IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40448

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARIA AIDE DELGADO,

Defendant-Appellant

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

O R D E R:

Maria Aide Delgado, federal prisoner # 68452-179, was convicted of conspiring to possess marijuana with intent to distribute and possession of marijuana with intent to distribute; she was sentenced to serve 100 months in prison and a four-year term of supervised release. Now, she moves this court for a certificate of appealability (COA) to appeal the district court's denial of her 28 U.S.C. § 2255 motion. She raises claims concerning ineffective assistance of counsel, the denial of her motion to suppress, and an evidentiary hearing.

One will receive a COA only by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). One "satisfies this standard by demonstrating that jurists of reason could disagree

with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Because Delgado has not met these standards, her COA motion is DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Oct 03, 2018

Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 21, 2018

#68452-179
Ms. Maria Aide Delgado
FPC Bryan
1100 Ursuline Avenue, P.O. Box 2149
Bryan, TX 77805-0000

No. 17-40448 USA v. Maria Delgado
USDC No. 7:13-CV-593

Dear Ms. Delgado,

Your petition for rehearing filed on November 19, 2018 has been accepted in its present form but was treated as a motion for reconsideration of the court's October 3, 2018 order. A petition for panel rehearing of an administrative order is not allowed.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Ms. Carmen Castillo Mitchell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40448

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARIA AIDE DELGADO,

Defendant - Appellant

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

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40448

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARIA AIDE DELGADO,

Defendant - Appellant

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

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

MARIA AIDE DELGADO VS. UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, MCALLEN DIVISION
2017 U.S. Dist. LEXIS 49552
CIVIL ACTION NUMBER M-13-593,CRIMINAL NUMBER M-06-981-1
March 31, 2017, Decided
March 31, 2017, Filed

Editorial Information: Prior History

Delgado v. United States, 2016 U.S. Dist. LEXIS 185511 (S.D. Tex., July 26, 2016)

Counsel **{2017 U.S. Dist. LEXIS 1}**Maria Aide Delgado, Plaintiff, Pro se, BRYAN, TX.

For United States of America, Defendant: James L Turner, LEAD ATTORNEY, US Attorneys Office, Houston, TX.

Judges: Ricardo H. Hinojosa, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: Ricardo H. Hinojosa

Opinion

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Magistrate Judge's Report and Recommendation regarding Movant Maria Aide Delgado's cause of action. After having reviewed the said Report and Recommendation, and after appropriate review of Movant's objections thereto, the Court is of the opinion that the conclusions in said Report and Recommendation should be adopted by this Court.

It is, therefore, ORDERED, ADJUDGED and DECREED that the conclusions in United States Magistrate Judge Peter E. Ormsby's Report and Recommendation entered as Docket Entry Number 25 are hereby adopted by this Court.

The Clerk shall send a copy of this Order to Movant and counsel for Respondent

DONE on this 31st day of March, 2017, at McAllen, Texas.

/s/ Ricardo H. Hinojosa

Ricardo H. Hinojosa

UNITED STATES DISTRICT JUDGE

MARIA AIDE DELGADO VS. UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, MCALLEN DIVISION
2016 U.S. Dist. LEXIS 185511
CIVIL ACTION NO. 7:-13-CV-593,CRIM. ACTION NO. 7:-06-CR-981-1
July 26, 2016, Decided
July 26, 2016, Filed

Editorial Information: Subsequent History

Adopted by, Post-conviction relief dismissed at, Certificate of appealability denied Delgado v. United States, 2017 U.S. Dist. LEXIS 49552 (S.D. Tex., Mar. 31, 2017)

Editorial Information: Prior History

United States v. Delgado, 672 F.3d 320, 2012 U.S. App. LEXIS 3503 (5th Cir. Tex., Feb. 22, 2012)

Counsel **{2016 U.S. Dist. LEXIS 1}**Maria Aide Delgado, Plaintiff, Pro se, BRYAN, TX.

For United States of America, Defendant: James L Turner, LEAD ATTORNEY, US Attorneys Office, Houston, TX.

Judges: Peter E. Ormsby, United States Magistrate Judge.

Opinion

Opinion by: Peter E. Ormsby

Opinion

REPORT AND RECOMMENDATION

Movant Maria Aide Delgado, a federal prisoner proceeding pro se, initiated this action pursuant to 28 U.S.C. § 2255 by filing a Motion to Vacate, Set Aside, or Correct Sentence. (Docket No. 1.)1 Movant was sentenced to serve two concurrent 100-month sentences of imprisonment after a jury found her guilty on charges of conspiracy to possess and possession with the intent to distribute 230 kilograms of marijuana. Movant's convictions and sentence were affirmed in an en banc ruling by the Fifth Circuit. *United States v. Delgado*, 672 F.3d 320 (5th Cir. 2012) (en banc). The Fifth Circuit found that the evidence against Movant was "overwhelming." *Id.* at 338.

Movant's § 2255 motion alleges five grounds for relief in which she asserts over 20 separate claims.2 In support of these claims, Movant filed a 196-page brief, along with about 650 pages of exhibits. (Docket No. 12.) Movant claims that both her trial attorney and her appellate attorney rendered ineffective assistance of counsel in multiple ways. She also claims that the District Court**{2016 U.S. Dist. LEXIS 2}** committed several errors.

Respondent United States has filed a Motion to Dismiss. (Docket No. 18.) Respondent argues that Movant's various claims are barred by the law of the case and otherwise lack merit.

Movant's pleadings reflect a fundamental misunderstanding of the nature of a § 2255 motion to vacate. The number and substance of Movant's claims suggest that she views her § 2255 motion as

APPENDIX K

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essentially another appeal. As the Supreme Court has emphasized, however, "[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks." *United States v. Frady*, 456 U.S. 152, 164-165, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). To the contrary, once a defendant (like Movant) has exhausted her right to a direct appeal, "we are entitled to presume [s]he stands fairly and finally convicted, especially when, as here, [s]he already has had a fair opportunity to present [her] federal claims to a federal forum." *Id.*

After carefully considering Movant's § 2255 motion, the record of Movant's criminal case, and the applicable law, the undersigned concludes that Movant's § 2255 motion should be denied. To begin with, many of Movant's ineffective assistance claims are clearly meritless because they**{2016 U.S. Dist. LEXIS 3}** fault her trial and appellate attorneys for failing to raise issues that were decided against Movant in the Fifth Circuit's en banc ruling. Movant's remaining ineffective assistance of counsel claims all lack merit. The record shows that Movant was well-represented both at trial and on appeal. Movant's claims that the District Court committed various errors are refuted by the Fifth Circuit's en banc ruling and otherwise lack merit. For the reasons explained further below, it is recommended that the District Court grant Respondent's motion to dismiss, deny Movant's § 2255 motion, and dismiss this action.

I. BACKGROUND

A. The Underlying Facts and Proceedings3

In considering Movant's appeal, the Fifth Circuit summarized the facts and proceedings in her case as follows:

> Delgado was the sole owner-operator of TJ Trucking, a company that shipped Mexican produce from Laredo, Texas to destinations throughout the United States. Bartolome Vasquez, a Mexican legal resident employed by a Laredo produce broker and shipper, had, at the time of Delgado's trial, known and done business with Delgado for almost four years, during which time he assembled shipments of Mexican produce to be hauled by TJ Trucking.**{2016 U.S. Dist. LEXIS 4}** Vasquez dealt regularly with Delgado and estimated that they spoke approximately four times per month to arrange shipments. According to Vasquez's testimony, he regarded Delgado as a legitimate trucking business operator until, on September 8, 2006, she offered to pay him $10,000 if he would commingle 500 pounds of marijuana in a TJ Trucking delivery of Mexican broccoli to North Carolina. He refused her offer and immediately reported the incident to Immigration and Customs Enforcement (ICE) officers in Laredo. He then secretly began working with ICE officers, withdrew his initial refusal of Delgado's offer, and agreed to begin making arrangements for the concealed drug shipment. In cooperation with the ICE officers, Vasquez taped phone conversations he had with Delgado about the arrangements. These recordings confirmed that, in order to disguise the nature of the shipment, Delgado asked Vasquez to prepare two bills of lading-one for North Carolina, where the marijuana was bound, and one for New York, where the broccoli was bound. In the same taped conversation, Delgado and Vasquez discussed, in guarded language that Vasquez explicated on the stand, the number of boxes of broccoli that**{2016 U.S. Dist. LEXIS 5}** would have to be opened to hold the marijuana; that the truck's interior would have to be heated to melt off some of the ice in which the broccoli was packed so that the increased weight of the marijuana would not arouse suspicion at a weigh station; and the possibility that the marijuana would be loaded at a different warehouse to avoid a run-in with Vasquez's supervisor. The ICE officers had planned to have Delgado deliver the truck containing the marijuana to rendezvous with Vasquez on September 11, 2006, at a government-controlled warehouse in Laredo, where they would make arrests and seize the

drugs. The shipment was canceled, however, after, as Vasquez explained, "the person who was going to work with [Delgado]"-that is, the intended recipient-was arrested. Delgado called Vasquez to tell him that the shipment was off, that the bundles of marijuana were still in the cab of her truck, and that she was waiting until night to unload them and return them to an unnamed supplier.

Acting on this information from Vasquez, government agents went to Delgado's securely fenced and gated property, on which there were several buildings including Delgado's residence, a barn, and multiple small**{2016 U.S. Dist. LEXIS 6}** storage sheds and dog kennels. The agents signaled their arrival with flashing lights, sirens, and bullhorns, but no one on the property responded. Approximately thirty minutes later, after being prompted by a phone call from a neighbor, Delgado came out of the house and spoke with the agents at the gate. She eventually allowed three agents onto the property to conduct a search. Before letting them enter her house, however, she left them on the doorstep without warning or explanation, went into the house, locked the door, and then emerged approximately ten minutes later, claiming that she had needed to use the bathroom.

Consistent with Vasquez's report, the agents found a tractor-trailer parked in the yard. Delgado told the agents that she did not have the keys to its locked cab; she claimed they were with the driver. Delgado also told the agents she could not contact the driver because she did not have his telephone number. The agents eventually were able to open the tractor-trailer cab without the key. In its sleeper berth, they found thirty-four bundles of marijuana, weighing 507 pounds. Delgado expressed no surprise at the discovery but denied knowing that the marijuana was in the**{2016 U.S. Dist. LEXIS 7}** cab. She blamed her "drivers," whose "names" she claimed she could not recall. In fact, Delgado employed only one driver at that time, with whom she worked on nearly a weekly basis.

Around the time the cab was opened, another agent entered a room of Delgado's house in which she kept approximately ten large, threatening dogs chained to the walls. Inside a cabinet, the agent found a garbage bag filled with wrapping material that smelled of marijuana and held what appeared to be marijuana seeds and residue. Delgado expressed no surprise at this discovery, either; she told the agent she thought the bags had been used to wrap potting soil. She also said they might have been placed in the house by a man named Peter, who worked for her. She told the agent she did not know Peter's last name and did not have his contact information. In addition to the drugs, agents seized a substantial amount of ammunition and four firearms from Delgado's residence, including a loaded TEC-9, but they did not arrest Delgado. Vasquez testified that Delgado called him after the search and expressed her anger that the agents had seized the drugs and guns. A month later, on October 11, 2006, ICE agents returned to**{2016 U.S. Dist. LEXIS 8}** Delgado's property with a search warrant, seized additional items, and arrested her.

Delgado was charged with possession of marijuana with the intent to distribute and conspiracy to commit the same offense, and following a two-day trial was convicted by a jury on both charges. The district court sentenced her to concurrent terms of 100 months' imprisonment.*United States v. Delgado*, 672 F.3d 320, 326-28 (5th Cir. 2012) (footnotes omitted) (en banc).

Movant appealed her case. A divided three-judge panel vacated her convictions, dismissed the conspiracy charge, and remanded the case for further proceedings on the possession charge. *United States v. Delgado*, 631 F.3d 685 (5th Cir. 2011). However, this panel decision was later vacated as a result of the Fifth Circuit's decision to hear the case en banc. *United States v. Delgado*, 646 F.3d 222 (5th Cir. 2011). After considering Movant's appeal en banc, the Fifth Circuit rejected the initial panel

decision and instead affirmed Movant's convictions and sentence.4 *United States v. Delgado*, 672 F.3d 320, 345 (5th Cir. 2012) (en banc).

On October 29, 2012, the United States Supreme Court denied Movant's petition for writ of certiorari. *Delgado v. United States*, 568 U.S. 978, 133 S. Ct. 525, 184 L. Ed. 2d 339 (2012). Movant later timely filed the instant § 2255 motion.

After completing the 100-month concurrent sentences imposed in this case, Movant must then serve a 240-month term of imprisonment resulting from a separate drug conspiracy conviction from the**{2016 U.S. Dist. LEXIS 9}** United States District Court for the Western District of Louisiana.5 Movant's § 2255 motion in this case addresses only her convictions and sentence from her McAllen case.

B. Movant's Allegations and the Government's Response

In her § 2255 motion, Movant asserts five grounds for relief, the first two of which allege ineffective assistance of counsel and include numerous separate claims. In ground one, Movant claims that her appellate counsel rendered ineffective assistance. Movant was represented on appeal by the Federal Public Defender. Movant describes appellate counsel's alleged deficiencies as follows:

(1) Failed to Raise the Actual Innocence Claim.

(2) Failed to Raise the Ineffective Assistance of Counsel Claim.

(3) Failed to Raise the Insufficiency of the Evidence.

(4) Failed to Raise the Court's Abuse of Discretion to deny the Motion to Suppress the Evidence of the Marijuana.

(5) Failed**{2016 U.S. Dist. LEXIS 11}** to Raise the Apprendi Violation as to the Firearms.

(6) Failed to Mitigate the Confrontation Clause as to the Lab Chemist and the Translator for the Tape Recording.

(7) Failed to Raise that the Sentence Exceeded the Maximum Authorized by Law.

(8) The Cumulative Errors, Pursuant to the Fed. R. Crim. P. Rule 52(b).(Docket No. 1 at 5.) In ground two, Movant claims that her retained trial counsel, Reynaldo M. Merino, was deficient in the following ways:

(1) Failed to File a Motion for Acquittal Pursuant to the Fed. R. Crim. P. Rule 29, for the government's inadequate evidence as to the co-conspirators.

(2) Failed to File a Motion for Acquittal Pursuant to the Fed. R. Crim. P. 29, for the Insufficiency of the Evidence.

(3) Failed to File a Motion for Acquittal, for government's inadequate Evidence of the Firearms, not contained in the Indictment, in violation of *Apprendi v. New Jersey*.

(4) Failed to File a Motion for Acquittal, Pursuant to the Fed. R. Crim. P. Rule 29, based on the government's violation of the Federal Rules of Evidence, Rule 806.

(5) Failed to File a Motion, Pursuant to the Fed. R. Crim. P. Rule 52(b). *See* 18 U.S.C. § 371.

(6) Failed to Include in the Motion to Suppress the Evidence of the Marijuana, Other Evidence that the Government used against the Defendant.

(7) Failed to Present Evidence in the Interest to the defendant's defense.

(8) Failed to Mitigate the Confrontation Clause as{2016 U.S. Dist. LEXIS 12} to the Lab Chemist and the Translator of the tape recordings. (From the Spanish Language to the English Language.).

(9) Failed to Mitigate the Miranda Violation.(*Id.* at 6-7(ii).)

In grounds three and four, Movant claims error by the District Court. Movant alleges in ground three that the District Court abused its discretion by denying the motion to suppress evidence that was seized on September 11, 2006. (*Id.* at 8.) In ground four, Movant claims that the Court erred in failing to instruct the jury on "(1) Law of Conspiracy and (2) Agreement with a Government Informant who intends to frustrate the Conspiracy purpose cannot predicate a Conspiracy Conviction." (*Id.* at 9.) In ground five, Movant argues that the combined effect of "cumulative errors" violated her due process rights. (*Id.* at 11(ii).)

Movant filed voluminous briefing in support of her claims. Movant's "Memorandum of Law and Argument" includes 196 pages of briefing and 649 pages of exhibits.6 (Docket No. 12 and attachments 1 - 22.)

In response to Movant's § 2255 motion, Respondent United States filed a motion to dismiss. (Docket No. 18.) Respondent argues that Movant's ineffective assistance claims mostly seek "reconsideration of issues resolved by the court of appeals{2016 U.S. Dist. LEXIS 13} sitting en banc" and are thus barred by the "law of the case doctrine." (*Id.* at 29-30; citing *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229, 1250, 179 L. Ed. 2d 196 (2011).) Respondent contends that Movant's other ineffective assistance of counsel claims lack merit. As to Movant's claims alleging error by the District Court, Respondent argues that the claim addressing the suppression ruling is barred by *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), and that the claim regarding the conspiracy instructions is foreclosed by the Fifth Circuit's en banc ruling on her appeal. (*Id.* at 39-41.)

Movant objected to Respondent's motion to dismiss and filed a 30-page opposition brief. (Docket No. 21.) Movant's claims will be addressed in the context of the standard of review for § 2255 actions.

II. ANALYSIS

A. 28 U.S.C. § 2255

To obtain collateral relief pursuant to 28 U.S.C. § 2255, a petitioner "must clear a significantly higher hurdle" than the plain error standard that would apply on direct appeal. *United States v. Frady*, 456 U.S. 152, 166, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). "Following a conviction and exhaustion or waiver of direct appeal, [courts] presume a defendant stands fairly and finally convicted." *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998) (citing *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991)). "As a result, review of convictions under section 2255 ordinarily is limited to questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on collateral review without a showing of cause and prejudice." *Cervantes*, 132 F.3d at 1109. Stated{2016 U.S. Dist. LEXIS 14} another way, relief under § 2255 is "reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). Subject to these constraints, there are only four limited grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence: (1) constitutional issues; (2) challenges to the District Court's jurisdiction to impose the sentence; (3) challenges to the length of a sentence in excess of the statutory maximum; and (4) claims that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a); *United States v. Placente*, 81

F.3d 555, 558 (5th Cir. 1996).

B. Ineffective Assistance of Counsel Claims

Movant alleges that her trial and appellate attorneys rendered ineffective assistance of counsel in multiple ways. An ineffective assistance of counsel claim is properly made for the first time in a § 2255 motion because it raises an issue of constitutional magnitude and generally cannot be raised on direct appeal. *United States v. Bass*, 310 F.3d 321, 325 (5th Cir. 2002); *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir. 1992).

1. General Standard

An ineffective assistance of counsel allegation presented in a § 2255 motion is properly analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). To prevail on a claim of ineffective**{2016 U.S. Dist. LEXIS 15}** assistance of counsel, a movant must demonstrate that her counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687. This means that a movant must show that counsel's performance was outside the broad range of what is considered reasonable assistance and that this deficient performance led to an unfair and unreliable conviction and sentence. *United States v. Dovalina*, 262 F.3d 472, 474-75 (5th Cir. 2001).

Counsel's performance is constitutionally deficient if it falls below "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. In reviewing an ineffectiveness claim, "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effects of hindsight." *Id.* at 689. An ineffective assistance claim focuses on "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[,]" because otherwise "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." *Id.* Recognizing that there "are countless ways to provide effective assistance in any given case," the Supreme Court emphasized that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise**{2016 U.S. Dist. LEXIS 16}** of reasonable professional judgment." *Id.*

With regard to the prejudice requirement, a movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing *Strickland*, 466 U.S. at 693).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). "[T]he *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 689-690). If the movant fails to prove one prong of the *Strickland* test, it is not necessary to analyze the other. *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one."). "Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997).

2. Trial Counsel

Movant claims that her trial attorney rendered ineffective assistance of counsel. She identifies numerous ways in which trial counsel was allegedly**{2016 U.S. Dist. LEXIS 17}** deficient. (Docket

No. 1 at 6-7(ii).)

Before turning to Movant's specific criticisms, it should be noted that many of her ineffective assistance claims (both as to trial and appellate counsel) are based on a flawed premise. Movant's exhaustive briefing relies heavily on the reasoning in the Fifth Circuit's initial panel decision on her appeal. *United States v. Delgado*, 631 F.3d 685 (5th Cir. 2011). However, Movant's reliance on that ruling is misplaced. The divided panel decision was later vacated when the Fifth Circuit heard her appeal en banc. *United States v. Delgado*, 646 F.3d 222 (5th Cir. 2011). In the Fifth Circuit's en banc decision, fourteen appellate judges disagreed with the two judges who had joined in the initial panel ruling. *United States v. Delgado*, 672 F.3d 320 (5th Cir. 2012) (en banc).

Many of Movant's claims fault counsel for failing to raise issues addressed in the Fifth Circuit panel decision. To the extent that the Fifth Circuit's en banc ruling comes to a different conclusion regarding those issues, Movant cannot show either that counsel's performance was deficient or that she was prejudiced by any error. *See United States v. Kimler*, 167 F.3d 889, 892 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney**{2016 U.S. Dist. LEXIS 18}** raised the issue.").

a. Sufficiency of the Evidence

Several of Movant's criticisms of trial counsel relate to her argument that the evidence presented at trial was insufficient to support her convictions, particularly as to the conspiracy charge.7 Movant relies heavily on the initial panel ruling that there was insufficient evidence from which the jury could have concluded that she conspired with anyone other than the Government informant. Movant re-argues the evidence at great length, concluding that her conspiracy conviction was "wrongful" and that the affirmance of this conviction was "frankly shocking." (Docket No. 12 at 30.)

Movant is wrong, as shown by the Fifth Circuit's en banc ruling. An overwhelming majority of the judges on the Fifth Circuit Court of Appeals, after careful review of the evidence in her case, found that "the evidence presented at trial was more than sufficient to support [Movant] Delgado's conspiracy conviction, as it shows that Delgado conspired with both her supplier and her intended purchaser in a large-scale drug distribution scheme."8 *Delgado*, 672 F.3d at 332-33.

In addition to challenging the sufficiency of the evidence supporting the conspiracy conviction, Movant engages in a lengthy**{2016 U.S. Dist. LEXIS 19}** review of the evidence in an attempt to show that there was insufficient evidence to support her conviction for possession with the intent to distribute marijuana. Movant's attempt to explain away the evidence is not persuasive.9 More importantly, the Fifth Circuit has already addressed this issue, finding that the "evidence clearly supports the conclusion that [Movant] Delgado knowingly participated in a plan to distribute drugs." *Id.* at 333. In considering Movant's claim of prosecutorial misconduct, the Fifth Circuit provided the following assessment of the strength of the evidence against Movant:

> Specifically as to the knowledge element of the charged offenses, the government presented *overwhelming evidence*: Vasquez's testimony, which we must credit, provided extensive direct evidence of [Movant] Delgado's knowledge that was corroborated by virtually every type of circumstantial evidence, including the uncontradicted evidence that the truck was under Delgado's exclusive control when it was loaded with more than 500 pounds of marijuana.*Delgado*, 672 F.3d at 338 (emphasis added).

The record shows that Movant's trial counsel, Mr. Merino, thoroughly cross-examined the Government's witnesses. He also effectively challenged**{2016 U.S. Dist. LEXIS 20}** the Government's evidence during his closing argument. (*See* Cr. Docket No. 69-3, Jury Trial Tr. (2nd

Day) at 138-49.) The jury heard the evidence, and it was their role to weigh it and to determine whether the Government had met its burden to prove her guilt beyond a reasonable doubt. They did so, finding that Movant was guilty on both counts charged in the indictment. The record fully supports the jury's verdict, notwithstanding Movant's skewed assessment of the evidence. As the Fifth Circuit found, there was "overwhelming evidence" of Movant's guilt. *Delgado*, 672 F.3d at 338.

Movant's trial counsel was not deficient in failing to raise a meritless legal challenge to the sufficiency of the evidence. *Kimler*, 167 F.3d at 892. As such, Movant's ineffective assistance claims regarding the sufficiency of the evidence should be denied.

b. *Apprendi* / *Booker* / *Alleyne* Claim

Movant faults trial counsel for failing to object to a sentencing enhancement based on her possession of firearms.10 Movant argues that the firearms enhancement was determined by the Court based on a preponderance of the evidence in violation of the Supreme Court's rulings in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). (*See* Docket No. 12-1 at 44-47.)

Movant misunderstands the Supreme Court's holdings in *Apprendi, Booker*, and *Alleyne* as they**{2016 U.S. Dist. LEXIS 21}** apply in her case. The jury found Movant guilty on both counts of the indictment, which charged her with conspiracy to possess with the intent to distribute more than 100 kilograms of marijuana (count one) and possession with the intent to distribute approximately 230 kilograms of marijuana (count two). Because the jury found her guilty-beyond a reasonable doubt-of drug offenses involving more than 100 kilograms of marijuana, Movant was subject to a mandatory minimum sentence of 5 years' imprisonment and a maximum sentence of 40 years' imprisonment. 21 U.S.C. § 841(b)(1)(B)(vii).

To aid in calculating Movant's Sentencing Guidelines range, the District Court directed the Probation Office to prepare a Presentence Investigation Report (PSR). The PSR noted the statutory minimum and maximum sentence that applied. (Cr. Docket No. 45 at ¶ 58.) Based on four firearms found in Movant's closet (two of which were loaded), the PSR recommended that a two-level enhancement be applied to her base offense level pursuant to U.S.S.G. § 2D1.1(b)(1). (*Id.* at ¶ 25.) In objections to the PSR, Movant's counsel argued that the two-level increase for possession of firearms was not warranted. (Cr. Docket No. 37 at 1-2.) The District Court overruled this objection**{2016 U.S. Dist. LEXIS 22}** and found that Movant's Guidelines range was 97 to 121 months imprisonment. After considering the sentencing factors under 18 U.S.C. § 3553(a), the Court sentenced Movant to 100 months' imprisonment as to each count (to run concurrently). (Cr. Docket No. 70, Sentencing Tr. 4.)

The Supreme Court explained its holding in *Apprendi* as follows: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by *the facts established by a plea of guilty or a jury verdict* must be *admitted by the defendant or proved to a jury* beyond a reasonable doubt." *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (emphasis added). In *Alleyne*, the Court applied this principle in the context of "any fact that increases the mandatory minimum" sentence. 133 S. Ct. at 2155. Taken together, in *Apprendi* and *Alleyne* "the Supreme Court held that factual determinations that increase maximum or minimum sentences, other than a prior conviction, must be found by a jury beyond a reasonable doubt (or admitted by the defendant)." *United States v. Haines*, 803 F.3d 713, 738 (5th Cir. 2015).

The holdings in *Apprendi* and *Alleyne* have no bearing in Movant's case because the jury found beyond a reasonable doubt that she committed drug offenses that involved more than 100 kilograms of marijuana. This jury finding subjected**{2016 U.S. Dist. LEXIS 23}** Movant to "term of

imprisonment which may not be less than 5 years." 21 U.S.C. § 841(b)(1)(B)(vii). Because application of the mandatory minimum sentence involved no judicial fact finding, Movant's claim based on *Booker, Apprendi*, and *Alleyne* lacks merit.

Movant is mistaken in arguing that the Court's findings in applying the Sentencing Guidelines (including the firearms enhancement) are contrary to the rulings in *Apprendi* and *Alleyne*. As the Fifth Circuit has explained, "the *Alleyne* opinion did not imply that the traditional fact-finding on relevant conduct, to the extent it increases the discretionary sentencing range for a district judge under the Guidelines, must now be made by jurors." *United States v. Hinojosa*, 749 F.3d 407, 412 (5th Cir. 2014) (citing *United States v. Booker*, 543 U.S. 220, 257, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) and *Alleyne*, 133 S. Ct. at 2169). The Court's concurrent 100-month sentences in Movant's case were well within its discretionary sentencing range-above the statutory minimum sentence (5 years) and well below the statutory maximum sentence (40 years).

Movant's counsel was not deficient in failing to object to the Court's Guidelines findings based on the Supreme Court's rulings in *Booker, Apprendi*, and *Alleyne*. Any such objection would have lacked merit and thus cannot support a claim of ineffective assistance of counsel. *Kimler*, 167 F.3d at 892.

c. Scope of Suppression{2016 U.S. Dist. LEXIS 24} Motion

Movant complains that her trial counsel "failed to include in the motion to suppress the evidence of the marijuana [and] other evidence that the Government used against the Defendant." (Docket No. 1 at 7(ii).) According to Movant, the seizure of items from her home was unconstitutional because the search for those items exceeded the scope of the limited consent that she had given. (*See* Docket No. 12-1 at 72-75.)

Movant's counsel did file a motion to suppress on her behalf. (Cr. Docket No. 22.) This motion focused on the search of the tractor trailer in which the marijuana was discovered. The tractor trailer was parked on Movant's property next to her residence. Mr. Merino argued that the search of the tractor (where the marijuana was found) was unlawful because the agents broke into the tractor without consent and without probable cause. (*Id.* at 1-2.)

The motion to suppress was addressed in an evidentiary hearing. Three Government agents and Movant testified. (*See* Cr. Docket Nos. 36, 63.) After hearing the evidence, the District Court denied the suppression motion, finding that Movant consented to the search of the tractor and that, in the alternative, the search was supported by probable**{2016 U.S. Dist. LEXIS 25}** cause. (Cr. Docket No. 63, Suppression Hrg. Tr. 30-31.)

