NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0336-PR
	)	DEPARTMENT A
Respondent,	)	
	)	MEMORANDUM DECISION
v.	)	Not for Publication
	)	Rule 111, Rules of
BRIAN BENJAMIN BARRAZA,	)	the Supreme Court
	)	
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR 2005-004

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By Raymond Geiser — Globe
Attorneys for Respondent

Law Office of Emily Danies
By Emily L. Danies — Tucson
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 This is the second post-conviction proceeding instituted by petitioner Brian Barraza pursuant to Rule 32, Ariz. R. Crim. P., since he was convicted in 2006 of two

felonies—disorderly conduct with a weapon and prohibited possession of a weapon—and a misdemeanor charge of threatening and intimidating.[1] In his first proceeding, Barraza unsuccessfully asserted claims of ineffective assistance of trial counsel and newly discovered evidence. On review, we upheld the trial court's denial of relief. *State v. Barraza*, No. 2 CA-CR 2008-0281-PR (memorandum decision filed Feb. 26, 2009).

¶2 In June 2009, Barraza filed the petition from which this petition for review arises. Barraza contended below that he had not known at his March 2006 sentencing that he had Hepatitis C, that he did not learn of his condition until approximately May 2007 after being tested in prison, and that his diagnosis constitutes newly discovered, mitigating evidence that entitles him to be resentenced. *Cf. State v. Ellevan*, 179 Ariz. 382, 383, 880 P.2d 139, 140 (App. 1994) (HIV-positive status material to sentencing "because it can transform into a life sentence a term of years that would otherwise end well within the recipient's probable life span").

¶3 In its response to Barraza's petition, the state conceded Barraza's Hepatitis C diagnosis met the legal definition of newly discovered evidence but urged the court to deny the claim as untimely because Barraza had known he had the virus well before he filed his first petition for post-conviction relief in October 2007 yet had failed to raise the

[1]Barraza was tried in absentia by a jury, which found him guilty of the above charges and also found he had two historical prior felony convictions, had been on probation for one of those convictions when he committed the present offenses, and had threatened to inflict serious physical injury in the course of these offenses. The trial court sentenced him to prison for an aggravated twelve-year term for the misconduct involving weapons charge and to lesser, concurrent terms for the other two convictions. We affirmed the convictions and sentences on appeal. *State v. Barraza*, No. 2 CA-CR 2006-0142 (memorandum decision filed Jan. 25, 2007).

claim in that petition. The state also argued any mitigating effect of Barraza's diagnosis did not outweigh the substantial aggravating factors found by the jury and therefore should have no effect on his sentences in any event.

¶4 In reply to the state's response, Barraza argued—albeit without providing any evidentiary support—that it was "extremely likely that [he had] had Hepatitis C when he was . . . sentenced," even though he was asymptomatic and unaware of his condition at the time. "Had he known of this diagnosis, and had the Court been apprised of his illness," Barraza argued, "the Court may not have given him the aggravated term of 12 years, but a lower term." He urged the court "in the interest of justice" not to dismiss his second petition because, "as he did not know []his diagnosis . . . could be an issue, [he had] thus never discussed his health [with his] attorney . . . prior to filing the first Rule 32."

¶5 The trial court dismissed Barraza's second petition after finding his medical condition did not constitute newly discovered evidence because he had been aware of his diagnosis before filing his previous petition for post-conviction relief. In its written ruling, the court stated:

> Defendant's supplemental pleading acknowledges that he was aware of his medical condition in 2007, before he filed his first petition for post-conviction relief but says he should be excused because he did not appreciate the legal significance of his condition vis-à-vis sentencing factors.
>
> Defendant Barraza's circumstance is similar to the Defendant in *State v. Dogan*, 150 Ariz. 595, 724 P.2d 1264 (Ariz. App., 1986). In that case, Defendant sought post-conviction relief because appellant's trial counsel did not argue at the *Dessureault* hearing that appellant's photograph

> was the only photograph in the lineup depicting a person in blue denim. The Court of Appeals found that the "discovery" by a different attorney was only a fact that was not argued and did not constitute[] newly-discovered material facts within the Rule.
>
> Even though Defendant's counsel may not have been aware of the condition at the time of the first petition for post-conviction relief, the Defendant was aware. As stated in *State v. Saenz*, 197 Ariz. 487, 4 P.3d 1030 (Ariz. App., 2000):
>
> > "Evidence known to the defendant is not newly discovered, even if it is not known to his counsel." *Commonwealth v. Osorno*, 30 Mass. App. Ct. 327, 568 N.E.2d 627, 631 (1991); *see also United States v. Luna*, 94 F.3d 1156 (8th Cir. 1996) (defendant failed to exercise due diligence because she knew about evidence and chose not to tell counsel about it before trial); *Stemple v. State*, 352 So. 2d 33, 37 (Ala. Crim. App. 1977) ("Evidence is not newly discovered where the accused knew of it but did not mention it to counsel."). As the New Mexico Supreme Court has observed, "It would work havoc on the system if we held that information possessed by the defendant during the trial is 'newly-discovered' when revealed by him after the trial." *State v. Mabry*, 96 N.M. 317, [323,] 630 P.2d 269, 275 (1981) .

We will not disturb the court's denial of relief unless it clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶6 Pursuant to Rule 32.2(a)(3), a defendant is precluded from relief based on any ground "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding." Rule 32.2(b), however, expressly exempts from the preclusive effect of Rule 32.2(a) claims, like Barraza's, seeking relief based on newly discovered evidence pursuant to Rule 32.1(e). Here, the trial court determined in effect that, assuming

Barraza's condition did constitute newly discovered evidence when he had first learned of his diagnosis, he had then failed to assert that claim in his previous collateral proceeding and it was no longer exempt from preclusion for purposes of Rule 32.2(a)(3) and (b). Inherent in the court's ruling is its implicit finding that Barraza failed to demonstrate a meritorious reason for having omitted the claim from his previous petition. *See* Ariz. R. Crim. P. 32.2(b).

¶7 In his petition for review, Barraza cites *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), as authority for the proposition that he should not be deemed to have waived the claim that his medical condition constituted newly discovered evidence material to sentencing because the constitutional magnitude of the claim required a knowing, voluntary, intelligent, and personal waiver. But what Barraza seeks to characterize as an inadvertent, unknowing waiver of his due process right to a fair trial was, rather, his personal failure to disclose or assert, and his resultant waiver of, a post-conviction claim of newly discovered evidence—a claim that might or might not have proven colorable or ultimately meritorious, even had he presented it in his first petition for post-conviction relief.

¶8 We are not persuaded that the right to assert a post-trial claim of newly discovered evidence is in any way comparable to those "relatively few rights"—such as the right to counsel, to a jury trial, to a twelve-person jury, or to testify in one's own defense—that have been recognized as of such constitutional significance that a lawyer cannot waive those rights on a client's behalf. *See Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954. Moreover, as this court has observed, "the mere assertion by a defendant

that his or her right to a fair trial has been violated is not a claim of sufficient constitutional magnitude for purposes of [avoiding the preclusive effect of] Rule 32.2." *Id.* Thus, we held in *Swoopes*, alleging a "violation of the general due process right of every defendant to a fair trial" will not alone "save [a] belated claim from preclusion." *Id.*

¶9 We agree with the trial court that Barraza's failure to "appreciate the legal significance of his [medical] condition vis-à-vis sentencing factors" when he filed his first petition did not merit an exemption from preclusion in this successive proceeding. We therefore find no abuse of the court's discretion in dismissing Barraza's second post-conviction petition. Although we grant his petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge