IN THE SUPREME COURT OF

THE STATE OF ARIZONA

Aranzi Rae Jon Willis, Petitioner, vs. The Honorable Judge Bernini, Respondent, and The State of Arizona, Real Party in Interest.	)	SUPREME COURT NO. CR21-0258 PR NO. 2CA-SA-2021-0031 (PIMA COUNTY SUPERIOR COURT CASE NO. CR20202482-001) **PETITIONER'S SUPPLEMENTAL BRIEF**

D. JESSE SMITH
SUITE 1003, PIONEER PLAZA BUILDING
100 NORTH STONE AVENUE
TUCSON, AZ 85701
(520) 623-8343
(520)792-2139 (FAX)

Attorney for Petitioner Willis

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II. ISSUES PRESENTED FOR REVIEW AS REPHRASED BY SUPREME COURT ORDER DATED 11/3/21

1. IS "CLEARLY EXCULPATORY EVIDENCE" DEFINED BY THE STANDARD SET FORTH IN *HERRELL V. SAGEANT,* 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?

III. ARGUMENT I

CLEARLY EXCULPATORY EVIDENCE IS ANY EVIDENCE THAT MIGHT DETER A GRAND JURY FROM FINDING PROBABLE CAUSE; THE STATE MUST HAVE THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE WITHHELD EVIDENCE DID NOT AFFECT THE RETURNING OF THE INDICTMENT

"A prosecutor can get a Grand Jury to indict a ham sandwich."[1]

This court has long ago held that a defendant in Arizona has a due process right to have the prosecution make a "fair and impartial presentation to the grand jury." *Crimmins vs. Superior Court*, 137 Ariz. 39, 668 P.2d 882 (1983) at 42.

The court has asked the parties to address the issue of which definition of "clearly exculpatory evidence" is correct, as two cases decided by this court by the same justices on the same date in 1997 contained different language as to the burden of proof to mandate a remand.[2]

In *Herrell vs. Sargent*, 189 Ariz. 627 (1997) the Court defined it as:

> [3] Moreover, we disagree with the trial judge's holding that the evidence Herrell wished to present was not clearly exculpatory. "Clearly exculpatory evidence is evidence of such weight that it

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[1] Sol Wachtler, the Chief Justice in New York State, in a 1995 interview with the Daily News proposed scrapping the Grand Jury system altogether. He was quoted as saying that District Attorneys have so much influence over the grand juries that they could get them to "indict a ham sandwich."

[2] The Court may have overlooked the difference in language in the two cases as the different definitions were not outcome determinative. *Herrell* won a remand under the "would deter" language. *Trebus* was denied relief under the "might deter" language.

> would deter the grand jury from finding the existence of probable cause." *State v. Superior Court (Mauro)*, 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984)

(Emphasis added.) 189 Ariz. At 631.

In *Trebus vs. Davis*, 189 Ariz. 621, (1997), it was defined as follows:

> Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding the existence of probable cause. *Id.* (citing 189 Ariz. At 625). (Emphasis added.)

Thus, which definition the Court affirms will determine whether the government or defendant bears the burden of persuasion or proof in any Rule 12.9 motion.

Under the *Trebus* definition, the defendant only need show that the evidence withheld from the grand jury "might deter the grand jury from finding the existence of probable cause;" whereas under the *Herrell* definition, the defendant has to show that the withheld evidence "would deter the grand jury from finding the existence of probable cause."

Article II section 30 of the Arizona Constitution guarantees a right not to have to stand trial on a felony offense unless the defendant has been indicted or had probable cause found by a magistrate. Article II section 4 guarantees Due Process.

Rule 12.1(d) of the Rules of Criminal Procedure requires the Court when

preparing grand jurors for their duties to instruct that their duties include:

> (14) the duty to return an indictment only if they are convinced there is probable cause to believe an offense has been committed and the person under investigation committed it;

(Emphasis added.)

