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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. TIMOTHY FARRELL, Petitioner.	2 CA-CR 2006-0228-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-48245

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Timothy Farrell — Douglas
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 In May 1995, a jury found petitioner Timothy Farrell guilty of arson of an occupied structure, a dangerous, class two felony. The trial court sentenced him to a presumptive, 10.5-year prison term, and we affirmed the conviction and sentence on appeal. *State v. Farrell*, No. 2 CA-CR 95-0364 (memorandum decision filed Jan. 23, 1996).[1]

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[1]Although the sentence imposed in this case has expired, Farrell remains in prison for other convictions. Five months after he was convicted in this case, CR-48245, a jury found him guilty of six more felonies in CR-49585. For those, the trial court sentenced him to a combination of aggravated sentences, the longest for twenty-one years, and ordered those concurrent sentences to be served consecutively to the 10.5-year sentence in this case. In CR-49585, Farrell has similarly had an appeal and three previous, unsuccessful petitions for

¶2 The present petition for review from the trial court's denial of post-conviction relief is the third such petition Farrell has filed in this case pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We upheld the trial court's denial of relief on his first petition in *State v. Farrell*, No. 2 CA-CR 97-0304-PR (memorandum decision filed June 23, 1998). We then granted a second petition for review and again denied relief in *State v. Farrell*, No. 2 CA-CR 2004-0082-PR (decision order filed Feb. 17, 2005).

¶3 In May 2006, Farrell filed the current petition for post-conviction relief.[2] Citing Rule 32.1(g), Farrell asserted the Arizona Supreme Court's decision in *State v. Wall*, 212 Ariz. 1, 126 P.3d 148 (2006), constituted a significant change in the law that applied to his case and entitled him to a new trial.[3] *Wall* held it reversible error for a trial court to refuse to give a lesser-included offense instruction "if two conditions are met. The jury must

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post-conviction relief. *State v. Farrell*, Nos. 2 CA-CR 95-0711, 2 CA-CR 99-0192-PR (consolidated) (memorandum decision filed Apr. 11, 2000); *State v. Farrell*, No. 2 CA-CR 2001-0159-PR (memorandum decision filed Oct. 18, 2001); *State v. Farrell*, No. 2 CA-CR 2005-0381-PR (memorandum decision filed June 6, 2006).

[2]Although the trial court characterized the petition as Farrell's fourth, from the available record, we can confirm the existence of only three such petitions.

[3]Farrell mistakenly contended that "retroactivity is not an issue" because the supreme court's decision in *Wall* relied on earlier case law that predated his 1995 "trial and sentencing." But that is not the meaning of, or test for, retroactivity. Farrell's conviction in this case became final more than a decade ago with the issuance of our June 1996 mandate in his appeal. Thus, *Wall*'s only possible application to Farrell would be retroactive. *See generally State v. Febles*, 210 Ariz. 589, ¶¶ 1, 9, 115 P.3d 629, 631, 632-33 (App. 2005) (holding new decision did "not apply retroactively to cases on collateral review" after those cases had become final, which occurs when mandate issues); *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (conviction final when availability of appeal or certiorari exhausted); *accord State v. Sepulveda*, 201 Ariz. 158, n.2, 32 P.3d 1085, 1086 n.2 (App. 2001). But Farrell's observation does help illustrate that *Wall* was not a significant change in the law.

be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* ¶¶ 32, 18.

¶4 The trial court denied Farrell's petition for reasons we find both cogent and legally correct:

> Petitioner is not entitled [to] a reversal of his conviction or a new trial. *Wall* is not a significant change in law. Instead, the decision makes clear that it was applying existing Arizona law as to when a defendant is entitled to instructions on lesser included offenses. *Id.* at ¶ 28, [126 P.3d at] 153. The *Wall* decision was consistent with Arizona case law and, therefore, was not a significant change of law. The petitioner cannot bring his fourth Rule 32 petition based upon *Wall*.
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> Furthermore, the petitioner had his current claims reviewed by the court of appeals on direct appeal from his conviction in 1996 (2 CA-CR 95-0364). In that decision the appellate court applied the same analysis that was again set forth in *Wall* as the current Arizona law on when a lesser included offense instruction should be given. In *Wall*, the Court explained that a lesser included offense instruction must be given if the offense is a necessarily included offense. *Id.* at ¶ 14, [126 P.3d at] 151. "[A]n offense is 'necessarily included,' and so requires that a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *Id.* On appeal, the petitioner argued that he should have received lesser included offense instructions: arson of an unoccupied structure and reckless burning. Following the same analysis as in *Wall*, the appellate court found that petitioner was not entitled to jury instructions on the lesser included offenses because there was no evidence supporting either of them. When there is no evidence to support the lesser included offenses, the defendant is not entitled to have an instruction on them. Since this claim has already been finally adjudicated on the merits, it is precluded. Ariz. R. Crim. P. 32.2(a)(2).

¶5 In short, the supreme court in *Wall* merely explained and applied existing Arizona law regarding lesser-included-offense instructions. *Wall* was not a significant change in the law, and Farrell consequently does not have a legitimate claim under Rule

32.1(g). Moreover, even had *Wall* been a significant change in the law retroactively applicable to Farrell's case, we long ago ruled in his appeal that the evidence at trial did not support instructions on the lesser-included offenses of arson of an unoccupied structure or reckless burning and that arson of an occupied structure was the only possible offense supported by the evidence. *Farrell*, No. 2 CA-CR 95-0364, at 4. The issue, therefore, is precluded in any event. *See* Ariz. R. Crim. P. 32.2(a).

¶6 Farrell's attempt to claim ineffective assistance of trial counsel is also precluded because he already alleged ineffective assistance in his first petition for post-conviction relief. *See id*. As we wrote in our decision denying relief on Farrell's petition for review from the trial court's ruling on his first post-conviction petition, "There is nothing in the available record to suggest the trial court erred in finding that . . . petitioner received effective assistance of counsel at trial and on appeal." *Farrell*, No. 2 CA-CR 97-0304-PR, ¶ 8.

¶7 We review a trial court's grant or denial of post-conviction relief only for an abuse of discretion. *State v. Morgan*, 204 Ariz. 166, ¶ 25, 61 P.3d 460, 467 (App. 2002). Because the trial court clearly did not abuse its discretion here, we grant the petition for review but again deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge