

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY WELTON NUNES, <i>Petitioner-Appellee,</i> v. G.A. MUELLER, Warden, <i>Respondent-Appellant.</i>

No. 03-15509
D.C. No.
CVS-98-0106-LLK
OPINION

Appeal from the United States District Court
for the Northern District of California
Laurence K. Karlton, District Judge, Presiding

Argued and Submitted
August 13, 2003—San Francisco, California

Filed December 1, 2003

Before: Stephen Reinhardt and Susan P. Graber,
Circuit Judges, and Milton I. Shadur,* District Judge.

Opinion by Judge Shadur;
Dissent by Judge Graber

*The Honorable Milton I. Shadur, Senior District Judge for the Northern District of Illinois, sitting by designation.

COUNSEL

Morris Beatus, Deputy Attorney General, San Francisco, California, argued the case for the respondent-appellant and was on the briefs. Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General and Peggy S. Ruffra, Supervising Deputy Attorney General were also on the briefs.

Daniel J. Broderick, Chief Assistant Federal Defender, San Francisco, California, argued the case for the petitioner-appellee and was on the brief. Quin Denvir, Federal Defender, Sacramento, California was also on the brief.

OPINION

SHADUR, District Judge:

Folsom State Prison Warden Glenn A. Mueller (“Mueller”) appeals the district court’s order granting habeas corpus relief under 28 U.S.C. § 2254¹ to Folsom prisoner Jeffrey Welton Nunes (“Nunes”). That relief was predicated on Nunes’ claim that he had received ineffective assistance of counsel during the plea bargaining process, and it resulted in a direction to the state (1) to vacate Nunes’ conviction for second degree murder and (2) to reinstate its plea offer of voluntary manslaughter. We agree with the district court that Nunes’ counsel failed to provide constitutionally adequate assistance, but we

¹All further citations to Title 28 provisions will simply take the form “Section —.”

find that the relief granted should be modified: We remand to the district court for the entry of an order releasing Nunes unless the state offers him the same terms that he would have received under the original plea offer, and then for the conduct of further proceedings consistent with this opinion.

Background

On August 28, 1989 Nunes was charged with one count of murder and three counts of assault with a firearm for the 1988 shooting of a man he found sleeping in his estranged wife's bedroom. In Nunes' first trial in 1989 the jury hung on the murder charge but found Nunes guilty of one count of assault with a firearm, one count of personal use of a firearm and two misdemeanor counts of exhibiting a firearm. Nunes was retried on the murder charge in 1990, and that second trial also ended with a hung jury, although the jury did unanimously decide that Nunes was not guilty of first degree murder. In a third trial in 1991 the jury found Nunes guilty of second degree murder and subject to the firearm use enhancement. That conviction was later reversed on appeal because the trial judge had spoken to the deliberating jury outside the presence of Nunes and his attorney.

On July 22, 1993, before Nunes' fourth trial, the prosecutor made a plea offer to Nunes' defense attorney Michael Brady ("Brady") that Nunes plead guilty to voluntary manslaughter, waive all presentence credits on that voluntary manslaughter charge and serve a sentence of 11 years. **(SER 60)** In exchange the prosecutor would drop the second-degree murder charge, the firearm enhancement would be dismissed and Nunes would get full credit for the time he had already served toward his assault conviction. **(SER 143)** Brady then met with Nunes for just five minutes to discuss the plea offer. Nunes claims that Brady told him incorrectly that he was being offered a 22-year sentence that included the firearm enhancement and waived all presentence credits for the time previously served. **(SER 66)** Nunes further claims that he asked

Brady to clarify the offer, **(SER 124)** but in the meantime Brady told the prosecutor that Nunes had rejected the plea bargain. **(SER 74)**

At some point after that meeting and before his trial, Nunes' mother told him that the actual plea offer was different from what he had thought. **(SER 67)** Though Nunes tried to reach Brady to clarify the offer, he was unable to do so. It was not until the day the fourth trial began that Nunes was able to talk with Brady—after the offer had already expired. **(SER 112, 132)** In the fourth trial Nunes was again convicted of second-degree murder and received a 15-years-to-life sentence, with a two-year enhancement for the use of a firearm.

Nunes challenged his conviction on direct appeal and then by a state court petition for a writ of certiorari. **(ER 64-94)** There Nunes claimed among other things that Brady had provided ineffective assistance of counsel by failing to inform him fully of the actual terms of the plea offer made by the prosecution. **(ER 91-94)** That claim was rejected by the California Court of Appeals, which found it unnecessary to hold an evidentiary hearing because Nunes had not made out a prima facie case for prejudice—“that but for counsel’s deficient performance, the defendant would have accepted the plea bargain.” **(ER 93 (internal quotation marks and citation omitted))**

After the state courts had rejected his claim, in 1998 Nunes filed a pro se Section 2254 petition in the federal district court for the Eastern District of California.² After Mueller answered the petition, the magistrate judge held a two-day evidentiary

²That petition was initially dismissed because it was a mixed petition—it included claims that had not been exhausted in state court. With the help of appointed counsel, Nunes then filed an amended petition raising only exhausted claims, together with a motion to stay proceedings that was granted by the district court. After exhausting his claims in state court, Nunes filed a motion to leave to amend his petition to include those newly exhausted claims. That motion was granted on June 24, 1999.

hearing on Nunes' ineffective assistance claim. **(ER 15-34)** On November 20, 2002 the magistrate judge recommended that Nunes' petition be granted on that ground, **(ER 2-52)** concluding that the state court ruling was (1) erroneous and (2) contrary to federal law as clearly established in *Strickland v. Washington*, 466 U.S. 688, 690-93 (1984). **(ER 21, 23)** Finding that Nunes had shown both that his counsel's conduct fell outside the range of professional competence and that he had suffered prejudice as a result, the magistrate judge recommended that the district court grant Nunes' petition in part and order the state (1) to vacate his second degree murder conviction and (2) to reinstate the plea offer to voluntary manslaughter. **(ER 51)**

On January 8, 2003 the district court adopted the magistrate judge's findings and recommendations in full. **(ER 55-56)** Mueller filed a timely notice of appeal and moved for a stay pending appeal. On May 20, 2003 a panel of this court issued an order granting the stay and expediting this appeal.

Mueller raises three issues on appeal. First, he contends that the state court's decision rejecting Nunes' ineffective assistance claim was not contrary to clearly established law because unless Nunes lost a substantive or procedural right (and Mueller claims he did not), Nunes was not prejudiced by his attorney's shortcomings. Second, Mueller argues that the state court reasonably applied the *Strickland* analysis in concluding that Nunes failed to establish that he would have accepted the plea had it been properly communicated to him. Third, Mueller claims that the district court was out of bounds in any event when it ordered the state to give Nunes the same deal that it had offered him before the trial.

Standard of Review

We review the district court's decision to grant habeas corpus relief de novo (*Evanchyk v. Stewart*, 340 F.3d 933, 939 (9th Cir. 2003)) and its findings of fact for clear error

(*McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003)). We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale (*Paradis v. Arave*, 240 F.3d 1169, 1175-76 (9th Cir. 2001)).

Section 2254(d), as revised by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"),³ instructs federal courts not to grant a state prisoner's habeas petition as to claims that a state court "adjudicated on the merits" unless the adjudication (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Ineffective assistance claims are generally resolved under the first standard, which controls both pure questions of law and mixed questions of law and fact, but the second standard applies to the extent a habeas petition challenges any factual determinations of the state court (*Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003)).

"Clearly established Federal law," as used in Section 2254(d)(1), refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision" (*Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1172 (2003)). As to whether a state court's decision is "contrary to" clearly established law, that is a function of whether that court either (1) applied the wrong authority or (2) applied the right authority but arrived at a "diametrically different" result despite materially indistinguishable facts (*Williams v. Taylor*, 529 U.S. 362, 406 (2000)). Alternatively, the state court would have "unreasonably applied" the law if it identified the right legal principle but applied it in an objectively unreasonable way or if it (unreasonably) extended the

³Nunes originally filed his habeas petition in 1998, well after AEDPA's 1996 amendments to Section 2254(d) became effective.

law to a context where it should not apply (*Alvarado v. Hickman*, 316 F.3d 841, 852 (9th Cir. 2002), citing *Williams*, 529 U.S. at 404-06)). It is not enough for us to determine in our independent judgment that the state court decision was incorrect or erroneous—instead the important question is whether the state court’s decision was “objectively unreasonable” (*Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527, 2535 (2003)).

Right to Counsel During Plea Bargaining

[1] *Strickland v. Washington*—the most sensible place to begin evaluating any claim for ineffective assistance of counsel—teaches that the benchmark for assessing such claims must be “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result” (466 U.S. at 686). Defendant must demonstrate (1) “that counsel’s representation fell below an objective standard of reasonableness” and (2) “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*Williams*, 529 U.S. at 390-91, quoting *Strickland*, 466 U.S. at 688, 694). And as *Wiggins*, 123 S.Ct. at 2542, quoting *Strickland*, 466 U.S. at 694, has reconfirmed:

A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Mueller argues that the state court applied the *Strickland* test properly and that its conclusion—that Nunes was not prejudiced by his counsel’s poor performance—was not contrary to Supreme Court authority, because no Supreme Court case has ever found prejudice where the criminal defendant received a fair trial despite inadequate counsel. Irrespective of whether Nunes’ counsel met professional standards, Mueller notes correctly that under existing Supreme Court law Nunes cannot claim he was prejudiced if his counsel’s incompetence

did not deprive him of a substantive or procedural right (*Williams*, 529 U.S. at 393). And Mueller observes (again correctly) that the Constitution does not afford Nunes the right to a plea bargain (*Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)).

[2] But Mueller incorrectly contends that it necessarily follows that Nunes did not lose any substantive or procedural right—and therefore did not suffer any prejudice—when his counsel failed to communicate the plea offer to him accurately. After all, the right that Nunes argues he lost was not the right to a plea bargain as such, but rather the right to counsel’s assistance in making an informed decision once a plea had been put on the table. It has long and clearly been held that criminal defendants are entitled to effective assistance of counsel during all critical stages of the criminal process (*Powell v. Alabama*, 287 U.S. 45, 57 (1932); *Brewer v. Williams*, 430 U.S. 387, 398 (1977)). And *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) applied that right (and the corresponding *Strickland* analysis) “to ineffective-assistance claims arising out of the plea process.”

Mueller claims that the real harm the Supreme Court sought to avoid in *Hill* arises only where the defendant actually pleads guilty, because in those situations the defendant surrenders his or her right to a fair trial. Mueller argues that a defendant who refuses a plea bargain is not deprived of that right and therefore suffers no prejudice. Mueller’s narrow reading of *Hill* is not entirely outre, for the opinion there did frame the prejudice inquiry—in the context then at issue—in terms of whether “but for counsel’s errors, [defendant] would not have pleaded guilty and would have insisted on going to trial” (*id.* at 59). And the Supreme Court has stated elsewhere that “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial” (*United States v. Cronin*, 466 US. 648, 658 (1984)).

[3] But “the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial”—it serves to protect the reliability of the entire trial process (*United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994), quoting *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992)). Over 70 years ago *Powell*, 287 U.S. at 57 extended the right to counsel to cover all critical stages of the prosecution and recognized that the period from the arraignment until the beginning of trial can be “perhaps the most critical period of the proceedings.” As *United States v. Ash*, 413 U.S. 300, 309-10 (1973) has chronicled, the “historical background suggests that the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial,” but the Court has over time recognized the importance of expanding that right because “‘Assistance’ would be less than meaningful if it were limited to the formal trial itself.”

[4] During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel’s “dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution” (*Strickland*, 466 U.S. at 688). Those obligations ensure that the ultimate authority remains with the defendant “to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal” (*Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Here the right that Nunes claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.⁴

⁴Alternatively we note (and Mueller himself concedes) that California law clearly recognizes the right to effective assistance of counsel during the plea bargaining process (*In re Alvernaz*, 830 P.2d 747 (Cal. 1992)). While clearly established Supreme Court law provides that counsel’s incompetence must deprive the defendant of a substantive or procedural right to rise to a constitutional violation, it does not require that the federal Constitution be the source of the substantive or procedural right being deprived—indeed, *Williams*, 529 U.S. at 393 suggests just the opposite.

Even so, Mueller is correct that the state court ruling was not “contrary to” clearly established Supreme Court law. It followed a California Supreme Court decision (*Alvernaz*, 830 P.2d 747), which sets forth the same requirements as *Strickland* for demonstrating an ineffective assistance claim in the context of plea bargaining. And the United States Supreme Court has not examined a case whose facts provide sufficient comparability for us to conclude that the result reached by the state court was at odds with established Supreme Court caselaw. We therefore reject the conclusion of the magistrate judge and the district court judge that the state court decision was contrary to clearly established Supreme Court law.

That does not of course end the analysis, for habeas relief can also be granted where the state court unreasonably applied the law or where the factual determination was unreasonable in light of the evidence presented. We now turn our attention to those questions.

Prejudice

We first examine precisely what the state court did:

1. It decided from the record that Nunes failed to make out a prima facie case for ineffective conduct of counsel.
2. It found that an evidentiary hearing was unnecessary and concluded on the record that Nunes could not show he would have accepted the state’s plea offer had his attorney communicated it to him accurately.
3. It held that Nunes’ contentions were meritless “on their face.” (ER 29 n.12)
4. It found that materials Nunes included in the record that showed his counsel’s delinquency were

“of dubious relevance” (*id.*) and rejected as “simply not credible” Nunes’ claim that he could not reach his attorney to clarify the plea offer. (*id.* 30)

5. It also inferred that someone in Nunes’ shoes who was facing a fourth trial would likely choose to go that fourth round rather than accept a plea offer. (*id.*)

And we note that all of that took place despite that court’s having said that it took Nunes’ claims at face value.

We hold that the state court’s rejection of Nunes’ habeas claim is unreasonable under both Sections 2254(d)(1) and (2).⁵ Under the AEDPA standard of review, it is entirely appropriate—even necessary—that federal courts ask whether the state court applied correct legal principles (in this case, the *Strickland* analysis) in an objectively unreasonable way (*Williams*, 529 U.S. at 404-06), an inquiry that requires analysis of the state court’s *method* as well as its result.

[5] In those terms the state court’s decision applied the law to the facts unreasonably because Nunes clearly made out a prima facie case of ineffective assistance of counsel under *Strickland*. With Nunes’ claims being taken at face value as the state court claimed it had done, the factual scenario was (1) that Nunes’ attorney gave him the wrong information and advice about the state’s plea offer and (2) that if Nunes had instead been informed accurately, he would expressly have taken the bargain.

⁵As is evident from our discussion, we reject the magistrate judge’s approach, following *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000), that a federal court must first determine whether the state court decision was erroneous before applying the AEDPA standard of review. *Lockyer*, 123 S.Ct. at 1172 has expressly disagreed with that method because “the only question that matters under § 2254(d)(1) [is] whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law.”

[6] Those assertions certainly suffice to support an ineffective assistance claim, and there was ample evidence in the record before the state court to support those assertions.⁶ With the state court having purported to evaluate Nunes' claim for sufficiency alone, it should not have required Nunes to prove his claim without affording him an evidentiary hearing—and it surely should not have required Nunes to prove his claim with absolute certainty. Nunes needed only to demonstrate that he had sufficient evidence for a reasonable fact finder to conclude with “reasonable probability” that he would have accepted the plea offer, a probability “sufficient to undermine the result” (*Strickland*, 466 U.S. at 694). He met that burden, and to the extent that the state court demanded more it applied the *Strickland* test unreasonably. In other words, it was objectively unreasonable for the state court to conclude on the record before it that no reasonable factfinder could believe that Nunes had been prejudiced.

If we rather view the state court's findings as a factual determination, the outcome there is equally problematic under AEDPA. Its assessment of the evidence went well beyond its self-assigned task of assessing Nunes' allegations for suffi-

⁶According to the dissent, *Alvernaz*, 830 P.2d at 756 requires that a habeas petitioner must always proffer some evidence other than his or her own statement to state a cognizable claim of ineffective assistance of counsel during the plea bargaining process. But that does not at all support the analytical edifice that the dissent has sought to erect on that foundation, for the situation here—as our text analysis hereafter demonstrates—is that Nunes *did* present objective corroborative evidence to the state court, but the state court unreasonably rejected it as not credible and hence as unpersuasive. We do observe, however, that the *Alvernaz* statement of such a universal requirement of corroboration is in substantial tension with *Strickland*'s discouragement of “mechanical rules” that distract from an inquiry into the fundamental fairness of the proceedings, and with its holding that “a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury” (*Strickland*, 466 U.S. at 695). But that aside, the state court's unreasonableness runs far deeper—for the state court did not conclude that Nunes failed to produce sufficient evidence, but rather that the evidence Nunes did produce failed to persuade.

ciency to determine whether Nunes would be entitled to relief. State court findings are generally presumed correct unless they are rebutted by clear and convincing evidence or based on an unreasonable evidentiary foundation (Sections 2254(e)(1) and (d)(2); *Gonzales v. Plier*, 341 F.3d 897, 903 (9th Cir. 2003)). But with the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings—if that is indeed how those stated findings should be characterized—when they were made without such a hearing (*Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999)).⁷

[7] While there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved, that was certainly not the case here (*see United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991)). It cannot fairly be said that Nunes' failure to have approached the trial judge independently with his concerns over the plea bargaining process leads to the conclusion that he would not have accepted the plea offer had he actually received it. To the contrary, it would be unreasonable to require Nunes to have confronted the trial judge on his own to preserve his right to assistance of counsel, when he was after all being represented by a lawyer on whom he was relying to protect his rights. It must be remembered that, as Nunes testified, he had in fact tried to speak to the judge at some earlier time in the proceedings, at which point the judge chastised him for doing so, instructing him that it was his lawyer's job to speak to the court. **(SER 159)**

In addition, and quite aside from the state court's departure

⁷It is particularly unacceptable for that court to have eschewed an evidentiary hearing on the basis that it was accepting Nunes' version of the facts, then to have given the lie to that rationale by discrediting Nunes' credibility and rejecting his assertions.

from its stated acceptance of Nunes' version of the facts, that court's statement that he had failed to show that he would have accepted the plea offer if it had been conveyed to him accurately was an impermissible—and a really speculative—conclusion. It must be remembered that Nunes was approaching his fourth trial on the same crime. Two of the earlier juries were hung in favor of a life sentence, while the third trial resulted in a conviction for second-degree murder that was overturned solely on procedural grounds. Nunes' strategy at trial had always been to argue that he was guilty of voluntary manslaughter—how then can it be thought that he would prefer risking a guilty verdict on second-degree murder to pleading guilty to voluntary manslaughter? At the very least, it was unreasonable for the state court to have denied Nunes the opportunity for a full and fair hearing on the matter—a hearing later granted by the district court, during which Nunes swore (just as he had stated in his written declaration in the state court proceedings) that he would have accepted the plea offer if it had been accurately conveyed to him, and explained why that was so.

Because the dissent suggests otherwise, we stress that we do not hold (or even hint) that the state court erred because it evaluated the facts differently than we would have or because it arrived at a different result. Instead the state court's decision was objectively unreasonable because that court made factual findings (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations) when it rather claimed to be determining *prima facie* sufficiency. By contrast, if the state court had first conducted an evidentiary hearing and had then arrived at the same inferences and credibility determinations, we would not be second-guessing those procedures and results as objectively unreasonable.

[8] Viewed either as a finding of fact or as a determination of law, then, the state court's determination was objectively unreasonable. Nunes had adduced sufficient evidence to sup-

port his allegations that his attorney failed to convey the correct plea bargain and that he suffered prejudice as a result. And because Mueller does not challenge on appeal either the federal district court's decision to grant an evidentiary hearing in this Section 2254 proceeding⁸ or the district court's factual findings after having done so, we affirm the district court's determination that Nunes is entitled to habeas relief for his ineffective assistance of counsel claim.

