

1 **STATE’S RESPONSE TO DEFENDANT’S MEMORANDUM IN SUPPORT OF**
2 **MOTION TO REMAND**

3 The State need not present all arguably exculpatory evidence to the Grand Jury; the State only
4 needs to make a fair and impartial presentation of the evidence. The defendant may not question
5 the sufficiency of the evidence presented to the Grand Jury. The defendant here claimed that the
6 State inappropriately characterized having an ignition interlock device on his vehicle as a
7 “restriction” on his privilege to drive.
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9 **FACTS:**

10 On March 7, 2005, a Kingman Police Officer was on patrol in the area of Hualapai Mountain Rd.
11 and Granite Bluffs. The Officer noticed that this vehicle “stopped briefly” and the “accelerated
12 quickly, squealing it’s tires as it left”. The Officer also saw the vehicle pass through a stop sign
13 without stopping. The officer pulled over this vehicle for the traffic violations observed.
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15 When the Officer made contact with the driver of the vehicle, hereinafter the Defendant.
16 The Officer asked the driver for his driver’s license, and the Defendant provided an Arizona
17 driver’s license number D019410005. The Officer also detected a “strong odor of alcoholic
18 beverage coming from inside the vehicle”. The Officer also observed an “open 18 pack of
19 Natural Ice Beer in the rear seat of the vehicle, behind the driver”; including an “open can of
20 beer in the rear floorboard of the vehicle behind the driver”. The Officer asked the Defendant if
21 he had been drinking alcohol and the Defendant stated he “had”. The Officer then requested a
22 driver’s license check on the Defendant. The Officer was advised that “his license was valid,
23 with the notation that he required an ignition interlock device in a vehicle that he operates”. See
24 **Exhibit “A”**, attached hereto. The Officer then asked if the Defendant had an ignition interlock
25 device, and was shown a device in the vehicle. A DUI investigation was then conducted to
26 which the Defendant performed very poorly, and was arrested for Aggravated Driving Under the
27 Influence- ARS 28-1383 for driving under the influence “while the person's driver license or
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1 privilege to drive is suspended, canceled, revoked or refused or *while a restriction is placed on*
2 *the person's driver license or privilege to drive as a result of violating section 28-1381 or 28-*
3 *1382 or under section 28-1385*". The Defendant later provided breath samples via the
4 Intoxilyzer 8000 machine that read .174 and .155.
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8 **LAW AND ARGUMENT:**

9 **A. The State gave fair and impartial facts of the present case to the Grand Jury**

10 The role of the Grand Jury is to determine whether probable cause exists to believe that a
11 crime has been committed and that the person being investigated committed it. *State v. Sanchez,*
12 165 Ariz. 164, 171, 797 P.2d 703, 710 (App. 1990).
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14 Expanding the Grand Jury's role beyond that point would put Grand Juries in the
15 business of holding mini-trials. *State v. Baumann,* 125 Ariz. 404, 408-409, 610 P.2d 38, 42-43
16 (1980). Since the function of the Grand Jury is accusatory, not adjudicatory, the State is under no
17 obligation to present an anticipated defense. Arizona courts will grant a motion for remand to
18 the Grand Jury only if the prosecutor interferes with the jurors' inquiry into the evidence of the
19 essential elements required for a particular crime to have been committed. *Nelson v. Royston,*
20 137 Ariz. 272, 276, 669 P.2d 1349, 1353 (App. 1983).
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22 The testimony presented to the Grand Jury was not prejudicial or misleading.
23 The defendant alleges that Mohave County Deputy Attorney Greg McPhillips "presentation" to
24 the Grand Jury was prejudicial and misleading, thus depriving Defendant of substantial
25 procedural due process. The prosecution must present the evidence to the grand jury in a fair and
26 impartial manner. "Due process compels the prosecutor to make a fair and impartial presentation
27 to the grand jury." *Trebus v. Davis,* 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997).
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1 An examination of the Grand Jury transcript clearly shows that the State made a fair and
2 impartial presentation of the evidence. In making a determination of probable cause, there is no
3 "mechanical test" to decide if due process has been satisfied. What is necessary for a fair and
4 impartial presentation will vary from case to case. Due process is violated when perjured or false
5 testimony is material to the indictment, thus precluding a Grand Jury from being able to find the
6 existence of probable cause. *Trebus v. Davis*, supra; *Nelson v. Royston*, 137 Ariz. 272, 669 P.2d
7 1349 (1983); *State v. Jacobson*, 22 Ariz. App. 128, 524 P.2d 962 (App. 1974); *United States v.*
8 *Basurto*, 497 F.2d 781 (9th Cir. 1974). When courts have remanded cases to the Grand Jury, they
9 have done so upon findings that the prosecution knowingly used false or misleading testimony
10 and that that testimony was material to the Grand Jury's finding of probable cause.

11 Here, Deputy County Attorney McPhillips presented evidence to the Grand Jury wherein he
12 stated: "this is the type of aggravated DUI where the defendant allegedly drive a motor vehicle
13 while under the influence of an intoxicating liquor while his license was either suspended,
14 revoked or while a restriction is placed on his driver's license or while a restriction is placed on
15 his driver's license or his privilege to drive as a result of violating A.R.S. 28-1381, 28-1382 or
16 28-1385." (page 8, lines 6-11). This is clearly the law in the state of Arizona, and in no way
17 misleading to anyone. Further, evidence presented to a grand jury need not be admissible in
18 trial. *State v. Fulminante*, 193 Ariz. 485, 491, 975 P.2d 75, 81 (1999). The grand jury can make
19 its determination based in whole or in part upon hearsay evidence. *Franzi v. Superior Court*, 139
20 Ariz. 556, 679 P.2d 1043 (1989); *State v. Bowling*, 151 Ariz. 230, 232, 726 P.2d 1099, 1101
21 (App. 1986). These broad investigatory powers as empowered by the legislation are essential to
22 the Grand Jury's historical role in our criminal justice system.

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27 **B. The State is not obligated to present all arguably exculpatory evidence to the grand jury.**

28 The State need not present exculpatory evidence to the Grand Jury, unless the evidence is
"clearly exculpatory evidence" -- i.e., evidence of such weight that it would deter the Grand Jury

1 from finding the existence of probable cause. *State v. Coconino County Superior Court [Mauro]*,
2 139 Ariz. 422, 678 P.2d 1386 (1984).

3 Here, the Defendant has an issue with the wording of ARS 28-1383, and does not feel
4 that having an ignition interlock device on your vehicle is a “**restriction**” on your privilege to
5 drive in Arizona. The State takes issue with this view.
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7 First, looking to ARS 28-1461- Use of certified ignition interlock devices: “A. If a
8 person's driving privilege is *limited* pursuant to section 28-1381, 28-1382, 28-1383 or 28-3319”.
9 Also, “(3) If the person's driving privilege has been reinstated, but *the person's driving privilege*
10 *is limited* pursuant to sections 28-1381, 28-1382, 28-1383 or 28-3319” It is anticipated that the
11 Defendant will state that “limited” is not synonymous with “restriction”. However, looking to
12 the definition of the word “**restriction**”, the dictionary defines the word as follows:
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14 “n 1: a principle that *limits* the extent of something; "I am willing to accept certain
15 restrictions on my movements" [syn: *limitation*] 2: *an act of limiting* or restricting (as by
16 regulation) [syn: *limitation*] 3: the act of keeping something within specified bounds (by force if
17 necessary). (Source: Merriam-Webster's Medical Dictionary, © 2002 Merriam-Webster, Inc.)

18 Also, the synonym for the word “restriction”: brake, catch, check, circumscription,
19 condition, confinement, constraint, containment, contraction, control, cramp, curb, custody,
20 demarcation, excess baggage, fine print, glitch, handicap, hang-up, inhibition, joker, kicker,
21 *limitation*, lock, no-no, off limits, qualification, regulation, reservation, restraint, rule, small
22 difficulty, stint, stipulation, stricture, string, stumbling block (Source: Roget's New
23 Millennium™ Thesaurus, First Edition (v 1.1.1)

24 As the State could not find any Arizona case law dealing with the issue of whether an
25 “ignition interlock device” is a “restriction” on the privilege to drive; the State found two cases
26 from other jurisdictions that address this issue. The first case is from the state of Idaho, *State v.*
27 *Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988); where a dissenting Justice states while
28 discussing the problem of public policy and the problem of intoxicated drivers: “The legislature
recently adopted a program for electronic monitoring of drivers who have received convictions
...for violation of the DUI statutes, by allowing the driver- as a condition of probation- to
operate a vehicle upon restricted driving privileges where the operator's vehicle is equipped

1 *with an “ignition interlock device“.*, see page 1074; 310. Further, in Pennsylvania Supreme
2 Court case, *Alexander v. Department of Transportation*, 2005 WL 1941202, which was decided
3 August 15, 2005; the Court states when discussing an “ignition interlock device”; “When an
4 operator is issued a license subject to installation of an interlock device, *this interlock restricted*
5 *license is a functional equivalent of a probationary license in that it restricts the operators use*
6 *of the motor vehicle to the conditions stated in the statute.*”, [FN7]. The defendant claims that
7 the State withheld clearly exculpatory evidence from the Grand Jury. The contention that a
8 Grand Jury must review all exculpatory evidence clearly misinterprets the Grand Jury’s primary
9 function of determining whether probable cause exists to believe that a crime has been
10 committed and the individual being investigated was the one who committed it. *State v.*
11 *Baumann*, 125 Ariz. 404, 610 P.2d 38 (1980).

