

22-6905 ORIGINAL

No. _____

FILED

FEB 22 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCISCO Nunez Carrillo — PETITIONER
(Your Name)

vs.
Arizona Attorney General, Phoenix.
Michael O'Toole "et al." — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Arizona Court of Appeals Division ONE
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

FRANCISCO Nunez Carrillo
(Your Name)

1752 East Arica Road
(Address)

ELOY, AZ 85131
(City, State, Zip Code)

UNKNOWN
(Phone Number)

QUESTION(S) PRESENTED

Question 1. I understand, the Government may seek a Multiple-Count indictment for certain offenses that are the same for double-jeopardy purposes. the accused may not suffer two convictions or sentences on that indictment.

Should the jury return guilty verdicts, does this Court give the district judge or Lower Courts discretion to enter judgment on only one of the statutory offenses?

And if so, and the Lower Court failed to do so, would that be consistent with case law. Before sentencing?

Question 2. IF STATE Court of APPEALS AFFIRMED IN PART AS MODIFIED, VACATED IN PART, but didn't vacate sentence, from a conviction that had identical statutory offenses, regarding an issue of fundamental error, would this be enough for the Arizona Court of Appeals to remand back to Lower Courts for a proper procedure? But given the state's willingness to concede error concerning exact issue in recent cases, the Court of Appeals for the state of Arizona didn't believe such action is necessary. would this Court consider issues of importance beyond particular facts and parties involved?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

David Shinn - Director Arizona Dept. of Corrections of Ryan Thornell.

Attorney General for the State of Arizona.

Alexander Michael Taber, Assistant Attorney General.

The Honorable Kathleen H. Mead, Judge STATE Trial Judge.

Roslyn O. Silver, Senior District Judge.

Michael O'Toole.

RELATED CASES

1. Ball v. United States, 470 U.S. 856 (U.S. March 26, 1985) / Dist Ariz.
2. Carrillo v. Shinn, 2022 U.S. Dist. LEXIS 90026, 2022 WL 1571265 March 25, 22
3. United States v. Zalapa, 509 F.3d 1060, 2007 U.S. App. LEXIS 28007 9th Cir. Cal. Dec 5, 2007
4. Johnson v. United States, 2011 U.S. Dist. LEXIS 140505 Southern Dist. N.Y. Dec 6, 2011
5. United States v. Tann, 577 F.3d 533, 2009 U.S. App. LEXIS 18943 3rd Cir. Del. Aug 24, 2009
6. United States v. Shorter, 328 F.3d 167, 2003 U.S. App. LEXIS 8853 4th Cir. Va. May 12, 2003
7. United States v. Callanan, 810 F.2d 544, 1987 U.S. App. LEXIS 1261 6th Cir. Mich. January 23, 1987
8. United States v. McCall, 2006 U.S. Dist. LEXIS 20555 Northern Dist. Iowa April 11, 2006
9. United States v. Christie, 717 F.3d 1156, 2013 U.S. App. LEXIS 11704 10th Cir. N.M. June 11, 2013
10. United States v. Quiroz, 57 M.J. 583, 2002 CCA LEXIS 168 U.S. Navy Ct. of Crim. Appeals July 31, 2002
11. United States v. Hickson, 22 M.J. 146, 1986 CMA LEXIS 16873 U.S. Ct. of Military App. June 2, 1986
12. State v. Parson, 509 A.2d 90, 1986 Del. Super. LEXIS 1499 Del. Super. Ct. April 3, 1986
13. People v. Miller, 498 Mich. 13, 869 N.W.2d 204, 2015 Mich. LEXIS 1620 July 20, 2015
14. Ex Parte Milner, 394 S.W.3d 502, 2013 Tex. Crim. App. LEXIS 418 Tex Crim. App. Feb. 13, 2013
15. 28 U.S.C. § 2253 (c) (2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).
16. Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306, 1932 U.S. LEXIS 875 U.S. January 4, 1932

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Francisco Nuñez Carrillo
No. 1 CA-CR 19-0492
INDEX TO APPENDICES No. CR 2018-146733-001 OT

The Court's memorandum decision was filed on 7-16-2020.
APPENDIX A Arizona Court of Appeals - Affirmed in Part as Modified, Vacated in Part.

APPENDIX B Supreme Court State of Arizona No. CR-20-0256-PR-Petition = Denied
Court of Appeals, Division One No. 1 CA-CR 19-0492, Maricopa County
Superior Court No. CR 2018-146733-001 - March 4, 2021.

APPENDIX C Superior Court of Arizona Maricopa County CR 2018-146733-001 OT
dismissing the petition for post-conviction relief. 3-24-2021.

APPENDIX D Arizona Court of Appeals, No. 1 CA-CR 21-0118 PRPC Filed 9-23-2021
Review Granted. Relief Denied. Appeal from the Superior Court in Maricopa County
No. CR 2018-146733-001 The Honorable Kathleen H. Mead, Judge.

APPENDIX E U.S. District Court District of Arizona, Carrillo v. Shin et al Case Number
2:21-cv-01742-Ros writ of habeas Corpus (OAC) is Denied and Dismissed
with prejudice. Certificate of Appealability and leave to proceed in forma pauperis Denied.
19th day of May, 2022.

APPENDIX F United States District Court District of Arizona CV 21-01742-PHX-Ros (MHB)
Response to petitioner's objection to Magistrate's Report and Recommendation.
D.C. No. 2:21-cv-01742-Ros - order - Certificate of appealability is denied.
Nov 30 2022

APPENDIX G United States Court of Appeals for the Ninth Circuit No. 2215797
D.C. No. 2:21-cv-01742-Ros - order - Certificate of appealability is denied.
Nov 30 2022

APPENDIX H United States Court of Appeals for the Ninth Circuit No. 22-15797
D.C. No. 2:21-cv-01742-Ros District of Arizona, Phoenix
Order Appellant's motion for reconsideration is denied.
See 9th Cir. 27-10 January 13 2023.

TABLE OF AUTHORITIES CITED

1

- CASES Ball v. United States, 470 U.S. 856, 105 S. Ct. 1168, 84 L. Ed. 394 S.W. 3d 502 p. 507
 2d 740 (1985). U.S. Lexis 79,53 U.S.L.W. 4395
2. State v. Carrillo, 2020 Ariz. App. Unpub. Lexis 782 394 S.W. 3d 502p. 511
3. State v. Carrillo, 2021 Ariz. App. Unpub. Lexis 952 2021 WL 4317694
 State v. Gutierrez, 229 Ariz. 573, 579 P.3d 1278 (2020). 250 Ariz. 433 p. 457
 2012 Ariz. Lexis 162 48 p. 3d 1250 p. 1274
4. State v. Poblete, 227 Ariz. 537, 260 P.3d 1102, 2011 Ariz. App. Lexis 139, 613
 Ariz. Adv. Ref. 6
5. United States v. Zalafa, 509 F.3d 1060, 2007 U.S. App. Lexis 28007 509 F.3d 1060 p. 1065
 Carrillo v. Shinn, 2022 U.S. Dist. Lexis 90026, WL 1571265 Cited by: 509 F.3d
 Carrillo v. Shinn, 2022 U.S. Dist. Lexis 89639 Dist. Ariz. 1060 p. 1062
 May 17, 22
- Carrillo v. Shinn, 2022 U.S. App. Lexis 33120. see also Miller-El v.
 Carrillo v. Shinn, 2023 U.S. App. Lexis 883. 28 U.S.C. § 2253(c)(2). Cockrell, 537 U.S. 322,
 327 (2003).

STATUTES AND RULES

Lexis- Arizona Annotated Revised Statutes Title 13 Criminal Code
 A.R.S. 13-1204 Aggravated Assault; classification; definitions
 Chapter 12 Assault and Related offenses (§§ 13-1201-13-1216)
 A. A person commits aggravated assault if the person commits
 Assault as prescribed by section 13-1203 under any of the following
 Circumstances: 1. if the person ~~comm~~ causes serious physical injury to
 another. 2. if the person uses a deadly weapon or dangerous instrument.
 3. if the person commits the assault by any means of force that causes temporary but
 substantial disfigurement, temporary but substantial loss or impairment of any body organ
 or part or a fracture of any body part.

OTHER

4. If the person commits the assault while the victim is bound or otherwise
 physically restrained or while the victim's capacity to resist is substantially impaired.
 5. If the person commits the assault after entering the private home
 of another with the intent to commit the assault.

Shepard's ®: pending Legislation Ariz. Rev. Stat. Sec. 13-1204

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix G&H to the petition and is Miller-El v. Cockrell, 537 U.S. 322

☒ reported at 141 S. Ct. 2231 p. 2234 210 L. Ed. 2d 977 p. 979; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is United States v. Zalapa.

☒ reported at 509 F.3d 1060, 1065 (9th Cir. 2007); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is Bail v. United States 713

☐ reported at 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985); or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Arizona STATE Court of Appeals court appears at Appendix A to the petition and is

☐ reported at Page 56, 713, 714; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Nov. 30, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan. 13, 2023, and a copy of the order denying rehearing appears at Appendix H..

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Nov. 30, 2022, Jan 13, 2023,

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Denied.
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

September 23, 2021

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

232 Ariz. 158 p. 162 302 p. 3d 683 p. 687

Ohio v. Johnson, 467 U.S. 493, 497-98, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). A Conviction is considered punishment and therefore double jeopardy does not permit convictions of multiple counts for a single offense.

cited by: 232 Ariz. 158 p. 160 302 p. 3d 683 p. 685

In Ball v. United States, the Supreme Court clarified that when the Legislature did not intend a single offense to be punishable under two separate provisions the separate conviction... has potential adverse collateral consequences that may not be ignored." 470 U.S. 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985).

For purposes of double jeopardy, two offenses are the same if they "have identical statutory elements" or "if one is a lesser included offense of the other." Fitzgerald v. Superior Court, 173 Ariz. 539, 544, 845 p. 2d 465, 470 (App. 1992); See State v. Chabolla-Hinojosa, 192 Ariz. 360 ¶¶ 10, 21, 965 p. 2d 94, 96-97, 99 (App. 1998). Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

United States v. Zalapa 509 F.3d 1060, 1065 (9th Cir. 2007).

Appendix E to the petition the text of the provisions appears p 1, 2, 3.

U.S. District Court of Arizona.

Habeas Corpus proceeding at Carrillo v. Shinn, 2022 U.S. Dist. LEXIS 90026, 2022 WL 1571265. Following the conviction in the case you are shepardizing the prisoner has brought an action that does not bear on the issue of guilt or innocence, but rather questions whether the petitioner was denied due process or other Constitution right(s) during his trial. Magistrate's recommendation. A judicial officer, having some but not all the powers of a federal District Court judge, has made a preliminary or pretrial findings in the case you are shepardizing. Generally such recommendations will eventually be considered by a Judge.

Appendix A. p. 5 p. 6. ¶¶ 13 ¶¶ 14
TEXT.

even when Court imposes concurrent sentences
470 U.S. 856, 865 (1985). 3.

A multiplicitous prosecution violates the double jeopardy protections of the United States and Article 2, § 10 of the Arizona Constitution
see Ball v. United States

STATEMENT OF THE CASE

Appendix E. p. 1, 2, 3

Conflicting Authority.

Petitioner was sentenced to 24 years on each aggravated-assault Count and 3.75 years on the unlawful discharge Count, with all three sentences to run concurrently. On direct appeal, the Arizona Court of Appeals concluded the two convictions for aggravated assault were multiplicitous. (Doc. 12-1 at 123). That court explained petitioner's "two aggravated-assault charges stemmed from only one act—shooting the victim." (Doc. 12-1 at 123). Based on that, petitioner "committed only one act of aggravated assault." In deciding the appropriate remedy, the court determined "both aggravated-assault convictions in this case carry identical A.R.S. # 13-1204 Count 1. Count 2. and for the sentence to run concurrent. Arizona Court of Appeals failed to remand case back to trial court for the correct remedy, when fundamental error is found, until its repeal in 1995, A.R.S. # 13-4035 required appellate courts to search the record for fundamental error. *State v. Kemp*, 185 Ariz. 52, 67 (1996). Thereafter, appellate courts retain their authority to reverse for fundamental error when they find it, *State v. Mann*, 188 Ariz. 220, 231 (1997). 1. the error went to the foundation of the case 2. the error took from the defendant a right essential to his defense. 3. the error was so egregious that he could not possibly have received a fair trial the error involved bypassing the constitutionally required jury determination. A reasonable jury, applying the appropriate standard could have reached a different result than did the trial judge. *Henderson*, 210 Ariz. at 569, p. 27. 570, p. 32. Arizona Court of Appeals cited *Ball v. United States*, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

opinion 394 S.W.3d 502 p. 511
394 S.W.3d 502 p. 507

Trial Court was not consistent with *Ball*—the district judge should

enter judgment on only one of the statutory offenses) before sentencing.

United States v. Zalaf 509 F.3d 1060, 2007 U.S. App. Lexis 28007

Followed by: 509 F.3d 1060 p. 1065

Cited by: 509 F.3d 1060 p. 1062.

Carrillo v. Shinn, 2022 U.S. Dist. Lexis 90026, 2022 WL 1571265. UNPUBLISHED.

REASONS FOR GRANTING THE PETITION

Meritorious Defense.

A defense worthy of a hearing or judicial inquiry, because raising a question of law deserving some investigation and discussion of a real controversy as to essential facts arising from conflicting assured of prevailing at a trial.

Under 28 USCS § 1254(1), United States Supreme Court has jurisdiction, on certiorari to review denial, by circuit judge or panel of Federal Court of Appeals, of Certificate of Appealability, as 28 USCS 2253(c) provides that unless "circuit justice or judge" issues COA Appeal may not be taken to Court of Appeals from final order in (a) Habeas Corpus proceeding involving state prisoner. Presumption by clear and convincing evidence.

"(Quoting *Rice v. Collins*, 546 U.S. 333 338-39, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)). "Even in the context of federal habeas, deference does not by definition preclude relief. A federal court disagree with a state court's determination when guided by the AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect *Miller-El v. Cockrell*, 537 U.S. at 340. Among conflicting authorities noted in: 586 Fed. Appx. 612 p. 613.

Moreover, we do not observe a uniform rule among the circuits Cf. *United States v. Gore*, 154 F.3d 34, 43 (2d Cir. 1998) (holding defendant established plain error where other circuits had "uniformly decided" the conviction violated Double Jeopardy... To the contrary, while the Ninth Circuit has concluded that "it was not Congress's intent to impose multiple punishments *United States v. Zalafa*, 509 F.3d 1060, 1062 (9th Cir. 2007). *United States v. Zalafa*, 509 F.3d 1060, 1064 (9th Cir. 2007) (holding if sentences are imposed on each count of that multiplicitous indictment the defendant is not forced to serve the erroneous sentence. Followed by: 509 F.3d 1060 p. 1065 *United States v. Zalafa*,

509 F.3d 1060, 2007 U.S. App. LEXIS 28007. The remedy for meritorious multiplicity claims is for the district court to vacate the multiplicitous conviction and sentence. See *Pottledge*, 517 U.S. at 307; *Ball*, 470 U.S. at 864... In accordance with *Ball*, we therefore remand to the district court with instructions to vacate the multiplicitous conviction, sentence under 26 U.S.C. § 5861(d). Cited by: 509 F.3d 1060 p. 1062. *Capillo v. Shinn*, 2022 U.S. Dist. LEXIS 90026, 2022 WL 1571265, "unpublished".

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Francisco Nunez Carrillo

Date: 2-11-23