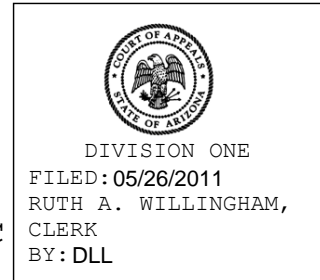


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 09-0842 PRPC  
)  
Respondent, ) DEPARTMENT C  
)  
v. ) Maricopa County  
) Superior Court  
MARK ANTHONY JOYNER, ) No. CR 1996-007193  
)  
)  
Petitioner. ) **D E C I S I O N**  
) **O R D E R**  
)

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Mark Anthony Joyner petitions this court to review the trial court's summary dismissal of his post-conviction relief proceeding. Presiding Judge Patricia A. Orozco, and Judges Donn Kessler and Michael J. Brown, have considered this petition for review and for the reasons stated, grant review and grant relief, and remand this matter to the trial court for further proceedings.

**FACTS AND PROCEDURAL HISTORY**

We discuss only the facts necessary to our disposition of this matter. Joyner plead guilty to first degree murder and was sentenced to life imprisonment. About ten years later, Joyner filed his first notice of post-conviction relief. He stated the failure to file a timely notice was not his fault; an exception

to the ninety day time limit, pursuant to Arizona Rule of Criminal Procedure 32.1.f. He stated he had "relied on [counsel] to initiate P.C.R. proceedings." He also indicated he wished to present a claim of ineffective assistance of counsel (IAC). Finally, he requested appointment of counsel.<sup>1</sup> After it considered the notice, the trial court summarily dismissed the proceeding, reasoning:

Pursuant to Rule 32.4(a), Ariz. R. Crim. P., the notice must be filed within 90 days of the entry of judgment and sentencing. Defendant was sentenced on June 4, 1999, more than 90 days before filing this notice. Defendant argues that pursuant to Rule 32.1(f), the failure to timely file was not his fault because he relied on counsel to initiate a Rule 32 proceeding in 1999. He now seeks to raise the claim of ineffective assistance of counsel.

Defendant cannot raise the claim of ineffective assistance of counsel in an untimely notice. An untimely notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a). As stated in the Notice of Rights of Review after Conviction in Superior Court signed by the Defendant and filed on June 4, 1999, it is the defendant's responsibility to file his Notice of Post-Conviction Relief. Defendant's claim that he relied on counsel to file the notice, does not bring him within the exception outlined in Rule 32.1(f).

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<sup>1</sup> Joyner was determined to be indigent and was represented by the public defender. Nothing in this record suggests his status as indigent has changed.

Joyner filed a motion for rehearing. He reasserted his claim that the untimely filing was not his fault. He also set forth claims of IAC. The trial court denied the motion:

The Court has considered the Petitioner's Motion for Rehearing on Notice of Post-Conviction Relief (filed 3/23/09).

On June 4, 1999, Defendant signed a Notice of Rights of Review which provides that it is Defendant's responsibility to file a Notice of Post Conviction Relief. Now, nearly 10 years later, Petitioner contends that his trial counsel did not file a Notice of Post Conviction Relief. As explained in the Notice of Rights (provided in June 1999), it is Defendant's responsibility to file timely Notice of Post Conviction Relief. This was not done here. Furthermore, the responsibilities of trial counsel do not include appeal or post conviction proceedings. Therefore, the record does not reflect any affirmative action by the Petitioner to pursue post conviction relief prior to the filing of this Petition.

Under these circumstances, the Petitioner has not demonstrated that the failure to timely seek post conviction relief for nearly 10 years was "without the fault on the defendant's part." Rule c32.1 Ariz. R. Crim. Pro.

**IT IS THEREFORE ORDERED** denying the Motion for Rehearing on Notice of Post-Conviction Relief.

Joyner then timely petitioned this court for review. The state has not responded.

#### **DISCUSSION**

In his petition for review, Joyner argues the trial court should have appointed counsel to represent him. He also sets

forth multiple claims of IAC.<sup>2</sup> On review, this Court reviews the grant or denial of post-conviction relief for an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, 118, 970 P.2d 947, 950 (App. 1998). In this case, the trial court abused its discretion when it failed to appoint counsel for Joyner.

Rule 32.4(c)(2) provides the following with respect to the appointment of counsel in a post-conviction proceeding of-right:

Upon the filing of a timely or *first* notice in a Rule 32 proceeding, the presiding judge, or his or her designee, *shall* appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel is within the discretion of the presiding judge. (Emphasis added).

The rule is clear and unambiguous. As stated recently by this Court:

The relevant provisions of Rule 32.4 are clear. Rule 32.4(c)(2) provides that in of-right and non-capital cases, the trial court must appoint counsel for the indigent defendant in two circumstances: '[u]pon the filing of a timely or first notice in a Rule 32 proceeding.' (Emphasis added.) Thus, both pleading and non-pleading defendants are clearly entitled to counsel in the first post-conviction proceeding.

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<sup>2</sup> We need not, and do not, express any opinion on the substantive claims raised by Joyner. As explained in this decision, we only decide Joyner has the right to appointed counsel to assist him with the presentation of his claims.

*Osterkamp v. Browning*, 2 CA-SA 2010-0091, 2011 WL 681098, at \*4, ¶ 15 (Ariz. App. Feb. 25, 2011). The court explained that if the rule read,

'[u]pon the filing of a timely, first notice,' the mandatory appointment of counsel would have been limited to first proceedings that have been timely filed. But this is not how the rule reads. Instead, rather than limiting first notices to those that are timely, it distinguishes a "timely" notice from one that is first, establishing the two circumstances in which the trial court must appoint counsel.

*Id.* at \*5, ¶ 16.

#### CONCLUSION

Though untimely, Joyner's petition for post-conviction relief was his first. He is indigent and he requested counsel. Therefore, we grant review and grant relief, vacate the trial court's order of dismissal, and direct the court to appoint counsel for Joyner.

/S/

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PATRICIA A. OROZCO, Presiding Judge