

**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,	)	
	)	
Respondent,	)	2 CA-CR 2007-0262-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
MASUM JAMES VIJAN,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200300226

Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

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Masum James Vijan

Buckeye  
In Propria Persona

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B R A M M E R, Judge.

¶1 Pursuant to a plea agreement that followed a psychiatric evaluation of his competency to stand trial, petitioner Masum James Vijan pled guilty to one count of armed robbery, committed in February 2003. The trial court sentenced him in June 2005 to an aggravated, eight-year prison term and ordered this sentence served consecutively to a nine-

year term Vijan was already serving in a different case, number CR200200612, for aggravated assault and criminal damage.<sup>1</sup> Vijan filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.,<sup>2</sup> and court-appointed counsel filed a petition alleging trial counsel had been ineffective at sentencing by failing to place before the court important mitigating evidence about Vijan’s mental health.

¶2 Finding Vijan’s petition stated a colorable claim of ineffective assistance of counsel, the trial court scheduled an evidentiary hearing pursuant to Rule 32.8. At the hearing, counsel presented oral argument but called no witnesses and offered only one exhibit. The court took the matter under advisement before ruling that Vijan had failed to establish ineffective assistance of counsel at sentencing. This petition for review followed. We will not disturb the trial court’s denial of post-conviction relief “unless an abuse of discretion affirmatively appears.” *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

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<sup>1</sup>According to Vijan’s counsel at the evidentiary hearing on his petition for post-conviction relief, Vijan was convicted after a jury trial in CR200200612 of “dangerous aggravated assault” and criminal damage, for which he received consecutive, presumptive prison sentences totaling nine years. At the sentencing hearing in this case, Vijan also pled guilty in a third case, CR200200946, to theft of a means of transportation. He was sentenced contemporaneously to a presumptive, 3.5-year prison term for that offense, to be served concurrently with his longer sentences in CR200200612.

<sup>2</sup>Simultaneously with his notice, Vijan filed a form petition for post-conviction relief, which referred to an attached memorandum that the record before us does not contain. Because appointed counsel subsequently filed the substantive post-conviction petition on which the trial court ruled, we view Vijan’s pro se petition as simply an extension of his Rule 32 notice.

¶3 To be entitled to relief on a claim of ineffective assistance of counsel, Vijan was required to show both that counsel’s performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004). The trial court found Vijan had presented a colorable claim that trial counsel had fallen below prevailing professional norms by failing to offer mitigating evidence of Vijan’s mental health and drug abuse issues but implicitly found that Vijan had failed to demonstrate resulting prejudice.

¶4 Based on Vijan’s presentation at the evidentiary hearing, the court ruled, in part:

Defendant has not produced any significant evidence that Defendant’s reported mental health issues had any causal effect of consequence on his participation in the crime at issue.

....

Mental illness which impairs a Defendant’s capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a statutory mitigating factor. [*See*] A.R.S. § 13-701(D). Evidence of causation is required before mental impairment related to mental illness can be considered a significant mitigating factor.

....

Defendant has not met his burden of proof to show that Defense Counsel’s failure to present evidence of Defendant’s mental health issues at sentencing violated Defendant’s Sixth Amendment right to effective assistance of counsel. There is no significant evidence that those mental health issues impaired

Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time he committed this crime. The failure to present that evidence, therefore, does not establish that defense counsel provided ineffective assistance of counsel under the standard set forth in *Strickland v. Washington* . . . .

(Citations omitted.) Thus, in effect, the court ruled that Vijan's claim failed because he could not show prejudice—that is, that the court would have imposed a lesser sentence had trial counsel presented the omitted evidence about Vijan's mental health. *See generally State v. Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d 63, 69 (2006) (defendant establishes prejudice by showing reasonable probability result of proceeding would have been different had counsel performed adequately).

¶5 In his pro se petition for review, Vijan repeats the allegation of his post-conviction petition below that trial counsel should have presented mitigation evidence and urged the court to treat Vijan's mental health issues and "com[m]ingled" substance abuse issues as mitigating factors at sentencing. In addition, Vijan identifies "*Blakely* issues with respect to priors" and asserts in general terms that the imposition of an aggravated sentence was inappropriate. In considering a petition for review, however, this court does not address any issues that have not first been presented to and ruled upon by the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). Consequently, we address only the ineffective assistance claim presented in Vijan's petition for post-conviction relief below.

¶6 In a "supplemental petition for review" filed one month after his initial petition for review, Vijan essentially revisits the factual recitation and legal arguments counsel

presented below. Ignoring the results of his formal competency evaluation, Vijan asserts that he was “legally incompetent” to plead guilty. But his primary focus is on trial counsel’s failure to develop and present the evidence necessary to persuade the sentencing court that Vijan’s mental health and substance abuse issues warranted a mitigated or presumptive sentence.

¶7 The majority of Vijan’s argument concerns the first element of the *Strickland* test—counsel’s allegedly deficient performance—rather than the second, prejudice, which was the basis for the trial court’s ruling. The closest Vijan comes in his supplemental petition for review to addressing the issue of prejudice—that is, the trial court’s finding that the mental health evidence counsel failed to present would not have persuaded the court to impose a mitigated sentence in any event—are the following statements: (1) “[T]he undiscovered ‘mitigating evidence,’ taken as a whole, ‘might well have influenced the Court’s . . . appraisal of [Vijan’s] culpability[.]’”; (2) “The above referenced evidence suggesting mental illness raises at least a colorable claim that there is a possible causal connection between that illness and Defendant[’]s conduct in this case.”; (3) “Clearly, Vijan was under considera[b]l[e] emotional distress at the time of the commission of the offense, com[m]ingled with Substance Abuse history (a noted . . . drug dependency.)”; and (4) “Clearly, . . . Vijan could not make rational decisions at the time of the commission of the offense, ostensibly he was . . . legally incompetent and sought treatment for psychological and emotional problems in 1998 and 1999.”

¶8 The difficulty is that these statements add nothing new to the facts and arguments counsel presented to the trial court in arguing Vijan’s petition for post-conviction relief below. The trial court considered those arguments and the evidence available to it before concluding Vijan had failed to demonstrate his mental health issues had any causal effect on his commission of this offense, by impairing Vijan’s “capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” The trial court consequently found Vijan’s mental illness and substance abuse issues would not have constituted a significant mitigating factor, even had counsel placed the additional evidence before the court.

¶9 Vijan’s arguments on review merely rehash the factual information and legal arguments that were already before the trial court when it denied his petition for post-conviction relief. Vijan has presented no arguments on review to demonstrate the trial court abused its discretion in reaching a different conclusion than the one Vijan advocates. *See Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69; *Watton*, 164 Ariz. at 325, 793 P.2d at 82.

¶10 Finding no abuse of the trial court’s discretion in denying post-conviction relief, we grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge