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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-14-0005
)
) COMMENT OF ARIZONA
Petition to Modify Rule 24.2, Arizona) ATTORNEYS FOR CRIMINAL
Rules of Criminal Procedure) JUSTICE REGARDING PETITION
) TO MODIFY RULE 24.2,
) ARIZ.R.CRIM.P.
)
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)

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) submits the following comment to the above-referenced petition. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer. AACJ is the Arizona state affiliate organization to the National Association of

Criminal Defense Lawyers, with which it shares its pursuit of ensuring justice and due process for persons accused of crime, improving the integrity, independence and expertise of the criminal defense profession, and promoting the proper and fair administration of criminal justice.

Discussion

AACJ agrees with the proposed change to Arizona Rule of Criminal Procedure 24.2 with one small reservation. The Maricopa County Attorney's Office is correct that a procedural mechanism would be helpful in allowing prosecutors to comply with the requirements of E.R. 3.8(h). The proposed addition adequately provides for this mechanism and closely tracks the language of E.R. 3.8(h). The only concern held by AACJ is that Rule 24.2, as changed in the proposal, appears to eliminate the requirements of E.R. 3.8(g).

E.R. 3.8(g) and (h) impose different burdens with differing levels of persuasion. Under subsection (h), a prosecutor must move to dismiss when the prosecutor uncovers "clear and convincing evidence" that a defendant was wrongfully convicted. Ariz. R. Sup. Ct. 42, E.R. 3.8(h). Subsection (g) requires a prosecutor to disclose evidence to the court and defendant, "[w]hen a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense" for which the defendant was convicted. Ariz. R. Sup. Ct. 42, E.R. 3.8(g). These different burdens keep in line

with the procedural mechanism already available to defendants: post-conviction relief. A defendant who receives new evidence pursuant to E.R. 3.8(g) can seek relief through Rule 32. *See* Ariz. R. Crim. P. 32.1(e), 32.2(b), 32.4(a).

The danger in enacting the proposed addition to Rule 24.2 is that it may be read as addressing both subsections (g) and (h) of E.R. 3.8. Under E.R. 3.8(g), it would be improper to refuse to disclose material evidence because the prosecutor does not believe the new evidence fails to meet the heightened “clear and convincing” burden set forth in E.R. 3.8(h) and the proposed addition to Rule 24.2. To obviate this problem, this Court should include a comment which states:

Paragraph (e) is intended to provide a mechanism for prosecutors to comply with E.R. 3.8(h). This paragraph does not alter a prosecutor’s duty to disclose new evidence demonstrating a reasonable likelihood that a defendant was wrongfully convicted under E.R. 3.8(g).

Such a comment would serve as a reminder that the proposed addition to Rule 24.2 has a limited scope and would refer to the ethical duties that govern prosecutors when they possess evidence that is material but that does not clearly and convincingly establish innocence.

Conclusion

The proposed addition to Rule 24.2 adequately provides a mechanism for prosecutors to comply with the duty imposed by E.R. 3.8(h). The proposed addition should be accepted. However, a comment should be inserted to ensure the

addition is not misread and to refer back to the ethical duty of a prosecutor to disclose evidence when there is a reasonable likelihood of a wrongful conviction.

RESPECTFULLY SUBMITTED this 19th day of May, 2014.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ Mikel Steinfeld
MIKEL STEINFELD

Electronic copy filed with the
Clerk of Supreme Court of Arizona
this 19th day of May, 2014.

By /s/ Mikel Steinfeld
MIKEL STEINFELD