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2 [REDACTED]
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Attorney for Defendant

6 **IN THE SUPERIOR COURT IN THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF YUMA**

9 THE STATE OF ARIZONA,
10 Plaintiff,

11 Vs.

13 [REDACTED],
14 Defendant.

Case No.: [REDACTED]

DEFENDANT'S MOTION TO
MODIFY SENTENCE, CHANGE
PLEA AND SET SENTENCING
HEARING

(Evidentiary Hearing Requested)

17 AND NOW, comes Defendant, [REDACTED] by and through his
18 attorney, [REDACTED], who respectfully submits the following motion as
19 follows:
20

21 **STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY**

22 This case involves allegations of child sexual abuse case that resulted in a
23 conviction after a jury trial. At this juncture of the case, it is limited to litigation
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1 the final claim, which is ineffective assistance of counsel against trial counsel for
2 failing to explain the plea offers extended by the State to the client.

3 Trial counsel was appointed on [REDACTED]. See [REDACTED]
4 Affidavit of [REDACTED] annexed hereto as Exhibit 1. Attorney [REDACTED]
5 was terminated from the indigent legal services contract more than one year before
6 trial. See Memorandum from [REDACTED] dated [REDACTED] annexed
7 hereto as Exhibit 2. It is unknown why Attorney [REDACTED] remained on this case.
8

9 On [REDACTED], the prosecutor offered a plea agreement whereby Mr.
10 [REDACTED] was to plead guilty to attempted child molestation and attempted sexual
11 conduct with a minor. He would be sentenced to a term of imprisonment between 5
12 and 15 years for attempted child molestation and to lifetime probation for
13 attempted sexual conduct. The continuous sexual abuse charge would be
14 dismissed. See [REDACTED] plea offer from Attorney [REDACTED] annexed hereto
15 as Exhibit 3. Attorney [REDACTED] does not recall receiving this plea offer. See
16 Exhibit 1. Mr. [REDACTED] states in his Declaration that he was never advised about the
17 first plea offer made. See Declaration of [REDACTED] [REDACTED] annexed hereto as Exhibit
18 4.
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22 On [REDACTED], the prosecutor offered a second plea agreement
23 whereby Mr. [REDACTED] would plead guilty to one count of attempted molestation of a
24 child, occurring during the months of [REDACTED]. See [REDACTED],
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1 ■■■■ plea offer from Attorney ■■■■ annexed hereto as Exhibit 5. The range of
2 sentence mentioned in the plea was ■■■■ years flat time, so the actual offense
3 would have been child molestation, not attempted child molestation. The offer
4 provided that Mr. ■■■■ would have been sentenced to the minimum ■■■■ years
5 imprisonment, but then the plea also indicates sentence would be “at the court’s
6 discretion.” See Exhibit ■■■■.

8 On ■■■■, at the request of the defense, a Donald hearing was held.
9 See ■■■■ transcript of Donald Hearing annexed hereto as Exhibit ■■■■. The
10 prosecutor advised Mr. ■■■■ that he was facing a mandatory minimum of 23 ½
11 years if convicted with a possibility of a maximum of ■■■■ years in prison ■■■■
12 Exhibit ■■■■ at ■■■■.

14 A trial was held and the jury found Mr. ■■■■ guilty on all three of the
15 charged crimes. On ■■■■, the trial court sentenced Mr. ■■■■ to
16 consecutive prison terms totaling ■■■■ years. See ■■■■ sentence hearing
17 transcript is annexed hereto as Exhibit ■■■■.

19 A notice of appeal was filed on ■■■■. The conviction was
20 affirmed by the Court of Appeals on ■■■■.

22 On ■■■■, newly appointed counsel filed a Petition for Post-
23 Conviction Relief. The Court of Appeals granted review and relief was granted in
24

1 part and denied in part. The matter was remanded on the claim of ineffective
2 assistance of counsel pertaining to the plea offers.

3 An Evidentiary Hearing was scheduled for [REDACTED]. Petitioner
4 asked for a continuance and was given a new date [REDACTED]. The reason
5 for the continuance was that the parties were negotiating a settlement of the case.
6

7 In order to finally resolve this case, the State has offered a new plea
8 agreement and the Petitioner has agreed to accept the new plea agreement. See
9 [REDACTED] plea agreement annexed hereto as Exhibit [REDACTED]. The parties are
10 not asking to disturb the jury's conviction. The new plea agreement honors the
11 jury's verdict that Mr. [REDACTED] is guilty on three counts. The new plea agreement
12 provides that Mr. [REDACTED] plead guilty to Count One, molestation of a child, Count
13 Two, sexual conduct with a minor and Amended Count Three, attempted
14 molestation of a child. See Exhibit [REDACTED]. The only difference in the new plea
15 agreement, is that Count Three was amended from continuous sexual abuse to
16 attempted molestation of a child. Mr. [REDACTED] would be sentenced to the
17 presumptive term of imprisonment of [REDACTED] years on Count One. Mr. [REDACTED] would be
18 sentenced to the presumptive term of imprisonment of 1 year on Count Two. The
19 sentences are to be consecutive. Following the imprisonment on Counts One and
20 Two, Mr. [REDACTED] would be placed on lifetime probation on Amended Count Three.
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25 PCR Counsel has discussed the plea with the client at length. [Insert area

1 to fill in the dates/times and written documentation reviewed with the
2 Petitioner]

3 **ARGUMENT**

4 **I. THIS COURT SHOULD FIND INEFFECTIVE ASSISTANCE OF**
5 **COUNSEL AND AGREE TO ACCEPT DEFENDANT'S**
6 **NEGOTIATED PLEA AND THEREAFTER SENTENCE**
7 **ACCORDINGLY**

8 This Honorable Court should find that Mr. [REDACTED] did not receive effective
9 assistance of counsel pertaining to the plea agreements offered prior to trial and it
10 should agree to accept Defendant's new plea agreement and sentence him
11 accordingly.

12
13 Mr. [REDACTED] did not receive effective assistance of counsel, in violation of the
14 Sixth Amendment and Article 2, Section 24 of the Arizona Constitution. Thus, his
15 conviction violated both the Federal and the State Constitutions.

16
17 Effective assistance of counsel is measured under the standard set forth in
18 *Strickland v. Washington* 466 U.S. 668 (1984); *see also State v. Nash*, 143 Ariz.
19 392, 397, 694 P.2d 222, 227 (1985) (adopting the *Strickland* test for determining
20 effective assistance). To prevail under that standard, the defendant must show that
21 counsel's performance fell below an objective standard of reasonableness and that
22 the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88.
23 To ascertain prejudice, the defendant must show that there is a reasonable
24 probability that but for counsel's unprofessional errors, the result of the proceeding
25



1 would have been different. A reasonable probability is a probability sufficient to
2 undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The court must
3 assess the cumulative impact of trial counsel's errors on the defendant's
4 constitutional rights. *Alcala v. Woodford*, 334 F.3d 862, 893 (9th Cir. 2003). Both
5 prong of the *Strickland* test have to be satisfied. *State v. Bennett*, 213 Ariz. 562,
6 567, 146 P.3d 63, 68 (2006). Defendant bears the burden of proving his claims
7 for post-conviction relief by a preponderance of the evidence. *State v. Berryman*,
8 178 Ariz. 617, 620, 875 P.2d 850, 853 (Ct. App. 1994).

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11 It is beyond dispute that a defendant's decision whether to plead guilty or
12 proceed to trial is a critical stage in a criminal proceeding for which he is
13 constitutionally entitled to the effective assistance of counsel. *Hill v. Lockhart*, 474
14 U.S. 52, 56 (1985); *State v. Anderson*, 147 Ariz. 346, 350, 710 P.2d 456, 460
15 (1985). Further, the right to effective assistance of counsel extends to the decision
16 to reject a plea offer, even if the defendant subsequently receives a fair trial. *State*
17 *v. Donald*, 198 Ariz. 406, 411, 10 P.3d 1193, 1198 (App. 2000).

18
19
20 Years after *Donald* was decided, the United States Supreme Court held that
21 a defendant's Sixth Amendment right to counsel extends to the plea-bargaining
22 process and that during plea negotiations, defendants are entitled to the effective
23 assistance of competent counsel. *Lafler v. Cooper*, __ U.S. __, 132 S.Ct 1376
24 (2012). Further and again, according to the Court, the right to effective assistance
25

1 extends to the decision to reject a plea offer, even if the defendant subsequently
2 receives a fair trial.

3 **A. Trial Counsel Failed to Properly Advise on the Plea Agreement**
4 **Offers Made by the State**

5 The first plea offer made on [REDACTED] was never presented to Defendant.
6 See Exhibits [REDACTED] and [REDACTED]. In said plea, the prosecutor offered a plea agreement whereby
7 Mr. [REDACTED] was to plead guilty to attempted child molestation and attempted sexual
8 conduct with a minor. He would be sentenced to a term of imprisonment between 5
9 and 15 years for attempted child molestation and to lifetime probation for
10 attempted sexual conduct. The continuous sexual abuse charge would be
11 dismissed. See Exhibit [REDACTED]. Attorney [REDACTED] does not recall receiving this plea
12 offer and Defendant never saw it either. See Exhibits [REDACTED]

15 On [REDACTED], the prosecutor offered a second plea agreement
16 whereby Mr. [REDACTED] would plead guilty to one count of attempted molestation of a
17 child, occurring during the months of [REDACTED]. See [REDACTED]
18 [REDACTED] plea offer from Attorney [REDACTED] annexed hereto as Exhibit [REDACTED]. The range of
19 sentence mentioned in the plea was 10-24 years flat time, so the actual offense
20 would have been child molestation, not attempted child molestation. The offer
21 provided that Mr. [REDACTED] would have been sentenced to the minimum 10 years
22 imprisonment, but then the plea also indicates sentence would be “at the court’s
23 discretion.” See Exhibit [REDACTED]. A ten-year sentence was an incredibly good offer for
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1 Defendant. Mr. [REDACTED] was incarcerated on [REDACTED]. As it stands, Mr.
2 [REDACTED] still has more than [REDACTED] years to go. His release date is [REDACTED].

3 Mr. [REDACTED] failed to receive effective assistance of counsel with respect to
4 these plea offers. His decision whether to plead guilty or proceed to trial was a
5 critical stage in this criminal proceeding for which he was constitutionally entitled
6 to the effective assistance of counsel. *See Lafler v. Cooper*, __ U.S. __, 132 S.Ct.
7 1376 (2012); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *State v. Anderson*, 147 Ariz.
8 346, 350, 710 P.2d 456, 460 (1985); *State v. Donald*, 198 Ariz. 406, 411, 10 P.3d
9 1193, 1198 (App. 2000).

10
11
12 Mr. [REDACTED] states in his Declaration that he was never advised about the first
13 plea offer made. *See Exhibit [REDACTED]*. Attorney [REDACTED] admits in his Affidavit that he
14 does not remember seeing it. *See Exhibit [REDACTED]*. However, newly appointed counsel
15 found a copy of the plea agreement offer in Attorney [REDACTED] file. *See Exhibit [REDACTED]*.
16 Mr. [REDACTED] declared that Attorney [REDACTED] advised him that Mr. [REDACTED] would
17 win his case. *Id.* Given such inappropriate advice, Mr. [REDACTED] was left without
18 proper legal guidance in considering the plea agreement offers made.
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21 Attorney [REDACTED] failure to inform his client about the details of the plea
22 offer and to discuss the relative merits of the offer compared to the client's chances
23 at trial fell below the standard of reasonable care. *See Donald*, 198 Ariz. At 411, 10
24 P.3d at 1198 ("To ensure that a defendant is adequately advised, 'defense counsel
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1 has the duty to communicate not only the terms of a plea bargain offer, but also the
2 relative merits of the offer compared to the defendant's chances at trial") (quoting
3 *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. 1978)). It also caused prejudice,
4 as Mr. [REDACTED] was forced to go to trial and receive a sentence of [REDACTED] years after
5 conviction, whereas he could have received as little as [REDACTED] years had he accepted the
6 first plea offer.
7

