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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Devon Mitchell,

9 Petitioner,

10 v.

11 United States of America,

12 Respondent.

No. CV11-0580-PHX-DGC (MEA)
CR05-0886 PHX DGC

13 **ORDER**

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15 On March 28, 2011, Petitioner Devon Mitchell filed a pro se motion to vacate, set
16 aside, or correct sentence, pursuant to 28 U.S.C. § 2255. Doc. 1. On April 1, 2011,
17 Petitioner filed a motion for permission to amend. Doc. 4. On April 5, 2011, the Court
18 denied Petitioner's first § 2255 motion with leave to amend, and denied his motion for
19 permission to amend as moot. Doc. 5. Petitioner filed an amended § 2255 motion to
20 vacate, set aside, or correct sentence on May 17, 2011. Doc. 6. The government
21 responded (Doc. 8), and Petitioner did not reply (*see* Doc. 10).

22 On December 8, 2011, Magistrate Judge Mark E. Aspey issued a report and
23 recommendation ("R&R") that Petitioner's § 2255 motion be denied and dismissed with
24 prejudice. Doc. 11. The Court granted Petitioner two extensions to respond to the R&R
25 (Docs. 13, 15), and set a final deadline of April 13, 2012 (Doc. 15). Petitioner filed a
26 substantive response (Doc. 16, at 4-21), and attached a copy of his prior motion for
27 permission to amend (Doc. 16, at 1-3). The Court construes the substantive response as
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1 an objection to the R&R.¹ Doc. 16, at 4-21. For the reasons that follow, the Court will
2 accept the R&R and deny the motion to vacate, set aside, or correct sentence.

3 **I. Background.**

4 Petitioner is currently confined at the Federal Bureau of Prisons facility in Pollock,
5 Louisiana. On June 20, 2006, Petitioner was indicted with one count of conspiracy
6 (Count 1), three counts of bank robbery (Counts 2, 5, and 6), one count of armed bank
7 robbery (Count 3), and one count of possession of a firearm during a crime of violence
8 (Count 4). Doc. 8-2, at 19-22. Petitioner's co-defendants, Ulonda Monroe and Shannon
9 Scott, pled guilty and testified against Defendant at trial. Doc. 8, at 2-3. On March 5,
10 2008, a jury convicted Petitioner on Counts 2, 3, 4, 5, and 6, but reached no verdict on
11 Count 1. Doc. 11, at 2. On Count 3, the jury found Defendant guilty of both armed bank
12 robbery and the lesser-included offense of bank robbery. *Id.* On April 24, 2008, on the
13 government's motion, the conspiracy charge was dismissed without prejudice. *Id.* The
14 Court subsequently vacated the conviction for the lesser-included offense in Count 3,
15 subject to reinstatement if the conviction for the greater offense was vacated and
16 remanded on appeal. *Id.* Petitioner was sentenced on July 10, 2008 to concurrent terms
17 of 162 months in prison for his convictions on Counts 2, 3, 5, and 6, and to a term of 60
18 months for Count 4, to be served consecutively. *Id.*

19 Plaintiff appealed his convictions and sentences. He argued that no credible
20 evidence was introduced to show that he was involved in a bank robbery, that the trial
21 court made improper and prejudicial evidentiary rulings, that the trial court violated his
22 due process rights by refusing to hold a *Daubert* hearing,² that the trial court improperly
23 denied his objections regarding jury objections and jury questions, and that the trial court
24 erred by adding enhancements at sentencing. Doc. 8-2, at 16-17. The Ninth Circuit

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26 ¹ While Petitioner's objection was not electronically filed until April 16, 2012,
27 Petitioner dated the objection March 9, 2012. Doc. 16, at 21. The Court therefore
28 considers the objection timely.

² See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

1 Court of Appeals rejected these claims and affirmed Petitioner's convictions and
2 sentences on October 2, 2009. Doc. 8-2, at 3-12. The Supreme Court denied certiorari
3 on April 2, 2010. Doc. 8, at 3.

