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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	No. R-13-0014
Petition to Amend Rule 17.4(b) and 17.4(c), Arizona Rules of Criminal Procedure	**COMMENT OF ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE REGARDING PETITION TO AMEND RULE 17.4(B) and 17.4(C), ARIZONA RULES OF CRIMINAL PROCEDURE**

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 The change has been proposed in response to *Missouri v. Frye*¸ 132 S. Ct. 1399 (2012), which confirmed that defendants may pursue claims for ineffective assistance of counsel during the plea-bargaining process. *Frye* was

prefigured in Arizona by *State v. Donald*, 198 Ariz. 406 (App. 2000), and therefore does not create new law in Arizona except to confirm that subsequent criticism of *Donald* by both divisions of the Court of Appeals was unwarranted. *See*, *e.g.*, *State ex rel Thomas v. Rayes*, 213 Ariz. 326, 328 ¶ 3 (App. 2006), *vacated*, 214 Ariz. 411 (2007); *State v. Vallejo*, 215 Ariz. 193, 196-98 ¶¶ 10-17 (App. 2007) (Howard, J., concurring).

¶3 The proposal contemplates two changes to Rule 17.4. First, it suggests modifying subsection (b) to require that the terms of any unaccepted plea offer be reduced to writing and filed as a confidential document with the clerk. Second, it proposes modifying subsection (c) by requiring the court to conduct a colloquy with the parties as to whether they have engaged in settlement discussions and whether any unaccepted plea has been filed with the clerk.

¶4 The proposed rule's stated goal is to "help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences." Petition at 1-2 (quoting *Frye*, 132 S. Ct. at 1408). The proposal does not include any modifications designed to ensure that criminal defendants are in fact fully informed of the consequences of plea offers—that is, that they are provided with effective assistance of counsel.

¶5 AACJ supports the Petition and proposed rule change in principle, and supports measures to implement the mandate set forth in *Frye* and *Donald* to inform criminal defendants of the terms of plea agreements. The current Petition is imperfect, however, because filing a rejected plea agreement with the court does nothing to ensure that a defendant receives a copy of the agreement or is fully informed of the agreement's terms. Thus, if a defense counsel has failed to convey the terms of an offered plea to the defendant, filing an additional copy with the court will do nothing to provide the defendant that information.

¶6 The proposed rule change will address egregious violations such as those that occurred in *Frye* and *Rayes*, where defense counsel utterly failed to convey plea offers to their clients. *See Frye*, 132 S. Ct. at 1404; *Rayes*, 213 Ariz. at 328 ¶ 5. Because the change to Rule 17.4(c) requires a colloquy in the defendant's presence, a defendant who has been wholly denied the opportunity to review a plea offer will learn at that point of his counsel's error.

¶7 A defense counsel can provide ineffective assistance, however, even when conveying a plea offer. In *Frye*'s companion case, *Lafler v. Cooper*¸ 132 S. Ct. 1376, 1383 (2012), a defense counsel had accurately conveyed a plea offer but inaccurately advised the defendant that the defendant could not be charged with attempted murder for the acts he had allegedly committed (shooting a woman in the legs and buttocks). The Court found that the defense counsel's conduct

qualified as ineffective assistance of counsel, and that the proper remedy for such a violation was for the defendant to be re-offered the original plea. *Id*. at 1389.

¶8 In *Donald* itself, "Donald's attorney presented the offer but failed, according to Donald, to adequately explain its benefits and risks versus those of proceeding to trial." *Donald*, 198 Ariz. at 410 ¶ 2. At issue was not merely the sentence that was offered, but the fact that only one prior felony would be alleged, and that Donald would be eligible for "soft time" parole after serving half of the sentence. *Id.* Donald only discovered these terms in the plea offer when he later reviewed the file himself. *Id.* ¶ 6. The court found that conveying the plea, without properly explaining its full consequences, qualified as ineffective assistance of counsel, and that reinstating the original plea offer would be an appropriate remedy. *Id*. at 418 ¶ 44.

¶9 Although the proposed rule would provide some assurance against the type of wholesale violation that took place in *Frye*, it would do little to ensure that defense counsel accurately convey the terms and consequences of the plea offer and the potential risks faced by the defendant at trial should the defendant reject the plea. As such, it presents only a partial solution to the issue at hand, and AACJ endorses it only so far as its limited utility is recognized.

¶10 To the extent that the proposed rule is designed to limit frivolous or fabricated claims, AACJ notes that it should not be used as a tool to whitewash or

dismiss legitimate claims. The rule will only provide assurance that a defendant was informed in a colloquy that a plea existed, and will not ensure that defense counsel informed the defendant of the full terms of that plea or the full consequences of choosing to go to trial instead. If courts rely on the rule to dismiss *Lafler* or *Donald*-style claims, it will have the adverse effect of denying a remedy to defendants who were denied an effective right to counsel during plea bargaining.

¶11 Since *Donald* was decided, the practice in many Superior Courts has been to conduct a "*Donald* record" in open court in the presence of the defendant. Although there is no policy governing how such a record shall be made, in general the prosecution informs the court that a plea offer has been extended and asks the court to determine from the defendant if the offer has been received, reviewed with counsel, and knowingly rejected. The court confirms with both counsel what is the sentencing exposure if the defendant is convicted at trial compared with the exposure contained within the plea offer, and then inquires either of the defendant personally or of defense counsel whether the plea offer has been discussed and whether the defendant is in fact rejecting the plea offer.

¶12 Such a procedure ensures that the defendant is aware of the existence of the plea offer, and to a certain extent an awareness of the terms; but in no way can a *Donald* record affect a potential future claim brought under *Lafler*, because the court may not infringe upon the attorney-client privilege by inquiring about

what legal advice was given concerning the decision to accept or reject the plea offer. AACJ is concerned that there may be a perception that this rule change will "fix" any problems with claims of ineffective assistance of counsel brought under *Frye* or *Lafler*. At most, the procedure sought by the petition can ensure that the court is aware of the prosecution's plea offers. No practical procedure can fully insulate the record against future meritorious Rule 32 claims.

¶13 With the preceding caveats in mind, AACJ endorses the proposed Petition and rule change.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/
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This comment e-filed this date with:

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