

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

FILED BY CLERK

NOV 20 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0388-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID REYES,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2005127620001DT

Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche

Phoenix
Attorneys for Respondent

David Reyes

Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 David Reyes seeks review of the trial court's order denying his motion for leave to amend his previously dismissed notice of post-conviction relief. For the reasons that follow, we grant review but deny relief.

¶2 In 2006, Reyes was convicted after a jury trial of attempted child molestation of a child under the age of fifteen and sentenced to a ten-year prison term. He filed a notice indicating he would not appeal his conviction and sentence. Two years later, Reyes filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming that, due to a 2007 statutory change, he could not be charged with attempt “due to the age of the victim.” The trial court summarily dismissed Reyes’s notice, finding it untimely and concluding any applicable statutory change was not retroactive and, to the extent Reyes claimed *State v. Gonzales*, 216 Ariz. 11, 162 P.3d 650 (App. 2007),¹ constituted a significant change in the law, he had “not demonstrated that *Gonzales* is a change in the law or that it applies to his case.”

¶3 Reyes then filed a successive notice claiming pursuant to Rule 32.1(f) that he did not timely seek Rule 32 relief because his trial counsel had informed him that he would file a notice of post-conviction relief. The trial court dismissed that notice, observing that Reyes had expressly informed the court he did not wish to appeal and that he had not substantiated his claim as required by Rule 32.2(b). Approximately one month later, Reyes filed a motion requesting leave to amend his petition and for “discovery,” claiming his attorney had “failed to collect mitigating evidence[]” regarding his “mental health condition” and had failed to seek relief pursuant to *Blakely v.*

¹In *Gonzales*, we concluded the statute then defining dangerous crimes against children, due to “the legislature’s apparent oversight,” did not include attempted sexual conduct with a child under the age of twelve. 216 Ariz. 11, ¶¶ 8, 10, 162 P.3d at 652-53.

Washington, 542 U.S. 296 (2004). The court denied that motion because Reyes had “no pending Rule 32 proceeding before the Court.” The instant petition for review followed.²

¶4 Nothing in Rule 32.6(d)—or any other provision of Rule 32—permits a defendant to amend his or her notice or petition after it has been dismissed. Reyes’s motion appears to be an improper attempt to reinstate the dismissed post-conviction relief proceeding; thus, the trial court did not err in denying it. And to the extent he intended his motion as an attempt to seek rehearing, pursuant to Rule 32.9(a), of the trial court’s dismissal of his second notice, it was not filed timely.

¶5 However, Reyes’s motion to amend cited Rule 32.1(e), which permits relief on the basis of newly discovered material facts, and Rule 32.1(g), which permits relief based on a significant change in the law. Thus, although the trial court apparently did not treat it as such, Reyes’s motion at least arguably could be construed as a successive notice of or petition for post-conviction relief. Although claims under those subsections are not necessarily subject to preclusion, *see* Ariz. R. Crim. P. 32.2(b), Reyes identified no claim in his motion that reasonably fits within either of those provisions. And, even though Reyes claims in his petition for review that he had only “recently discovered” that *Gonzales* applied to his case, he did not raise that argument in his motion below, and we

²Reyes also filed a request for “permission to file [a] delayed/untimely petition for post-conviction relief,” citing *Gonzales* and arguing “the state was without jurisdiction to charge, convict, and sentence” him with attempted molestation of a child under the age of fifteen. The trial court treated that filing as a notice of post-conviction relief and summarily dismissed it, finding the claim precluded and meritless. Reyes’s petition for review does not address that ruling, but instead seeks review only of the court’s earlier order denying his motion to amend.

therefore do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). In any event, the trial court rejected that claim in Reyes’s first Rule 32 proceeding and it is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(2).

¶6 For the reasons stated, we find no error in the trial court’s summary denial of Reyes’s motion to amend. Thus, although review is granted, relief is denied.

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

CONCURRING:

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

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