4 Petitioner raises six claims in his amended § 2255 motion: (1) constructive
5 amendment of the indictment, (2) the government's failure to prove each essential
6 element of the offenses charged in Counts 2, 3, 5, and 6, (3) insufficient evidence to
7 sustain the charge in Count 4, (4) prejudice resulting from the trial court's failure to give
8 an alibi instruction, (5) abuse of discretion by the trial court in failing to respond
9 promptly to jury notes requesting clarification of legal issues, and (6) ineffective
10 assistance of counsel. Doc. 6.

11 Judge Aspey found that Petitioner had procedurally defaulted on some of his
12 § 2255 claims by failing to raise them in his direct appeal, and that other claims raised in
13 direct appeal were not properly reiterated in the § 2255 motion. Doc. 11, at 7. The only
14 claim Judge Aspey considered on the merits was ineffective assistance of counsel. *Id.*
15 at 7-11. Petitioner objects to the R&R on the following claims: constructive amendment
16 of the indictment, insufficient evidence presented on Count 4, prejudice resulting from
17 the trial court's refusal to give an alibi instruction, and ineffective assistance of counsel.
18 Doc. 16.

19 **II. Standard of Review.**

20 A party may file specific written objections to the R&R's proposed findings and
21 recommendations. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The Court must
22 undertake a de novo review of those portions of the R&R to which specific objections are
23 made. *See id.*; *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*,
24 328 F.3d 1114, 1121 (9th Cir. 2003). The Court may accept, reject, or modify, in whole
25 or in part, the findings or recommendations made by the magistrate judge. Fed. R. Civ.
26 P. 72(b); 28 U.S.C. § 636(b)(1).

1 **III. Discussion.**

2 **A. Claims Not Raised On Appeal.**

3 Absent a showing of cause and prejudice, a federal habeas petitioner procedurally
4 defaults all claims which were not raised on direct appeal, other than claims asserting that
5 the petitioner was deprived of effective assistance of counsel. *See Massaro v. United*
6 *States*, 538 U.S. 500, 504 (2003); *Bousley v. United States*, 523 U.S. 614 (1998); *United*
7 *States v. Frady*, 456 U.S. 152, 167-68 (1982). To obtain collateral relief under § 2255
8 based on trial errors to which no contemporaneous objection was made, “a convicted
9 defendant must show both (1) ‘cause’ excusing his double procedural default, and
10 (2) ‘actual prejudice’ resulting from the errors of which he complains.” *Frady*, 456 U.S.
11 at 167. Petitioner did not raise his constructive amendment or alibi instruction claims on
12 direct appeal. *See* Doc. 8-2, at 17. He must therefore show both cause and actual
13 prejudice in order to receive habeas relief on these claims.

14 **1. Constructive Amendment.**

15 Petitioner claims that his indictment was constructively amended with respect to
16 Count 6. Doc. 16, at 7. Count 6 of the superseding indictment reads: “On or about
17 August 4, 2005, in the District of Arizona, [Petitioner], by force, violence, and
18 intimidation, did take from Margarita Aram, a bank teller, approximately \$2,655.00,
19 belonging to, and in the care, custody, control, management and possession of the
20 National Bank of Arizona, located at 5555 E. Main Street, Mesa, Arizona. The deposits
21 of which were federally insured.” Doc. 8-2, at 21-22. Petitioner alleges that the
22 government constructively amended the indictment by offering evidence at trial that a
23 female codefendant committed the offense charged in Count 6 and that Petitioner instead
24 aided in committing the offense. Doc. 16, at 9. Petitioner argues that the alleged
25 constructive amendment prejudiced his defense because he was preparing to contest
26 “entry into the bank (or the alleged presence on the scene)” while the government
27 intended to present evidence that the female codefendant was the actual robber. *Id.* at 7.

28 Petitioner has not shown cause and prejudice. The indictment was not

1 constructively amended, and could not have caused actual prejudice to Petitioner’s
2 defense strategy. Under federal law, a defendant may be found guilty of a crime even if
3 the defendant personally did not commit the act or acts constituting the crime, but aided
4 and abetted in its commission. This was the instruction given the jury on Count 6. *See*
5 CR05-00886-DGC, Doc. 231, at 31-32.

6 Aiding and abetting need not be pleaded in an indictment. In *Nye & Nissen v.*
7 *United States*, 336 U.S. 613 (1949), the petitioner was charged with substantive counts of
8 filing false invoices with a United States agency. No evidence of the petitioner’s direct
9 participation in the unlawful acts was produced, but the verdict was upheld because the
10 evidence was sufficient to warrant the submission of the substantive counts to the jury on
11 an aiding and abetting theory, even though that theory was not pleaded in the indictment.
12 Since *Nye & Nissen*, the Ninth Circuit “has uniformly held that it is not necessary to
13 charge a defendant as an aider and abetter and that a conviction on that theory will be
14 upheld when the defendant has been charged as a principal.” *Giraud v. United States*,
15 348 F.2d 820, 822 (9th Cir. 1965) (collecting cases).

16 Furthermore, Petitioner has made no attempt to demonstrate cause for his default.
17 He bases his ineffective assistance of counsel claim on counsel’s failure to challenge the
18 validity of the relevant banks’ Federal Deposit Insurance Corporation (“FDIC”)
19 certification. *See* Doc. 16, at 16. Petitioner has not alleged any external impediment that
20 prevented counsel from raising a constructive amendment claim at trial or on appeal. *See*
21 *Murray v. Carrier*, 477 U.S. 478, 497 (1986).

22 Petitioner’s claim may nonetheless be reviewed in this collateral proceeding if he
23 can establish that the alleged error ““has probably resulted in the conviction of one who is
24 actually innocent.”” *Bousley*, 523 U.S. at 623 (quoting *Murray* 477 U.S. at 496). “To
25 establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it
26 is more likely than not that no reasonable juror would have convicted him.” *Id.*
27 (quotations and citations omitted). Petitioner claims that he “is actually innocent of
28 Count Six as charged in the indictment of being the principle in robbing the National

1 Bank of Arizona on August 4, 2005.” Doc. 16, at 10. He “maintains his innocence on all
2 counts.” *Id.* at 10 n.1. This assertion alone, with no supporting evidence, does not
3 demonstrate actual innocence.

4 Petitioner’s motion for habeas review of his constructive amendment claim must
5 be denied for failure to establish actual prejudice or cause for the default. *Murray*, 477
6 U.S. at 497. The Court will accept the R&R on constructive amendment claim.

7 **2. Alibi Instruction.**

8 Petitioner claims that the trial court erred by refusing to give an alibi instruction to
9 the jury.³ Judge Aspey found that Petitioner procedurally defaulted on this claim by
10 failing to raise it on direct appeal. Doc. 11, at 7. Petitioner objects that he did raise the
11 claim on direct appeal in his opening brief, but that counsel failed to address it in oral
12 argument and that the Ninth Circuit failed to acknowledge the claim in its memorandum
13 opinion. Doc. 16, at 14. The Court has reviewed Petitioner’s appellate brief. It does not
14 challenge the trial court’s decision not to give an alibi instruction. *See* Ninth Circuit
15 Court of Appeals Case No. 08-10323, Doc. 15-1. Judge Aspey correctly concluded that
16 Petitioner procedurally defaulted on this claim by failing to raise it on appeal.

17 Petitioner claims that he was prejudiced because an alibi was his “only realistic
18 defense” given that the government’s evidence was directed at demonstrating Petitioner’s
19 presence at the scene as a getaway driver. Doc. 16, at 15. However, “the habeas
20 petitioner must show ‘not merely that the errors at trial . . . created a *possibility* of
21 prejudice, but that they worked to his *actual* and substantial disadvantage[.]’” *Murray*,
22 477 U.S. at 494 (quoting *Frady*, 456 U.S. at 170) (emphasis and alteration in original);
23 *see Fairbank v. Ayers*, 650 F.3d 1243, 1247 (9th Cir. 2011). Petitioner has not shown
24 that the lack of an alibi instruction “infect[ed] his entire trial with error of constitutional
25 dimensions.” *Id.* Nor has Petitioner established cause for procedural default. *See*
26 *Fairbank*, 650 F.3d at 1247 (“To establish cause for a procedural default, a petitioner

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28 ³ With respect to Count 2 of the superseding indictment, the trial court did instruct
the jury on alibi evidence. CR05-00886-DGC, Doc. 231, at 23.

1 must show that ‘some objective factor external to the defense impeded counsel’s efforts
2 to comply with the State’s procedural rule.’”) (citation omitted). As discussed above,
3 Petitioner has not demonstrated actual innocence.

4 Petitioner’s motion for habeas review of his alibi instruction claim is denied for
5 failure to establish actual prejudice or cause for the default. *Murray*, 477 U.S. at 497.
6 The Court will accept the R&R on the alibi instruction claim.

7 **B. Sufficiency of Evidence.**

8 Plaintiff claims that the trial evidence presented on Count 4 of the superseding
9 indictment was insufficient to sustain a conviction. Count 4 reads: “On or about
10 August 2, 2005, in the District of Arizona, [Petitioner] and Ulonda Monroe, did possess,
11 use, carry and brandish a firearm, a hand gun, during and in relation to a crime of
12 violence, that is armed bank robbery[.]” Doc. 8-2, at 21. Petitioner objects that the
13 government “failed to offer any evidence of Petitioner[’s] knowledge of the use of a
14 weapon or that there was a likelihood that a weapon would be utilized.” Doc. 16, at 13.

15 Relief is precluded on a § 2255 claim that was raised and decided in the
16 petitioner’s direct appeal. *See United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979)
17 (“Issues disposed of on a previous direct appeal are not reviewable in a subsequent
18 § 2255 proceeding.”); *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972);
19 *McCreary v. United States*, Nos. CV-09-01023-PHX-JFM, CR-04-00313-PHX-JFM,
20 2009 WL 5206803, at *2 (D. Ariz. Dec. 30, 2009).

21 Judge Aspey found that Petitioner had arguably raised his sufficiency of evidence
22 claim on direct appeal, and that this claim was denied. Doc. 11, at 7. Indeed, the Ninth
23 Circuit considered Petitioner’s contention that the trial court erred when it denied his
24 motion for a judgment of acquittal because there was insufficient evidence to support a
25 conviction for armed bank robbery and possession of a firearm. CR05-00886-DGC,
26 Doc. 325-1, at 7. It concluded that “[s]ufficient evidence supports each of [Petitioner’s]
27 convictions.” *Id.* Furthermore, although the jury was not properly instructed on the
28 aggravating element distinguishing armed bank robbery from bank robbery, the Ninth

1 Circuit held this was harmless error because Petitioner “was aware Monroe was given a
2 gun prior to the bank robbery; he saw her place it in her purse and walk into the bank;
3 and he had written the demand note which stated Monroe had a gun. A rational jury
4 could find that [Petitioner] intended to aid and abet the use of the gun during the robbery,
5 and that the bank teller’s life was put in jeopardy by the use of a dangerous weapon.”
6 CR05-00886-DGC, Doc. 325-1, at 5.

7 A § 2255 petitioner may, in limited circumstances, raise claims of trial court error
8 that were previously raised and decided on direct appeal. *Feldman v. Henman*, 815 F.2d
9 1318, 1322 (9th Cir. 1987) (citing *Kaufman v. United States*, 394 U.S. 217, 227 & n.8)
10 (1969)). “These are extraordinary circumstances when a constitutional violation
11 probably has caused the conviction of one innocent of the crime.” *McCleskey v. Zant*,
12 499 U.S. 467, 494 (1991). Petitioner has not, however, demonstrated a probability of
13 innocence that would “implicat[e] a fundamental miscarriage of justice.” *Id.* (citing
14 *Murray*, 477 U.S. at 485).

15 The Court declines to review Petitioner’s sufficiency of evidence claim because
16 the claim has been resolved on direct appeal by the Ninth Circuit. *See Feldman*, 815 F.2d
17 at 1321 (“[A] district court *cannot* entertain, even in a matter properly before it, a petition
18 by a party which in effect seeks to undo our court’s resolution of a matter first addressed
19 to and fully and fairly adjudicated by it.”) (emphasis in original).

20 **C. Ineffective Assistance of Counsel.**

21 Judge Aspey found that Petitioner failed to establish that counsel’s failure to raise
22 any of the claims alleged in his § 2255 action constituted deficient performance or that he
23 was prejudiced as a result, because he has not made an arguable claim that asserting any
24 of these errors would have produced a different result in his criminal proceedings or in
25 his direct appeal. Doc. 11, at 10-11. Petitioner objects that counsel’s failure to challenge
26 the validity of each bank’s FDIC certificate, and to ensure that they were in fact current at
27 the time of the robbery, constituted deficient conduct under the *Strickland* standard.
28 Doc. 16, at 16.

1 To prevail on a claim for ineffective assistance of counsel, Petitioner must show
2 that “(1) his attorney’s performance was unreasonable under prevailing professional
3 standards, and (2) a reasonable probability that but for counsel’s unprofessional errors,
4 the results would have been different.” *United States v. Blaylock*, 20 F.3d 1458, 1465
5 (9th Cir. 1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-94) (1984)).
6 *Strickland* defines reasonable probability as “a probability sufficient to undermine
7 confidence in the outcome.” *Id.*

8 Applying “highly deferential” judicial scrutiny to counsel’s performance,
9 *Strickland*, 466 U.S. at 689, the Court concludes that Petitioner has not shown ineffective
10 assistance of counsel. The government issued a subpoena to the custodian of records for
11 each of the three banks for their certification of federal insurance documentation. Doc. 8,
12 at 8. This documentation and additional supporting testimony were admitted as evidence
13 to prove that the deposits at each of the banks were federally insured at the time of each
14 robbery. *Id.* In the Ninth Circuit, testimony of a bank manager or officer that the
15 deposits were federally insured at the time of the offense is sufficient. *See United States*
16 *v. Phillips*, 606 F.2d 884, 887 (9th Cir. 1979) (“The rule, as stated in this circuit and
17 elsewhere, is that the uncontradicted testimony of a ranking official of the institution is
18 sufficient to establish that the institution is federally insured.”). At trial, copies of FDIC
19 insurance certificates were certified and admitted into evidence for Arizona Central
20 Credit Union, National Bank of Arizona, and Compass Bank. Doc. 8, at 9-10. These
21 admissions were made without objection by Petitioner’s counsel. *Id.* The custodian of
22 records for National Bank of Arizona testified as to the accuracy of the records and that
23 the bank was insured by the FDIC. *Id.* at 10. Custodians of record for the other two
24 banks were present and available to testify at trial regarding their bank’s federal
25 insurance coverage at the time of the robbery, but these witnesses were excused because
26 Petitioner’s counsel agreed to the authenticity of the business records and did not object
27 to their admission. *Id.* at 9-10.

28 Counsel’s performance clearly “falls within the wide range of reasonable

1 professional assistance,” *Strickland*, 466 U.S. at 689, and Petitioner has not shown that
2 the result at trial or on appeal would have been different had counsel challenged the
3 validity of each bank’s FDIC certificate. The Court will accept the R&R on Petitioner’s
4 ineffective assistance of counsel claim.

5 **IT IS ORDERED:**

- 6 1. The factual findings and conclusions in Judge Aspey’s R&R (Doc. 11) are
7 **accepted.**
8 2. The Clerk shall terminate this action.

9 Dated this 16th day of May, 2012.

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David G. Campbell
United States District Judge
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