

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/04/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL GILLILAND,)
)
Petitioner,) No. 1 CA-SA 11-0173
)
v.) DEPARTMENT A
)
THE HONORABLE SUSANNA C. PINEDA,) Maricopa County
) Superior Court
Judge of the SUPERIOR COURT OF) No. CR2011-107426-001 DT
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,) **DECISION ORDER**
)
STATE OF ARIZONA,)
)
Real Party in Interest.)
)

The court, Judge Lawrence F. Winthrop, Presiding Judge Margaret H. Downie, and Judge Patrick Irvine participating, have considered the special action petition of Michael Gilliland ("Petitioner"). For the reasons stated below, we accept jurisdiction and deny relief.

As part of an undercover operation run by the Phoenix Police Department, Petitioner was arrested on February 10, 2011, after he solicited sex from an undercover police officer who had portrayed herself as a minor. He was indicted by the grand jury on one count of child

prostitution in violation of Arizona Revised Statutes section 13-3212(B)(2) (Supp. 2010).

At the grand jury proceeding, the State did not provide the grand jury with a picture or the actual age (31) of the undercover officer who had been posing as an underage prostitute, nor did the officer testify. The grand jury was told that the undercover officer both expressly and impliedly indicated to Petitioner that she was no older than 17 years of age, both on the website where Petitioner first contacted her and in person. The State did inform the grand jury that the website where Petitioner made first contact with the undercover officer required all posters to be age 18 or older, and admitted that the post itself listed her age as 18. On April 20, 2011, Petitioner filed a motion for remand to the grand jury. After a hearing, the court denied Petitioner's motion for remand. Accordingly, Petitioner filed a petition for special action with this court on July 7, 2011.

We have jurisdiction to consider the petition under Article 6, Sections 5 and 9, of the Arizona Constitution and Rule 4 of the Arizona Rules of Special Action. Our exercise of special action jurisdiction is highly discretionary, but we will generally accept jurisdiction

when relief is available only through special action, the issue is likely to rise again, and/or we are addressing a "purely legal issue of first impression." *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2, 40 P.3d 1249, 1250 (App. 2002) (citation omitted). To obtain relief from a denial of a motion to remand to a grand jury for redetermination of probable cause, "a defendant must seek relief before trial by special action." *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995) (citation omitted). Accordingly, we accept jurisdiction in this matter.

Petitioner argues that remand is appropriate because the undercover officer's actual age and physical appearance is central to the *mens rea* element of the charged crime, and is clearly exculpatory information that the State was obligated to present to the grand jury.

We agree that, under certain scenarios, knowledge of an undercover officer's actual age or physical appearance could constitute clearly exculpatory evidence on a central element of the crime, thus requiring its presentation to the grand jury. See *United States v. Cote*, 504 F.3d 682, 686 (7th Cir. 2007) (noting that both the United States Supreme Court and the 9th Circuit Court of Appeals also had recognized that the age of a victim is a "crucial element separating legal innocence from wrongful conduct" and

federal statutes involving child prostitution "contain a *mens rea* requirement for the age element of the crime" (citations omitted)). In this case, however, there is nothing in the record to suggest that the undercover officer's actual age or physical appearance negated Petitioner's understanding that he was meeting, and had met, a minor or that the actual age and physical appearance of the undercover officer were clearly exculpatory on their own. See *Bashir v. Pineda*, 226 Ariz. 351, 355, ¶ 15, 248 P.3d 199, 203 (App. 2011) (finding that "[w]hat constitutes a fair and impartial presentation will vary, so the 'degree of detail' of information that the prosecutor must present to the grand jury will also 'vary from case to case'" (citations omitted)). Although the undercover officer's actual age and physical appearance may be relevant to Petitioner's defense at trial, the State was not required to anticipate such a defense, let alone present the evidence related to such a defense. See *Francis v. Sanders*, 222 Ariz. 423, 427, ¶¶ 12, 16, 215 P.3d 397, 401 (App. 2009) (holding that "the State has no obligation to anticipate every defense, or to present facts and law pertaining to defenses in every case," but noting that the State is obliged to present "clearly exculpatory" evidence and answer any legal questions asked by the grand jury

concerning defenses).¹ Since Petitioner has never actually claimed that the undercover officer's actual age or physical appearance affected his understanding or belief concerning her age, it remains unclear how the failure of the State to provide these "facts" to the grand jury prejudiced Petitioner or denied him his right to a fair presentation. Similarly, without further information in the record, we cannot conclude that the age or physical appearance of the undercover officer constitutes "clearly exculpatory" evidence such that it needed to be presented to the grand jury. Accordingly,

IT IS ORDERED accepting jurisdiction of Petitioner's petition for special action.

IT IS FURTHER ORDERED denying Petitioner's request for an order remanding this case to the grand jury for a redetermination of probable cause.

IT IS FURTHER ORDERED that the clerk of this court provide a copy of this Decision Order to Petitioner's counsel, Larry A. Hammond, Jean-Jacques Cabou, and Kathleen Brody O'Meara of the firm Osborn Maledon, P.A., and William Foreman of the firm William Foreman, P.C.; and to the Real Party in Interest's counsel, Adam Susser, Deputy County

¹ In the instant case, none of the grand jurors inquired about the undercover officer's actual age or physical appearance.

Attorney; and to the Honorable Susanna C. Pineda, a Judge
of the Maricopa County Superior Court.

/s/
LAWRENCE F. WINTHROP, Judge