IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

NATHANIEL EDUARDO CAÑEZ,
Petitioner.

No. 2 CA-CR 2015-0149-PR
Filed November 2, 2015

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NOT FOR PUBLICATION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. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20100880001
The Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Dean Brault, Pima County Legal Defender
By Alex Heveri, Assistant Legal Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Petitioner Nathaniel Cañez 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). Cañez has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Cañez was convicted of multiple counts of aggravated assault, simple assault, felony criminal damage, fleeing from a law enforcement vehicle, driving under the influence of marijuana (DUI), and driving with a metabolite of marijuana in his body. The trial court imposed concurrent prison terms, the longest of which was eighteen years. This court affirmed Cañez's convictions and sentences on appeal. *State v. Cañez*, No. 2 CA-CR 2012-0020 (memorandum decision filed Apr. 18, 2014).

¶3 In June 2014, Cañez filed a notice of post-conviction relief. He argued in his petition that the court should "dismiss his case for the state's failure to disclose *Brady*[1] . . . evidence." The trial court summarily denied relief, concluding the *Brady* claim was precluded and Cañez had not established a claim of newly discovered evidence under Rule 32.1(e).

¶4 On review, Cañez again asserts the state violated the rule set forth in *Brady* and argues the trial court abused its discretion

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[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

in denying his claim as precluded. But a claim under *Brady* is a constitutional claim and therefore is cognizable under Rule 32.1(a). *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression by state "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). As such, a *Brady* claim is subject to preclusion pursuant to Rule 32.2(a) and is waived if not raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 As the trial court properly recognized, however, Cañez was not precluded from making a claim that he was entitled to relief based on newly discovered evidence, specifically the interview with a victim witness conducted in 2014, which is the basis for his *Brady* claim. Ariz. R. Crim. P. 32.2(b), 32.4(a). Cañez argues that the trial court's analysis of whether this evidence would have changed the outcome or was merely cumulative "misses the point entirely." And he maintains that because the victim's statement was not available earlier and "there was no record to raise this argument on appeal," the claim should not be precluded.

¶6 An analysis of whether the evidence in question "probably would have changed the verdict" is required under Rule 32.1(e)(3) in determining whether a petitioner has stated a claim for relief based on newly discovered evidence. Likewise, to establish a claim under *Brady*, the evidence in question must be material; that is there must be "a reasonable probability that disclosure of the evidence to the defense would have changed the outcome of the proceeding." *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). In view of these legal standards, we disagree with Cañez's assertion that "the trial court's analysis . . . that the state presented overwhelming evidence of his guilt is . . . a legally flawed analysis." Whether viewed as a claim based on prosecutorial misconduct and *Brady* or as a claim of newly discovered evidence, such an analysis was required. And because "[n]o useful purpose would be served by this court rehashing the . . . court's correct ruling in a written decision," we adopt the portion of the ruling analyzing Cañez's claim pursuant to Rule 32.1(e). *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We likewise adopt its ruling insofar

as it analyzes Cañez's ability to have raised this claim on appeal in light of the record available at that time. *Id.*

¶7 Additionally, even were we to accept Cañez's implicit assertion that, despite any such provision in Rule 32, a claim of this nature is exempt from preclusion notwithstanding whether the evidence withheld qualifies as newly discovered evidence, this case presents a situation distinguishable from those in the cases on which he relies for his claim.[2] In *State v. Minnitt*, the prosecutor, inter alia, "elicited testimony . . . that he knew was false." 203 Ariz. 431, ¶ 38, 55 P.3d 774, 782 (2002). In *Milke v. Mroz*, the state withheld "evidence of numerous prior acts of improper and deceitful conduct" by the investigating officer in the case. 236 Ariz. 276, ¶ 7, 339 P.3d 659, 663 (App. 2014). In *State v. Jorgenson*, the prosecutor "engaged in knowing and intentional misconduct," by "'ignoring the facts . . . , [and] relying on prejudice'" throughout the trial. 198 Ariz. 390, ¶ 2, 10 P.3d 1177, 1177 (2000), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 61, 969 P.2d 1184, 1198 (1998) (alterations in *Jorgenson*). We cannot say the situation here presents the type of "extreme misconduct" that the prosecutor "knew was grossly improper and highly prejudicial." *Minnitt*, 203 Ariz. 431, ¶ 4, 55 P.3d at 776.

¶8 Thus, we grant the petition for review, but we deny relief.

[2]Unlike this case, each of the cases on which Cañez relies was decided based on double jeopardy principles when retrial was sought after the defendant had been granted relief on the grounds of prosecutorial misconduct. Thus, the claims in those cases were not precluded.