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NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

Plaintiff,

v.

Eugene Joseph Escalanti,

Defendant/Movant.

No. CV-17-02141-PHX-SRB (DKD)
CR09-00946-PHX-SRB

ORDER

Movant, Eugene Joseph Escalanti, filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. He asserted three grounds for relief. First, Escalanti argues that his counsel was ineffective for failing to obtain a video of Movant at a Circle K on the day of the murder and for failing to object to jury instructions. Second, Escalanti argues that he was acquitted of assault and, therefore, could not have been found guilty of murder. Finally, Escalanti argues that there was no jurisdiction because the evidence at trial did not establish the crime occurred on tribal land. The government filed a response in opposition to the motion. This Court referred the motion to the Magistrate Judge for a Report and Recommendation, which was issued on January 24, 2018. The Magistrate Judge recommended that Movant's

1 Motion to Vacate, Set Aside, or Correct Sentence be denied.

2 Movant filed timely written objections to the Magistrate Judge's Report and
3 Recommendation and the government filed a response to the objections.
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5 Movant objects only to the Magistrate Judge's recommendations on the first and
6 second grounds. Movant concedes that the third issue raised concerning jurisdiction was
7 previously argued and decided on appeal and, therefore, cannot be the basis of a § 2255
8 motion.
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10 In his first of two claims of ineffective assistance of counsel, Movant has failed to
11 show how the reported statement contained in an investigative report that Movant had
12 been seen at a Circle K means that there was a video of him that would have changed the
13 outcome of the case because it would have shown that he was not with the decedent and
14 witness Kim Baker. Movant does not address how such a video, if it existed, would have
15 overcome the witness testimony and the physical evidence that linked him to the murder
16 of the decedent. The Court agrees with the Magistrate Judge that Movant has failed to
17 show how he was prejudiced by the absence of this alleged video. The Court, therefore,
18 rejects this claim of ineffective assistance of counsel.
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22 Movant also claims that his counsel was ineffective because he failed to object to
23 jury instructions. This is all Movant said. He did not say what jury instruction was
24 objectionable nor did he explain at all what jury instruction should have been given that
25 would have likely changed the outcome. In the Report and Recommendation the
26 Magistrate Judge correctly concluded that Movant failed to show ineffective assistance of
27 counsel by a bare statement that counsel failed to object to jury instructions.
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1 In his objections Movant now attempts to urge that this ground for ineffective
2 assistance of counsel involves a failure to object to jury instructions on the basis of the
3 “Bruce test” claiming if an instruction involving the “Bruce test” had been given ‘the jury
4 wouldve (sic) found it difficult to convict me.’ (Doc. 6, R. & R. Resp. at 3) The
5 government and the Court assume Movant is referring to *United States. v. Bruce*, 394
6 F.3d 1215 (9th Cir. 2005) which addressed the requirements for proof of tribal
7 membership. Movant cannot raise an argument for the first time in his objections that was
8 not previously presented in the motion. Additionally, this argument was raised on appeal
9 and rejected by the Court of Appeals which found there was sufficient evidence for the
10 jury to find that Escalanti was a tribal member. *United States v. Escalanti*, 623 F. App’x
11 844, 846 (9th Cir. 2015). This issue, decided on appeal, cannot be the basis of a § 2255
12 motion.
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16 The Court agrees with the Magistrate Judge that there has been no showing of
17 ineffective assistance of counsel for failing to object to jury instructions.
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19 Movant also objects to the Magistrate Judge’s recommendation that his claim on
20 ground two be denied. In his motion he claims that he was acquitted by the Court of
21 assault and, therefore, could not be found guilty by the jury of murder. As noted by the
22 Magistrate Judge, Movant’s motion misstates the underlying facts in his criminal case.
23 The assault charge was dismissed because the evidence at trial showed that the elements
24 of assault were part of the murder charge not because of an absence of evidence to
25 support either charge. The Magistrate Judge also notes that this argument could have
26 been raised on direct appeal and, therefore, is procedurally defaulted without any
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1 showing of cause to excuse the default or actual prejudice. In his objections, Movant tries
2 to recast this as a claim for ineffective assistance of counsel claiming that his lawyer
3 disregarded his direction that this issue be brought up on direct appeal. Movant appears
4 to be reframing his argument because the Magistrate Judge's noted that the issue could
5 have been raised on direct appeal and, therefore, is precluded. However, there is still no
6 merit to the argument, either as a claim for ineffective assistance of counsel or as a claim
7 of error by this Court. The dismissal of the count of assault with a deadly weapon was
8 based on the fact that the elements of assault were also elements of the more serious
9 charge of murder. Had the issue been raised on direct appeal it would have been
10 meritless. The Court agrees with the Magistrate Judge that the claim in ground two
11 should be denied.

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15 IT IS ORDERED overruling Movant's objections to the Report and
16 Recommendation of the Magistrate Judge.

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18 IT IS FURTHER ORDERED adopting the Report and Recommendation of the
19 Magistrate Judge as the Order of this Court.

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21 IT IS FURTHER ORDERED that Movant's Motion to Vacate, Set Aside, or
22 Correct Sentence be denied.

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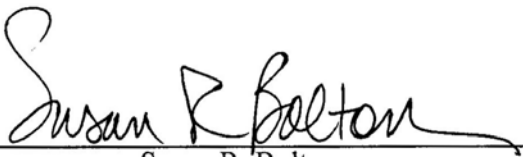
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1 IT IS FURTHER ORDERED that a Certificate of Appealability and leave to
2 proceed *in forma pauperis* on appeal is denied because Movant has not made a
3 substantial showing of the denial of a constitutional right.
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6 Dated this 8th day of March, 2018.
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11 _____
12 Susan R. Bolton
13 United States District Judge
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