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ARIZONA SUPREME COURT

In the Matter of

PETITION TO AMEND ER 3.8 OF THE
ARIZONA RULES OF
PROFESSIONAL CONDUCT (RULE
42 OF THE ARIZONA RULES OF THE
SUPREME COURT)

No. R-11-0033

**ARIZONA ATTORNEY
GENERAL'S COMMENTS TO
PETITION TO AMEND E.R. 3.8
OF THE ARIZONA RULES OF
PROFESSIONAL CONDUCT**

Pursuant to this Court's Order dated August 30, 2012, the Arizona Attorney General submits the following comments on the staff draft of proposed amendments to Rule 3.8, Arizona Rules of Professional Conduct (ER 3.8).

OVERVIEW

The State of Arizona has no interest in convicting or incarcerating innocent people. Consequently, the Attorney General would support any necessary, well-crafted rule to rectify such injustices. The rule amendments requested in the

petition and embodied in the staff draft, however, are both unnecessary and impractical. Accordingly, the Attorney General strongly urges this Court to reject them and to leave the current version of ER 3.8 in place.

For fifty years, Arizona’s criminal prosecutors have pursued convictions knowing that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This Court has already confirmed that the duty to disclose exculpatory evidence under *Brady* continues after sentencing. *Canion v. Cole*, 210 Ariz. 598, 599, 115 P.3d 1261, 1262 (2005).

At least two existing Arizona rules enforce the due process right identified in *Brady*. ER 3.8(d) requires criminal prosecutors to timely disclose evidence “that tends to negate the guilt of the accused,” while Rule 15.1(b)(8) of the Arizona Rules of Criminal Procedure requires disclosure of all “existing material or information which tends to mitigate or negate the defendant’s guilt as to the offense charged.” These rules reflect the prosecutor’s higher duty to ensure that justice is done and to refrain from practices calculated to produce a wrongful conviction. *See State v. Superior Court In and For Pima County*, 2 Ariz.App. 458, 463, 409 P.2d 742, 747 (1966) (“Counsel for the prosecution as public officers sworn to uphold the law are duty bound to protect the rights of the innocent as well

as prosecute the guilty and are duty bound to reveal and not to conceal evidence tending to exonerate a defendant.”); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (describing government’s interest in criminal prosecution as “not to win a case, but that justice shall be done.”).

These rules work. The petitioners do not argue, nor could they, that any convicted-but-innocent people will be exonerated only if ER 3.8 is amended. Prosecutors are already fulfilling their duty to disclose exculpatory evidence, before and after sentencing, under existing rules, controlling case law and far-reaching Constitutional dictates. While allegations of Rule 15.1 violations are commonplace, and courts occasionally find it necessary to sanction prosecutors for violations, the incarceration of innocent people based on *Brady* violations is all but unheard of.

Despite the absence of a problem, the petition offers a solution drafted by defense attorneys but applicable only to prosecutors. The proposal will encourage bar complaints as a tactic to conflict entire prosecutorial agencies; it will require prosecutors to defend bar complaints in addition to their already considerable obligations and resource commitments; and it will thwart the victims’ right to “prompt and final conclusion of the case after conviction and sentence.” Ariz. Const. Art. II § 2.1(A)(10). The petition alludes to many “exonerations” yet it fails to identify any instance where an Arizona prosecutor’s failure to disclose

exculpatory information after sentencing resulted in the continuing incarceration of an innocent person. Such instances have not occurred even though Rule 15.1(f) imputes to prosecutors any non-disclosure by agents, crime labs and other members of the “prosecution team.” In short, the problem addressed by the proposed amendments does not exist.

If a pervasive post-sentencing pattern of non-disclosure existed, one would expect this Court to address it in a rule of criminal procedure, not in the rules governing professional conduct. Instead, the petitioners – who are not prosecutors and who would not be subject to the rule they propose – would have this Court treat post-sentencing *Brady* disclosure violations as *per se* breaches of professional conduct which necessarily implicate bar disciplinary proceedings. The more sensible and logical approach, if a problem really existed, would be to amend either Rule 15.1 or Rule 32.1(e) of the Arizona Rules of Criminal Procedure.

Rule 15.1 and Rule 32.1 already address disclosure of newly discovered evidence of actual innocence, which is purportedly the concern behind the petition. This Court could amend either Rule 15.1 or Rule 32.1 to specifically require attorneys (including prosecutors) who become aware of newly discovered materially exculpatory facts to disclose them to the court itself. That should be the outer limit of any rule amendment. The court, in turn, can decide whether the new

information merits appointment of counsel or funding of a defense investigator who can proceed at the direction of appointed counsel.¹

Finally, the petition seeks to impose additional duties on prosecutors and to create additional procedural rights for defendants without any reference to crime victims. Whatever this Court does in addressing the proposed rule change, it should remain cognizant that Arizona crime victims have a constitutional right to notice of, and the opportunity to participate in, any post-conviction proceeding.

For the foregoing reasons, the Attorney General joins the Arizona Prosecuting Attorneys' Advisory Council, the United States Attorney for the District of Arizona, the Maricopa County Attorney, and the Pima County Attorney in recommending against the proposed amendments to ER 3.8 of the Arizona Rules of Professional Conduct.

The Attorney General also offers the following responses to the specific issues set forth in this Court's Order Reopening Petition for Comment.

¹ This Court should summarily reject the proposition that prosecutors – whose interests are adverse to the defendant, and who have neither the authority to investigate nor investigators at their disposal – should “undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.” *See* response to Issue (2), *infra*.

ISSUE (1): What criteria should trigger the prosecutor’s ethical duty to disclose exculpatory information after a conviction? Should it be “new, credible and material information,” “credible and material information,” or some alternative phrasing of the criteria?

Response: This Court should decline to amend ER 3.8 because the petition fails to set forth sufficient grounds to justify any amendment. To the extent this Court amends the rule, the amendment should trigger a post-conviction disclosure duty only when the attorney knows of evidence that would clearly exculpate the defendant, meaning the attorney has clear and convincing evidence that no reasonable fact-finder would have found the defendant guilty. Prosecutors already have such a duty.

This Court should reject the “new, credible and material” standard because those broad terms will make prosecutors a steady target of the defense bar, require them to defend unjustified claims, and divest resources from financially pressed offices. There is no factual basis to justify the adoption of this broad language and impose this onerous duty. The existing standard, set forth below, strikes the proper balance between the prosecutor’s obligation to disclose and the universal interest in setting innocent-but-convicted defendants free.

Prosecutors, unlike other members of the Arizona bar, already have a duty to disclose “clearly exculpatory” material discovered after sentencing. *Canion*, 210 Ariz. at 599, ¶ 8, 115 P.3d at 1262. A clearly exculpatory standard for a prosecutor’s post-conviction disclosure obligation is consistent with the relief

Arizona provides to post-conviction petitioners who establish actual innocence. Arizona Rule of Criminal Procedure 32.1(h) defines evidence of actual innocence as “clear and convincing evidence” that “no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt . . .”

Federal post-conviction statutes define evidence of actual innocence the same way. *See* 28 U.S.C. §2254(e)(2)(B) (allowing the federal court to hold an evidentiary hearing on a claim not developed in State court if “the facts underlying the claim would be sufficient to establish by clear and convincing evidence” that “no reasonable factfinder would have found the [defendant] guilty of the underlying offense”); §2244(b)(2)(B)(ii) (allowing consideration of a second or successive habeas petition if there is evidence sufficient to establish by “clear and convincing evidence” that “no reasonable factfinder would have found [defendant] guilty of the underlying offense”).

A duty triggered by the discovery of evidence that clearly exculpates the defendant is also consistent with the stated goal of the Petition to Amend E.R. 3.8; namely, to uncover and rectify instances of wrongful conviction and incarceration. (*See Petition*, ¶¶ 3–4.) The Petition to Amend E.R. 3.8 also notes the importance of maintaining a history of consistency. (*See Petition*, ¶ 2:14.) Limiting a prosecutor’s post-conviction duty of disclosure to evidence that clearly exculpates the defendant – *i.e.* clear and convincing evidence that no reasonable fact-finder

would have found the defendant guilty – is consistent with existing case law, Arizona post-conviction law, and federal habeas corpus law. This well-established, consistent standard achieves the goal of exonerating innocent-but-convicted defendants.

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

Response: This Court should decline to amend ER 3.8 because the petition fails to set forth sufficient grounds to justify any amendment.

Even if this Court amends ER 3.8, it should delete this passage. Prosecutors are neither police officers nor investigators. They lack authority to convene investigations outside the context of grand jury proceedings, and they have no other authority or resources to launch independent investigations. Even if the Court overlooks the conflation of police and prosecutorial powers, police agencies are organized to investigate crimes in support of prosecutions. While police agents have a duty to inform prosecutors of exculpatory evidence obtained during a criminal investigation, searching for exculpatory evidence in a post-conviction setting is beyond the scope of their functions.

Even if a prosecutor could require a police agency to initiate a post-conviction investigation for purposes of developing or analyzing exculpatory

material, such an investigation would be inimical to the duties and functions of police investigation. To prosecutors, and by extension police investigators, the criminal defendant is an adverse party. Disclosure is one thing, but investigation is quite another. Requiring prosecutors and police to investigate exculpatory leads on behalf of a convicted defendant implicates an obvious inherent conflict.

On the other hand, defendants routinely employ investigators to find and analyze exculpatory information in both pre-trial and post-conviction settings. Court-appointed or privately-retained defense investigators should be charged with that duty.

It seems equally anomalous to engraft an investigative requirement into a rule of professional conduct, particularly where the current framework of criminal procedural rules already contemplates post-conviction investigation. Defendants make post-conviction claims of actual innocence under Rules 32.1(e) and (h) of the Arizona Rules of Criminal Procedure. They have the prerogative to investigate their colorable claims, and Superior Court judges routinely evaluate such claims to see if they are colorable and warrant the services of court-appointed attorneys and investigators. *See* Ariz. R. Crim. P. 32.4(c). If this Court expands Rule 3.8 – or any rule – to create a new investigative duty, the Court should assign that duty to the defense. *See* response to Issue No. 3, *infra*.

Finally, the Attorney General opposes the portion of the petition requiring a prosecutor to investigate because a prosecutor's absolute immunity disappears when he or she ventures outside of the prosecutorial realm and into the investigative realm. The Attorney General concurs with the analysis on this point set forth in the Maricopa County Attorney's Comments to Petition to Amend ER 3.8 (submitted on May 18, 2012); APAAC's Comments to Petition to Amend ER 3.8 (submitted on May 21, 2012); the Comments of the U.S. Attorney's Office for the District of Arizona (submitted on May 20, 2012); and the Pima County Attorney's Comment (submitted on May 21, 2012).

ISSUE (3): Should the prosecutor's duty be different depending on whether the conviction was obtained in the prosecutor's jurisdiction or outside that jurisdiction? See Petitioners' proposed ER 3.8(g) and (h) and Comment 7.

Response: This Court should decline to amend ER 3.8 because the petition fails to set forth sufficient grounds to justify any amendment. In any event, to the extent this Court elects to impose a new disclosure requirement, it should not differ based on the jurisdiction where the conviction was obtained.

If a rule amendment is adopted, it should be simple, uniformly applicable to all attorneys, and designed to promote the goal of exonerating convicted defendants who are actually innocent. The disclosure requirements described in the petition and in the staff draft do not meet those criteria. Instead, any new disclosure rule should require an attorney who obtains clear and convincing

evidence of actual innocence, after a defendant has been sentenced, to disclose that evidence to the sentencing court, not to the defendant.

First, if the goal is to exculpate innocent defendants, the disclosure requirement should apply to any attorney in any jurisdiction who obtains clear and convincing evidence of actual innocence. Exculpatory information does not necessarily come into the hands of a prosecutor. Yet the amendments as drafted would exempt anyone but prosecutors – even the defendant’s own trial attorney – from divulging the information. That limitation does not promote justice. The amendment, if adopted, should apply to all attorneys and should not be placed among the “Special Responsibilities of a Prosecutor” provisions of the professional conduct rules.

Second, in the post-conviction context, years may elapse before the information comes to light. The prosecutors who litigated the case may no longer work for the prosecuting agency and may no longer be prosecutors. A prosecutor who obtains exculpatory information, but who did not work on the defendant’s case, may have no basis for understanding or evaluating whether the information is “new and credible” much less “clear and convincing” evidence of innocence. The proposed amendment erroneously presumes that time has stood still and that the person who obtains the new information will be the prosecutor who tried the case, and who presumably has kept all of the files in his or her office.

Third, by placing the burden on a prosecutor – even the same prosecutor who tried the case against the defendant – to evaluate the evidence misdirects the decision-making calculus. This new duty of disclosure should begin and end with conveying the information to the sentencing court. The court itself, which (1) operates neutrally, (2) evaluates information without the backdrop of bar disciplinary proceedings, and (3) ultimately decides what is “new and credible” or “clear and convincing” evidence, can determine whether new information merits appointment of counsel or commitment of investigative resources to seek relief from judgment. Only the Court has the power to appoint counsel and investigators for the defendant in order to determine if there are grounds to pursue a Rule 32 proceeding.

Finally, attempting to notify the defendant is problematic. A defendant may no longer be incarcerated or readily located. The defendant’s last-appointed counsel will likely have withdrawn, and the defendant will not necessarily know what to do with the information. Just as the prosecutor is inappropriately tasked with investigating post-conviction evidence of innocence, the defendant is inappropriately tasked with evaluating the evidentiary significance of information or initiating post-conviction relief proceedings (especially successive post-conviction relief proceedings).

ISSUE (4): Should the duty to disclose exculpatory information be extended to all lawyers, as proposed in at least one other U.S. jurisdiction?

Response: This Court should decline to amend ER 3.8 because the petition fails to set forth sufficient grounds to justify any amendment. To the extent this Court determines it should impose a new disclosure duty on the ground that it furthers the exoneration of innocent-but-convicted defendants, the duty should extend to all attorneys.

The Court's proposed ER 3.10 would extend the duty to disclose “new and credible exculpatory evidence that a convicted defendant did not commit an offense of which the defendant was convicted” to all Arizona attorneys, not just prosecutors. Neither the original petition to amend ER 3.8 nor the ABA Model Rules extend this obligation to all lawyers. Only the District of Columbia has proposed such a rule, and to date it appears that it has not been adopted.

Presumably, no officer of the court wants to perpetuate the injustice of incarcerating someone who is actually innocent. But the proposed amendment – whether limited to prosecutors or not – does not prevent that injustice to any degree unachieved by existing rules of procedure and conduct. These rules include, in addition to the rules discussed above, ER 3.4(a), which prohibits concealment of material having potential evidentiary value, and ER 8.4(d), which prohibits conduct prejudicial to the administration of justice.

When considering whether to extend the proposed new disclosure requirement to all attorneys, it becomes even more evident that this Court should reject the proposed amendment altogether. As discussed in response to Issue (3) above, a prosecutor who receives information that is supposedly evidence of innocence might be hard-pressed to evaluate its significance. Imposing a mandatory duty of disclosure on lawyers who do not even practice criminal law is all the more problematic if it requires them to determine whether information is “new and credible” or “clear and convincing” evidence of innocence. Although it is unlikely that civil practitioners will come into possession of exculpatory evidence and need to evaluate it for purposes of the proposed, amended version of Rule 3.8, it might happen. If it does,² and disclosure is limited to prosecutors, an innocent person might not be exonerated. Consequently, if the rule amendment must be adopted, it should apply to all attorneys.

Criminal defense attorneys, unlike civil practitioners, are just as likely as prosecutors to come into possession of new exculpatory evidence, especially in the context of representing the wrongly-convicted defendant. They would have at least as much ability and institutional knowledge of the case as prosecutors, and

² It seems most likely (or least unlikely) to occur in the context of dependency cases, domestic relations cases, wrongful death cases or probate matters. However, such information would come to the lawyer in the context of representing a client, and proposed Rule 3.10(b) would still not require disclosure of the information as it would be protected by ER 1.6 or other law.

would have a comparable ability to evaluate whether information is “new and credible” or “clear and convincing” evidence of innocence. It seems anomalous to exempt them from a new requirement aimed at exonerating their own innocent clients, particularly in situations when such evidence might also implicate claims of ineffective assistance of counsel. If the goal is exonerating innocent-but-convicted defendants, the new rule should also create an additional confidentiality exception under ER 1.6(d) for attorneys who obtain such evidence in the course of representing a codefendant or another client, as disclosure might otherwise be prohibited.

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

Response: This Court should decline to amend ER 3.8 because the petition fails to set forth sufficient grounds to justify any amendment. In any event, this Court should reject a new rule that requires prosecutors to “seek to remedy” (petition) or “take steps ... to set aside” (staff draft) the conviction.

These terms are exceedingly vague, yet the consequence for all but “good faith” violations is bar discipline. These terms do not provide the necessary procedural framework to understand what this Court would require of the prosecutor. Adopting this amendment using either version’s parlance will invite

litigation as defendants – innocent and guilty alike – wield the threat of bar sanctions to prompt action by prosecutors.

Both versions of the proposed amendments also require the prosecutor to proceed “in the appropriate court, consistent with applicable law . . .” Those phrases are equally vague, and the latter clause is superfluous in any event. Simply requiring disclosure to the sentencing court is the less unsound resolution to this ersatz problem.

Again, requiring the prosecutor to “remedy” the wrongful conviction misplaces the burden. Rule 32 of the Arizona Rules of Criminal Procedure soundly places the burden on defendant to seek relief based on claims of newly discovered evidence. The proposed amendment anomalously and inappropriately shifts that burden to a prosecutor – the representative of the party adverse to the defendant. That approach is unworkable and should be rejected accordingly.

DATED this 20th day of May, 2013.

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/s/ Robert L. Ellman
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