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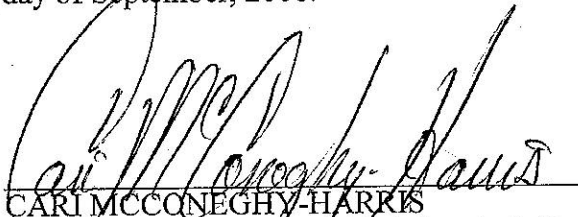
IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

8	STATE OF ARIZONA,	)	Case No.: CR2008-106594-001 DT
9		)	
10	Plaintiff,	)	MOTION TO DISMISS OR IN THE
11		)	ALTERNATIVE REMAND TO THE
12	vs.	)	GRAND JURY FOR A
13		)	REDETERMINATION OF PROBABLE
14	JOHN C. STUART,	)	CAUSE
15		)	
16	Defendant.	)	(Hon. Paul McMurdie)

17 Defendant, John C. Stuart, by and through counsel undersigned, and for the reasons  
18 asserted in the attached Memorandum of Points and Authorities, respectfully requests this  
19 Court to Dismiss with Prejudice or, in the alternative, to Remand to the Grand Jury for a  
20 Redetermination of Probable Cause. *See* Ariz. R. Crim. P., Rule 12.9 (a).

21 **RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of September, 2008.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 The function of the Grand Jury, "is to investigate whether there is probable cause to  
3 believe that a crime was committed and whether the person under investigation committed the  
4 crime." *State v. Coconino County Superior Court*, 139 Ariz. 422, 424, 678 P.2d 1396, 1398  
5 (1984). Pursuant to Arizona Rules of Criminal Procedure, Rule 12.9 a defendant may  
6 challenge the Grand Jury Proceedings, under the following relevant circumstances:

7 (a) **Grounds.** The Grand Jury Proceeding may be challenged only by Motion  
8 for New Findings of Probable Cause alleging that the Defendant was denied his  
substantial procedural right.

9 This challenge is properly brought under Arizona Rules of Criminal Procedures 12.9,  
10 and the Arizona and federal constitutions, because the prosecutor allowed and aided the  
11 testifying police officer in presenting misleading and false testimony to the Grand Jury and  
12 further failed to present exculpatory information and statutory instruction necessary to the  
13 Grand Jury's decision. This resulted in a denial of a substantial procedural right, mandating  
14 dismissal with prejudice, or in the least, a return to the Grand Jury for a redetermination of  
15 probable cause.

16 **A. The State Owed a Heightened Duty to Assure that the Grand  
17 Jury Was Free From Any Misleading Evidence and the Failure  
18 to Perform that Duty Supports Either Remand or Dismissal with  
Prejudice.**

19 The Arizona State Constitution provides that a person may be tried after a Grand Jury  
20 Indictment or via Information followed by a Preliminary Hearing. Ariz. Const., Art. II, § 30.  
21 Arizona Defendants who face a Preliminary Hearing rather than a Grand Jury unquestionably  
22 receive a greater level of judicial protection. *See* Ariz. R. Crim. P., Rules 5.1-5.4; *see also*  
23 Sigmund G. Popko, *Arizona's County Grand Jury: The Empty Promise of Independence*, 29  
24 ARIZ. L. REV. 667, 681-83 (1987) (recognizing that Preliminary Hearings provide Defendants

1 more protection). Such protections include, but are not limited to, notice of charges, right to  
2 counsel, subpoena of witnesses, and the right of confrontation. Ariz. R. Crim. P., Rules 5.1-  
3 5.4.

4 Perhaps, because of the lesser constitutional protections afforded to Defendants who  
5 face a Grand Jury rather than a Preliminary Hearing, Arizona law contemplates that the Grand  
6 Jury will function as an independent body free of improper influence from the Prosecutor. *See*  
7 *Trebus v. Davis*, 189 Ariz. 621, 624-625, 944 P.2d 1235, 1238-39 (1997); *Crimmins v. Superior*  
8 *Court*, 137 Ariz. 39, 43-44, 668 P.3d 882, 886-87 (1983) (Feldman, J., concurring); *see also*  
9 Ariz. R. Crim. P., Rules 12.1-12.9.

10 Notwithstanding the stated goal of Grand Jury independence, the Prosecutor's *ex parte*  
11 role before the Grand Jury is both statutorily and practically a tremendous and largely  
12 unchecked one: he or she attends all Grand Jury proceedings, participates in the selection of the  
13 Grand Jury panel, calls and examines witnesses, provides definitions of legal terms, acts as a  
14 legal advisor, and instructs the Grand Jury. A.R.S. §§ 21-408, 21-409 (2001); *see also*  
15 Sigmund G. Popko, *Arizona's County Grand Jury: The Empty Promise of Independence*, 20  
16 ARIZ. L. REV. 667, 681-83 (1987).

17 Thus, in *Trebus* 189 Ariz. at 624-625, 944 P.2d at 1238-39, the Arizona Supreme Court  
18 recognized that, due to the *ex parte* nature of the proceeding, the "the power of the Prosecutor  
19 in the Grand Jury system" and the Grand Jurors' corresponding dependence on the Prosecutor,  
20 a Prosecutor owes a greater level of responsibility to assure that the Defendant receives a fair  
21 presentation of the evidence. As stated in *Trebus*:

22 The Prosecutor, as an officer of the court as well as the lawyer for the state, is  
23 not just an adversary of the person under investigation. The interests of the  
24 prosecutor and the state are not limited to indictment but include serving the  
25 interests of justice; thus, the prosecutor's obligation to make a fair and impartial

1 presentation to the jury has long been recognized. See Cummins, 137 Ariz. at  
2 41, 668 P.2d at 884; see also State v. Emery, 131 Ariz. 493, 506, 642 P.2d 838,  
851 (1982).

3 Trebus, 189 Ariz. at 64–625, 944 P.2d at 1238–39. (Emphasis added).

4 The notion that a Prosecutor owes a heightened standard of duty before the Grand Jury  
5 is furthered embodied within the Rules of Professional Conduct. Specifically, Rule 42 of the  
6 Arizona Rules of the Supreme Court, Ethical Rule (“E.R.”) 3(d) provides that, “in an *ex parte*  
7 proceeding, the lawyer shall inform the Tribunal to make an informed decision . . . .” The  
8 comment to E.R. 3.8, which governs the special responsibilities of a Prosecutor, specifically  
9 notes that E.R. 3.3(d) applies to a Prosecutor’s presentation to the Grand Jury. See Ariz. R.  
10 Sup. Ct., Rule 42, E.R. 3.8, cmt.; see also O’Meara v. Gottsfield, 174 Ariz. 576, 579, 851 P.2d  
11 1375, 1378 (1993) (Zlacket, J., concurring) (“[G]iven a Prosecutor’s special ethical  
12 responsibility as a ‘minister of justice,’ [citing to comment 3.8] it should be incumbent upon  
13 him or her to exercise the utmost care and caution in Grand Jury proceedings.”).

14 Thus, in assessing what standard of care the Prosecutor should be held to in preserving  
15 the integrity of the Grand Jury process, this Court must be mindful of the heightened duties of a  
16 Prosecutor in presenting a matter *ex parte* to the Grand Jury. To permit a law enforcement  
17 officer to go forward in his career with the notion that he can, at will, mislead the Grand Jury  
18 either by explicit misstatements or by the omission of relevant information creates a dangerous  
19 precedent not only for the law enforcement officer but for the Prosecutor who, as discussed  
20 above, has nearly unfettered discretion before the Grand Jury.

21 Moreover, an Indictment that is a product of the government usurping control over an  
22 independent investigative body bespeaks of a “devastating personal professional impact that a  
23 later dismissal or acquittal can never undo.” Crimmins, 137 Ariz. at 44, 668 P.2d at 887. Such



1 is the case here, especially since these charges involve homicide and drive by shooting. The  
2 mere charging of these types of crimes can destroy a defendant's life.

3 This Court already returned this matter to the Grand Jury once. During the new  
4 presentation, the prosecutor and the testifying officer once again presented the facts in a  
5 skewed and biased manner and deliberately mislead and misinformed the Grand Jury. Thus,  
6 not only does this Court have the authority to remand once again for a redetermination of the  
7 issue of probable cause, it also has the authority to dismiss with prejudice. *See generally Pool*  
8 *v. Superior Court*, 139 Ariz. 98, 108-109, 677 P.2d 261 (1984).

9 The Arizona Supreme Court has held in relevant part:

10 We have routinely noted that a Prosecutor has an obligation not only to  
11 prosecute with diligence, but to seek justice. **He must refrain from all use of**  
12 **improper methods** designed solely to obtain a conviction." *State v. Bible*, 175  
13 Ariz. 549, 600, 858 P.2d 1152, 1203 (1993) (while a prosecutor 'may strike hard  
14 blows, he is not at liberty to strike foul ones. It is as much his **duty to refrain**  
15 **from improper methods** calculated to produce a wrongful conviction as it is to  
16 use every legitimate means to bring about a just one') (Quoting *Berger v. United*  
17 *States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). *Id.* at 440.

18 *State v. Minnitt*, 203 Ariz. 431, 440, ¶¶ 44-45, 55 P.3d 774, 783 (2002) (emphasis added);  
19 *accord In re Peasley*, 208 Ariz. 27, 42, ¶ 65, 90 P.3d 764, 779 (2004).

20 In the case at bar, as will be discussed, the Prosecutor presented false and misleading  
21 testimony about the circumstances surrounding the shooting and failed to present exculpatory  
22 evidence and legal direction critically bearing on the finding of probable cause. As the second  
23 Grand Jury presentation following a remand, the prosecutor has no excuse for once again  
24 manipulating the Grand Jury proceedings in this manner.

25 **B. The State denied John Due Process of Law by Improperly Misleading  
and Deflecting the Grand Jury from Consideration of Exculpatory  
Evidence on issues of critical importance to the Grand Jury's  
determination of probable cause.**

1 The standard of the law in Arizona regarding misleading officer testimony which is  
2 assisted by the Prosecutor is set forth in the case of *Maretick v. Jarrett*, 204 Ariz. 194, 62 P.3d  
3 120 (App. 2003). In *Maretick*, the Supreme Court ruled that the Defendant was denied his right  
4 to have the State present evidence to the Grand Jury in a fair and impartial manner, and he was  
5 denied substantial due process by having an indictment returned against him with the use of  
6 misleading testimony.

7 The *Maretick* case involved a vehicular homicide, and in that case, as here, only one  
8 witness testified. 204 Ariz. at 195, 62 P.3d at 121. In *Maretick*, Mr. Maretick suffered brain  
9 damage during the accident, and it did not appear that he would ever fully recover. *Id.* He was  
10 also left with no memory regarding the incident. *Id.* When the Grand Jurors asked about the  
11 Defendant's health and whether he had given a statement, however, the Detective indicated that  
12 "he had made pretty much a full recovery" and the Prosecutor stated "he [Detective Twitchell]  
13 has received no statements [from the Defendant]." *Maretick*, 204 Ariz. at 196, 62 P.3d at 122.  
14 The Court ruled that the statement was misleading regarding the Defendant's condition and  
15 whether he could voluntarily make a statement and that it also infringed upon his right to  
16 remain silent. *Maretick*, 204 Ariz. at 196, 62 P.3d at 122; *see also Marston's Inc. v. Strand*,  
17 114 Ariz. 260, 264, 560 P.2d 778, 782 (1977). In reviewing the prosecutor's actions, the Court  
18 went on to state:

19 The Prosecutor therefore 'must not take advantage of his or her role as the *ex*  
20 *parte* representative of the State before the Grand Jury to unduly or unfairly  
21 influence it'. 1 A.B.A. Standards for Criminal Justice, Ch. 3, Std. 3-3.5 cmt. (2d  
22 Ed. 1980). Indeed, the Prosecutor must 'give due deference to [the Grand  
23 Juries] status as the independent legal body'. *Id.* Significantly, the initiation  
24 and control of questioning 'rests with the Grand Jury and not with the  
25 Prosecutor'. *Gershon v. Broomfield* [citations omitted], quoted in *Crimmons*,  
137 Ariz. at 44, 668 P.2d at 887 (Feldman, J. specially concurring). In other  
words, the Prosecutor's powers 'are derived from the Grand Jury; it is the Grand  
Jury that possesses the broad investigative powers, and must be the decision

1 maker'. *Id.* It is not the Prosecutor's role to deflect the Grand Jury from its  
2 inquiry".

3 *Maretick*, 204 Ariz. at 196, 62 P.3d at 122.

4 *Maretick* quotes extensively from the Arizona Supreme Court's holding in *Crimmons v.*  
5 *Superior Court*, 137 Ariz. 39, 44, 668 P.2d 882, 887 (1983). In *Crimmons*, the Defendant was  
6 indicted for kidnapping and his defense was that he made a citizen's arrest of a young man he  
7 thought had burglarized his home. 137 Ariz. at 41, 668 P.2d at 884. During that Grand Jury  
8 proceeding, again, the investigating officer was the only witness. *Id.* The officer inaccurately  
9 testified that there was no evidence that the alleged kidnapping victim was involved with the  
10 burglary. 137 Ariz. at 42, 668 P.2d at 885. The *Crimmons* court held that due process compels  
11 the prosecutor to make a fair and impartial presentation before the Grand Jury, and that the  
12 prosecutor's actions in that case, usurped the Grand Jury's role and deprived the defendant of  
13 his right to an independent Grand Jury. *Crimmons*, 137 Ariz. at 44, 668 P.2d at 887.

14 The prosecutor also has a duty to present "clearly exculpatory" evidence to the Grand  
15 Jury. *State v. Coconino County Superior Court (Mauro)*, 139 Ariz. 422, 425, 678 P.2d 1386,  
16 1389 (1984). "Clearly exculpatory evidence is evidence of such weight that it might deter the  
17 grand jury from finding the existence of probable cause. *Trebus*, 189 Ariz. 621, 944 P.2d 1235  
18 (citing *Mauro*, 139 Ariz. at 425, 678 P.2d at 1389 and *United States v. Ciambrone*, 601 F.2d  
19 616, 623 (2<sup>nd</sup> Cir. 1979)).

20 Here, the State denied John Due Process of Law because the prosecutor deflected the  
21 Grand Jury from considering exculpatory evidence, ignored requests from John to present the  
22 evidence and relevant law, and allowed the testifying officer to mislead the Grand Jury with the  
23 evidence that was presented and to testify falsely.

1 The prosecutor, through the testifying detective, deliberately presented misleading  
2 testimony to the Grand Jury, concerning the alcohol intake of both Beasley and his wife,  
3 Rebecca. (R.T. 07/11/08, at 14.) City of Phoenix Homicide Detective Paul Dalton, presented  
4 the Grand Jury with the blatant lie told by Rebecca Beasley that she and her husband both had a  
5 mere 1 ½ drinks each throughout the evening prior to the shooting. (R.T. 07/11/08, at 14.)  
6 The detective conveniently left out the fact that officers recorded at the scene that Rebecca was  
7 “very intoxicated.” (Bates, at 127.) This information is critical for credibility purposes and  
8 especially since Rebecca is the person who was taken to a one-on-one show-up identification of  
9 John, and since she only exited the police vehicle for the identification with officer’s “help.”  
10 (Bates, at 125.)

11 Aside from the problems regarding Rebecca’s inebriated state, the autopsy report makes  
12 clear that *Beasley* was also extremely inebriated and in fact had a blood alcohol content (BAC)  
13 of .19. (See Attachment A, Autopsy Report, Bates 278.) At one point, the Grand Jurors  
14 explicitly asked Dalton about what “other evidence” (aside from Rebecca’s assertion) there was  
15 regarding the victim’s “drinking” and use of “alcohol” that night and thereafter Dalton did  
16 affirm that the BAC at autopsy was .19 percent. (R.T. 07/11/08, at 23.) Dalton did not,  
17 however, explain what that BAC meant to the Grand Jury, nor did he provide the Grand Jury  
18 with the affidavit of Chester Flaxmayer, which is relevant and necessary evidence relating to  
19 the explicit question asked and which John also formally requested that the Grand Jury be  
20 provided. The affidavit explains how many drinks it takes to attain such a BAC, putting the lie  
21 to Rebecca’s claim that she and Beasley each had a mere 1 ½ drinks that evening.

22 The import of this failure to provide requested evidence cannot be denied. Beasley did  
23 not by any stretch of the imagination have a mere “one and a half glasses or drinks” of “jack

1 and soda” that day. In fact to obtain a .19 blood alcohol level Beasley had to have 10.26 drinks  
2 in his system at *the time of the shooting*. (See Attachment B, Affidavit of Chester Flaxmayer.)  
3 Either Beasley started drinking at the FBR open, which means he would have had 14.15  
4 standard drinks, or he started drinking at Greasewood Flats, which means he would have had  
5 12.21 standard drinks within that much shorter period of time. (See *id.*) Quite clearly, this  
6 number of drinks is so far beyond the reasonable “one and a half glasses” that the Grand Jury  
7 was informed about as to be ridiculous. That Dalton informed the Grand Jury about what  
8 Beasley’s wife had told him, does not alter the fact that Dalton and the prosecutor clearly *knew*  
9 that the statement was a lie and could not possibly be even a close approximation to the number  
10 of drinks Beasley had that evening. Again, this is a *deliberate misrepresentation* of the record  
11 to the Grand Jury that went uncorrected by the prosecutor on an issue of critical import. *State*  
12 *v. Minnitt*, 203 Ariz. 431, 440, ¶¶ 44-45, 55 P.3d 774, 783 (2002); *Pool v. Superior Court*, 139  
13 Ariz. 98, 108-109, 677 P.2d 261 (1984). The misrepresentation was not remedied by the later  
14 admission that the BAC at autopsy was .19, since no context or meaning was given to that  
15 number to explain it. Moreover, it is clear that the prosecutor deflected the Grand Jury from  
16 any further inquiry into the .19 BAC, by immediately asking her own question redirecting the  
17 detective to what occurred after John Stuart was stopped by police. (R.T. 07/11/08, at 23.)

18 The Grand Jury is the investigative body, and when they ask for “evidence” regarding  
19 the alcohol intake of the victim, they must be provided with the evidence the prosecutor had in  
20 the form of Chester Flaxmayer’s affidavit. They should not have been deprived of the  
21 requested evidence, nor should they have been deflected from their questioning regarding the  
22 evidence. The evidence presented certainly misportrayed the “victim” in this case, and  
23 hindered the Grand Jury from its independent ability to determine whether John should be

1 charged or whether in fact he was just defending himself against the *severely drunken*  
2 *aggressor*, Beasley. *See Trebus*, 189 Ariz. 621, 944 P.2d 1235; *Mauro*, 139 Ariz. at 425, 678  
3 P.2d at 1389; *Crimmons*, 137 Ariz. at 44, 668 P.2d at 887; *Maretick*, 204 Ariz. at 196, 62 P.3d  
4 at 122.

5 As if this egregious omission and misrepresentation was not enough, to further mislead  
6 the Grand Jurors, Dalton also relayed that the cause of death was a “[g]unshot wound to the  
7 head and the manner of death was homicide,” (R.T. 07/11/08, at 10), but he conveniently failed  
8 to explain that the pathological diagnosis regarding the death included a finding of “[e]thyl  
9 alcohol intoxication” along with the gunshot wound. (Attachment A, Autopsy Report, Bates  
10 267.) This misrepresentation further establishes that the prosecutor and the testifying officer  
11 were acting together to usurp the Grand Jury’s role by completely “failing to inform them of  
12 relevant facts and law.” *Crimmins*, 137 Ariz. at 44, 668 P.3d at 887. This especially egregious  
13 and reversible, since the Grand Jury explicitly asked for other evidence regarding the victim’s  
14 alcohol intake and since the evidence was also explicitly requested by John Stuart to be  
15 provided to the Grand Jury. This Court should dismiss this case with prejudice for these  
16 violations and due to the import and effect on John’s substantial rights.

17 Dalton relayed Rebecca’s further assertion that Beasley and she were driving the speed  
18 limit and did not speed up, flash their high beams, or engage in any other provoking behavior  
19 when John and Cindy passed them that night. (R.T. 07/11/08, at 14–15.) Rebecca further  
20 asserted that John yelled to Beasley out the window at the light “[y]our wife’s a cunt.” (R.T.  
21 07/11/08, at 14.) But, in fact, witnesses actually heard Beasley and Rebecca yell those words at  
22 John, not the other way around. (Bates, at 10, 99.) Jeshua Espinoza informed that *Rebecca’s*  
23 specific words *yelled at John* as she shoved at his vehicle were “[y]our wife’s a fucking cunt.”



1 (Bates, at 99.) This is important, not only because witnesses repeatedly asserted that Rebecca  
2 and Beasley were the aggressors, but also for the added reason that this indicates Rebecca was  
3 *out of the vehicle* participating in the confrontation, which is supported by another witness,  
4 Baldev Sangha. (Bates, at 106.)

5 Furthermore, when testifying to the Grand Jury, Dalton acknowledged the threats by  
6 Beasley as reported by Cindy, "I'm going to kick your ass...[y]ou need your ass kicked.  
7 You're going to die. I'm going to pull my gun on you. I'm going to draw my gun." (R.T.  
8 07/11/08, at 12.) But he failed to mention that Cindy watched Beasley swing at John and grab  
9 at John's throat while making these comments. (Bates, at 10, 60.) This is another critical piece  
10 of information that the Grand Jury was denied. Instead, Dalton completely misrepresented  
11 Beasley's attack on John and reaching into the vehicle to do so, by asserting that Cindy stated  
12 that Beasley "was trying to reach in the window, rear window, and Stuart was telling him to  
13 stop now and get back." (R.T. 07/11/08, at 13.) The misrepresentation is critical, because it  
14 deprives the Grand Jury of any reason to even consider the defense of occupied structure  
15 statute. It makes no sense at all to question if John was being attacked and acting in self-  
16 defense from Beasley as he reached into the vehicle, when the only information provided to the  
17 Grand Jury was that Beasley was reaching into the "rear" window.

18 In order to determine whether there was probable cause to charge John, the Grand Jury  
19 needed to be properly informed of Beasley's drunken attack on John as John sat in his vehicle.  
20 The misinformation critically affected John's right to a fair proceeding. *See Trebus*, 189 Ariz.  
21 621, 944 P.2d 1235; *Mauro*, 139 Ariz. at 425, 678 P.2d at 1389; *Crimmons*, 137 Ariz. at 44,  
22 668 P.2d at 887; *Maretick*, 204 Ariz. at 196, 62 P.3d at 122.



1 Dalton further explained that Josh Spade watched the incident from immediately behind  
2 John's vehicle and he detailed John's moving his vehicle and even hitting Josh's vehicle. (R.T.  
3 07/11/08, at 20-21.) He also presented some information about what Josh saw, but Dalton  
4 failed to inform the Grand Jury specifically that Josh stated Beasley began the confrontation  
5 and approached Beasley as they were arguing and was trying to "pull Stuart out of his vehicle."  
6 (Bates, at 28, 143.) In fact, Spade repeatedly asserted that Beasley was grabbing and pulling on  
7 John immediately prior to the gunshot, but that information was missing from the Grand Jury  
8 testimony. (Bates, at 143.)

