond a reasonable doubt. First of all, the word "warrant" carries many

definitions. For example, the "plain language" of "warrant" means "justification for an action; grounds." The American Heritage Dictionary 1364 (2nd College Ed. 1985). Also, other examples are consistent: "justification for an action or a belief; grounds"; "something that provides assurance or confirmation; a guarantee or proof"; "to provide adequate grounds for; justify"; synonym of "justify" (to demonstrate sufficient legal reason for (an action taken); synonym of "warrant"). The American Heritage Dictionary of the English Language 2014 (3rd Ed. 1992). Black's Law Dictionary also defines "warrant" "to justify <the conduct warrants a presumption of negligence>." WARRANT, Black's Law Dictionary (11th ed. 2019). These definitions have not significantly changed for over 100 years. Thus, the "plain language" of the word "warrant" easily means that, after hearing the evidence, a grand jury, "would, in their judgment," be justified to send the accused to trial by a trial jury.

Kohberger seems to miss this additional language of the statute: "by a trial jury." The additional language provides the broader context of "warrant a conviction by a trial jury," not a grand jury. One definition of "probable cause" is a "reasonable ground for belief in the existence of facts **warranting the proceeds complained of."** This is precisely what grand juries are charged to determine. Black's Law Dictionary 1081 (5th ed. 1979) (emphasis added).

The grand jury is not a trial jury. Its function is to screen whether or not there is sufficient evidence to proceed to trial. The grand jury is baked into our United States Constitution, Amendment 5, ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury…"), and our Idaho Constitution, Article I, Section 8 (see language above), and the procedures of the grand jury have evolved over the years.

In 1956, Justice Black, in *Costello v. United States*, provides some early history of the grand jury:

> The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictment of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this county by the early colonists and incorporated in the Constitution by the Founders. . . . The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. … [I]n this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.
> . . .
>
> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.
> . . .
>
> In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

Costello v. United States, 350 U.S. 359, 361, 76 S. Ct. 406, 408, 100 L. Ed. 397 (1956) (citations omitted).

The *Costello* case is addressing federal law and grand jury procedures, employed by federal prosecutors since the birth of the Fifth Amendment. And the standard of "beyond a reasonable doubt" is certainly not applied in federal courts. But Kohberger's argument is based on Idaho law, not federal. Nevertheless, the language and practice are similar.

Kohberger's brief seems to acknowledge he is reaching for a "higher than the probable cause standard" even though "the whole of modern jurisprudence on this issue is against it, as well as at least one founding father of this state [William H. Clagett, selected as the president of the Idaho Constitutional Convention in 1889, who stated that "all the grand jury is entitled to do, to say there is probable cause to believe the man is guilty…"]." Mot. to Dismiss Indictment at 6, 10.

Even if there is some ambiguity to Idaho Code Section 19-1107, the case law in Idaho seems to be settled on the standard of proof for a grand jury to approve an indictment. While there is not an abundance of early appellate cases directly addressing the standard of proof for indictment, the available cases consistently reference the standard to be "probable cause."

In *Gasper v. Dist. Ct. of Seventh Jud. Dist., in & for Canyon Cnty*, the plaintiff (the defendant in the lower court) claimed that the indictment should be dismissed on the grounds of various alleged errors in the proceedings of the grand jury. The Court denied the claims as insufficient and not prejudicial to the plaintiff, who had been charged with second degree murder. Related to this case, the plaintiff, for some reason, challenged the instructions given to the grand jury part of which stated: "[Y]ou are not compelled to go under public trial in open court before a trial jury unless you are satisfied beyond a reasonable doubt from the evidence…." *Gasper v. Dist. Ct. of Seventh Jud. Dist., in & for Canyon Cnty.*, 74 Idaho 388, 395, 264 P.2d 679, 683 (1953).

The court recognized that the charge to the grand jury had no bearing on the plaintiff's complaints because the charge was to the plaintiff's advantage. "However, we observe that the charge complained of, though erroneous, is more favorable to one accused before a grand jury than would be a charge embodying the statute," citing Idaho Code Section 19-1107. *Id.* The

language remains the same today. "The charge as given calls for a greater degree of proof to justify an indictment that the statue requires." *Id.* While this may be dicta, it does acknowledge the Supreme Court's view of the standard of proof for an indictment.

A more recent and more definite acknowledgment of the standard of proof for an indictment is expressed in *State v. Edmonson*. The Supreme Court states clearly the purpose of the grand jury, including the standard of proof:

> The grand jury is an accusing body and not a trial court. Its functions are investigative and charging. The purpose of both a grand jury proceeding and a preliminary hearing is to determine probable cause.

State v. Edmonson, 113 Idaho 230, 234, 743 P.2d 459, 463 (1987). And, again:

> The purpose of a grand jury proceeding is to determine whether sufficient probable cause exists to bind the defendant over for trial. The determination of guilt and innocence is saved for a later day. As long as the grand jury has received legally sufficient evidence which in and of itself supports a finding of probable cause it is not for an appellate court to set aside the indictment.

Id. at 236-237, 743 P.2d at 465-466. And, finally:

> [W]ithout even considering the evidence used to find probable cause, we note that the prosecutor directed the grand jury that it should not indict unless all the elements of an alleged crime are proven beyond a reasonable doubt. This is a much higher standard than is required by Idaho law.

Id. at 238, 743 P.2d at 467.

In *State v. Martinez,* the Supreme Court recognized that the "law governing grand jury indictments" is rooted in the "numerous statutes and rules," including Idaho Code § 19-1107, Idaho Code § 19-1105, and Idaho Criminal Rules 6(f) and (h) (amended and rearranged in 2017). *State v. Martinez*, 125 Idaho 445, 448, 872 P.2d 708, 711 (1994). The merging of the statutes and the rules suggest no conflict between the statute and the rule: "[if] there is probable cause to believe an offense has been committed and the accused committed it, the jury ought to find an indictment." *Id.* at 448, 872 P.2d at 711. In the following paragraph, the Court stated it "must

determine whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause." *Id.* (citing *State v. Jones,* 125 Idaho 477, 875 P.2d 122 (1994) (overruled on different grounds); *State v. Edmonson,* 113 Idaho 230, 743 P.2d 459 (1987)). The Court held that there was "sufficient independent evidence to support a finding of probable cause and therefore this Court will not set aside the indictment." *Id.* at 449, 872 P.2d at 712.

The Court of Appeals mirrored the *Martinez* case in merging Idaho Code § 19-1107 with Rule 6.6(a) I.C.R. with no conflict that the standard of proof for a grand jury indictment was probable cause. *State v. Marsalis,* 151 Idaho 872, 876, 264 P.3d 979, 983 (Ct. App. 2011). The *Marsalis* court referred to the "collection of statues and rules" that "govern Idaho grand jury proceedings," including the language of I.C. § 19-1107 and Rule 6.6(a) I.C.R. [which is almost identical to the language of current Rule 6.5(a) I.C.R.]. *Id.* The court includes the language of the rule, including a definition of "probable cause":

> If it appears to the grand jury after evidence has been presented to it that an offense has been committed and that there is probable cause to believe that the accused committed it, the jury ought to find an indictment. Probable cause exists when the grand jury has before it such evidence as would lead a reasonable person to believe that an offense has been committed and that the accused party has probably committed the offense.

Id.

In reviewing the propriety of the grand jury proceeding, the appellate court first looks at "whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence **to support a finding of probable cause."** *Id.* (emphasis added).The *Martinez* Court and the rest of these relevant cases look to both the statutes and the rules in determining the law for a grand jury to justify, to "warrant," an indictment and the standard of proof has been consistently "probable cause" for at least three decades.

This Court has also reviewed three decisions from three separate District Judges that address similar or identical arguments from defendants claiming that the standard of proof is "beyond a reasonable doubt" and not "probable cause" for a grand jury to warrant an indictment: *State v. Peone,* Kootenai County, CR28-22-8343; *State v. Rodriguez,* Canyon County, CR14-20-22902; and *State v. Williams*, Kootenai County, CR28-22-18387. These decisions were attached as exhibits to the State's Objection to Defendant's Motion to Dismiss Indictment. Their results were the same as this one: The standard of proof for a grand jury to find an indictment is "probable cause."

The current rule for a grand jury to "find an indictment" is Rule 6.5 Idaho Criminal Rules:

> If the grand jury finds, after evidence has been presented to it, that an offense has been committed and that there is **probable cause** to believe that the accused committed it, the jury ought to find an indictment. **Probable cause** exists when the grand jury had before it evidence that would lead a reasonable person to believe an offense has been committed and that the accused party has probably committed the offense.

Any change of this settled law would need to be addressed by the legislature or the Idaho Supreme Court, not this Court.

2. If there were any conflict or ambiguity related to Idaho Code § 19-1107, then the standard of proof set forth in Rule 6.5 I.C.R. would be considered "procedural" and therefore trump the statute.

Based on the case law and the Criminal Rules, there should be no confusion or conflict between Idaho Code § 19-1107 and the grand jury rules. However, if there were any ambiguity or conflict, whether statutory language or evolution over 100 years of history, there could be friction over whether the standard of proof set in the grand jury criminal rule is substantive or procedural. Kohberger argues that the standard of proof for an indictment is substantive and,

therefore, trumps the rule. The State argues that the standard for indictment is procedural and, therefore, trumps the statute.

These struggles have also long been resolved in Idaho law: "The Court has stated that 'where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matter of procedure, the rules will prevail.'" *State v. Bean,* 121 Idaho 862, 863, 828 P.2d 891 (1992) (*citing State v. Currington,* 108 Idaho 539, 541, 700 P.2d 942, 944 (1985)).

> 'It is well established that the Idaho Supreme Court is uniquely empowered with certain inherent powers. The Court has the inherent power to make rules governing the procedure in all of Idaho's courts.' *Talbot v. Ames Constr.*, 127 Idaho 648, 651, 904 P.2d 560, 563 (1995) (citing *In re SRBA Case No. 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995); *State v. Beam,* 121 Idaho 862, 863, 828 P.2d 891, 892 (1992)). 'The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed.' I.C. § 1-212. Accordingly, this Court has noted that if a statutory provision that is procedural in nature is in conflict with the Idaho Criminal Rules, the rules govern. *See, e.g.*, *State v. Abdullah*, 158 Idaho 386, 484, 348 P.3d 1, 99 (2015); *State v. Johnson*, 145 Idaho 970, 974, 188 P.3d 912, 916 (2008); *Beam*, 121 Idaho at 863, 828 P.2d at 892.

*State v. Weigle,*165 Idaho 482, 486, 447 P.3d 930, 934 (2019).

The powers established for the judiciary are not only "inherent," but they are also written in Article II of the Idaho Constitution to protect them:

> Article II of the Idaho Constitution prohibits the Legislature from usurping powers properly belonging to the judicial department ...." *In re SRBA Case No. 39576*, 128 Idaho at 255, 912 P.2d at 623. The Idaho Constitution further states, "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government[.]" Idaho Const. art. 5, § 13.

Id. at 486-487, 447 P.3d at 934-935.

"When a statute and a rule can be reasonably interpreted so that there is no conflict between them, they should be so interpreted rather than interpreted in a way that results in a conflict. . . . When there is a conflict between a statute and a criminal rule, this Court must

determine whether the conflict is one of procedure or one of substance; if the conflict is procedural, the criminal rule will prevail." *State v. Abdullah*, 158 Idaho 386, 483, 348 P.3d 1, 98 (2015) (citations and internal quotation marks omitted). As discussed above, the case law does not find conflict between Idaho Code § 19-1107 and Rule 6.5(a) I.C.R, but even if there were some conflict, the criminal rule would "prevail" because the standard of proof in this context is procedural.

The *Beam* case, quoting the *Currington* case, draws the "distinction between procedure and substance":

> Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violation thereof. It thus *creates, defines, and regulates primary rights.* In contrast, practice and procedure pertain to the essentially mechanical operation of the courts by which substantive law, rights, and remedies are effectuated.

Beam, 121 Idaho at 863-864, 828 P.2d at 892-893 (italics in original, citations omitted); *Abdulla,* 158 Idaho at 483, 348 P.3d at 98.

The procedures of the grand jury are defined in detail in Rules 6 through 6.8 I.C.R., including the standard of proof to justify, to warrant, an indictment. These are not primary rights. They are procedures that "pertain to the essentially mechanical operation of the courts by which substantive law, rights, and remedies are effectuated." *Abdulla,* 158 Idaho at 483, 384 P.3d at 98. These are procedures for the grand jury to effectively operate under the law with some consistency and fairness. The judicial inherent powers to establish rules of procedures are essential for a functioning judiciary, and these powers are protected by the law.

IV. CONCLUSION

The arguments from the defense for a "beyond reasonable doubt" standard for the grand jury were historically interesting and creative, but do not overturn Idaho courts' interpretation of the statute, the case law, and the Criminal Rules, specifically Rule 6 through 6.8 I.C.R., that the standard for the grand jury to indict is "probable cause." Therefore, the Court denies Kohberger's Motion to Dismiss the Indictment based on his claim of inaccurate instructions to the grand jury in order to warrant an indictment.

SO ORDERED this 15th day of December 2023.

John C. Judge
District Judge

CERTIFICATE OF SERVICE

I certify that copies of the ORDER DENYING MOTION TO DISMISS INDICTMENT FOR INACCURATE INSTRUCTIONS TO GRAND JURY were delivered by email to the following:

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on this 15th day of December 2023.

CLERK OF THE COURT

By:_____
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