

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2012-0191-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOEL ESCALERA RODRIGUEZ,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2001010978

Honorable Randall H. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche

Phoenix
Attorneys for Respondent

Joel Escalera Rodriguez

El Paso, Texas
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Joel Rodriguez seeks review of the trial court’s order summarily dismissing his untimely 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). Rodriguez has not met his burden of establishing such abuse here.

¶2 Rodriguez pled guilty in 2002 to aggravated assault and was sentenced to a 7.5-year prison term. In June 2011, Rodriguez filed a “motion to re-open his criminal case or vacate his conviction,” stating that he had been released from prison in 2008 and was now detained in Texas by United States Immigration and Customs Enforcement “pending deportation and removal proceedings based on his old conviction in the State of Arizona.” He argued his counsel in his 2002 proceeding had been ineffective because counsel had “ignored” his purported self-defense claim and had not advised him about the immigration consequences of his guilty plea as required by *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473 (2010).

¶3 Treating Rodriguez’s motion as a petition for post-conviction relief, the trial court summarily dismissed it. The court concluded Rodriguez’s claims were untimely and, to the extent he argued *Padilla* constituted a significant change in the law, that decision was not retroactively applicable to Rodriguez.

¶4 On review, Rodriguez repeats his claims and contends, as we understand his argument, that *Padilla* applies to his case because he had been misled by counsel and therefore any time limitations on his claim of ineffective assistance of counsel must be “equitabl[y] toll[ed].” He also suggests his claim is not untimely because *Padilla* was permitted to raise his claim when “he was close to be[ing] release[d] from prison [and] . . . learned that he was facing deportation.”¹

¹Because he did not raise the claim below, we do not address Rodriguez’s claim that he did not timely seek post-conviction relief because he was denied access to a law library. *See Ariz. R. Crim. P. 32.9(c)(1)(ii)* (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for

¶5 Rodriguez’s arguments are meritless. His claim is patently untimely, having been filed years after his conviction and sentence. *See* Ariz. R. Crim. P. 32.4(a) (“[N]otice [of post-conviction relief] must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later.”). An untimely petition for post-conviction relief may only raise claims enumerated in Rule 32.2(b), specifically those made pursuant to Rule 32.1(d), (e), (f), (g), or (h).

¶6 Nothing in *Padilla* suggests that Padilla did not timely seek post-conviction relief. ___ U.S. at ___, 130 S. Ct. at 1477-78. Thus, that case cannot reasonably be read to permit an untimely petition. And, to the extent the doctrine of equitable tolling may permit untimely claims beyond those contemplated by Rule 32.2(b), Rodriguez cites no authority, and we find none, suggesting that doctrine applies in these circumstances. *See generally Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (discussing equitable tolling of federal habeas time limits). Thus, we reject Rodriguez’s claim that he is permitted to file an untimely petition because he had been misled by counsel and only recently learned of the potential immigration consequences of his guilty plea. Pursuant to Rules 32.1(f) and 32.2(b), a defendant may file an untimely petition if the “failure to file a notice of post-conviction relief of-right . . . within the prescribed time was without fault on the defendant’s part.” But that exception does not permit a defendant to file an untimely claim because he only recently learned of the legal basis for that claim. *See State v. Poblete*, 227 Ariz. 537, ¶ 7, 260 P.3d 1102, 1104-05 (App. 2011) (rejecting claim Rule

review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues in petition for review).

32.1(f) permits untimely petition on basis defendant only recently learned plea had immigration consequences).

¶7 Finally, to the extent Rodriguez asserts that *Padilla* constitutes a significant change in the law entitling him to relief pursuant to Rule 32.1(g), the trial court did not err in rejecting that claim. Although we concluded in *Poblete* that *Padilla* was a significant change in the law, we determined it was not applicable to defendants, like Rodriguez, whose convictions were final when the new rule was announced. *Id.* ¶¶ 10, 12, 16; *see also* Ariz. R. Crim. P. 32.1(g) (permitting post-conviction relief based on “significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence”).

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge