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| CASE NAME: NADIA H BASHIR v HON. PINEDA/STATE OF ARIZONA | CASE NUMBER: CV-11-0068 |
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SUPREME COURT OF ARIZONA

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| NADIA H. BASHIR |) Supreme Court No. CV-11-0068- |
| |) PR |
| Petitioner, |) |
| |) Court of Appeals |
| v. |) Division One |
| |) No. SA-10-0267 |
| THE HONORABLE SUSANNA C. |) |
| PINEDA, Judge of the SUPERIOR |) |
| COURT OF THE STATE OF |) |
| ARIZONA, in and for the County of |) Maricopa County Superior Court |
| MARICOPA, |) No. CR2010-005129-001 |
| |) |
| Respondent Judge, |) |
| |) |
| STATE OF ARIZONA, |) |
| |) |
| Real Party in Interest. |) |
| |) |

RESPONSE TO PETITION FOR REVIEW

OSBORN MALEDON, P.A. (00196000)
 Larry A. Hammond, 004049
 Timothy J. Eckstein, 018321
 Christina C. Rubalcava, 026357
 2929 North Central Ave., Suite 2100
 Phoenix, Arizona 85012-2793
 (602) 640-9000
lhammond@omlaw.com
teckstein@omlaw.com
crubalcava@omlaw.com

Attorneys for Nadia H. Bashir

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INTRODUCTION¹

In *Trebus v. Davis*, 189 Ariz. 621, 626, 944 P.2d 1235, 1240 (1997), this Court held that where an accused requests to testify before the grand jury and provides the State with “some degree of detail” as to her proposed testimony, the prosecutor must “convey[] that information to the grand jury” to enable it to make an informed decision whether to hear from the accused. The State failed below to convey to the grand jury any of the information regarding Nadia Bashir’s proposed testimony. Applying *Trebus*, the Court of Appeals reversed the Superior Court’s denial of Bashir’s motion to remand, remanding the case for a new determination of probable cause by the grand jury.² There are no conflicting Court of Appeals’ decisions to reconcile or important misstatements of law that need correction. The Court of Appeals (Judges Irvine, Swann, and Portley) correctly decided this case by applying the unambiguous language drafted by this Court in *Trebus*. Accordingly, this case does not warrant review by this Court.

PERTINENT FACTS AND PROCEDURE

I. Bashir’s Son Dies in a Tragic Accident

Bashir’s son, Asher, began exhibiting developmental delays consistent with Autism Spectrum Disorder at an early age. Bashir and her husband were

¹ References to the State’s Appendix to Petition to Review are indicated by “**State App.**” References to Appendix to Response to Petition for Review are indicated by “**App.**”

² Court of Appeals decision dated February 8, 2011 (“Decision”) ¶ 22.

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 they could observe him playing safely. Over time, both parents grew comfortable knowing that Asher could safely play by himself for moderate periods of time.³ In the late afternoon of August 23, 2009, as Bashir was helping her older child, Daniel, prepare for his first day of school, she allowed Asher sit on the edge of the pool with his feet in it, as he had done many times before without incident. As she helped Daniel, Bashir became distracted for a few minutes. When Bashir returned to check on him, she saw the awful sight of Asher face-down in the pool. Asher passed away three days later.⁴

II. The State Fails to Inform the Grand Jury of Bashir's Request to Testify, Requiring a Remand of the First Indictment

As she was trying to cope with the loss of her son, Bashir learned that she was the focus of a criminal investigation into Asher's death. Bashir cooperated with the investigation, providing to the State a letter explaining why Asher's death was a tragic accident. That letter -- including 17 attachments -- detailed Asher's diagnoses, development and level of functioning, explained why Bashir's conduct

³ State App. 2 at 4-5.

⁴ *Id.* at 7-8.

was consistent with the standard of care, and outlined objective evidence undermining the State's timeline of events and theory of the case.⁵

When, following receipt of this letter, the State nonetheless indicated a desire to charge Bashir, she requested 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 convey either.⁷ Following the State's admission of a violation of the portion *Trebus* that requires that the grand jury be informed of an accused's request to testify,⁸ the court ordered the matter back to the jury for a redetermination of probable cause.⁹

III. Despite the State's Failure to Comply with *Trebus* During a Second Grand Jury Presentation, the Superior Court Abuses Its Direction and Denies Bashir's Remand Motion

On August 24, 2010, the State appeared before a second grand jury, this time informing the jurors that Bashir wished to testify. The State, however, made no mention of the scope or substance of Bashir's anticipated testimony, despite having received more than 120 pages of detailed information.¹⁰ The grand jury declined to hear Bashir's testimony and returned an indictment.¹¹

⁵ *Id.* at 6-8.

⁶ State App. 3 at 1.

⁷ App. 1.

⁸ State App. 4 at 10.

⁹ App. 2 at 1.

¹⁰ State App. 1 at 32:16-33:19.

¹¹ *Id.* at 33:24-34:1.

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 from her.¹² The trial court denied the motion, stating that the “Defendant has failed to show that the State’s presentation of evidence was not fair and impartial.”¹³ Bashir moved for reconsideration on the question of whether the State was required to provide any information to the grand jury regarding the substance of her proposed testimony.¹⁴ The court denied the motion.¹⁵

IV. The Arizona Court of Appeals Grants Bashir’s Petition for Special Action Based on the State’s Violation of *Trebus*

Bashir filed a Petition for Special Action with the Arizona Court of Appeals, asking the court to accept jurisdiction and reverse the Superior Court’s denial of the motion to remand.¹⁶ The Court of Appeals accepted jurisdiction and applied *Trebus*, noting that “if a defendant has requested to appear and provided some detail of the proposed testimony and evidence, a prosecutor has a duty to convey that information to the grand jury in a fair and impartial manner so that it may make an informed decision.”¹⁷ Because the State failed to provide any information

¹² App. 3.

¹³ App. 5.

¹⁴ App. 6.

¹⁵ App. 7.

¹⁶ App. 8.

¹⁷ Decision ¶ 16.

regarding Bashir’s proposed testimony, the Court of Appeals found that “the grand jury was not fully informed when it made its decision” not to hear from her.¹⁸ The Court further determined that this error was not harmless because the proposed testimony concerned “information that directly related to the standard of care necessary to find criminal negligence” and the State’s failure to convey this information “might have influenced the grand jury’s decision to hear from [Bashir].”¹⁹ The Court of Appeals remanded the matter for a new determination of probable cause.²⁰

REASONS THE COURT SHOULD DENY REVIEW

This Court should deny review because the Court of Appeals correctly decided this case by applying *Trebus*, where this Court made clear that, when an accused asks to testify and provides some detail as to her proposed testimony, the State must provide the grand jury with, at a minimum, the subject and outline of the proposed testimony for the jury to make an informed decision whether to hear from the accused.

¹⁸ *Id.* ¶ 17.

¹⁹ *Id.* ¶¶ 18-19.

²⁰ *Id.* ¶ 22.

I. The Court of Appeals Correctly Applied *Trebus* in Remanding the Matter for a New Determination of Probable Cause

A. This Court’s Decision in *Trebus* Is Clear and Unambiguous

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. For this reason, this Court in *Trebus* imposed on the State the obligation to provide the grand jury with sufficient information to enable it to make an informed decision regarding whether to hear from the defendant. In particular, the Court observed that:

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*.

189 Ariz. at 626, 944 P.2d at 1240 (emphasis added). Contrary to the State’s argument,²¹ there is nothing ambiguous about this Court’s analysis or reasoning, or what is required of the State. When a defendant requests to testify before a grand jury and provides some detailed information as to her proposed testimony, the State must convey some version of that information to the grand jury.

²¹ Petition for Review (“Petition”) at 7-8.

B. The Court of Appeals Correctly Applied *Trebus* to the Facts below in Concluding the Trial Court Abused its Discretion in Denying Bashir’s Motion to Remand

The Court of Appeals correctly applied *Trebus* in concluding that the Superior Court abused its discretion in denying Bashir’s remand motion.²² Specifically, the Court of Appeals found that, although Bashir requested to testify before the grand jury and provided the State with some degree of detail as to the subject and outline of her proposed testimony, the State failed to convey to the grand jury any information as to the substance of her proposed testimony, in clear violation of *Trebus*.²³ There is no dispute as to the principal facts of the State’s grand jury presentation or the Court of Appeals’ application of *Trebus* to those facts. As such, this Court should decline to review the matter.

C. The Court of Appeals Correctly Held That the Trial Court’s Failure to Apply *Trebus* Was Not Harmless

Noting that Bashir’s proposed testimony “directly related to the standard of care necessary to find criminal negligence” and that “[b]eing informed of her proposed testimony might have influenced the grand jury’s decision to hear from her,”²⁴ the Court of Appeals concluded correctly that the trial court’s error was not harmless. The State challenges this conclusion based on its belief that (1) no case

²² Decision ¶ 17 (citing *Francis v. Sanders*, 222 Ariz. 423, 426 ¶¶ 9-10, 215 P.3d 397, 400 (App. 2009)).

²³ Decision ¶¶ 16-17.

²⁴ Decision ¶¶ 18-19.

authority previously required the prosecutor to provide this information, (2) the prosecutor acted in good faith, and (3) the prosecutor did not fail to provide clearly exculpatory evidence or an accurate recitation of the law.²⁵ Even if true, none of these arguments would undermine the Court of Appeals' holding, that an "error is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the outcome." *Maretick v. Jarrett*, 204 Ariz. 194, 198 ¶ 15, 62 P.3d 120, 124 (2003) (quotation marks and brackets omitted).

II. The State Fails to Raise in Its Petition Any Basis on Which Review Should Be Granted

A. The State Conflates the Obligation to Present Clearly Exculpatory Evidence with That to Present the Subject and Outline of an Accused's Proposed Testimony When She Has Asked to Testify

Notwithstanding both the clear language and rationale underlying *Trebus*, the State argued before the Court of Appeals, and continues to assert before this Court, that the prosecutor need not convey to the grand jury information provided by the defendant as to her expected testimony, other than clearly exculpatory evidence.²⁶ The State's position both ignores and renders irrelevant the plain words in *Trebus*, as it simply reaffirms an obligation -- presenting clearly exculpatory evidence -- that exists in every case, regardless of whether an accused

²⁵ Petition at 13-14.

²⁶ Petition at 6-8; App. 9 at 6.

has requested to testify and provided a proffer for the same.²⁷ *See Francis v. Sanders*, 222 Ariz. 423, 426-27 ¶ 12, 215 P.3d 397, 400-01 (App. 2009).

As the Court of Appeals notes, although “the prosecutor always has the duty to inform the grand jury of clearly exculpatory evidence, even if a defendant has not requested to appear,” a “different situation is presented when a defendant requests to appear before the grand jury.”²⁸ In this instance, the defendant is not asking the prosecutor to present evidence to the grand jury, but rather “is seeking an opportunity to present evidence herself.”²⁹ The issue, therefore, is not whether the information is “clearly exculpatory,” but whether it is sufficient to enable the grand jury to “make an informed decision about the defendant’s request to appear.”³⁰ Recognizing that *Trebus* “set the standard” on this issue, the Court of Appeals correctly stated that if a “defendant’s request provides information with some degree of detail...as to the subject and outline of the proposed evidence, the prosecutor must convey that information to the grand jury.”³¹

²⁷ Conceding that *Trebus* requires a prosecutor to inform the grand jury that an accused wants to testify, the State then, incredibly, argues that the sentences that follow that holding are only “arguably advisory in nature.” Petition at 8.

²⁸ Decision ¶¶ 12, 14.

²⁹ Decision ¶ 14.

³⁰ *Id.* at ¶ 14.

³¹ *Id.* (quoting *Trebus*, 189 Ariz. at 626, 944 P.2d at 1240) (quotation marks omitted).

B. The State’s Petition Raises Issues Not Presented in This Record

The State argues that it should not be required to provide the “details” of the accused’s proposed testimony to the grand jury and that requiring it to do any more than convey clearly exculpatory information will turn grand jury proceedings into “mini-trials.”³² The hypothetical problems complained of by the State, however, do not exist on this record because the prosecutor did not provide *any* information regarding Bashir’s proposed testimony. As such, the record does not allow this Court to evaluate whether the State’s presentation of the proposed testimony constitutes an adequate summary of the information provided by Bashir. In this matter, the State provided nothing.

Moreover, neither *Trebus* nor the Court of Appeals’ decision requires a prosecutor to provide every detail of the proposed testimony; only those sufficient to allow the grand jury to make an informed decision regarding whether to hear the proposed testimony.³³ The Court of Appeals recognized that the State is not required to make a defendant’s case for her and that determining whether the prosecutor’s summary of the proposed testimony provides a sufficient “degree of detail” will “vary from case to case.”³⁴ In this case, because the prosecutor failed to provide any information beyond informing the grand jury of Bashir’s

³² See, e.g., Petition at 6, 10.

³³ Decision ¶ 15-17.

³⁴ Decision ¶ 15 (quoting *Trebus*, 189 Ariz. at 626, 944 P.2d at 1240).

willingness to testify, the Court of Appeals concluded that the prosecutor's presentation effectively removed the choice of whether to hear from the accused from the grand jury, in violation of *Trebus*.³⁵

C. The State Waived Any Argument As to the Sufficiency of the Summary Provided by Bashir

The State argues for the first time in its Petition for Review that the information Bashir provided to the prosecutor did not constitute a sufficient summary of the specific testimony that she would provide to the grand jury.³⁶ In its response to both the Motion to Remand and the Petition for Special Action, the State did not contend that the information Bashir provided did not constitute an adequate summary of her proposed testimony, only that the evidence was the equivalent of a "mitigation report."³⁷ Because that issue was never fairly before the Superior Court or the Court of Appeals, the State cannot raise it now for the first time before this Court. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to argue a claim on appeal waives that claim).

Even upon a consideration on the merits, however, the State's assertion fails. *Trebus* states that if the accused's request to testify "provides information with some degree of detail...as to the subject and outline of the proposed evidence" then

³⁵ Decision ¶¶ 16-17.

³⁶ Petition at 3-4.

³⁷ App. 4; App. 9. In fact, in its response to her second remand motion, the State described as "voluminous" the materials provided by Bashir. App. 4 at 8.

the prosecutor must “convey[] that information to the grand jury.” 189 Ariz. at 626, 944 P.2d at 1240. It is undisputed that Bashir gave the State a detailed letter - including 17 attachments and comprising over 120 pages -- providing information regarding her proposed testimony concerned her son’s “diagnoses, development and level of function[]” and “directly related to the standard of care necessary to find criminal negligence.”³⁸ The State’s contention that Bashir failed to provide sufficient information to the prosecutor is without merit.

CONCLUSION

For the above reasons, the Court should decline review.

RESPECTFULLY SUBMITTED this 14th day of April, 2011.

OSBORN MALEDON, P.A.

By: s/ Timothy J. Eckstein
Larry A. Hammond, 004049
Timothy J. Eckstein, 018321
Christina C. Rubalcava, 026357
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794
Attorneys for Nadia H. Bashir

3610671

³⁸ Decision ¶ 8.