

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ALBERTO RODRIGUEZ,  
*Petitioner.*

No. 2 CA-CR 2017-0091-PR  
Filed April 12, 2017

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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NOT FOR PUBLICATION  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 Maricopa County  
No. CR2013443669002DT  
The Honorable Richard L. Nothwehr, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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Alberto Rodriguez, Douglas  
*In Propria Persona*

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**MEMORANDUM DECISION**

Judge Vásquez authored the decision of the Court, in which Presiding Judge Howard and Chief Judge Eckerstrom concurred.

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VÁSQUEZ, Judge:

¶1 Alberto Rodriguez seeks review of the trial court’s order denying as untimely his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Rodriguez has not met his burden of demonstrating such abuse here.

¶2 Rodriguez pled guilty to conspiracy to commit possession of a dangerous drug for sale and, on April 10, 2014, was sentenced to a five-year prison term. On July 21, 2014, Rodriguez filed a notice of post-conviction relief indicating, among other things, that his failure to timely seek relief was without fault on his part.<sup>1</sup> The trial court allowed him to file a supplement to provide “the factual and legal basis as to why his filing was untimely and the basis upon which [the] untimely [p]etition should be considered.” In the supplement, Rodriguez claimed that “yard lock downs,” power outages, and a brief leave taken by the prison librarian had interfered with his filing of his notice. He also asserted his trial counsel had been ineffective in failing to file a notice for him. The court found no “excusable delay” and dismissed the proceeding. Rodriguez did not file a timely petition for review of that ruling.

¶3 In June 2015, Rodriguez filed a notice of and petition for post-conviction relief. In that notice, he indicated that there was newly discovered evidence material to his verdict or sentence, that

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<sup>1</sup>Rodriguez also indicated he did not wish to have counsel appointed.

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his failure to timely seek relief was without fault on his part, and that he was actually innocent. He reiterated that his failure to timely file his original notice was due to an extended power outage and lack of access to a library to prepare his notice. In his accompanying petition, Rodriguez asserted his attached affidavit constituted newly discovered evidence and his trial counsel had been ineffective, but he did not explain his claim of actual innocence. The trial court summarily dismissed the proceeding, noting Rodriguez had not provided “specific and articulable justification” for “a delayed petition.” This petition for review followed.

¶4 On review, Rodriguez reasserts his claims. His claim of ineffective assistance of counsel is a constitutional claim that cannot be raised in this untimely proceeding. *See* Ariz. R. Crim. P. 32.1(a), 32.4(a). However, a claim pursuant to Rule 32.1(f) that a pleading defendant’s “failure to file a notice of post-conviction relief of-right . . . within the prescribed time was without fault on the defendant’s part” can be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). But Rodriguez’s claim under Rule 32.1(f) was raised and rejected in his first proceeding and, thus, cannot be relitigated in this proceeding. *See State v. Little*, 87 Ariz. 295, 304, 350 P.2d 756, 761-62 (1960) (doctrine of res judicata generally applies in criminal cases). A claim of newly discovered evidence under Rule 32.1(e) similarly can be raised in an untimely proceeding. Ariz. R. Crim. P. 32.4(a). Rodriguez, however, has identified no such evidence. Instead, his claim centers on his affidavit in which he describes events he witnessed and heard during his plea proceeding. *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) (evidence not newly discovered if known to defendant at time of trial).

¶5 Rodriguez has identified no error in the trial court’s summary denial of his petition for post-conviction relief. Thus, although we grant review, we deny relief.