

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

FILED BY CLERK

JUN 10 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0063-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JON EDWARD ERICKSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200100103

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Jon Erickson

Winslow
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Jon Erickson seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Erickson has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Erickson was convicted of first-degree murder, and the trial court sentenced him to a term of natural life without the possibility of parole. This court affirmed his conviction and sentence on appeal. *State v. Erickson*, No. 2 CA-CR 2010-0012 (memorandum decision filed Jan. 21, 2011). Erickson then sought post-conviction relief, arguing trial counsel had been ineffective in failing to present sufficient mitigating evidence at sentencing. The trial court denied relief, and this court dismissed his petition for review as untimely. *State v. Erickson*, No. 2 CA-CR 2012-0400-PR (order filed Oct. 10, 2012).

¶3 In September 2012, Erickson filed another notice of post-conviction relief, stating he was entitled to relief under *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), and counsel in his first Rule 32 proceeding had been ineffective, but arguing in his subsequently filed, pro se petition that trial counsel had been ineffective in not calling a forensic expert to testify at trial. The trial court denied relief, concluding Erickson’s claim of ineffective assistance by trial counsel was precluded because he had not raised it in his first Rule 32 proceeding and, in any event, it was not colorable.

¶4 On review, Erickson claims the trial court abused its discretion because it did not “address the issue presented by [him] based on ‘a significant change in the law . . .’ as explained in the notice.” He argues the court should have viewed the arguments in his notice and petition as a whole to state a claim of ineffective assistance of Rule 32 counsel. But Rule 32.5 requires that a petitioner include in his or her petition “every ground known to him or her for . . . changing all judgments or sentences imposed.” Erickson cites no authority to suggest that if such grounds are included in the

notice, a petitioner is relieved of his or her duty to state all grounds for relief in the petition. Therefore, we cannot say the court abused its discretion to the extent it failed to consider Erickson's claim as one of ineffective assistance of Rule 32 counsel. And it properly concluded that a claim of ineffective assistance of trial counsel was precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 In any event, even assuming *Martinez* could be applied to Erickson's case, it does not provide him with a basis for relief. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason). In *Martinez*, the Court acknowledged that, under Arizona law, a non-pleading defendant does not have the right to effective representation in post-conviction proceedings. ___ U.S. at ___, 132 S. Ct. at 1313. Such a defendant may not, therefore, under Arizona law, assert a claim of ineffective assistance of Rule 32 counsel in a successive post-conviction proceeding based on counsel's alleged deficiencies in presenting claims in the post-conviction proceeding. *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996). The Court in *Martinez* addressed the narrow issue of whether the ineffectiveness of Rule 32 counsel in failing to assert a claim of ineffective assistance of trial counsel can be cause for a defendant's procedural default for federal habeas purposes. ___ U.S. at ___, 132 S. Ct. at 1315. The Court thereby qualified its holding in *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991). *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1315. It expressly stated it was not deciding the question it had left open in *Coleman*—whether a defendant is entitled to effective assistance of counsel in

the first collateral proceeding in which the defendant may assert a claim of ineffective assistance of trial counsel. *Id.*

¶6 Because Erickson has failed to establish he was entitled to relief under *Martinez*, or on any other basis, he has not sustained his burden of establishing the trial court abused its discretion by denying relief. Thus, although we grant the petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge