

## NOTE

# DISCOVERY VIOLATIONS PROMPT COURT TO ORDER STATE TO PAY ATTORNEYS' FEES FOR DEFENSE

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### I. INTRODUCTION

On May 16, 1997, a Phoenix police officer arrested Ricardo Dominic Meza (“Meza”) after the car he was driving struck a motorcycle stopped at an intersection. As a result of the collision, the driver of the motorcycle was thrown from his vehicle and suffered a hairline fracture of a vertebra, among other injuries. Immediately following the accident, an investigation by Phoenix police concluded that Meza was under the influence of alcohol when he rear-ended the motorcycle. Two breath tests administered by an officer with the aid of a breathalyzer registered Meza’s blood-alcohol content (“BAC”) at .160 and .159, respectively.<sup>1</sup>

The Maricopa County Attorney’s Office charged Meza with aggravated assault with a motor vehicle. If convicted of the felony charges, Meza would face a minimum of five years in prison. Refusing a plea offer, Meza chose to defend against the charges in court. More than two years after the accident that led to his arrest, Meza still had not been tried.<sup>2</sup> The lengthy delay was the result of numerous discovery violations by the State of Arizona.<sup>3</sup> Repeated discovery requests by the defense were ignored by the State, and ultimately Meza’s counsel learned that the Phoenix Police

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1. The legal limit for BAC was .100 when the accident occurred. It since has been lowered to .080. See ARIZ. REV. STAT. ANN. § 28-1381 (2003).

2. State v. Meza, 50 P.3d 407, 410 (Ariz. Ct. App. 2002), *cert. denied*, No. CR-02-310-PR, 2003 Ariz. LEXIS 2 (Jan. 8, 2003).

3. *Id.*

Department Crime Lab attempted to dispose of evidence critical to the defense.<sup>4</sup>

The Arizona Court of Appeals ordered the Maricopa County Attorney's Office to reimburse Meza's counsel for costs related to its discovery efforts.<sup>5</sup> Never before had an Arizona court assessed a monetary sanction against a prosecutor. Even courts in other jurisdictions that had ordered monetary sanctions against a state had not done so when it was determined the prosecutor's office itself had committed no wrongdoing. This precedent may encourage other courts throughout the United States to take a similar approach to incidences of prosecutorial and governmental misconduct.

This Note examines the July 2002 opinion of the Arizona Court of Appeals in *State v. Meza* and the subsequent remand to the trial court. Part II provides a summary of the case, including a thorough description of the discovery violations that led the court to sanction the Maricopa County Attorney's Office and other state agencies. Part III discusses the reasoning behind the decision of the Arizona Court of Appeals to assess monetary sanctions against the State. Part IV considers the potential impact of the court's ruling. A summary of the issues and arguments made in this Note is contained in Part V.

## II. STATEMENT OF THE CASE

### *A. Pre-Trial Discovery*

The attorney representing Meza filed the first discovery motion on January 12, 1998.<sup>6</sup> Defense counsel requested all calibration checks and standard quality assurance procedure ("SQAP") tests for the Intoxilyzer 5000 unit #2806 performed during the month immediately preceding and the month immediately following Meza's arrest.<sup>7</sup> These diagnostic tests are conducted regularly to ensure the accuracy of the units,<sup>8</sup> and the results are then stored in the Alcohol Data Acquisition Management System ("ADAMS").<sup>9</sup> These reports are then made accessible to prosecutors and

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4. See *infra* text accompanying notes 22–28.

5. 50 P.3d at 416–17.

6. Appellee's Corrected Answering Brief and Cross-Appellant's Corrected Opening Brief at 7, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR97-12101).

7. 50 P.3d at 409.

8. The testing procedure involves the use of a known alcohol concentration of .100. If the unit performs within a twenty percent range, reporting a value between .09 and .110, the unit is considered to be operating properly. *Id.*

9. See *id.*

defense attorneys for use in court as evidence of the reliability of the device.<sup>10</sup>

In a pre-trial hearing, Clark McDonough, the criminalist charged with maintaining the testing program at the Phoenix Police Department Crime Lab, testified that these test results could not be deleted.<sup>11</sup> According to his testimony, therefore, the recorded tests made available to defense attorneys represented all tests conducted on the relevant Intoxilyzer unit. When asked if he intentionally deleted information that otherwise would be available in these records, McDonough responded that he did not.<sup>12</sup>

Unconvinced that it had received all of the relevant records for Intoxilyzer 5000 unit #2806, Meza's counsel filed a second discovery motion with the court.<sup>13</sup> The judge agreed that the records already provided by the prosecutor were insufficient and ordered the State to surrender all relevant reports.<sup>14</sup> The State provided Meza with additional information, which again did not prove satisfactory to defense counsel.<sup>15</sup> Meza's attorney filed yet another discovery demand, this time expanding its request to include all data available on the unit in question from January 1, 1997 through the date of the request.<sup>16</sup>

The State submitted a response to this motion, stating that it "either supplied the requested information or no such documents exist."<sup>17</sup> The prosecutor further argued that "[t]he defense basis for the argument is that undocumented calibration tests are being run by the quality assurance specialist. . . . The issue is the 'undocumented calibration tests' that the Defense claims are being run. There is no evidence to support that statement."<sup>18</sup> The prosecution later stated that defense counsel's claims that quality assurance officers were tampering with the ADAMS system were "preposterous."<sup>19</sup>

The trial court was not convinced by this response from prosecutors, calling it "flat unacceptable."<sup>20</sup> The court again ordered the State to

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10. *Id.* The database used by prosecutors to access this information is named the Arizona Criminal Justice Information System ("ACJIS").

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Appellee's Corrected Answering Brief and Cross Appellant's Corrected Opening Brief at 11, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR97-12101).

19. *Id.*

20. 50 P.3d at 409.

produce all requested records, and informed the State that charges against the defendant would be dropped if it did not comply with this latest order.<sup>21</sup>

At another pre-trial hearing on May 5, 1999, criminalist Jesse Shriki (“Shriki”) testified for the State that it was possible to prevent a test from being recorded to ADAMS.<sup>22</sup> No written protocol existed for circumstances under which a test might be disregarded.<sup>23</sup> A deletion would result in the inability of defense attorneys to learn potentially important facts about the particular intoxilyzer unit.

A memo intercepted by Meza’s counsel on the day before trial raised concerns that diagnostic tests of Intoxilyzer units could be deleted by crime lab employees.<sup>24</sup> The memo from Terry Hogan, an employee with the Department of Public Safety, instructed a colleague to delete a calibration test because it had recorded an inaccurate date.<sup>25</sup> Following this revelation that calibration tests could be concealed from defense attorneys, the defense filed a motion to prevent introduction of Meza’s breath test results at trial.<sup>26</sup> At a hearing to consider the motion, Shriki testified that calibration test results would not be recorded in the Arizona Criminal Justice Information System (“ACJIS”) if the quality assurance specialist believed the results “[did] not reflect the operating condition of the instrument.”<sup>27</sup> Shriki further admitted these tests were deleted so defense attorneys could not use them to discredit the reliability of the Intoxilyzer units.<sup>28</sup>

Notwithstanding indications that evidence may have been tampered with, the trial court refused Meza’s motion to preclude the breath tests substantially on its determination that there had been no failed tests for the unit used on Meza in the two-week period before and after Meza’s arrest.<sup>29</sup>

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21. *Id.* at 410.

22. *Id.*; *see supra* text accompanying note 11 (Shriki’s predecessor testified that equipment tests could not be deleted).

23. 50 P.3d at 410.

24. The memo was discovered by an attorney working on a DUI case in Yavapai County. That attorney forwarded a copy of the memo to counsel representing Meza. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The court said:

[A]ll calibration tests indicated that the instrument was working properly. All experts have said, assuming that the instrument was working properly on May 14th, assuming that it was working properly on May 29th and May 30th, both of which were before and after the subject test, a . . . reasonable scientific assumption, is that the machine was working properly on the date in question.

*Id.*

*B. Meza's Trial*

The trial began on June 1, 1999, more than two years after the arrest of Meza. The Arizona Court of Appeals noted that this inordinate delay was “largely a function of the State’s delay in providing discovery.”<sup>30</sup> The State introduced evidence purporting to demonstrate the accuracy of the Intoxilyzer 5000 unit used to test Meza following the accident.<sup>31</sup> Both of the tests submitted to the court reported values within the required range of .090 to .110.<sup>32</sup> One of the tests introduced by the State was taken on May 29, 1997, exactly thirteen days after Meza’s arrest.<sup>33</sup> That test of unit #2806 reported a blood-alcohol content of .094 for the .100 solution, a value within the accepted range of accuracy.<sup>34</sup>

The eight-person jury was unable to reach a decision based on the evidence presented at trial. Five jurors voted guilty, with the remaining three voting not guilty.<sup>35</sup>

*C. Post-Trial*

Meza’s counsel remained convinced that the State still possessed evidence that it had not disclosed involving the operating condition of the Intoxilyzer 5000 unit #2806.<sup>36</sup> The State adamantly denied any such evidence existed.<sup>37</sup> Notwithstanding these repeated assurances, an expert witness working for Meza found a computer file within the ADAMS system that contained deleted test results.<sup>38</sup>

The file, titled “BFMLOGG,” contained a record of all deleted entries for unit #2806.<sup>39</sup> Included in the file was a failed test performed May 29, 1997.<sup>40</sup> This log is substantially similar to the “Recycle Bin” on Microsoft

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30. *Id.*

31. *Id.*

32. *See supra* note 8.

33. 50 P.3d at 410.

34. *Id.*; *see supra* note 8.

35. 50 P.3d at 410.

36. *Id.* at 410–11.

37. *Id.* at 411. The State said, “One critical fact needs to be addressed at this point: All relevant information regarding the breath testing instrument involved in the Defendant’s case has been disclosed.” *Id.*

38. *Id.*

39. *Id.*

40. *Id.* It was determined that on May 29, 1997, two tests of Intoxilyzer unit #2806 were conducted. The first one previously had been undisclosed to the defense, and showed the unit used to determine Meza’s BAC was operating outside the required range of accuracy. This test subsequently was deleted, and a second test was run showing the unit was operating properly.

Windows computers, wherein deleted files are stored and the information can be resurrected. The contents—even the existence—of this file were not disclosed to defense counsel prior to Meza’s first trial. Had they been disclosed, Meza’s counsel would have possessed strong evidence that the subject machine was not functioning properly when it was used to determine the BAC level of the defendant. A key State witness, Shriki, was the crime lab technician who deleted the failed test. In previous court proceedings, Shriki offered no testimony to indicate he deleted any information relevant to the reliability of unit #2806.<sup>41</sup> In light of these findings, the State admitted it had failed to disclose the May 29th calibration test prior to Meza’s trial.<sup>42</sup>

Meza’s counsel filed a motion with the trial court to dismiss the charges altogether, or, alternatively, suppress the breath test results.<sup>43</sup> The trial court denied the motion to dismiss, but ordered that the State could not use the BAC test results in the second trial:

The Court does not find that a dismissal of the charges is warranted. There is no evidence that the State intentionally failed to disclose this evidence. . . . While the Court has not found intentional misconduct, *the State had been guilty of gross negligence* in failing to produce this evidence. It failed to produce this evidence despite numerous court orders, and previous extensions of deadlines to produce evidence of all calibration tests.<sup>44</sup>

The State appealed the trial court’s decision to suppress the blood alcohol evidence, and Meza appealed the court’s refusal to dismiss the charges.<sup>45</sup>

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This is the test that was disclosed to the defense and presented as evidence during Meza’s trial.  
*Id.*

41. *See supra* text accompanying notes 22, 27–28. The Arizona Court of Appeals noted that Shriki “acknowledged that he had not previously revealed his own deletions from the ADAMS system, stated that he had no independent recollection of the deleted test on May 29, 1997, and testified that he was unaware, both in 1997 and at the time of his testimony in 1999, that there existed a BFMLOGG or that deletions were saved or could be retrieved.” 50 P.3d at 411.

42. *Id.*

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.* at 414.

## III. COURT OF APPEALS SANCTIONS STATE FOR DISCOVERY VIOLATIONS

The issue before the Arizona Court of Appeals was whether the trial court had chosen an appropriate sanction. In a decision that surprised both prosecutors and defense counsel, the Arizona Court of Appeals held that the trial court had not gone far enough. While the court emphasized that the Maricopa County Attorney's Office had committed no wrongdoing,<sup>46</sup> it found disclosure violations committed by the Phoenix Police Department Crime Lab warranted sanctions.<sup>47</sup> In support of its decision, the court cited a 1993 Court of Appeals decision, *Carpenter v. Superior Court*,<sup>48</sup> which held "a law enforcement agency investigating a criminal action operates as an arm of the prosecutor for purposes of obtaining information that falls within the required disclosure provisions of Rule 15.1."<sup>49</sup>

Rule 15.7 of the Arizona Rules of Criminal Procedure provides courts with the authority to sanction counsel for discovery violations.<sup>50</sup> Rule 15.7 does not explicitly authorize courts to impose monetary sanctions against a party to a criminal proceeding.<sup>51</sup> Courts look to various criteria, described

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46. *Id.* at 413.

47. *Id.* at 412. The court criticized the Crime Lab for its attempt to destroy evidence:

[E]ven if we assume that the Crime Lab's practices were well-intended and that the objective was only to delete tests that participating Crime Lab employees honestly believed were unreliable and might unnecessarily impugn the accuracy of the machines, this was not a judgment that was theirs to make. At bottom, they engaged in the secretion or attempted destruction of inconvenient evidence—evidence that should have been available for independent evaluation by prosecutors, criminal defendants, and the courts.

*Id.* at 413.

48. 862 P.2d 246 (Ariz. Ct. App. 1993).

49. 50 P.3d at 412 (quoting *Carpenter v. Superior Court*, 862 P.2d 246, 250 (Ariz. Ct. App. 1993)).

50. ARIZ. R. CRIM. P. 15.7(a).

51. Rule 15.7 has been amended since the Arizona Court of Appeals issued its decision in *Meza*. Although the language of 15.7(a) changed, the changes did little to change the substantive meaning of the law. The modifications did not affect the language relied upon by the court in issuing a monetary sanction against the State. The changes do not resolve the issue of whether a court should assess monetary sanctions against a party in a criminal proceeding. The relevant pre-amendment language of Rule 15.7(a) reads:

If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, including, but not limited to:

- (1) Ordering disclosure of the information not previously disclosed.
- (2) Granting a continuance.
- (3) Holding a witness, party, or counsel in contempt.
- (4) Precluding a party from calling a witness, offering

in *State v. Smith*,<sup>52</sup> to determine the appropriate sanction under the circumstances.<sup>53</sup> Perhaps the most relevant factor in the *Smith* inquiry is whether a less stringent sanction would remedy the violation.<sup>54</sup>

In *Meza*, the Arizona Court of Appeals noted that a number of the sanctions defined in Rule 15.7 were inappropriate in this case. Because the first trial already had been held, and the evidence eventually was discovered by defense counsel, issuing a disclosure order, a continuance, or a mistrial would be useless and insufficient.<sup>55</sup> The court then affirmed the trial court's order suppressing the breath test evidence, noting the State still had other evidence that could be used to establish the guilt of Meza in a second trial.<sup>56</sup> The court concluded a lesser sanction would not fit the circumstances of the case.<sup>57</sup>

After holding a dismissal of the charges with prejudice was unnecessary,<sup>58</sup> the court proceeded to detail the enormous work done by Meza's counsel to uncover the relevant evidence on the #2806 Intoxilyzer unit.<sup>59</sup> Noting that this discovery was the result of hundreds of hours of time, the court held the State was responsible to Meza and his counsel for costs incurred as a result of the discovery violations.<sup>60</sup> Because the Phoenix Police Department Crime Lab is an arm of the prosecutor in matters of discovery, the State was responsible for any violations made by that agency.<sup>61</sup> The Arizona Court of Appeals remanded the case to the trial

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- evidence, or raising a defense not disclosed; and  
 (5) Declaring a mistrial when necessary to prevent a miscarriage of justice.

ARIZ. R. CRIM. PROC. 15.7(a) (2003) (amended Oct. 16, 2003).

52. 681 P.2d 1374 (Ariz. 1984).

53. The relevant factors include "the vitality of the evidence to the proponent's case; the degree to which the evidence or the sanctionable conduct has been prejudicial to the opposing party; whether the sanctionable conduct was willful or motivated by bad faith; and whether a less stringent sanction would suffice." *Id.* at 1378.

54. *Id.*

55. 50 P.3d at 414. *See supra* note 51.

56. 50 P.3d at 415.

57. *Id.*

58. *Id.*

59. *See id.* at 415–16.

60. *Id.* The court reached this conclusion in spite of its determination that the Maricopa County Attorney's Office "made a good faith effort to meet its discovery obligations in this case." *Id.* at 416.

61. *See supra* text accompanying notes 48–49. The court also cited reasoning used by the Supreme Court of Mississippi in *State v. Blenden* to assert the liability of the prosecutor when an agency purportedly under its control violates court rules:

Where material evidence within the knowledge of a governmental officer has been withheld from the defense, that knowledge is imputed to the prosecutor, regardless of the fact that the governmental officer with actual

court for a determination of the attorneys' fees and costs incurred by the Meza defense that were attributable to its efforts to obtain discovery from the State.

#### IV. ANALYSIS

##### *A. Impact*

The Arizona Court of Appeals did not award a monetary sanction because of procedural mistakes, but because the State intentionally attempted to destroy information relevant and useful to the defense, and then hid this fact. The criminalist responsible for deleting the calibration test on unit #2806 candidly admitted he did so in an effort to prevent damaging evidence from being made available to defense attorneys through discovery.<sup>62</sup> These facts do not imply that monetary sanctions will be available to courts only when prosecutors and state agencies *intentionally* make errors during discovery. It is more likely monetary penalties will be assessed by courts in certain circumstances even when the sanctioned conduct is unintentional.<sup>63</sup>

Trial judges are in the best position to determine what sanctions are appropriate when discovery violations unnecessarily burden counsel. *Meza* will provide Arizona judges with one additional sanction to be applied in the event of prosecutorial misconduct or gross negligence. In some instances, this may allow for imposing a sanction less stringent than available options that otherwise would be used to remedy an injustice.

When misconduct can be remedied by monetary sanctions, a court may prefer that option over dismissal of the charges with prejudice. This has the potential for enhancing the public's perception of the justice system, as it may reduce dismissals that many see as exonerating a defendant due only to a "technicality." If a monetary sanction provides an adequate remedy to the defendant, neither the State nor the defendant suffered irreparable harm. Ultimately, the State's most significant interest in criminal law rests in prosecuting those who violate laws. With that goal in mind, a sanction less severe than outright dismissal helps ensure defendants are treated fairly

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knowledge is from a different governmental agency. . . . Such knowledge is also imputable to the prosecution regardless of the good or bad faith of the prosecutor.

50 P.3d at 416 (quoting *State v. Blendon*, 748 So.2d 77 (Miss. 2000)).

62. *See supra* text accompanying note 28.

63. *See supra* text accompanying note 44.

within the legal system while simultaneously protecting the prosecution when mistakes beyond its immediate control otherwise would result in the dismissal of a case.

Perhaps more important, the threat of monetary sanctions will deter prosecutors and state agencies from acting improperly during discovery. It will expedite the pre-trial process, and deter state actors from destroying or concealing evidence, ignoring discovery requests, or generally responding inadequately or too slowly. Rule 1.2 of the Arizona Rules of Criminal Procedure states that the rules are designed to protect the fundamental rights of individuals and promote simplicity in procedure while eliminating delay and expense.<sup>64</sup> To that end, the ability of a court to levy monetary sanctions encourages complete and timely disclosure between parties. Had the various state agencies in *Meza* known they would be held financially accountable for failure to comply with discovery requests, it is unlikely defense counsel would have been forced to file more than thirty discovery requests to obtain the relevant information on unit #2806.<sup>65</sup>

The impact of this decision stretches beyond the physical boundaries and legal jurisdiction of Arizona. It may well represent an early element in a trend among courts across the United States to meaningfully penalize a state when it acts improperly in judicial proceedings. For example, in *State v. Blenden*,<sup>66</sup> the Supreme Court of Mississippi upheld the imposition of a monetary sanction against the State totaling \$28,268.65 as a result of discovery violations and concealment of evidence.<sup>67</sup> Similarly, the Supreme Court of Idaho imposed monetary sanctions against the State. In *State v. Thompson*,<sup>68</sup> that court interpreted Rule 16 of Idaho's Criminal Rules to allow for the imposition of such sanctions.<sup>69</sup> The rule analyzed by the Idaho court is virtually identical to Rule 15 of the Arizona Rules of Criminal Procedure.<sup>70</sup> Because the Arizona Court of Appeals ordered monetary sanctions in a case where the prosecutor committed no wrongdoing, *Meza* has the effect of expanding the emerging trend toward allowing monetary sanctions against states.

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64. See ARIZ. R. CRIM. P. 1.2.

65. 50 P.3d at 415.

66. 748 So. 2d 77, 90 (Miss. 1999).

67. *Id.* at 82. Like *Meza*, *Blenden* involved a DUI investigation where the State concealed records relevant to the defense and ignored discovery requests to produce documents relating to a blood sample of the defendant. The Supreme Court of Mississippi held the sanctions were appropriate even if the violations amounted only to negligence. *Id.* at 83.

68. 803 P.2d 973 (Idaho 1989).

69. *Id.* at 974.

70. See *supra* note 51.

*B. Authority of Courts to Sanction the State*

Although the ability of a court to impose monetary sanctions against a state for prosecutorial misconduct has significant social and judicial benefits, the legal authority of courts to enforce such penalties is unclear. Although the Arizona Supreme Court denied certiorari sought by the State of Arizona in the regards to the monetary sanction, the issue is not resolved nationally and likely will be the subject of contentious legal proceedings between prosecutors and defense attorneys.

A respectable argument can be made that sovereign immunity prohibits a court from assessing such costs against a state. This argument rests on the premise that the State has not consented to the imposition of these sanctions.<sup>71</sup> For example, in *United States v. Woodley*,<sup>72</sup> the trial court sanctioned the government for violating discovery rules.<sup>73</sup> The Ninth Circuit Court of Appeals ultimately held that sovereign immunity applied and reversed the trial court's order.<sup>74</sup> The decision rested on the language of the rule that permitted courts to sanction parties.<sup>75</sup> Similar to Rule 15.7 of the Arizona Rules of Criminal Procedure, the applicable rule in the State of Washington did not explicitly authorize monetary sanctions for discovery violations. The court reasoned that because "[t]here was no explicit waiver of sovereign immunity[,] [t]he court incorrectly levied sanctions under [the local rule]."<sup>76</sup> However, the Ninth Circuit Court of Appeals suggested sovereign immunity would not protect the government if the judiciary used monetary sanctions "to remedy a violation of recognized statutory, procedural, or constitutional rights."<sup>77</sup> The court also noted that sanctions may be appropriate when they serve as a deterrent to future governmental misconduct.<sup>78</sup> Based on this reasoning, the Ninth Circuit Court of Appeals may well have upheld the monetary sanction if presented with the facts in *Meza*. The misconduct in *Meza* likely rose to a violation of the defendant's due process rights under the Fourteenth Amendment of the U.S. Constitution and the remedy serves as an appropriate deterrent to governmental misconduct.

*Blenden* clarified the issue by holding that the judiciary possesses the authority to assess monetary sanctions against the state in criminal cases. In

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71. *See supra* note 63.

72. 9 F.3d 774 (9th Cir. 1993).

73. *Id.* at 781.

74. *Id.* at 782.

75. *Id.*

76. *Id.* at 781.

77. *Id.* at 782.

78. *Id.*

*Blenden*, the Mississippi Supreme Court held that it had “the authority to impose the sanctions on the basis of its inherent power to control matters which are prosecuted before it.”<sup>79</sup> The court further noted that “when the State . . . enters the judicial arena as a party, the Rules apply equally to the State irrespective of any statute to the contrary.”<sup>80</sup> Therefore, it is unlikely a state will successfully argue that sovereign immunity protects it from monetary penalties imposed by courts as a result of clear and meaningful discovery violations.

### C. Calculating Attorneys’ Fees

The Arizona Court of Appeals charged the *Meza* trial court with the daunting task of determining the “reasonable costs and fees” that Meza’s attorneys incurred “*as a consequence* of the sanctioned conduct of the State.”<sup>81</sup> The trial court, thus, was directed to resolve two factual issues. First, it must calculate the reasonable number of hours Meza’s counsel expended during the discovery process attributable to the wrongful conduct by the State. Second, the trial court must determine the appropriate hourly billing rate for Meza’s counsel. Finally, simple math produces the outcome.

#### 1. Number of Hours Attributed to Violation

A number of challenges exist when a court examines the reasonableness of legal work performed by a criminal defense attorney over the course of her representation of a client. In *Meza*, the court must examine acts both large and small that occurred years earlier and determine whether those services were performed “*as a consequence*” of the sanctioned conduct.<sup>82</sup> The State did not deny that numerous discovery motions were filed by the defense as a consequence of its failure to lawfully comply with the initial discovery requests.<sup>83</sup>

The Arizona Court of Appeals clearly intended that the sanction be *restitutionary* in nature; it explicitly did not intend the State to be subject to

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79. 748 So. 2d 77, 88 (Miss. 1999).

80. *Id.* at 89.

