

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

CARL EDWARD LANE,  
*Petitioner.*

No. 2 CA-CR 2015-0062-PR  
Filed June 4, 2015

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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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Pima County

No. CR20072360

The Honorable Howard Fell, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Law Offices of Thomas E. Higgins, P.L.L.C., Tucson  
By Thomas E. Higgins  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Brammer<sup>1</sup> concurred.

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V Á S Q U E Z, Judge:

¶1 Carl Lane 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 that ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Lane has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Lane was convicted of continuous sexual abuse of a child under the age of twelve, commercial sexual exploitation of a minor under the age of twelve, sexual exploitation of a minor under the age of fifteen, and sexual conduct with a minor under the age of fifteen. On appeal, we vacated his conviction and sentence for commercial sexual exploitation, as well as his remaining sentences. *State v. Lane*, No. 2 CA-CR 2008-0283 (memorandum decision filed Aug. 13, 2009). He then was resentenced to consecutive prison terms totaling sixty years. We affirmed those sentences on appeal, modifying the restitution award. *State v. Lane*, No. 2 CA-CR 2010-0162 (memorandum decision filed Mar. 23, 2011).

¶3 Following our decision in his first appeal, Lane filed a notice of post-conviction relief. In August 2010, appointed counsel filed a notice stating he had reviewed the record but had found no claims for relief to raise in a Rule 32 proceeding. Despite being granted numerous extensions, Lane did not file a pro se petition.

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<sup>1</sup>The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

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¶4 In June 2011, through counsel assigned for resentencing, Lane filed a notice of post-conviction relief. The trial court appointed counsel in “this newly raised Rule 32 issue proceeding.” Through assigned counsel, Lane filed a petition for post-conviction relief in March 2014, raising various claims of ineffective assistance of trial counsel, including the failure to properly investigate his case or make certain objections during trial. Lane did not claim in that petition that counsel had been ineffective at resentencing. The court rejected those claims after an evidentiary hearing. This petition for review followed.

¶5 On review, Lane repeats his claims of ineffective assistance of trial counsel. We need not address the merits of these claims, however, because they could not properly be raised in this post-conviction proceeding. A post-conviction “proceeding is commenced by timely filing a notice of post-conviction relief.” Ariz. R. Crim. P. 32.4(a). Lane began such a proceeding following our decision in his first appeal, but he did not file a pro se petition after appointed counsel determined there were no issues to raise. Then, following our decision on his appeal after resentencing, Lane began a second Rule 32 proceeding for which new counsel was appointed.

¶6 As to the convictions affirmed in his first appeal, Lane’s second notice of post-conviction relief was untimely and, thus, he was not permitted to raise a claim of ineffective assistance of trial counsel pursuant to Rule 32.1(a). *See* Ariz. R. Crim. P. 32.1, 32.4(a); *see also* Ariz. R. Crim. P. 32.2(a) (governing preclusion of claims); *State v. Rosales*, 205 Ariz. 86, ¶ 8, 66 P.3d 1263, 1266 (App. 2003) (ineffective assistance of counsel claim at resentencing is “separate claim” that must “be litigated in a different Rule 32 proceeding initiated by filing a separate notice of post-conviction relief”). Lane was required to raise these claims in his first Rule 32 proceeding by filing a pro se petition as directed by the trial court. He has not done so.

¶7 Nor can we reasonably conclude the trial court implicitly consolidated Lane’s pending first post-conviction proceeding with his second. When it assigned counsel after Lane filed his second notice, the court expressly noted it was a new

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proceeding.<sup>2</sup> And, although the court reached the merits of Lane's claims, we may deny relief on a basis not considered by the court below. *See State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007) (appellate court must uphold correct ruling for any reason supported by record); *see also* Ariz. R. Crim. P. 32.2(c) ("[A]ny court on review of the record may determine and hold that an issue is precluded.").

¶8           Although we grant review, we deny relief.

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<sup>2</sup>At a status conference, counsel in the second proceeding stated that he intended to "supplement . . . anything that [Lane had] previously filed" in his "pro se Rule 32." It is not clear to what counsel was referring – Lane had not filed a pro se petition and both of his notices had been filed through counsel. And, even had Lane filed a pro se petition in either proceeding, nothing in our rules permits a supplemental filing absent a showing of good cause, which is absent here. *See* Ariz. R. Crim. P. 32.6(d). In any event, hybrid representation is discouraged. *See State v. Dixon*, 226 Ariz. 545, ¶¶ 38-39, 250 P.3d 1174, 1182 (2011).