UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 30 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FRANCISCO NUNEZ CARRILLO, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 22-15797 D.C. No. 2:21-cv-01742-ROS District of Arizona, Phoenix ORDER

Before: WATFORD and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

"APPENDIX G"

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Francisco Nunez Carrillo,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-01742-PHX-ROS

ORDER

Petitioner seeks a writ of habeas corpus based on alleged errors during his trial and convictions in state court. The Report and Recommendation ("R&R") concludes Petitioner's claims lack merit and recommends the petition be denied and dismissed with prejudice. (Doc. 15). Petitioner filed objections to which Respondents filed a reply. (Doc. 16, 17). The R&R is correct and will be adopted in full.

Neither party objects to the factual background contained in the R&R. In brief, Petitioner was accused of shooting one person in the stomach. After a jury trial, Petitioner was convicted of two counts of aggravated assault and one count of unlawful discharge of a firearm. 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 sentences." If there had been any indication the trial court intended to impose different sentences on the two aggravated-assault counts, the court would have remanded for the trial court "to determine which conviction should be vacated." But the court of appeals believed that was unnecessary and opted to vacate one of the aggravated assault convictions. The Court of Appeals' decision to vacate one of those charges provided no meaningful relief to Petitioner. After the appellate decision, Petitioner was left with a conviction for aggravated assault that required he spend 24 years in prison as well as the conviction for unlawful discharge.

In October 2021, Petitioner filed the present habeas petition presenting a variety of claims. As correctly explained by the R&R, those "claims, read together, raise one issue, and that is a purported double jeopardy violation due to . . . multiplicitous" convictions. (Doc. 15 at 8). While not clear from his filings, Petitioner's argument appears to be that the constitutionally required remedy for two multiplicitous convictions is to vacate both. Thus, when the Arizona Court of Appeals chose to vacate only one of the aggravated assault counts, Petitioner believes that violated his rights under the Fifth Amendment's Double Jeopardy Clause.

Respondents conceded Petitioner's claim was timely and exhausted but they argued the claim failed on the merits. The R&R agreed and found the Arizona Court of Appeals' remedy regarding the two aggravated assault convictions was not contrary to, or an unreasonable application of clearly established federal law. (Doc. 15 at 10). Having reviewed that issue de novo, the R&R is correct. Petitioner has not cited any Supreme Court authority requiring all multiplicitous counts be vacated.[1] The well-established rule

[1] At times, Petitioner seems to argue the aggravated assault convictions and the unlawful discharge convictions were all multiplicitous such that, of the three convictions, only one could remain in place. Under this theory, Petitioner claims he should only have to serve the sentence attributed to the unlawful discharge conviction. Petitioner does not develop this argument in any detail and it does not appear Arizona's aggravated assault and unlawful discharge crimes are multiplicitous. Those two crimes each "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

is that when two convictions are deemed multiplicitous, the proper remedy is to vacate one of the convictions, leaving the other conviction in place. *See, e.g., United States v. Zalapa*, 509 F.3d 1060, 1065 (9th Cir. 2007). That is what the Arizona Court of Appeals did in Petitioner's case. There was no violation of clearly established federal law.

Accordingly,

IT IS ORDERED the Report and Recommendation (Doc. 15) is **ADOPTED**. The petition for writ of habeas corpus (Doc. 6) is **DENIED** and **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED a Certificate of Appealability and leave to proceed in forma pauperis on appeal are **DENIED** because the dismissal of the petition is justified as the Petitioner has not demonstrated a substantial showing of the denial of a constitutional right.

Dated this 17th day of May, 2022.

Honorable Roslyn O. Silver
Senior United States District Judge

MIME–Version:1.0 From:azddb_responses@azd.uscourts.gov To:azddb_nefs@localhost.localdomain
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U.S. District Court

DISTRICT OF ARIZONA

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Case Name: Carrillo v. Shinn et al
Case Number: 2:21–cv–01742–ROS
Filer:
WARNING: CASE CLOSED on 05/18/2022
Document Number: 20
Docket Text:
CLERK'S JUDGMENT – Adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied and this action is hereby dismissed with prejudice. (DXD)

2:21–cv–01742–ROS Notice has been electronically mailed to:

Alexander Michael Taber Alexander.Taber@azag.gov, CAdocket@azag.gov, Yvonne.Garcia@azag.gov

2:21–cv–01742–ROS Notice will be sent by other means to those listed below if they are affected by this filing:

Francisco Nunez Carrillo
141543
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ELOY, AZ 85131

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Francisco Nunez Carrillo,

Petitioner,

v.

David Shinn, et al.,

Respondents.

NO. CV-21-01742-PHX-ROS

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED adopting the Report and Recommendation of the Magistrate Judge as the order of this Court. Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is denied and this action is hereby dismissed with prejudice.

Debra D. Lucas
District Court Executive/Clerk of Court

May 18, 2022

By s/ D. Draper
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Francisco Nunez Carrillo,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-21-01742-PHX-ROS (MHB)

REPORT AND RECOMMENDATION

TO THE HONORABLE ROSLYN O. SILVER, UNITED STATES DISTRICT COURT JUDGE:

On October 5, 2021, Petitioner Francisco Nunez Carrillo, who is confined in the Arizona State Prison, Redrock Correctional Center, Eloy, Arizona, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (hereinafter "habeas petition").[1] (Doc. 1.) The Court dismissed that petition without prejudice and with leave to amend because Petitioner did not allege any supporting facts. (Doc. 5.) On November 2, 2021, Petitioner filed an amended habeas petition. (Doc. 6.) On February 11, 2022, Respondents filed an Answer, to which Petitioner has replied. (Docs. 12, 14.)

PROCEDURAL BACKGROUND

On October 1, 2018, Petitioner was indicted by a State of Arizona grand jury on two

[1] This Court will consider Petitioner's filings as having been filed on the date on which he signed and delivered the document to the prison authorities for filing, not the date on which the Court accepted the document for filing. See, Huizar v. Cary, 273 F.3d 1220, 1223 (9th Cir. 2001) (applying "prison mailbox rule" in construing filing date); Butler v. Long, 752 F.3d 1177, 1178 n. 1 (9th Cir. 2014).

counts of aggravated assault, class 3 felony dangerous offenses (counts one and two), one count of unlawful discharge of firearm (count three), a class 6 dangerous felony, and one count misconduct involving weapons (count 4), a class 4 felony. (Doc. 12, Exh. C.) Counts one and two charged, in pertinent part:

> Count One: [Petitioner], on or about September 21, 2008, using a handgun, a deadly weapon or dangerous instrument, intentionally, knowingly or recklessly did cause a physical injury to [P.O.].
>
> Count Two: [Petitioner], on or about September 21, 2018, intentionally, knowingly or recklessly did cause a serious physical injury to [P.O.].

Petitioner proceeded to trial and was convicted after six days of trial of both counts of aggravated assault, and one count of unlawful discharge of a firearm.[2] (Doc. 12, Exh. K at 17-20.) After the aggravation and dangerousness phase of the trial, the jury found all three counts to be dangerous offenses, and found as to count one the following aggravating factors: (1) the way the defendant assaulted or attacked the victim caused severe or extreme pain, and (2) the offenses caused physical, emotional, or financial harm to the victim. (Id.) As to count two, the jury found the following aggravating factors: (1) the offense involved the use, threatened use or possession of a deadly weapon or dangerous instrument, and (2) the offense caused physical, emotional, or financial harm to the victim. (Id.)

On August 26, 2019, Petitioner appeared for sentencing. (Doc. 12, Exh. P.) The Court, having found that Petitioner had five prior felony convictions, sentenced Petitioner to a less than maximum sentence of 24 years on counts one and two, and a presumptive sentence of 3.75 years on count three, with the sentences on all three counts ordered to be served concurrently. (Id.)

Petitioner appealed his convictions and sentences to the Arizona Court of Appeals. (Doc. 12, Exh. Q.) Appointed counsel filed an opening brief in which he indicated that despite having searched the record on appeal in compliance with Anders v. California, 386

[2] The court granted the state's later motion to dismiss the charge of misconduct involving weapons. (Doc. 12, Exh. O.)

U.S. 738 (1967), he could find "no arguable nonfrivolous issues to raise on direct review." (Id., Exh. R.) The appellate court granted Petitioner time to file a supplemental brief in *propria persona*, but Petitioner did not do so. (Id., Exhs. S, T, V.)

In its Memorandum Decision issued on July 16, 2020, the Arizona Court of Appeals indicated it had reviewed the record for arguable issues, determined Petitioner's two aggravated assault convictions to be multiplicitous and vacated Petitioner's second conviction and sentence for aggravated assault. (Doc. 12, Exh. V.) In its decision the court set forth the pertinent facts as follows:

> On September 21, 2028, Carillo, Carillo's sister (Z.C.), and her husband (P.O.), were gathered at Carillo's aunt's apartment. Z.C. and P.O. began to argue, and Z.C. left the apartment in the couple's car. Unwilling to walk home, P.O. walked to a nearby convenience store to purchase alcohol. When he returned to the apartment, P.O. noticed his phone battery was nearly dead, so he went into a bedroom to charge his phone. As P.O. did so, Carrillo entered the bedroom with a handgun and shot him. The bullet penetrated through P.O.'s abdomen, burying itself into the drywall behind him. Carrillo attempted to fire the gun again, but it jammed.
>
> When police arrived at the scene, they arrested Carrillo nearby and found the handgun, its slide still jammed open, lying on the concrete outside the open apartment door. Inside the apartment, officers discovered P.O. in the bedroom in severe medical distress and sent him to a hospital for emergency treatment. Officers photographed the scene, recovered the bullet that had struck P.O. from the drywall, and found a spent casing and a box of ammunition. The ammunition in the box and within the handgun was the same caliber and brand as the spent casing and bullet that struck P.O.
>
> At the police station, Carrillo consented to an interview with Detective David Thompson after receiving Miranda [] warnings. During the interview Carrillo initially claimed that P.O. shot himself. Eventually, Carrillo admitted that he had shot P.O.
>
> P.O. underwent emergency surgery. Due to the damage caused by the gunshot, doctors removed P.O.'s kidneys, adrenal glands, spleen and gallbladder, as well as a portion of his liver. P.O. also suffered a spinal fracture that required neurosurgery. Although P.O. survived the surgeries, his treating physicians believed there was a genuine risk that he would die from his injuries. Around a week later – when P.O. had recovered enough to speak – Detective Thompson interviewed him about the shooting. P.O. claimed he did not know who shot him.

* * *

> In February 2019, while Carrillo's trial was still pending, P.O. contacted Detective Thompson and requested to make a statement. During the second interview, P.O. admitted he had lied in the first interview and then identified Carrillo as the shooter.
>
> The court held a six-day jury trial in May and June 2019. During the trial, the State called P.O., the law-enforcement officers who investigated the shooting, and P.O.'s treating physicians to testify about the circumstances surrounding the crimes and the extent of P.O.'s injuries. When questioned about changing his statement to the police, P.O. explained that he initially refused to identify Carrillo to avoid betraying his wife and to protect her family. When his wife failed to support him in the wake of the assault, however, P.O. decided to come forward and identify Carrillo as the shooter. P.O. also testified that, because of his injuries, he was unable to work, could not drive or play sports, and would be forced to undergo regular medical treatments for the rest of his life. After the State's case, Carrillo declined to testify or present evidence in his defense.

(Id. at 2-3.)

The appellate court found that Petitioner's two convictions for aggravated assault were multiplicitous, as they were two charges for "a single offense" in violation of the double jeopardy clause of the United States Constitution. (Doc. 12, Exh. V at 5.) Petitioner's two aggravated assault charges "stemmed from only one act – shooting P.O." (Id.) The appellate court vacated the second aggravated assault conviction, as "the court sentenced [Carrillo] under the same sentencing scheme" for both counts. (Id.)

Petitioner filed a pro se petition for review in the Arizona Supreme Court asserting that review should be granted as the "multiplicitous prosecution violates the double jeopardy [clause] of the United States Constitution," and that the court of appeals had found the aggravated assault counts to be multiplicitous. (Doc. 12, Exh. Y.) The Arizona Supreme Court denied review on March 4, 2021. (Id., Exh. Z.)

On July 23, 2020, Petitioner filed a notice of post-conviction relief ("PCR") in the trial court, in which he indicated that he would be raising a claim that "[n]ewly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence." (Doc. 12, Exh. BB.) The trial court appointed counsel to represent him, but

counsel was "unable to find a colorable issue to submit to the court," and filed a Notice of Completion of the Post-Conviction Review by Counsel indicating as such. (Id., Exh. DD.) Although the trial court gave Petitioner until December 21, 2020, to file a pro se petition, Petitioner filed a PCR petition on October 25, 2020, raising the following claims.

- He was denied the effective assistance of counsel;
- The State "used a coerced confession at trial" and the State "suppressed favorable evidence";
- The State used "perjured testimony";
- The State violated his right "not to be placed twice in jeopardy for the same offense or punished twice for the same act"';
- The State "used a prior conviction that was obtained in violation of the United States and Arizona Constitution;
- The existence of a new constitutional right not recognized as existing at the time of trial;
- Newly discovered material facts that probably would change the judgment or sentence.

Petitioner essentially checked the boxes on the PCR form relating to these various claims, without providing any additional facts or law in support, except with respect to his claim of newly discovered evidence. As to this claim, Petitioner wrote that his trial counsel "never interviewed witnesses on his behalf" and "[n]ever objected when prosecutor sanitized victim record." (Doc. 12, Exh. DD.) On November 23, 2020, Petitioner filed a second PCR petition, again claiming ineffective assistance of counsel. (Id., Exh. HH.) Specifically, Petitioner alleged:

> Trial counsel [] failed to prepare on my behalf, never interviewed witnesses on my behalf, failed to object, argues that victim shot himself when claimed self defense, jury wanted to know why was [V] or [Z] not brought in for trial. It's clear on record that trial counsel fell below an objective standard or reasonableness and that there is a reasonable probability that but for counsels unprofessional errors, the result of the proceeding would have been different. Not only that was charged twice for one act which violates

> the United States constitution even when court imposes concurrent sentence. Also trial court counsel used report from 2010. I feel he wasn't competent and ask that you may grant petition and review record. . . . My trial lawyer should've challenged that a person can't be charged twice and filed motion and had case dismissed, but he didn't; feel he sided with the judge and prosecutor. So with all that behind, I'm sentence to 24 years with a self incriminating statement, "trial lawyer with." The act or omission, neglected my case, then says he's retired is coming soon. There were neighbors who heard commotion or fighting they were never in trial jury deserved to hear truth, victim lied on stand, detective interviewed me didn't smell liquor on my breath I was at a legally place legally allowed to be at.
>
> Finally, direct appeal lawyer also never scrutinize the record like he said he would. Then come to find out appeals court found these errors. There might even be more errors.

(Id., Exh. HH)

The trial court denied relief on March 24, 2021. (Doc. 12, Exh. LL.) As to Petitioner's claim of ineffective assistance of counsel, the trial court found that Petitioner "fails to set forth any facts or law that would support that any of those acts were deficient performance or that those acts prejudiced the defendant." (Id. at 2.) As to appellate counsel's purported failure to raise double jeopardy on appeal, the trial court found that Petitioner "failed to state why he was prejudiced as the Court of Appeals has vacated the second conviction." (Id.) The trial court also found Petitioner precluded from relief pursuant to Arizona Rule of Criminal Procedure 32.2(a)(2) on his double jeopardy claim, as the argument was "addressed on appeal and the second conviction for aggravated assault was vacated." (Id.)

On the remaining issues raised by Petitioner in his PCR petition, the trial court held that Petitioner "merely checked a box on a form and did not allege any facts or law to support the remaining issues" and therefore "failed to state a colorable claim." (Doc. 12, Exh. LL at 3.) Petitioner filed a petition for review of the trial court's decision regarding his claims of double jeopardy, newly discovered evidence, new material facts that would change the judgment or sentence, and ineffective assistance of counsel. (Id., Exh. NN.) The Arizona Court of Appeals granted review but denied relief on September 23, 2021, finding

that, after reviewing the record in the matter, Petitioner had not carried his burden of demonstrating that the trial court abused its discretion. (Id., Exh. OO.)

In Petitioner's habeas petition, he raises the following claims:

> Ground One: a conviction and sentence that violate the United States or other federal laws.
>
> Ground Two: conviction that was obtained, or sentence imposed, in violation of the United States or Arizona Constitutions.
>
> Ground Three: newly discovered evidence and a double jeopardy violation due to a multiplicitous prosecution.
>
> Ground Four: unlawful sentence due to being tried twice for the same offense.

(Doc. 6.)

Respondents assert that Petitioner's four claims, read together are in reality just one claim that aggravated assault convictions were multiplicitous, and that Petitioner's claim should be denied on its merits.

MERITS

Pursuant to the AEDPA, a federal court "shall not" grant habeas relief with respect to "any claim that was adjudicated on the merits in State court proceedings" unless the state court decision was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard of review). This standard is "difficult to meet." Harrington v. Richter, 562 U.S. 86, 102 (2011). It is also a "highly deferential standard for evaluating state court rulings, which demands that state court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (citation and internal quotation marks

omitted). "When applying these standards, the federal court should review the 'last reasoned decision' by a state court ... ." Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).

A state court's decision is "contrary to" clearly established precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 404-05. "A state court's decision can involve an 'unreasonable application' of Federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

DISCUSSION

This Court agrees with Respondents that Petitioner's habeas claims, read together, raise one issue, and that is a purported double jeopardy violation due to a multiplicitous indictment. At the outset, Respondents state that Petitioner did not raise this claim on direct review to the Arizona Court of Appeals and thus has not exhausted his claim. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999) (In Arizona, "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them."). However, Respondents assert that the claim is nonetheless considered exhausted, as the Arizona Court of Appeals raised the multiplicity issue *sua sponte*. In support of their argument, Respondents cite Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990). The court in Walton concluded that although a habeas petitioner may not have raised a claim in a state proceeding, it is nonetheless exhausted "if a state court with the authority to make final adjudications actually undertook to decide the claim on its merits." Id. at 1356 (citation omitted). In Petitioner's case, the court of appeals reviewed the trial record for error and *sua sponte* addressed the question of whether Petitioner's two aggravated assault charges and convictions were multiplicitous. This Court agrees that the authority

cited by Respondents supports a finding that Petitioner's claim is exhausted.

Respondents then address the merits of Petitioner's claim. They argue that the Arizona Court of Appeals' decision that Petitioner's aggravated assault charges and convictions were multiplicitous and that the proper remedy was the dismissal of the second count was not contrary to, or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts developed in state court proceedings. Petitioner argues the appellate court erred because the proper remedy is dismissal of both counts.

Petitioner and Respondents both cite Ball v. United States, 470 U.S. 856 (1985) in arguing their positions. The United States Supreme Court in Ball indicated that it had "long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select charges to be brought in a particular case." Id., at 859. Although the government may charge one criminal offense utilizing two theories of guilt, "an accused may not suffer two convictions or sentences on that indictment." Id., at 865. In that case, "the only remedy" is for the trial court "to exercise its discretion to vacate one of the underlying convictions." Id., at 864.

The Ninth Circuit has interpreted Ball to require that the trial court vacate one of the two statutory offenses as the remedy for multiplicity. See, United States v. Zalapa, 509 F.3d 1060, 1063 (9th Cir. (2007) ("In accordance with *Ball*, we therefore remand to the district court with instructions to vacate the multiplicitous conviction, sentence, and [] for one of the two counts."); see also, United States v. Burns, 990 F.2d 1426, 1438 (4th Cir. 1993) ("Even where the defendant has suffered multiple convictions and faces multiple sentences, the appropriate remedy is to vacate all but one."), citing Ball, 470 U.S. at 864-65. Other Circuits have ordered the merger of multiplicitous counts into one as the proper remedy. See, United States v. Platter, 514 F.3d 782, 787 (8th Cir. 2008) (proper remedy for multiplicitous charges is merger of charges into one). Petitioner cites no authority to support an argument that the proper remedy is to dismiss both counts that are multiplicitous.

The Arizona Court of Appeals in its decision noted that "aggravated assault, as defined in A.R.S. § 13-1204(A), constitutes a single offense that may be committed in several ways," such that a defendant "cannot be convicted twice of aggravated assault arising from a single act." (Doc. 12, Exh. V.) As Petitioner's two assault charges arose from a single act – the shooting of P.O. – the court concluded that the aggravated assault charges were multiplicitous. (Id.) The court then vacated Petitioner's second aggravated assault conviction and sentence. The court's conclusion that Petitioner's aggravated assault charges were multiplicitous, and that the proper remedy was to vacate the conviction and sentence on count two was not contrary to, or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

CONCLUSION

Having determined that Petitioner's claims in his amended habeas petition lack merit, the Court will recommend the petition be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Petitioner's amended Petition for Writ of Habeas Corpus (Doc. 6) **DENIED and DISMISSED WITH PREJUDICE**;

IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is justified as the Petitioner has not demonstrated a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure

timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

Dated this 25th day of March, 2022.

Honorable Michelle H. Burns
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 13 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FRANCISCO NUNEZ CARRILLO, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 22-15797 D.C. No. 2:21-cv-01742-ROS District of Arizona, Phoenix ORDER

Before: CANBY and BERZON, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

cc "Appendix H"