

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ERIC CHRISTOPHER NICODEMO DELUCA  
FORMERLY KNOWN AS ERIC CHRISTOPHER DEGRAAF,  
*Petitioner.*

No. 2 CA-CR 2014-0319-PR  
Filed November 24, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Yavapai County  
No. V1300CR9980244  
The Honorable Michael R. Bluff, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Sheila Sullivan Polk, Yavapai County Attorney  
By Michael P. McGill, Deputy County Attorney, Prescott  
*Counsel for Respondent*

Eric C. Deluca, Buckeye  
*In Propria Persona*

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**MEMORANDUM DECISION**

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

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M I L L E R, Presiding Judge:

¶1 Petitioner Eric DeLuca<sup>1</sup> seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "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). DeLuca has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in 2000, DeLuca was convicted of manslaughter, two counts of aggravated assault, criminal damage, and aggravated driving under the influence (DUI). The trial court imposed enhanced, aggravated, concurrent and consecutive sentences, totaling thirty-one years' imprisonment. The convictions and sentences were affirmed on appeal. *State v. DeGraaf*, No. 1 CA-CR 00-0436 (memorandum decision filed July 31, 2001). DeLuca sought and was denied post-conviction relief in 2002, and the petition for review was denied in 2003.

¶3 In 2012, DeLuca filed a second notice of post-conviction relief, arguing in his petition that he was entitled to relief under Rule 32.1 (e), (f), and (g), and because he had received ineffective assistance of counsel. The trial court summarily denied relief in March 2013.

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<sup>1</sup>DeLuca was formerly known as, and appealed as, Eric Christopher DeGraaf. He later legally changed his name and the trial court amended the caption in this matter accordingly.

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¶4 Thereafter, DeLuca filed a third notice of post-conviction relief and a document entitled “Notice of Post Conviction Relief Form and Supporting Reasons and Substance of Each Specific Exception,” in which he again asserted he had received ineffective assistance of trial and appellate counsel; claimed he was entitled to relief based on a significant change in the law, specifically the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); alleged the trial court had improperly imposed consecutive sentences; and asserted he was without fault in “fail[ing] to timely file [his] Notice” of post-conviction relief. The court summarily dismissed DeLuca’s notice, noting the claims were “not new claims,” but previously had been raised and denied.

¶5 On review, DeLuca contends that even if his notice of post-conviction relief was deficient under Rule 32.2(b), the trial court should not have dismissed the document he subsequently filed in which he set forth the substance of his claims. He reasserts his claims made below, and contends the court should not have dismissed his notice.

¶6 DeLuca also challenges the trial court’s actions in his previous proceeding, and contends that the issues raised in his third notice were not fully litigated in that proceeding based on the court’s errors therein, preventing the preclusion of issues raised again in his third proceeding. But had DeLuca wished to challenge the trial court’s rulings in or handling of his second proceeding for post-conviction relief, he could only do so by way of a petition for review to this court from the court’s ruling in that proceeding. *See* Ariz. R. Crim. P. 32.9(c).

¶7 As to the current, successive proceeding, which was initiated ten years after the mandate issued on his appeal and was therefore untimely, *see* Ariz. R. Crim. P. 32.4(a), we cannot say the trial court abused its discretion in dismissing DeLuca’s notice.<sup>2</sup>

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<sup>2</sup>DeLuca argues that although Rule 32.2(b) allows a trial court to dismiss a notice based on a petitioner’s failure to comply with that rule’s requirements, the rule does not allow the court to dismiss a subsequent petition for post-conviction relief. But Rule 32 does not

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Pursuant to Rule 32.4, only claims under Rule 32.1(d), (e), (f), (g), or (h) may be raised in an untimely proceeding for post-conviction relief such as this one. Thus, DeLuca's claims of ineffective assistance of counsel, which arise under Rule 32.1(a), cannot now be raised. Likewise, his claims that he was improperly sentenced to consecutive rather than concurrent prison terms cannot be raised, as such claims also arise under Rule 32.1(a).

¶8 As noted above, DeLuca asserted that his claim based on *Apprendi* was exempt from the timeliness requirements and rules of preclusion as a significant change in the law.<sup>3</sup> See Ariz. R. Crim. P. 32.1(g). But, although claims made pursuant to Rule 32.1(g) may be exempt from preclusion and timeliness requirements, DeLuca's claim was raised and conclusively adjudicated by the court's dismissal of the previous proceeding, and, as noted above, he did not seek review of that decision. The claim is therefore barred by res judicata.<sup>4</sup> See *State v. Little*, 87 Ariz. 295, 304, 350 P.2d 756, 761-62 (1960) (doctrine of res judicata generally applies in criminal cases).

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provide for the filing of a petition in the absence of a valid notice of post-conviction relief or after a notice has been dismissed. See Ariz. R. Crim. P. 32.4(a), (c)(2).

<sup>3</sup>Although this court denied DeLuca's motion to amend his petition for review, which was filed after the state had filed its response, DeLuca therein abandoned his claims pursuant to Rule 32.1(e), (f), and (g).

<sup>4</sup>In DeLuca's second proceeding for post-conviction relief, he filed a notice of post-conviction relief on April 25, 2012, and the court ultimately gave him until January 21, 2013 to file his petition. On January 9, the state filed an objection to another request for extension filed by DeLuca and in that motion also asked for summary dismissal of the proceeding. The court denied DeLuca's request for an extension of time and "note[d]" that the state's motion was "pending." DeLuca thereafter filed his petition for post-conviction relief.

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¶9 For these reasons, although we grant the petition for review, we deny relief.