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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,  
Plaintiff,  
vs.  
LUIS AVELINO CAMACHO,  
Defendant

No. \_\_\_\_\_  
Maricopa County Superior Court  
Cause No. CR2006-005509-001

**DEFENDANT'S PETITION FOR  
REVIEW TO THE COURT OF  
APPEALS**

PETITIONER, Luis Avelino Camacho ("Camacho"), by and through undersigned counsel, pursuant to Rule 32.9(c) of the Arizona Rules of Criminal Procedure, hereby petitions for review from the lower court's denial of his August 29, 2011, Rule 32 petition for post-conviction relief. This petition is supported by the attached memorandum of points and authorities.

Respectfully Submitted on 16 August, 2012.

MICHAEL P. DENEVA, PLC

/s/Michael P. Denea (014768)  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. ISSUES PRESENTED FOR REVIEW**

- 3 **A. Did the Defendant receive ineffective assistance of counsel**  
4 **during the initial stages of plea negotiations when he was either**  
5 **represented by counsel having a conflict or unrepresented at the**  
6 **settlement conference?**
- 7 **B. Did the Defendant receive ineffective assistance of counsel when**  
8 **his subsequent attorney rejected a plea offer received by email**  
9 **without communicating it to the Defendant?**
- 10 **C. Did the jail regulations implemented during the week of the**  
11 **Defendant's trial, later found by the Superior Court to be**  
12 **unconstitutional limitations on access to counsel and courts by**  
13 **defendants, constitute an unconstitutional denial of access to**  
14 **counsel and therefore ineffective assistance of counsel for the**  
15 **Defendant in violation of his due process rights under the Sixth**  
16 **and Fourteenth Amendments to the U.S. Constitution?**

17 **II. FACTS MATERIAL TO THE ISSUES PRESENTED**

18 A. Procedural History

19 On January 24, 2006, Petitioner Luis Avelino Camacho ("Camacho") was  
20 indicted and charged with conspiracy to commit first degree murder and  
21 kidnapping on May 17, 2004. [Ex. 1] The case went to trial between November  
22 11, 2007, and November 20, 2007, and Camacho was convicted on all counts.  
23 [Ex. 2] Camacho did not testify and made no statements to the police. Camacho  
24 was sentenced to 25 years to life on the conspiracy to commit first degree murder  
25 charge, and was given a concurrent sentence of 10.5 years with respect to the  
26 kidnapping charge. [Ex. 3] Camacho filed a timely notice of appeal, but his  
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1 conviction was affirmed. The Arizona Supreme Court denied review without  
2 comment and the appellate court issued its memorandum decision on November  
3 18, 2009. [Ex. 4] Camacho filed a Renewed<sup>1</sup> Petition for Post-Conviction Relief  
4 on August 29, 2011. [Ex. 5] After granting an evidentiary hearing, the Petition  
5 was denied on June 1, 2012. [Ex. 6]

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8 B. Underlying Charge and Conviction<sup>2</sup>

9 On or about May 16-17, 2004, Camacho, his nephews Alfonso and Daniel  
10 along with Daniel's girlfriend, Odalis Alba, drove the victim into the desert with  
11 the apparent intention of killing her. Camacho resided with Daniel and another  
12 relative, Sergio Camacho, in a one bedroom apartment in Glendale. Alba was  
13 Daniel's girlfriend and a frequent visitor at the apartment.

14  
15 On May 17, 2004, the victim was at the apartment with Camacho when  
16 Alfonso arrived. Camacho and Alfonso had learned that the victim may have  
17 given them a sexually transmitted disease and they were angry with her. Under  
18 the guise of taking the victim home, they instead drove to a remote area of desert  
19 on the Gila River Indian Reservation, where they forced the victim out of the  
20 vehicle and ordered her to remove her clothes. Alba was holding the gun while  
21 the victim was undressing. When Alba was distracted, the victim ran away,  
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27 <sup>1</sup> Camacho's Initial Petition was dismissed for a technicality. [See XXX]

<sup>2</sup> The facts are taken from the Arizona Court of Appeals Memorandum Decision, which  
referenced the record in outlining the facts. [Ex. 4]

1 jumped the canal, and ran into the desert to hide. Camacho took the gun for  
2 himself and pursued her into the desert.

3 The victim successfully escaped and was rescued by a passing motorist  
4 who summoned the tribal authorities. Alba, Alfonso, and Daniel, were taken into  
5 custody after a traffic stop near the scene of the crime. The victim's personal  
6 belongings and her cell phone were located in the vehicle. The vehicle belonged  
7 to Camacho's grandmother and he frequently drove it. Camacho was indicted in  
8 January of 2006, and was taken into custody and made his initial appearance on  
9 May 16, 2006. [Ex. 7]

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13 C. Conflict and Lack of Representation at the Initial Settlement

14 Conference

15 Camacho's first lawyer was James Harris of the Public Defender's Office.  
16 Harris represented the Defendant from May 16 until August 23, 2006, when he  
17 moved to withdraw, because his office previously represented Camacho's  
18 nephew, Alfonso on at least one other matter, and represented Odalis Alba, a  
19 witness for the State. [Ex. 8] Another attorney, Michael Urbano appeared as  
20 counsel of record on Camacho's other pending matters, but was not retained as  
21 Knapp counsel in this matter until October 3, 2006. [Ex. 9]

1 One day after filing his motion to withdraw, Harris<sup>1</sup> appeared at an  
2 untranscribed settlement conference on August 24, 2006, before Judge Keppel.  
3 [Ex. 15] At the recent evidentiary hearing on this matter, Harris clarified that he  
4 was sole counsel on the attempted murder charge at the time because Knapp  
5 counsel was not yet on the case. [Ex. 10 at 13] Harris was very ambiguous about  
6 what role he may have played at the settlement conference, at one point saying, “I  
7 don’t think I played any part. I think I just went there to make sure they had the  
8 motion to withdraw and know I couldn’t proceed further.” [Id. at 16-17]. Harris  
9 also agreed that according to the minute entry, there was discussion by counsel  
10 and the court was informed that there was no settlement, so that it also appears  
11 that he did speak on behalf of Camacho. [Id. at 18]. Yet, when asked why he  
12 attended the settlement conference, Harris seemed uncertain if he had authority to  
13 speak for Camacho at the hearing, saying, “but I was withdrawn, so really nothing  
14 I could do at that point.” [Id. at 23]. However, the court did not order that  
15 Harris be withdrawn as counsel until August 30, 2006. [Id. at 24].  
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21 D. Failure to Communicate Settlement Offer

22 After Harris withdrew, Steve Koestner from the Office of the Legal  
23 Advocate substituted in as counsel and appeared at a hearing on September 14,  
24 2006. [Ex. 11] On Thursday, April 19, 2007, Koestner exchanged emails with  
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27 <sup>1</sup> Urbano also appeared at the hearing on Camacho’s other three pending matters, but was not counsel on the attempted murder charge.

1 prosecutor Anthony Church. [Ex. 12] At 1:47 p.m. Koestner told Church by  
2 email that Camacho “would be amenable” to a 15-year sentence. [*Id.*] Church  
3 responded at 5:06 that same afternoon that his supervisors would only approve a  
4 21-year agreement but that “if he will take that we’re don[e].” [*Id.*] At 9:21 a.m.  
5 the next morning, Koestner responded “He won’t accept that. I will advise him of  
6 the offer but he isn’t going to accept 21 years. Looks like trial.” [*Id.*]  
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9 At the PCR evidentiary hearing, the prosecutor indicated that he considered  
10 the plea negotiations to be over after receiving this email from Koestner, even  
11 though he never indicated receiving word back that Koestner had indeed advised  
12 his client and that Camacho himself had refused the plea. [Ex. 10 at 47] The  
13 prosecutor also indicated at the hearing that if Koestner had accepted the 21-year  
14 offer, then he would have considered the case settled. [*Id.* at 52]. There is no  
15 indication anywhere in the record that a *Donald* advisement was given. However,  
16 the sentencing transcript indicates that the Judge appeared to believe that a plea  
17 had been offered and refused by Camacho at some point in the litigation, and that  
18 his refusal of it was used against him during sentencing. [Ex. 13 at 18]  
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22 E. Jail Policies Prohibited Effective Assistance During Trial  
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24 On May 22, 2007, the trial court dismissed Mr. Koestner from Camacho’s  
25 defense team and substituted Candice Shoemaker. [See Exhibit 5; Exhibit 24 at ¶  
26 8]. On November 12, 2007, the MCSO changed the visiting hours at all the jail  
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1 facilities from 6:30 am to 2:30 pm. This change reduced the hours previously  
2 available for privileged visits for attorneys who previously had almost unlimited  
3 access to their jailed clients. [Ex. 15 at 4]  
4

5 On November 13, 2007, two days into the trial, Shoemaker, as Camacho's  
6 trial counsel, gave her business card to Camacho with a message for jail  
7 personnel to allow him to call. [Ex. 10 at 126-27] It stated: "Need Camacho to  
8 call attorney this evening. We are in trial. Important. Any time. /s/ Candice  
9 Shoemaker." [Ex. 11] Shoemaker testified that, among other things, she wanted  
10 to talk with Camacho more about whether he wanted to testify because he was  
11 very unsure and was having a difficult time deciding whether he wished to do so  
12 or not. [Ex. 10 at 127-30.] Shoemaker also testified that she did not know what  
13 could be done about the jail policy, and that all visits were restricted after 2:00  
14 p.m., so her purpose in giving her business card to Camacho was that he would be  
15 allowed to make some contact with her, even by phone, if personnel knew that  
16 "he legitimately needed to talk to me because we were in the midst of trial." [*Id.*  
17 at 126-27.]  
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22 Immediately after the visitation schedule was changed, the defense bar  
23 instituted a "class action" because they were no longer able to see their clients as  
24 necessary. The matter came before the Honorable Anna Baca, who made findings  
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1 of fact and conclusions of law on December 6, 2007. [Ex. 15] Judge Baca's key  
2 findings of fact are summarized below:

- 3 1. MCSO shortened the hours for video remote access, also  
4 referred to as videoconferencing for the indigent defense  
5 attorneys (Ms. Shoemaker was court appointed). Previous  
6 privileged visits by attorneys had been unrestricted. [Ex. 15  
7 at 4]
- 8 2. The court found defense attorneys were in court each  
9 morning for morning calendars until about 10:00 or 11:00  
10 am. Additional court obligations could stretch some  
11 defense calendars into the afternoon. [*Id.* at 4 ¶ 3]
- 12 3. The court determined that defense attorneys attempted to  
13 visit their clients in custody after 2:30 pm and were turned  
14 away. [*Id.* at 4 ¶ 2]
- 15 4. The court found that the new schedule for privileged visits  
16 at the MCSO facilities impaired the in-custody defendants'  
17 constitutional right to counsel. [*Id.* at 8]
- 18 5. The new schedule was not implemented because of any  
19 MCSO need to safeguard jail security, but because of its  
20 budget problems, resulting in eliminating detention officer  
21 assignments on shift 2 privileged visits. [*Id.*]
- 22 6. The MCSO changes in privileged visit hours, taken to  
23 resolve its budget issues, are not an allowable basis for the  
24 result which impairs in-custody defendants' constitutional  
25 right to counsel and access to the courts. [*Id.*]

23 On December 6, 2007, Judge Baca entered temporary orders setting aside  
24 the restricted visitation hours and reinstating the previous schedule. [*Id.*] The  
25 legality of the injunction was questioned in *Arpaio v. Baca*, 217 Ariz. 579, 177  
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1 P.3d 312, 322 (App. 2008), but the appellate court left Judge Baca's factual  
2 findings and legal conclusions untouched.

### 3 III. LEGAL ARGUMENT

#### 4 A. Standard of Review

5 The denial of a Rule 32 petition is reviewed for an abuse of discretion.  
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7 *State v. Watton*, 164 Ariz. 323, 793 P.2d 80 (1990). The trial court's conclusions  
8 of law and its application of the facts to the law are reviewed de novo. *State ex*  
9 *rel. McDougall v. Superior Ct*, 191 Ariz. 182, 953 P.2d 926 (App. 1997). "A  
10 court abuses its discretion if a decision is manifestly unreasonable or is based on  
11 untenable grounds[.]" *Schwartz v. Superior Court In and For County of*  
12 *Maricopa*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996), or if the reasons  
13 given for its action are legally incorrect. *State v. Chapple*, 135 Ariz. 281, 297 n.  
14 18, 660 P.2d 1208, 1224 n. 18 (1983).

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18 To state a colorable claim of ineffective assistance of counsel, a defendant  
19 must show that counsel's performance fell below objectively reasonable standards  
20 and that the deficient performance prejudiced the defendant. *Strickland v.*  
21 *Washington*, 466 U.S. 668, (1984); *State v. Nash*, 143 Ariz. 392, 694 P.2d 222  
22 (1985). If a defendant fails to make a sufficient showing on either prong of the  
23 *Strickland* test, the court need not determine whether the other prong was  
24 satisfied. *State v. Salazar*, 146 Ariz. 540, 707 P.2d 944 (1985). A colorable claim  
25 for post-conviction relief is "one that, if the allegations are true, might have  
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1 changed the outcome.” *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 169,  
2 173 (1993).

3  
4 Defense counsel may move the court to withdraw if he believes his  
5 continued representation of a defendant will or is likely to result in a violation of  
6 a Disciplinary Rule. E.R. 1.16(a)(1). If counsel believes an actual conflict exists,  
7 he must also promptly reveal it to the court. *State v. Davis*, 110 Ariz. 29, 31, 514  
8 P.2d 1025 (1973). A public defender’s office may need to withdraw from a case  
9 to avoid the appearance of impropriety when having a prior relationship with  
10 another person involved in the current client’s case. *Rodriguez v. State*, 129 Ariz.  
11 67, 74, 628 P.2d 950, 957 (1981) (“We therefore hold that because of the  
12 appearance of impropriety, [the court-appointed attorney] and the Public  
13 Defender's Office should have been disqualified.”)

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17 “The Sixth Amendment guarantees criminal defendants the right to  
18 representation by counsel.” *State v. Torres*, 208 Ariz. 340, ¶ 6, 93 P.3d 1056,  
19 1058 (2004); *see also Faretta v. California*, 422 U.S. 806, 807 (1975). However,  
20 the circumstances of this case with regard to Harris’ appearance at the settlement  
21 conference do not give rise to a claim of a complete denial of access to counsel,  
22 which would constitute structural error and could have been raised on appeal.  
23  
24 *Neder v. United States*, 527 U.S. 1, 8 (1999). Indeed, if Camacho would have  
25 raised these facts on appeal, such would have been summarily rejected based on  
26 prior case law establishing that such a violation must be a complete denial of  
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1 access, rather than just a lack of representation at one critical stage in the trial.  
2 *See. e.g., State v. Glassel*, 211 Ariz. 33, 54, ¶¶ 63-64 n.9, 116 P.3d 1193, 1211 n.9  
3 (App. 2009). The *Glassel* court instructed the defendant in that case that his  
4 claim was more properly one based on ineffective assistance of counsel. (“This  
5 does not mean, however, that *Glassel* is without a remedy. He can raise a claim of  
6 ineffective assistance of counsel in a Rule 32 petition for post-conviction relief.”)  
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9 Legal standards governing ineffective assistance of counsel with regard to  
10 plea bargains are set forth in *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (2000).

