IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

MICHELLE ANN BUTLER,
*Petitioner*.

No. 2 CA-CR 2020-0153-PR
Filed February 11, 2021

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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NOT FOR PUBLICATION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. 31.19(e).

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Petition for Review from the Superior Court in Pinal County
No. S1100CR201600010
The Honorable Kevin D. White, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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

Harriette P. Levitt, Tucson
*Counsel for Petitioner*

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## MEMORANDUM DECISION

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

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

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

**¶2** After a jury trial, Butler was convicted of second-degree murder. The trial court sentenced her to twenty-three years' imprisonment. This court affirmed her conviction and sentence on appeal. *State v. Butler*, No. 2 CA-CR 2018-0254 (Ariz. App. Aug. 8, 2019) (mem. decision).

**¶3** Butler thereafter sought post-conviction relief, arguing in her petition that she had received ineffective assistance of trial counsel. Specifically, Butler asserted her counsel had failed "to obtain an expert to testify about the general characteristics and behavioral traits of people who have been victims of domestic violence" and to admit into evidence Butler's booking photograph showing she "had marks on her neck and bruises, which were consistent with having been recently assaulted."

**¶4** The trial court summarily dismissed Butler's petition. It explained that Butler had "suffered no prejudice" from trial counsel's failure to call an expert regarding the behavioral characteristics of domestic violence victims because "many of the same points" she sought to admit were otherwise established through another expert. The court additionally noted that Butler's "defense relied largely on her credibility, and her testimony was not at all credible" and that "the evidence gathered in the case did not support [Butler's] claim of self-defense." The court further found no prejudice as to counsel's failure to admit the booking photograph because "[m]ultiple witnesses, including witnesses for the State, [had] testified to the existence of the injuries pictured in the booking photo" and "the jury actually got to see the booking photo." This petition for review followed.

**¶5** On review, Butler contends the trial court erred by dismissing her petition without an evidentiary hearing. She maintains the court "held [her] to a much higher standard" when considering whether to grant a hearing because she "was only required to present a colorable claim, not clear and convincing proof that she would have had a different verdict at trial." Butler additionally maintains the court "did not even consider [her] claim of ineffective assistance of counsel."

**¶6** "If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition." Ariz. R. Crim. P. 32.11(a). Put another way, a defendant is entitled to an evidentiary hearing only if his petition presents a colorable claim—that is, one that, "if true, would *probably* have changed the verdict or sentence." *State v. Kolmann*, 239 Ariz. 157, ¶ 8 (2016) (quoting *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016)).[1] "If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal." *Amaral*, 239 Ariz. 217, ¶ 11.

**¶7** "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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). And a "[f]ailure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.*

**¶8** In its ruling, the trial court concluded that Butler had not established prejudice because "the use of a 'cold expert' and the admission of [Butler's] booking photo would not have changed the verdict at trial." The court correctly applied the law. It simply found that Butler—rather

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[1] *Amaral* sought to clarify the standard because the case law inconsistently suggested that a colorable claim is one that, if true, "'might' have changed the sentence or verdict." 239 Ariz. 217, ¶ 11. But it is unclear whether the standard announced in *Amaral* is limited to claims of newly discovered material facts under Rule 32.1(e). *See State v. Martinez*, 243 Ariz. 110, 111 (2017) (describing *Amaral* standard in context of Rule 32.1(e)); *see also State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (colorable claim of ineffective assistance of counsel is "one that, if the allegations are true, might have changed the outcome"). However, the difference is of no consequence here, where the trial court found there would be no change in the outcome.

than having presented allegations that would probably have changed the verdict—had presented allegations with no chance of changing the verdict. Though the language is different, the standard is not higher.

**¶9** Moreover, the trial court squarely addressed Butler's claims of ineffective assistance of counsel, finding they failed because she had not established prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21. Butler does not challenge the court's prejudice analysis.[2] *See* Ariz. R. Crim. P. 32.16(c)(4) ("A party's failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue."). The court therefore did not abuse its discretion in summarily dismissing Butler's petition for post-conviction relief. *See Roseberry*, 237 Ariz. 507, ¶ 7.

**¶10** Accordingly, we grant review but deny relief.

[2] Butler suggests trial counsel was ineffective in failing to offer "testimony as to when the injuries displayed in the booking photograph were inflicted." However, she made no such argument below. We therefore do not consider it for the first time on review. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (petition must contain issues trial court decided that defendant is presenting for review); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not consider on review claims not raised below).