

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,

Petitioner,

v.

HONS. JEFFREY T. BERGIN &
DANELLE B. LIWSKI, Judges of the
Superior Court of the State of Arizona in
and for the County of Pima,

Respondent Judges,

RYAN TAYLOR REMINGTON,

Real Party in Interest.

No. CR-24-0012-PR

Court of Appeals No.
No. 2 CA-SA 2023-0078

Pima County Superior Court
No. CR-20223150-001

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF REAL PARTY IN INTEREST**

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INTEREST 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 them. 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 right of a target of a criminal investigation to fairness and due process goes to the core of AACJ's mission. In *Willis v. Bernini*, 253 Ariz. 453 (2022), this Court announced not only that defendants have a state due process right to fairness in grand jury proceedings but also that the grand jury falls within the province of the judicial department of government. In the absence of any law forbidding the release of a grand jury transcript to the target of the investigation, and where the law clearly permits the exercise of judicial discretion in deciding the propriety of doing so, there is no reason to deny such information to a person who requests it. The court of appeals' opinion restricting judicial discretion is, to a large extent, predicated on this Court's decision sixty years ago in *State ex rel. Ronan v.*

Superior Court, 95 Ariz. 319 (1964). The court of appeals was powerless to modify that ruling even though there has been a sea change in the rules for grand jury transcript dissemination, but it is firmly within the purview of this Court to reconsider the vitality of *Ronan* in light of contemporary law and understanding of the grand jury in Arizona.

ARGUMENTS

I. In Arizona, the grand jury is part of the judicial branch. Therefore, the prosecution should not be entitled to more information about a presentation that results in no indictment than the target of the investigation.

A. Unlike the federal system and many states, in Arizona, the grand jury is supervised by the judicial branch.

The grand jury is an independent investigative body tasked with “bringing to trial those who may be guilty and clearing the unjustly accused.” *Crimmins v. Superior Court*, 137 Ariz. 39, 41 (1983). Though the grand jury operates “independently of either prosecutor or judge,” in Arizona, the grand jury is judicial in nature and subject to judicial control and supervision. *Willis v. Bernini*, 253 Ariz. 453, ¶¶ 18-19 (2022); *State v. Superior Court (Collins)*, 102 Ariz. 388, 390 (1967) (“a proceeding before a grand jury is a judicial inquiry”); *State v. Young*, 149 Ariz. 580, 586 (App. 1986) (noting Arizona’s “history of judicial control of grand jury abuse”).

Arizona is rather unique in this regard. Unlike the federal constitution, which

does not “textually assign” the grand jury to any branch of government or grant the judiciary authority to regulate grand jury proceedings, the Arizona Constitution specifically addresses grand juries, and grants this Court authority to enact rules governing grand jury proceedings. Ariz. Const. art. 6, §§ 5(5) & 17; *see also Willis*, 253 Ariz. at 458-59 ¶ 18 (“concluding that ‘a fundamental change in the grand jury system . . . can only be made by this [C]ourt upon which has been conferred the authority to make rules’ pursuant to article 6, section 5(5) of the Arizona Constitution”) (quoting *Ronan*). It is for this reason that this Court recognized that the absence of a federal due process right to a fair grand jury proceeding did not foreclose this Court from finding a state due process right in article 2, section 4 of the Arizona Constitution. *See id.* ¶¶ 18-23 (rejecting *United States v. Williams*, 504 U.S. 36 (1992), as inapplicable to Arizona grand jury proceedings).

Consistent with its supervisory authority, this Court has exercised control over the grand jury on numerous occasions when necessary to ensure the fairness of the proceedings, to correct irregularities, or to protect a defendant’s due process right to a fair and impartial grand jury hearing. *See Willis*, 253 Ariz. at 459-60 ¶ 22; *Crimmins*, 137 Ariz. 39; *Herrell v. Sargeant*, 189 Ariz. 627 (1997); *Maretick v. Jarrett*, 204 Ariz. 194 (2003); *cf. Wilkey v. Superior Court*, 115 Ariz. 526, 528 (App. 1977) (“All actions of the prosecutor and the jurors should be susceptible to review to ensure to the defendant an impartial, just and unbiased hearing.”). To that end, it

has enacted rules that enable defense challenges and, when necessary, judicial oversight of grand jury proceedings. *See* Ariz. R. Crim. P. 12.7, 12.9.

Our legislature has also enacted laws aimed at protecting a target's rights during grand jury proceedings, relaxing the historical rule of secrecy, and enabling judicial oversight of proceedings. *See* A.R.S. § 21-411(A); A.R.S. § 21-412 (granting defendant right to request to testify before grand jury and consider evidence on his behalf); A.R.S. § 21-409 (tasking court with examining grand jurors, instructing on matters to be considered and their legal duties, and appointing foreman). These laws have granted criminal targets far greater access to Arizona grand jury proceedings than their federal counterparts, including the automatic right to a receive a transcript of the proceedings. *Compare* A.R.S. § 21-411(A) (transcript of grand jury proceeding shall be made available to prosecuting officer and defendant if indictment is returned), *with United States v. Mechanik*, 475 U.S. 66 (1986) (Marshall, J., dissenting) (defendant has no right to review grand jury transcript); Fed. R. Crim. P. 6(e).

Arizona is not only distinct from the federal system; most states also restrict a defendant's right to access the grand jury transcript. Of the 35 states that require grand jury proceedings to be recorded, only twelve afford defendants access to a

transcript without the need to show cause.¹ The remaining states either have no recording requirement² or require the defendant to make a specific showing before he may access a transcript.³ Of the twelve states that grant defendants the right to review grand jury proceedings, only four provide a transcript automatically; the others requiring a motion or a specific request.⁴

The legislature's decision to break away from the majority view and grant

¹See Alaska R. Crim. P. 6(k); Ariz. R. Crim. P. 12.7(a); Cal. Penal Code § 938(a); Conn. Gen. Stat. Ann. § 54-45a(a); Haw. R. Penal P. 6(d); Ky. R. Cr. 5.16(1); Mass. R. Crim. P. 5(i); Nev. Rev. Stat. Ann. § 172.215(1)-(3); N.D. Cent. Code Ann. § 29-10.1-16(1); Okla. Stat. Ann. tit. 22, § 340(A); Or. Rev. Stat. Ann. § 132.260(1); S.C. Code Ann. § 14-7-1700.

²See Ala. Code § 12-17-275; Ark. Code Ann. § 16-85-512; Del. Super. Ct. Crim. R. 6(e); *Thompson v. State*, 565 So. 2d 1311, 1313 (Fla. 1990) (no duty to record grand jury proceedings); Ga. Code Ann. § 15-12-83(a); La. Code Crim. Proc. Ann. art. 433(A)(1)(d); M.R.U. Crim. P. 6(f); Md. Code Ann., Cts. & Jud. Proc. § 2-503; Mich. Comp. Laws Ann. § 767.16; Mo. Ann. Stat. § 540.105; N.H. Sup. Ct. Rule 52(1); N.Y. Crim. Proc. Law § 190.25(3)(c); *State v. Jones*, 210 S.E.2d 454, 456 (N.C. App. 1974); Tex. Code Crim. Proc. Ann. Art. 20A.201(a); Wis. Stat. Ann. § 968.43(1).

³See Colo. Rev. Stat. Ann. § 16-5-204(f); D.C. Super. Ct. R. Crim. P. 6(e)(1); 725 Ill. Comp. Stat. Ann. 5/112-6; Ind. Code Ann. § 35-34-2-3(d); Iowa R. Crim. P. 2.3(f); Kan. Stat. Ann. § 22-3012; Minn. R. Crim. P. 18.04(2); Mont. Code Ann. § 46-11-317; Neb. Rev. Stat. Ann § 29-1407.01; N.J. Stat. Ann. § 2B:21-8; N.M. Stat. Ann. § 31-6-8; Ohio Crim. R. 22; Pa. R. Crim. P. 228; R.I. Super. R. Crim. P. 6(e)(1); S.D. Codified Laws § 23A-5-11.1; Tenn. Code Ann. § 40-12-208(a); Utah Code Ann. § 77-10a-13(7)(a); Vt. R. Crim. P. 6(e)(1); Va. Code Ann. §§ 19.2-212 & 19.2-215.9; Wash. Rev. Code Ann. § 10.27.070(4); W. Va. R. Crim. P. 6(e)(1); Wyo. R. Crim. P. 6(a)(10).

⁴See A.R.S. § 21-411(A); Cal. Pen. Code 938,1; Nev. Rev. Stat. Ann § 172.225; Or. Rev. Stat. Ann. § 132.260(1).

defendants the automatic right to review grand jury proceedings is no surprise given Arizona's preference towards openness in legal proceedings and its uniquely robust discovery procedures. *See* Ariz. R. Crim. P. 15.1; *R.S. v. Thompson*, 251 Ariz. 111, ¶ 16 (2021).

B. Except while the prosecution is presenting a specific case to the grand jury, this Court and the legislature have determined that the State is entitled to no advantage over targets of investigation.

Because the grand jury does not function as an arm of the prosecution, the State should be no more entitled to access information presented to the grand jury than the target of an investigation, except where necessary under the law. Though this Court has recently reaffirmed the grand jury's intended function as an independent body, the State still often operates as if the grand jury is under its control. At least in Pima County, nearly all felony cases are charged by way of grand jury, and grand jury presentments are mostly run by prosecutors: the prosecutor instructs the grand jury,⁵ proposes charges, presents witnesses, and answers legal

⁵ There does not appear to be any legal authority for the prosecutor's power to explain the law to the grand jury; instead, it seems to be assumed. *See* David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL, § 3:3 (2023-24 ed.). A.R.S. § 13-408 allows the prosecutor to answer legal questions in the context of a case presentation; however, A.R.S. § 13-409 tasks the court with instructing the grand jury concerning its legal duties and "the matters that may be considered by it." A.R.S. § 13-409(B), (C). Allowing prosecutors to give empanelment instructions instead of the court has caused problems in the past. *See Cespedes v. Lee*, 246 Ariz. 43 (2017) (prosecutor misinformed grand jury that justification defenses are for trial juries).

questions. It is thus perhaps no surprise that the State often feels entitled to some control over the grand jury proceedings. However, that is not the law in this State.

It is also often assumed that the grand jury's "veil of secrecy" may be pierced by the prosecution, but not the defendant. The State and the court of appeals assumed as much in this case when they relied on *Ronan* to deny Remington access to the grand jury transcript. But that assumption is wrong in light of more recent changes to the law, which relaxed the rule of secrecy, granted defendants greater access to grand jury proceedings, and rendered *Ronan*'s analysis inapplicable.

The policy considerations articulated in *Ronan* to justify withholding a transcript from the defendant were extinguished when the legislature enacted A.R.S. § 21-411(A) to grant defendants access to grand jury transcripts as a matter of course. The *Ronan* court even acknowledged that defendants theoretically *could* be entitled to a grand jury transcript if there is "some modern development of the law relaxing the rule of secrecy which is applicable in Arizona." *Ronan*, 95 Ariz. at 325. That "modern development" came just a few years later in 1971 with section 21-411(A)'s enactment. Targets are now clearly entitled to the same access as the prosecution when it comes to review of grand jury proceedings, and are similarly excepted from grand jury secrecy.

Given the substantial changes to the grand jury procedure that have occurred since *Ronan* was decided in 1964, which have greatly relaxed the so-called "rule of

secrecy” as to defendants, the court of appeals applied the wrong balancing test in this case. At a minimum, in weighing a defendant’s rights against “societal interests in secrecy,” the court of appeals needed to re-balance those factors applying modern standards, rather than 1960s standards. Defendants are now entitled to grand jury transcripts upon return of indictment; thus, the re-balance of those factors by modern standards now weighs in favor of granting Remington access to a transcript.

C. The court of appeals’ interpretation of the presiding judge’s authority to release the grand jury transcript was too narrow.

Because the legislature “has not enacted substantive laws that prohibit the superior court from ordering a no-bill transcript disclosed,” Opinion ¶ 23, and the judicial branch is responsible for supervising grand jury proceedings, it stands to reason that the presiding judge is vested with broad discretion to determine what constitutes the “furtherance of justice” and to disclose a transcript to a target when it deems it appropriate. *See Franzi v. Superior Court*, 139 Ariz. 556, 567 (1984) (reviewing for abuse of discretion and affirming trial court’s decision to permit defendant to inspect transcript of grand jury proceedings, which were related to, but did not directly result in, his indictment). In this case, however, the court of appeals too narrowly construed the superior court’s authority and discretion to release the transcript by focusing on a “particularized need” requirement. It also interpreted that requirement too onerously. It concluded “discovery purposes” or “to effectively

prepare a follow-up *Trebus*⁶ letter” in anticipation of re-presentation were not enough to satisfy standard, while offering no guidance to targets regarding what showing might warrant disclosure.⁷

In fairness to the court of appeals, it had no authority to ignore the words “particularized need” because they appear in *Ronan*, decided by this Court. *See State v. Smyers*, 207 Ariz. 314, 318 n.4 (2004). It is for this reason that this Court must accept review of Remington’s petition and hold that *Ronan*, a vestige of a different era, is incompatible with current statutes and rules governing the release of grand jury transcripts to certain persons.

Still, despite the court of appeals’ lack of authority to ignore the words “particularized need,” its interpretation of those words was unreasonable under current Arizona law. At the time *Ronan* was decided, Arizona’s grand jury practice was consistent with the federal system. It was also consistent with the idea that defendants were not constitutionally entitled to discovery. Like the evolution in grand jury practice, in 1973, this Court overhauled the Arizona Rules of Criminal Procedure and adopted Rule 15, requiring the State to supply broad discovery to all

⁶ *Trebus v. Davis*, 189 Ariz. 621 (1997).

⁷Its interpretation is also difficult to reconcile with *State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 294 n.1 (App. 2006), where it found its own disclosure of “the substance of grand jury testimony” to be “in furtherance of justice” without requiring the parties to demonstrate a particularized need.

criminal defendants. Requiring a heightened standard for obtaining a grand jury transcript is inconsistent with Arizona's liberal discovery rules.

II. This Court should hold that the target of an investigation is no less entitled to a transcript after the return of no bill than with a true bill.

The court of appeals determined that Remington was not entitled to the second transcript because he had not made a showing of good cause. It found unavailing his argument that the transcript would assist in the preparation of a *Trebus* letter.

No law forbids the disclosure of the transcript to the target of the investigation. Indeed, the court of appeals acknowledged as much in this case when it concluded that A.R.S. § 21-411(A) grants the presiding judge authority to release a grand jury transcript of a no-bill proceeding. Opinion ¶ 15. But it then reads a heightened standard for such disclosure into the law because A.R.S. § 21-411(A) should be read in conjunction with § 13-2812(A), which criminalizes unauthorized disclosure of “the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding...” Opinion ¶ 21. Interpretation of A.R.S. § 13-2812(A) is a matter of first impression. Few cases even mention this statute, and most arise out of lawsuits filed by journalists alleging prosecutors' violations of the First Amendment and addressing questions of immunity. *Morgan v. Cochise County Board of Supervisors*, 487 F.Supp.3d 789 (D. Ariz. 2020); *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012); *Flores v. Cooper Tire & Rubber Co.*, 218 Ariz. 52 (App. 2008).

At the outset, section 13-2812(A) is vague and overbroad. The plain language of the statute prohibits witnesses from divulging information they learned prior to giving testimony and thus violates the First Amendment. *Butterworth v. Smith*, 494 U.S. 624, 635-36 (1990). Statutes must be read in a manner that avoids a constitutional violation. *State v. Gray*, 239 Ariz. 475, 477 ¶ 6 (2016). Even with unconstitutional restrictions, the statute nevertheless builds in an exception for “when permitted by the court in furtherance of justice.”

Section 13-2812(A) applies to all people, not just targets of investigation, and it also applies to dissemination of material to the general public, as opposed to only the target of the investigation. The Supreme Court has explained the purposes of the secrecy rules:

We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Butterworth, 494 U.S. at 630 (quoting *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979)) (internal citation omitted). None of these

purposes is served by denying a transcript to a target who is not indicted after the grand jury proceedings have concluded; this is especially true in Remington's case.

First, the concern for protecting the grand jurors against threats and intimidation for returning an indictment has not materialized in Arizona, even though all indicted persons get, with the transcript, the names of all grand jurors who deliberated in the case. The target of an investigation who is not indicted would have no such motivation. Second, witnesses whose testimony is later revealed to indicted persons have not greatly suffered from attacks by defendants, and the risk is even further reduced when the target is not indicted. Third, public secrecy would remain preserved since the defendant would still be subject to A.R.S. § 13-2812(A). Finally, once the grand jury proceeding has concluded, the interest in secrecy to protect the integrity of the investigation is minimal. Thus, allowing the target to see the transcript of a proceeding that results in no bill being returned does not contradict the purposes of secrecy.

Remington's case demonstrates the absurdity of keeping the proceeding secret from himself. Since he was indicted the first time the State presented the case, he has already seen what the State's witnesses would say about him. It is unlikely that the second presentation would look significantly different from the first. (Possibly the State corrected the error that led the trial court to grant the motion to remand.) Knowing that the State intends a third try at indicting him, Remington wants the

transcript not to see the witnesses' answers, but the questions posed by grand jurors. Petition for Review at 3, 6. This is a legitimate request for discovery of information. Courts should not prevent such discovery except in cases where there is a legitimate court interest in doing so.

Against Remington's interest in discovering what was said about him in secret, the State's offerings amount to little more than reliance on outdated case law and scare tactics about drug cartels and "doxing jurors." Response at 5-6. The State has articulated no reason to deny the transcript in Remington's case. Although not required, Remington agreed with the trial court's order redacting grand jurors' identities. There is no concern for witnesses' safety. Whatever possible reasons may exist for denying the transcript to a target, the State should be required to present them for a trial court's consideration, rather than rely on hypotheticals.

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CONCLUSION

AACJ requests this Court grant review, find that the holding and reasoning of *Ronan* have been overruled by subsequent changes to Arizona law, and hold that a target of an investigation is entitled to a transcript of grand jury proceedings unless a trial court determines there is good cause to withhold it.

RESPECTFULLY SUBMITTED this 29th day of May, 2024.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By /s/ David J. Euchner

David J. Euchner & Carol Lamoureux
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