IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN DONALD WOMACK,
Petitioner.

No. 2 CA-CR 2017-0084-PR
Filed June 8, 2017

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Pima County
No. CR038184
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

John D. Womack, Florence
In Propria Persona

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 John Womack seeks review of the trial court's order summarily dismissing his untimely, successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 In 1992, Womack was convicted of three counts of sexual conduct with a minor and sentenced to minimum, consecutive, fifteen-year prison terms. We affirmed his convictions and sentences and, after review, denied relief on the ineffective assistance claim he raised in his first petition for post-conviction relief. *State v. Womack*, Nos. 2 CA-CR 92-1026, 2 CA-CR 94-0189-PR (Ariz. App. Dec. 20, 1994) (consol. mem. decision).

¶3 In his most recent successive petition for post-conviction relief, he alleged the Supreme Court's decisions in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), considered in combination, constitute a "significant change in law that if determined to apply to [his] case would probably overturn" his conviction or sentence. Ariz. R. Crim. P. 32.1(g). As summarized in the trial court's order, Womack maintained that *Montgomery* required the court to give retroactive effect to the rule in *Apprendi*. The court correctly identified several reasons why neither opinion, alone or in combination, would apply to afford relief in Womack's case.

¶4 On review, Womack reasserts his claims and argues the trial court mistakenly relied on *State v. Sepulveda*, 201 Ariz. 158, ¶¶ 4-8, 32 P.3d 1085, 1086-88 (App. 2001), to explain that Arizona courts had employed the analysis in *Teague v. Lane*, 489 U.S. 288 (1989)

(O'Connor, J., plurality opinion)—the same analysis the Supreme Court followed in *Montgomery*—to conclude the rule announced in *Apprendi* has no application to convictions that have become final, as Womack's has. [1] Womack asserts *Montgomery*, a 2016 case, "invalidated" *Sepulveda* and "makes *Apprendi* retroactive to [his] case."

¶5 We review a trial court's summary dismissal, based on the lack of a colorable claim, for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. Nothing in *Montgomery* alters the *Teague* retroactivity analysis in *Sepulveda*. *See Montgomery*, ___ U.S. at ___, 136 S. Ct. at 728 (absent specific exceptions, "[u]nder *Teague*, a new constitutional rule of criminal procedure does not apply . . . to convictions that were final when the new rule was announced"); *see also Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) ("[r]ules that allocate decision making authority," such as those "requiring that a jury rather than a judge find the essential facts bearing on punishment," "are prototypical procedural rules").

¶6 The trial court clearly identified, thoroughly addressed, and correctly resolved this and other arguments Womack raised in his petition for post-conviction relief, and properly dismissed that petition for his failure to state a colorable claim. We need not repeat the court's analysis here; instead, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Accordingly, we grant review, but we deny relief.

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[1]In *Apprendi*, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. As the trial court also explained, this proposition would have no application to Womack, who received a mitigated sentence and who relies on *Apprendi* to contend his indictment was "unconstitutionally defective," a claim that appears to have been raised and rejected in Womack's direct appeal. *See Womack*, Nos. 2 CA-CR 92-1026 & 94-0189-PR, 2.