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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of: Petition to Amend Rule 16.4 of The Arizona Rules of Criminal Procedure	Supreme Court No. R-16 _____

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Maricopa County Office of the Legal Defender respectfully petitions this Court to adopt the attached proposed amendment to Rule 16.4 of the Rules of Criminal Procedure. The text of the proposed amendment is set out in the accompanying Appendix A.

If adopted, the Superior Court, at an early stage in the proceedings, would ensure that the prosecution has complied with its *Brady* and Rule 15.1(b)(8) obligations to affirmatively search its files to ensure that all material and

information tending to mitigate or negate the defendant's guilt or punishment is disclosed.

I. Background and Purpose of the Proposed Rule Amendments.

The prosecution in a criminal case has a duty to disclose exculpatory information. There are two main sources for this duty. The Fifth and Fourteenth Amendments to the United States Constitution require disclosure of evidence favorable to the accused if material to guilt or punishment, *Brady v. Maryland*, 373 U.S. 83 (1963), whether or not a request is made. *United States v. Bagley*, 473 U.S. 667 (1985). The prosecution's constitutional duty of disclosure also includes impeachment evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Moreover, the prosecution "has a duty to learn of any favorable evidence" held by others acting on the prosecution's behalf, including the police. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Rule 15.1(b) (8), Ariz. R. Crim. Pro., is broader. It requires the prosecution to disclose all material and information "which tends to" mitigate or negate guilt, or "would tend to" reduce punishment.

Brady problems[1] have existed for years throughout the country and in Arizona. A quick review of some of the Arizona cases reported (both published

[1] "*Brady* problems" in this memorandum means a prosecutor's failure to disclose information under *Brady* or Rule 15.1(b)(8).

and unpublished[2]) reveals this is to be longstanding problem that continues to the present[3]:

- *State v. LaBarre*, 114 Ariz. 440, 446, 561 P.2d 764, 770 (1977) ("We do not approve of the State's conduct with respect to the discovery in this case . . . but we cannot hold that the court was constitutionally required to declare a mistrial, nor can we say that its failure to do so was an abuse of discretion under our rules.")

- *State v. Lukezic*, 143 Ariz. 60, 691 P.2d 1086 (1984) (failure to disclose state aid to witnesses: car payments, prescription drugs, and alteration of pre-sentence reports; grant of new trial affirmed)

- *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985) (similar failure to disclose as *Lukezic*; death sentence affirmed despite finding that prosecution suppressed exculpatory evidence)

- *State v. Van Den Berg*, 164 Ariz. 192, 196, 791 P.2d 1075, 1079 (App. 1990) ("The above suggests an issue that bears mention to prevent repetition. . . . It appears from the record that the prosecutor failed to comply with the dictates of *Brady*. This failure precipitated the necessity of a remand in this case to ascertain whether a new trial is necessary.")

- *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (1978 trial; failure to disclose prison file revealing star witness's long history of lying to law enforcement and blaming his crimes on others)

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[2] Unpublished opinions are cited herein not for any precedential value, but to demonstrate the recurring problem. *Cf.* Rule 111(c) (1) (b), Rules, Arizona Supreme Court, which permits the citation of unpublished opinions in order to assist the Court in deciding whether to grant a petition for review. In this instance, similarly, the unpublished opinions are cited in order to help this Court decide whether to grant this Petition to Amend.

[3] This listing is not meant to be exhaustive but, rather, representative.

- *State v. Rice*, 2007 WL 5187935 (2007) (unpublished) (failure to disclose jail tapes of defendant was disclosure violation (statement of defendant); no sanction imposed)

- *State v. Grabinski*, 2009 WL 1531020 (2009) (unpublished) and *State v. Crotts*, 2009 WL 1531024 (Rule 15 violation for failing to disclose admission of perjury by state's witness until trial even though prosecutor was aware of the perjury admission earlier; denial of request for mistrial affirmed)

- *State v. Powell*, 2011 WL 193367 (2011) (unpublished) (prosecution failed to disclose witness conviction; conviction affirmed because court determined that there was no reasonable probability that disclosure would have rendered the result different)

- *State v. Cota*, 229 Ariz. 136, 272 P.3d 1027 (2012) (failure to provide exculpatory electronic DNA data until the eve of trial, other data unavailable, missing, destroyed; trial court determined the evidence was improperly withheld, struck one witness's testimony but permitted 2nd witness testimony, gave additional time to review new materials; no abuse of discretion in imposing the limited sanction)

- *State v. Lopez*, 2012 WL 3020071 (2012) (unpublished) (upholding continuance as a sanction for State's failure to timely disclose "free talks" of cooperating defendant and cooperating defendant's prior convictions including providing false information to police officers)

- *State v. Cloud*, 2014 WL 645185 (2014) (unpublished) (hundreds of pages of witness interviews and other material disclosed in the middle of trial due to 'inadvertence;' sanction of one month continuance affirmed)

- *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659 (App. 2015) (trial in 1990; failure to disclose evidence of detective's dishonesty and *Miranda* violations in other cases; retrial barred by double jeopardy)

- *State v. Miles*, 2015 WL 848298 (2015) (unpublished) (State disclosed seven additional witnesses less than two weeks before trial and late disclosure of *Brady* information; trial court found violation as to two witnesses and

precluded them, and ordered reinstatement of final plea offer; Court of Appeals vacated order requiring reinstatement of plea offer)

- *State v. Simmons*, 2014 WL 4437673 (2015) (unpublished) (Maricopa County Attorney announced that it delegates police officer file review to law enforcement to determine existence of *Brady* material; Court ordered prosecutor to personally review files or submit to court for inspection; prosecutor could not obtain the files before trial and moved to dismiss without prejudice; trial court's order dismissing with prejudice reversed by Court of Appeals)

Although no sanction was imposed in many of these cases, there was no question that a discovery violation occurred.[4] And the practice continues despite the appellate courts' continued recognition of the problem. This proposal is designed to help ensure that discovery violations become less commonplace. The Superior Court will affirmatively ensure that discovery obligations are being met, and, hopefully, the appellate courts will not have to address the issue as often as they are now.

II. The Proposed Amendment to Rule 16.4 is Meant to Address Disclosure Early in the Criminal Trial Process

This proposal requires the Court to enter into a colloquy with the prosecutor to ensure that proper measures have been or are being taken to ensure that disclosure obligations are met. As any frequent visitor to the criminal courts in Arizona knows, the familiar mantra by the prosecutor is: "we are aware of our

[4] Whether or not the failure to disclose is purposeful does not matter. *E.g.*, *Carriger v. Stewart, supra.*

discovery obligations and we are complying with them." The cases, however, reveal that discovery obligations frequently are not met. Indeed, twenty-five years ago in *Van Den Berg*, *supra.*, the Court of Appeals specifically addressed the issue "to prevent repetition." *Id.*, at 196, 1079. Unfortunately, the problem keeps repeating itself.

This problem is not unique to Arizona. *See*, *e.g.*, *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir., 2013) (Kozinski, J., dissenting from denial of rehearing en banc) (describing an "epidemic of *Brady violations* abroad in the land"); Jones, A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence. 100 Journal of Crim. Law and Criminology 415 (Spring, 2010).

Policing the prosecutor's *Brady* obligations is difficult, as evidenced by the multitude of cases cited earlier. As described in one article, "*Brady* violations almost always defy detection. The cops know it. The prosecutors know it. The defense and the defendant have no idea whether *Brady* material exists." Greenfield, *The Flood Gates Myth*, Simple Justice, A Criminal Defense Blog (Feb. 16, 2015), http://blog.simplejustice.us/2015/02/16/the-flood-gates-myth/ (last visited Oct. 19, 2015).

As one commentator has noted, the *Brady* obligation is one of the most unenforced constitutional mandates in the criminal justice system. Jones, *supra*, at 434, citing Gershman, Prosecutorial Misconduct, §§ 5:1, 5:3 (2d ed.

2002) ("Nondisclosure of exculpatory evidence by prosecutors . . . account[s] for more miscarriages of justice than any other type of prosecutorial infraction.").

Another solution should be tried because of the demonstrated difficulty in holding prosecutors accountable for complying with *Brady* / Rule 15 obligations, the understandable reluctance of the appellate courts to reverse convictions if the misconduct does not appear prejudicial, and the history of *Brady* violations within the State. The proposed *Brady* colloquy will not burden the Court (only asking a few questions at the pre-hearing conferences) and will not burden the prosecutor because she is required to conduct the review in any event[5]. The colloquy simply reminds the prosecutor of her obligations. Once the colloquy becomes part of the culture, it is anticipated that the number of issues will decline significantly. *See*, generally, Kreig, The *Brady* Colloquy, 67 Stan. L. Rev. Online 47 (2014).

For these reasons, it is respectfully requested that the Court amend Rule 16.4, as proposed in the Appendix.

[5] The prosecutor has an affirmative obligation to become aware of exculpatory information, even without a request from the defendant. *Kyles v. Whitley, supra*

Dated this 22nd day of October, 2015.

MARTY LIEBERMAN
Office of the Legal Defender

By /s/ Marty Lieberman
Marty Lieberman
Legal Defender

Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this 22nd day of October,
2015.

By: Marty Lieberman

APPENDIX A

Proposed Rules Changes

(Proposed deletions are shown with ~~strikethrough~~, new language is shown with underscoring)

Arizona Rules of Criminal Procedure

Rule 16.4. Mandatory prehearing conference

a. [no changes]

b. [no changes]

c. [no changes]

d. Prosecutor's Disclosure Obligations. The Court shall ensure that the prosecutor has searched its files, the investigating police agency's files, and any other appropriate files, to determine whether information favorable to the defense exists and has been disclosed.

~~**d**~~ **e.** [no changes]

COMMENT: The prosecution is required to learn of any favorable evidence held by others acting on the prosecution's behalf. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). This would include, for example, evidence in the custody of the Department of Child Safety in cases investigated by that agency even if the charges had been filed by a police agency, or evidence in the custody of crime labs utilized by the State, even if the crime lab is independent of the investigating law enforcement agency.