This is particularly relevant when there is evidence of a chapter 4 justification defense in the State's possession at the time of the Grand Jury presentation as in the instant case. ARS §13-405, 13-406 and 13-411 and ARS §13-205 were not read to the instant grand jury in conjunction with the presentation of evidence in the instant case.

ARS 13-205 (which was enacted in 1997, after the date of the alleged criminal conduct at issue in *Herrell* and *Trebus*, *supra*) reads:

> **§ 13-205. Affirmative defenses; justification; burden of proof**
>
> **A.** Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

(Emphasis added.)

In Arizona, the slightest evidence of self defense mandates an instruction

of self defense, see *State vs. Lujan*, 136 Ariz. 102, 664 P.2d 646 (1983); *State vs. Carson*, 243 Ariz. 463, 410 P.3d 1230 (2018).

Because a defendant in Arizona has a constitutional right to a fair and impartial Grand Jury hearing, under long settled law, the burden must be on the government to prove that "any error was harmless beyond a reasonable doubt." See E.G. *Chapman vs. California*, 386 US 18, 24, 87 S.Ct 824, 17 L.Ed.2d 705 (1967) at 21-24.

Moreover, all the equities here are on the side of the defendant, not the State.

As a threshold matter, in any case where a possible justification issue is presented, the State has the option of bypassing the Grand Jury and holding a hearing before a magistrate.

Rule 15.1 (8) of the Rules of Criminal Procedure mandates that the State disclose:

> (8) all existing material or information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment

Rule 15.2 (2) mandates that this disclosure be made prior to a preliminary hearing, but not prior to the Grand Jury presentation:

> (2) the State must make these reports available by the preliminary

hearing or, if no preliminary hearing is held, the arraignment.

At the preliminary hearing the State would be free to zealously advocate that it has met its burden of proof and leave it to defense counsel to present and argue any "clearly exculpatory evidence" that may negate probable cause.

The Double Jeopardy clause does not apply to grand juries or preliminary hearings. If a grand jury fails to indict, the State is not prohibited from presenting the case a second or third time with additional evidence or witnesses to the same or another grand jury; or opting to hold a new hearing in front of a magistrate.

A defendant, on the other hand, suffers irreparable harm from an unfounded indictment even if he or she is ultimately not found guilty at trial or the case is later dismissed.

> This court has previously expressed its concerns surrounding the grand jury process:
>
> > We must bear in mind the potential for abuse and the "devastating personal and profession impact that a later dismissal or acquittal can never undo," when the prosecutor is allowed to exercise control "over a cooperative grand jury."
>
> *Crimmins*, 137 Ariz. At 44, 668 P.2d at 887 (Feldman, J., specially concurring. *See Trebus*, 189 Ariz. at 625, 944 P.2d at 1239.

Herrell vs. Sargent, *supra*, 189 Ariz. at 631.

Now that national criminal records are available for a low fee online, most employers, loan officers and apartment rental agents routinely run background checks and a person indicted for attempted murder, aggravated assault, etc., is going to have a hard time getting a job, loan or apartment (or even a date online).

The United States Supreme Court has held that a sentencing judge may enhance punishment based on a prior criminal charge even when the defendant was found not guilty at trial! *See United States vs. Watts*, 519 US 148 (1997), 117 S.Ct 633, 136 L.Ed.2d 554.

An improperly indicted defendant, who is later found not guilty after spending time in custody, losing wages, family, etc., cannot sue for damages due to prosecutorial immunity; *See Imbler vs. Pachtman*, 426 US 409 , 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

Therefore, the Court should affirm the definition found in *Trebus*, *supra*, and further hold that any relevant justification statutes as well as ARS §13-205 be read to the Grand Jury hearing the case, even if they had been read those statutes along with hundreds of others, weeks or months earlier when they were first instructed in their duties.

IV. ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MOTION FOR REMAND

UNDER EITHER DEFINITION OF CLEARLY EXCULPATORY EVIDENCE

Exculpatory evidence was defined by the United States Supreme Court in the 1963 case of *Brady vs. Maryland*, 373 US 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) as any evidence material to a determination of guilt or punishment.

Rule 15.1 (8) of the Arizona Rules of Criminal Procedure codifies this rule.

Withholding this evidence from the defense is a due process violation under the 5th and 14th Amendments to the US Constitution. Rule 15.1 (8) of the Arizona Rules of Criminal Procedure codifies this rule.

In the instant case, not only was clearly exculpatory evidence withheld from the Grand Jury on both the attempted 2nd degree murder charge and aggravated assault charges; (Please see pages 3-6 of the Petition for Review filed July 28, 2021, for details and references to documents in Appendix) but the relevant justification statutes, ARS §13-405, ARS §13-406 and ARS §13-411 were not read to the grand jurors in conjunction with the presentation of evidence.

Nor was ARS §13-205, *supra*, read to the Grand Jury. CF *Cespedes vs. Lee*, 243 Ariz. 46 (2017) when the prosecutor read all the relevant justification

statutes to the grand jurors; 243 Ariz. at 50.

As noted in the Petition for review, the vote to indict Aranzi Willis was not unanimous (12-3 and 11-4) even with all the crucial justification statutes and evidence withheld from the Grand Jury. (Appendix II Pg. 20).

Withholding evidence that Mr. Kunz was trying to get hold of Portillo's gun when the shots were fired not only violated either definition of "clearly exculpatory evidence" it was also a clear violation of Arizona Rules of Evidence 106 that reads:

> **Rule 106. Remainder of or Related Writings or Recorded Statements**
>
> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statements—that in fairness ought to be considered at the same time. Amended Oct. 19, 1988, effective Nov. 1, 1988; Sept. 8, 2011, effective Jan. 1, 2012.

In the absence of the "adverse party" at the grand jury, it is surely a due process violation for the prosecution to have left out the part of the statement that Mr. Kunz was trying to get hold of Jesse's (Portillo) gun. (Appendix V).

V. CONCLUSION

If Article II Section 30 is to remain a Constitutional Right and not a meaningless rite, the prosecution must be required to present any evidence in its

possession, however slight, that supports a defense of justification. The instant case must be remanded for a new finding of probable cause.

RESPECTFULLY SUBMITTED this 10th day of December, 2021.

S/ D. JESSE SMITH

D. JESSE SMITH
SUITE 1003, PIONEER PLAZA BUILDING
100 NORTH STONE AVENUE
TUCSON, AZ 85701
(520) 623-8343
(520)792-2139 (FAX)

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ARANZI RAE JON WILLIS, PETITIONER, vs. THE HONORABLE JUDGE BERNINI, RESPONDENT, AND THE STATE OF ARIZONA, REAL PARTY IN INTEREST,	SUPREME COURT NO. CR21-0258PR (PIMA COUNTY SUPERIOR COURT CASE NO. CR20202482-001) **CERTIFICATE OF COMPLIANCE**

Pursuant to Arizona Rules of Criminal Procedure, Rule 31.13, I certify that the attached Supplemental Brief uses proportionately spaced type of 14 points or more, is double spaced and uses a Times New Roman font and contains 2498 words.

DATED this 10th day of December, 2021.

S/ D. JESSE SMITH

D. JESSE SMITH
SUITE 1003, PIONEER PLAZA BUILDING
100 NORTH STONE AVENUE
TUCSON, AZ 85701
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	)	SUPREME COURT NO. CR21-0258PR
PETITIONER,	)	
	)	
vs.	)	NO. 2CA-SA-2021-0031
	)	
THE HONORABLE JUDGE	)	(PIMA COUNTY SUPERIOR COURT
BERNINI,	)	CASE NO. CR20202482-001)
	)	
RESPONDENT,	)	
AND	)	**CERTIFICATE OF SERVICE**
	)	
THE STATE OF ARIZONA,	)	
	)	
REAL PARTY IN INTEREST,	)	
_____ ____	)	

COMES NOW attorney for Petitioner and states that the Petitioner's Supplemental Brief will be served electronically to the Respondent Court and Real Party in Interest, Pima County Attorney.

DATED this 10th day of December, 2021

S/ D. JESSE SMITH