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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Julio Cesar Morales,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondents.

No. CV-14-01729-PHX-DJH

ORDER

This matter is before the Court on Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and the Report and Recommendation ("R&R") issued by United States Magistrate Judge Bridget S. Bade (Doc. 13).

Petitioner raises two grounds for relief in the Petition. In Ground One, Petitioner alleges his second trial counsel, David Gregan, provided ineffective assistance in violation of the Sixth Amendment by promising Petitioner a more favorable plea deal than the available offer of 3.5 years in prison; Plaintiff instead received eight years. (Doc. 1 at 6). In Ground Two, Petitioner alleges his first trial counsel, Kent Volkmer, provided ineffective assistance in violation of the Sixth Amendment by failing or refusing to accurately convey the original plea offer to Petitioner. (Doc. 1 at 7). After a thorough and well-reasoned analysis, the Magistrate Judge determined that Petitioner failed to show that the Arizona State Courts' rejection of his claims was based on an unreasonable determination of the facts or that it was contrary to or an unreasonable application of federal law. Accordingly, the Magistrate Judge recommends the Petition be denied.

1 (Doc. 13 at 23).

2 Petitioner filed an Objection to the R&R ("Objection") (Doc. 14) on April 16,
3 2015. Respondents have not filed a response to Petitioner's Objection. On April 27,
4 2015, Petitioner filed a Motion for Clarification (Doc. 15) in which he inquires whether
5 his Objection was in proper form.

6 **I. Background**

7 The Magistrate Judge described in the R&R the procedural and factual
8 background of the case. (Doc. 13 at 1-9). The Court therefore finds it unnecessary to
9 repeat the same information here. Moreover, Petitioner has not objected to any of the
10 information in the background section. *See Thomas v. Arn*, 474 U.S. 140, 149 (1989)
11 (The relevant provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(C), "does
12 not on its face require any review at all . . . of any issue that is not the subject of an
13 objection.").

14 **II. Analysis**

15 Petitioner asserts in his Objection that the Magistrate Judge erred in
16 recommending that his ineffective assistance claims be denied. Petitioner disagrees with
17 the Magistrate Judge's conclusion and argues that the State Court's decision was based
18 on an unreasonable determination of the facts, and is contrary to or an unreasonable
19 application of federal law. Petitioner further contends the Magistrate Judge erred in
20 recommending that a certificate of appealability and leave to proceed in forma pauperis
21 on appeal be denied. Lastly, Petitioner argues that an evidentiary hearing should be
22 granted.

23 The district judge "shall make a de novo determination of those portions of the
24 report or specified proposed findings or recommendations to which objection is made."
25 28 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) ("The district judge must
26 determine de novo any part of the magistrate judge's disposition that has been properly
27 objected to."); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (same). The judge "may
28 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)(C); Fed.R.Civ.P. 72(b)(3).

1 **A. Merits of Claims**

2 As noted above, Petitioner alleges in Ground One that Attorney Gregan provided
3 ineffective assistance of counsel by promising, but failing to obtain, a better plea offer.
4 Petitioner alleges in Ground Two that Attorney Volkmer provided ineffective assistance
5 by failing to accurately convey to Petitioner the original plea offer. In his Objection,
6 Petitioner does not challenge the Magistrate Judge's discussion of the relevant legal
7 standards, including the strict standards to establish ineffective assistance under
8 *Strickland v. Washington*, 466 U.S. 668 (1984) and the highly deferential standard for
9 habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996
10 ("AEDPA"). (See R&R at 9-13). Rather, Petitioner claims the Magistrate Judge erred in
11 the conclusions she reached upon applying the legal standards. Petitioner contends his
12 lawyers were ineffective and the State Court's ruling to the contrary was sufficiently
13 erroneous to meet the high standard for habeas relief. The Court disagrees.

14 Under the AEDPA, a habeas corpus petition cannot be granted unless the State
15 court decision was: (1) "contrary to, or involved an unreasonable application of, clearly
16 established Federal law, as determined by the Supreme Court of the United States," or
17 was (2) "based on an unreasonable determination of the facts in light of the evidence
18 presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). The petitioner
19 bears the burden of proving the standards for habeas relief have been met. *Woodford v.*
20 *Visciotti*, 537 U.S. 19, 25 (2002). When applying this highly deferential standard of
21 review, "the federal court should review the 'last reasoned decision' by a state court"
22 *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Accordingly, the Court has
23 reviewed the Memorandum Decision issued by the Arizona Court of Appeals on
24 February 10, 2014. (Doc. 11-2 at 83-83).¹ That decision was issued after Petitioner filed
25 a petition for review of the trial court's denial of his petition for post-conviction relief.
26 (Doc. 11-2 at 65-81).

27 ¹ In conducting its *de novo* review, the Court has also reviewed the full State Court
28 record, paying special attention to the post-conviction proceedings, including the
transcript of the evidentiary hearing in the trial court and the trial court's written decision
denying Petitioner's petition for post-conviction relief.

1 The controlling Supreme Court precedent on claims of ineffective assistance of
2 counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a convicted
3 defendant must show that counsel’s performance was objectively deficient and counsel’s
4 deficient performance prejudiced the petitioner. *Id.* at 687. To be deficient, counsel’s
5 performance must fall “outside the wide range of professionally competent assistance.”
6 *Id.* at 690. When reviewing counsel’s performance, the court engages a strong
7 presumption that counsel rendered adequate assistance and exercised reasonable
8 professional judgment. *Id.* “A fair assessment of attorney performance requires that
9 every effort be made to eliminate the distorting effects of hindsight, to reconstruct the
10 circumstances of counsel’s challenged conduct, and to evaluate the conduct from
11 counsel’s perspective at the time.” *Id.* at 689. Review of counsel’s performance is
12 “extremely limited.” *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir. 1998), *rev’d*
13 *on other grounds*, 525 U.S. 141 (1998). Acts or omissions that “might be considered
14 sound trial strategy” do not constitute ineffective assistance of counsel. *Strickland*, 466
15 U.S. at 689.

16 In addition to showing counsel’s deficient performance, a petitioner must establish
17 that he suffered prejudice as a result of that deficient performance. *Id.* at 691-92. To
18 show prejudice, a petitioner must demonstrate a “reasonable probability that, but for
19 counsel’s unprofessional errors, the result of the proceeding would have been different.
20 A reasonable probability is a probability sufficient to undermine confidence in the
21 outcome.” *Id.* at 694; *Hart v. Gomez*, 174 F.3d 1067, 1069 (9th Cir. 1999); *Ortiz v.*
22 *Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). The prejudice component “focuses on the
23 question whether counsel’s deficient performance renders the result of the trial unreliable
24 or the proceeding fundamentally unfair.” *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).
25 It is not enough to merely show “that the errors had some conceivable effect on the
26 outcome of the proceeding.” *Strickland*, 466 U.S. at 693.

27 A habeas court may proceed directly to the prejudice prong without deciding
28 whether counsel’s performance was deficient. *Id.* at 697; *Jackson v. Calderon*, 211 F.3d
1148, 1155 n. 3 (9th Cir. 2000) (citing *Strickland*). The court, however, may not assume

1 prejudice solely from counsel’s allegedly deficient performance. *Jackson*, 211 F.3d at
2 1155.

3 In the context of a habeas petition, a petitioner must do more than demonstrate that
4 the State Court applied *Strickland* incorrectly. *Bell*, 535 U.S. at 698-99. Rather, a
5 petitioner must show the State Court “applied *Strickland* to the facts of his case in an
6 objectively unreasonable manner.” *Id.* Because the standards created by *Strickland* and
7 § 2254(d) are both “highly deferential,” review under both standards in tandem is even
8 more deferential. *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citations omitted).
9 “[T]he question is not whether counsel’s actions were reasonable. The question is
10 whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential
11 standard.” *Id.*

12 In its Memorandum Decision, the Arizona Court of Appeals rejected Petitioner’s
13 two claims of ineffective assistance. Regarding Attorney Gregan, the Court of Appeals
14 explained that “[t]he [trial] court found that [Attorney Gregan] had told Morales and his
15 girlfriend ‘he believed that he could get a better deal,’ not that counsel had unequivocally
16 promised Morales a more favorable deal would become available.” (Doc. 11-2 at 85).
17 Regarding the claim against Attorney Volkmer, the Court of Appeals explained that the
18 trial court properly relied on a recorded jail phone call between Petitioner and his mother
19 that demonstrated Petitioner was aware of a two-year plea offer obtained by Attorney
20 Volkmer but Petitioner chose to reject it. (*Id.*). Thus, the Court of Appeals affirmed the
21 denial of Petitioner’s post-conviction relief claims of ineffective assistance.

22 Here, the Court finds Petitioner has failed to demonstrate that the Court of Appeals
23 decision affirming the trial court’s decision was contrary to, or involved an unreasonable
24 application of, clearly established Supreme Court law, or was based on an unreasonable
25 determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). First, with regard to
26 Attorney Volkmer, who first represented Petitioner, this Court agrees with the trial
27 court’s discussion of the facts and application of the law in its decision denying post-
28 conviction relief. (*See* Doc. 11-2 at 48-51). Based on the evidentiary hearing testimony
of the first prosecutor and Mr. Volkmer, the trial court reasonably found that the

1 prosecutor extended a plea offer capping Petitioner’s prison time at 3.5 years. (Doc. 11-2
2 at 49). Both witnesses further testified that a better offer calling for two years in prison
3 was subsequently made but it had to be accepted quickly. (*Id.*)

4 Although Petitioner and his girlfriend testified that the better offer was never
5 communicated to Petitioner, the trial court relied on a recorded jail phone call between
6 Petitioner and his mother to conclude Petitioner had been made aware of the better offer.
7 (*Id.*). After summarizing the content of the call, the trial court concluded that “[b]ased on
8 this call it appears that Mr. Volkmer did, in fact, transmit the two year offer and that
9 Petitioner was aware of when it would expire.” (*Id.*). Thus, the trial court found “no
10 issue of ineffective assistance of counsel” regarding Plaintiff’s claim against Attorney
11 Volkmer. (*Id.* at 50).

12 Based on the record, especially the testimony at the evidentiary hearing, this Court
13 would have reached the same conclusion. Mr. Volkmer testified that it is his practice to
14 communicate all plea offers to his clients, and although he did not have a specific
15 recollection of doing so here, one can certainly infer from the transcript of the jail phone
16 call with Petitioner’s mother that Petitioner knew about the two year offer. Neither the
17 trial court, nor the Court of Appeals in affirming the trial court, made an unreasonable
18 determination of the facts in light of the evidence presented in the State Court, or
19 unreasonable application of *Strickland*. The Court therefore finds that Petitioner has
20 failed to show that the State Courts’ decisions denying his ineffective assistance claim
21 against Attorney Volkmer satisfy the standards for habeas relief. Thus, Petitioner’s
22 objection that the Magistrate Judge erred is rejected.

23 Regarding Attorney Gregan, this Court agrees with the trial court that “[t]he issue
24 with Mr. Gregan is more problematic.” (Doc. 11-2 at 50). The trial court explained that
25 Petitioner and his girlfriend paid Gregan \$500 for their initial meeting and then an
26 additional \$5,000 for him to represent Petitioner. (*Id.*). Gregan told them at the initial
27 meeting that he believed he could get a better plea deal for Petitioner. (*Id.*). But during
28 the ensuing five month period when he represented Petitioner, Gregan “wrote no letters,
filed no motions, conducted no interviews nor sent any e-mails to the prosecutor.” (*Id.*).

