

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MATTHEW CHRISTOPHER PETERS,  
*Petitioner.*

No. 2 CA-CR 2013-0524-PR  
Filed April 25, 2014

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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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Maricopa County

No. CR2010155033001DT

The Honorable Susanna C. Pineda, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Matthew Peters, Florence  
*In Propria Persona*

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**MEMORANDUM DECISION**

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer<sup>1</sup> concurred.

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H O W A R D, Chief Judge:

¶1 Matthew Peters petitions this court for review of the trial court's order summarily dismissing his successive and untimely petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Peters has not met his burden of demonstrating such abuse here.

¶2 Peters pled guilty in 2011 to second-degree murder and was sentenced to an aggravated, twenty-year prison term. He first sought post-conviction relief nearly a year after sentencing, filing a notice in which he raised claims of ineffective assistance of counsel, newly discovered material facts, actual innocence, and that his failure to timely seek post-conviction relief was without fault on his part. The trial court summarily dismissed that notice, and Peters did not seek review of that ruling.

¶3 Peters instead filed a petition for post-conviction relief raising six claims: (1) counsel had been ineffective in advising him to plead guilty "when the murder of the victim was actually and legally caused by the intentional, criminal acts of a third-party"; (2) the "police investigation" of that murder is "clear and convincing evidence" that he is "actually innocent, and not criminally culpable"; (3) a civil verdict finding the "killer of the victim is more

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<sup>1</sup>The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

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than 51% liable for the death” is a newly discovered material fact “which would have changed the outcome of [his] case”; (4) his guilty plea was not knowing, voluntary, and intelligent because it was “based on material misrepresentations by counsel,” including his “culpability under the felony murder doctrine” and because of his attorney’s “unethical behavior”; (5) he is “entitled to a Rule 32 process” and appointed counsel despite the lack of a timely notice because he raises claims of actual innocence and newly discovered facts; and (6) the trial court erred in summarily dismissing his notice in his first proceeding.

¶4 The trial court summarily dismissed the petition. It concluded Peters’s claims that his plea had been involuntary and that his counsel had been ineffective could not be raised in an untimely proceeding. It further stated Peters had failed to meet the required burden of establishing “by clear and convincing evidence that [he] is actually innocent,” and his claim based on Rule 32.1(h) was precluded pursuant to Rule 32.2(a) because he had raised it in his previous proceeding. Finally, it determined he had not identified any evidence “discovered after trial” that “existed before trial” because he had not identified any “newly discovered facts . . . present[ed] during the civil trial.”

¶5 On review, Peters first repeats his claim that his counsel was ineffective for advising him to plead guilty. He further asserts he is “entitled to substantive review” of this argument based on *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012). A claim of ineffective assistance of counsel cannot be raised in an untimely post-conviction proceeding like the one before us. Ariz. R. Crim. P. 32.4(a); *see also* Ariz. R. Crim. P. 32.1(a). Peters claims, however, that the Supreme Court in *Martinez* established, “as an equitable right, a new category of post-conviction” claims for ineffective assistance “when counsel fails to follow State Court Rules.” But the Court limited its reasoning in *Martinez* to claims raised in federal habeas proceedings, and the “equitable” right the Court discusses permits defendants to raise in a federal habeas proceeding a claim of ineffective assistance of trial counsel if “in the [state law] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1315, 1319-

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20; *see also State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.2d 1013, 1014 (App. 2013). The Court's reasoning does not apply to Peters's state-law claims.

¶6 Peters did not timely initiate his first post-conviction proceeding in which he could have raised his claims of ineffective assistance of trial counsel. And, although he sought relief in his first proceeding pursuant to Rule 32.1(f) on the basis that his "failure to file a notice of post-conviction relief of-right . . . within the prescribed time was without fault on the defendant's part," he did not support that statement with sufficient facts nor seek review in this court pursuant to Rule 32.9(c) of the trial court's summary denial of that claim.<sup>2</sup> Because Peters's claim of ineffective assistance cannot be raised in an untimely petition, the court did not err in summarily rejecting it. Ariz. R. Crim. P. 32.4(a). For the same reason, the court did not err in summarily rejecting Peters's claim that his plea was not knowing, voluntary, and intelligent.

¶7 Peters also repeats his claim of actual innocence pursuant to Rule 32.1(h). To obtain relief pursuant to Rule 32.1(h), a defendant must "demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt." Peters's claim is essentially that the facts of his offense do not constitute second-

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<sup>2</sup>Peters asserts in his petition for review that his counsel "failed to advise [him] as to what to file, how to file, or when to file" a claim of ineffective assistance of counsel. To the extent Peters intends to raise a claim pursuant to Rule 32.1(f), he did not raise it in his petition below. Accordingly, we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

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degree murder.<sup>3</sup> He asserts that he, the victim, and one other individual had been attempting to burglarize a home when a neighbor intervened. The neighbor fired a gun at Peters and the others as they left in their car, striking one of the occupants and killing him. But Peters's claim fails. His first and second petitions for post-conviction relief were both untimely under Rule 32.4(a). Furthermore, this issue was decided in his previous Rule 32 proceeding and that decision became final.

¶8 Peters also repeats his claim of newly discovered material facts pursuant to Rule 32.1(e), claiming that the civil adjudication finding the neighbor liable for the victim's death constitutes "clear and convincing evidence of the newly discovered facts entitling [him] to an evidentiary hearing." It is not clear whether Peters means that the verdict constitutes a newly discovered material fact, or whether newly discovered material facts were presented during the civil proceeding. But in either case, his claim fails.

¶9 To obtain relief pursuant to Rule 32.1(e), the proffered evidence must have existed at the time of trial but be discovered only after trial; thus, evidence is "newly discovered" only if it is "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." *State v. Saenz*, 197

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<sup>3</sup>A guilty plea generally is antithetical to a later claim of innocence. See *State v. Norgard*, 92 Ariz. 313, 315, 376 P.2d 776, 778 (1962) (characterizing as "frivolous" motion to withdraw from plea when "the only basis given . . . was that the defendant apparently changed his mind and claimed to be innocent"). But a defendant may claim pursuant to Rule 32 that the factual basis for a guilty plea was insufficient as a matter of law. See, e.g., *State v. Johnson*, 181 Ariz. 346, 348-51, 890 P.2d 641, 643-46 (App. 1995). Recognizing that the factual basis for a plea need only provide strong evidence of guilt and not proof beyond a reasonable doubt, see *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994), we assume without deciding that such a claim may be raised pursuant to Rule 32.1(a).

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Ariz. 487, ¶ 13, 4 P.3d 1030, 1033-34 (App. 2000). Any later civil verdict, such as this one, therefore cannot support a claim for relief because it did not exist at the time Peters pled guilty. And Peters has not identified any evidence presented at the civil trial, much less evidence that existed at the time of his plea, that he could not have known about with the exercise of due diligence.

¶10 For the reasons stated, although we grant review, we deny relief.