14 The Arizona legislature has recently spoken of the issue of “ignition interlock device”, in
15 newly enacted legislation under Senate Bill 1240; an “ignition interlock” device is now defined
16 as: ARS 28-1301. Definitions (L05, Ch. 312, sec. 2. Eff. February 1, 2006):

18 “4. “**Ignition interlock device**” means a device that is based on alcohol specific electrochemical
19 fuel sensor technology that meets the national highway traffic safety administration
20 specifications that connects a breath analyzer to a motor vehicle's ignition system, that is
21 constantly available to monitor the concentration by weight of alcohol in the breath of any
22 person attempting to start the motor vehicle *by using its ignition system and that deters starting*
23 *the motor vehicle by use of its ignition system unless the person attempting to start the motor*
24 *vehicle provides an appropriate breath sample for the device and the device determines that*
25 *the concentration by weight of alcohol in the person's breath is below a preset level.”*

26 ARS 28- 28-1321. Implied consent; tests; refusal to submit to test; order of suspension;
27 hearing; review; temporary permit; notification of suspension; *special ignition interlock*
28 *restricted driver license* (L05, Ch. 312, sec. 3. Eff. 2/1/06)

P. After completing not less than ninety consecutive days of the period of suspension
required by this section, a person whose driving privilege is suspended pursuant to this section
may apply to the department for a *special ignition interlock restricted driver license* pursuant to
section 28-1401. Unless the certified ignition interlock period is extended by the department
pursuant to section 28-1402, a person who is issued a *special ignition interlock restricted driver*
license as provided in this subsection shall maintain a functioning certified ignition interlock
device in compliance with chapter 4 of this title during the remaining period of the suspension
prescribed by this section.

1 Based upon the case law provided, the statutory language; and secondary sources
2 provided it is clear that in Arizona, as well as other jurisdictions driving with an interlock device
3 on your vehicle is a “restriction” of your driving privilege. The State is on solid ground by
4 asserting that under the facts of this case the Defendant’s privilege to drive was restricted under
5 ARS 28-1383, and in no way did Deputy County Attorney McPhillips “mislead” the Grand Jury
6 and no procedural Due Process rights of Defendant were infringed.
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9 Therefore, this Court should deny the defendant’s motion to remand.
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11 **C. The defendant may not inquire into the weight, sufficiency, or nature of the evidence the
12 Grand Jury used to reach its probable cause finding.**

13 It is a "long established rule that an indictment valid on its face is not subject to challenge
14 on the ground that the grand jury acted on the basis of inadequate or incompetent evidence."
15 State ex rel. *Collins v. Kamin*, 151 Ariz. 70, 725 P.2d 1104, 1106 (1986), quoting *State ex rel.*
16 *Preimsberg v. Rosenblatt*, 112 Ariz. 461, 462, 543 P.2d 773, 774 (1975). The defendant may not
17 attack the "nature, weight or sufficiency of the evidence" presented to the Grand Jury. *State v.*
18 *Jacobson*, 22 Ariz. App. 128, 524 P.2d 962 (1974). It is well recognized in Arizona that courts
19 generally do not concern themselves with the nature, weight, and sufficiency of evidence
20 underlying a Grand Jury indictment, as distinguished from deciding whether the State made a
21 fair and impartial presentation of the evidence to the Grand Jury. *Crimmins v. Superior Court*,
22 137 Ariz. 9, 668 P.2d 882 (1983). Whatever weight the Grand Jury gave to each fact is not
23 subject to critique. *State v. Jacobson*, supra at 129, 542 P.2d at 963.
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26 There are no misleading material facts, interpretation of law or perjured testimony in this
27 case. The defendant argues that some of the evidence could be interpreted in his favor.
28 However, at the Grand Jury stage, the defendant may not attack the facts or argue the
conclusions to be drawn from the evidence. The Grand Jury is not the place to try the case. At

1 trial, the defendant may argue the interpretation of evidence and raise any defenses; he may not
2 do so at the Grand Jury level.

3 **COMCLUSION:**

4 The State contends that the State presented the evidence to the Grand Jury in a fair and
5 impartial manner. Based on that evidence the Grand Jury duly returned an indictment. Therefore,
6 this Court should deny the defendant's motion to remand and allow the matter to proceed to trial.
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