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 28, 2013. Since we filed our Petition two years ago, we have seen an additional fifty DNA exonerations and hundreds of non-DNA exonerations across the country. The problem exists, and it will not disappear—no matter how many times the MCAO and others tell the public that no "real-world" problems exist. The Court's rule guides and encourages prosecutors to address wrongful convictions carefully, consistently, and promptly, for the benefit of the defendant, the victim, and the potential future victims.

Petitioners therefore support the Court's revised rule and the comments in its favor.[1] The revised rule contains numerous, significant improvements. To name just three improvements, the rule omits the redundant former listings of "knows," requires that evidence of a likely wrongful conviction be disclosed to both the court and prosecutor in the applicable jurisdiction, and includes an "inquiry" requirement consistent with both the Washington Rules of Professional Conduct and (in essence) the ABA's Model Rule.[2] The rule importantly codifies

---

[1] *See, e.g.*, Comment of Victim and Author Jennifer Thompson (Oct. 22, 2013); Comment of Messrs. Harrison, Goddard, Woods, Feldman, Gordon, Jones, Myers, and Zlaket (Oct. 15, 2013).

[2] On this last improvement, we note that the responsive comments of local prosecuting offices have again misstated the risk of prosecutors' civil liability. The offices have never cited any actually supporting authority for their claims, and in this last round, they do not cite anything; nor do they address the authority refuting their claims. *See, e.g.*, 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.*,

what good prosecutors do.[3] And because the rule will constitute a substantial improvement to the current Arizona ERs, the Court should adopt it.

In the spirit of continuous improvement, we also would have no objection should the Court include additional defense notification provisions in its final rule, as suggested by the APDA and State Bar.[4] Alternatively, if we learn through our Innocence and Justice Project networks and partners that additional defense notification provisions are necessary or prudent, we will propose a targeted amendment in the future.

---

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). Several prosecuting offices have also misread the Court's rule as requiring the prosecutor "to cause" a law enforcement investigation; the Court's rule instead requires only that the prosecutor "make reasonable efforts . . . to cause" an investigation. *See* Petitioners' Reply (June 30, 2013) (explaining the specific need for an inquiry or investigation requirement); Comment of Messrs. Harrison, Goddard, Woods, Feldman, Jones, Myers, and Zlaket (May 20, 2013) (same); Comment of Professors Green and Yaroshefsky (May 20, 2013) (same).

[3] *See, e.g.*, Comment of Messrs. Harrison, Goddard, Woods, Feldman, Gordon, Jones, Myers, and Zlaket (Oct. 15, 2013) ("Commenting prosecutors have said that they do not need a rule because they already follow essentially the same steps now clearly articulated in the Court's rule. . . . For this reason, there would appear to be no legitimate controversy if the Court's proposed, revised rule is adopted.").

[4] To account further for differences in indigent defense systems, we would suggest that the Court consider replacing the term "public defender office" with "indigent defense appointing authority" or "office responsible for providing indigent defense services in the court of conviction."

Finally, with respect to proposed ER 3.10, we suggest that the Court reincorporate defense notification into its rule, as in the Court's prior version and in the D.C. proposal on which it was based.[5]

CONCLUSION

Let us end this thorough and inclusive public comment process where we began—with the role of the minister of justice. In its final comment, the MCAO recounts a recent story in which it acknowledges prosecuting fourteen defendants for "huffing," realizing belatedly that the conduct did not constitute a criminal offense under the relevant statute, and moving to set aside the convictions. Laudably, the MCAO eventually corrected its mistakes; indeed, its corrective actions presumably complied with what will be the Court's rule. But then no answer explains the resistance to a rule that consistently guides the disclosure and reexamination of such mistakes in the future.

Because the Court's rule is a substantial improvement to the state of the law and justice, we commend the Court and suggest that the Court has the answer. Professors Bruce Green and Ellen Yaroshefsky—two key drafters in both the ABA and New York—join us in our unqualified support of the Court's rule.

. . .

. . .

. . .

[5] We appreciate the design of the Court's rule, which funnels the evidence to the in-jurisdiction prosecutor who in turn notifies the defense. To account for inevitable human error and to provide timelier defense notice, however, we suggest that the Court reinsert a defense notification provision into ER 3.10.

RESPECTFULLY SUBMITTED this 25th day of October, 2013.

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

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

/s/Karen Wilkinson
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 25th day of October, 2013.

By: Keith Swisher

* Institutional designation is for identification purposes.