IN THE SUPREME COURT
STATE OF ARIZONA

ARANZI RAE JON WILLIS, Petitioner, vs. HON. DEBORAH BERNINI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA, Respondent, and THE STATE OF ARIZONA, LAURA CONOVER, PIMA COUNTY ATTORNEY Real Party in Interest.	Arizona Supreme Court No. CR-21-0258-PR Court of Appeals Division Two No. 2 CA-SA 2021-0031 Pima County Superior Court No. CR 20202482-001

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

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ARGUMENT

“CLEARLY EXCULPATORY” EVIDENCE, PURSUANT TO A.R.S. § 21-412, MUST BE EXONERATIVE EVIDENCE THAT BEARS SUBSTANTIAL RELIABILITY AND CREDIBILITY, AND OF SUCH WEIGHT THAT IT WOULD DETER THE GRAND JURY FROM FINDING PROBABLE CAUSE.

Arizona’s statutory- and rule-based framework for grand juries should only require the prosecutor to present reliable, credible, and truly exculpatory evidence that “*would deter*” the grand jury from finding probable cause, consistent with the history and nature of the grand jury system. The Court should reaffirm the *Herrell* standard and adopt clear and workable standards for the prosecutor’s obligation to present clearly exculpatory evidence to the grand jury only when such evidence *would deter* the grand jury from finding probable cause. *Herrell v. Sargeant*, 189 Ariz. 627, 631 (1997). Anything less will transform the grand jury proceeding into a mini-trial.

By statute, Arizona’s grand jury system *is* transparent, A.R.S. § 21-411, and more permissive regarding evidence, A.R.S. § 21-412, than many other jurisdictions, including the federal system, as Amicus notes. However, the grand jury is nonetheless an autonomous, independent body to determine *only* whether probable cause exists to charge an individual with a crime. The semblance of secrecy for grand jury proceedings is for the *suspect’s* benefit, as there will be no public record of accusation if a grand jury determines not to issue a true bill. And, if indicted, the

individual in Arizona is immediately provided a verbatim transcription of the entire proceeding. A.R.S. § 21-411. Consistent with that autonomy, reviewing courts cannot consider challenges to the indictment based upon the "nature, weight or sufficiency of the evidence presented to the grand jury." *Crimmins v. Super. Ct., in and for Maricopa Cnty*., 137 Ariz. 39, 42-43 (1983) (citation omitted).

The State need not even resort to the grand jury, but can merely charge an individual with a crime by filing a complaint followed by a probable cause hearing before a judge. *See* ARIZ. CONST. art. II, § 30 (criminal prosecution begins with an indictment or information); Ariz. R. Crim. P. 2.1 (misdemeanors), 2.2 (felonies), 5.4 (determination of probable cause), and 13.1(b) (information).

Amicus recognizes that the grand jury is an "*independent* investigative body," with an "*independent* responsibility to determine whether there is probable cause to believe a particular crime has been committed," all while acting as a "vital check against unfettered prosecutorial discretion." (Br. at 2-4; emphasis added.) Amicus repeatedly emphasizes the grand jury's independence, "broad investigative power," and autonomy. (*Id*. at 4.) Yet, Amicus nonetheless then argues that Arizona law *compels* the prosecutor to *affirmatively present* evidence to a grand jury as part of some undefined due process concern and Arizona's expanded statutory and rule-based protections for fundamental fairness. Amicus' suggestion would create ideological disparity and tension.

Amicus also contends that the "historical" backdrop of the grand jury system supports its position that this Court should impose an obligation on the prosecutor to present exculpatory evidence that "might deter" a grand jury from indicting a suspect. Amicus is mistaken. The history of the grand jury system, dating back more than 850 years to the Assize of Clarendon (issued in 1166), does not support Amicus' position to any extent, let alone warrant a more permissive standard. *See, e.g.*, Wayne R. LaFave & Jerold H. Israel, CRIMINAL PROCEDURE 347 (1985). As the United States Supreme Court in *Williams* recounted, "the prevailing practice in 18th-century England, the grand jury was 'only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined.'" *United States v. Williams*, 504 U.S. 36, 51 (1992) (citing 4 W. Blackstone, Commentaries 300 (1769); 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847)). The origin and the historical practice of the grand jury does not support a constitutional obligation on the prosecutor to present specific exculpatory evidence.

Amicus then appeals to policy, citing the "devastating personal and professional" impacts for the wrongly accused. (Br. at 3.) Notably, counsel cites no examples in which an Arizona grand jury issued a true bill while the attending prosecutor failed to disclose truly exculpatory evidence. Not one. Amicus correctly notes that Arizona has enacted several statutory- and rule-based protections for the

grand jury system, distinct from the federal system. Undoubtedly, Arizona provides for broader protections.

Finally, any requirement that the prosecutor present contradictory evidence that *might deter* a probable cause finding will inevitably require the grand jury to weigh and resolve conflicting evidence, as well as make credibility determinations, often without proper context, instruction, or argument. The 'factual distortion' which would result, as Amicus claims, comes not from the lack of exculpatory evidence, but from nuanced and conflicting evidence for which the grand jurors have none of the hallmark tools for discerning truthfulness, including live testimony, examination, and evidentiary rules which ensure accuracy. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (In our system of justice, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); *State v. Todd*, 244 Ariz. 374, 379, ¶ 12 (App. 2018) (same).

I. THE STATE'S OBLIGATION TO PRESENT EXCULPATORY EVIDENCE HAS NO CONSTITUTIONAL BASIS.

Amicus first argues that the State "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." (Amicus Br. at 5; citing *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).) Amicus contends the federal due process clause governs grand jury proceedings, a legal conclusion compelled by *Beck*, which

"suggest[ed] that once resorting to grand jury procedure, state must comply with due process clause of Fourteenth Amendment." (Br. at 5; citing *Beck v. Washington*, 369 U.S. 541, 546 (1962).)

Beck announced no such holding. The *Beck* Court assumed *arguendo* that the due process clause even applied to grand juries in rejecting the petitioner's argument that "the judge impaneling the grand jury had breached his duty to ascertain on voir dire whether any prospective juror had been influenced by the adverse publicity" and that the grand jury had been inadequately instructed regarding bias and prejudice. *Beck*, 369 U.S. at 545-46. The Supreme Court held:

> But we find that it is *not necessary for us to determine this question*; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—*a question upon which we do not remotely intimate any view*—we have concluded that Washington, so far as is shown by the record, did so in this case.

Id. at 546 (emphasis added).

Amicus also argues that the State erroneously cited *Williams* for the proposition that there is no federal due process right requiring the State to present exculpatory evidence to the grand jury. (Br. at 6.) Amicus contends that the *Williams* decision was "narrow" and addressed only whether federal courts had inherent supervisory authority to fashion rules requiring federal prosecutors to present exculpatory evidence to a federal grand jury. (*Id*.) Amicus also argues that, "to date, it appears the Supreme Court has never answered [the] question" whether the federal

due process clause applies to grand juries. (Br. at 5-6.)

Amicus reads *Williams* too narrowly. The Supreme Court's ruling in *Williams* constitutes the leading precedent rejecting a prosecutorial obligation to disclose known exculpatory evidence to the grand jury, on any basis. *See* Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, 4 CRIM. PROC. § 15.7(f) (4th ed.). As one leading legal treatise opined:

> *Williams* held that the federal court's supervisory authority could not be utilized to dismiss an indictment based upon the prosecution's failure to have presented the grand jury "substantial exculpatory evidence" within its possession. [T]he *Williams* ruling rested on the premise that federal courts, in general, lack authority to prescribe grand jury procedures and to dismiss indictments apart from the prosecution's violation of procedural rules derived from either the Constitution, statutes, or the Federal Rule of Criminal Procedures. However, the Court clearly indicated that establishing a prosecutorial obligation to present exculpatory evidence to the grand jury would not be justified even if the federal courts had authority to prescribe grand jury procedures as part of a "sort of common law of the Fifth Amendment." Requiring disclosure of even the most substantial exculpatory evidence "would neither preserve nor enhance the traditional functioning" of the federal grand jury, but instead "alter the grand jury's historical role, transforming it from an accusatory body to an adjudicatory body."

LaFave et al., *supra*, at 15.7(f) (internal footnotes omitted).

Thus, although *Williams* noted at the outset that the respondent had not argued that "the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury," the Court nonetheless rejected any such suggestion as inconsistent with "a sort of Fifth Amendment common law" aimed at fulfilling the functions of the constitutional guarantee of

grand jury screening. LaFave et al., *supra*, at 15.7(f), at n. 142 (quoting *Williams*, 504 U.S. at 45, 51). In addition, the Supreme Court implicitly rejected the district court's analogy to trial disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), which rests upon due process grounds. *Williams*, 504 U.S. at 39. Finally, the Court noted that requiring the prosecutor to present exculpatory evidence would be incompatible with the "institution that the Fifth Amendment demands." LaFave et al., *supra*, at 15.7(f), at n. 142 (quoting *Williams*, 504 U.S. at 45, 51).

Those conclusions, therefore, "logically foreclose[] imposing such a requirement as prerequisite of due process, for the Court has held that the due process clause cannot be utilized to mandate additional requirements where a more particularized constitutional guarantee specifically addresses the subject matter." *Id.*

Notably, the *Williams* Court did not even mention *Beck* or any of the other previous decisions relied upon by Amicus, despite what Amicus claims were clear due process holdings. 504 U.S. 36 (1992). In fact, the *Williams* Court rejected the same argument asserted by Amicus here, that *Wood v. Georgia*, 370 U.S. 375, 390 (1962), requires an "independent and informed grand jury" as a basis for requiring the prosecutor to present exculpatory evidence. *Williams*, 504 U.S. at 51. The Supreme Court specifically and succinctly rejected that argument, holding, "We do not agree." *Id*. In fact, the *Williams* decision would be in direct contradiction to *Beck*, *Wood*, and *Hobby v. United States*, 468 U.S. 339 (1984), if those cases stood for the

proposition that the federal due process clause applies to grand jury proceedings, as Amicus contends. (Br. at 5-6.)

Amicus's next suggestion—that the Supreme Court left open the possibility of due process requiring a prosecutor to disclose exculpatory evidence to the grand jury, in light of *Williams*—is equally unavailing. The *Williams* Court, which examined the origin and centuries-long history of the grand jury institution, found that requiring the prosecutor to disclose exculpatory evidence would fundamentally alter the nature of the grand jury inquisition and would be "incompatible with this system." 504 U.S. at 47-55. Thus, assuming the due process clause required the prosecutor to present exculpatory evidence, it would render *Williams* and its entire rationale obsolete. As the *Williams* Court noted,

> 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. *See United States v. Calandra*, 414 U.S., at 343. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th–century England, the grand jury was "only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries 300 (1769); *see also* 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847). So also in the United States. According to the description of an early American court, three years before the Fifth Amendment was ratified, it is the grand jury's function 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. *Respublica v. Shaffer*, 1 U.S. (1 Dall.) 236 (O.T.Phila.1788); *see also* F. Wharton, Criminal Pleading and Practice § 360, pp. 248–249 (8th ed. 1880). As

> a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented. *See* 2 Hale, *supra*, at 157; *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 605–606 (CA2), cert. denied, 323 U.S. 790 (1944).

Id. at 51-52 (internal parallel citations omitted).

Thus, Amicus's arguments regarding the federal due process clause are untenable, in light of the origin, history, and nature of the grand jury system, as well as the Supreme Court's own precedents disavowing any such prosecutorial obligation to present exculpatory evidence. *Id*. As the *Williams* Court reasoned, "If the grand jury has no obligation to consider all 'substantial exculpatory' evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it." *Id*. at 53.

II. THE FEDERAL VERSUS STATE GRAND JURY SYSTEMS.

Amicus next argues that the federal and state grand juries are "fundamentally different," in light of Arizona's statutory framework which provides for broader protections. (Br. at 7.) Arizona, however, has incorporated many of the same federal standards. *See Marston's*, *Inc. v. Strand*, 114 Ariz. 260, 264 (1977) ("The grand jury system is an investigative body acting independently of either prosecutor or judge whose mission is to bring to trial those who may be guilty and clear the innocent.") (citing *United States v. Dionisio*, 410 U.S. 1 (1973)); *Crimmins*, 137 Ariz. at 43-44 (Feldman, J., specially concurring) ("These principles are not confined to the federal

system. This court has recently held that the initiation and control of inquiries into public offenses "rests with the grand jury and not the prosecutor.") (quoting *Gershon v. Broomfield*, 131 Ariz. 507, 509 (1982)).

While Amicus claims the federal courts "chip[ed] away" at their own power over grand jury proceedings, a pejorative description for constitutional interpretation, it asserts that Arizona has expanded the standards applicable to grand juries, citing "our unique statutes" and "rulemaking powers." (Br. at 8.) Amicus claims that Arizona's grand jury system is "*vastly* more protective of an accused's rights during grand jury proceedings." (*Id.*; emphasis added.)

However, Amicus points to nothing more than the grand jury statutes, A.R.S. § 21-401 *et seq.*, and Rule 12.9 of the Arizona Rules of Criminal Procedure, to demonstrate these differences. (*Id.*) As noted by Amicus, Arizona law provides the following two rights, as distinct from the federal system:

- 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. A.R.S. § 21-412.

- A transcript of the proceedings shall be filed with the clerk of the superior court, and made available to the prosecuting officer and the defendant.[1] A.R.S. § 21-411(A).

[1] *See* A.R.S. § 13-2812 (it is a class 1 misdemeanor to knowingly disclose to another "the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding[.]").

(*Id*. at 8-9.) Although Amicus contends the Arizona judiciary has also recognized that suspects have a "substantial procedural right" to have evidence presented to the grand jury in a fair and impartial manner, pursuant to Arizona Procedural Rule 12.9, his assertion begs the very question here about the attendant standards for grand jury and their derivative authority. (*Id*. at 9.)

Amicus contrasts Rule 12.9 with Rule 6(b)(1) of the Federal Rules of Criminal Procedure, which permits defendants to challenge the procedural aspects of the grand jury, including "that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified." However, those two criminal procedural rules appear to have very similar aims. In fact, several early Arizona decisions considered only "substantial *procedural* rights" for Rule 12.9 purposes. *See, e.g.*, *State v. Super. Ct. in and for Pima Cnty. (Collins)*, 102 Ariz. 388 (1967) (holding that the composition of the grand jury was not properly qualified); *Corbin v. Broadman*, 6 Ariz. App. 436 (App. 1967) (whether prosecutor had a conflict of interest in presenting case).

Amicus also points to *Johnson v. Super. Ct.*, 124 Cal. Rptr. 32 (1975), a California Supreme Court decision referenced in *Trebus v. Davis*, 189 Ariz. 621, 724 (1997), and argues that the California statute at issue is "substantively similar" to A.R.S. § 21-412. Amicus argues that "Arizona's founders adopted California's statutes with respect to charging criminal prosecutions," and thus the *Johnson*

decision is particularly compelling. (Br. at 11, n. 1; citing *Fertig v. State*, 14 Ariz. 540 (1913).)

First, the *Johnson* decision predated *Williams*. Second, the California legislature subsequently codified the *Johnson* decision in 1997, twenty-two years after the *Johnson* decision. *See* Cal. Penal Code § 939.71.[2] Therefore, to the extent the California Supreme Court interpreted § 939.7 to require the presentation of exculpatory evidence, that authority appears to have been tenuous, thus requiring the California legislature to subsequently enact a statute explicitly providing for the presentation of such exculpatory evidence. Here, the Arizona legislature has not enacted a similar statute to § 939.71. And third, the statute is internally illogical, as the prosecutor's failure to present *exculpatory evidence* is still subject to a "substantial prejudice" analysis. In other words, the State's failure to present to the grand jury evidence which *exculpates* a suspect can still be non-prejudicial.

III. ARIZONA'S STATUTORY- AND RULE-BASED FRAMEWORK FOR GRAND JURIES SHOULD ONLY REQUIRE THE PROSECUTOR TO PRESENT RELIABLE, CREDIBLE, AND TRULY EXCULPATORY EVIDENCE THAT "WOULD DETER" THE GRAND JURY FROM FINDING PROBABLE CAUSE, CONSISTENT WITH THE HISTORY AND NATURE OF THE GRAND JURY SYSTEM.

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[2] Cal. Penal Code § 939.71 states: "(a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence."

To the extent this Court will resolve the difference between the *Trebus* and *Herrell* standards, it should reaffirm the *Herrell* standard as the only one consistent with the history, nature, and statutory- and rule-based authority for grand juries. *Trebus* defined clearly exculpatory evidence as "evidence of such weight that it ***might*** deter the grand jury from finding the existence of probable cause," 189 Ariz. 621, 625 (1997) (emphasis added), while *Herrell* defined it as "evidence of such weight that it ***would*** deter the grand jury from finding the existence of probable cause," 189 Ariz. 627, 631 (1997) (emphasis added).[3]

As Amicus Curiae, the Maricopa County Attorney's Office, correctly notes, the *Herrell* decision accurately recited the "clearly exculpatory" standard from *Mauro*, while the *Trebus* decision cited *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979),[4] and appeared to lessen the *Mauro* standard. (MCAO Am. Br. at 13) (citing *State v. Super. Ct. (Mauro)*, 139 Ariz. 422, 425 (1984) ("Clearly exculpatory evidence is evidence of such weight that it ***would*** deter the grand jury from finding the existence of probable cause.") (emphasis added)).

[3] Amicus also asserts that *Herrell* requires the prosecutor to present the grand jury with "an accurate picture of the substantive facts." (Br. at 13.) Amicus omits the entirety of that "conclusion" in *Herrell*: "The county attorney failed to present the grand jury with an accurate picture of the substantive facts in both the initial grand jury proceeding and on remand. Thus, Herrell was denied his ***right to due process and a fair and impartial presentation of the evidence***." *Herrell*, 189 Ariz. at 631 (emphasis added). Thus, Amicus's omission is the very question at issue in this case.

[4] As explained in the State's Supplemental Brief, the *Ciambrone* decision was overruled by the Supreme Court in *Williams*, 504 U.S. 36.

In addition, the standard from *Mauro* and *Herrell* is also consistent with the plain language of A.R.S. § 21-412, which states: "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." (emphasis added); (*see* MCAO Am. Br. at 13-14.)

Further, the *Trebus* standard—exculpatory evidence that *might* deter the grand jury from finding the existence of probable cause—is grammatically strained. Black's Law Dictionary defines "Exculpatory evidence" as: "Evidence tending to establish a criminal defendant's innocence. Fed. R. Crim. P. 16. • The prosecution has a duty to disclose exculpatory evidence in its possession or control when the evidence may be material to the outcome of the case. See BRADY MATERIAL." BLACK'S LAW DICTIONARY (11th ed. 2019).[5] Further, "tend" is generally defined as "inclination or tendency," while "might" generally refers to a "possibility." *See* Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-

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[5] It is noteworthy that Black's Law Dictionary defines "exculpatory evidence" with reference to the State's constitutional due process disclosure requirements pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The attempt to incorporate the State's constitutional disclosure requirement into the grand jury analysis further illustrates the proverbial square-peg problem here. Once disclosed, the prosecutor and the defendant are free to test all admissible evidence in the crucible of trial, whereas the prosecutor is barred, by law, from commenting on or testing the evidence *in any fashion* submitted to the grand jury.

webster.com/ dictionary (last accessed 17 Jan. 2022).

Thus, "exculpatory evidence" that *might tend* to exculpate a suspect is grammatically inconsistent, confusing evidence which has the *possibility* of exculpating a suspect with evidence that has a *tendency* to do so. Further, all conflicting, inconsistent, or contrasting evidence *might* have some conceivable effect on the other evidence against a potential suspect. By requiring the State to introduce such broad evidence to a grand jury would place grand juries in the position of having to reconcile conflicting evidence and make credibility judgments.

Such evidence *would also* place reviewing courts in the position of "concern[ing] themselves with the evidence underlying a grand jury indictment." *Crimmins v. Super. Ct. in and for Maricopa Cnty*., 137 Ariz. 39, 42 (1983) (quoting *State v. Jessen*, 130 Ariz. 1, 5 (1981)). As the *Williams* Court noted, challenges to the reliability or competence of the evidence before a grand jury "will not be heard;" a "complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was 'incomplete.'" 504 U.S. at 54 (quoting *Costello v. United States*, 350 U.S. 359, 363-64 (1956); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988)). The Court reasoned, "It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation." *Id*. The Court concluded: "Review of facially valid indictments on

such grounds 'would run counter to the whole history of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires [it].'" *Id.* at 54-55 (quoting *Costello*, 350 U.S. at 364).

Requiring the prosecutor to present "clearly exculpatory" evidence that *might deter* a probable cause finding will not lead to enhanced reliability and fairer outcomes, as Amicus suggests. To the contrary. Under Amicus' proposal, for example, the prosecutor would be required to present the conflicting hearsay statements of numerous percipient and circumstantial witnesses, including the defendant's own insulated, unchallenged version of events, because this evidence *might* deter the grand jury from finding probable cause. The grand jury would have no way to evaluate and assess that evidence. *See* Ariz. R. Evid. 1101(d) (the rules of evidence, with the exception of privileged evidence, do not apply to grand jury proceedings); *Maretick v. Jarrett*, 204 Ariz. 194, 197, ¶ 9 (2003). The Court of Appeals' recent pronouncement that the State is also required to present the *Trebus* letter itself worsens the problem. *Hansen v. Chon-Lopez*, 2021 WL 5194914 (App. Nov. 9, 2021); (*see* State's Supp. Br., Appendix A (recent *Trebus* letters)).

The issue is even more problematic for certain types of cases, like child and adult sexual assault, which often require medical and professional expert testimony to help explain unusual conduct by sexual assault victims. *See, e.g.*, *State v. Salazar-Mercado*, 234 Ariz. 590, 594, ¶ 15 (2014) ("cold expert" testimony satisfied Rule

702(a) and "might have helped the jury to understand possible reasons for the delayed and inconsistent reporting" by sexual abuse victims); *State v. Lindsay*, 149 Ariz. 472, 474 (1986) (the Arizona Supreme Court has recognized that jurors, who "are [often] unfamiliar with the behavioral sciences, may well benefit from expert testimony of [a] general type" regarding the unique behavioral patterns of sexual abuse victims"); *State v. Moran*, 151 Ariz. 378, 381 (1986) ("[E]xpert testimony on recantation [may be used to] explain a victim's seemingly inconsistent behavior and aid jurors in evaluating the victim's credibility."); *State v. Chapple*, 135 Ariz. 281, 291 (1983) (holding that expert testimony that helps jurors evaluate victims' credibility and explains why victims of sexual abuse may behave inconsistently is admissible). Prosecutors are well-versed in these medical and evidentiary issues.

Amicus's *Trebus* letters, however, take advantage of this very issue in a way that potentially *misleads* the grand jury about the evidence of sexual assault and victims. (State's Supp. Br., Appendix A); *see also Hansen*, supra. In fact, the requirement that the prosecutor present arguably exculpatory evidence that a sexual assault victim previously failed to report an assault to law enforcement, even when such evidence may be consistent with the psychology of victimization, may place the prosecutor in the position of knowingly introducing false or misleading evidence to the grand jury. *Hansen*, *supra*. (State's Supp. Br., Appendix A.) These contrasting views of evidence demonstrate the difficulty in determining whether evidence is

"clearly exculpatory" and "*might* deter" a grand jury from concluding there is probable cause that the suspect committed a crime.

Next, Amicus addresses *Herrell* at length, and contends that, despite this Court reiterating the correct standard—"Clearly exculpatory evidence is evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *State v. Superior Court* (*Mauro*), 139 Ariz. 422, 425, (1984)"—the Court lowered that standard to "might" through its analysis. (Br. at 15-16.) In the *Herrell* opinion, this Court used the word "might" on only two occasions, and neither instance addressed the prosecutor's obligation to present clearly exculpatory evidence. *Herrell*, 189 Ariz. at 630. Amicus misreads *Herrell*.

Regardless, although recounting the correct standard, the *Herrell* opinion requires additional scrutiny in several respects. The opinion is based on violations of the defendant's alleged rights to "due process and a fair and impartial presentation of the evidence." 189 Ariz. at 631. Further, the Court assumed the truth of the defendant's version of the facts that he was acting to prevent what he believed was the kidnapping of his daughter, and held that the prosecutor was required to present such conflicting evidence. *Id*. at 628-29, 631. Thus, the grand jury was placed in the position of reconciling the evidence of the crime as recounted through the officer with the hearsay evidence of the defendant's version of the crime. *Id*. Further, the grand jury had to determine, on that evidence, whether the defendant acted

objectively reasonable in light of a complex family history and a volatile situation, without hearing from any of those witnesses. *Id*. Such a presentation on limited and incompetent evidence can hardly be said to be "fair," accurate, or truthful. The analysis also does not appear to address whether there is probable cause that the suspect committed a crime, but whether the defendant is *actually legally innocent* of the *crime* because he was legally justified, the very objective of a trial.

Finally, Amicus argues that this analysis is "highly case-specific," and urges the Court to adopt a lesser "might" standard for "clearly exculpatory evidence" and permit "trial courts to determine whether the particular circumstances amounted to an unfair or biased proceeding." (Br. at 13-14, 19.) Amicus' proposal is akin to the current status quo, which has led to substantial litigation. It has become common practice for defense counsel to challenge grand jury indictments. While a public indictment has substantial consequence for the individual, defense counsel routinely file *Trebus* letters *after* the indictment has issued, when requesting a remand for a new determination of probable cause. Therefore, this litigation does not appear aimed at preventing the initial public indictment and preventing those public and private harms, as Amicus contends. And both Willis and Amicus have not left it to the trial courts; they have pursued their challenges through Arizona's appellate courts, causing significant delay and disruption. *See, e.g.*, *Hansen*, 2021 WL 5194914 (App. Nov. 9, 2021); *Stocker v. Ortiz*, CR-21-0196-PR; *Webber-Graff v.*

Woods, CR-22-[]-PR (filed 1/12/22); *Clements v. Lee*, CR-21-0321-PR.

The United States Supreme Court previously noted this potential for abuse. Rather than require the prosecutor to "say what he knows in defense of the target of the investigation," the Court surmised that the target should be permitted to "tender his own defense" to the grand jury. *Williams*, 504 U.S. at 52. Yet, the Court noted that requiring the former while denying the latter "would be quite absurd," and "invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury—unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure." *Id*. (emphasis in original; citations omitted). That is precisely the current state of Arizona's grand jury system, and it has led to substantial confusion, litigation, and unjust results.

IV. CONCLUSION.

The grand jury sits to determine *only* whether the evidence establishes probable cause to believe the person being investigated committed a crime. *Mauro*, 139 Ariz. at 425. It "is not the place to try a case." *Id*. The State respectfully requests that this Court clarify the standards applicable to grand jury presentments, including any prosecutorial obligation to present clearly exculpatory evidence that *would deter* a grand jury from finding probable cause. Anything more would transform the grand jury into a mini-trial.

RESPECTFULLY SUBMITTED this _20th_ day of January, 2022.

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