

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

STATE OF ARIZONA, *Respondent*,

v.

JESUS JOSE MARQUEZ-ALVAREZ, *Petitioner*.

No. 1 CA-CR 17-0807 PRPC
FILED 7-24-18

Appeal from the Superior Court in Maricopa County
No. CR2015-129976-001
The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

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

Jesus Jose Marquez-Alvarez, Florence
Petitioner

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge David D. Weinzweig joined.

M c M U R D I E, Judge:

¶1 Petitioner Jesus Jose Marquez-Alvarez petitions this court for review from the dismissal of his petition for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32. We have considered the petition for review and, for the reasons stated, grant review and relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 Marquez-Alvarez pled guilty to one count of molestation of a child, a Class 2 felony and dangerous crime against children, and two counts of attempted molestation of a child, Class 3 felonies and dangerous crimes against children. In January 2017, he was sentenced to a mitigated term of 15 years' imprisonment on the molestation charge and placed on lifetime probation on the remaining counts.

¶3 Marquez-Alvarez's counsel withdrew after sentencing and did not file a notice of post-conviction relief. In August 2017, Marquez-Alvarez filed a *pro se* notice of post-conviction relief. In an attached affidavit, Marquez-Alvarez claimed his failure to timely file his notice was the result of his trial counsel's failure to do so at his request.

¶4 The superior court appointed Marquez-Alvarez Rule 32 counsel, who consulted with Marquez-Alvarez's trial counsel before filing a notice of completion stating trial counsel did not recall promising to file a notice of post-conviction relief on Marquez-Alvarez's behalf. The superior court then summarily dismissed Marquez-Alvarez's Rule 32 proceeding. Marquez-Alvarez petitioned this court for review and we have jurisdiction pursuant to Rule 32.9.

DISCUSSION

¶5 A timely notice of post-conviction relief must be filed within 90 days of the entry of judgment and sentencing. Ariz. R. Crim. P. 32.4(a). Marquez-Alvarez was sentenced on January 27, 2017, but did not file his notice of post-conviction relief until August 23, 2017, well beyond the

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90-day limit. However, Marquez-Alvarez's notice of post-conviction relief included a claim under Rule 32.1(f), arguing his failure to file a timely notice of post-conviction relief was not his fault. *See State v. Poblete*, 227 Ariz. 537, 539, ¶ 6 (App. 2011) ("Relief should be granted under [Rule 32.1(f)] if . . . the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request.").

¶6 We review a superior court's summary dismissal of a post-conviction relief proceeding for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17 (2006). To be granted an evidentiary hearing in a Rule 32 proceeding, a defendant must make a colorable claim. *State v. Jeffers*, 135 Ariz. 404, 427 (1983); *see also* Ariz. R. Crim. P. 32.6(d). A colorable claim presents an allegation that, if true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441 (1986). Whether a petition for post-conviction relief presents a colorable claim "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73 (1988). However, when doubt exists, "a hearing should be held to allow the defendant to raise the relevant issues . . . and to make a record for review." *Schrock*, 149 Ariz. at 441.

¶7 In his notice of post-conviction relief, Marquez-Alvarez included an affidavit which stated, "my attorney told me that she would file my notice of post-conviction relief." Marquez-Alvarez went on to state that on August 9, 2017, he became aware that his attorney had not filed a notice of post-conviction relief as promised. Therefore, he decided to file the untimely notice of post-conviction relief *pro se*.¹

¶8 As part of the notice of completion, Marquez-Alvarez's Rule 32 counsel included the following:

[Trial counsel] does not recall telling the Defendant that she would file the Notice of Post-Conviction Relief. Additionally, [trial counsel] reviewed her file and found no notes that support Defendant's claims that she was going to file the motion.

¹ Marquez-Alvarez avowed he became aware of counsel's failure to file a notice of post-conviction relief on August 9, 2017, and he filed his *pro se* notice on August 23, 2017, which would be within 90 days of becoming aware that no petition for relief was filed. *See* Ariz. R. Crim. P. 32.4(a).

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If Marquez-Alvarez's assertion that he asked counsel to file a notice of post-conviction relief before withdrawing is viewed as true, his trial counsel's failure to recall such a statement or the lack of such a notation in her file does not directly contradict the factual allegation. At the very least, Marquez-Alvarez's allegation, if assumed to be true, may have changed the outcome regarding the timeliness of his Rule 32 petition, and therefore constitutes a colorable claim. *See State v. Carriger*, 132 Ariz. 301, 305 (1982) ("If in doubt, a hearing should be held to allow the defendant to raise all relevant issues, to resolve the matters finally, and to make a record for review."); *Volk v. Brame*, 235 Ariz. 462, 465, ¶ 14 (App. 2014) ("[D]ue process requires the court to allow parties a reasonable opportunity to present testimony whenever resolution of a material contested issue hinges on credibility.").

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CONCLUSION

¶19 We hold Marquez-Alvarez stated a colorable claim under Rule 32.1(f) and the superior court erred by summarily dismissing the proceeding.² The case is remanded for the superior court to hold an evidentiary hearing on whether Marquez-Alvarez instructed his trial counsel to file a notice of post-conviction relief.



AMY M. WOOD • Clerk of the Court
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² In his petition for review, Marquez-Alvarez also raised additional claims that were not presented to the superior court in his petition for post-conviction relief. Because a petition for review may not raise issues not first presented to the superior court, we do not address these claims. *See* Ariz. R. Crim. P. 32.9(c)(4)(B)(ii); *see also State v. Bortz*, 169 Ariz. 575, 577 (App. 1991). Also, Marquez-Alvarez raised objections to the superior court's summary disposition of his claims under Rule 32.1(e) (newly discovered material facts) and (g) (significant change in the law). Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). We have reviewed the record in this matter, as well as the superior court's order summarily denying the "newly discovered evidence" and "change in the law" claims, and conclude that petitioner has not established an abuse of discretion.