

APPENDIX A

No. 19-3582

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 07, 2019
DEBORAH S. HUNT, Clerk

VICTOR NUNEZ,

Petitioner-Appellant,

v.

SEAN BOWERMAN, Warden,

Respondent-Appellee.

ORDER

Victor Nunez, a pro se Ohio prisoner, appeals the district court's judgment denying his petitions for a writ of habeas corpus filed under 28 U.S.C. § 2254. Nunez moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a)(5).

In 2009, a jury in the Cuyahoga County Court of Common Pleas convicted Nunez of three counts of rape, two counts of kidnapping with sexual motivation specifications, one count of aggravated burglary, and one count of intimidation of a crime witness or victim. The trial court sentenced Nunez to an aggregate sentence of twenty-two years of imprisonment. On direct appeal, the Ohio Court of Appeals affirmed Nunez's convictions but remanded for resentencing, determining that he was improperly convicted and sentenced for allied offenses. *State v. Nunez*, No. 93971, 2010 WL 4684721 (Ohio Ct. App. Nov. 18, 2010).

On remand, the trial court conducted a new sentencing hearing and again sentenced Nunez to an aggregate term of twenty-two years of imprisonment. Nunez filed a motion for leave to file a delayed appeal of his resentencing. The Ohio Court of Appeals denied the motion and dismissed Nunez's appeal. Nunez subsequently moved the Ohio Supreme Court for leave to

file a delayed appeal from the decisions of the Ohio Court of Appeals (1) affirming his convictions and (2) denying his motion for leave to file a delayed appeal of his resentencing. The Ohio Supreme Court denied the motions and dismissed Nunez's appeals. *State v. Nunez*, 967 N.E.2d 763 (Ohio 2012) (table).

While his motions were pending in the Ohio Supreme Court, Nunez filed his first habeas petition. *Nunez v. Kelly*, No. 1:12-cv-903 (N.D. Ohio). Nunez later asserted that the trial court failed to appoint him counsel on direct appeal from his resentencing. The district court dismissed the claims raised in Nunez's original habeas petition but granted the writ on his denial-of-counsel claim. The district court remanded to the Ohio Court of Appeals with instructions to grant Nunez's motion for leave to file a delayed appeal from his resentencing and appoint him counsel. On remand, the Ohio Court of Appeals affirmed Nunez's resentencing. *State v. Nunez*, No. 102946, 2016 WL 860294 (Ohio Ct. App. Mar. 3, 2016), *perm. app. denied*, 51 N.E.3d 660 (Ohio 2016) (table).

Nunez then filed a motion for a new trial. The trial court denied Nunez's motion, and the Ohio Court of Appeals affirmed. *State v. Nunez*, No. 104917, 2017 WL 2814015 (Ohio Ct. App. June 29, 2017), *perm. app. denied*, 83 N.E.3d 940 (Ohio 2017) (table).

While his motion for a new trial was pending, Nunez filed a second habeas petition, raising four grounds related to his resentencing: (1) he was denied due process when the trial court imposed consecutive sentences without making mandatory findings, (2) he was denied due process because the trial court's journal entry increased the aggregate prison sentence by two years above that imposed at the resentencing hearing, (3) he was denied due process and placed in double jeopardy when the trial court imposed consecutive sentences for two rape counts because they were allied offenses of similar import, and (4) counsel provided ineffective assistance at resentencing for failing to assert that two of the rape counts and one of the kidnapping counts were allied offenses of similar import requiring their merger for sentencing purposes. *Nunez v. Bowerman*, No. 1:16-cv-1931 (N.D. Ohio) (*Nunez I*). Nunez subsequently filed a third habeas petition, raising the same claims that he raised in his motion for a new trial:

(1) the failure to grant his motion for a new trial, or at least hold an evidentiary hearing, violated his constitutional rights, (2) the indictment was fatally defective in violation of his constitutional rights, and (3) the trial court's deadlocked jury instruction violated his constitutional rights. *Nunez v. Bowerman*, No. 1:17-cv-2325 (N.D. Ohio) (*Nunez II*).

A magistrate judge recommended that the district court dismiss Nunez's habeas petitions. Nunez then filed a first supplemental traverse, which apparently crossed in the mail with the magistrate judge's report and recommendation. After receiving the magistrate judge's report and recommendation, Nunez filed a motion to recommit the case to the magistrate judge for consideration of his traverse or, in the alternative, for an enlargement of time to file objections to the magistrate judge's report and recommendation. The district court adopted the magistrate judge's report and recommendation, dismissed Nunez's habeas petitions, and declined to issue a certificate of appealability. The district court denied Nunez's motion to recommit the case to the magistrate judge as moot, having considered his traverse on the merits, and denied his motion for an enlargement of time to file objections to the magistrate judge's report and recommendation. Nunez filed a timely notice of appeal.

Nunez now moves this court for a certificate of appealability. *See* Fed. R. App. P. 22(b). In support of his motion, Nunez argues that the district court deprived him of the opportunity to file objections to the magistrate judge's report and recommendation and that the magistrate judge failed to acknowledge and consider his original and supplemental traverses. Nunez does not address his substantive habeas claims.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nunez has failed to satisfy this standard. Regardless of whether reasonable jurists could debate the district court's denial of his motion to recommit the case to the magistrate judge or, in the alternative, for an enlargement of time to file objections to the magistrate judge's report and recommendation, Nunez has failed to demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve

encouragement to proceed further,” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), or with respect to his claims denied on procedural grounds, “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Habeas Claims in Nunez I

As his first ground for relief, Nunez argued that he was denied due process when the trial court imposed consecutive sentences without making the findings required by Ohio Revised Code § 2929.14(C). The Ohio Court of Appeals overruled Nunez’s argument, stating that, at the time of his resentencing, “trial judges were not mandated to make statutory findings as a prerequisite to imposing consecutive sentences.” *Nunez*, 2016 WL 860294, at *2. The district court concluded that Nunez’s first ground for relief was not cognizable on federal habeas review because he challenged the state court’s interpretation of the state’s sentencing laws. *See Austin v. Jackson*, 213 F.3d 298, 300 (6th Cir. 2000). Reasonable jurists could not disagree with that conclusion.

Nunez next argued that the trial court’s journal entry increased the aggregate sentence by two years above that imposed at the resentencing hearing, violating his right to due process, his right to be present for sentencing, and his right to not be punished twice for the same offense. According to Nunez, the journal entry stated that his two-year sentence for Count 11, intimidation of a crime victim or witness, ran consecutively to all other counts, which was not what the trial court stated in open court. In rejecting Nunez’s argument, the Ohio Court of Appeals stated: “Although the trial court did not specifically state in pronouncing its sentence that the term on Count 11 was to run ‘consecutive’ to the term on Count 8, it clearly indicated that it was imposing a sentence consistent with the original sentencing, which ran those counts consecutive.” *Nunez*, 2016 WL 860294, at *3 (“Your total aggregate sentence again is 22 years, which is the identical sentence that I gave to you at your sentencing hearing.” (quoting trial

court)). The Ohio Court of Appeals found that there was no ambiguity in the record and that the journal entry was consistent with the trial court's resentencing decision.

On habeas review, the district court rejected Nunez's double-jeopardy argument, pointing out that his rape conviction in Count 8 and his intimidation conviction in Count 11 were two separate crimes. The district court otherwise determined that the Ohio appellate court's decision overruling Nunez's argument was not contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d). Jurists of reason could not debate that determination.

As his third ground for relief, Nunez asserted that the trial court erred in failing to merge two of the rape charges, Counts 8 and 9, and the kidnapping charge in Count 10 because they were allied offenses of similar import. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). "[F]or purposes of double jeopardy analysis, once a state court has determined that the state legislature intended cumulative punishments, a federal habeas court must defer to that determination." *Banner v. Davis*, 886 F.2d 777, 780 (6th Cir. 1989). The Ohio Court of Appeals determined that cumulative punishments were intended for the rape charges as they involved different types of sexual activity and that Nunez's kidnapping charge merged with one of his rape charges. Reasonable jurists therefore could not debate the district court's conclusion that Nunez's double-jeopardy claim failed.

In his fourth ground for relief, Nunez claimed that counsel was ineffective at resentencing for failing to assert that Counts 8, 9, and 10 were allied offenses of similar import requiring their merger for sentencing purposes. In addressing Nunez's ineffective-assistance claim, the Ohio Court of Appeals applied the two-pronged standard under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring him to show (1) deficient performance by counsel and (2) prejudice. The Ohio appellate court concluded that Nunez had failed to establish ineffective assistance of counsel given that the trial court merged the allied offenses—kidnapping and one of the rape

charges. Reasonable jurists could not debate the district court's determination that resentencing counsel was not required to present these meritless arguments and therefore was not ineffective. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

Habeas Claims in Nunez II

Nunez first asserted that the trial court's failure to grant his motion for a new trial, or at least hold an evidentiary hearing, violated his constitutional rights. In affirming the denial of his motion for a new trial, the Ohio Court of Appeals determined that Nunez had failed to file a motion for leave to file his delayed motion for a new trial, a necessary prerequisite under Ohio Rule of Criminal Procedure 33(B). The Ohio Court of Appeals went on to determine that, even if Nunez had filed a motion for leave, the trial court did not abuse its discretion in denying his motion for a new trial because (1) the supporting evidence was not newly discovered, (2) he was not unavoidably prevented from discovering the evidence, or (3) the evidence was not timely brought to the court's attention.

The district court concluded that this ground for relief was procedurally defaulted. "A habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default." *Tolliver v. Sheets*, 594 F.3d 900, 927 n.11 (6th Cir. 2010). Based on the state court record, Nunez failed to file a motion for leave to file a delayed motion for a new trial as required by Ohio Rule of Criminal Procedure 33(B). Ohio courts have regularly enforced this rule. *See State v. Smith*, No. 100588, 2014 WL 5499114, at *2 (Ohio Ct. App. Oct. 30, 2014); *State v. Tucker*, No. 95556, 2011 WL 3612212, at *5 (Ohio Ct. App. Aug. 18, 2011); *State v. Norman*, No. 04AP-1312, 2005 WL 2364978, at *2 (Ohio Ct. App. Sept. 27, 2005).

Even assuming that Nunez established cause for his procedural default, he cannot establish actual prejudice or a fundamental miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). The evidence presented by Nunez in his motion for a new trial

allegedly supported his defense that he had a consensual sexual relationship with one of the victims. That defense was presented at trial and rejected by the jury. Accordingly, jurists of reason would not debate whether the district court was correct in its ruling that this ground for relief was procedurally defaulted.

Nunez's second ground for relief asserted that his indictment was fatally defective because it alleged "multiple, identical, and undifferentiated counts, in violation of the Double Jeopardy and Due Process Clauses." Nunez's third ground for relief asserted that the trial court's deadlocked jury instruction violated his constitutional rights. The Ohio Court of Appeals concluded that *res judicata* barred these claims because they could have been raised on direct appeal. *Nunez*, 2017 WL 2814015, at *9. "Ohio's use of the doctrine of *res judicata* to preclude a merits determination of a claim raised in post-conviction proceedings that had been, or should have been, raised on direct appeal is an adequate and independent state ground barring federal habeas review." *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007). Nunez failed to establish cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. *See Murray*, 477 U.S. at 495-96. Nunez instead asserted that the indictment and jury instruction rendered his judgment void and that void judgments can be challenged at any time. No reasonable jurist could conclude that these defaulted claims deserve encouragement to proceed further.

For these reasons, the court **DENIES** Nunez's motion for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

VICTOR NUNEZ,)	CASE NO. 1:16CV1931
)	CASE NO. 1:17CV2325
)	
PETITIONER,)	JUDGE SARA LIOI
)	
vs.)	
)	MEMORANDUM OPINION
SEAN BOWMAN, ¹)	
)	
)	
RESPONDENT.)	

Before the Court is the report and recommendation (“R&R”) of the Magistrate Judge in the above-entitled actions, filed May 17, 2019. (Case No. 1:16-cv-1931 [*Nunez I*], Doc. No. 21; Case No. 1:17-cv-2325 [*Nunez II*], Doc. No. 17.) Under the relevant statute:

[. . .] Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

28 U.S.C. § 636(b)(1)(C).² In these cases, the fourteen-day period has elapsed and no objections have been filed. The failure to file written objections to a Magistrate Judge's report and recommendation constitutes a waiver of a de novo determination by the district

¹ Sean Bowman is the current warden of Toledo Correctional Institution and as such is the proper party respondent. Rule 2(a) of the Rules Governing Section 2254 Cases.

² Moreover, the R&R advised the parties that any objections to the report were required to be filed within 14 days of the issuance of the R&R. (*Nunez I*, Doc. No. 21 at 2065; *Nunez II*, Doc. No. 17 at 253.)

court of an issue covered in the report. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *see United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

After the R&R was filed, on May 30, 2019, petitioner filed an untimely first supplemental traverse in *Nunez II*.³ The filing did not reference the R&R and did not even mention the grounds for relief raised in *Nunez I*. The Court has reviewed the Magistrate Judge's report and recommendation relative to those grounds and **ADOPTS** the same.

Accordingly, the Court dismisses *Nunez I*.

Likewise, the untimely supplemental traverse fails to address the Magistrate Judge's recommended disposition of petitioner's grounds raised in *Nunez II*. However, it does generally address the arguments raised in respondent's supplemental answer to the *Nunez II* petition. The Court has no duty to construct objections for petitioner, nor has it the responsibility of treating petitioner's untimely traverse as a properly filed objection to specific findings contained in the R&R. *See generally Powell v. United States*, 37 F.3d 1499 (Table), 1994 WL 532926, at *1 (6th Cir. Sept. 30, 1994) ("Any report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party shall be subject to de novo review by the district court in light of *specific objections* filed by any party.") (emphasis added); 28 U.S.C. § 636(b)(1)(C). Nonetheless, out of an abundance of caution, the Court has reviewed the supplemental traverse and has considered the arguments raised therein relative to the findings and conclusions contained in the R&R.

³ Petitioner filed a motion requesting an extension of 30 additional days in which to file his supplemental traverse. (*Nunez II*, Doc. No. 11.) Noting the numerous delays in the prosecution of these habeas petitions, the Magistrate Judge granted the motion, in part, and directed petitioner to file his supplemental traverse by May 13, 2019. (*Id.*, Doc. No. 12.) At that time, petitioner was advised that no further extensions would be granted. (*Id.* at 106.) Notwithstanding this warning, petitioner subsequently sought an additional 60 day extension (Doc. No. 14), which was denied. (Non-Doc. Order, dated April 22, 2019.)

The Court determines that the supplemental traverse fails to suggest any error in the Magistrate Judge's conclusions that the first two grounds for relief are procedurally defaulted, and that the third ground for relief—addressing a state court jury instruction—is not cognizable on federal habeas review. Accordingly, the Court **ADOPTS** the R&R relative to the grounds raised in *Nunez II*, and **DISMISSES** this action, as well.⁴

Further, the Court **CERTIFIES** that an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. 28

U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: June 6, 2019



HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

⁴ After the Court had drafted the present Memorandum Opinion, but before it was filed on the docket, petitioner filed a motion in *Nunez II* to “recommit” that case to the Magistrate Judge for consideration of petitioner’s untimely supplemental traverse. (*Nunez II*, Doc. No. 19.) In the alternative, petitioner seeks an enlargement of time in which to file objections to the R&R. (*Id.* at 277.) Petitioner’s request to “recommit” *Nunez II* to the Magistrate Judge is **DENIED AS MOOT** inasmuch as the Court considered petitioner’s untimely traverse on the merits. Further, petitioner’s untimely request for additional time in which to file objections to the R&R is **DENIED**. While petitioner maintains he only recently received a copy of the R&R and he needs a minimum of 60 days in which to “adequately research and prepare objections” (*id.* at 279), he fails to indicate what objections he would lodge, if given additional time, and he fails to explain how additional time would alter the Court’s conclusion that the grounds raised in *Nunez II* are either procedurally defaulted or non-cognizable on federal habeas review.