

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ANTHONY RICO,  
*Petitioner.*

No. 2 CA-CR 2016-0050-PR  
Filed June 17, 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NOT FOR PUBLICATION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. CR20103436001  
The Honorable Casey F. McGinley, Judge Pro Tempore

**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*

STATE v. RICO  
Decision of the Court

Law Offices of Henry Jacobs, PLLC, Tucson  
By Henry Jacobs  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Presiding Judge:

¶1 Anthony Rico petitions for review of the trial court’s denial, after an evidentiary hearing, of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review, but we deny relief.

¶2 After a jury trial, Rico was convicted of first-degree burglary, conspiracy to commit first-degree murder, and first-degree murder. The trial court sentenced him to concurrent prison terms, the longest of which is life imprisonment without the possibility of release for twenty-five years. This court affirmed his convictions and sentences on appeal. *State v. Rico*, No. 2 CA-CR 2013-0002 (memorandum decision filed June 20, 2014).

¶3 Rico sent a letter to the trial court, which the court construed as a notice of post-conviction relief. The court appointed counsel, who filed a petition alleging Rico’s trial counsel had been ineffective in failing (1) to investigate whether a head injury Rico suffered in 2002 would have been relevant to his defense at trial or in mitigation at sentencing, (2) to retain an expert to “render opinions about the blood spatter or bullet trajector[y]” evidence, and (3) “to present an actual innocence defense” based on Rico’s mother’s outcry at sentencing that her daughter had “‘confessed to [her] that [Rico] is innocent.’”

¶4 After an evidentiary hearing, the trial court denied relief in a detailed, under-advisement ruling addressing each of

STATE v. RICO  
Decision of the Court

Rico's claims and finding he failed to establish the deficient performance and prejudice required to prevail on a claim of ineffective assistance of counsel. *See State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998) (to establish claim of ineffective assistance of counsel, petitioner must show counsel's performance fell below prevailing professional norms and caused prejudice to defense). This petition for review followed.

¶5 On review, Rico asserts the trial court abused its discretion in denying relief and "incorrectly held that the record could not be expanded in the evidentiary hearing phase to prove [Rico] had a head injury." He contends he "presented sufficient evidence for the court to determine that counsel should have requested a mental evaluation of [him]" and "to justify the court ordering a mental examination . . . for the purpose of establishing the extent to which [his] head injury affected his ability to assist in his defense" and to understand the proceedings before and during trial. He also argues the court abused its discretion in finding counsel had made reasoned, tactical decisions to refrain from presenting testimony from Rico's mother and an expert on the blood-spatter evidence.

¶6 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶7 To the extent Rico maintains on review that counsel had acted unreasonably in deciding not to call Rico's mother or a blood-spatter expert as witnesses, the trial court's findings to the contrary are fully supported by testimony at the evidentiary hearing. The trial court is the sole arbiter of witness credibility in post-conviction proceedings, *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988), and it is the province of that court, not this one, to resolve any factual disputes underlying an ineffective assistance of counsel claim, *State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995). We will not reweigh the evidence presented, as Rico seems to suggest on review. *Cf. State v. Lee*, 189 Ariz. 590, 603, 944

STATE v. RICO  
Decision of the Court

P.2d 1204, 1217 (1997) (appellate court does not reweigh trial evidence).

¶8 In addressing Rico's claim that trial counsel should have presented evidence of his head injury to the jury to rebut evidence of premeditation, the trial court noted that Rico had presented "no medical records, evaluations, or other documentation as to the nature and extent of his injury" or whether it "in any way affected his impulse control," as alleged in his petition. At the evidentiary hearing, Rico's counsel had made "offer[s] of proof" that he could obtain medical records from the original injury and that "a competent psychiatrist or neuropsychologist . . . would find [present] evidence of head-injury-induced cognition problems." But the court rejected Rule 32 counsel's suggestion that the court might be "inclined" to order such an evaluation or otherwise expand the record. As Rule 32 counsel acknowledged at the evidentiary hearing, such evidence "may not [have] matter[ed]," in light of trial counsel's testimony that other evidence of premeditation was so strong that he would not have argued the crime occurred because Rico lacked impulse control. But, in any event, the court's determination that evidence in support of Rico's claim should have been developed before the evidentiary hearing was not an abuse of discretion. *See* Ariz. R. Crim. P. 32.8(a), (c) (Rule 32 evidentiary hearing held to resolve "issues of material fact" relevant to post-conviction claims, which defendant must prove by preponderance of evidence).

¶9 Finally, although Rico now argues trial counsel had been ineffective in failing to request an evaluation to determine his competence to stand trial, this claim was neither presented in his petition nor argued by Rule 32 counsel at the evidentiary hearing. Accordingly, it was not addressed in the trial court's order, and we will not address it on review. *See* 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"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review).

STATE v. RICO  
Decision of the Court

¶10 In its under-advisement ruling, the trial court clearly identified and thoroughly addressed each of Rico's claims and resolved them in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Ample evidence supported the court's findings, and no purpose would be served by repeating the court's analysis here. *See id.* Based on the record before us, the applicable law, and the court's assessment of the testimony presented at the evidentiary hearing, the court did not abuse its discretion in denying relief on Rico's claims. Accordingly, although we grant review, we deny relief.