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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 3.8 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT (RULE 42 OF THE ARIZONA SUPREME COURT RULES)	Supreme Court No. R-11-0033 **COMMENTS OF THE U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF ARIZONA**

Pursuant to Ariz. Sup. Ct. R. 28(D), the United States Attorney's Office for the District of Arizona, by undersigned counsel, responds to the above-referenced

Petition and respectfully requests that this Court deny the same; or, in the alternative, prescribe the additional obligations on all attorneys in the criminal justice system. In its existing form, Ethical Rule ("ER") 3.8's imposition of special obligations on prosecutors appropriately imposes responsibilities on city, county, state, and federal prosecutors as "minister[s] of justice" beyond those rules placed on non-government attorneys, and also beyond those in the defense bar. (See Comment ¶ 1). Moreover, case law imposes obligations on a prosecutor in post-conviction matters. Petitioners' well-intentioned proposal to amend ER 3.8 by adding new subsections (g) and (h) with respect to new evidence obtained following a conviction is unnecessary, inconsistent with existing obligations, and (as to the investigation requirement) contradictory to a prosecutor's role in the justice system. In the alternative, and in the interest of justice, any additional obligations with respect to newly-discovered information are best imposed on all lawyers, consistent with every Arizona attorney's obligation as an officer of the court.

A. The duty to disclose is already clear.

Both the Ninth Circuit and this Court recognize the prosecutor's duty to disclose exculpatory evidence post-conviction. See, e.g. Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) (remanding for a determination of the existence of forensic evidence). "[W]e believe the state is under an obligation to come forward with any exculpatory semen evidence in its possession. We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding." Id. at 749-50 (internal citation omitted). See also Canion v. Cole, 115 P. 3d 1261 (Ariz. 2005). "The Court of Appeals found, and the State

acknowledges, an ethical and constitutional obligation to disclose clearly exculpatory material that comes to its attention after the sentencing has occurred, and we affirm that the State does bear such a duty." Id. at 1262. Petitioner contends that the discussion in Canion is mere "passing dictum," (Pet. at 3-4 and n. 5), but this Court has eloquently established in that case a clearly defined standard to guide Arizona's prosecutors.

Moreover, other Ethical Rules instill in the prosecutor related obligations. ER 3.4, Fairness to Opposing Party and Counsel, requires that a lawyer shall not unlawfully conceal "material having potential evidentiary value." ER 3.3, Candor Toward the Tribunal, requires disclosure of information to correct false statements of law or fact, even if such disclosure is otherwise protected. ER 8.4(d) admonishes that it is professional misconduct to engage in conduct that is prejudicial to the administration of justice, and that provision could be violated by a prosecutor who knowingly suppresses evidence of actual innocence. The existing rules, along with case law, impose a duty on prosecutors to disclose clearly exculpatory evidence after sentencing.

The Department of Justice has regularly opposed the ER 3.8 expansion efforts in other jurisdictions precisely because the obligation already exists. Moreover, the Department has adopted several internal procedures aimed at militating against erroneous convictions based on flawed evidence, including requiring broader disclosure of potentially exculpatory information than is constitutionally required and providing our prosecutors with extensive yearly training on their discovery obligations. We share the goals of the Petitioners, but as set forth below raise concerns of unanticipated consequences of a vague set of standards that place prosecutors into an investigative function.

B. The proposed new Rule provisions are overly broad and inconsistent with the existing obligations.

Subsection (g) (1) in particular is overly broad in its imposition of a disclosure obligation on all prosecutors in the state who learn, through any forum, of evidence of actual innocence of any defendant who has been convicted anywhere. It strains credulity to think that Arizona prosecutors should have an obligation to disclose to courts in other jurisdictions deficiencies in prosecutions or of prosecutors licensed in those other jurisdictions. To the extent this proposed new provision accomplished anything, it would likely encourage an onslaught of "I didn't do it" letters directed to Arizona prosecutors, courts, and the Arizona Bar by inmates housed in Arizona whose crimes were committed, charged and tried in another state. How is an Arizona prosecutor to know if the evidence presented shows actual innocence? Equally important, how is disciplinary counsel for the Arizona State Bar to judge a well written, plaintive letter complaining about an Arizona prosecutor who did not remedy a claim of wrongful conviction, no matter the jurisdiction of conviction? Judging the proposed rule from the standpoint of mere practicality, its imposition would create an onslaught of Bar complaints against federal, state, and local prosecutors by prisoners seeking nothing more than an avenue to challenge their convictions. Such remedies are already provided, at least in the federal system, by petitioning the courts for habeas relief pursuant 28 U.S.C. §§ 2254, 2255, and 2241. The State Bar's disciplinary system should not be substituted for the court system as a means of prisoners' challenging their convictions.

Moreover, Petitioner's efforts to define the phrase of art "new, credible and material evidence" through commentary exacerbate the over-reaching. Because the proposed rule imposes a requirement on *all prosecutors*, whether they have

any prior involvement with the case or not, it is not clear how a prosecutor with no background in a case can meaningfully evaluate whether evidence is "new," whether it is "credible," and whether it is "material." In other words, a prosecutor may "know" of the existence of evidence, but have no basis to assess whether such evidence is in any sense material because it does not pertain to any case worked by that prosecutor.

