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(FIRM STATE BAR NO. 00032000)

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(STATE BAR NUMBER 011474)

6 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 IN THE MATTER OF:

R-13-0014

8 PETITION TO AMEND RULE 17.4 OF THE  
9 ARIZONA RULES OF CRIMINAL  
PROCEDURE

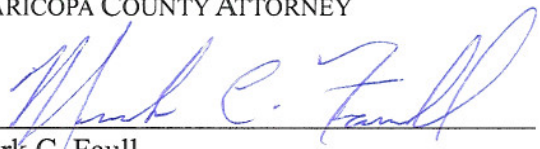
MARICOPA COUNTY ATTORNEY'S  
OFFICE COMMENT IN OPPOSITION OF  
PETITION TO AMEND RULE 17.4 OF THE  
ARIZONA RULES OF CRIMINAL  
PROCEDURE

10 The Maricopa County Attorney hereby comments to the Petition to Amend Rule 17.4 of the  
11 Arizona Rules of Criminal Procedure.

12 Respectfully submitted this 16<sup>th</sup> day of May, 2013.

13 WILLIAM G. MONTGOMERY  
14 MARICOPA COUNTY ATTORNEY

15 BY:

  
16 Mark C. Faull  
17 Chief Deputy  
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1           The proposal in Petition 13-0014 mandates prosecutors file copies of any plea offers  
2 tendered to and rejected by a defendant. While MCAO agrees that there should be a clear record of  
3 rejected plea offers, the proposed rule change would not fill this need. The import of such a record,  
4 which was addressed by the United States Supreme Court in *Missouri v. Frye*, 132 S.Ct. 1399  
5 (2012), is to disprove later claims by a defendant that he/she was not aware of or did not  
6 understand earlier plea offers. The fact that such an offer was made, which is the only record  
7 mandated by the Petition, does not prove anything other than the offer itself. Any rule change  
8 should mandate that the record reflect the communication of the offer, and all attendant terms, to the  
9 defendant and the defendant's knowing rejection of the offer. Furthermore, the onus of making  
10 such a record should not be on the prosecutor. The defense attorney is ethically bound to  
11 communicate any offer to a defendant. Rule 42, Rules of Prof.Conduct, ER 1.4. Failure to do so  
12 may constitute ineffective assistance of counsel, which is the very claim that the *Frye* court was  
13 dealing with. The court also has the responsibility to ensure the integrity of any conviction. The  
14 prosecutor should not have the sole responsibility of making this record, particularly when the  
15 prosecutor is not privy to the communications between the defendant and defense counsel. Finally,  
16 the Petition suggests that this record be confidential. MCAO sees no reason for such  
17 confidentiality. In the rare circumstance where the fact of a plea offer might be prejudicial to the  
18 defendant or a victim, the parties can ask that the record be sealed. Confidentiality need not be the  
19 presumption.

20           MCAO proposes that the Petition be revised to reflect the following rule change:

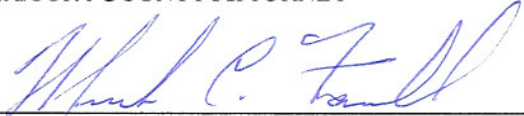
21           b. Plea Offer. The court shall ensure that the record clearly reflects the  
communication to the defendant of the terms of any unaccepted plea offer, the  
defendant's understanding of any offer and its terms, and the defendant's knowing  
rejection of such offer.

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MCAO believes that this alternative language is more likely to avoid later ineffective assistance of counsel claims and thus avoid the issues raised by the *Frye* decision.

Respectfully submitted this 16<sup>th</sup> of May, 2013.

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Chief Deputy