

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Petitioner,

v.

KELLI WARD; TYLER BOWYER;
NANCY COTTLE; JACOB
HOFFMAN; ANTHONY KERN;
JAMES LAMON; ROBERT
MONTGOMERY; SAMUEL
MOORHEAD; GREGORY SAFSTEN;
MICHAEL WARD; RUDOLPH
GIULIANI; JOHN EASTMAN; BORIS
EPSHTEYN; CHRISTINA BOBB;
MICHAEL ROMAN; MARK
MEADOWS,

Respondents.

CV-25-0271-PR

Court of Appeals

No. 1 CA-SA 25-0167

Maricopa County Superior Court

No. CR2024-006850-001

CR2024-006850-001

CR2024-006850-002

CR2024-006850-003

CR2024-006850-004

CR2024-006850-005

CR2024-006850-006

CR2024-006850-007

CR2024-006850-008

CR2024-006850-010

CR2024-006850-011

CR2024-006850-012

CR2024-006850-013

CR2024-006850-014

CR2024-006850-016

CR2024-006850-017

CR2024-006850-018

STATE OF ARIZONA'S PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

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I. Introduction

A grand jury indicted 18 people (“Defendants”) for conspiracy, fraudulent schemes and artifices, and forgery related to their acts within a nationwide scheme to prevent the lawful transfer of the presidency after the 2020 election. The scheme involved eleven Defendants signing documents on December 14, 2020, in which they falsely purported to be the “duly elected and qualified Electors”; submitting those documents to various government officials; and then spending the next four weeks trying to legitimize those false documents through pressure campaigns on state and national leaders, and false claims of election fraud.

Following their indictment, Defendants claimed they submitted the false documents only as a “contingency” in case the results of the election were overturned and claimed the Electoral Count Act of 1887 (“ECA”) “authorized” this contingency plan. In a motion to remand pursuant to Arizona Rule of Criminal Procedure (“Rule”) 12.9, Defendants argued the State was required to instruct the grand jury on the ECA. The State countered, arguing that it had no duty to instruct on the ECA, and alternatively argued any error was harmless because it had provided either the substance or actual text of the relevant portions of the ECA, presented evidence supporting the “contingency” defense, and told the grand jury it could choose not to indict Defendants based on a contingency defense.

The trial court, however, agreed with Defendants and remanded the indictment on the sole basis that the State failed to provide the ECA to the grand jury. It further suggested the State had a duty to instruct the grand jury on the ECA because the ECA was central to the Defendant's claims that they were acting lawfully and without an intent to defraud.

The trial court's ruling expands the State's duty to instruct the grand jury beyond exculpatory evidence, justification defenses, and other affirmative defenses. The ECA is neither a justification defense nor relevant to the issue of probable cause. First, the ECA is a federal statute that provides no defense to the state fraud, forgery, and conspiracy charges. Moreover, instructing the grand jurors on the ECA would be misleading at best and would ask them to determine if the Defendants' legal interpretation of the ECA is correct, a duty reserved for the judiciary.

The trial court compounded its error by not determining whether the purported instructional error was harmless, in direct contravention to this Court's precedent. The issues presented in this case affect every case that is presented to the grand jury. The State, as the grand jury's legal advisor, should have consistency in knowing what instructions must be provided, and should not be subject to after-the-fact second guessing imposed here.

The State's only remedy from this erroneous ruling is through special action review. See *State v. Fields ex rel. Cnty. of Pima*, 232 Ariz. 265, 267, ¶ 6 (App. 2013).

The State petitioned for special action review, raising issues of first impression and statewide importance. After full briefing, the court of appeals declined jurisdiction without any reasoning. The State now seeks review from this Court. The issues presented in this petition are succinct, of statewide importance, and of first impression. This Court should accept review, reverse the trial court's order, and remand with instructions to consider the remaining claims in the Defendants' Rule 12.9 motions.

II. Issue Presented for Review

Whether the court of appeals erred by declining jurisdiction over the State's petition for special action.

III. Issues Presented Below, But Not Decided¹

1. Whether the trial court erred by remanding to the grand jury because the State did not read the entire text of the Electoral Count Act to the grand jury.
2. Whether trial courts must evaluate alleged instructional errors for harmlessness before remanding to the grand jury.

¹ In the court of appeals, Defendants raised alternative arguments for affirming the remand order. Neither the trial court nor the court of appeals addressed those arguments. If Defendants raise them again, this Court should decline to review them and allow the lower courts to address them in the first instance.

IV. Material Facts

A state grand jury investigated the events surrounding the filing of documents signed by people purporting to be the “duly elected and qualified Electors” from the State of Arizona in a scheme to change the outcome of the 2020 presidential election. After 13 days of testimony, the grand jury indicted 18 people. *See generally* APPV1-111 (indictment); APPV2 (grand jury transcripts).

The indictment summarizes evidence outlining the Defendants’ plan, which was premised, in part, on [Section 7](#) of the ECA. [Section 7](#) provides that “[t]he electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment” [3 U.S.C. § 7](#) (2020); *see also* APPV1-126. An unindicted coconspirator claimed that, under the ECA, “if there was a pending legal challenge that could change the outcome of the election from Biden-Harris to Trump-Pence, the Republican electors were required to meet and vote on December 14, 2020,” or the Vice President would not be able to count their votes on January 6, 2021. APPV1-146. He argued that this legal analysis was “supported by historical precedent (in particular, the 1960 Kennedy-Nixon contest),” where the Hawaiian Democratic elector nominees submitted electoral college ballots pending a court-ordered recount. *See* APPV1-147.

However, Defendants undermined this “contingency” claim by then pursuing a lawsuit to have the relevant portions of the ECA declared unconstitutional so that Vice President Pence could “exercise ... exclusive authority and sole discretion in determining which electoral votes to count for a given State.” *See* APPV3-916-20; APPV2-0137-38; -0461-62; -0517-18; -0701-02; -0137-38; -0462; APPV1-161. The grand jury also received as exhibits two memos drafted by Defendant Eastman in which he claimed portions of [3 U.S.C. § 15](#) (2020) were unconstitutional. *See* APPV3-641-49.

Much of the grand jury presentation focused on Defendants’ intent. *See, e.g.*, APPV2-0081-82; -0364-65; -1318-19. The State was aware that at least some of the Defendants would advance the “contingency” defense and argue they had no intent to defraud. *See, e.g.*, APPV3-196. Prosecutors introduced this potential defense on the first day of testimony as a “legal theory that might conceivably justify alternate electors.” *See* APPV2-0056-59. The defense was then discussed on seven other days of testimony, often labeled the “contingency plan.” *See, e.g.*, APPV2-0362-63; -0450-51; -0499; -0922; -1064, -1079-80; -1249; -1313-16. The State explained that if the grand jurors believed Defendants’ actions were done only as a contingency, then the Defendants had no intent to defraud, and the grand jurors should not find probable cause. *See* APPV2-1316-1317.

Defendant Hoffman also submitted a *Trebus* letter, which the grand jury considered. *See* APPV2-1033-1071; APPV3-683-713. In the letter, Hoffman detailed the contingency plan, and attached a memo written by Kenneth Chesebro detailing the plan. APPV3-702-707. He also urged the grand jury to read co-defendant Kelli Ward's book, which he claimed showed he had "no criminal or fraudulent intent," but instead was "following legal guidance from lawyers." APPV3-699-700.

The grand jury considered the substance and text of the relevant portions of the ECA through witness testimony, exhibits, the *Trebus* letter, the draft indictment, and discussions with the prosecutor. For example, the grand jury received the text of the "counting provision" of [Section 15](#) in two separate exhibits. *See* APPV3-642; APPV3-646. The draft indictment contained nearly the full text of [Section 7](#), *see* APPV3-747, and the grand jury received substantial instruction detailing the requirements of [Sections 5](#) (Safe Harbor Provision), [6](#) (Certificates of Ascertainment and Final Determination), and [11](#) (mailing requirement for certificates). *See, e.g.*, APPV2-0424, -0425, -0433, -0436, -0813, -0822-23, -1070; APPV3-581, -644-49, 695-97, 702-13.

The jurors and the prosecutor also engaged in a lengthy discussion about "intent to defraud" being an element of the offense. A grand juror asked the prosecutor whether any federal statute, like the ECA, or any case law prevented the

grand jury from considering criminal charges. APPV2-1315. The prosecutor answered, “No. There is no legal prohibition against you all prosecuting them under federal law.” *Id.* Regarding the 1960 Hawaii example, the prosecutor explained that the grand jury could “assess that evidence for what happened in Hawaii as you would in terms of does it affect intent [and] knowledge ... of the individual actors. ... Does what happened in Hawaii factually affect the people today and their actions ... that you may not find probable cause That’s up to you. That’s your choice.” APPV2-1316-17.

The grand jury chose to indict. Thereafter, several Defendants moved to remand the case to the grand jury. APPV1-005. Defendants asserted numerous errors requiring remand, including that the State failed to read the ECA to the grand jury. The State responded that it “adequately presented the case to the grand jury and characterized the facts related to anticipated defenses.” APPV1-469. The trial court remanded the case to the grand jury on the sole basis that the State had a duty to provide the grand jury with the full text of the ECA. APPV1-006. The trial court declined to address Defendants’ other arguments for a remand. *Id.*

The trial court stayed all proceedings so the State could pursue this special action. APPV1-624. The court also clarified that the remand order applied to all 16 remaining defendants. *Id.* After full briefing, the court of appeals declined special action jurisdiction without addressing the merits of the State’s petition. APPV1-652.

V. This Court Should Grant Review.

Although special action jurisdiction is discretionary, the court of appeals abused its discretion by declining jurisdiction of the State's petition. Special action jurisdiction is the State's *only* remedy from the trial court's erroneous order. The State's petition raised issues of first impression and statewide importance, and these issues will entirely evade further review if not addressed through special action. The court of appeals therefore abused its discretion by declining jurisdiction and this Court should grant review. *See* [Ariz. R. Crim. P. 31.21\(d\)\(1\)\(C\)](#) (reasons for granting review).

The trial court erred in two respects. First, it imposed a novel duty on prosecutors to instruct the grand jury on a non-criminal federal statute that provided no defense to the charges and was otherwise irrelevant to the elements of the offenses. Second, the trial court compounded its error by failing to evaluate whether any instructional error was harmless.

A. The State has no duty to instruct on non-criminal federal statutes that provide no defense to the charges and are otherwise irrelevant to the elements of the offenses.

In Arizona, “the primary function of the grand jury is to determine whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it.” [State v. Superior Court \(Mauro\)](#), 139 Ariz. 422, 424 (1984) (quotation omitted). The “prosecutor’s role

before the grand jury is unique in our system” because they must “assist[] the jurors in their inquiry.” *Maretick v. Jarrett*, 204 Ariz. 194, 197, ¶ 10 (2003); *see also* A.R.S. § 21-408(A); A.R.S. § 21-427(A). In that role, the prosecutor must “instruct the grand jury on all the law applicable to the facts of the case.” *Cespedes v. Lee*, 243 Ariz. 46, 48-49, ¶ 9 (2017) (quoting *Trebus v. Davis*, 189 Ariz. 621, 623 (1997)). That “duty includes providing instructions on justification defenses that, based on the evidence presented to the grand jury, are relevant to the jurors determining whether probable cause exists to indict the defendant.” *Id.* at 49, ¶ 9.

However, a prosecutor need not instruct the grand jury as a trial court would a petit jury. *See Mauro*, 139 Ariz. at 425 (holding the “state is not required ... to instruct on all lesser included offenses” and that “the defense of insanity is not well suited to the primary function of the grand jury”); *see also State v. Superior Court (Fisher)*, 119 Ariz. 286, 288-89 (App. 1978) (finding “nothing misleading or incorrect” about prosecutor’s summary of a statute to the grand jury and that, in context, “there was no need to spell out the procedural details set forth in the statute”). Rather, the State must instruct the grand jury so that it receives a “fair and impartial presentation of the evidence and law” and its “indictment is supported by probable cause.” *Mauro*, 139 Ariz. at 425.

To reach its ruling, the trial court had to find the ECA was a “justification defense[] that, based on the evidence presented to the grand jury, [was] relevant to

the jurors determining whether probable cause” existed to indict Defendants. [Cespedes](#), 243 Ariz. at 48-49, ¶ 9. But the ECA has no application to the probable cause determination “based on the evidence presented,” *id.*, because Defendants actually sued to have portions of the ECA declared unconstitutional—it was not central to their defense. *See Gohmert v. Pence*, 510 F. Supp. 3d 435, 438-40 (E.D. Tex. 2021) (“asking the Court to declare that the Electoral Count Act [was] unconstitutional”). It is illogical to declare that the very statute Defendants sued to have declared unconstitutional was central to their defense.

Here, the trial court’s order requires the State to provide the grand jury the ECA, seemingly in full. To make sense of the trial court’s order, it must logically be directed at instructing on [3 U.S.C. § 15 \(2020\)](#), given that [3 U.S.C. § 7](#) is substantially quoted in the indictment.² Regardless, [Section 15](#) and the remaining provisions of the ECA do not inform the grand jury about any elements of the charged offenses, nor do they provide any justification or affirmative defense. *See* [A.R.S. § 13-103\(B\)](#) (defining affirmative defense). Defendants were charged with fraudulent schemes, fraudulent practices, forgery, and conspiracy, of which the ECA says nothing. *See* APPV1-114.

² Read literally, the order would require the State instruct on the entire ECA, including provisions regarding parliamentary procedure for the joint session of Congress to count electoral college votes. *See, e.g.,* [3 U.S.C. § 18 \(2020\)](#).

The trial court relied solely on cases citing the State’s duty to instruct on affirmative and justification defenses. See APPV1-006 (prosecutor’s duty to instruct “includes providing instructions on justification defenses that, based on the evidence presented to the grand jury, are relevant to the jurors determining whether probable cause exists to indict the defendant”). Although the Defendants claimed the ECA authorized their conduct, nothing in the text of the ECA provides an affirmative or justification defense to the charged acts.³ The hallmark of such defenses is that they “excuse” or justify otherwise criminal conduct. [A.R.S. § 13-103\(B\)](#). These defenses do not deny elements of the charges, like lack of intent. *Id.*; *see also State v. Brown*, [258 Ariz. 270, 275, ¶ 25 \(App. 2024\)](#) (“Justification defenses are one of three mutually exclusive types of defenses in criminal cases (the other two are affirmative defenses that attempt to excuse criminal conduct and defenses that deny or negate an element of the charge or responsibility).”).

Nor is any evidence available that a grand jury could use to find [Section 15](#) justified Defendants’ conduct. As part of their scheme, Defendants filed a lawsuit arguing “[3 U.S.C. §§ 5 and 15](#), are unconstitutional because these provisions violate

³ To the extent Defendants argue their actions were “contemplated and authorized by the United States Constitution and ECA,” *see* APPV1-176, the State cannot provide that instruction. [Joel K. Goldstein, *The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective*, 21 U. N.H. L. REV. 269, 401 \(2023\)](#) (disputing Defendants’ interpretation).

the Electors Clause and the Twelfth Amendment of the U.S. Constitution.” APPV3-917. The evidence the State had when presenting the case to the grand jury showed that Defendants saw [Section 15](#) as an impediment to their scheme, concluding they “would suffer an injury-in-fact” if Vice President Pence “follows the procedures in [Section 15](#) of the Electoral Count Act.” APPV3-936. In his *Trebus* letter, Defendant Hoffman provided a CNN article that reached the same conclusion: “If the state’s governor has certified only one slate, [which Arizona’s did,] the Electoral Count Act says that is the slate that Congress must count—regardless of when it was certified.” APPV3-711. For that reason, the United States Senate Parliamentarian considered Arizona’s Republican electors’ ballots a “private citizen submission” and did not submit them to Congress. APPV3-412. In other words, the Arizona Republican electors fraudulently represented themselves as “Arizona’s lawful electors” and submitted their votes, with no support in law.

If Defendant’s mistaken view of the ECA affected their mens rea, as the trial court indicated and Defendants now argue, reading the ECA does not address the Defendants’ intent. The factual circumstances underlying a lack-of-intent defense are not subject to legal instruction. Nor was it the grand jury’s role to determine whether the Defendants’ legal theory was actually correct. *See [Fields](#), 232 Ariz. at 267-68, ¶ 7* (reversing order requiring prosecutor to present competing legal theories to the grand jury). Rather, the grand jury’s role was to determine whether probable

cause existed that Defendants had intent to defraud when they submitted the false ballots and then strived for a month to have them accepted as the true ballots. That determination does not turn on whether various provisions of the ECA, cobbled together, permitted contingent elector ballots. Rather, it turns on whether Defendants' mistaken view of the law affected their intent, which the State instructed the grand jury to consider. *See* APPV2-1317-18.

This Court should grant review and vacate the remand order because the State was not required to read the entire ECA to the grand jury.

B. The trial court erred by not evaluating any theoretical error for harmlessness; any error in not reading the text of the ECA to the grand jury was harmless beyond a reasonable doubt.

The trial court erred by not considering whether any alleged instructional error was harmless. Instead, the court simply concluded that because “the State failed to provide the ECA to the grand jury,” the Defendants “were denied a substantial procedural right as guaranteed by Arizona law.” APPV1-006. Even assuming the State should have read the ECA to the grand jury, any error was harmless because the grand jury received either the substance or actual text of the ECA through exhibits, witness testimony, a *Trebus* letter, and instructions from the prosecutor. This Court should reverse the trial court's order because the Defendants failed to meet their burden of showing actual prejudice.

Some Defendants rely on *State v. Good*, 10 Ariz. App. 556, 559 (1969), to argue that trial courts need not review instructional errors for harmlessness. Contrary to Defendants’ assertions, *Good* has been implicitly abrogated. In *State v. Hocker*, 113 Ariz. 450, 454 (1976), this Court evaluated three alleged errors, including one similar to the error in *Good*, for harmlessness. This Court specifically rejected the defendant’s contention that “any sort of error in the grand jury proceedings invalidates the indictment even without a showing of prejudice to the defendant.” *Id.* Thus, *Good*’s discussion of prejudice was implicitly overruled by *Hocker*. See also *State v. Baumann*, 125 Ariz. 404, 409 (1980) (“Absent a showing of prejudice in these grand jury proceedings, there can be no reversible error.”) (citing *Hocker*, 113 Ariz. at 454-55, and *Good*, 10 Ariz. App. at 559-60).

Since *Hocker*, this Court has repeatedly evaluated grand jury presentation errors for harmlessness. See, e.g., *Maretick*, 204 Ariz. at 198-99, ¶¶ 14-16 (reviewing grand jury presentation errors, including an instructional error, for harmlessness); *State ex rel. Woods v. Cohen*, 173 Ariz. 497, 502 (1992) (finding a violation of “anti-marital fact privilege” was “not the end of the inquiry” because an accused is denied a substantial procedural right “only when actual prejudice is shown”); *Crimmins v. Superior Court, in and for Maricopa Cnty.*, 137 Ariz. 39, 42-43 (1983) (“Properly informed as to the facts and instructed as to the citizen’s arrest statutes, the grand

jury could have decided the propriety and legal effect of Crimmins' reliance on the right of a private individual to arrest a criminal suspect.”)

Here, although the trial court acknowledged the State's argument that relevant portions of the ECA were provided to the grand jury through exhibits, the court then failed to determine whether the failure to read the full ECA to the grand jury was harmless. *See* APPV1-005-006. Instead, in a single sentence, the court concluded that “[b]ecause the State failed to provide the ECA to the grand jury, ... the defendants were denied a substantial procedural right as guaranteed by Arizona law.” APPV1-006. This conclusory sentence does not show the trial court evaluated the alleged error for harmlessness because finding error is the prerequisite to harmless error review.

Thus, even if the ECA should have been read in its entirety to the grand jury, this Court should accept jurisdiction, explicitly abrogate *Good*'s statement about prejudice, and find that any error was harmless where the grand jury was provided either the substance or actual text of the relevant portions of the ECA.

VI. Conclusion.

For these reasons, this Court should grant review.

Respectfully submitted November 21, 2025,

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