No. 22-7895

IN THE

SUPREME COURT OF THE UNITED STATES

Anthony Merrick — PETITIONER
(Your Name)

vs.

Charles Ryan, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Merrick, ADCRR #051614
(Your Name)

ASPC-Y-Cibola, P.O. Box 8909
(Address)

San Luis, Az. 85349
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

1.. When the Court and trial counsel Knew the defendant had demanded to testify and they refused him that right, did the Court have a duty to put on the record colloguy that the defendant Knowingly, Intelligently, and voluntarily waives his right to testify to preserve a fair trial?

a). Because the circuits are split, is there a constitutional right for colloguy to be on the record to waive the fundamental right to testify?

2. Where trial Counsel refused to call the defendant to testify who was demanding to testify and the testimony was material to guilt or innocence, was counsel ineffective?

3 Does the Ninth Circuit decision not to grant a certificate of appealability on Habeas Corpus grounds one and two [Actual innocence and denial of the right to testify], conflict with this courts decisions in LOZADA V. DEEDS, 498 U.S. 430 (1991)(per curiam); and Miller-EL v. Cockrell, 537 U.S. 322 (2003) when Merrick made a substantial showing of the denial of a constitutional right and other state and federal courts have resolved the same issues differently.

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 B to the petition and is

[ ] reported at _____; 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☒ is unpublished.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 A to the petition and is

[ ] reported at _____; 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☒ is unpublished.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 D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Superior Court & Court of Appeals court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

LIST OF PARTIES

[X] 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:

RELATED CASES

There are no related cases I'm aware of.

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TABLE OF AUTHORITIES CITED

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Jan. 23, 2023.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 04-18-2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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).

[ ] For cases from **state courts**:

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

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION - FIFTH AMENDMENT: NO PERSON SHALL BE HELD ~~answer~~ FOR A CAPITOL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

U.S. CONSTITUTION - SIXTH AMENDMENT: IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

U.S. CONSTITUTION - FOURTEENTH AMENDMENT: SEC. 1: ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

Mr. Merrick was convicted in 2011 of fraudulent schemes and artifices, theft and theft of gift cards - the latter two violating double jeopardy, that stemmed from thefts in 2007/2008 from his then friend, Dominick Hurley, who was a Sales manager at Henry Brown, Buick, Pontiac, GMC. Hurley admitted that he alone used the dealership computers to fraudulently divert customers Lowe's and Best Buy gift cards to himself, friends and family. He admitted he alone chose what names to put on the gift card claim forms which included friends and family without their knowledge or participation. Hurley admitted that he stole three Best Buy gift cards before Merrick ever moved into his home, when he stated he first told Merrick about the scheme and thefts. The three Best Buy gift cards he stole without Merrick's knowledge or participation were cards: 3790 3081 941 4293; 3790-3081 941 3615, and 3790 3081 941 3623 and they were stolen using Merricks name. On it's face, Hurley, indirectly admitted to stealing Merricks identity to steal these three cards. However the jury was never told. In fact gift card 3790 3081 941 4293 was stolen and completely used before Merrick moved into Hurleys home, and this card was used to steal a Best Buy reward zone card, which was the catalyst for connecting Merricks name to the other stolen gift cards.

Also undisclosed to the jury was the date Merrick moved into Hurley's home. Between 6-22-06 and 12-12-07 Merrick had an alibi as he was incarcerated in a federal Correctional facility and did not leave it's walls until 12-12-07.

Two of Hurley's crime partners told officers that Merrick was not involved in the crimes and Hurley told them not to tell Merrick about any crimes. This was confirmed by Hurley in his numerous recorded jail calls where he added he was going to lie to prosecutors and the jury about Merrick's involvement so he could get a favorable plea deal. Hurley also confirmed Merrick's innocence in a pretrial defense interview where he said Merrick never knew the customers did not sign the claim forms - giving him the cards. Effectively notifying the state Merrick was innocent of crimes.
At trial, another witness, Richard Salazar, testified that he and Hurley alone negotiated a deal exchanging painting for gift cards and that Hurley sent the cards directly to Salazar, who got them, activated them and spent them - all without Merrick's knowledge or participation. Merrick was convicted of these two gift cards too. [Best Buy 3790 3146 151 5502, and Lowe's 6006 4917 9300 432 4171].
At the close of the states case Merrick told his counsel to call him to the stand to testify. Merrick handed a note to the judge informing her that Merrick was going to testify, but objected to testifying about his religion. The court read it, handed it to defense counsel then remained mute even when defense counsel said he would not call Merrick to testify and rested the defense - a minute after the court read Merricks note, Merrick began to speak out and gesture to the court, but deputies quickly threatened him to remain silent or be tased. Merrick was convicted of all charges.
On a Petition for Post conviction Relief the trial court failed to rule on actual innocence and ruled their was no ineffective counsel when Merrick knew he could testify, but did not make a record in open court.

On Habeas Corpus review, the district court followed the decisions of the state court ruling because the record of the court does not indicate a clear request to testify there was no ineffective counsel. The court also failed to consider Merrick's innocence claim, even though the state court also refused to hear it. Merrick requested a certificate of Appealability [COA] on actual innocence and ineffective assistance of counsel for failing to call Merrick to testify. Merrick pointed out that seven to eleven other circuit courts had decided these two grounds differently than the district court in Arizona and Ninth Circuit court of Appeals and that he met the standards for the issuance of a COA. Both the district court and Ninth circuit court of Appeals denied the requests for a COA, without any discussion. The Ninth circuit court of appeals would later deny a certified ground on appeal. Double Jeopardy.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUITS MISAPPLICATION OF THE CERTIFICATE OF APPEALABILITY STANDARDS OF LOZADA V. DEEDS AND MILLER-EL V. COCKRELL WARRANTS THIS COURTS ATTENTION

The Ninth Circuit's denial of Certificate of appeal on grounds one and two of the Habeas Corpus misapplied Both the Lozada v. Deeds, 498 U.S. 430 (1991)(per curiam) and Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1034 (2003) tests for obtaining a COA. This court requires that "... a prisoner seeking a COA need only demonstrate a 'substantial showing of the denial of a constitutional right.' A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district courts resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragment to proceed further. Under this test a petitioner does not have to prove the district court was wrong, just that it's resolution of the grounds were debatable.

In Merrick's "MOTION FOR CERTIFICATE OF APPEALABILITY FOLLOWING DENIAL OF COA REQUEST BY DISTRICT COURT" [DKT. 4] Merrick pointed out that at least the 1st, 2nd, 7th, 11th, and D.C. circuit courts and district courts in Arkansas, and Oklahoma found that when a defendant does not make a record in open court of his denial of his right to testify, he has not waived his right to testify. So jurists did disagree with the distinct courts resolutions, therefore the Lozada/MILLER-EL tests required the issuance of a COA, on this ground.

Further, in the same motion, Merrick pointed out that at least the 1st, 4th, 5th, 6th, 7th, 8th, 10th and 11th circuit courts and a New York district court found that it was ineffective assistance of counsel when counsel refused to call a defendant to testify in his trial - who demanded to testify and who would produce evidence of his innocence and thereby undermining the states case. Certiorari should be granted

II. THE DECISION OF THE DISTRICT COURT BASED UPON NINTH CIRCUIT PRECEDENT IS IN CONFLICT WITH DECISIONS OF OTHER DISTRICT AND CIRCUIT COURTS