9 In her statement to police, Shellani Jensen described how Beasley confronted John and  
10 was angrily waving his arms around and aggressively moving up toward John's vehicle and  
11 acting like he was going to hit John, immediately before the gunshot. (Bates, at 34.) But that  
12 information was not presented to the Grand Jury and instead they were told her statement was  
13 as follows:

14 Saw Beasley moving his hands and walking back and forth in the  
15 roadway in front [of] his Isuzu. Saw a Toyota cut over towards him and she  
16 thought Stuart was going to hit Beasley and crush him. It looked like Beasley  
was arguing with someone in the Toyota, but it was too dark to tell. She heard  
one gunshot, and saw Mr. Beasley fall to the ground.

17 (R.T. 07/11/08, at 20.) While, again, this testimony provides part of the witness' description of  
18 the events, it fails to inform the Grand Jury about who was really the aggressor and what basis  
19 there may have been for a shot to have been fired. *See Trebus*, 189 Ariz. 621, 944 P.2d 1235;  
20 *Mauro*, 139 Ariz. at 425, 678 P.2d at 1389.

21 Aside from the missing or misleading information provided concerning witnesses who  
22 were discussed at the Grand Jury presentation, there were also witnesses who were not  
23 discussed at all, and they too had information that was exculpatory and should have been

1 presented. For example, Sarah Banks stated that she witnessed Beasley get out of his vehicle  
2 and approach John's, after which Beasley put his hand's in the window and appeared to be  
3 "strangling" John. (Bates, at 146.) When asked to clarify if she could really see him strangling  
4 John she admitted that she could not be sure, but that Beasley was yelling and had his hands in  
5 the window of John's vehicle. (Bates, at 147.)

6 Stacy Strachan also witnessed the incident and asserted that Beasley got out of his  
7 vehicle and angrily confronted John and was "pulling on [John's] door" prior to the gunshot.  
8 (Bates, at 69.) Likewise, Kim Kemper saw Beasley angrily pounding on John's vehicle just  
9 before the gunshot and knew from his "animated" actions that Beasley was "angry." (Bates, at  
10 150-151.) Again, none of this information was provided to the Grand Jury.

11 John explicitly argued these same problems in the original Grand Jury remand motion  
12 and, despite being made aware of the problems, and despite a further formal *Trebus* letter  
13 explicitly requesting any representation to the Grand Jury include all of the above relevant and  
14 critically necessary information, the prosecutor and the testifying detective presented the same  
15 factually inaccurate and deceptive testimony during the new presentation after the remand. (See  
16 Attachment C, June 23, 2008, Letter to Susie Charbel.) This is the type of willful behavior that  
17 warrants not only remand for redetermination of probable cause, but also dismissal with  
18 prejudice.

19 Moreover, when explicitly asked if any "of the witnesses say at any time that they saw  
20 the victim pulling the suspect out of the FJ cruiser," and Dalton blatantly lied and said "No."  
21 (R.T. 07/11/08, at 25.) When follow-up questions regarding whether anyone saw the victim  
22 "punching him, scratching him, threatening him with a knife, gun, anything like that," the  
23 officer first asserted "No," and then conceded, "Maybe one - - I think it was Mr. Spade that

1 may have saw him break the plain of the actual driver's window, his hands breaking the plain  
2 of that." (R.T. 07/11/08, at 25.) As already discussed, in fact there was at least one other  
3 witness who saw Beasley put his hand's in the window and appear to be "strangling" John.  
4 (Bates, at 146.) There were also other witnesses who saw Beasley's hands hitting the FJ cruiser  
5 and breaking the plane of the window as he angrily confronted John and was pulling on John's  
6 driver's side door. (Bates, at 69, 150-151.) Again, the Grand Jury was deprived of this  
7 important information.

8 John wants to be clear that he is not challenging the sufficiency of the evidence, but he  
9 is challenging the misrepresentations made to the Grand Jury and critical omissions by the  
10 testifying Officer, which were aided and uncorrected by the prosecutor. *Maretick*, 204 Ariz.  
11 194, 62 P.3d 120; *Crimmons*, 137 Ariz. 39, 44, 668 P.2d 882, 887. John also understands that  
12 the Grand Jury function is not designed to be a trial on the merits and does not require a  
13 presentation of the defendant's defense. But, the Grand Jury function is to act as an  
14 *independent* body and not as a tool for the prosecutor to manipulate to assure a charging  
15 decision where one is not warranted. *See Trebus*, 189 Ariz. at 624-625, 944 P.2d at 1238-39;  
16 *Crimmins*, 137 Ariz. at 43-44, 668 P.3d at 886-87. As stated in *Trebus*:

17 The interests of the prosecutor and the state are not limited to indictment but  
18 include *servng the interests of justice*; thus, the prosecutor's obligation to make  
19 a *fair and impartial presentation* to the jury has long been recognized. *See*  
*Cummins*, 137 Ariz. at 41, 668 P.2d at 884; see also *State v. Emery*, 131 Ariz.  
493, 506, 642 P.2d 838, 851 (1982).

20 *Trebus*, 189 Ariz. at 64-625, 944 P.2d at 1238-39. (Emphasis added).

21 John is entitled to a fair and impartial presentation to the Grand Jury. *See Trebus*, 189  
22 Ariz. at 624-625, 944 P.2d at 1238-39 (1997); *Crimmins*, 137 Ariz. at 43-44, 668 P.3d at 886-  
23 87 (Feldman, J., concurring); Ariz. R. Crim. P., Rules 12.1-12.9. He did not receive that in this

1 case. Instead, the testifying officer and the prosecutor acted together to usurp the Grand Jury  
2 function and deprive the jurors from a consideration of whether there really was probable cause  
3 to charge John given the true facts. *See Trebus*, 189 Ariz. 621, 944 P.2d 1235; *Mauro*, 139  
4 Ariz. at 425, 678 P.2d at 1389; *Crimmons*, 137 Ariz. at 44, 668 P.2d at 887; *Maretick*, 204  
5 Ariz. at 196, 62 P.3d at 122.

6 All this missing and/or misrepresented evidence was exculpatory and necessary to alert  
7 the Grand Jury to the true facts of the incident and to complete the story and to assure that the  
8 jurors were not misled about who instigated the incident and the reason that the gunshot was  
9 fired. The testimony presented incorrectly portrayed the Beasley's, despite the witness accounts  
10 that tend to establish the Beasley's were hostile, extremely inebriated, and aggressively  
11 attacking John (and his fiancé) as John sat in his vehicle at the stop light. *See Trebus*, 189 Ariz.  
12 621, 944 P.2d 1235; *Mauro*, 139 Ariz. at 425, 678 P.2d at 1389; *Crimmons*, 137 Ariz. at 44,  
13 668 P.2d at 887; *Maretick*, 204 Ariz. at 196, 62 P.3d at 122.

14 Due to the fact that this was the second presentation to the Grand Jury, and that the  
15 State was on notice that John asked for the information to be provided to the Grand Jury, not  
16 only does this Court have the authority to remand for a redetermination of the issue of probable  
17 cause, it also has the authority to dismiss with prejudice. (See Attachment C, June 23, 2008,  
18 Letter to Susie Charbel.) The blatant omissions and misrepresentations have clearly prejudiced  
19 the defendant by effectively removing the probable cause determination from the Grand Jury  
20 and dictating the result. Such actions are inexcusable. *See In re Peasley*, 208 Ariz. 27, 42, ¶  
21 65, 90 P.3d 764, 779 (2004); *State v. Minnitt*, 203 Ariz. 431, 440, ¶¶ 44-45, 55 P.3d 774, 783  
22 (2002); *Pool v. Superior Court*, 139 Ariz. 98, 108-109, 677 P.2d 261 (1984).

1                   **C. The State Denied John Due Process of Law Because the Grand Jury was**  
2                   **not Instructed on the Applicable Law.**

3                   The State was obligated, but failed, to instruct the Grand Jury on the applicable law  
4                   given the facts of John's case. *Crimmins*, 137 Ariz. at 42, 668 P.2d at 885 (1983) ("We hold  
5                   that the citizen's arrest statutes were part of the applicable law given the facts of the case, and it  
6                   was the duty of the prosecutor as legal advisor to the grand jury to instruct on that law.").

7                   In granting the original Grand Jury Remand Motion, this Court alerted the prosecutor to  
8                   the necessity that A.R.S. § 13-418, be provided to the Grand Jury in any representation of the  
9                   case. The prosecutor had argued that the presentation of the general self-defense statutes was  
10                  sufficient, but this Court disagreed. During the representation, the prosecutor did provide  
11                  A.R.S. § 13-418 to the Grand Jury, however, this time, the prosecutor failed to present the  
12                  other applicable self-defense statutes A.R.S. §§ 13-404 (self-defense), 13-405 (use of deadly  
13                  physical force), 13-406 (defense of a third person), as well as A.R.S. § 13-411 A, B, C, and D,  
14                  which protects a person's right to use deadly physical force to prevent the commission of  
15                  crime.

16                  John Stuart explicitly requested in a formal written request to Susie Charbel on June 23,  
17                  2008, and in accordance with *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235 (1997), that these  
18                  statutes be provided to the Grand Jury. John also requested that the lesser-included offense  
19                  statutes, A.R.S. §§13-1102 and 13-1103, regarding manslaughter and negligent homicide be  
20                  presented, but the prosecutor failed to present those statutes as well. (R.T. 07/11/08, at 3-5.)  
21                  The prosecutor explicitly referred the Grand Jury only to A.R.S. §§ 13-1101 and 13-1104,  
22                  bypassing any reference to the requested statutes.

