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

SUPPLEMENTAL BRIEF

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ISSUES REPHRASED BY THE COURT AND PRESENTED FOR REVIEW.

1. Is "clearly exculpatory evidence" defined by the standard set forth in *Herrell v. Sargeant*, 189 Ariz. 627 (1997) or *Trebus v. Davis*, 189 Ariz. 621, 623 (1997)?

2. Did the trial court commit error by denying defendant's motion for remand to the grand jury?

ARGUMENTS

THE FEDERAL AND STATE DUE PROCESS CLAUSES DO NOT APPLY TO GRAND JURY PROCEEDINGS. THE STATE SHOULD ONLY BE REQUIRED TO PRESENT CLEARLY EXCULPATORY EVIDENCE, PURSUANT TO A.R.S. § 21-412, THAT BEARS SIGNIFICANT INDICIA OF RELIABILITY AND EXONERATES A SUSPECT.

Pursuant to Arizona law, prosecutors may present evidence of a crime to a grand jury to obtain an indictment against a suspected individual. ARIZ. CONST. art. II, § 30; A.R.S. § 21-401 *et seq*. Pursuant to A.R.S. § 21-412, "[t]he grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so." Defendants indicted by the grand jury may only challenge that indictment if they were "denied a substantial procedural right" or "an insufficient number of qualified grand jurors concurred in the indictment." Ariz. R. Crim. P. 12.9(a).

Decades ago, Arizona's appellate courts created numerous standards for the State's presentation of evidence to the grand jury, requiring the prosecutor to present the evidence in a "fair and impartial manner," and present all "clearly exculpatory" evidence that has the tendency to disprove probable cause against the individual. *Corbin v. Broadman*, 6 Ariz.App. 436, 441 (App. 1967); *State v. Coconino Cnty. Super. Ct., Div. II (Mauro)*, 139 Ariz. 422, 425 (1984). These requirements were born out of a misinterpretation of the federal due process clause. These standards are not required by the federal or state constitutions. Worse, Arizona subsequently

expanded the prosecutor's obligations to require the prosecutor to present to the grand jury all "exculpatory" evidence requested by the suspect through a *Trebus*[1] letter.

Those standards have vastly transformed grand jury proceedings in Arizona and resulted in substantial litigation. What was once a hearing designed to determine *only* whether probable cause exists that an identified individual committed a crime, the grand jury proceeding, contrary to this Court's warnings, has devolved into a mini-trial, requiring grand jurors to make credibility determinations and resolve conflicting evidence. *See Marston's Inc. v. Strand*, 114 Ariz. 260, 265 (1977) ("A grand jury investigation must not be frustrated or impeded by minitrials and preliminary showings."). Willis's petition here proves the point.

To the extent this Court will continue to adhere to these standards, requiring the State to present such "exculpatory" and "clearly exculpatory" evidence in a "fair and impartial manner," it should mandate that such evidence must bear significant indicia of reliability and affirmatively prove the suspect's innocence. At present, defense counsel routinely submit lengthy *Trebus* letters with attachments for presentation to the grand jury, and then challenge nearly every indictment based upon arguably conflicting evidence. The numerous petitions for review currently before this Court, challenging grand-jury-remand denials, also prove the point. The

[1] *Trebus v. Davis in and for Cnty. of Pima*, 189 Ariz. 621 (1997).

oft-repeated fear that the grand jury proceedings would be transformed into "mini-trials," requiring the grand jurors to make credibility determinations and resolve conflicting evidence, has undoubtedly been realized.

I. THE STATE'S OBLIGATION TO PRESENT EVIDENCE IN A "FAIR AND IMPARTIAL MANNER," INCLUDING ALL "EXCULPATORY" AND "CLEARLY EXCULPATORY EVIDENCE," HAS NO CONSTITUTIONAL BASIS.

The obligations for the prosecutor to present evidence to the grand jury in a "fair and impartial manner," including disclosing all "exculpatory" and "clearly exculpatory" evidence, have no textual basis in the federal or Arizona Constitutions. Rather, these standards were created by the Arizona judiciary, based upon federal decisions which were subsequently overruled by the United States Supreme Court. As explained below, the Supreme Court held that there is *no federal constitutional due process right* requiring the State to present exculpatory evidence to a grand jury. *United States v. Williams*, 504 U.S. 36, 51 (1992). Yet, after *Williams*, Arizona courts continued to rely on prior cases which cited the general "due process" requirement, based upon that erroneous interpretation of the federal due process clause, to require the State to present clearly exculpatory evidence to grand juries.

The exculpatory evidence standards have not been clearly defined and have resulted in significant confusion and litigation about what evidence meets such standards for presentation to a grand jury. Further, defense counsel often submit lengthy *Trebus* letters that are filled with the suspect's own self-serving version of

the facts, as well as opinion, argument, and innuendo. (*See* Appendix A.)

The Court should take this opportunity to clarify the applicable standards for grand jury presentations, including holding that there are no constitutional requirements that the prosecutor present "exculpatory" or "clearly exculpatory" evidence in a "fair and impartial manner." To the extent such evidence is still required pursuant to A.R.S. § 21-412, this Court should only require disclosure of such evidence that bears significant indicia of reliability and exculpates a suspect.

A. *The role of the Arizona Grand Jury*.

This Court has long recognized that "Arizona grand juries, like their federal counterparts, were ... designed to act as a 'vital check against the wrongful exercise of power by the State and its prosecutors.'" *McKaney v. Foreman*, 209 Ariz. 268, 275, ¶ 31 (2004) (quoting *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998)). The grand jury "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." *Marston's*, 114 Ariz. at 264 (citing *United States v. Dionisio*, 410 U.S. 1, 15 (1973)). "By its very nature a grand jury is an inquisitorial, informing and accusing body; however its functions are of a judicial nature-a proceeding before a grand jury is a judicial inquiry." *State v. Super. Ct. in and For Pima Cnty. (Collins)*, 102 Ariz. 388, 390 (1967); *see* Ariz. Const. art. II, § 17 ("Grand juries shall be drawn and summoned only by order of the superior court.").

"In order that it carry out its mission the grand jury has a right to every man's evidence except for those persons protected by a constitutional, common law, or statutory privilege." *Marston's*, 114 Ariz. at 264 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)). "Because the task of the grand jury is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad," including the power to subpoena witnesses and evidence. *Id*. at 264–65 (citing *Branzburg*, 408 U.S. at 700). The power of the grand jury, however, is not unlimited, and it may not "require a witness to testify against himself, nor may it require the production by a person of private books and records that would incriminate him." *Id*.

"A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated, [but rather] an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343–44 (1974). The grand jury's function "is not to determine the truth of the charges against an accused, but, rather, to determine whether there is probable cause to believe the accused committed a crime," *State v. Jessen*, 130 Ariz. 1, 5 (1981).

A grand jury's sole function is to determine probable cause. *State v. Baumann*, 125 Ariz. 404, 408 (1980) (A grand jury's "primary function" is "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."); *State v. Sanchez*, 165 Ariz. 164, 171 (App. 1990) (same). "Determinations of probable cause are naturally based on probabilities, and a finding of probable cause 'does not require evidence sufficient to support a conviction, nor even evidence demonstrating that it is more likely than not that the suspect committed a crime.'" *United States v. Funches*, 327 F.3d 582, 586 (7th Cir. 2003) (quoting *United States v. Carrillo*, 269 F.3d 761, 766 (7th Cir. 2001)).

State and county prosecutors have the authority to present cases to a grand jury to obtain an indictment. ARIZ. CONST. art. II. § 30; A.R.S. § 21-401 *et seq*. "It is the duty of the prosecutor, whether it be a county attorney or attorney general, to serve the grand jury." *Marston's*, 114 Ariz. at 265 (citing A.R.S. § 21-408 and § 21-427(A)). "Generally, the prosecutor presents the evidence, prepares the indictments, and advises the grand jury on legal matters." *Id*. "In performing these functions, wide latitude is given to the prosecutor … to assist the grand jury in carrying out its investigations." *Id*.

A remand for a redetermination of probable cause is appropriate only when the prosecutor violates a "substantial procedural right" of the suspect, under Rule 12.9 of the Arizona Rules of Criminal Procedure, for example when he elicits evidence in violation of a privilege, *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 502 (1992), elicits false evidence, *Escobar v. Super. Ct. In and For Maricopa Cnty.*, 155

Ariz. 298, 302 (App. 1987), or interferes with a grand juror's questioning of a witness unless it is along clearly improper and unfair lines of inquiry, *State v. Super. Ct. in and for Cnty. of Coconino (Coker)*, 186 Ariz. 143, 145 (App. 1996).

B. *The Federal and State Constitutions do not require the State to present exculpatory evidence to a grand jury.*

Federal. In 1992, resolving a split among the federal circuit courts, the Supreme Court held that the due process clause of the federal constitution does not impose *any* obligation on the prosecution to present evidence, exculpatory or otherwise, to the grand jury. *Williams*, 504 U.S. at 51-55; *see also Branzburg*, 408 U.S. at 688 n.25 ("[I]ndictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment ....") (citing *Hurtado v. California*, 110 U.S. 516, 538 (1884)).

After recounting a lengthy history, the *Williams* Court held that "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." 504 U.S. at 52; *see also United States v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000) (prosecutor has no duty to present "evidence [that] impeaches the credibility of a key witness"); *accord United States v. Bingham*, 653 F.3d 983, 999 (9th Cir. 2011) (collecting cases). The *Williams* Court held that a federal court could not dismiss a grand jury indictment, under any circumstances, because the prosecutor had failed to present exculpatory evidence given that the grand jury is an

accusative rather than an adjudicative body, and that requiring the grand jury to weigh inculpatory and exculpatory evidence would "alter the grand jury's historical role." 504 U.S. at 51.

Arizona. Many states, including Arizona, retained the grand jury system, permitting crimes to be charged by indictment or information. ARIZ. CONST. art. II, § 30 ("No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment;"); ARIZ. CONST. art. VI, § 17 ("Grand juries shall be drawn and summoned only by order of the superior court."); A.R.S. § 12-401 *et seq*. While Arizona retained the grand jury, the State can also charge a suspect with a crime by filing an information followed by a probable cause hearing before a judge. *Id*.; Ariz. R. Crim. P. 13.

In *Corbin*, before the *Williams* decision, the Arizona Court of Appeals relied upon the due process clauses of both the federal and state constitutions to find that the State was required to 'fairly and impartially' present evidence to a grand jury:

> We are governed by certain fundamental rules of law which provide that a defendant must be given *a fair and impartial hearing*. Arizona Constitution, Article II, Section 4, A.R.S., and the Fourteenth Amendment to the U.S Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.

Corbin, 6 Ariz.App. at 440–41 (emphasis added). The court then referred to "a long series" of due process and equal protection cases recently decided by the United States Supreme Court as support for its holding. *Id*. at 441. The court continued, "In

Beck v. Washington, 369 U.S. 541 (1962), the Supreme Court indicated the same standard of fairness should be applied to grand juries." *Id*. (internal parallel citations omitted). Accordingly, the *Corbin* court created the "fair and impartial" hearing standard and applied it to grand juries in Arizona, based upon its understanding of the due process clause of the federal constitution. Thereafter, numerous appellate cases described either the "due process" or "fair and impartial" requirements for grand jury presentations, often citing *Corbin* and subsequent similar decisions, including *Crimmins v. Super. Ct.*, 137 Ariz. 39 (1983), and *State v. Emery*, 131 Ariz. 493 (1982). (*See* Appendix B; collecting cases.)

Thus, Arizona's reliance on due process for grand jury proceedings, and all attendant "fair and impartial" standards, was based upon an interpretation of the due process clause of the federal constitution which turned out, in retrospect, to be erroneous. *See Williams*, 504 U.S. at 51.

While the Arizona Constitution contains a due process clause, it cannot, standing alone, mandate presentation of exculpatory evidence. As this Court has held, the federal and state due process clauses are construed similarly, based upon their identical language. *State v. Casey*, 205 Ariz. 359, 362, ¶ 11 (2003), *superseded on other grounds by statute*, A.R.S. § 13-205(A)); *State v. Ewer*, 250 Ariz. 561, ¶ 8 (App. 2021) (holding that the court considers state and federal due process claims together, as both due process clauses "contain nearly identical language and protect

the same interests"); *Vong v. Aune*, 235 Ariz. 116, 118 ¶ 21 (App. 2014) (quoting *Casey*); *State v. Russo*, 219 Ariz. 223 (App. 2008) (holding that the equal protection and due process clauses of the state and federal constitutions are construed similarly). Accordingly, a different or contrary interpretation of the due process clause of Arizona's Constitution would contravene long-standing Arizona jurisprudence holding that both federal and state due process clauses are construed similarly. *Id*.

C. *The history of the "clearly exculpatory" standard.*

Arizona's appellate courts for many years considered *only* procedural irregularities regarding grand jury proceedings, such as the jury composition, when reviewing challenges to probable cause. *See Collins*, 102 Ariz. at 389–93 (examining the fair and impartial cross-section of the grand jury); *Corbin*, 6 Ariz.App. at 440 (holding that presentation of evidence to the grand jury by a disqualified deputy county attorney warranted quashing indictment).

Eventually those courts addressed and readily dismissed arguments that the prosecutor erred by failing to present "exculpatory" evidence to the grand jury. *See, e.g.*, *State v. Guerrero*, 119 Ariz. 273, 276 (App. 1978) (holding that court had no power to inquire into kind of evidence considered by grand jury and conduct of prosecutor did not indicate attempt to improperly influence actions of grand jury); *State v. Reed*, 121 Ariz. 547, 548 (App. 1979) (holding that the failure to disclose

allegedly exculpatory evidence to the grand jury is a waivable, non-jurisdictional defect).

For example, in *Baumann*, this Court rejected a challenge that the grand jury failed to consider all exculpatory evidence, holding that such an argument "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 408-09 (citing A.R.S. § 21-413; Ariz. R. Crim. P. 12.1(d)(4)). The Court reasoned, "Any more would put grand juries in the business of holding minitrials." *Id*. (citing *Marston's*, 114 Ariz. at 265; *State v. Horner*, 112 Ariz. 432, 433 (1975); *State v. Bell*, 589 P.2d 517, 519 (Haw. 1978)).

However, in 1984, this Court reversed course, creating the "clearly exculpatory evidence" standard, which required the State to present such evidence to grand juries. *Mauro*, 139 Ariz. at 425. The *Mauro* Court first rejected the appellant's argument that the prosecutor was required to instruct on all lesser-included offenses during the grand jury presentation. *Id*. at 424. The Court, however, then reviewed the grand jury record to determine whether the appellant was denied his "right to due process and a fair and impartial presentation of the evidence by the manner in which the proceeding was conducted." *Id*. (citing *Crimmins*, 137 Ariz. at 43).

The *Mauro* Court then addressed the evidence of a potential insanity defense

not presented to the grand jury, holding:

> Although this evidence may be admissible at trial, *see* A.R.S. Rules of Evidence, rule 402 (to be admissible the proposed evidence must be relevant) and rule 401 (relevant evidence is that which has a tendency to prove a fact in issue), 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***. *See Baumann, supra*, 125 Ariz. at 408–09, 610 P.2d at 42–43. ***Clearly exculpatory evidence is evidence of such weight that it would deter the grand jury from finding the existence of probable cause***. *See United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979) (suggesting a similar standard, although apparently lower than our standard, for determining when the prosecutor is obligated to present exculpatory evidence).

Id. at 425 (emphasis added).[2] Notably, the *Baumann* decision cited by the court provided *no* such authority for a "clearly exculpatory" standard; in fact, the *Baumann* Court *specifically rejected* any notion that the State was required to present exculpatory evidence to the grand jury. *Baumann*, 125 Ariz. at 408–09.

It appears that the definition for the "clearly exculpatory evidence" standard announced in *Mauro*—"evidence of such weight that it would deter the grand jury

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[2] The *Ciambrone* decision, relied upon by the *Mauro* Court in announcing this "clearly exculpatory evidence" standard, was subsequently overruled by the Supreme Court in *Williams*. The *Williams* decision explicitly rejected such a rule, reversing the lower court's decision that a district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury "substantially exculpatory evidence" in its possession. 504 U.S. at 51; *see also United States v. Leonard*, 817 F.Supp. 286, 296 (E.D.N.Y. 1992) ("Even if the evidence cited by [defendants] were to be considered substantially exculpatory, the applications would fail in light of *United States v. Williams* .... Accordingly, even accepting defendants' characterization of the evidence as substantially exculpatory, the relief sought must be denied.").

from finding the existence of probable cause"—has not been further defined or clarified by this Court. Arizona courts have recently expanded the definition somewhat to include "evidence that would support an applicable justification defense." *Reyes v. Cohen in and for County of Maricopa*, 497 P.3d 486, 489-90, ¶ 10 (App. 2021) (citing *Herrell*, 189 Ariz. at 631).

D. *The evidentiary standards for grand jury have transformed Arizona's proceedings from accusatory into adjudicatory.*

With this constitutional and common law background, the fairness and evidentiary standards governing the prosecutor's presentation of evidence to a grand jury for a probable cause determination have transformed the proceeding from an accusatory into an adjudicatory one. While Arizona appellate courts have recognized that grand jury presentations should not be "mini-trials," they have nonetheless created and expanded the prosecutor's obligations to present evidence and instruction far beyond that for the determination of probable cause for a crime. *See Bashir v. Pineda*, 226 Ariz. 351, 355, ¶ 15 (App. 2011); *Trebus*, 189 Ariz. at 625 ("[W]itness credibility and factual inconsistencies are ordinarily for trial.").

The only authority governing the presentation of grand jury proceedings is A.R.S. § 21-401 *et. seq.*, and Rule 12 of the Arizona Rules of Criminal Procedure. Section 21-412 states: "The grand jurors are under no duty to hear evidence at the request of the person under investigation, but may do so. […] 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."

The plain language of A.R.S. § 21-412 provides only that grand jurors may hear evidence at the request of an accused person but are under no duty to do so. Applying canons of statutory construction, the plain text of the statute appears to only grant authority to the grand jury to hear evidence, not compel a prosecutor to affirmatively present evidence. *See Garcia v. Butler in and for Cnty. of Pima*, 251 Ariz. 191, ¶ 12 (2021) ("A statute's plain language best indicates legislative intent, and when the language is clear, we apply it unless an absurd or unconstitutional result would follow.") (citing *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195, ¶ 9 (2016)).

To the extent these standards are required under the statute or Rule 12.9,[3] the prosecutor's statutory obligation to present "clearly exculpatory" evidence must be limited to substantial evidence which credibly and reliably exonerates a suspect. *See, e.g.*, SARAH SUN BEALE, ET AL., GRAND JURY LAW AND PRACTICES § 4:17 (2d ed. 2019) ("Most states that recognize a prosecutorial duty […] require[] the prosecutor to present to the grand jury evidence that is clearly exculpatory, in other words, evidence that would exonerate the accused or lead the grand jury to refuse to indict.

[3] "The Arizona Constitution allocates to [the Arizona Supreme Court] the '[p]ower to make rules relative to all procedural matters in any court.'" *State v. Bigger*, 251 Ariz. 402, ¶ 35 (2021) (citing Ariz. Const. art. VI, § 5(5)).

[…] Generally, however, it appears that this test is a very difficult one for the defendant to satisfy.") (footnotes and citations omitted).

A survey of other jurisdictions yields diverse results, from no obligation to present exculpatory evidence (relying on *Williams*) to compelled disclosure based on the state constitution, statute, criminal procedural rule, or other. Several states (approx. 13) have held there is no prosecutorial obligation to present exculpatory evidence during the grand jury, pursuant to *Williams*. *See, e.g., State v. Wilks*, 114 N.3d.3d 1092, 1105-08 (Ohio 2018) (the prosecution has "no obligation, constitutional or otherwise, to present allegedly exculpatory evidence to the grand jury"); *Matney v. State,* 99 S.W.3d 626, 629 (Tex. App. 2002) (After *Williams*, Texas courts have held that "generally, the State has no duty to present exculpatory evidence to a grand jury."); *People v. Ager*, 928 P.2d 784, 788 (Colo. App. 1996).

Approximately 15 other states require a prosecutor to present exculpatory evidence to a grand jury, based upon controlling statutes or explicit criminal procedural rules, with many pre-dating *Williams*. *See, e.g., Berardi v. Super. Ct.*, 149 Cal.App.4th 476, 490–91 (Cal. App. 2007) ("Section 939.71 provides that if the prosecution is aware of exculpatory evidence, it shall inform the grand jury of its nature and existence, and if the prosecution fails to comply with its disclosure duty and the failure "results in substantial prejudice," the portions of the indictment related to the undisclosed evidence should be dismissed."); *Lay v. State*, 886 P.2d

448, 453-54 (Nev. 1994) (relying on N.R.S. § 172.145(2)) (citation omitted); *Frink v. State*, 597 P.2d 154, 164 (Ala. 1979) (relying on Alabama Criminal Procedural Rule 6(q)).

While a more precise definition for "exculpatory" evidence appears elusive, other courts have articulated helpful standards to define the prosecutor's obligations. For example, in *Hogan*, the New Jersey Supreme Court held that "the routine presentation of evidence by prosecutors to grand juries only *rarely* will involve significant questions about exculpatory evidence." 676 A.2d 533, 543 (N.J. 1996) (emphasis added). The court adopted standards "intended to be applied only in the *exceptional case* in which a prosecutor's file includes not only evidence of guilt but also evidence negating guilt that is genuinely exculpatory." *Id*. (emphasis added). The court imposed a "limited duty" of disclosure on prosecutors, triggered only in the "unique" or "rare" case, in which the prosecutor has both "evidence that both directly negates the guilt of the accused and is clearly exculpatory." *Id*.

As for "clearly exculpatory" evidence, the *Hogan* court held that a reviewing court must evaluate "the quality and reliability of the evidence," while "analyzed in the context of the nature and source of the evidence, and the strength of the State's case." *Id*. For example, the court reasoned that, "if the exculpatory evidence in question is eyewitness testimony, potential bias on the part of the eyewitness may affect the prosecutor's obligation to present the witness's testimony to the grand

jury." *Id*. Similarly, the court held that one eyewitness is "not 'clearly exculpatory' if contradicted by the incriminating testimony of a number of other witnesses." *Id*.; *see Bell*, 589 P.2d at 520 (holding that a prosecutor must present testimony from a witness that is "not directly contradicted by any other witness and who maintains that the accused was nowhere near the scene of the crime when it occurred.").

Finally, the *Hogan* court held that "an accused's self-serving statement denying involvement in a crime, although such a statement directly negates guilt, ordinarily would not be sufficiently credible to be 'clearly exculpatory,' and need not be revealed to the grand jury." *Hogan*, 676 A.2d at 543 (citing 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.4(d), at 319-20 (1984).

After providing contrasting examples of "clearly exculpatory" evidence, *Hogan* held that "the prosecutor need not construct a case for the accused or search for evidence that would exculpate [him]." *Id*. at 544. The court cautioned that indictments should be dismissed on this ground "only after giving due regard to the prosecutor's own evaluation of whether the evidence in question is 'clearly exculpatory.'" *Id*. Given that "[a]scertaining the exculpatory value of evidence at such an early stage of the proceedings can be difficult,"[4] the court reaffirmed that "courts should act with substantial caution before concluding that a prosecutor's

[4] This is particularly so in Arizona, where the State "must file an information in the superior court no later than 10 days after a magistrate finds probable cause[,]" after an individual's arrest. Ariz. R. Crim. P. 13.2.

decision in that regard was erroneous" and emphasized that "only in the exceptional case will a prosecutor's failure to present exculpatory evidence to a grand jury [] constitute grounds for challenging an indictment." *Id*. (citing 2 LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 15.4(d), at 318); *see People v. Ramjit*, 612 N.Y.S.2d 600, 601-02 (App. Div. 1994) (prosecutors are not required to accept allegedly exculpatory evidence at face value and are permitted to use their broad discretion in declining to present the evidence).

Arizona has not articulated any such standards for clearly exculpatory evidence required for disclosure to a grand jury, but should do so now. Under current Arizona law, there is no practical or discernible difference between the "clearly exculpatory" and "exculpatory" evidentiary standards from *Herrell* and *Trebus* for disclosure to a grand jury. This Court should also reevaluate *Trebus*, which presented an entirely new demand on the prosecutor, one in which defense counsel, representing the interests of his/her client, attempts to affirmatively *inject* evidence into the grand jury room through the prosecutor to dissuade the jurors from issuing a true bill. 189 Ariz. at 625. This was not the grand jury's historical role.

Clarifying the law in this context would not invite meritless indictments. Arizona prosecutors are bound by special ethical duties, including "refrain[ing] from prosecuting a charge that the prosecutor knows is not supported by probable cause," as well as "mak[ing] timely disclosure to the defense of all evidence or information

known to the prosecutor that tends to negate the guilt of the accused[.]" Ariz. R. Prof. Cond. 3.8(a), (d). And, of course, prosecutors are always bound to disclose all exculpatory evidence before trial. *See Brady v. Maryland*, 373 U.S. 83 (1963), Ariz. R. Crim. P. 15.1, 15.6.

And finally, there is no practical reason for prosecutors to seek an indictment against a suspect while possessing evidence that would exculpate or exonerate a defendant. To the extent a reprobate prosecutor pursues criminal charges for nefarious reasons, he or she would be disbarred, *id*., and the subsequent prosecution invalidated. *See Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (prosecutorial vindictiveness in the indictment process may run afoul of the constitution and warrant court intervention).

II. THE PROSECUTOR PRESENTED THE CASE IN A FAIR AND IMPARTIAL MANNER, INCLUDING ALL "CLEARLY EXCULPATORY" FACTS.

In this case, none of the evidence Willis identified clearly exculpated him. If the prosecutor had presented this evidence, the grand jury would have had to resolve conflicting evidence, determine credibility, and assess a potential justification defense.

The purported "exculpatory" evidence included the respective weights of Willis and the victim, the victim's blood alcohol content, the victim's wrestling ability and record, a witness's double-hearsay statement that the victim was

attempting to grab Willis's gun before the shooting, and the allegation that the victim acted aggressively with medical personnel when they arrived on scene.

These alleged facts are not clearly exculpatory. These facts do not conclusively show that Willis needed to immediately attempt to kill the victim, or that at the time Willis shot and killed him, the unarmed victim was about to use, or was actually using, deadly physical force. A.R.S. § 13-405(A)(2); *see* A.R.S. § 13-406. The only evidence that the victim was attempting to get Portillo's gun was an unreliable, biased, double-hearsay statement from Portillo's girlfriend, Ms. Tapia, who was not present for the shooting and only heard about it afterwards *from Portillo*. Even so, the prosecutor nonetheless *presented* Tapia's statements about the victim being the aggressor, as well as the statements from Portillo, Willis's co-defendant. The existence and meaning of the other facts are classic matters for trial.

Here, the grand jury was properly instructed on all applicable crimes, criminal statutes, and justification defenses relevant to Willis. (R.T. 5/19/20; Empanelment Instruction Transcripts.) The prosecutor's presentation of evidence did not omit any "clearly exculpatory" evidence and his motion to remand was properly denied.

III. CONCLUSION.

The State respectfully requests that this Court clarify the standards applicable to grand jury presentments, including any prosecutorial obligation to present exculpatory evidence.

RESPECTFULLY SUBMITTED this 13th day of December, 2021.

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