

1 Honorable Joseph C. Welty
2 Criminal Department Presiding Judge
3 Superior Court of Arizona, Maricopa County
4 175 W. Madison St.
5 Phoenix, AZ 85003
6 (602) 372-2537

7 IN THE SUPREME COURT OF THE STATE OF ARIZONA

8 In the Matter of:

9 } Supreme Court No. R-13-____

10 } PETITION TO AMEND RULE 17.4
11 } OF ARIZONA RULES OF
12 } CRIMINAL PROCEDURE
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12 Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Criminal
13 Department Presiding Judge of the Superior Court of Arizona in Maricopa
14 County, respectfully petitions this Court to adopt the attached proposed
15 amendment to Rule 17.4 of the Arizona Rules of Criminal Procedure.

16 In March 2012, the United States Supreme Court issued its opinion in
17 *Missouri v. Frye*, 132 S. Ct. 1399 (2012), which addressed ineffective assistance
18 of counsel claims related to the plea bargaining process. Since the *Missouri v.*
19 *Frye* opinion was released, the Superior Court in Maricopa County has received
20 more than 50 petitions for post-conviction relief with claims for relief citing
21 *Missouri v. Frye*. As a result, the Superior Court in Maricopa County is seeking
22 to amend Rule 17.4 to provide a record to the extent possible for ineffective
23 assistance claims in the plea bargaining process.

24 The *Missouri v. Frye* opinion suggests trial courts adopt procedures or
25 processes to help decrease later claims. “The prosecution and the trial courts
26 may adopt some measures to help ensure against late, frivolous, or fabricated
27 claims after a later, less advantageous plea offer has been accepted or after a trial
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1 leading to conviction with resulting harsh consequences.” 132 S. Ct. at 1408.

2 Specifically, the opinion states:

3 First, the fact of a formal offer means that its terms and its processing
4 can be documented so that what took place in the negotiation process
5 becomes more clear if some later inquiry turns on the conduct of
6 earlier pretrial negotiations. Second, States may elect to follow rules
7 that all offers must be in writing, again to ensure against later
8 misunderstandings or fabricated charges. See N.J. Ct. Rule 3:9–1(b)
9 (2012) (“Any plea offer to be made by the prosecutor shall be in
10 writing and forwarded to the defendant's attorney”). Third, formal
11 offers can be made part of the record at any subsequent plea
12 proceeding or before a trial on the merits, all to ensure that a
13 defendant has been fully advised before those further proceedings
14 commence.

13 132 S. Ct. at 1409. Based on the direction provided in *Missouri v. Frye*, the
14 Superior Court in Maricopa County recommends amending Rule 17.4 to require
15 plea offers to be in writing and filed in the trial court by inserting the following
16 provision into Rule 17.4:

17 **b. Plea Offer.** The terms of any unaccepted plea offer shall be
18 reduced to writing and shall identify all parties and counsel involved.
19 The plea offer shall be filed by the prosecutor as a confidential
20 document no later than five court days after the plea offer has expired
21 or has been rejected. The plea offer shall be maintained by the clerk
22 as a confidential record and only available to the parties, the parties'
23 attorneys, court personnel and any other person or agency authorized
24 by court order.

24 This is similar to the procedure in Federal Rule of Criminal Procedure 11 which
25 requires “The parties must disclose the plea agreement in open court when the
26 plea is offered, unless the court for good cause allows the parties to disclose the
27 plea agreement in camera.”

28 //

1 In addition, the Superior Court in Maricopa County seeks to amend Rule
2 17.4 to create a record before trial begins to ensure defendant was made aware of
3 any plea offer extended by inserting the following provision into Rule 17.4:

4
5 **c. Duty of the Court.** Before proceeding to trial, the court shall
6 inquire of the parties whether they have engaged in settlement
7 discussions and if so, insure that the record required by subsection (b)
8 of this rule has been filed.

9 The Superior Court believes these two additions to Rule 17.4 will create a
10 sufficient record in the trial court to safeguard against “late, frivolous, or
11 fabricated claims after a later, less advantageous plea offer has been accepted or
12 after a trial leading to conviction with resulting harsh consequences,” without
13 creating additional hearings or adding an undue burden on either the prosecution
14 or defense.

15 For the foregoing reasons, the Criminal Department Presiding Judge
16 of the Superior Court in Maricopa County respectfully requests this Court
17 amend Rule 17.4 to create a record of plea offers before trial.

