ARIZONA SUPREME COURT

ARANZI RAE JON WILLIS, Petitioner, v. HON. DEBORA BERNINI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pima, Respondent Judge, and STATE OF ARIZONA, Real Party in Interest.	CR–21–0258–PR Court of Appeals No. 2 CA–CR 2021–0031 Pima County Superior Court No. CR20202482–001

AMICUS CURIAE BRIEF OF THE MARICOPA COUNTY ATTORNEY'S OFFICE

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INTEREST OF AMICUS CURIAE

This Court granted review to decide two issues. The first presents a question of law that governs grand jury proceedings throughout the state of Arizona: "Is 'clearly exculpatory evidence'" defined by the standard set forth in *Herrell v. Sergeant*, 189 Ariz. 627 (1997) or *Trebus v. Davis*, 189 Ariz. 621, 623 (1997)?" The Maricopa County Attorney's Office ("MCAO") is submitting this *amicus curaie* brief only as to the first issue regarding the appropriate legal standard that applies grand jury proceedings.

MCAO serves the most populous county in Arizona and prosecutes the greatest number of criminal cases in the State. MCAO also has an interest in ensuring consistency in Arizona case law on the important legal issue of the correct definition of clearly exculpatory evidence because that legal standard dictates the duty of a prosecutor to inform the grand jury of certain evidence, including in some cases evidence that is proffered by the person under investigation. MCAO therefore has a significant interest in the resolution of this issue.

INTRODUCTION

This Court decided *Herrell* and *Trebus* on the same day in 1997, but those decisions announced different definitions of "clearly exculpatory evidence." *Trebus*, 189 Ariz. at 625 ("Clearly exculpatory evidence is evidence of such weight that it *might* deter the grand jury from finding the existence of probable cause.")

(emphasis added); *Herrell*, 189 Ariz. at 631 ("Clearly exculpatory evidence is evidence of such weight that it *would* deter the grand jury from finding the existence of probable cause.") (emphasis added). Moreover, *Trebus* suggests its holding was compelled by A.R.S. § 21–412, while *Herrell*'s holding appeared to be grounded in due process. *Trebus*, 189 Ariz. at 624–25 (noting that Arizona's "statutes and rules give the grand jury, not the prosecutor, the right and obligation to decide whether to hear a defendant or his exculpatory evidence" and extensively discussing "the statutory right of the grand jury to decide whether to hear evidence from the [accused]"); *Herrell*, 189 Ariz. at 631 (remanding for a determination of probable cause because "Herrell was denied his right to due process and a fair and impartial presentation of the evidence").

Throughout the 24 years that have since passed, the court of appeals has erroneously expanded the definition of "clearly exculpatory evidence" and broadened the duty of the prosecutor in grand jury proceedings. *See, e.g., Hansen v. Chon-Lopez*, 57 Ariz. Cases Digest 9, 2021 WL 5194914, ¶ 24 (Ariz. App. Nov. 9, 2021) (concluding *Trebus* requires a prosecutor to "inform the grand jury that a defendant has asked to appear or has submitted '*possible* exculpatory evidence'") (emphasis added); *Reyes v. Cohen in and for County of Maricopa*, 497 P.3d 486, 490, ¶ 10 (Ariz. App. 2021) (stating prosecutor was obligated to present clearly exculpatory evidence, which includes "evidence that would support an applicable

justification defense"); *Bashir v. Pineda*, 226 Ariz. 351, 355, ¶¶ 14-16 (App. 2011) (stating, "*Trebus* set the standard" and holding, "if a defendant has requested to appear and provided some detail of the proposed testimony and evidence, a prosecutor has a duty to convey that information to the grand jury in a fair and impartial manner"). Most recently, the court of appeals stated a prosecutor has an obligation to "alert [a] grand jury to [a] *Trebus* letter" itself, *see Hansen*, 57 Ariz. Cases Digest 9, ¶ 34—which does not constitute "evidence" at all. Simply put, the court of appeals' inconsistent application of *Trebus* and *Herrell* has caused significant confusion over the type of evidence that triggers a prosecutor's duty.

Additionally, Arizona case law must be reconciled with two other related observations. First, Arizona's grand jury statute, A.R.S. § 21–412, does not impose an affirmative obligation on a prosecutor to present clearly exculpatory evidence; instead, § 21–412 states only that "[t]he grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so." Thus, "clearly exculpatory evidence" is best understood as a statutory standard that applies to both state grand juries and county grand juries. *See* A.R.S. § 21–422(A) ("The law applicable to county grand juries, including their powers, duties and functions, applies to the state grand juries" unless the law conflicts with Title 21, Chapter 4, article 2). Second, as the State of Arizona correctly notes in its Supplemental Brief (at 1–4), the United States Supreme Court held in *United States v. Williams*, 504

U.S. 36, 51 (1992)—five years before this Court decided *Trebus* and *Herrell*—that federal constitutional due process does not require a prosecutor to present exculpatory evidence to a grand jury. Yet *Trebus* and *Herrell* suggested, erroneously, that due process does require the prosecutor to present exculpatory evidence in grand jury proceedings. *See Trebus*, 189 Ariz. at 623; *Herrell*, 189 Ariz. at 630.

This case therefore provides this Court with an opportunity to reconcile its own precedent with *Williams* by clarifying that a prosecutor's duty to inform a grand jury of "clearly exculpatory evidence" derives from A.R.S. § 21–412, not from any constitutional requirement. And even then, a grand jury is under no obligation to hear the evidence; the statute empowers the grand jury to make that choice. Finally, although the person under investigation in this case did not request to testify before the grand jury, this Court should clear up the confusion in court of appeals' decisions that conflate the prosecutor's responsibility to present "clearly exculpatory evidence" with a prosecutor's responsibility to inform a grand jury of an accused's unequivocal request to testify. It is imperative that prosecutors know what the law requires of them.

ARGUMENT

I. Purpose and History of Grand Jury Proceedings.

Both the United States and Arizona Constitutions contain provisions that govern indictment by a grand jury. U.S. Const. Amend. V; Ariz. Const. Art. 2, § 30. Grand juries are traditionally viewed as a separate institution that operates as a "buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992); *see also* A.R.S. § 21–401(2) (defining "grand jury" as "qualified persons ... who are sworn to inquire into public offenses that may be tried within the county, including corrupt or willful misconduct in office of public officials within the county"). Thus, grand juries have broad investigatory power to determine whether probable cause exists that "the person under investigation is guilty of such public offense." A.R.S. § 21–413; *see also* A.R.S. § 21–407 (conferring upon grand jurors broad power to investigate all offenses brought to them or otherwise known by them and "access to all jails, public institutions, and public records"); *Williams*, 504 U.S. at 48–50 (discussing broad investigatory power of grand jury); *Franzi v. Superior Court*, 139 Ariz. 556, 559-60, 565 (1984) (discussing grand jury's broad investigative powers and holding "the grand jury's power to investigate may exceed its authority to indict").

As the Supreme Court has stated, "It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for

bringing a criminal charge." *Williams*, 504 U.S. at 51; *see also Trebus*, 189 Ariz. at 625 ("Simply put, the grand jury is not the place to try a case."); *State v. Baumann*, 125 Ariz. 404, 409 (1980) ("The duty of a grand jury is to decide whether probable cause exists[.]"). Notably, at the time the United States Constitution was ratified, "the grand jury's function [was] not 'to enquire .... upon what foundation [the charge may be] denied,' or otherwise to try the suspect's defenses, but only to examine 'upon what foundation [the charge] is made by the prosecutor.'" *Williams*, 504 U.S. at 51 (quoting *Respublica v. Shaffer*, 1 U.S. (1 Dall.) 236 (O.T. Phila. 1788)). The suspect under investigation did not "have a right to testify or to have exculpatory evidence presented." *Id.* Thus, the grand jury's role is to investigate and decide whether the State has sufficient evidence to support an "accusation," which is to be later "tried and determined" by a petit jury. *See id.* "Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *United States v. Calandra*, 414 U.S. 338, 349 (1974).

In Arizona, state and county grand jury proceedings are governed by statute, *see* A.R.S. §§ 21–401-428, and the Arizona Rules of Criminal Procedure, *see* Ariz. R. Crim. P. 12.1-12.29. A defendant may challenge a grand jury proceeding only on the basis that he or she "was denied a substantial procedural right or that an

insufficient number of qualified grand jurors concurred in the indictment." Ariz. R. Crim. P. 12.9(a). 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. Priemsberg v. Rosenblatt*, 112 Ariz. 461, 462 (1975); *see also Allen v. Sanders*, 240 Ariz. 569, 572, ¶ 16 (2016) (same).

Regarding evidence on behalf of a person under investigation, A.R.S. § 21–412 provides:

> The grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so. The person under investigation shall have the right to advice of counsel during the giving of any testimony by him before the grand jury, provided that such counsel may not communicate with anyone other than his client. If such counsel communicates with anyone other than his client he may be summarily expelled by the court from the grand jury chambers. The grand jurors shall weigh all the evidence received by them and when they have reasonable ground to believe that other evidence, which is available, will explain away the contemplated charge, they may require the evidence to be produced.

This statute has remained unchanged since its original enactment in 1971. Notably, this statute does not *require* a grand jury to hear *any* evidence proffered by a person under investigation and highlights the independence of the grand jury to decide what evidence to consider.

II. A Person Under Investigation Does Not Possess a Due Process Right to Demand that a Prosecutor Present Clearly Exculpatory Evidence in Grand Jury Proceedings.

As set forth in the State's Supplemental Brief (at 3–10 & App'x B), Arizona case law, including *Trebus* and *Herrell,* has relied on an incorrect assumption that a person under investigation has a due process right to have a prosecutor present clearly exculpatory evidence to a grand jury. *See also Hansen*, 57 Arizona Cases Digest 9 at ¶ 15 ("[D]ue process requires the state to inform the grand jury of the existence of clearly exculpatory evidence."). The United States Supreme Court, however, squarely rejected that argument in *Williams*, concluding the Fifth Amendment does not require a prosecutor to present exculpatory evidence and determining such a holding "would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." 504 U.S. at 51. As stated by the Supreme Court, because the grand jury has "no obligation to consider all substantial exculpatory evidence," it does not make sense that "the prosecutor can be said to have a binding obligation to present it." *Id.* at 53 (cleaned up).

Trebus and *Herrell* were issued five years after *Williams*, but do not cite it. In fact, *Williams* has only been cited in Arizona in two cases: a depublished opinion in *Trinh v. Garcia in and for County of Maricopa*, 251 Ariz. 147, 155, ¶ 25 (App. 2021), and for a different proposition in a concurrence in *State v. Youngblood*, 173 Ariz. 502, 510 (1993) (Feldman, J., concurring in part and dissenting in part). Given

that the State cites *Williams* and correctly points out that there is no due process requirement for the prosecutor to present exculpatory evidence in grand jury proceedings, it is necessary for this Court to reconcile Arizona law with *Williams*.

III. "Clearly Exculpatory Evidence" In Arizona Is Best Understood as a Statutory Standard under A.R.S. § 21–412, Which is Satisfied When the Evidence Will Explain Away The Contemplated Charge.

The best way to reconcile *Trebus* and *Herrell* with *Williams* is to hold that the prosecutor only has a statutory duty to inform the grand jury of the existence of "clearly exculpatory evidence." As this Court recognized in *Trebus*, because § 21–412 allows the grand jury to hear and require the production of evidence that "will explain away the contemplated charge," the grand jury must be informed the evidence exists. *Trebus*, 189 Ariz. at 625. But, importantly, the duty is to *inform* the grand jury of the existence of clearly exculpatory evidence, not to *present* the evidence. It is ultimately the grand jury's decision under A.R.S. § 21–412 whether to hear the evidence. If the prosecutor instead *presents* the evidence, that would improperly take the choice away from the grand jury. *See State v. Just*, 138 Ariz. 534, 540 (App. 1983) ("The purpose of [§ 21–412] is obviously to give the grand jury the opportunity to hear the evidence it deems necessary to make its probable cause determination.").

To be sure, some statements in this Court's pre-*Williams* cases may suggest that the prosecutor has an obligation to present clearly exculpatory evidence, not just

to inform a grand jury of its existence. For example, in *State v. Coconino County Superior Court (Mauro)*, 139 Ariz. 422, 425 (1984) ("*Mauro*"), this Court said "the state is not obligated to present exculpatory evidence before a grand jury, absent a request from the grand jury, unless the evidence is clearly exculpatory." (Emphasis added). In *Trebus*, this Court quoted *Mauro*'s statement. *Trebus*, 189 Ariz. at 625 (quoting *Mauro*, 139 Ariz. at 425). But as the State explains in its Supplemental Brief (at 12-13), *Mauro* cited only *State v. Baumann*, 125 Ariz. 404, 408-09 (1980), for this proposition. *Baumann* rejected that proposition, stating, "[t]he contention that a grand jury must consider all exculpatory evidence misreads the grand jury's primary function of determining whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it." 125 Ariz. at 408. Moreover, *Mauro* ultimately held that the accused's insanity defense and mental health evidence was not exculpatory and that this evidence "was not required to be presented." 139 Ariz. at 425-26. *Mauro*'s suggestion that a prosecutor has an obligation to present clearly exculpatory evidence is dicta at best. Likewise, *Trebus*'s recitation of *Mauro*'s dicta is inconsequential for two reasons. First, like *Mauro*, *Trebus* was "not an exculpatory evidence case." *Trebus*, 189 Ariz. at 625. Second, *Trebus*'s citation to *Mauro* is likewise dicta; the Court clearly held that "[u]nder A.R.S. § 21–412 and Rule 12.6, the grand jury is to decide if it wishes to hear a defendant or his evidence." *Id.* at

626. Although *Trebus* also cited *Mauro* while discussing "due process requirements," those statements are also dicta (given *Trebus*'s holding that the evidence at issue was not clearly exculpatory) and erroneous in light of *Williams* as discussed above.[1]

A. *Herrell* Provides the Correct Standard for "Clearly Exculpatory Evidence"

As noted above, *Trebus* and *Herrell* were issued the same day but used different definitions of clearly exculpatory evidence. In *Trebus*, a grand jury indicted Trebus for 12 dangerous crimes against children for molesting his stepdaughter. 189 Ariz. at 622. This Court considered whether a letter written to the county attorney by Trebus' counsel prior to the grand jury proceedings triggered "the county attorney's duty to inform the grand jury of Trebus' willingness to present exculpatory evidence or to testify." *Id*. at 625. This Court stated that a prosecutor is not obligated "to present all exculpatory evidence to the grand jury absent a

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[1] Arizona cases also discuss a "fair presentation" requirement—which is distinct from a prosecutor's obligation to inform a grand jury of the existence of clearly exculpatory evidence. *See, e.g., Maretick v. Jarrett*, 204 Ariz. 194, ¶ 8 (2003) ("To do its job effectively, the grand jury must receive a fair and impartial presentation of the evidence.") (internal citation omitted), and *State v. Emery*, 131 Ariz. 493, 506 (1982)). As discussed in *Maretick*, a prosecutor is always bound by ethical rules and must not mislead the grand jury. 204 Ariz. at ¶ 10. In his petition for review, Willis does not appear to challenge the trial court's finding that the detective "did not present false or misleading testimony."

request by the grand jury, but must present only 'clearly exculpatory evidence.'" *Id.* *Trebus* defined clearly exculpatory evidence as "evidence of such weight that it might deter the grand jury from finding the existence of probable cause." *Id.* (citing *Mauro*, 139 Ariz. at 425). Using this standard, this Court concluded the letter contained no clearly exculpatory evidence because it concerned only "his stepdaughter's veracity and credibility and highlighted inconsistencies in her various allegations." *Id.*

In *Herrell*, the grand jury charged Herrell with aggravated assault, stemming from an incident where he pursued and pointed a CO2-powered BB pistol at a person he claimed to believe was harming his 13-year-old daughter. 189 Ariz. at 628-29. After the case was initially remanded to the grand jury, Herrell's attorney requested the prosecutor to present all known evidence and relevant justification statutes, including § 13–411 (crime prevention justification defense). *Id.* at 629. The prosecutor, however, did not present evidence such as transcripts of 911 calls, a prior complaint filed against a person accused of eight crimes of sexual conduct with Herrell's daughter, and records of Herrell's daughter's juvenile court hearings where she was adjudicated incorrigible, or refer the grand jury to A.R.S. § 13–411. *Id.* at 629-30.

This Court remanded the case for a new grand jury proceeding, concluding the applicable justification defense should have been provided to the grand jury as

well as a fair presentation of the facts of the case. *Id.* at 630-31. This Court deemed the evidence Herrell sought to present was "clearly exculpatory evidence" because it was "of such weight that it would deter the grand jury from finding the existence of probable cause." *Id.* at 631 (citing *Mauro*, 139 Ariz. at 425). Herrell alleged he attempted to stop what he believed to be an "a surreptitious taking of his underage daughter, probably for the purpose of an illicit sexual encounter, or other type of unlawful assault[.]" *Id.* at 631. His version of the facts was supported by "documentary evidence that was available to the county attorney." *Id.*

Herrell and *Trebus* both cited *Mauro* for a definition of "clearly exculpatory evidence," but employed different language—*Trebus* defines it as evidence that "***might*** deter the grand jury from finding the existence of probable cause," 189 Ariz. at 625 (emphasis added), but *Herrell*'s definition states it "***would*** deter the grand jury from finding the existence of probable cause," 189 Ariz. at 631 (emphasis added). *Herrell*, not *Trebus*, correctly recited the standard from *Mauro*. *See* 139 Ariz. at 425 ("Clearly exculpatory evidence is evidence of such weight that it ***would*** deter the grand jury from finding the existence of probable cause.") (emphasis added).

This Court should hold *Herrell* provides the correct definition of "clearly exculpatory evidence." First, this standard is consistent with the plain language of A.R.S. § 21–412, which allows the grand jury to hear other evidence that "***will***

explain away the contemplated charge." (Emphasis added.) The statute, thus, uses the non-conditional form of "would"—emphasizing certainty consistent with *Herrell* and *Mauro*'s formulation. Second, the *Herrell* standard is also consistent with this Court's precedent that requires a higher standard because a lower standard would "put grand juries in the business of holding minitrials." *Baumann*, 125 Ariz. at 409-10; *see also Trebus*, 189 Ariz. at 626 (recognizing the potential that "county attorneys might well be inundated with meaningless letters seeking to muddy the waters").

Trebus also erroneously relied on California case law that purportedly interpreted a "similar" statute. *See Trebus*, 189 Ariz. at 624 (citing *Johnson v. Superior Court*, 539 P.2d 792, 796 (Cal. 1975)). But the California statute interpreted in *Johnson* is not similar to A.R.S. § 21–412. The California statute states that although the "grand jury is not required to hear evidence for the defendant[,] ... when it has reason to believe that other evidence within its reach will explain away the charge, it ***shall*** order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses." Cal. Penal Code § 939.7 (West 2021) (emphasis added). Because a California grand jury is statutorily required to consider exculpatory evidence, it follows that a prosecutor must "inform the grand jury of its nature and existence." *Johnson*, 539 P.2d at 796. But in Arizona, a grand jury does not have a statutory obligation to consider

exculpatory evidence. Thus, California case law is not helpful in interpreting the Arizona statute; this provides another reason to depart from the analysis in *Trebus*. *See State v. Baumann*, 125 Ariz. 404, 408 (1980) (refusing to rely on reasoning of a California case in grand jury context when it relied on "a California statute which has no Arizona counterpart").

Trebus also improperly suggested that the prosecutor has a duty to "tell the grand jury about *possible* exculpatory evidence" instead of "clearly" exculpatory evidence. 189 Ariz. at 624 (emphasis added). This language has been quoted as the holding of *Trebus* in some court of appeals' decisions. *See*, *e.g.*, *Hansen*, 57 Ariz. Cases Digest 9, ¶ 24. This Court should clarify that the statutory duty arises only when evidence is "clearly exculpatory." And a prosecutor's duty is not to present the evidence itself, but instead, to inform the grand jury of its existence and enable the grand jury to decide whether to consider the evidence.

B. This Court Should Explain What Categories of Evidence Constitute "Clearly Exculpatory Evidence."

This Court has already concluded that "clearly exculpatory evidence" does not include witness credibility or factual inconsistencies, *see Trebus*, 189 Ariz. at 625, or an insanity defense, *see Mauro*, 139 Ariz. at 425–26. It would be helpful for this Court to further elaborate on this legal standard by including examples of the types of evidence that qualify as "clearly exculpatory evidence."

As set forth in the State's Supplemental Brief, *Herrell* is consistent with New Jersey's approach. New Jersey's definition of "clearly exculpatory evidence" provides workable rules for the grand jury process and recognizes that the "grand jury's role is not to weigh evidence presented by each party, but rather to investigate potential defendants and decide whether a criminal proceeding should be commenced." *State v. Hogan*, 676 A.2d 533, 542 (N.J. 1996).[2] Evidence must be "credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a *prima facie* case against the accused." *Id.* at 543. The evidence "must carry with it some indicia of reliability" and "does not require the grand jurors to engage in any extensive weighing of credibility factors that could substantially affect the value of the evidence." *State v. Evans*, 799 A.2d 708, 717–18 (N.J. Sup. Ct. Law Div. 2001).

Examples of such evidence include "credible testimony of a reliable, unbiased alibi witness" or "physical evidence of unquestioned reliability" demonstrating that the accused did not commit the alleged crime. *Hogan*, 676 A.2d at 543–44. But the following evidence *is not* clearly exculpatory evidence: lack of motive to commit

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[2] Citing *Williams*, New Jersey recognized there was no federal due process right for a prosecutor to present exculpatory evidence to the grand jury. *Hogan*, 676 A.2d at 539. New Jersey has based its right generally on its precedent allowing courts to exercise "supervisory power to remedy perceived injustices in grand jury proceedings." *Id.* at 540.

the crime; evidence relating to credibility of State's witnesses, including criminal history; conflicting eyewitness testimony; and recantation testimony. *Id.* at 543–44. For this reason, this Court should disapprove of *Hansen*'s pronouncement that "when [] credibility is everything and there is no independent evidence to support a finding of probable cause," a prosecutor violates A.R.S. § 21–412 by giving the grand jury a "one-sided presentation of evidence relating to the accuracy of [a] victim's statements, despite known, contrary evidence[.]" 57 Ariz. Cases Digest 9, ¶ 43. Disputes over credibility of witnesses and conflicts in the evidence should not be litigated in a grand jury proceeding, even when a witness's credibility is crucial to the State's case.

IV. A Prosecutor's Obligation to Inform a Grand Jury of "Clearly Exculpatory Evidence" Is Distinct from the Requirement to Inform a Grand Jury of an Accused's Unequivocal Request to Testify.

Finally, some decisions of the court of appeals have conflated a prosecutor's duty to inform a grand jury of "clearly exculpatory evidence" with a prosecutor's duty to convey an accused's unequivocal request to testify. Section 21–412 permits a person under investigation to testify before the grand jury only if the grand jury wants to hear the testimony. *See also* Ariz. R. Crim. P. 12.5(a) ("A person under investigation by the grand jury may be compelled to appear before the grand jury, or may be permitted to appear upon the person's written request."). In *Trebus*, this Court held the prosecutor must inform the grand jury of an accused's request to

testify. 189 Ariz. at 625. But *Trebus* also contains some ambiguous language about when that duty arises. *See* 189 Ariz. at 625 (concluding prosecutor had no duty to convey request to testify because the *Trebus* letter was "vague," did not reference any "specific exculpatory evidence," and "is non-committal about Trebus' desire to testify before the grand jury").

In *Black v. Coker*, 226 Ariz. 335, 339, ¶ 11 (App. 2011), the court of appeals correctly stated that *Trebus* requires the prosecutor "to inform the grand jury of an unequivocal request to appear and testify." The court of appeals explained that "[a]n unequivocal offer by a defendant to appear before the grand jury is distinct from any other proposed evidence" because the defendant "is uniquely situated to either explain away the contemplated charge or irrevocably incriminate himself." *Id.* at 340, ¶ 13 (internal quotation omitted). This Court should endorse *Black*'s holding, i.e., that a prosecutor has a duty to convey only an unequivocal offer to testify. Under those circumstances, the grand jury would then decide whether to allow a suspect under investigation to testify. *See* A.R.S. § 21–412.

Contrary to the court of appeals' holding in *Bashir v. Pineda*, 226 Ariz. 351, 355, ¶ 16 (App. 2011), however, a prosecutor is not obligated to summarize or outline an accused's proposed testimony, or otherwise summarize evidence that is not "clearly exculpatory," but merely proffered in a *Trebus* letter. In *Bashir*, the court of appeals expanded *Trebus* to hold "if a defendant has requested to appear

and provided some detail of the proposed testimony and evidence, a prosecutor has a duty to convey that information to the grand jury[.]" 226 Ariz. at 355, ¶ 16; *see also State v. Blair* (*Taveras*), No. 1 CA-SA 21-0188, 2021 WL 5072394 at ¶ 24 (Ariz. App. Nov. 2, 2021) (mem. decision) (stating "the standard from both *Trebus* and *Bashir*" is satisfied when a prosecutor "read[s] the substance of [a *Trebus*] letter to the grand jury"). But again, there is no due process right to have any exculpatory evidence presented to the grand jury. *Williams*, 504 U.S. at 51–55. And the statute puts no such obligation on the prosecutor to summarize the defendant's case or make the case for him. *See e.g. Trebus*, 189 Ariz. at 626–27 (Martone, J., dissenting) (noting Arizona's statutes do not impose a duty on a prosecutor to convey request to testify).

If a prosecutor is required to provide a summary or outline of proposed testimony or evidence, this would allow a person under investigation to essentially testify before the grand jury through the prosecutor. This standard is unworkable and provides no clear guidance to prosecutors. Under *Bashir* and subsequent court of appeals cases, a prosecutor must convey the suspect's proposed evidence and testimony, but the level of detail required will vary "case by case." *Bashir*, 226 Ariz. at 355, ¶ 15. A prosecutor should not make a suspect's case for him or her, but must convey a sufficient "degree of detail" in a "fair and impartial manner" for the grand jury to make "an informed decision." *Id.* at 355, ¶¶ 15-16. It is entirely unclear what

"degree of detail" is necessary. Instead, the rule that is most consistent with the statute and easy to apply is to require a prosecutor to inform the grand jury of an accused's unequivocal request to testify and any evidence that will explain away the contemplated charge. Thus, this Court should disavow *Bashir*.

CONCLUSION

Under A.R.S. § 21–412, a prosecutor must inform a grand jury of existence of "clearly exculpatory evidence" as defined by *Herrell*. The separate statutory duty to inform a grand jury that a person under investigation requests to testify is triggered only upon an accused's unequivocal request to testify. Contrary to *Bashir*, a prosecutor should not be expected to summarize an accused's evidence or proposed testimony that is not clearly exculpatory.

Respectfully submitted,

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