Ms. Lorrie Platt, Secretary
New Hampshire Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

VIA E-MAIL (rulescomment@courts.state.nh.us)

Re: Proposed Amendments to Rule of Professional Conduct 3.8

Dear Ms. Platt:

In response to the October 26, 2022 request of the New Hampshire Supreme Court Advisory Committee on Rules for comments regarding changes to the New Hampshire Rule of Professional Conduct 3.8 and a further individualized request by the Advisory Committee at its December 9, 2022 hearing, I respectfully submit the following:

Context

I have been involved in the New Hampshire criminal justice system for over 40 years as a public defender (13 years), as a law professor (29 years), as the chair of the ACLU-NH (6 ½ years) and as one who has drafted, testified and successfully encouraged the New Hampshire State legislature to address issues of criminal legal reform and privacy. As a professor, I have taught many, many prosecutors and defense lawyers, including all but one of the prosecutors who testified before the Advisory Committee on December 9, 2022. Perhaps, most importantly, I was trial counsel with Attorney James Moir in *State v. Carl Laurie,* which led to the seminal exculpatory evidence decision by the New Hampshire Supreme Court, overturning a first-degree murder case because of a failure to disclose potential exculpatory evidence by the Attorney General's office.

Beyond what was carefully described in the NHACDL letter to the Advisory Committee concerning the *Laurie* case, I would note that the potentially exculpatory evidence in *Laurie* came to the attention of the defense only by accident, a casual conversation between Attorney Moir and a County Attorney (uninvolved in the prosecution of Mr. Laurie) followed by in-depth investigation. It is noteworthy that it was at least as likely , perhaps more likely, that the potentially exculpatory evidence would never have come to light as it is that the revealing conversation even occurred. Its accidental discovery post-trial resulted in Mr. Laurie receiving a 17-years-to-life sentence upon remand of the *Laurie* case, compared to the life-without-parole sentence he had been serving after conviction at trial.

The Proposed Rule 3.8

I have significant concern with four parts of the proposed rule:

1) The language in the first part of 3.8(b) relating to new credible/material evidence of actual innocence;

2) The absence of prompt notification to defense counsel of the presence of potentially exculpatory evidence;

3) The standard in the language regarding a prosecutor's investigation in 3.8(b)(2)(ii); and

(4) The language on 3.8(d) regarding a prosecutor's independent, good faith judgement.

(1) The language in the first part of 3.8(b)

Rule 3.8(b) says, in part, "When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, **..."**

That language shifts the burden articulated in *Laurie.* In *Laurie*, the Supreme Court placed the burden **on the State** to show that the withheld exculpatory evidence was not material. *State v. Laurie,* 139 N.H. 325, 329-30 (1999). By contrast, Rule 3.8 effectively says that only if a prosecutor finds the new evidence is material must they act, a shift in deference to the prosecutor contrary to the explicit finding in *Laurie* and one that is unwarranted and without basis.

Moreover, the 3.8(b) language requires that the new evidence create a reasonable probability of actual innocence. That standard conflicts with the standard that is in place when the previously undisclosed, potentially exculpatory evidence is in the prosecutor's possession pre- or during trial. Neither *Brady v. Maryland, U.S. v. Bagley* nor *State v. Laurie* talk in terms of whether the favorable evidence was indicative of innocence. Instead, they speak of whether the favorable evidence, "if disclosed and used effectively, … may make the difference between conviction and **acquittal**." *U.S. v. Bagley,* 473 U.S. 667, 676 (1985); *Brady v. Maryland,* 373 U.S. 83 (1965); *State v. Laurie,* 139 N.H. at 327 (quoting *Bagley*) (emphasis added).

The difference between establishing the probability of actual innocence as 3.8 requires and establishing the probability of an acquittal is a very substantial one. It is an unjustifiable distinction. Sometimes in post-trial proceedings, the burden is placed on a defendant and it becomes a heavier burden than pre- or at trail. That change is understandably based on the importance of finality, on the defendant having had their "shot" at trial and, on it being tougher to prevail on a post-trial, second-bite-at-the-apple argument in the interests of judicial and administrative economy.

Rule 3.8 does not capture a second-bite-at-the-apple circumstance, however. By its very nature, a 3.8 circumstance is only, at best, a first-bite circumstance, and it isn't even that first bite is very conditional to the detriment of the defendant. I't only a first bite if and only if a difficult probability-of-actual-innocence burden is met **in the judgement of the prosecutor without input from the court, defendant or counsel.**

The principle of finality does not justify an approach that (1) offers a very unlikely possibility (2) to a defendant who has no responsibility whatsoever for the previously undisclosed, potentially exculpatory evidence becoming available (3)after, rather than before or during, trial. It punishes a defendant for the lack of availability of the potentially exculpatory evidence pre-conviction when, as in *Laurie,* it may well have been the fault of the prosecutor. And, it creates a perverse disincentive for police and prosecutors at the pre-conviction phase to be aggressive in searching for potential exculpatory evidence.

(2) The absence of prompt notification of defense counsel of the presence of potentially exculpatory evidence

Rule 3.8(b)(1)–(2) provided for prompt disclosure to the court or the prosecutorial authority of the new, credible and material evidence of actual innocence. It is less clear as to either the promptness or certainty of existing defense counsel being informed of the evidence.

As was discussed at the December 9 hearing before the Advisory Committee, the sooner decision-making as to what to do about the evidence includes different perspectives, **especially those of defense counsel,** the better. The criminal legal system works best when differing perspectives collide (or agree) as a part of a process for making sure important decisions are thoroughly thought through. No basis exists for deferring to the prosecutor's judgement as to the timing of alerting defense counsel about potentially critical evidence. Prompt disclosure to defense counsel will improve the quality of all subsequent judgements.

Many good reasons exist for some of the extent of the power that prosecutors' offices have in the criminal legal system. It is power that is greater than any of the other players in the system, again often for good reason. That power vests a prosecutor's office with wide discretion. That discretion is far less regulated than that of either a judge, whose decisions are subject to the appellate process, or that of a defense attorney, who is subject to 6th Amendment ineffective assistance of counsel claims and legal malpractice claims. For example, prosecutors have absolute immunity for civil claims against them.

To the point here: the Rules of Professional Conduct are one of the very few external regulatory mechanisms to which prosecutors are subject. It is important that these rules do not also embed that same wide deference and discretion to prosecutors.

(3) The standard in the language regarding a prosecutor's investigation in 3.8(b)(2)(ii)

Rule 3.8(b)(2)(ii) says that a prosecutor shall "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. **"** This provision repeats the problematic actual-innocence standard addressed in point # 1 above and, for the reasons stated there, should not be used.

(4) The language of 3.8(d) regarding a prosecutor's independent, good faith judgement.

The language of 3.8(d) effectively relieves a prosecutor of any significant external regulatory pressure when they make the critical Rule 3.8(a) decision (putting aside the poor-language issues of 3.8(a) addressed above). As long as a prosecutor cannot be shown to have acted in bad faith, an almost impossible burden to meet, no external regulatory pressure exists to get the decision correct. As addressed in point # 3, it leaves the decision again to the wide, unregulated discretion of the prosecutor, trusting that they will act in the interests of justice with no external oversight of those actions.

More broadly, as I addressed at the December 9 hearing, the focus of the procedures in Rule 3.8 must be on preventing wrongful convictions based on exculpatory evidence discovered only after the fact. The focus should not be on lessening a prosecutor's burden when post-conviction potentially exculpatory evidence arises and it should not be on carefully protecting a prosecutor from a potentially bad decision. One need only looks at the National Innocence Project website (https://innocenceproject.org/all-cases/) and search its catalog of wrongful convictions for prosecutorial misconduct relating to exculpatory evidence to understand the seriousness of the exculpatory-evidence problem. Or, one can search the even larger database of the National Registry of Exonerations (https://www.law.umich.edu/special/exoneration/Pages/about.aspx) to appreciate even more deeply that the focus of Rule 3.8 should be on prosecutorial conduct post-conviction that enables the discovery of those who may well have been found not guilty, let alone innocent, but for the never-revealed potentially exculpatory evidence.

One final note as to the need for improvements on the draft of Rule 3.8 before the Advisory Committee: if the prosecutors in *Laurie* had only discovered the potentially exculpatory evidence post-conviction, it is almost certain it would never have come to light. It would never have survived the 3.8(b) inquiry as proposed just as it did not survive a pre-trial, independent, good faith judgement by those same prosecutors.

An Alternate Proposal

As promised at the December 9 hearing, below is a draft of a proposed 3.8(b)-(d) alternative:

3.8(b) When a prosecutor knows of ***previously undisclosed***, ***potentially exculpatory evidence in a case in which the defendant was convicted*** ~~credible and material evidence creating a reasonable probability 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 prosecutorial authority in the jurisdiction where the conviction occurred***; and***

(2) promptly disclose that evidence to trial and/or appellate counsel for the defendant; and

(3) if ~~the conviction was obtained in the prosecutor's jurisdiction~~ ***and the defendant does not currently have counsel***,

(i) promptly request that the Court appoint counsel for the defendant to provide advice regarding what action, if any, should be taken, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense ***when the potentially exculpatory evidence may constitute sufficient evidence from which a reasonable juror may conclude that***

the state had not proven its case beyond a reasonable doubt. ~~that the defendant did not commit.~~

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

~~(d) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (c) or (d), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.~~

Sincerely,
/s/
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