



Defendants Guilty of Being Innocent; Prosecutors Guilty of Being Human

BY KEITH SWISHER

We do not know how many innocent people in this country have been convicted. But we do know that more than 1,000 people have been officially exonerated since 1989.¹ We do not know how all prosecutors in Arizona handle the news that they have (often innocently) convicted the wrong person. But we do know that some handle it one way, others handle it another way, and no Arizona ethical rule provides guidance either way. Finally, we do not know why the County Attorney's article (see facing page) resists any change to the rules that would, finally, provide guidance to prosecutors facing these travesties of justice. (Indeed, the new rules arguably might even strengthen prosecutors' immunity from civil liability in this context.²) But we do know that the arguments against amending the ethical rules lack merit and that the proposed rule is better than Arizona's status quo—which is no rule whatsoever.

We therefore have petitioned the Arizona Supreme Court to amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional Conduct, which governs the ethical responsibilities of prosecutors.³ For nearly 30 years, ER 3.8 had remained virtually identical to the corresponding Model Rule 3.8. In 2008, the ABA adopted a significant amendment to Model Rule 3.8 to address the now-well-documented problem of wrongful convictions and to recognize the influential role of the prosecutor in achieving the release of innocent people. The amendment would require that the prosecutor disclose new, credible and material evidence to the convicted defendant and court, and when that evidence clearly and convincingly shows that the defendant is innocent, the prosecutor must seek to set aside the conviction (see the rule and comments at accompanying link).

Although case law recognizes a general ethical duty to disclose exculpatory evidence acquired after a conviction, that duty is not clearly defined in either case law or ethical rules. The U.S. Supreme Court has noted that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."⁴ Similarly, our Arizona Supreme Court has agreed in passing that prosecutors have an "ethical and constitutional obligation to disclose clearly exculpatory material that comes to [their] attention after the sentencing has occurred."⁵ Furthermore, as the ABA noted when promulgating the ethical amendment, "[W]hen a prosecutor concludes upon investigation of such evidence that an innocent person was convicted, it is well recognized that the prosecutor has an obligation to endeavor to rectify the injustice."⁶ Thus, prosecutors seem to have post-conviction obligations (1) to disclose "clearly" exculpatory evidence and (2) if that evidence

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Prosecution ETHICS

A Post-Conviction Duty Pro-Con

What should a prosecutor do if he or she discovers someone may have been wrongly convicted? What should any lawyer do?



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KEITH SWISHER is Associate Dean of Faculty Development and Associate Professor of Law at Phoenix School of Law.

Those questions are at the heart of a proposed change to the Rules of Professional Conduct, specifically a revised rule of prosecutorial ethics in ER 3.8 or a new rule applying to all lawyers. The Arizona Supreme Court is considering the questions now; the comment period closes May 20.

News stories about wrongful convictions and exonerations have peppered the media in the past decade. A criminal sentence levied against an innocent person clearly calls for a remedy. But are those instances in need of new rules? Or are current procedures sufficient to address injustices when they occur?

Our commentators have communicated their views to the Supreme Court. Professor Keith Swisher was a petitioner seeking the change. And Maricopa County Attorney Bill Montgomery opposes it.

You can read the petition and all the comments online at the Court's Rules Forum: <http://ow.ly/jp2nO> (To post a comment yourself, you'll have to register on the site.)



Adding to Prosecutor Duties Adds Little Justice

BY BILL MONTGOMERY

“[I]t is better that ten guilty persons escape, than that one innocent suffer,” said Sir William Blackstone in his *COMMENTARIES ON THE LAWS OF ENGLAND*. That 18th-century ideal of not punishing the innocent is also a goal of our modern prosecuting offices. Closer to home, in the 1935 case of *Berger v. United States*, the Court stated:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

These are not idle words.

