IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

PEDRO ESPINOZA,
*Petitioner*.

No. 2 CA-CR 2017-0053-PR
Filed March 21, 2017

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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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Maricopa County
No. CR2010127952001DT
The Honorable Roger E. Brodman, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
*Counsel for Respondent*

Pedro Espinoza, Tucson
*In Propria Persona*

## MEMORANDUM DECISION

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

V Á S Q U E Z, Judge:

**¶1** Petitioner Pedro Espinoza 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). Espinoza has not sustained his burden of establishing such abuse here.

**¶2** After a jury trial, Espinoza was convicted of armed robbery, aggravated assault, first-degree burglary, first-degree criminal trespass, and six counts of kidnapping. The trial court imposed consecutive and concurrent sentences totaling 58.5 years' imprisonment. Espinoza's appeal was dismissed in March 2012, but the trial court granted him relief pursuant to Rule 32.1(f) and ordered a delayed appeal. The convictions and sentences were affirmed on that appeal. *State v. Espinoza*, No. 1 CA-CR 12-0811 (Ariz. App. Mar. 18, 2014) (mem. decision).

**¶3** Espinoza thereafter sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was "unable to find a colorable issue to submit to the court pursuant to Rule 32." In a supplemental, pro se petition, however, Espinoza claimed he had received ineffective assistance of trial, appellate and Rule 32 counsel; had been denied "the 'Right' to perfect his appeal" when he did not receive his entire file from counsel; the indictment against him was multiplicitous; the identification procedure in his case had been "inherently suggestive"; and his rights

as set forth in *Miranda*[1] had been violated "with [an] involuntary confession." The trial court summarily denied relief.

**¶4** On review, Espinoza repeats his arguments and contends the trial court abused its discretion in denying relief and in failing to consider his reply to the state's response to his petition for post-conviction relief. First, we agree with the trial court that Espinoza's claims relating to the completeness of the record on appeal are precluded. Espinoza asserts on review that he raised this issue on appeal, and he filed a petition for review to our supreme court, which was denied. The matter was therefore adjudicated on appeal, and is precluded in this collateral proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2). To the extent Espinoza did not alert the appellate court to the lack of any portions of the record, the argument is now precluded because it was waived. *See* Ariz. R. Crim. P. 32.2(a)(3). We likewise agree with the trial court that Espinoza's claims concerning a multiplicitous indictment, identification procedures, and his allegedly involuntary statements are precluded because they either were or could have been adjudicated on appeal. *See* Ariz. R. Crim. P. 32.2(a)(2), (3).

**¶5** We also reject Espinoza's claim that the trial court abused its discretion in determining he had not stated a colorable claim of ineffective assistance of counsel. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

**¶6** Espinoza claims trial counsel was ineffective in failing to object to his being charged with six counts of kidnapping. He argues

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

that the evidence showed that he had only held one of the victims personally and he further contends that he was not charged as an accomplice and "[t]he jury's verdict was 'guilty of kidnapping; not as an accomplice.'" But Espinoza's indictment included a citation to A.R.S. § 13-301, the accomplice liability statute; the jury was instructed on accomplice liability; and nowhere did the jury's verdict indicate whether or not its guilty verdict was based on accomplice liability, it simply found him guilty of the charged offenses. Espinoza has therefore not established either deficient performance by counsel or prejudice resulting therefrom.

**¶7** Likewise, we reject Espinoza's claim that counsel was ineffective in failing to "get[] [his] involuntary confessions suppressed." As the trial court pointed out, trial counsel requested a voluntariness hearing. The court found Espinoza had been given the warning required by *Miranda* and his "statements were voluntary and not overcome by any violence, threat or coercion." Although set forth as an argument about counsel's performance, Espinoza's argument amounts to a request for this court to reconsider the court's decision.[2] He has not shown that counsel did not adequately raise the claim, but rather asserts essentially that counsel was ineffective because he lost.

**¶8** Espinoza also contends his appellate and Rule 32 counsel were ineffective. But a claim of ineffective assistance of Rule 32 counsel cannot be raised in this ongoing proceeding, nor is Espinoza, as a non-pleading defendant, entitled to effective assistance in a Rule 32 proceeding. *State v. Escareno-Meraz,* 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013) (Non-pleading defendants "have no constitutional right to counsel in post-conviction proceedings."). His claim that appellate counsel was ineffective is also unavailing. He contends essentially that counsel was ineffective for filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). He has not explained how any proposed appellate argument could have resulted in a different disposition on appeal.

[2]Any such claim is precluded in this proceeding. *See* Ariz. R. Crim. P. 32.2(a).

**¶9** Espinoza further suggests counsel were ineffective in allowing the trial court to impose and failing to challenge on appeal and in Rule 32 proceedings the consecutive sentences on his kidnapping convictions. He argues A.R.S. § 13-116 bars such a result. Because each count involved a different victim, however, consecutive sentences were permissible under the statute. *See State v. Riley*, 196 Ariz. 40, ¶ 21, 992 P.2d 1135, 1142 (App. 1999) (Section "13-116 does not apply to sentences imposed for a single act that harms multiple victims.").

**¶10** Finally, we note that the record supports Espinoza's claim that his reply was timely filed. But, any error was harmless because, as we have explained, none of Espinoza's claims warrant relief.

**¶11** Therefore, although we grant the petition for review, we deny relief.