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 SUR REPLY**

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ARGUMENT

THE COURT SHOULD REJECT THE STATE'S INVITATION TO ALLOW IT TO WITHHOLD CLEARLY EXCULPATORY EVIDENCE FROM THE GRAND JURY, PROCEDURAL DUE PROCESS REQUIRES A FAIR AND IMPARTIAL PRESENTATION OF EVIDENCE.

The Amicus Brief filed December 29, 2021 by Ms. Lamoureux for Arizona Attorneys for Criminal Justice addresses the State's argument reference ***United States v. Williams,*** 504 U.S. 36 (1992) on pages 6-9 of its brief, and is incorporated by reference herein. Petitioner's counsel would point out that ***U.S. v. Williams,*** supra was decided five years prior to the 1997 decisions in ***Herrell v. Sargent,*** 189 Ariz. 627 (1997) and ***Trebus v. Davis,*** 189 Ariz. 621 (1997) so presumably the five Justices on the Court, as well as litigants were aware of that decision when the 1997 decisions in ***Herrell*** and ***Trebus*** were under consideration.

The State in its supplemental brief filed December 14, 2021 invited the Court to overrule decades of caselaw that was repeatedly held that procedural due process requires that evidence before the grand jury be presented in a fair and impartial manner and that clearly exculpatory evidence be presented, even in the absence of a special request. See ***Trebus v. Davis,*** 189 Ariz. 621 (1997) at

624.

United States v. Williams, 504 U.S. 36 (1992) does not control Arizona grand jury proceedings because it dealt only with federal grand jury proceedings. Assuming *arguendo* that the State's interpretation of *Williams* as holding that the Fifth Amendment does not require the presentation of exculpatory evidence in grand jury proceedings was legally sound (something Willis does not concede), the holding of *Williams* is not binding upon this Court because the Fifth Amendment's specific guarantee to a grand jury is not incorporated through the Fourteenth Amendment. ***Hurtado v. California***, 110 U.S. 516 (1884).

Arizona's criminal charging process is wholly distinct from the criminal charging process in the federal system, conflating our state system with the federal system in this context is illogical. Unlike federal law, Arizona law allows the State to proceed with felony charges by way of indictment *or* preliminary hearing. *Compare* Ariz. Const. art. 2, § 30 with U.S. Const., amend.V; see also ***State v. Bojorquez***, 111 Ariz. 549, 553 (1975). In Arizona, although defendants have no right to a specific charging procedure, they do have a right to be charged only upon a finding of probable cause by a neutral fact-finder and are entitled to due process.

It is undeniable that there is a considerable disparity in the procedural

rights afforded to defendants charged by means of information and defendants charged by indictment. At a preliminary hearing, defendants have a right to counsel, to notice of charges against them, to challenge the State's evidence, and to present evidence on their own behalf. *Cf. Bojorquez*, 111 Ariz. at 553; *see also* ***State v. Essman***, 98 Ariz. 228, 231-32 (1965). Though this Court has characterized these rights as "incidental" to the preliminary hearing process, *see* ***Bojorquez***, 111 Ariz. at 553, it has recognized that preliminary hearings "must comport with the requirements of due process." ***Brailsford v. Foster***, 242 Ariz. 77, ¶ 15 (App. 2017), *quoting* ***State ex rel. Berger v. Jennings***, 110 Ariz. 441, 442 (1974).

Though defendants ultimately have no say in which charging process the State pursues, the presence of the right to be charged with a felony only by indictment *or* the more-protective preliminary hearing in the Arizona constitution indicates that the constitutional framers intended the grand jury to be more than a mere rubber stamp of the prosecutor's office. Indeed, the decision to give the preliminary hearing constitutional status was a *direct* response to fears of prosecutorial abuse. *See* John D. Leshy, *The Making of Arizona Constitution*, 20 Ariz. St. L.J. 1, 84 (1988). Given this backdrop, it is extraordinarily unlikely that Arizona's constitutional framers intended the grand jury process to be vastly less

protective than the alternative charging procedure. Grand Jury proceedings and preliminary hearings, though procedurally distinct, were intended to provide *equivalent* protection against prosecutorial abuse and arbitrary state action. *Cf.* ***State v. McKaney***, 209 Ariz. 268, ¶ 37 (2004) (Hurwitz, J. and Ryan, J., dissenting in part, concurring in part).

Since the accused has no right to participate in a grand jury proceeding, the only person who can ensure the grand jury receives a fair and accurate portrayal of the evidence against the accused is the prosecutor. *Cf.* ***O'Meara v. Gottsfield***, 174 Ariz. 576 (1993) ("the secret nature of the hearings, the absence of a judge, and the lack of an adversarial structure makes these proceedings ripe for abuse, and warrant additional, not fewer, [procedural] precautions") (Zlacket, J., specially concurring) (alteration added).

Recognizing this reality, this Court has imposed a duty on the prosecutor to ensure that indictments are not secured through unfair or misleading grand jury presentments. *Cf.* ***Trebus v. Davis***, 189 Ariz. 621 (1997) (acknowledging prosecutor's power in grand jury proceedings and necessity for safeguards to protect defendant's interests); ***Maretick v. Jarrett***, 204 Ariz. 194, ¶ 8 (2003) (because defendants enjoy few procedural rights before grand jury, grand jury *must* be unbiased and independent of prosecutor or judge). This duty makes

perfect sense. If the law is to permit defendants to be charged by indictment—through a process that affords them significantly fewer rights than the only other constitutionally available charging process—then, at the very least, the grand jury process must be truly independent.

Arizona courts and our legislature have strived to ensure that grand juries remain fair and independent and have enacted numerous laws and rules of procedure to that end. *See* A.R.S. §§ 21-401 through -417; *see also* Ariz. R. Crim. P. 12.1 through 12.9. Arizona courts have also recognized that both preliminary hearings and grand jury proceedings must comport with the requirements of due process. ***Brailsford***, 242 Ariz. 77, ¶ 15; *see also* ***State v. Crimmins***, 137 Ariz. 39 (1983).

A grand jury cannot be expected to perform its vital protective function if it is denied access to information that might cause it to conclude the State lacked probable cause. Nor can it make a fair and impartial charging decision if its "probable cause" determination is based on a distorted version of the facts.

This is especially important in cases, like the instant case, where the withheld evidence supported a Chapter 4 Justification defense. Pursuant to A.R.S. 13-205, absence of justification is an element of the crime, as the statute specifically states that "conduct that if not justified, would constitute an offense,

but if justified, does not constitute criminal or wrongful conduct."

The State has provided no compelling reason to ignore *stare decisis* or to strip defendants of a procedure that ensures fairness during a critical stage of the criminal proceedings. Cf. ***Lowing v. Allstate Ins. Co.***, 176 Ariz. 101 (1993) (Supreme Court does not lightly overrule precedent and will not do so without compelling reasons).

Holding that criminal suspects have due process rights in one constitutionally sanctioned charging process (preliminary hearing), but not the other (grand jury), would also create an unfair and arguably unconstitutional problem, as defendant's charged via grand jury proceedings would be denied the equal protection of the law. If the grand jury process and the preliminary hearing are to remain constitutionally "equivalent," they must at least provide the same bare minimum protection against prosecutorial abuse and arbitrary state action - i.e., *both* constitutionally sanctioned charging processes must similarly afford defendants due process. The State cannot be permitted to circumvent due process requirements during the charging process by simply choosing one charging process over the other.

Indeed, nothing in the Arizona Rules of Criminal Procedure or Arizona Statutes, or caselaw, requires that a person has to be under arrest or notified that

the State is going to present a proposed indictment against him or her to a grand jury. Persons not arrested prior to presentment have no opportunity to request to testify pursuant to Rule 12.5 or request that the grand jurors "hear evidence at the request of the person under investigation" pursuant to A.R.S. §21-412.

Unlike a person who is held to answer after a preliminary hearing pursuant to Rule 5, which provides a right to have the Superior Court review the probable cause determination pursuant to Rule 5.5; a person whose case is presented to the grand jury may only file a challenge under Rule 12.9, which does not allow the Superior Court to redetermine probable cause, only to determine if the defendant was "denied a substantial procedural right."

Arizona has a statutory scheme (A.R.S. §41-1758 et seq) that requires a person to possess a fingerprint clearance card issued by DPS in order to hold a long list of occupations.

According to their website, between July 1, 2019 and June 30, 2020, 138,940 fingerprint clearance cards were issued; as of January 1, 2019 there were 762,811 active fingerprint clearance cards in use in Arizona.

Anyone pending trial for 48 categories of crimes, will be denied a card or have it revoked, without the right to a good cause exception hearing, or any right to contest the factual basis behind the charges. See A.R.S.§41-1758.03(B) and

A.R.S. §41-1758.07(B).

"One may not be excluded by State action from a business, profession or occupation in a manner or for reasons which contravene the due process clause... ***Application of Levine,*** 97 Ariz. 88, at 91 (1964), see also ***Wassef v. Arizona State Board of Dental Examiners ex rel Hugunin,*** 242 Ariz. 90, at 93 (App. 2017).

In ***Cleveland Board of Education v. Loudermill,*** 470 U.S. 532 (1985) the Supreme Court held that:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." ***Mullane v. Central Hanover Bank & Trust Co.,*** 339 U.S. 306, 339 U.S. 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."
>
> 470 U.S. at 542
>
> . . .
> First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. (citations omitted)
>
> 470 U.S. at 543
> . . .
> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or

> in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975).

470 U.S. at 546.

The Arizona Fingerprint Card statutory scheme supra, would be clearly in violation of the due process clause if the State may withhold "clearly exculpatory evidence" from any separate grand jury proceedings.

Benjamin Franklin, in Poor Richard's Almanac was quoted as saying "a half truth is a whole lie."

This aphorism has been codified in both Arizona and Federal Security Law.

Both Section 10 b(5) of the 1934 Federal Security Law and A.R.S. §44-1995 contain the exact same language making it a criminal violation to defraud investors if the defendant:

> Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading. (emphasis added)

This is a Class 4 felony in Arizona pursuant to A.R.S. §44-1991, and is punishable up to 25 years under federal law (18 U.S.C. 1348).

C.F. ***Nelson v. Roylston,*** 137 Ariz. 272 (App. 1983) placing obligation on

prosecutor to correct any misleading testimony in ex parte proceedings before the grand jury.

A person's liberty should not be accorded less protection under the due process clause than an investor's money.

The State is seeking to get the Court to override the long established rules reference presenting clearly exculpatory evidence to enable the State to start plea negotiations[1] from a higher list price; even if a case ends up in trial, if higher unfounded charges are presented to the trial jury, any compromise verdicts will be more favorable to the State.

CONCLUSION

The Court should adopt the "might deter" standard from ***Trebus v. Davis,*** supra, the State should not be able to commence every felony prosecution at the fifty yard line by withholding clearly exculpatory evidence from the grand jury.

RESPECTFULLY SUBMITTED this 19th day of January, 2022.

S/ D. JESSE SMITH

[1]The Court can take judicial notice that the overwhelming majority of felony charges end in plea agreements, as well as the mandatory penalties that preclude trial judges from imposing probation upon conviction in many cases.

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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 Petitioner's Sur Reply Brief uses proportionately spaced type of 14 points or more, is double spaced and uses a Times New Roman font and contains 2789 words.

DATED this 19th day of January, 2022.

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AND	**CERTIFICATE OF SERVICE**
THE STATE OF ARIZONA, REAL PARTY IN INTEREST,	

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

DATED this 19th day of January, 2022.

S/ D. JESSE SMITH

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