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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Daniel Aguilar,

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No. CV 08-0319-PHX-JAT

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Petitioner,

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ORDER

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vs.

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Dora B. Schriro; et al.,

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Respondents.

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Pending before this Court is Petitioner’s Petition for Writ of Habeas Corpus. On January 22, 2009, the Magistrate Judge to whom this case was assigned issued a Report and Recommendation (R&R), in which the Judge recommended that the Petition be denied. Petitioner timely filed objections to the R&R and Respondents filed a response to the objections.

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I. Review of R&R

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This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that the district judge must review the magistrate judge’s findings and recommendations *de novo if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in original). District courts are not required to conduct “any review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) (“the court shall

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1 make a *de novo* determination of those portions of the [report and recommendation] to which
2 objection is made.”).

3 The Petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is
4 incarcerated based on a state conviction. With respect to any claims that Petitioner exhausted
5 before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must deny the
6 Petition on those claims unless “a state court decision is contrary to, or involved an
7 unreasonable application of, clearly established Federal law”¹ or was based on an
8 unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).
9 Further, this Court must presume the correctness of the state court’s factual findings
10 regarding a petitioner’s claims. 28 U.S.C. § 2254(e)(1); *Ortiz v. Stewart*, 149 F.3d 923, 936
11 (9th Cir. 1998).

12 As discussed above, Petitioner filed objections to the R&R. This Court will review
13 the portions of the R&R to which Petitioner objected *de novo*.

14 **II. Background**

15 In the R&R, the Magistrate Judge made the following factual findings. Petitioner pled
16 guilty in Maricopa county superior court. Petitioner now seeks to return to superior court for
17 trial on the theory that his counsel was ineffective in his plea process. Petitioner raised his
18 claim of ineffective assistance of counsel in his petition for post-conviction relief. Neither
19 party has objected to these findings, and this Court accepts and adopts them.

20 **III. Ineffective Assistance of Counsel**

21 As the Magistrate Judge correctly recited in the R&R, to prevail on an ineffective
22 assistance of counsel claim, Petitioner must show that his counsel’s performance fell below
23 an objective standard of reasonableness and that but for counsel’s unreasonable performance,
24 the result of the proceeding would have been different. R&R at 4 (citing *Strickland v.*
25 *Washington*, 466 U.S. 668, 687-90 (1984)). In the context of a plea agreement, Petitioner
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27 ¹ Further, in applying “Federal law” the state courts only need to act in accordance with
28 Supreme Court case law. *See Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

1 “must show that there is a reasonable probability that but for counsel’s errors, he would not
2 have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S.
3 52, 59 (1985). In this case, Petitioner claims his counsel was ineffective in three ways: 1)
4 counsel failed to advise Petitioner that the state would play a recording of Petitioner’s phone
5 calls while in custody at sentencing; 2) counsel failed to explain some of the terms of the plea
6 to Petitioner; and 3) counsel improperly induced Petitioner to enter into the plea.

7 **A. Claim 1**

8 As to Plaintiff’s first theory of ineffective assistance of counsel, in the R&R, the
9 Magistrate Judge concluded that the state court’s decision was not contrary to nor an
10 unreasonable application of federal law, nor an unreasonable determination of the facts, for
11 two reasons. First, Petitioner has offered no evidence that his counsel knew that the state
12 intended to play the phone calls at sentencing, so counsel could not have been ineffective for
13 failing to tell Petitioner about this before Petitioner entered his plea. Second, even if counsel
14 did have this knowledge, Petitioner has failed to show that had counsel advised him of this
15 fact, the result of his case would have been different; particularly considering the Petitioner
16 knew the calls were being recorded. R&R at 4-6.

17 Petitioner objects arguing that this Court cannot know what his counsel knew and
18 when he knew it because the state court did not conduct an evidentiary hearing. Objections
19 at 3. Thus, Petitioner argues that the state court’s decision was unreasonable. This Court
20 agrees with the state court’s decision that Petitioner has not presented a colorable claim
21 justifying an evidentiary hearing because Petitioner has not shown that his advance
22 knowledge of the potential for the playing of the tapes at sentencing would have changed
23 Petitioner’s decision to enter into a plea or the ultimate sentence. *See* R&R at 5 (quoting the
24 state court’s decision). Thus, Petitioner cannot show prejudice under *Strickland* and relief
25 on this claim will be denied.

26 **B. Claim 2**

27 Petitioner next claims that his counsel was ineffective for failing to explain certain
28 legal language in the plea agreement to him. In the R&R, the Magistrate Judge concludes

1 that the state court's decision to deny relief was not contrary to, nor an unreasonable
2 application of federal law, nor an unreasonable determination of the facts. Specifically,
3 Petitioner's argument that he did not understand he was waiving jury fact-finding of
4 aggravators is belied by the fact that in his plea colloquy he said he understood and was
5 choosing to waive jury fact-finding. R&R at 6-7 (quoting state court decision).

6 In his Objections, Petitioner argues that the judge's explanation in the colloquy was
7 inadequate because he used the same words to describe the issue as his attorney used, and
8 the same language as the plea agreement. Objections at 5. The Court said,

9 Finally, do you understand by entering into these pleas, you're giving up your
10 right to a jury trial; instead, consenting to judicial fact finding for any
11 aggravated circumstances that the Court would find and the full range of
sentences allowed by law.

12 R&R at 6-7 (emphasis added). Petitioner responded, "Yes, Your Honor." *Id.* at 7.

13 Petitioner's contention that he did not understand is absolutely contradicted by the
14 record. Accordingly, the Court finds neither deficient performance nor prejudice on the
15 ineffective assistance of counsel claim, and accepts the Magistrate Judge's recommendation
16 that the state court's decision in this regard was neither contrary to nor an unreasonable
17 application of federal law, nor an unreasonable determination of the facts. Further, as to
18 Petitioner's request for an evidentiary hearing in federal court, no evidentiary hearing is
19 necessary when the Court "is able to determine without a hearing that the allegations are
20 without credibility" *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991).
21 The Court finds Petitioner's arguments are not credible and will not hold an evidentiary
22 hearing. Relief on this claim will be denied.

23 C. Claim 3

24 Similar to claim 2, the Magistrate Judge found that the state court's decision on claim
25 3 was not contrary to nor an unreasonable application of federal law, nor an unreasonable
26 determination of the facts because Petitioner's argument is inconsistent with his own
27 statements during his plea colloquy. Specifically, Petitioner now claims that his counsel
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