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6 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 IN THE MATTER OF:

R-11-0033

8 PETITION TO AMEND ER 3.8 OF THE
ARIZONA RULES OF PROFESSIONAL
9 CONDUCT (RULE 42 OF THE ARIZONA
RULES OF SUPREME COURT)

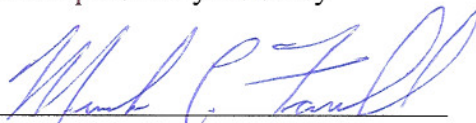
MARICOPA COUNTY ATTORNEY'S
COMMENTS TO SUPREME COURT
ORDER AND STAFF DRAFT

10 The Maricopa County Attorney hereby responds to the Supreme Court Order and Staff Draft
11 filed August 30, 2012, in the matter of the Petition to Amend ER 3.8.

12 Respectfully submitted this 16th day of May, 2013.

13 WILLIAM G. MONTGOMERY
14 Maricopa County Attorney

15 By:


16 Mark C. Faull
17 Chief Deputy
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1 The Petition to Amend ER 3.8, Special Responsibilities of a Prosecutor, sought to add an
2 amended version of ABA Model Rules 3.8(g) and (h), along with an amended version of the ABA’s
3 comments. Petitioners began with the proposition that the rule change was needed to address “the
4 problem of wrongful convictions,” and alleged that over a 25-year period, eight Arizona death row
5 inmates had been “exonerated.” Of those, only one was shown to be innocent, based on DNA
6 testing that was not available at the time of trial.

7 The proposed rule change subjected prosecutors to new obligations that could be both
8 confusing and burdensome. All of the major prosecuting offices in Arizona, including this office,
9 submitted comments in opposition. The comments included that the amendment was unnecessary
10 in light of other rules, statutes and case law; the obligations were overbroad; wording was unclear;
11 prosecutors should not be tasked with post-conviction investigations; the rule did not apply to all
12 lawyers; no evidence existed that Arizona prosecutors failed to disclose post-conviction information
13 that could have changed the outcome of a case; and few other states had adopted similar rules.

14 The organization representing Arizona criminal defense lawyers commented in support,
15 arguing that the rule change would provide “necessary guidance to prosecutors.” A small group
16 that included former attorneys general and retired judges also commented in support, citing national
17 DNA exonerations and indicating that the rule change was necessary because “wrongful
18 convictions unfortunately occur.”

19 Noticeably missing were comments from any Arizona defense lawyers or judges stating that
20 in their personal experience, prosecutors withheld information that delayed a post-conviction
21 exoneration. If such a problem existed in Arizona, members of the legal profession could be

1 expected to come forward with evidence. Instead, the proposed rule change appears to be driven by
2 statistics from other jurisdictions, anecdotal information and unsupported fears.

3 This office maintains its position that the amendments are unnecessary and likely to cause
4 confusion and abuse. However, we appreciate the efforts of this Court's staff in providing a draft
5 that took into consideration the comments received from prosecutors. Regarding the issues raised
6 in the Order of August 30, 2012:

7 (1) The criteria that trigger the prosecutor's ethical duty should be as narrow as possible,
8 such as "new, credible and material information." Proposed Comment 7 defines "new." "Credible"
9 and "material," although not defined, have different meanings: "credible" is believable or
10 trustworthy, whereas "material" is having substantial importance or a logical connection with the
11 facts. The staff draft deletes the term "material." However, narrow criteria are necessary to
12 prevent a continuous second-guessing of convictions and to conserve the limited resources of
13 prosecuting offices.

14 The staff draft does add a knowledge requirement to paragraphs (g) and (h), so that the new
15 evidence must cause the prosecutor to "know" that the defendant was convicted of an offense that
16 the defendant did not commit. A safe harbor paragraph (i) also has been added, so that a prosecutor
17 does not violate the rule if the prosecutor makes a good faith judgment that the information is not of
18 such a nature as to trigger the obligations. Those additions are helpful in stemming potential abuse
19 that could arise under the amended rule.

20 (2) The staff draft deletes Petitioners' requirement that a prosecutor "undertake further
21 investigation, or make reasonable efforts to cause an investigation." That provision caused concern
in prosecuting offices, which generally do not have the authority, personnel or financial resources to
conduct such investigations. Once the prosecutor conveys the new information to the court, and to

1 the defendant for same-jurisdiction convictions, the burden should shift to the defense to further
2 investigate if necessary.

3 (3) A lesser duty should apply when a conviction was obtained outside the prosecutor's
4 jurisdiction. A particular prosecuting office is only responsible for charges brought by that office.
5 As to convictions in other jurisdictions, the prosecutor's obligations under the rule should be
6 satisfied by providing disclosure to an appropriate court or authority. That court or authority could
7 then determine whether and how to contact the affected defendant.

8 (4) Any duty to disclose should be extended to all lawyers, as the staff draft does in new ER
9 3.10. If the goal is to overturn wrongful convictions, members of the defense bar should welcome
10 the opportunity to contribute to that effort.

11 (5) Paragraph (h) and Comment 8 requiring the prosecutor to "take steps" to "remedy the
12 conviction" (Petitioners' draft) or "set aside the conviction" (staff draft) appear to duplicate the
13 requirements of paragraph (g). If the prosecutor discloses evidence to the court and defendant, as
14 required by paragraph (g), and noted again in Comment 8, it is unclear what other steps are
15 required.

16 Under Arizona law, a defendant must petition for post-conviction relief pursuant to Rule 32,
17 Ariz.R.Crim.P., which allows untimely petitions for newly discovered material facts, Rule 32.1(e),
18 and actual innocence, Rule 32.1(h). The State then has an opportunity to respond, and the trial
19 court determines whether an evidentiary hearing is necessary. Imposing an ethical obligation on
20 prosecutors to "remedy a conviction" appears inconsistent with Rule 32, under which a defendant
21 has the burden of proof.

For example, a prosecutor might disclose evidence to the court and defendant out of an
abundance of caution, such as if an alibi witness comes forward. But that evidence may only be

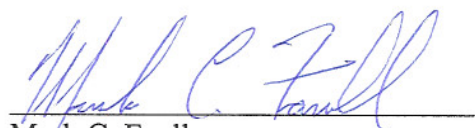
1 sufficient to warrant a new trial, rather than an outright dismissal of the charges. The post-
2 conviction relief process should be allowed to proceed in such a case. It is truly a rare situation
3 where newly discovered evidence will exonerate a defendant and warrant an immediate dismissal.
4 If paragraph (h) and Comment 8 generally contemplate that type of remedy, legitimate convictions
5 could be threatened.

6 The Maricopa County Attorney's Office continues to oppose the Petition to Amend ER 3.8,
7 because there is no convincing evidence that Arizona has a "problem" of wrongful convictions, that
8 prosecutors have failed to take corrective action when appropriate, or that the proposed
9 amendments will solve the perceived problem. However, if this Court finds that the ethical rules
10 should be revised to impose new post-conviction disclosure obligations, the staff draft of amended
11 ER 3.8 and new ER 3.10 is preferable to the changes proposed in the original petition.

12 Respectfully submitted this 16th day of May, 2013.

13 WILLIAM G. MONTGOMERY
14 Maricopa County Attorney

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