Proposed sections 3.8(g)(1) and(2) compound this confusion by requiring a prosecutor to act upon such knowledge "promptly." Although the proposed rule does not define "promptly," presumably it requires significant dispatch. Yet the proposed rule does not reasonably inform prosecutors when they must act. Is that duty of speed triggered when the prosecutor receives the evidence or only when the prosecutor learns that the evidence is new, credible, and material? Put differently, how will a prosecutor with no background knowledge of a prosecution be able to act "promptly" when that prosecutor may know nothing about the charges, nothing about the witnesses, nothing about the broader investigation, nothing about the discovery that occurred, nothing about discussions had between the prosecutor in charge of the case and the defense counsel, and so on?

Aside from the overbreadth, proposed new subsection "g" is inconsistent with the existing duty to disclose "clearly exculpatory material." Petitioner seeks to overrule Canion through the rule-making process rather than through an actual case or controversy. To the extent that Petitioner intends the proposed language to merely mirror existing law, it fails. There is a difference between "new, credible and material" and "clearly exculpatory" evidence. For example, it is not uncommon for convicted persons who are faced with sex offender registration requirements to seek to persuade a victim (sometimes a family member) to recant

the victim's testimony. The proposed modification to Rule 3.8 would raise the risk that a prosecutor must deem such post-hoc recantation to be "credible" and "material" even where not "clearly exculpatory." A prosecutor may thus be required to undertake an investigation of this type of claim to avoid a disciplinary complaint and the necessity of preparing a response to the State Bar.

C. Investigative duties are inconsistent with the role of a federal prosecutor.

Petitioner carefully notes that it does not seek to require a prosecutor to undertake an investigation, but rather to "make reasonable efforts to cause an investigation." (Pet. at 8.) The argument is a stratagem aimed at getting the same result. Particularly in the federal system, and in contrast to many Arizona counties, prosecutors have no in-house investigators and must obtain the assistance of other federal agencies, or of other components within the Department of Justice, to investigate a crime. Federal prosecutors have no general investigative powers, and cannot compel testimony or subpoena evidence post-conviction.

A further practical reality impedes the proposed investigation mandate. Such a mandate could blur the lines between the qualified immunity generally afforded to investigators and the absolute immunity for prosecution (and judicial) functions. E.g. Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993):

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or

> police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction."

Id. (internal and external citations omitted). This Court should not abrogate immunity through Rule.

Finally, we raise the important issue of a crime victim's rights. Although in the federal system a crime victim's rights are not of a constitutional magnitude, as they are in the State of Arizona, a federal crime victim is nonetheless entitled by statute to "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). The imposition of an investigation requirement could impede this right. Take, for example, a federal prisoner who writes a letter to a prosecutor contending that a family member of the victim coerced the testimony of a key witness. Would this allegation qualify as "credible, new and material?" Must a prudent prosecutor really investigate the family member of the crime victim in order to protect the prosecutor's license to practice law? Significant opportunity exists for malingerers in the system to exploit such a rule change with claims that require an investigation and response by the prosecutors.

D. In the alternative, this Court should impose a universal obligation on all Arizona attorneys.

In the alternative, to the extent this Court seeks a mechanism to provide greater protections to convicted defendants, that mechanism should appropriately place an obligation on all Arizona attorneys. The Preamble to the Ethical Rules confirms that "[a] lawyer, as a member of the legal profession, is a representative

of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." (Preamble, at ¶ 1.) This general admonition is consistent with common sense, because prosecutors are not endowed with exclusive access to potentially exculpatory information.

Indeed, many non-prosecutors may have ready access to potentially exculpating and/or impeaching material, to include by way of example and not limitation: a) an in-house counsel for a forensic laboratory who learns of tainted DNA results; b) the family law practitioner who, in the course of deposing a party-opponent who was a percipient witness in an unrelated criminal trial, learns of significant impeachment evidence casting doubt on the testimony in the criminal trial; and c) a criminal defense attorney for a third party unrelated to the party claiming innocence, whose client provides anecdotal information suggesting that someone else committed the crime. Any of these individuals may likely come forward under our current rule (ER 1.6) for maintaining client confidences, but none would be required to do so.

In each of these scenarios, and the myriad of others that may occur, all Arizona attorneys might reasonably have an enhanced duty of candor to the tribunal under ER 3.3, which could be modified to add the following additional language:

> (e) When an attorney knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the attorney shall, subject to the restrictions in ER 1.6:
>
> > (1) promptly disclose that evidence to an appropriate court or authority.

Mutuality of obligations with respect to evidence that may provide post-conviction relief may also help to increase civility among the bar, and to militate against prosecutorial misconduct allegations which are raised tactically, rather than as a means to protect the system.[1] Inclusion of the post-conviction disclosure obligation in ER 3.8 gives a powerful new weapon to that rare group of defense lawyers who may seek to misuse misconduct allegations to leverage a better result in a case. Mutuality of the obligation, in contrast, comports more closely with every Arizona attorney's obligations. "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." (Preamble, at ¶ 5.)

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[1] Moreover, although clearly this Court has an important role in ensuring that attorneys adhere to Arizona's ethical rules, this Court and other state and federal courts are in a better position to judge counsel directly, in the context of a particular matter, rather than derivatively, through a disciplinary process begun in an administrative forum.

E. Conclusion.

While respecting Petitioner's intentions and laudable goals, we object to the proposed modifications to the special duties of prosecutors for the reasons set forth above.

RESPECTFULLY SUBMITTED this 20th day of May, 2012.

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