

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

CESAR FERNANDO MAYTORENA,  
*Petitioner.*

No. 2 CA-CR 2014-0028-PR  
Filed May 16, 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NOT FOR PUBLICATION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. CR064513

The Honorable Casey F. McGinley, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Stanton Bloom, P.C., Tucson

By Stanton Bloom

*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Presiding Judge:

¶1 Cesar Maytorena 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). Maytorena has not met his burden of demonstrating such abuse here.

¶2 Maytorena was convicted after a jury trial of second-degree murder, eight counts of aggravated assault, and six counts of endangerment and sentenced to aggravated, concurrent and consecutive prison terms totaling 145 years. We affirmed his convictions and sentences on appeal. *State v. Maytorena*, No. 2 CA-CR 1999-0375 (memorandum decision filed Apr. 30, 2003). Our mandate issued March 2, 2004. Maytorena, through appellate counsel, also filed a petition for post-conviction relief; the trial court denied relief, and Maytorena did not seek review of that ruling.

¶3 Maytorena filed a notice of post-conviction relief in July 2011, followed by a petition filed through counsel. In that petition, Maytorena raised numerous claims of ineffective assistance of trial and appellate counsel. He argued that, because he was represented by the same counsel during his appeal and first post-conviction proceeding, his claims of ineffective assistance of appellate counsel were not precluded by Rule 32.2(a)(3) and that the United State Supreme Court's recent decision in *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012), permitted him to raise a claim of ineffective assistance of Rule 32 counsel. He further asserted that, as we understand his petition, *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376

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(2012), constituted a significant change in the law relevant to a claim of ineffective assistance of counsel during plea negotiations.<sup>1</sup> Maytorena also asserted without explanation that he should be permitted to “present newly discovered facts” pursuant to Rule 32.1(e), which would permit him to demonstrate “by clear and convincing evidence that no reasonable fact finder would have found [him] guilty of the charges beyond a reasonable doubt,” citing Rule 32.1(h). Finally, Maytorena asserted that his failure to timely file the petition was without fault on his part, citing Rule 32.1(f).

¶4 The trial court summarily dismissed the petition, finding his claims of ineffective assistance of trial counsel were precluded pursuant to Rule 32.2(b) and his claims of ineffective assistance of appellate counsel were not colorable. It also rejected Maytorena’s claim based on *Lafler*. It did not expressly address Maytorena’s Rule 32.1(h) claim. This petition for review followed the court’s denial of Maytorena’s motion for reconsideration.

¶5 On review, Maytorena first argues that preclusion does not apply to his claims because his petition is “technically not a successive [p]etition,” citing *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006). In *Bennett*, our supreme court concluded that, when a defendant is represented by the same counsel on appeal and in his or her first Rule 32 proceeding, a claim of ineffective assistance of appellate counsel could be raised in a successive proceeding. 213 Ariz. 562, ¶¶ 13-16, 146 P.3d at 66-67. But *Bennett* does not apply here because Maytorena’s second notice of post-conviction relief was patently untimely – it was filed more than nine years after the trial court denied his first petition for post-conviction relief and more than seven years after our mandate issued in his appeal; accordingly, Maytorena may only raise claims pursuant to Rule 32.1(d) through (h). See Ariz. R. Crim. P. 32.4(a).

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<sup>1</sup>In what appears to be in reference to *Lafler*, Maytorena cited Rule 32.1(e). But he identifies nothing that could constitute newly discovered evidence under that rule. Thus, it seems Maytorena intended to cite Rule 32.1(g).

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¶6 We also reject Maytorena’s argument that he was entitled to file an untimely successive petition for post-conviction relief pursuant to Rule 32.1(f) because his failure to timely seek relief was without fault on his part. Although such a claim may be raised in an untimely Rule 32 proceeding, *see* Ariz. R. Crim. P. 32.4(a), Maytorena has not established that it may be raised in relation to a successive proceeding like this one. Nor has he explained, as Rule 32.2(b) requires, why he failed to raise his claim related to trial counsel’s effectiveness in plea bargaining in his first petition in 2001, particularly as at the time of the filing of that petition Maytorena was certainly aware that he had received the equivalent of a natural life sentence despite allegedly having been assured he could receive only twenty-five years. *See State v. Donald*, 198 Ariz. 406, ¶¶ 14-17, 20-21, 10 P.3d 1193, 1200-01 (App. 2000) (setting forth claim for ineffective assistance of counsel in relation to plea bargaining). Rule 32.1(f) does not apply.

¶7 Additionally, we find unavailing Maytorena’s contention that he is permitted to raise his claims because they are of sufficient constitutional magnitude to avoid preclusion pursuant to *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). Our supreme court’s decision in *Stewart* is limited to preclusion based on waiver pursuant to Rule 32.2(a)(3). 202 Ariz. 446, ¶ 1, 46 P.3d at 1068. The court did not address the failure to file a timely notice pursuant to Rule 32.4(a) for claims outside of Rule 32.1(d) through (h). Rule 32.4(a) is not based on waiver but instead on the defendant’s timeliness in seeking relief. Thus, whether the underlying claim is of a sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver is immaterial, and *Stewart* does not apply to Maytorena’s claims. *See State v. Lopez*, No. 2 CA-CR 2013-0506-PR, ¶¶ 6-8, 2014 WL 1592969 (Ariz. Ct. App. Apr. 21, 2014).

¶8 Except for his claim pursuant to Rule 32.1(f), Maytorena identifies only one other claim that is exempt from the timeliness requirement of Rule 32.4(a). He cites Rule 32.1(h) and asserts that “he can demonstrate by clear and convincing evidence that no reasonable fact finder would have found [him] guilty of the charges beyond a reasonable doubt if the allegations in the Petition are sustained.” But this claim depends entirely on Maytorena’s claims

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of ineffective assistance of counsel. He makes no independent argument that the evidence does not support the jury's finding of guilt. Accordingly, the claim fails.

¶9 The remainder of Maytorena's arguments address his claims of ineffective assistance of counsel. Those claims cannot be raised in an untimely proceeding like this one; thus, the trial court did not err in rejecting them. *See* Ariz. R. Crim. P. 32.1(a), 32.4(a). And he does not assert the court erred in rejecting his claims that *Lafler* and *Martinez* constitute significant changes in the law pursuant to Rule 32.1(g).

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