IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10605-A

DANIEL DIAZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Daniel Diaz is a federal prisoner serving a 115-month sentence after pleading guilty to receiving a visual depiction of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and possession of a visual depiction of a prepubescent minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2). He seeks a certificate of appealability ("COA"), in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate sentence, in which he raised seven claims for relief.

In order to obtain a COA, a § 2255 movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Claim 1:

Diaz argued that his appellate counsel was ineffective for failing to argue that the statute under which Diaz was charged was overbroad and unconstitutional. The district court did not err by denying this claim because the United States Supreme Court has determined that 18 U.S.C. § 2252 is constitutional. *See United States v. Williams*, 553 U.S. 285, 306-07 (2008) (determining that § 2252 was not impermissibly overbroad or void for vagueness). Therefore, appellate counsel was not ineffective for failing to raise a meritless constitutional challenge to the statute on appeal. No COA is warranted for this claim.

Claim 2:

Next, Diaz argued that his appellate counsel was ineffective for failing to argue that the district court had erred by denying Erwin Rosenberg's[1] motion to continue sentencing. Specifically, he stated that the Justice Safety Valve Act of 2013 had been introduced in Congress, and that the law might have reduced his mandatory-minimum term of imprisonment if his sentencing had been continued until after the law was passed. The district court did not err by denying this claim. Diaz was not prejudiced in any way by counsel's decision not to move to continue the sentencing hearing, as the Justice Safety Valve Act of 2013 was never signed into law and the mandatory-minimum sentence for possession of child pornography is still 60 months. *See* 18 U.S.C. § 2252(b)(1). Because Diaz was not prejudiced by his counsel's inaction, no COA is warranted for this claim.

[1] After Diaz pleaded guilty, a private attorney, Erwin Rosenberg, began filing motions in Diaz's case, including a motion to continue sentencing in light of the Justice Safety Valve Act of 2013 and a motion to compel the government to file a motion to reduce his sentence under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1. However, all of Rosenberg's motions were summarily denied by the district court, as Rosenberg was not Diaz's counsel of record.

Claim 3:

Diaz argued that his appellate counsel was ineffective for failing to argue that the district court improperly denied Rosenberg's amended motion to compel the government to file a motion to reduce his sentence under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1. The district court did not err by denying this claim because Diaz failed to explain how the government had acted in bad faith or through a constitutionally impermissible motive. *See United States v. Forney*, 9 F.3d 1492, 1501-03 (11th Cir. 1993) (noting that the government's failure to make a § 5K1.1 motion could be challenged only if the government acted in bad faith or through a constitutionally impermissible motive). Furthermore, the government did not promise to move to reduce Diaz's sentence as part of the plea agreement. No COA is warranted for this claim.

Claim 4:

Diaz next argued that his appellate counsel was ineffective for failing to argue that his sentence should not have been enhanced based on distribution of child pornography and that he should have received a two-level reduction for merely receiving or soliciting child pornography. The district court did not err by denying this claim because Diaz's appellate counsel did in fact raise this claim on direct appeal. Diaz has pointed to no specific ways in which counsel's argument was deficient or that his failure to raise certain arguments prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (noting that, in order to establish a claim of ineffective assistance of counsel, counsel's performance must have been deficient and that deficiency must have prejudiced the defendant). No COA is warranted for this claim.

Claim 5:

Diaz argued that his appellate counsel was ineffective for failing to argue that the district court had erred by overruling Diaz's objection at sentencing to the government showing pictures

of Diaz's child pornography to the court. The district court did not err by denying this claim because the pictures of child pornography, while undoubtedly prejudicial, were also highly relevant in the court's weighing of the § 3553(a) factors due to the large quantity of infant and toddler pornography that Diaz possessed. Any argument on appeal that the district court erred by viewing this evidence seems unlikely to have succeeded, as the sentencing court has wide latitude to consider evidence establishing the seriousness of the offense committed. *See* U.S.S.G. § 6A1.3(a) ("In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information . . . which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Because Diaz was not prejudiced by counsel's decision not to pursue this claim on direct appeal, no COA is warranted.

Claim 6:

Diaz next argued that his appellate counsel was ineffective for not arguing that the government should have sought a sentence reduction for Diaz based on Diaz's cooperation with the government. The district court did not err by denying this claim, which is virtually identical to the argument raised in Claim 3. For the reasons detailed in Claim 3, no COA is warranted for this claim.

Claim 7:

Finally, Diaz argued that his appellate counsel was ineffective for failing to argue that Diaz's judgment and sentences were improper. However, Diaz did not flesh out the claim any further. The district court did not err by denying this claim as conclusory. *See Wilson v. United*

States, 962 F.2d 996, 998 (11th Cir. 1992) (noting that bare, conclusory claims of ineffective assistance of counsel do not merit relief).

Diaz has failed to establish that the district court committed any reversible error. Accordingly, his motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 19, 2018

Corrected Letter

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 18-10605-A
Case Style: Daniel Diaz v. USA
District Court Docket No: 1:16-cv-24126-CMA
Secondary Case Number: 1:13-cr-20660-CMA-1

The enclosed correct copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Correction: This letter and order replaces previous *DIS-4 Multi-purpose dismissal letter* dated April 19, 2018, wrong order was attached.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Denise E. O'Guin, A
Phone #: (404) 335-6188

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10605-A

DANIEL DIAZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: NEWSOM and JULIE CARNES, Circuit Judges.

BY THE COURT:

Daniel Diaz has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 19, 2018, denying his motion for a certificate of appealability in the appeal of the denial of his motion to vacate sentence, 28 U.S.C. § 2255. Because Diaz has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-24126-CIV-ALTONAGA/White

DANIEL DIAZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

On September 20, 2016,[1] Movant, Daniel Diaz, filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. [Section] 2255 [ECF No. 1].[2] Thereafter the Government filed its Response [ECF No. 9], Movant filed a Reply [ECF No. 10], and the Government filed a nearly identical Second Supplemental Response two times [ECF Nos. 25 & 26]. On January 2, 2018, Magistrate Judge Patrick A. White filed his Report of Magistrate Judge [ECF No. 27], recommending the Motion be denied. Movant filed Objections [ECF No. 28] to the Report, and the Government has filed its Response ("Resp. to Objs.") [ECF No. 30] to those. The Court has carefully reviewed the written submissions, record, and applicable law.

In his 17-page Report, Judge White recounts the procedural history of Movant's criminal case, case number 13-cr-20660, wherein the undersigned sentenced Movant to a below-guidelines sentence following a plea of guilty to receipt and possession of child pornography

[1] Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court and absent evidence to the contrary, are presumed to be dated the date the document was signed. *See, e.g.*, *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001).

[2] The Clerk referred the case to Magistrate Judge Patrick A. White under Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a report and recommendation on any dispositive matters. (*See* Clerk's Notice [ECF No. 3]).

files. (*See* Report 1–2). Movant, represented by the Federal Public Defender, filed a timely notice of appeal, and now-disbarred attorney Erwin Rosenberg filed an amended notice of appeal raising seven issues, all of which the Public Defender did not raise on appeal. (*See id.* 3–4). In the present Motion to Vacate, Movant asserts his Public Defender was ineffective for not raising on direct appeal all of the seven issues Mr. Rosenberg identified. (*See id.* 2). Judge White carefully addresses each of the seven issues (*see id.* 8–14), finding Mr. Rosenberg's issues "are either wholly conclusory or totally devoid of merit," and so "appellate counsel cannot be deemed ineffective in having failed to raise them" (*id.* 9).

In his Objections, Movant disagrees with Judge White's conclusion the statute he was charged with, 18 U.S.C. sections 2252 (a)(2) and (a)(4)(B), is constitutional, contrary to one of Mr. Rosenberg's claims. (*See* Objections). Movant also conclusorily disagrees with Judge White's analysis it was not ineffective for appellate counsel to fail to raise on appeal: a double jeopardy argument, and the Government's failure to honor an immunity agreement. (*See id.*).

When a magistrate judge's "disposition" has properly been objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). Because Movant has filed objections, the Court reviews the Report *de novo* only as to those matters to which an objection has been raised. *See, e.g.*, *United States v. Govea-Vazquez*, 962 F. Supp. 2d 1325, 1327 (N.D. Ga. 2013) ("Where objections are made, a district judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." (internal quotation marks and citation omitted)). As to the remainder of the Report, when no party has timely objected, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72 advisory committee's notes 1983 addition (citations omitted). The Court reviews the Report's

analysis of the other claims under this clear error standard.

Strickland v. Washington erects an exceedingly high bar for demonstrating counsel was ineffective under the Sixth Amendment. 466 U.S. 668 (1984). To prevail, a defendant must prove: (1) his attorney performed in a professionally deficient manner, and (2) the deficient performance caused prejudice in the case. *See id.* at 687. In evaluating attorney performance, judges "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To show prejudice, a criminal defendant must show by "a probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Court finds Movant has not met his burden under *Strickland* with respect to any of his ineffective assistance claims, and certainly not as to the three points he identifies in his Objections. First, it was not ineffective for appellate counsel to fail to raise the argument the statute under which Movant was convicted is unconstitutional. Judge White's reliance on *United States v. Williams*, 553 U.S. 285 (2008), in rejecting Movant's position in this regard, was not in error, as the statute Movant was charged with violating is nearly identical to the statute at issue in *Williams*, 18 U.S.C. section 2252A. Moreover, numerous courts have assessed the constitutionality of 18 U.S.C. section 2252 and have upheld its validity on various grounds. (*See* Resp. to Objs. 4–5 (citing cases)).

As to the two remaining and conclusory points Movant includes in his Objections, no "immunity agreement" existed between the parties (*see id.* 3 n.2); rather, and as discussed in the Report, there was no issue to raise on appeal regarding a failure by the Government to seek a sentence reduction based on Movant's cooperation (*see* Report 10, 13). As to the reference to

"double jeopardy" in the Objections, the Court cannot discern what argument or claim of error Movant is making.

The Report also rejects the suggestion an evidentiary hearing is warranted. (*See* Report 14–15). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall" grant a hearing on a section 2255 motion. 28 U.S.C. § 2255(b). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (citation omitted). A hearing is not required, however, "on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where the petitioner's allegations are affirmatively contradicted by the record." *United States v. Guerra*, 588 F.2d 519, 521 (5th Cir. 1979) (citing *Holland v. United States*, 406 F.2d 213 (5th Cir. 1969)).

Again, the record conclusively demonstrates Movant's claims are meritless. The Court must agree with the Report that Mr. Rosenberg's issues that were not raised on appeal "are either wholly conclusory or totally devoid of merit," and so "appellate counsel cannot be deemed ineffective in having failed to raise them." (Report 9). Movant has not shown his appellate attorney failed to satisfy an objectively reasonable standard of performance, or that there was a sufficient probability of a different outcome had counsel raised the issues on appeal Movant now suggests he should have.

Finally, a certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (alteration added). The Supreme Court has described the limited circumstances when a certificate of

appealability should properly issue after the district court denies a habeas petition:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [section] 2253(c) is straightforward: The [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (alterations added). Movant does not satisfy his burden, and the Court will not issue a certificate of appealability.

The undersigned has reviewed the Report, record, and applicable law *de novo* as to those matters for which an objection was received, and for clear error in all other respects. In light of that review, the undersigned agrees with the Report's analysis and recommendations.

Accordingly, it is **ORDERED AND ADJUDGED** that the Report **[ECF No. 27]** is **AFFIRMED AND ADOPTED** as follows:

1. Movant, Daniel Diaz's Motion **[ECF No. 1]** is **DENIED**.
2. A certificate of appealability shall not issue.
3. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 30th day of January, 2018.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White;
Daniel Diaz, *pro se*;
counsel of record