A. ARE TRIAL COURTS REQUIRED TO OBTAIN A DEFENDANTS KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF THE RIGHT TO TESTIFY UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In United States v. Edwards, 897 F.2d 445 (9th cir. 1990), The court held that when a defendant was aware he had a fundamental Constitutional right to testify and remained silent in open court, he has waived the right. Yet other circuits have held that silence does not waive the fundamental Constitutional right to testify - and a judge has a duty to obtain a defendants knowing, voluntary, and intelligent waiver of the right. U.S. v. Chang, 250 F.3d 79.84 (2nd cir. 2001) (No waiver in spite of defendants failure to object); Underwood v. Clarke, 939 F.2d 473, 476 (7th cir 1991) (Refusing to treat defendants failure to object as waiver); U.S. v. Teague, 908 F.2d 752, 759-60 (11th cir. 1990), rev'd on other grounds 953 F.2d 1525 (11th cir, 1992) (defendants failure to object does not constitute waiver of right to testify); U.S. v.

Ortiz, 82 F.3d 1066, 1071 (D.C. Cir. 1996) (silence is not waiver of right to testify); U.S. v. Pennycooke, 65 F.3d 9, 12-13. (3rd cir 1995) (noting that colloquy may be required where attorney-client conflicts are evident); Crawley v. Commonwealth, 107 S.W. 3d 197, 199 (Ky. 2003) (holding that trial counsel's failure to inquire as to whether defendant made a knowing and voluntary waiver of right to testify constituted error where trial court knew the defendant wanted to testify but was kept from the stand by defense counsel). See also 72 A.L.R. 5th 403 §§5-9 for list of cases; also Guam v. Kitano, 2011 WL 3236596 (Guam Terr.).

There is a clear split in the circuits and courts on whether the court must obtain a knowing, voluntary and intelligent waiver of a defendants constitutional right to testify, and whether this right can be waived merely by not making a record of the desire to testify, yet being denied.

This court should review this issue as it involves fundamental constitutional rights of all defendants in criminal cases nationwide. This matter has not been ruled on by this court and the courts are split on the question. Certiorari should be granted.

III. WHEN TRIAL COUNSEL HAS REFUSED TO CALL A DEFENDANT TO THE STAND WHO DEMANDS TO TESTIFY TO MATERIAL ISSUES, WAS COUNSEL INEFFECTIVE

A criminal defendant has the fundamental constitutional right to testify under the Fifth, Sixth and Fourteenth Amendments to the

United States Constitution and that right is "essential to due process of law in a fair adversarial process" Rock v. Arkansas, 483 U.S. 44, 51, 107 S.Ct. 2704 (1987); See also Jones v. Barnes, 463 U.S. 745, 751, (1983). As the Supreme Court observed in Rock, "the most important witness for the defense in many criminal cases is the defendant himself." Id, at 52. Accordingly, "an accused's right to present his own version of events in his own words" is "[e]ven more fundamental ... than the right of self representation". id.

This court has said a lawyer cannot override a defendants decision to testify. Harris v. N.Y., 401 U.S. 222 (1971); See also ABA model Rule of professional conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of representation"); Az. Supreme Court Rule 42, ER 1.2 (a) ("the lawyer shall abide by the clients decision, after consultation with the lawyer, as to ... whether the client will testify).

When trial counsel refused to call Merrick, who was demanding to testify, the first Strickland prong was met. Strickland v. Washington, 466 U.S. 668 (1984).

Because Merrick would have testified to his innocence of all cards and that he was incarcerated when at least one card was stolen and completely used - and how Hurley had stolen his identity to steal gift cards, and the Best Buy reward zone card. This would have likely led the jury to a different result and therefore Stricklands prejudice prong was also met.

Accordingly this court should review this issue as it involves fundamental constitutional rights of all defendants

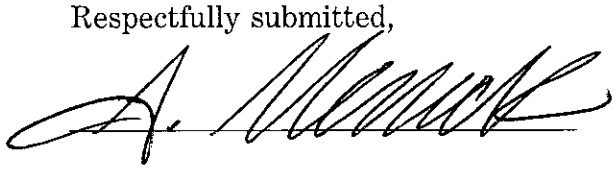
in criminal cases nationwide. This matter has not yet been ruled on by this court and this question warrants this courts attention.

Certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: June 19, 2023

NOT FOR PUBLICATION

FILED

JAN 23 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY JAMES MERRICK,

Petitioner-Appellant,

v.

CHARLES RYAN, *et al.*,

Respondents-Appellees.

No. 19-17247

D.C. No. 2:19-cv-00172-SPL

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Argued and Submitted November 18, 2022
Phoenix, Arizona

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

Anthony Merrick appeals the district court's dismissal of his petition for a writ of habeas corpus challenging, on Double Jeopardy grounds, his convictions for certain offenses in Arizona state court. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

An Arizona jury convicted Merrick of 11 offenses, including one count of fraud in violation of Arizona Revised Statutes § 13-2310 (Count 1); one count of theft of property with a value of at least $4,000 in violation of Arizona Revised

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Statutes § 13-1802 (Count 2); and nine counts of credit-card theft in violation of Arizona Revised Statutes § 13-2102 (Counts 6, 8–11, 14–15, and 23–24). The factual basis for all 11 of Merrick's convictions was his unlawful receipt and retention of 29 gift cards, each valued at $500. *See* ARIZ. REV. STAT. § 13-2101(3)(c) (providing that, for purposes of § 13-2102, "[c]redit card" includes a "stored value card"). The nine credit-card theft charges under § 13-2102 were based on the allegation that, without the consent of the issuers, Merrick "knowingly controlled" one or more of eight specific gift cards on various dates. Counts 1 and 2 were based on Merrick's unlawful receipt and retention of the 29 gift cards generally. Specifically, the fraud charge in Count 1 alleged that, through fraud, Merrick "knowingly obtained a benefit" from the issuers, and the theft charge in Count 2 alleged that, "without lawful authority," Merrick "knowingly controlled" gift cards worth $4,000 or more. At trial, the state argued that Merrick's theft charge involved more than $4,000, because "we have 29 gift cards" and "$500 each equals $14,500." Merrick was given concurrent sentences on all counts.

On appeal, Merrick argued, *inter alia*, that (1) his theft charge in Count 2 was multiplicitous of his nine credit-card theft convictions, in violation of the Double Jeopardy Clause; and (2) some of the nine credit-card theft convictions were multiplicitous of one another to the extent that they relied on the same gift

card. The Arizona Court of Appeals partly agreed with the second argument and vacated Merrick's convictions on Counts 9, 10, 11, and 15. *See State v. Merrick*, 2012 WL 4955425, at *2–3 (Ariz. Ct. App. Oct. 18, 2012). The court's opinion did not address Merrick's other Double Jeopardy argument concerning Count 2, but it expressly affirmed Merrick's convictions on "Counts 1, 2, 6, 8, 14, 23 and 24." *Id.* at *4. Merrick unsuccessfully sought review of the Count 2 Double Jeopardy issue in the Arizona Supreme Court. After the district court denied habeas relief, we granted a certificate of appealability limited to the Count 2 Double Jeopardy issue.

As an initial matter, we reject Merrick's argument that the deferential standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), do not apply to Merrick's Count 2 Double Jeopardy claim. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). This same presumption applies when—as here—"a state-court opinion addresses some but not all of a defendant's claims." *Johnson v. Williams*, 568 U.S. 289, 298 (2013). Merrick has provided no basis for concluding that this presumption has been rebutted, and we therefore treat the Arizona Court of Appeals' decision as having rejected the

Count 2 Double Jeopardy claim on the merits. Accordingly, under AEDPA, a federal court may not grant habeas relief based on that claim unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). In applying these standards to a state court decision that did not explain why it rejected this claim, we "must determine what arguments or theories . . . *could have* supported[] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the U.S. Supreme Court. *Richter*, 562 U.S. at 102 (emphasis added).

