

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

7

8

9

United States of America,
Plaintiff/Respondent,

) CR 03-0061-PHX-HDM
) CV-10-2361-PHX-JAT (ECV)

10

11

vs.

) **ORDER**

12

13

Robert Wilson Stewart,
Defendant/Movant.

14

15

16

Pending before the Court is Movant’s Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. This case was referred to Magistrate Judge Voss who, on June 28, 2011, filed a Report and Recommendation (R&R). Doc. 7.¹ Movant filed objections to the R&R. Doc. 8 and Doc. 9. Because objections have been filed, the Court will review the motion de novo. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

22

As recounted in the R&R:

23

24

25

26

27

On June 17, 2003 following a four day jury trial, the jury returned guilty verdicts on all four counts alleged against Movant. Count 1 alleged Movant threatened to murder United States District Judge Roslyn O. Silver, in violation of 18 U.S.C. §115(a)(1)(B); Counts II and III alleged Movant made material false statements to government agents in violation of 18 U.S.C. § 1001(a)(2); and Count IV alleged that Movant solicited another person to commit the murder. On November 20, 2003, Movant was sentenced to 60 months in prison on each of Counts I, II and III, to run

28

¹ All Document numbers are in CV 10-2361 unless otherwise indicated.

1 concurrently, and 232 month in prison on Count IV, to run consecutively
2 to the sentences for Count I, II and III. ...

3 On November 26, 2003, Movant filed a timely Notice of Appeal. On
4 August 23, 2005, the Ninth Circuit Court of Appeals, in a reported
5 decision, affirmed the convictions on Counts I, II and IV, but reversed the
6 conviction on Count III and remanded for re-sentencing. Movant was re-
7 sentenced on June 15, 2006, to concurrent 60 month prison terms on each
8 of Counts I and II, and 232 months on Count IV, again to run consecutively
9 to the sentences for Counts I and II. ...

10 Movant again filed a direct appeal in the Ninth Circuit. On October
11 7, 2009, in a Memorandum Decision, the Court affirmed the convictions
12 and sentences. ...

13 Doc. 7 at 1–2.

14 In his Petition, Movant raises three claims for relief. Doc. 1 at 1. The first is
15 ineffective assistance of counsel. The second and third both challenge the federal court’s
16 territorial jurisdiction over his offenses.

17 **I. Ineffective Assistance of Counsel Claim**

18 Under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, “[a]n ineffective
19 assistance claim has two components: a petitioner must show that counsel’s performance was
20 deficient, and that the deficiency prejudiced the defense. To establish deficient performance,
21 a petitioner must demonstrate that counsel’s representation fell below an objective standard
22 of reasonableness.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (internal citations and
23 quotations omitted). A deficient performance is one that is “outside the wide range of
24 professionally competent assistance.” *Strickland*, 466 U.S. at 690. In order to show prejudice,
25 Petitioner “must show that there is a reasonable probability that, but for counsel’s
26 unprofessional errors, the result of the proceeding would have been different. A reasonable
27 probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*,
28 466 U.S. at 694. Without specifics that cause the court to have such doubts, a claim of
ineffective assistance of counsel must be denied. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir.
1994) (noting that petitioner needs to “identify what evidence counsel should have presented”
to show his innocence).

Movant claims his counsel was ineffective for failing to challenge the fact that an audio

1 recording that was played to the jury was different from the defense copy and was largely
2 unintelligible. On that audio recording, Movant solicited another person to kill a federal
3 judge. Movant claims that if the original had been played to the jury, it would have
4 demonstrated his innocence.

5 The R&R views Movant's complaint of ineffective assistance of counsel as nothing
6 more than an attempt to challenge his sentence and the ruling that has been made on the audio
7 recording. Doc. 7 at 3. The R&R notes that the Ninth Circuit ruled that the duplicate audio
8 recording submitted by the prosecution was properly admitted. *Id.* (citing *U.S. v. Stewart*, 420
9 F.3d 1007, 1021 n.13 (9th Cir. 2005)). Additionally, the R&R notes that because the
10 admissibility of the duplicate recording had already been decided by the Ninth Circuit,
11 Movant cannot re-litigate the issue simply by framing it as ineffective assistance of counsel.
12 Doc. 7 at 3.

13 The R&R notes that notwithstanding the Ninth Circuit's determination that the audio
14 recording was admissible, Movant's ineffective assistance claim would fail nonetheless. Doc.
15 7 at 4. Additionally, the R&R notes that Movant has not demonstrated that the result of the
16 proceedings would have been different even if his lawyer would have challenged the accuracy
17 of the duplicate recording played to the jury. *Id.* The only evidence that Movant has
18 presented for this court to conclude that there is a reasonable probability that the trial court
19 would have excluded the duplicate recording is his self-serving assertions that the original
20 would have shown his innocence. Having reviewed this issue de novo, the Court finds that
21 Movant did not have ineffective assistance of counsel because Movant has failed to
22 demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result
23 of the proceeding would have been different.

24 In his objections, Movant raises an additional argument about the original recording.
25 Specifically, Movant claims that defense witnesses, if called, would have testified in his favor
26 concerning the information contained in the original audio recording. Doc. 8 at 4. Movant
27 also claims that the exculpatory value of the original recording cannot be determined because
28

1 of counsel’s failure to subpoena possible witnesses. *Id.* at 3. However, a petitioner may not
2 use self-serving speculation to argue that a witness might have had favorable testimony.
3 *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997); *U.S. v. Ashimi*, 932 F.2d 643, 650 (7th
4 Cir. 1991). And trial counsel is not required to interview every possible witness to be
5 effective. *See generally Bobby v. Van Hook*, 130 S. Ct. 13, 17–18 (2009). Once again,
6 Movant has failed to show a reasonable probability that the result of the proceeding would
7 have been different if not for counsel’s alleged unprofessional errors. Additionally, the Court
8 has found that Movant has not shown that the result of the proceeding would have been
9 different had counsel called the additional witnesses, nor has Movant shown prejudice due to
10 counsel’s failure to further object to the admission of the recording because the Court of
11 Appeals ruled that it was properly admitted. Therefore, the Court need not conduct the
12 evidentiary hearing requested by Movant to resolve any factual disputes. Accordingly, the
13 objections on this claim are overruled.

14 **II. Jurisdiction Claims**

15 Movant and the R&R note that the issues in grounds two and three are closely linked
16 because they both challenge the federal court’s territorial jurisdiction over Movant’s offenses.
17 Doc. 7 at 4. Movant argues that because the federal prison where the offenses occurred is
18 situated on land not owned by the United States, the federal court was without jurisdiction to
19 hear the case and impose sentences. Doc. 1 at 3–4.

20 “The federal court’s jurisdiction is not limited to federal crimes committed on federal
21 lands.” *United States v. McCalla*, 545 F.3d 750, 756 (9th Cir. 2008); *see also United States*
22 *v. Adams*, 581 F.2d 193, 200 (9th Cir. 1978) (federal jurisdiction over murders of postal
23 employees is not limited to those occurring on federal land). Under 18 U.S.C. § 3231, “[t]he
24 district courts of the United States have original jurisdiction, exclusive of the courts of the
25 States, of all offenses against the laws of the United States.” Federal crimes apply “equally
26 to everyone everywhere within the United States.” *United States v. Begay*, 42 F.3d 486, 499
27 (9th Cir. 1994).

1 Using the authority above, the R&R notes that Movant's territorial jurisdiction claims
2 are without merit. Doc. 7 at 5. It is irrelevant to the court's jurisdiction that the offenses may
3 have occurred on land not owned by the United States. Accordingly, relief on grounds two
4 and three will also be denied.

5 In his objections, Movant argues that in the majority of cases, the location or place of
6 a crime determines the jurisdiction. Doc. 8 at 8. Movant also contends that the federal crimes
7 he has been convicted of are among those that must occur on federal lands to be tried in a
8 federal court. *Id.* In light of *United States v. McCalla*, 545 F.3d at 756, Movant's position
9 is legally incorrect. Accordingly, the objection on this claim is overruled.

10 **III. Conclusion**

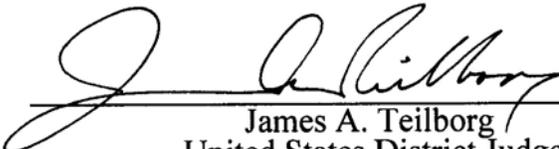
11 Based on the foregoing,

12 **IT IS ORDERED** that the Report and Recommendation (Doc. 7) is accepted, the
13 Objections (Doc. 8) and Supplemental Objection (Doc. 9) are overruled, the Motion to
14 Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Doc. 1) is denied, and
15 the Clerk of the Court shall enter judgment accordingly.

16 **IT IS FURTHER ORDERED** that pursuant to Rule 11 of the Rules Governing
17 Section 2255 Proceedings, in the event Movant files an appeal, the Court denies issuance of
18 a Certificate of Appealability because Movant has not made a substantial showing of the
19 denial of a constitutional right.

20 DATED this 23rd day of August, 2011.

21
22
23
24
25
26
27
28


James A. Teilborg
United States District Judge