IN THE

SUPREME COURT OF THE STATE OF ARIZONA

GARY ALLER,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

No. CV-25-0176-PR
Filed August 24, 2026

Appeal from the Superior Court in Maricopa County
No. CR2021-001791-002
The Honorable Jennifer E. Green, Judge

REVERSED AND REMANDED

Order of the Court of Appeals, Division One
1 CA-SA 25-0110
Filed May 5, 2025

VACATED

COUNSEL:

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JUSTICE KING authored the Opinion of the Court, in which CHIEF JUSTICE TIMMER, VICE CHIEF JUSTICE LOPEZ, and JUSTICES BOLICK, BEENE, MONTGOMERY, and CRUZ joined.

JUSTICE KING, Opinion of the Court:

¶1 Arizona law has long recognized "the general public interest in preserving grand jury secrecy." *State ex rel. Ronan v. Superior Court*, 95 Ariz. 319, 330 (1964). "The great attribute of a grand jury, as we know it, is that it acts independently and without fear and that persons who testify in its presence, protected by the [cloak] of secrecy, will speak the truth." *Id.* at 331. Under Arizona law, it is a class one misdemeanor for a person to "knowingly disclose[] to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding." A.R.S. § 13-2812. Nonetheless, there is an exception when such disclosure is "permitted by the court in furtherance of justice." § 13-2812(A).

¶2 A state grand jury indicted Gary Aller on felony counts of conspiracy, fraudulent schemes and artifices, and fraudulent schemes and practices. Aller received the grand jury transcripts pursuant to A.R.S. § 21-411(A) (providing that grand jury transcripts "shall be made available to . . . the defendant"). Later, the State dismissed the criminal indictment against Aller with prejudice. Recognizing the confidentiality of grand jury transcripts under § 13-2812, Aller asked the superior court for permission

to use the transcripts he lawfully possesses in a civil lawsuit against the State and its agents related to his prosecution. The superior court denied his request.

¶3 We conclude that the "particularized need" framework originally set forth in *Ronan* applies in these circumstances. *See Ronan*, 95 Ariz. at 332; *see also State v. Bergin*, 256 Ariz. 516, 524 ¶¶ 28–30 (App. 2023) (applying the "particularized need" framework). Further, we conclude the superior court erred in finding that Aller lacks a "particularized need" to use the grand jury transcripts because he has access to a separate public document that he could rely upon instead, and for this reason the transcripts are not needed to avoid a possible injustice. We remand to the superior court to review the grand jury transcripts in camera and determine whether Aller has met his burden under *Ronan*. If he has, the court should determine the scope of authorized use and fashion any appropriate conditions on Aller's use.

BACKGROUND

¶4 Higley Unified School District ("District") determined that it would build two new middle schools due to the growth of its student population. The District was at or near its bonding limit and, therefore, could not use the traditional bonding structure to finance and construct the new schools. Thus, the District elected to fund construction through an alternative finance structure.

¶5 The District issued a Request for Proposal for the development and management of the proposed educational facilities. Educational Facilities Development Services ("EFDS") submitted a proposal. Aller was President of EFDS. In 2012, the District selected EFDS to serve as the project developer and manager. The construction of both schools commenced in 2012, and they opened for the 2013/2014 school year.

¶6 In 2021, the Arizona Attorney General's Office convened a state grand jury. The grand jury indicted Aller on a series of criminal charges relating to alleged violations of Arizona Administrative Code ("A.A.C.") procurement rules concerning the District's project. Aller was indicted on three felony counts—one count of conspiracy, one count of

fraudulent schemes and artifices, and one count of fraudulent schemes and practices.

¶7 After the indictment, Aller moved to remand the criminal counts to the grand jury. The superior court granted the motion, explaining that the allegations against Aller related to whether he, through EFDS, "improperly bid on a school procurement project. During the grand jury proceeding, the State improperly presented [the A.A.C.] procurement code that was in effect in 2021, rather tha[n] the procurement code that was in effect at the time of the alleged offense in 2011/2012. The law had changed" after the bid. The court stated that "substantive changes and clarifying language [were] added to the procurement code" after the bid "which affect the very provisions that Aller [was] charged with violating," and the new provisions were "not the applicable law when the alleged crimes occurred. Those changes raise due process concerns which the [c]ourt will not ignore." The court determined that reading the wrong A.A.C. provision to the grand jury deprived Aller of a substantial right, and remand was necessary so "the grand jury will be properly and adequately informed as to the applicable code."

¶8 In 2022, the State again presented the case against Aller to the grand jury and obtained a new indictment. Pursuant to § 21-411(A), Aller received copies of the grand jury transcripts from both indictments. *See also* Ariz. R. Crim. P. 12.7(c) (providing that, after the return of the indictment, the certified reporter's record of grand jury proceedings must be transcribed and filed with the court clerk and may be made available to the defendant).

¶9 Thereafter, the State moved to dismiss the case against Aller *without* prejudice. The State explained that it "no longer believes there is a reasonable likelihood of conviction due to the passage of time since the alleged conduct, and the issues that creates with regard to the State's high burden of proof." The superior court dismissed the case *with* prejudice, finding that good cause appeared for the dismissal based on the contents of the State's motion. The State did not appeal.

¶10 In the same criminal case matter, Aller moved for leave to use the two grand jury transcripts that he possesses to support his forthcoming civil lawsuit. Aller explained that he was "in the process of preparing claims to be made under A.R.S. § 12-821.01" (the notice of claim statute).

He planned to pursue a civil lawsuit against the State and its agents "based upon the State having falsely accused [Aller] with multiple felonies based upon fabricated evidence."[1] According to Aller, the State falsely claimed that he was disqualified from bidding on the District's project because of rules that did not become applicable until three years *after* the bid. Aller claimed that "fabricated findings" from an investigation were incorporated into a report from the Auditor General's Office ("Auditor General Report"), and the Auditor General Report "supplied the basis for false and perjured testimony of other state agents before the State Grand Jury."

¶11 In his motion, Aller argued that he has a "particularized need" to use the two grand jury transcripts, citing *Ronan* and *Bergin*. He stated that the testimony before the grand jury was drawn directly from the Auditor General Report, and he has a "particularized need" to establish "the causal connection between the fabrication of the evidence in the case and the indictment, now dismissed, that caused [his] damages." According to Aller, "[w]ithout the grand jury transcripts, there is an unfillable hole in the necessary element of causation that will be common to all of the [c]laims." Aller also offered redactions within the grand jury transcripts.

¶12 The superior court denied Aller's motion. The court noted Aller's allegation that fabricated findings were incorporated into the Auditor General Report, which, in turn, supplied the basis for the alleged false testimony of state agents before the grand jury. The court concluded that Aller could rely on the Auditor General Report (a public record) to present his evidence of the alleged fabricated findings in the civil litigation, and he therefore did not demonstrate a "particularized need" under *Ronan* to use the grand jury transcripts that are presumed by law to be kept secret. The court also found no "possible injustice" because Aller has access to the Auditor General Report, citing *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 222–23 (1979). According to the court, the need for secrecy outweighs Aller's need to use the grand jury transcripts because the relevant information is available to him in another public record.

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[1] According to the parties, Aller has since filed two civil lawsuits—one in Maricopa County Superior Court and another in the United States District Court for the District of Arizona. We do not have the complaints in the record, but Aller refers to these lawsuits as "malicious prosecution suits."

¶13 The court of appeals accepted special action jurisdiction and denied relief. The court determined that "the particularized need test applies not only to accessing grand jury transcripts, but also to use of such transcripts in litigation." The court rejected Aller's claim that the transcripts are the only means by which he can establish his claim, explaining that "the superior court correctly noted that the information that [Aller] desires from the grand jury transcript appears to be publicly available." Thus, Aller "has not established prejudice, nor that his need to use the transcripts outweighs the need for secrecy." Thereafter, Aller filed a motion for reconsideration, which the court denied.

¶14 We granted review to address an issue of statewide importance regarding whether the "particularized need" standard applies to a former criminal defendant who lawfully possesses grand jury transcripts and seeks to use those transcripts in a civil lawsuit against those responsible for his prosecution. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶15 We review the denial of permission to disclose or use grand jury transcripts for abuse of discretion. *See Ronan*, 95 Ariz. at 323; *Douglas Oil*, 441 U.S. at 221, 228–29; *Incito Schs. v. State*, 261 Ariz. 72, 74 ¶ 9 (App. 2025). Whether the law was properly applied is an issue of law that we review de novo. *Bergin*, 256 Ariz. at 523 ¶ 24; *Incito Schs.*, 261 Ariz. at 74 ¶ 9.

A. Arizona Law Regarding Grand Jury Secrecy And The Showing Of A "Particularized Need"

¶16 In 1964, this Court explained:

> The grand jury is an ancient institution. It has always been venerated and highly prized in this country. It has been regarded as the shield of innocence against the plottings of private malice, as the defense of the weak against the oppression of political power, and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source. These blessings accrue from the grand jury because its proceedings are secret and

> uninfluenced by the presence of those not officially and necessarily connected with it . . . . Secrecy is the vital requisite of grand jury procedure.

Ronan, 95 Ariz. at 323–24 (quoting *In re Opinion of the Justices*, 123 N.E. 100, 100 (Mass. 1919)).

¶17 In *Ronan*, criminal defendants filed a motion seeking access to transcripts of grand jury testimony in the proceeding against them. *See id.* at 321. At that time, unlike now, Arizona law did not provide defendants access to grand jury transcripts as a matter of course. *Id.* at 323, 325. Instead, the superior court could order disclosure of grand jury testimony only under limited circumstances, one of which was "when permitted by the court in the furtherance of justice." *Id.* at 323 (quoting Ariz. R. Crim. P. 107).

¶18 *Ronan* adopted the "particularized need" framework for evaluating when a defendant may access grand jury testimony. *Id.* at 326–27, 332 (discussing the "particularized need" standard addressed in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399–400 (1959), and *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958)). This Court described that standard as follows:

> A 'particularized need' which in the furtherance of justice would authorize a trial judge to make available to the defendant a transcript of testimony, must be shown by facts and circumstances which demonstrate that unless such relief is forthcoming, the defendant will, in some manner, be prejudiced, or his legal rights adversely affected.

Id. at 332. *Ronan* went on to explain that "[u]nder the law as it exists today, . . . the defendant is not entitled to a transcript of testimony of any witness solely because he wants to find out what the witness said." *Id.* Granting him such a privilege "is not in the 'furtherance of justice' because the public interest in preservation of secrecy [outweighs] the defendant's interest in discovery." *Id.*

¶19 In 1971, the Legislature enacted a law providing that the grand jury transcript "shall be made available to . . . the defendant" after an

indictment is returned. § 21-411(A). Nonetheless, the "transcript or a portion of the transcript may be denied to a defendant by the court upon a showing of extraordinary circumstances by a prosecuting officer." *Id.*

¶20 Although indicted defendants now receive grand jury transcripts as a matter of course, the Legislature continued to recognize the importance of secrecy in grand jury proceedings. After § 21-411 became law, the Legislature passed a statute making the offense of unlawful grand jury disclosure a class one misdemeanor: "A person commits unlawful grand jury disclosure if the person knowingly discloses to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding." § 13-2812(A)–(B). The only exceptions are when the disclosure is (1) "in the proper discharge of official duties"; (2) "at the discretion of the prosecutor to inform a victim of the status of the case"; or (3) "when permitted by the court in furtherance of justice." § 13-2812(A).

¶21 Moreover, as discussed next, Arizona courts continued to apply *Ronan*'s "particularized need" standard when analyzing whether requests for disclosure or use of grand jury transcripts were "in furtherance of justice."

¶22 In 2023, the court of appeals in *Bergin* evaluated a party's "request for a transcript of a grand jury proceeding that resulted in the grand jurors declining to return an indictment against him." 256 Ariz. at 519–20 ¶¶ 1–4. The court addressed the party's claim that "he need only show that the transcript's release would be 'in the furtherance of justice,' without also showing a particularized need." *Id.* at 523 ¶ 25. The court rejected that argument, explaining that the "particularized need" standard is used to determine whether the transcript's release is "in furtherance of justice." *Id.* at 523–24 ¶¶ 27–29. As the court observed, *Ronan* "dictates that the in-furtherance-of-justice assessment requires a person who is not entitled to a transcript as a matter of course . . . to show 'facts and circumstances' demonstrating a 'particularized need' that would authorize the court to make a transcript available in the furtherance of justice." *Id.* at 524 ¶ 29. A court should only order the transcript's release after balancing the party's particularized need against societal interests in grand jury secrecy. *Id.*

¶23 In 2025, the court of appeals again addressed the "particularized need" framework in *Incito Schools*. There, two school administrators were indicted on felonies related to education grant fraud. *Incito Schs.*, 261 Ariz. at 73 ¶ 2. The superior court remanded the indictments due to a state expert's "mischaracterization" of a forensic report and "misleading" assertions made during the grand jury proceeding, and the state did not refile charges. *Id.* at 74 ¶ 4. The former defendants filed a lawsuit in federal court against the Arizona Attorney General and two investigators. *Id.* ¶ 5. They also separately asked the superior court for permission to use the grand jury transcripts, which they already had, in the federal case. *Id.* ¶¶ 5–6. *Incito Schools* reiterated that in order to obtain permission to use the grand jury transcripts "in furtherance of justice," the former defendants "must show a 'particularized need,' which is balanced 'against the societal interests in grand jury secrecy.'" *Id.* ¶ 11 (quoting *Bergin*, 256 Ariz. at 524 ¶ 29).

B. Application Of The "Particularized Need" Framework To Former Defendants Who Lawfully Possess The Grand Jury Transcripts

¶24 Aller contends that the "particularized need" framework, originally adopted by this Court in *Ronan*, does not apply to him. As Aller points out, *Ronan* dealt with the release of grand jury transcripts to criminal defendants at a time when they did not receive such transcripts as a matter of course. After *Ronan*, Arizona law codified the right of an indicted defendant to receive grand jury transcripts. *See* § 21-411(A). Thus, Aller now lawfully possesses the grand jury transcripts at issue and has full knowledge of their contents.

¶25 Aller contends that a new test should apply in these circumstances—one that does not require a showing of "particularized need," but instead merely requires him to show "a reasonable basis for the request in the furtherance of justice." He also proposes that evidentiary admissibility standards be applied pertaining to his use of grand jury transcripts. *See* Ariz. R. Evid. 401–403 (addressing the test for relevant evidence, its general admissibility, and its exclusion for certain reasons).

¶26 To address this issue, we begin by discussing the "particularized need" framework under Arizona law. A party's "particularized need" for grand jury transcripts is more accurately described as one factor in a balancing test, which is used to determine

whether disclosure or use of the transcripts would be "in furtherance of justice." *See Ronan*, 95 Ariz. at 332 (stating that whether grand jury testimony should be made available in "furtherance of justice" requires consideration of whether "the public interest in preservation of secrecy [outweighs] the defendant's interest in discovery"); *Bergin*, 256 Ariz. at 524 ¶ 29 (explaining "the in-furtherance-of-justice assessment" requires the demonstration of a "particularized need," balanced "against the societal interests in grand jury secrecy"); *Incito Schs.*, 261 Ariz. at 74 ¶ 11 ("To secure disclosure in furtherance of justice, a movant must show a 'particularized need,' which is balanced 'against the societal interests in grand jury secrecy.'" (quoting *Bergin*, 256 Ariz. at 524 ¶ 29)). This balancing test captures a party's "particularized need" for the grand jury transcripts and balances that need against the societal interests in maintaining grand jury secrecy. *See Ronan*, 95 Ariz. at 332; *Bergin*, 256 Ariz. at 524 ¶ 29; *Incito Schs.*, 261 Ariz. at 74 ¶ 11.

¶27 It is impossible to anticipate all possible circumstances in which a "particularized need" to disclose or use a grand jury transcript may arise. *Ronan*, 95 Ariz. at 327 (noting that some examples include the need for a transcript for impeachment or for refreshing a witness's recollection). Nonetheless, a requesting party must show a "'particularized need' . . . by facts and circumstances" demonstrating that an order prohibiting disclosure or use will, in some manner, prejudice him or adversely affect his legal rights. *Id.* at 332. A general interest in "find[ing] out what the witness said" or seeking the transcript "for discovery purposes *only*" does not meet the "particularized need" requirement. *Id.*

¶28 *Ronan* held that the core standard for determining whether disclosure is "in furtherance of justice" is whether the party's "particularized need" outweighs the societal interests in maintaining grand jury secrecy. *Id.* at 329–30, 332; *see also Bergin*, 256 Ariz. at 523–24 ¶¶ 27–29; *Incito Schs.*, 261 Ariz. at 74 ¶¶ 10–11. We recognize there have been changes in the law since *Ronan* was decided in 1964. In 1971, the Legislature enacted § 21-411, making grand jury transcripts available to indicted defendants. And in 1977, the Legislature enacted § 13-2812, criminalizing the disclosure of grand jury matters. Aller contends that developments in Arizona law, especially § 21-411, have limited *Ronan*'s holding, and therefore the "particularized need" standard does not apply to him. We disagree.

¶29 Significantly, when the Legislature enacted § 13-2812, it carried forward the very "in furtherance of justice" language that this Court authoritatively construed in *Ronan*. *See Ronan*, 95 Ariz. at 323, 329–32 (interpreting "in the furtherance of justice" in Ariz. R. Crim. P. 107 in effect at that time); *see also* § 13-2812(A) (criminalizing the unlawful disclosure of grand jury testimony except "when permitted by the court in furtherance of justice"); *see also Bergin*, 256 Ariz. at 524 ¶ 27 (noting the provisions relied upon in *Ronan* "largely mirrored § 13-2812's prohibition on disclosing witness testimony, including its exception for disclosure upon court permission 'in the furtherance of justice'"). Based on the "prior-construction" canon, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); *see also In re Marriage of Friedman & Roels*, 244 Ariz. 111, 115 ¶ 14, 116 ¶ 20 (2018) (applying the prior-construction canon). Thus, we must continue to consider the "particularized need" of a former defendant who lawfully possesses a grand jury transcript in determining whether his disclosure or use of the transcript in a separate civil action is "in furtherance of justice."

¶30 Further, although § 21-411(A) now allows indicted defendants to receive grand jury transcripts as a matter of course, the statute does not absolve defendants of having to demonstrate a "particularized need" when seeking to disclose the transcripts beyond the mere access that the statute provides. Also, § 21-411 continues to underscore the secrecy of grand jury proceedings. *See* § 21-411(A) (allowing a transcript to "be denied to a defendant by the court upon a showing of extraordinary circumstances by a prosecuting officer"); § 21-411(B) (providing that court reporters and typists transcribing notes of grand jury proceedings must be sworn "not to disclose any testimony or the name of any witness except to the county attorney or other prosecuting officer or when testifying in court"). While § 21-411(A) provides indicted defendants access to grand jury transcripts, it does not authorize additional disclosure of the transcripts. Indeed, § 13-2812 continues to underscore the secrecy of grand jury proceedings by making unlawful grand jury disclosure a criminal offense.

¶31 In addition, the emphasis on grand jury secrecy is replete throughout the Arizona Rules of Criminal Procedure. *See, e.g.*, Ariz. R. Crim. P. 12.1(d)(6) ("The court must inform the grand jurors of . . . the confidentiality of grand jury matters and materials, and the penalties for unlawful disclosure."); Ariz. R. Crim. P. 12.4 (providing that only certain individuals may be present during grand jury sessions and only grand jurors may be present during deliberations and voting); Ariz. R. Crim. P. 12.10(a) (requiring the clerk to limit inspection and viewing of grand jury physical evidence to "the State, the court, and the defendant"); Ariz. R. Crim. P. 12.26 (requiring the judge to "order the indictment to be kept secret until the defendant is in custody or served with a summons," and prohibiting disclosure of "the indictment's contents except if necessary to issue and execute a warrant or summons"); Ariz. R. Crim. P. 12.27 (authorizing the judge to publicly disclose in a minute entry that a grand jury investigation ended without an indictment "if extraordinary circumstances exist and the furtherance of justice requires it").

¶32 Thus, Aller's claim that "there is no secrecy interest in the circumstances here" is inconsistent with the codification of grand jury secrecy in Arizona statutes and rules. Aller's proposal does not require that a party make any showing of actual need to use the grand jury transcript, nor does it give sufficient credence to the continued interests in grand jury secrecy. We conclude that the "particularized need" framework applies to the circumstances here, where a former defendant lawfully possesses grand jury transcripts and seeks to use those transcripts in a subsequent civil action that relates to the government's presentation to the grand jury.

C. The Superior Court's Application Of The "Particularized Need" Framework

1. Aller's "Particularized Need"

¶33 We now consider the superior court's application of the "particularized need" framework in Aller's case. The superior court began by noting Aller's position that the Auditor General's alleged "fabricated findings" were "incorporated into the Auditor General's Report which, in turn, supplied the basis for false and perjured testimony of other state agents before the State Grand Jury." The court determined that Aller does not have a "particularized need" to use the grand jury transcripts in the civil action because the Auditor General Report, a public record, is available

to him. Because there is another means by which Aller could obtain the evidence that contains the alleged fabrication, the need for secrecy outweighs Aller's need to use the transcripts to avoid an injustice.

¶34 The "particularized need" framework asks whether the party has "shown by facts and circumstances which demonstrate that unless such relief is forthcoming, the [party] will, in some manner, be prejudiced, or his legal rights adversely affected." *See Ronan*, 95 Ariz. at 332. With this framework, the superior court erred in concluding that the Auditor General Report is the functional equivalent of the grand jury transcripts for Aller's civil lawsuit.

¶35 To prove his malicious prosecution claim, Aller must establish "(1) a criminal prosecution, (2) that terminate[d] in [his favor], (3) with defendants as prosecutors, (4) actuated by malice, (5) without probable cause, and (6) causing damages." *See Slade v. City of Phoenix*, 112 Ariz. 298, 300 (1975) (citing *Overson v. Lynch*, 83 Ariz. 158, 161 (1957)).

¶36 The grand jury transcripts provide the means by which Aller can attempt to prove certain elements of his malicious prosecution claim. In the lawsuit, the defendants may use the indictments to demonstrate that probable cause supported the prosecution, in an effort to defeat Aller's claim. *See* A.R.S. § 21-413 ("The grand jury shall return an indictment charging the person under investigation with the commission of a public offense if, from all the evidence taken together, it is convinced that there is probable cause to believe the person under investigation is guilty of such public offense."). However, the grand jury transcripts may enable Aller to show the Auditor General investigation's alleged "fabricated findings" that were presented to the grand jury and that this presentation—including the manner in which the "fabricated findings" were presented—did not actually support the existence of probable cause. The transcripts will show precisely how the State used and discussed the Auditor General Report and represented the law when presenting testimony and other evidence to the grand jury. The transcripts are also how Aller can attempt to show a causal connection between the alleged "fabricated" investigative acts and the indictments, from which his alleged damages flow. These same objectives cannot be accomplished by relying on the Auditor General Report alone.

¶37 Also, even if some testimony was drawn directly from the Auditor General Report, the exact testimony is still pertinent to understanding precisely what information the State presented to the grand jury and how it was presented. Relatedly, given that the first indictment was dismissed after the incorrect law was presented to the grand jury, the State's specific representations about the law to grand jurors when seeking the second indictment may be pertinent to the "malice" element of a malicious prosecution claim. At bottom, the grand jury transcripts are the only evidence of precisely what the State presented to the grand jury and how it was presented.

¶38 The State contends that Aller's motion to use the grand jury transcripts did not demonstrate a "particularized need" because "Aller did not identify any specific claims he intended to raise or discuss their elements." But Aller's motion identified that the substance of his forthcoming civil lawsuit against the State and its agents was "based upon the State having falsely accused [Aller] with multiple felonies based upon fabricated evidence." Aller provided sufficient information for the court to understand that the substance of his civil action was one based on malicious prosecution. Moreover, Aller's inability to recite the contents of the grand jury transcripts under § 13-2812 circumscribed his ability to be more specific about his civil theory in the motion. If Aller was more specific about his theory, he risked potential prosecution for unauthorized disclosure of grand jury material. This created a dilemma that should not be used against him. Thus, we decline to penalize Aller for not specifically using the term "malicious prosecution" or providing more details in his motion.

2. Societal Interests In Grand Jury Secrecy

¶39 On the grand jury secrecy side of the balancing test, the superior court correctly observed that Arizona law supports an interest in maintaining grand jury secrecy. We must, however, elaborate on this point in the context of a former defendant who lawfully possesses the grand jury transcripts.

¶40 Arizona courts "consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Bergin*, 256 Ariz. at 525 ¶ 34 (quoting *Samaritan Health Sys. v. Superior Court*, 182 Ariz. 219, 221 (App. 1994), which in turn quotes

Douglas Oil, 441 U.S. at 218); *see also Ronan*, 95 Ariz. at 324. Drawing from the interests in grand jury secrecy recognized in *Douglas Oil*, the court of appeals in *Incito Schools* recognized that the following interests are served by safeguarding the confidentiality of grand jury proceedings: (1) the interest in protecting individuals accused but exonerated by the grand jury from public ridicule; (2) the possibility that individuals facing indictment might flee or attempt to influence grand jurors; (3) the concern that prospective witnesses may be reluctant to come forward voluntarily, knowing that the people against whom they testify will be aware of that testimony; and (4) the concern that witnesses who appear before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution and inducements. 261 Ariz. at 74–75 ¶¶ 12–18. Although using different terminology, this Court recognized the same types of interests in *Ronan*, 95 Ariz. at 323–27, 330–31.

¶41 In *Incito Schools*, two former defendants who lawfully possessed the grand jury transcripts asked for permission to use those transcripts in a subsequent civil action alleging the grand jury was presented with "fabricated" information. 261 Ariz. at 74–75 ¶¶ 2–6, 13. They intended to use those transcripts "to prove causation and to impeach the State's expert." *Id.* at 74 ¶ 5. The court of appeals concluded that several factors supported a conclusion "that society had a diminished interest in grand jury secrecy when the former defendants asked the superior court for permission to use the grand jury transcripts" in the subsequent civil action. *Id.* at 75 ¶¶ 13–18.

¶42 First, in *Incito Schools*, because the former defendants themselves wanted to use the grand jury transcripts in the civil action, the court was "less concerned about negative publicity for those accused and ultimately exonerated." *Id.* at 75 ¶ 13.

¶43 Second, because the grand jury had already returned the indictments, the *Incito Schools* court explained that "secrecy was not essential to prevent the former defendants from influencing the grand jury proceedings." *Id.* ¶ 14.

¶44 Third, pursuant to Arizona law, the former defendants in *Incito Schools* already lawfully possessed the grand jury transcripts when they sought to use them in the civil action. *Id.* ¶ 15; *see also* § 21-411(A);

Ronan, 95 Ariz. at 325 (noting the possibility of "some modern development of the law relaxing the rule of secrecy which is applicable in Arizona"). Thus, using the transcripts in that civil action "would not have impacted the risk of retribution." *Incito Schs.*, 261 Ariz. at 75 ¶ 15.

¶45 Fourth, there was not a risk of flight in *Incito Schools* because the indictments were already dismissed and the State elected not to refile them. *Id.* ¶ 16.

¶46 Also, the *Incito Schools* court observed that "the superior court could have protected grand jury members and witnesses from public pressure with protective orders limiting how the transcripts are used" in the separate civil action. *Id.* ¶ 17. Such conditions on use are a measure by which the interests in grand jury secrecy can be safeguarded. *See id.*

¶47 These same factors are applicable in Aller's case. Aller already possesses the grand jury transcripts and has full knowledge of their contents; he is the party seeking to use the transcripts; the grand jury already returned an indictment; and Aller's case has been dismissed with prejudice. *See supra* ¶¶ 2, 6, 8–10; *Incito Schs.*, 261 Ariz. at 75 ¶¶ 13–17. Therefore, as in *Incito Schools*, the societal interests in grand jury secrecy are diminished in this case. *See* 261 Ariz. at 75 ¶ 13. Also, it appears that some grand jury testimony here was based on the publicly available Auditor General Report, further supporting diminished secrecy interests. Moreover, Aller acknowledges that some limitations may be placed on his use of the transcripts in the civil action, including redactions. *See id.* ¶ 17.

¶48 We have two final observations about the societal interests at issue. First, the secrecy interests here are not altogether eliminated. The State points to the interest in not imposing a chilling effect on future grand jury witnesses. Indeed, as *Ronan* explained, "[i]t is not the damage which is done to a particular grand jury by revealing its actions and deliberations, but the prospective harm which is directed to every future grand jury and every witness who may appear before it which is important." 95 Ariz. at 330–31; *see also Douglas Oil*, 441 U.S. at 222 ("[T]he interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities."). Because the Legislature changed the law to grant indicted defendants access to grand jury transcripts as a matter of course, *see* § 21-411(A), it is now generally understood that indicted

defendants will know the contents of witness testimony. Nonetheless, in considering the societal interests in grand jury secrecy, courts should still consider (1) the possibility of prospective harm to future grand jury witnesses if grand jury testimony is publicly disclosed, and (2) whether prospective harm can be mitigated by placing conditions on a party's use (e.g., limitations on the scope of use, redactions, or protective orders). *See Douglas Oil*, 441 U.S. at 222 ("For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries.").

¶49 Second, on a broader level, the interest in encouraging witnesses to testify fully and frankly protects the candor of grand jury testimony. And the interest in grand jury secrecy is not meant to shield a witness who testified falsely from civil accountability for that testimony. Where the claimed injury flows from a deliberately false and fabricated presentation of evidence and the law to the grand jury, a decision to altogether prevent use of the transcripts (particularly before in camera review) does little to serve that secrecy interest. It would instead foreclose an injured party's ability to prove the elements of his claim.

¶50 At this point, remand to the superior court is necessary for Aller to lodge the grand jury transcripts with the court under seal for in camera review. *See Ronan*, 95 Ariz. at 332 (explaining the court should read the grand jury transcript in camera when considering a party's "particularized need"); *Incito Schs.*, 261 Ariz. at 75–76 ¶¶ 21–22 (discussing in camera review). The court must then determine whether Aller has met his burden of showing a "particularized need" to use the grand jury transcripts in the civil action that outweighs the diminished societal interests in grand jury secrecy, such that his use is permitted in the furtherance of justice. If Aller has met his burden, the court should determine the scope of authorized use and fashion any appropriate conditions on Aller's use, such as redactions or protective orders.

D. Procedural Framework Under Arizona Law

¶51 We offer the following procedural framework as guidance in future cases when a former defendant lawfully possesses a grand jury transcript under § 21-411 and wants to use that transcript in a separate civil action.

¶52 First, the former defendant should file a motion with the superior court asserting a good faith belief that he has a "particularized need" to use the transcript in the civil action.[2] *See* Ariz. R. Civ. P. 11. He should explain why his "particularized need" outweighs societal interests in grand jury secrecy. The former defendant should also file the grand jury transcript under seal and identify which portions of the transcript he seeks to use in the civil action. If necessary, the motion may also be filed under seal.

¶53 In this case, Aller filed his motion with the superior court's presiding criminal judge before he had ever filed a civil lawsuit. But where a former defendant has already filed a civil action in superior court, the motion to use the grand jury transcript and sealed transcript should be filed with the superior court judge presiding over the civil action, who is most familiar with the underlying civil lawsuit in which the transcript is allegedly needed. Previous cases have discussed a two-step process, where requests are generally first filed with the court that supervised the grand jury activities to determine whether "disclosure might be appropriate," and then the court where the separate civil action is pending makes the final decision whether the request for disclosure should be granted. *See Douglas Oil*, 441 U.S. at 224–30; *Incito Schs.*, 261 Ariz. at 75 ¶¶ 20–21. However, where a former defendant lawfully possesses the grand jury transcript, there is not the same need to utilize this two-step process. *See Douglas Oil*, 441 U.S. at 224–30 (recognizing that, under federal law, "those who seek grand jury transcripts have little choice other than to file a request with the court that supervised the grand jury, as it is the only court with control over the transcripts").

