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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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United States of America,
Plaintiff/Respondent,

) CV 12-2577-PHX-JAT
) CR 09-678-01-PHX-JAT

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vs.

ORDER

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Stephen Ross Raboy,

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Movant/Defendant.

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Movant was convicted on September 17, 2010, of three counts of armed bank robbery, aiding and abetting, and using a firearm during a crime of violence. Following a direct appeal, Movant timely filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 (“Motion”) on December 3, 2012 (Doc. 7).¹

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On December 16, 2013, the Magistrate Judge to whom this case was assigned issued a Report and Recommendation (“R&R”) recommending that this Court deny the Motion (Doc. 14). Movant filed objections to the R&R (Doc. 15).

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I. Review of R&R

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This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that the

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¹ All Doc. numbers refer to the CV case number referenced above unless otherwise noted.

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1 district judge must review the magistrate judge’s findings and recommendations *de novo* if
2 *objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
3 (9th Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263 F.Supp.2d 1219,
4 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes that *de novo* review of
5 factual and legal issues is required if objections are made, ‘but not otherwise.’”); *Klamath*
6 *Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir. 2009)
7 (the district court “must review *de novo* the portions of the [Magistrate Judge’s]
8 recommendations to which the parties object.”). District courts are not required to conduct
9 “any review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*,
10 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28 U.S.C. § 636(b)(1) (“the court shall
11 make a *de novo* determination of those portions of the [report and recommendation] to which
12 objection is made.”). Thus, this Court will review the portions of the R&R to which Movant
13 objected *de novo*.

14 **II. Objections**

15 The Motion in this case claims two theories of ineffective assistance of counsel. As
16 the R&R correctly noted, claims of ineffective assistance of counsel are properly raised in
17 a motion under 28 U.S.C § 2255. R&R at 3. The R&R determined that neither of Movant’s
18 claims established ineffective assistance of counsel, and recommended that the motion be
19 denied on the merits. Movant objected to the R&R’s recommendation on both of his theories
20 of ineffective assistance of counsel.

21 The R&R correctly details the law governing ineffective assistance of counsel claims,
22 and neither party objected to this legal standard. Therefore, the Court adopts the following
23 and will apply it to Movant’s claims:

24 ...The Court reviews claims of ineffective assistance of counsel under the
25 two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).
26 Under *Strickland*, Movant must show: (1) that counsel’s performance was
27 deficient, and (2) that counsel’s deficient performance prejudiced the defense.
28 466 U.S. at 687.

To establish that counsel’s performance was deficient, Movant must show that
“counsel’s representation fell below an objective standard of reasonableness.”
Id. at 688. There is a strong presumption that counsel’s conduct falls within the

1 wide range of reasonable assistance. *Id.* Movant “must overcome the
2 presumption that, under the circumstances, the challenged action ‘might be
3 considered sound trial strategy.’” *Id.* (citing *Michael v. Louisiana*, 350 U.S. 91,
4 101 (1955)). “A fair assessment of attorney performance requires that every
5 effort be made to eliminate the distorting effects of hindsight, to reconstruct
6 the circumstances of counsel’s challenged conduct, and to evaluate the conduct
7 from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

8 To establish prejudice from counsel’s errors, Movant must demonstrate that
9 “there is a reasonable probability that, but for counsel’s unprofessional errors,
10 the result of the proceeding would have been different.” *Id.* at 694. A
11 “reasonable probability” is “a probability sufficient to undermine confidence
12 in the outcome.” *Id.* The court need not determine whether counsel’s
13 performance was deficient before examining whether prejudice resulted from
14 the alleged deficiencies. *See Smith v. Robbins*, 528 U.S. 259, 286 fnt.14
15 (2000). “If it is easier to dispose of an ineffectiveness claim on the ground of
16 lack of sufficient prejudice, which we expect will often be so, that course
17 should be followed.” *Id.* (quoting *Strickland*, 466 U.S. at 697).

18 R&R at 3-4.

19 **A. First theory of ineffective assistance of counsel**

20 Movant’s first theory of ineffective assistance of counsel is that his attorney failed to
21 investigate and present an alibi defense. The R&R concludes that Movant has failed to show
22 counsel was ineffective in this regard because Movant makes only a vague assertion that he
23 had an alibi witness or defense. R&R at 4. Movant objects to the R&R on this point and
24 argues that he has “sworn facts” to support this claim. Objections at 4.

25 None of the “sworn facts” Movant claims to have are recounted in his objections.
26 Additionally, none of the “sworn facts” Movant claims to have are in the Motion itself.
27 Movant never states the name of any potential alibi witness. Further, Movant never states
28 one fact to which any such witness would testify. He simply offers the conclusion that “The
testimony proffered would have shown that Petitioner was someplace other than the scene
of the crimes at the time of the crimes.” Doc. 7 at 8. Finally, Movant never even specifies
whether he has a different alibi witness for all three dates on which he was convicted of bank
robbery, or whether this is one witness.

On this record the Court agrees with the R&R that Movant has not alleged a single
fact that would support an alibi defense. Thus, the Court finds that counsel’s performance
was not deficient for not investigating this theory, nor was Movant prejudiced by it not be

1 presented to the jury. Therefore, Movant’s ineffective assistance of counsel claim premised
2 on an alleged alibi witness(es) is denied.

3 Moreover, Movant’s argument that his counsel was not investigating potential
4 defenses that Movant suggested is belied by the record. In the sealed request for additional
5 funds, it is clear to the Court that counsel was chasing down every theory Movant suggested.
6 *See* Doc. 183 at 1-3 in CR 09-678. Therefore, Movant’s conclusory assertions that he had
7 an alibi witness or witnesses and that his counsel refused to investigate is not supported by
8 the record.

9 In his objections on this claim, Movant renews his request for an evidentiary hearing.
10 As the R&R notes, an evidentiary hearing is only required when Movant makes allegations
11 which if true would entitle him to relief. R&R at 8. Here, Movant has made no factual
12 allegations whatsoever; therefore, Movant has failed to allege any facts which if true would
13 entitle him to relief. *See United States v. Navarro–Garcia*, 926 F.2d 818, 822 (9th Cir. 1991);
14 *see also Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir. 1994) (to be entitled to an
15 evidentiary hearing, a habeas petitioner must assert a colorable claim to relief). As this Court
16 has previously held, an evidentiary hearing cannot be used as a fishing expedition to
17 determine if any witnesses are in existence who may have relevant testimony. *See United*
18 *States v. Fuentes*, 2009 WL 4730733, *5 (D. Ariz. Dec. 7, 2009) *aff’d United States v.*
19 *Fuentes*, 457 Fed. Appx. 687, 688 (9th Cir. 2011) (“Further, because Fuentes has failed to
20 provide any indication of how the additional testimony would affect his right to relief, the
21 district court did not err in declining to appoint counsel to assist in investigating these four
22 witnesses or to hold an evidentiary hearing.”).² Therefore, Movant’s request for an
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24 ² In his Objections to the R&R’s recommendation that this Court deny the request for
25 an evidentiary hearing, Movant makes his only factual assertion about his alibi theory.
26 Objections at 9. Specifically, Movant suggests that a receipt is available that would show
27 someone purchased tires for Movant’s car at the time of one of the crimes. *Id.* The Court
28 finds that Movant has still failed to show that he is entitled to an evidentiary hearing or
habeas relief. First, Movant fails to actually attach such a receipt to prove it in fact exists.
Second, assuming such receipt exists, it could only be at the time of one of the three

1 evidentiary hearing on this claim is denied.

2 **B. Second theory of ineffective assistance of counsel**

3 Movant's second theory of ineffective assistance of counsel is based on Movant's
4 claim that his counsel failed to challenge the eye witness identification of Movant. However,
5 as the R&R recounts, Movant's counsel did move to suppress the eye witness identification
6 before trial. R&R at 5-6 The Court denied that motion and the Court of Appeals affirmed.
7 *Id.* at 6-7. Thus, Movant's claim that his counsel failed to challenge this evidence is
8 incorrect.

9 Perhaps recognizing that his allegations are not supported by the record, in his
10 Objections, Movant argues more generally that his counsel was ineffective because he was
11 "weak" in "challenging and cross examining witnesses". Objections at 7. First, the
12 undersigned sat through the trial in this matter and has reviewed the record, and finds no
13 factual support for Movant's conclusory allegation the counsel's challenge of the witnesses
14 was "weak." Therefore, the Court finds counsel's performance was not deficient.

15 Second, given the overwhelming weight of the evidence against Movant as recounted
16 by the Court of Appeals (*United States v. Raboy*, 454 Fed. Appx. 649, 651 (9th Cir. 2011)),
17 even if Movant could point to "stronger" questions counsel should have asked, Movant has
18 failed to show prejudice. Therefore, Movant's request for habeas relief on this theory of
19 ineffective assistance of counsel is denied.

20 **III. Conclusion**

21 Based on the foregoing,

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24 robberies of which Movant was convicted. Third, again assuming such receipt exists, such
25 receipt would not prove that Movant was with the car at the time it went in for service.
26 Therefore, the Court finds that Movant has failed to show prejudice resulting from counsel's
27 failure to introduce the alleged receipt at trial given the significant evidence against Movant.
28 *See United States v. Raboy*, 454 Fed. Appx. 649, 651 (9th Cir. 2011) (noting four eye witness
identifications, DNA evidence linking Movant to the robberies, and evidence seized from
Movant's residence such as two-way radios, a list of police and medical scanner frequencies,
and a note that read "Bomb. Big bills. No dye-no GPS, no alarms, or else.")

