

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

GERMAN S. MORALES,  
*Petitioner.*

No. 2 CA-CR 2015-0226-PR  
Filed September 21, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Pima County

No. CR20080585001

The Honorable Jane L. Eikleberry, Judge

**REVIEW GRANTED; RELIEF DENIED**

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German S. Morales, Buckeye  
*In Propria Persona*

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly<sup>1</sup> concurred.

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H O W A R D, Judge:

¶1 German Morales seeks review of the trial court's orders dismissing his untimely, successive notice of post-conviction relief and denying his motion for rehearing, each filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Morales has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Morales was convicted of driving under the influence of an intoxicant (DUI) and aggravated DUI. The trial court sentenced him to time served for DUI and to a twelve-year prison term for aggravated DUI. On appeal, we affirmed his conviction and sentence for aggravated DUI but vacated his DUI conviction. *State v. Morales*, No. 2 CA-CR 2009-0156, ¶ 10 (memorandum decision filed July 23, 2010).

¶3 Morales filed a petition for post-conviction relief, which the trial court dismissed. He failed to timely seek review of that ruling pursuant to Rule 32.9(c). *State v. Morales*, No. 2 CA-CR 2012-0082-PR, ¶ 5 (memorandum decision filed July 27, 2012). He again sought post-conviction relief in 2012 and was appointed counsel. Counsel filed a notice stating she had reviewed the record and found what she described as "clear error in this case" but, because those claims were precluded, she would "not be filing a Petition." Morales was granted leave to file a pro se petition, and filed

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<sup>1</sup>The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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numerous motions asserting that he did not have the entire record in his case, all of which the court denied. The court ultimately dismissed the proceeding when Morales failed to file a petition. He sought review in this court, but did not file a petition for review in compliance with Rule 32.9(c), and we therefore dismissed the case on review. *State v. Morales*, No. 2 CA-CR 2014-0131-PR (order filed Jun. 6, 2014).

¶4 Morales filed another notice of post-conviction relief in February 2015, stating he was raising claims of ineffective assistance of counsel, newly discovered evidence, significant change in the law, and actual innocence. He seemed to contend that he recently had obtained exhibits from his trial that supported claims of ineffective assistance of trial and appellate counsel. Specifically, he asserted that trial counsel had failed to adequately challenge the state's evidence of his previous DUI convictions, instead stipulating to those convictions, and that appellate counsel had been ineffective in failing to argue the stipulation was ineffective. He also suggested that *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007), constituted a significant change in the law applicable to his case. The trial court summarily dismissed the notice, finding precluded and untimely Morales's claims of ineffective assistance and determining he had "failed to substantiate his claims and explain why they were not timely raised in previous Rule 32 proceedings." This petition for review followed the court's denial of Morales's motion for rehearing.

¶5 On review, Morales argues the trial court erred in finding his ineffective-assistance claims precluded. He contends they are claims of sufficient constitutional magnitude to require his knowing waiver before they can be subject to preclusion, citing *Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067, 1071 (2002). But Morales's most-recent notice was patently untimely, *see* Ariz. R. Crim. P. 32.4(a), and thus *Stewart* does not apply, *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-9, 323 P.3d 1164, 1166 (App. 2014). Claims of ineffective assistance of counsel fall within Rule 32.1(a) and cannot be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a).

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¶6 Morales seems to suggest, however, that his claims of ineffective assistance are based on newly discovered evidence. Claims of newly discovered evidence pursuant to Rule 32.1(g) may be raised in an untimely proceeding. Ariz. R. Crim. P. 32.4(a). But Morales has not identified any such evidence. Instead, he argues the trial court improperly denied him access to the record in his previous Rule 32 proceeding and he only recently obtained portions of his record. But, as we noted above, Morales failed to properly seek review of the court's orders in his previous proceeding. And, in any event, documents already contained in the record cannot constitute newly discovered evidence as contemplated by Rule 32.1(g), even if the defendant only recently became aware of them. *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) ("Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.").

¶7 Morales does not argue in his petition for review that the trial court erred in dismissing his claims of actual innocence or a significant change in the law. Accordingly, we do not address those claims. *See* Ariz. R. Crim. P. 32.9(c) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review"). And, to the extent Morales attempts to incorporate by reference the arguments made in his motion for rehearing filed below, that procedure is not permitted by our rules. *See State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991).

¶8 Although we grant review, we deny relief.