SHEILA SULLIVAN POLK (007514)
ELIZABETH ORTIZ (012838)
ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. CAMELBACK RD. SUITE 202
PHOENIX, ARIZONA 85015
TELEPHONE: (602) 542-7222

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF PETITION TO AMEND RULE 17.4, ARIZ. R. CRIM.P.	R-13-0014 ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL'S COMMENTS TO PETITION TO AMEND RULE 17.4, ARIZ.R.CRIM.P.

Pursuant to Arizona Rules of the Supreme Court, Rule 28(C), the Arizona Prosecution Attorneys' Advisory Council ("APAAC") hereby submits its comments to the Petition to Amend Rule 17.4, Arizona Rules of Criminal Procedure. APAAC respectfully objects to the proposed amendment.

I. Discussion

APAAC opposes this Petition to Amend Arizona Rule of Criminal Procedure 17.4 for the reasons that it will not effectively address frivolous

Ineffective Assistance of Counsel ("IAC") claims; it places unrealistic burdens on prosecutors; it impinges upon the Separation of Powers between the courts and the prosecuting authorities; and a process is already in place to effectively address IAC claims. The proposed amendment seeks to require prosecutors and the Court to adopt procedures creating a written record of every plea offer made in an on-going criminal case. Such a procedure is not only unworkable but unnecessary.

Missouri v. Frye

According to the Petition, the impetus for the proposed change is the recent United States Supreme Court case of *Missouri v. Frye*, 132 S. Ct. 1399 (2012), wherein the Court held that defense counsel was deficient in failing to communicate to a defendant the prosecutor's written plea offer before it expired. The facts underlying *Missouri v. Frye* are important here. The defendant was arrested for driving with a revoked license with previous convictions for same, a felony carrying a 4 year prison sentence. By letter to Frye's counsel, the prosecutor offered two separate, limited-time plea offers: a 3 year sentence with a possibility of probation if he pled to the felony, or a reduction of the charge to a misdemeanor with a 90-day jail sentence recommendation. These offers were not, however, conveyed to the defendant by his attorney and they expired. One week prior to his preliminary hearing, the defendant was arrested and charged yet again with driving on a revoked license. At the subsequent court hearing, the defendant entered a plea

of guilty to the pending charge as a felony without any underlying plea offer or agreement. He was sentenced to 3 years in prison.

The Supreme Court held that the failure to convey to the defendant a plea offer from the State is deficient performance under the ineffective assistance of counsel standards of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The lower court had found that Frye had been prejudiced by this deficient performance because he, quite obviously, claimed that he would have taken the misdemeanor plea offer. The Supreme Court, however, found that the record was not sufficient to determine whether the defendant was prejudiced under the circumstances of his case, i.e., would the prosecutor have extended that misdemeanor offer given that defendant had incurred his fifth offense for driving on a revoked license. The case was remanded for further proceedings.

State v. Donald

Arizona's criminal justice system already has a procedure in place to make a record of final and formal plea offers, and has been operating under the principles of *Missouri v. Frye* since the Court of Appeals decision in *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). The procedure – *Donald* hearings - assures that the defendant is personally aware of a plea offer, its consequences, and affirms its rejection or the lapsing of a deadline. *Donald* hearings further ensure that defense counsel has provided effective assistance.

Although the facts of *Missouri v. Frye* and *Donald* are different – Donald's counsel conveyed the plea offer but did not adequately explain its consequences as compared to the potential consequences of being convicted at trial – the underlying principles are the same.

State ex. rel. Thomas v. Rayes

State ex. rel. Thomas v. Rayes, 214 Ariz. 411 (2007), an Arizona Supreme Court case, illustrates this point. A plea offer was conveyed to the defendant, Real Party in Interest Anthony Raynaga, who had two open cases in Maricopa County Superior Court, one involving theft of means of transportation and a second involving armed robbery. The prosecutor sent defense counsel separate, written plea offers for each case. The letters stated the offers were contingent on each other and included an expiration date. Six weeks after the offers expired, a Trial Management Conference was held at which time the issue of plea offers was raised. The record established that, through no fault of the defense attorney, the letters had been filed away by her staff without her knowledge. Defense counsel requested reinstatement of the offers but the prosecutor refused. The trial court did not find that defense counsel was ineffective, but rather that it was an instance of "excusable neglect," and ordered the State to reinstate the plea. The State filed the Special Action to overturn the trial court's order.

The Arizona Supreme Court rendered a decision consistent with the *Donald case,* holding that reinstatement of a plea offer is the appropriate remedy for ineffective assistance of counsel in plea negotiations but that for "excusable neglect" it is not. *Rayes*, 214 Ariz. 411, 414, 153 P.3d 1040, 1043. In so holding, the Court assumed that the failure to communicate a plea offer to a defendant before it expires is deficient performance under the first prong of *Strickland*. The Court further held that the record failed to establish ineffective assistance of counsel because the defendant could not demonstrate prejudice in a pre-trial situation. "Even assuming that the failure to communicate a plea offer to a defendant before it expires is deficient performance under the first prong of ***Strickland***, the limited record in this case cannot support a conclusion that Reynaga has suffered the prejudice required by the second ***Strickland*** prong." *Id.* 214 Ariz. 411, 414, 153 P.3d 1040, 1043.

As evidenced by these three cases, the proposed amendment is unnecessary.

Paragraph 17.4.b

The proposal to amend Rule 17.4 is well intentioned, designed to deal with claims made perhaps years after a case disposition when memories are vague and files incomplete. However, the language does not address the deficient performance recognized in *Missouri v. Frye* or discussed in *State ex. rel. Thomas v. Rayes*. Merely filing papers which reflect that an offer was made in no way reflects

whether it was meaningfully conveyed to the defendant or whether it was conveyed at all.

Additionally, it mandates an undue burden on the State in light of the many informal means in which prosecutors and defense attorneys do business. Conversations about potential plea dispositions occur in elevators, hallways, meetings, on the sidewalk outside the Courthouse and via email. There is a give and take which occurs in these conversations involving not only the charges to which the defendant might plead, the sentencing ranges, and other terms both general and specific. This "give and take" can occur over days or weeks. Which of these "offers" or "counter-offers" must be reduced to writing and when? This is just one example of not only how unworkable this proposal is, but the burden it would also impose.

None of the aforementioned "give and take" establishes with any certainty that the defendant has been personally apprised of the "offers" or "counter-offers." If each of the "offers" or "counter-offers" are memorialized as required by the Rule proposal, which is the one the defendant personally and explicitly rejected? In his Post-Conviction proceedings, does the defendant get to choose the one that is most favorable and argue that is the one he would have taken had it not been for the claimed IAC? This problem occurred in the fact pattern presented by *Missouri v. Frye*, as well as *Donald*.

In *Donald*, the defendant's counsel conveyed the offer to him but failed to adequately explain the merits of accepting the plea versus the relative merits of going to trial. Ever since *Donald* was decided in 2000, courts statewide have conducted what are referred to as "*Donald"* hearings to set forth on the record the State's offer; the consequences of accepting or going to trial; documenting that the offer has been conveyed to the defendant; documenting the defendant's understanding; and further documenting his rejection of the offer. The *Donald* hearings also documents whether plea offers were ever made to the defendant and appropriately conveyed. In fact, in *Missouri v. Frye*, the United States Supreme Court specifically noted this procedure as an acceptable measure adopted by some states to minimize the type of late, fabricated, and frivolous IAC claims that the Petition addresses:

> The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims ***1409** after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N.J. Ct. Rule 3:9–1(b) (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before

> trial. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 20 (discussing hearings in Arizona conducted pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App.2000)); see also N.J. Ct. Rules 3:9–1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz*, 2 Cal.4th 924, 938, n. 7, 8 Cal.Rptr.2d 713, 830 P.2d 747, 756, n. 7 (1992) (encouraging parties to "memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, ... and (3) the defendant's response to the plea bargain offer"); Brief for Center on the Administration of Criminal Law, New York University School of Law as *Amicus Curiae* 25–27.

Missouri v. Frye, 132 S. Ct. 1399, 1408-09.

Petitioner's proposal does neither of these things, but rather, allows a post-conviction defendant to choose from a smorgasbord of "offers" which were, in reality, the give and take of plea negotiations.

Separation of Powers

Extant in this discussion is the doctrine of Separation of Powers. "The prosecution retains discretion to determine whether to make a plea offer, the terms of any offer, the length of time an offer will remain open, and the other particulars of plea bargaining." *Rivera-Longoria v. Slayton, ex rel. County of Coconino*, 264 P.3d 866, 869 (Ariz. 2011)

In her dissent in *Donald,* Chief Justice Berch forcefully pointed out that compelling the reinstatement of a plea offer is nothing short of the Court's infringement on the power of the executive in the area of plea offers and

negotiations. "I therefore believe that ordering the prosecution to offer a particular plea agreement transgresses too deeply into the prosecutorial realm and usurps too great a portion of the function of the executive to comport with separation of powers principles." *Donald*, 198 Ariz. 406, 419, 10 P.3d 1193, 1205-06. If compelling the reinstatement of an offer is a violation of Separation of Powers, ordering prosecutors to file, in writing, every suggested plea disposition is as well.

Paragraph 17.4.c

Petitioner also proposes a new paragraph "c" to Rule 17.4 which would require a hearing during which the Court would inquire into the status and result of plea negotiations. To the extent this is a codification of *"Donald"* hearings, prosecutors have no position on whether this rule change is necessary or not.

II. Conclusion

In summary, the State of Arizona already operates in a manner which provides the most meaningful record of the defendant's choice to reject a plea offer or the failure of the defense counsel to either convey an offer to the defendant or adequately explain its significance. The proposed amendment to the Rule is unnecessary in light of the use of *"Donald"* hearings.

Respectfully submitted this 20th day of May, 2013.

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY
APAAC Chair

ELIZABETH ORTIZ
APAAC Executive Director

By: _____
SHEILA SULLIVAN POLK
APAAC Chair