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**NOT FOR PUBLICATION**

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Russell Bruce Gillott,

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No. CV-09-00849-PHX-FJM

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Petitioner,

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**ORDER**

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vs.

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Charles Ryan, et al.,

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Respondents.

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The court has before it Russell Gillott’s petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (doc. 1), respondents’ answer (doc. 20), and petitioner’s reply (doc. 23). We also have before us the United States Magistrate Judge’s report and recommendation (doc. 24), petitioner’s objections (doc. 27), and respondents’ response (doc. 28).

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**I**

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In 2003, petitioner pled guilty in the Superior Court of Arizona in Maricopa County to one count of sexual conduct with a minor (Count 9) and two counts of attempted sexual conduct with a minor (Count 4, renumbered from Count 6, and Count 12). A.R.S. §§ 13-1001, -1405. Under a plea agreement, petitioner stipulated to no sentencing recommendations for Count 4, committal to the Arizona Department of Corrections for Count 9, and lifetime probation for Count 12. The court sentenced him to 15 years on Count 4, 20 years on Count 9, and lifetime probation on Count 12. Because of the sentencing

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1 provisions for dangerous crimes against children, petitioner is ineligible for early release on  
2 Count 9, and the sentence on Count 4 must be served consecutive to the sentence on Count  
3 9. A.R.S. § 13-604.01 (current version at A.R.S. § 13-705).

4 In a petition for post-conviction relief, petitioner claimed ineffective assistance of  
5 counsel. At an evidentiary hearing, he asserted that his former counsel did not adequately  
6 inform him that he could receive a sentence other than probation on Count 4, he would be  
7 ineligible for early release on Count 9, and he would serve potential multiple sentences  
8 consecutively. He also asserted that his misunderstanding of the plea agreement continued  
9 through the change of plea hearing because the court said, as transcribed, “Your agreement  
10 says there are no agreements as to sentencing. As to Count 6 and Count 12, you will be  
11 placed on lifetime probation.” Answer, Ex. H, Attachment C at 5. In support, his sister  
12 testified that he had told her that he would receive 13 years on one count and probation on  
13 two other counts. Petition, Ex. 6 at 63. His former counsel, however, testified that he read  
14 and explained the plea agreement to petitioner, which included the stipulation to no  
15 recommendation on Count 4 and a provision on serving consecutive sentences. Id. at 44-46.  
16 He also said that he informed petitioner of his ineligibility for early release. Id.

17 In the last reasoned state court decision, the court denied petitioner’s claim on the  
18 merits. It found that petitioner’s former counsel met with petitioner and “fully explained the  
19 terms of the plea agreement, including the possible penalties and the structure of any  
20 sentence.” Answer, Ex. P at 2. The court also found that the change of plea hearing  
21 transcript more likely should have read: “Your agreement says there are no agreements as  
22 to sentencing as to count 6. And count 12, you will be placed on lifetime probation.” Id.

23 Petitioner renews his ineffective assistance of counsel claim in his petition for a writ  
24 of habeas corpus. To prevail, he must show that the state court decision “was contrary to,  
25 or involved an unreasonable application of, clearly established Federal law, as determined by  
26 the Supreme Court of the United States” or “was based on an unreasonable determination of  
27 the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C.  
28 § 2254(d). To the extent that he challenges a state court determination of a factual issue

1 based on evidence extrinsic to the state court record, that is, evidence presented for the first  
2 time in federal court, he must rebut a presumption of correctness by clear and convincing  
3 evidence. Id. § 2254(e)(1); Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004)  
4 (interpreting § 2254(e)(1) to apply only to challenges based on extrinsic evidence); cf. Wood  
5 v. Allen, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 841, 848-49 (2010) (citing Taylor and noting that the  
6 Court has not resolved a circuit split on the correct application of § 2254(e)(1)).

7 Under clearly established federal law, a defendant claiming ineffective assistance of  
8 counsel must show that “counsel made errors so serious that counsel was not functioning as  
9 the ‘counsel’ guaranteed the defendant by the Sixth Amendment” based on an objective  
10 standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct.  
11 2052, 2064 (1984). In the context of a guilty plea, a defendant must also show prejudice by  
12 showing a reasonable probability that he would have insisted on going to trial but for  
13 counsel’s errors. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

14 After de novo consideration of the issues, we accept the Magistrate Judge’s  
15 recommended decision and deny petitioner’s claim.

## 16 II

17 In his Objection, petitioner maintains that the state court unreasonably found that his  
18 former counsel informed him of the consequences of accepting the plea agreement and  
19 pleading guilty. Petitioner asserts that his former counsel’s testimony was not credible  
20 because he said that his explanations were always understood by his English-speaking  
21 clients, he read every word of the plea agreement to petitioner, and he explained petitioner’s  
22 ineligibility for early release to him even though it was not covered in the plea agreement.  
23 We agree with the Magistrate Judge that the state court was in the best position to evaluate  
24 the credibility of a witness. Nothing about the testimony of petitioner’s former counsel  
25 suggests that the state court unreasonably determined the facts.

26 Petitioner also objects to the Magistrate Judge’s conclusion that he fails to show that  
27 either the trial court or counsel was required to inform him of his ineligibility for early  
28 release. Petitioner relies on authority based on a trial court’s general obligation to accept

1 only knowing and voluntary guilty pleas and the Arizona Rules of Criminal Procedure, which  
2 specifically mention an understanding of special conditions regarding parole. See State v.  
3 Djerf, 191 Ariz. 583, 594, 959 P.2d 1274, 1285 (1998) (citing Boykin v. Alabama, 395 U.S.  
4 238, 89 S. Ct. 1709 (1969), and Rule 17.2, Ariz. R. Crim. P.). As a matter of clearly  
5 established federal law, however, “the Supreme Court has never held that the United States  
6 Constitution requires furnishing a defendant with information about parole eligibility in order  
7 for a guilty plea to be deemed voluntary.” Lambert v. Blodgett, 393 F.3d 943, 981 n.26 (9th  
8 Cir. 2004). Therefore, petitioner would not be entitled to relief on this issue even if his  
9 former counsel had not explained his ineligibility for early release to him.

10 Next, petitioner objects based on the state court’s failure to address his sister’s  
11 testimony. To render a resulting finding unreasonable, unaddressed evidence must be  
12 “highly probative and central” to a petitioner’s claim. Taylor, 366 F.3d at 1001. Petitioner  
13 contends that his sister’s testimony corroborated his misunderstanding of the plea agreement.  
14 His sister testified that he said he would receive 13 years on one count and probation on the  
15 other two. This is consistent with petitioner’s best-case scenario under the plea agreement,  
16 but it is inconsistent with his position that he understood that “there was no agreement or  
17 stipulation to any particular amount of time in prison.” Reply at 10. Moreover, evidence that  
18 petitioner misunderstood the plea agreement is not highly probative that it was caused by the  
19 ineffective assistance of counsel. “Considered in the context of the full record bearing on the  
20 issue presented in the habeas petition,” Taylor, 366 F.3d at 1001, his sister’s unaddressed  
21 testimony does not suggest that the state court’s findings were unreasonable.

22 Petitioner also asserts that the transcript from the change of plea hearing reflects what  
23 he actually heard, which was a pause between “sentencing” and “as to Count 6.” Thus, he  
24 contends that he reasonably continued to believe that he would receive probation on two  
25 counts. If petitioner heard a pause, however, he would necessarily have heard the court say,  
26 “Your agreement says there are no agreements as to sentencing,” as a complete statement.  
27 Such a statement would have been inconsistent with petitioner’s claimed understanding of  
28 the plea agreement. In any case, as the Magistrate Judge explains, the court subsequently

1 clarified the terms of the plea agreement. We reject petitioner's objection based on his  
2 understanding of the change of plea hearing.

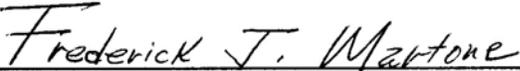
3 Petitioner's remaining objections concern whether he intentionally misled the state  
4 court, the evidentiary weight of a statement waiving the right to a jury trial, the circumstances  
5 surrounding a settlement conference, and whether a statement should be attributed to the state  
6 court or to petitioner. We reject these objections because they are insubstantial and  
7 tangential to petitioner's ineffective assistance of counsel claim.

8 We conclude that petitioner fails to show that the state court decision was based on  
9 an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(2). Although he  
10 proposes to present evidence concerning his glasses that was excluded from his state court  
11 hearing, he does not challenge the state court's evidentiary ruling, and the evidence is  
12 otherwise not clear and convincing proof that the state court incorrectly decided a factual  
13 issue. See id. § 2254(e)(1). Finally, petitioner points out that the state court's denial of his  
14 ineffective assistance of counsel claim is not itself a finding of a fact, but he does not show  
15 that the decision was contrary to, or an unreasonable application of, clearly established  
16 federal law. See id. § 2254(d)(1). Accordingly, we accept the Magistrate Judge's  
17 recommended decision and deny the petition.

18 **IT IS THEREFORE ORDERED DENYING** the petition for writ of habeas corpus  
19 (doc. 1).

20 **IT IS FURTHER ORDERED DENYING** a certificate of appealability and leave  
21 to proceed in forma pauperis on appeal because petitioner has not made a substantial showing  
22 of the denial of a constitutional right.

23 DATED this 22<sup>nd</sup> day of July, 2010.

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 Frederick J. Martone  
27 United States District Judge  
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