

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

DAVID AUGUSTINE HIGDON,  
*Petitioner.*

No. 2 CA-CR 2014-0016-PR  
Filed June 3, 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NOT FOR PUBLICATION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 Pima County

No. CR20022359001

The Honorable Howard Fell, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

David Augustine Higdon, Buckeye  
*In Propria Persona*

STATE v. HIGDON  
Decision of the Court

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MEMORANDUM DECISION

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

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M I L L E R, Judge:

¶1 David Higdon petitions this court for review of the trial court's order summarily dismissing his 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). Higdon has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Higdon was convicted of first-degree murder and armed robbery and sentenced to a natural life prison term for murder and a 15.75-year prison term for armed robbery. We affirmed his convictions and sentences on appeal. *State v. Higdon*, No. 2 CA-CR 2005-0110 (memorandum decision filed May 25, 2006). He then sought post-conviction relief; the trial court denied his petition and we denied relief on review. *State v. Higdon*, No. 2 CA-CR 2009-0337-PR (memorandum decision filed Apr. 29, 2010).

¶3 In 2012, Higdon filed a notice of post-conviction relief followed by a petition. He asserted that *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376 (2012); and *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012), are significant changes in the law pursuant to Rule 32.1(g) allowing him to raise a claim of ineffective assistance of Rule 32 counsel. He asserted that Rule 32 counsel should have brought his diagnosis of Hepatitis C to the court's attention during Rule 32 proceedings and should have asserted the claim that trial counsel had been ineffective during plea negotiations. He raised various other claims of ineffective trial, Rule 32, and appellate counsel. He also asserted, as we understand his claim, that there was newly discovered evidence

STATE v. HIGDON  
Decision of the Court

pursuant to Rule 32.1(e) relevant to Rule 32 counsel's ineffectiveness, specifically counsel's failure to include in Higdon's first Rule 32 petition a news video purportedly demonstrating a witness's perjury.

¶4 The trial court summarily denied relief. It determined that none of the cited cases constitutes a significant change in the law and that Higdon's various claims of ineffective assistance of counsel are precluded or not cognizable. As to Higdon's claim of newly discovered evidence, it observed that Higdon had been aware of the news video since 2005 and thus had not been "diligent in discovering the facts and bringing them to the Court's attention." The court also noted that, insofar as Higdon claimed his Hepatitis C diagnosis constituted newly discovered evidence, the "diagnosis would not have affected his sentence."

¶5 Higdon then filed a motion for reconsideration, arguing the trial court had erred in summarily rejecting his claims and raising a new claim: the trial court had erred in his first Rule 32 proceeding by accepting counsel's "incomplete petition." The trial court rejected the newly raised claim, noting Higdon had "characterize[d] it as an *amended* version of" his existing claim of ineffective assistance of Rule 32 counsel, and observing such a claim is not cognizable under Rule 32. The court denied the motion for reconsideration as to the remaining claims. This petition for review followed.

¶6 On review, Higdon repeats his claim that *Frye*, *Lafler*, and *Martinez* constitute significant changes in the law entitling him to relief that permit him to raise various claims of ineffective assistance of counsel.<sup>1</sup> Higdon's most recent notice of post-conviction relief was untimely. Ariz. R. Crim. P. 32.4(a). "Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)." Ariz. R. Crim. P. 32.4(a). Thus, apart

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<sup>1</sup>On review, Higdon raises his claims regarding Hepatitis C and the news story only in the context of ineffective assistance of counsel, not in terms of newly discovered evidence.

STATE v. HIGDON  
Decision of the Court

from any rule of preclusion that applies in this successive proceeding, *see* Ariz. R. Crim. P. 32.2, Rule 32.4 prohibits Higdon from raising any claim of ineffective assistance of counsel pursuant to Rule 32.1(a). Any such claim can only be raised in an untimely notice if it is in actuality a claim of a significant change in the law under Rule 32.1(g). Ariz. R. Crim. P. 32.4(a).

¶7 “Rule 32 does not define ‘a significant change in the law.’ But plainly a ‘change in the law’ requires some transformative event, a ‘clear break from the past.’” *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009), quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991). Examples of such changes include “when an appellate court overrules previously binding case law” or “[a] statutory or constitutional amendment representing a definite break from prior law.” *Id.* ¶¶ 16-17.

¶8 Higdon argues that, pursuant to *Martinez*, he is entitled to raise a claim of ineffective assistance of Rule 32 counsel and, apparently by extension, additional claims of ineffective assistance of trial and appellate counsel. This court expressly rejected the notion that *Martinez* constitutes a significant change in the law. *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 6, 307 P.3d 1013, 1014 (App. 2013). We explained that the reasoning in *Martinez* was limited “to the application of procedural default in federal habeas review,” and did not alter established Arizona law that “[n]on-pleading defendants . . . have no constitutional right to counsel in post-conviction proceedings” and, thus “a claim that Rule 32 counsel was ineffective is not a cognizable ground for relief in a subsequent Rule 32 proceeding.” *Id.* ¶¶ 4-5.

¶9 Higdon further asserts that, pursuant to *Lafler* and *Frye*, he is entitled to raise for the first time a claim of ineffective assistance of counsel during plea negotiations. The trial correctly determined that *Frye* and *Lafler* do not constitute a significant change in the law. It has long been the law in Arizona that a defendant is entitled to effective representation in the plea context. *See State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000). Even before *Donald* was decided a defendant could have relied on other authority in asserting a claim of ineffective assistance of

STATE v. HIGDON  
Decision of the Court

counsel during plea negotiations. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Bowers*, 192 Ariz. 419, ¶¶ 11, 19-20, 966 P.2d 1023, 1026, 1028 (App. 1998).

¶10 Finally, Higdon asserts the trial court erred in rejecting his argument, raised for the first time in his motion for reconsideration, that the court had erred by accepting Rule 32 counsel's "incomplete" petition for post-conviction relief in Higdon's first post-conviction proceeding. He asserts the court incorrectly treated the claim as one of ineffective assistance of counsel, and that the claim instead "had to do with the Court's duty to not accept incomplete Petitions."

¶11 We agree with Higdon insofar as his amended claim below did not appear to be based on his claims of ineffective assistance of counsel. He instead asserted the court was required to "return[] the incomplete petition" pursuant to Rule 32.5, thus giving him an opportunity to fully develop his claims. The court nonetheless did not err in summarily rejecting this argument. We may uphold a trial court's correct ruling "for any reason supported by the record." *State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013). First, a trial court is not required to address arguments raised for the first time in a motion for reconsideration. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). And, in any event, any claim that the court erred in Higdon's first post-conviction relief proceeding should have been raised in his petition for review of the court's ruling in that proceeding; it cannot later be raised in a successive and untimely post-conviction proceeding. *See Ariz. R. Crim. P. 32.1, 32.9(c)*.

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