

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JAIME SANTAMARIA JR.,  
*Petitioner.*

No. 2 CA-CR 2013-0356-PR  
Filed November 29, 2013

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Maricopa County

No. CR2008176637003DT

The Honorable Michael W. Kemp, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By Gerald R. Grant, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Jaime Santamaria Jr., Buckeye  
*In Propria Persona*

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**MEMORANDUM DECISION**

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

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H O W A R D, Chief Judge:

¶1 Petitioner Jaime Santamaria Jr. seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Santamaria has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Santamaria was convicted of second-degree murder, aggravated assault, and two counts of armed robbery. The trial court imposed concurrent, presumptive and aggravated prison sentences, the longest of which was twenty years. Santamaria initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had "investigated [the] case for any and all colorable claims" and "determined that no colorable claim c[ould] be raised."

¶3 In a pro se petition, however, Santamaria raised various claims of sentencing error and ineffective assistance of counsel at sentencing. The trial court summarily denied relief.

¶4 On review, Santamaria contends only that trial counsel was ineffective in relation to sentencing, first because he failed to obtain or introduce mental health evidence in mitigation or to secure a "mitigation specialist" to support such evidence. And, second, he contends counsel should have objected to the trial court's imposing an aggravated sentence on his murder conviction. He apparently

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maintains the court violated A.R.S. § 13-701(F) by imposing an aggravated sentence when it had found a mitigating circumstance.<sup>1</sup>

¶5 To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), quoting *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 First, in support of his claims, Santamaria has only provided his bare assertion that he informed counsel he "was once hospitalized for psychological issues" and his statement at his change-of-plea hearing that he was then taking medication for "depression, anxiety, and sleeping." He has not provided any affidavits, medical records, or other evidence from which the trial court or this court could determine whether he had or has a mental illness, or whether such an illness could have been established as a mitigating circumstance at sentencing. See Ariz. R. Crim. P. 32.5; *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). Accordingly, Santamaria has failed to establish that the result of the sentencing would have been different had counsel obtained such evidence and that he was therefore prejudiced by counsel's purported deficient performance.

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<sup>1</sup>In his reply to the state's response to his petition for review, Santamaria also argues for the first time that the use of the word "shall" in A.R.S. § 13-701(E) required the trial court to impose a mitigated sentence. We do not consider arguments raised for the first time on review. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

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¶7 Furthermore, Santamaria relies on *State v. Miles*, in support of his argument that a mitigation specialist was required for sentencing. 186 Ariz. 10, 18, 917 P.2d 1028, 1036 (1996). His reliance is misplaced. Contrary to Santamaria's assertion, the court in *Miles* did not hold that mitigating evidence can only be introduced if an expert provides foundation for that evidence. Rather, the *Miles* court merely concluded that the expert witness in that case lacked the knowledge to lay foundation for evidence of Miles's drug use and had been properly excluded. *Id.*

¶8 Beyond asserting essentially that a mitigation specialist is always required, Santamaria does not explain how a mitigation specialist was necessary to support any existing mental health evidence. Nor does he provide any evidence as to what testimony a mitigation specialist would have provided and how such testimony would have changed the outcome at sentencing. *See* Ariz. R. Crim. P. 32.5; *Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201. He has therefore also failed to establish how he was prejudiced by counsel's failure to obtain a mitigation specialist, even had one been required.

¶9 Finally, Santamaria misunderstands the requirement of § 13-701(F). Isolating the clause, "and does not find any mitigating circumstances, the court shall impose an aggravated sentence," § 13-701(F), Santamaria seems to believe that the statute prohibits a trial court from imposing an aggravated sentence if it finds any mitigating circumstances. But when viewed in the context of the entire subsection, it is clear that § 13-701(F) only requires that a court impose an aggravated sentence if it finds only aggravating circumstances and no mitigating circumstances. Otherwise, a court is free to "take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term." § 13-701(F). That is what the trial court did here. Because the court did not violate § 13-701(F), Santamaria has not established that counsel's failure to object to the aggravated sentence on that ground was deficient performance.

¶10 For all these reasons, although we grant the petition for review, relief is denied.