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NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Corletha Sherie Davis,

 Petitioner,

v.

Charles L Ryan, et al.,

 Respondents.

No. CV-14-01950-PHX-DJH
ORDER

Pending before the Court is *pro se* Petitioner’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and the Report and Recommendation (“R & R”) of United States Magistrate Judge Michelle H. Burns (Doc 9), wherein she recommends denial of the Petition and dismissal with prejudice. Petitioner timely filed objections to the R&R. (Doc. 10). Respondents filed no objections. The Court now rules as follows. **I.**

R & R

Petitioner is seeking habeas relief based upon one narrow claim, which she raised on direct appeal to the Arizona Court of Appeals. Namely, Petitioner alleges:

that because the trial court gave a duplicitous, dangerous-offense instruction in that it included two distinct theories the jury could have used to find the offense was dangerous (serious physical injury and use of a deadly weapon), there was no unanimous jury finding of dangerousness that would support aggravating Petitioner’s sentence, as under the Arizona statutory sentencing scheme “serious physical injury” could not be used as an aggravating factor.

1 (Doc. 9 at 4:11-16). After a detailed and accurate recitation of the background of this
2 claim, the Magistrate Judge proceeded to analyze whether a faulty jury instruction could
3 support habeas relief herein.

4 At step one of this analysis, the Magistrate Judge found that “constitutional error
5 occurred when the trial court relied on the ambiguous dangerousness finding to impose
6 an aggravated sentence[.]” *id.* at 6:12-13 (citation omitted), which the State conceded in
7 its answer. (Doc. 7 at 8:7-11). Based upon this finding, the Magistrate Judge properly
8 applied the harmless-error test, and found that “Petitioner was not prejudiced, . . . , by the
9 erroneous jury instruction, as it did not have a substantial and injurious effect on her
10 trial.” (*Id.* at 6:17-18). Finally, the Magistrate Judge found, among other things, that
11 “Petitioner does not allege or establish that she was prejudiced by the erroneous jury
12 instruction, and thus Petitioner is not entitled to habeas relief.” (*Id.* at 7:7-8) (citation
13 omitted). Because Petitioner’s habeas petition failed on the merits, the Magistrate Judge,
14 as stated at the outset, recommended denial and dismissal with prejudice. The Magistrate
15 Judge further recommended denial of a Certificate of Appealability and leave to proceed
16 *in forma pauperis* on appeal because Petitioner did not make the requisite showing. *See*
17 *id.* at 7:23-25.

18 **II. Analysis**

19 This Court must “make a de novo determination of those portions of the report or
20 specified proposed findings or recommendations to which” a Petitioner objects. 28
21 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) (“The district judge must
22 determine de novo any part of the magistrate judge’s disposition that has been properly
23 objected to.”); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (same).
24 Conversely, the relevant provision of the Federal Magistrates Act, 28 U.S.C. §
25 636(b)(1)(C), “does *not* on its face *require any review at all* . . . of any issue that is not
26 the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1989) (emphasis added);
27 *see also* *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005) (“Of course, de novo
28 review of a R & R is only required when an objection is made to the R & R, [*Reyna-*
Tapia,] 328 F.3d [at] 1121. . . (“Neither the Constitution nor the [Federal Magistrates

1 Act] requires a district judge to review, de novo, findings and recommendations that the
2 parties themselves accept as correct”[.]”). Likewise, it is well-settled that “failure to
3 object to a magistrate judge's factual findings waives the right to challenge those
4 findings[.]” *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015) (quoting *Miranda*
5 *v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (internal quotation marks omitted)
6 (footnote omitted)).

7 Although Petitioner Davis did file objections, critically, she is not challenging any
8 aspect of the R & R. Instead, Petitioner contends that the State “failed to notify [her] of
9 [its] intent to use” another sentence aggravator -- use of a deadly weapon. (Doc 10 at
10 8:24-27). This seemingly new claim was, understandably, not addressed in the R & R.
11 Moreover, because Petitioner makes no objections at all to the R & R, this Court is not
12 required to review the R & R. Nonetheless, the Court has reviewed the R & R and agrees
13 with its sounding reasoning, findings and recommendations. The Court will, therefore,
14 accept the R & R, deny the Petition and dismiss this matter with prejudice. *See* 28 U.S.C.
15 § 636(b)(1)(C) (“A judge of the court may accept, reject, or modify, in whole or in part,
16 the findings or recommendations made by the magistrate judge.”); Fed.R.Civ.P. 72(b)(3)
17 (same).

18 **III. Conclusion**

19 Accordingly,

20 **IT IS ORDERED ACCEPTING AND ADOPTING** as an Order of this Court
21 Magistrate Judge Burns’ R & R (Doc. 9).

22 **IT IS FURTHER ORDERED DENYING AND DISMISSING WITH**
23 **PREJUDICE** the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc.
24 1).

25 **IT IS FURTHER ORDERED** a Certificate of Appealability and leave to proceed
26 *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a substantial
27 showing of the denial of a constitutional right.

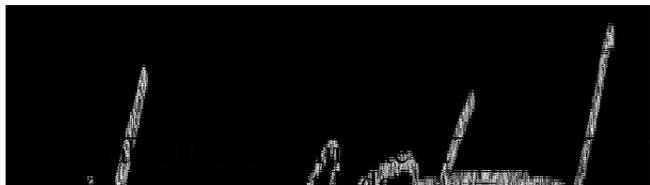
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IT IS FINALLY ORDERED that the Clerk of the Court shall terminate this action and enter judgment accordingly.

Dated this 20th day of June, 2016.



United States District Judge