Appropriate Remedy

Mueller further argues that the district court did not have the authority to order specific performance of the original plea offer. He urges that specific performance is available only where the prosecution has abused its discretion (*see Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) or where the prosecution breaches its plea agreement (*Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984)). According to Mueller, permitting such orders in other instances would run afoul of abstention principles that generally bar federal interference with state criminal proceedings (*Moore v. Sims*, 442 U.S. 415, 424 (1979); *Younger v. Harris*, 401 U.S. 37, 49 (1971)).

⁸Section 2254(e)(2) provides that a habeas petitioner that has "failed to develop the factual basis of a claim in State court proceeding" is not entitled to an evidentiary hearing in federal court except in the circumstances provided in the statute. As *Belmontes v. Woodford*, 335 F.3d 1024, 1053-54 (9th Cir. 2003), citing *Williams v. Taylor*, 529 U.S. 420, 429-37 (2000) states:

A habeas petitioner must meet two conditions to be entitled to an evidentiary hearing: He must (1) allege facts which, if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding.

Because Mueller does not contend that Nunes actually received a full and fair hearing on his claim or that he failed to develop the factual basis of his claim in state court, we need not explore that issue further.

But any such issues can be avoided by the simple expedient of modifying the writ to order Nunes' release (that is, after all, the classic relief afforded by the writ) within a reasonable time unless the state provides the identical offer it made to Nunes earlier. As *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) teaches:

Federal habeas practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief. Federal habeas courts are authorized, under 28 U.S.C. §2243, to dispose of habeas corpus matters "as law and justice require." In construing §2243 and its predecessors, this Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.

See also the discussion of conditional writs in *McQuillion v. Duncan*, 253 F. Supp. 2d 1131, 1134 (C.D. Cal. 2003). That obviates the concerns that Mueller raises and is "tailored to the injury suffered from the constitutional violation" without "unnecessarily infring[ing] on competing interests" (*United States v. Morrison*, 449 U.S. 361, 364 (1981)). And it conforms to the Section 2243 directive that the federal habeas court shall "dispose of the matter as law and justice require."

[9] Conceptually, any habeas remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred," and in some circumstances granting a new trial is not the appropriate remedy to that end (*Blaylock*, 20 F.3d at 1468). Here as in *Blaylock* the ineffective assistance occurred before trial, and "the harm consisted in defense counsel's failure 'to communicate a plea offer to defendant' " (*id.*). Under such circumstances the constitutional infirmity would justify Nunes' release, but if the state puts him in the same position he would have been in had

he received effective counsel, that would cure the constitutional error (*see Phifer v. Warden, United States Penitentiary*, 53 F.3d 859, 864-65 (7th Cir. 1995)).⁹

Conclusion

Because we agree with the district court that the state court's decision was an unreasonable application of clearly established Supreme Court law and an unreasonable determination of the facts in light of the evidence before the state court, we AFFIRM the district court's decision to grant Nunes' Section 2254 petition because of the ineffective assistance of counsel during the plea bargaining process. We REMAND to the district court with directions to modify its order so as to direct the state to release Nunes within 120 days unless it offers Nunes the same material terms that were contained in its original plea offer. Any further proceedings shall be consistent with this opinion.

GRABER, Circuit Judge, dissenting:

I respectfully dissent.

Federal habeas corpus relief is available to Petitioner only if the state court's "adjudication of [his] claim resulted in a decision that was contrary to,¹ or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C.

⁹It might perhaps be contended that because Nunes had never actually accepted the terms of the original plea offer, we cannot enforce it as a binding contract. While it is true that contract law generally guides the enforcement of plea bargains (*United States v. Sar-Avi*, 255 F.3d 1163, 1166 (9th Cir. 2001)), the remedy we provide stems from Section 2243 and not from contract law.

¹I agree with the majority that this case does not involve the "contrary to" prong of 28 U.S.C. § 2254(d)(1). (Maj. op. at 16833.)

§ 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2). In this case, the facts on which the state court relied to hold that Petitioner failed to make out a prima facie case of prejudice are supported by the record, and the prejudice analysis that the state court applied—*In re Alvernaz*, 830 P.2d 747, 756 (Cal. 1992)—is consistent with *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, we may grant relief only if the state court’s application of *Alvernaz* to the facts before it was objectively unreasonable. It was not.

Petitioner claims ineffective assistance of counsel in failing to communicate a plea bargain accurately.² The majority properly identifies *Strickland* as the governing law for that claim. (Maj. op. at 16834-35.) Prejudice is an essential element of a *Strickland* claim. 466 U.S. at 694.

The state court assessed Petitioner’s claim under the prejudice analysis of *Alvernaz*—a framework that the majority agrees is not contrary to clearly established Supreme Court law. (Maj. op. at 16833-34.) Under *Alvernaz*, a defendant’s own assertion in hindsight that he would have accepted a plea bargain is insufficient to prove prejudice; prejudice must be shown by objective corroborating evidence. 830 P.2d at 756. Thus, to make out a legally sufficient prima facie case of prejudice under *Alvernaz*, Petitioner had to present some objective corroborating evidence.

The majority holds that “it was objectively unreasonable for the state court to conclude on the record before it that no reasonable factfinder could believe that Nunes had been prejudiced.” (Maj. op. at 16835.) With respect, that is not the question before us. The state court applied *Alvernaz*, which is not contrary to *Strickland* and which requires objective cor-

²I agree with the majority’s analysis of the right to counsel during plea bargaining. (Maj. op. at 16830-33.)

roborating evidence before the right to a hearing attaches. The question, then, is whether it was objectively unreasonable for the state court to conclude on the record before it that Petitioner had failed to offer objective corroborating evidence in support of his assertion that he would have taken the plea at the time it was offered, had it been properly communicated.

It was not objectively unreasonable for the state court to conclude that the evidence Petitioner had presented failed to establish a prima facie case under *Alvernaz*. As a factual matter, the state court *assumed* (1) that Petitioner's trial lawyer did not accurately communicate the plea offer or competently advise him and (2) that Petitioner truthfully asserted that he would have taken the plea at the time it was offered, had it been properly communicated. However, the latter assumption did not avail Petitioner under the *Alvernaz* test; even assuming Petitioner's utter sincerity, California Supreme Court precedent prevented the California Court of Appeal from relying solely on Petitioner's own after-the-fact statement that he would have taken the plea bargain.

Petitioner's remaining evidence,³ taken in Petitioner's favor, established (1) that before trial, his mother told him that the plea offer was better than he thought after talking to his lawyer; (2) that, although he saw his lawyer before and during trial, his lawyer's incompetence made it difficult or impossible to communicate his concerns about the plea offer; and (3) that he had escaped a murder conviction three times already after three earlier trials.

The state appellate court found that the foregoing facts did not establish objective, corroborating evidence that Petitioner

³Petitioner presented three declarations to the state court. They were from him, his mother, and his appellate counsel. His later-proffered declarations and other documents, which the state court rejected, did not supply objective corroboration of Petitioner's willingness to accept a plea offer. The state court also reviewed the trial transcript of the fourth trial.

would have taken the plea offer. The court reasoned that, because Petitioner knew that the terms of the plea offer were different from those his counsel had reported, but did not seek clarification of the plea offer when he saw his counsel before trial,⁴ he had failed to establish a reasonable probability that, with effective representation, he would have accepted the proffered plea bargain. The court also reasoned that the plea offer of eleven years was not a patently preferable choice, given that Petitioner had escaped conviction on the murder charge three times and could hope for a voluntary manslaughter sentence of six years. Consequently, the state court concluded, Petitioner failed to demonstrate a prima facie case of prejudice by objective corroborating evidence.

The majority and the district court draw different, and perhaps more convincing, inferences from the facts that were before the state court. But a strong alternative analysis does not make the state court's inferences and analysis objectively unreasonable. Our sole task is to determine whether the state court's decision that the facts, taken in Petitioner's favor, did not meet the *Alvernaz* threshold for objective corroboration was objectively unreasonable under *Strickland*. See *Wiggins v. Smith*, 123 S. Ct. 2527, 2535 (2003) (holding that the question for a federal habeas court is whether the state court's decision was "objectively unreasonable"). Indeed, as the United States Supreme Court recently held, "[w]e may not grant [a] habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 124 S. Ct. 7, 12 (2003) (per curiam).

