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

10 In the Matter of:

Supreme Court No. R-15-0038

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

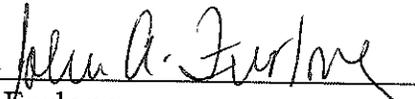
14 **COMMENT OF**  
15 **THE STATE BAR OF ARIZONA**

16 The State Bar of Arizona takes no position on this Petition but notes that the  
17 Criminal Prosecution Practice and Procedure Committee submitted a proposed  
18 comment, which is included in the attached Appendix<sup>1</sup>. The Criminal Defense  
19 Practice and Procedure Committee did not submit a proposed comment. However,  
20 the Criminal Defense Practice and Procedure Committee's position is that the  
21 Petition is procedurally problematic. As a result, the State Bar takes no position

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23 <sup>1</sup> The proposed comment attached as the Appendix has been modified by the State  
24 Bar to reflect the true drafter of the proposed comment. As such, the instances where  
25 the State Bar of Arizona was referenced as filing the comment have been modified,  
in brackets, and replaced with Criminal Prosecution Practice & Procedure  
Committee.

1 because of the conflicting positions of our State Bar members.

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3 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2016.

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5   
6 John Furlong  
General Counsel

7 Electronic copy filed with the  
8 Clerk of the Arizona Supreme Court  
9 this 12<sup>th</sup> day of May, 2016.

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**APPENDIX**

1                                   **PROPOSAL SUBMITTED BY CRIMINAL PROSECUTION**  
2                                   **PRACTICE & PROCEDURE COMMITTEE**

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4                   **I.     BACKGROUND OF PETITION**

5           The Maricopa County Office of the Legal Defender has proposed an  
6 amendment to Rule 16.4, *Arizona Rules of Criminal Procedure*, which would  
7 require a court to ensure that prosecutors have searched their files, as well as those  
8 of their investigating police agencies and others, for any information that might be  
9 “favorable to the defense.” A proposed Comment to the rule change states that  
10 prosecutors also would be required to “learn of any favorable evidence held by  
11 others” (e.g. the Department of Child Safety) who were “acting on the  
12 prosecution’s behalf.” The [Criminal Prosecution Practice & Procedure  
13 Committee, hereinafter “CRPP”] has considered the proposed rule change to Rule  
14 16.4 and opposes its adoption. While the intent behind the proposed amendment  
15 is obvious, it is a superfluous, overbroad, and ill-defined proposal that conflicts  
16 with existing law and would impose an unnecessary requirement on the courts and  
17 parties.  
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21                   **II.   DISCUSSION/ANALYSIS**

22           Arizona has broad discovery rules that require prosecutors to disclose at the  
23 arraignment or preliminary hearing all original and supplemental police reports  
24 together with the names and addresses of any experts who have examined the  
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1 defendant or evidence and the results of their examination or tests. Rule 15.1(a),  
2 *Arizona Rules of Criminal Procedure*. The discovery rules also require prosecutors  
3 to disclose to a defendant, among a host of other items, existing material and  
4 information that “tends to mitigate or negate the defendant’s guilt as to the offense  
5 charged, or which would tend to reduce the defendant’s punishment therefor[.]”  
6 Rule 15.1(b)(8). This rule extends to information in the possession or control of  
7 investigating police agencies and “[a]ny other person who has participated in the  
8 investigation or evaluation of the case and who is under the prosecutor’s direction  
9 or control.” Rule 15.1(f). If a prosecutor violates these broad disclosure  
10 requirements, the court can impose sanctions including precluding or limiting  
11 witnesses, precluding or limiting evidence, dismissing the case, declaring a  
12 mistrial, holding a person in contempt and imposing costs. Rule 15.7(a). It is the  
13 trial court’s responsibility to enforce these disclosure rules. See *State v. Tucker*,  
14 157 Ariz. 433, 441, 759 P.2d 579, 587 (1988).

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19 On top of the requirements of Rule 15.1, prosecutors have a due process  
20 obligation to unilaterally disclose exculpatory information to a defendant. *Brady*  
21 *v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United*  
22 *States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *United States v. Bagley*,  
23 473 U.S. 667, 676-684, 105 S.Ct. 3375, 3380-85, 87 L.Ed.2d 481 (1985). See also,  
24 *Milke v. Mroz*, 236 Ariz. 276, 280, 339 P.3d 659, 663 (App. 2014), *review denied*.  
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1 These cases hold that evidence favorable to an accused must be disclosed when the  
2 evidence is material either to guilt or to punishment. *Brady*, 373 U.S., at 87, 83  
3 S.Ct., at 1196-97. Favorable evidence is material if there is a reasonable probability  
4 that had the evidence been disclosed the result of the proceeding would have been  
5 different. *Bagley*, 473 U.S., at 682, 105 S.Ct., at 3383. On the other hand, a  
6 defendant's mere speculation that evidence might contain exculpatory material  
7 does not impose a disclosure obligation on prosecutors. See *State v. Acinelli*, 191  
8 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997).

11 Petitioner's proposal in R-15-0038 would require courts, at the mandatory  
12 prehearing conference under Rule 16.4, to "ensure" that the prosecutor has  
13 searched its and other "appropriate files" for information "favorable to the  
14 defense." Initially, this presents a number of practical problems. First, it does not  
15 explain *how* the courts would ensure such a search. Would there be a colloquy with  
16 the prosecutor, as suggested in the petition? If so, what proof would the prosecutor  
17 have to offer for the court to ensure that everything had been searched? Second,  
18 petitioner does not define the term "files". The proposal would require, in addition  
19 to a search of the prosecutor's and investigating police agency's files, a search of  
20 "any other appropriate files", without clarifying what that means. The proposed  
21 "Comment" to the rule change does nothing to assist in clarifying that meaning.  
22 Instead, it suggests the prosecutor would be required to search unconnected agency  
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1 files, such as the Department of Child Safety (DCS) and outside labs, without  
2 regard to whether they are under the prosecutor's "direction and control" (Rule  
3 15.1(f)) and without regard as to how such a search is to be conducted and  
4 confidentiality addressed. Finally, the proposal would expand the prosecutor's  
5 obligation to search unknown files for any information that is simply "favorable to  
6 the defense", without regard to the materiality of such information. As shown  
7 below, this generic phrase, standing alone, is onerous and not consistent with  
8 current law.  
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11 In addition to the practical problem it creates, the proposal to amend Rule  
12 16.4 is unnecessary. It seeks to add yet another rule - essentially directing the court  
13 to inquire if the prosecutor is following the rules - for something that the criminal  
14 rules already cover. Requiring the Court to engage in some sort of inquiry with  
15 prosecutors at the prehearing conference to ensure they are following the rules  
16 already in place is redundant, is a waste of time and resources, and adds an  
17 unnecessary requirement on the courts and prosecution.  
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20 Finally, the proposal is overbroad. The proposed rule would expand the  
21 prosecutor's obligations to anything that is simply "favorable to the defense",  
22 which is not the standard of either the Arizona criminal rules or the United State  
23 Supreme Court pronouncements. Prosecutors already have the duty to disclose  
24 exculpatory information. They already have the duty to disclose information that  
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1 tends to mitigate or negate the defendant's guilt or reduce punishment. This applies  
2 to information in the possession or control of law enforcement agencies and "any  
3 other person" under the prosecutor's "direction or control" who has investigated or  
4 evaluated the case. The proposed rule, however, would now extend the  
5 prosecutor's duty to any information "favorable to the defense", without regard to  
6 the materiality of such information. Petitioner, in his proposed Comment, cites  
7 *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) for the  
8 proposition that the prosecutor is required to "learn of any favorable evidence held  
9 by others acting on the prosecution's behalf." However, *Kyles* does not support  
10 Petitioner's specific proposal. While the statement is quoted correctly, its import  
11 is not fully set forth in the petition. In the same paragraph as the quoted statement  
12 *Kyles* also explicitly reiterates that such evidence must be *material* before there is  
13 a duty to disclose:  
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18 [S]howing that the prosecution knew of an item of favorable evidence  
19 unknown to the defense does not amount to a *Brady* violation, without  
20 more.

21 *Kyles*, 514 U.S., at 437, 115 S.Ct., at 1567. It is only when favorable evidence  
22 "ris[es] to a material level of importance" that its nondisclosure is a violation. *Id.*  
23 at 438, 115 S.Ct. at 1568. Thus, a *Brady* violation occurs only when the prosecution  
24 suppresses "material" evidence that is favorable to the defense. In short, *Kyles* does  
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1 not support the petition. In the final analysis, *Kyles* is a twenty years old case  
2 containing nothing new to support an unnecessary rule change in an already  
3 established area of law.  
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### 5 **III. CONCLUSION**

6 The [CRPP] respectfully requests that the Arizona Supreme Court refuse to  
7 adopt the amendment to Rule 16.4 as requested in petition R-15-0038. Current  
8 criminal disclosure laws are very clear. Procedures are already firmly in place for  
9 ensuring that prosecutors comply with their *Brady* and Rule 15.1 obligations. In  
10 addition to adding confusion to existing law, the proposal in the petition is  
11 unnecessary, imposing a new requirement on the courts for something that is already  
12 provided in the rules. And it is overbroad, expanding a prosecutor's obligations  
13 beyond what is expressly prescribed in well-established standards and creating an  
14 undue burden on prosecutors.  
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