

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Respondent*,

*v.*

JOSHUA MARK NUNEZ, *Petitioner*.

No. 1 CA-CR 17-0109 PRPC  
FILED 2-13-2018

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Petition for Review from the Superior Court in Maricopa County  
No. CR2008-006051-003  
The Honorable Warren J. Granville, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix  
By Diane Meloche  
*Counsel for Respondent*

Joshua Mark Nunez, Florence  
*Petitioner*

STATE v. NUNEZ  
Decision of the Court

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**MEMORANDUM DECISION**

Presiding Judge Michael J. Brown delivered the decision of the Court, in which Judge Jennifer B. Campbell and Chief Judge Samuel A. Thumma joined.

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**B R O W N**, Judge:

¶1 Joshua Mark Nunez petitions this court for review from the dismissal of his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32. We have considered the petition for review and, for the reasons stated, we grant review and deny relief.

¶2 In 2008, Nunez was indicted for first-degree murder, conspiracy to commit murder, assisting a criminal street gang, misconduct involving weapons and participation in a criminal syndicate. A few months later, the State gave notice that it intended to seek the death penalty.

¶3 In February 2011, Nunez pled guilty to first-degree murder with a stipulated sentence of life imprisonment, of which no less than 25 calendar years would be served. The superior court sentenced him in accordance with the plea agreement and ordered that the sentence would run concurrent with a 25-year sentence imposed in another case. Nunez then signed a notice of rights form, which included the filing deadlines for petitions for post-conviction relief.

¶4 In January 2017, Nunez filed his first notice of post-conviction relief. He checked the boxes on the pre-printed form indicating that (1) he was alleging newly discovered material facts; (2) the failure to file a timely petition was without fault on his part; and (3) he received an illegal sentence because there was no avenue to seek parole after serving 25 years in prison. He did not provide any reason for his failure to raise these claims in a timely petition.

¶5 The superior court dismissed the petition as untimely, finding that Nunez failed to present newly discovered material facts and made no showing as to how he was without fault for the failure to file a timely petition. Counsel was not appointed and the notice was dismissed. Nunez filed a timely “motion for reconsideration” in this court, which we treat as a petition for review.

STATE v. NUNEZ  
Decision of the Court

¶6 Absent an abuse of discretion, this court will not disturb the superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). An abuse of discretion occurs if the "court makes an error of law or fails to adequately investigate the facts necessary to support its decision." *State v. Pandeli*, 242 Ariz. 175, 180, ¶ 4 (2017). On review, Nunez bears the burden of establishing an abuse of discretion. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011).

¶7 Nunez argues that the failure to file a timely notice was without fault on his part. Ariz. R. Crim. P. ("Rule") 32.1(f) (2017) (giving a defendant's lack of fault in filing a timely notice as a ground for post-conviction relief).<sup>1</sup> In his notice, Nunez was required to "set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner." Rule 32.2(b). Otherwise, the superior court was obligated to summarily dismiss the notice. *Id.* This is Nunez's first notice of post-conviction relief, and he offered no explanation as to why he did not file within the deadline. Therefore, the superior court did not abuse its discretion in dismissing the notice as untimely.

¶8 Moreover, although Nunez asserts he has newly discovered material facts due to the omission from his plea agreement of a statement of whether his sentence was to run consecutive or concurrent to that in another case, he was aware of the terms of his plea agreement. The fact that the plea agreement did not indicate whether the stipulated sentence was to be consecutive or concurrent does not constitute newly discovered evidence. *See* Rule 32.1(e). Further, it is clear from the sentencing order and order of confinement that the court imposed a concurrent sentence.

¶9 And to the extent Nunez relies on recently discovered "cases" to support his argument that his sentence is illegal, it is unclear whether he is relying on case law or the events occurring in other prisoners' cases related to their life sentences. Neither, however, can be considered newly discovered material facts related to the legality of Nunez's sentence.

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<sup>1</sup> We cite the rules in effect at the time Nunez filed his notice of post-conviction relief.

STATE v. NUNEZ  
Decision of the Court

¶10 Nunez's notice of post-conviction relief was untimely and he failed to set forth meritorious reasons that would excuse the late filing. Accordingly, we grant review and deny relief.



AMY M. WOOD • Clerk of the Court  
FILED: AA