18 Respectfully submitted this 10th day of January, 2013.

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20

Hon. Joseph C. Welty
21 Criminal Department Presiding Judge
22 Superior Court of Arizona, Maricopa County

23 Original and six (6) copies delivered this
24 10th day of January, 2013 to:

25 Clerk of the Arizona Supreme Court
26 1501 W. Washington, Suite 402
27 Phoenix, AZ 85007
28

1 Copy delivered this
2 10th day of January, 2013 to:

3 David K. Byers, Director
4 Administrative Office of the Courts
5 1501 W. Washington St.
6 Phoenix, Arizona 85007

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1 Exhibit A

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3 Rules of Criminal Procedure

4 **Rule 17.4 Plea negotiations and agreements**

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6 **a. Plea Negotiations.** The parties may negotiate concerning, and reach an
7 agreement on, any aspect of the case. At the request of either party, or sua sponte,
8 the court may, in its sole discretion, participate in settlement discussions by
9 directing counsel having the authority to settle to participate in a good faith
10 discussion with the court regarding a non-trial or non-jury trial resolution which
11 conforms to the interests of justice. Before such discussions take place, the
12 prosecutor shall afford the victim an opportunity to confer with the prosecutor
13 concerning a non-trial or non-jury trial resolution, if they have not already
14 conferred, and shall inform the court and counsel of any statement of position by
15 the victim. If the defendant is to be present at any such settlement discussions, the
16 victim shall also be afforded the opportunity to be present and to state his or her
17 position with respect to a non-trial or non-jury trial settlement. The trial judge
18 shall only participate in settlement discussions with the consent of the parties. In
19 all other cases, the discussions shall be before another judge or a settlement
20 division. If settlement discussions do not result in an agreement, the case shall be
21 returned to the trial judge.

22 **b. Plea Offer.** The terms of any unaccepted plea offer shall be reduced to writing
23 and shall identify all parties and counsel involved. The plea offer shall be filed by
24 the prosecutor as a confidential document no later than five court days after the
25 plea offer has expired or has been rejected. The plea offer shall be maintained by
26 the clerk as a confidential record and only available to the parties, the parties'
27 attorneys, court personnel and any other person or agency authorized by court
28 order.

1 **c. Duty of the Court.** Before proceeding to trial, the court shall inquire of the
2 parties whether they have engaged in settlement discussions and if so, insure that
3 the record required by subsection (b) of this rule has been filed.

4 **bd. Plea Agreement.** The terms of a plea agreement shall be reduced to writing
5 and signed by the defendant, the defendant's counsel, if any, and the prosecutor.
6 An agreement may be revoked by any party prior to its acceptance by the court.

7 **ee. Determining the Accuracy of the Agreement and the Voluntariness and**
8 **Intelligence of the Plea.** The parties shall file the agreement with the court, which
9 shall address the defendant personally and determine that he or she understands
10 and agrees to its terms, that the written document contains all the terms of the
11 agreement, and that the plea is entered in conformance with Rules 17.2 and 17.3.

12 **df. Acceptance of Plea.** After making such determinations and considering the
13 victim's view, if provided, the court shall either accept or reject the tendered
14 negotiated plea. The court shall not be bound by any provision in the plea
15 agreement regarding the sentence or the term and conditions of probation to be
16 imposed, if, after accepting the agreement and reviewing a presentence report, it
17 rejects the provision as inappropriate.

18 **eg. Rejection of Plea.** If an agreement or any provision thereof is rejected by the
19 court, it shall give the defendant an opportunity to withdraw his or her plea,
20 advising the defendant that if he or she permits the plea to stand, the disposition of
21 the case may be less favorable to him or her than that contemplated by the
22 agreement.

23 **fh. Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related**
24 **Statements.** The admissibility or inadmissibility of a plea, a plea discussion, and
25 any related statement is governed by Arizona Rule of Evidence 410.

26 **gi. Automatic Change of Judge.** If a plea is withdrawn after submission of the
27 presentence report, the judge, upon request of the defendant, shall disqualify
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1 himself or herself, but no additional disqualification of judges under this rule shall
2 be permitted.

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4 CREDIT(S)

5 Amended Sept. 24, 1992, effective Sept. 30, 1992, adopted in final form Feb. 25,
6 1993; July 28, 1993, effective Dec. 1, 1993; Jan. 22, 1997, effective from Feb. 1,
7 1997 through Jan. 31, 1999. Amended January 29, 1999, effective from February
8 1, 1999 to July 1, 1999; June 17, 1999, effective July 1, 1999; Sept. 8, 2011,
9 effective Jan. 1, 2012.

10 16A A. R. S. Rules Crim. Proc., Rule 17.4, AZ ST RCRP Rule 17.4
11 COURT COMMENT TO 1999 AMENDMENT

12 In adopting a statewide amendment permitting judges to participate in plea
13 negotiations, the Court expects that all lawyers--prosecutors and defense counsel
14 alike--will cooperate in the use of this rule, and that judges will avoid coercive
15 behavior of any kind.

16 COMMENT [AMENDED 201307]

17 Rule 17.4 is drawn from the ABA, Standards Relating to Pleas of Guilty §§
18 2.1(a)(ii)(4), 3.1 and 3.3 (Approved Draft, 1968), Ill. Ann. Stat. Ch. 110A, § 402
(Smith-Hurd, Cum. Supp. 1971), and proposed Federal Rules of Criminal
19 Procedure, Rule 11(d) (Preliminary Draft, April 1971).

20 See *Santobello v. New York*, 92 S.Ct. 495, 404 U.S. 257, 261-62, 30 L.Ed.2d 427
(1971).

21 See also *Brady v. United States*, 90 S.Ct. 1463, 397 U.S. 742, 751-752, 25
22 L.Ed.2d 747 (1970); ABA, *supra*, at § 3.1. Plea bargaining is a recognized part of
23 the Arizona criminal process. See, *e.g.*, *State v. Jennings*, 104 Ariz. 6, 448 P.2d
24 62, modified in 104 Ariz. 159, 449 P.2d 938 (1969); *State v. Carpenter*, 105 Ariz.
25 504, 467 P.2d 749 (1970).

26 **Rule 17.4 (a).** Plea bargaining and plea agreements may cover any and all aspects
27 of the disposition of the case. See Forms 18(a) and (b).

28 Under section (a) the parties may discuss and agree to the type, length or range of
sentence to be imposed. However nothing in this rule is intended to restrict the

1 court's duty and power to determine and impose sentence under
2 Ariz.Rev.Stat. Ann. § 13-1642 (1956) [repealed]. See Rules 17.4(~~fd~~) and (~~ge~~).

3 **Rule 17.4 (b).** This provisions addition of filing the plea offer as a confidential
4 document is intended to encourage settlement and prevent any inappropriate
5 inferences from being drawn.

6 **Rules 17.4 (~~db~~) and (~~ee~~).** These provisions formalize the agreement and require
7 oral confirmation in order to insure that both parties, the sentencing court, any
8 reviewing court, and the public know exactly what promises have been made.

9 Requiring that negotiations, if any, be carried on through defendant's counsel, if
10 he has one, follows ABA, Code of Professional Responsibility, EC-7-18 (1969);
11 ABA, Standards Relating to Pleas of Guilty § 3.1(a) (Approved Draft, 1968).
12 Some federal cases have held that plea negotiations constitute a critical stage of
13 the proceedings requiring counsel. *E.g.*, *Anderson v. State of North Carolina*, 221
14 F.Supp. 930 (W.D.N.C.1963); see also *Argersinger v. Hamlin*, 92 S.Ct. 2006, 407
15 U.S. 25, 32 L.Ed.2d 530 (1972).

16 **Rules 17.4(~~fd~~) and (~~ge~~).** These provisions are modeled after Ill. Ann.Stat. Ch.
17 110A, § 402(d)(2) (Smith-Hurd, Cum.Supp.1971), proposed Federal Rules of
18 Criminal Procedure, Rules 11(e)(3) and (4) (Preliminary Draft, April 1971), ABA,
19 Standards Relating to Pleas of Guilty, at §§ 2.1(a)(ii)(4) and (5) and 3.3(b)
20 (Approved Draft, 1968), and Ariz.Rev.Stat. Ann. § 13-1642 (1956) [repealed].

21 **Rule 17.4(~~hf~~).** This provision is taken from proposed Federal Rules of Criminal
22 Procedure, Rule 11(e)(6) (Preliminary Draft, 1971); ABA, Standards Relating to
23 Pleas of Guilty, at § 2.2 (Approved Draft, 1968); and Ill. Ann.Stat. Ch. 110A, §
24 402(f) (Smith-Hurd, Cum.Supp.1971).

25 **Rule 17.4(~~ig~~).** See *Gregg v. United States*, 89 S.Ct. 1134, 394 U.S. 489, 22
26 L.Ed.2d 442 (1969), rehearing denied 89 S.Ct. 1738, 395 U.S. 917, 23 L.Ed.2d
27 232.