IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

MICHAEL ISIDORO SANCHEZ,
*Petitioner*.

No. 2 CA-CR 2017-0123-PR
Filed July 14, 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NOT FOR PUBLICATION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 Cochise County
No. CR201300346
The Honorable Karl D. Elledge, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Michael I. Sanchez, Florence
*In Propria Persona*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Howard[1] concurred.

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V Á S Q U E Z, Presiding Judge:

**¶1** Petitioner Michael Sanchez seeks review of the trial court's order denying his motion for DNA[2] testing pursuant to Rule 32.12, Ariz. R. Crim. P., and dismissing his related Rule 32 claims. We review the denial of a request for post-conviction relief, including for DNA testing, for an abuse of discretion. *State v. Gutierrez*, 229 Ariz. 573, ¶ 19, 278 P.3d 1276, 1280 (2012).

**¶2** Pursuant to a plea agreement, Sanchez was convicted of sexual conduct with a minor under the age of fifteen and attempted sexual conduct with a minor under the age of fifteen. Consistent with a stipulation in the plea agreement, the trial court sentenced him to a twenty-five year prison term on the first count to be followed by lifetime probation on the second. Sanchez thereafter sought and was denied post-conviction relief, and this court denied relief on review. *State v. Sanchez*, No. 2 CA-CR 2015-0359-PR (Ariz. App. Dec. 22, 2015) (mem. decision).

**¶3** In December 2015, Sanchez filed a motion for DNA testing pursuant to Rule 32.12. The trial court appointed counsel, who filed a notice stating she had reviewed the record and could "find no colorable claims pursuant to Rule 32." Counsel also stated "the records available do not indicate that law enforcement conducted a medical rape examination of the victims."

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]Deoxyribonucleic acid.

**¶4** Sanchez filed a pro se "motion to compel prosecutor to provide access to DNA" and a pro se, supplemental petition for post-conviction relief, in which he asserted the victims had been "medically examined," but the prosecutor had informed his trial counsel that there were no "medical records, rape exams, or evaluations in this matter." Sanchez's claims in this regard appear to rest on a "SVPD Law Supplemental Narrative," which he asserts "a friend who reviewed [his] case" had told him "meant medical rape exams were produced." That report, attached as an exhibit to Sanchez's petition, states that the victims "were seen" by a forensic nurse and that one child was interviewed. The remainder of the report details the interview but does not mention a medical exam or test results.

**¶5** Sanchez asserted claims of prosecutorial misconduct based on the prosecutor having allegedly withheld this purported discovery material, argued it constituted newly discovered evidence entitling him to relief, claimed there was an insufficient factual basis for his guilty plea because "the requested discovery would substantially undermine the validity of the plea," and alleged he had received ineffective assistance of trial and Rule 32 counsel. The trial court dismissed the petition, concluding Sanchez's claims were or could have been raised in previous proceedings.

**¶6** Sanchez filed a motion for rehearing, and the trial court ordered a response from the state. In its response, the state pointed out that the investigation had begun when Sanchez "confessed his crimes to his wife" and had not been based on "an allegation of recent/fresh abuse that would have yielded DNA in the children's medical exams." It asserted it had "disclosed all forensic medical exams of the victims to the Defense prior to [Sanchez] entering into his plea agreement." The court summarily denied Sanchez's motion.

**¶7** On review, Sanchez repeats his claims and asserts the trial court "erred in summarily dismissing [his] Rule 32.12 DNA Petition on [the] ground of preclusion" because a motion pursuant to Rule 32.12 is not subject to preclusion under Rule 32.2. We agree with the trial court, however, that Sanchez's claims of prosecutorial

misconduct, ineffective assistance of trial counsel, and lack of a factual basis are precluded in this successive proceeding. *See* Ariz. R. Crim. P. 32.2(a), (b). Pursuant to Rule 32.2(b), however, his claim of newly discovered evidence is not precluded. And, because he is a pleading defendant, he may challenge the effectiveness of his first Rule 32 counsel in a second, timely proceeding. *See State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995). Furthermore, his claim under Rule 32.12 is not subject to preclusion and the issue has not been raised in a prior proceeding. *Cf.* Ariz. R. Crim. P. 32.12(i) ("Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the post-conviction DNA testing are favorable to the petitioner, the court shall order a hearing . . . .").

**¶8** Rule 32.12 provides a court "shall" order DNA testing if the petitioner meets all the requirements of Rule 32.12(c) or A.R.S. § 13-4240(B). Among those requirements is that the evidence must still exist and be in a condition that allows DNA testing. § 13-4240(B)(2); Ariz. R. Crim. P. 32.12(c)(2). Further, the evidence must not have been previously subjected to DNA testing or not previously subjected to the specific testing the petitioner now requests, and the additional testing may resolve an issue not resolved by prior testing. § 13-4240(B)(3); Ariz. R. Crim. P. 32.12(c)(3). The court "may" order testing if those requirements and those of Rule 32.12(d)(1) or § 13-4240(C)(1) are met.

**¶9** In this case, as detailed above, Sanchez's claims that any evidence exists that has not been tested or disclosed is speculative. That a report indicated the victims were seen by a forensic nurse does not itself establish physical exams were performed, particularly in view of the fact that the most recent act suggested on the record before us was a touching within a week of Sanchez's arrest and confession. The state asserts all evidence was disclosed; Sanchez's trial counsel informed him there were no "medical records, rape exams, or evaluations in this matter," Rule 32 counsel found no indication a medical rape examination was completed, and although Sanchez asserts he has made Freedom of Information Act requests, he has not provided the court with any evidence received thereby. Furthermore, as part of his plea agreement in 2014, Sanchez agreed that any evidence "obtained for use in this case" could "be disposed of."

Because Sanchez has not established that any evidence exists to be tested, the trial court did not err in denying his Rule 32.12 motion. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm ruling if result legally correct for any reason).

**¶10** As to Sanchez's other non-precluded claims, he has not shown that any additional evidence exists, or that it would, in any event, be exculpatory or have changed the outcome of the proceeding in view of his own admissions that he had engaged in "sexual intercourse with a female child" and "oral sexual contact with a female child."[3] We therefore cannot say the trial court abused its discretion in dismissing the claims.

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

[3] "Sexual intercourse" as defined by A.R.S. § 13-1401(A)(4) includes "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva."