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**NOT FOR PUBLICATION**  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

John Nicholas Drilling,

Petitioner,

vs.

Dora B. Schriro, et al.,

Respondents.

) No. CV-08-00786-PHX-FJM

) **ORDER**

The court has before it petitioner’s petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and memorandum of points and authorities in support of the petition (docs. 1 & 3), respondents’ answer (doc. 12), petitioner’s reply and memorandum of points and authorities in support of reply (docs. 15 & 16), a report and recommendation of the United States Magistrate Judge (doc. 17), and petitioner’s objections (doc. 18). For the following reasons, we accept the magistrate judge’s recommendation to deny the habeas petition.

**I**

On December 2, 2005, petitioner pled guilty to two counts of involving a minor in a drug offense (counts one and five) and two counts of attempted sexual assault with a minor (counts nine and fourteen). On February 23, 2006, he was sentenced to consecutive aggravated terms of 6 years imprisonment on counts one and five and concurrent terms of lifetime probation on counts nine and fourteen. By entering a plea agreement, petitioner

1 waived his right to a conventional direct appeal under A.R.S. § 13-4033(B), but retained the  
2 right to seek review in an “of-right proceeding” under Rule 32, Ariz. R. Crim. P.

3 Petitioner filed a notice of post-conviction relief on May 5, 2006. On October 5,  
4 2006, appointed counsel notified the court that she could find no meritorious claims to raise  
5 on petitioner’s behalf, and the court granted an extension for petitioner to file his own  
6 petition. Petitioner filed a *pro se* petition for post conviction relief on November 3, 2006.  
7 Petitioner argued that: (1) he was denied effective assistance of counsel because he was not  
8 advised of his right to have a jury determine aggravating factors beyond a reasonable doubt;  
9 and (2) his lifetime probation sentence violates equal protection. Petitioner’s Rule 32 motion  
10 was denied at every stage of state court review. On April 24, 2008, he timely filed the  
11 pending petition for writ of habeas corpus claiming that: (1) he was denied effective  
12 assistance of counsel; (2) the prosecution violated due process by “surreptitiously plac[ing]  
13 a waiver of fundamental rights in the plea agreement”; (3) his lifetime probation sentence  
14 violates due process, equal protection, and the protection from cruel and unusual punishment;  
15 and (4) the plea agreement violated due process and fundamental fairness. Petition for Writ  
16 of Habeas Corpus at 5-8.

17 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), habeas  
18 relief shall not be granted on any claim that was adjudicated on the merits in state court  
19 unless the state court’s decision was: (1) contrary to clearly established federal law; or (2)  
20 based on an unreasonable determination of the facts considering the evidence presented. 28  
21 U.S.C. § 2254(d). The magistrate judge concluded that the state court did not err in applying  
22 the law or evaluating the facts and recommends denying the petition. We agree.

## 23 II

24 In his objections to the magistrate judge's report and recommendation, petitioner again  
25 argues that he was deprived of constitutional rights. First, petitioner maintains that counsel  
26 failed to explain to him his right to have a jury find aggravating factors beyond a reasonable  
27 doubt. Because of this failure, petitioner claims that he was deprived effective assistance of  
28 counsel. This argument is without merit.

1 To prove ineffective assistance of counsel, petitioner must show that: (1) counsel's  
2 representation was objectively unreasonable; and (2) he was prejudiced by it. Strickland v.  
3 Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Petitioner's claim that  
4 counsel did not explain his rights to him is contradicted by his representations in the plea  
5 agreement. Petitioner signed an addendum to the plea agreement specifically acknowledging  
6 that he waived his right to have a jury consider aggravating circumstances. The addendum  
7 also states that petitioner "discussed the case and [his] constitutional rights with [his]  
8 lawyer." Response, Ex. C.

9 Moreover, even if petitioner's attorney failed to explain his right to have a jury  
10 consider aggravating circumstances, he suffered no prejudice. An attorney's failure to advise  
11 a defendant of rights is not prejudicial when the defendant is informed by the court of the  
12 consequences of his guilty plea. See Womack v. Del Papa, 497 F.3d 998, 1003 (9th Cir.  
13 2007). At the change in plea hearing, the court explained to petitioner that he had a right to  
14 have aggravating facts decided by a jury beyond a reasonable doubt, and petitioner expressly  
15 agreed to waive that right. Response, Ex. B at 29.

16 Next, petitioner claims he was deprived due process because the prosecution did not  
17 plainly state in the plea agreement that he was waiving his right to have a jury determine  
18 aggravating factors. We disagree. In the addendum to the plea agreement, petitioner  
19 expressly consented "to judicial factfinding by preponderance of the evidence as to any  
20 aspect or enhancement of sentence," and waived the right to have a jury "determine any fact  
21 used to impose a sentence." Response, Ex. C. This waiver was not surreptitious and does  
22 not violate due process.

23 Finally, petitioner argues that his lifetime probation sentence is illegal. Petitioner  
24 claims that a term of lifetime probation violates A.R.S. §§ 13-912 & 13-905. However, the  
25 Arizona statutes to which petitioner cites provide for the restoration of civil rights upon the  
26 completion of a probationary term and do not apply to petitioner's lifetime sentence. A.R.S.  
27 §§ 13-912 & 13-905. Lifetime probation for sexual offenses is specifically authorized by  
28 Arizona statute. A.R.S. § 13-902(E).

