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14 **IN THE SUPREME COURT**
15 **STATE OF ARIZONA**

16
17 In the Matter of
18 PETITION TO AMEND RULE 3.8 OF
19 THE ARIZONA RULES OF
PROFESSIONAL CONDUCT

Arizona Supreme Court No.
R-11-0033

**COMMENTS OF THE UNITED
STATES ATTORNEY'S
OFFICE FOR THE DISTRICT
OF ARIZONA**

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22 Pursuant to this Court's August 30, 2012 Order Reopening Petition for Comment,
23 the United States Attorney's Office for the District of Arizona, (hereinafter the "USAO"),
24 by undersigned counsel, submits the following.
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1 **I INTRODUCTION**

2 The United States Attorney's Office filed its initial objections to Petitioners'
3 proposed revisions to ER 3.8 in May 2012, citing, among other concerns, discrepancies
4 between the duties imposed by the rule change and prosecutors' existing obligations under
5 the Federal Constitution and applicable case law. The USAO would not countenance the
6 continued incarceration of any defendant who was convicted and later found to be
7 innocent of a crime. The United States Attorney's Manual reflects this goal, requiring
8 Assistant United States Attorneys, when confronted with evidence of a defendant's
9 innocence, to disclose such exculpatory information to the defendant or the court
10 whenever the information is obtained.
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13 The USAO's concerns regarding the wholesale adoption of ABA Model Rules
14 3.8(g) and (h) therefore do not stem from a desire to abrogate prosecutors' continuing
15 obligations to the accused and the truth underlying convictions, but pertain to the fact that
16 wholesale adoption of Model Rule 3.8(g) and (h) as written would lead to an unintended or
17 unreasonable application of the Model Rule and that prosecutors may misunderstand their
18 duties under the Model Rule.
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21 The five issues raised in the Supreme Court's August 30, 2012 Order reflect the
22 USAO's concerns. Hence, this Comment does not reiterate the USAO's prior arguments
23 *en toto*. Instead, the USAO submits this Comment in support of and in addition to the State
24 Bar of Arizona's Comment regarding this Court's August 30, 2012 Order (the "State Bar
25 Comment"), noting that the positions therein appear responsive to many of the USAO's
26 concerns.
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1 **II UNITED STATES ATTORNEY'S OFFICES COMMENTS ON**
2 **REQUESTED ISSUES**

- 3 **(1) What criteria should trigger the prosecutor's ethical duty to disclose**
4 **exculpatory information after a conviction? Should it be "new, credible**
5 **and material information," "credible and material information," or**
6 **some alternative phrasing of the criteria?**

7 The USAO contends that prosecutors' ethical duty to disclose post-conviction,
8 exculpatory information should not require individual prosecutors to evaluate the weight
9 of newly acquired information – *i.e.* whether the exculpatory information rises to an
10 undefined standard of "credible" or "material" – because doing so would necessarily cause
11 confusion regarding a prosecutor's obligations. Rather, the USAO believes that the
12 language negotiated in State Bar Committee and proposed in the State Bar Comment
13 defines more workable criteria.

14 It is unclear how a prosecutor who receives information about a case she did not
15 prosecute can determine whether the information is new, credible, and/or material,
16 especially because the proposed rule either requires prosecutors who were not responsible
17 for the underlying conviction to evaluate new information or places an evaluative
18 obligation on prosecutors when an underlying conviction may have occurred years earlier
19 among thousands of files for which the prosecutor has been responsible.¹ Although the Bar
20 should expect its criminal attorneys to engage in their best efforts to make this
21 determination, there must be recognition that, in some cases, this is a truly Sisyphean task.

22 Accordingly, the USAO supports the proposition that the duty to disclose post-
23 conviction evidence of a defendant's innocence should not create an additional duty to
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¹ See Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146, 2148 (1998) (noting that prosecutors and defenders work "in a world of heavy caseloads").

1 evaluate the weight and credibility of new information, but instead simply requires the
2 prosecutor in receipt of new information to disclose the same to either the judge or the
3 defendant's attorney. The proposed change would read as follows:

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5 (g) When a prosecutor is in receipt of information that may support a finding ~~knows~~
6 ~~of new and credible evidence the prosecutor knows creates a reasonable likelihood~~
7 that a convicted defendant did not commit an offense of which the defendant was
8 convicted, the prosecutor shall:

9 (1) promptly disclose that evidence to an appropriate court or authority,
10 and

11 (2) if the judgment of conviction was entered by a court in which the
12 prosecutor exercises prosecutorial authority, promptly disclose that
13 evidence: (i) to an appropriate court with a request to appoint an attorney for
14 the defendant and (ii) to the defendant unless a court authorizes delay; and
15 (3) if applicable, follow the requirements of ER 3.8(h).

16 Under the State Bar Comment's above wording, the defendant and his or her
17 attorney (arguably the individuals with the most interest in the newly acquired
18 information) will be able to develop the claim of wrongful conviction without the
19 prosecuting agency guessing whether the information is new, credible, or material. The
20 proposed rule further references ER 3.8(h) for situations in which the newly discovered
21 information raises "substantial questions"² concerning the defendant's guilt.

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23 **(2) Should this Court retain or delete the prosecutor's duty, upon receipt of
24 exculpatory information after a conviction, to "undertake further
25 investigation, or make reasonable efforts to cause an investigation, to
26 determine whether the defendant was convicted of an offense that the
27 defendant did not commit"? See Petitioners' proposed ER 3.8(g)(2)(ii)
28 and proposed Comment 7.**

29 The USAO contends that, upon adoption of the standard set forth in the State
30 Bar Comment and in Section II.(1) of this Comment, a prosecutor's duty to

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² "Substantial questions" is language taken from E.R. 8.3(a). Ethics Opinion 90-13, " 'Substantial question' ... refers to the seriousness of the possible offense and not the quantum of evidence... In this context, 'substantial' also 'denotes a material matter of clear and weighty importance." Citations omitted.

1 investigate the defendant's actual innocence would occur only after the defendant,
2 through his or her attorney, presented evidence to the court and the prosecuting
3 agency that warranted further investigation or in circumstances set forth in 3.8(h).

4 Accordingly, Comment 7 would be amended as follows:

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6 [7] For the purposes of paragraph (g), the information requiring the
7 prosecutor to act is any claim of actual innocence. Evidence is considered new
8 when it was unknown to a trial prosecutor at the time the conviction was
9 entered or, if known to a trial prosecutor, was not disclosed to the defense,
10 either deliberately or inadvertently. The reasons for the evidence being
11 unknown (and therefore new) are varied. It may be new because: the
12 information was not available to a trial prosecutor or the prosecution team at
13 the time of trial; the significance of the evidence was not appreciated by the
14 trial prosecutor or prosecution team at the time of trial; the police department
15 investigating the case or other agency involved in the prosecution did not
16 provide the evidence to a trial prosecutor; or recent testing was performed that
17 was not available at the time of trial. When a prosecutor knows of new and
18 credible evidence that the prosecutor knows creates a reasonable likelihood that
19 a person If the conviction was obtained in a court in which the prosecutor
20 exercises prosecutorial authority, paragraph (g) requires the prosecutor to
21 promptly disclose that evidence to the defendant unless a court authorizes
22 delay. If the information raises a substantial question about the defendant's
23 guilt with the prosecutor, the procedure set forth in ER 3.8(h) should be
24 followed. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a
25 represented defendant must be made through the defendant's counsel, and, in
26 the case of an unrepresented defendant, would ordinarily be accompanied by a
27 request to a court for the appointment of counsel to assist the defendant in
28 taking such legal measures as may be appropriate. If the conviction was
obtained outside the prosecutor's jurisdiction was convicted of a crime that the
person did not commit, paragraph (g) requires prompt disclosure to the court or
other appropriate authority, e.g. the chief prosecutor of the jurisdiction in which
the conviction occurred.

As currently drafted, Comment 7 would substantially alter the professional duties of
a federal prosecutor by imposing some vague duty to investigate when federal law and
organization define and limit what federal prosecutors can and cannot do. Indeed, the
USAO is a prosecutorial body, while investigative functions are frequently left to other

1 agencies. These additional, ill-defined duties to investigate also risk drastically raising the
2 cost born by the public and infringes upon our adversarial system of justice.³ Under the
3 changes proposed above—and in contrast to the earlier version of Comment 7—the
4 prosecutor's role would not be merged with that of investigators, defendants or the court.
5 Rather, only when the prosecutor is presented with information that raises a substantial
6 question, as defined by E.R. 8.3(a), about the defendant's guilt, would ER 3.8(h) apply.
7 With the suggested revisions, assessment of the quality of the information supporting a
8 claim of innocence will be easier for all parties.
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11 **(3) Should the prosecutor's duty be different depending on whether the**
12 **conviction was obtained in the prosecutor's jurisdiction or outside that**
13 **jurisdiction? See Petitioners' proposed ER 3.8 (g) and (h) and Comment**
14 **7.**

15 The USAO incorporates the reasoning set forth in Section II.(1), *supra*, herein. As
16 commented above, when a prosecutor is confronted with information concerning a
17 conviction outside the prosecutor's jurisdiction, under the changes proposed in the State
18 Bar Comment, the prosecutor must forward the new information to the appropriate
19 jurisdiction, via the sentencing court or responsible prosecuting agency. Under that
20 proposed language, the responsibility to assess the evidence will fall upon the best
21 qualified persons, the prosecutor who tried the case, the sentencing tribunal, or the
22 defendant and his or her attorney, all in the jurisdiction where the conviction occurred.
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27 ³ See e.g., Ramsey, Carolyn B., *The Discretionary Power of "Public" Prosecutors in Historical*
28 *Perspective*, 39 Am. Crim. L. Rev. 1309 (2002) (addressing comparative thesis for prosecutors' role in
public society from its Anglo-American inception to the present day).

1 **(4) Should the duty to disclose exculpatory information be extended to all**
2 **lawyers, as proposed in at least one other U.S. jurisdiction? See**
3 **proposed Rule 8.6, Rules of Professional Conduct of the District of**
4 **Columbia.**

5 The USAO agrees with the reasoning set forth in the June 18, 2012 proposed
6 amendments to the District of Columbia's Rules of Professional Conduct regarding the
7 universality of attorneys' obligations to disclose exculpatory information. As set forth in
8 the USAO's initial comments, prosecutors do not possess sole access to exculpating
9 material. A myriad of attorneys ranging from corporate counsel, to civil practitioners, to
10 defense attorneys, may come across evidence unbeknownst to prosecutors that calls an
11 underlying conviction into question.

12 The Board of Governors to the D.C. Bar was "firmly persuaded that preventing the
13 incarceration of the innocent is a core value of the judicial system and the correction of a
14 significant miscarriage of justice should be of interest to and the responsibility of all
15 lawyers, not just prosecutors."⁴

16 The USAO acknowledges that prosecutors have some unique ethical obligations;
17 however, imposing the duty to remedy inaccurate convictions solely upon federal, state,
18 and local prosecutors severely limits the Bar's ability to service the public. Extending the
19 duty of disclosure to all members of the Bar would provide a multitude of avenues by
20 which exculpatory information could be fed to responsible agencies, thereby decreasing
21 the likelihood that innocent men and women remain incarcerated. The USAO believes that
22 any amendment to Rule 3.8 should include a provision that any member of the Bar in
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⁴ The same principle can be said to apply to Arizona attorneys. *See* Preamble to the Ethical Rules confirms that "[a]
28 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.)

1 possession of non-confidential and non-secret information indicating the innocence of a
2 convicted person should be obligated to disclose that evidence to an appropriate authority.

3 **(5) Should the Court retain or eliminate the prosecutor’s duty, not only to**
4 **disclose exculpatory information, but to take affirmative steps to**
5 **“remedy the conviction”? See Petitioners’ proposed ER 3.8(h) and**
6 **Comment 8.”**

7 The USAO acknowledges the “special responsibilities” placed upon prosecutors as
8 ministers of justice and not simply advocates of a client’s position. In implementing an
9 affirmative duty to remedy a conviction, the USAO suggests amending proposed ER
10 3.8(h) in accordance with the State Bar Comment, namely, requiring a prosecutor to
11 remedy a conviction when newly discovered information raises a “substantial question”⁵
12 concerning the defendant’s guilt.


14 The USAO notes that, as a matter of substantive law, when a federal prosecutor
15 receives information that exculpates a convicted defendant, there are no specific statutory
16 or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the
17 courts have placed the responsibility to remedy a conviction on the defendant. Under Fed.
18 R. Crim. P. 33(a), a convicted defendant may move to vacate a judgment and for the grant
19 of a new trial “if the interest of justice so requires.” Under 28 U.S.C. § 2255, a defendant
20 may challenge a conviction on constitutional or other legal grounds, but must do so within
21 one year of judgment of conviction, the occurrence of the constitutional violation, the
22 establishment of the constitutional right or the date that new facts would be discoverable.
23 Congress has also created a procedure to permit convicted defendants to compel post-
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28 ⁵ E.R. 8.3(a) uses the term “substantial question” to define when an attorney must report a fellow attorney for violation of rules that goes to another attorney’s “honesty, trustworthiness or fitness as a lawyer in other respects.”

1 conviction DNA testing in extremely limited circumstances. If, however, such testing is
2 ordered and the test results exclude the applicant as the source of the DNA evidence, it is
3 still the convicted defendant who may file a motion for new trial. *See* 18 U.S.C. § 3600.
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5 These procedures are not available to federal prosecutors.

6 The USAO acknowledges, however, that circumstances in which a prosecutor
7 receives information raising a “substantial question,” as defined by ER 8.3(a), as to the
8 guilt of a convicted person, may constitute newly discovered evidence as defined by Ariz.
9 R. Crim. P. 32.1(e); and, in those rare situations, place an affirmative duty upon the
10 prosecutor. Amending proposed ER 3.8(h) to include the “substantial question” standard
11 as proposed by the Criminal Prosecution Policy and Procedure Committee as opposed to
12 the “clear and convincing” standard proposed by the Petitioners would align prosecutors’
13 ethical responsibilities with their substantive duties under current ethics opinions and case
14 law.
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17 Respectfully submitted this 7 Day of May, 2013.

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