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

| IN THE MATTER OF: | R-11-0033 |
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| **PETITION TO AMEND ER 3.8 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT** | MARICOPA COUNTY ATTORNEY'S COMMENTS TO SUPREME COURT ORDER AND PROPOSED CHANGES TO ER 3.8 AND 3.10. |

The Maricopa County Attorney hereby responds to the Supreme Court Order and proposed draft of Rule 42, ER 3.8 and 3.10, Rules of the Supreme Court, filed on August 28, 2013.

Respectfully submitted this 25th day of October, 2013.

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## INTRODUCTION

On August 28, 2013, this Court filed an order reopening the comment period for a third draft of a proposal to amend Rule 42, ER 3.8 and add Rule 3.10, Rules of the Supreme Court. The Maricopa County Attorney's Office (MCAO) continues to oppose the proposal to add Rule 3.8(g) and (h) and Rule 3.10. Despite having two previous comment periods regarding this proposal, there has been no showing that these changes are needed in Arizona. None of the previously submitted comments in support of this rule change have demonstrated that such a rule would have led to any exonerations or expedited any exonerations in Arizona. Nor has there been any showing that in any case in Arizona prosecutors failed to act appropriately when discovering the type of evidence discussed in the proposed rule. Prosecutors in Arizona already fully embrace their role as ministers of justice when comes to righting wrongful convictions. A recent situation in Maricopa County is illustrative.

Prosecutors in the Maricopa County Attorney's Office realized that 14 defendants had pled guilty to "Huffing" under A.R.S. §13-3403 for knowingly inhaling "a vapor-releasing substance containing a toxic substance." These convictions were based on the vapor releasing substances defined in A.R.S. §13-3401. At the time these defendants pled guilty no one realized that the legislature had defined "a vapor-releasing substance containing a toxic substance" differently in A.R.S. §13-3403(H). The same term defined in A.R.S. §13-3401 contained substances that were not included in §13-3403(H). Thus, while these 14 defendants

had committed the acts alleged, those acts were not criminalized based on the definition of the term under §13-3403. When the MCAO prosecutors realized the error, they quickly filed motions to vacate the convictions and dismiss the cases despite the fact that there was no clear procedural method to do so under the Rules of Criminal Procedure.[1] The error in these cases was not caught by defense counsel or the courts; it was discovered and rectified by prosecutors. This example demonstrates the reality that when confronted with information that shows a conviction is unjust prosecutors correct the problem because it is the right thing to do. A change to the ethical rules with all of the collateral problems it may cause is simply unnecessary and unwise. While the current draft of the proposed changes to ER 3.8 and ER 3.10 contains some improvements over the previous drafts, the proposed change continues to be a solution in search of a problem.

**COMMENTS ON THE CURRENT DRAFT**

In the current proposal, the Court has defined the type of evidence that triggers the prosecutor's duty as "new, credible, and material" evidence. The return of the word "material" is helpful in that it helps to narrow the scope of the rule. A definition of "material" in the comments would also be helpful to further clarify what type of evidence will trigger the prosecutor's special duties under the rule. The MCAO recommends including a definition as follows: "Material evidence is evidence

1 The Maricopa County Attorney's Office hopes to rectify this procedural issue with a proposed rule change to the Rules of Criminal Procedure that will be filed with this Court in the near future.

that creates a reasonable doubt as to the defendant's guilt that did not otherwise exist."

The new draft clarifies a prosecutor's specific obligations depending on whether the conviction was obtained in the prosecutor's jurisdiction or some other jurisdiction. For the most part, these changes are improvements to the previous draft's vague requirements to disclose to "appropriate authorities."

However, the new proposal has re-added a requirement that the prosecutor "make reasonable efforts to inquire into the matter" or "to cause the appropriate law enforcement agency to undertake an investigation into the matter." This addition is similar to language in the original petition that raised concerns about requiring prosecutors to launch investigations. The second draft removed this requirement completely which was a change the MCAO commended in a previous comment. If ER 3.8(g) is added to the rules, for all the reasons discussed in previous comments, the MCAO recommends that the proposed ER 3.8(g)(2)(ii) be removed. Once the new, credible, and material evidence has been disclosed to the defendant and counsel, the prosecutor should not have any additional ethical obligation to investigate or to cause other law enforcement agencies – agencies that are not within the prosecutor's control – to initiate any investigations. As an ethical obligation, the proposed language is vague and it fails to clearly define what a prosecutor must do to comply with his or her ethical obligations. For example, is simply informing a law enforcement agency sufficient? Is it necessary for the prosecutor to follow-up with

the law enforcement agency and if so, how often and when does that obligation end? What is the prosecutor's obligation when the conviction occurred in the prosecutor's jurisdiction but the appropriate law enforcement agency to investigate the new "matter" is not in the prosecutor's jurisdiction? Would notifying the law enforcement agency that originally investigated the crime satisfy the prosecutor's ethical obligations? As drafted, the changes create vague ethical obligations that threaten a prosecutor with State Bar disciplinary action if the prosecutor does not take one of two actions. The prosecutor can attempt to cajole some agency that the prosecutor does not control to perform a sufficient investigation or the prosecutor may choose to "inquire into the matter" which potentially places the prosecutor in the role of an investigator where the courts have clearly held that the prosecutor is protected with only qualified immunity.

Additionally troublesome is the fact that these "investigation provisions" use the attorney ethical rules to create unfunded mandates that require a prosecutor's office to either investigate or force other State agencies to investigate the new evidence. Considering the reality that the cases may be decades old, investigating new leads may significantly burden already financially strained State agencies. Directing how State agencies spend their limited resources is an inappropriate use of the attorney ethical rules. The proposed ER 3.8(g)(2)(ii) should be removed completely as it was in the second draft.

Proposed ER 3.8(h) remains largely unchanged from the second draft. The MCAO's previous comment addressed concerns about the fact that this ethical rule shifts the burden of proof from the defense to the prosecution in a post-conviction action. If the prosecutor has disclosed the "clear and convincing evidence" to the court, defendant and/or the defendant's counsel, the prosecution should not have any further ethical obligations. At that point, the burden should be on the defendant to pursue appropriate relief under the Rules of Criminal Procedure.

Because we have no real-world Arizona examples of prosecutors discovering evidence of the nature that would trigger a duty under this rule, it is difficult to hypothesize what evidence a prosecutor may discover in the future. However, based on the types of evidence we have seen defendants raise in post-conviction actions, it is likely that whatever evidence a prosecutor discovers will not be clear, unequivocal evidence that proves a defendant is actually innocent. Evidence disclosed under this rule will more likely be very arguable as to whether it exonerates the defendant. The proposed rule's language that attempts to limit this duty to situations where there is "clear and convincing evidence" will not prevent this problem because prosecutors will err on the side of complying with the rule without attempting to parse out the precise strength of the evidence to decide whether the provisions of ER 3.8(g) or (h) apply. Thus, the proposed rule will cause prosecutors to initiate a post-conviction relief action to comply ER 3.8(h) when the evidence is only arguably "clear and convincing." In that circumstance, the prosecutor may be placed in the position of

arguing that the evidence does not warrant a reversal of the conviction. In other words the prosecutor would be put in the position of arguing against the very proceeding that the rule required the prosecutor to initiate. This type of scenario highlights the problem with putting the burden of initiating a post-conviction proceeding on the prosecutor. If this Court determines that ER 3.8(g) should be added, ER 3.8(h) is unnecessary, but to the extent that any ethical duty to act on the new evidence is needed, it should be imposed on the defense, not the prosecution. A rule that imposed ethical obligations on the defense to act on evidence disclosed under ER 3.8(g) would at least put the burden on the appropriate party and it would be consistent with the current burden of proof for post-conviction actions in the Arizona Rules of Criminal Procedure.

## CONCLUSION

The MCAO continues to assert that the proposed changes to ER 3.8 are unnecessary. The rule will subject honest, hard-working prosecutors to unnecessary bar complaints where the burden will be on the prosecutor to prove that his or her action or inaction was "in good faith." The rule will unnecessarily raise questions about just convictions based on marginal new evidence that prosecutors will unnecessarily disclose in an abundance of caution to avoid disciplinary action. The rule will create less certainty and finality for criminal convictions with no demonstrated evidence that the rule will help promote just outcomes.

Although parts of the current draft are improvements over previous drafts the inclusion of proposed ER 3.8(g)(2)(ii) and (h) are particularly problematic and should be eliminated from any final rule change. Therefore, the MCAO asks this Court to deny the petition to modify ER 3.8 in its entirety, but, if the proposed change is adopted in part, the Court should delete ER 3.8(g)(2)(ii) and (h).

Respectfully submitted this 25th of October, 2013.

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