In testimony prepared for the Senate Judiciary Committee in July 2012, the executive director of the National District Attorneys Association disputed the perception that DNA exonerations indicate the justice system is irreparably broken. The NDAA noted that the 289 post-conviction DNA exonerations identified by the Innocence Project since 1989 were but a tiny fraction of the estimated 220 million cases involving serious crimes filed during that period. While acknowledging that even one wrongful conviction is too many, the NDAA emphasized that “more than 99.9999% of the time the prosecutor properly serves justice and gets the case right.” It is doubtful that other professions can claim such a minuscule margin of error. Yet recent efforts to exonerate convicted defendants and amend the ethical rules have placed unfair blame on prosecutors as a whole, often implying that they intentionally engage in misconduct to convict innocent people.

In November 2011, a petition was filed in the Arizona Supreme Court to amend ER 3.8 addressing “Special Responsibilities of a

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shows that a person has been wrongfully convicted, to do something about it.

Neither obligation, however, has ever been helpfully defined for prosecutors in ethical rules or elsewhere. Adopting the ABA's Model Rule 3.8 amendment would remedy that void in Arizona.

Indeed, Arizona would not be the first state to accept this much-needed guidance: Colorado, Delaware, Idaho, New York, North Dakota, Tennessee, Washington and Wisconsin have all adopted a similar rule in whole or part. Rules committees in many additional states are currently considering whether to recommend the rule. In response to our petition, commentary, and the other states' rules, the Arizona Supreme Court also has taken positive action by drafting the proposed rule for public comment. Thus, the County Attorney's argument that "only a handful of states" have adopted the relatively recent amendment is more accurately flipped in the amendment's favor: More than a "handful" of states have adopted or are considering the amendment, and less than a handful of states have rejected it (only three).

In sum, as recognized by the ABA, the Arizona Attorneys for Criminal Justice, two former Arizona Attorneys General, three retired Chief Justices of the Arizona Supreme Court, Mark Harrison, Bob Myers, and other states, the ethical rules—and justice—have a void that this amendment would fill. We are still hoping for Arizona prosecutors to add their support. Although prosecutors from other states have supported or even spearheaded ethical amendments similar to the one proposed here,⁷ the Arizona prosecutorial offices responding to our petition to date have not, and the County Attorney's article serves as an outspoken example.⁸

His article questions whether Arizona actually has a "problem" with wrongful convictions, whether "prosecutors have failed to take corrective action when appropriate, [and whether] the amendment would solve the perceived problem." The bulk of his article, however, does not prove up those points; it instead reads more like a call for recognition in other areas. I provide that recognition at the end of this reply and commend the County Attorney for addressing those areas. With respect to the proposed amendment in particular, his article advances only two seemingly supportive arguments against change: (1) denial and (2) statistics. It first argues that

no problems exist and then supports that argument with an aggressive use of statistics. Unfortunately, denying the problem aggravates the problem, and applying statistics to erroneous data distorts reality.

In Pursuit of Denial

Even if Arizona does justice better than other states, Arizona still has problems with wrongful convictions. In the County Attorney's public comments against the amendment, those comments suggested only one case as proof of Arizona's perfection: the infamous Ray Krone case. (Krone spent years in prison for a murder he did not commit, while the actual murderer remained free to commit additional crimes.⁹) The County Attorney argues, "The Krone case proves that prosecutors will act appropriately when newly discovered evidence shows a convicted defendant did not commit the crime."¹⁰ That argument is erroneous, for two reasons. First, the argument reveals a logical fallacy in reasoning: that because the County Attorney's office did it right once, it has done and will do it right every time (and without guidance to boot).

Second, the premise is false: The office firmly opposed post-conviction DNA testing in Krone's case, arguing that "the evidence strongly supports the jury's finding of guilt."¹¹ Furthermore, even after the office lost that unnecessary opposition (which ultimately failed to keep an innocent person in prison but succeeded in significantly delaying his release), the office took six additional weeks to allow Krone a conditional release from prison and two months to move to vacate the conviction.

Such suboptimal reactions occur nationally. For example, an analysis of 182 cases in which prosecutors could consent to a motion to vacate convictions following DNA exoneration revealed that 12 percent of prosecutors did not consent.¹² And almost 20 percent of prosecutors initially opposed DNA testing.¹³ As another example, certain prosecutorial agencies disregard wrongful conviction claims or eventually agree to give some likely innocent defendants the choice either to fight the conviction for months or years or to plead guilty to a lesser charge for time-served. In some instances, the prosecutorial agencies should not be faulted for offering the deals, but the deals do contribute to an artificially low exoneration count.

Using this count, the County Attorney's

article advances its second argument against change: statistics.

To Err Is Human

The County Attorney's article states that prosecutors "get the case right" "99.9999% of the time," and that prosecutors should be commended for achieving an "amazingly low" "margin of error." That is indeed an "amazing" percentage. I truly hope that it is somehow correct—basic math and basic human nature notwithstanding. Unfortunately, the touted error rate—only 289 errors out of 220 million prosecutions—grossly deflated the numerator and grossly inflated the denominator.

The numerator assumed only 289 wrongful convictions (i.e., the then-current number of DNA-based exonerations in the Innocence Project's tally).¹⁴ But even the testimony on which the County Attorney's article based this drastically understated error rate had itself acknowledged that "no one ... is naïve enough to think that the Innocence Project has uncovered every single wrongful conviction in America," and although "[s]ome cases are fortunate enough to have something as reliable as DNA evidence, ... most cases do not."¹⁵ Moreover, as the County Attorney himself noted, the National Registry of Exonerations has documented at least 873 exonerations, which it "conservatively" defined as only officially declared exonerations.¹⁶ Even this 873 figure is significantly understated.¹⁷

The denominator is outlandish in the other direction. It comprises the total number of criminal case filings—including misdemeanor and limited-jurisdiction-court cases. The number of case filings hardly produces a valid comparison; a more valid number would be the total number of felony convictions (although even that number would still be inflated).¹⁸ If we instead insert that number, the denominator is reduced by approximately 200 million.¹⁹

Admittedly, it is possible that prosecutors make statistical errors and nevertheless maintain an impressively low error rate in convictions. Still, a one-ten-thousandth-of-one-percent error rate is so staggeringly low that it risks giving the rest of us an inferiority complex. As an overly simple example, I have probably toasted 5,000 pieces of bread; my error rate—the frequency with which I burn the toast—is much higher than a fraction of one percent; it is, conservatively, around three percent. Furthermore, the setting and

supervision of the toaster are (or at least should be) much simpler and more predictable tasks than the tough task of justly prosecuting cases. We know for certain that many cases involve false confessions or faulty eyewitness testimony (among other problems); to maintain a one-ten-thousandth-of-one-percent error rate under those conditions would indeed be “amazing.” The sample data and human error suggest otherwise, unfortunately.

Actual error rate aside, the very belief in superhuman perfection is concerning. It suggests that prosecutors need not (although fortunately most do) approach their important duty humbly, with a healthy fear of inevitable human error.²⁰ I do not doubt that prosecutors’ actual error rate is low, but it is not nearly as low as the County Attorney’s article suggests—and it is not good policy to think it is.²¹

Seeking Recognition and Support

For the reasons above, we should not be persuaded by the County Attorney’s article, which applies denial and statistics to an undeniable, immeasurable problem. And the gist of the County Attorney’s article does not address the proposed amendment or related issues. Rather than a logical argument against the amendment, the article instead calls for recognition in other areas. Fortunately, we can work together; we can resolve to give the County Attorney the requested recognition and at the same time support the proposed amendment:

Resolution 1. The County Attorney does not want us to “absolve the defense bar of responsibility.” Let us not: Ineffective criminal defense lawyers have indeed contributed mightily to wrongful convictions.²² Although some development and disciplinary measures have been taken, many more measures could and should be taken. We should ask the County Attorney’s question (“where is the funding?”) and support efforts to educate ineffective defense lawyers and discipline those for whom education is insufficient. These efforts could and should be in addition to, not in lieu of, the ethical amendment.

Resolution 2. The County Attorney rightfully requests recognition for the many prosecutors who “honor their duty as ministers of justice, do not pursue charges unsupported


by probable cause, and properly disclose exculpatory evidence.” Arizona absolutely boasts many phenomenal prosecutors, and let us all give them sincere thanks for their service. Moreover, let me again disclaim that this amendment implies that prosecutors “intentionally engage in misconduct to convict innocent people.” Indeed, the amendment is not designed for, and is less likely to be effective against, the rare prosecutor who has intentionally convicted the wrong person; that prosecutor may well be beyond saving through an ethical rule.²³ Fortunately, most wrongful convictions to date have not been the result of intentional prosecutorial misconduct, and this amendment provides guidance in these situations.

Resolution 3. The County Attorney is similarly concerned that “there is no distinction made between an error and intentional misconduct by a prosecutor.” Such a distinction generally seems sound, and the ABA itself has commendably called for it.²⁴ While we are getting our labels right, we also could and should seek the speedy release of the innocent person (and the conviction of the guilty person).

Resolution 4. The County Attorney acknowledges that convicting an innocent person is bad but wants us to acknowledge that “[j]ustice also is equally ill served when the 10 guilty persons go free.” Although making these two concerns (convicting the innocent and freeing the guilty) “equal” reinterprets the Blackstone maxim with which his article began,²⁵ “10 guilty persons” generally should not go free unnecessarily. He worries that these “guilty” people escape justice by these and other devices: insufficient evidence, defense lawyers and witnesses rebutting evidence, unfavorable judicial rulings, and juries refusing to convict. Let us put aside the controversy of calling all such people “guilty” and simply concede that at least some factually guilty people unjustly walk. But let us never concede the implications that (1) innocent people should be convicted to remedy this concern and (2) innocent-but-convicted people should remain in prison because the system “for better or for worse works.”

Resolution 5. The County Attorney likewise worries that when a guilty defendant is not convicted, “a victim may not receive justice and the defendant may go on to commit

other more serious crimes.” This separate issue is worry-worthy, but the documented issues at hand—the presence of wrongful convictions and the lack of guidance to correct them efficiently—produce the same problems. The victim generally is not in favor of convicting an innocent person, and the actually guilty person remains free to commit additional crimes, which is exactly what happened in Mr. Krone’s case and others.

RESOLVED, the County Attorney’s article acknowledges in passing that wrongful convictions occur and that even one is “too many.” Some prosecutors will thus be faced with the tragic fact that they or their offices have inadvertently convicted an innocent person. The ethical rules should finally guide those prosecutors. For those horrible situations, we ask for your support; for the other “99.9999%” of the time, it will be justice as usual.²⁶ 

endnotes

1. See National Registry of Exonerations, www.law.umich.edu/special/exoneration/Pages/about.aspx (documenting more than 1,000 exonerates, the majority of whom are minorities). An additional 1,100 people have been exonerated in groups (resulting from 12 major law enforcement scandals). Samuel R. Gross & Michael Shaffer, Nat’l Registry Exonerations, *Exonerations in the United States, 1989–2012* 80-90 (May 2012), www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.
2. See *Warney v. Monroe Cnty.*, 587 F.3d 113, 125 (2d Cir. 2009) (noting that, because disclosing exculpatory evidence post-conviction pursuant to Model Rule 3.8(g) and (h) is part of the prosecutor’s “advocacy function,” prosecutors are entitled to absolute civil immunity); see also *Connick v. Thompson*, 131 S. Ct. 1350, 1361-63 (2011) (suggesting that, because prosecutors are subject to professional discipline, little reason exists to impose civil liability for failing to train subordinate prosecutors on their disclosure obligations); *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976) (similar).
3. Larry Hammond and Karen Wilkinson are co-petitioners. Although I frequently draw from our petition and reply, I should note that the views expressed in this brief piece are mostly mine, not necessarily those of my co-petitioners or anyone else.
4. *Imbler*, 424 U.S. at 427 n.25.
5. *Canion v. Cole*, 115 P.3d 1261, 1262 (Ariz. 2005).
6. ABA CRIMINAL JUSTICE SECTION ET AL., REPORT TO HOUSE OF DELEGATES (Feb. 2008), www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_

- FINAL.doc.
7. See, e.g., *In re* Amendment of S. Ct. R. Chap. 20, No. 08-24 (Wis. Sup. Ct. June 17, 2009) (adopting the Model Rule 3.8 amendment and noting that the Wisconsin District Attorneys Association filed the rule change petition), www.wicourts.gov/sc/scord/DisplayDocument.html?content=html&seqNo=36849; see also NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 8-1.8 (3d ed. 2009) (adopting similar duties for prosecutors in cases of actual innocence).
 8. See, e.g., Gary Grado, *Proposed Ethical Rules Would Require Prosecutors to Disclose Evidence Even After Convictions*, ARIZ. CAPITOL TIMES, Dec. 17, 2012. I should note that the County Attorney is not alone in resisting the rule change. See, e.g., Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889-93 (2012) (describing certain prosecutorial offices' erroneous arguments against the amendment in other states and suggesting: "The *in terrorem* effect of prosecutors' hostility conceivably goes beyond discouraging courts from adopting these particular rules; it discourages bar associations from promoting any new ethics rules for prosecutors.").
 9. Krone had been branded the "Snaggletooth Killer," whose crooked teeth formed the prosecution's primary evidence against him. Krone was eventually freed, becoming the 100th DNA exoneree and a guest on Extreme Makeover. See, e.g., Jack Chin, CRIMPROF BLOG (Nov. 19, 2004), http://lawprofessors.typepad.com/crimprof_blog/2004/11/extreme_makeove.html.
 10. See, e.g., Maricopa County Attorney's Comments to Petition to Amend ER 3.8 (May 18, 2012), at 5, 7, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/152125143012.pdf.
 11. See Response to Petition for DNA Testing, No. CR 92-00212 (March 23, 2001), available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/173233646158.pdf.
 12. Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 410 n.46 (2011) (citing Brandon L. Garret, Exonerates Postconviction DNA Testing, UNIV. VA. SCH. LAW, www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerates_postconviction_dna_testing.pdf); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 557-63 (2002).
 13. Orenstein, *supra* note 12.
 14. The County Attorney's article claims that "true exonerations are rare" and fears that the public might be misled to the contrary. But "true" DNA exonerations total at least 303 to date (i.e., dozens more than the 265 exonerations at the time we researched the count for our petition).
 15. See Testimony of Scott Burns, Executive Director, National District Attorneys Association (July 18, 2012), www.judiciary.senate.gov/pdf/12-7-18BurnsTestimony.pdf.
 16. The National Registry of Exonerations is a joint project of Michigan and Northwestern Law Schools. As of this writing, the database has recorded 1080 exonerations. See www.law.umich.edu/special/exoneration/Pages/about.aspx.
 17. See, e.g., D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (estimating a three to five percent wrongful conviction rate for capital rape-murders); see also Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832-36 (2010).
 18. Indeed, Senator Franken made an almost identical point in critiquing this proffered error rate. See www.judiciary.senate.gov/resources/transcripts/upload/071812QFRs-Burns.pdf.
 19. See, e.g., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 tbl. 1.6 (Dec. 2009; rev. Nov. 2010) (estimating 1.2 million state and federal felony convictions in 2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>; BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 1994 (Jan. 1997; rev. July 1999), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc94.pdf> (estimating 920,000 state and federal felony convictions in 1994).
 20. As in other areas of human behavior, a growing literature examines various cognitive biases in prosecutorial decision-making. To believe in a one-ten-thousandth-of-one-percent error rate arguably suggests that several subconscious biases are at work, including overconfidence bias. Moreover, another "bias, the reiteration effect—where confidence in the truth of an assertion naturally increases if the assertion is repeated—makes it increasingly difficult over time for police and prosecutors to consider alternative perpetrators or theories of a crime," and "biases, especially belief perseverance, are responsible for prosecutorial resistance to the possibility of innocence before a DNA test, and even after a DNA test excludes the suspect as the perpetrator." Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1483 (2007); see also *id.* ("Because the conviction of an innocent person is inconsistent with the ethical prosecutor's belief that charges should be brought only against suspects who are actually guilty, the ethical prosecutor seeks to avoid cognitive dissonance by clinging to the original belief in guilt, refusing to believe that she took part in a wrongful conviction."); Orenstein, *supra* note 12, at 402-03, 425.
 21. In its comments, the United States Attorney's Office did note its recent efforts to increase disclosure training to both prosecutors and law enforcement agents. That is indeed a laudable effort that should be pursued regularly by prosecutorial agencies.
 22. See, e.g., Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 515 (2009) ("The prosecutor reinvestigating the case should also consider the quality of the defense counsel, given that ineffective assistance of counsel is a rampant criminal justice problem and among the leading causes of wrongful convictions."). Although we are criticizing ineffective defense counsel, we should at least footnote that we all owe thanks to the many hardworking defense counsel who have prevented, or tirelessly sought the reversal of, wrongful convictions.
 23. For such a prosecutor, see *Connick*, 131 S. Ct. at 1356 n.1; Ellen Yaroshesky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913, 925-26 (2012).
 24. ABA House of Delegates Resolution 100B (Aug. 9-10, 2010) (urging states to adopt the terminology of "error" to describe unintentional violations of criminal defendants' rights and "misconduct" to describe intentional violations), www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf.
 25. See, e.g., Alexander Volokh, *N Guilty Men*, 146 U. PENN. L. REV. 173 (1997) (noting that most state and federal formulations of the maxim conclude that it is "better" to let one, ten, some, or many guilty persons escape than to convict one innocent person); *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 93 P.3d 507, 509 (Ariz. 2004) (noting the belief that "it is far worse to convict an innocent [person] than to let a guilty [person] go free") (internal quotation marks omitted); *State v. Sneed*, 403 P.2d 816, 822 (Ariz. 1965) ("For a guilty man to escape punishment is a miscarriage of justice, but for an innocent man to be convicted is unthinkable") (quotation marks omitted).
 26. *But see*, e.g., Green & Yaroshesky, *supra* note 22, at 471-72 (noting that the Model Rule 3.8 amendment requires little of prosecutors—only the "bare minimum"—and suggesting that prosecutors should go above and beyond the rule in appropriate circumstances).

Prosecutor” (R-11-0033). The petition proposed adding language based on American Bar Association Model Rule 3.8, which would require prosecutors to disclose, post-conviction, “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense,” and to “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.” If a prosecutor has “clear and convincing evidence” that a convicted defendant did not commit the crime, the prosecutor must “seek to remedy the conviction.”

The petitioners—two defense lawyers and a professor—cited “the problem of wrongful convictions” as a reason behind the rule change. The petition mentioned eight Arizona “exonerations” between 1978 and 2003, although in seven of those cases no new evidence proved the defendants were actually innocent. Only prosecutors, not defense counsel, would be required to disclose new evidence that might free a convicted person.

Prosecuting agencies have generally opposed the amendment, asserting that current rules and case law already set disclosure standards, and the amendment is overbroad, confusing and burdensome, particularly the establishment of a duty to investigate when prosecuting agencies, generally speaking, are not investigating agencies in the first instance. The State Bar has taken no position on the pending petition (though it did summarize for the Court the input it received from Defense and Prosecution subcommittees). Nor has a task force been formed to study the proposal and assess whether this is, in reality, a solution looking for a problem in Arizona. As for other jurisdictions, only a handful of states have adopted some version of amended Model Rule 3.8 since the ABA approved it in 2008.

By Order of August 30, 2012, the Arizona Supreme Court opened a staff draft for public comment until May 20, 2013. That draft made several improvements to the proposals in the original petition. For example, the staff draft adds a knowledge requirement to ER 3.8(g) and (h), so that the new evidence must cause the prosecutor to “know” that the defen-

dant was convicted of an offense that the defendant did not commit. A safe harbor paragraph (i) also has been added, so that a prosecutor does not violate the rule if the prosecutor makes a good-faith judgment that the information is not of such a nature as to trigger the obligations. The staff draft also deletes any requirement that prosecutors investigate or “cause an investigation.”

Most notably, the staff draft adds a new ER 3.10, which extends the duty of post-conviction disclosure to all lawyers. The petitioners have previously opposed that suggestion, arguing that there is only a slim chance that lawyers in general would have such information. The same could be said of prosecutors. If the goal is to overturn wrongful convictions, members of the defense bar should welcome the opportunity to contribute to that effort.

Although the staff draft is preferable to the original petition, the proposed amendment to ER 3.8 is simply not needed. During the earlier comment period, no defense lawyers or judges alleged that in their personal experience, Arizona prosecutors withheld information that delayed a post-conviction exoneration. Supporters have provided no convincing evidence that there is a widespread “problem” of wrongful convictions in Arizona, that prosecutors have failed to take corrective action when appropriate, or that the amendment would solve the perceived problem. The amendment actually could endanger solid convictions and expose ethical prosecutors to unwarranted discipline.

Further fueling the perception that prosecutorial misconduct and wrongful convictions are rampant is the rise in prominence of state and national “innocence projects.” The release of a prisoner championed by an advocacy group often receives considerable publicity, regardless of the circumstances of the conviction and

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whether the prisoner is actually innocent. The general public may not realize that true exonerations are rare and release is sometimes a consequence of a lack of evidence to prosecute a crime committed decades prior due to faded memories or death of witnesses. These groups are funded by private donations, university subsidies and government grants, such as the nearly \$200,000 recently given by the Department of Justice to the “Exoneration Initiative.” Though these may be worthy causes, where is the funding for prosecutors to battle the seemingly endless attacks on sound convictions and to support the use of all available technologies and expedite forensic testing at the beginning of prosecutions?

The university-based National Registry of Exonerations reported in May 2012 that 873 “exonerations” had occurred in the United States since 1989, with “official misconduct” being a contributing factor in 368. Of the 11 identified in Arizona, 4 listed official misconduct as a contributing factor. The report, however, did not absolve the defense bar of responsibility: “For 104 exonerations, our information includes clear evidence of severely inadequate legal defense, but we believe that many more of the exonerated defendants—perhaps a clear majority—would not have been convicted in the first instance if their lawyers had done good work.” In addition, there is no distinction made between an error and intentional misconduct by a prosecutor. While the

ultimate effect on a case may be indistinguishable, ensuring the public has an accurate understanding of what happened in any given case to maintain confidence in our criminal justice system merits such a distinction.

Justice also is equally ill served when the 10 guilty persons go free. That can occur for a variety of reasons, including the suspect absconding, witnesses not coming forward, evidence that is insufficient to file charges, a defense lawyer violating a court ruling on evidence or engaging in improper tactics, a judge ruling against the State on significant issues, or a jury simply discharging their duty through a not guilty verdict. The defense lawyer who improperly questions witnesses at trial and exceeds the boundaries of permissible closing argument may succeed in getting the guilty defendant acquitted. But the fact remains that a victim may not receive justice and the defendant may go on to commit other more serious crimes.

Every day, thousands of prosecutors across the country and hundreds here in Arizona honor their duty as ministers of justice, do not pursue charges unsupported by probable cause, and properly disclose exculpatory evidence. They work long hours on behalf of the public, with good intentions, honoring our criminal justice system. The profession is not rife with misconduct. A prosecutor, just like defense counsel, does not want to see an innocent person charged and convicted. Overwhelmingly, however, most defendants are in fact guilty, and their convictions are upheld. Requiring prosecutors to second-guess those convictions after the fact or face discipline by the State Bar is not what Blackstone had in mind.

The reality is that the error rate in prosecution is amazingly low and worthy of recognition in the face of an unsupported effort to create an additional duty. While the public is told of that 1 in nearly 20 million that fell through the cracks, they also need to be told about the millions who were never prosecuted because there wasn't enough admissible evidence, because defense attorneys or their experts were able to undermine the evidence, because judicial decisions suppressed the evidence for technical reasons—because the system, for better or for worse, works. 