IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ARMANDO DUARTE ISLAS JR.,
Petitioner.

No. 2 CA-CR 2017-0086-PR
Filed May 18, 2017

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NOT FOR PUBLICATION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. CR20142017002
The Honorable Carmine Cornelio, Judge

REVIEW GRANTED; RELIEF DENIED

Armando D. Islas Jr., San Luis
In Propria Persona

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Armando Islas Jr. seeks review of the trial court's orders summarily denying his petition for post-conviction relief and motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Islas has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Islas was convicted of sale of a narcotic drug and sentenced to a 15.75-year prison term. We affirmed his conviction and sentence on appeal. *State v. Islas*, No. 2 CA-CR 2014-0442 (Ariz. App. Jul. 14, 2015) (mem. decision). Islas then sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no claims to raise in a Rule 32 proceeding. Islas filed a pro se petition arguing his trial counsel had caused him to reject a favorable plea offer because he failed to adequately prepare for trial and advise him about the strength of the state's case.

¶3 In July 2014, Islas rejected a plea offer from the state. During a colloquy with the trial court held pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), Islas stated he had little opportunity to discuss his case with counsel. The court then instructed Islas to "talk with your lawyer about what the terms are, what the possible range of sentencing would be if you went to trial without the plea so that you fully understand and know what you're doing before you turn it down." Later in that hearing, counsel informed the court that Islas's "concerns were more to do with trial strategy and motions than to the actual *Donald* record." Islas then

rejected the plea offer, avowing he understood the sentencing range available under the plea compared to conviction after trial.

¶4 Islas rejected a second plea offer in September 2014. Islas repeated that he understood the differences in possible sentences but, when the trial court asked him if he "had plenty of time to talk to your lawyer about it and how the evidence is likely to go," he replied only that he "believe[d] in the system. Innocent until proven guilty by all the rules of criminal procedure." Counsel stated he had recommended Islas accept the plea. In response to the court's question whether he was "going to go against [counsel's] advice," Islas stated, "I'm not going against his advice. We are standing together on this. He is my counsel."

¶5 The trial court summarily denied Islas's petition for post-conviction relief. It noted that Islas had not demonstrated counsel was aware of his misapprehensions about evidence the state might present at trial, and that counsel had adequately advised Islas he "might lose at trial," particularly in light of his recommendation that Islas accept the state's plea offer. The court denied Islas's motion for rehearing, and this petition for review followed.

¶6 On review, Islas asserts he is entitled to an evidentiary hearing on his claim that trial counsel failed to advise him adequately about the strength of the state's case, thus making involuntary his rejection of a plea offer from the state. A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11, 368 P.3d 925, 927-28 (2016). "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); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶7 Counsel has a duty to communicate not only the terms of a plea offer, but also its relative merits compared to a defendant's

chances at trial. *Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d at 1198. Accordingly, "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial." *Id.* ¶ 14.

¶8 In evaluating whether a claim is colorable and whether Islas is thus entitled to an evidentiary hearing, we must assume the facts he has alleged are true. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). However, a defendant must do more than contradict what the record plainly shows, and must provide more than conclusory assertions in doing so. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998); *see also State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995) (court may disregard "conclusory" affidavit "completely lacking in detail"); *Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶9 In his petition for review, Islas asserts his counsel was deficient "during plea negotiations" because he had advised Islas to reject the state's plea offer. He claims that, just before the second *Donald* hearing, counsel had told him he would seek to preclude the informant's statements and Islas should thus reject the state's plea offer. Islas made this assertion for the first time in his motion for rehearing. The trial court was not required to consider facts asserted for the first time in a motion for rehearing. *Cf. State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (trial court not required to consider claims first raised in rehearing motion). Moreover, Islas has provided no evidentiary support for this assertion, which is contradicted by counsel's statement at the second *Donald* hearing that he had advised Islas to accept the plea, a statement Islas makes no effort to explain. *See Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d at 952.

¶10 Islas, however, seizes on his statement to the trial court in that hearing that he was "not going against [counsel's] advice," as evidence that counsel had, in fact, advised him to reject the state's plea offer. He claims counsel failed to "contradict this statement," thereby "adopt[ing]" it. But the authority Islas cites addresses adoptive admissions under Rule 801(d)(2)(B), Ariz. R. Evid., and does not

support an argument that counsel was required to correct or object to Islas's statement to avoid adopting it. In any event, although Islas's statement is confusing, it is most reasonably read as reflecting Islas's understanding that counsel would represent him at trial despite advising him to accept the plea offer, not as contradicting counsel's avowal that he had done so.

¶11 We agree with the trial court that Islas is not entitled to an evidentiary hearing. Although he claimed in his affidavit that counsel had not advised him adequately about the state's case, this conclusory statement, standing alone, is insufficient to establish a colorable claim. And, although Islas claimed he "believed" an informant's testimony would be inadmissible, he did not state in the affidavit that he had made counsel aware of that belief nor that counsel should have been aware of it.

¶12 Islas also listed in his affidavit several recordings and transcripts he did not review before trial. But he did not avow he was unaware those conversations had been recorded or that they could be admissible at trial. Nor did he explain in his affidavit why he would have opted to accept the plea only after reviewing that evidence, particularly in light of his trial counsel's advice that he accept the state's plea offer.

¶13 Islas repeats his argument that counsel did not investigate his case sufficiently to advise him whether to reject the state's plea offer. But, as we have explained, counsel advised Islas to accept the state's plea, and Islas had not explained why he chose to reject counsel's advice. Nor has he asserted that counsel's advice would have differed had the investigation been more thorough.

¶14 We grant review but deny relief.