⁴The state court did not discuss whether the plea offer had expired by the time Petitioner saw his counsel before trial began. However, that court's narrow point was that Petitioner's silence implied consent to proceed to trial—not that Petitioner's hypothetical protest necessarily would have enabled his counsel to secure a revival of the offer.

It simply was not objectively unreasonable for the state court to conclude that the facts Petitioner presented did not amount to objective, corroborating evidence. It *would* have been objectively unreasonable if, for instance, Petitioner's mother in her declaration had sworn that Petitioner told her—at the time he learned of the eleven-year plea offer—that he wanted to take it. Petitioner offered nothing of the sort. Therefore, I simply cannot say that the state court was objectively unreasonable in deciding that Petitioner did not present objective, corroborating evidence sufficient to make out a prima facie claim of prejudice.

Although it may appear that the majority and I differ only in how we read the record or the state appellate court's opinion, our disagreement also is more fundamental. In this case, a state's highest court has established evidentiary requirements for a claim of ineffective assistance of counsel that are more stringent than those established in *Strickland* or in other Supreme Court cases. The majority comments, fairly, that those evidentiary requirements are “in substantial tension” with *Strickland*, maj. op. at 16835 n.6, but as all of us conclude the requirements are not “contrary to” clearly established Supreme Court precedent, *id.* at 16833. I also believe that *Alvernaz* is not an objectively unreasonable application of *Strickland*. In that situation, I believe that 28 U.S.C. § 2254(d) and the Supreme Court's recent interpretations of it, such as the cases cited above and *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (per curiam), require us to allow the state to apply its higher evidentiary standard.

Two final points: First, the majority's assertion that the state court's decision should be viewed, in the alternative, as a factual determination (maj. op. at 16835-36) misapprehends what that court held. The state court held as a matter of law that the facts, taken in Petitioner's favor, did not meet the *Alvernaz* threshold for objective corroboration of Petitioner's claim that he would have taken the plea offer had his counsel communicated it to him accurately at the time. To the extent

that the state court relied on facts, the key facts on which it relied are entitled to a presumption of correctness under 28 U.S.C. § 2254(d)(2) and (e)(1), and none was contradicted in the later federal hearing.⁵

Second, the majority faults the state court for denying Petitioner a hearing to develop additional objective corroboration for his claim. (Maj. op. at 16834-36.) Under our AEDPA standard of review, this criticism is relevant only if (1) clearly established Supreme Court law required a hearing in the circumstances or (2) the facts before the state court were unreasonably determined or insufficient to support an objectively reasonable decision that Petitioner had failed to make out a prima facie case.

Here, as to the first option, the state court's failure to hold a hearing did not violate clearly established Supreme Court precedent. As to the second option, the state court based its decision on (1) Petitioner's failure to exploit an opportunity to clarify the plea offer he knew to be different from what his lawyer had told him and (2) the potential benefits of proceeding to trial, as they then appeared. Support for those key facts existed in the record, and the state court did not exceed the bounds of objective reasonableness in concluding that there

⁵Thus the majority's reliance (maj. op. at 16835-36) on *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 992 (2003), and *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), is misplaced even if factual findings are involved here. *Killian* involved a situation in "which no adjudication on the merits in state court was possible," 282 F.3d at 1208, whereas here the state court had the opportunity and the obligation to decide whether Petitioner had made out a prima facie case. *Weaver* involved a situation in which a trial judge wrote an informal letter but made no formal factual determination, 197 F.3d at 363, whereas here the state court's determination that Petitioner had not made out a prima facie case was contained in a formal decision. *See also Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001) (holding that AEDPA deference applies to state-court findings of fact based on a review of the record), *cert. denied*, 537 U.S. 883 (2002).

was insufficient objective corroboration to trigger further inquiry.

For the foregoing reasons, I would reverse the district court's order granting habeas corpus relief. I must therefore dissent from the majority's holding to the contrary.