

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

RICK MARTIN HEIDELBACH,  
*Petitioner.*

No. 2 CA-CR 2015-0379-PR  
Filed February 11, 2016

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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NOT FOR PUBLICATION  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)(1); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Pima County  
No. CR20113667001  
The Honorable Deborah Bernini, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Rick M. Heidelberg, Buckeye  
*In Propria Persona*

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

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H O W A R D, Presiding Judge:

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

¶2 Heidelberg pled guilty to two counts of armed robbery, five counts of aggravated assault, and one count of attempted armed robbery. The trial court sentenced him to a combination of consecutive and concurrent presumptive prison terms totaling thirty-four years. He sought post-conviction relief, which the trial court denied, and this court denied relief on review. *State v. Heidelberg*, No. 2 CA-CR 2014-0310-PR (memorandum decision filed Jan. 22, 2015).

¶3 In March 2015, Heidelberg filed a notice of post-conviction relief, and the trial court appointed counsel. Counsel filed a “Petition for Post-Conviction Relief Pursuant to *Anders*” stating she had reviewed the record and had found no issues to raise in post-conviction proceedings. The court granted Heidelberg leave to file a pro se petition for post-conviction relief.

¶4 Heidelberg then contemporaneously filed a notice of and petition for post-conviction relief. In the notice, Heidelberg requested that counsel be appointed and indicated he wished to raise claims of newly discovered material facts and a change in the law. He asserted that he had “just learned” of a change in the law

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concerning his sentences and that he “can file due to my first PCR counsel not being effective, and other problems.” In his petition, he noted that he had been denied relief in two previous post-conviction proceedings and claimed: (1) *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151 (2013), is a change in the law requiring the trial court to impose the minimum term of imprisonment; (2) his trial and Rule 32 counsel had been ineffective; (3) his sentences were improper; and (4) his plea agreement was “illegal.”

¶5 The trial court characterized Heidelberg’s petition as being in support of his second post-conviction proceeding and his notice as initiating “yet a third claim for post-conviction relief.” It rejected the claims raised in his petition and, in addressing his most-recent notice, declined to appoint counsel and dismissed the notice. This petition for review followed.

¶6 On review, Heidelberg asserts the trial court erred in dismissing his third notice of post-conviction relief and that the petition filed with that notice “was to be his third PCR. It was NOT intended as a second petition.” Accepting Heidelberg’s assertion, we nonetheless determine the court did not err in summarily rejecting both Heidelberg’s notice and his petition.<sup>1</sup>

¶7 Generally, in a successive Rule 32 proceeding, a defendant is permitted to raise only those claims arising under Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a). A pleading defendant like Heidelberg, however, may in a successive proceeding raise a claim that counsel in the first proceeding was ineffective. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 10, 250 P.3d 551, 554 (App. 2011). Such a claim is not precluded by Rule 32.2 because a defendant “could not have raised it in [his or her] first proceeding.” *Id.* The time for Heidelberg to have done so, however, was in his timely initiated second proceeding; he cannot now raise that claim in

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<sup>1</sup>Even were we to disregard Heidelberg’s assertion that he intended his petition to accompany his third post-conviction notice, we agree with the trial court that summary dismissal was warranted.

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his third proceeding, because his third notice was not timely filed. *See* Ariz. R. Crim. P. 32.4(a). Nor was Heidelberg permitted to raise his claim of ineffective assistance of trial counsel, his sentencing claim, nor his claim that his plea agreement was unlawful. Those claims do not fall within Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion).

¶8 Heidelberg is correct, however, that a claim of newly discovered evidence or a claim there has been a change in the law can be raised in an untimely proceeding. Ariz. R. Crim. P. 32.1(e), (g); 32.4(a). But Heidelberg was required to provide “meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b).

¶9 Insofar as Heidelberg claims newly discovered evidence supports his claim, he has identified no such evidence and thus has not complied with Rule 32.2(b) with respect to that claim. As to his claim under Rule 32.1(g), he asserts he only recently “learned of the U.S. Supreme Court ruling that affected his sentence.” But Heidelberg initiated this third proceeding before the time to file a pro se brief in his second proceeding had passed. He has not explained his failure to raise a claim based on Rule 32.1(g) in his second proceeding despite having the opportunity to have done so.

¶10 Although we grant review, we deny relief.