

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

PETER ANTHONY CANO,  
*Petitioner.*

No. 2 CA-CR 2016-0296-PR  
Filed December 21, 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NOT FOR PUBLICATION  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. CR033042  
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*

Peter Anthony Cano, Florence  
*In Propria Persona*

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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 Peter Cano seeks review of the trial court's orders denying his successive and untimely requests for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Cano has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Cano was convicted of second-degree murder, four counts of aggravated assault, theft, and aggravated driving under the influence of an intoxicant. The trial court sentenced him to five concurrent terms of life imprisonment without the possibility of release for twenty-five years for the murder and assault convictions and a concurrent 2.5-year prison term for aggravated driving under the influence, to be followed by a ten-year prison term for theft. This court affirmed his convictions and sentences on appeal. *State v. Cano*, No. 2 CA-CR 91-0657 (Ariz. App. Mar. 2, 1993) (mem. decision). We denied review of a subsequent denial of post-conviction relief. *State v. Cano*, No. 2 CA-CR 97-0203-PR (Ariz. App. May 5, 1998) (mem. decision). Before this proceeding, Cano sought post-conviction relief on two other occasions. He sought review of the trial court's denial of relief in the latter of those proceedings, and this court denied relief on review. *State v. Cano*, No. 2 CA-CR 01-342-PR (Ariz. App. Dec. 18, 2001) (mem. decision).

¶3 In June 2014, Cano filed a petition for writ of habeas corpus in Pinal County, which was transferred to Pima County pursuant to Rule 32.3. In that petition, Cano raised a variety of claims, including that: (1) the trial court's sentencing order was

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ambiguous because the ten-year prison term was imposed both concurrently and consecutively to one of his life terms; (2) the trial court improperly relied on an out-of-state conviction in sentencing him; (3) the court improperly sentenced him based on facts not found by a jury; and (4) the jury instructions for his aggravated assault charges were “duplicitous,” resulting in non-unanimous jury verdicts because aggravated assault is not a unitary offense, citing *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009), which he argued constituted a significant change in the law. The trial court summarily rejected the bulk of those claims, but amended the sentencing order nunc pro tunc to conform with its oral pronouncement at sentencing that the ten-year prison term should be served consecutively to all other terms. Additionally, the court ordered the state to respond to Cano’s claim based on *Freeney*. After the state’s response was filed, the court noted Cano had not filed a reply and summarily rejected the claim.

¶4 Cano’s reply, which apparently had been mailed the day it was due, was not filed until after the trial court’s ruling. See *State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999) (filing by prisoner timely if given to department of corrections for mailing by date due). Cano sought rehearing, arguing inter alia that the court was required to consider his reply. He additionally filed a “motion for writ of coram nobis,” arguing the state had not met its burden of proving his out-of-state conviction was a dangerous felony under Arizona law. The court denied the motion for rehearing, deemed Cano’s motion for writ of coram nobis as a new Rule 32 proceeding, and summarily denied it. This petition for review followed.

¶5 On review, Cano repeats his sentencing claims and his claims that his convictions of aggravated assault were based on defective jury verdicts. But, as the trial court recognized, Cano’s sentencing claims cannot be raised in this untimely proceeding. See Ariz. R. Crim. P. 32.1(a), 32.4(a). Cano did not identify in his petition below any listed exception to the timeliness requirement of

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Rule 32.4(a) that applied to his sentencing claims.<sup>1</sup> He does, however, repeat his argument that he was entitled to raise his claims in this untimely proceeding because his sentences are a “miscarriage of justice.” The principle Cano describes, however is not implicated under Arizona law; it instead applies to requests for federal habeas relief. *See generally Herrera v. Collins*, 506 U.S. 390 (1993). But, even were the principle theoretically applicable, Cano would have to establish his actual innocence for it to apply. *See id.* at 404. He has not attempted to do so.

¶6 Additionally, Cano argues that his sentencing claims are of sufficient constitutional magnitude to be exempt from preclusion because he did not knowingly waive them, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). But as this court has explained, the waiver principles discussed in *Stewart* do not apply to untimely proceedings like this one. *See State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8, 323 P.3d 1164, 1166 (App. 2014). In any event, Cano did not raise this argument in his petition below, but raised it for the first time in his motion for rehearing. We do not address claims raised for the first time in a motion for rehearing. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). He also repeats his argument, also made for the first time in his motion for rehearing, that various cases constitute significant changes in the law applicable to his sentencing claims. We decline to address this argument. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928 (appellate court will not consider on review claims not raised below).

¶7 And we find no error in the trial court’s rejection of Cano’s claim based on *Freeney*. His claim the jury verdicts were not unanimous cannot be raised in an untimely proceeding. *See Ariz. R. Crim. P. 32.4(a)*. He repeats his argument, however, that *Freeney*, decided in 2009, constitutes a significant change in the law pursuant

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<sup>1</sup>Cano also argues the trial court erred in summarily rejecting the sentencing claim raised in his motion seeking a writ of coram nobis. We find no error in the court’s summary rejection of that claim, which cannot be raised in an untimely proceeding. *Ariz. R. Crim. P. 32.1(a), 32.4(a)*.

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to Rule 32.1(g). A claim under Rule 32.1(g) can be raised in an untimely proceeding like this one. Ariz. R. Crim. P. 32.4(a). But, even were the claim otherwise meritorious, Cano has not complied with Rule 32.2(b) by “indicating why the claim was not stated . . . in a timely manner.” Thus, the court was required to summarily reject it. *See id.*

¶8 Cano also asserts the trial court’s order clarifying his sentence was improper because he “had already served the . . . 10 year prison term,” apparently because the sentencing minute entry stated it was concurrent to one of his life sentences. But Cano ignores that the court clarified the sentencing order to be consistent with the oral pronouncement of sentence. When there is a discrepancy in sentencing, the court’s oral pronouncement generally controls. *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983). The court’s order thus did not alter Cano’s sentence – his ten-year sentence was always to be served consecutively, irrespective of any ambiguity in the sentencing minute entry.

¶9 Cano additionally argues his “procedural rights” were violated because the trial court did not consider his reply to the state’s response. But, even assuming the court did not consider Cano’s reply in denying his motion for rehearing, any error was harmless because, as we have explained, none of Cano’s claims warrant relief.

¶10 Although we grant review, we deny relief.