23                  In *Crimmins*, the Arizona Supreme Court examined a similar failure to give instructions  
24                  and claim of a denial of a substantial procedural right. 137 Ariz. at 40, 668 P.2d at 883. The

1 defendant in *Crimmins* was indicted on a kidnapping charge and asserted as a defense that he  
2 had made a citizen's arrest of a young man whom he thought had burglarized his home. *Id.*  
3 The State's failure to give instructions regarding the citizen's arrest statute "rendered the  
4 presentation of this case less than fair and impartial," and the court ordered the redetermination  
5 of probable cause by an independent grand jury. *Id.* at 43, 668 P.2d at 886; *see also Trebus v.*  
6 *Davis in and for County of Pima*, 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997) ("[Due  
7 process] requires the prosecutor to instruct the grand jury on all the law applicable to the facts  
8 of the case.").

9 The circumstances are similar here. The State presented its case through a single  
10 witness, the investigating detective. Contrary to the command of *Crimmins*, the grand jurors  
11 received no instruction on the range of justification defenses that were applicable and lesser  
12 included offenses that were supported by the evidence. Thus, the jurors who returned the  
13 Indictment against John were once again denied a full and fair presentation of the applicable  
14 law, and John was denied substantial due process as a result.

15 Not only did the State fail to instruct the grand jury on applicable statutes, the State  
16 ignored the defendant's express request to present the statutes. *Trebus v. Davis*, 189 Ariz. 621,  
17 624-625, 944 P.2d 1235, 1238-39. This constitutes a willful refusal to provide John with his  
18 substantial rights and should not be tolerated by this Court. Dismissal with prejudice is thus the  
19 appropriate remedy.

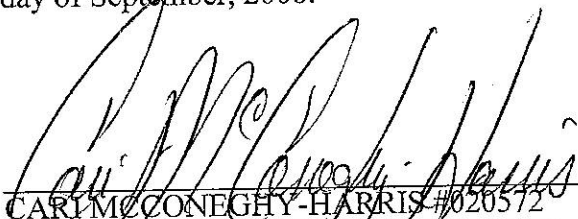
20 The lack of the statutes, dictates that at least another remand is necessary. A.R.S. § 21-  
21 411(A); Ariz. R. Crim. P., Rule 12.8; *Crimmins*, 137 Ariz. at 42, 668 P.2d at 885 ("We hold  
22 that the citizen's arrest statutes were part of the applicable law given the facts of the case, and it  
23 was the duty of the prosecutor as legal advisor to the grand jury to instruct on that law.") As in

1 *Crimmins*, the State's failure to give instructions regarding all the applicable statutes (here,  
2 A.R.S. §§ 13-411, 13-418, 13-3889), "rendered the presentation of this case less than fair and  
3 impartial." *Id.* at 43, 668 P.2d at 886; *see also Trebus v. Davis in and for County of Pima*, 189  
4 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997) ("[Due process] requires the prosecutor to instruct  
5 the grand jury on all the law applicable to the facts of the case.").

6 **CONCLUSION**

7 Pursuant to Rule 12.9(a) of the Arizona Rules of Criminal Procedure, John Stuart  
8 requests that this Court dismiss this matter with prejudice or in the alternative Remand this  
9 matter to the Grand Jury for a redetermination of the issue of probable cause. John was denied  
10 his right to have the State present evidence to the grand jury in a fair and impartial manner, and  
11 was denied substantial due process in having an indictment returned against him with the use of  
12 misleading and incomplete testimony and law. *See Crimmins*, 137 Ariz. at 41, 668 P.2d at 884  
13 (due process requires a fair and impartial presentation of the evidence). The one testifying  
14 witness, the police detective, with the prosecutor's assistance, failed to inform and misled the  
15 Grand Jury to believe something that was not true, thereby usurping the Grand Jury's role, and  
16 depriving John of his right to an independent Grand Jury.

17 **RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of September, 2008.

18  
19  
20   
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25 **ORIGINAL OF THE FOREGOING**



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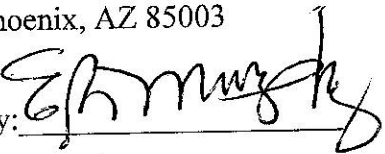
1 filed this 8<sup>th</sup> day of September, 2008, to:

2 Clerk of the Court  
3 Maricopa County Superior Court  
4 201 W. Jefferson  
5 Phoenix, AZ 85003

6 **COPY OF THE FOREGOING**  
7 delivered this 8<sup>th</sup> day of September, 2008, to:

8 Honorable Paul McMurdie  
9 Judge of the Superior Court  
10 East Court Building  
11 101 W. Jefferson  
12 Phoenix, AZ 85003

13 Susie Charbel  
14 Deputy County Attorney  
15 Maricopa County Attorney's Office  
16 301 W. Jefferson  
17 Phoenix, AZ 85003

18 By: 

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