

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Respondent*,

*v.*

JUAN SALVADOR MONTES, *Petitioner*.

No. 1 CA-CR 16-0509 PRPC  
FILED 9-28-2017

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Petition for Review from the Superior Court in Maricopa County  
No. CR2014-001794-019  
The Honorable Sherry K. Stephens, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix  
By Diane Meloche  
*Counsel for Respondent*

Juan Salvador Montes, Florence  
*Petitioner*

**MEMORANDUM DECISION**

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Chief Judge Samuel A. Thumma joined.

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**J O N E S**, Judge:

¶1 Juan Salvador Montes petitions this Court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 Montes pleaded guilty to one count each of possession of dangerous drugs for sale, assisting a criminal street gang, and misconduct involving weapons arising out of events occurring in 2014. He was sentenced as a non-dangerous, non-repetitive offender to twelve years' imprisonment for possession of dangerous drugs for sale and probation tails on the other two counts.

¶3 Montes timely filed post-conviction relief proceedings, but his appointed counsel was unable to identify any colorable claims to present. Montes then filed a *pro se* petition, alleging he had newly discovered that the weight of the methamphetamine in his possession fell below the statutory threshold amount identified in Arizona Revised Statutes (A.R.S.) § 13-3401(36)(e)<sup>1</sup> (defining the threshold amount of methamphetamine at nine grams),<sup>2</sup> and therefore did not evidence any intent to sell the drugs. Thus, Montes contends his conviction and sentence are in error. Montes also argues his attorney was ineffective for failing to file a motion to

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<sup>1</sup> Absent material changes from the relevant date, we cite a statute's current version.

<sup>2</sup> Montes incorrectly cites A.R.S. § 13-3420 as establishing the threshold amount. This statute simply defines how unlawful substances are to be treated in the event multiple substances in varying weights are involved in an offense or combination of offenses and is inapplicable here where Montes possessed a single unlawful substance, methamphetamine.

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suppress. The superior court summarily dismissed the petition, and a timely petition for review to this Court followed.

¶4 Within his petition for review, Montes reiterates his claim of newly discovered evidence and asserts his counsel was ineffective for not identifying and raising the issue regarding the threshold amount with the trial court.<sup>3</sup> We will not disturb a superior court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012) (citing *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17 (2006)). On review, the petitioner bears the burden of establishing error. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011). Montes has not sustained his burden here.

¶5 Regarding the claim of newly discovered evidence, first, Montes has not presented any evidence suggesting he was charged with possession of any specific amount of methamphetamine, let alone an amount in excess of the statutory threshold. Second, Montes admits he knew of this information before sentencing. It therefore was not "discovered after trial" and cannot be "newly discovered" for purposes of Arizona Rule of Criminal Procedure 32.1(e).

¶6 Third, Montes has not proved the information "was of such critical significance . . . such that the evidence probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e)(3). The amount of the drugs does not create any presumption of an intent to sell and is relevant only for sentencing purposes. *See* A.R.S. § 13-3407(D) (providing a person who possesses dangerous drugs for sale in an amount greater than the statutory threshold is generally "not eligible for suspension of sentence, probation, pardon or release from confinement on any basis"). And, the record reflects Montes was charged with an unidentified amount of methamphetamine for sale. He pleaded guilty to that charge, and two others, in exchange for the dismissal of an allegation of two historical felony convictions and forty-one other counts, and the State's agreement not to file certain other charges. On this record, we cannot say the superior court abused its discretion in concluding the amount of methamphetamine –

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<sup>3</sup> Montes does not reassert within his petition for review that counsel was ineffective for failing to file a motion to suppress, and that claim is waived. *See* Rule 32.9(c)(1) ("Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.").

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even assuming it fell below the statutory threshold – would have affected his decision to plead guilty or resulted in a more lenient sentence.

¶7 Montes also suggests his counsel was ineffective in preventing him from raising the threshold amount issue with the trial court at a settlement conference. Montes did not raise this issue with the superior court, and we will not consider it on appeal. *See* Ariz. R. Crim. P. 32.9(c)(ii) (authorizing a petitioner to seek appellate review only of “issues which were decided by the trial court”).

¶8 Accordingly, we grant review and deny relief.