IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

MICHAEL DEVAUGHN JOHNSON,
*Petitioner*.

No. 2 CA-CR 2022-0099-PR
Filed November 9, 2022

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Petition for Review from the Superior Court in Pinal County
No. S1100CR201800448
The Honorable Patrick K. Gard, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
*Counsel for Respondent*

Michael D. Johnson, Florence
*In Propria Persona*

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**MEMORANDUM DECISION**

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

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E P P I C H, Presiding Judge:

**¶1** Michael Johnson seeks review of the trial court's rulings dismissing two petitions for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Johnson has not met his burden of establishing such abuse here.

**¶2** After a jury trial, Johnson was convicted of promoting prison contraband—specifically, a cell phone. During the state's case-in-chief, Johnson represented himself with the help of advisory counsel; however, after the state rested, Johnson asked advisory counsel to take over for the remainder of the trial. The trial court sentenced Johnson to five years in prison, to be served at the completion of his existing term. This court affirmed Johnson's conviction and sentence on appeal. *State v. Johnson*, No. 2 CA-CR 2020-0003 (Ariz. App. Apr. 22, 2021) (mem. decision).

**¶3** In October 2021, Johnson simultaneously filed a notice of and petition for post-conviction relief. He argued that appellate counsel had been ineffective in failing to challenge the final jury instruction on self-representation and that advisory counsel at trial had been ineffective in failing to object to the admission of a jail call recording. Johnson later filed an addendum to the petition, arguing that advisory counsel had been ineffective in failing to request a jury instruction on a mere presence defense and that appellate counsel had been ineffective in failing to confirm there was a "'true verdict' by all 8 jurors." Before the state responded, Johnson filed another notice of and petition for post-conviction relief. He repeated his claim that appellate counsel had been ineffective in failing to challenge the "erroneous final jury instructions that [he] represented himself" and that "prejudice is presumed."

**¶4** In May 2022, the trial court issued its ruling addressing all of Johnson's claims. The court determined that "it was absolutely necessary" to instruct the jury on self-representation because Johnson had "represented himself for a majority of the trial." It therefore concluded

Johnson had failed to establish a colorable claim as to "appellate counsel being ineffective for failing to raise the issue." The court next determined that Johnson had failed to make a colorable claim as to advisory counsel's failure to object to the jail call recording because the "alleged objectionable material" was removed from the exhibit. The court similarly concluded that Johnson had failed to make a colorable claim of advisory counsel's ineffectiveness as to a mere presence instruction because, even if the instruction were warranted, the state had presented "overwhelming evidence" of Johnson's guilt and Johnson consequently failed to establish prejudice. Finally, the court found Johnson had not made a colorable claim as to his "true verdict" argument because the transcript "indicates the presence of the jury and no absences" during the reading of the verdict.

**¶5** In June 2022, Johnson filed a motion for rehearing, as well as another notice of and petition for post-conviction relief. In his petition, Johnson raised a claim of newly discovered material facts. Specifically, he asserted that he had recently learned from another inmate that the corrections officer, who found the cell phone that was the basis of his contraband conviction, had been communicating with Johnson's wife, and the wife had sent the corrections officer "nude photos of herself."

**¶6** Later that month, the trial court denied the motion for rehearing. It also dismissed Johnson's successive petition, concluding that the "alleged newly discovered evidence would merely be used to impeach a state's witness at best and is unlikely to have changed the judgment or sentence." This petition for review followed both of those rulings.

**¶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)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* "There is 'a strong presumption' that counsel 'provided effective assistance.'" *State v. Smith,* 244 Ariz. 482, ¶ 9 (App. 2018) (quoting *State v. Febles*, 210 Ariz. 589, ¶ 20 (App. 2005)).

**¶8** On review, Johnson first contends the trial court erred in rejecting his claim of newly discovered material facts because its finding that "the new evidence was merely used to impeach" is "unsupported." He maintains that evidence his wife had been communicating with the corrections officer and had sent him nude photos of herself would not have

been "used to impeach the officer" but instead to establish that the officer was "the person with the phone."

**¶9** To establish a colorable claim of newly discovered material facts under Rule 32.1(e), five requirements must be met:

> (1) the motion must show that the evidence relied on is, in fact, newly discovered; (2) the motion must allege facts from which the court can infer due diligence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issue involved; and (5) it must be evidence which, if introduced, would probably change the verdict if a new trial were ordered.

*State v. Acuna Valenzuela*, 245 Ariz. 197, ¶ 58 (2018) (quoting *State v. Serna*, 167 Ariz. 373, 374 (1991)). If the newly discovered facts are "used solely for impeachment," they must "substantially undermine[] testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence." Ariz. R. Crim. P. 32.1(e)(3). "[R]equests for a new trial based on newly discovered evidence are disfavored and should be granted cautiously." *State v. Saenz*, 197 Ariz. 487, ¶ 13 (App. 2000).

**¶10** Impeachment evidence is "designed to discredit a witness, i.e., to reduce the effectiveness of his testimony by bringing forth evidence which explains why the jury should not put faith in him or his testimony." *Zimmerman v. Superior Court*, 98 Ariz. 85, 90 (1965). Johnson's proposed evidence that the corrections officer was communicating with and receiving photos from Johnson's wife fits within the definition of impeachment. Indeed, Johnson admits on review that the evidence "clearly undermines [the officer's] testimony."

**¶11** Even assuming the evidence was more than impeachment, however, Johnson needed to establish that the newly discovered facts would probably change the verdict if a new trial were ordered. *See Acuna Valenzuela*, 245 Ariz. 197, ¶ 58. At trial, Johnson claimed his cellmate had possessed the cell phone and Johnson's wife was communicating with the cellmate. Johnson's newly discovered evidence is a variation of this theory, which the jury rejected. In addition, the evidence presented at trial established that the cell phone had been found in a chip bag on top of a cabinet belonging to Johnson. More importantly, the phone had

photographs of both Johnson and his wife on it. We therefore agree with the trial court that Johnson has failed to establish that the evidence would probably change the verdict.

**¶12** Johnson next argues the trial court erred in determining the jury instruction on self-representation was "necessary." He contends the instruction was improper because, as given, it "failed to explicitly recognize any representation by counsel." And he reasons that appellate counsel was ineffective for failing to raise the issue, given that "final jury instructions are most critical to a trial."[1]

**¶13** The trial court instructed the jury as follows:

> Every defendant has a right to represent himself. The Defendant will be representing himself with the assistance of an advisory lawyer. The Defendant's decision to represent himself means that he will be required to follow the same rules and procedures as any lawyer.
>
> You should not let the fact that the Defendant has chosen to represent himself affect your deliberations in any way.

This instruction is consistent with Revised Arizona Jury Instructions (RAJI) Standard Criminal 6 (defendant's right to represent himself) (5th ed. 2019). Because Johnson represented himself at trial—including during voir dire, opening statements, and the state's case-in-chief—the court properly gave the instruction. Johnson is correct that the instruction did not explain he only represented himself during part of the trial. But at the time Johnson asked advisory counsel to take over, the court informed the jury that the "circumstances have changed," Johnson is "no longer representing himself," and advisory counsel "is now officially defense counsel." The jury was adequately advised of the change. *See State v. Cox*, 217 Ariz. 353, ¶ 15 (2007) (we review instructions as a whole); *State v. McLoughlin*, 133 Ariz. 458, 461 n.2 (1982) (jurors may rely on common sense).

[1]Johnson suggests that a structural-error analysis applies because he was denied the right to counsel. The record belies that assertion. As discussed, Johnson had advisory counsel at the start of trial, and that attorney took over for Johnson when he requested.

**¶14** Because we agree with the trial court that the instruction on self-representation was necessary, we also agree with the court that Johnson has failed to state a colorable claim of ineffective assistance of appellate counsel. Counsel's performance does not fall below objectively reasonable standards by failing to raise a meritless issue. *See State v. Herrera*, 183 Ariz. 642, 647 (App. 1995) (appellate counsel reviews record, determines issues to present, and should focus on those most likely to prevail). In addition, Johnson has not established any prejudice from counsel's purported error, and we fail to see how, but for counsel's failure to challenge the instruction, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

**¶15** Lastly, Johnson challenges the trial court's finding that the jury gave their "true verdict." He maintains that "all jurors must respond in unison that the verdict was the jury's 'true verdict.'" But he points to no authority supporting that proposition, and we are aware of none. Instead, Rule 23.1(a), Ariz. R. Crim. P., provides that "[t]he jury's verdict must be in writing, signed by the foreperson, and returned to the judge in open court." After a verdict is returned, the trial court "must poll the jury at the request of any party or on the court's own initiative." Ariz. R. Crim. P. 23.3(a).

**¶16** Here, a signed verdict form was returned in open court. After the clerk read the verdict, the trial court asked the jury, "[I]s this your verdict," to which the jury collectively responded, "Yes." The court asked counsel if either wished to have the jury polled, and both responded no. Johnson was not present for the reading of the verdict. The court complied with the necessary procedures. Johnson therefore has failed to establish that appellate counsel's performance fell below objectively reasonable standards by failing to raise this issue. *See Bennett*, 213 Ariz. 562, ¶ 21.

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