

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 22 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0052-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ARMANDO ESTRADA III,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074036

Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.  
By Brick P. Storts III

Tucson  
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial in 2009, petitioner Armando Estrada was convicted of first-degree murder, conspiracy, armed robbery, kidnapping, theft of a means of transportation, and theft by control. The trial court sentenced him to multiple terms of imprisonment, including two concurrent life sentences. We affirmed Estrada's convictions and sentences on appeal. *State v. Estrada*, No. 2 CA-CR 2009-0246

(memorandum decision filed Aug. 17, 2010). Estrada now seeks review of the court's October 2012 ruling summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and urges us to remand for an evidentiary hearing. We will not disturb a court's ruling on a Rule 32 petition absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 In its ruling denying post-conviction relief, the trial court concluded most of Estrada's claims were precluded and also found he had failed to raise a colorable claim of newly discovered evidence under Rule 32.1(e). The court thus found Estrada had failed to provide "any basis to either go forward with an evidentiary hearing or grant the requested relief." On review, Estrada argues the court abused its discretion in finding the following claims precluded: the court's refusal to permit his expert to testify at trial; the inadvertent presentation of extrinsic evidence (his expert's written report) to the jury during jury deliberations; and prosecutorial misconduct. Rather than explaining why the court should not have found his claims precluded, Estrada instead reasserts the underlying arguments in support of his claims.

¶3 However, Estrada's claims are plainly precluded because he raised the first two claims on appeal and could have raised the third one on appeal. *See* Ariz. R. Crim. P. 32.2(a) (precluding relief based on claims raisable on direct appeal, adjudicated on the merits on appeal, or waived on appeal). Estrada also argues "notwithstanding the fact that this court ruled against the Defendant in his appeal [regarding the preclusion of his expert's testimony and the jury's viewing of extrinsic evidence] . . . [d]uring the direct

appeal, this court did not analyze the constitutional violation of the Defendant's right to confront witnesses." To the extent Estrada failed to assert the confrontation argument on appeal, he is precluded from doing so under Rule 32.2(a)(3), and to the extent he is attempting to challenge our decision on appeal, such a claim is not cognizable under Rule 32.<sup>1</sup> Therefore, we find no abuse of discretion in the trial court's dismissal of these claims based on preclusion.

¶4 Estrada also argues the trial court erred in finding he had failed to assert a colorable claim of newly discovered evidence pursuant to Rule 32.1(e). The court rejected Estrada's claim that the report prepared by Dr. Denis Keyes, a professor of special education consulted before sentencing, was newly discovered evidence related to Estrada's mental functioning at the time of the offense. The court found that Keyes's report was not only cumulative of the testimony Estrada had attempted unsuccessfully to present through a different expert witness at trial, but that Estrada had failed to exercise due diligence to obtain Keyes's opinion, and that it would not, in any event, have changed the verdict. Estrada maintains, inter alia, that "[m]erely because the defense obtained the services of Dr. Keyes prior to sentencing, does not preclude a further evaluation after sentencing. The defense did not learn certain factors relating to Dr. Keyes's research until after both the conviction and sentencing."<sup>2</sup>

---

<sup>1</sup>In our mandate dated April 12, 2011, we noted that Estrada did not file a motion for reconsideration of our decision and that the Arizona Supreme Court denied Estrada's petition for review.

<sup>2</sup>The trial court noted in its ruling denying post-conviction relief that because Keyes's report was before the court at sentencing, there is no issue regarding its impact

¶5 As our supreme court has explained,

A colorable claim in a newly-discovered evidence case is presented if the following five requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

*State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶6 Estrada attached to his Rule 32 petition Keyes's 2012 post-sentencing "Amended Report," in which Keyes reported, inter alia, that "Estrada's case was first brought to [his] attention . . . in 2009, while [Estrada] was awaiting trial and sentencing"; that Keyes "was particularly concerned" with Estrada's responses on two testing instruments as early as the "initial interview"; and that "a thorough diagnostic process should have been completed before the Court could fairly dispe[n]se justice." These comments alone support the trial court's finding that Estrada was not "diligent in bringing [Keyes's opinions] to the Court's attention," and that Keyes's report thus was not newly discovered evidence.<sup>3</sup> "Evidence is not newly discovered unless it was

---

on Estrada's sentence. Although it appears the court was not referring to Keyes's post-sentencing February 2012 amended report attached to the Rule 32 petition, which could not have been before the court at the 2009 sentencing, this misstatement does not impact our decision in light of our agreement with the court's due diligence finding.

<sup>3</sup>Because the record supports the trial court's finding that Estrada did not exercise due diligence in providing the court with Keyes's opinions, we need not address his related argument that the court erroneously failed to consider the unsworn interview of a

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.” *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000).

¶7 Finally, because Estrada did not present a colorable claim for relief, the trial court correctly denied his petition without conducting an evidentiary hearing. A Rule 32 petitioner “is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also* Ariz. R. Crim. P. 32.6(c) (court shall dismiss petition upon determination “that no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief . . . and that no purpose would be served by any further proceedings”).

¶8 Therefore, we grant review but deny relief.

*/s/ Peter J. Eckerstrom*  
\_\_\_\_\_  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

*/s/ Joseph W. Howard*  
\_\_\_\_\_  
JOSEPH W. HOWARD, Chief Judge

*/s/ Michael Miller*  
\_\_\_\_\_  
MICHAEL MILLER, Judge

---

juror and an investigator’s affidavit describing a conversation he had with a another juror, evidence Estrada provided solely to support his claim that Keyes’s opinion was newly discovered.