

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 18 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JUSTIN L. MARTIN,

Petitioner-Appellant,

v.

ATTORNEY GENERAL FOR THE STATE
OF ARIZONA; DAVID SHINN, Director,

Respondents-Appellees.

No. 21-15789

D.C. No. 2:18-cv-03005-RCC
District of Arizona,
Phoenix

ORDER

Before: PAEZ and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 9) is denied. *See*
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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Petitioner-Appellant,

D.C. No. 2:18-cv-03005-RCC
District of Arizona,
Phoenix

v.

ATTORNEY GENERAL FOR THE STATE
OF ARIZONA; DAVID SHINN, Director,

ORDER

Respondents-Appellees.

Before: CLIFTON and BENNETT, Circuit Judges.

Appellant's opening brief (Docket Entry No. 4) is construed as a request for a certificate of appealability. So construed, the request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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

8
9 Justin L. Martin,

No. CV-18-03005-PHX-RCC

10 Petitioner,

ORDER

11 v.

12 Charles L Ryan, et al.,

13 Respondents.

14
15 On March 3, 2021, Magistrate Judge Jacqueline M. Rateau issued a Report and
16 Recommendation (“R&R”) in which she recommended the Court deny Petitioner Justin
17 L. Martin’s Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. (Doc. 1).¹
18 (Doc. 24.) Judge Rateau notified the parties they had fourteen days from the date of the
19 R&R to file objections and an additional fourteen days to file a response. (*Id.* at 10.)
20 Plaintiff filed an objection (Doc. 26), and Defendant a response (Doc. 28). The Court
21 adopts the Magistrate Judge’s R&R and dismisses the § 2254 habeas petition.

22 *I. Standard of Review: Magistrate’s R&R*

23 The standard of review of a magistrate judge’s R&R is dependent upon whether or
24 not a party objects: where there is no objection to a magistrate’s factual or legal
25 determinations, the district court need not review the decision “under a *de novo* or any
26 other standard.” *Thomas v. Arn*, 474 U.S. 140, 150 (1985). However, when a party

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28 ¹ Citations refer to the docket and page numbers generated by the Court’s CM/ECF system.

1 objects, the district court must “determine *de novo* any part of the magistrate judge’s
2 disposition that has been properly objected to. The district judge may accept, reject, or
3 modify the recommended disposition; receive further evidence; or return the matter to the
4 magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. §
5 636(b)(1).

6 *II. Martin’s Objections*

7 *a. General Objections*

8 First, Martin states he “objects to all adverse rulings in the Report and
9 Recommendation” and generally asserts that his objection stems from the argument
10 contained in his petition. (Doc. 26 at 1.) This is an unacceptable basis for objection,
11 requiring the Court to formulate Petitioner’s arguments for him and search throughout
12 various filings to find his previous arguments. Fed. R. Civ. P. 72(b) (objections must be
13 specific); *see Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003)
14 (“Judges are not like pigs, hunting for truffles buried in briefs.”) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). The Court, therefore, will only address
15 arguments that specifically describe why the Magistrate Judge’s conclusions were
16 incorrect.

17 *b. Ground One*

18 Martin’s first specific objection to the Magistrate’s R&R claims that the
19 Magistrate did not address Martin’s allegations that his counsel failed to: (1) object when
20 the prosecutor “solicited false testimony from Det. Frank Hockstra,” who stated Darrel
21 “Thompson[’]s story had never changed”; (2) cross-examine Thompson and Det.
22 Hockstra about the inconsistency; (3) object to the prosecutor’s closing argument stating
23 testimony had been consistent; and (4) ensure that the inconsistent statements be
24 submitted to the jury. (Doc. 26 at 3–5.) Martin believes that because the false testimony
25 of Thompson was not apparent, this was not a simple issue of credibility as the
26 Magistrate Judge believed, but rather a demonstration of counsel’s ineffectiveness. (*Id.*)
27 Martin claims these failures show his counsel was ineffective under *Strickland* standards.

1 (Id. at 7.) Furthermore, Martin argues he suffered prejudice.

2 To raise a colorable claim of ineffective assistance of counsel, a petitioner must
3 demonstrate both that counsel's performance was deficient, and that petitioner was
4 prejudiced because of counsel's deficient actions. *Strickland v. Washington*, 466 U.S.
5 668, 686-90, (1984). There is "a strong presumption that counsel's conduct falls within
6 the wide range of reasonable professional assistance[.]" *Carrera v. Ayers*, 670 F.3d 938,
7 943 (9th Cir. 2011) (quoting *Strickland*, 466 U.S. at 689). Moreover, ineffective
8 assistance of counsel claims in a habeas petition are "doubly" deferential. *Harrington v.*
9 *Richter*, 562 U.S. 86, 105 (2011). "When §2254(d) applies, the question is not whether
10 counsel's actions were reasonable. The question is whether there is any reasonable
11 argument that counsel satisfied *Strickland's* deferential standard." *Id.* Under this
12 deference, prejudice requires a petitioner demonstrate that there is "a reasonable
13 probability that, but for counsel's unprofessional errors, the result of the proceeding
14 would have been different." *Id.* at 104. "Failure to satisfy either prong of the *Strickland*
15 test obviates the need to consider the other." *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir.
16 2002).

17 The Magistrate Judge noted counsel adequately pointed out Thompson's
18 inconsistent statements by "directly cross-examin[ing] Thompson about lying during his
19 initial police interview and Thompson admitted that he had lied about not being involved
20 or having any knowledge of the incidences giving rise to the charges against Martin."
21 (Doc. 24 at 7.) She continued that "Martin's counsel thus made it clear to the jury that
22 Thompson had lied during the investigation and that his initial statements to police did
23 not implicate either Thompson or Martin in the charged crimes." (*Id.*) Because the
24 inconsistency was clear, the Magistrate found that the credibility of the testimony was for
25 a jury to decide. (*Id.* at 8.) So, counsel's representation was not deficient because
26 "counsel effectively represented Martin in relation to the testimony of Thompson"
27 (*Id.*) Therefore, the denial by the Arizona Court of Appeals was reasonable. (*Id.*)

28 The Court cannot find the Magistrate Judge's decision was erroneous. Martin is

1 entitled to effective counsel, which requires reasonable representation, not perfection. *See*
2 *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003); *United States v. Barbour*, 150 F. Supp. 2d
3 369, 384 (N.D.N.Y. 2001) (“A defendant is not entitled to representation by a modern-
4 day Clarence Darrow - mere competence will suffice.”) (citation and quotation marks
5 omitted)). Counsel’s ability to draw out the inconsistencies of Thompson’s testimony was
6 reasonable, despite Martin’s desire to have these inconsistencies presented differently.
7 Because the Court finds counsel was not ineffective, it need not address prejudice.

8 c. Ground Two

9 Martin then states the Magistrate did not address his argument that counsel failed
10 to object to the false testimony of Darrel Thompson. He chooses to incorporate his prior
11 arguments rather than reassert them in his objection. As stated previously, this is non-
12 specific, circumvents the Court’s established page limits for objections, and requires the
13 Court to peruse the docket and locate the arguments Martin to which is referring. *See*
14 Fed. R. Civ. P. 72(b). Moreover, the contention is inaccurate. The Magistrate Judge stated
15 that counsel had cross-examined Thompson and pointed out that his recollections were
16 contradictory, and that “Thompson agreed with counsel that he had ‘boldface lied’ to him
17 during their pretrial interview.” (Doc. 24 at 7.) Although the Magistrate did not
18 specifically state this conclusion was in response to Ground Two, Martin’s argument was
19 properly addressed in the R&R when the Magistrate found the Arizona Court of Appeals’
20 determination that counsel’s representation was not deficient was neither an unreasonable
21 determination of the facts, nor contrary to federal law. For the same reasons stated
22 previously, the Court agrees.

23 Martin asks this Court to acknowledge the prosecutor’s errors, including eliciting
24 and repeating false testimony alleging Thompson’s statements were consistent. (Doc. 26
25 at 5.) However, these concessions do not prove Martin received ineffective assistance.
26 Martin’s counsel highlighted the inconsistent statement even eliciting Thompson’s
27 admission he blatantly lied, which let the jury decide whether Thompson’s assertions
28 were credible. This was not ineffective.

1 d. Ground Three

2 Martin's third ineffective assistance of counsel claim alleges counsel should have
3 presented financial information to show Martin did not need to obtain money through
4 crime. (Doc. 26 at 10.) First, Martin claims the Magistrate Judge made an error in the
5 "amount paid to Mr. Martin by Iris Larson"; it was \$1,450.00 rather than the stated
6 \$600.00 (Doc. 24 at 8.) In addition, counsel should have produced evidence that Martin
7 received public assistance benefits. (Doc. 26 at 10.)

8 The Magistrate Judge found Martin's allegations were conclusory and Martin
9 "offer[ed] no evidence that his counsel did not consider or conduct such an
10 investigation." (Doc. 24 at 8.) The Judge directly addressed Martins concerns, stating:

11 It was certainly within the wide range of reasonableness for Martin's
12 counsel to elect not to present evidence that Martin was on public
13 assistance in an attempt to rebut the State's claim that he needed money.
14 Reasonable jurors could readily conclude that by seeking public assistance,
15 Martin was in fact not earning enough to cover his expenses. The state
16 court's denial of this claim was therefore not unreasonable.

17 (*Id.* at 8–9.) Regardless of whether Martin's income from Larson was \$600.00 or
18 \$1,450.00, Martin has not shown how the Magistrate's conclusions are incorrect. With
19 the proper deference given to counsel, there need only be a reasonable argument that
20 counsel exhibited adequate representation. *See Harrington*, 562 U.S. at 105. The
21 Magistrate's conclusion provides a reasonable likelihood the choice not to present
22 financial evidence was trial strategy. The Arizona Court of Appeals denial was not,
23 therefore, in error..

24 e. Ground Four

25 Here Martin claims that trial counsel should have submitted into evidence a receipt
26 that would have placed him ten miles from where the first of six robberies occurred,
27 despite his cell phone placing him in the vicinity. (Doc. 26 at 11.) He states that if this
28 evidence had been presented "it could have painted a different picture for the jury." (*Id.*
at 12.) This does not demonstrate prejudice. Martin was not convicted of Counts 1–5, and

1 any conclusion that one receipt relevant to the first robbery would have prevented his
2 conviction of another is purely speculative. *See Strickland*, 466 U.S. at 694 (ineffective
3 assistance requires showing outcome would have changed absent counsel's deficient
4 conduct).

5 *f. Cumulative Error*

6 Martin argues for the first time in his objection that the cumulative effect of
7 counsel's errors prejudiced him. (Doc. 26 at 14.) In this circuit, a district judge need not
8 conduct a de novo review of arguments never raised before the magistrate judge. *United*
9 *States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). Moreover, because the Court does
10 not find counsel's representation as to his individual claims deficient, the Court cannot
11 determine that as a whole of counsel representation was ineffective.

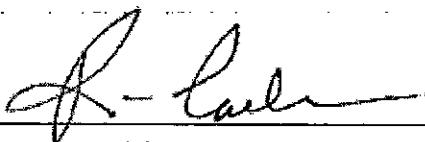
12 *III. Certificate of Appealability*

13 The Court declines to issue a certificate of appealability because reasonable jurists
14 would not find the Court's decision debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484
15 (2000).

16 IT IS ORDERED Magistrate Judge Jacqueline M. Rateau's Report and
17 Recommendation is ADOPTED. (Doc. 24.) Petitioner Justin L. Martin's Petition for Writ
18 of Habeas Corpus Pursuant to 28 U.S.C. § 2254 is DENIED and this matter is
19 DISMISSED with prejudice (Doc. 1). The Clerk of Court shall docket accordingly and
20 close the case file in this matter.

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22 Dated this 8th day of April, 2021.

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Honorable Raner C. Collins
Senior United States District Judge

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Justin L. Martin,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.

14 No. CV-18-3005-PHX-RCC (JR)

15 **REPORT AND
RECOMMENDATION**

16 Petitioner Justin Martin, incarcerated at the Arizona State Prison in Tucson,
17 Arizona, has filed a Petition for Writ of Habeas corpus pursuant to 28 U.S.C. § 2254.
18 Before the Court are the Petition (Doc. 1), Respondents' Answer (Doc. 15), and Martin's
19 Amended Traverse (Doc. 21). Pursuant to the Rules of Practice of this Court, this matter
20 was referred to Magistrate Judge Rateau for Report and Recommendation. Based on the
21 pleadings, transcripts and record, the Magistrate Judge recommends the District Court,
22 after its independent review, deny the Petition.

23 **I. Factual and Procedural Background**

24 **A. Trial and Sentencing**

25 On December 21, 2009, the State indicted Martin with: seven counts of armed
26 robbery, class 2 dangerous felonies (Counts 1, 2, 6, 7, 15, 19, 20); seven counts of
27 kidnapping, class 2 dangerous felonies (Counts 3, 4, 8, 9, 16, 21, 22); five counts of
28 misconduct involving weapons, class 4 dangerous felonies (Counts 5, 11, 13, 18, 23); two
counts of theft of means of transportation, class 3 felonies (Counts 10 and 17); one count

1 of attempted armed robbery (Count 12); and one count of burglary in the second degree
2 (Count 14). Ex. A (Indictment).¹ The Arizona Court of Appeals' decision on direct appeal
3 summarized the circumstances of the crimes as follows:

4 [O]n October 26, 2009, as [Mr.] K.W. and [Mrs.] K.W. pulled into the garage
5 of their home in Paradise Valley, an armed man accosted them. The gunman
6 ordered Mr. K.W. to the ground and told Mrs. K.W. to walk around the
7 vehicle and sit next to Mr. K.W. The gunman restrained them with zip ties
8 and began taking property and asking questions about property inside the
9 house. Eventually, a struggle ensued between the gunman and Mr. K.W., and
Mrs. K.W. escaped to a neighbor's house to call police. Mrs. K.W. later
testified that the gunman took their vehicle when he left the house.

10 On November 10, 2009, W.C. was confronted by an armed man in the
11 hallway of his Paradise Valley home. W.C. escaped by quickly ducking into
12 an adjacent room and exiting the house through the garage. W.C. called
police and the gunman fled without taking any property from the house.

13 On November 16, 2009, a masked gunman confronted K.M. in the
14 garage of his mother's house, where he lived with his mother M.M. A
15 struggle between the gunman and K.M. took place, which included M.M.
16 attempting to assist her son by hitting the gunman with a vacuum cleaner.
17 K.M. yelled to M.M. to flee back into the house and call the police. The
18 struggle ended only when the gunman pulled out his gun and ordered K.M.
19 to the ground. While walking back into the house at the gunman's orders,
K.M. testified that he quickly turned around, closed the door allowing entry
into the house from the garage, and locked it before the gunman could enter
the house. K.M. then called police, and the gunman fled.

20 On November 23, 2009, M.R. was watching television in his Paradise
21 Valley home when an armed man burst through the door and ordered him to
22 the ground. The gunman tied M.R.'s hands and feet and began asking
23 questions about where M.R. kept his valuable property. After some time, the
gunman took M.R.'s car and fled with some of M.R.'s valuables.

24 Finally, on December 4, 2009, a gunman entered the Paradise Valley
25 home of S.C. and K.C. as they prepared to go to bed for the evening. The
26 gunman ordered them to lie on the floor and demanded that they open a safe
27 located in their home. When S.C. refused to recite the combination, the

28 ¹ Unless noted otherwise, all exhibit citations are to the exhibits attached to the
Respondents' Answer to Petition for Writ of Habeas Corpus (Doc. 15).

1 gunman threatened to kill him. Later, after refusing another demand for the
2 combination, the gunman also threatened to kill K.C. Eventually, the gunman
3 moved them to a kitchen pantry and tied the door shut. The gunman
eventually left, taking some valuables with him.

4 Though none of the victims could identify the gunman, the State
5 presented evidence that tied Martin to the crimes. Martin's uncle, Darrel
6 Thompson, testified as part of a plea bargain that Martin committed the
7 crimes against Mr. and Mrs. W. and W.C. [FN 2: Thompson also testified to
8 involvement in the incident that resulted in the five charges the State
dismissed after trial.] Thompson also testified that he acted as Martin's
9 getaway driver for those incidents. Because he was a previously convicted
10 felon out on parole, Thompson wore a tracking device that monitored his
11 location through GPS. Through this tracking device, the State submitted
12 evidence that showed Thompson's proximity to the robberies about which he
13 testified. Cell phone records obtained from Martin's then-girlfriend, S.S.,
14 showed that Martin was with Thompson at the time of the robberies about
15 which Thompson testified. Further records obtained from cell towers in
16 Paradise Valley showed that Martin's phone was located in or near Paradise
17 Valley at or around the times of each incident. Additional witness testimony
revealed that Martin previously worked on S.C. and K.C.'s home as a
contractor and that he would have known the layout of the house. Finally, a
Paradise Valley police officer testified that he saw Martin's car in the area
around S.C. and K.C.'s home while responding to S.C. and K.C.'s 9-1-1
call.

18 *State v. Martin*, No. 1 CA-CR 2012-0390, 2013 WL 4774143 (Ariz. App. Sept. 5, 2013);
19 Ex. VVV, pp. 1-2.

20 The trial court declared a mistrial on Counts 1-5 after the jury was unable to reach
21 a verdict on those counts, but the jury found Martin guilty of the remaining 18 counts
22 (Counts 6-23)—five counts of armed robbery, five counts of kidnapping, four counts of
23 misconduct involving weapons, two counts of theft of means of transportation, one count
24 of attempted armed robbery, and one count of second-degree burglary. Exs. CC; PPP;
25 SSSS, p. 36; TTTT, p. 19. The trial court sentenced Martin to life without the possibility
26 of release for 25 years for each count of armed robbery, kidnapping, and attempted armed
27 robbery; 20 years for one count of theft of means of transportation; 25 years for the other
28 count of theft of means of transportation; 16 years for each count of misconduct involving
weapons; and 25 years for the count of second-degree burglary. Ex. PPP. The sentences

1 for the counts related to each respective home invasion incident were ordered to be served
2 concurrently, but each of these groupings was ordered to be served consecutively to one
3 another. *Id.* Martin received 923 days of presentence-incarceration credit, applied to his
4 first grouping of concurrent sentences. *Id.*

5 **B. Direct Appeal**

6 After filing a notice of appeal from his convictions and sentences, Martin voluntarily
7 moved to dismiss his appeal, which the Court of Appeals granted. Exs. RRR, TTT. Martin's
8 counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and
9 *State v. Leon*, 451 P.2d 878 (Ariz. 1969), stating that she searched the record and found no
10 arguable question of law existed. Ex. UUU, p. 5. The Court of Appeals affirmed Martin's
11 convictions and sentences, ex. VVV, and Martin did not petition for review in the Arizona
12 Supreme Court, ex. WWW (Court of Appeals Mandate).

13 **C. Post-Conviction Relief**

14 On September 24, 2013, Martin filed a PCR notice. Ex. XXX. On August 26, 2014,
15 Martin filed a pro se PCR petition, claiming ineffective assistance of counsel ("IAC")
16 because his trial counsel failed to: prepare to argue the mere presence defense; object to
17 the State's use of false testimony, properly cross-examine Darrel Thompson and Detective
18 Hoekstra; call rebuttal witness Defective Steve Schrimpf; investigate Martin's financial
19 records; call rebuttal witnesses to show lack of motive; and provide alibi evidence to show
20 he was 10 miles away at a gas station during the first robbery. Ex. ZZZ, pp. 15-16, 23. He
21 also alleged that the State presented known false testimony and committed prosecutorial
22 misconduct. *Id.* The trial court found that all of Petitioner's claims other than the IAC
23 claims were precluded under Rule 32.2(a) of the Arizona Rules of Criminal Procedure
24 because they could have been raised on direct appeal. Ex. CCCC, pp. 2-4. The trial court
25 examined and dismissed Petitioner's IAC claims after concluding that he had "failed to
26 establish a colorable claim of deficient performance [and] . . . failed to establish prejudice."
27 *Id.*, pp. 5-8.

28 Martin filed a petition for review with the Arizona Court of Appeals on June 30,

1 2015, claiming: the trial court erred by precluding his PCR claims of the unconstitutional
2 use by the State of perjured testimony; the State's use of known false testimony constituted
3 a fundamental due process violation; the trial court erred by summarily dismissing his PCR
4 petition without a hearing to review his IAC claims; and the trial court erred by failing to
5 consider the cumulative, prejudicial effect of multiple errors and the effect of the State's
6 use of false testimony. Ex. JJJJ. The Court of Appeals granted review but denied relief,
7 finding that Martin's claims were precluded by Rule 32.2(a), Ariz. R. Crim. P., that he had
8 not stated a colorable claim of IAC, and that his claim of cumulative prejudice would not
9 be addressed because it had not been presented to the trial court. Ex. KKKK, ¶¶ 4-9.

10 Martin then petitioned the Arizona Supreme Court for review. Ex. LLLL. The
11 Arizona Supreme Court denied Martin's petition for review on April 11, 2018. Ex.
12 MMMM.

13 **D. Habeas Petition**

14 On September 20, 2018, Martin filed his Petition, alleging one ground for relief:
15 that his trial counsel was ineffective. Doc. 1, p. 7. In the accompanying memorandum, he
16 specifically alleges that his counsel was ineffective at trial because he failed to: object to
17 the State's known use of false testimony from witnesses Darrel Thompson and Detective
18 Frank Hoekstra; present evidence of Martin's finances to rebut the State's motive theory;
19 and present alibi evidence that showed Martin was 10 miles away from the first in a series
20 of six robberies as it was occurring. Ex. UUUU, Att. 1, pp. 2-14.

21 **II. Merits**

22 **A. Legal Standards**

23 Under the AEDPA, a federal court "shall not" grant habeas relief with respect to
24 "any claim that was adjudicated on the merits in State court proceedings" unless the state
25 decision was (1) contrary to, or an unreasonable application of, clearly established federal
26 law as determined by the United States Supreme Court; or (2) based on an unreasonable
27 determination of the facts in light of the evidence presented in the State court proceeding.
28 U.S.C. § 2254(d). *See Williams v. Taylor*, 529 U.S. 362, 384-85 (2000). To justify relief,

1 the state court's ruling on a claim must be "so lacking in justification that there was an
2 error well understood and comprehended in existing law beyond any possibility for
3 fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

4 In conducting an analysis under AEDPA, the federal habeas court looks to the last
5 reasoned state court decision. *Castellanos v. Small*, 766 F.3d 1137, 1145 (9th Cir. 2014).
6 Where there is no reasoned decision from the state's highest court, the District Court "looks
7 through" to the last reasoned state court decision and presumes that the unexplained
8 decision relies on the same reasoning. *Ylst v. Nunnemaker*, 501 U.S. 63, 73-74 (1991).
9 Where no state court decision provides a basis for the decision, the district court must
10 undertake an independent review of the record and determine whether the state court's
11 decision was objectively reasonable. *Castellanos*, 766 F.3d at 1145; *see also Harrington v.*
12 *Richter*, 562 U.S. 86, 98 (2011). However, a state court need not cite Supreme Court
13 precedent when resolving an issue presented on direct or collateral review. *Early v. Packer*,
14 537 U.S. 3, 8 (2002). "[S]o long as neither the reasoning nor the result of the state-court
15 decision contradicts [Supreme Court] precedent," the state court decision will not be
16 contrary to" clearly established federal law. *Id.*

17 The Sixth Amendment to the United States Constitution provides that a criminal
18 defendant has a right to the effective assistance of counsel in his defense. The operative
19 legal standard applicable to claims of ineffective assistance of counsel was addressed by
20 the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The
21 standards enunciated in *Strickland* are applied unless there is other Supreme Court
22 precedent directly on point. *See Wright v. Van Patten*, 552 U.S. 120 (2008). Under
23 *Strickland*, Martin must show both deficient performance and prejudice in order to
24 establish that his counsels' representation was ineffective. *Strickland*, 466 U.S. at 687.
25 Deficient performance is established by a petitioner's showing that counsel's performance
26 fell below an objective standard of reasonableness. *See Hill v. Lockhart*, 474 U.S. 52, 57
27 (1985) (citing *Strickland*, 466 U.S. at 688). The court's evaluation of counsel's
28 performance must be "highly deferential" and must avoid "the distorting effects of

1 hindsight" by analyzing the challenged decision from counsel's perspective at the time.
2 *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel's conduct falls
3 within the wide range of reasonable assistance. *Id.* To establish prejudice, Martin must
4 show that there is a reasonable probability that, but for counsel's unprofessional errors, the
5 result of the proceeding would have been different. *Lafler v. Cooper*, 566 U.S. 156, 163
6 (2012) (citing *Strickland*, 466 U.S. at 694).

7 **B. Application to Ground I**

8 Martin claims that his uncle, Darrel Thomson, falsely testified at trial because his
9 trial testimony and free talk contradicted his initial police interview on December 17, 2009,
10 and contends that his trial counsel should have prevented Martin's false testimony from
11 being admitted at trial. He also claims that his counsel did not challenge testimony from
12 Detective Hoekstra stating that Thomson's statements had been consistent and "had never
13 changed." Ex. UUUU, Att. 1, pp. 3-5. In relation to these claims, the trial court and the
14 court of appeals determined that Martin had not established that his counsel's performance
15 fell below objectively reasonable standards or that he had suffered prejudice. Exs. CCC
16 (trial court), KKK (Arizona Court of Appeals). An examination of the trial record
17 establishes that the State court's decisions on these claims were reasonable.

18 At the very inception of his cross-examination of Thompson, Martin's counsel's
19 said, "you know, I have three [statement] transcripts here" and told Thompson that "[y]ou
20 seem to have not a very good recollection of the facts . . ." Ex. RRRR, p. 136. A little later
21 in the examination, Thompson agreed with counsel that he had "boldface lied" to him
22 during their pretrial interview. *Id.*, p. 140. Then, a few questions later, he directly cross-
23 examines Thompson about lying during his initial police interview and Thompson admitted
24 that he had lied about not being involved or having any knowledge of the incidences giving
25 rise to the charges against Martin. *Id.*, p. 149. Martin's counsel thus made it clear to the
26 jury that Thompson had lied during the investigation and that his initial statements to police
27 did not implicate either Thompson or Martin in the charged crimes. As Respondents note,
28 the inconsistencies were readily explained by the fact that Thompson, after giving his initial

1 statement, agreed to a free talk and admitted his and Martin's involvement to get a plea
2 agreement with the State. Ex. RRRR, pp. 115-118. As is the case in every jury trial,
3 "inconsistencies in witness testimony go not to the admissibility of testimony, but rather to
4 the credibility of the witnesses and the weight to be accorded to the evidence, which are
5 issues for the jury to resolve." *State v. Rivera*, 109 P.3d 83, 87 (Ariz. 2005); *see also State*
6 *v. Linden*, 64 P.2d 673, 684 (Ariz. App. 1983) ("The inconsistencies in the witnesses'
7 testimonies were apparent. Therefore, the credibility to be given their testimony became a
8 question for the jury.") (citing *State v. Money*, 514 P.2d 1014 (Ariz. 1973)). Contrary to
9 Martin's contentions, his counsel had no basis upon which to challenge the admissibility
10 of Thompson's testimony and was not deficient in identifying the inconsistencies with
11 earlier testimony. The record thus establishes that Martin's counsel effectively represented
12 Martin in relation to the testimony of Thompson and that Martin suffered no prejudice. The
13 Arizona Court of Appeals' denial of these claims was reasonable.

14 Martin next alleges that his counsel was ineffective because he did not investigate
15 Martin's financial status as a rebuttal to the States argument that he was motivated to
16 commit the crimes because he needed money. As Respondents note, Martin's allegations
17 on this point are conclusory and he offers no evidence that his counsel did not consider or
18 conduct such an investigation. *See, e.g., Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995)
19 ("Conclusory allegations . . . do not warrant habeas relief."). Just as important, however, is
20 that the decision not to present the evidence Martin suggests should have been presented
21 is readily defensible. Martin argues that his counsel should have presented evidence that
22 he had recently been paid \$600.00 for a restaurant remodeling job and should have obtained
23 records from the Arizona Department of Economic Security to show that Martin was
24 receiving benefits. Ex. UUUU, Att. 1, pp. 9-10. It was certainly within the wide range of
25 reasonableness for Martin's counsel to elect not to present evidence that Martin was on
26 public assistance in an attempt to rebut the State's claim that he needed money. Reasonable
27 jurors could readily conclude that by seeking public assistance, Martin was in fact not
28 earning enough to cover his expenses. The state court's denial of this claim was therefore

1 not unreasonable.

2 Martin's final contention is that his counsel was ineffective for failing to argue that
3 a gas receipt from the night of October 20, 2009, the night of the first armed robbery and
4 kidnapping charges, provided an alibi. Ex. UUUU, Att. 1, p. 10. As Respondents argue,
5 and Martin does not rebut, Martin's counsel was so effective that Martin was not found
6 guilty of the robbery that he was alleged to have committed on the night of October 20,
7 2009. Ex. A (Indictment Counts 1-5 alleged to have been committed on October 20, 2009);
8 Ex. CC (Trial Court Minute Entry reflecting no verdict on Counts 1-5); Ex. PPP
9 (Sentencing Order dismissing Counts 1-5 without prejudice). On this record, Martin cannot
10 show that he was prejudiced by counsel not presenting a gas receipt from October 20, 2009
11 to support his alibi claim for Counts 1-5 of the indictment. *Lafler*, 566 U.S. at 163 (to
12 establish prejudice, petitioner must show that the outcome of the proceeding would have
13 been different) (citing *Strickland*, 466 U.S. at 694).

14 Martin has not met his burden of showing that the state courts applied *Strickland* to
15 the facts of his case in an objectively unreasonable manner. *Knowles*, 556 U.S. at 123.
16 Thus, he is not entitled to relief on his claims of ineffective assistance of counsel.

17 **III. Certificate of Appealability**

18 "The district court must issue or deny a certificate of appealability when it enters a
19 final order adverse to the applicant." Rule 11(a), Rules governing § 2254 Proceedings. A
20 COA should issue as to those claims on which a petitioner makes a "substantial showing
21 of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if
22 "jurists of reason could disagree with the district court's resolution of [the] constitutional
23 claims" or "conclude the issues presented are adequate to deserve encouragement to
24 proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v.*
25 *McDaniel*, 529 U.S. 473, 484 (2000)). Under these standards, a certificate of appealability
26 should be denied. Martin has not presented facts supporting any possibility for fairminded
27 disagreement about the state court's denial of his claims of ineffective assistance of
28 counsel, *see Harrington*, 562 U.S. at 103, and the issues he has presented are inadequate

1 to merit encouragement to proceed further.

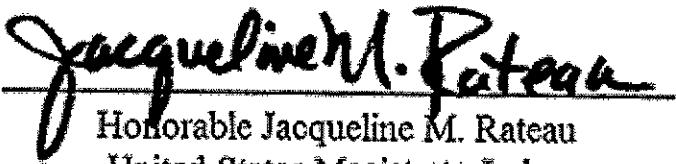
2 **IV. Recommendation**

3 Based on the foregoing, the Magistrate Judge **RECOMMENDS** that the District
4 Court, after its independent review, **dismiss** Martin's Petition for Writ of Habeas Corpus
5 (Doc. 1), **direct** the Clerk of Court to enter judgment in favor of Respondents and against
6 Petitioner.

7 This Recommendation is not an order that is immediately appealable to the Ninth
8 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
9 Appellate Procedure, should **not** be filed until entry of the District Court's judgment.

10 However, the parties shall have fourteen days from the date of service of a copy of
11 this recommendation within which to file specific written objections with the District
12 Court. *See* 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules of
13 Civil Procedure. Thereafter, the parties have fourteen days within which to file a response
14 to the objections. Replies shall not be filed without first obtaining leave to do so from the
15 District Court. If any objections are filed, this action should be designated case number:
16 **CV 18-3005-PHX-RCC**. Failure to timely file objections to any factual or legal
17 determination of the Magistrate Judge may be considered a waiver of a party's right to *de*
18 *novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121
19 (9th Cir. 2003) (*en banc*).

20 Dated this 3rd day of March, 2021.

22 
23 Honorable Jacqueline M. Rateau
24 United States Magistrate Judge
25
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28

**Additional material
from this filing is
available in the
Clerk's Office.**