

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 18 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0264-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROBERT WILLIAM DUTCHER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR021173

Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert W. Dutcher

Florence
In Propria Persona

HOWARD, Chief Judge.

¶1 Petitioner Robert Dutcher seeks review of the trial court's order denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged trial counsel was ineffective in failing to communicate to him a plea

offer, which had been made while Dutcher was voluntarily absent from trial. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Dutcher has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in his absence, Dutcher was convicted of one count of sexual abuse of a minor, two counts of child molestation and six counts of sexual conduct with a minor. *State v. Dutcher*, No. 2 CA-CR 2005-0234-PR, ¶ 1 (memorandum decision filed Apr. 6, 2006). The trial court sentenced Dutcher to various prison terms, including multiple terms of life without the possibility of parole for thirty-five years. The court ordered each of the terms to be served consecutively to the term imposed for the conviction before it. Dutcher appealed and this court affirmed his convictions and sentences on appeal. *State v. Dutcher*, No. 2 CA-CR 89-0397 (memorandum decision filed Oct. 12, 1989).

¶3 Dutcher subsequently petitioned three times for post-conviction relief, arguing trial counsel had been ineffective and his sentence was illegal.¹ The trial court denied relief on each petition, as did this court on review. *State v. Dutcher*, No. 2 CA-CR 2005-0234-PR, ¶¶ 2, 5 (memorandum decision filed Apr. 6, 2006); *State v. Dutcher*, No. 2 CA-CR 2009-0316-PR, ¶¶ 2, 5 (memorandum decision filed Apr. 7, 2010); *State v. Dutcher*, No. 2 CA-CR 2010-0377-PR, ¶¶ 4, 6 (memorandum decision filed Feb. 28, 2011). Thereafter, Dutcher initiated another post-conviction proceeding, arguing in his

¹Dutcher characterized one of these petitions as a petition for a writ of habeas corpus, but the trial court properly treated it as a Rule 32 petition. *See* Ariz R. Crim. P. 32.3.

petition that the United States Supreme Court’s recent decisions in *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), constituted a significant change in the law entitling him to relief. Concluding that *Lafler* and *Frye* did not represent a significant change in the law, that Dutcher had not established a colorable claim of ineffective assistance of counsel even if they did, and that any such claim was precluded by its having been litigated in a previous proceeding, the court summarily denied relief.

¶4 On review Dutcher argues that his claim is not precluded because it was not rejected on the merits in previous proceedings, but was “procedurally barred,” and that, in any event, *Lafler* and *Frye* represent a significant change in the law entitling him to relief. First, although the trial court addressed this claim of ineffective assistance of counsel on the merits in Dutcher’s 2005 post-conviction relief proceeding, this court affirmed on the basis of preclusion. *State v. Dutcher*, No. 2 CA-CR 2005-0234-PR, ¶¶ 1, 5 (memorandum decision filed Apr. 6, 2006). But, regardless of whether the claim is precluded under Rule 32.2(a)(2), the court did not abuse its discretion in denying relief.

¶5 We agree with the trial court that the right to ineffective assistance of counsel in plea bargaining has long existed in this state,² see *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000), and that Dutcher has failed to establish counsel’s performance was deficient. The court set forth its ruling on these points in a thorough, well-reasoned minute entry, which we adopt. See *State v. Whipple*, 177 Ariz.

²A significant change in the law “requires some transformative event, a clear break from the past.” *State v. Poblete*, 227 Ariz. 537, ¶ 8, 260 P.3d 1102, 1105 (App. 2011), quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009).

272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court’s correct ruling in a written decision”). Thus, although we grant the petition for review, relief is denied.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge