

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

JESUS XAVIER ALMAGUER,  
*Petitioner.*

No. 2 CA-CR 2015-0384-PR  
Filed February 25, 2016

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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NOT FOR PUBLICATION  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. 31.24.*

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Petition for Review from the Superior Court in Pima County  
No. CR20083840  
The Honorable D. Douglas Metcalf, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Law Office of Emily Danies, Tucson  
By Emily Danies  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

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M I L L E R, Judge:

¶1 Jesus Almaguer 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. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Almaguer has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Almaguer was convicted of manslaughter and sentenced to an aggravated, nineteen-year prison term. *State v. Almaguer*, 232 Ariz. 190, ¶ 1, 303 P.3d 84, 86 (App. 2013). This court affirmed his conviction and sentence on appeal. *Id.* Almaguer then sought post-conviction relief, arguing his trial counsel had been ineffective in failing to present certain mitigating evidence, namely that Almaguer had suffered “serious domestic violence” as a child, had attempted suicide at about age thirteen, and had health problems related to a childhood head injury, as well as mental health issues. Almaguer also suggested those facts constituted newly discovered evidence relevant to his sentence.

¶3 The trial court summarily dismissed the petition. As to Almaguer’s claim of newly discovered evidence, the court observed the evidence could not be newly discovered because Almaguer was necessarily aware of it at the time of trial. It further noted that much of the evidence Almaguer identified had, in fact, been presented before sentencing. And, the court concluded, even assuming counsel had been ineffective in failing to present evidence of Almaguer’s childhood abuse and suicide attempt, it would not have changed his sentence. This petition for review followed.

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¶4 On review, Almaguer argues the trial court erred in rejecting his claim of ineffective assistance of counsel. To establish he was entitled to relief, Almaguer was required to show counsel's performance fell below prevailing professional standards and that the deficiency was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, he was required to demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶5 But Almaguer does not meaningfully address the trial court's conclusion that the additional mitigating evidence would not have changed the result. The court reasoned that such evidence would be afforded little weight in light of the multiple aggravating factors as well as the ten-year gap between Almaguer's childhood abuse and suicide attempt and the offense of conviction. And, as the court correctly pointed out, "evidence of a troubled childhood is entitled to greater weight when the offender is a minor than when he is an adult." *State v. Gerlaugh*, 144 Ariz. 449, 460, 698 P.2d 694, 705 (1985). Nor has Almaguer identified any evidence that he or anyone else told counsel about these mitigating facts, or that counsel fell below prevailing professional norms by failing to discover them. In sum, Almaguer has identified no abuse of the trial court's discretion, and thus no basis upon which this court could grant relief.<sup>1</sup>

¶6 We grant review but deny relief.

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<sup>1</sup>To the extent Almaguer asserts in his petition for review that counsel was ineffective for failing to present available mitigation evidence "more clearly, specifically and forcefully," we do not address claims raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").