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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of, PETITION TO AMEND ER 3.8 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT (RULE 42 OF THE ARIZONA RULES OF SUPREME COURT)	Supreme Court No. R-11-0033 **REPLY TO PROSECUTORS' COMMENTS IN OPPOSITION OF ADOPTING ABA'S AMENDMENTS TO MODEL RULE 3.8**

* Institutional designation is for identification purposes only.

Pursuant to Rule 28(D)(2) of the Arizona Rules of Supreme Court, Petitioners hereby reply to the comments filed in opposition to the Petition to Amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional Conduct.[1]

INTRODUCTION

As recognized by the American Bar Association, the Arizona Attorneys for Criminal Justice, the State Bar's Defense Subcommittee, two prior Arizona Attorneys General, three retired Chief Justices of the Arizona Supreme Court, Judge Bob Myers, and Mark Harrison, there is a void in Arizona's ethical rules that must be filled. Although the National District Attorneys Association and prosecutors from other states have acknowledged the problem and supported new ethical obligations similar to those proposed here, the Arizona prosecutorial offices responding to the Petition did not take this self-critical "high-road." Rather, they have proposed numerous arguments, most of which are unsupported by the law, internally inconsistent, and indicate a reluctance to prioritize the correction of wrongful convictions. Specifically, the opposing comments variously:

- Deny that any problem exists in Arizona;
- Argue that the problem is covered by existing caselaw and ethical rules;
- Argue that the proposed amendments expose prosecutors to civil liability;
- Argue that the proposed language is vague and ambiguous;
- Deny that the Court can regulate prosecutors in this area;

[1] Comments in opposition were received from the following prosecutorial entities: Arizona Prosecuting Attorneys' Advisory Council (APAAC), United States Attorney's Office (USAO), and the Maricopa and Pima County Attorney's Offices (MCAO and PCAO). In this Reply, we cite to the opposing comments using these agency abbreviations, followed by the relevant page number of the comments.

- Suggest that fiscal concerns, victim rights, and the need to prosecute new crimes trump the concerns of wrongful convictions; and
- Maintain the amendments will not accomplish their goal, as prosecutors who engage in misconduct will not change even with an ethical rule in place.

Most of these arguments were addressed in the Petition and the comments filed in support of the proposed rule change. Petitioners, however, briefly address these arguments in this Reply to illustrate that the arguments are both erroneous and contrary to the prosecutorial role of "minister of justice."

ARGUMENT

I. THE ARGUMENT THAT NO PROBLEMS EXIST IN ARIZONA IGNORES OUR HISTORY AND THE NATURE OF THE ISSUE.

The opposing comments take the incredible position that no problems exist in Arizona.[2] Petitioners and the opposing comments do agree on one thing—Arizona boasts many exceedingly good prosecutors. But even if Arizona is generally better than other states, a proposition for which the opposing comments provide no support, "ministers of justice" should still want ethical guidance in this area; they currently have almost none. Furthermore, Arizona is actually not perfect. Although the goal of the amendments is not to react to a problem peculiar to Arizona but to address a nationally documented problem in every state, several problematic examples follow, disproving the notion that prosecutorial misconduct does not occur in Arizona.

[2] *See* APAAC at 2 ("First and foremost, there is simply no evidence that Arizona prosecutors fail to disclose post-conviction information that could have changed the outcome of a case."); MCAO at 3, 5 ("The Krone case proves that prosecutors will act appropriately when newly discovered evidence shows a convicted defendant did not commit the crime."), 6–7.

First, a recent study of Arizona appellate opinions between just 2004 and 2008 revealed 20 cases of prosecutorial misconduct.[3] Second, on the specific case level, a few examples of many follow. Experienced prosecutor Kenneth Peasley permitted false testimony to establish a crucial fact and obtain the death penalty in the prosecution of two defendants.[4] The two defendants have since been exonerated for the 1992 murders.[5] Moreover, "[i]n September 2011, a federal

