

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

CHRISTOPHER SHAY DAVIS, *Petitioner*.

No. 1 CA-CR 21-0111 PRPC  
FILED 9-30-2021

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Petition for Review from the Maricopa County Superior Court  
No. CR2018-001126-001  
The Honorable Laura Johnson Giaquinto, Judge *Pro Tempore*

**REVIEW GRANTED; RELIEF GRANTED IN PART**

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COUNSEL

Maricopa County Attorney's Office, Phoenix  
By Amanda M. Parker  
*Counsel for Respondent*

Christopher Shay Davis, San Luis  
*Petitioner*

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**MEMORANDUM DECISION**

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Chief Judge Kent E. Cattani joined.

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**T H U M M A**, Judge:

¶1 Petitioner Christopher Shay Davis seeks review of the superior court's order dismissing his second notice requesting post-conviction relief (PCR). Having considered his petition for review, this court grants review and grants relief by directing the superior court to treat Davis' successive notice as timely.

¶2 After a jury found Davis guilty of two counts of aggravated driving under the influence, the court sentenced him to ten years in prison. Davis did not appeal from his May 2019 sentence, but hired an attorney to represent him in PCR proceedings.

¶3 Ninety-five days after his sentencing, Davis' retained attorney filed a PCR notice, but not stating the claimed grounds for relief or discussing its timeliness. At that time, claims for PCR asserting constitutional violations, lack of jurisdiction, or a sentence unauthorized by law were required to be filed within 90 days of sentencing. *See* Ariz. R. Crim. P. 32.4(a)(2)(A), (C) (2019). Claims asserting discovery of newly discovered material facts, a significant change in the law, or actual innocence could be brought after the 90-day deadline, but were subject to summary dismissal if the defendant did not explain why the claim was not raised earlier. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a)(2)(A) (2019). At that time, PRC notices were not required to specify the claimed grounds for relief. *See* Ariz. R. Crim. P. 32.4(a)(3) (2019) (requiring the information listed in Rule 41, Form 24(b) (2019)).

¶4 On January 1, 2020, while the notice was pending, changes to the PCR rules went into effect and were applicable to all pending PCRs, unless the court "determine[d] that applying the rule or amendment would be infeasible or work an injustice, in which event the former rule or procedure applie[d]." Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The new rules provided the 90-day deadline applied only to claims asserting

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constitutional violations, and the superior court was required to excuse a notice filed after that deadline “if the defendant adequately explain[ed] why the failure to timely file a notice was not the defendant’s fault.” Ariz. R. Crim. P. 32.4(b)(3)(A), (D) (2020). The new rules required PRC notices to list the proposed grounds for relief. *See* Ariz. R. Crim. P. 32.4(b)(2) (requiring the information listed in amended Rule 41, Form 24(b) (2020)). After the new rules went into effect, the court dismissed Davis’ PCR notice as not raising any timely claims for relief.

¶5 Davis filed a successive PCR notice that raised a constitutional claim under Rule 32.1(a) and a claim of newly discovered material facts under Rule 32.1(e). Davis did not further describe the bases for those claims, but asserted he was not at fault for their untimely filing because his attorney had not timely filed the initial PCR notice. In an affidavit, Davis attested that immediately after he was sentenced, his family retained an attorney to initiate a proceeding for PCR; the attorney missed the deadline for doing so by five days and had “been assuring” Davis “that he was going to fix this situation and file something on [Davis’] behalf ever since then;” and Davis terminated the attorney shortly before filing the successive notice “because of his failure and misrepresentations.” Davis attested to his indigency and requested appointed counsel.

¶6 The superior court summarily dismissed Davis’ successive PCR notice. The court ruled it could not consider whether Davis was at fault in not timely pressing his Rule 32.1(a) claim because Davis’ “remedy was to seek review of the first Rule 32 proceeding’s dismissal in the Arizona Court of Appeals, not to litigate the untimeliness of the first proceeding in this second proceeding.” The court acknowledged that Davis could raise a Rule 32.1(e) claim in a successive notice, but dismissed his Rule 32.1(e) claim for failure to establish a colorable basis for relief.

¶7 Davis contends the superior court should have allowed him to proceed with his PCR claims because his failure to file a timely notice was not his fault. In support, Davis provides three documents on review that he did not include with his notice in the superior court: (1) his retention agreement with PCR counsel; (2) his letter to counsel terminating that representation and (3) correspondence from the State Bar of Arizona regarding its investigation of a complaint made by Davis against his former attorney.

¶8 This court considers the superior court’s dismissal of Davis’ successive PCR notice for an abuse of discretion. *State v. Harden*, 228 Ariz. 131, 132 ¶ 3 (App. 2011). This court reviews the superior court’s legal

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conclusions, including its interpretation of rules, de novo. *State v. Pandeli*, 242 Ariz. 175, 180 ¶ 4 (2017); *Harden*, 228 Ariz. at 132 ¶ 3.

¶9 The superior court correctly recognized that when a defendant misses the 90-day deadline for filing an initial PCR notice, the court “must excuse” the untimeliness of the notice “if the defendant adequately explains why the failure to timely file a notice was not the defendant’s fault.” Ariz. R. Crim. P. 32.4(b)(3)(D). Contrary to the court’s interpretation, however, no rule or other authority prevents it from applying Rule 32.4(b)(3)(D) when a defendant explains, in a successive PCR notice, the reason for filing an untimely first PCR notice. Nor was Davis required to obtain relief by petitioning for review of the dismissal of his first notice. Because the notice filed by Davis’ attorney did not provide a reason for its untimeliness, and because this court is generally limited to the record before the superior court at the time of its ruling, *see State v. Varela*, 245 Ariz. 91, 95 ¶ 10 n.2 (App. 2018), this court would not have been in a position to provide relief even if Davis had petitioned for review. Moreover, Davis’ affidavit shows that his attorney’s assurances after filing the late notice persuaded him there was no need to file a petition for review.

¶10 This case bears some similarity to *State v. Diaz*, 236 Ariz. 361 (2014). In that case, a defendant who was convicted and sentenced after pleading guilty, filed two consecutive PCR notices that were each dismissed after counsel failed to timely file a petition. *Id.* at 362 ¶¶ 3–4. After Diaz initiated a third PCR proceeding asserting a claim of constitutional error, the superior court ruled the claim was waived because Diaz had not raised it in a previous proceeding. *Id.* at 362 ¶ 5. The Arizona Supreme Court reversed, reasoning that under the “unusual facts” of the case, Diaz should not be treated as having waived his constitutional claim because the failure to present the claim earlier was “through no fault of Diaz’s.” *Id.* at 361, ¶ 1. Like *Diaz*, this case entails “unusual circumstances” showing that “despite [Davis’] efforts” to file a timely first PCR notice, “he was deprived of that opportunity through no fault of his own.” *Id.* at 363, ¶ 10.

¶11 For these reasons, the superior court should have decided whether Davis’ successive notice requesting PCR “adequately explain[ed] why the failure to timely file a notice [under Rule 32.4(b)(3)(A)] was not [his] fault.” Ariz. R. Crim. P. 32.4(b)(3)(D). On the record presented, and to avoid a waste of judicial resources, *see State v. Emery*, 141 Ariz. 549, 553 (1984) (concluding that remand would be “inefficient if not futile” where the record obliged the superior court to make a particular finding on

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remand), this court concludes that Davis adequately explained why he was not at fault for the late filing of his initial PCR notice.<sup>1</sup>

¶12 Accordingly, this court grants review and grants relief. Given that Davis adequately explained why he was not at fault for filing his initial PCR notice, this matter is remanded for the superior court to address Davis' successive PCR notice, which constitutes a timely notice under Rule 32.4, and to conduct further proceedings consistent with this decision.



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

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<sup>1</sup> This court reaches this conclusion without relying on the documents Davis offers for the first time on review by this court. When Davis explained to the superior court why he should be excused for the untimely filing of his first notice, he supported his argument with an affidavit consistent with the record and absent any indicators to cast doubt on its credibility. The additional documentation Davis provides on review substantiates his affidavit without altering, or adding to, the evidence presented to the superior court.