

APPENDICES

- Appendix A Arizona Court of Appeals Memorandum Decision Accepting Review but Denying Relief (01/05/2018)**
- Appendix B Superior Court Order Summarily Dismissing Notice of Post Conviction Relief (09/02/2016)**
- Appendix C Petition for Review, Arizona Court of Appeals (11/03/2015)**
- Appendix D Petition for Review, Arizona Supreme Court (04/06/2018)**
- Appendix E Arizona Supreme Court Order Denying Review (07/30/2018)**

APPENDIX A
Arizona Court of Appeals Memorandum Decision
Accepting Review but Denying Relief
01/05/2018

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EFRAIN ISMAEL CONDE,
Petitioner.

No. 2 CA-CR 2017-0326-PR
Filed January 5, 2018

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NOT FOR PUBLICATION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 Maricopa County
No. CR1988005881
The Honorable James P. Beene, Judge

REVIEW GRANTED; RELIEF DENIED

Efrain Conde, Buckeye
In Propria Persona

STATE v. CONDE
Decision of the Court

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

B R E A R C L I F F E, Judge:

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

¶2 After a jury trial, Conde was convicted of first-degree murder, first-degree burglary, five counts of armed robbery, eight counts of aggravated assault, and attempted armed robbery. For murder, the trial court sentenced him to life in prison without the possibility of release on any basis for twenty-five years, and to consecutive prison terms for the remaining crimes totaling 255 years. We affirmed his convictions and sentences on appeal. *State v. Conde*, 174 Ariz. 30, 37 (App. 1992). His convictions stem from a 1988 bank robbery. *Id.* at 31. During the robbery he and an accomplice shot and killed an off-duty police officer working as a security guard. *Id.* Conde and his accomplice stole a car for their getaway from a bank customer, and then, after a thirty-minute car chase during which they stole two other cars at gunpoint, Conde was wounded and arrested. *Id.*

¶3 Before this proceeding, Conde has twice unsuccessfully sought post-conviction relief. In the second proceeding in July 2016, Conde filed a notice of post-conviction relief only claiming, without further showing, that he "now possesses new evidence of material facts that proves beyond any reasonable doubt that he was wrongly convicted." The trial court summarily dismissed the notice, noting that Conde did not "allege any new facts."

¶4 Shortly thereafter, to start this proceeding, Conde filed a notice of and petition for post-conviction relief, along with a "Motion for Evidentiary Hearing." He claimed to have recently obtained "new evidence" that a detective involved in his case had "falsified information in

STATE v. CONDE
Decision of the Court

multiple . . . cases." He raised multiple claims of error, including trial error, arguing that the new evidence "brings into question ALL the evidence used in the trial," "would have produced a none-guilty [sic] verdict," and "confirms [he] was unconstitutionally deprived of assistance of counsel." He included with his petition a brief magazine article dated November 2014 noting that, in *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013), the court had vacated a defendant's death sentence because the state had "withheld information" about several cases in which the same detective involved in his case had "lied under oath or committed other misconduct." Conde also raised claims about his sentences and argued that the parole board had violated his due process rights by denying him parole "without [his] presence."

¶5 The trial court, stating it would treat Conde's filings as a "single Notice of Post-Conviction Relief," summarily dismissed the proceeding. It found the bulk of Conde's claims precluded because he did not raise them on appeal or in his first Rule 32 proceeding. The court also noted Conde could not raise a claim as to a recent parole board hearing under Rule 32. As to his claims of newly discovered evidence, the court concluded that Conde had not "show[n] why the instances of misconduct in other cases were material here, or[,] if they were, why the evidence was not merely cumulative or impeaching." This petition for review followed.

¶6 On review, Conde asserts that the evidence he provided "met the tests for newly discovered material evidence," the evidence "supported claims that could not have been previously presented," and that claims of newly discovered evidence "may include reinvigoration of claims categorized under Rule 32.1(a)." To prevail on a claim of newly discovered evidence, Conde must show that the newly discovered material facts were discovered after the trial, he was diligent in securing them, and they "probably would have changed the verdict." *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016); *see* Ariz. R. Crim P. 32.1(e). Also, he "must establish that the evidence . . . could not have been discovered and produced at trial through reasonable diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000). The facts must not be "merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e).

¶7 Assuming, without deciding, that Conde has otherwise met these requirements, he has not shown that the evidence would have changed the verdict had it been used at trial. The evidence would no doubt

STATE v. CONDE
Decision of the Court

have been useful in impeaching the detective's testimony, but Conde has not shown that he probably would have been acquitted had the jury disregarded the detective's testimony. And Conde, who was unrepresented at trial, defended himself against the charges by arguing that the detective and others had framed him for the crimes, in part by taking his gun, firing it, and then, apparently, placing fired bullets and shell casings at the crime scenes and then firing the gun into the already-dead victim's skull. None of the misconduct described in *Milke* is similar.¹ 711 F.3d at 1020-21.

¶8 Nor do we agree with Conde's assertion that the evidence allows him to raise claims under Rule 32 that cannot be raised in an untimely proceeding like this one. Conde was only permitted to raise claims under Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a)(2)(A), (D). He is wrong that claims otherwise precluded — such as his claims of police misconduct and other alleged trial errors — are "reinvigorated" by the claim of newly discovered evidence. That argument is inconsistent with the plain language of Rule 32.1(e), which does not refer to newly discovered material facts as to other post-conviction claims — it refers only to those facts bearing on the defendant's "verdict or sentence." *See State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7 (App. 2009) (rule's plain language is best indicator of meaning). And, in any event, evidence of the detective's conduct in other cases does not support Conde's various claims, which depend on his unproven assertion that the state falsified evidence against him.

¶9 Conde also seems to argue that he may amend his original petition based on the newly discovered evidence. Rule 32.6(c) permits amendment "only for good cause." Citing case law that does not control this court, Conde argues that the rule allows a petition to be amended even after a trial court has ruled on it. Even were we to agree with this interpretation, Conde did not move to amend his original petition and, as we have explained, the newly discovered evidence does not support his other claims in any event. Additionally, we need not address his argument that he cannot be said to have waived the claims under Rule 32.2(a)(3) because he did not have all the "material facts" relevant to those claims.

¹The court in *Milke* provided a list of cases in which the detective had committed misconduct. 711 F.3d at 1020-21. That conduct, some of which occurred before Conde's trial, consisted of the detective lying under oath as well as Fifth Amendment violations in the interrogation of suspects, including interrogation of a suspect suffering a skull fracture who "did not know his own name, the year or the name of the president." *Id.*

STATE v. CONDE
Decision of the Court

Whether a claim has been waived or not is immaterial, only the timeliness of raising the claim is relevant. *See Ariz. R. Crim. P. 32.4(a)(2)(A); see also State v. Lopez, 234 Ariz. 513, ¶¶ 7-8 (App. 2014).*

¶10 Conde also seems to claim that, because the trial court treated his filings as a notice of post-conviction relief, summary dismissal was inappropriate. He claims that, because he had complied with Rule 32.2(b), he is entitled to “appointment of counsel” and “full post conviction relief briefing.” Pursuant to Rule 32.2(b), a defendant seeking to raise a claim pursuant to Rule 32.1(d) through (h) in an untimely proceeding must include with the notice of post-conviction relief “the specific exception to preclusion and . . . the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner.” Even if we accept Conde’s suggestion that his filings, taken together, would meet the requirements of Rule 32.2(b), he is not entitled to relief. Conde filed a petition for post-conviction relief with his notice. As we have explained, that petition does not state a colorable claim. The court was thus required by Rule 32.6(d)(1) to summarily dismiss it, and we may affirm the court’s ruling for any reason supported by the record. *See State v. Banda, 232 Ariz. 582, n.2 (App. 2013).* And Conde was not entitled to counsel. *See Ariz. R. Crim. P. 32.4(b)(2)* (non-pleading defendant entitled to counsel only in timely or first post-conviction proceeding).

¶11 We grant review but deny relief.

**APPENDIX B
Superior Court Order
Summarily Dismissing
Notice of Post Conviction Relief
09/02/2016**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

HONORABLE JAMES P. BEENE

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

EFRÉN ISAMEL CONDE (B)

EFREN ISAMEL CONDE
#054328 ASPC LEWIS STINER UNIT
P O BOX 3100
BUCKEYE AZ 85326

COURT ADMIN-CRIMINAL-PCR

RULE 32 PROCEEDING DISMISSED

Pending before the Court are (1) Defendant's Notice of Post-Conviction Relief, (2) Petition for Post-Conviction Relief, and (3) Motion for Evidentiary Hearing, all filed on August 23, 2016. The Court deems these submissions a single Notice of Post-Conviction Relief. This is Defendant's third Rule 32 proceeding. It is both untimely and successive.

A jury convicted Defendant of sixteen offenses, including the first-degree murder of Phoenix police officer. On March 19, 1990, the Court entered judgment and imposed consecutive terms of imprisonment, including a life sentence with no possibility of release on any basis for 25 years. The Arizona Court of Appeals affirmed the convictions and sentences, issuing its order and mandate on March 22, 1993. *See State v. Conde*, 174 Ariz. 30, 846 P.2d 843 (App. 1992). Next, Defendant unsuccessfully sought post-conviction relief, and the Arizona Court of Appeals denied review in 2001. More recently, this Court dismissed a second Rule 32 proceeding in an order filed on July 25, 2016.

A. Rule 32.1(a) and Rule 32.1(c) Claims

In his current submission, Defendant contends that his convictions and sentences were obtained in violation of his constitutional rights and he is entitled to relief under Arizona Rule of

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

Criminal Procedure. Specifically, Defendant contends that he received ineffective assistance of counsel. (Petition at 2; Notice at 2) In addition, Defendant contends that: (1) the State engaged in misconduct, including using falsified evidence provided by Detective Armando Saldate and Officer Mike Chambers, along with a coerced confession, perjured testimony, an identification obtained in violation of constitutional rights, and evidence obtained pursuant to an unlawful arrest and an unlawful search and seizure; (2) the State introduced at trial a statement made in the absence of an attorney at a time when representation is constitutionally required; (3) Defendant's right against self-incrimination and another unspecified constitutional right were infringed; (4) the State engaged in the unconstitutional suppression of evidence; (5) the State engaged in malicious prosecution; (6) Defendant's right to a timely initial appearance was violated, and (7) there was no probable cause to arrest or prosecute Defendant. (Notice at 3; Petition at 1-9) Furthermore, Defendant contends that his sentences were not imposed in accordance with applicable statutes and rules, and he is entitled to relief under Arizona Rule of Criminal Procedure 32.1(c). (Petition at 2, 9-10) Defendant cannot raise these Rule 32.1(a) and Rule 32.1(c) claims because an untimely Notice of Post-Conviction Relief may only assert claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are "cognizable under Rule 32.1(a)"). The Rule 32.1(a) and Rule 32.1(c) claims Defendant has asserted were required to be raised in a timely Rule 32 proceeding.

Defendant's claims are also precluded under Arizona Rule of Criminal Procedure 32.2(a). In his direct appeal, Defendant unsuccessfully contested the use of his confession, claimed that it was not coerced, and objected to the use of essential elements of an offense as aggravators. The Arizona Court of Appeals affirmed: the finding that one of Defendant's confessions was voluntary, the admissibility of the confession as impeachment evidence, and the use of aggravating factors in imposing sentence. These issues are now precluded under Arizona Rule of Criminal Procedure 32.2(a)(2). Likewise, Defendant raised his ineffective assistance of counsel claim in a previous Rule 32 proceeding, and relief on that basis is also precluded. *See id.; State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.") (emphasis in original). Because Defendant could have raised the other constitutional violations on appeal, relief as to those claims is precluded under Arizona Rule of Criminal Procedure 32.2(a)(3).

B. Rule 32.1(e) Claim

Alternatively, Defendant contends that newly discovered material facts exist that require the Court to grant relief pursuant to Arizona Rule of Criminal Procedure 32.1(e). (Notice at 2) To be entitled to post-conviction relief based on newly discovered evidence, the defendant must

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or on appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). The defendant states that he learned on June 3, 2016 that Detective Saldate and Officer Chambers engaged in misconduct in other cases. (Petition at 2 & att. at 3) Defendant explains that he did not raise the issue in his 1997 petition because there was no corroborating evidence from police investigations at that time. (Notice at 4)

Importantly, “[e]vidence is not newly discovered unless it was 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.” *Saenz*, 197 Ariz. at 490, ¶ 13, 4 P.3d at 1033. Defendant states that he alerted defense counsel about the police misconduct in 1988 (Petition att. at 2), and the information was known by the defense at the relevant times. Indeed, at trial Defendant “argued that he was the victim of a police conspiracy to implicate him in the police officer’s death.” *Conde*, 174 Ariz. at 32, 846 P.2d at 845. He also raised the issues about his hospital confession (*id.* at 3) on appeal. Although Defendant also claims that Detective Saldate had direct involvement in the shooting of Kenneth Collings, he relies upon 1989 transcripts. (*Id.*) His identifications of instances of misconduct in this case were known at all relevant times. Defendant fails to show why the instances of misconduct in other cases were material here, or if they were, why the evidence is not merely cumulative or impeaching. Accordingly, Defendant fails to state a Rule 32.1(e) claim.

C. Rule 32.1(h) Claim

In addition, Defendant claims that he is actually innocent and therefore entitled to relief under Arizona Rule of Criminal Procedure 32.1(h). (Notice at 3) The evidence alluded to by the defendant fails to meet the standard that must be met for Defendant to obtain post-conviction relief pursuant to Rule 32.1(h). The defendant must prove by clear and convincing evidence that, based on the new facts presented, a reasonable fact finder could not find the defendant guilty of the underlying offenses. The defendant has failed to meet this burden. It is also worth noting that the Arizona Court of Appeals affirmed his convictions and sentences.

D. Parole Board Proceedings

Finally, Defendant contends that the Parole Board violated his due process rights at a recent hearing. (Petition Att. at 10-11) A defendant may challenge a decision regarding parole only through special action, and then may only allege violations of due process. *See Sheppard v. Ariz. Bd. of Pardons and Paroles*, 111 Ariz. 587, 588, 536 P.2d 196, 197 (1975) (explaining that

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

the legislature has denied the courts the right to review decisions of the Board regarding parole with an exception for special actions with “the limited purpose of considering due process violations in the hearing process”). Accordingly, if Defendant has a due process claim to raise, he will need to follow the special action procedures.

In sum, Defendant fails to state a claim for which Rule 32 can provide relief. When a Rule 32 notice is untimely and successive, a defendant must identify a substantial basis for his claims, provide specific factual support, and adequately explain why the claims are untimely. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this burden. The Court finds that no purpose would be served by further proceedings or appointment of counsel.

IT IS THEREFORE ORDERED, dismissing Defendant’s Notice of Post-Conviction Relief, Petition for Post-Conviction Relief, and “Motion for Evidentiary Hearing,” which the Court deems a single Notice of Post-Conviction Relief, pursuant to Arizona Rule of Criminal Procedure 32.2(b).

**APPENDIX C
Petition for Review
Arizona Court of Appeals
11/03/2015**

COURT OF APPEALS DIVISION ONE
STATE OF ARIZONA
FILED

1 Efrain Conde ADC# 054328
2 Arizona Department of Corrections
3 Lewis Complex, Stiner Unit L3
P.O. Box 3100
Phoenix, Arizona 85326-3100

JAN 25 2017

AMY M. WOOD, CLERK

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In Propria Persona

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

9 STATE OF ARIZONA, } No.
10 Plaintiff/Respondent, } Maricopa County
11 -vs- } Superior Court
12 EFRAIN ISMAEL CONDE, } No. CR1988-005881
13 .., Defendant/Petitioner. }
14 PRO SE PETITION
FOR REVIEW OF SUMMARY
DENIAL OF NOTICE OF
POST CONVICTION RELIEF

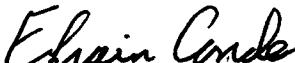
15 COMES NOW Defendant-Petitioner *in pro per* Efrain Ismael Conde,¹
16 pursuant to (1) Rule 32.9(c)(2), Ariz.R.Crim.P., authorizing Petitions for Review;
17 (2) the Superior Court's 12/15/2016 Minute Entry Order granting extension to
18 January 20, 2017;² (3) the 5th, 6th, and 14th Amendments to the United States

1 Petitioner's name is properly spelled Efrain Ismael Conde. The Superior
2 Court documents list his name as Efren Isamel Conde. The published Opinion on
3 his direct appeal used Efran Ismael Conde. Petitioner has used the proper
4 spelling of his name in this Petition for Review, and requests the Court allow him
5 to continue using his proper name on any further documents.

2 The due date for this Petition for Review is January 25, 2017, pursuant to
23 **Rule 1.3(a), Ariz.R.Crim.P.**, (providing that, for any period of time prescribed
24 by ...order of court, ...where the order is served by mail, five calendar days shall
25 be added to the prescribed period). See also *State v. Herrera*, 183 Ariz. 642, 645,
26 905 P.2d 1377 (App.1995, Div.1) (holding that “[b]ecause the trial court mailed
to defendant the minute entry granting the extension of time, defendant was
entitled to an additional five days to comply with the court’s order. See
Rule 1.3; *State v. Savage*, 117 Ariz. 535, 536, 573 P.2d 1388, 1389 (1978).”).

1 Constitution; and (4) Art. II, § 4 of the Constitution of the State of Arizona; and
2 hereby submits his Petition for Review, requesting review by the Court of Appeals
3 of the Maricopa County Superior Court's 09/02/2016 Minute Entry Order summarily
4 dismissing the Notice of Post Conviction Relief³ filed by Petitioner
5 *in propria persona*, which asserted claims under Rule 32, Ariz.R.Crim.P. and cited
6 the provision of law authorizing review for newly discovered material evidence. A
7 copy of the Order summarily dismissing the Notice of Post Conviction Relief is
8 attached hereto as **Attachment A**. This Petition for Review is supported by the
9 following Memorandum of Points and Authorities.

10 **RESPECTFULLY SUBMITTED** this 17th day of January, 2017.

11 

12 _____
13 Efrain Conde
Petitioner *pro se*

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 This Petition for Review arises from the summary denial of Petitioner's
17 08/23/2016 Notice of Post Conviction Relief⁴ (hereinafter, "**08/16/2016 Notice**")
18 involving circumstances, claims, and facts which, at the time of filing, called for
19 appointment of counsel, full briefing, and an evidentiary hearing. *See* Superior
20 Court Order of summary denial, at **Attachment A**.

21 _____
22 ³ In the Superior Court, Petitioner submitted (1) a Notice of Post Conviction
23 Relief, (2) a Petition for Post Conviction Relief, and (3) a Motion for Evidentiary
24 Hearing, all filed on August 23, 2016. The Superior Court, Honorable James
25 P. Beene, deemed these documents as "*a single Notice of Post Conviction Relief*,"
26 *see* 09/02/2016 Minute Entry Order, at page 1, first paragraph.

27 ⁴ Petitioner's references throughout this Petition for Review to his Superior
28 Court Notice of Post Conviction Relief necessarily indicates reference to the
29 content of all of the documents which the Superior Court officially deemed as
30 "*a single Notice of Post Conviction Relief*," *see* 09/02/2016 Minute Entry Order,
31 at page 1, first paragraph. *See* also footnote # 3 of this Petition, *supra*.

1 **II. ISSUES PRESENTED FOR REVIEW**

2 1. Did the Superior Court abuse its discretion and violate Petitioner's right to
3 due process of law under Rule 32.1(e), Ariz.R.Crim.P., A.R.S. Const., art. II,
4 § 4 and U.S. Const., 14th Amendment, by summarily dismissing Petitioner's
5 *pro se* Notice of Post Conviction Relief which presented, to the best of his
6 ability as an unrepresented indigent petitioner, a claim of newly discovered
7 material evidence? *See Attachment A.*
8
9 2. Did the Superior Court abuse its discretion by summarily dismissing
10 Petitioner's *pro se* Notice of Post Conviction Relief despite the fact that the
11 content of the Notice⁵ included (1) the substance of the specific exception to
12 preclusion, (2) meritorious reasons substantiating the claim, and (3) reason
13 why the claim was not stated in any previous petition or in a timely manner?
14
15 3. As a subsidiary but nonetheless essential legal issue implicitly implicated by
16 the Superior Court's decision summarily rejecting Petitioner's claims based
17 on newly discovered evidence:

18 Did the Superior Court's summary dismissal constitute
19 constitutional error with its implicit ruling that newly discovered
20 material evidence could not constitute a basis for reassertion
21 of a previously presented type of constitutional error, where the
22 new, additional, form of constitutional error could not have been
23 presented for adjudication in the absence of the newly discovered
24 material evidence?

25 **III. FACTS MATERIAL TO THIS COURT'S DETERMINATION OF
26 THE ISSUES PRESENTED FOR REVIEW**

27 1. A one-page basic history of the case was presented in Petitioner's
28 hand-written *pro se* Superior Court Petition for Post Conviction Relief, immediately
29 following the end of the Rule 32 form.

30 2. A hand-written Statement of Facts was presented in that same document,
31 beginning at the bottom of the one-page history of the case. Those facts included the
32 following.

33 ⁵ As previously stated in footnote #3, *supra*, Petitioner submitted a set of
34 documents which the Superior Court treated as a single Notice of Post Conviction
35 Relief, *see* 09/02/2016 Minute Entry Order, at page 1, first paragraph.
36 Accordingly, for purposes of this Petition for Review, the content of the "Notice
37 of Post Conviction Relief" must include the content of all those documents,
38 which were (1) a Notice of Post Conviction Relief, (2) a Petition for Post
39 Conviction Relief, and (3) a Motion for Evidentiary Hearing, all filed on
40 August 23, 2016.

1 3. Petitioner was shot and arrested on May, 27, 1988. *See* PCR Exhibit B and
2 taken to the hospital for treatment for serious gunshot wounds. *See* PCR Exhibit C.

3 4. At the hospital, Petitioner repeatedly was interrogated by Phoenix Police
4 Detective Armando Saldate, while Petitioner was in critical condition and in the
5 hospital's Intensive Care Unit (ICU). During the interrogation, detective Saldate
6 repeatedly grabbed Petitioner's wounds, inflicting extreme pain upon Petitioner. *See*
7 PCR Exhibit B, at ¶ 5.

8 5. At some point, Petitioner was removed from the ICU and placed in a room
9 and all medical treatments and medical attention were stopped. *See* PCR Exhibit B,
10 at ¶ 6.

11 6. Based upon the time frame of Petitioner's ICU treatment and subsequent
12 removal to another room without any medical care, Detective Saldate prepared
13 multiple reports stating Petitioner had confessed to having committed serious crimes.
14 *See* PCR Exhibit D.

15 7. In May 1988, Kenneth Collings, the murder victim in the case, was shot
16 with the .45 caliber gun that belonged to Petitioner. *See* PCR Exhibit E, and
17 transcript citations in the PCR Statement of Facts.

18 8. On June 14, 1988, Petitioner was indicted by a Grand Jury. *See* PCR
19 Exhibit H.

20 9. After informing his defense counsel of serious police misconduct, and after
21 defense counsel refused to engage in any investigation of police misconduct,
22 Petitioner was compelled to seek to represent himself. *See* PCR Exhibit B, and
23 transcript citations in the PCR Statement of Facts.

24 10. At trial, Detective Saldate testified to Petitioner's having "confessed" to
25 him during interrogation at the hospital, in the ICU and in a different hospital room.
26 Petitioner's primary defense was misconduct by the police.

1 11. On June 3, 2016, Petitioner received new evidence reflecting critical
2 information about Detective Saldate's long-term serious misconduct as a police
3 detective, both before and after the time period of Petitioner's trial. Detective
4 Saldate's misconduct expressly included false testimony regarding alleged
5 confessions by criminal defendants who were interviewed by Saldate without
6 witnesses or contemporaneous recordings; and those confessions were rejected
7 by the various courts on the basis of Saldate's misconduct. *See* PCR Exhibit B,
8 ¶¶ 14-15; PCR Exhibit J.

9 **IV. REASONS WHY THE PETITION SHOULD BE GRANTED**

10 **A. Applicable Standards of Review**

11 **A trial court abuses its discretion when it commits an error of law.** *State*
12 *v. West*, 224 Ariz. 575, ¶ 8, 233 P.3d 1154, 1156 (App.2010). Appellate courts
13 reviewing the denial of post conviction relief apply an abuse of discretion standard.
14 *State v. Cook*, 177 Ariz. 595, 870 P.2d 413 (App.1993, Div.1); *State v. Rosales*,
15 205 Ariz. 86, 66 P.3d 1263 (App.2003, Div.2); *State v. Schurz*, 176 Ariz. 46, 57,
16 859 P.2d 156 (1993); *State v. Amaya-Ruiz*, 166 Ariz. 152, 180, 800 P.2d 1260
17 (1990); *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (review of a trial
18 court's summary dismissal of a petition for post conviction relief is for an abuse of
19 discretion).

20 “*We review a denial of a Rule 32 petition based on lack of a colorable claim*
21 *for an abuse of discretion.*” *State v. Amaral*, 239 Ariz.217, ¶ 9, 368 P.3d 925, 927
22 ¶ 9 (2016), citing *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19, 278 P.3d 1276, 1280
23 (2012); and *State v. Bennett*, 213 Ariz. 562, 566 ¶ 17, 146 P.3d 63, 67 (2006).
24 Summary denial of a claim based on newly discovered material evidence constitutes
25 a ruling that a petitioner failed to present a colorable claim.

Constitutional and legal issues, however, are reviewed *de novo*.⁶ *State v. Moody*, 208 Ariz. 424, 445, 94 P.3d 1119 (2004) (*en banc*), citing *State v. Davolt*, 207 Ariz. 191, 201, ¶ 21, 84 P.3d 456, 466 (2004); and *State v. Cook, supra*.

B. The Requirements of Rule 32.2(a) & (b), Ariz.R.Crim.P., for Untimely or Successive Petitions for Post Conviction Relief

Because Petitioner previously filed a Petition for Post Conviction Relief, the current, successive, petition is subject to the provisions of **Rule 32.2(a) and Rule 32.2(b), Ariz.R.Crim.P.**, which expressly provide as follows:

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

- (1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
- (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
- (3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, 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. If 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 manner, the notice shall be summarily dismissed.

Rule 32.2(a) & (b), Ariz.R.Crim.P. (emphasis by bold print added).

Petitioner's Superior Court Notice of Post Conviction Relief presented a claim under **Rule 32.1(e), Ariz.R.Crim.P.**, (newly discovered material facts); and that rule expressly provides as follows:

⁶ The third legal issue identified in Section II (Issues Presented for Review) calls for *de novo* review by this Court, in that resolution of the issue necessarily involves interpretation of the relationship between Rule 32.1(a) and Rule 32.1(e), Ariz.R.Crim.P., within the context of state and federal constitutional law, either in the abstract or in an as-applied manner.

e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

- (1) The newly discovered material facts were discovered after the trial.
- (2) The defendant exercised due diligence in securing the newly discovered material facts.
- (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

Rule 32.1(e), Ariz.R.Crim.P.

C. A Critical Feature of Rule 32.1(e), Ariz.R.Crim.P., That Must Be Taken Into Account

It is important for the Court to take special notice of a critical feature of the governing rule, which is that a claim under **Rule 32.1(e), Ariz.R.Crim.P.**, is a claim that “*newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence*” — not that newly discovered material facts **DO EXIST**, just that newly discovered material facts **PROBABLY EXIST**. The reason for the distinction is clear from the difference between a **NOTICE** of post conviction relief and a **PETITION** for post conviction relief. The Notice is to make the trial court aware of the type of claim that is being asserted, whereas the Petition is to prove up the claim. This distinction also potentially implicates the question of whether the Superior Court abused its discretion in failing to appoint counsel (Petitioner indicated that he sought appointment of counsel in his Notice of Post Conviction Relief).

D. An Evidentiary Hearing Constitutes the Formal Process for the Determination of Facts Underlying A Claim for Post Conviction Relief, and Especially So Within the Context of A Claim Seeking Relief on the Basis of Newly Discovered Material Evidence

1 As previously stated, **Rule 32.1(e)** provides that a defendant may seek relief
2 if newly-discovered material facts exist, which, if introduced, might have affected the
3 verdict, finding, or sentence. A defendant is entitled to an evidentiary hearing on an
4 allegation of newly-discovered evidence if the defendant presents a “*colorable
5 claim.*” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988); *see also State
6 v. Fisher*, 141 Ariz. 227, 250–51, 686 P.2d 750, 773–74, *cert. denied*, 469 U.S. 1066
7 (1984). The facts underlying a claim for relief that are outside the record of
8 prior proceedings are to be determined by the court at a special proceeding created
9 for that specific purpose, namely, at an evidentiary hearing.

10 **1. The Evidentiary Hearing Process**

11 Evidentiary hearings are governed by the provisions of **Rule 32.8**,
12 **Ariz.R.Crim.P.**, which provides as follows:

- 13 a. **Evidentiary Hearing.** The defendant shall be entitled to a
14 hearing to determine issues of material fact, with the right to be
15 present and to subpoena witnesses. If facilities are available,
16 the court may, in its discretion, order the hearing to be held at
17 the place where the defendant is confined, giving at least 15 days
18 notice to the officer in charge of the confinement facility.
19 In superior court, the hearing shall be recorded.
- 20 b. **Evidence.** The rules of evidence applicable in criminal
21 proceedings shall apply, except that the defendant may be called
22 to testify at the hearing.
- 23 c. **Burden of Proof.** The defendant shall have the burden of
24 proving the allegations of fact by a preponderance of the
25 evidence. If a constitutional defect is proven, the state shall have
26 the burden of proving that the defect was harmless beyond a
reasonable doubt.

21 **Rule 32.8, Ariz.R.Crim.P.**

22 **2. Summary Dismissal vs. Mandatory Evidentiary
23 Hearing**

24 This Court has emphasized the process for resolving claims that are based on
25 facts not of record in prior proceedings. *State v. Robbins*, 166 Ariz. 531, 532,
26 803 P.2d 942 (App. 1991, Div. 1) (holding that the Rule 32 process is available for

1 examination and expansion of the record to determine factual basis for a claim). This
2 Court has held that, where doubts exist, the PCR court should first permit the
3 defendant to raise the relevant issues, then conduct an evidentiary hearing, formally
4 resolve the matter, and make a record for review:

5 One of the purposes of a Rule 32 proceeding "*is to furnish*
6 *an evidentiary forum for the establishment of facts*
7 *underlying a claim for relief, when such facts have not*
previously been established of record." *State v. Scrivner*,
132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982);....

8 *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85, (1990) (underlining added).

9 As a matter of constitutional law, under both the state and federal constitutions,
10 when a petitioner presents a colorable claim for post conviction relief, there is a due
11 process entitlement to an evidentiary hearing, and summary
12 dismissal is impermissible. *State v. Jenkins*, 193 Ariz. 115, 118, 970 P.2d 947
13 (App.1998,Div.1); *Donald, supra*, 198 Ariz., at 411, 10 P.3d, at 1198.

14 In *Townsend v. Sain*, 372 U.S. 293 (1963), the United States Supreme Court
15 ruled that a petitioner is constitutionally entitled to a full factual determination — an
16 evidentiary hearing — if a petitioner presents a claim of the violation of a federal
17 constitutional right based on allegations of fact calling for judicial determination,
18 that is, what has since been commonly termed a “*colorable claim*.” The evidentiary
19 hearing constitutionally required by *Townsend v. Sain* as a matter of federal due
20 process could be conducted in state court or on federal habeas review:

21 Therefore, where an applicant ... alleges facts which, if
22 proved, would entitle him to relief, the federal court to which the
23 application is made has the power to receive evidence and try the
24 facts anew.

25 In announcing this test we do not mean to imply that the
26 state courts are required to hold hearings and make findings
which satisfy this standard, because such hearings are governed
to a large extent by state law.

25 *Townsend v. Sain*, 372 U.S., at 757.
26

1 An evidentiary hearing was required for any of six specific circumstances:

2 We hold that a federal court must grant an evidentiary hearing to
3 a habeas applicant under the following circumstances: If (1) **the**
4 **merits of the factual dispute were not resolved in the state**
5 **hearing;** (2) the state factual determination is not fairly supported
6 by the record as a whole; (3) **the fact-finding procedure**
7 **employed by the state court was not adequate to afford a full**
8 **and fair hearing;** (4) there is a substantial allegation of newly
9 **discovered evidence;** (5) **the material facts were not**
10 **adequately developed at the state-court hearing;** or (6) for any
11 reason it appears that the state trier of fact did not afford the
12 habeas applicant a full and fair fact hearing.

13 ***Townsend v. Sain***, 372 U.S., at 313 (emphasis by bold print added).

14 Following the advent of ***Townsend v. Sain***, this Court issued an opinion
15 interpreting a portion of **Rule 32.6, Ariz.R.Crim.P.**, concerning summary disposition
16 versus mandatory evidentiary hearings, and defined a “*colorable claim*” (i.e., one in
17 which an evidentiary hearing) as follows: “*To be colorable, a claim has to have*
18 *the appearance of validity, i.e., if the defendant's allegations are taken as*
19 *true, would they change the verdict?*” ***State v. Richmond***, 114 Ariz. 186, 194,
20 560 P.2d 41, 49 (1976), *cert. denied*, 433 U.S. 915 (1977).

21 Subsequently, this Court expressly reiterated that “*A defendant is entitled to an*
22 *evidentiary hearing regarding a claim of newly discovered evidence if he or*
23 *she presents a ‘colorable claim.’*” ***Amaral***, *supra*, 239 Ariz.217, 368 P.3d, at 927,
24 citing ***State v. Bilke***, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989). Importantly, the
25 Arizona Supreme Court recently modified the definition of a colorable claim within
26 the specific context of claims based on newly discovered evidence: “[W]e clarify
the standard for entitlement to a Rule 32.8(a) evidentiary hearing on claims
made under Rule 32.1(e). A defendant is entitled to relief if ‘newly discovered
material facts probably exist and such facts probably would have changed
the verdict or sentence.’” ***Amaral***, 239 Ariz., at ¶ 10, 368 P.3d, at 927, ¶ 10.

Importantly, one purpose of an evidentiary hearing is addressed to subsequent

1 review, i.e., “*Rule 32 not only provides a procedure through which a defendant may*
2 *be heard, but also ensures a record from which reviewing courts can determine*
3 *whether the facts support petitioner's claim for relief.*” *Canion v. Cole*,
4 210 Ariz. 598, 600, 115 P.3d 1261, 1263 (2005). Accordingly, a court abuses its
5 discretion if it denies post conviction relief based on factual determinations that were
6 conducted in the absence of an evidentiary hearing. In *Amaral*, the Supreme Court
7 pointed out that “*A Rule 32 evidentiary hearing allows “the court to receive evidence,*
8 *make factual determinations, and resolve material issues of fact,*” quoting
9 *Gutierrez*, 229 Ariz., at ¶ 31, 278 P.3d, at 1282 (2012). *Amaral*, 239 Ariz., at ¶ 12,
10 368 P.3d, at 928, ¶ 12. Once again, the constitutional issues potentially implicated
11 in summary denial of a claim based on newly discovered material evidence implicates
12 the question of whether the Superior Court abused its discretion in failing to appoint
13 counsel.

14 **E. There Are Three Critical Errors In the Superior Court's**
15 **Order Summarily Denying Petitioner's *Pro Se* Notice of Post**
16 **Conviction Relief; (1) The Evidence Presented Met the Tests**
17 **for Newly Discovered Material Evidence, and (2) That**
18 **Evidence Supported Claims That Could Not Have Been**
19 **Previously Presented In the Absence of the Newly Discovered**
20 **Evidence; and (3) Claims Pursuant to Rule 32.1(e) May**
21 **Include Reinvigoration of Claims Categorized Under**
22 **Rule 32.1(a)**

23 **1. The Evidence Presented Met the Tests for Newly**
24 **Discovered Material Evidence**

25 The rule governing claims grounded in newly discovered material facts
26 provides as follows:

27 e. Newly discovered material facts probably exist and such
28 facts probably would have changed the verdict or sentence.
29 Newly discovered material facts exist if:

30 (1) The newly discovered material facts were
31 discovered after the trial.
32 (2) The defendant exercised due diligence in
33 securing the newly discovered material facts.

(3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

Rule 32.1(e), Ariz.R.Crim.P.

Here, the newly discovered material facts — *e.g.*, the previously unobtainable records of Detective Saldate’s utter lack of integrity or trustworthiness, especially with regard to Detective Saldate’s long history of lying under oath and other misconduct, including falsification of alleged “confessions” by significantly impaired / hospitalized defendants⁷ — (1) existed at the time of trial but were discovered after the trial (as articulated in the Superior Court Notice of Post Conviction Relief); (2) the defendant exercised due diligence in securing the newly discovered material facts (Petitioner has been diligently seeking such material facts throughout the entirety of his trial, conviction, and incarceration, as amply demonstrated by the record under this cause number); and (3) the newly discovered facts constitute impeachment evidence that substantially undermines testimony which

⁷ *Milke v. Ryan*, 711 F.3d 998 (9thCir.2013), the court addressed Detective Saldate's past history demonstrating a lack of credibility, especially regarding confessions by defendants not recorded or independently witnessed):

“The Appendix contains summaries of some of Saldate’s misconduct and the accompanying court orders and disciplinary action. This history includes a five-day suspension for taking ‘liberties’ with a female motorist and then lying about it to his supervisors; four court cases where judges tossed out confessions or indictments because Saldate lied under oath; and four cases where judges suppressed confessions or vacated convictions because Saldate had violated the Fifth Amendment or the Fourth Amendment in the course of interrogations. And it is far from clear that this reflects a full account of Saldate’s misconduct as a police officer. See pp. 24-25 infra.”

Milke v. Ryan, 711 F.3d, at 1003.

Detective Saldate's "*past history*" expressly includes significant material predating Petitioner's 1989 trial, conviction, and sentencing. *See* full Appendix to *Milke v. Ryan, supra*, printed in that published case.

1 was of critical significance at trial such that the evidence probably would have
2 changed the verdict or sentence (because Detective Saldate's testimony that Petitioner
3 "confessed" to multiple crimes was a key element in his conviction and was the focal
4 point for Petitioner's defense at trial).

5 **2. The Evidence Supported Claims That Could Not Have**
6 **Been Previously Presented In the Absence of the Newly**
Discovered Evidence

7 Because Petitioner's trial counsel flatly refused to consider investigating
8 Petitioner's claims of police misconduct in his prosecution, Petitioner was compelled
9 to represent himself with the assistance of advisory counsel. Because of the lack of
10 investigation, Detective Saldate's lack of credibility with respect to his testimony that
11 Petitioner had confessed to multiple crimes during recovery from trauma in the
12 hospital was not available to Petitioner, either at time of trial or subsequently during
13 appeal and prior post conviction relief action(s).

14 Because the evidence was unavailable, Petitioner was unable to present the
15 evidence to the Arizona court system for adjudication. The unavailability of the
16 evidence, however, does not constitute a basis for preclusion of the underlying
17 constitutional violations. Indeed, the unavailability of the evidence constitutes a
18 constitutional basis for exception to the general rule of preclusion.

19 Indeed, the emergent evidence should have been taken as cause for the
20 Superior Court to appoint counsel and allow amendment of the *pro se* post conviction
21 relief petition, rather than acting as the lower court actually did — deeming all the
22 submitted documents to constitute a Notice of PCR and then summarily dismissing
23 the notice for lack of a colorable claim. Indeed, amendment of the PCR petition in
24 this case is still appropriate.

25 (i) This Court's establishment of a Liberal policy for
26 post-petition amendment in post conviction relief
proceedings; standard for amendment of post

1 conviction relief pleadings; permitted upon a
2 showing of good cause

3 The rules governing post conviction relief actions allows amendment of
4 pleadings, conditioned upon a showing of good cause:

5 Amendment of Pleadings. After the filing of a post-conviction
6 relief petition, no amendments shall be permitted except by leave
7 of court upon a showing of good cause.

8 **Rule 32.4(d), Ariz.R.Crim.P.**

9 (ii) amendments are permitted at any time, even after a
10 post conviction relief petition has been denied

11 The only condition required for amendment of post conviction relief pleadings
12 is good cause, and timeliness is not included as a condition. Importantly, prior to the
13 1992 amendments to post conviction relief procedures, amendments were permitted
14 only prior to entry of judgment:

15 Before 1992, Rule 32.6(d) read, “*Amendments to pleadings
16 shall be liberally allowed at all stages of the proceeding prior
17 to entry of judgment.*” Ariz. R.Crim. P. 32.6(d) (1991) (emphasis
18 added). The emphasized language from this prior version of
19 the rule, restricting amendments to the time period “*prior to
20 entry of judgment*,” was deleted by the legislature in 1992.

21 ***Scott v. Schriro*, 567 F.3d 573, 581 (9th Cir., 2009).**

22 Following the 1992 amendments to post conviction relief procedures, this
23 Court allowed amendments liberally, **conditioned only upon a showing of good
24 cause:**

25 Arizona courts continue to construe Rule 32.6(d)
26 [Ariz.R.Crim.P.] as liberally allowing amendments, even
though this language was also deleted in the 1992 revisions.
See *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261,
1264 (2005) (holding “*Rule 32.6(d), which permits a defendant
to amend his petition ‘upon a showing of good cause,’ adopts
a liberal policy toward amendment of [post-conviction relief]
pleadings.*”).

27 ***Scott v. Schriro*, 567 F.3d 573, 581, note 6..**

1 Thus, under this Court's current approach to amendment of post conviction
2 relief pleadings, **amendments are permitted even after a petition has been denied**
3 **or dismissed:**

4 ...after Rule 32.6(d) was amended in 1992, the Arizona Court of
5 Appeals ruled in 1995 that a post-conviction court has the
6 authority to allow the filing of an amended petition upon a
7 showing of good cause, even if the court has already dismissed
8 the original petition. *See Rodriguez*, 903 P.2d [639] at 640-41
9 (holding that good cause was shown under Rule 32.6 where a
10 petitioner sought to file a petition *pro se* after the post-conviction
11 court dismissed his first petition because his post-conviction
12 counsel failed to file the necessary brief explaining is [sic] claims
13 in a timely manner).⁷

14 embedded footnote 7: ...we note that after Scott's trial, the Arizona
15 Supreme Court followed the reasoning of *Rodriguez*
16 and issued orders allowing defendants upon a showing
17 of good cause to file amended or supplemental petitions
18 after their first petitions had been denied. *See Arizona*
19 *v. Stokley*, No. CV-97-0203-SA (1999); *Arizona v. Kayer*,
20 No. CR-94-0694 (1998).

21 ***Scott v. Schriro*, 567 F.3d 573, 581 and note 7 (bold print added).**

22 Therefore, it is clear that the controlling issue with regard to any potential
23 request by the defendant to amend his post conviction pleading is whether good cause
24 exists for allowing such amendment, which, of course is intertwined with the
substance of any amendment he might seek to file. This case clearly constitutes a
case in which appointment of counsel and amendment of the PCR petition is
appropriate, based on the newly discovered material facts implicated by the pleadings
in the Superior Court.

25 **(iii) The issue of waiver is not applicable to
26 amendments to PCR petitions, especially where
the claim(s) asserted in the amended petition is
grounded in material facts not known to the
defendant at the time of the prior pleadings and
is newly discovered**

27 If the additional claim sought to be asserted in an amended petition is a
28 colorable claim grounded in material facts not known to the defendant at the time

1 of prior pleadings and newly discovered, then legally there can be no waiver under
2 **Rule 32.2(a), Ariz.R.Crim.P.**, because the post conviction relief action is still being
3 litigated and the issue has not been finally adjudicated on the merits.

4 **3. Claims Asserted Pursuant to Rule 32.1(e) May Include
5 Reinvigoration of Claims of Constitutional Violations
Categorized Under Rule 32.1(a)**

6 **Rule 32.1, Ariz.R.Crim.P.**, specifies grounds for which a Petitioner may seek
7 post conviction relief. Post conviction relief provides a simple and efficient means
8 of inquiry into a defendant's claim that the conviction or sentence was obtained in
9 disregard of fundamental fairness, which is essential to our concept of justice. *See*
10 **24 CJS, Criminal Law § 1612 (1989)**. Within **Rule 32.1, Ariz.R.Crim.P.**, there
11 are claims that may be asserted only in a timely manner in a first PCR; and
12 included in that group of claims is the claim of ineffective assistance of counsel
13 at time of trial, lack of a fair trial, and other constitutional violations. *See*
14 **Rule 32.1(a), Ariz.R.Crim.P.** Within the remaining types of claims, which may be
15 asserted at any time (assuming due diligence on the part of a petitioner), is a
16 claim grounded in newly discovered material facts.

17 It is important to note that the rule contains no bar to a claim asserted under
18 newly discovered material facts in a subsequent PCR action for purposes of
19 supporting a claim that would have been asserted under **Rule 32.1(a),**
20 **Ariz.R.Crim.P.**, if those facts had been discovered within the time frames applicable
21 to the prior PCR action. Instead, the test for viability of a claim asserted under **Rule**
22 **32.1(e), Ariz.R.Crim.P.**, is whether "*such facts probably would have changed the*
23 *verdict or sentence.*" *See Rule 32.1(e), Ariz.R.Crim.P.*, at first sentence. The
24 remainder of the rule is dedicated to a determination of whether the facts are "*newly*
25 *discovered facts*" and "*material facts*" — that is, do the facts fall within the
26 parameters of "*newly discovered material facts*."

1 Petitioner contends that the newly discovered material facts demonstrate
2 impeachment evidence that substantially undermines testimony which was of critical
3 significance at trial such that the evidence probably would have changed the verdict
4 or sentence (because Detective Saldate's testimony that Petitioner "confessed" to
5 multiple crimes was a key element in Petitioner's conviction and was the focal point
6 of Petitioner's defense at trial).

7 Petitioner asserts he is entitled to present the Superior Court with arguments
8 supporting post conviction relief on the basis of truly significant new developments
9 in impeachment evidence that substantially undermines critical trial testimony and
10 supports the core of Petitioner defense at trial. The newly discovered information
11 probably would have changed the outcome at trial if the information had been
12 available in the trial court in 1999.

13 **CONCLUSION**

14 **WHEREFORE**, based upon the foregoing, Petitioner contends he is entitled
15 to review of this Petition, remand to the Superior Court for appointment of counsel,
16 full post conviction relief briefing (*i.e.*, an amended PCR petition) presenting the
17 newly discovered material facts and cogent argument for the granting of relief.

18 **RESPECTFULLY SUBMITTED** this 17th day of January, 2017.

19
20 
21 Efrain Conde
Petitioner *pro se*
22
23
24
25
26

CERTIFICATE OF COMPLIANCE

Sender hereby certifies on behalf of Petitioner that the accompanying Petition for Review is double spaced, uses a 14-point proportionately spaced typeface, and does not exceed 20 pages, according to the processing system used to prepare the document.

STATEMENT OF FILING AND SERVICE

Sender hereby certifies that on the 25th day of January, 2017, this Petition for Review was filed and served as follows:

Ruth A. Willingham, Clerk of Court, Arizona Court of Appeals, Division One, 1501 West Jefferson Street, Second Floor, Phoenix, AZ 85007 (original and four copies hand delivered for filing).

William Montgomery, Maricopa County Attorney, 301 West Jefferson Street, Phoenix, Arizona 85004 (one copy served by first class mail).

By Nuvia Kent
Nuvia Kent, Typist for Efrain Conde

ATTACHMENT A

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
09/07/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

HONORABLE JAMES P. BEENE

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

EFREN ISAMEL CONDE (B)

EFREN ISAMEL CONDE
#054328 ASPC LEWIS STINER UNIT
P O BOX 3100
BUCKEYE AZ 85326

COURT ADMIN-CRIMINAL-PCR

RULE 32 PROCEEDING DISMISSED

Pending before the Court are (1) Defendant's Notice of Post-Conviction Relief, (2) Petition for Post-Conviction Relief, and (3) Motion for Evidentiary Hearing, all filed on August 23, 2016. The Court deems these submissions a single Notice of Post-Conviction Relief. This is Defendant's third Rule 32 proceeding. It is both untimely and successive.

A jury convicted Defendant of sixteen offenses, including the first-degree murder of Phoenix police officer. On March 19, 1990, the Court entered judgment and imposed consecutive terms of imprisonment, including a life sentence with no possibility of release on any basis for 25 years. The Arizona Court of Appeals affirmed the convictions and sentences, issuing its order and mandate on March 22, 1993. *See State v. Conde*, 174 Ariz. 30, 846 P.2d 843 (App. 1992). Next, Defendant unsuccessfully sought post-conviction relief, and the Arizona Court of Appeals denied review in 2001. More recently, this Court dismissed a second Rule 32 proceeding in an order filed on July 25, 2016.

A. Rule 32.1(a) and Rule 32.1(c) Claims

In his current submission, Defendant contends that his convictions and sentences were obtained in violation of his constitutional rights and he is entitled to relief under Arizona Rule of Docket Code 167

Form R000A

Page 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

Criminal Procedure. Specifically, Defendant contends that he received ineffective assistance of counsel. (Petition at 2; Notice at 2) In addition, Defendant contends that: (1) the State engaged in misconduct, including using falsified evidence provided by Detective Armando Saldate and Officer Mike Chambers, along with a coerced confession, perjured testimony, an identification obtained in violation of constitutional rights, and evidence obtained pursuant to an unlawful arrest and an unlawful search and seizure; (2) the State introduced at trial a statement made in the absence of an attorney at a time when representation is constitutionally required; (3) Defendant's right against self-incrimination and another unspecified constitutional right were infringed; (4) the State engaged in the unconstitutional suppression of evidence; (5) the State engaged in malicious prosecution; (6) Defendant's right to a timely initial appearance was violated, and (7) there was no probable cause to arrest or prosecute Defendant. (Notice at 3; Petition at 1-9) Furthermore, Defendant contends that his sentences were not imposed in accordance with applicable statutes and rules, and he is entitled to relief under Arizona Rule of Criminal Procedure 32.1(c). (Petition at 2, 9-10) Defendant cannot raise these Rule 32.1(a) and Rule 32.1(c) claims because an untimely Notice of Post-Conviction Relief may only assert claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are "cognizable under Rule 32.1(a)"). The Rule 32.1(a) and Rule 32.1(c) claims Defendant has asserted were required to be raised in a timely Rule 32 proceeding.

Defendant's claims are also precluded under Arizona Rule of Criminal Procedure 32.2(a). In his direct appeal, Defendant unsuccessfully contested the use of his confession, claimed that it was not coerced, and objected to the use of essential elements of an offense as aggravators. The Arizona Court of Appeals affirmed: the finding that one of Defendant's confessions was voluntary, the admissibility of the confession as impeachment evidence, and the use of aggravating factors in imposing sentence. These issues are now precluded under Arizona Rule of Criminal Procedure 32.2(a)(2). Likewise, Defendant raised his ineffective assistance of counsel claim in a previous Rule 32 proceeding, and relief on that basis is also precluded. *See id.*; *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.") (emphasis in original). Because Defendant could have raised the other constitutional violations on appeal, relief as to those claims is precluded under Arizona Rule of Criminal Procedure 32.2(a)(3).

B. Rule 32.1(e) Claim

Alternatively, Defendant contends that newly discovered material facts exist that require the Court to grant relief pursuant to Arizona Rule of Criminal Procedure 32.1(e). (Notice at 2) To be entitled to post-conviction relief based on newly discovered evidence, the defendant must

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

09/02/2016

show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or on appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). The defendant states that he learned on June 3, 2016 that Detective Saldate and Officer Chambers engaged in misconduct in other cases. (Petition at 2 & att. at 3) Defendant explains that he did not raise the issue in his 1997 petition because there was no corroborating evidence from police investigations at that time. (Notice at 4)

Importantly, “[e]vidence is not newly discovered unless it was 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.” *Saenz*, 197 Ariz. at 490, ¶ 13, 4 P.3d at 1033. Defendant states that he alerted defense counsel about the police misconduct in 1988 (Petition att. at 2), and the information was known by the defense at the relevant times. Indeed, at trial Defendant “argued that he was the victim of a police conspiracy to implicate him in the police officer’s death.” *Conde*, 174 Ariz. at 32, 846 P.2d at 845. He also raised the issues about his hospital confession (*id.* at 3) on appeal. Although Defendant also claims that Detective Saldate had direct involvement in the shooting of Kenneth Collings, he relies upon 1989 transcripts. (*Id.*) His identifications of instances of misconduct in this case were known at all relevant times. Defendant fails to show why the instances of misconduct in other cases were material here, or if they were, why the evidence is not merely cumulative or impeaching. Accordingly, Defendant fails to state a Rule 32.1(e) claim.

C. Rule 32.1(h) Claim

In addition, Defendant claims that he is actually innocent and therefore entitled to relief under Arizona Rule of Criminal Procedure 32.1(h). (Notice at 3) The evidence alluded to by the defendant fails to meet the standard that must be met for Defendant to obtain post-conviction relief pursuant to Rule 32.1(h). The defendant must prove by clear and convincing evidence that, based on the new facts presented, a reasonable fact finder could not find the defendant guilty of the underlying offenses. The defendant has failed to meet this burden. It is also worth noting that the Arizona Court of Appeals affirmed his convictions and sentences.

D. Parole Board Proceedings

Finally, Defendant contends that the Parole Board violated his due process rights at a recent hearing. (Petition Att. at 10-11) A defendant may challenge a decision regarding parole only through special action, and then may only allege violations of due process. *See Sheppard v. Ariz. Bd. of Pardons and Paroles*, 111 Ariz. 587, 588, 536 P.2d 196, 197 (1975) (explaining that

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1988-005881

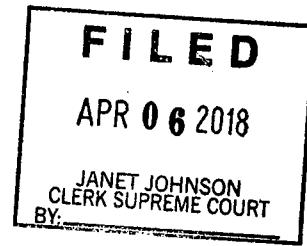
09/02/2016

the legislature has denied the courts the right to review decisions of the Board regarding parole with an exception for special actions with “the limited purpose of considering due process violations in the hearing process”). Accordingly, if Defendant has a due process claim to raise, he will need to follow the special action procedures.

In sum, Defendant fails to state a claim for which Rule 32 can provide relief. When a Rule 32 notice is untimely and successive, a defendant must identify a substantial basis for his claims, provide specific factual support, and adequately explain why the claims are untimely. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this burden. The Court finds that no purpose would be served by further proceedings or appointment of counsel.

IT IS THEREFORE ORDERED dismissing Defendant’s Notice of Post-Conviction Relief, Petition for Post-Conviction Relief, and “Motion for Evidentiary Hearing,” which the Court deems a single Notice of Post-Conviction Relief, pursuant to Arizona Rule of Criminal Procedure 32.2(b).

**APPENDIX D
Petition for Review
Arizona Supreme Court
04/06/2018**



1 Efrain Conde ADC# 054328
2 Arizona Department of Corrections
3 Lewis Complex, Stiner Unit L3
P.O. Box 3100
Phoenix, Arizona 85326-3100

RECEIVED

APR 06 2018

4 *In Propria Persona*

5 CLERK SUPREME COURT

6 ARIZONA SUPREME COURT

7 STATE OF ARIZONA,) No. CR-18-0063-PR
8 Plaintiff/Respondent,) Court of Appeals Division Two
9) Case No. 2 CA-CR 2017-0326-PR
-vs-)
10 EFRAIN ISMAEL CONDE,) Maricopa County Superior Court
11) Case No. CR1988-005881
12 Defendant/Petitioner.) PETITION FOR REVIEW

13 COMES NOW Defendant-Petitioner *in pro per* Efrain Ismael
14 Conde, pursuant to the Due Process Clause of the Fourteenth Amendment to the
15 United States Constitution, art. II, § 4 of the Constitution of the State of Arizona,
16 Rule 32.9(g), Ariz.R.Crim.P. (2018), and Rule 31.21(b)(1), Ariz.R.Crim.P.
17 (2018); and hereby seeks review of the 01/05/2018 Memorandum Decision of the
18 Arizona Court of Appeals, Division Two (Attachment A), requesting the Court grant
19 relief on the grounds and for the reasons presented below.

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. INTRODUCTION**

22 This Petition for Review arises from the summary denial of Petitioner's
23 Superior Court PCR action and the subsequent appellate court Memorandum
24 Decision which granted review but denied relief. Petitioner asserts that his case
25 involves circumstances, claims, and facts which, at the time of the Superior Court
26 filing, called for appointment of counsel, full briefing, and an evidentiary hearing.

1 **II. ISSUES PRESENTED FOR REVIEW**

2 1. Did the Court of Appeals abuse its discretion and violate Petitioner's right to
3 due process of law under **Rule 32.1(e), Ariz.R.Crim.P., A.R.S. Const., art.**
4 **II, § 4 and U.S. Const., 14th Amendment**, by affirming the Superior Court's
5 summary dismissal of Petitioner's *pro se* Notice of Post Conviction Relief
6 which presented, to the best of Petitioner's ability as an unrepresented indigent
7 petitioner, a claim of newly discovered material evidence?

8 2. Did the Court of Appeals abuse its discretion by affirming the Superior Court's
9 summary dismissal of Petitioner's *pro se* Notice of Post Conviction Relief
10 despite the fact that the content of the Notice¹ included (1) the substance of the
11 specific exception to preclusion, (2) meritorious reasons substantiating the
12 claim, and (3) reason why the claim was not stated in any previous petition or
13 in a timely manner?

14 3. Did the Court of Appeals abuse its discretion and err as a matter of law with
15 its ruling that newly discovered material evidence could not constitute a basis
16 for reassertion of a previously presented type of constitutional error, where the
17 new, additional, form of constitutional error could not have been presented for
18 adjudication in the absence of the newly discovered material evidence?

19 **III. FACTS MATERIAL TO DETERMINATION OF THE ISSUES
20 PRESENTED FOR REVIEW**

21 1. A one-page basic history of the case was presented in Petitioner's
22 hand-written *pro se* Superior Court Petition for Post Conviction Relief, immediately
23 following the end of the Rule 32 form.

24 2. A hand-written Statement of Facts was presented in that same document,
25 beginning at the bottom of the one-page history of the case. Those facts included the
26 following.

27 3. Petitioner was shot and arrested on May, 27, 1988. *See* PCR Exhibit B and
28 taken to the hospital for treatment for serious gunshot wounds. *See* PCR Exhibit C.

29 4. At the hospital, Petitioner repeatedly was interrogated by Phoenix Police

30 ¹ Petitioner submitted a set of documents which the Superior Court treated
31 as a single Notice of Post Conviction Relief, *see* 09/02/2016 Minute Entry Order,
32 at page 1, first paragraph. Accordingly, for purposes of this Petition for Review,
33 the content of the "Notice of Post Conviction Relief" must include the content
34 of all those documents, which were (1) a Notice of Post Conviction Relief, (2) a
35 Petition for Post Conviction Relief, and (3) a Motion for Evidentiary Hearing, all
36 filed on August 23, 2016.

1 Detective Armando Saldate, while Petitioner was in critical condition and in the
2 hospital's Intensive Care Unit (ICU). During the interrogation, detective Saldate
3 repeatedly grabbed Petitioner's wounds, inflicting extreme pain upon Petitioner. *See*
4 PCR Exhibit B, at ¶ 5.

5 5. At some point, Petitioner was removed from the ICU and placed in a room
6 and all medical treatments and medical attention were stopped. *See* PCR Exhibit B,
7 at ¶ 6.

8 6. Based upon the time frame of Petitioner's ICU treatment and subsequent
9 removal to another room without any medical cause, Detective Saldate prepared
10 multiple reports stating Petitioner had confessed to having committed serious crimes.
11 *See* PCR Exhibit D.

12 7. In May 1988, Kenneth Collings, the murder victim in the case, was shot
13 with the .45 caliber gun that belonged to Petitioner. *See* PCR Exhibit E, and
14 transcript citations in the PCR Statement of Facts.

15 8. On June 14, 1988, Petitioner was indicted by a Grand Jury. *See* PCR
16 Exhibit H.

17 9. After informing his defense counsel of serious police misconduct, and after
18 defense counsel refused to engage in any investigation of police misconduct,
19 Petitioner was compelled to seek to represent himself. *See* PCR Exhibit B, and
20 transcript citations in the PCR Statement of Facts.

21 10. At trial, Detective Saldate testified to Petitioner's having "confessed" to
22 him during interrogation at the hospital, in the ICU and in a different hospital room.
23 Petitioner's primary defense was misconduct by the police.

24 11. On June 3, 2016, Petitioner received new evidence reflecting critical
25 information about Detective Saldate's long-term serious misconduct as a police
26 detective, both before and after the time period of Petitioner's trial. Detective

1 Saldate's misconduct expressly included false testimony regarding alleged
2 confessions by criminal defendants who were interviewed by Saldate without
3 witnesses or contemporaneous recordings; and those confessions were rejected
4 by the various courts on the basis of Saldate's misconduct. *See* PCR Exhibit B,
5 ¶¶ 14-15; PCR Exhibit J.

6 **IV. REASONS WHY THE PETITION SHOULD BE GRANTED**

7 **A. Applicable Standards of Review**

8 **A trial court abuses its discretion when it commits an error of law.** *State*
9 *v. West*, 224 Ariz. 575, ¶ 8, 233 P.3d 1154, 1156 (App.2010). Appellate courts
10 reviewing the denial of post conviction relief apply an abuse of discretion standard.
11 *State v. Rosales*, 205 Ariz. 86, 66 P.3d 1263 (App.2003, Div.2); *State v. Schurz*,
12 176 Ariz. 46, 57, 859 P.2d 156 (1993); *State v. Amaral*, 239 Ariz.217, ¶ 9,
13 368 P.3d 925, 927 ¶ 9 (2016), citing *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19,
14 278 P.3d 1276, 1280 (2012); and *State v. Bennett*, 213 Ariz. 562, 566 ¶ 17,
15 146 P.3d 63, 67 (2006).

16 **Constitutional and legal issues, however, are reviewed *de novo*.**² *State v.*
17 *Moody*, 208 Ariz. 424, 445, 94 P.3d 1119 (2004) (*en banc*), citing *State v. Davolt*,
18 207 Ariz. 191, 201, ¶ 21, 84 P.3d 456, 466 (2004); and *State v. Cook*, *supra*.

19
20 **B. The Requirements of Rule 32.2(a) & (b), Ariz.R.Crim.P., for**
21 **Untimely or Successive Petitions for Post Conviction Relief**

22 Because Petitioner previously filed a Petition for Post Conviction Relief, the
23 current, successive, petition is subject to the provisions of **Rule 32.2(a) and**
24 **Rule 32.2(b), Ariz.R.Crim.P.**, which expressly provide as follows:

25
26 ² The third legal issue identified in Section II (Issues Presented for Review)
calls for *de novo* review by this Court, in that resolution of the issue necessarily
involves interpretation of the relationship between Rule 32.1(a) and Rule 32.1(e),
Ariz.R.Crim.P., within the context of state and federal constitutional law, either
in the abstract or in an as-applied manner.

1 a. Preclusion. A defendant shall be precluded from relief
2 under this rule based upon any ground:
3 (1) Raisable on direct appeal under Rule 31 or on post-trial
4 motion under Rule 24;
5 (2) Finally adjudicated on the merits on appeal or in any
6 previous collateral proceeding;
7 (3) That has been waived at trial, on appeal, or in any
8 previous collateral proceeding.

9 b. Exceptions. Rule 32.2(a) shall not apply to claims for relief
10 based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under
11 Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or
12 untimely post-conviction relief proceeding, the notice of
13 post-conviction relief must set forth the substance of the specific
14 exception and the reasons for not raising the claim in the previous
15 petition or in a timely manner. If the specific exception and
16 meritorious reasons do not appear substantiating the claim and
17 indicating why the claim was not stated in the previous petition
18 or in a timely manner, the notice shall be summarily dismissed.

19 **Rule 32.2(a) & (b), Ariz.R.Crim.P.** (emphasis by bold print added).

20 Petitioner's Superior Court Notice of Post Conviction Relief presented a claim
21 under **Rule 32.1(e), Ariz.R.Crim.P.**, (newly discovered material facts),
22 which expressly provides as follows:

23 e. Newly discovered material facts probably exist and such facts
24 probably would have changed the verdict or sentence. Newly
25 discovered material facts exist if:

26 (1) The newly discovered material facts were discovered
27 after the trial.
28 (2) The defendant exercised due diligence in securing the
29 newly discovered material facts.
30 (3) The newly discovered material facts are not merely
31 cumulative or used solely for impeachment, unless the
32 impeachment evidence substantially undermines testimony
33 which was of critical significance at trial such that the
34 evidence probably would have changed the verdict or
35 sentence.

36 **Rule 32.1(e), Ariz.R.Crim.P.**

37 **C. A Critical Feature of Rule 32.1(e), Ariz.R.Crim.P.,**
38 **Must Be Taken Into Account**

39 It is important for the Court to take special notice of a critical feature of
40 the governing rule, which is that a claim under **Rule 32.1(e), Ariz.R.Crim.P.**,

1 is a claim that “*newly discovered material facts probably exist and such facts*
2 *probably would have changed the verdict or sentence*” — not that newly
3 discovered material facts **DO EXIST**, just that newly discovered material facts
4 **PROBABLY EXIST**. The reason for the distinction is clear from the difference
5 between a **NOTICE** of post conviction relief and a **PETITION** for post conviction
6 relief. The Notice is to make the trial court aware of the type of claim that is being
7 asserted, whereas the Petition is to prove up the claim. This distinction also
8 potentially implicates the question of whether the Superior Court abused its discretion
9 in failing to appoint counsel (Petitioner indicated that he sought appointment of
10 counsel in his Notice of Post Conviction Relief). These matters also fundamentally
11 undermine the validity of the appellate court’s analysis.

12 **D. An Evidentiary Hearing Is the Formal Process for**
13 **Determination of Facts Underlying Claims for Post**
14 **Conviction Relief, and Especially So Within the Context of**
15 **A Claim of Newly Discovered Material Evidence**

16 As previously stated, **Rule 32.1(e)** provides that a defendant may seek relief
17 if newly-discovered material facts exist, which, if introduced, probably would have
18 affected the verdict, finding, or sentence. A defendant is entitled to an evidentiary
19 hearing on an allegation of newly-discovered evidence if the defendant presents a
20 “*colorable claim.*” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988);
21 *see also State v. Fisher*, 141 Ariz. 227, 250–51, 686 P.2d 750, 773–74, *cert. denied*,
22 469 U.S. 1066 (1984). The facts underlying a claim for relief that are outside the
23 record of prior proceedings are to be determined by the court at a special
24 proceeding created for that specific purpose, namely, at an evidentiary hearing.

25 Evidentiary hearings are governed by the provisions of **Rule 32.8**,
26 **Ariz.R.Crim.P.**, which provides as follows:

27 a. Evidentiary Hearing. The defendant shall be entitled to a
28 hearing to determine issues of material fact, with the right to be

1 present and to subpoena witnesses. If facilities are available,
2 the court may, in its discretion, order the hearing to be held at
3 the place where the defendant is confined, giving at least 15 days
4 notice to the officer in charge of the confinement facility.
5 In superior court, the hearing shall be recorded.

6 **Rule 32.8, Ariz.R.Crim.P.**

7 **Summary Dismissal vs. Mandatory Evidentiary Hearing.** This Court has
8 emphasized the process for resolving claims that are based on facts not of record in
9 prior proceedings. *State v. Robbins*, 166 Ariz. 531, 532, 803 P.2d 942 (App. 1991,
10 Div.1) (holding that the Rule 32 process is available for examination and expansion
11 of the record to determine factual basis for a claim). This Court has held that,
12 where doubts exist, the PCR court should first permit the defendant to raise the
relevant issues, then conduct an evidentiary hearing, formally resolve the matter, and
make a record for review:

13 One of the purposes of a Rule 32 proceeding "*is to furnish
14 an evidentiary forum for the establishment of facts
15 underlying a claim for relief, when such facts have not
previously been established of record.*" *State v. Scrivner*,
132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982);....

16 *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85, (1990).

17 As a matter of constitutional law, under the state and federal constitutions,
18 when a petitioner presents a colorable claim for post conviction relief, there is a
19 due process entitlement to an evidentiary hearing, and summary dismissal is
20 impermissible. *State v. Jenkins*, 193 Ariz. 115, 118, 970 P.2d 947 (App.1998,Div.1);
21 *Donald*, 198 Ariz. 406, 411, 10 P.3d 1193, 1198 (App.2000, Div.1). This Court
22 reiterated that "*A defendant is entitled to an evidentiary hearing regarding a claim
23 of newly discovered evidence if he or she presents a 'colorable claim. '*" *Amaral*,
24 *supra*, 239 Ariz.217, 368 P.3d, at 927, citing *State v. Bilke*, 162 Ariz. 51, 52, 781
25 P.2d 28, 29 (1989). Importantly, this Court recently modified the definition of a
26 colorable claim within the specific context of claims based on newly discovered

1 evidence: “[W]e clarify the standard for entitlement to a Rule 32.8(a) evidentiary
2 hearing on claims made under Rule 32.1(e). A defendant is entitled to relief if
3 ‘newly discovered material facts probably exist and such facts probably would have
4 changed the verdict or sentence.’” *Amaral*, 239 Ariz., at ¶ 10, 368 P.3d, at 927,
5 ¶ 10.

6 Importantly, one purpose of an evidentiary hearing is addressed to subsequent
7 review, *i.e.*, “Rule 32 not only provides a procedure through which a defendant may
8 be heard, but also ensures a record from which reviewing courts can determine
9 whether the facts support petitioner’s claim for relief.” *Canion v. Cole*,
10 210 Ariz. 598, 600, 115 P.3d 1261, 1263 (2005). Accordingly, a court abuses its
11 discretion if it denies post conviction relief based on factual determinations that
12 were conducted in the absence of an evidentiary hearing. In *Amaral*, the Supreme
13 Court pointed out that “A Rule 32 evidentiary hearing allows “the court to receive
14 evidence, make factual determinations, and resolve material issues of fact,”” quoting
15 *Gutierrez*, 229 Ariz., at ¶ 31, 278 P.3d, at 1282 (2012). *Amaral*, 239 Ariz., at ¶ 12,
16 368 P.3d, at 928, ¶ 12. Once again, the constitutional issues potentially
17 implicated in summary denial of a claim based on newly discovered material
18 evidence implicates the question of whether the Superior Court abused its discretion
19 in failing to appoint counsel and the question of whether the appellate court
20 abused its discretion.

21 E. **There Are Three Critical Errors In the Appellate Court’s
22 Memorandum Decision: (1) The Evidence Presented Met the
23 Tests for Newly Discovered Material Evidence; (2) The
24 Evidence Supported Claims That Could Not Have Been
25 Previously Presented In the Absence of the Newly Discovered
26 Evidence; and (3) Claims Pursuant to Rule 32.1(e) May
Include Reinvigoration of Claims Categorized Under
Rule 32.1(a)**

1. **The Evidence Presented Met the Tests for Newly
Discovered Material Evidence**

1 The rule governing claims grounded in newly discovered material facts
2 provides as follows:

3 e. Newly discovered material facts probably exist and such
4 facts probably would have changed the verdict or sentence.
 Newly discovered material facts exist if:

5 (1) The newly discovered material facts were
6 discovered after the trial.

7 (2) The defendant exercised due diligence in
8 securing the newly discovered material facts.

9 (3) The newly discovered material facts are not
10 merely cumulative or used solely for impeachment,
 unless the impeachment evidence substantially
 undermines testimony which was of critical
 significance **at trial** such that the evidence probably
 would have changed the verdict or sentence.

11 **Rule 32.1(e), Ariz.R.Crim.P.** (bold print added).

12 Here, the newly discovered material facts — **e.g., the previously unobtainable records of Detective Saldate's utter lack of integrity or trustworthiness, especially with regard to Detective Saldate's long history of lying under oath and other misconduct, including falsification of alleged "confessions" by significantly impaired / hospitalized defendants**³ — (1) existed at the time of trial

17 ³ *Milke v. Ryan*, 711 F.3d 998 (9thCir.2013), the court addressed Detective
18 Saldate's past history demonstrating a lack of credibility, especially regarding
19 confessions by defendants not recorded or independently witnessed):

20 *"The Appendix contains summaries of some of Saldate's misconduct and the accompanying court orders and disciplinary action. This history includes a five-day suspension for taking 'liberties' with a female motorist and then lying about it to his supervisors; four court cases where judges tossed out confessions or indictments because Saldate lied under oath; and four cases where judges suppressed confessions or vacated convictions because Saldate had violated the Fifth Amendment or the Fourth Amendment in the course of interrogations. And it is far from clear that this reflects a full account of Saldate's misconduct as a police officer. See pp. 24-25 infra."*

21 *Milke v. Ryan*, 711 F.3d, at 1003.

22 Detective Saldate's "past history" expressly includes significant material
23 predating Petitioner's 1989 trial, conviction, and sentencing. See full Appendix
24 to *Milke v. Ryan*, *supra*, printed in that published case.

1 but were discovered after the trial (as articulated in the Superior Court Notice of
2 Post Conviction Relief); (2) the defendant exercised due diligence in securing the
3 newly discovered material facts (Petitioner has been diligently seeking such material
4 facts throughout the entirety of his trial, conviction, and incarceration, as amply
5 demonstrated by the record under this cause number); and (3) the newly discovered
6 facts constitute impeachment evidence that substantially undermines testimony
7 which was of critical significance at trial such that the evidence probably would
8 have changed the verdict or sentence (because Detective Saldate's testimony that
9 Petitioner "confessed" to multiple crimes was a key element in his conviction and
10 was the focal point for Petitioner's defense at trial).

11

12 **2. The Evidence Supported Claims That Could Not
Have Been Previously Presented In the Absence of the
Newly Discovered Evidence**

13 Because Petitioner's trial counsel flatly refused to consider investigating
14 Petitioner's claims of police misconduct in his prosecution, Petitioner was compelled
15 to represent himself with the assistance of advisory counsel. Because of the lack of
16 investigation, Detective Saldate's lack of credibility with respect to his testimony that
17 Petitioner had confessed to multiple crimes during recovery from trauma in the
18 hospital was not available to Petitioner, either at time of trial or subsequently during
19 appeal and prior post conviction relief action(s).

20 Because the evidence was unavailable, Petitioner was unable to present the
21 evidence to the Arizona court system for adjudication. The unavailability of the
22 evidence, however, does not constitute a basis for preclusion of the underlying
23 constitutional violations. Indeed, the unavailability of the evidence constitutes a
24 constitutional basis for exception to the general rule of preclusion.

25 Indeed, the emergent evidence should have been taken as cause for the
26 Superior Court to appoint counsel and allow amendment of the *pro se* post conviction

1 relief petition, rather than acting as the lower court actually did — deeming all the
2 submitted documents to constitute a Notice of PCR and then summarily dismissing
3 the notice for lack of a colorable claim. Indeed, amendment of the PCR petition in
4 this case is still appropriate. The Court of Appeals erred in ruling that:

5 ¶9 Conde also seems to argue that he may amend his original
6 petition based on the newly discovered evidence. Rule 32.6©
7 permits amendment “only for good cause.” Citing case law that
does not control this court, Conde argues that the rule allows a
petition to be amended even after a trial court has ruled on it.

8 **01/05/2018 Memorandum Decision**, at page 4, ¶ 9.⁴

9 This Court has established a liberal policy for post-petition amendment in post
10 conviction relief proceedings, with amendment permitted upon a showing of good
11 cause. *See Rule 32.4(d), Ariz.R.Crim.P.* Indeed, under this Court’s current
12 approach to amendment of post conviction relief pleadings, **amendments are**
13 **permitted even after a petition has been denied or dismissed:**

14 ...after Rule 32.6(d) was amended in 1992, the Arizona Court of
15 Appeals ruled in 1995 that a post-conviction court has the
16 authority to allow the filing of an amended petition upon a
17 showing of good cause, even if the court has already dismissed
18 the original petition. *See Rodriguez*, 903 P.2d [639] at 640-41
19 (holding that good cause was shown under Rule 32.6 where a
20 petitioner sought to file a petition *pro se* after the post-conviction
21 court dismissed his first petition because his post-conviction
22 counsel failed to file the necessary brief explaining is [sic] claims
in a timely manner).⁷

23 ...we note that after Scott's trial, **the Arizona**
24 **Supreme Court followed the reasoning of Rodriguez**
25 **and issued orders allowing defendants upon a showing**
26 **of good cause to file amended or supplemental petitions**
after their first petitions had been denied. *See Arizona v. Stokley*, No. CV-97-0203-SA (1999); *Arizona v. Kayer*, No. CR-94-0694 (1998).

27 ***Scott v. Schriro*, 567 F.3d 573, 581 and note 7 (bold print added).**

28 Therefore, it is clear that the controlling issue with regard to any potential

29 ⁴ Petitioner was under the impression that rulings by the Arizona Supreme
30 Court were binding on Division Two of the Arizona Court of Appeals.

request by the defendant to amend his post conviction pleading is whether good cause exists for allowing such amendment, which, of course is intertwined with the substance of any amendment he might seek to file. This case clearly constitutes a case in which appointment of counsel and amendment of the PCR petition is appropriate, based on the newly discovered material facts implicated by the pleadings in the Superior Court.

3. Claims Asserted Pursuant to Rule 32.1(e) May Include Reinvigoration of Claims of Constitutional Violations Categorized Under Rule 32.1(a)

Rule 32.1, Ariz.R.Crim.P., specifies grounds for which a Petitioner may seek post conviction relief. Post conviction relief provides a simple and efficient means of inquiry into a defendant's claim that the conviction or sentence was obtained in disregard of fundamental fairness, which is essential to our concept of justice. *See 24 CJS, Criminal Law § 1612 (1989).* Within **Rule 32.1, Ariz.R.Crim.P.**, there are claims that may be asserted only in a timely manner in a first PCR; and included in that group of claims is the claim of ineffective assistance of counsel at time of trial, lack of a fair trial, and other constitutional violations. *See Rule 32.1(a), Ariz.R.Crim.P.*

It is important to note that the rule contains no bar to a claim asserted under newly discovered material facts in a subsequent PCR action for purposes of supporting a claim that would have been asserted under **Rule 32.1(a)**, **Ariz.R.Crim.P.**, if those facts had been discovered within the time frames applicable to the prior PCR action. Instead, the test for viability of a claim asserted under **Rule 32.1(e)**, **Ariz.R.Crim.P.**, is whether “*such facts probably would have changed the verdict or sentence.*” See Rule 32.1(e), Ariz.R.Crim.P., at first sentence. It is axiomatic that a change in the verdict can arise only from issues involving the trial. To rule that newly discovered material evidence cannot provide the means to support

1 a claim of fundamental error at trial — *i.e.*, a claim under **Rule 32.1(a)** — is to
2 eliminate a significant portion of the rule itself.

3 Petitioner contends that the newly discovered material facts demonstrate
4 impeachment evidence that substantially undermines testimony which was of critical
5 significance at trial such that the evidence probably would have changed the verdict
6 or sentence (because Detective Saldate's testimony that Petitioner "confessed" to
7 multiple crimes was a key element in Petitioner's conviction and was the focal point
8 of Petitioner's defense at trial).

9 **CONCLUSION**

10 **WHEREFORE**, based upon the foregoing, Petitioner contends he is entitled
11 to review of this Petition, remand to the Superior Court for appointment of counsel,
12 full post conviction relief briefing (*i.e.*, an amended PCR petition) presenting the
13 newly discovered material facts and cogent argument for the granting of relief.

14 **RESPECTFULLY SUBMITTED** this 30th day of March, 2018.

15 
16 Erain Conde
17 Petitioner *pro se*

18
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26

CERTIFICATE OF COMPLIANCE

Sender hereby certifies on behalf of Petitioner that, with the exception of the word limit, the accompanying *pro se* Petition for Review complies with the requirements for such documents. The Petition contains 3,874 words, according to the word processing system used to prepare the document, 374 words over the standard word limit of 3,500 words for a Petition for Review.

STATEMENT OF FILING AND SERVICE

Sender hereby certifies that on the 5 day of April, 2018, this Petition for Review was filed and served as follows:

Ruth A. Willingham, Clerk of Court, Arizona Court of Appeals, Division One, 1501 West Jefferson Street, Second Floor, Phoenix, AZ 85007 (original and one copy filed by commercial courier (Federal Express) for delivery not later than April 6, 2018, along with two additional copies for conforming and return via enclosed preaddressed envelope, postage affixed.

William Montgomery, Maricopa County Attorney, 301 West Jefferson Street, Phoenix, Arizona 85004 (one copy served by first class mail).

By Efrain Kent
Efrain Kent, Typist for Efrain Conde

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EFRAIN ISMAEL CONDE,
Petitioner.

No. 2 CA-CR 2017-0326-PR
Filed January 5, 2018

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 Maricopa County
No. CR1988005881
The Honorable James P. Beene, Judge

REVIEW GRANTED; RELIEF DENIED

Efrain Conde, Buckeye
In Propria Persona

STATE v. CONDE
Decision of the Court

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

B R E A R C L I F F E, Judge:

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

¶2 After a jury trial, Conde was convicted of first-degree murder, first-degree burglary, five counts of armed robbery, eight counts of aggravated assault, and attempted armed robbery. For murder, the trial court sentenced him to life in prison without the possibility of release on any basis for twenty-five years, and to consecutive prison terms for the remaining crimes totaling 255 years. We affirmed his convictions and sentences on appeal. *State v. Conde*, 174 Ariz. 30, 37 (App. 1992). His convictions stem from a 1988 bank robbery. *Id.* at 31. During the robbery he and an accomplice shot and killed an off-duty police officer working as a security guard. *Id.* Conde and his accomplice stole a car for their getaway from a bank customer, and then, after a thirty-minute car chase during which they stole two other cars at gunpoint, Conde was wounded and arrested. *Id.*

¶3 Before this proceeding, Conde has twice unsuccessfully sought post-conviction relief. In the second proceeding in July 2016, Conde filed a notice of post-conviction relief only claiming, without further showing, that he "now possesses new evidence of material facts that proves beyond any reasonable doubt that he was wrongly convicted." The trial court summarily dismissed the notice, noting that Conde did not "allege any new facts."

¶4 Shortly thereafter, to start this proceeding, Conde filed a notice of and petition for post-conviction relief, along with a "Motion for Evidentiary Hearing." He claimed to have recently obtained "new evidence" that a detective involved in his case had "falsified information in

STATE v. CONDE
Decision of the Court

multiple . . . cases." He raised multiple claims of error, including trial error, arguing that the new evidence "brings into question ALL the evidence used in the trial," "would have produced a none-guilty [sic] verdict," and "confirms [he] was unconstitutionally deprived of assistance of counsel." He included with his petition a brief magazine article dated November 2014 noting that, in *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013), the court had vacated a defendant's death sentence because the state had "withheld information" about several cases in which the same detective involved in his case had "lied under oath or committed other misconduct." Conde also raised claims about his sentences and argued that the parole board had violated his due process rights by denying him parole "without [his] presence."

¶5 The trial court, stating it would treat Conde's filings as a "single Notice of Post-Conviction Relief," summarily dismissed the proceeding. It found the bulk of Conde's claims precluded because he did not raise them on appeal or in his first Rule 32 proceeding. The court also noted Conde could not raise a claim as to a recent parole board hearing under Rule 32. As to his claims of newly discovered evidence, the court concluded that Conde had not "show[n] why the instances of misconduct in other cases were material here, or[,] if they were, why the evidence was not merely cumulative or impeaching." This petition for review followed.

¶6 On review, Conde asserts that the evidence he provided "met the tests for newly discovered material evidence," the evidence "supported claims that could not have been previously presented," and that claims of newly discovered evidence "may include reinvigoration of claims categorized under Rule 32.1(a)." To prevail on a claim of newly discovered evidence, Conde must show that the newly discovered material facts were discovered after the trial, he was diligent in securing them, and they "probably would have changed the verdict." *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016); *see Ariz. R. Crim P. 32.1(e)*. Also, he "must establish that the evidence . . . could not have been discovered and produced at trial through reasonable diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000). The facts must not be "merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." *Ariz. R. Crim. P. 32.1(e)*.

¶7 Assuming, without deciding, that Conde has otherwise met these requirements, he has not shown that the evidence would have changed the verdict had it been used at trial. The evidence would no doubt

STATE v. CONDE
Decision of the Court

have been useful in impeaching the detective's testimony, but Conde has not shown that he probably would have been acquitted had the jury disregarded the detective's testimony. And Conde, who was unrepresented at trial, defended himself against the charges by arguing that the detective and others had framed him for the crimes, in part by taking his gun, firing it, and then, apparently, placing fired bullets and shell casings at the crime scenes and then firing the gun into the already-dead victim's skull. None of the misconduct described in *Milke* is similar.¹ 711 F.3d at 1020-21.

¶8 Nor do we agree with Conde's assertion that the evidence allows him to raise claims under Rule 32 that cannot be raised in an untimely proceeding like this one. Conde was only permitted to raise claims under Rule 32.1(d) through (h). Ariz. R. Crim. P. 32.4(a)(2)(A), (D). He is wrong that claims otherwise precluded — such as his claims of police misconduct and other alleged trial errors — are "reinvigorated" by the claim of newly discovered evidence. That argument is inconsistent with the plain language of Rule 32.1(e), which does not refer to newly discovered material facts as to other post-conviction claims — it refers only to those facts bearing on the defendant's "verdict or sentence." *See State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7 (App. 2009) (rule's plain language is best indicator of meaning). And, in any event, evidence of the detective's conduct in other cases does not support Conde's various claims, which depend on his unproven assertion that the state falsified evidence against him.

¶9 Conde also seems to argue that he may amend his original petition based on the newly discovered evidence. Rule 32.6(c) permits amendment "only for good cause." Citing case law that does not control this court, Conde argues that the rule allows a petition to be amended even after a trial court has ruled on it. Even were we to agree with this interpretation, Conde did not move to amend his original petition and, as we have explained, the newly discovered evidence does not support his other claims in any event. Additionally, we need not address his argument that he cannot be said to have waived the claims under Rule 32.2(a)(3) because he did not have all the "material facts" relevant to those claims.

¹The court in *Milke* provided a list of cases in which the detective had committed misconduct. 711 F.3d at 1020-21. That conduct, some of which occurred before Conde's trial, consisted of the detective lying under oath as well as Fifth Amendment violations in the interrogation of suspects, including interrogation of a suspect suffering a skull fracture who "did not know his own name, the year or the name of the president." *Id.*

STATE v. CONDE
Decision of the Court

Whether a claim has been waived or not is immaterial, only the timeliness of raising the claim is relevant. *See Ariz. R. Crim. P. 32.4(a)(2)(A); see also State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8 (App. 2014).

¶10 Conde also seems to claim that, because the trial court treated his filings as a notice of post-conviction relief, summary dismissal was inappropriate. He claims that, because he had complied with Rule 32.2(b), he is entitled to "appointment of counsel" and "full post conviction relief briefing." Pursuant to Rule 32.2(b), a defendant seeking to raise a claim pursuant to Rule 32.1(d) through (h) in an untimely proceeding must include with the notice of post-conviction relief "the specific exception to preclusion and . . . the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner." Even if we accept Conde's suggestion that his filings, taken together, would meet the requirements of Rule 32.2(b), he is not entitled to relief. Conde filed a petition for post-conviction relief with his notice. As we have explained, that petition does not state a colorable claim. The court was thus required by Rule 32.6(d)(1) to summarily dismiss it, and we may affirm the court's ruling for any reason supported by the record. *See State v. Banda*, 232 Ariz. 582, n.2 (App. 2013). And Conde was not entitled to counsel. *See Ariz. R. Crim. P. 32.4(b)(2)* (non-pleading defendant entitled to counsel only in timely or first post-conviction proceeding).

¶11 We grant review but deny relief.

APPENDIX E
Arizona Supreme Court Order
Denying Review
07/30/2018



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
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TELEPHONE: (602) 452-3396

July 30, 2018

RE: **STATE OF ARIZONA v EFRAIN ISMAEL CONDE**
Arizona Supreme Court No. CR-18-0063-PR
Court of Appeals, Division Two No. 2 CA-CR 17-0326
Maricopa County Superior Court No. CR1988-005881

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 30, 2018, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Bales, Justice Pelander, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

TO:

Joseph T Maziarsz
Diane Meloche
Efrain Ismael Conde, ADOC 054328, Arizona State Prison,
Lewis - Stiner Blue
Jeffrey P Handler

tel