

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ERIC ALVAREZ,  
*Petitioner.*

No. 2 CA-CR 2019-0238-PR  
Filed April 15, 2020

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Petition for Review from the Superior Court in Graham County  
No. CR201900004  
The Honorable Michael D. Peterson, Judge

**REVIEW GRANTED; RELIEF GRANTED**

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Eric Alvarez, Florence  
*In Propria Persona*

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

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B R E A R C L I F F E, Judge:

¶1 Eric Alvarez seeks review of the trial court’s order summarily dismissing his notice of post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that order unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Because Alvarez has sustained his burden of establishing such abuse here, we grant relief.

¶2 Pursuant to a plea agreement, Alvarez was convicted of attempted sexual conduct with a minor and molestation of a child, both dangerous crimes against children. In May 2019, the trial court sentenced him to an aggravated prison term of twenty-four years, to be followed by lifetime probation. Approximately four months later, in September 2019, Alvarez filed a notice of post-conviction relief, alleging that the “failure to file timely [a] notice of post-conviction relief . . . was without fault on [his] part.” Alvarez explained that he “told [his] attorney [he] would like to file a Rule 32” and that he was “filing this notice . . . out of abundance of caution” because he had “not heard from [his] attorney.” The trial court summarily dismissed the notice as untimely.

¶3 On review, Alvarez contends the trial court abused its discretion in dismissing his petition because the law “is well settled” and “allows [him] to file an untimely notice of [post-conviction relief] if his attorney failed to file the notice.” He further asserts that he “filed his notice in a reasonable time after he became concerned that his attorney failed to do so.”

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<sup>1</sup> Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

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¶4 Pursuant to Rule 33.1(f), formerly part of Rule 32.1(f), a pleading defendant is entitled to relief if “the failure to timely file a notice of post-conviction relief was not the defendant’s fault.” See Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). However, the defendant must file the notice “within a reasonable time after discovering the basis for the claim.” Ariz. R. Crim. P. 33.4(b)(3)(B). “Relief should be granted under this rule if . . . the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice or request.” *State v. Poblete*, 227 Ariz. 537, ¶ 6 (App. 2011) (discussing Rule 32.1(f)).

¶5 Alvarez asserted the precise claim discussed in *Poblete*, which would entitle him to a delayed proceeding in which he could present any claim cognizable under Rule 33.1, including those barred in an untimely proceeding. Taking Alvarez’s allegation that he had asked counsel to file a notice of post-conviction relief as true, his Rule 33.1(f) claim is colorable. See *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (“A colorable claim is ‘one that, if the allegations are true, might have changed the outcome.’” (quoting *State v. Runningeagle*, 176 Ariz. 59, 63 (1993))). Alvarez is therefore entitled to an evidentiary hearing on his allegation that the failure to file a timely notice was not his fault and as to whether his notice was filed within a reasonable time after discovering that his counsel had failed to file the notice. See *State v. Donald*, 198 Ariz. 406, ¶ 8 (App. 2000) (defendant entitled to evidentiary hearing on colorable claim).

¶6 Accordingly, we grant review of Alvarez’s petition, and we grant relief.