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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)	Petition No. R-11-0033
	)	
PETITION TO AMEND RULE 3.8, ARIZONA RULES OF PROFESSIONAL CONDUCT	)	COMMENT OF THE PIMA COUNTY ATTORNEY
	)	
	)	
	)	
	)	

I write to inform the Court that I continue to oppose the proposed change to Rule 3.8 of the Arizona Rules of Professional Conduct and that I have serious concerns with respect to a portion of the newly proposed wording.

DATED this 25th day of October, 2013

BARBARA LAWALL
PIMA COUNTY ATTORNEY

/s/

¶1 As explained in my earlier comment to the Court, I oppose the proposed change to Rule 3.8 of the Arizona Rules of Professional Conduct because I believe the change in the Rule to be unnecessary and the proposed language to be flawed.

¶2 In the event this Court nevertheless decides to amend the Rule in accordance with the draft it has circulated for comment, I urge the Court to modify the proposed language in one important respect. The proposed Rule 3.8(g)(2)(ii) requires a prosecutor to "make reasonable efforts to inquire into the matter or to cause the appropriate law enforcement agency to undertake an investigation into the matter." This language is, in part, impossible for a prosecutor to comply with and also is, in part, worded in a fashion that could be construed to impose requirements upon prosecutors that would be unduly burdensome.

¶3 The proposed language obligating a prosecutor to "cause the appropriate law enforcement agency to undertake an investigation" is impossible to comply with. I have no authority to cause any law enforcement officers, other than those whom I employ in my office, to do anything. I can make requests of law enforcement agencies, but I cannot assure that those requests are fulfilled. I cannot "cause" a law enforcement agency to do anything; nor can any other prosecutor.

¶4 Because I cannot "cause the appropriate law enforcement agency to undertake an investigation," I, as the prosecutor, would bear the obligation of "making reasonable

efforts to inquire into the matter." The new duty imposed by the proposed rule would be unduly burdensome to prosecutors. As stated in my first comment opposing this change, the proposed new rule fails to adequately define when a prosecutor is duty bound to act. The new rule imposes an obligation to take action only when the prosecutor "knows of new, credible, and material evidence creating a reasonable likelihood that the convicted defendant did not commit an offense of which the defendant was convicted." The proposed rule fails to define these terms, and gives a prosecutor little guidance about when he/she must act.

¶5 For example, prison inmates and their family members frequently write to me claiming to have been wrongfully convicted. In their correspondence, inmates and family members often assert that there is new exculpatory evidence available that demonstrates their innocence. While it may seem that such correspondence rarely, if ever, would create a "reasonable likelihood" that the defendant did not commit the crime, the proposed language is ambiguous enough that it could require me to make individual inquiry into every one of these cases to be certain that I comply with the obligations set forth in the newly proposed Rule 3.8. Because of the tens of thousands of cases my office prosecutes annually, I do not have any way of determining, simply by reading one of these letters, whether the evidence referred to therein - which I apparently will be deemed to "know of" by virtue of being informed via the letter - is,

as asserted, new, credible, and material and whether it creates a reasonable likelihood that the convicted defendant did not commit the offense of which he or she was convicted. In order to make that determination, I would first have to assign a staff member to request the file from the location where it is shelved in off-site archives and to deliver the file to me or another prosecutor in my office to review. If the convicted individual asserted that such evidence is in the possession of a law enforcement agency, I would also have to make contact with that agency and request that it assign a detective to search its evidence files. Then, I would have to follow up with that agency to determine whether, in fact, it had such evidence. I would have to assign a prosecutor in my office to review the file and the evidence and report back to me, and I would have to make a final assessment whether the evidence created a reasonable likelihood that the defendant did not commit the offense of which he or she was convicted. While this may not be the intent of the proposed change, looking into every case is the only way I could truly be sure I was complying with my ethical obligations. It would be unduly burdensome for me to do this with respect to each and every prison inmate who writes to me letting me know about new evidence and asking me to inquire into his or her case. It is not currently my practice to do so, nor does my office have the resources to do so.

¶6 By contrast, it is an extremely rare circumstance when I receive communication from a law enforcement agency, defense attorney, or other source letting me know that there is new evidence, believed to be credible and material, that creates a reasonable likelihood that the convicted defendant did not commit the offense of which he or she was convicted. It is my current practice in each of these circumstances to direct my staff to pull the file, to assign a prosecutor to carefully review the file, and to conduct an inquiry into the new evidence. On such occasions as I have determined that there was, in fact, new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense of which he or she was convicted by my office, I have swiftly taken appropriate action to obtain his or her release from incarceration and to effectuate a dismissal of the case or otherwise to have the conviction set aside.

¶7 On rare occasions, I have received information regarding new potentially exculpatory evidence involving a case that my office did not prosecute. On such occasions, I have referred the party who provided me with such evidence to the prosecutor's office that handled the case. Again, because I cannot "cause" law enforcement to conduct an investigation, the rule would require that I make reasonable efforts to investigate the matter. I do not believe it would be appropriate for me to

conduct an investigation into such a case, nor does my office have the resources to do so.

¶8 As previously stated in my first comment, the newly proposed Rule 3.8(g)(2)(iii) is unnecessary. The proposed language imposes some duties that are ambiguously broad and others that are impossible to comply with. If the Court adopts the new Rule, amending the language in the newly proposed Rule 3.8(g)(2)(ii) to provide that a prosecutor must "make reasonable efforts to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter" would at least assist prosecutors in complying with the Rule and lessen the unduly burdensome duty the current proposed language would create.

CONCLUSION:

¶9 In conclusion, I stand by my earlier objections and believe that this Court should reject the proposed changes to the Rule. But if this Court determines to amend Rule 3.8, I urge it to make changes to the proposed wording as detailed in this comment.

RESPECTFULLY SUBMITTED this 25th day of October, 2013.

/s/
BARBARA LAWALL
PIMA COUNTY ATTORNEY

CERTIFICATE OF SERVICE

I certify that, on the 25th day of October, 2013, the original of the foregoing document was electronically filed in Word format and pdf format with:

Clerk of the Court
Arizona Supreme Court
1501 West Washington St.
Phoenix, AZ 85007

/s/
BARBARA LAWALL
Pima County Attorney