

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

MAR 29 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0037-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
RAYMOND DOUGLAS ORION CARLTON,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR20050951

Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

The Brewer Law Office  
By Benjamin M. Brewer

Show Low  
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Raymond Carlton seeks review of the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

## Background

¶2 Carlton was convicted after a jury trial of first-degree murder, aggravated assault, and misconduct involving weapons. The trial court sentenced him to natural life imprisonment for the first-degree murder conviction, to be served concurrently with a fifteen-year term for the aggravated assault, and followed by a consecutive 3.75-year prison term for the weapons misconduct. We affirmed Carlton’s convictions and sentences on appeal, after modifying the court’s restitution order. *State v. Carlton*, No. 1 CA-CR 06-0977, ¶ 1 (memorandum decision filed Mar. 5, 2009).

¶3 Carlton then filed a notice of post-conviction relief, followed by a petition in which he alleged his trial counsel had been ineffective in (1) failing to object or move for a new trial in response to the prosecutor’s improper closing argument, (2) failing to request a change of judge as a matter of right, (3) failing to file a motion to suppress evidence based on allegations the police illegally had stopped the vehicle Carlton had been driving before his arrest, (4) failing to file a motion to suppress evidence based on allegations that Carlton’s arrest was illegal, and (5) failing to request a “voluntariness hearing” or otherwise challenge the admission of statements Carlton had made after his arrest. Carlton also appears to have alleged (1) the trial court erred in failing to remind the jury, as the attorneys completed their examination of each witness, that jury members were permitted to submit questions for the witness before he or she was excused, and (2) he is entitled to a new trial because *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007),

constitutes a “significant change in the law” that would have required suppression of evidence obtained when police searched his vehicle. Ariz. R. Crim. P. 32.1(g).<sup>1</sup>

¶4 Each of the above claims was identified in the opening paragraphs of Carlton’s petition and addressed in order. The last two pages of the twenty-seven page petition fell under the heading, “Other deficiencies of trial counsel are listed below; however the page limit for the [post-conviction relief petition] has been reached.” In this section of his petition, Carlton noted “any additional analysis would exceed the page limit” in Rule 32.5,<sup>2</sup> and he “move[d] the trial court to allow the filing of an amended petition”—specifically “an extended petition that extends the [twenty-five] page limit[] set forth under the Rule,” to address a list of twenty-one “additional errors that occurred in the trial court” that he identified by short phrases and references to the record.<sup>3</sup>

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<sup>1</sup>Although nominally identified as “violations of . . . Carlton’s right to effective counsel,” we agree with the trial court that these two claims appear to have been separate claims for relief, as Carlton did not identify any way counsel’s performance had been deficient with respect to these claims. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (defendant claiming ineffective assistance “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment”).

<sup>2</sup>“In Rule 32 of-right and non-capital cases, the petition [for post-conviction relief] shall not exceed [twenty-five] pages.” Ariz. R. Crim. P. 32.5.

<sup>3</sup>Most of these items alleged trial counsel’s performance had been deficient because he had not objected, on various grounds, to testimony offered by various witnesses. Also included in Carlton’s shorthand list of counsel’s “[o]ther deficiencies” were allegations that counsel had failed to conduct voir dire “or to challenge any potential jurors for cause”; to object to the admission of physical evidence, the appearance of an incarcerated witness in civilian clothes, or gestures made by the prosecutor; to cross-examine witnesses adequately; to request an instruction pursuant to Rule 404(b), Ariz. R. Evid.; or to poll the jury.

¶5 The trial court denied Carlton’s request to exceed the page limit in an amended petition, noting that Rule 32.5 “[n]ot only does . . . not provide for a waiver of the page limit” but requires a court to return a non-compliant petition to the defendant for revision. *See* Ariz. R. Crim. P. 32.5. In its order, the court directed counsel to “cases interpreting Rule 31.13(b), [Ariz. R. Crim. P.,] which establishes page limits for appellate briefs.” *See, e.g., State v. Cruz*, 175 Ariz. 395, 401, 857 P.2d 1249, 1255 (1993) (noting page limitation “induces the advocate to write tight prose, which helps his client’s cause”), *quoting Morgan v. S. Bend Cmty. Sch. Corp.*, 797 F.2d 471, 480 (7th Cir. 1986). The state responded to Carlton’s petition; his reply was limited to his argument that the state had failed to support its response with an affidavit of trial counsel, in contravention of Rule 32.6(a), and that the court “should require the [g]overnment to file supporting affidavits prior to considering said response and before [he] must file a reply.”

¶6 The trial court summarily denied Carlton’s petition, finding he had “raised no claim presenting a material issue of fact or law which would entitle him to relief under Rule 32 and that no purpose would be served by any further proceedings.” *See* Ariz. R. Crim. P. 32.6(c). In its eleven-page order, the court addressed Carlton’s first seven claims in detail and found none of them colorable. With respect to Carlton’s simply listing “[o]ther deficiencies” at the end of his petition, the court found that, had Carlton attended to “the preparation of efficient pleadings,” twenty-five pages would have provided “more than sufficient space to address additional meritorious claims for relief.”<sup>4</sup>

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<sup>4</sup>The court stated, “Counsel devoted at least [two] pages, and in several instances more, to each of the [seven] claims discussed previously” in the court’s order. This

“Without purporting to address any of those claims on the merits,” the court found them “precluded because they were not presented in the first [twenty-five] pages of the [p]etition although they easily could have been.”

### **Discussion**

¶7 In his petition for review, Carlton argues the trial court abused its discretion in denying his claims without an evidentiary hearing, “in not authorizing expansion of the page limit” so that Carlton could “raise additional issues under Rule 32,” and “in not requiring the government to comply with Rule 32.6 by providing affidavits in support of its factual claims.” We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

### **Denial of Claims without Evidentiary Hearing**

¶8 Pursuant to Rule 32.9(c), after a final decision has been entered on a petition for post-conviction relief, “any party aggrieved” may petition for appellate “review of the actions of the trial court.” A petition for review shall include the issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review,” the facts material to our consideration of those issues, and “[t]he reasons why the petition should be granted.” Ariz. R. Crim. P. 32.9(c)(1)(ii)–(iv).

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included Carlton’s claim based on *Gant*, which, as the court noted, now has been foreclosed by the Supreme Court’s decision in *Davis v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 2419, 2423-24 (2011). Even before *Davis* was decided, however, this claim was precluded by Carlton’s failure to raise it in his direct appeal, based on this court’s decision in *State v. Gant*, 213 Ariz. 446, 453, 143 P.3d 379, 386 (App. 2006) *aff’d*, *vacated*, 216 Ariz. 1, 162 P.3d 640 (2007), *aff’d*, 556 U.S. 332 (2009).

Although Carlton contends “a colorable claim was presented” below, entitling him to an evidentiary hearing, he does not challenge the court’s extensive analysis of his claims, but simply asks this court to “review the original petition for post conviction relief as it pertains to the issues of fact and law that were presented and the prejudice demonstrated as that analysis is contained therein.” But this would constitute a de novo review of Carlton’s post-conviction relief claims and, as Carlton acknowledges, our review here is limited to whether the trial court abused its discretion in summarily denying relief. Carlton fails to present any argument addressing the “reasons why” the “issues . . . decided by the trial court,” as set forth in its ruling, were an abuse of the court’s discretion. Ariz. R. Crim. P. 32.9(c)(1)(ii), (iv). He therefore has waived our review of these issues. *See State v. Diaz*, 228 Ariz. 541, ¶ 6, 269 P.3d 717, 719 (App. 2012) (issue waived by absence of argument on review “as to why” court abused discretion in dismissing petition); *State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims incorporated by reference to memoranda filed below), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002); *see also State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) (“Petitioners must strictly comply with Rule 32 or be denied relief.”); *cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on direct review).

## Denial of Request to Expand Page Limitation

¶9 Similarly, Carlton argues the trial court abused its discretion and denied him “the opportunity to fully argue and support” the issues he had listed at the end of his petition for post-conviction relief by denying his request to expand Rule 32.5’s page limitation. But he cites no authority regarding whether, or under what circumstances, a court might abuse its discretion by enforcing that rule. Instead, he argues only that “these additional issues were material and demonstrated a colorable claim existed,” and he devotes the following thirteen pages of his petition for review to argument on the merits of claims neither fairly presented to nor decided by the court.

¶10 Carlton has failed to establish the trial court abused its discretion by enforcing the page limitations for his petition for post-conviction relief, and, similarly, we will not consider the issues listed at the end of his petition below or his expanded argument on such issues in his petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”); *cf. State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995) (waiver on direct appeal; “argument must be in the body of the brief[, a] list of issues in the brief is not adequate[, n]or may the argument be in the appendix”), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996).

## **State's Failure to Attach Affidavits to Response**

¶11 Carlton also argues the trial court abused its discretion in “not requiring the state to comply with [Rule 32.6] and further in not allowing [him] to file a substantive reply.” Rule 32.6(a) provides, “Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached” to the state’s response to a petition for post-conviction relief, and Rule 32.6(b) permits a petitioner to file a reply “[w]ithin fifteen days after receipt of the response.” The state filed its response on May 5, 2011. In what Carlton styled as his “Reply,” filed on May 26, 2011, he did not reply to the state’s arguments, but instead simply stated he could not “adequately do so without the [s]tate providing supporting affidavits” for its representations of what trial counsel would say if called to testify about two of the issues Carlton had raised. He asserted the court “should require the [s]tate to file these affidavits prior to considering the response and further give [Carlton] time to reply after said affidavits are provided.”

¶12 But the trial court did not prevent Carlton from filing a substantive reply to the state’s response, as he now suggests. Carlton chose to file a half-page, two-paragraph reply objecting to the state’s failure to file affidavits, when his objection easily could have been combined with a substantive reply to the state’s argument. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838 (“[w]e strongly disapprove of defendant’s attempt to create legal issues out of his own failure to cooperate” with court’s review of issues). The court did not appear to have relied on the state’s assertions about trial counsel’s decisions, and it did not abuse its discretion in ruling without requiring the state to file affidavits in support of those assertions. *See State v. Curtis*, 185 Ariz. 112, 114, 912 P.2d 1341, 1343



(App. 1995) (no abuse of discretion in court’s summary denial under Rule 32.6(c) “without awaiting the [s]tate’s response”), *disapproved on other grounds by Stewart*, 202 Ariz. 446, ¶ 10, 46 P.3d at 1071.

**Disposition**

¶13 For the reasons stated, we grant review, but deny relief.

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

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

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

\*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.