

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 30 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0057-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MICHAEL G. SCHOTTENBAUER,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR047264

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Michael G. Schottenbauer

Buckeye
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Michael Schottenbauer 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 he had received ineffective assistance of counsel. “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). Schottenbauer has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Schottenbauer was convicted of two counts of child molestation and one count of sexual conduct with a minor under the age of fourteen. The trial court imposed mandatory, mitigated, consecutive prison terms totaling thirty-nine years. This court affirmed the convictions and sentences on appeal. *State v. Schottenbauer*, No. 2 CA-CR 95-0366 (memorandum decision filed June 11, 1996). We subsequently denied relief on his petition for review of the trial court’s denial of his first petition for post-conviction relief. *State v. Schottenbauer*, No. 2 CA-CR 97-0328-PR (memorandum decision filed Apr. 30, 1998). And we denied his petition for review in his second post-conviction relief proceeding, based on his failure to comply with Rule 32.9. *State v. Schottenbauer*, No. 2 CA-CR 2010-0234-PR (order issued Sept. 7, 2010).

¶3 Schottenbauer then initiated a third post-conviction-relief proceeding, and appointed counsel filed a notice stating he had reviewed the record and “was unable to find any claims for relief to raise in Rule 32 post-conviction proceedings that [Schottenbauer] wished to pursue.” In a pro-se petition for post-conviction relief, Schottenbauer cited *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) and *Missouri*

v. Frye, ___ U.S. ___, 132 S. Ct. 1399 (2012), and argued he had received ineffective assistance of counsel, claiming trial counsel had “failed to advise [him] of [the] improbability of acquittal or [the] benefits of accepting the [s]tate’s plea offer with [a] reduced sentence.” The trial court found Schottenbauer’s claims precluded and summarily denied relief.

¶4 On review, Schottenbauer maintains the trial court abused its discretion in denying relief because his claims were presented pursuant to Rule 32.1(g), based on a significant change in the law, and therefore were not precluded. But, although Schottenbauer cited newly decided cases—*Lafler* and *Frye*—in his petition for post-conviction relief, he did not cite Rule 32.1(g) or address whether these cases would apply to his long-final convictions. It was only in his reply to the state’s response to his petition that he clarified he was seeking relief pursuant to Rule 32.1(g). *Cf. State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052, 1054 (App. 2009) (trial court need not consider claims of ineffective assistance of counsel first raised in petitioner’s reply).

¶5 In any event, any such claim of ineffective assistance of counsel is precluded because it has long been the law in Arizona that a defendant is entitled to effective representation in the plea context, *see State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000), and this issue could have been raised in Schottenbauer’s last post-conviction proceeding, *see Ariz. R. Crim. P. 32.1(g), 32.2(a)*. *See also State v. Poblete*, 227 Ariz. 537, ¶ 8, 260 P.3d 1102, 1105 (App. 2011) (significant change in law “requires some transformative event, a clear break from the

past”), quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009).

Therefore, although we grant the petition for review, we deny relief.

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge