

ARIZONA SUPREME COURT

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| SAMMANTHA ALLEN, |) | No. CR-16-0234-PR |
| JOHN MICHAEL ALLEN, |) | |
| |) | |
| Petitioners, |) | Court of Appeals Div. 1 |
| |) | No. 1 CA-SA 16-0049 |
| v. |) | |
| |) | Maricopa County Superior |
| HON. TERESA SANDERS, JUDGE OF |) | Court |
| THE SUPERIOR COURT OF THE |) | No. CR 2011-138856-001 DT |
| STATE OF ARIZONA, in and for the |) | |
| County of Maricopa, |) | |
| |) | |
| Respondent Judge, |) | |
| |) | |
| STATE OF ARIZONA, |) | |
| Real Party in Interest. |) | |
| |) | |
| |) | |

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE IN SUPPORT OF PETITIONERS**

Amy P. Knight, No. 31374
Kuykendall & Associates
531 S. Convent Avenue
Tucson, Arizona 85701
(520) 792-8033
amyknight@kuykendall-law.com

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INTRODUCTION

The question in this case is whether a capital defendant's right to a determination by the trial court after an adversarial proceeding with the defendant present and represented by counsel can be instead satisfied by reliance on a grand jury's findings, rendered in secret and not subject to substantive challenge. This question cuts to the very core of the rights Arizona affords capital defendants. This Court must recognize that adopting the State's position would badly curtail rights this Court has specifically granted to capital defendants in Arizona Rule of Criminal Procedure 13.5(c) and in this Court's opinions interpreting that rule. The only justification the State has provided for curtailing that right is that it provides for some redundancy in the capital trial process. Far from justifying a brand new exception to Rule 13.5(c), this redundancy is actually desirable in death penalty cases where the State seeks an utterly irrevocable punishment.

INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and

associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer. AACJ offers this brief in support of the Allens because the issue presented will affect many capital cases prosecuted in this State. It touches the core of AACJ's mission to protect individual rights guaranteed by the federal and state Constitutions and to resist all efforts to curtail such rights, especially in death penalty cases. *Chronis*¹ hearings are an essential part of the pre-trial litigation in capital cases. Permitting the State to avoid these protections at the front end of the case increases the risk of an unnecessary capital trial, not to mention the risk of a death sentence that might be vacated at the back end due to failure of proof of an aggravating circumstance.

¹ *Chronis v. Steinle*, 220 Ariz. 559, 208 P.3d 210 (2009).

ARGUMENT

I. The grand jury determination of probable cause can never be an adequate substitute for a *Chronis* hearing.

The State has apparently abandoned the position it took at the Court of Appeals and is pursuing a new strategy in this Court. Now, the State argues that a grand jury hearing—held in secret without the presence of the defendant, who has no right to participate and no right to counsel—is the equivalent of a *Chronis* hearing, which is a public adversarial proceeding, often after significant discovery, with the right to counsel, to cross-examine witnesses, and to put on rebuttal evidence. The only similarity between a grand jury proceeding and a *Chronis* hearing is that both the grand jury and the trial judge make determinations of probable cause. Beyond that, the proceedings bear no similarity.

The circumstances and manner of the determination, and not just the test applied, are part of the right. The relevant question is not whether anyone has ever made a probable cause determination; we do not deprive defendants of a grand jury determination because a police officer may have determined there was probable cause for arrest without a warrant. It matters who makes the determination, and under what circumstances. The difference between a determination made after an unchallenged presentation by the State alone and one after an adversarial proceeding, like the difference between a

decision by law enforcement and a decision by a grand jury, is deeply significant. One cannot stand in for the other.

Although it might be tempting to take this shortcut if the two proceedings were very close in time, the *Chronis* hearing cannot take place until after the filing of the notice to intent to seek the death penalty, and in practice it rarely occurs within a year of the grand jury proceeding. Additional facts may well come to light during that time, with or without the defense team's specific efforts, that alter the probable cause calculus.

Probable cause is a totality of the circumstances determination. *See, e.g., State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987). This means the grand jury, and the court, must weigh not just the evidence that the defendant committed a crime, but also the evidence that he did not—evidence which the defendant, not the State, has the incentive to develop. In these cases, the second determination will not be redundant at all, but will be an entirely different determination based on an overlapping but distinct set of facts. Accordingly, every capital defendant has the right to have each aggravating circumstance as a whole, including any factual underpinnings, considered in the first instance under the circumstances contemplated by Rule 13.5(c), *Chronis*, and *Sanchez v. Ainley*, 234 Ariz. 250, 321 P.3d 415 (2014): by the trial court in an adversarial proceeding.

Of course there may be cases where a defense team's early investigation turns up no significant facts beyond those known to the grand jury. But there will also be cases where only intensive defense investigation and challenge can reveal devastating weaknesses in the State's evidence that could put a stop to the capital proceeding. Consider a case that rests on the word of a police officer who, unbeknownst to the prosecutor, has a long history of neglecting to record interviews and then fabricating confessions. *Cf. Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013). In such a case, the prosecutor's duty to present the evidence fairly, *see Crimmins v. Superior Court*, 137 Ariz. 39, 42-43, 668 P.2d 882, 885-86 (1983), may not fully protect the defendant, as the prosecutor may be unaware of the history.² Discovering such facts often requires defense investigation, and has a highly significant bearing on the reliability of the key evidence, which the fact-finder must weigh for the probable cause determination.

Or imagine a case of mistaken identity, where both an alibi witness and an alternative suspect exist who could expose the improbability that the defendant was involved, but the State, with no particular incentive to do so,

² To be sure, the State has an obligation to produce such evidence to the defense without request, and there are post-conviction remedies for failing to do so. *See Brady v. Maryland*, 373 U.S. 83 (1963). But preventing such problems *ex ante* is vastly preferable—to the State, the criminal justice system, and of course the defendant—to reversing a death sentence or conviction many years after the fact.

has not located these witnesses. Or a case in which the State itself discovers exculpatory evidence for the alleged serious crime between the grand jury hearing and the *Chronis* hearing, such as a DNA or fingerprint match to another individual. None of these situations would be fully revealed to a grand jury, even by a prosecutor making best efforts to observe the impartiality requirements, but could be fully explored by defense counsel in a *Chronis* hearing, starkly illustrating the essential substantive differences between the two rights.

II. The Rule 13.5(c) Hearing Protects Essential Rights.

It is well established that grand jury presentations are one-sided hearings conducted in secret. There is no cross-examination. The grand jurors—lay people—may ask questions, but there is nothing even resembling an adversarial testing of the State’s case. The grand jury may be independent, but it is an accusatory body and its function is wholly different from that of a trial judge. The right recognized in *Chronis* is nothing less than a defendant’s right to put the State to its proof before going too far down a path that can be terribly damaging to the defendant’s case, and ultimately end his life.

In some cases, this decision about whether a *Chronis* hearing is required specifically for the F(2) aggravator will determine whether the court holds

any *Chronis* hearing at all. If the only alleged aggravating circumstance is the conviction of a serious offense that was committed or indicted contemporaneously with the murder pursuant to A.R.S. § 13-751(F)(2), presumably no hearing would be necessary under the State’s interpretation of the rule. By the State’s logic, the factual questions about the alleged serious offense would be conclusively determined by the grand jury, and the only remaining question would be whether the indicted offense was “serious” for purposes of (F)(2). This purely legal question is usually not open to reasonable debate, given the statute’s specificity. The probable cause determination, in turn, will dictate whether the case proceeds as a capital case. This decision has enormous consequences for the defendant and for the system as a whole.

First, a capital case requires a specifically constituted defense team, with two specially qualified attorneys, a mitigation specialist, and an investigator. The State must provide such a team for indigent defendants so long as a case is potentially capital—but no such requirement exists if there are no viable aggravating circumstances.

Then there is the dramatically different strategy a defense team must undertake in a capital case. In death cases, the defense team must balance the guilt-phase presentation and the mitigation evidence; there are delicate and

painful decisions to make about the degree to which to contest guilt, as opposed to setting up the case throughout the guilt phase to explain why the facts may not be as bad as they look. Then there are the resources diverted from all possible challenges to guilt and poured into developing a mitigation case, irrespective of counsel's ultimate strategic decisions about what to focus on before the jury.

Even if there are other aggravators, the presence of multiple aggravators may influence the jury's determination as the jury may be more likely to credit one aggravator with the knowledge that it is not the only one alleged. And of course, a defendant not properly facing the death penalty should never be forced to stand trial before a death-qualified jury. It is well documented that such juries are more likely to convict than noncapital juries. *See, e.g., State v. Anderson*, 197 Ariz. 314, 320 ¶ 12, 4 P.3d 369, 375 (2000) ("Arizona's system implicitly and explicitly acknowledges that jurors' views in opposition to the death penalty could affect their ability to impartially evaluate the defendant's guilt."); *see generally* CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A PSYCHOLOGICAL SYSTEM*, 118–21 (2005) (describing the conviction proneness of death qualified juries); William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 *JUDICATURE* 220, 222–23 (1996) (same); Robert Fitzgerald & Phoebe C.

Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 LAW & HUMAN BEHAV. 31, 48 (1984) (same); Walter E. Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt? 39 TEX. L. REV. 545 (1961) (same); Robert L. Young, Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment, 25 DEVIANT BEHAV. 151,155 (2004) (same).

In sum, the Court's decision here will, in some cases, determine whether a case proceeds as capital or not. This is a decision of monumental importance to defendants, and the Court must not shortchange them of their rights in the name of the State's convenience.

III. The State Proposes a Sweeping New Exception to *Chronis* and *Sanchez*.

The State does not seem to quarrel with *Chronis*, or with *Sanchez*; thus, the State agrees, as it must, that a Rule 13.5(c) hearing is required—except for the aggravating circumstance the State is attempting to use here, the (F)(2) for a prior conviction for a serious offense.

Chronis did not say that a defendant gets a hearing to determine whether there is probable cause for any facts necessary to establish aggravating circumstances that have not yet been passed upon by a grand jury. The rule was a blanket one: that a defendant is entitled to have the trial court conduct

a hearing and determine probable cause for alleged aggravating circumstances. Whether the State had, at one point in the past, enough evidence to begin a criminal prosecution for a given crime in the first instance—an inquiry governed by Arizona Rule of Criminal Procedure 12—cannot fully answer the question of whether there is, at the time of the *Chronis* hearing, probable cause to proceed with the alleged aggravating circumstance.

If this Court were to follow the State’s logic to its conclusion, this exception to *Sanchez* would quickly swallow the rule. If the grand jury’s probable cause determinations are conclusive for Rule 13.5(c) purposes, then this brand new exception would also have to apply to several other aggravating circumstances. For example, the (F)(5) pecuniary gain aggravator could be established by the grand jury’s indictment for burglary, if the underlying felony was theft. The (F)(7) factor—committed while in custody or on probation—could be established if the alleged serious offense is assault by a prisoner under A.R.S. § 13-1206. This court would surely later face the question of whether this new exception also applies to the (F)(8) if there are two counts of murder in the indictment. There would be the question of the need for a *Chronis* hearing on the (F)(12) aggravator if there is a concurrent witness tampering charge under A.R.S. § 13-2409.

Surely there are other situations where the elements of the crimes in the indictment, if proven, would necessarily establish aggravating factors. Every new capital case would then include litigation about what facts the grand jury necessarily found in order to indict, and whether those facts necessarily establish aggravators.

This Court recognized in *Sanchez* that it did not matter if a probable cause determination had already been made by some other body operating under different procedures. If a grand jury's determinations could stand in for a trial court's consideration of the facts, the *Sanchez* opinion would never have included the extended discussion of the right to a *Chronis* hearing independent of any grand jury determination. 234 Ariz. at 254 ¶¶ 14-15, 321 P.3d at 419. Indeed, Chief Justice Berch filed a separate opinion concurring in the result stating that she would rule on that basis alone: "Rule 13.5(c) provides defendants in capital cases the right to a hearing before a judge to challenge the sufficiency of the aggravating circumstances. *Sanchez* requested but was denied such a hearing. It is enough to say that, as a defendant in a capital case, he is entitled to one." *Id.* at ¶ 19. This Court went out of its way to make clear that regardless of its authority to make any particular determination, a grand jury's findings have no effect on the right to a *Chronis* hearing. This view is simply incompatible with the position that

the trial court need not re-determine issues already considered by the grand jury.

IV. The State is Wrong to Suggest that a Rule 12.9 Motion Is the Proper Venue for this Challenge.

Rules 12.9 and 13.5(c) afford defendants two very different, and non-overlapping, rights. Thus, whether a defendant makes, or could make, a Rule 12.9 motion has no bearing on his right to a Rule 13.5(c) determination.

Longstanding case law establishes that the trial court may not hear an attack based on nature, weight, or sufficiency of evidence in a motion brought under Rule 12.9, only of a substantial procedural right. *See, e.g., Crimmins*, 137 Ariz. at 42-43, 668 P.2d at 885-86 (“Those cases clearly prohibit a trial court from considering an attack on an indictment based on the nature, weight or sufficiency of the evidence presented to the grand jury.”).

In contrast, Rule 13.5(c) gives defendants the specific right to challenge the “legal sufficiency” of the alleged aggravators—precisely what *cannot* be challenged in a Rule 12.9 motion. Under the State’s model, there would be no situation where a defendant would lose a Rule 12.9 motion and win a *Chronis* hearing. That does not reflect reality. If this Court thought a grand jury hearing could fulfill the function just as well, it never would have decided *Sanchez* the way it did. And it never would have structured the

required *Chronis* hearing the way it did — it could have allowed the State to make an *ex parte* showing to the judge, for instance, or it could have given the State the choice of presenting the aggravators to the grand jury or alleging the aggravators and later facing a *Chronis* hearing. Instead, *Sanchez* required this adversarial proceeding, because that procedure has a purpose.

In short, by claiming that the grand jury can do in secret what a Court is supposed to do in an open, adversarial proceeding, and by equating a challenge to the procedural propriety of the grand jury proceeding with a substantive challenge to the nature and sufficiency of the evidence, the State completely misses the point that this Court recognized in *Chronis* and again in *Sanchez*: defendants have a right to test the nature and strength of the state's evidence regarding any aggravating factor on which the State will rely in seeking a sentence of death. A grand jury hearing does not afford such a right.

Nor does the fact that Rule 12.9 does not give trial courts a given power have any bearing on whether some other rule may afford that power. Rule 12.9 does not forbid courts from making probable cause determinations; it simply limits the scope of one particular procedure. Rule 12.9 does not afford a trial court the power to consider whether there is, in fact, probable cause; Rule 13.5(c) does. There is nothing incompatible about that.

V. The Court of Appeals Dissent Ignores Several Key Realities.

Judge Cattani's dissenting opinion rested on five primary points, all of which are faulty, irrelevant, or both.

First, the dissent explains that "the grand jury in this case. . . only determined probable cause for public offenses. . . precisely the grand jury's proper role." It is true that the grand jury is authorized to make this determination for purposes of initiating a criminal case. But any reliance on that fact entirely ignores paragraphs 14 and 15 of *Sanchez*, as well as Chief Justice Berch's concurrence, which are explicit that "even if the grand jury were authorized to determine that probable cause supports alleged aggravators, Sanchez would be entitled to a *Chronis* hearing." *Sanchez*, 234 Ariz. at 254 ¶ 14, 321 P.3d at 419. In other words, this Court explicitly stated that the right to a *Chronis* hearing has nothing to do with whether or not the grand jury properly has a role.

Next, the dissent suggests that the requirement that the trial court make the determination itself is met by the court's determination that the offenses qualify as "serious offenses." But this is a purely legal determination, where probable cause, the determination required by *Chronis*, is a determination that mixes facts and law. A court cannot make a determination of probable cause without a consideration of evidence. Moreover, in many cases,

including this one, there is no real determination to make; the statute explicitly specifies offenses included under (F)(2)'s "serious offense" umbrella, leaving no room, in many cases, for interpretation. In such cases, the grand jury's determination *is* the determination regarding the aggravating circumstance. There is nothing left for the trial court to determine.

Third, the dissent notes that the Court *did* conduct a *Chronis* hearing in this case. But here, the (F)(2) was not the only aggravator alleged; the evidence the Court took at the hearing was primarily addressed to the (F)(6) aggravating circumstance. There is no reason to believe that the Court would have convened a full-blown evidentiary hearing of this type simply to determine that the grand jury had indicted, and the statute classifies the indicted offenses as "serious." Indeed, the Court's minute entry explicitly states that it was not reconsidering the evidence, but rather relying on the grand jury's probable cause determination. It is evident that, if faced with the (F)(2) factor alone, the Respondent would not have held the hearing at all. The right to test the legal sufficiency applies to each and every aggravating circumstance, and the fact that the Respondent heard and applied evidence to one alleged aggravating circumstance does nothing to satisfy the right as to the other. Indeed, the dissent does not ultimately claim that any hearing was conducted specifically as to the (F)(2) factor, but rather

that the Respondent “appropriately conducted the required analysis.” *Allen v. Sanders*, 736 Ariz. Adv. Rep. 33, ¶ 22 (Cattani, J., dissenting). Rule 13.5(c), *Chronis*, and *Sanchez* require more than a legal analysis; they require a factual determination after a proper hearing.

The dissent’s fourth assumption is that preexisting convictions would obviously not be subject to this same challenge now being applied to charges consolidated for trial with the homicide, so neither should these charges. *See Allen*, 736 Ariz. Adv. Rep. 33, ¶ 23 (Cattani, J., dissenting). But this position ignores the crucial distinction that at the time of the Rule 13.5(c) determination, existing convictions were already established beyond a reasonable doubt, after a jury trial with all its attendant rights, or by plea. With consolidated alleged offenses, on the other hand, the defendant has not yet had an opportunity to challenge the evidence supporting those charges. Whatever may be the requirements for preexisting convictions, it has no bearing on those alleged in the same indictment, which remain unproven allegations.

Finally, the dissent suggests that there would be no harm in the diminished pretrial rights because the alleged serious offenses cannot become actual aggravating circumstances justifying a death sentence until found by a jury beyond a reasonable doubt, after a trial in which the

defendant has had the chance for all the adversarial features he now seeks. *Allen*, 736 Ariz. Adv. Rep. 33, ¶ 24 (Cattani, J., dissenting). This argument ignores the fact that Rule 13.5(c) is a *pretrial* right, and that the way in which the trial proceeds—as capital or not, with a greater or smaller number of aggravators—can matter deeply to a defendant. If the finding after a jury trial were sufficient, there would be no need for Rule 13.5(c) at all, and no such thing as a *Chronis* hearing.

VI. No Downside Exists to Maintaining the *Chronis/Sanchez* Hearing Requirement for All Aggravating Factors in All Cases.

As established above, the reasons for requiring the Court to separately receive evidence supporting alleged aggravating circumstances in an adversarial hearing are manifold, and go to the core rights of capital defendants. In contrast, the State and the criminal justice system have very little to lose if the Court requires the State to present its evidence a second time, this time with an opponent. Of course it will create some redundancy, as the evidence is likely to overlap with the grand jury evidence. But redundancy in capital proceedings is a good thing; it is an extra safeguard against conducting onerous capital trials where they are not justified, and ultimately, against convicting, sentencing, and executing undeserving defendants.

Moreover, the State’s strong resistance to the suggestion that it should subject its case to pretrial scrutiny suggests that the procedure is indeed warranted. If the case were strong, the State would have nothing to lose in presenting it.

Finally, if saving the State a little trouble were important enough to justify substituting a secret, one-sided proceeding for a public adversarial hearing, this Court never would have required an adversarial hearing for the *Chronis* proceeding in the first place, and the Court would have allowed the *Sanchez* grand jury findings to suffice. Instead, this Court recognized in *Sanchez* that the *Chronis* hearing reflects the “greater procedural rights” this Court affords to capital defendants. The Court acknowledged the importance of discovery, cross-examination, and the presentation of rebuttal evidence for the probable cause determination—rights a non-capital defendant, who, under Rule 12.9 may *not* challenge the substance of the evidence supporting a probable cause determination—does not have. *Sanchez*, 234 Ariz. at 254 ¶¶ 15, 321 P.3d at 419. This was not an accident; it reflected this Court’s calculation that in the death penalty context, any inconvenience to the State occasioned by redundancy is well worth the additional reliability gained by the greater procedural rights in a *Chronis* hearing not afforded in a grand jury proceeding.

CONCLUSION

In undertaking capital prosecutions, the State exercises extraordinary power over its citizens. This Court has endeavored, over the years, to ensure that defendants are given sufficient tools to check this power, and to fight back vigorously to ensure that only the truly deserving are subject to capital trials, sentenced to death, and executed. The State is attempting, for no discernible reason, to curtail these vigorous challenges. This Court must not limit a defendant's essential rights to challenge the State's attempts to end his life as a simple matter of convenience.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By /s/ Amy P. Knight

Amy P. Knight

Amy P. Knight, No. 31374
Kuykendall & Associates
531 S. Convent Avenue
Tucson, Arizona 85701
(520) 792-8033
amyknight@kuykendall-law.com