IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

JOHNNY RAY CALVIN,
*Petitioner*.

No. 2 CA-CR 2016-0075-PR
Filed August 11, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR200901726
The Honorable Joseph R. Georgini, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
By D. Matthew Conti, Assistant Attorney General, Phoenix
*Counsel for Respondent*

Johnny Ray Calvin, Tucson
*In Propria Persona*

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**MEMORANDUM DECISION**

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

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H O W A R D, Presiding Judge:

**¶1** Johnny Calvin seeks review of the trial court's orders denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and his subsequent motion for reconsideration. 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). Calvin has not met his burden of demonstrating such abuse here.

**¶2** Calvin pled guilty to conspiracy to commit transportation and possession of marijuana for sale, illegally conducting an enterprise, transportation of marijuana for sale, possession of marijuana for sale, and use of a wire communication in a drug transaction. The trial court sentenced him to concurrent prison terms for conspiracy, illegally conducting an enterprise, use of a wire communication, and transportation of marijuana for sale, the longest being a 7.5-year term for transportation of marijuana for sale. The court imposed a five-year prison term for possession of marijuana for sale, to run consecutively to the other terms imposed.

**¶3** Calvin sought post-conviction relief, and the trial court appointed attorney Harriett Levitt to represent him. Levitt moved to withdraw, stating she had represented Calvin "in pre-plea litigation." The court granted that motion and appointed attorney Michael Villarreal. In July 2014, Villarreal filed a notice stating he had reviewed the record but found no claims to raise in a post-conviction proceeding. The court then granted Calvin leave to file a pro se petition, which he did in January 2015.

**¶4** Rather than rule on that petition, however, the trial court noted "it ha[d] not appointed Second Counsel of Right" and again appointed Levitt to represent Calvin. In June 2015, Levitt filed a notice stating she had reviewed the record and could "find no colorable claims pursuant to Rule 32." The court once again granted Calvin leave to file a pro se petition and he did so, raising various claims, including issues related to the propriety of his plea, counsel's effectiveness, and the imposition of a consecutive sentence.

**¶5** While his petition was pending, Calvin requested that "conflict-free" counsel be appointed, asserting Levitt had a conflict because she had previously represented him and Villarreal also had a conflict because he had previously represented one of his codefendants. Without ruling on that request, the trial court summarily denied Calvin's petition. Calvin filed a motion for reconsideration requesting that the trial court rule on his motion seeking new counsel and arguing the court had erred in summarily rejecting his claims. The court denied that motion, and this petition for review followed.

**¶6** On review, Calvin first argues his trial counsel was ineffective because he "did not receive a proper *Donald* hearing and counsel failed to communicate two favorable plea offers." The purpose of a pretrial *Donald* hearing is to ensure the defendant is aware of a plea offer and consequences of conviction, and provide a record in the event of a later claim of ineffective assistance of counsel. *See State v. Donald*, 198 Ariz. 406, ¶¶ 14, 17, 10 P.3d 1193, 1200 (App. 2000). The trial court conducted a hearing pursuant to *Donald* in April 2011, after which Calvin rejected a plea offer from the state. Calvin has identified no deficiency in that hearing. Instead, he claims counsel failed to inform him of other plea offers. But he raised this issue for the first time in his motion for reconsideration. A trial court is not required to address claims raised for the first time in a motion for reconsideration. *See* Ariz. R. Crim. P. 32.9(a); *State v. Bonnell*, 171 Ariz. 435, n.3, 831 P.2d 434, 437

n.3 (App. 1992). Thus, we will not address this argument further on review.[1]

**¶7** Calvin next argues the state did not and cannot "establish the threshold amount" of marijuana necessary to support his guilty pleas to transportation and possession of marijuana for sale. But at his change of plea, he admitted to conspiring to transport and possess "no less than 1000 pounds of marijuana," transporting "approximately 170 pounds of marijuana for sale," and possessing "approximately 200 pounds of marijuana for sale." No further evidence was required. *State v. Rubiano*, 214 Ariz. 184, ¶ 14, 150 P.3d 271, 275 (App. 2007) (corpus delicti rule does not apply in context of guilty plea proceeding). And he has provided no documentation supporting this argument, and we therefore do not address it further. Nor do we address his additional claims that the factual bases for his guilty pleas were otherwise "totally false" because he raises those arguments for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980).

**¶8** Citing Rule 15.8, Ariz. R. Crim. P., Calvin also contends, as we understand his argument, that he accepted the plea without having been provided required discovery. Rule 15.8 generally obligates the state to disclose material evidence currently in its possession when it extends a plea and to continue to provide material disclosure while the plea offer is pending. Calvin has not identified any undisclosed material evidence that was in the state's

[1]Calvin suggests we review this claim despite his failure to raise it properly below because it is one of sufficient constitutional magnitude to require his knowing waiver, citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). But the supreme court in *Stewart* was concerned only with preclusion on waiver grounds pursuant to Rule 32.2(a)(3). *State v. Lopez*, 234 Ariz. 513, ¶ 8, 323 P.3d 1164, 1166 (App. 2014). Nothing in *Stewart* alters our general rule that a claim must first be properly presented to the trial court before it is subject to review in this court.

possession at the time he pled guilty and thus has not established any violation of Rule 15.8.

**¶9** He further suggests his rights were somehow violated because he was not provided a copy of his indictment. The record unambiguously states otherwise and, in any event, he was advised of the charges against him at his arraignment. A Rule 32 petitioner must do more than simply contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant's claim he was unaware sentence "must be served without possibility of early release" not colorable when "directly contradicted by the record").

**¶10** Calvin next repeats his claim that the sentence imposed for his conspiracy conviction must run concurrently to the sentences imposed for transportation and possession of marijuana for sale. Thus, he seems to reason, the sentences for transportation and possession must also run concurrently. Our supreme court addressed a similar claim in *State v. Roseberry*:

> To determine whether conspiracy and transportation constitute separate acts, for which consecutive sentences are permissible, or only one act, for which sentences must be concurrent, we first apply the "identical elements test." The test requires that we identify the ultimate crime, discard the evidence that fulfills the elements of that crime, and then determine whether the remaining facts satisfy the elements of the other crimes. If they do, then consecutive sentences are permissible unless, given the entire transaction, it was not possible to commit the ultimate crime without also committing the other offense.

210 Ariz. 360, ¶ 58, 111 P.3d 402, 412 (2005), *quoting State v. Gordon*, 161 Ariz. 308, 312, 778 P.2d 1204, 1208 (1989) (internal citations omitted).

**¶11** Conspiracy is the ultimate crime in this case. *See id.* ¶ 59. To support a conspiracy conviction, the factual basis for Calvin's plea had to show he, "with the intent to promote or aid the commission of an offense," agreed "with one or more persons that at least one of them or another person [would] engage in conduct constituting the offense and one of the parties [commits] an overt act in furtherance of the offense." A.R.S. § 13-1003(A). Calvin is correct that the factual basis for his guilty pleas does not identify any overt acts save those constituting his other convictions—his transportation of 170 pounds of marijuana on September 11, 2009; his possession of 200 pounds of marijuana on September 28, 2009; and his use of a cell phone on September 30, 2009, "to discuss [with one of his coconspirators] the steps [he] would take to keep law enforcement from learning about his involvement" with a stash house.

**¶12** Because one of these acts must serve as the overt act in support of his conspiracy conviction, the sentence for at least one of Calvin's other convictions must run concurrently to the sentence imposed for conspiracy. *See Roseberry*, 210 Ariz. 360, ¶ 58, 111 P.3d at 412. However, the factual bases for two of Calvin's convictions are unnecessary to support his conviction for conspiracy, including the basis for his conviction of possession of marijuana for sale. And it was clearly possible for Calvin to have committed conspiracy without also having committed that offense. Thus, his consecutive sentence for possession of marijuana for sale is proper.

**¶13** Calvin additionally argues the trial court erred in rejecting his repeated requests for a third attorney to review his case, again claiming that attorneys Levitt and Villarreal had conflicts. Although Levitt initially withdrew from representing Calvin because she had briefly represented him previously in this case, that previous representation did not create a conflict of interest or require her to withdraw. *See* Ariz. R. Sup. Ct. 42, ER 1.7. It means only, at most, that Calvin was entitled to have another attorney review her previous representation for potential claims of ineffective assistance, which is precisely what occurred.[2] *See Osterkamp v.*

[2]We further observe it was unnecessary for the trial court to have reappointed Levitt after Villarreal had reviewed the case. Any

*Browning*, 226 Ariz. 485, ¶ 10, 250 P.3d 551, 554 (App. 2011) ("[C]ounsel could not be expected to evaluate and assert his or her own ineffectiveness."). Similarly, Villarreal's previous representation of Calvin's codefendant[3] creates a conflict only if that codefendant's interests were contrary to Calvin's. *See* Ariz. R. Sup. Ct. 42, ER 1.9(a). Calvin has not identified any contrary interest and Villarreal has avowed that no conflict exists. Thus, the court did not err in rejecting Calvin's request for a third post-conviction attorney.

**¶14** Calvin further argues the trial court erred in treating his "motion to strike" as his reply to the state's response, thereby costing him the opportunity to file a reply. But the court did not treat Calvin's motion to strike as his reply; it merely noted it had considered it before summarily denying his petition. And Calvin has not identified any event that prevented him from timely filing a reply. *See generally* Ariz. R. Crim. P. 32.6(b). Rather, he opted to file his motion to strike and motion seeking new counsel. Calvin similarly suggests the court erred in treating as a motion for reconsideration his motion titled "Motion for Reconsideration (Request for Ruling on Outstanding Motion for Conflict Free Rule 32 Counsel under *State v. Bennett*, 213 Ariz. 562 (2006)." Not only was that motion titled as a motion for reconsideration, it included substantive argument. The court obviously did not err in treating it as designated.

**¶15** Last, Calvin asserts for the first time on review that the trial court "was without jurisdiction" because "the selection of grand jurors was done with racial discrimination." He contends we may review the claim for the first time because it concerns the court's jurisdiction. But Calvin cites no authority, and we are aware of none, suggesting a defect in grand jury proceedings is a defect in subject-matter jurisdiction—that is, a defect depriving the trial court

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concerns with Villarreal's representation could be raised in a subsequent, timely filed Rule 32 proceeding. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 10, 250 P.3d 551, 554 (App. 2011).

[3]It appears Villarreal represented a defendant named in the indictment charging Calvin.

of the authority to hear the case. *See State v. Fimbres*, 222 Ariz. 293, ¶ 29, 213 P.3d 1020, 1028 (App. 2009) ("Subject matter jurisdiction is the power of a court to hear and determine a controversy."), *quoting State v. Bryant*, 219 Ariz. 514, ¶ 14, 200 P.3d 1011, 1014 (App. 2008). Thus, because Calvin did not raise this argument in his petition below, we do not address it on review. *See Ramirez*, 126 Ariz. at 467-68, 616 P.2d at 927-28.

**¶16** We grant review but deny relief.