81. *State v. Meza*, 50 P.3d 407, 417 (Ariz. Ct. App. 2002) (emphasis added).

82. *Id.*

83. The City of Phoenix, Maricopa County Attorney, and Arizona Attorney General each submitted briefs to the trial court admitting a significant number of hours were expended by Meza’s counsel related to the discovery violations made throughout the case. They did, however, dispute the number of hours asserted by Clifford Girard, the attorney representing Meza.

*punitive* damages for the misconduct.<sup>84</sup> The mere availability of this sanction will serve as an adequate deterrent to the State—there is no need to provide even greater sanctions than are reasonably necessary to “make [Meza] whole.”<sup>85</sup> The relevant and dicey inquiry for courts, therefore, is to determine whether restitution is available for consequential damages.<sup>86</sup>

The trial court’s first inquiry should be to determine whether Meza’s trial was a *consequence* of the discovery violations. Counsel for Meza argued that, had the evidence in question been made available during discovery, the case likely never would have reached trial.<sup>87</sup> The State countered with its contention that the evidence was sufficiently strong that preclusion of the breath test results would not have deterred it from pursuing the charges through trial.<sup>88</sup> In fact, the Arizona Court of Appeals noted that other evidence was available to the State to establish guilt.<sup>89</sup>

On remand, the trial court determined that because the trial did not “flow[] directly from the discovery abuses,” the State was not required to compensate the defense for any work done in preparation for the trial and time spent at trial.<sup>90</sup> The court found that the holding by the Arizona Court of Appeals did not contemplate consequential damages.<sup>91</sup> The trial judge further stated that the court “rejects defense counsel’s claim that the trial in this case and the attendant legal fees would have been avoided had the State made full discovery.”<sup>92</sup>

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84. On remand, Judge Gregory Martin held that “the Court of Appeals viewed the sanction to be imposed as solely restitutionary in nature and that the amount of the sanction should not be driven, in any way, by punitive or deterrence consideration.” *State v. Meza*, No. CR 1997-012101 at 1 (Sup. Ct. Ariz. Nov. 3, 2003) (Under Advisement Ruling).

85. 50 P.3d at 416.

86. ARIZ. REV. STAT. ANN. § 13-603(c) denies restitution when the consequential damage is not directly related to the offensive conduct. However, when the damage is reasonably related to the costs incurred, restitution is an appropriate remedy.

87. Post Hearing Memorandum in Support of Attorney Fees/Costs at 3, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR 1997-012101). W. Clifford Girard argued that disclosure would have allowed the defendant to evaluate the plea offer from the State. “The State ignore[d] that the reason for the entire jury trial was a direct and proximate result of those discovery violations, and a ‘consequence of the sanctionable conduct of the state.’” *Id.*

88. Before Meza’s scheduled second trial, the trial court precluded the State from presenting any evidence of the breath results. This was the original sanction for the State’s discovery violation. The State would have been forced to rely on statements by the arresting police officer as to Meza’s condition immediately following the accident.

89. *See supra* text accompanying note 53.

90. *State v. Meza*, No. CR 1997-012101 at 1 (Sup. Ct. Ariz. Nov. 3, 2003) (Under Advisement Ruling).

91. *Id.*

92. It should be noted that Girard was not compensated for his work in preparing the State’s appeal of the trial court’s decision to suppress the evidence, nor for his time handling the remand to the trial court. *Id.* Surely these activities were not anticipated by Girard when he

The trial court, therefore, concluded that the State likely would have pursued the charges against Meza even if the critical undisclosed evidence had been made available to the defense.<sup>93</sup> The court may have been wrong. A jury likely would put little weight on the incriminating breath tests, given the rebuttal evidence documenting the machine's failure. Thus, if the State elected to pursue charges, it would be forced to present a case without quantitative evidence of Meza's guilt. It would be required to rely only upon testimony of the arresting police officer concerning the defendant's behavior at the scene of the accident to prove, beyond a reasonable doubt, that the defendant was legally intoxicated. Given the widespread use of breath analyzer tests, jurors may expect such evidence to be presented at trial and may be reluctant to convict a defendant without that data. It should be noted that after the Arizona Court of Appeals upheld the trial court's order that the State could not use the breath evidence in a subsequent trial,<sup>94</sup> the State elected *not* to pursue a second trial of Meza. One possible explanation for this decision is that prosecutors believed a conviction would not be likely without BAC evidence. Alternatively, they may simply have decided that after five years enough resources had been expended on the attempted prosecution of this defendant. Even before the first trial, the State's refusal to produce the important and requested evidence prevented the defendant from making an informed decision regarding a plea agreement offered by the State.<sup>95</sup> The trial, therefore, almost certainly was the direct result of the State's discovery violations.

The Arizona Court of Appeals clearly held that the primary purpose of the sanction was to "make the defendant whole."<sup>96</sup> This principle demands that the defense be compensated for trial fees and expenses when, absent the discovery violations, the trial would not have occurred. The decision by the Arizona Court of Appeals in *Meza* demonstrates it intended the remedy to

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contracted with Meza. They were the direct result of the State's failure to meet its discovery obligations.

93. *See id.*

94. *State v. Meza*, 50 P.3d 407, 415 (Ariz. Ct. App. 2002).

95. W. Clifford Girard, the attorney representing Meza, argued the State would only offer a plea deal to his client if the attorney did not pursue discovery. "[T]here was a clear message that plea agreements are offered in exchange for the Defense not pursuing simple discovery about the Intoxilyzer, including that which could be exculpatory." Post Hearing Memorandum in Support of Attorney Fees/Costs at 3, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR 1997-012101). Girard noted that the State rescinded the plea offer before discovery of the exculpatory evidence was made, and argued that "a defendant is entitled to exculpatory and impeachment evidence from the State in order to properly evaluate a plea offer, once it is made, prior to its revocation." *Id.*

96. *State v. Meza*, No. CR 1997-012101 at 1 (Sup. Ct. Ariz. Nov. 3, 2003) (Under Advisement Ruling).

cover trial costs. The court justified the imposition of a monetary sanction against the State based, in part, on a similar holding in *Blenden*.<sup>97</sup> That case was markedly similar to *Meza*, as it also involved discovery violations concerning an alcohol breath testing unit used during a DUI investigation. The Supreme Court of Mississippi held that the State owed the defense for “expenses incurred in bringing the first trial.”<sup>98</sup> Thus, the Supreme Court of Mississippi implicitly found that the trial was a “direct result” of the discovery violations.<sup>99</sup> The same conclusion should have been reached by the trial court in *Meza*. Courts should award all fees associated with trials when the record suggests the trial was a consequence of the discovery violations and would not otherwise have occurred. In *Meza*, charges likely would have been dropped or a plea agreement reached had the State timely disclosed the evidence to the defense.

The trial court may have been influenced by the potential widespread effects of the wrongful conduct by the State when it decided to limit the award to defense counsel. Had the court found the trial was a result of discovery violations, lawyers for hundreds of clients whose convictions already had been overturned as a result of the findings could have argued that they, too, were entitled to compensation for time spent at trial. The trial court may have found it wise to limit the ability of defense attorneys to assert such claims, as the potential damages to the State could have been enormous.

Trial courts that address this remedy face another challenge in determining the fees reasonably related to procedural violations attributable to the State. W. Clifford Girard (“Girard”), the counsel retained by *Meza*, represented the defendant for a flat fee of \$5000.<sup>100</sup> Girard and other attorneys who handle similar cases frequently use fixed fee arrangements.<sup>101</sup> Under the terms of the fee agreement, Girard would receive the same compensation from his client regardless of whether *Meza* accepted a plea offer or instead chose to proceed to trial.

According to Girard, he anticipated investing about twenty to twenty-five hours in the defense of *Meza*.<sup>102</sup> He believed the case would not go to trial.<sup>103</sup> Based on these numbers, Girard would earn between \$200 and \$250 per hour for his representation of *Meza*. If a plea agreement could not

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97. See *supra* text accompanying notes 77–78.

98. *State v. Blenden*, 748 So. 2d 77, 81 (Miss. 1999).

99. *Id.*

100. Post Hearing Memorandum in Support of Attorney Fees/Costs at 3, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR 1997-012101).

101. *Id.*

102. *Id.*

103. *Id.*

be reached, and the case proceeded to trial, his hourly compensation would be significantly less. Girard regularly offered such fee arrangements with the knowledge, based on considerable experience, that most DUI cases do not reach trial.<sup>104</sup>

Because Girard worked under a fixed fee contract that did not reward him for the amount of time spent on the case, there was no reason for him to keep a written record of the time spent on each task related to his representation of Meza.<sup>105</sup> Girard had every reason to believe such records never would be necessary. This poses a significant problem for the trial court, as it must calculate the number of hours invested by Girard in the defense of Meza without a detailed and reliable accounting of the work performed. In the short term, there is no simple answer to this daunting task. Because defense attorneys, working under fixed fee arrangements, are unlikely to maintain such records, courts may be forced to undertake a case-by-case inquiry when assessing monetary sanctions against a state. Ideally, attorneys would strive to keep accurate records of all work done on cases to alleviate this procedural challenge. That, however, is unlikely.

## 2. Reasonable Hourly Rate of Compensation

Perhaps the most contentious issue on remand to the trial court was the determination of the reasonable billing rate for defense attorneys. Because Girard does not charge clients on the basis of hourly billings,<sup>106</sup> no clear-cut formula exists to gauge the value of his work. Girard testified that he expected to work about twenty to twenty-five hours on Meza's defense.<sup>107</sup> This would result in an hourly rate of between \$200 and \$250.

The hourly rates proposed by the various state agencies involved in *Meza* were not nearly as generous. In its brief to the court, the City of Phoenix contended Girard's services were worth only \$29.84 per hour.<sup>108</sup>

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104. *Id.*

105. On remand, the trial court noted that Girard had no reason to keep an accounting of his work throughout Meza's case. *State v. Meza*, No. CR 1997-012101 at 1 (Sup. Ct. Ariz. Nov. 3, 2003) (Under Advisement Ruling). The court acknowledges that doing so after the fact had to be a very difficult assignment. *Id.* After all, as noted, the fee agreement in this case was for a flat fee, not an hourly one, and defense counsel never could have anticipated that he would encounter all of the discovery obstacles that he did and that years later he would have to piece together an hourly statement of fees. *Id.* at 3.

106. *See supra* text accompanying note 100.

107. *See supra* text accompanying note 102.

108. City of Phoenix's Post-Hearing Memorandum at 7, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR 1997-012101). The City of Phoenix reached this number by dividing the \$5000 fee Girard charged by the 167.55 hours they argued he expended on non-discovery

Both the Maricopa County Attorney's Office and the Department of Public Safety proposed an hourly billing rate of just \$90.00 per hour.<sup>109</sup>

The trial court, on remand, primarily looked at the fee agreement between counsel and the client to determine an appropriate billing rate. The court found that an attorney representing a client charged with aggravated assault would expend, on average, forty hours of time in defending the case through trial and sentencing.<sup>110</sup> Applying that as a guideline, the court determined that \$125/hour was an appropriate hourly fee to use for sanctions.<sup>111</sup>

This decision by the trial court failed to consider the fact that many criminal cases are resolved before trial. In fact, Girard might well have advised his client to accept a plea agreement that would have resulted in his investing significantly less than forty hours on the case, if the plea agreement had reasonably been predicated on all the available evidence. The trial court mistakenly applied the maximum number of hours a reasonable attorney should invest in this case, without taking into consideration the probability that the case never would have reached trial, and the related fact that less demanding cases compensate for those that are more demanding. The trial court seemingly underestimated the value of Girard's work by awarding an hourly rate of only \$125 per hour.<sup>112</sup>

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related issues. *Id.* The City of Phoenix also suggested a more liberal approach that awarded defense counsel \$56.18 per hour might be appropriate. *Id.* The approach taken this time was to divide \$5000 by 89 hours, the amount of work the City of Phoenix argued "could or should have been contemplated under the fee agreement in this case." *Id.*

109. Post Hearing Memorandum in Support of Attorney Fees/Costs at 3, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR 1997-012101); Department of Public Safety's Post-Hearing Memorandum Regarding Attorney's Fees and Costs, at 5, *State v. Meza*, 50 P.3d 407 (Ariz. Ct. App. 2002) (No. CR 1997-012101).

110. *State v. Meza*, No. CR 1997-012101 at 2 (Sup. Ct. Ariz. Nov. 3, 2003) (Under Advisement Ruling).

111. *Id.* The contract between counsel and Meza was for a flat fee of \$5000. That fee divided by forty hours equals \$125/hr.

112. The trial court found that an attorney would spend approximately forty hours in the defense of this case, through trial and sentencing. *Id.* If the case did not reach trial, the time spent probably would be closer to ten to fifteen hours. Assuming only half of these cases go to trial, counsel contemplated spending about twenty-five to thirty hours on each case for which he was retained. Based on Girard's fee agreement, his work would be valued at between \$166 and \$200 per hour.

### 3. Distribution of Attorneys' Fees Among State Agencies

The trial court's finding that the State owed defense counsel \$49,750.00 in fees and costs did not conclude the matter.<sup>113</sup> A further proceeding required the court to determine how to apportion the sanction among the three state agencies potentially responsible for the discovery violation. The court was given the discretion to divide the sanction among the Maricopa County Attorney's Office, the Department of Public Safety, and the Phoenix Police Department Crime Lab in any manner it found appropriate. The trial court ordered the City of Phoenix to pay \$39,750.00 of the sanction as a result of the actions by its crime lab.<sup>114</sup> The Maricopa County Attorney's Office was liable for the remaining \$10,000.00 that Meza's counsel was entitled to under the sanction.<sup>115</sup> The court did not find the DPS Crime Lab responsible financially for the discovery violations in *Meza*.

## V. CONCLUSION

The State acted highly inappropriately in its handling of Ricardo Meza's case. The record reveals that multiple actors within the Phoenix Police Department Crime Lab and DPS Crime Lab conspired to prevent the disclosure of important evidence relevant to the criminal charges. They did so knowing the evidence was critical to Meza's defense. Their acts were inexcusable and possibly criminal. The Arizona Court of Appeals recognized the egregious nature of their actions, and took appropriate action to remedy the misconduct of the crime labs and its agents. The court held the State accountable with a sanction that had long been utilized by courts in civil cases.

As the court noted, the discovery of hidden evidence by Meza's counsel was accomplished only as the result of hundreds of hours of his work. It would be imminently unfair to force Meza's counsel to absorb this loss. In fee arrangements where criminal defendants pay their legal counsel by the hour, it would be equally unfair to hold the defendant liable to his counsel for fees incurred as a result of the State's misconduct.

Monetary sanctions against a state should be imposed infrequently, and only under clearly demonstrable circumstances of intentional wrongdoing or great carelessness when this conduct goes to relevant matters affecting the fundamental rights of criminal defendants. Ideally, prosecutors will

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113. *Id.* at 4.

114. *State v. Meza*, No. CR 1997-012101 at 2 (Sup. Ct. Ariz. Feb. 12, 2004) (Ruling).

115. *Id.*

strive to ensure such violations do not occur. The threat of significant monetary sanctions, however, may provide the added incentive required to ensure states acts fairly in the prosecution of those suspected of violating criminal laws. The mere availability of this remedy benefits all participants in our legal system, and society generally, to the extent that it further deters states from violating the due process rights of all defendants.