¶54 Second, the State should be afforded the opportunity to weigh in and defend the societal interests in grand jury secrecy. If the separate

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[2] The issue before us involves a former defendant's request to use grand jury transcripts in a subsequent civil lawsuit. The issue of whether another party may obtain access to grand jury transcripts is not before us and is left for another day.

civil action does not involve the State, notice should be provided to the State to allow it an opportunity to weigh in on the secrecy interests.[3]

¶55 Third, the court should conduct an in camera review of the grand jury transcript and assess the former defendant's asserted "particularized need" balanced against the societal interests in grand jury secrecy.

¶56 Finally, after undertaking the balancing test, the court should issue an order explaining its reasoning. If the court grants the motion, the court's order should provide the scope of authorized use of the grand jury transcript and any appropriate conditions on use, such as redactions or protective orders.

¶57 We make a few final points about this process. In *Incito Schools*, the former defendants asked to use the grand jury transcripts in a civil action that was pending in federal court. 261 Ariz. at 75 ¶¶ 19–21. The court determined that the former defendants' "particularized need for the grand jury transcripts in the federal action" is "best determined by the federal court in the federal action," and the federal court would then undertake the balancing test. *Id.* We disagree with this approach. Federal and state law substantively differ in this area.

¶58 Under Arizona law, indicted defendants receive grand jury transcripts as a matter of course. *See* § 21-411(A). Federal law does not permit such access; instead, it takes a more restrictive approach. Under federal law, a court may authorize disclosure of grand jury transcripts "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." *See* Fed. R. Crim. P. 6(e)(3)(E)(ii).

¶59 Also, *Ronan* interpreted Arizona Rule 107's "in the furtherance of justice" language through a balancing test that weighs the party's "particularized need" against societal interests in preserving grand

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[3] The State may also alert the court as to whether the rights of a victim may be impacted if the motion is granted. *See, e.g.*, A.R.S. § 13-4434 (addressing a victim's right to privacy and redactions of a victim's name).

jury secrecy. 95 Ariz. at 330. In doing so, this Court treated the "particularized need" as the means by which a defendant demonstrates that disclosure is required "in the furtherance of justice." *Id.* at 332. Although *Ronan* quoted the "compelling necessity" language in *Procter & Gamble*, 356 U.S. at 683, *Ronan* did not mention or adopt a requirement of "compelling necessity" when setting forth the balancing test. 95 Ariz. at 327, 332. A more rigid standard of "compelling necessity" has not been incorporated into Arizona jurisprudence. The superior court should not delegate the determination of whether a party has met his burden under *Ronan* to a federal court for the potential application of an inapplicable "compelling necessity" standard. *See, e.g.*, *Smith v. United States*, 423 U.S. 1303, 1304 (1975). We believe that consistent application of Arizona law requires that the superior court decide whether a "particularized need" for the use of grand jury transcripts outweighs the societal interests in secrecy.

¶60 In cases where the separate civil action has not yet been filed or is pending in federal court or a court outside of Arizona, the former defendant's motion should be filed with the superior court that supervised the grand jury activities. We recognize that in these cases, the superior court will not have "firsthand knowledge of the litigation in which the transcripts allegedly are needed." *See Incito Schs.*, 261 Ariz. at 75 ¶ 20 (quoting *Douglas Oil*, 441 U.S. at 226). But a party's motion to use grand jury transcripts may (1) explain the "particularized need" in the context of the separate civil action and (2) attach the federal court complaint or other relevant documents that support the "particularized need" in that separate action. The superior court will undertake its analysis in conjunction with this information and the grand jury transcripts that will be reviewed in camera. If the superior court grants the motion, it will issue an order to the court presiding over the civil action, providing the scope of authorized use of the grand jury transcript and any appropriate conditions on use, such as redactions or protective orders.[4]

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[4] We recognize that a party may "use" a grand jury transcript in discovery in a manner consistent with the court's conditions on such use (e.g., for purposes of deposing a witness), even if it is not ultimately admitted into evidence. A party may not refer to information contained only in a grand jury transcript during discovery unless and until permitted by the court.

CONCLUSION

¶61 We vacate the court of appeals' order accepting special action jurisdiction and denying relief. We grant relief to Aller by reversing the superior court's order denying Aller's motion to use the grand jury transcripts. We remand to the superior court with instructions for it to review the grand jury transcripts in camera, allow the parties to make arguments under seal about Aller's "particularized need," and determine if Aller has met his burden of demonstrating that his "particularized need" to use the grand jury transcripts outweighs the societal interests in grand jury secrecy. If so, the superior court should determine the scope of Aller's authorized use in the civil actions he has filed and fashion any other appropriate conditions on his use, such as redactions or protective orders.

The court presiding over the civil action will decide whether the grand jury transcript is admissible under applicable evidentiary rules. And while the State here argues "that a civil claim dependent on grand jury testimony is likely barred by absolute immunity," that is also an issue that should be decided by the forum court.