

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MICHAEL EDWARD FINCK,  
*Petitioner.*

No. 2 CA-CR 2014-0239-PR  
Filed October 6, 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NOT FOR PUBLICATION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 Pima County

No. CR20103802002

The Honorable Casey F. McGinley, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barton & Storts, P.C., Tucson  
By Brick P. Storts, III  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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ECKERSTROM, Chief Judge:

¶1 Petitioner Michael Finck 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). Finck has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, at which he represented himself, Finck was convicted of four counts of third-degree burglary and one count each of possession of burglary tools, criminal damage, and attempted theft by control. The trial court imposed enhanced, maximum, concurrent prison terms, the longest of which is twelve years. This court affirmed Finck’s convictions on appeal, vacated a criminal restitution order that had been entered, and otherwise affirmed Finck’s sentences. *State v. Finck*, No. 2 CA-CR 2012-0186 (memorandum decision filed Dec. 5, 2013).

¶3 Finck initiated a proceeding for post-conviction relief, arguing in his petition that he was entitled to post-conviction relief on the ground that his advisory counsel had been ineffective.<sup>1</sup>

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<sup>1</sup>During the pendency of his appeal, Finck apparently filed a pro se notice of and petition for post-conviction relief. This court denied the motion to stay. The trial court considered only the petition filed by counsel, noting that Finck was not entitled to hybrid representation. Finck has not argued the court’s consideration of counsel’s petition was in error, and we therefore likewise also consider that petition without further discussion of the pro se filing.

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Relying on *State v. Russell*, the trial court summarily denied relief, concluding Finck had no constitutional right to challenge the effectiveness of his advisory counsel. 175 Ariz. 529, 534-35, 858 P.2d 674, 679-80 (App. 1993).

¶4 On review, Finck again argues he is entitled to relief based on ineffective assistance of advisory counsel and asserts the trial court “[e]rrred when it [r]uled” otherwise. We agree with the trial court, however, that ineffective assistance of advisory counsel is not a cognizable claim under Rule 32. *Russell*, 175 Ariz. at 531, 534-35, 858 P.2d at 676, 679-80.

¶5 Finck maintains that unlike the defendant in *Russell*, he requested that advisory counsel be replaced at trial. But, nothing in *Russell* suggested that the defendant had waived a claim of ineffective assistance; rather the court rejected the claim because the state’s provision of advisory counsel exceeded what was required by the constitution and the defendant therefore had “no constitutionally protected right to challenge the advice or services provided by advisory counsel.” *Id.* at 534, 858 P.2d at 679.

¶6 Finck also apparently suggests that this court’s citation to *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), in our appellate decision suggests that a claim of ineffective assistance of advisory counsel may validly be raised in Rule 32 proceedings. But, we also relied on *Russell* in reaching our conclusion that such a claim could not be raised, thereby rejecting the claim both as one that was not cognizable on appeal and one that lacked a valid constitutional basis.

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*See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “the reasons why the petition should be granted” and “specific references to the record”); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

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¶7 To the extent Finck also contends the trial court's denial of his request during trial for new advisory counsel was error and "rendered [his] waiver of counsel involuntary," any such argument is precluded. Appointment of advisory counsel for a defendant who has exercised his constitutional right to represent himself is discretionary under Rule 6.1(c), Ariz. R. Crim. P. *State v. Gonzales*, 181 Ariz. 502, 510, 892 P.2d 838, 846 (1995); *see also Locks v. Sumner*, 703 F.2d 403, 407-08 (9th Cir. 1983) (no constitutional right to advisory counsel; whether to appoint rests in trial court's discretion). A challenge to the court's exercise of such discretion is raisable on appeal, and is therefore now precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶8 For these reasons, we grant the petition for review, but deny relief.