

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ISIDRO PACHECO,
Petitioner.

No. 2 CA-CR 2018-0269-PR
Filed January 23, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pinal County
No. S1100CR201301351
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Isidro Pacheco, Kingman
In Propria Persona

STATE v. PACHECO
Decision of the Court

MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Petitioner Isidro Pacheco seeks review of the trial court’s order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Pacheco has not demonstrated such abuse here.

¶2 Pursuant to a plea agreement in 2014, Pacheco was convicted of one count of child molestation and two counts of attempted sexual conduct with a minor under the age of fifteen, all dangerous crimes against children. The trial court sentenced Pacheco to a presumptive, seventeen-year prison term for the molestation conviction, to be followed by lifetime probation for the attempted sexual conduct convictions. Pacheco sought post-conviction relief and, after appointed counsel notified the court she had been unable to find any claims to raise in a Rule 32 proceeding, Pacheco filed a pro se supplemental petition, which the court summarily denied. We denied relief on review from the court’s denial of that petition. *State v. Pacheco*, No. 2 CA-CR 2015-0240-PR (Ariz. App. Oct. 13, 2015) (mem. decision).

¶3 In November 2015, Pacheco filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona. On December 22, 2016, the federal court conditionally granted Pacheco’s petition, ordering him released unless he was permitted to file “a new of-right Rule 32 PCR proceeding, including the filing of a brief by counsel and an independent review of the record by the trial court consistent with *Anders v. California*, 386 U.S. 738 (1967).” *Pacheco v. Ryan*, CV-15-02264-PHX-DGC, 2016 WL 7407242, *10 (D. Ariz. Dec. 22, 2016).¹ In February

¹In *State v. Chavez*, 243 Ariz. 313, ¶¶ 5-6, 12-18 (App. 2017), this court rejected the petitioner’s argument that, based in part on the district court’s decision in *Pacheco v. Ryan*, 2016 WL 7407242, he was entitled to a fundamental-error, *Anders*-type review by the appellate and trial courts in his of-right proceeding. Although we deny Pacheco relief on review, we do

STATE v. PACHECO
Decision of the Court

2018, counsel filed a Rule 32 petition, which the trial court summarily denied in June 2018.² This pro se petition for review followed.

¶4 On review, Pacheco generally reurges the claims he raised in his petition below. He argues he is entitled to an evidentiary hearing on his claims that trial counsel was ineffective for failing to: 1) investigate an alibi defense and a possible motive for false accusations by the victim; 2) file a motion to suppress his confession to the police; and, 3) investigate mitigation evidence for sentencing. He generally asserts counsel's alleged deficient performance had a prejudicial effect on his plea negotiations and the eventual outcome of the case. A defendant is entitled to a hearing 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 (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 (2006); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 And, in an argument separate from his claims of ineffective assistance of counsel, Pacheco maintains *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017), constitutes a significant change in the law, to wit, finding that A.R.S. §§ 13-1407(E) and 13-1410 unconstitutionally shift the burden of proof to the defendant. Pacheco also asserts that, because our supreme court's decision in *State v. Holle* predated *May*, it does not control the

so for the reasons stated in this decision, and not based on whether it was proper for the trial court to give him the opportunity to file a new petition in a successive of-right proceeding including an *Anders* review, because the district court so required. See *Arpaio v. Figueroa*, 229 Ariz. 444, ¶ 11 (App. 2012) (federal district court decisions concerning state law not binding on state court). We nonetheless note that, in Pacheco's first Rule 32 proceeding, after appointed counsel reviewed the record and determined there was no colorable claim pursuant to *Montgomery v. Sheldon*, 181 Ariz. 256 (1995), Pacheco was given the opportunity to, and in fact, did file a pro se brief.

²In response to the state's motion for clarification, in July 2018 the trial court issued an eight-page supplemental ruling in support of its June ruling denying Pacheco's petition for post-conviction relief.

STATE v. PACHECO
Decision of the Court

outcome in this case. 240 Ariz. 300, ¶¶ 17-19, 40 (2016) (§§ 13-1407(E) and 13-1410 do not violate due process).³

¶6 Pacheco finally contends his plea was rendered involuntary because he was entitled to a jury trial on the enhanced sentences he received for the commission of dangerous crimes against children, a right he maintains he did not expressly waive; the imposition of an enhanced sentence under A.R. S. § 13-705 is discretionary; he did not understand he could receive an enhanced sentence under the plea agreement; and, § 13-705 is unconstitutional. He asks that we vacate his enhanced sentence and find § 13-705 unconstitutional.

¶7 We agree with the trial court that Pacheco is not entitled to relief on any of the claims he has raised. We have reviewed the record and the court's ruling and conclude it correctly rejected Pacheco's arguments. We therefore adopt that ruling. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶8 Accordingly, although we grant review, relief is denied.

³ We recognize that the potential conflict in federal and state authority could foster constitutional challenges to the prosecution and punishment of defendants charged with child molestation under Arizona statute. Because Arizona's courts are bound to follow the decisions of the Arizona Supreme Court, *see State v. Smyers*, 207 Ariz. 314, n.4 (2004), this court would, in any event, lack authority to resolve any such conflict here.