**IN THE ARIZONA SUPREME COURT**

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| ARANZI RAE JON WILLIS,<br><br>Petitioner,<br><br>vs.<br><br>HON. DEBORAH BERNINI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,<br><br>Respondent,<br><br>and<br><br>STATE OF ARIZONA<br><br>Real Party in Interest. | Arizona Supreme Court<br>No. CR-21-0258-PR<br><br>Court of Appeals<br>No. 2-CA-SA-2021-0031<br><br>Pima County Superior Court<br>No. CR20202482-001 |

# BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF WILLIS


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## INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice ("AACJ") was founded in 1986 as the Arizona affiliate of the National Association of Criminal Defense Lawyers ("NACDL") to give a voice to the rights of the criminally accused and to the attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization made up of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ submits this brief in the instant matter because the fairness of the criminal charging process is of immense importance to Arizona defendants. Simply being charged with a crime has devasting personal and professional consequences that can never be undone even if the case ultimately ends in a dismissal or an acquittal. The core function of the grand jury is to return only well-founded indictments and free the unjustly accused from suspicion. For these reasons, AACJ has a strong interest in seeing that grand jury proceedings remain fair and impartial, and not subject to improper prosecutorial control. AACJ also has an interest in the continued integrity of Arizona's criminal justice system overall, which includes grand jury proceedings.

Defining "clearly exculpatory evidence" as evidence that "might deter" the grand jury from finding probable cause strengthens this integrity by preserving the independence of the grand jury and better protecting a criminal defendant's constitutional right to fair and impartial grand jury proceeding.

## ARGUMENT

### I. Defining "Clearly Exculpatory Evidence" as Evidence of Such a Weight That "Might Deter" a Grand Jury from Finding Probable Cause Facilitates the Grand Jury's Dual Role of Investigating Crimes and Clearing the Unjustly Accused

The grand jury is an independent investigative body designed to bring to trial those who may be guilty and free the innocent from suspicion. *See Maretick v. Jarrett*, 204 Ariz. 194, ¶ 8 (2003) ("The grand jury's mission is 'to bring to trial those who may be guilty and clear the innocent.'"), *quoting Marston's Inc. v. Strand*, 114 Ariz. 260, 264 (1977). It stands as a vital check against unfettered prosecutorial discretion in deciding whether to bring criminal charges. Though the grand jury is investigatory in nature, this Court and the United States Supreme Court have emphasized its dual role. *See Wood v. Georgia*, 370 U.S. 375, 390 (1962); *Crimmins v. Superior Court*, 137 Ariz. 39, 40 (1983) ("necessity of maintaining . . . independence arises because of the grand jury's unique role in bringing to trial those who may be guilty and clearing the unjustly accused"). Equally important to the grand jury's critical function of determining whether probable cause exists is its duty to protect individuals against unfounded or unsupported charges. *See Wood*, 370

U.S. at 389-90. Commensurate with the grand jury's unique role is the "need to ensure that 'the determinations made by that body are informed, objective and just.'" *Cespedes v. Lee*, 243 Ariz. 46, ¶ 23 (2017) (Lopez, J., dissenting), *quoting Crimmins*, 137 Ariz. at 41.

Individuals face serious consequences when they are indicted by a grand jury. *See* Monroe H. Freedman, Lawyers' Ethics in an Adversary System 84 (1975); *see also Crimmins*, 137 Ariz. at 44 (Feldman, J., specially concurring). Simply being charged with a crime often has a "devastating personal and professional impact that a later dismissal or acquittal can never undo." *Crimmins*, 137 Ariz. at 44; *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life."). Recognizing this reality, this Court has been especially mindful of the potential for abuse when the prosecutor is allowed to exercise control over a cooperative grand jury and, to that end, has taken special care to see that grand juries remain fair, impartial, and understanding of their unique and powerful role. *Crimmins*, 137 Ariz. at 44.; *see also O'Meara v. Gottsfield*, 174 Ariz. 576, 578 (1993) ("Because an indictment can have catastrophic consequences for those charged, considerable attention should be paid to the task of ensuring that grand jurors fully understand their unique role, and the law they are to apply.") (Zlacket, J., specially concurring); *Gershon v. Broomfield*, 131 Ariz. 507

(1982) (discussing historical purpose of grand jury as buffer against evil of unwarranted intrusion into lives of private citizens and noting importance that "we continue to utilize the grand jury as an investigatory body with assistance of the prosecution, rather than vice versa") (Feldman, J., specially concurring).

This Court has also steadfastly underscored the historical independence of the grand jury and has repeatedly stressed that the prosecutor does not control grand jury proceedings. "The grand jury is neither an arm nor a servant of the prosecution," and has an independent responsibility to determine whether there is probable cause to believe a particular crime has been committed. *See Trebus v. Davis*, 189 Ariz. 621, 624 (1997); *see also Crimmins*, 137 Ariz. at 40, 44 (Feldman, J., specially concurring). Though prosecutors are tasked with *assisting* grand juries in performing their functions, their "powers 'are derived from the grand jury; it is the grand jury that possesses the broad investigative powers, and . . . that must be the decisionmaker' in exercising those powers." *Id.*, *quoting Gershon*, 131 Ariz. at 509; *see also State v. Good*, 10 Ariz. App. 556 (1969) (prosecutor, whose role during grand jury proceedings is carefully circumscribed, must refrain from conducting himself in manner as to invade grand jury's province).

## II. *Trebus*'s "Might Deter" Definition Better Protects Due Process and the Substantial Procedural Right to a Fair and Impartial Grand Jury Presentment

Arizona law recognizes that when the State uses the grand jury process to initiate criminal charges, it must comply with the due process clauses of the Fourteenth Amendment to the United States Constitution and Article 2, section 4 of the Arizona Constitution. *See Corbin v. Broadman*, 6 Ariz. App. 436, 440-41 (1967); *State v. Emery*, 131 Ariz. 493, 506 (1982); *cf. Beck v. Washington*, 369 U.S. 541, 546 (1962) (suggesting that once resorting to grand jury procedure, state must comply with due process clause of Fourteenth Amendment). Due process requires an unbiased grand jury and the presentation of evidence in a fair and impartial manner, without improper or undue influence by the prosecutor. *See Emery*, 131 Ariz. at 506; *Good*, 10 Ariz. App. at 559 (there is a lack of due process when county attorney improperly attempts to influence actions of grand jury).

Though the Supreme Court has frequently avoided addressing precisely what due process requires in the context of grand jury proceedings under the federal Constitution, it has at least acknowledged that the proceedings must comport with fundamental fairness. *See Beck*, 369 U.S. at 546; *Wood*, 370 U.S. at 390 (recognizing necessity to society of an "independent and informed grand jury"); *Hobby v. United States*, 468 U.S. 339, 346 (1984) (implicitly recognizing fundamental right to fairness in criminal process extends to grand jury proceedings);

*Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979) (fact that there is no constitutional requirement that States institute prosecutions by means of indictment "does not relieve those States that do employ grand juries from complying with the commands of the Fourteenth Amendment in the operation of those juries"); *Bank of Nova Scotia v. United States*, 256 U.S. 250, 256-57 (1988).

Citing *United States v. Williams*, 504 U.S. 36 (1992), the State erroneously asserts that the Supreme Court has held that "there is no federal constitutional due process right requiring the State to present exculpatory evidence to the grand jury." (State Supp. Br. at 3). The State's reading of the law on this issue is fundamentally flawed. Indeed, to date, it appears the Supreme Court has never answered that question. Instead, *Williams* considered *only* whether federal courts had any power—via the Fifth Amendment or otherwise—to fashion rules requiring federal prosecutors to present exculpatory evidence to a federal grand jury. *See generally id.* at 50-51. In answering that precise question in the negative, *Williams* never actually addressed due process requirements under either the Fifth or Fourteenth amendments because it was only asked to consider the narrow question of whether the Tenth Circuit's disclosure rule was supported by the federal judiciary's supervisory powers over federal grand juries. *Id.* at 45-46 (noting defendant did not contend Fifth Amendment itself obliged prosecutor to disclose substantial exculpatory evidence to grand jury). The *Williams* Court ultimately held that federal

courts have no inherent supervisory authority to prescribe procedural rules requiring federal prosecutors to disclose exculpatory evidence to a federal grand jury. *Id.* at 55. Thus, *Williams* did *not* address whether due process applies in the grand jury context or whether exculpatory evidence must be presented as part of the guarantee of fair and impartial grand jury presentment.

Indeed, Arizona grand jury practice is fundamentally different from federal grand jury practice, and the State's attempt to conflate them is troublesome. Unlike the federal system, this Court has emphasized that, in Arizona, grand jury proceedings are of a judicial nature that are subject to oversight by the judiciary. *State v. Superior Court (Collins)*, 102 Ariz. 388, 390 (1967); *see also* Ariz. Const., art. 2, § 17 ("Grand juries shall be drawn and summoned only by order of the superior court."); *Marston's, Inc*, 114 Ariz. 260 (grand jury's power not unlimited and subject to judicial control so there is balance between its constitutional purpose and constitutional rights of witnesses). Indeed, throughout our history as a state, Arizona courts have not hesitated to exercise their supervisory authority to remedy perceived injustices in our grand jury proceedings. *See* Ariz. R. Crim. P. 12.9; *see also State v. Young*, 149 Ariz. 580, 586 (App. 1986) (discussing Arizona's history of judicial control of grand jury abuse); *cf. State ex rel. Ronan v. Superior Court*, 95 Ariz. 319 (1964) (acknowledging this Court's constitutional authority under article 6, § 5 to enact fundamental changes to grand jury proceedings).

At the same time that federal courts were arguably chipping away at their own ability to ensure the fairness of their own grand jury proceedings, *see Williams*, 504 U.S. 36 (criticizing majority's conclusion that Court lacked supervisory power to protect integrity and independence of grand jury and fundamental fairness of grand jury proceedings) (Stevens, J., dissenting), Arizona appellate courts have continued to rely on our unique statutes and its own supervisory and rulemaking powers to further strengthen the independence and fairness of our state grand jury process. *See, e.g.*, *Crimmins*, 137 Ariz. at 41; *Herrell v. Sargeant*, 189 Ariz. 627, 629 (1997); *Trebus*, 189 Ariz. at 625. In fact, in many ways, Arizona is vastly more protective of an accused's rights during grand jury proceedings than the federal system, and the fundamental differences between state and federal grand jury jurisprudence are vast.

For instance, Arizona recognizes that the accused has a right to request to testify before the grand jury and ask that it consider specific evidence on his behalf. *See* A.R.S. § 21-412; *see also* Ariz. R. Crim. P. 12.5 (person under investigation by grand jury may be permitted to appear upon person's written request). Arizona also grants charged defendants the right to obtain transcripts of the grand jury presentment. *Compare* A.R.S. § 21-411(A) (transcript of grand jury proceeding shall be made available to defendant), *with United States v. Mechanik*, 475 U.S. 66 (1986) (defendant has no right to review grand jury transcript) (Marshall, J., dissenting). Perhaps most critically, whereas federal defendants may only challenge

the grand jury selection process or an individual grand juror's legal qualifications, *see* Fed. R. Crim. P. 6(b), Arizona defendants have the right to challenge irregularities in the grand jury presentment itself. *See* Ariz. R. Crim. P. 12.9.

Rule 12.9(a) of the Arizona Rules of Criminal Procedure specifically recognizes a defendant's right to challenge a grand jury's probable cause findings if he was "denied a substantial procedural right" during the presentment. This Court has held that defendants have a substantial procedural right to have evidence presented to the grand jury in a fair and impartial manner, something not recognized in the federal system. *Crimmins*, 137 Ariz. at 41; *cf. Nelson v. Roylston*, 137 Ariz. 272 (App. 1983) (interference with grand jury's inquiry was denial of substantial procedural right). For a presentment to be fair and impartial, the grand jury must be properly instructed on the applicable law, *see Cespedes*, 243 Ariz. 49, ¶ 9, receive evidence in a non-misleading manner, *see Maretick*, 204 Ariz. 194, ¶¶ 16, 19-20, and be informed of any evidence that is "clearly exculpatory." *Trebus*, 189 Ariz. at 625.

## III. The Prosecutor's Duty to Present Clearly Exculpatory Evidence to the Grand Jury Preserves Its Central Function as the Independent Adjudicator of Probable Cause

A prosecutor's duty to present clearly exculpatory evidence to Arizona grand juries, though rooted in due process, is primarily statute- and rule-based in nature. *See Trebus*, 189 Ariz. at 623 (noting duty serves to effectuate defendant's statutory

right to ask grand jury to consider his evidence and grand jury's statutory right to consider any evidence that might explain away contemplated charge). As this Court has repeatedly recognized, the duty principally serves to further the grand jury's rights and obligations under A.R.S. § 21-412 and Rule 12.5 of the Arizona Rules of Criminal Procedure. *See id.* at 625 (without requiring prosecutor to inform grand jury of clearly exculpatory evidence, A.R.S. § 21-412 and Rule 12.5 (formerly Rule 12.6) are rendered meaningless); *see also State v. Just*, 138 Ariz. 534, 540 (App. 1983) (purpose of section 21-412 is "obviously to give the grand jury the opportunity to hear the evidence it deems necessary to make its probable cause determination"). This is because the grand jury's ability to carry out its duties under A.R.S. §§ 21-412 and -413 "will often depend on being adequately informed of the circumstances surrounding an incident, including the defendant's version of events." *Bashir v. Pineda*, 226 Ariz. 351, ¶ 11 (App. 2011) (failure to present clearly exculpatory information to grand jury in fair and impartial manner deprives it of ability to make informed decision as to whether to indict); *see also Herrell*, 189 Ariz. at 629 (prosecutor's obligation to inform grand jury of clearly exculpatory evidence was recognized to "enable[e] the jury to make an informed decision under A.R.S. § 21-412").

In *Trebus*, this Court cited *Johnson v. Superior Court*, 124 Cal. Rptr. 32 (1975) in support of its conclusion that prosecutors are required to independently

inform grand juries about exculpatory evidence. *See Trebus*, 189 Ariz. at 724. Though the *Johnson* Court emphasized the protective function of the grand jury, it ultimately decided the case on statutory grounds. *See Johnson*, 124 Cal. Rptr. at 36 (prosecutor had obligation under section 939.7 of the California Penal Code to reveal to grand jury nature and existence of evidence "reasonably tending to negate guilt" so that it may exercise its power under the statute to order the evidence produced). California's relevant statute[1] is substantively similar to A.R.S. § 21-412. Like § 21-412, Cal. Pen. Code § 939.7 similarly required the grand jury to weigh all evidence submitted to it and stated that if it believed other evidence within its reach will "explain away the charge," it should ask for such evidence to be produced. *Id.* Reasoning that the grand jury cannot be expected to request evidence of which it is ignorant, the *Johnson* Court held that when a prosecutor is "aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its proper under the statute to order the evidence produced." *Id.*

Similarly, in *Trebus*, this Court concluded that to effectuate "the statutory right of the grand jury to decide whether to hear evidence from the defendant, and

[1]Arizona's founders adopted California's statutes with respect to charging criminal prosecutions. *See Fertig v. State*, 14 Ariz. 540 (1913). The construction of these adopted statutes by California courts is thus entitled to great weight by this Court in construing Arizona's equivalent statutes. *Id.*

the defendant's right to request appearance before the grand jury" the prosecutor must present exculpatory evidence to the grand jury if the defendant specifically requests it.[2] 189 Ariz. at 625. This Court's reasoning is sound because suppression of exculpatory evidence prevents grand juries from making independent, impartial decisions. Whether to consider evidence, and what weight (if any) to give it, is a decision for the grand jury, not the prosecutor. When the grand jury is not made aware of relevant, material information that supports the defendant, it cannot fulfill its duties under § 21-412 and runs the substantial risk of becoming a rubber stamp for the State. By withholding evidence of an obviously exculpatory nature, the prosecutor essentially presents a distorted version of the facts and interferes with the grand jury's ability to make a fair and accurate charging decision. *See Trebus*, 189 Ariz. at 624; *see also Crimmins*, 137 Ariz. at 41.

[2]An important distinction is whether the defendant has made a specific request to the prosecutor for certain evidence to be presented to the grand jury. Even absent such a request, Arizona prosecutors are duty-bound to present clearly exculpatory evidence to the grand jury. *Trebus*, 189 Ariz. at 625, *citing State v. Superior Court (Mauro)*, 134 Ariz. 422, 425 (1984); *Bashir*, 226 Ariz. 351, ¶¶ 9-13. Though a prosecutor ordinarily has no obligation to search out exculpatory evidence in anticipation of a grand jury presentment, when a defendant specifically requests that certain evidence be presented to the grand jury, the prosecutor's duty to present it is especially high. *Trebus*, 189 Ariz. at 623.

## IV. Both Definitions of "Clearly Exculpatory Evidence" Set Forth in *Trebus* and *Herrell* Encompass Substantive Evidence Tending to Negate or Reduce a Suspect's Culpability

*Trebus* defined clearly exculpatory evidence as "evidence of such weight that it *might* deter the grand jury from finding the existence of probable cause." *Trebus*, 189 Ariz. at 625 (emphasis added), whereas *Herrell* defined it as "evidence of such weight that it *would* deter the grand jury from finding the existence of probable cause," *Herrell*, 189 Ariz. at 631 (emphasis added). Though technically applying slightly different definitions, *Trebus* and *Herrell* both held that prosecutors are obligated—even absent a specific request from the defendant—to present evidence to the grand jury in a manner that ensures it "receives an accurate picture of the substantive facts" and facilitates the grand jury's ability to carry out its statutory rights and duties. *Herrell*, 189 Ariz. at 631 ("to have a fair and impartial presentation, it was necessary to inform the grand jury about Herrell's version of the relevant, substantive facts"); *Trebus*, 189 Ariz. at 624-25.

Determining whether evidence is "clearly exculpatory" is highly case-specific, and ultimately depends upon the applicable facts and available defenses. *Cf. Trebus*, 189 Ariz. at 626 (what constitutes fair presentation of evidence will "vary from case to case"). This Court has intentionally avoided delineating a mechanical test to determine whether a presentment was fair and impartial, preferring instead to leave it to the trial courts to determine whether the particular circumstances

amounted to an unfair or biased proceeding. *See id.*, *citing State v. Superior Court (Mauro)*, 134 Ariz. 422, 424 (1984). However, at its core, the inquiry will always boil down to whether a fair and impartial presentation would require that certain evidence be conveyed to the grand jury. *Herrell*, 189 Ariz. at 630; *see also Hansen v. Chon Lopez*, __ P.3d ___, No. 2 CA-SA 2021-0015, 2021 WL 5194914 (Ariz. Ct. App., Nov. 9, 2021). If omission of evidence would mislead the grand jury in its probable cause determination, it is "clearly exculpatory" and must be presented.

*Trebus*'s "might deter" definition is more consistent with the purposes underlying the duty to present clearly exculpatory evidence because it better ensures that the grand jury receives an accurate picture of the facts such that it is able to make a fair and accurate charging decision. *See Crimmins*, 137 Ariz. at 41. Inherent in the probable cause requirement is that grand jurors must also consider any evidence that cuts against or tends to negate evidence that would otherwise suggest the defendant's guilt. *Cf.* § 21-412 (grand jurors shall weigh all evidence received by them and may consider evidence that would "explain away the contemplated charge"). The "might deter" standard ensures the grand jury is made aware of any evidence reasonably tending to negate guilt or to explain away the charges while, at the same time, filters out evidence that is better left for trial. *See Trebus*, 189 Ariz. 621 (evidence relating solely to accuser's veracity and credibility and vague inconsistencies in her various allegations were not clearly exculpatory).

On the other hand, the narrow interpretation of *Herrell*'s "would deter" definition, as urged by the State, is far too restrictive because it suggests evidence must be indisputably exonerative to be deemed "clearly exculpatory." (*See* State's Supp. Br. at 14.) Construing "deter" to mean "prevent," as opposed to "discourage" or "dissuade," is irreconcilable with the prosecutor's independent duty to present clearly exculpatory evidence. *See Herrell*, 189 Ariz. at 630; *see also Bashir*, 226 Ariz. 351, ¶ 11. Of course, such an interpretation would effectively render the duty meaningless and illusory, given that, as the State acknowledges, prosecutors are not permitted to pursue charges against an individual while possessing evidence that exonerates him. (State's Supp. Br. at 19.)

Even though *Trebus*'s and *Herrell*'s definitions of clearly exculpatory evidence are perhaps technically distinct, in practice, they are functionally equivalent and have both been plainly understood to encompass substantive evidence that tends to negate or reduce a suspect's culpability, rather than being limited solely to evidence that completely exonerates a suspect. If evidence exists that points to a suspect's potential innocence, the prosecutor has a duty to tell the grand jury about it, and the grand jury has the right to consider it.

Indeed, there is no better support for the notion than *Herrell*'s "would deter" definition was intended to encompass more than just clearly exonerative evidence than the *Herrell* opinion itself. 189 Ariz. at 631. There, this Court concluded that

evidence the defendant wished to present to the grand jury regarding the proposed aggravated assault charge was "clearly exculpatory" because it "might" have made the crime prevention statute relevant to its charging decision. 189 Ariz. at 630-31. Herrell asked the State to inform the grand jury that he was trying to stop what appeared to be a surreptitious taking of his underage daughter, who had been the victim of previous sexual assaults, from "'being taken from her parent's home, certainly against their will, and possibly against [hers].'" *Id.* at 631 (alterations in *Herrell*). Citing *Crimmins*, this Court held that Herrell's version of the facts was "very clearly exculpatory" because it could have caused the grand jury to conclude that Herrell was justified in using force to prevent what he perceived as a serious crime being committed against his daughter. *Id.* From this analysis, it is evident that this Court intended the "would deter" definition to be broad enough to encompass evidence that "might" or "could" reasonably deter a grand jury from issuing charges. *Id.* This Court never suggested that had the grand jury heard Herrell's version of the facts, it necessarily *would* have returned—or *had to* return—a no-bill. Such a reading, as the State urges, would render *Herrell* and the 25 years of caselaw applying it an outright nullity, as it would only apply where the suspect was plainly innocent. *Herrell* also suggests that this Court intended "clearly exculpatory" to mean evidence whose exculpatory value is "clear" or "obvious," as

opposed to commenting on the weight of the exculpatory nature of the evidence. *See id.* at 631 ("we believe the evidence was very clearly exculpatory").

It is also helpful to consider evidence that has been found *not* to be clearly exculpatory. In *Mauro*, which appears to be the first Arizona case to define "clearly exculpatory" in the context of grand jury proceedings, this Court applied the "would deter" definition and held that the defendant's evidence was not clearly exculpatory because it would not have diminished probable cause, even if accepted as true. *See Mauro*, 134 Ariz. at 425; *cf. State v. Baumann*, 125 Ariz. 404, 409 (1980) (recognizing grand jury's duty to consider clearly exculpatory evidence without defining term). There, the defendant wanted the grand jury to know that he had a long history of hospitalizations for mental disorders. *Id.* Though relevant at trial, Mauro's mental health history did not make it any more or less likely that he committed the proposed charge of murder. *Id.* Since Mauro's mental health history would not have deterred the grand jury from finding probable cause because it did not tend to negate any of the elements of murder, it was not "clearly exculpatory." *Id.* Thus, *Mauro* also supports the notion that evidence is clearly exculpatory if it tends to negate an element of a crime or supports a possible justification defense.[3]

[3]*Mauro* cites *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979) in support of its definition of "clearly exculpatory evidence." In *Ciambrone*, the Second Circuit articulated the following duty: "where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it

A survey of the limited caselaw applying *Herrell* and *Trebus* reveals that Arizona courts have similarly construed both definitions of clearly exculpatory evidence as encompassing evidence that either tended to negate a suspect's culpability or otherwise supported a potential justification defense such that it could deter the grand jury from indicting. In *Byers v. Bluff*, the State told the grand jury that Byers had vaginal intercourse with M.H., that ejaculate remained after the sexual assault, and that Byers's DNA "match[ed]" a sample taken from M.H.'s "genitalia area." *See Byers v. Bluff*, No. 1 CA-SA 17-0113, 2017 WL 3765506, ¶ 9 (Ariz. Ct. App., Aug. 31, 2017) (mem. decision). However, the State failed to mention that the DNA match was to non-spermatozoa from M.H.'s external genitalia, and that M.H.'s vaginal samples revealed no male DNA whatsoever. *Id.* Even though the negative forensic tests did not clear Byers of guilt, the court of appeals concluded that the negative forensic tests were clearly exculpatory and should have been presented because that information might have caused the grand jury not to indict. *See id.*; *see also Reyes v. Cohen*, 252 Ariz. 33 (App. 2021) (evidence of prior threats by victim and victim's girlfriend and Reyes actions after shooting were not "clearly exculpatory," where evidence was cumulative to other evidence presented about similar prior threats by victim and Reyes' actions in

known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict." 601 F.2d at 623.

driving away while victim ran towards him and calling police immediately after shooting); *Ugalde v. Fisk*, No. 1 CA-SA 17-0254, 2017 WL 6616372, ¶ 11 (Ariz. Ct. App., Dec. 28, 2017) (mem. decision) (evidence not "clearly exculpatory" where it did not tend to establish victim was using or attempting to use deadly force against defendant such that killing might have been justified under Arizona law); *Gonzalez v. Mahoney ex rel. Cty. of Maricopa*, No. 1 CA-SA 14-0015, 2014 WL 346120, ¶ 9 (Ariz. Ct. App., Jan. 30, 2014) (mem. decision) (given victim's injuries, for which defendant offered no explanation, grandmother's lack of suspicion of past abuse was not clearly exculpatory and would not deter finding of probable cause regarding current incident).

Ultimately, what constitutes a fair and impartial presentation will vary, so the degree of detail that the prosecutor must present to the grand jury will similarly vary from case to case. *Bashir*, 226 Ariz. 351, ¶ 15. However, what is clear is that *Trebus* and *Herrell* require the prosecutor to inform the grand jury about evidence if that evidence is of such a nature that it might deter it from finding probable cause.

## CONCLUSION

For these reasons, AACJ requests that this Court clarify that evidence is clearly exculpatory if it might (or reasonably could) deter the grand jury from finding the existence of probable cause, vacate the trial court's order denying Willis' motion for remand, and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 29th day of December, 2021.

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