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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Jeffrey Lee Mitchell,  
10 Petitioner,  
11 vs.  
12 Charles Ryan, et al.,  
13 Respondents.

No. CV 12-0178-TUC-BPV

**ORDER**

14  
15 On March 13, 2012, Petitioner, Jeffrey Lee Mitchell, filed a Petition titled “Ex  
16 Parte Habeas Corpus” (“Petition”). (Doc. 1.)<sup>1</sup> The Court dismissed the Petition with leave  
17 to amend. (Doc 5.) On June 4, 2012, Petitioner filed an amended petition (“Amended  
18 Petition”). (Doc. 6.) Respondents filed answer to the Amended Petition (“Answer”) with  
19 exhibits A through U attached. (Docs. 17-18). Petitioner did not file a reply.

20 In accordance with provisions of Title 28, U.S.C. § 636(c)(1), all parties consented  
21 to proceed before a United States Magistrate Judge to conduct any and all further  
22 proceedings in this case, including trial and entry of a final judgment, with direct review  
23 by the Ninth Circuit Court of Appeals if an appeal is filed. (Doc. 19) On November 19,  
24 2013, this matter was reassigned to Magistrate Judge Bernardo P. Velasco. (Doc. 20)

25 On March 26, 2014, the Court entered an order finding the Petition timely but  
26 dismissing all but one ineffective assistance of counsel (IAC) claim as procedurally  
27 defaulted or for failing to present a cognizable claim. (Doc. 21.) The Court directed

28 <sup>1</sup> “Doc.” refers to the documents in this Court’s file.

1 Respondents to file a supplemental answer, addressing the IAC claim (Ground One (b) as  
2 designated by this Court), and providing time for Petitioner to file a supplemental reply.  
3 (*Id.*) On April 25, 2014, Respondents filed a Supplemental Answer addressing the IAC  
4 claim in Ground One (b) on the merits. (Doc. 22.) Petitioner did not file a supplemental  
5 reply.

6 For the reasons discussed below, the Magistrate Judge dismisses the remaining  
7 claim in the Amended Petition, Ground One (b), and denies the Amended Petition in its  
8 entirety.

9 **I. FACTUAL AND PROCEDURAL BACKGROUND**

10 **A. Proceedings in the Trial Court**

11 Mitchell was charged with one count of theft and three counts of fraudulent  
12 scheme and artifice, arising from various real-estate transactions that the victim, S., had  
13 undertaken on Mitchell’s advice. (See Ex. Q, at ¶ 2.) Mitchell executed a plea agreement  
14 in which he agreed to plead no contest to the amended charge of unlawful use of a power  
15 of attorney. (Ex. A, Ex. Q, ¶ 2.) That amended charge as presented in the plea agreement  
16 alleged that Mitchell had held a power of attorney from S. and had “committed theft by  
17 using or managing assets or property”—specifically, “revenue from the real property  
18 located at 1608 Oak Shadows”—with the intent to unlawfully deprive S. of that revenue.  
19 (Ex.A, at 1, Ext Q, at ¶ 2.) The plea agreement also expressly stated that the offense was  
20 “A Class Six Felony (Undesignated),” with a potential maximum sentence of 2 years’  
21 imprisonment, in accord with the statutorily prescribed sentence for a class six felony  
22 offense. (Ex. A, at 1–2.)

23 At the change-of-plea hearing, the trial court described the offense:

24 The offense that is set forth in the plea agreement states that between  
25 February of 2004 and October of 2006 that you, doing business as Mitchell  
26 Finance, an agent, holding [S.’s] power of attorney, committed theft by  
27 using or managing assets or property with the intent to unlawfully deprive  
28 [S.] of that asset or property.

(Ex. B, at 9.) Subsequently, Mitchell’s attorney stated to the court that there were aspects

1 of the charge that were incorrect. (*Id.* at 9-10.) Mitchell also stated to the court he did not  
2 “thoroughly” understand the charges. (*Id.* at 10.) In response, Mitchell was informed by  
3 the court that “[i]f this charge isn’t correct, then it needs to be redrafted to be correct, but  
4 it won’t do to substitute your verbal recitation of the charges to substitute for what’s in  
5 the plea agreement.” (*Id.* at 10-11.) While amending the charge, the court clarified, by  
6 asking Mitchell, “And is the thing of value that was the object of the theft revenue?” to  
7 which Mitchell replied, “Yes, it would have been what the higher rent would have been[–  
8 – t]he rent that was to be received by [S.] for the lease of the property.” (*Id.* at 11)  
9 Corrections were made by the court to the plea agreement, and the Court read the charges  
10 as amended:

11           Between February of 2004 and October of 2006 that you, holding [S.’s]  
12           power of attorney, committed theft by using or managing assets or property  
13           with the intent to unlawfully deprive her of that asset or property described  
                  as revenue from the real property located at 1608 Oak Shadows . . .

14 (*Id.* at 11-12.) Mitchell agreed that he understood the charges, and wished to plead no  
15 contest to the charge. (*Id.* at 12.)

16           The trial court also asked Mitchell during the hearing if he understood that he was  
17 pleading no contest to “a class six undesignated felony,” and Mitchell responded  
18 affirmatively. (*Id.* at 3.) The court then expressly explained to Mitchell that, although “at  
19 some point the Court could designate the matter as a misdemeanor,” the court could  
20 alternatively continue in its discretion to “treat[] [it] as a felony.” (*Id.* at 5–6.) The court  
21 also expressly stated as future options the prescribed sentencing range for a class six  
22 felony offense and “the maximum fine that could be imposed on any felony,” and that  
23 such measures reflected “the whole range of what could happen.” (*Id.* at 3–4.) With  
24 respect to each of those pronouncements, Mitchell expressed his understanding and  
25 ultimately pled no contest to the felony theft charge. (*Id.* at 3– 4, 16.)

26           Following the no-contest plea but before sentencing, Mitchell moved to withdraw  
27 the no-contest plea, claiming that the State, through its agent, the DPS, had breached the  
28 terms of the plea in its denial of a fingerprint clearance card on grounds that Mitchell had

1 been convicted of a “theft.” (Ex. D.) During the hearing on the motion, Mitchell testified  
2 that he did not recall the judge or anyone telling him this was a theft conviction, and  
3 would not have entered into a no contest plea if he had known this was going to be  
4 designated a theft conviction. (Ex. F, at 5.) Mitchell affirmed he had problems finding  
5 employment stating that, as a result of his plea, he was “a convicted felon.” (*Id.*, at 6.)  
6 The trial court denied the motion to withdraw, finding it “difficult to believe that there  
7 was not an understanding on part of the defendant that the nature of what he was pleading  
8 to at the time of the Change of Plea hearing was theft” and that defendant “knowingly,  
9 intelligently, and voluntarily entered into the plea agreement.” (Ex. G.)

10 At the subsequent sentencing hearing, defense counsel, in Mitchell’s presence,  
11 asked the court to re-designate the class six undesigned felony offense as a  
12 misdemeanor offense. (Ex. H, at 5.) The court declined to do so at that time but told  
13 Mitchell that if he successfully completed his probation term the court was imposing and  
14 fully paid the victim the restitution she was owed, it would “very likely” grant a future  
15 motion for early termination of probation and to re-designate the felony offense as a  
16 misdemeanor offense. (*Id.* at 5–6.) At no point during this colloquy specifically or the  
17 sentencing hearing generally did Mitchell indicate his confusion regarding the  
18 undesigned-felony-offense classification and/or its implications with respect to the  
19 offense of which he had pled no contest. (*Id.* at 5–7.) The court sentenced Petitioner to a  
20 2-year term of probation.<sup>2</sup> (Ex. H–I.)

#### 21 B. Petition for Post-Conviction Relief

22 Petitioner filed a notice of post-conviction relief, (Ex. J), and, through counsel,  
23 filed a petition for post-conviction relief (“PCR”) on October 9, 2009. (Ex. K.) Among  
24 other claims, Petitioner argued that his trial counsel had been ineffective in failing to  
25 inform him that he was pleading to a felony theft offense. (Ex. K) The trial court  
26 dismissed the PCR without a hearing, addressing the merits of the petition and finding

27 <sup>2</sup> This term of probation was extended for three years to January 14, 2014. See  
28 Hearing Re: Petition to Extend Probation, November 3, 2010, attached as Exhibit A to  
this Court’s Order dated March 26, 2014.

1 ample evidence in the record indicating that Mitchell had been fully aware that he was  
2 pleading to theft, and found that neither Mitchell nor his counsel misunderstood that  
3 Petitioner was pleading no contest to a felony, rather than a misdemeanor, separate and  
4 apart from any action or inaction by defense counsel, and thus any deficiency on  
5 counsel's part was non-prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984).  
6 (Ex. N.)

7 On February 4, 2010, Petitioner filed a "Petition for Review from Denial of Post-  
8 Conviction Relief" with the Arizona Court of Appeals. (Ex. O.) Petitioner argued, among  
9 other claims, that the trial court had abused its discretion in dismissing Petitioner's claims  
10 of ineffective assistance of counsel and manifest injustice without a hearing. (Ex. O.)  
11 The court of appeals denied relief in a memorandum decision, concluding that the written  
12 plea agreement, the reporter's transcript of the change-of-plea hearing, and the record as  
13 a whole support the trial court's ruling. (Ex. Q, ¶ 6.)

14 The Arizona Supreme denied review of Mitchell's "Petition for Further Review  
15 from Denial of Post-Conviction Relief" and the mandate issued. (Ex. R-T.)

### 16 C. Federal Habeas

17 On March 13, 2012, Petitioner filed an "Ex Parte Habeas Corpus" (the original  
18 Petition) which was dismissed with leave to amend. (Docs. 1-5) Petitioner filed an  
19 Amended Petition on June 4, 2012. (Doc. 6.) Petitioner presented four grounds in the  
20 Amended Petition in support of his request for habeas relief, all but one of which were  
21 dismissed by this Court on March 26, 2014. (See Doc. 21.) Petitioner asserts in the  
22 remaining claim, Ground One (b), that his counsel was ineffective for failing to inform  
23 him that the unlawful use of a power of attorney was a theft or felony offense. (Doc. 6, at  
24 14-17.)

## 25 II. DISCUSSION

### 26 A. Standard of Review

27 Because Mitchell filed his petition after April 24, 1996, this case is governed by  
28 the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)

1 (“AEDPA”).

2 B. Timeliness

3 A one year period of limitation shall apply to an application for writ of habeas  
4 corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C. §  
5 2244(d)(1). The Court addressed the issue of timeliness in the Court’s prior order (Doc.  
6 21), rejecting Respondents’ argument and finding the grounds raised in the Amended  
7 Petition timely. *See* (Doc. 21 at 10).

8 C. Exhaustion of State Remedies

9 A writ of habeas corpus may not be granted unless it appears that a petitioner has  
10 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1). To exhaust state  
11 remedies, a petitioner must “fairly present” the operative facts and the federal legal  
12 theory of his claims to the state's highest court in a procedurally appropriate manner.  
13 *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6  
14 (1982); *Picard v. Connor*, 404 U.S. 270, 277–78 (1971). Respondents have never  
15 asserted that Ground One(b) was not exhausted. *See* Docs. 17, 22). The Court finds  
16 Ground One (b) properly exhausted and amendable to review in this Court.

17 D. Merits

18 Petitioner argues in the remaining claim of his Amended Petition that, as a result  
19 of his attorney’s ineffective performance, he did not understand he was pleading to a  
20 felony or to a theft. (Doc. 6, at 9.) Respondents maintain that this Court should defer to  
21 the state court’s factual findings, supported by the objective evidence in the record, and  
22 conclude that the state court’s finding, that Petitioner was aware of the nature of the  
23 offense of which he pled no contest, and thus any deficiency on counsel’s part was non-  
24 prejudicial, was not unreasonable. (Doc. 22)

25 Under the AEDPA, a petitioner is not entitled to habeas relief on any claim  
26 “adjudicated on the merits” by the state court unless that adjudication was either (1)  
27 “contrary to” clearly established federal law as determined by the Supreme Court, (2)  
28 “involved an unreasonable application of such law,” or (3) “was based on an

1 unreasonable determination of the facts in light of the record before the state court.”  
2 *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785 (2011) (quoting 28 U.S.C. §  
3 2254) (internal quotation marks omitted).

4 Because the relevant state court decision is the last reasoned state decision  
5 regarding a claim, the Court reviews the appellate court’s ruling on Petitioner’s petition  
6 for review (Doc. Q.) *See Barker v. Fleming*, 423 F.3d 1085, 1091 (9<sup>th</sup> Cir. 2005) (citing  
7 *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d  
8 657, 664 (9<sup>th</sup> Cir. 2005).

9 *Strickland*, 466 U.S. 668, is the clearly established law for IAC claims. *See*  
10 *Richter*, 562 U.S. at ---, 131 S. Ct. at 780. When, as here, a defendant alleges IAC during  
11 a plea process, the two-part test in *Strickland* applies. *Wright v. Van Patten*, 552 U.S.  
12 120, 128 (2008); *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). To prevail on a claim of  
13 IAC, “a defendant must show both deficient performance by counsel and prejudice.”  
14 *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (citing *Strickland*, 466 U.S. at 687).

15 The Court need not address both components of the test if petitioner makes an  
16 insufficient showing on one. *Strickland*, 466 U.S. at 697. Thus, a court need not  
17 determine whether counsel’s performance was deficient before examining whether  
18 prejudice resulted from the alleged deficiencies. *See Smith v. Robbins*, 528 U.S. 259, 286  
19 n.14. (2000) (“If it is easier to dispose of an ineffectiveness claim on the ground of lack  
20 of sufficient prejudice, which we expect will often be so, that course should be  
21 followed.”) (quoting *Strickland*, 466 U.S. at 697). For reasons explained below, the  
22 Magistrate Judge finds that it is only necessary to address the prejudice prong to resolve  
23 Petitioner’s IAC claim.

24 To establish prejudice, a prisoner must demonstrate a “reasonable probability that,  
25 but for counsel’s unprofessional errors, the result of the proceeding would have been  
26 different.” *Strickland*, 466 U.S. at 694. A “reasonable probability” is “a probability  
27 sufficient to undermine confidence in the outcome.” *Id.* “That requires a ‘substantial,’ not  
28 just ‘conceivable,’ likelihood of a different result.” *Cullen v. Pinholster*, --- U.S. ---, 131

1 S.Ct. 1388, 1403 (2011) (quoting *Richter*, 562 U.S. at ---, 131 S.Ct. at 791). In the  
2 context of guilty pleas, the prejudice requirement “focuses on whether counsel’s  
3 constitutionally ineffective performance affected the outcome of the plea process.” *Hill*,  
4 474 U.S. at 59.

5 Under the “unreasonable application” prong of § 2254(d)(1), a federal habeas  
6 court may grant relief where a state court “identifies the correct governing legal rule from  
7 [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular ...  
8 case” or “unreasonably extends a legal principle from [Supreme Court] precedent to a  
9 new context where it should not apply or unreasonably refuses to extend that principle to  
10 a new context where it should apply.” *Williams v. Taylor*, 529 U.S. 362, 407 (2000). For  
11 a federal court to find a state court’s application of Supreme Court precedent  
12 “unreasonable,” the petitioner must show that the state court decision was not merely  
13 incorrect or erroneous, but “objectively unreasonable.” *Id.* at 409; *Landrigan*, 550 U.S. at  
14 473; *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). “[R]eview under § 2254(d)(1) is  
15 limited to the record that was before the state court that adjudicated the claims on the  
16 merits.” *Pinholster*, 131 S. Ct. at 1898.

17 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the  
18 state court decision was based upon an unreasonable determination of the facts. *Miller–El*  
19 *v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller–El II*). A state court decision “based on a  
20 factual determination will not be overturned on factual grounds unless objectively  
21 unreasonable in light of the evidence presented in the state-court proceeding.” *Miller–El*  
22 *v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller–El I*); see *Taylor v. Maddox*, 366 F.3d 992,  
23 999 (9<sup>th</sup> Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual  
24 determinations are presumed to be correct, and a petitioner bears the “burden of rebutting  
25 this presumption by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *Schriro v.*  
26 *Landrigan*, 550 U.S. 465, 473–74 (2000); *Miller–El II*, 545 U.S. at 240.

27 In the context of a habeas petition, a petitioner must do more than demonstrate to  
28 the federal court that the State court applied *Strickland* incorrectly. *Bell v. Cone*, 535 U.S.

1 685, 698-99 (2002). Rather, a petitioner must show the State court “applied *Strickland* to  
2 the facts of his case in an objectively unreasonable manner.” *Id.* Because the standards  
3 created by *Strickland* and § 2254(d) are both “highly deferential,” review under both  
4 standards in tandem is even more deferential. *Richter*, 562 U.S. at ---, 131 S. Ct. at 788  
5 (citations omitted); *Mirzayance*, 556 U.S. at 123 (citing *Yarborough v. Gentry*, 540 U.S.  
6 1, 5-6 (2004)(*per curiam*)). In reviewing a state court’s resolution of an IAC claim, the  
7 Court considers whether the state court applied *Strickland* unreasonably:

8 For [a petitioner] to succeed [on an ineffective assistance of counsel claim],  
9 ... he must do more than show that he would have satisfied *Strickland*’s test  
10 if his claim were being analyzed in the first instance, because under §  
11 2254(d)(1), it is not enough to convince a federal habeas court that, in its  
12 independent judgment, the state-court decision applied *Strickland*  
13 incorrectly. Rather, he must show that the [state court] applied *Strickland* to  
14 the facts of his case in an objectively unreasonable manner.

13 *Cone*, 535 U.S. at 698-99 (citations omitted). The petitioner bears the burden of proving  
14 his case, and must convince the district court by a preponderance of evidence of the facts  
15 underlying the alleged constitutional error. *See Lambert v. Blodgett*, 393 F.3d 943, 970  
16 n.16 (citing *McKenzie v. McCormick*, 27 F.3d 1415, 1418-19 (9<sup>th</sup> Cir. 1994)). Given the  
17 uncertainty involved in plea negotiations, deference to the appellate court’s determination  
18 is significant. *See Premo v. Moore*, 562 U.S. 115, 131 S.Ct. 733, 744 (2011) (“The stakes  
19 for defendants are high, and many elect to limit risk by forgoing the right to assert their  
20 innocence.”).

21 The Arizona Court of Appeals did not expressly rely on *Strickland* in its  
22 Memorandum Decision; however, it expressly affirmed the trial court’s findings which  
23 did rely on *Strickland*. The court of appeals adopted the trial courts findings and analysis  
24 of Petitioner’s claims, and concluded that Petitioner had failed to demonstrate that the  
25 trial court abused its discretion in summarily denying Petitioner’s PCR. (Ex. Q, at ¶  
26 7)(citing *State v. Whipple*, 177 Ariz. 272, 274 (App. 1993).) The trial court applied the  
27 *Strickland* standard in addressing Mitchell’s IAC claims. (Ex. N, at 3–4.) Having  
28 reviewed the record, the Court finds that the state court did not unreasonably apply

1 *Strickland*.

2 The state court reasonably held that trial counsel’s alleged failure to inform him of  
3 the nature and consequences of his plea did not result in prejudice to Petitioner. As the  
4 court of appeals noted in its memorandum decision affirming the denial of post-  
5 conviction relief, Mitchell’s IAC claims were “heavily fact-dependent” and in a large  
6 measure, a “request that [the court] reweigh the evidence in the record.” (Ex. Q, at ¶ 7.)  
7 The record, as described above, objectively supports the court’s findings given that  
8 Mitchell was informed both by the plea agreement and the trial court personally that he  
9 was pleading to a felony theft offense, “irrespective of Petitioner’s claim that his counsel  
10 was unaware that the crime constituted a theft” (Ex. N, at 2). Because Mitchell was aware  
11 of the nature of the offense of which he pled no contest, any deficiency on counsel’s part  
12 was clearly non-prejudicial, as the state court reasonably found. *See Strickland*, 466 U.S.  
13 at 697 (“[A] court need not determine whether counsel’s performance was deficient  
14 before examining the prejudice suffered by the defendant as a result of the alleged  
15 deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack  
16 of sufficient prejudice, which we expect will often be so, that course should be  
17 followed.”). Petitioner has presented nothing to show that the Court of Appeals decision  
18 regarding his ineffective assistance claim is contrary to or an unreasonable application of  
19 clearly established Supreme Court law or based on an unreasonable determination of the  
20 facts.

21 Based on the foregoing,

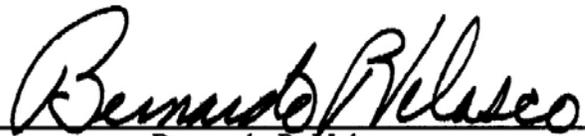
22 IT IS ORDERED that the Amended Petition for Writ of Habeas Corpus pursuant  
23 to 28 U.S.C. § 2254 (Doc. 6) is DENIED and DISMISSED WITH PREJUDICE.

24 IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing  
25 Section 2254 Cases, a Certificate of Appealability and leave to proceed in forma pauperis  
26 on appeal are denied because Petitioner has not made a substantial showing of the denial  
27 of a constitutional right.  
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IT IS FURTHER ORDERED that the Clerk of Court shall terminate this action and enter judgment accordingly.

Dated this 6th day of October, 2014.

  
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Bernardo P. Velasco  
United States Magistrate Judge