

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**

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

19 **I. BACKGROUND OF PETITION**

20 The Maricopa County Office of the Legal Defender has proposed an
21 amendment to Rule 16.4, *Arizona Rules of Criminal Procedure*, which would
22 require a court to ensure that prosecutors have searched their files, as well as
23 those of investigating police agencies and others, for any information "which
24 tends to mitigate or negate the defendant's guilt, or which would tend to reduce
25 the defendant's punishment. . .". [Amended Petition at Appendix A]. A
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 ("APAAC") has
2 considered the proposed rule change to Rule 16.4 and urges this Court to deny the
3 Petition in its entirety. The proposed rule is a superfluous, overbroad, and ill-
4 defined proposal that imposes unnecessary requirements on the courts and
5 prosecutors.
6

7 II. DISCUSSION/ANALYSIS

8 Prosecutors have a well-established, well-known duty to disclose
9 exculpatory information to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963);
10 *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S.
11 667 (1985). Exculpatory information includes evidence that could be used to
12 impeach witnesses. *Giglio*, 405 U.S. at 154-55. The prosecution is required to
13 disclose evidence that is material to either guilt or punishment. *Brady*, 373 U.S.
14 at 87. Evidence is material if there is a reasonable probability that had the
15 evidence been disclosed the result of the proceeding would have been different.
16 *Bagley*, 473 U.S. at 682. These disclosure obligations include information in the
17 possession of others who are acting on the prosecution's behalf. *Kyles v. Whitley*,
18 514 U.S. 419 (1995).
19
20
21
22

23 In addition to these constitutional discovery requirements, Arizona has
24 broad discovery rules that specifically require prosecutors to disclose, at the
25 arraignment or preliminary hearing, all original and supplemental police reports

1 that were in the attorney's possession when the case was filed. *Ariz. R. Crim. P.*
2 15.1(a). Consistent with *Brady's* requirements, Arizona's rules also require
3 prosecutors to disclose to a defendant existing material and information that
4 "tends to mitigate or negate the defendant's guilt as to the offense charged, or
5 which would tend to reduce the defendant's punishment therefor." Rule
6 15.1(b)(8). Consistent with *Kyles*, this rule extends to information in the
7 possession or control of investigating police agencies and "[a]ny other person
8 who has participated in the investigation or evaluation of the case and who is
9 under the prosecutor's direction or control." Rule 15.1(f). If a prosecutor
10 violates these broad disclosure requirements, the court can impose sanctions
11 including precluding or limiting witnesses, precluding or limiting evidence,
12 dismissing the case, declaring a mistrial, holding a person in contempt, and
13 imposing costs. Rule 15.7(a). It is the trial court's responsibility to enforce these
14 disclosure rules. See *State v. Tucker*, 157 Ariz. 433, 441, 759 P.2d 579, 587
15 (1988).

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

1 that tends to negate the guilt of the accused or mitigates the offense, and, in
2 connection with sentencing, disclose to the defense and to the tribunal all
3 unprivileged mitigating information known to the prosecutor. . .” ARIZ. R. SUP.
4 Ct. 42, ER 3.8(d).

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

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

1 depending on what an individual court felt was enough to “ensure” that an
2 appropriate search had been conducted? The proposed rule lends itself to
3 different interpretations in every city and county in Arizona. Rules of procedure
4 should establish uniformity, not create vague court duties that will vary from
5 judge to judge.
6

7 Second, the proposed rule commands that the court ensure that the
8 prosecutor has “searched” files but it is unclear *what* is to be done because
9 nothing in the proposed rules defines “files.” When a prosecutor gets a new case,
10 what must be searched? Does the rule require the prosecutor to find and cull
11 through all previous prosecutions against that defendant? This vague reference to
12 “files” is even more problematic for the proposed rule’s command that the
13 prosecutor search the “police agency’s files.” To exactly what files does the rule
14 refer? Police agencies do not maintain central “records rooms” where prosecutors
15 can search through files. In many police agencies information about
16 investigations are kept in electronic systems that prosecutors have no access to
17 and would not know how to “search” even if they did.
18
19
20

21 Likewise the proposed rule’s command regarding “other appropriate files”
22 is so broad as to defy any meaningful definition. Who is to determine what
23 “other appropriate files” are? Is it the court who is ensuring that the search was
24 done? Is it the prosecutor? Is it the defense attorney? Whoever is making that
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 proposed rule is also unclear as to *who* is required to do the search. It
6 does not clarify if the searching must be done by the individual prosecutor
7 handling the case or if it must be done on behalf of the prosecutor’s office. While
8 it is true that prosecutors have a duty to know of any material exculpatory
9 information held by the police and others working on the prosecutor’s behalf, that
10 duty is not discharged by a prosecutor personally searching records. Instead,
11 prosecution offices all over Arizona (and the country) comply with their
12 obligations in the only possible way – they work with their law enforcement
13 partners to ensure that they understand their duty to present all relevant material
14 to the prosecutor and, in individual cases, individual prosecutors work with
15 specific officers to confirm that all information has been provided. Using these
16 procedures is the only realistic way any prosecutor can ensure that they have all
17 discoverable information. As proposed, the rule could be interpreted to require
18 individual prosecutors to personally search police files or files of “other
19 appropriate” agencies, which is a completely unrealistic requirement.
20
21
22
23

24 In addition to the implementation problems and litigation this vague rule
25 would create, the proposal is also completely unnecessary. It seeks to add yet

1 another rule (in addition to the three sources of the discovery obligation discussed
2 above) that requires a court to do something undefined to find out if the
3 prosecutor is following the rules. Enforcing compliance with the rules is already
4 an obvious court function. Nevertheless, Petitioner asserts that this new rule is
5 necessary because, he claims, Arizona has a long history of *Brady* violations.
6 [Petition at 2-3, 5-7]. In an effort to support this claim, Petitioner cites fourteen¹
7 cases that he claims is a “representative” sample illustrating the problem.
8 [Petition at 3, fn3]. Petitioner’s cases actually prove that there is no widespread
9 *Brady* problem in Arizona that needs to be corrected. A close review of the cases
10 presented shows that, apart from five trials that were conducted before *Kyles* was
11 decided, there is not a single case on the list where material exculpatory evidence
12 was withheld from the defense. Considering the thousands of cases in Arizona
13 that have been tried and resulted in convictions since *Brady* was decided in 1963,
14 the fact that Petitioner’s “representative” list only includes five cases of
15 reversible error – and those all pre-date *Kyles* – indicates that Arizona police and
16 prosecutors are complying with their *Brady* obligations. Furthermore, Petitioner
17 does not explain (and in reviewing the cited cases it is difficult to imagine) how
18 the proposed rule change would have had any impact on any of the errors that
19
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 occurred. In his proposed Comment to the new rule, Petitioner cites *Kyles* as the
2 support for this rule. *Kyles* is more than twenty years old at this point and it
3 contains nothing new to support this unnecessary rule change in an already
4 clearly established area of law. The proposed rule is a poor solution in search of a
5 problem.
6

7 **III. CONCLUSION**

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

19 RESPECTFULLY SUBMITTED this 11 day of May, 2016.

20 

21 Elizabeth Ortiz, #012838
22 Executive Director
23 Arizona Prosecuting Attorneys'
24 Advisory Council

24 Electronic copy filed with the
25 Clerk of the Arizona Supreme Court

1 this 11 day of May, 2016.

2 by: [Signature]

- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25