

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

SEP 16 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                        |   |                            |
|------------------------|---|----------------------------|
| THE STATE OF ARIZONA,  | ) | 2 CA-CR 2013-0073-PR       |
|                        | ) | DEPARTMENT B               |
| Respondent,            | ) |                            |
|                        | ) | <u>MEMORANDUM DECISION</u> |
| v.                     | ) | Not for Publication        |
|                        | ) | Rule 111, Rules of         |
| ROBERT CARRASCO GAMEZ, | ) | the Supreme Court          |
|                        | ) |                            |
| Petitioner.            | ) |                            |
| _____                  | ) |                            |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20020991

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Robert Carrasco Gamez

Florence  
In Propria Persona

ECKERSTROM, Judge.

¶1 Following a jury trial, petitioner Robert Gamez was convicted of two counts each of attempted first-degree murder, aggravated assault with a deadly weapon, and endangerment. The trial court sentenced him to aggravated, concurrent and consecutive prison terms totaling forty-six years. We affirmed the convictions and

sentences on appeal,<sup>1</sup> *State v. Gamez*, No. 2 CA-CR 2003-0201 (memorandum decision filed Feb. 28, 2006), and denied relief on Gamez’s petition for review from the court’s denial of his second petition for post-conviction relief, *State v. Gamez*, No. 2 CA-CR 2011-0308-PR (memorandum decision filed Jan. 27, 2012).<sup>2</sup> After Gamez filed a pro se notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., appointed counsel filed a notice advising the court he “could find no issues that could be raised” in a petition for post-conviction relief.<sup>3</sup> Gamez then filed a pro se petition, which the court dismissed without holding an evidentiary hearing. Gamez now seeks review of that ruling. “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). We find no such abuse here.

¶2 On review, Gamez raises several claims, summarized as follows: (1) actual innocence; (2) significant change in the law; (3) trial court error; (4) newly discovered evidence; (5) ineffective assistance of trial and first Rule 32 counsel, and; (6) prosecutorial misconduct. Asserting he is disadvantaged because he is a pro se litigant,

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<sup>1</sup>We initially affirmed Gamez’s convictions, but vacated his sentences and remanded for resentencing. *State v. Gamez*, No. 2 CA-CR 2003-0201 ¶ 1 (memorandum decision filed Apr. 28, 2005). However, after our supreme court granted the state’s petition for review and remanded the case to us for reconsideration, *State v. Gamez*, No. CR-05-0204-PR (Ariz. Jan. 4, 2006), we vacated our prior decision and affirmed Gamez’s convictions and sentences. *State v. Gamez*, No. 2 CA-CR 2003-0201 ¶ 2 (memorandum decision filed Feb. 28, 2006).

<sup>2</sup>In 2008, the trial court dismissed Gamez’s first petition for post-conviction relief.

<sup>3</sup>Although counsel referred to this as Gamez’s fourth post-conviction proceeding, it appears to be his third such proceeding.

Gamez asks that we vacate his sentence and remand for new trial; remand for an evidentiary hearing; and order “additional funding to conduct additional testing.”<sup>4</sup>

¶3 In its minute entry ruling dismissing Gamez’s petition, the trial court identified and addressed the claims he had raised, resolving them in a manner that has permitted review by this court. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). The record before us supports the trial court’s ruling.<sup>5</sup> Consequently, we adopt the court’s ruling, finding no purpose would be served by restating it in its entirety here. *See id.* In addition, although the court found Gamez’s claim of ineffective assistance of Rule 32 counsel precluded because he could have filed it in his second petition, we additionally note that a non-pleading defendant has no constitutional right to counsel or effective assistance in post-conviction proceedings. *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). And, to the extent Gamez intended to raise a claim of ineffective assistance of trial counsel, a claim the court did not address, any such claim would be precluded. Gamez could have, and in fact did, raise such a claim in an earlier petition. *See Swoopes*, 216 Ariz. 390, ¶ 25, 166 P.3d at 953, *quoting State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002) (“[S]uccessive [ineffective assistance of counsel] claims ‘will be deemed waived and precluded’ not only when they

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<sup>4</sup>Gamez also asks that we review his “motion for special action” for which we declined to accept jurisdiction on March 6, 2013. Because our ruling is not part of the trial court’s ruling on the petition for post-conviction relief, the only ruling before us on review, we do not address it. *See Ariz. R. Crim. P. 32.9(c)*.

<sup>5</sup>Although it does not affect our ruling, we note that the trial court appears to mistakenly have written “2001” instead of “2011” in its discussion of Newly Discovered Evidence on page five of its ruling.

previously were raised, but also when they ‘could have been raised’ in a prior Rule 32 proceeding.”).

¶4 Although we grant the petition for review, we deny relief.

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

CONCURRING:

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

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