8 To show prejudice when a plea offer lapses, the defendant must demonstrate
9 a reasonable probability that the end result would have been more favorable by
10 reason of a plea to a lesser charge or a sentence of less prison time. *See Missouri v.*
11 *Frye*, _ U.S. _, 132 S.Ct. 1399, 1404-05 (2012) (holding that prejudice results
12 where the conviction or sentence or both would have been less severe under the
13 lapsed plea than under the judgment and sentence that were in fact imposed). It is
14 clear that Mr. [REDACTED] end result was considerably worsened by trial and either of
15 the plea offers would have been significantly more favorable.
16
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18 **B. Trial Counsel Demonstrated He Failed to Understand the Sentencing
19 Guidelines that Applied to this Case Sentencing Hearing**

20 At the Sentencing Hearing, trial counsel effectively demonstrated that he
21 never understood the sentencing guideline and thus could never have properly
22 advised the Petitioner on the risks and rewards of plea versus trial. Trial counsel
23 suggested on page [REDACTED] of the Sentencing transcript that the judge give the defendant a
24 concurrent sentence. This was not possible per statute and case law. *See A.R.S. §*
25

1 13- 604.01(K) and *State v. Tsinnijinnie*, 206 Ariz. 477, 479, 80 P.3d 284, 286 (Ct.
2 App. 2003) (If a defendant is convicted of any "other" dangerous crime against
3 children, the sentence for each such offense must be served consecutively to any
4 other sentence imposed).

5
6 Further proof that TC didn't explain the consequences properly was in the
7 Presentence report where Defendant was explaining to the author of the report that
8 as soon as the judge heard his witness that he would be exonerated and his further
9 explaining where he was going to live when he is released from custody.

10 11 **C. The Donald Hearing was Constitutionally Deficient**

12 Attorney [REDACTED] was clearly not prepared for the Donald hearing and he
13 needed to have been ready because this was the critical moment when the client
14 was supposed to have decided whether he would take or reject the plea. The court
15 properly requested that facts be placed on the record about the odds or chances of
16 Defendant being convicted. See Donald Hearing transcript Exhibit [REDACTED] at pages 3-4.
17 Attorney [REDACTED] responded that he was not prepared to respond to the court's
18 request on that point. *Id.* at pg. [REDACTED]. If trial counsel cannot advise him of the risks and
19 rewards of trial versus plea, it is a violation of the client's constitutional rights.
20
21

22 The State only explained the presumptive on the one-year charge and not the
23 minimum and maximum. *Id.* at pg. [REDACTED]. The court asked Defendant if he had any
24 questions. *Id.* at pg. [REDACTED]. However, Mr. [REDACTED] is not asked if he understands what is
25

1 being stated at the Donald Hearing. The State did not mention if or when the offer
2 would be withdrawn if he did not accept the offer. Mr. [REDACTED] was not asked if he
3 accepted or rejected the plea offer. In fact, Mr. [REDACTED] did not indicate either way
4 that he would accept or reject the plea offer.
5

6 The Donald Hearing was supposed to be a significant turning point for Mr.
7 [REDACTED] in his case. He was to either take a plea offer or proceed to trial. It is
8 unclear from the record, whether Mr. [REDACTED] had any understanding of what was
9 happening in his case. Attorney [REDACTED] wholly lacked preparedness and
10 understanding of the case. Attorney [REDACTED] failed in his obligation to make a
11 proper record for his client to understand and properly weigh the risks and
12 consequences of going to trial.
13

14 **D. Trial Counsel Missed Significant Evidence**

15
16 Arguably the single most important piece of evidence in a case like this is
17 the forensic interview of the child that started the case. Attorney [REDACTED] never
18 even noticed that it was not disclosed. The first post-conviction relief attorney
19 requested the forensic interview for the first time. It was produced to her and it was
20 determined that the audio didn't work. The second post-conviction relief attorney
21 assigned (this undersigned attorney) requested it again. The first time it was actual
22 watched and heard by the defense was [REDACTED], more than [REDACTED] years after the
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1 recording was made in [REDACTED]. See Certification of production of video dated [REDACTED]
2 [REDACTED] annexed hereto as Exhibit [REDACTED].

3 **E. Trial Counsel was Unprepared**

4 Attorney [REDACTED] did not prepare a defense for Mr. [REDACTED] case and
5 without preparation over those years, he could not have properly and appropriately
6 counseled the client on the plea agreement offers made.
7

8 Attorney [REDACTED] repeatedly indicated his lack of preparation and trial
9 readiness. As an example, a status hearing was held on [REDACTED] (which was
10 supposed to be the day before trial started) and it was also argument on the State's
11 motion to preclude and for sanctions. The motion to preclude and for sanctions
12 was filed because trial counsel had just submitted photographic evidence to the
13 prosecution only a few days before the scheduled trial was to begin. The trial judge
14 expressed his frustration and stated "[REDACTED]
15 [REDACTED]." See [REDACTED]
16 [REDACTED]. Status Hearing transcript at page [REDACTED] annexed hereto as Exhibit [REDACTED]. The trial judge
17 proceeds to state "[REDACTED]
18 [REDACTED]." *Id.*

19 At the trial, Attorney [REDACTED] indicated that he did not know how to locate
20 and subpoena the police officers who authored the police reports. In the end, trial
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1 counsel was not able to use that information. See Jury Trial Day ■ at pages ■
2 annexed hereto as Exhibit ■

3 Attorney ■ did not file a motion to request the CPS records even
4 though the victims' family had a long history with CPS and the child disclosed to a
5 CPS social worker both facts made known pursuant to the police reports. Attorney
6 ■ did not interview the CPS social worker who found the case
7 unsubstantiated in ■. He did not interview the reporting CPS social worker.¹
8 Police reports that show that victim was designated as a sexual abuse victim in at
9 least three separate law enforcement investigations at that time. He did not
10 investigate the other people or incidents.²

13 It is further evidence that Attorney ■ failed to prepare his case prior
14 to trial because of his scarce and minimal attorney invoices prior to the trial. See
15 Yuma County invoices annexed hereto as Exhibit ■.

17 For all of the foregoing reasons, it is respectfully requested that this
18 Honorable Court find that Mr. ■ Federal and State Constitutional rights
19 were violated because of ineffective assistance of counsel. As a direct result and in
20 order to conclude this matter effectively and efficiently and in the interests of
21

22
23 ¹ Trial counsel was asked for his file by the first PCR attorney but there were no
24 notes, no calendar, no interviews, and no research and only a few schedule letters
25 that reflected the entire correspondence for ■ years. It was unethical and
unprofessional that he failed to give a decent file to successor counsel.

² This is upon information and belief due to the lack of information in the file.

1 justice, this Court should accept the negotiated plea dated [REDACTED] and
2 set a date for a sentencing hearing in accordance with the new plea agreement.

3 **CONCLUSION**

4 WHEREFORE, Petitioner respectfully requests that the court modify his current
5 sentence per the proposed plea agreement dated [REDACTED] and set the matter
6 for a Change of Plea and Sentencing Hearing.
7

8
9
10 Date: [REDACTED]

Respectfully submitted,

11 _____/S/
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Attorney for Petitioner