

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MICHAEL RAY LYNAM,  
*Petitioner.*

No. 2 CA-CR 2014-0275-PR  
Filed October 30, 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NOT FOR PUBLICATION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 Cochise County

No. CR200800661

The Honorable Wallace R. Hoggatt, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Michael R. Lynam, San Luis  
*In Propria Persona*

STATE v. LYNAM  
Decision of the Court

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**MEMORANDUM DECISION**

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

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ESPINOSA, Judge:

¶1 Michael Lynam seeks review of the trial court's order summarily denying his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Lynam has not met his burden of establishing such abuse here.

¶2 After a jury trial, Lynam was convicted of transportation of methamphetamine for sale, four counts of possession of a deadly weapon while committing a felony drug offense, three counts of possession of drug paraphernalia, and possession of marijuana. He was sentenced to concurrent and consecutive prison terms totaling 12.5 years. We affirmed his convictions and sentences on appeal. *State v. Lynam*, No. 2 CA-CR 2009-0130 (memorandum decision filed Mar. 9, 2010).

¶3 Lynam sought post-conviction relief, and appointed counsel filed a petition claiming the trial court had erred in imposing consecutive sentences and trial and appellate counsel had been ineffective for failing to raise that argument. The trial court summarily denied relief, and Lynam did not seek review of that ruling.

¶4 Lynam filed a second notice of post-conviction relief claiming newly discovered evidence, and the trial court again appointed counsel. Counsel filed a notice of completion stating she had reviewed the record but found no "tenable issue to submit . . . pursuant to [Rule 32]." Lynam then filed a pro se petition raising six claims: (1) there was newly discovered evidence of his counsel's

STATE v. LYNAM  
Decision of the Court

conduct, asserting counsel had “changed [the] agreed upon defense strategy” without notifying him, “which also created a prejudice against [him] at sentencing”; (2) there was newly discovered evidence he had been interviewed by a detective without “defense counsel[']s knowledge or permission” in violation of his due process rights; (3) that, pursuant to *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012), he was permitted to raise a claim that his Rule 32 counsel had been ineffective for failing to raise certain claims, specifically for failing to raise the fourth and fifth grounds for relief in his petition; (4) that his sentence was improper because the court did not “use the statutory mitigators as opposed to the statutory aggravators”; (5) that he would have accepted the plea agreement had he known counsel “was not going to present any witnesses or evidence on his behalf”; and (6) that the court should clarify that he had not received a flat-time sentence. The trial court summarily denied relief, as well as Lynam’s subsequent motion for reconsideration. This petition for review followed.

¶5 In rejecting Lynam’s third claim, the trial court determined that a claim of ineffective assistance of Rule 32 counsel was not cognizable under Rule 32, citing *State v. Escareno-Meraz*, 232 Ariz. 586, 307 P.3d 1013 (App. 2013). In that case, we determined that the United States Supreme Court’s recent decision in *Martinez* did not alter established Arizona law that a non-pleading defendant, like Lynam, has no constitutional right to the effective assistance of Rule 32 counsel. *Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d at 1014. As his sole claim on review, Lynam argues that *Escareno-Meraz* is wrongly decided.

¶6 Although Lynam suggests that our decision in *Escareno-Meraz* “flies in the face of *Martinez*,” he does not explain this argument. Instead, relying on decisions predating *Martinez*, he argues that he is entitled to the effective assistance of Rule 32 counsel because his first Rule 32 proceeding is his first opportunity to raise a claim of ineffective assistance of trial counsel.

¶7 Lynam is correct that our supreme court has determined that a claim of ineffective assistance of counsel cannot be raised on direct appeal and must instead “be brought in Rule 32

STATE v. LYNAM  
Decision of the Court

proceedings.” *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). But that does not necessarily mean Lynam is entitled to the effective assistance of counsel in bringing that claim. Ineffective assistance is a constitutional claim, grounded in the Sixth Amendment to the United States Constitution and brought pursuant to Rule 32.1(a). *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). But our supreme court has stated that there is no constitutional right to the effective assistance of Rule 32 counsel. *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996); *State v. Krum*, 183 Ariz. 288, 291-92 & n.5, 903 P.2d 596, 599-600 & n.5 (1995). Absent that constitutional right, no claim pursuant to Rule 32.1(a) exists. The United States Supreme Court has never held otherwise—indeed, it expressly declined to address that question in *Martinez*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1315. Even if we agreed that a non-pleading defendant should be constitutionally entitled to effective counsel in raising a claim of ineffective assistance of trial counsel, we cannot modify or disregard the decisions of our supreme court. *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004). The trial court did not err in rejecting this claim.

¶8 For the reasons stated, although review is granted, relief is denied.