

APPENDIX A

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

ANDRE ALMOND DENNISON, *Petitioner*.

No. 1 CA-CR 16-0616 PRPC
FILED 12-7-2017

Petition for Review from the Superior Court in Maricopa County
No. CR1997-002770
The Honorable Christopher A. Coury, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Andre Almond Dennison, Florence
Petitioner

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop, Judge Diane M. Johnsen and Judge
Maria Elena Cruz delivered the decision of the Court.

STATE v. DENNISON
Decision of the Court

PER CURIAM:

¶1 Petitioner Andre Almond Dennison seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is petitioner's fourth petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not established an abuse of discretion.

¶4 For the foregoing reasons, we grant review and deny relief.

APPENDIX B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-002770

06/21/2016

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT

N. McKinney

Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

ANDRE ALMOND DENNISON (A)

ANDRE ALMOND DENNISON
#143931 ASPC EYMAN COOK UNIT
P O BOX 3200
FLORENCE AZ 85132
LORILL VOEPEL

COURT ADMIN-CRIMINAL-PCR
RULE 32 UNIT COUNSEL

RULE 32 PROCEEDING DISMISSED

Pending before the Court are the following submissions from Defendant filed on May 10, 2016: (1) "Motion for Relief from a Judgment or a Proceeding Pursuant to A.R.Civ.P. 60," (2) "Motion for Leave to Exceed Page Limit," and (3) "Motion Receipt Confirmation." The Court deems Item #1 a Notice of Post-Conviction Relief, and advises Defendant that Rule 60 is a Rule of Civil Procedure irrelevant to this criminal case. This is Defendant's fourth Rule 32 proceeding and it is successive.

Defendant was convicted after a bench trial of two counts of sexual conduct with a minor, both class 2 felonies and dangerous crimes against children, and one count of attempted sexual conduct with a minor, a class 3 felony and a dangerous crime against children. (Motion Ex. G) The offenses were committed between September 1, 1996 and March 4, 1997. (*Id.*) The victim was 5 years old. (Motion Ex. E Interview at 2) On April 27, 1999, the Court entered judgment and sentenced Defendant to two consecutive 20-year terms of imprisonment for the sexual conduct with a minor counts. (Motion Ex. G) In addition, the Court suspended imposition of sentence and placed Defendant on a lifetime term of probation commencing upon his release from the Arizona Department of Corrections for the attempted sexual conduct with a minor

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count. The Arizona Court of Appeals affirmed Defendant's convictions and sentences, issuing its order and mandate on February 6, 2001. (Motion Ex. K)

A. Sentencing Issues

In his current submission, Defendant contends that the lifetime probation term constituted an illegal sentence in violation of Arizona Rule of Criminal Procedure 32.1(c). Further, he claims relief under Arizona Rule of Criminal Procedure 32.1(a) because the sentence violated his rights under Article 2, Sections 3 and 4 and Article 6, Section 14(4) of the Arizona Constitution, as well as the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (Motion at 14) As Defendant points out, the Arizona Supreme Court ruled in *State v. Peek* that lifetime probation was not available for persons convicted of attempted child molestation on or between January 1, 1994 and July 21, 1997, the effective date of amendment to A.R.S. § 13-902(E). 219 Ariz. 182, 195 P.3d 641 (2008). *See State v. Dean*, 226 Ariz. 47, 49, ¶ 1, 243 P.3d 1029, 1031 (Ct. App. 2010). Because Defendant's crimes occurred during the *Peek* period, he argues that the maximum probation term was five years, not lifetime probation. (Motion at 13)

Similarly, Defendant relies upon *State v. Gonzalez*, arguing that the Court misapplied A.R.S. § 13-604.01. 216 Ariz. 11, 162 P.3d 650 (App. 2007). (Motion at 17) According to Defendant, he is entitled to be resentenced. In *Gonzalez*, the Arizona Court of Appeals held that former A.R.S. § 13-604.01 omitted any sentencing enhancements for attempted sexual conduct with a minor under the age of 12. *Id.* at 13-15, ¶¶ 5-15, 162 P.3d at 652-54. As *Gonzalez* recognizes, statutory sentencing enhancements did exist for defendants who committed attempted sexual conduct with a minor under 15, but made no provision for enhancing the offense when committed with minors under 12. *Id.* at 13, ¶¶ 7-8, 162 P.3d at 652.

The problem is that Defendant already raised these arguments in his third Rule 32 proceeding, and the Court dismissed the proceeding in an order filed on June 4, 2009. The Arizona Court of Appeals then denied review. That decision is final. Defendant cannot raise these arguments again in a successive Rule 32 proceeding because a successive notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). *See Ariz. R. Crim. P. 32.4(a)*. The Rule 32.1(c) and Rule 32.1(a) claims the defendant is asserting must be asserted in a timely Rule 32 proceeding. Furthermore, Defendant is precluded from raising claims previously raised in a Rule 32 proceeding. *See Ariz. R. Crim. P. 32.2(a)(2)*.

Importantly, the Arizona Supreme Court has held in *State v. Shrum* that a defendant could not assert a sentencing error under *Gonzalez* in a second post-conviction relief proceeding and rejected the defendant's argument that *Gonzalez* was actually a significant change in the law qualifying the defendant for relief under Arizona Rule of Criminal Procedure 32.1(g). *See State v. Shrum*, 220 Ariz. 115, 120, ¶ 23, 203 P.3d 1175, 1180 (2009). Because *Gonzalez* does not

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supply a basis for Rule 32.1(g) relief, the relief requested in the *Shrum* defendant's second Rule 32 proceeding "was therefore precluded under Rule 32.2(a), and the superior court erred in granting post-conviction relief." *Id.* Likewise, Defendant's request for Rule 32.1(c) and Rule 32.1(a) relief is precluded in this fourth Rule 32 proceeding. *See id; see generally State v. Swoopes*, 216 Ariz. 390, 403, ¶ 42, 166 P.3d 945, 958 (App. 2007) (holding that fundamental error is not exempt from preclusion under Rule 32).

Alternatively, Defendant contends that his two consecutive prison sentences constitute an excessive, illegal, and unconstitutional punishment resulting in a miscarriage of justice. (Motion at 18-19) According to Defendant, the Court should have opted for concurrent terms when sentencing for the two sexual misconduct offenses. The Court disagrees. As a threshold matter, this constitutional claim is barred because it arises under Rule 32.1(a) and was raised on direct appeal. *See Ariz. R. Crim. P. 32.2(a)(2).* Furthermore, the claim fails on the merits. In *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), the Arizona Supreme Court reversed an aggregate 52-year sentence for multiple counts of sexual misconduct with a minor for a 19-year-old who had engaged in conduct with two willing 13-year-olds. *Davis* distinguished other cases in which sizable sentences were imposed for rape. *Id.* at 386-87, ¶¶ 42-43, 79 P.3d at 73-74. In this case, Defendant was in his early twenties at the time of his offenses, and the victim was 5 years old. The Arizona Court of Appeals affirmed Defendant's convictions and sentences. This Court finds Defendant's case readily distinguishable from *Davis*.

B. Ineffective Assistance and Insufficient Evidence

Defendant also resurrects his ineffective assistance of claim against trial counsel and asserts that there was insufficient evidence to support his convictions. Again, he cannot raise these Rule 32.1(a) claims in a successive Rule 32 proceeding because a successive notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). *See Ariz. R. Crim. P. 32.4(a); see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are "cognizable under Rule 32.1(a)"). The Rule 32.1(a) claims the defendant raised must be asserted in a timely Rule 32 proceeding. Furthermore, the ineffective assistance claim is barred because Defendant raised it in prior Rule 32 proceeding. *See Ariz. R. Crim. P. 32.2(a)(2).* Likewise, the sufficiency of the evidence claim is barred because Defendant raised it on appeal. *See id.*

C. Significant Changes in the Law

Alternatively, Defendant contends that *Cunningham v. California* constitutes a significant change in the law which, if applied retroactively to his case, would probably overturn his convictions or sentences under Arizona Rule of Criminal Procedure 32.1(g). 549 U.S. 270 (2007). (Motion at 6) In *Cunningham*, the United States Supreme Court held that California's

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sentencing laws, which permitted a judge rather than a jury to find facts that exposed the defendant to a sentence above the statutory maximum, violated the defendant's right to trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution. *Id.* at 274. The *Cunningham* court invalidated California's statutory scheme for the same reason it found Washington's sentencing scheme constitutionally infirm in *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004). *See Cunningham*, 549 U.S. at 288 ("In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum.").

Defendant contends that the Court unlawfully aggravated his sentence pursuant to A.R.S. § 13-702 in violation of *Cunningham*. This claim substantially duplicates the argument rejected in Defendant's last Rule 32 proceeding. Although this claim is not precluded as untimely, *see Ariz. R. Crim. P. 32.2(b)*, it nevertheless lacks merit. As this Court previously held, Defendant's sentence became final before the United States Supreme Court decided *Blakely* or *Cunningham*. For reasons explained in the June 4, 2009 ruling, the Court is not persuaded that *Cunningham* applies retroactively to Defendant's case.

Equally unavailing is Defendant's claim that his sentence is contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The United States Supreme Court held that any fact that increases the penalty beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to jury and proven beyond a reasonable doubt. *Id.* at 491-92. Because Defendant received two presumptive terms, *Apprendi* does not apply.

In sum, Defendant's submission does not state any claims for which Rule 32 can provide relief. When a notice is successive, the defendant has the burden of alleging substantive claims, supporting those claims with specific facts, and adequately explaining why the claims are untimely. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet that burden. The Court finds that no purpose would be served by further proceedings or appointment of counsel.

Good cause appearing,

IT IS ORDERED dismissing Defendant's "Motion for Relief from a Judgment or a Proceeding Pursuant to A.R.Civ.P. 60," which the Court deems a Notice of Post-Conviction Relief, pursuant to Rule 32.2(b) of the Arizona Rules of Criminal Procedure.

APPENDIX C



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

June 12, 2018

RE: STATE OF ARIZONA v ANDRE ALMOND DENNISON
Arizona Supreme Court No. CR-18-0014-PR
Court of Appeals, Division One No. 1 CA-CR 16-0616 PRPC
Maricopa County Superior Court No. CR1997-002770

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 12, 2018, in regard to the above-referenced cause:

ORDERED: Petition for Review of the Decision from the Arizona Court of Appeals, Division 1 = DENIED.

A panel composed of Justice Timmer, Justice Bolick, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

TO:

Joseph T Maziarz
Diane Meloche
Andre Almond Dennison, ADOC 143931, Arizona State Prison,
Florence - Eyman Complex-SMU #1 Unit
Amy M Wood
gs

**Additional material
from this filing is
available in the
Clerk's Office.**