IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LARRY DEAN ANDERSON,
Petitioner.

No. 2 CA-CR 2022-0121-PR
Filed December 8, 2022

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NOT FOR PUBLICATION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).

Petition for Review from the Superior Court in Pima County
No. CR062244001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Robert J. McWhirter, Phoenix
By Robert J. McWhirter
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Larry Anderson seeks review of the trial court's order summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Anderson has not met his burden of establishing such abuse here.

¶2 After a jury trial, Anderson was convicted of conspiracy to commit first-degree murder and sentenced to life in prison without the possibility of release for twenty-five years. We affirmed his conviction and sentence on appeal. *State v. Anderson*, Nos. 2 CA-CR 2000-0092, 2 CA-CR 2001-0509-PR (Ariz. App. Dec. 24, 2002) (consol. mem. decision). Before this proceeding, Anderson has twice sought and been denied post-conviction relief, and this court has denied relief on review. *See id.*; *State v. Anderson*, No. 2 CA-CR 2003-0347-PR (Ariz. App. Nov. 9, 2004) (mem. decision).

¶3 In February 2022, Anderson filed a notice of and petition for post-conviction relief arguing he had recently discovered his trial counsel was ineffective. Specifically, counsel advised him to reject a plea offer calling for a prison term of "18 to 22 years" because he would "be eligible for parole after serving 25 years," despite the fact parole had been abolished.[1] He asserted that his failure to raise the claim sooner was not his fault.

¶4 The trial court concluded Anderson's claim was not untimely or "subject to preclusion" under Rule 32.4(b)(3)(D), citing both trial counsel's affidavit acknowledging he had advised Anderson he would be eligible for parole and Arizona Department of Corrections policies that were "ambigu[ous]" regarding parole eligibility for defendants like

[1]Arizona largely abolished parole for offenses committed after the end of 1993. *See* A.R.S. § 41-1604.09(I)(1); *Chaparro v. Shinn*, 248 Ariz. 138, ¶¶ 3, 10 (2020).

Anderson. It rejected his claim of ineffective assistance, however, concluding counsel had not fallen below prevailing professional standards. And, it found that in any event, there was no "meaningful evidence" supporting his claim the state had offered a plea "with the sentencing range of 18 to 22 years." This petition for review followed.

¶5 On review, Anderson argues the trial court erred by concluding he had not presented a colorable claim of ineffective assistance of counsel. We need not address this issue, however, because the court erred in reaching the merits of Anderson's claim. *See State v. Banda*, 232 Ariz. 582, n.2 (App. 2013) ("We can affirm the trial court's ruling for any reason supported by the record.").

¶6 Constitutional claims like Anderson's fall under Rule 32.1(a) and, as such, can only be raised in a proceeding initiated within ninety days of sentencing or thirty days "after the issuance of the mandate in the direct appeal, whichever is later." Ariz. R. Crim. P. 32.4(b)(3)(A). Under Rule 32.4(b)(3)(D), an untimely notice like Anderson's may be excused "if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." But that provision does not excuse a defendant's failure to timely seek relief based on the mere failure to recognize a valid claim might exist. *See State v. Poblete*, 227 Ariz. 537, ¶¶ 6-7 (App. 2011). And, even if Rule 32.4(b)(3)(D) applied, Anderson's claim would still be precluded by Rule 32.2(a)(3) because he failed to raise it in a previous proceeding.

¶7 Insofar as Anderson asserted below that his claim was not subject to preclusion because it is based on newly discovered evidence, that argument also fails. Rule 32.1(e) does not contemplate a claim of newly discovered ineffective assistance of counsel and is instead restricted to "newly discovered" material facts that "probably would . . . change[] the verdict." *See State v. Serna*, 167 Ariz. 373, 374 (1991) (describing five elements of cognizable newly-discovered-evidence claim). And, although Anderson stated in his notice that there had been a significant change in the law, he has identified no such change.[2]

¶8 We grant review but deny relief.

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[2] Below, Anderson relied primarily on a federal district court decision. Such decisions are not binding on this court, *Arpaio v. Figueroa*, 229 Ariz. 444, ¶ 11 (App. 2012), and thus cannot constitute a change in Arizona law under Rule 32.1(g).