

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,)	Supreme Court No. CR-10-0175-PR
)	
Plaintiff / Respondent,)	Court of Appeals No.
)	2 CA-CR 2009-0171-PR
v.)	DEPARTMENT B
)	
DANIEL SOUZA,)	Pima County Superior Court
)	Cause No. CR-20002988
Defendant / Petitioner.)	
_____)	

**BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

¶1 This case implicates one of the most important protections guaranteed under the United States and Arizona Constitutions: the right to effective assistance of counsel. The Arizona Attorneys for Criminal Justice (“AACJ”) offers this brief in support of Daniel Souza’s petition for review because the issues presented touch the core of AACJ’s mission to protect the right to effective assistance of counsel. For the last decade, since it first decided *State v. Donald*, 198 Ariz. 406 (App. 2000), the Arizona Court of Appeals has been struggling to fashion an appropriate remedy for a criminal defendant who rejected a plea agreement because he received ineffective assistance of counsel (“IAC”).

¶2 Both divisions of the Court of Appeals have criticized *Donald*. *State ex rel Thomas v. Rayes*, 213 Ariz. 326 (App. 2006), *vacated*, 214 Ariz. 411, 153 P.3d 1040 (2007); *State v. Vallejo*, 215 Ariz. 193 (App. 2007) (Howard, J., concurring). Judge Howard’s concurrence in *Vallejo* is routinely cited in Division Two memorandum decisions even in cases where the legitimacy of *Donald* is not challenged. *See, e.g., State v. Elem*, 2 CA-CR 2007-0335-PR, 2008 WL 4455280 (Aug 25, 2008); *State v. Alcantar*, 2 CA-CR 2008-0108-PR, 2009 WL 765502 (March 29, 2009); *State v. Huggins*, 2 CA-CR 2009-0376-PR, 2010 WL 1223982 (March 30, 2010); *State v. Flores*, 2 CA-CR 2009-0408-PR, 2010 WL 2006249 (May 19, 2010). AACJ respectfully urges the Court to grant Mr. Souza’s petition

for review as a matter of first impression before this Court.

II. REASONS THE COURT SHOULD GRANT THE PETITION

A. This Court Has Never Interpreted How to Fashion a Remedy for Ineffective Assistance of Counsel During the Plea Bargaining Phase of Representation

¶3 The right to effective assistance of counsel at all critical stages of the proceedings includes assistance with respect to plea bargaining. *Hill v. Lockhart*, 47 U.S. 52, 56 (1985); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994). “To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea.” *Donald*, 198 Ariz. 406, ¶ 16 (citations omitted). To establish prejudice in the rejection of a plea offer, there must be “a reasonable probability that, absent his attorney’s deficient advice, he would have accepted the plea offer” and declined to proceed to trial. *Id.* ¶ 20. “A defendant may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would have been imposed as a result of a plea.” *Id.* ¶ 21.

¶4 In *Donald*, a divided panel of Division One held that the proper remedy for IAC in explaining a plea offer is reinstatement of the original plea

offer. Where a lawyer fails to effectively explain the “relative merits of the offer compared to the defendant's chances at trial” to the defendant’s prejudice, the trial conviction must be vacated and the plea offer reinstated. *Id.* at ¶¶ 9, 46. The reason is that a defendant is entitled to be “put back in the position he would have been in if the Sixth Amendment violation had not occurred.” *Blaylock*, 20 F.3d at 1468.

¶5 This Court denied the State’s petition for review of *Donald*, and to date this Court has not lent its voice to the question of the proper remedy for IAC during the plea bargaining stage of representation. In *Rayes*, Division One overruled *Donald* on the ground that it violated separation of powers by infringing on the prosecutor’s authority to extend plea offers. 213 Ariz. 326, ¶¶ 26-29. In dissent, Judge Norris found that the Supremacy Clause of the United States and Arizona Constitutions required the court to uphold the Sixth Amendment right to effective assistance of counsel over any potential conflict with the Arizona Constitution. *Id.* ¶ 44 (Norris, J., concurring in part and dissenting in part). This Court granted review of that case and vacated the Court of Appeals’ opinion, but on grounds unrelated to the core holding of *Donald*. *Rayes*, 214 Ariz. 411 (holding that IAC claims may only be brought in Rule 32 proceedings).

¶6 In *Vallejo*, Division Two addressed an IAC claim where counsel advised the defendant of the plea offers but did not sufficiently inquire into the defendant’s reasons for rejecting them, and had counsel so inquired, a plea

agreement could have been reached (as evidenced by the prosecutor's affidavit). 215 Ariz. 193, ¶ 5. *Vallejo* held that IAC cannot result from failure to accept a nonexistent plea agreement. *Id.* ¶ 7. In a separate concurring opinion, Judge Howard expressed the belief that the Sixth Amendment protects only the right to effective counsel at trial, and that since *Vallejo* received a fair trial, there could be no IAC based on her rejection of the plea agreement. *Id.* ¶ 16 (Howard, J., concurring). In Judge Howard's view, there could be IAC where a defendant *accepts* a plea offer due to the attorney's ineffectiveness, because such a defendant waives the fundamental right to trial by jury. *Id.* ¶ 13.

¶7 But Judge Howard's opinion takes several cases out of context. For example, he cites *State ex rel. Bowers v. Superior Court*, 173 Ariz. 34, 40 (App. 1992), for the proposition that "'in rejecting a plea agreement, the court does not impair any of defendant's constitutional rights' ... because, after rejecting the plea bargain, a defendant can still receive a fair trial with the assistance of counsel." *Id.* But *Bowers* was a case about the court's rejection of a plea agreement; that case is completely inapplicable to cases where the plea offer is rejected by the defendant due to IAC.

¶8 As the *Donald* court and predecessor courts pointed out, however, it is problematic to interpret the Sixth Amendment in a way that would protect a defendant's right to effective counsel in the plea bargaining stage only if the

defendant *accepted* the plea: “To accept or reject a plea offer presents a binary choice at a fork in the road; providing constitutional protection against an incompetent shove in one direction, but not against an equally incompetent shove in the other, may produce unwanted skewing of the results.” *Id.* ¶ 13, quoting *In re Alvernaz*, 830 P.2d 747, 754-55 (Cal. 1992) (quoting in turn *Turner v. State*, 664 F. Supp. 1113, 1120 (M.D. Tenn. 1987), and *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981)).

¶9 Further, Judge Howard fails to see how a defendant is prejudiced by IAC when he is convicted after a fair trial, *id.* ¶ 14, but the demonstration of prejudice to such defendants is made throughout *Donald*: “A defendant may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would have been imposed as a result of a plea.” *Donald*, 198 Ariz. 406, ¶ 21, citing *United States v. Day*, 969 F.3d 39, 42-43 (3d Cir. 1992); *Alvernaz*, 830 P.2d at 755-56. “Prejudice” requires the defendant to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). What *Donald* and other courts have categorized as an “inferential” showing of prejudice is simple common sense: when a defendant receives a significantly longer prison sentence as a result of IAC, he has shown that “the result of the proceeding would have been

different.”

¶10 Judge Howard’s view that defendants have no right to effective counsel during the plea bargaining stage has been resoundingly rejected by most state and federal courts in the country, something Judge Howard acknowledges in *Vallejo*. 215 Ariz. 193, ¶ 16 (Howard, J., concurring) (citing two cases in support of his position while recognizing significant authority for the opposing position cited in *Donald*, 198 Ariz. 406, n.4). One of the two cases cited by Judge Howard, *Bryan v. State*, 134 S.W.3d 795 (Mo. App. 2004), has been undermined by another Missouri case, *McClendon v. State*, 247 S.W.3d 549, 556 (Mo. App. 2007) (whereas Bryan alleged only that “trial counsel failed to give adequate advice about the case,” McClendon “alleged that trial counsel affirmatively misinformed him about the maximum punishment he could receive.”).

¶11 The other court to make such a finding, the Utah Supreme Court, recently decided in *State v. Greuber*, 165 P.3d 1185 (Utah 2007), that a defendant is not prejudiced when he rejects a plea offer that might have been accepted had his attorney viewed important evidence before counseling him on the plea. However, the court suggested that, in cases where counsel offers erroneous advice about sentencing exposure with a plea versus conviction at trial, such conduct of counsel “might effectively constitute the absence of counsel at a critical stage. We do not offer an opinion on that question, however, as it is not before us in this case.” *Id.* at

1189 n.4. Contrary to the assertions in Judge Howard’s concurring opinion in *Vallejo*, there is no court in the country that has failed to find IAC and resulting prejudice when an attorney fails to counsel his client on his sentencing exposure, as the trial court in this case found to have occurred with Petitioner.

¶12 The overwhelming consensus among state and federal courts for the past twenty years is that a defendant who proves that IAC caused him to reject a plea bargain is entitled to reinstatement of the plea offer. *See, e.g., Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009); *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006); *Comm. v. Mahar*, 809 N.E.2d 989, 993 & n.5 (Mass. 2004) (“we agree with nearly every other appellate court ... that if the offer is rejected because of [IAC], the fact that the defendant subsequently receives a fair trial does not ameliorate the constitutional harm that occurred in the plea consideration process.”).

¶13 Judge Brammer’s concurrence in this case points out that providing a new trial to Petitioner when his counsel was effective at trial but ineffective during the plea bargaining stage is “a colossal waste of resources,” and there is merit to that position. Courts have typically recognized the “elephant in the room” that no remedy precisely matches the constitutional harm that occurs where the defendant rejects the plea offer due to IAC. Reinstatement of the plea agreement may put the defendant in the same position as when he rejected the plea agreement due to IAC, but it fails to take into account that the prosecution made the offer in part so that it

would not have to expend the resources of bringing the case to trial. *See Mahar*, 809 N.E.2d at 1001-02 (Sosman, J., concurring) (“Whatever potential costs, risks, and consequences caused the prosecution to tender its plea offer in the first place, the defendant’s rejection of that offer has caused the prosecution to incur the very costs, risks, and consequences that the prosecution hoped to avoid.”). While fashioning an appropriate remedy might be challenging, it is still necessary in order to vindicate the defendant’s denial of his right to effective counsel.

¶14 The remedy for IAC “should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.” *United States v. Morrison*, 449 U.S. 361, 364 (1981). In a case such as this, where Petitioner’s trial counsel was effective during trial but ineffective with regard to his advice that led to rejection of the plea bargain, the only remedy that fits the constitutional harm is reinstatement of the plea offer. It is of significantly less concern that the prosecution is placed in a less advantageous position by having a plea offer reinstated when the case has already proceeded to trial, because the State has lost no fundamental rights as a result of this remedy, whereas the defendant loses a fundamental right as a result of the trial court’s failure to order the remedy.

B. Reinstatement of the Original Plea Offer by the Court does not Violate Separation of Powers

¶15 Numerous courts, including Division One in *Donald* and *Rayes*, have addressed the question of whether a trial court can order the prosecution to reinstate the previously-rejected plea offer as a remedy for IAC during the plea bargaining stage without violating separation of powers. Article III of the Arizona Constitution creates the three branches of government and states: “such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.” “The Arizona Constitution, written after generations of experience and experimentation under the United States Constitution, spells out the separation of powers doctrine even more specifically than does the national document.” *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). Though separation of powers is explicit in the Arizona Constitution, “[t]he separation of powers does not require a ‘hermetic sealing off’ of the three branches of government.” *State v. Prentiss*, 163 Ariz. 81, 84 (1989).

¶16 However, this Court has recognized that the powers of the three branches of government may be “blended” permissibly, so long as the result is not an outright usurpation of the powers of one branch by another. *Id.* at 276, citing *J.W. Hancock Enters. v. Registrar of Contractors*, 142 Ariz. 400, 405-06 (App. 1984). This Court approved *Hancock*, where the Court of Appeals used four factors for consideration in determining whether a separation of powers violation

has occurred. *Block*, 189 Ariz. at 276. As stated in *Donald*, 198 Ariz. 406, ¶ 37, those four factors are: “(1) the essential nature of the power exercised; (2) the ... degree of control [that one branch assumes] in exercising the power [of another]; (3) the ... objective [of the exercise]; (4) the practical consequences of the action.”

¶17 Under this test, as explained in *Donald*, a trial court does not usurp the prosecution’s executive authority to tender plea offers. First, the essential nature of the power being exercised in this case is judicial: a trial court’s vindication of denial of a defendant’s fundamental right to effective assistance of counsel. The reinstatement of a plea offer is merely the means toward achieving the essential end. *Id.* ¶ 40. Second, the degree of control that the court exercises over the reinstatement of the plea offer is not only limited to the scope of remedying a constitutional harm, *id.* ¶ 41, but it is also limited to reinstating a firm plea offer that had already been tendered, as opposed to reinstatement of a potential offer that was the subject of dispute in *Vallejo*. Third, as *Donald* pointed out, *id.* ¶ 42, the objective of the exercise of this power by the judiciary is a judicial function at its core – to remedy the loss of an essential right to a criminal defendant. Fourth, under *Donald*, *id.* ¶ 43, the State may still offer reasons why the plea offer should not be reinstated.

¶18 On this final point, however, *Donald* does not go far enough. The Ninth Circuit has frequently held that the writ of *habeas corpus* must be granted

when a defendant rejects a plea agreement because of IAC unless the State offers the same plea agreement, an act that would cure the constitutional violation. *Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003) (citing *Blaylock*, 20 F.3d at 1468); *Hoffman*, 455 F.3d at 942-43 (same). The Sixth Circuit has similarly required the writ to be granted unless the State extends the original plea agreement, though with a caveat that changed circumstances might permit a more severe offer if the State could rebut the presumption of prosecutorial vindictiveness. *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001). The Sixth Amendment does not merely permit the State to re-extend the original plea offer as one potential remedy; instead, the Sixth Amendment mandates that result, or else the prisoner must be released.

III. CONCLUSION

¶19 Because of the serious constitutional right to counsel issue present here, AACJ respectfully requests this Court to grant Mr. Souza's petition for review.

DATED: (electronically filed) May 27, 2010.

By _____ /s/
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CERTIFICATE OF SERVICE

The undersigned has filed and served Brief of Amicus Curiae Arizona Attorneys for Criminal Justice in Support of Petition for Review this 27th day of May, 2010, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31.25(b)(1) and 31.19(c), I certify that the foregoing Brief of Amicus Curiae Arizona Attorneys for Criminal Justice in Support of Petition for Review uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 2,682 words.

Dated this 27th day of May, 2010.

/s/
David J. Euchner, Attorney for
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Petitioner.)	
_____)	

The undersigned counsel for petitioner, under Ariz.R.Crim.P. 31.20(k) and 31.25, consents to the filing of a brief *amicus curiae* in support of the petitioner by the Arizona Attorneys For Criminal Justice.


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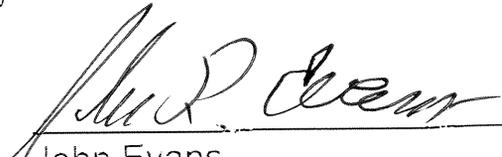
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The undersigned counsel for respondent, under Ariz.R.Crim.P.
31.20(k) and 31.25, consents to the filing of a brief *amicus curiae* in support
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