

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Respondent*,

*v.*

MICHAEL ALLEN SUTTON, *Petitioner*.

No. 1 CA-CR 16-0541 PRPC  
FILED 9-14-2017

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Petition for Review from the Superior Court in Maricopa County  
No. CR1991-090420  
The Honorable Warren J. Granville, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix  
By Diane Meloche  
*Counsel for Respondent*

Michael Allen Sutton, Florence  
*Petitioner*

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**MEMORANDUM DECISION**

Chief Judge Samuel A. Thumma delivered the decision of the court in  
which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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**T H U M M A**, Chief Judge:

¶1 Petitioner Michael Allen Sutton seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).<sup>1</sup> Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Because Sutton has shown no such error, this court grants review but denies relief.

¶2 A jury found Sutton guilty of (1) sexual assault, a Class 2 dangerous felony; (2) kidnapping, a Class 2 dangerous felony; (3) aggravated assault, a Class 3 dangerous felony; (4) armed robbery, a Class 2 dangerous felony; (5) burglary in the first degree, a Class 2 dangerous felony, and (6) theft, a Class 6 felony, all committed in February 1991. The jury also found Sutton had one prior felony conviction. All offenses were designated as repetitive offenses, and after an evidentiary hearing, the first five offenses were found to have been committed while Sutton was on parole in California for a felony conviction.

¶3 In July 1991, Sutton was sentenced to life in prison for the first five offenses, and 2.25 years in prison on the theft count. Three of the life terms were concurrent, and two were consecutive to those and to each other. The 2.25-year prison term was concurrent with the last consecutive life term.

¶4 The convictions and sentences were affirmed on direct appeal in a May 27, 1993 memorandum decision. Since that time, Sutton has filed multiple petitions for post-conviction relief. In this, his most recent successive and untimely petition, Sutton claims he was denied due process in 1991 because he did not have an Arabic translator, he was not able to appropriately present a misidentification defense, he was illegally sentenced, and that he should be re-sentenced given a claimed substantial change in the law. The superior court summarily denied his petition.

¶5 Sutton timely filed his petition for review reiterating his claims presented to and rejected by the superior court, asserting the delay in raising these issues was not his fault. He also asserts a claim of actual innocence, ineffective assistance of counsel, and that the superior court erred by ruling his petition was successive and he was not entitled to

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<sup>1</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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counsel. Sutton also raises ineffective assistance of post-conviction relief counsel as well as cruel and unusual punishment.

¶6 This court declines to consider arguments not appropriately presented to the superior court, and such arguments may not be presented in a petition for review with this court. *See* Ariz. R. Crim. P. 32.9(c)(1); *State v. Wagstaff*, 161 Ariz. 66, 71 (App. 1988); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). In addition, Sutton is not automatically entitled to counsel, as this is not an “of-right” petition. *See* Ariz. R. Crim. P. 32.4(c)(2). Moreover, because this is not his first petition, he is not entitled to rely on the Rule 32.1(f) exception. As noted by the superior court, he also is precluded from raising an ineffective assistance of counsel claim because it is untimely and had been raised before. *See* Ariz. R. Crim. P. 32.2(a), 32.4(a).

¶7 Sutton’s claim that he was denied due process because he was not provided an Arabic interpreter is governed by Rule 32.1(a). As a result, the claim is precluded because it could have been raised on direct appeal or in a prior petition. *See* Ariz. R. Crim. P. 32.2(a). Moreover, the first mention in the record of a purported need for an Arabic interpreter was in Sutton’s 2008 petition for post-conviction relief, which was dismissed. At no point did he or his counsel request an interpreter during the trial or on appeal.

¶8 The detective who interviewed Sutton testified that the whole interview was conducted in English, and Sutton was “pretty articulate.” The pre-sentence report noted Sutton’s primary language was English. Sutton addressed the superior court at sentencing in English. All of Sutton’s post-conviction filings over the past many years are in English. This lengthy record contradicts his recent assertion that he was denied due process because the court did not, *sua sponte*, appoint an Arabic interpreter.

¶9 Sutton’s claim of “actual innocence” is an attempt to avoid preclusion, and fails. The issue relating to misidentification is an attempt to challenge the sufficiency of the evidence, which is precluded under Rule 32.2(a). His trial claims regarding an unduly suggestive identification/misidentification was rejected long ago and affirmed on appeal by this court as well as in a prior petition that was dismissed. To the extent he is claiming he did not appear for certain proceedings because of confusion, this is again a due process claim, and has been raised before, and is precluded.

¶10 Nor does Sutton’s claim that there has been a significant change in the law show a right to relief. As the superior court noted, and Sutton concedes, he alleges an illegal sentence under Rules 32.1 (a) and 32.1

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(c), which is precluded. Ariz. R. Crim. P. 32.2 (a); *see also State v. Shrum*, 220 Ariz. 115, 119-120 ¶¶ 18-23 (2009) (sentencing issue regarding sentence legality is precluded as untimely even where there was no lawful authority for sentence imposed).

¶11 The superior court also properly concluded the elimination of the “*Hannah* prior” language in Arizona Revised Statutes (“A.R.S.”) § 13-604 (H) does not support relief under Rule 32.1 (g). An offender is sentenced under the laws in effect at the time the offense is committed. *State v. Newton*, 200 Ariz. 1, 2 ¶ 3 (2001); A.R.S. § 1-246. While A.R.S. § 13-604(M) changed the practice of using *Hannah* priors, it did not apply retroactively. *See* A.R.S. § 1-244. Moreover, Sutton was not sentenced under A.R.S. §13-604(H), but under §13-604.02(A) on the first five counts (offenses committed on parole) and as a repetitive offender under A.R.S. §13-604(A) for theft, given his prior felony conviction in California.

¶12 It is true that A.R.S. §13-604.02(A) was amended in 1994, after the mandate issued in Sutton’s direct appeal. *See Galaz v. Stewart*, 207 Ariz. 452, 454 ¶ 9 (2004). Sutton cites nothing to show that the change in law was intended to be retroactive. *Blakely v. Washington*, 502 U.S. 296 (2004), cited by Sutton, simply “announced a new constitutionally based rule of criminal procedure that has no retroactive application.” *State v. Febles*, 210 Ariz. 589, 592 ¶ 7 (App. 2005). Likewise, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is not retroactive to cases that have become final. *State v. Sepulveda*, 201 Ariz. 158, 161 ¶ 8 (App. 2001). Finally, sentences generally are not altered or amended based on subsequent changes of statutory sentencing provisions. *State v. Stine*, 184 Ariz. 1, 3 (App. 1995) (quoting A.R.S. § 1-246).

¶13 For these reasons, this court grants review but denies relief.



AMY M. WOOD • Clerk of the Court  
FILED: AA