IN THE ARIZONA SUPREME COURT

MARCUS DAVID MORRIS and MARKIEFF A. MORRIS,	)	S.Ct. No. CR-16-0018-PR
Petitioners,	)	Court of Appeals No. 1 CA-SA 15-0289
v.	)	
HON. JOAN M. SINCLAIR, Judge of the Superior Court of Arizona in and for Maricopa County,	)	Maricopa County Superior Court Nos. CR2015-001671-003 & CR2015-001671-004
Respondent Judge,	)	
STATE OF ARIZONA,	)	
Real Party In Interest.	)	

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

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INTRODUCTION

Not only in this case but in countless others in Arizona courts, the prosecution and their officer witnesses manipulate grand juries by painting portraits of the evidence that inexorably leads to "true bills." For this reason, the idea that grand juries will "indict a ham sandwich" has become part of popular vernacular. Recent events across America involving police shootings, however, has brought public mistrust of the grand jury system to a fever pitch. The historical purpose of the grand jury—to put a layer of protection between the accused and an oppressive government—has disappeared as prosecutors manipulate the evidence to suit their own purposes.[1]

"The grand jury system 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, Inc. v. Strand*, 114 Ariz. 260, 264 (1977). This Court has regularly recognized "the potential for abuse and the devastating personal and professional impact that a later dismissal or acquittal can never undo, when the prosecutor is allowed to exercise control over a cooperative grand jury." *E.g.*, *Herrell v. Sergeant*, 189 Ariz. 627, 631 (1997) (internal quotes omitted). Because of the practicalities of police work, however, the grand jury cannot conduct its own

[1] Editorial, "Do We Need Grand Juries?," *New York Times*, 2/18/85 (last accessed February 5, 2016).

investigations; instead, it must rely on prosecutors and police to provide fair presentations of the evidence.

This Court has stated on multiple occasions that prosecutors must produce any "clearly exculpatory" evidence to the grand jury, defining that term as "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). Yet the very next paragraph uses the phrase, "None of the evidence clearly shows…" thereby suggesting that the term applies to the clarity of the evidence and not its weight. *Id*. The term has not been explained well in the last three decades. *Id*. In *Herrell*, this Court merely stated that the withheld evidence was clearly exculpatory, without explanation. Prosecutors assume they may refuse to present exculpatory evidence because, in their opinion, it is not sufficiently weighty to deter a probable cause finding. Prosecutors must not be allowed to keep grand jurors in the dark like this.

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") asks this Court to grant review in this case and hold that prosecutors' duty to present evidence fairly includes its obligation to present any evidence that appears on its face to have exculpatory value. Thus, the adverb "clearly" should stand for the quality of clarity, and not for "overwhelming" weight. This standard would be much easier to implement for prosecutors and trial judges.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order 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 because the issue presented touches on the cornerstone of the right of all persons to not be put through the ordeal of a criminal trial unless a citizens grand jury finds probable cause based on a fair presentation of evidence. For too long prosecutors have dodged their responsibility to present evidence fairly by convincing lower courts that evidence is not "clearly exculpatory" unless it conclusively demonstrates a person's innocence. Such a standard allows prosecutors to make unilateral determinations as to who gets indicted and who does not, because prosecutors would not present cases where evidence was so overwhelming for innocence. Action by this Court is necessary to give effect and meaning to the term "clearly exculpatory."

ARGUMENTS

I. The grand jury must be restored to its status as an independent investigative body, and prosecutors must recognize that they are servants and not masters of the grand jury.

Witnesses are "not entitled to set limits to the investigation that the grand jury may conduct." *Blair v. United States*, 250 U.S. 273, 282 (1919). "A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970). "When a witness is summoned before [the grand jury], he is bound to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." *Carroll v. United States*, 16 F.2d 951, 953 (2d Cir. 1927).

A textbook example of the legitimate function of grand jury investigations occurred only days ago. In Harris County, Texas, a grand jury was convened for the express and publicized purpose of investigating potential crimes committed by Planned Parenthood based on "sting videos" created by abortion opponents. Two months later, that grand jury returned indictments, not against Planned Parenthood or any of its agents, but against the filmmakers. The district attorney told the press in a prepared statement: "As I stated at the outset of this investigation, we must go where the evidence leads us. All the evidence uncovered in the course of this

investigation was presented to the grand jury. I respect their decision on this difficult case."[2]

A.R.S. §21-401 et seq. demarcates the role of the prosecutor in the grand jury process. Ariz.R.Crim.P. 12.6 gives effect to A.R.S. §21-412. Notably, no statute- or rule-based authority permits the prosecutor to direct the grand jury; on the contrary, such authority requires the prosecutor to assist the grand jury in its investigative function. *See* A.R.S. §21-408(A) (prosecutors may assist with legal questions and examination of witnesses, as well as with preparing draft indictments under grand jury's direction). *See also Gershon v. Broomfield*, 131 Ariz. 507, 509 (1982) (prosecutor's powers "are derived from the grand jury; it is the grand jury that possesses the broad investigative powers…"). Courts have recognized that the role of the prosecutor is as the servant of the grand jury and not its master:

> The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." ... The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.

[2] Danielle Paquette, "Creator of anti-Planned Parenthood videos faces felony charge," *Washington Post*, January 25, 2016 (last accessed February 8, 2016).

United States v. Samango, 607 F.2d 877, 882 (9th Cir. 1979). Yet, even in light of both centuries-old Anglo-American tradition of empaneling grand juries for investigation and recent statutory authority for such, the grand jury has largely disintegrated into a rubber stamp to be directed by prosecutors and police.

This is due in no small part to the absence of meaningful judicial oversight. It is self-evident that prosecutors will learn from adverse judicial determinations, and that they will see no reason to change their practices unless the judiciary requires it. When defendants petition the Court of Appeals for special action relief from a denial of a motion to remand to the grand jury, jurisdiction is rarely granted in Division One and never in Division Two. Even when, thirty years ago, Arizona courts vigilantly protected suspects from abusive and misleading presentations to grand juries, the lack of any substantial sanction on prosecutors meant that prosecutors need not be deterred by what Professor Popko called in his student note "the inadequacy of the judicial response." Sigmund G. Popko, Note, *Arizona's County Grand Jury: The Empty Promise of Independence*, 39 Ariz. L. Rev. 667, 686 (1987). Vigilant oversight is needed when a person's life can so easily be destroyed by an indictment, which our state's constitutional convention recognized carried social stigma equivalent to a conviction. *Id*. at 674.

It has been more than a decade since this Court granted review of a challenge to an unfair grand jury presentation, and nearly two decades since this Court addressed failure to present exculpatory evidence. Both in *Herrell* and in *Trebus v. Davis*, 189 Ariz. 621 (1997), the issue involved prosecutors' duty to present evidence already brought to their attention by defense attorneys. This case provides an excellent vehicle for this Court to remind prosecutors of their role as ministers of justice and servants of the grand jury.

II. This Court has never given an understandable definition for "clearly exculpatory" evidence. This Court should interpret the phrase similarly to its use in the *Brady* and *Willits* contexts.

In *Trebus*, the defendant wanted the grand jury to have information that his accuser lacked credibility. This Court stated that "Trebus concedes that this is not an exculpatory evidence case." 189 Ariz. at 625. This Court agreed with Trebus's concession, because "issues such as witness credibility and factual inconsistencies are ordinarily for trial.... Simply put, the grand jury is not the place to try a case." *Id.* Essentially, this Court drew a sharp-line distinction between evidence that demonstrates a defendant's innocence (which must be presented) and that which merely calls one's guilt into question (which need not). Because Trebus never articulated—not even at oral argument—just what helpful he hoped to provide to the

grand jury, this Court could not find his letter to the prosecutor sufficient to trigger the requirement to present defense evidence to the grand jury. *Id*.

The analysis in *Trebus*, however, seems to contradict that of this Court's recent opinion in *State v. Glissendorf*, 235 Ariz. 147 (2014), where this Court recognized that impeachment evidence has exculpatory value. In *Glissendorf*, the defendant's niece reported a molestation in 2001 that was alleged to have occurred years earlier, but because there was no prosecution, both the police and Child Protective Services destroyed the recordings of that statement. *Id*. ¶2. The State argued, and the trial court agreed, that the destruction of this evidence did not warrant a *Willits*[3] instruction on unpreserved evidence because the evidence was not maliciously destroyed and the recording was not shown to contain exculpatory evidence. *Id*. ¶5.

This Court rejected that approach. It clarified that "[t]he phrase 'tendency to exonerate' … does not mean the evidence must have had the potential to completely absolve the defendant.... a defendant is entitled to an instruction if he can demonstrate that the lost evidence would have been material and potentially useful to a defense theory supported by the evidence." *Id*. ¶10 (internal cites omitted). It noted that "we have previously used the phrase 'potentially helpful' interchangeably

[3] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

with 'tendency to exonerate.'" *Id*. (cites omitted). It distinguished bad faith evidence destruction whose exculpatory value was apparent, for which a defendant may seek dismissal with prejudice under *Arizona v. Youngblood*, 488 U.S. 51 (1988), and the lesser offense of negligent or even accidental loss of evidence, for which the defendant's remedy is a jury instruction. *Id*. ¶¶11-12.

Finally, the State asked this Court to overrule *Willits* because it is not grounded in the Due Process Clauses of either the federal or state constitutions. *Id*. ¶13. Rejecting the State's entreaty, this Court stated: "Even if *Willits* is characterized as a court-adopted rule of evidence, … we believe that it properly balances the state's duty to prove guilt with the defendant's presumed innocence." *Id*. ¶16. Although *Glissendorf* did not do so, this Court recognized the due process issue twenty-five years earlier: "a *Willits* instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith." *State v. Schad*, 163 Ariz. 411, 416 (1989) (citing *State v. Tucker*, 157 Ariz. 433, 442-43 (1988)); *see also State v. Youngblood*, 173 Ariz. 502, 506-07 (1993) (same). Thus, the loss of evidence potentially useful to the defense always raises the specter of a due process violation; the remaining question is measuring the gravity of the violation against the remedy (dismissal or jury instruction).

Glissendorf's scope has limits. In *State v. Carlson*, 237 Ariz. 381 (2015), this Court held that the failure to preserve phone records of third parties did not fall within the *Willits* ambit for multiple reasons. First, the absence of evidence whether the third party's phone was found, "ma[de] it unclear whether it was reasonably accessible." *Id.* ¶40. Second, although records were reasonably accessible via subpoena, "Carlson does not specify exactly what data—text histories, call histories, or the contents of text messages—those records would have contained." *Id.* Although this Court determined that speculation cannot support entitlement to a *Willits* instruction, *id*. ¶41, this Court intimated that the failure to secure the phone itself was insufficient to warrant the instruction.

A separate but related line of cases involving the government's affirmative duty to help the accused flows from *Brady v. Maryland*, in which the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Court then extended the *Brady* rule to apply to any agent of the government on behalf of all other government agents and agencies: "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154 (1972). This rule applies not only to evidence that exonerates the accused but also anything that is potentially

useful to the defense such as attacking the credibility or reliability of State's witnesses. *Id*.; *United States v. Bagley*, 473 U.S. 667, 682 (1985). And in *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995), the Court explained that the test for determining materiality of suppressed evidence is not whether there was sufficient evidence to convict but rather whether the suppression of evidence results in casting the case in such a different light "as to undermine confidence in the verdict."

This Court recognizes a state constitutional right to be free from multiple prosecutions when the first prosecution is tainted by intentional and egregious prosecutorial misconduct. Ariz. Const. art. II, §10; *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984). The Court of Appeals recently recognized that *Brady* violations usually are remedied by a new trial, but nonetheless barred retrial in a case involving *Brady/Giglio* violations that were so egregious that "[n]o lesser sanction would rehabilitate the damage done to the integrity of the justice system." *Milke v. Mroz*, 236 Ariz. 276, ¶21 (App. 2014).

At the core of the *Brady* doctrine is a prosecutor's duty not only to disclose evidence favorable to the accused but also "to learn of" such evidence—whether or not the accused has requested such disclosure. *Id*. ¶14 (quoting *Kyles*, 514 U.S. at 437). *See also United States v. Agurs*, 427 U.S. 97 (1976) (extending *Brady* to the prosecution's duty to disclose information favorable to defense even in absence of request). As with the *Willits/Youngblood* doctrine, the determination whether a

Brady violation is remedied by a new trial or barring retrial under the state double jeopardy clause hinges largely on the intent of the actor(s) and the severity of the violation.

This Court has never weaved the substantive due process right of suspects to fair grand jury presentations with the *Brady* and *Willits/Youngblood* lines of cases, but there are striking similarities that unite the various doctrines. The common and critical characteristic shared across all three doctrines is that substantive due process requires the government to treat the accused fairly, including at the pre-accusation stages. Furthermore, all three recognize that there is a remedy of dismissal with prejudice available to the defendant who establishes that the government's action was sufficiently egregious to warrant such a weighty sanction. Although this Court has never ordered a sanction of dismissal with prejudice against a prosecuting agency due to misconduct before the grand jury, it recognizes and affirms the availability of that sanction. *Maretick v. Jarrett*, 204 Ariz. 194, n.5 (2003); *Crimmins v. Superior Court*, 137 Ariz. 39 (1983) (Feldman, J., concurring) (citing *Samango*, 607 F.2d at 882). *See also State v. Young*, 149 Ariz. 580, 585 (App. 1986) ("Dismissals with prejudice occur only when the evidence is irrevocably tainted or there exists a pattern of misconduct that is prevalent or continuous.").

In all three lines of cases, prosecutorial misconduct is a potential cause for constitutional error. The oft-cited seminal case on prosecutorial misconduct, *Berger v. United States*, 295 U.S. 78, 88 (1935), states:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

This paragraph regularly appears in the context of an alleged due process violation based on prosecutorial misconduct in trial. *See, e.g.*, *Pool*, 139 Ariz. at 103 (prosecutor's intentional misconduct led to defense request for mistrial). Yet it has been recognized by this Court as the potential cause for a grand jury remand. *Maretick*, 204 Ariz. 194, ¶19. And the Supreme Court in *Agurs*, 427 U.S. at 111, tied *Berger* to the *Brady* doctrine, and this in turn was recognized in Justice Blackmun's *Youngblood* dissent. 488 U.S. at 64 n.2 (Blackmun, J., dissenting).

Thus, it is prudent and practical for this Court to expressly unite these three doctrines and hold that evidence that is "clearly exculpatory" in the context of a grand jury presentation is of the same quality as that which the government is

expected to preserve under the *Willits/Youngblood* doctrine and that it must disclose under the *Brady/Agurs* doctrine.

This necessitates a more practical definition of "clearly exculpatory." The primary definition provided in *Mauro* is useful for the court to determine whether a grand jury presentation was fair, but it actually encourages prosecutors to withhold information from the grand jury based on their own biased assessment of the weight of the evidence. Instead, "clearly exculpatory" should mean that the evidence tends to negate or reduce the suspect's culpability and that its value as such is clear on its face. In fact, this definition is implied in *Mauro*: "None of the evidence clearly shows that Mauro lacked the ability to form the requisite intent…" 139 Ariz. at 425. The supporting authority for this statement, *State v. Bell*, 589 P.2d 517, 522-23 (Haw. 1978), refers to statements that are not "clearly exculpatory in nature." Thus, *Mauro* is not necessarily looking to the evidence's ***weight*** but rather its exculpatory ***nature***.

All legal doctrines involve substantial gray areas, and this is no different. This Court stated in *Mauro* that "the defense of insanity is not well suited to the primary function of the grand jury." 139 Ariz. at 425. But alibi evidence is well outside any potential gray areas. If the Morrises were someplace else, then they were not assaulting the victim. The prosecution, in possession of such evidence (either individually or constructively through *Giglio*), was obligated to present information that would tend to exonerate the suspects. This selective presentation of evidence

was designed to lead the grand jury to the trough of indictments. Prosecutors should present such evidence so that the grand jury can perform its investigative function unimpeded.

CONCLUSION

AACJ asks this Court to grant review of the Morrises' petition in order to clarify the meaning of "clearly exculpatory" evidence and to ensure that prosecutors respect the independence of the grand jury.

RESPECTFULLY SUBMITTED this 12th day of February, 2016.

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