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[3] Maurice Possley, *Viewpoints: Prosecutorial Conduct Exposed in Arizona*, CRIME REP., http://www.thecrimereport.org/viewpoints/2012-04-prosecutorial-conduct-exposed-in-arizona (last visited June 19, 2012). Moreover, the study relied on only appellate opinions, which likely grossly understated the error rate. *See* Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* 2–3 (Veritas Initiative, online ed. 2010) ("About 97 percent of felony criminal cases are resolved without trial, almost all through guilty pleas. Moreover, findings of misconduct at the trial court level that are not reflected in appellate opinions cannot be systematically reviewed without searching every case file in every courthouse in the state. And of course, the number cannot capture cases of prosecutorial misconduct that were never discovered (for example, failure to disclose exculpatory evidence) or appealed (due, for example, to lack of resources or ineffective counsel).") (citation omitted); Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989 – 2012*, NAT'L REGISTRY OF EXONERATIONS 40, 67 (May 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf ("Misbehavior is rarely advertised. If misconduct is not uncovered in litigation or by journalists, we don't know about it. As a result, our data underestimate the frequency of official misconduct.").

[4] *In re Peasley*, 90 P.3d 764, 773 (Ariz. 2004).

[5] NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited June 20, 2012).

judge set aside the 1997 murder conviction of Khalil Rushdan, ruling the conviction was the product of a 'vindictive prosecution' engineered by Peasley."[6]

In 2003, Carolyn June Peak's murder charge was dismissed because the original prosecutor in the case failed to turn over to the defense "more than 30 witness interviews, more than two dozen investigative reports as well as records of subpoenas issued by" the original prosecutor.[7]

Third, national studies disprove the notion that prosecutors (unlike other humans) are perfect. The most common causal factors that appear in all exonerations include perjury or false accusation (51%) and official misconduct (42%), and "[t]he most common form of official misconduct is concealing exculpatory evidence from the defendant and the court."[8] Furthermore, unique

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[6] Maurice Possley, *Viewpoints: Prosecutorial Conduct Exposed in Arizona*, CRIME REP., http://www.thecrimereport.org/viewpoints/2012-04-prosecutorial-conduct-exposed-in-arizona (last visited June 19, 2012).

[7] Maurice Possley, *Carolyn June Peak*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3528, (last visited June 20, 2012).

[8] Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989 – 2012*, NAT'L REGISTRY EXONERATIONS, 40, 67 (May 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. It should be noted that official misconduct includes police misconduct, in addition to prosecutorial misconduct. The National Registry of Exonerations launched after our Petition: "The National Registry of Exonerations is a joint project of the University of the Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law. We maintain an up to date list of all known exonerations in the United States since 1989." *See* http://www.law.umich.edu/special/exoneration/Pages/about.aspx. It is an excellent new resource illustrating (although admittedly understating) this embarrassing flaw in the criminal justice system—or at least the tip of the iceberg. The report shows

problems exist in post-conviction settings in spades. An analysis of 182 cases in which prosecutors could consent to a motion to vacate convictions *following DNA exoneration* revealed that *12% did not consent*.[9] Almost 20% of prosecutors initially opposed DNA testing.[10]

The only proof offered that Arizona prosecutors are immune from the troubles of prosecutors nationally—and human beings generally—is the Ray Krone case, discussed immediately below.

II. THE RAY KRONE CASE IS ILLUSTRATIVE OF THE SYSTEMIC PROBLEMS, NOT PROSECUTORS' PERFECTION.[11]

The only evidence proffered as proof that Arizona prosecutors act or will act perfectly without guidance or regulation is the high-profile Ray Krone case.[12]

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873 known exonerations since 1989, plus an additional 1170 group exonerations (resulting from several major police scandals).

[9] Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 446 n.46 (2011) (citing Brandon L. Garret, *Exonerees Postconviction DNA Testing*, UNIV. VA. SCH. LAW, http://www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerees_postconviction_dna_testing.pdf (last visited Jan. 11, 2011)). Although 12% is not horrible, it does show a problem in prosecutors' post-conviction behavior in a significant number of cases; a problem not even acknowledged in the opposing comments.

[10] *Id.*

[11] *See, e.g.*, MCAO at 5 ("The Krone case proves that prosecutors will act appropriately when newly discovered evidence shows a convicted defendant did not commit the crime."); MCAO at 7 ("The Krone case is proof that prosecutors do take appropriate action.").

[12] MCAO at 5. To be sure, the USAO cited its recent efforts to increase disclosure training to both prosecutors and law enforcement agents. That is a laudable effort that should be pursued regularly by all prosecutorial agencies.

These arguments are misplaced for two reasons. First, the arguments reveal a troubling logical fallacy in their reasoning: that because they did it right once, they have done and will do it right every time. Second, they are wrong: The MCAO strongly opposed DNA testing in Ray Krone's case.[13]

Furthermore, even after the MCAO lost that unjust opposition (but succeeded in significantly delaying Ray Krone's release for no good reason), the office took six weeks to allow Krone a conditional release from prison and two months to move to vacate the conviction. Moreover, by that time the press had already started asking questions about Krone's innocence, which might have increased the attention and speed with which the MCAO treated the matter.

In sum, even if the office had gotten it right in Krone's case, it would not address the literally thousands of other cases it prosecutes. In any event, its behavior was not a model of justice. Indeed, by its own reasoning—i.e., one case is a valid and reliable predictor of every case—ethical guidance is absolutely necessary.

USAO at 3. By both adopting the ABA's amendments and following the USAO's example, positive change would occur.

[13] For the Court's reference, we have submitted with this Reply the MCAO's opposition to DNA testing. That opposition reveals several resistive, burden-shifting, and incorrect arguments: "the evidence strongly supports the jury's finding of guilt," "[n]one of the scientific methods used to analyze the evidence in this case have been found invalid or unreliable," "the nature of the evidence . . . does not 'make testing results on the issue of identity virtually dispositive,'" and the evidence might not be "in a condition which would allow for DNA testing." Unerring ministers of justice would presumably not resist relatively inexpensive DNA testing and certainly not in close cases, such as Ray Krone's case.

III. EXISTING CASELAW DOES NOT PROVIDE POST-CONVICTION GUIDANCE.

Two of the comments labor under the misimpression that existing caselaw provides sufficient guidance.[14] They cite only two cases: (1) *Canion v. Cole*,[15] whose relevant discussion was general, brief, and made in dictum;[16] and (2) *Thomas v. Goldsmith*,[17] whose application is largely constrained to pending federal habeas corpus proceedings, explicitly addresses only semen evidence in a sexual assault case, and suffers from the same inherent limitations as the general statement in *Canion*.

The entire discussion in *Canion* regarding a duty to disclose consists of the following sentence: "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, *see Brady*, 373 U.S. at 87, 83 S.Ct. 1194 (setting forth requirement to disclose clearly exculpatory material), and we affirm that the State does bear such a duty." *Canion*, 115 P.3d at 1262. This Court then went on to distinguish the issue before it. *See id.* at 1262–63.

Similar to *Canion*, the entire relevant discussion in *Goldsmith* is contained in a few general sentences: "[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

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[14] *See* MCAO at 3; USAO at 2–3.

[15] 115 P.3d 1261 (Ariz. 2005).

[16] We support *Canion*'s statement, and we are not using "dictum" in any pejorative sense. Rather, it was dictum in the technical sense: it was not necessary to support the result in light of the facts.

[17] 979 F.2d 746 (9th Cir. 1992).

duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding."[18] Furthermore, as the court noted, the petitioner knew what evidence might exculpate him and specifically requested it from both the state and court. Many potential exonerees do not know the specific nature of the potentially exculpating evidence.[19] Finally, the opposing comments fail to mention that the Supreme Court has subsequently limited *Goldsmith*'s holding.[20]

IV. EXISTING ETHICAL RULES ALSO DO NOT PROVIDE POST-CONVICTION GUIDANCE.

The opposing comments state that the existing ethical rules cover these post-conviction situations. They cite ERs 3.3, 3.4, 3.8(a), and 8.4(d).[21] These rules do not apply post-conviction at all—certainly not without a pending proceeding. For

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[18] *Id.* at 749–50 (citing only *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

[19] *See generally* Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* 37 (Veritas Initiative, online ed. 2010) (citing James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000)), *available at* http://www.veritasinitiative.org/our-work/prosecutorial-misconduct/pm-preventable-error-a-report-on-prosecutorial-misconduct-in-california/pm-research-report-highlights/#download/ ("It is impossible to know how many *Brady* violations occur—by their nature they involve evidence that is hidden from the defense. But a study of all 5,760 capital convictions in the United States from 1973 to 1995 found that the suppression of evidence by prosecutors was responsible for 16 percent of reversals at the state post-conviction stage.").

[20] "[T]he holding in *Goldsmith* that *Brady* applied in such a situation was specifically rejected by the United States Supreme Court in *Osborne*." *Stewart v. Cate*, No. 05cv1059-BTM (CAB), 2010 WL 1687671, at *2 (S.D. Cal. 2010) (citing *District Attorney v. Osborne*, 129 S.Ct. 2308, 2319–20 (2009)).

[21] *See* APAAC at 4; USAO at 3; MCAO at 3; PCAO at 4.

example, in addition to other facially obvious limitations, ER 3.3 clearly states that its duties last only until the "conclusion of the proceeding." ER 3.3(c) & cmt. 13. ER 3.4 prohibits only "unlawful concealment," which is a far cry from affirmatively requiring disclosure and pursuing justice.[22] ER 3.8(a) prohibits prosecutors from prosecuting a charge without probable cause; although prosecutors do occasionally violate this prohibition, as former County Attorney Andrew Thomas recently illustrated, the rule is facially inapplicable in the *post-conviction* context. ER 3.8 also speaks in terms of the "guilt of the *accused*" and disclosure in connection with sentencing, saying nothing about obligations in a post-conviction procedural posture.

ER 8.4(d) broadly prohibits conduct "prejudicial to the administration of justice." The same opposing comments that claim that the proposed amendments' additional guidance is vague or "totally unclear" now hypocritically rely on 8.4(d), which is undisputedly one of the vaguest (or at least "broadest") ethical rules on the books. Moreover, 8.4(d) typically presumes misconduct in a pending proceeding, which renders it largely inapplicable.[23] Perhaps most tellingly, neither 8.4(d) nor any other rule has been applied in disciplinary cases arising from the situations primarily at issue; and the opponents cite none.

Finally, relying on the above rules presumes that we are primarily addressing situations in which prosecutors intentionally conceal evidence.[24] That

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[22] *See* USAO at 3; MCAO at 3.

[23] *See, e.g., In re Gustafson*, 968 P.2d 367, 372 (Or. 1998) (requiring that the prejudicial conduct occur "during the course of a judicial proceeding or another proceeding").

[24] *See* USAO at 3 ("ER 8.4(d) admonishes that it is professional misconduct to engage in conduct that is prejudicial to the administration of justice,

is not even half of the problem, however. Indeed, most prosecutors do not intentionally suppress evidence. The amendments provide guidance to the more common situation in which, inadvertently, the prosecutor likely convicted the wrong person. In those situations, prosecutors are currently left without significant guidance, wonder about their obligations, and face institutional and psychological pressures to do nothing in the face of high caseloads, limited resources, and no clearly defined duty. And, as discussed above, some (though not all) prosecutors regrettably delay, ignore, or outright resist efforts to release a clearly innocent person.

V. THE COURT CLEARLY CAN REGULATE THE ETHICAL CONDUCT OF PROSECUTORS.

The suggestion that the Court cannot regulate prosecutors, both explicit and implicit in the comments, is tired and meritless.[25] First, the courts regulate prosecutors—qua prosecutors—in analogous contexts quite frequently.[26] Second, as a general matter, prosecutors are legally and appropriately subject to ethical

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and that provision could be violated by a prosecutor who knowingly suppresses evidence of actual innocence.").

[25] *See, e.g.*, APAAC at 3 ("Prosecutors cannot be ordered to investigate."). The proposed amendments, of course, do not actually require investigation, as noted again below.

[26] *See, e.g.*, ARIZ. R. CRIM. P. 15 (requiring various disclosure obligations on the state on penalty of sanction); ER 3.8(a) (prohibiting prosecutions without probable cause); ER 3.8(e) (imposing limitations on prosecutors' ability to subpoena lawyers); ER 3.8(f) (imposing limitations on prosecutors' pretrial public statements).

regulation—the same as any other attorney. The authority to regulate is well-settled as to both state[27] and federal[28] prosecutors.

The opposing comments also specifically argue that the Court cannot, or at least should not, impose on them a duty to investigate. As the Petition made clear, however, prosecutors can choose to investigate (which they should do in any event to make sure that the actual criminal is not out committing more crimes as in Ray Krone's case) *or "make reasonable efforts to cause an investigation."* To alleviate this concern about investigations,[29] Petitioners added a sentence in the comment

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[27] This Court long ago established its inherent authority to regulate lawyers, including sitting county attorneys. *See In re* Bailey, 30 Ariz. 407, 412, 248 P. 29, 30 (1926) ("[I]t . . . follows that, whenever a practitioner by his conduct shows that he no longer possesses the qualifications required for his admission, he may be deprived of the privilege theretofore granted him, and such deprivation may be either under the authority of a statute prescribing the cause therefor, and the manner of procedure, or the court of its own inherent power may act."); *In re* McMurchie, 26 Ariz. 52, 58, 221 P. 549, 551 (1923) ("The assumption that the court's jurisdiction is limited to the express provisions of this statute is based upon totally false premises. All courts exercising general and common-law jurisdiction possess the inherent right to require lawyers practicing at their bar to so conduct themselves that they shall neither bring reproach upon their profession nor in any way impede the due administration of justice. This is a right not derived from statute, nor held at the will of the Legislature. It is essential to the orderly administration of justice.").

[28] *See generally* 28 U.S.C. § 530B(a) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

[29] *See, e.g.*, APAAC (citing no legal support for its immunity propositions). The Petition showed that no cases impose civil liability on prosecutors for investigating their mistakes (and indeed, existing case law suggests that civil immunity is a privilege bestowed in part because prosecutors are still subject to ethical rules). MCAO, however, cites two cases, but neither addresses these circumstances at all. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 275 (1993)

making this fact doubly clear: "if the prosecutor makes a reasonable effort to cause an investigation, it is not necessary for the prosecutor personally to conduct an investigation." It is neither dangerous nor burdensome to prosecutors to request that the local police department or FBI investigate the matter in light 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 opposing comments' tooth-and-nail resistance to this duty raises concerns that certain prosecutorial offices would not make that phone call or send that letter in the absence of an ethical rule requiring it.

VI. NO "PANOPLY" OF EXISTING REMEDIES PERFECTLY PROTECTS CRIMINAL DEFENDANTS.[30]

The opposing comments argue that existing laws already perfectly protect wrongfully convicted defendants. This "panoply" of existing protections, such as habeas corpus, provides no such safety net for defendants. There is no right to counsel for non-capital habeas petitioners in federal court. There also is no general right to the effective assistance of counsel in state habeas proceedings. Habeas corpus law is highly deferential to the status quo, is procedurally difficult to

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("Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of § 1983."); *State v. Super. Ct.*, 186 Ariz. 294, 298, 921 P.2d 697, 701 (Ct. App. 1996) ("As to the discovery violation, it is clear that absolute immunity applies, since the conduct of discovery is both quasi-judicial and within the prosecutor's authority;" concluding that only prosecutor's statements to the press were not protected by absolute civil immunity).

[30] *See* APAAC at 4; USAO at 4; MCAO at 5; PCAO at 3 (citing 28 U.S.C. §§ 2241, 2254, 2254; A.R.S. § 13-4240; ARIZ. R. CRIM. P. 32).

maneuver (even with a competent attorney), and is often impossible to navigate successfully without "new, credible, and material" evidence or the like.[31] Moreover, the argument presumes that the innocent defendant knows of the evidence in the first place, which these amendments will help assure. For example, an inmate locked up in prison with no attorney, no money, and no legal education, has few resources to "discover" new evidence and file a timely, complete, and persuasive habeas petition. Furthermore, the opposing comments are simply burden-shifting the executive branch errors onto criminal defendants, some of the least powerful people in the state. And, as the attachment and studies suggest, prosecutors often fight post-conviction relief both reflexively and zealously—even in close cases. Finally, this argument also suggests an untoward callousness to those innocent citizens whom they convict, because the suggested remedies are notoriously slow and can fail.

VII. ANY REQUIREMENT TO DISCLOSE EVIDENCE OUT-OF-STATE DOES NOT MAKE THE AMENDMENTS UNWORKABLE.

The opposing comments complain that, if prosecutors were somehow to learn of new, credible, and material evidence creating a reasonable likelihood that an out-of-state defendant is innocent, they would have to disclose that evidence to authorities in another state.[32] Initially, it is tough to see the issue—it does not seem

[31] *See, e.g.*, Ariz. R. Crim. P. 32.1(e) (requiring for relief newly discovered material facts that probably would have changed the verdict or sentence).

[32] The APAAC comment seems confused about general principles of disciplinary authority: "Another concern is the cross-jurisdictional requirement. Evidence may be obtained in a jurisdiction thousands of miles away. It is unclear if the mere discovery of evidence in another jurisdiction triggers a requirement for that jurisdiction's prosecutor to investigate." APAAC at 4. The amendments

ethical or good policy to allow innocent out-of-state inmates to languish in prison and making a phone call or sending an email or letter takes nearly the same amount of effort regardless of the location of the recipient. Moreover, not one of the growing number of states adopting these amendments has noted a problem in this regard. That should not be surprising. As one example, ER 8.3 on its face requires lawyers to report unethical acts of any attorney, not just Arizona attorneys. Although the rule has been on the Arizona books for nearly thirty years, there have been no administrative difficulties with reporting out-of-state attorneys. The rules are read with reason. If a prosecutor were to learn in a newspaper article that a New York attorney was being investigated by disciplinary authorities for stealing client funds, for instance, the prosecutor would not have to report that attorney (about whom, of course, the disciplinary authorities already know). Similarly, if the defendant or applicable, out-of-state prosecuting agency already knows about the new evidence, there typically would be no reason to require the Arizona prosecutor to retell the defendant or prosecutor.[33]

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would have to be adopted by a state or other jurisdiction in which the prosecutor practices before the prosecutor could be subject to discipline.

[33] The USAO raises, at first blush, a more sophisticated question: how will an Arizona prosecutor who has not worked on the particular case know whether the evidence is "new, credible and material . . . creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted?" USAO at 4–5. The amendments already account for that situation by requiring only that this prosecutor disclose the evidence to the prosecutor who has authority over the prosecution. *See, e.g.*, Model Rule 3.8 cmt. 7 ("[P]aragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction in which the conviction occurred."). The rest of the rule generally applies only if the conviction was entered in a court in which the prosecutor exercises prosecutorial authority.

VIII. THE AMENDMENTS ALREADY FOCUS ON THE APPROPRIATE ACTOR—THE PROSECUTOR.

The opposing comments first claimed that the amendments are horribly drafted and the sky will fall if adopted, but they then claim in the alternative that the amendments are important and should be imposed on every attorney, not just prosecutors. The opposing arguments ignore the unique minister of justice role in our system. The prosecutor is also the most knowledgeable and influential player in these cases: Unlike all other attorneys, prosecutors have the ability and authority to motivate law enforcement agencies to investigate and to motivate courts (by, for example, filing a motion to dismiss or vacate) to reconsider a previously decided matter; prosecutors are truly the gateway between an innocent person and freedom. It is the prosecutor who effectively decides whether an innocent person will be released with all deliberate speed or whether the innocent person languishes further in prison for months, years, or even life.

While it is theoretically possible that another attorney might stumble upon evidence that would fall under the proposed rule, the likelihood of this possibility seems slim. The likelihood that that evidence could then be unilaterally disclosed without violating ER 1.6 is even slimmer. There is no reason to delay this amendment further to consider this slight hypothetical possibility. The ABA amendments were nationally vetted by prosecutors, defense counsel, judges, the House of Delegates, and others, and yet they chose to limit the scope of the rule change to prosecutors.

CONCLUSION

Everyone makes mistakes. Despite the opposing comments' claims to the contrary, prosecutors have indeed made mistakes in both pre- and post-conviction stages, as the Petition and this Reply have shown. What counts is how we handle

those mistakes and whether we make adjustments to avoid or mitigate the inevitable mistakes of the future. To err is human, and that is exactly why we subject ourselves to regulation—especially when we are in positions as powerful and important as prosecutors. We are confident that this Court—in its inherent duty to regulate its officers—will do the right thing.

RESPECTFULLY SUBMITTED this 30th day of June, 2012.

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