11 In *Donald*, the Court held that:

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13 (1)[A] defendant suffers a constitutionally significant injury  
14 who loses a favorable plea bargain as a consequence of ineffective  
15 assistance of counsel; (2) the loss of a favorable plea agreement due  
16 to ineffectiveness of counsel is not relieved by the defendant's  
17 receipt of a fair trial; and (3) the court has power to fashion a remedy  
18 for such a deprivation, including, if warranted under the  
19 circumstances, an order to reinstate the original plea offer.

20 198 Ariz. at 418, ¶ 46, 10 P.3d at 1205 (emphasis added).

21 Failing to communicate a plea offer to a defendant results in a violation of  
22 the defendant’s constitutional rights. “This Court now holds that . . . defense  
23 counsel has the duty to communicate formal offers from the prosecution to accept  
24 a plea on terms and conditions that may be favorable to the accused. . . . When  
25 defense counsel allowed the offer to expire without advising the defendant or  
26 allowing him to consider it, defense counsel did not render the effective  
27 assistance the Constitution requires.” *Missouri v. Frye*, 132 S. Ct. 1398 (2012).

1                                    B. Reasons to Grant Review

2                    The crux of the matter is that Camacho was denied effective assistance of  
3 counsel at what has been called the most critical juncture in a criminal case—plea  
4 bargaining. *Id. at* \_\_\_ (“In today’s criminal justice system, therefore, the  
5 negotiation of a plea bargain, rather than the unfolding of a trial, is almost always  
6 the critical point for a defendant.”) The Supreme Court has recently spoken on  
7 the matter, and cited approvingly language from prior precedent, “Anything less  
8 [than effective counsel during plea negotiations] might deny a defendant  
9 ‘effective representation by counsel at the only stage when legal aid and advice  
10 would help him.’” *Id. at* \_\_\_ (quoting *Massiah v. United States*, 377 U. S. 201,  
11 204 (1964) (internal citation omitted)).

12                    Camacho received ineffective assistance of counsel during critical  
13 junctures of plea bargaining not just once, and not just by one attorney, but twice,  
14 by two different court-appointed attorneys. Camacho was denied effective  
15 assistance at the settlement conference when his attorney Harris had not yet been  
16 withdrawn from the case by the court, but believed himself unable to speak for  
17 Camacho, and also by his later counsel Koestner, who utterly failed to  
18 communicate a settlement offer to allow Camacho to decide whether or not to  
19 accept it, rejecting it outright himself instead.

20                    The third issue in the case has also been specifically addressed by the  
21 Supreme Court. In *Geders v. United States*, 425 U.S. 80, 91 (1976), a defendant

1 was not allowed to speak to his counsel overnight during the trial, resulting in  
2 seventeen hours of a lack of access. In finding that this was a violation of the  
3 Sixth Amendment, the Court quoted prior case language, explaining: “[A  
4 defendant] is unfamiliar with the rules of evidence . . . He lacks both the skill and  
5 knowledge adequately to prepare his defense, even though he (may) have a  
6 perfect one. He requires the guiding hand of counsel at every step in the  
7 proceedings against him.” *Id.* at 89 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-  
8 69 (1932).  
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11           Though the court here granted an evidentiary hearing on these issues,  
12 finding that there were colorable claims, the ultimate ruling still denied relief.  
13 [Ex. 6] In its ruling, the court failed to apply the correct burden of proof and legal  
14 standards such that the denial of relief was an abuse of discretion and must be  
15 reviewed and relief granted.  
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#### 18           1. Settlement Conference

19           The court ruled in its denial of relief that Harris did not participate in the  
20 settlement conference after realizing he had a conflict and filing a motion to  
21 withdraw, therefore no prejudice occurred. [Ex. 6] However, this factual ruling  
22 denies the existence of the minute entry specifying that discussions with counsel  
23 did occur with regard to the case and settlement. [Ex. 17] Importantly, Camacho  
24 was also not present to speak on his own behalf.  
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1 Further, the decision to deny relief also ignores the fact that either Harris  
2 participated in the settlement conference after knowing he had a conflict, or he  
3 did not participate and Camacho was unrepresented at his one opportunity for a  
4 formal settlement conference with the court. Though the court in its ruling uses  
5 nonparticipation to show no violation of Camacho's Sixth Amendment rights,  
6 ultimately that means that an indigent defendant was unrepresented at a crucial  
7 juncture in the proceedings. Harris could have certainly requested a continuance  
8 after explaining to the court that he was in a conflict position and could no longer  
9 speak for his client. Rather, he appeared and yet did nothing apparently,  
10 according to his own testimony. This left Camacho in a no-man's land of having  
11 an attorney in name only that was unable or unwilling to speak on his behalf.<sup>1</sup>  
12 The Supreme Court has explained "[t]hat a person who happens to be a lawyer is  
13 present at trial alongside the accused . . . is not enough to satisfy the [Sixth  
14 Amendment]. The Sixth Amendment recognizes the right to the assistance of  
15 counsel because it envisions counsel's playing a role that is critical to the ability  
16 of the adversarial system to produce just results. An accused is entitled to be  
17 assisted by an attorney . . . who plays the role necessary to ensure the trial is fair."  
18 *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984).  
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26 <sup>1</sup> Perhaps it could be argued that Harris was not yet relieved of representation by the  
27 court and could have spoken on behalf of Camacho even in light of a conflict until the court  
relieved him of the representation. The most important consideration, however, is that Harris  
himself did not believe, or understand that he could, and therefore he did not ultimately do so.

1 Arizona is somewhat unusual and proactive in criminal settlement  
2 conferences, and how critical a stage this is in Arizona criminal proceedings is  
3 underlined by the statistics themselves. According to an article appearing in The  
4 Arizona Attorney in 2007, co-written by the Honorable Robert L. Gottsfield and  
5 Mitch Michkowski, PhD.,<sup>1</sup> fully 64 to 78 percent of criminal cases settle after  
6 holding a settlement conference. [Ex. 18] Particularly when both the sentencing  
7 judge and the PCR judge commented on how overwhelming the evidence was  
8 against Camacho, not being represented at a settlement conference was extremely  
9 detrimental. Especially at this time, it is well-known and also documented in the  
10 article, that settlement offers not accepted at a very early stage in the proceedings  
11 were not available later under County Attorney Andrew Thomas's office policies.

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15 Harris's actions at the settlement conference resulted in a denial of  
16 Camacho's Sixth Amendment right to effective assistance of counsel at a critical  
17 juncture in the proceedings and prejudiced his ability to receive a fair opportunity  
18 at plea bargaining.

## 21 2. Failure to Communicate Settlement Offer

22 In denying Camacho's plea for relief on the ineffective assistance of  
23 counsel claim when attorney Koestner failed to apprise him of the State's offer,  
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26 <sup>1</sup> At the time the article was written, Judge Gottsfield was a retired but called-back  
27 full-time judge of the Superior Court, Maricopa County, who was regularly conducting 40 to 60  
settlement conferences a month. Mr. Michkowski was the court's Civil Court Administrator  
and Senior Researcher.

1 the Court ruled that there was no violation because “the State never offered a  
2 formal plea offer.” [Ex. 6] However, case law does not mention any sort of  
3 “formality” as a requirement. This is not a case where no offer had been made,  
4 and the defendant is simply claiming ineffective assistance because his attorney  
5 should have bargained more. *Cf. State v. Jackson*, 209 Ariz. 13, 97 P.3d 113  
6 (App. 2004) (“The constitutional principles underlying Donald come into play  
7 only when a concrete plea offer has been made by the state, and we decline  
8 Jackson's request, unsupported by authority, to extend Donald's reach to include a  
9 defense counsel's failure to investigate the speculative possibilities of a potential  
10 plea offer, the very existence of which is contested.”) The term to be served was  
11 spelled out in writing here, and was not ambiguous.

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15 In *Frye*, the defendant’s attorney failed to convey the State’s written plea  
16 offer to the defendant, and the plea agreement lapsed to the detriment of the  
17 defendant. *Frye* 132 S.C. at \_\_\_\_\_. Citing *State v. Donald*, 198 Ariz. 406, 10  
18 P.3d 1193 (App. 2009), the Supreme Court decreed that *Frye* was entitled to  
19 effective assistance of counsel during plea negotiations, a critical phase of the  
20 proceedings. The Court determined that the failure of defense counsel to  
21 effectively convey a plea agreement to the defendant and allowing it to lapse  
22 constituted ineffective assistance of counsel, satisfying the first prong of  
23 *Strickland v. Washington*, 466 U.S. 668 (1984).  
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1 As to prejudice, the Court held that prejudice is present under the second  
2 prong of *Strickland* if the defendant can show there was a reasonable probability  
3 the defendant would have accepted the plea offer and not gone to trial. The  
4 defendant must also show that there was a reasonable probability that the State  
5 and the trial court would have accepted the plea. In short, *Missouri v. Frye*  
6 appears to be the Court's approval of the procedure already employed in Arizona  
7 in which the trial court addresses the defendant in court, and advises the  
8 defendant about the risks of trial and the availability of an offer. *Donald* was  
9 controlling law when Mr. Camacho went to trial, but he did not receive a *Donald*  
10 advisory.  
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14 Here, both attorneys agreed at the evidentiary hearing that they were  
15 bargaining and that an offer was made first by defense counsel, and then a  
16 counter-offer was made by the prosecutor. The counter-offer already had  
17 approval from prosecutorial supervisors, such that Church said in the email, "if he  
18 will take that we're don[e]." [Ex. 12] The prosecutor likewise testified at the  
19 evidentiary hearing that if Camacho had accepted the 21 year offer, then he would  
20 have considered the case settled. [Ex. 10 at 52]  
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23 The *Frye*<sup>1</sup> court, in recounting the procedural history of the case before it  
24 was heard at the Supreme Court, stated, "First, the court determined Frye's  
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27 <sup>1</sup> Importantly, the plea offer in *Frye* was also not "formal" in that it was simply a letter  
from one attorney to the other. *Frye*, 132 S. Ct. at \_\_\_\_.

1 counsel's performance was deficient because the 'record is void of any evidence  
2 of any effort by trial counsel to communicate the Offer to Frye during the Offer  
3 window.'" *Missouri v. Frye*, 311 S. W. 3d, at 355, 356 (emphasis deleted). In  
4 other words, when the record did not support that the offer had indeed been  
5 conveyed, the appeals court and the Supreme Court assumed that it had not been  
6 conveyed. Here, the only indication in the record is that Koestner rejected the  
7 proposal, but said he would let his client know about it. The prosecutor testified  
8 that he considered the offer rejected at the time of receiving the email, and neither  
9 attorney had any evidence or specific recollection of any other conversation with  
10 Camacho rejecting the plea offer.

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14         The facts are further complicated by the Judge at sentencing referencing  
15 that Camacho had rejected a plea offer, something his trial attorney seemed to  
16 know nothing about. [Ex. 13 at 18] If Camacho had indeed rejected an offer  
17 known to the court, there is no indication why there was not a *Donald* advisement  
18 given. In light of these facts, and particularly in light of the relevant law in  
19 *Donald* and *Frye*, it was an abuse of discretion to reject the only factual evidence  
20 presented at the hearing with regard to the settlement offer that supported  
21 Camacho's contentions of a presented offer that was never conveyed to him, as  
22 well as an abuse of discretion to apply a legal standard of "formality" that does  
23 not exist in case law. This resulted in prejudice because by going to trial, he  
24 faced at least a life sentence. Though 21 years is still a long prison sentence, at  
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1 least it would have been guaranteed time with release after a determinate period.  
2 Additionally, the sentence was likely severe enough that a judge would have  
3 accepted it, particularly when a co-defendant charged with the same crime  
4 received only half of that sentence, and another received no time at all in  
5 exchange for testimony against Camacho.  
6

### 7 3. Prison Regulations

8  
9 The judge denied relief with regard to Camacho's Sixth and Fourteenth  
10 Amendment due process claims for a lack of access to his attorney during the trial  
11 by finding no prejudice. However, the court seemed to place the primary  
12 importance on attorney Shoemaker's unwillingness to raise the issue at the time  
13 of trial or conclusively state at the evidentiary hearing that she absolutely needed  
14 to speak with Camacho in the evening during the trial.  
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16

17 First, this occurred six years ago, so virtually all of the testimony of the  
18 attorneys was very ambiguous and more to their usual practice than to the  
19 specifics of this case. Second, Shoemaker did testify that at the time, she did not  
20 know what could be done about the jail policy. [Ex. 10 at 126-27] Judge Baca  
21 did not strike down the jail regulations until weeks after the trial had ended, and  
22 in the midst of the criminal trial, it is not practical nor reasonable to think that an  
23 attorney would find it advisable to complain about the jail regulations that had the  
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25  
26  
27

1 entire defense bar in a state of confusion.<sup>1</sup> Third, the best evidence of whether  
2 she felt it necessary to speak to her client at the time is found in her message to  
3 the jail personnel in her business card. She specifically tells them that Camacho  
4 is in trial, and that is important that he be allowed to speak with her, and that he  
5 can call at any time that night. [Ex. 16] Finally, Shoemaker's hindsight view of  
6 exactly how important or valuable speaking with her client may have been that  
7 night must be put into perspective. It is not an attorney's right to speak with her  
8 client, it is a defendant's right to speak with his attorney. Though she may say  
9 that she would have advised him not to testify, and may have sound legal reasons  
10 for giving that advice, that does not change the fact that Camacho faced strong  
11 evidence against him, and that his decision to testify, and discussions about what  
12 witnesses may have said that day during trial could very well have been critical  
13 and the only defense he had to present.

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18 As to prejudice, the State had offered immunity to Camacho's nephew,  
19 Alfonso to testify against Camacho. It was not known for sure whether Alfonso  
20 would invoke his Fifth Amendment rights, something he did eventually do. The  
21 legal discussion surrounding this point of the trial would have been very difficult  
22 for a lay person to understand absent a lawyer explaining what happened in the  
23 courtroom and the ramifications. It was also not known exactly what the victim  
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25  
26

27 <sup>1</sup> Camacho did file a pro per Motion to Vacate the Judgment, referencing the jail policies.  
[Ex. 19]

1 and Alba would say on the stand. Camacho would have wanted to know whether  
2 to testify in light of these wild cards, and to discuss contingent strategies if  
3 Alfonso did or did not take the stand. All of these questions were legitimate and  
4 necessary during the pendency of the trial and could not have been discussed  
5 ahead of time. The new visitation policies frustrated these rights and Camacho  
6 was prejudiced. Accordingly, he is entitled to post-conviction relief.  
7

### 8 CONCLUSION

9  
10 Based on the foregoing, Camacho respectfully requests that the court grant  
11 review and relief in this matter. As to the proper remedy, the Supreme Court  
12 recently stated, “the District Court ordered specific performance of the original  
13 plea agreement. The correct remedy in these circumstances, however, is to order  
14 the State to reoffer the plea agreement.” *See Lafler v. Cooper*, 566 U.S. \_\_\_\_\_  
15 (2012). Therefore, Camacho requests that the parties be returned to their  
16 respective positions before the constitutional violations occurred.  
17  
18  
19  
20

21 Electronic original filed via  
22 TURBOCOURT on 16 August 2012  
23 with:

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