

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

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SEP -5 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0192-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LACY RIDDELL JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR17839

Honorable Kyle Bryson, Judge

REVIEW GRANTED; RELIEF DENIED

Lacy Riddell Jr.

Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Lacy Riddell Jr. challenges the trial court’s summary dismissal of his successive notice for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., based on its finding that his claims were precluded. *See* Ariz. R. Crim. P. 32.2. We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶2 In 1986, a jury found Riddell guilty of aggravated assault, robbery, kidnapping, sexual assault, and second-degree burglary, all perpetrated against a ninety-seven-year-old woman. The trial court sentenced him to a combination of concurrent and consecutive prison sentences totaling forty-eight years. We affirmed his convictions and sentences on appeal. *State v. Riddell*, Nos. 2 CA-CR 4658-3, 2 CA-CR 4659-4 (consolidated) (memorandum decision filed July 14, 1987). This court also has denied relief on review in at least six other post-conviction proceedings. *State v. Riddell*, No. 2 CA-CR 2008-0258-PR (memorandum decision filed Mar. 5, 2009); *State v. Riddell*, No. 2 CA-CR 2006-0431-PR (memorandum decision filed May 14, 2007); *State v. Riddell*, No. 2 CA-CR 2005-0244-PR (memorandum decision filed Mar. 16, 2006); *State v. Riddell*, No. 2 CA-CR 2003-0067-PR (decision order filed Sept. 10, 2004); *State v. Riddell*, No. 2 CA-CR 01-0087-PR (memorandum decision filed Nov. 30, 2001); *State v. Riddell*, No. 2 CA-CR 91-0883-PR (order filed Feb. 12, 1992).

¶3 In his notice of post-conviction relief below, Riddell alleged his trial counsel had been ineffective in “fail[ing] to advise [him] of his [Sixth] Amendment right to confront . . . witness[es] against him” and his Rule 32 counsel had been ineffective in failing to assert this claim in his first Rule 32 proceeding. He also cited *Martinez*, in

which the Supreme Court stated, for the purpose of federal habeas review under 28 U.S.C. § 2254, that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez v. Ryan*, ___ U.S. ___, ___, 132 S. Ct. 1309, 1315 (2012).

¶4 The trial court found Riddell’s notice untimely and concluded none of his claims fell within the exceptions to preclusion found in Rule 32.1(d), (e), (f), (g), or (h). *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). The court also noted that Rule 32.2(b) requires summary dismissal of a notice of post-conviction relief when it does not include “meritorious reasons . . . substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner.”

¶5 On review, Riddell argues “the trial court erred when it refused to recognize the United States Supreme Court’s . . . equity ruling in *Martinez* . . . as a significant change in the law” that entitled him to raise his claim of ineffective assistance of counsel “in accordance with Rule 32.1(g).” *See* Ariz. R. Crim. P. 32.1(g) (post-conviction relief available based on “a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence”). According to Riddell, *Martinez* represents “a ‘significant change in the law,’ at least on the federal level,” that permits him to raise a claim of ineffective assistance of trial counsel in this successive, untimely Rule 32 proceeding. As his substantive claim, Riddell alleges trial counsel failed to advise him of his right to be present when an emergency-room physician was deposed about her examination of the victim. *See*

Ariz. R. Crim. P. 15.3(e). He contends he was prejudiced by this error because, had he been aware before trial of this testimony about the victim's injuries, he "would have directed trial counsel to seek a plea agreement." *See Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69 (to state colorable claim of ineffective assistance, petitioner must show "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'"), *quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶6 The trial court did not err or abuse its discretion in dismissing Riddell's untimely and successive notice of post-conviction relief. Riddell's claim of ineffective assistance of trial counsel is precluded by waiver, *see* Ariz. R. Crim. P. 32.2(a)(3), and his claim of ineffective assistance of Rule 32 counsel is not cognizable under Rule 32, *see State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996). *Martinez* is not a significant change in the law for purposes of Rule 32.1(g). *See State v. Escareno-Meraz*, No. 2 CA-CR 2013-0094-PR, ¶ 6, 2013 WL 4477048 (Ariz. Ct. App. Aug. 21, 2013). A non-pleading defendant like Riddell has no constitutional right to counsel in post-conviction proceedings and, therefore, cannot state a cognizable claim of ineffective assistance of initial Rule 32 counsel in a subsequent Rule 32 proceeding. *Id.* ¶ 4; *see also* Ariz. R. Crim. P. 32.1(a) (ground for post-conviction relief if conviction or sentence "was in violation of the Constitution of the United States or of the State of Arizona").

¶7 In this most recent notice of post-conviction relief, Riddell failed to identify or substantiate any non-precluded claim for post-conviction relief and failed to state "meritorious reasons" his claims were not raised in a previous proceeding.

Ariz. R. Crim. P. 32.2(b). The trial court properly dismissed the notice. *See id.*;

Ariz. R. Crim. P. 32.4(a). Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Michael Miller

MICHAEL MILLER, Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge