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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:

PETITION TO AMEND ARIZONA E.R. 3.8,
Rule 42, Rules of the Supreme Court

R-11-0033

ARIZONA PROSECUTING ATTORNEYS'
ADVISORY COUNCIL'S COMMENTS TO
PETITION TO AMEND ARIZONA E.R. 3.8,
RULE 42, RULES OF THE SUPREME
COURT

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits comments to the Petition to Amend the E.R. 3.8, Rule 42, Rules of the Supreme Court.

Respectfully submitted this XXth day of May, 2012.

GEORGE SILVA, Santa Cruz County Attorney,
Chair, APAAC Rules Committee

ELIZABETH ORTIZ, APAAC
Executive Director

BY: _____

Kimberly W. MacEachern
APAAC Staff Attorney

I. Preface

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) hereby submits its comments in opposition to R11-0033 Petition to Amend the E.R. 3.8, Rule 42, Supreme Court Rules. APAAC, a statutory council, is populated by representatives of the various criminal prosecution offices at every level of Arizona government: state, county and municipal. The content of this comment is a consensus of the member organizations. As such it may not include all the observations or concerns that may be held by any single member. Nevertheless, this comprehensive comment should be imputed the weight of the general prosecuting community which is tasked with promoting justice while ensuring public safety throughout Arizona.

II. General Observations Regarding the Proposed Rule

*Until one decides that virtue matters—until it becomes a personal mission—no training will produce the commitment needed to pursue or maintain integrity.
Judge O'Neil writing in the Thomas Decision, page 6.*

To be sure, within our imperfect but “model” criminal justice system, there are occasions when all the checks, balances and due process fail to properly screen out mistakes resulting in the anomalous conviction of one who may indeed be innocent of the charges brought in a particular case. However, the proposed rule amendment does not address that. Prosecutors are already charged with a higher standard of seeking justice above all things. And, under Arizona's Constitution, the victim's enumerated rights, which hold equal footing with those of society and defendants should not be overlooked in any discussion of rule changes.

Nonetheless, Petitioners are inferring that somehow the existing rules are insufficient to ensure maximum optimization of the system. Petitioners, who are the adversarial counterpoint of the prosecutor and are so vital to ensuring maximum efficiency in achieving the goal of 100% accuracy, assert that conformance of the Arizona rule to the proffered ABA Model Rule

will remove an impediment to achieving the goal of zero tolerance of mistakes¹ in the conviction process.

As the collective voice of prosecutors statewide, APAAC disagrees that the proposed change will net the results sought and therefore oppose the change. While acknowledging the noble goal of fine-tuning the system to filter out innocent defendants, Petitioners have failed to make the case that the proposed rule amendment will actually tighten the mesh on the sieve. There is simply no evidence of a direct relationship between, for example, the DNA-testing cases that have resulted in post-conviction exoneration and a pattern of prosecutorial practice of failing to disclose post-conviction evidence that would have made a difference in those cases.

Benjamin Franklin thought "that it is better [one hundred] guilty Persons should escape than that one innocent Person should suffer." We could not agree more. But it is also generally accepted that "bad facts make bad law." What is lacking in this proposal is the inventory. The best evidence supporting the idea that prosecutors need this guidance because the overarching role as minister of justice is simply too idealistic and ethereal to have any real meaning is anecdotal. See, e.g., Aviva Orenstein's *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*.²

As part of a recent symposium on prosecutors Alafair S. Burke actually offered a statistic: of the 40 years of federal and state cases studied by the Habeas Assistance and Training Project, 270 cases were impacted by the post-conviction revelation of undisclosed evidence.³ Notwithstanding the words of the Founding Father, given that there are

¹ To be clear, a distinction must be made between error and prosecutorial misconduct. It is unfortunate that this distinction is often overlooked, thus clouding the discussion with a film of soot that is only representative of a very few cases. See, e.g., *Mike Nifong-Duke University LaCrosse Players*, disbarred former North Carolina District Attorney and our own *Andrew Thomas*, disbarred Maricopa County Attorney, both of whom were more likely affected by the hubris that sometimes afflicts persons in positions of power. In both these notorious cases the system worked by rooting out and holding them responsible for their unethical acts. The concern about the language of fault impeding full participation of the prosecutor in the reform discussion is addressed by Burke, Alafair S., *Talking About Prosecutors*, 2119 *Cardozo Law Review* 31:6 (2010).

² Research Paper 176 (September 24, 2010) Indiana University Maurer School of Law-Bloomington; Legal Research Paper Series <http://ssrn.com/abstract=1682076>.

³ Burke, Alafair S., *Talking About Prosecutors*, 2119 *Cardozo Law Review* 31:6 (2010).

approximately 2.2 million people in prison nationwide⁴, this can hardly support a systemic indictment that warrants the level of professional angst that this rule change represents.

The genesis of this proposal is well stated in the Petition and in the February 25, 2010 Arizona State Bar Criminal Practice and Procedure Committee Prosecution Section Report to the State Bar Ethics Committee, so it will not be rehashed here. Suffice it to say that APAAC is moved to make this comment in an attempt to emphasize the concerns that have been articulated not only in Arizona but in many other jurisdictions. See, e.g. August 17, 2010 Los Angeles District Attorneys' Office, Opposition to Proposed Rule 3.8(d) of the California Rules of Professional Conduct.

III. Specific Concerns and the February 25, 2010 Report to the State Bar Ethics Committee

APAAC hereby incorporates by reference the February 25, 2010 Arizona State Bar Criminal Practice and Procedure Committee Prosecution Section Report to the State Bar Ethics Committee as its comments. In addition, APAAC points out the following concerns:

Proposed Rule Text:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) Promptly disclose that evidence to an appropriate court or authority, and*
- (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority if the conviction was obtained in the prosecutor's jurisdiction,*
 - (i) Promptly disclose that evidence to the defendant unless a court authorizes delay, and*
 - (ii) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.*

⁴ "Prisoner Statistics". Correctional Population in the United States, 2011. Bureau of Justice Statistics. Retrieved 10 February 2012.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

1) Prosecutors cannot be ordered to investigate (g)(2)(ii). While the Report addresses several objections to imposing investigative duties on Arizona prosecutors, it does not specifically point out that such an order cannot be made by rule as it is contrary to the constitutional separation of powers that underlay the exercise of prosecutorial discretion.

2) What is meant by new credible and material evidence? How will a prosecutor be able to make that determination when it is case specific, fact driven, circumstantial and perhaps a matter of perspective?

3) Evidence may be obtained in a jurisdiction that is not the same as that of the originating case. It is unclear if the mere discovery of evidence in another jurisdiction triggers a requirement for that new jurisdiction's prosecutor to take up an investigation to determine if that evidence would even raise the reasonable likelihood that the defendant did not commit the offense.

IV. Conclusion

APAAC's mission statement: "[e]mpowering Arizona's prosecutors to administer justice and contribute to public safety through training and advocacy" reflects our dedication not only to the overarching philosophical goals of the criminal justice system but to the daily machinations of bringing that philosophy to fruition. As with all systems individual imperfections sometimes translate into error. That said we should take care to ensure that any modifications are not only practical and amenable to implementation, but also that they are indeed necessary to address a carefully defined and well-evidenced problem. Even as we abhor the thought that the Franklin adage may occasionally be true in the reverse, the current situation simply does not warrant this proposed change, particularly given the impediments to effective implementation.

Respectfully submitted this XXth day of May, 2012.

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