

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

MAY -6 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0403-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ROBERT WILLIAM WHITE,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053547

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Robert W. White

Tucson  
In Propria Persona

ECKERSTROM, Judge.

¶1 Robert White seeks review of the trial court’s summary denial of his request to file a successive petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> We will not disturb this ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 White was convicted after a jury trial of illegally conducting an enterprise, conspiracy to possess a dangerous drug for sale, and three counts of possession of a dangerous drug for sale. He was sentenced to concurrent, presumptive prison terms, the longest of which are life terms without the possibility of parole for twenty-five years. We affirmed his convictions and sentences on appeal. *State v. White*, No. 2 CA-CR 2007-0108 (memorandum decision filed Sept. 3, 2008). White sought post-conviction relief, asserting his trial counsel had been ineffective in failing to object to purportedly improper comments made by the prosecutor and by failing to move for a mistrial. The trial court summarily denied relief, and we denied relief on review. *State v. White*, No. 2 CA-CR 2010-0049-PR (memorandum decision filed June 3, 2010).

¶3 White then filed a “motion for praecipe and leave to lodge a 2nd petition for p[ost-conviction relief],” stating that he wished to raise claims of ineffective trial, appellate, and Rule 32 counsel. He asserted, as we understand his argument, that his claims are not subject to preclusion because his attorneys’ ineffective assistance resulted in fundamental error and that he must be permitted to raise these claims in order to exhaust his state law remedies before seeking relief in federal court. The trial court

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<sup>1</sup>Although White has styled his petition as one for “special action” relief, we regard it as a petition for review pursuant to Rule 32.9(c).

denied his motion, stating White’s claims of ineffective assistance of counsel were precluded pursuant to Rule 32.2(a), and White had not “state[d] facts that would support any of the specific exceptions to preclusion of claims” listed in Rule 32.2(b). It noted White would be permitted to file successive petitions “if filed pursuant to Rule 32.1(d), (e), (f), (g), or (h).”

¶4 On review, White argues, for the first time, that his ineffective assistance of trial counsel claim is based on newly discovered evidence pursuant to Rule 32.1(e). Without explaining how the claim falls within Rule 32.1(e), he asserts he is entitled to relief under *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), because his trial counsel did not advise him properly concerning the benefits of the state’s plea offer “in comparison to the chances [of conviction] at trial and [the] consequences of being convicted.” Because White did not raise this argument below, we do not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court . . . which the defendant wishes to present” for review).

¶5 Insofar as White suggests his claims are not precluded because he must exhaust his state law remedies before seeking relief in federal court, that consideration simply is immaterial to our review. Our preclusion rules are wholly separate from federal law. *Cf. Stewart v. Smith*, 536 U.S. 856, 861 (2002) (preclusion “independent of federal law”). White’s assertion that his claims are “colorable” similarly is irrelevant. Rule

32.2(a) precludes a defendant from obtaining relief upon any ground raisable on direct appeal or in a post-trial motion, finally adjudicated, or waived on appeal or in a previous collateral proceeding—whether those grounds constitute a colorable claim or not. As the trial court correctly noted, White’s claims of ineffective assistance of trial and appellate counsel are precluded by Rule 32.2. White argued in his first petition that his trial counsel had been ineffective; all claims regarding that attorney’s performance are therefore precluded pursuant to Rule 32.2(a)(2) and (3). *See State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis omitted). Rule 32.2(a)(3) also precludes his claim of ineffective assistance of appellate counsel because he failed to raise it in his previous post-conviction proceeding. *See Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d at 526. And, although the court did not address White’s claim of ineffective assistance of Rule 32 counsel expressly, that claim is not cognizable under Rule 32. *See State v. Krum*, 183 Ariz. 288, 292 & n.5, 903 P.2d 596, 600 & n.5 (1995) (when defendant entitled to direct appeal with assistance of counsel, “there is no constitutional right to counsel or effective assistance in post-conviction proceedings” and therefore no “valid, substantive claim under Rule 32” for “ineffective assistance on a prior [post-conviction relief] petition”).

¶6 A trial court is required to dismiss a successive notice of post-conviction relief if it fails to raise a claim under Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.2(b). Thus, because White did not demonstrate to the trial court that any of his claims

are excepted from preclusion by Rule 32.2(b), the court did not abuse its discretion in denying his request to file a successive petition of post-conviction relief.

¶7 For the reasons stated, although we grant review, we deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge