IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RUDOLPH CHARLES ARENAS,
Petitioner.

No. 2 CA-CR 2019-0245-PR
Filed April 3, 2020

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NOT FOR PUBLICATION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 Pima County
No. CR20012407
The Honorable Joan Wagener, Judge

REVIEW GRANTED; RELIEF DENIED

Rudolph C. Arenas, Buckeye
In Propria Persona

MEMORANDUM DECISION

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

E C K E R S T R O M, Judge:

¶1 Rudolph Arenas 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.[1] We will not disturb that order unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Arenas has not met his burden of establishing such abuse here.

¶2 After a jury trial, Arenas was convicted of second-degree murder and two counts of attempted second-degree murder. The trial court sentenced him to aggravated, consecutive prison terms totaling fifty-four years. We affirmed his convictions and sentences on appeal. *State v. Arenas*, No. 2 CA-CR 2002-0082 (Ariz. App. Jan. 29, 2004) (mem. decision). We also denied relief or review on the trial court's denial of three of his petitions for post-conviction relief. *State v. Arenas*, No. 2 CA-CR 2016-0378-PR (Ariz. App. Feb. 7, 2017) (mem. decision); *State v. Arenas*, No. 2 CA-CR 2015-0437-PR (Ariz. App. Apr. 20, 2016) (mem. decision); *State v. Arenas*, No. 2 CA-CR 2006-0313-PR (Ariz. App. Mar. 15, 2007) (mem. decision). Arenas also sought post-conviction relief, which the trial court denied, in two other proceedings in May 2014 and February 2015, but Arenas did not seek review.

¶3 In September 2019, Arenas filed his sixth petition for post-conviction relief.[2] He asserted that the prosecutor improperly

[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

[2] His petition, which was titled "Notice of Request for Post-Conviction Relief," was initially filed in August 2019, but, because it

commented on his Fifth Amendment right not to testify by referring to evidence as "undisputed," that his sentences for attempted second-degree murder were not "authorized by law" because the offenses should have been treated as class three felonies, and that his trial and appellate counsel were ineffective in failing to raise those issues. Arenas also argued that his claims were of "sufficient constitutional magnitude" that the rules of preclusion under Rule 32.2(a) should not apply.

¶4 The trial court summarily dismissed Arenas's petition, finding his claims "untimely and precluded." However, the court also considered the merits of Arenas's claims, explaining that "the prosecutor's comment was not improper and did not violate . . . Arenas' Fifth Amendment rights" because "a comment that evidence is 'undisputed' only violates the defendant's Fifth Amendment rights if the defendant was the only person who could have disputed this evidence" and Arenas was "not the only person who could have disputed the State's 'undisputed' evidence." The court also reasoned that Arenas's convictions for attempted second-degree murder were properly charged as class two felonies and Arenas was sentenced accordingly. *See* A.R.S. §§ 13-1001(C)(1), 13-1104(C). The court further rejected Arenas's ineffective assistance of counsel claims based on those purported errors. This petition for review followed.

¶5 On review, Arenas argues his claim that the prosecutor improperly commented on his Fifth Amendment right not to testify "cannot be precluded" because it "constitute[s] fundamental error" and "[f]undamental error may be raised at any time."[3] But even a claim of fundamental error is subject to preclusion under Rule 32.2(a) and the timeliness requirement of Rule 32.4(b). *Cf. State v. Swoopes*, 216 Ariz. 390, ¶¶ 41-42 (App. 2007) (discussing fundamental error in context of Rule 32.2). Arenas's claim could have been raised previously but was not, and it is, therefore, precluded under Rule 32.2(a)(3).[4] Moreover, his claim is untimely under Rule 32.4(b)(3)(A).

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was missing a page, the trial court directed Arenas to refile the document, which he did the following month.

[3]Arenas does not assert on review that the trial court erred in finding as precluded his claim that the sentences for his attempted second-degree murder convictions should have been treated as class three felonies. We therefore do not address it.

[4] Rule 32.2(a)(3) excepts a claim that "raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and

¶6 Arenas also contends that his ineffective assistance of counsel claims are not precluded because he was entitled to, but did not receive, effective assistance of Rule 32 counsel pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). But as a non-pleading defendant, Arenas has no constitutional right to the effective assistance of Rule 32 counsel. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4 (App. 2013). Nothing in *Martinez* alters that result. In that case, the United States Supreme Court addressed a defendant's equitable right to effective representation of initial post-conviction counsel in the context of default in federal habeas review. *See id.* ¶ 5. Arenas's ineffective assistance of counsel claims are precluded and untimely. *See* Ariz. R. Crim. P. 32.1(a), 32.2(a)(3), 32.4(b)(3)(A); *see also State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance of counsel claim "cognizable under Rule 32.1(a)").

¶7 And even assuming the issues were not precluded, the trial court clearly identified Arenas's claims and correctly resolved them on their merits. Because that analysis is thorough and well-reasoned, we adopt it. *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 the petition for review, we deny relief.

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personally by the defendant." Although Arenas's claim implicates the Fifth Amendment, the purported error is one of prosecutorial misconduct to which the exception does not apply. *Cf. Stewart v. Smith*, 202 Ariz. 446, ¶¶ 9-12 (2002) (describing relevant question as whether asserted ground is of "sufficient constitutional magnitude" to require knowing, voluntary, and intelligent waiver).