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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 PETITION FOR REVIEW**

I. ISSUE PRESENTED FOR REVIEW.

Did the trial court abuse its discretion in denying Petitioner's motion to remand the case to the grand jury after finding that the State did not withhold clearly exculpatory evidence from the Grand Jury, or mischaracterize the evidence in its presentation?

II. FACTS MATERIAL TO THE ISSUES PRESENTED.

At the grand jury proceedings in this matter, Detective Robinson of the Pima County Sheriff's Department testified to the following facts:

On March 15, 2020, police responded to shots being fired at Eden Adult Cabaret. *RT – Grand Jury Transcripts*, at 4 (June 26, 2020). When police arrived, a white male, the victim, was lying on the ground with several gunshot wounds to his torso and one to his head. (*Id.*) No firearm or any type of weapon was found on his person. (*Id.* at 17.) The victim survived the incident. (*Id.* at 15.)

A witness present at the Cabaret reported hearing gunshots and then seeing a blue Dodge Challenger or Charger with custom paint leaving the scene. (*Id.* at 5). This witness captured a video of the car and its license plate. (*Id.* at 5.) The owner of the blue sedan was determined to be a woman named Maggie Lujan, and the car was also associated with Anthony Lujan Terrazas. (*Id.*) Surveillance footage from

the cabaret showed that Anthony Lujan Terrazas entered the club with Jesse Portillo at 2:38 a.m. (*Id.* at 6.) The footage also showed that the two left the club at 3:49 a.m., and then the blue Dodge sedan left the parking lot fifteen minutes later, at 4:05 a.m. (*Id.*) Police found a cell phone on the scene that belonged to Jesse Portillo. (*Id.*)

Police interviewed Portillo's acquaintances regarding the shooting. (*Id.* at 7.) One said that Portillo admitted to being at Eden when a white male flicked a cigarette on him. (*Id.*) According to this acquaintance, who was not present for the events, Portillo then said that the male began a fight and was on top of him, so he had to shoot the male. (*Id.*)

Petitioner implicated himself in this shooting in Facebook messages between himself and Anthony Lujan Terrazas' sister, Sevenna. (*Id.* at 9.) On March 15, 2020, the day of the shooting, at approximately 7:30 p.m., Sevenna sent Petitioner a Facebook message about Anthony getting into a fight with a white male. (*Id.*) Sevenna asked Petitioner whether they "caught a body," and Petitioner replied that he heard the person scream after he "hit him." (*Id.*) He then told Sevenna to "delete that," referencing the last sent message. (*Id.*) Petitioner also sent messages statting they should paint Terrazas' car because people probably saw them. (*Id.*) A further review of Petitioner's Facebook account revealed that he sold a tan Glock 19 at

approximately 10:00 p.m. on the day of the shooting. (*Id.*)

During the grand jury presentation, one juror asked the detective: "did I understand that the defendant said that he was doing his – he made the first shot in self-defense? I heard that in the beginning." (*Id.* at 18.) Detective Robinson responded, "He said that he held him down on the ground and then he shot him. I didn't use the words you are using." (*Id.*)

The grand jury subsequently returned a true bill, charging Petitioner with one count of Attempted Second Degree Murder, a Class Two Felony, one count of Aggravated Assault with a Deadly Weapon and one count of Aggravated Assault causing Serious Physical Injury, both Class Three Felonies, and one count of Unlawful Discharge of a Firearm in or into the City Limits, a Class Six Felony. *Direct Indictment 001* (June 26, 2020).

Petitioner filed a Motion to Remand this matter back to the grand jury, alleging that the State failed to present clearly exculpatory evidence, rendering the grand jury presentation unfair. He also argued that the State made improper comments about its opinion on the evidence and on Petitioner's right to remain silent. The trial court denied his motion, and Petitioner filed a Petition for Special Action, in which he presented many of the same arguments. The Court of Appeals

declined jurisdiction. He now files this Petition for Review alleging that the State's omission of certain facts denied him a substantial procedural right, warranting remand. For the following reasons, this Court should decline review.

III. SPECIAL ACTION JURISDICTION IS NOT WARRANTED.

This Court's decision to accept jurisdiction of a special action is highly discretionary. *King v. Superior Court*, 138 Ariz. 147, 149 (1983) (citing *Wicks v. City of Tucson*, 112 Ariz. 487, 488 (1975). Special action jurisdiction is appropriate when a matter "presents a purely legal issue of first impression that is of statewide importance." *Brailsford v. Foster*, 242 Ariz. 77, 81, ¶ 10 (App. 2017) (quoting *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶ 5 (App. 2007)). This Court generally exercises discretionary jurisdiction over a special-action petition when a trial court's actions cannot be justified under any rule of law or the extraordinary circumstances where "no 'equally plain, speedy, and adequate remedy by appeal' exists." *King v. Sup. Ct.*, 138 Ariz. 147, 149 (1983); *Wal-Mart Stores, Inc. v. LeMaire*, 242 Ariz. 357, 359, ¶ 3 (App. 2017); *see also* Ariz. R. Pro. Special Actions 1(a).

Because the court of appeals did not accept jurisdiction of the petition, this Court's review is limited to whether the court abused its discretion in declining jurisdiction. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92 (App. 1979). An abuse of

discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigley v. City Ct. of City of Tucson*, 132 Ariz. 35, 37 (App. 1982). When reviewing for an abuse of discretion, this Court "only intervene[s] where no evidence exists to support the decision." *Bishop v. Law Enf't Merit Sys. Council*, 119 Ariz. 417, 421 (App. 1978). "The denial of special action relief is a discretionary decision for the superior court which will be upheld for any valid reason disclosed by the record." *State ex rel. Dean v. City Ct. of City of Tucson*, 123 Ariz. 189, 192 (App. 1979).

Here, there are no extraordinary circumstances presented that warrant this Court's intervention. Petitioner has not presented an issue of first impression or state-wide importance. *Brailsford*, 242 Ariz. at 81, ¶ 10. And, as discussed below, none of Petitioner's complaints rendered the grand jury presentment unfair.

In addition, the presentation of evidence to a grand jury is subject to harmless-error review. *Bashir v. Pineda*, 226 Ariz. 351, 355–56, ¶ 18 (App. 2011) (citing *Maretick v. Jarrett*, 204 Ariz. 194, 198, ¶ 15 (2003)). To find an error harmless, this Court "must be confident beyond a reasonable doubt that the error did not influence the jury's judgment." (*Id.* at 356, ¶ 20) (quoting *State v. Bible*, 175 Ariz. 549, 588 (1993)). Petitioner claims that the errors he alleges occurred cannot be considered

harmless because the grand jury vote to indict him was not unanimous. However, Petitioner does not cite any law to support this claim. An indictment only requires the concurrence of nine grand jurors. Ariz. R. Crim. P. 12.6(a). Petitioner's indictment was supported by an 12-3 vote on Count 1, and a 11-4 vote on Counts 2-4. Thus, even if the vote was not unanimous, more grand jurors concurred in each ruling than required by the rules.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION BECAUSE HE WAS NOT DENIED A SUBSTANTIAL PROCEDURAL RIGHT.

Here, Petitioner has not demonstrated that he was denied a substantial procedural right or that the State failed to present "clearly exculpatory" evidence to the grand jury. The trial court did not abuse its discretion in denying his motion to remand, nor did the Court of Appeals err in declining jurisdiction.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION / PETITIONER WAS NOT DENIED A SUBSTANTIAL PROCEDURAL RIGHT.

Remand of an indictment for redetermination of probable cause is warranted, "only where the [defendant] is denied a 'substantial procedural right.'" *State ex. rel. Woods v. Cohen*, 173 Ariz. 497, 502 (1992). A matter will be remanded only where there is a "high probability" that the grand jury would have reached a different decision. *Korzep v. Superior Court*, 155 Ariz. 303, 306 (App. 1987), *vacated on*

other grounds, *State v. Korzep*, 165 Ariz. 490 (1990).

The Court of Appeals did not abuse its discretion in declining to review this case on its merits because Petitioner did not present an issue that warranted review. His claims do not involve legal arguments; rather, they concern the sufficiency of the evidence underlying the indictment. *State v. Jessen*, 130 Ariz. 1, 5 (1981) (a trial court is prohibited from "considering an attack on an indictment based on the nature, weight or sufficiency of the evidence presented to the grand jury"). Because Petitioner was not denied a substantial procedural right, this Court should deny his Petition for Review.

B. THE STATE DID NOT FAIL TO PRESENT CLEARLY EXCULPATORY EVIDENCE.

The State need not present all exculpatory evidence, but it must provide the grand jury with all "clearly exculpatory" evidence, which 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); *see also Bashir*, 226 Ariz. at 355, ¶¶ 12–13. "Clearly exculpatory evidence includes evidence that would support an applicable justification defense." *Reyes v. Choen in and for County of Maricopa*, --- P.3d ---, 2021 WL 3732578, *3, ¶ 10 (App. 2021) (citing *Herrell v. Sargeant*, 189 Ariz. 627, 631 (1997)).

Here, Petitioner contends that the State failed to present "clearly exculpatory" evidence that would support his self-defense claim and negate his specific intent for attempted murder. But the evidence Petitioner describes is not clearly exculpatory for the reasons identified below. Therefore, the State was not under an obligation to present this evidence to the grand jury, and its choice not to do so did not deny Petitioner a substantial procedural right.

i. SELF-DEFENSE

Petitioner claims that the State failed to present "clearly exculpatory" evidence that would have supported his claim of self-defense. Petitioner further argues that there are currently no reported decisions from this Court or the Court of Appeals that address the State's obligations at grand jury where the defendant has a potential justification defense. (Pet. at 7.)

Petitioner is mistaken on both points. The State's obligations were set out in *Cespedes v. Lee,* 243 Ariz. 46 (2017). Under *Cespedes,* this Court made clear that prosecutors have the duty to "instruct the grand jury on all the law applicable to the facts of the case." 243 Ariz. at 48, ¶ 9. The Court further clarified that this "includes providing instructions on justification defenses that, based on the evidence presented to the grand jury, are relevant to the jurors determining whether probable cause exists

to indict the defendant." *Id.* This logic was used by the Court of Appeals in *Reyes*, --- P.3d ---, 2021 WL 3732578, *3-4, ¶¶ 10-12.

In *Reyes*, the defendant submitted a *Trebus* letter outlining specific facts regarding his claim of self-defense that he wished to be presented to the grand jury. *Id.* at *1, ¶ 3. The State did not present his full list of facts, but told the grand jury that the defendant said "he shot at [the victim] that night because he felt in fear of his own life as well as his daughter's life." *Id.* at *2, ¶ 7. The court found that although the State's summary of Reyes' letter "did not lay out Reyes's proposed testimony in the detail he would have preferred, it captured the crux of the matter by specifically noting . . . his assertion that his use of force was appropriate in the face of a perceived . . . threat." *Id.* at *5, ¶ 19. Although the present case does not involve a *Trebus* letter, the State nonetheless presented the "crux" of Petitioner's defense to the grand jury.

Petitioner does not claim that the State failed to instruct the grand jury on the law, or that the State failed to put the grand jury on notice that Petitioner may claim self-defense. Rather, his arguments concern specific pieces of information omitted from the presentation that may have added more weight to his defense. These pieces of information include the respective weights of the Petitioner and the victim, the

victim's Blood Alcohol Content ("BAC"), the victim's wrestling record, that the victim was attempting to grab his gun before the shooting, and that the victim acted aggressively with medical personnel when they arrived on scene.

These facts are not clearly exculpatory as Petitioner claims. First, in order to use deadly physical force under the self-defense and defense-of-others statutes, it must be "immediately necessary to protect himself against the other's use of attempted use of unlawful **deadly** physical force." A.R.S. § 13–405(A)(2); *see* A.R.S. § 13-406 (also referencing deadly force as a prerequisite to using deadly force). The facts that the victim was bigger than Petitioner, drunk, and had wrestling experience do not indicate that the victim was using or attempting to use **deadly** force on Portillo. Further, while those facts may make it more believable that the victim could have an advantage in a physical fight, they do not, by their nature, suggest that the victim was more likely to use force, much less deadly force, than any other person. Nor do those facts show that the victim actually used any force in this instance. The victim's ability to use force or his experience with using force in a particular way do not indicate a foregone conclusion that he did use that force. Petitioner also overlooks the fact that the victim in this case was unarmed.

Finally, during the incident, the victim had sustained gunshot wounds to his head and torso. His attitude toward the medical personnel had no relevance to the time of the crime and whether a reasonable person would have felt compelled to use deadly physical force. The way the victim acted immediately after sustaining multiple gunshot wounds is not representative of how he was acting prior to the shooting.

Finally, the only evidence to suggest that the shooting occurred because the victim was trying to get Portillo's gun was a statement that came from one person, Portillo's girlfriend, Ms. Tapia. She was not present for the incident, and she said that Portillo told her about it later the same day that it happened. Not only does this witness have obvious bias in favor of Portillo, but her statement is unreliable double-hearsay that is uncorroborated by anyone on the scene with personal knowledge of the events. And the State did present Ms. Tapia's statements to the extent they referenced the victim starting the fight and being on top of Portillo. In fact, Ms. Tapia's statements were basically the only evidence or indication that Petitioner and Portillo may be claiming self-defense. Thus, the State did not omit "clearly exculpatory" evidence in the form of Ms. Tapia's double-hearsay statements from

Portillo, particularly when the State presented Ms. Tapia's statements about the victim being the aggressor. Any additional evidence was merely cumulative.

Petitioner relies on *Crimmins v. Sup. Ct.*, to argue that clearly exculpatory evidence must be presented to the grand jury. 137 Ariz. 39 (1983). Although that is a true statement of the law, the facts in *Crimmins* do not support Petitioner's case-specific arguments. In *Crimmins*, the defendant claimed, in defense to kidnapping charges, that he conducted a citizen's arrest on a young man who he suspected had burglarized his home. (*Id.* at 40). During the grand jury presentation, the State's law enforcement witness *incorrectly* testified that there was no evidence to indicate the victim had been involved with the burglary. (*Id.* at 42). However, the witness had information suggesting the victim may have participated in the burglary, which would have given more weight to the defendant's citizen's arrest defense. (*Id.*)

This Court found that, on its own, the witness' inaccurate testimony was insufficient to warrant remand. *Id.* It was only because the State also failed to instruct the grand jury regarding the citizen's arrest statutes that this Court found the presentation of evidence to be unfair and misleading. *Id.*; *see Maretick*, 204 Ariz. at 124, ¶ 12 ("We therefore held that when the State withholds information from the grand jury and couples that conduct with inadequate instructions on the law, the

defendant *may* be entitled to a redetermination of probable cause by an independent grand jury.") (emphasis added).

Here, the grand jury was properly instructed on the self-defense and defense-of-others statutes that were applicable to Petitioner's defense.[1] The grand jury was also told that, according to co-defendant Portillo, the victim started the altercation and was on top of him, "so he *had to* shoot" the victim. The grand juror's questions about self-defense, although that phrase was never used by the witness because it implied a significant legal determination, indicate that the grand jury was aware of this defense.

Although the State did not present the complete list of facts Petitioner deemed material, the presentation as a whole put the grand jury on reasonable notice that he may have acted in self-defense. A fully fledged factual determination on the issue of self-defense and its reasonability is a question for the jury at trial, not the grand jury. *See State v. Baumann*, 125 Ariz. 404, 409-10 (1980) (stating that grand juries are not "in the business of holding minitrials").

[1] The Grand Jury was provided with instruction on these statutes on May 19, 2020, during the empanelment and instruction phase of the proceedings. These transcripts have not been attached to motions in the lower courts because Petitioner has not argued that the State failed to properly instruct the grand jury on the law. If this Court wishes the State to supplement its briefing with the relevant transcripts, it will do so.

The State presented the evidence fairly and did not provide any false or misleading information. Additionally, the State did not omit any "clearly exculpatory" evidence. Therefore, Petitioner was not denied a substantial procedural right regarding the presentation of this evidence.

ii. Specific Intent

Petitioner also claims that the State failed to present clearly exculpatory evidence that the victim was still alive when he left the scene. According to Petitioner, "the fact that [the victim] was clearly still alive and receiving aid as Portillo and [Petitioner] departed the parking lot, clearly negated any specific intent to kill. . ." In essence, Petitioner's argument is that the State will not be able to show that he possessed the requisite intent for attempted murder because he did not kill the victim. However, the fact that the victim was still alive when Petitioner left the scene is not clearly exculpatory for several reasons.

First, the fact that the victim's medical records show that he was still alive at the scene when Petitioner fled has no bearing on whether Petitioner intended to kill the victim. Second, there is no evidence that Petitioner was even aware of that fact, or whether he believed the victim would die from his extensive injuries.

Therefore, the evidence of the victim's medical state does not negate Petitioner's intent, because one can still intend to commit murder without actually doing so.

V. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court deny Petitioner's request for review of this case, as the lower courts did not abuse their discretion.

RESPECTFULLY SUBMITTED this 29th day of September, 2021.

LAURA CONOVER
PIMA COUNTY ATTORNEY

/s/_____
MAILE BELONGIE
Deputy County Attorney