

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

NADIA H. BASHIR) Court of Appeals
) Division One
Petitioner,) No.
)
v.)
)
THE HONORABLE SUSANNA C.) Maricopa County Superior Court
PINEDA, Judge of the SUPERIOR) No. CR2010-005129-001
COURT OF THE STATE OF)
ARIZONA, in and for the County of)
MARICOPA,)
)
Respondent Judge,)
)
STATE OF ARIZONA,)
)
Real Party in Interest.) (Oral Argument Requested)

PETITION FOR SPECIAL ACTION

OSBORN MALEDON, P.A. (00196000)
Larry A. Hammond, 004049
Timothy J. Eckstein, 018321
Christina C. Rubalcava, 026357
OSBORN MALEDON, P.A.
2929 North Central Ave., Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9316
lhammond@omlaw.com
teckstein@omlaw.com
crubalcava@omlaw.com

Attorneys for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT	2
ISSUE PRESENTED	3
PERTINENT FACTS AND PROCEDURE.....	4
I. Ms. Bashir and her husband dedicate themselves to helping their special needs child, Asher.....	4
II. Asher Bashir dies in a tragic accident.	4
III. The State’s failure to inform the grand jury of Ms. Bashir’s request to testify requires a remand of the first indictment.....	6
IV. Despite the State’s failure to comply with <i>Trebus</i> during a second grand jury presentation, the Superior Court abuses its direction and denies Ms. Bashir’s remand motion.....	7
ARGUMENT	8
I. Legal standard.....	8
II. <i>Trebus</i> requires the State to convey to the grand jury the subject and outline of an accused’s proposed testimony so that the grand jury can make an informed decision whether to allow her to testify	9
III. The State failed to convey to the grand jury any information regarding the subject or outline of Ms. Bashir’s proposed testimony	9
IV. The Superior Court abused its discretion by denying Ms. Bashir’s motion to remand despite the State’s failure to convey to the grand jury either the subject or an outline of her anticipated testimony.....	11

A.	The Supreme Court’s mandate in <i>Trebus</i> is clear and unambiguous	11
B.	There is no other sensible reading of <i>Trebus</i>	11
CONCLUSION		13

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Francis v. Sanders</i> , 222 Ariz. 423, 215 P.3d 397 (App. 2009)	passim
<i>Gershon v. Broomfield</i> , 131 Ariz. 507, 642 P.2d 852 (1982).....	11
<i>Herrell v. Sargeant</i> , 189 Ariz. 627, 631, 944 P.2d 1241, 1245 (1997)	3
<i>Marston’s, Inc. v. Strand</i> , 114 Ariz. 260, 560 P.2d 778 1977).....	8
<i>Trebus v. Davis</i> , 189 Ariz. 621, 944 P.2d 1235 (1997)	passim
<i>Wood v. Georgia</i> , 370 U.S. 375 (1962)	8
Statutes	
A.R.S. § 21-412.....	3
Rules	
Ariz. R. Crim. P. 12.6.....	3
Arizona Rules of Procedure for Special Actions, Rule 3.....	2

INTRODUCTION

This Special Action concerns the Superior Court's denial of Petitioner Nadia Bashir's Motion to Remand to the Grand Jury for a Redetermination of Probable Cause. Following the drowning death of her four and a half year-old son, Ms. Bashir entered into precharging discussions with the State, providing over 120 pages of material detailing testimony and evidence she wished to present to the grand jury. The State did not communicate this information to the grand jury, telling it only that Ms. Bashir wished to testify and that it was within the grand jury's discretion whether to hear her testimony. In so doing, the State violated the rule announced by the Arizona Supreme Court in *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235 (1997) that, where the defendant has requested to testify and provided "some degree of detail, at least as to the subject and outline of proposed evidence," the State must "convey[] that information to the grand jury" for the grand jury to be able to make an "informed decision" regarding whether to hear from the defendant. *Id.* at 626, 944 P.2d at 1240.

Ms. Bashir moved for a remand of the indictment citing this violation, among other things, which the trial court denied. Ms. Bashir then moved the trial court for reconsideration of its denial on the narrow question of whether the Arizona Supreme Court meant what it wrote in *Trebus* -- that the grand jury must be given sufficient information to make an "informed decision." The trial court

denied that motion as well. The trial court abused its discretion in denying both the original remand motion and the motion for reconsideration on this question.

JURISDICTIONAL STATEMENT

The Court of Appeals exercises special action jurisdiction only in limited circumstances. “A challenge to the denial of a motion for remand generally must be made by special action before trial, and is not reviewable on direct appeal.” *Francis v. Sanders*, 222 Ariz. 423, 426 ¶ 9, 215 P.3d 397, 400 (App. 2009). This case warrants special action review because the trial court abused its discretion in denying Ms. Bashir’s motion to remand. *See* R.P.S.A. 3(c) (special action may properly raise the question of whether the trial court abused its discretion).

When a suspect has indicated a desire to testify before a grand jury, *Trebus* requires the State to provide the grand jury with, at a minimum, the subject and outline of that person’s anticipated testimony in order for the grand jury to make an informed decision as to whether “it wishes to hear a defendant or his evidence.” 189 Ariz. at 626, 944 P.2d at 1240. Here, the State provided no information to the grand jury regarding Ms. Bashir’s anticipated testimony, rendering the grand jury incapable of making an informed decision, in violation of *Trebus*.

This is a paradigm case for a special action appeal. This petition presents a question of statewide importance – the scope of information that the State is required to present to the grand jury when the accused expresses a desire to testify.

Moreover, this same issue is likely to be encountered time and time again. *See Francis*, 222 Ariz. at 426 ¶ 9, 215 P.3d at 400 (accepting special jurisdiction of the denial of a remand motion where the Court’s ruling would provide guidance on a prosecutor’s duty to provide legal instruction in response to grand juror questions).

By exercising jurisdiction, this Court will provide much needed guidance as to what information the State is required to present to the grand jury so it can make an informed decision whether to hear a defendant’s testimony. Should the Court decline to accept jurisdiction, the State will continue to prosecute Ms. Bashir and other accused individuals under indictments obtained in violation of A.R.S. § 21-412, Ariz. R. Crim. P. 12.6, and the Arizona Supreme Court’s decision in *Trebus*. *Cf. Herrell v. Sargeant*, 189 Ariz. 627, 631, 944 P.2d 1241, 1245 (1997) (recognizing “devastating personal and professional impact that a later dismissal or acquittal can never undo” where a prosecutor is permitted to exercise undue control over a grand jury (internal quotations and citation omitted)).

ISSUE PRESENTED

Whether, when a suspect requests to testify before the grand jury and provides information as to the detail of her proposed testimony, *Trebus* obligates the State to convey to the grand jury the subject and outline of that proposed testimony to enable the grand jury to make an informed decision whether to hear from the defendant?

PERTINENT FACTS AND PROCEDURE

I. Ms. Bashir and her husband dedicate themselves to helping their special needs child, Asher.

Nadia Bashir and her husband, Faran, first suspected that their younger child, Asher, had developmental delays before he was six months old. The Bashirs worked tirelessly to provide Asher all appropriate diagnoses, treatments and therapies. In early 2009, the Bashirs were told that Asher's presentation was consistent with an Autism Spectrum Disorder ("ASD").¹ They were counseled that Asher should be allowed to learn through independent play. At home, that meant allowing Asher to spend time by himself on the back patio, where Ms. Bashir could observe him playing safely. Over the months, Ms. Bashir grew comfortable knowing that Asher could safely play by himself for moderate periods of time.²

II. Asher Bashir dies in a tragic accident.

On August 8, 2009, the Bashirs moved to a new home. Although they had installed a pool fence in their previous home, the new one did not yet have one. Asher, who did not know how to swim, liked the pool. He nonetheless understood that he was not to try to swim without an adult and without his swim vest. Indeed,

¹ App. Tab 1 at 4. The Bashirs later learned that Asher suffered from a 10q26 chromosomal deletion, a rare condition that, like ASD, is accompanied by a wide range of developmental delays, and for which many of the treatments and therapies are identical to ASD. *See* July 8, 2009 Genetics Clinic Note, App. Tab 1 at Ex. D, p. 3.

² App. Tab 1 at 4-5.

in the new home, each parent had observed and monitored Asher sitting with his feet in the pool, without problem or incident.³ In the late afternoon of August 23, 2009, as Nadia was helping her older child, Daniel, prepare for his first day of school, Asher took his mother by the hand and led her to the door that went from the kitchen to the backyard. Ms. Bashir opened the door and watched Asher go to the pool and sit on the edge, with his feet in it.

It never occurred to Ms. Bashir that Asher was in danger of falling into the pool, or would attempt to go in on his own. Ms. Bashir further intended to watch Asher from the kitchen, where she had a clear view of the pool.

Several minutes later, as she was watching Asher from the kitchen, Daniel called from the master bedroom, requesting help in printing a back-to-school packet. Ms. Bashir went to the bedroom for a moment to help Daniel, before going back into the kitchen and seeing Asher in the same position, safely sitting with his feet in the pool. Ms. Bashir then followed Daniel into his room, where they gathered a few school items. A few minutes later, Ms. Bashir returned to the kitchen, where she saw the awful sight of Asher face-down in the pool. After pulling him out and beginning CPR, Ms. Bashir had Daniel call 911. The

³ *Id.* at 5-6.

emergency responders and medical professionals were not able to resuscitate Asher for close to 40 minutes. Asher passed away three days later.⁴

As she was trying to cope with the loss of her young son, Ms. Bashir learned that she had become the focus of a criminal investigation into Asher's death. Although grieving, she cooperated with the investigation, directing counsel to provide to the State a detailed letter explaining why Asher's death was a tragic accident. That letter -- including 17 attachments -- provides detail regarding Asher's diagnoses, development and level of functioning, explains why Ms. Bashir's conduct was consistent with the standard of care, and outlines objective evidence undermining the State's timeline of events and theory of the case.⁵

III. The State's failure to inform the grand jury of Ms. Bashir's request to testify requires a remand of the first indictment.

When, following receipt of this letter, the State nonetheless indicated a desire to charge Ms. Bashir, Ms. Bashir requested, pursuant to *Trebus*, that the State inform the grand jury of the exculpatory facts contained in the letter as well as her desire to testify.⁶ When the State went before the grand jury on April 21, 2010, it failed to inform the grand jury of this request to testify.⁷ Following the

⁴ *Id.* at 7-8.

⁵ *Id.* at 6-8.

⁶ App. Tab 2.

⁷ App. Tab 3.

State's admission of this violation of *Trebus*,⁸ the court ordered the matter back to the jury for a redetermination of probable cause.⁹

IV. Despite the State's failure to comply with *Trebus* during a second grand jury presentation, the Superior Court abuses its direction and denies Ms. Bashir's remand motion.

On August 24, 2010, the State appeared before a second grand jury, this time explaining that Ms. Bashir wished to testify. The State, however, made no mention of the scope or substance of Ms. Bashir's anticipated testimony, despite having received more than 120 pages of detailed information. The grand jury declined to hear Ms. Bashir's testimony and returned an indictment.¹⁰

Ms. Bashir filed a second motion to remand arguing, among other things, that by failing to provide even a simple outline of her anticipated testimony, the State precluded the grand jury from making an informed decision whether to hear her testimony.¹¹ Before the time provided under the rules for Ms. Bashir to file a reply, the court issued a single sentence order denying the motion.¹² Ms. Bashir promptly filed a motion for reconsideration on the sole question of whether the State was required to provide any information to the grand jury regarding her

⁸ App. Tab 4 at 10.

⁹ App. Tab 5.

¹⁰ App. Tab 6 at p. 33 ln 24 – p. 34 ln. 1.

¹¹ App. Tab 7.

¹² App. Tab 9.

proposed testimony beyond her willingness to testify.¹³ The court denied the motion without providing any basis for the decision.¹⁴

ARGUMENT

I. Legal standard

A “primary security to the innocent against hasty, malicious and oppressive persecution,” the grand jury “serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by intimidating power or by malice or ill will.” *Wood v. Georgia*, 370 U.S. 375, 390 (1962). When, as here, the State fails to present information sufficient to allow the grand jury to make an informed decision whether to hear a defendant’s testimony, it impedes the grand jury from carrying out its mission “to bring to trial those who may be guilty and clear the innocent.” *Marston’s, Inc. v. Strand*, 114 Ariz. 260, 264, 560 P.2d 778, 782 (1977); *Trebus*, 189 Ariz. at 626, 944 P.2d at 1240.

In a special action, this Court will grant relief where a trial judge abused her discretion in denying a motion to remand, including where, as here, the denial is premised on a legal error. *Francis*, 222 Ariz. at 426 ¶ 10, 215 P.3d at 400 (reviewing trial court’s decision to deny motion to remand for abuse of discretion).

¹³ App. Tab 10.

¹⁴ App Tab 11.

II. *Trebus* requires the State to convey to the grand jury the subject and outline of an accused's proposed testimony so that the grand jury can make an informed decision whether to allow her to testify

The State is always obligated to present to the grand jury clearly exculpatory evidence -- evidence of such a weight that it deters the grand jury from finding probable cause. *Id.* at 426-27, ¶ 12, 215 P.3d at 400-01. In addition, when the defendant has indicated a desire to testify and provided some information as to what she would testify, *Trebus* mandates that the State provide the grand jury with, at minimum, the subject and outline of the defendant's proposed testimony:

Under A.R.S. § 12-412 and Rule 12.6, the grand jury is to decide if it wishes to hear a defendant or his evidence. It can make an informed decision only if, on the one hand the defendant's request provides information with some degree of detail, *at least as to the subject and outline of the proposed evidence*, and, on the other hand, *if the prosecutor conveys that information to the grand jury.*

. at 626, 944 P.2d at 1240 (emphasis added). The failure to convey this information prevents the grand jury from making an informed decision regarding whether to allow the defendant to testify.

III. The State failed to convey to the grand jury any information regarding the subject or outline of Ms. Bashir's proposed testimony

Ms. Bashir gave to the State a detailed letter -- including 17 attachments and comprising over 120 pages -- providing detail regarding Asher's diagnoses, development and level of functioning, explaining why Ms. Bashir's conduct was consistent with the standard of care, and outlining objective evidence that

contradicts the State’s timeline of events.¹⁵ The State failed to convey any of this information to the grand jury, stating at the end of the presentation of evidence: “I would like to inform you the subject of this investigation has made a written request to appear before you and testify.”¹⁶ After reading verbatim Ariz. Crim. P. 12.6, counsel for the state concluded: “I would like to inform you that if you decide you wish to hear the testimony from the subject of the investigation, she is available to appear today.”¹⁷ The State gave no description of the scope or substance of Ms. Bashir’s proposed testimony. With no basis on which to determine whether Ms. Bashir’s testimony would be helpful, the grand jury declined to hear from her and returned an indictment.¹⁸

...
...
...
...

¹⁵ App. Tab 1.

¹⁶ App. Tab 6 at p. 32 lns. 17-19. Counsel for the State said that Ms. Bashir was available to testify that day – implying that the grand jurors would need to postpone their deliberations and wait for her to arrive. *Id.* at p. 33 lns. 14-16. In fact, as counsel knew, Ms. Bashir was in the hallway outside the grand jury room and available to testify immediately.

¹⁷ *Id.* at p. 33 lns. 14-16.

¹⁸ *Id.* at p. 33 ln. 24-p. 34 ln. 1.

IV. The Superior Court abused its discretion by denying Ms. Bashir’s motion to remand despite the State’s failure to convey to the grand jury either the subject or an outline of her anticipated testimony

The Superior Court’s decision denying Ms. Bashir’s motion to remand was necessarily an error of law and, therefore, an abuse of discretion. *See Francis*, 222 Ariz. at 426 ¶¶ 9-10, 215 P.3d at 400.

A. The Supreme Court’s mandate in *Trebus* is clear and unambiguous

In *Trebus*, the Arizona Supreme Court states that, if the accused asks to testify before the grand jury and provides the State with “some degree of detail, at least as to the *subject and outline* of the proposed evidence,” then the grand jury can *only* make an informed decision regarding whether it wishes to hear the accused or her evidence “*if the prosecutor conveys that information to the grand jury.*” 189 Ariz. at 626, 944 P.2d at 1240 (emphasis added). The State told the grand jury nothing beyond the bare fact that Ms. Bashir was willing to testify, in clear violation of *Trebus*. The trial court’s denial of Ms. Bashir’s remand motion, in light of this violation, was an error of law constituting an abuse of discretion. *Francis*, 222 Ariz. at 426 ¶¶ 9-10, 215 P.3d at 400.

B. There is no other sensible reading of *Trebus*

The prosecutor’s duty is to assist the grand jury in its investigations. *Gershon v. Broomfield*, 131 Ariz. 507, 510, 642 P.2d 852, 855 (1982). “Our statutes and rules give the grand jury, not the prosecutor, the right and obligation to

decide whether to hear a defendant or his exculpatory evidence.” *Trebus*, 189 Ariz. at 624, 944 P.2d at 1238. Unless so informed by the State, however, “the grand jury ordinarily has no reason to believe that other evidence within its reach will explain away the charge.” *Id.* (internal quotation marks and citation omitted). For this reason, the Supreme Court in *Trebus* imposed upon the State the obligation to provide the grand jury with sufficient information to make an informed decision – at a minimum, the “*subject and outline*” of the proposed testimony. *Id.* at 626, 944 P.2d at 1240 (emphasis added).

Notwithstanding both the clear language and rationale underlying *Trebus*, the State argued below that *Trebus* imposes no additional obligation other than to inform the grand jury of a defendant’s desire to testify.¹⁹ In particular, the State asserted that it need not convey to the grand jury information provided by the defendant as to her expected testimony, other than clearly exculpatory evidence.²⁰ Beyond ignoring the plain words in *Trebus*, the State’s position renders those words irrelevant, as it reads them to create an obligation -- presenting clearly exculpatory evidence -- that already exists in every case, including those where the defendant makes no offer to testify and presents no information regarding her expected testimony. *See Francis*, 222 Ariz. at 426-27 ¶ 12, 215 P.3d at 400-01.

¹⁹ App. Tab 8 at 6.

²⁰ *Id.*

CONCLUSION

Nadia Bashir informed the State that she wished to appear before the grand jury, and further provided over 120 pages detailing the testimony and evidence she wished to present. The State failed to convey any of this information to the grand jury, in clear violation of the rule announced in *Trebus*, mandating remand. Failing to apply the law that requires a remand, the trial court abused its discretion. This Court should accept jurisdiction and reverse the Superior Court's denial of the motion to remand.

Respectfully submitted this 10th day of December, 2010.

OSBORN MALEDON, P.A.

By/s/ Timothy J. Eckstein

Larry A. Hammond, 004049

Timothy J. Eckstein, 018321

Christina C. Rubalcava, 026357

OSBORN MALEDON, P.A.

2929 North Central Ave., Suite 2100

Phoenix, Arizona 85012-2793

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2010, Petitioner's Petition for Special Action was electronically filed with the Clerk's Office and pursuant to ARCAP Rule 4(c), copies of Petition for Special Action were sent via hand delivery to:

Honorable Susanna C. Pineda (*2 copies of Petition; 1 copy of Appendix*)
Maricopa County Superior Court
101 West Jefferson, ECB 714
Phoenix, AZ 85003

Lori Eidemanis (*2 copies of Petition; 1 copy of Appendix*)
Deputy County Attorney
MARICOPA COUNTY ATTORNEY'S OFFICE
301 West Jefferson, 9th Floor
Phoenix, Arizona 85003
Attorney for State of Arizona

Dated: December 10, 2010.

/s/ Timothy J. Eckstein
Timothy J. Eckstein
Attorney for Petitioner