

1 Elizabeth Ortiz, Bar No. 012838
2 Executive Director
3 Arizona Prosecuting Attorneys'
4 Advisory Council
5 1951 West Camelback Road, Suite 202
6 Phoenix, AZ 85015-3407
7 (602) 542-7222 / FAX (602) 274-4215
8 Elizabeth.Ortiz@apaac.az.gov

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

11 In the Matter of:

Supreme Court No. R-15-0038

12 **PETITION TO AMEND RULE 16.4**
13 **OF THE ARIZONA RULES OF**
14 **CRIMINAL PROCEDURE**

DRAFT COMMENT OF
15 **THE ARIZONA PROSECUTING**
16 **ATTORNEYS' ADVISORY**
17 **COUNCIL**

18 **I. BACKGROUND OF PETITION**

19 The Maricopa County Office of the Legal Defender has proposed an
20 amendment to Rule 16.4, *Arizona Rules of Criminal Procedure*, which would
21 require a court to ensure that prosecutors have searched their files, as well as
22 those of investigating police agencies and others, for any information “which
23 tends to mitigate or negate the defendant’s guilt, or which would tend to reduce
24 the defendant’s punishment. . .”. [Amended Petition at Appendix A]. A
25 proposed Comment to the new rule cites *Kyles v. Whitley*, 514 U.S. 419 (1995)
and provides some examples of agencies that might be “acting on the
prosecution’s behalf” in a particular case. [Amended Petition at Appendix A].

1 The Arizona Prosecuting Attorney's Advisory Council has considered the
2 proposed rule change to Rule 16.4 and urges this Court to deny the Petition in its
3 entirety. The proposed rule is a superfluous, overbroad, and ill-defined proposal
4 that imposes unnecessary requirements on the courts and prosecutors.
5

6 **II. DISCUSSION/ANALYSIS**

7 Prosecutors have a well-established, well-known duty to disclose
8 exculpatory information to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963);
9 *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S.
10 667 (1985). Exculpatory information includes evidence that could be used to
11 impeach witnesses. *Giglio*, 405 U.S. at 154-55. The prosecution is required to
12 disclose evidence that is material to either guilt or punishment. *Brady*, 373 U.S.
13 at 87. Evidence is material if there is a reasonable probability that had the
14 evidence been disclosed the result of the proceeding would have been different.
15 *Bagley*, 473 U.S. at 682. These disclosure obligations include information in the
16 possession of others who are acting on the prosecution's behalf. *Kyles v. Whitley*,
17 514 U.S. 419 (1995).
18
19
20

21 In addition to these constitutional discovery requirements, Arizona has
22 broad discovery rules that specifically require prosecutors to disclose, at the
23 arraignment or preliminary hearing, all original and supplemental police reports
24 that were in the attorney's possession when the case was filed. ARIZ. R. CRIM. P.
25

1 15.1(a). Consistent with *Brady*'s requirements, Arizona's rules also require
2 prosecutors to disclose to a defendant existing material and information that
3 "tends to mitigate or negate the defendant's guilt as to the offense charged, or
4 which would tend to reduce the defendant's punishment therefor." Rule
5 15.1(b)(8). Consistent with *Kyles*, this rule extends to information in the
6 possession or control of investigating police agencies and "[a]ny other person
7 who has participated in the investigation or evaluation of the case and who is
8 under the prosecutor's direction or control." Rule 15.1(f). If a prosecutor
9 violates these broad disclosure requirements, the court can impose sanctions
10 including precluding or limiting witnesses, precluding or limiting evidence,
11 dismissing the case, declaring a mistrial, holding a person in contempt, and
12 imposing costs. Rule 15.7(a). It is the trial court's responsibility to enforce these
13 disclosure rules. See *State v. Tucker*, 157 Ariz. 433, 441, 759 P.2d 579, 587
14 (1988).

15
16
17
18
19 In addition to the due process requirements explained in *Brady* and its
20 progeny and the Arizona Rules of Criminal Procedure, Arizona prosecutors are
21 also mandated by the ethical rules to disclose exculpatory and mitigating evidence
22 to the defense. ER 3.8 broadly provides that a prosecutor shall "make timely
23 disclosure to the defense of all evidence or information know to the prosecutor
24 that tends to negate the guilt of the accused or mitigates the offense, and, in
25

1 connection with sentencing, disclose to the defense and to the tribunal all
2 unprivileged mitigating information known to the prosecutor. . .” ARIZ. R. SUP.
3 CT. 42, ER 3.8(d).
4

5 With this backdrop of discovery obligations stemming from the
6 Constitution, the Arizona Rules of Criminal Procedure, and the Arizona Ethical
7 Rules, Petitioner asks this court to add a new rule of criminal procedure to require
8 courts, at the mandatory prehearing conference under Rule 16.4, to “ensure” that
9 the prosecutor has “searched its files,” the “police agency’s files,” and “other
10 appropriate files” for discoverable information. This broad and undefined
11 proposal presents a number of implementation problems. Rules of procedure
12 should clearly direct what needs to be done, when it must be done, how it must be
13 done, and who is responsible for it. Other than the “when,” the proposed rule
14 lacks clarity in every other aspect.
15
16

17 First, the rule does not explain *how* the courts would “ensure” what the
18 prosecutor has done. The Petition suggests a colloquy with the prosecutor, but
19 that is not what the proposed rule requires. The rule directs that the court must
20 “ensure” that searching has been accomplished. How should a court accomplish
21 this duty? Would the court require the prosecutor to provide proof of some
22 specific search? Would the proof requirement vary from courtroom to courtroom
23 depending on what an individual court felt was enough to “ensure” that an
24
25

1 appropriate search had been conducted? The proposed rule lends itself to
2 different interpretations in every city and county in Arizona. Rules of procedure
3 should establish uniformity, not create vague court duties that will vary from
4 judge to judge.
5

6 Second, the proposed rule commands that the court ensure that the
7 prosecutor has “searched” files but it is unclear *what* is to be done because
8 nothing in the proposed rules defines “files.” When a prosecutor gets a new case,
9 what must be searched? Does the rule require the prosecutor to find and cull
10 through all previous prosecutions against that defendant? This vague reference to
11 “files” is even more problematic for the rule’s command that the prosecutor
12 search the “police agency’s files.” What files is the rule referring to exactly?
13 Police agencies do not maintain central “records rooms” where prosecutors can
14 wander in and search through files. That is simply not how the real world works.
15 In many police agencies information about investigations are kept in electronic
16 systems that prosecutors have no access to and would not know how to “search”
17 even if they did.
18

19 Likewise the proposed rule’s command regarding “other appropriate files”
20 is so broad as to defy any meaningful definition. Who is to determine what
21 “other appropriate files” are? Is it the court who is ensuring that the search was
22 done? Is it the prosecutor? Is it the defense attorney? Whoever is making that
23
24
25

1 determination, what is the basis for their decision that a particular “file” is
2 appropriate for searching in a given case? In sum, the rule proposes completely
3 undefinable duties on the court and prosecutors.
4

5 The rule is also unclear as to *who* is required to do the searching the rule
6 commands. The proposed rule does not clarify if the searching must be done by
7 the individual prosecutor handling the case or if it must be done on behalf of the
8 prosecutor’s office. Surely Petitioner does not envision a world where individual
9 prosecutors go to a police station to search police records for discoverable
10 information every time they get a new case. Yet, the proposed rule is drafted in
11 such a way that a defense attorney or court could certainly conclude that the rule
12 is imposing a personal search duty on each individual prosecutor handling a case.
13
14

15 Obviously such a system would be impossible to implement. While it is true that
16 prosecutors have a duty to know of any material exculpatory information held by
17 the police and others working on the prosecutor’s behalf, that duty is not
18 discharged by a prosecutor personally searching records. Instead, prosecution
19 offices all over Arizona (and the country) comply with their obligations in the
20 only possible way – they work with their law enforcement partners to ensure that
21 they understand their duty to present all relevant material to the prosecutor and, in
22 individual cases, individual prosecutors work with specific officers to confirm
23 that all information has been provided. Using these procedures is the only
24
25

1 realistic way any prosecutor can ensure that they have all discoverable
2 information. As proposed, the rule could be interpreted to require individual
3 prosecutors to personally search police files or files of “other appropriate”
4 agencies, which is an absurd, unrealistic, completely impossible requirement.
5

6 In addition to the implementation problems and litigation this vague rule
7 would create, the proposal is also completely unnecessary. It seeks to add yet
8 another rule (as if the three sources of the discovery obligation discussed above
9 were not enough) that requires a court to do something undefined to find out if the
10 prosecutor is following the rules. Enforcing compliance with the rules is already
11 an obvious court function. Nevertheless, Petitioner asserts that this new rule is
12 necessary because, he claims, Arizona has a long history of *Brady* violations.
13 [Petition at 2-3, 5-7]. In an effort to support this claim, Petitioner cites fourteen¹
14 cases that he claims is a “representative” sample illustrating the problem.
15 [Petition at 3, fn3]. Petitioner’s cases actually prove that there is no widespread
16 *Brady* problem in Arizona that needs to be corrected. A close review of the cases
17 presented shows that, apart from five trials that were conducted before *Kyles* was
18 decided, there is not a single case on the list where material exculpatory evidence
19 was withheld from the defense. Considering the thousands of cases in Arizona
20
21
22
23

24
25 ¹ There are fifteen cases cited in the Petition, but two of them are co-defendants
presenting the same factual claims.

1 that have been tried and resulted in convictions since *Brady* was decided in 1963,
2 the fact that Petitioner’s “representative” list only includes five cases of
3 reversible error – and those all pre-date *Kyles* – indicates that Arizona police and
4 prosecutors are complying with their *Brady* obligations. Furthermore, Petitioner
5 does not explain (and in reviewing the cited cases it is difficult to imagine) how
6 the proposed rule change would have had any impact on any of the errors that
7 occurred. In his proposed Comment to the new rule, Petitioner cites *Kyles* as the
8 support for this rule. *Kyles* is more than twenty years old at this point and it
9 contains nothing new to support this unnecessary rule change in an already
10 clearly established area of law. The proposed rule is a poor solution in search of a
11 problem.
12
13
14

15 **III. CONCLUSION**

16 The Arizona Prosecuting Attorneys’ Advisory Council respectfully
17 requests that the Arizona Supreme Court deny the Petition to adopt the
18 amendment to Rule 16.4 as requested in petition R-15-0038. Current criminal
19 disclosure laws are very clear and well established. Prosecution offices and
20 police agencies already have procedures firmly in place to ensure that prosecutors
21 comply with their *Brady* and Rule 15.1 obligations. In addition to being unclear
22 and poorly defined, the proposed rule is unnecessary, and it imposes a new
23 requirement on the courts for something that is already well covered in the rules.
24
25

1 RESPECTFULLY SUBMITTED this ____ day of _____,
2 2015.

3 _____
4 Elizabeth Ortiz, #012838
5 Executive Director
6 Arizona Prosecuting Attorneys'
7 Advisory Council

8 Electronic copy filed with the
9 Clerk of the Arizona Supreme Court
10 this ____ day of _____, 2015.

11 by: _____
12
13
14
15
16
17
18
19
20
21
22
23
24
25