Applying these standards, we conclude that fairminded jurists could reasonably reject Merrick's Count 2 Double Jeopardy argument. In addressing this issue, we assume arguendo that Merrick is correct in contending that the elements of a theft charge under § 13-1802 overlap with the elements of a credit-card theft charge under § 13-2102, such that the two statutes do not define separate offenses under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). But just as two bank robberies may be charged under the same statute when a defendant separately robs two banks, so too separate theft and credit-card theft

charges may be brought based on the defendant's theft of distinct underlying gift cards. *See, e.g.*, *United States v. Chilaca*, 909 F.3d 289, 291 (9th Cir. 2018) (noting that the inquiry turns on "the allowable unit of prosecution" under the charged statute (citations and internal quotation marks omitted)). On this record, a reasonable jurist could reach such a conclusion here.

As the case was charged in the indictment and presented at trial, only a total of eight specific gift cards were at issue in the various credit-card theft counts. To sustain the charge of theft involving at least $4,000 under Count 2, only eight of the 29 cards at issue in that count were necessary, because each card was worth $500. Accordingly, Merrick's conviction on Count 2 would not be multiplicitous to the extent that it rested on eight of the 21 cards that were *not* at issue in the credit-card theft counts. Given that the state's theory and evidence at trial were that Count 2 was based on Merrick's possession of *all* 29 gift cards, the Arizona Court of Appeals could reasonably have concluded that, in convicting on Count 2, the jury should be understood to have accepted the state's undifferentiated reliance on all 29 cards. That would mean that the jury concluded that Merrick unlawfully possessed all 29 cards, including the 21 cards that were *not* at issue in the credit-card theft counts. And since only eight cards were necessary to sustain the charge on Count 2, the Arizona Court of Appeals could reasonably have concluded that Count 2 was more than amply supported by non-overlapping cards and that there

was therefore no Double Jeopardy violation. *See Merrick*, 2012 WL 4955425, at *3 (similarly rejecting Merrick's Double Jeopardy challenge to Counts 23 and 24, despite the fact that one of the five cards charged in Count 24 overlapped with the single card charged in Count 23).

For substantially the same reasons, we further conclude that Merrick has not shown a federal law error that "resulted in actual prejudice." *Davis v. Ayala*, 576 U.S. 257, 267 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).[1]

AFFIRMED.

[1] We decline to expand the certificate of appealability to include the additional uncertified issues raised by Merrick in his supplemental *pro se* opening brief. *See* NINTH CIR. R. 22-1(e).

APPENDIX-C

FILED

APR 18 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY JAMES MERRICK, Petitioner-Appellant, v. CHARLES L. RYAN; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 19-17247 D.C. No. 2:19-cv-00172-SPL District of Arizona, Phoenix ORDER

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

The Memorandum filed on January 23, 2023 is amended (1) by replacing the phrase <no basis for concluding> in the penultimate sentence on page 3 with <no persuasive basis for concluding>, and by inserting the following new footnote immediately after the clause in that sentence that ends with <has been rebutted,>:

> As we note below, the Arizona Court of Appeals' reasons for explicitly rejecting Merrick's Double Jeopardy challenge to Counts 23 and 24—*viz.*, that the overlap between the two counts was irrelevant—would similarly apply to the Count 2 Double Jeopardy issue. *See infra* at 6. Under these circumstances, the court's failure to explicitly extend such reasoning to that additional Double Jeopardy challenge is insufficient to rebut the presumption.

An Amended Memorandum reflecting these amendments is filed concurrently with this order. With those amendments, the panel has voted

unanimously to deny the petition for panel rehearing and the supplemental petition for panel rehearing. Judges Owens and Collins have voted to deny the petition for rehearing en banc and the supplemental petition for rehearing en banc, and Judge Bybee so recommends. The full court has been advised of both petitions for rehearing en banc, and no judge of the court has requested a vote on either of them. *See* FED. R. APP. P. 35(f). Accordingly, the petition for panel rehearing and rehearing en banc (Dkt. Entry 72) and the supplemental petition for panel rehearing and rehearing en banc (Dkt. Entry 74, 76) are **DENIED**. No further petitions for rehearing may be filed.