DIVISION ONE
FILED: 03/30/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0217 PRPC
	)	
Respondent/Cross Petitioner,	)	DEPARTMENT A
	)	
v.	)	Maricopa County
	)	Superior Court
JEFFREY SHANE JOHNSON,	)	No. CR 1994-001649
	)	
Petitioner/Cross Respondent.	)	
	)	
	)	**DECISION ORDER**
	)	

Jeffrey Shane Johnson and the State have petitioned this court to review the superior court's orders in Johnson's post-conviction relief proceeding. Presiding Judge Maurice Portley, and Judges Lawrence F. Winthrop and Margaret H. Downie, have considered Johnson's petition for review and deny review. Having considered the State's cross-petition for review, we grant review and grant relief for the reasons stated, and remand this matter to the superior court for further proceedings.

Facts and Procedural History

We discuss only the factual and procedural history necessary to our disposition of this matter. On the advice of

counsel, Johnson rejected a plea agreement and chose to proceed to trial. The jury acquitted him on the armed robbery count, but convicted him on the lesser-included offense of criminal trespass, as well as on two counts of aggravated assault, two counts of endangerment, one count of theft, and resisting arrest. The jury also found that Johnson had a prior felony conviction and was on parole when he committed the offenses. Johnson filed a direct appeal and this court reduced the endangerment convictions to misdemeanors and remanded for resentencing. *See State v. Johnson*, 1 CA-CR 96-0248 (Ariz. App. Aug. 26, 1997) (mem. decision).

Johnson then filed a petition for post-conviction relief. He claimed his appellate counsel had been ineffective for failing to raise an issue regarding inconsistent verdicts.[1] The State filed a response and, after considering the matter, the trial court summarily dismissed the petition. Johnson did not seek review of the dismissal.

[1] The jury convicted Johnson on the aggravated assault counts and on the lesser included offenses of disorderly conduct and simple assault. Over trial counsel's objection, the trial court granted the State's motion to dismiss the convictions on the lesser-included offenses.

Johnson filed his second petition for post-conviction relief in March 2005. He claimed that he was entitled to relief based on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), because trial counsel had failed to adequately explain the plea bargain, that the dismissal of the convictions on the lesser-included offenses was reversible error, and that the *Portillo* reasonable doubt instruction given at his trial incorrectly stated the burden of proof.[2] He argued that the *Donald* claim was not precluded because *Donald* was a significant change in the law, and that the inconsistent verdict and *Portillo* claims were fundamental or structural error, and therefore not subject to preclusion.

The State filed its response and argued that all claims were precluded. The State asserted that *Donald* was not a significant change in the law, and that, even if *Donald* applied, Johnson failed to set forth a colorable claim.

[2] *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (setting forth the specific reasonable doubt instruction to be given in all criminal cases).

The trial court found the *Portillo* and inconsistent verdict claims precluded,[3] but found the *Donald* claim colorable, and set an evidentiary hearing. After the evidentiary hearing, the court found that Johnson had established his *Donald* claim, and granted relief. The State moved to reconsider on the grounds that Johnson's *Donald* claim was precluded because *Donald* was not a significant change in the law, and because the claim could have been raised in Johnson's first petition for post-conviction relief. The trial court denied the motion, and ultimately decided the appropriate remedy was a new trial.

The State petitioned this court for review. The State continues to argue that *Donald* was not a significant change in the law and that the trial court erred when it refused to find the claim was precluded and dismiss it.[4] Johnson argues that *Donald* was a significant change as it "established an as-yet unrecognized" claim.

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[3] The trial court clearly identified the issues and correctly applied preclusion. Based on this, and because of our resolution of the *Donald* claim, we deny Johnson's petition for review. *See State v. Whipple*, 177 Ariz. 272, 866 P.2d 1358 (App. 1993).

[4] Because we agree that *Donald* was not a significant change in the law and vacate the trial court's order granting relief, we need not address the other issues raised by the State.

Discussion

Arizona Rule of Criminal Procedure 32.2(a) states, in part, that a defendant "shall be precluded from relief" based upon any ground that has been waived in any previous collateral proceeding. Johnson did not raise his *Donald* claim in his first post-conviction relief proceeding, and thus it is his burden to show an exception to preclusion. Ariz. R. Crim. P. 32.2(b). Johnson relied on Rule 32.1(g), which provides an exception from Rule 32.2(a) if a claim is based on a "significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence."