1 Gregan testified at the evidentiary hearing that he called the prosecutor several times and
2 that his calls were not returned, and that his only contact with the prosecutor was in the
3 elevator at the courthouse. (*Id.*). The trial court found that Gregan’s “obvious strategy
4 was to wait out the prosecutor who he believed would not want to take the case to trial
5 and who would sweeten the offer in order to avoid trying the case.” (*Id.*). The trial court
6 found that given his comments to Petitioner, Gregan based this strategy on his
7 perceptions of the prosecutor as being lazy. (*Id.*). That strategy, however, backfired
8 when the case was transferred to a new prosecutor, who withdrew the 3.5 year plea offer
9 because it had been outstanding for so long. (*Id.*). Additionally, the new prosecutor
10 failed to give Gregan any warning that if Petitioner did not accept the offer by a certain
11 date it would be withdrawn, thus providing Gregan with no opportunity to notify
12 Petitioner. (*Id.*).

13 Based on these facts, the trial court found that “Mr. Gregan’s strategy cannot be
14 said to fall below an objective standard of reasonableness under prevailing professional
15 norms.” (Doc. 11-2 at 50). The trial court found that Gregan believed the first
16 prosecutor was unlikely to try the case and had no reason to believe the second
17 prosecutor would take over the case. (*Id.*). Further, had the second prosecutor warned
18 him that the plea offer was going to be withdrawn, Gregan would have had time to advise
19 Petitioner accordingly. (*Id.*). The trial court explained that although the second
20 prosecutor was not required to give notice of the plea offer withdrawal, such notice was
21 not unreasonable for Gregan to expect. (*Id.*).

22 Although this Court is troubled by Mr. Gregan’s failure to communicate with the
23 first prosecutor in an attempt to obtain a better plea offer, as he told Petitioner he would
24 do, and by his inaction in general, the Court cannot conclude that the trial court or the
25 Court of Appeals applied *Strickland* in an objectively unreasonable manner. Nor can this
26 Court conclude that the trial court or the Court of Appeals based their decisions on an
27 unreasonable determination of the facts. The trial court reasonably determined the facts
28 based on information provided during the evidentiary hearing. The trial court then
reasonably applied the legal standards in *Strickland* to those facts to reach its decision.

1 Likewise, the Court of Appeals reasonably applied the *Strickland* standards in affirming
2 the trial court’s decision. Even if this Court would have reached a different conclusion
3 on the merits of the claim against Attorney Gregan, the Court, at this stage of review,
4 must apply the highly deferential habeas standard set forth above. In doing so, the Court
5 finds Petitioner has not shown he is entitled to habeas relief.

6 **B. Certificate of Appealability**

7 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United
8 States District Courts, “[t]he district court must issue or deny a certificate of appealability
9 when it enters a final order adverse to the applicant,” and the Court must state the specific
10 issue or issues that satisfy the showing required for a certificate of appealability
11 (“COA”). The Court is authorized to issue a COA “only where a petitioner has made a
12 ‘substantial showing of the denial of a constitutional right.’” *Miller-El v. Cockrell*, 537
13 U.S. 322, 336 (2003) (quoting 28 U.S.C. § 2253(c)). “Under the controlling standard, a
14 petitioner must show that reasonable jurists could debate whether (or, for that matter,
15 agree that) the petition should have been resolved in a different manner or that the issues
16 presented were adequate to deserve encouragement to proceed further.” *Id.* at 336
17 (internal quotations and citations omitted). A COA “does not require a showing that the
18 appeal will succeed.” *Id.* at 337.

19 Petitioner claims the Magistrate Judge should not have recommended denial of a
20 COA for his claims. He argues that he has made a substantial showing of the denial of a
21 constitutional right, thus satisfying the COA standard.

22 The Court agrees with Petitioner’s argument with respect to the claim against
23 Attorney Gregan but disagrees with respect to his claim against Attorney Volkmer. For
24 the reasons discussed above, the Court finds that reasonable jurists could debate whether
25 the claim against Attorney Gregan should be resolved in a different manner. The Court
26 will therefore grant a COA for the ineffective assistance claim against Attorney Gregan.

27 Regarding Attorney Volkmer, however, the Court finds that clear evidence
28 demonstrates Attorney Volkmer communicated the more favorable two-year plea offer to
Petitioner and that the offer would remain open for only a short time. The Court

1 therefore finds a COA should not issue for the claim against Attorney Volkmer.

2 **C. Evidentiary Hearing**

3 Next, Petitioner claims he is entitled to an evidentiary hearing. Petitioner did not,
4 however, request an evidentiary hearing in his Petition or Reply. (*See* Doc. 1 at 9; Doc.
5 12). Consequently, the Magistrate Judge did not address the issue in the R&R. Because
6 the issue is raised for the first time in Petitioner's Objection, the Court declines to
7 consider it because it has not been fairly presented for adjudication. *See Brown v. Roe*,
8 279 F.2d 742, 744 (9th Cir. 2002) (holding that a district court is not required to consider
9 claims raised for the first time in a party's objection to a magistrate judge's
10 recommendation).

11 However, even if the Court considered Petitioner's request for an evidentiary
12 hearing, it would be denied. The standard for holding an evidentiary hearing in a habeas
13 case is set forth in 28 U.S.C. § 2254(e)(2), which states:

14 If the applicant has failed to develop the factual basis of a claim in State
15 court proceedings, the court shall not hold an evidentiary hearing on the
claim unless the applicant shows that –

16 (A) the claim relies on - (i) a new rule of constitutional
17 law, made retroactive to cases on collateral review by the
18 Supreme Court, that was previously unavailable; or (ii) a
19 factual predicate that could not have been previously
discovered through the exercise of due diligence; and

20 (B) the facts underlying the claim would be sufficient to
21 establish by clear and convincing evidence that but for
22 constitutional error, no reasonable factfinder would have
found the applicant guilty of the underlying offense.

23 Evidentiary hearings, however, are not authorized for claims adjudicated on the
24 merits in the State court. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-1401 (2011). Such
25 claims are subject to review under § 2254(d)(1), which asks whether a State Court's
26 decision on the claim was contrary to, or an unreasonable application of, clearly
27 established federal law. *Id.* at 1398. "[R]eview under § 2254(d)(1) is limited to the
28 record that was before the state court that adjudicated the claim on the merits." *Id.*

1 Evidence introduced in federal court would, therefore, have no bearing on the Court's
2 review under § 2254(d)(1). *Id.* at 1400. As a result, evidentiary hearings pursuant to 28
3 U.S.C. § 2254(e)(2) are inapplicable to claims decided on the merits in State Court. *Id.* at
4 1401.

5 As the above analysis demonstrates, the State Court adjudicated Petitioner's
6 ineffective assistance claims on the merits. Applying § 2254(d)(1), this Court has
7 determined that the State Court decisions were not contrary to, and did not involve an
8 unreasonable application of, clearly established Supreme Court law. Under *Pinholster*,
9 the Court's analysis was limited to the record before the State Court that decided the
10 claims on the merits. The Court could not consider any newly presented evidence.
11 Petitioner is therefore not entitled to an evidentiary hearing.

12 **III. Conclusion**

13 Based on the foregoing,

14 **IT IS ORDERED** that Magistrate Judge Bade's R&R (Doc. 13) is **accepted** and
15 **adopted**, except the recommendation to deny Petitioner a Certificate of Appealability for
16 his claim against Attorney Gregan.

17 **IT IS FURTHER ORDERED** that the Petition for Writ of Habeas Corpus
18 pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied** and **dismissed with prejudice**.

19 **IT IS FURTHER ORDERED** that pursuant to Rule 11(a) of the Rules Governing
20 Section 2254 Cases, a Certificate of Appealability and leave to proceed *in forma pauperis*
21 on appeal is **granted** with respect to the ineffective assistance of counsel claim against
22 Attorney Gregan because Petitioner has made a substantial showing of the denial of a
23 constitutional right. A Certificate of Appealability is **denied** with respect to the
24 ineffective assistance of counsel claim against Attorney Volkmer because Petitioner has
25 not made a substantial showing of the denial of a constitutional right.

26 **IT IS FURTHER ORDERED** that Petitioner's Motion for Clarification (Doc.
27 15) is **DENIED** as moot.

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. . . .

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

3 Dated this 2nd day of November, 2015.

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8 Honorable Diane J. Humetowa
9 United States District Judge
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