

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

FRANCISCO ALBERTO BERRONES,  
*Petitioner.*

No. 2 CA-CR 2016-0079-PR  
Filed May 31, 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NOT FOR PUBLICATION  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  
Nos. CR20063848 and CR20080745  
The Honorable Gus Aragon, 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*

Francisco Alberto Berrones, Florence  
*In Propria Persona*

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

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ESPINOSA, Judge:

¶1 Citing Rule 32.9(c), Ariz. R. Crim. P., Francisco Berrones seeks review of the trial court's orders granting in part and denying in part his petition for post-conviction relief filed pursuant to Rule 32, and denying his motion seeking earned release credits. We will not disturb those orders unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Berrones has not met his burden of demonstrating such abuse here.

¶2 In cause number CR-20063848, Berrones pled guilty to two counts of sale and/or transfer of a narcotic drug, three counts of possession of a narcotic drug for sale, and one count of possession of drug paraphernalia. He was sentenced to concurrent prison terms, the longest of which was 9.25 years.<sup>1</sup> In cause number CR-20080745, Berrones pled guilty to transportation of marijuana for sale. Pursuant to that plea, he was sentenced in 2009 to a four-year prison term, to be served consecutively to the sentences imposed in CR-20063848.

¶3 In June 2015, Berrones sent a letter to the trial court stating he was entitled to additional presentence incarceration credit in both cause numbers; sixty-eight days in CR-20063848 and fifty in CR-20080745. The court, treating that letter as a petition for post-

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<sup>1</sup> In CR-20063848, Berrones has previously sought post-conviction relief on at least one occasion. The trial court denied relief, and this court denied relief on review. *State v. Berrones*, No. 2 CA-CR 2013-0394-PR (memorandum decision filed July 15, 2014).

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conviction relief, ordered the state to respond. The state did so, asserting Berrones was not entitled to additional credit in CR-20080745, but conceded he should receive two days' additional credit in CR-20063848. The court granted partial relief, awarding Berrones three days' credit in CR-20063848 and twenty-three days' credit in CR-20080745.

¶4 Berrones filed a motion for rehearing, which the court denied. In a separate motion, he also asserted he was entitled to additional earned release credits pursuant to A.R.S. § 41-1604.07(A). The court denied that motion as well, stating that such credits "are a matter entrusted to the discretion of the department of corrections," and that the court "lacks jurisdiction to address [the] motion at this time." This petition for review followed.

¶5 On review, Berrones again asserts he is entitled to additional presentence incarceration credit. Such credits are determined at sentencing, *see* A.R.S. § 13-712, and a claim that a sentence is improper must be raised pursuant to Rule 32.1(c), and can only be raised in a timely post-conviction proceeding. Ariz. R. Crim. P. 32.4(a). Even assuming Berrones is correct that the court miscalculated his presentence incarceration credit, because this proceeding is untimely, he is not entitled to relief.<sup>2</sup>

¶6 Berrones also contends the trial court erred in denying his claim that he is entitled to additional earned release credits pursuant to § 41-1604.07. But that claim is not cognizable under Rule 32 unless the defendant asserts he is being held beyond the expiration of his sentence, which Berrones does not. *See State v.*

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<sup>2</sup>The trial court did not have discretion to grant Berrones relief under Rule 32. *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). But, the state did not seek review and, indeed, conceded Berrones's sentence in CR-20063848 should be altered. Thus, we will not alter Berrones's sentences to his detriment. *Cf. State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990) (correction of illegally lenient sentences declined in the absence of proper appeal or cross-appeal by the state).

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*Davis*, 148 Ariz. 62, 64, 712 P.2d 975, 977 (App. 1985); *see also* Ariz. R. Crim. P. 32.1(d). Thus, we do not address this issue.

¶7 Although we grant review, relief is denied.