Larry Hammond, 4049
ARIZONA JUSTICE PROJECT
c/o Sandra Day O'Connor College of Law
PO Box 875920
Tempe, Arizona 85287-5920
Phone: 602.640.9361
Email: lhammond@omlaw.com

Keith Swisher, 23493
PHOENIX SCHOOL OF LAW*
One North Central Avenue
Suite 1400
Phoenix, Arizona 85004
Phone: 602.432.8464
Email: kswisher@phoenixlaw.edu

Karen Wilkinson, 14095
OFFICE OF THE FEDERAL PUBLIC DEFENDER*
850 West Adams Street
Phoenix, Arizona 85007-2730
Phone: 602.382.2700
Email: Karen_Wilkinson@fd.org

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 **PETITIONERS' REPLY IN SUPPORT OF AMENDING ER 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 in response to the Petition to Amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional Conduct and this Court's order of August 30, 2012.

Petitioners commend the Court's staff draft and the comments in its favor. With respect to the five specific questions in the Court's order, the Petitioners agree in full with the answers provided in the supportive comments of Professors Green and Yaroshefsky and Messrs. Harrison, Goddard, Woods, Feldman, Jones, Myers, and Zlaket (submitted on May 20, 2013).[1] Furthermore, because the two opposing comments did not raise any "new, credible, and material" arguments, we will not spend the Court's time rehashing the previous comment period and rebutting those arguments.[2]

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[1] Both the ABA and the National Lawyers Guild also submitted supportive comments (submitted April 25, 2013 and May 18, 2013, respectively), but their comments did not explicitly track the Court's five questions. The Arizona Public Defenders Association (APDA) submitted thoughtful and supportive comments as well, but we partially disagree with its answer to the Court's Question 2 (i.e., "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'"?). Our disagreement is primarily practical. The APDA's comment assumes that indigent defendants have (or will have) counsel post-conviction to investigate actual innocence claims, and prosecutorial investigations would therefore be unnecessary. Unfortunately, however, most defendants do not retain a constitutional or statutory right to post-conviction counsel, and adding the words "indigent representation appointing authority" to ER 3.8, as the APDA proposes, would be unlikely to cure this fact. Furthermore, as discussed below, prosecutors should have a duty to review their cases in which they have likely convicted innocent defendants—even when those defendants have access to counsel.

[2] *See, e.g.*, Petition, Reply, and supportive comments of the Arizona Attorneys for Criminal Justice and Harrison et al. Only Bill Montgomery and

The Court is now in a laudable position. It has before it two vetted proposals—either of which would significantly improve the status quo. The first proposal is the staff draft, which substantially tracks the ABA Model Rule (with one significant exception discussed below). The second is the alternative proposal supported by the State Bar and the United States Attorney's Office (the "Bar-USAO proposal"). We urge the Court to adopt the staff draft as judiciously modified below, and we address the Bar-USAO proposal in the alternative.

I. THE COURT SHOULD ADOPT ITS STAFF DRAFT, ADDING A DUTY TO INQUIRE.

The Petitioners support the staff draft in full. Our only recommendation is that the Court should explicitly incorporate a duty to investigate strong cases of innocence. As the Comment to ABA Model Rule 3.8 recognizes, a prosecutor's responsibility as "a minister of justice . . . carries with it specific obligations to see . . . that special precautions are taken . . . to rectify the conviction of innocent persons." If a prosecutor indeed learns of "new and credible evidence that the prosecutor knows creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," the prosecutor whose office obtained the conviction should have a duty to investigate the matter further or to make reasonable efforts to cause a law enforcement agency to do so. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(g). Moreover, the rule would codify what prosecutors already claim they would do when faced with such strong evidence that they had convicted an innocent person.

Tom Horne submitted opposing comments during the second comment period. All of their arguments, however, were addressed during the previous comment period. If the Court would nevertheless like Petitioners to respond to any argument, we of course stand ready to assist.

By considering just a few real examples, we can see the logical and ethical case to require at least some duty of inquiry when the prosecutor's office learns that it has likely convicted the wrong person. For example, when the prosecutor's office learned of (1) the exculpatory DNA results in the Ray Krone, Michael Morton, and Larry Youngblood cases, (2) the expert reports agreeing that the arson of which Ray Girdler had been convicted was likely caused by accident, (3) the expert reports (including, eventually, a report from the state's own trial expert) agreeing that the baby in the Drayton Witt case had not died of "shaken baby syndrome" as the prosecution argued, or (4) the fact that Carolyn June Peak's original prosecutor (who had since passed away) had failed to disclose material exculpatory evidence,[3] would it have been proper as a minister of justice to do nothing further—not even to revisit the files or talk to the agents?

Of course not: the proper course at that point would have been to revisit the files, to determine to the extent possible whether the defendants were indeed innocent as the new evidence indicated, and if so, to seek to set aside the convictions consistent with applicable law and procedure. Thus, when the prosecutor's office learns of "new and credible evidence that the prosecutor knows creates a reasonable likelihood that a convicted defendant did not commit

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[3] A brief summary of each of these cases can be found at the National Registry of Exonerations, which is a joint project of the Michigan and Northwestern Law Schools: https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (documenting 1155 exonerations). By listing the examples above, we do not mean to imply that the prosecutors in these cases invariably failed to investigate further after they had received the new, credible, and material evidence (in Carolyn Peak's case, for example, the prosecutors discovered that the original prosecutor had failed to disclose the exculpatory evidence in the file, and they eventually requested the court to dismiss the case). Instead, these examples illustrate the obvious importance of prosecutors acting promptly to investigate these matters once they learn of strong evidence of a wrongful conviction.

an offense of which the defendant was convicted," the prosecutor should have a duty to investigate the matter further or to make reasonable efforts to cause a law enforcement agency to do so. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(g).

Because the word "investigate" has caused unnecessary controversy,[4] however, we would support in the alternative the language in the Washington Rules of Professional Conduct: When the prosecutor learns of evidence creating a reasonable likelihood that a person has been wrongfully convicted, the prosecutor shall "make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter." WASH. R. PROF'L CONDUCT R. 3.8(g)(2)(B).

The modified rule would read as follows:

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) – (f) [No change]

[4] This controversy is not legally well-founded, however. The existing authority does not support the proposition that prosecutors would lose their civil immunity if Model Rule 3.8(g) were adopted in full. *See* ARIZ. RULES OF PROF'L CONDUCT Scope ¶ 20 ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . [The Rules] are not designed to be a basis for civil liability."); Proposed ER 3.8(i) (immunizing "good faith" errors); *Warney v. Monroe Cnty.*, 587 F.3d 113, 125 (2d Cir. 2009) (noting that, because disclosing exculpatory evidence post-conviction pursuant to Model Rule 3.8(g) and (h) is part of prosecutors' "advocacy function," prosecutors are entitled to absolute civil immunity); *see also Connick v. Thompson*, 131 S. Ct. 1350, 1361-63 (2011) (suggesting that, because prosecutors are subject to professional discipline, little reason exists to impose civil liability for failing to train subordinate prosecutors on their disclosure obligations); *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976) (similar).

(g) When a prosecutor knows of new and credible evidence that the prosecutor knows creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay~~.~~; and

(ii) 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.

[Or in the alternative:]

(ii) make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.

(h) – (i) [No change to Proposed Staft Draft]

In sum, the Court should adopt the staff draft and one of the preceding inquiry requirements.

II. IF THE COURT IS INCLINED TO ADOPT THE BAR-USAO PROPOSAL, WE RECOMMEND THE FOLLOWING MODIFICATIONS.

If the Court is inclined to move away from the approach of the ABA and the staff draft and instead adopt the Bar-USAO proposal, we suggest the following modifications. These modifications would, in short, raise the evidentiary threshold before prosecutors would be required to inquire further, to involve the courts, and to request appointment of counsel. By allocating certain prosecutorial

and judicial resources only to stronger claims of innocence, the tiered approach below would likely prove more efficient and effective in addressing innocence claims.

The suggested modifications to the Bar-USAO proposal are tracked as follows:

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) – (f) [No change]

(g) When a prosecutor is in receipt of information that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to an appropriate authority, and if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority:

(1) promptly disclose that evidence to the defendant~~an appropriate authority~~ unless a court authorizes delay;

(2) if the prosecutor knows that the evidence creates a reasonable likelihood that the defendant was convicted of an offense that the defendant did not commit~~ if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority~~, (i) promptly disclose that evidence~~: (i)~~ to an appropriate court with a request to appoint an attorney for the defendant and (ii) make reasonable efforts to inquire into the matter or cause an appropriate law enforcement agency to undertake an investigation into the matter;[5] and ~~to the defendant unless a court authorizes delay~~

(3) if applicable, follow the requirements of ER 3.8(h).

(h) When a prosecutor knows, based upon newly discovered evidence raising a substantial question about a defendant's guilt, that the defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

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[5] This identical language already appears in the Bar-USAO proposal but only in the proposed comment to ER 3.8(h).

(i) [No change to Proposed Staff Draft]

In sum, the above modifications would effectively mean that all evidence of innocence is turned over to the defendant, but only evidence that creates a reasonable likelihood that the defendant did not commit the offense would trigger the prosecutor's duties to disclose that evidence to the court with a request for the appointment of counsel and to inquire further into the matter.

CONCLUSION

Because the Court and its staff draft have already proposed an excellent improvement to the state of the law and justice, our comments are brief. The Court should adopt the staff draft, including ER 3.10,[6] and incorporate the "inquiry" requirement into ER 3.8.

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[6] Every public comment supported ER 3.10 (although the Bar-USAO's proposal would modify the evidentiary trigger). We recommend the adoption of the Court's staff draft combined with the Bar-USAO's proposed comment 3, but either proposal would be an important—and potentially trendsetting—improvement.

RESPECTFULLY SUBMITTED this 30th day of June, 2013.

By s/Larry Hammond
ARIZONA JUSTICE PROJECT
c/o O'Connor College of Law
PO Box 875920
Tempe, Arizona 85287-5920

s/Keith Swisher
PHOENIX SCHOOL OF LAW*
One North Central Avenue
Suite 1400
Phoenix, Arizona 85004

s/Karen Wilkinson
FEDERAL PUBLIC DEFENDER'S OFFICE*
850 West Adams Street
Phoenix, Arizona 85007-2730

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 30th day of June, 2013.

By: Keith Swisher

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