IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AUGUSTIN SOTO RIVERA,
Petitioner.

No. 2 CA-CR 2020-0081-PR
Filed August 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NOT FOR PUBLICATION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. CR20121143002
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Augustin S. Rivera, Tucson
In Propria Persona

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

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

¶2 At the conclusion of a jury trial *in absentia* in 2013, Rivera was convicted of two counts of armed robbery, one count of attempted armed robbery, three counts of aggravated assault with a deadly weapon or dangerous instrument, two counts of aggravated robbery, one count of attempted aggravated robbery, one count of burglary in the first degree, one count of possession of marijuana, and one count of fleeing from a law enforcement vehicle. In 2014, the trial court sentenced Rivera to concurrent and consecutive prison terms totaling 31.5 years. We affirmed Rivera's convictions and sentences on appeal. *State v. Rivera*, No. 2 CA-CR 2014-0087 (Ariz. App. Feb. 2, 2016) (mem. decision).

¶3 Rivera sought post-conviction relief, and appointed counsel notified the court she was "unable to find any arguably meritorious legal issues" to raise in a Rule 32 petition. In April 2019, Rivera filed a pro se petition, arguing he had been denied representation at sentencing by his counsel of choice, Laura Udall; trial counsel, Jack Lansdale, had been ineffective at his plea proceeding; and, appellate counsel had been

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[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("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'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

ineffective for failing to raise the issue regarding Udall on appeal. He also asserted he was entitled to an evidentiary hearing.

¶4 Rivera attached a signed declaration to his petition avowing, in relevant part, that before the sentencing hearing he had retained Udall, "who in a manner unknown to [him] gave notice to the Court and counsel Jack Lansdale" that she had been retained to represent him at sentencing. He further explained that he had instructed Lansdale to notify the trial court he wanted Udall to represent him at sentencing, and that Lansdale had told him he would notify the court and file a motion to postpone sentencing. He also avowed that despite having told Lansdale he was confused by the "sentencing scenarios" discussed at the March 18, 2013, *Donald* hearing and had requested a written copy of the state's plea offer, Lansdale did not communicate with him in the week following the hearing, before the offer expired. *State v. Donald*, 198 Ariz. 406 (App. 2000). The Rule 32 judge, who was also the trial judge, summarily dismissed Rivera's petition, concluding he had failed to present a colorable claim warranting an evidentiary hearing. This petition for review followed.

¶5 "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). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2 (App. 2004) (quoting *State v. Runningeagle*, 176 Ariz. 59, 63 (1993)); *see also State v. Fillmore*, 187 Ariz. 174, 180 (App. 1996) (to avoid summary dismissal on claim of ineffective assistance of counsel, defendant must make showing of colorable claim on both prongs of test).

¶6 On review, Rivera asserts he is entitled to an evidentiary hearing on his claims regarding his right to counsel of choice and Lansdale's ineffective representation at the *Donald* hearing. He first argues the trial court erred by dismissing his claim that he was denied his counsel of choice at sentencing. When the court asked Rivera if he wanted to say anything at sentencing, he responded, "I was under the impression that we were going to get a continuance today because I got Laura Udall to step in. I feel I wasn't represented right [by Lansdale]."[2] Although Rivera

[2]Rivera then explained to the trial court that during Lansdale's only visit with him at the jail, Lansdale had advised him if he "could afford to bond out, bond out and talk to your travel agent," advice he had followed. Rivera also provided the court with a lengthy description of the hardships

acknowledges that the avowals in his declaration do not entitle him to relief on this claim, he maintains he established that he is entitled to an evidentiary hearing at which Lansdale and Udall will testify. He also contends the court incorrectly analyzed his claim under *Strickland* to conclude Lansdale had provided effective representation at sentencing, maintaining he had a right to counsel of choice even if his current counsel's performance was not deficient. *Strickland*, 466 U.S. 668.

¶7 In its ruling below, the trial court noted that Rivera had avowed in his declaration that he *had* retained Udall to represent him at sentencing and that she *had* notified the court and Lansdale of that fact. However, the court pointed out that the record did not contain "any formal indication that Ms. Udall was retained, intended to, but did not file a notice of appearance, or otherwise was involved in this case formally." And despite the court having granted Rivera multiple time extensions for the express purpose of obtaining an affidavit from Udall to attach to the reply to his Rule 32 petition, no affidavit was forthcoming.

¶8 We conclude the trial court did not abuse its discretion by summarily dismissing this claim. To the extent Rivera is presenting this as a claim of the denial of his Sixth Amendment right to counsel of choice or the denial of his request for a continuance to substitute counsel, it is a claim he could have, but did not, raise on appeal. *See State v. Ramos*, 239 Ariz. 501, ¶ 16 (App. 2016) (indigent criminal defendant has constitutional rights to choose representation by non-publicly funded private attorney); *State v. Aragon*, 221 Ariz. 88 (App. 2009) (direct appeal from denial of motion to continue to substitute privately retained counsel for appointed counsel). It is, therefore, precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). *See State v. Herrera*, 232 Ariz. 536, ¶ 14 (App. 2013) (we must affirm trial court's ruling if legally correct for any reason).

¶9 Additionally, to the extent Rivera intended to present this claim indirectly as one of ineffective assistance of counsel by asserting that Lansdale should have filed a motion for change of counsel, notified the trial court that Udall had been retained, or requested a continuance at sentencing, he has failed to support such a claim.[3] As the trial court

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his family had suffered as a result of having to repay his bond money after he absconded; the court then sentenced him.

[3] Although Rivera seemed to suggest in his petition below that Lansdale may have been ineffective in this regard, as previously noted, he nonetheless asserts on review that the trial court incorrectly relied on the

observed, despite Rivera's repeated requests for extensions for the express purpose of obtaining an affidavit from Udall to corroborate his avowal that he had retained her, he failed to provide any such affidavit. *See* Ariz. R. Crim. P. 32.7(e) ("The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition."). Nor did he provide an affidavit from Lansdale in support of this claim. *See id.* Accordingly, even assuming as true Rivera's avowal that he had retained Udall and that she had so notified the court, *see State v. Watton*, 164 Ariz. 323, 328 (1990), the record does not support his assertion, and the court thus did not abuse its discretion by finding Rivera had failed to establish a colorable claim entitling him to an evidentiary hearing. *See Herrera*, 232 Ariz. 536, ¶ 14.

¶10 We next address Rivera's third claim, which is closely related to his first. He asserts appellate counsel was ineffective for failing to argue he was denied his right "to choose and retain" Udall at sentencing. Rivera acknowledges that "this claim turns on whether Claim/Issue One [that he was denied his right to counsel of choice at sentencing] has merit." Moreover, in its ruling below, the trial court correctly noted that because "the record is void of any substantive proof that [Rivera] retained Ms. Udall as counsel for sentencing," appellate counsel's failure to raise a claim "without the necessary factual and legal support" was not deficient.

¶11 Finally, Rivera contends the trial court erred by rejecting his claim that Lansdale was ineffective during plea negotiations, asserting Lansdale neither explained the plea agreement nor obtained a written copy of it in the week following the *Donald* hearing, before it expired. And, although he does not challenge the court's reliance on the settlement conference transcripts, Rivera instead generally asserts, apparently for the first time on review, that "this court" consider his "off-the-record discussions with [Lansdale] . . . in concert with [the] on-the-record colloquies" the court considered in order to determine whether Lansdale had adequately explained the plea offer to him.[4]

Strickland standard in dismissing this claim. *Strickland*, 466 U.S. 668. In light of our ruling, we do not address this argument further.

[4]To the extent this is a new claim, we do not consider issues raised for the first time on review. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (appellate court reviews issues presented to trial court); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review). Moreover, even if this argument were properly before us, insofar as Rivera relies on the single reference to an off-the-record conversation with Lansdale at the *Donald* hearing to support

¶12 A defendant may show deficient performance during plea negotiations by proving counsel gave him erroneous advice or "failed to give information necessary to allow [the defendant] to make an informed decision whether to accept the plea." *Donald*, 198 Ariz. 406, ¶ 16. Under *Donald*, "[t]o establish prejudice in the rejection of a plea offer, a defendant must show 'a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer' and declined to go forward to trial." *Id*. ¶ 20 (quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997)).

¶13 In its ruling below, the trial court stated it had found the records of the settlement conference and the *Donald* hearing "illuminating."[5] At the *Donald* hearing, the court explained the sentencing exposure Rivera would face at trial, and told him if it were to impose consecutive sentences at trial, which it stated it often does in cases like this one, where multiple victims and a gun are involved, Rivera could receive "'essentially a life sentence'"; Rivera should not have "false hope" the court would impose concurrent sentences if he accepted the plea offer; and, the court would not hold it against Rivera or penalize him if he decided to go to trial. The court also explained that the sentencing range for the plea offer was from 10.5 to fifty-one years. After discussions with counsel about the possible sentencing ranges, the court told Rivera and his co-defendant, "I'm sure I confused you guys," and asked if they had any questions—there was no response. In its ruling, the court noted that Lansdale had successfully negotiated the option of a plea agreement with "high end exposure removal," and concluded the records of the settlement conference and *Donald* hearing established that Rivera was aware of his exposure.[6]

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this claim, he has not described the substance of that conversation, nor has he attached an affidavit from Lansdale in this regard. *See* Ariz. R. Crim. P. 32.7(e).

[5]We refer to both the March 4, 2013 settlement conference and the March 18, 2013 *Donald* hearing as the "*Donald* hearing."

[6]To the extent the trial court also stated Rivera had "knowingly, intelligently, and voluntarily rejected the plea agreement at the [*Donald*] hearing," Rivera did not reject the offer at that hearing. Rather, it was apparent at the April 8, 2013, status conference, when a trial date was set, that he had not accepted the offer before it had expired. Moreover, nothing in *Donald* suggests a pretrial record of a rejected plea agreement is constitutionally required, nor does Rivera so assert. *Donald*, 198 Ariz. 406.

¶14 Rivera has identified no error in the trial court's ruling that the risks of going to trial were not explained to him or that he did not understand those risks, notwithstanding his assertion that Lansdale failed to meet with him after the *Donald* hearing or provide him with a written copy of the state's plea offer. *See Donald*, 198 Ariz. 406, ¶ 17 (to state colorable claim, defendant "must provide specific factual allegations that, if true, would entitle him to relief"). And in *Donald*, this court stated, "To mandate an evidentiary hearing, the defendant's challenge must consist of more than conclusory assertions and be supported by more than regret." *Id.* ¶ 21. We also stated counsel must do more than merely ensure the defendant understands the comparative punishment, to wit, counsel must advise the defendant about the merits of the offer compared to the chances of success at trial. *Id*. ¶ 9. And although the record does not show Lansdale necessarily did that here, we nonetheless find Rivera is not entitled to an evidentiary hearing.

¶15 Based on the avowals in Rivera's declaration, which the trial court was obligated to treat as true, *see Watton*, 164 Ariz. 323, 328, he has not stated what would have been different if Lansdale had met with him after the *Donald* hearing or provided him with a written copy of the plea agreement. He has not asserted how a meeting with Lansdale would have added to the information the court had already imparted to him, nor has he offered any argument how Lansdale's conduct caused him to make an uninformed decision to reject the plea offer. *Donald*, 198 Ariz. 406, ¶ 14. And although a meeting with Lansdale to review the written plea agreement might have been helpful, Rivera only speculates that he was prejudiced by the fact that this did not occur. Nor has he made a meaningful effort to establish that competent counsel would have acted differently. *Id.* ¶ 20 (to establish prejudice in this context, defendant must show reasonable probability that, absent attorney's deficient conduct, he would have accepted the plea offer). And, although Rivera stated in his petition below that "he would not have proceeded to trial" if Lansdale had acted differently, he did not say that in his declaration or in his petition for review. *Cf. Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (pleading defendant's failure to allege he would have insisted on trial but for counsel's misadvice rendered petition's allegations "insufficient" to satisfy prejudice requirement).

¶16 And, to the extent Rivera asserts he would have received a shorter prison term if he had accepted the plea offer, as the trial court concluded, and the record supports, he was aware of the potential disparity in sentences and nonetheless rejected the plea offer. In addition, at the April 8, 2013 status conference to set the trial date, which took place shortly after the plea offer had expired and which Rivera attended, he did not say

anything about Lansdale's failure to meet with him regarding the then-expired plea offer.

¶17 Even taking his allegations as true, Rivera has not established a colorable claim entitling him to an evidentiary hearing on this claim. *Cf. State v. Borbon*, 146 Ariz. 392, 399-400 (1985) (request for hearing "so that trial counsel can fully explain" conduct found "insufficient to raise a colorable claim"; court not required "to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims"); *see also Donald*, 198 Ariz. 406, ¶ 21 (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). Indeed, we recognized in *Donald* that "[i]t is easy to claim but hard to secure" evidence to establish prejudice in the rejection of a plea offer. *Id.* ¶¶ 20-21.

¶18 Rivera has failed to establish the trial court abused its discretion in summarily dismissing his petition. Accordingly, we grant review but deny relief.