

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAMES ELDON ROGERS,  
*Petitioner.*

No. 2 CA-CR 2014-0351-PR  
Filed December 2, 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NOT FOR PUBLICATION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 Yavapai County

No. P1300CR20000367

The Honorable Celé Hancock, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Sheila Sullivan Polk, Yavapai County Attorney  
By Bill R. Hughes, Deputy County Attorney, Prescott  
*Counsel for Respondent*

James E. Rogers, Florence  
*In Propria Persona*

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

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ESPINOSA, Judge:

¶1 Petitioner James Rogers seeks review of the trial court’s summary denial of his petition for writ of habeas corpus, which the court construed as a petition for post-conviction relief pursuant to Rule 32.3, Ariz. R. Crim. P., and the court’s denial of his motion for reconsideration of that ruling. For the following reasons, we grant review but deny relief.

¶2 In 2001, Rogers was convicted of first-degree murder and sentenced to life imprisonment. This court affirmed his conviction and sentence on appeal, *State v. Rogers*, No. 1 CA-CR 01-0239 (memorandum decision filed Mar. 7, 2002), and our supreme court denied review of that decision. He has since initiated at least five unsuccessful post-conviction relief proceedings.

¶3 In his most recent proceeding, Rogers challenged the trial court’s instruction to the jury, based on A.R.S. § 13-1101(1), that “[p]roof of actual reflection is not required” to establish premeditation. He noted that after his trial was completed, our supreme court held such an instruction, “without further clarification,” erroneous. *State v. Thompson*, 204 Ariz. 471, ¶ 34, 65 P.3d 420, 429 (2003). He argued the court’s opinion in *Thompson*—as well as decisions that followed in *State v. Dann*, 205 Ariz. 557, 74 P.3d 231 (2003), and *State v. Moore*, 222 Ariz. 1, 213 P.3d 150 (2009)—constituted “a significant change in the law that if determined to apply to [his] case would probably overturn [his] conviction or sentence.” Ariz. R. Crim. P. 32.1(g).

¶4 The trial court dismissed Rogers’s petition on the alternate grounds that it was untimely and, “even if . . . timely,”

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provided no basis for relief. Rogers filed a motion for rehearing in which he argued a claim under Rule 32.1(g) could be raised in an untimely proceeding, and the court denied the motion, confirming its ruling without further comment. This petition for review followed.

¶5 On review, Rogers relies on the arguments he raised below and maintains the trial court “erred” in concluding his claim was untimely.<sup>1</sup> We will not disturb the dismissal of his petition unless the court clearly has abused its discretion. See *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rogers has not met his burden of establishing an abuse of discretion here.

¶6 Although Rogers is correct that a claim under Rule 32.1(g) is an exception to the rule of preclusion, pursuant to Rule 32.2(b), and is not time-barred under Rule 32.4(a),<sup>2</sup> Rule 32.2(b) imposes specific requirements for such exceptional claims. Specifically, the rule provides that “the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner,” and, “[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely

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<sup>1</sup>We do not address other issues Rogers raises for the first time in his petition for review. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); see also Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

<sup>2</sup>In Rogers’s direct appeal, this court considered the same jury instruction he now challenges, but found “the defect in A.R.S. § 13-1101(1) . . . did not prejudice or affect [his] trial.” *Rogers*, No. 1 CA-CR 01-0239, ¶ 15. But because that decision was issued before our supreme court’s decision in *Thompson* and without benefit of that decision, we do not find his current claim precluded by Rule 32.2(a)(2).

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manner, the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b).

¶7 The law with respect to the jury instruction Rogers challenged below has remained unchanged since our supreme court’s decision in *Thompson* in 2003. See *Dann*, 205 Ariz. 557, ¶¶ 13, 16, 74 P.3d at 238-39 (relying on *Thompson*); *Moore*, 222 Ariz. 1, ¶¶ 71-72, 213 P.3d at 164 (relying on *Dann*). Although the trial court may have been mistaken in finding Rogers’s claim “untimely” pursuant to Rule 32.4, the claim was clearly subject to summary dismissal for his failure to provide meritorious reasons for failing to raise it in an earlier proceeding. See Ariz. R. Crim. P. 32.2(b).

¶8 Because Rogers failed to comply with the requirements of Rule 32.2(b), in bringing a claim based on a ten-year-old decision, the trial court did not err or abuse its discretion in summarily dismissing this proceeding. Cf. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court’s ruling if result legally correct for any reason). Accordingly, although we grant review, relief is denied.