Recently, the Arizona Supreme Court has considered what constitutes a significant change in the law, and explained:

> Rule 32 does not define "a significant change in the law." But plainly a "change in the law" requires some transformative event, a "'clear break' from the past." *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).
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> The archetype of such a change occurs when an appellate court overrules previously binding case law. In *Walton v. Arizona*, for example, the Supreme Court held that the Sixth Amendment does not require that a jury find the aggravating circumstances authorizing the imposition of the death penalty. 497 U.S. 639, 647-49, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). *Ring v.*

Arizona expressly overruled *Walton*. 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Thus, before *Ring*, a criminal defendant was foreclosed by *Walton* from arguing that he had a right to trial by jury on capital aggravating factors; *Ring* transformed existing Sixth Amendment law to provide for just such a right. *Ring* was thus "a significant change in the law" under Rule 32.1(g). *See State v. Towery*, 204 Ariz. 386, 390 ¶ 9, 64 P.3d 828, 832 (2003). In *Towery*, this Court therefore did not treat the Rule 32 petitions before it as precluded; rather, it addressed whether the relevant change in the law should be applied retroactively. *Id*. at 390-93 ¶¶ 10-25, 64 P.3d at 832-35. Concluding that the new rule was not retroactive, the Court denied post-conviction relief. *Id*. at 394 ¶ 31, 64 P.3d at 836; *see also Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (reaching same conclusion).

A statutory or constitutional amendment representing a definite break from prior law can also be a Rule 32.1(g) "significant change in the law." Thus, for example, when the legislature amended A.R.S. § 13-453 to allow prisoners serving life sentences to become parole-eligible after twenty years in prison, the court of appeals concluded that a defendant's Rule 32 petition was not precluded because the new statute was a change from previous law. *State v. Jensen*, 193 Ariz. 105, 107 ¶ 13, 970 P.2d 937, 939 (App. 1998). Rather than summarily rejecting the Rule 32 petition as precluded, the court of appeals considered it on the merits, eventually concluding that the legislature did not intend the amendment to

apply retroactively. *Id*. at 107-09 ¶¶ 14-22, 970 P.2d at 939-41.

Shrum contends that the court of appeals' opinion in [*State v.*] *Gonzalez*[, 216 Ariz. 11, 162 P.3d 650 (App. 2007),] was a "significant change in the law" within the purview of Rule 32.1(g) and that his second PCR petition, based on *Gonzalez*, is therefore not precluded under Rule 32.2(b). But he concedes that, unlike *Ring*, *Gonzalez* overruled no prior appellate decision. Nor does Shrum argue that § 13-604.01, the statute interpreted in *Gonzalez*, materially changed between the dates his crimes were committed and the court of appeals' opinion was issued.

Gonzalez applied no novel technique of statutory construction; it merely concluded that in enacting § 13-604.01 the legislature omitted, likely unintentionally, any provision for DCAC sentence enhancement for attempted sexual conduct with a minor under the age of twelve. 216 Ariz. at 13-15 ¶¶ 5-15, 162 P.3d at 652-54 ("[T]he plain language of § 13-604.01 does not encompass attempted sexual conduct with a victim under the age of twelve."). Nor does *Gonzalez* rest on a changed interpretation of Arizona constitutional law. In short, the law was not changed in any way by *Gonzalez*. Before that decision, § 13-604.01 contained no language expressly authorizing DCAC enhancement of sentences for attempted sexual conduct with a minor under the age of twelve. No precedent interpreted § 13-604.01 as allowing such enhancement. After *Gonzalez*, the law remained precisely the same.

> Shrum nonetheless contends that *Gonzalez* was a change in the law because "up to that that point courts had assumed that § 13-604.01 applied to all defendants sentenced for attempted sexual conduct with a minor." He does not, however, identify any appellate decisions, reported or otherwise, so holding, and we are aware of none. *Gonzalez* does not purport to overrule any prior opinion; at most, it is merely the first appellate opinion interpreting § 13-604.01 on the issue now before us.

State v. Shrum, 220 Ariz. 115, 118-21, ¶¶ 15-20, 203 P.3d 1175, 1178-81 (2009) (footnotes omitted).

Like *Gonzalez*, *Donald* did not overrule existing precedent or represent a definite break from prior law. *Donald* "is merely the first appellate opinion" to recognize that counsel's ineffective assistance which leads a defendant to make an uninformed decision to reject a plea bargain is a cognizable claim. Against the backdrop of *Shrum*, we do not find *Donald* to be a significant change in the law.

Conclusion

Because *Donald* is not a significant change in the law, Johnson's ineffective assistance of counsel claim based on *Donald* is precluded. Therefore, we vacate the trial court's order of April 14, 2006, which granted post-conviction relief, and its order for a new trial dated April 11, 2007, and remand

this matter to the superior court for dismissal of the petition for post-conviction relief.

/s/
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MAURICE PORTLEY, Presiding Judge