Although the search of the tractor was the main focus of the suppression hearing, the search of Movant's home was also addressed at length. Immigration and Customs Enforcement (ICE) Agent Antonio Farias testified that Movant allowed three agents to enter her property and orally consented to the search of her residence; at no time did she instruct the agents to stop searching. (Cr. Docket No. 36, Suppression Hrg. Tr. 11.) ICE Agent Vance Callender testified that when he arrived, he knocked on Movant's door, and she allowed him in her house. (*Id.* at 23-24.) Agents searching Movant's home discovered numerous keys (in a closet and a safe), and Movant agreed that Agent Callender could take the keys out to the tractor trailer to see if any of them would unlock the doors to the tractor cab. (*Id.* at 24-26.)

ICE Agent Ronald Spivey testified that Movant agreed that a canine could be brought into her home to aid in the search. (*Id.* at 40-41.) Movant had numerous large dogs that were kept in one room while the canine was brought through Movant's house. Agent Spivey entered the room with Movant's dogs, looked in a cabinet, and "found a large garbage bag with marijuana wrappings**{2016 U.S. Dist. LEXIS 26}** consistent with marijuana residue inside of it." (*Id.* at 41.) Agent Spivey testified that at no

time did Movant rescind her consent to search her property. (*Id.*) After finding the marijuana wrappings, Agent Spivey and another agent gave Movant her Miranda warnings and she signed a written consent to search her property. (*Id.* at 41-46.) The written consent signed by Movant was made a part of the record. (*Id.* at 43.) Although Movant initially denied that it was her signature on the consent, later in the hearing she admitted that it was her signature. (*Id.* at 43, 50.) The written consent to search specifically stated that the place to be searched was Movant's "residence." (*Id.* at 51.)

During Movant's testimony at the suppression hearing, she stated that she allowed three agents to search her property "but they had to respect my animals." (Cr. Docket No. 63, Suppression Hrg. Tr. 4-5, 23-24.) Specifically, Movant "agreed with Mr. Farrias to let him and two other men come in the property." (*Id.* at 5.) In response to a question from the Court, Movant stated: "I agreed that they could search my property." (*Id.* at 26.)

It is obvious from the record that Movant's counsel was not deficient in failing to move to suppress the marijuana wrappings and other items found**{2016 U.S. Dist. LEXIS 27}** in her home. The evidence overwhelmingly shows that Movant consented to the search of her home-at first orally and later in writing. "The Supreme Court has long held that 'one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.'" *United States v. Gonzales*, 121 F.3d 928, 938 (5th Cir. 1997) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). On the facts of this case, a motion to suppress the items found in Movant's house would have been meritless, if not frivolous, and thus counsel's failure to pursue such a motion cannot support an ineffective assistance claim. *Kimler*, 167 F.3d at 892.

d. Failure to Present Evidence

Movant claims that counsel "failed to present evidence in the interest to the defendant's defense." (Docket No. 1 at 7(ii).) Movant acknowledges that counsel "actively pursued pretrial and discovery," but she asserts that "he cut his efforts short." (Docket No. 12-2 at 94-95.) Movant appears to complain generally that Mr. Merino presented no evidence in her defense. She also specifically criticizes counsel's failure to subpoena alibi witnesses, to present "papertrail evidence" regarding her business, and to use the tractor cab's side door as demonstrative evidence. (*Id.* at 95-112.)

To the extent that Movant argues**{2016 U.S. Dist. LEXIS 28}** that counsel was constitutionally deficient merely because he did not present rebuttal evidence, she is wrong. The Supreme Court has cautioned that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Here, the defense strategy pursued by Movant's counsel was to argue that the Government had failed to meet its burden to prove its case against Movant. This strategy is reflected by Mr. Merino's closing argument in which he effectively pointed to weaknesses in the Government's case, including the lack of scientific and other evidence showing that Movant was aware of the marijuana in the tractor on her property. (*See* Cr. Docket No. 69-3, Trial Tr. at 138-49.) As the Fifth Circuit has recognized, "[t]his is a viable strategy, as it 'sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.'" *United States v. Bernard*, 762 F.3d 467, 478 (5th Cir. 2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)).

Movant also contends that her attorney failed to subpoena specific witnesses. In particular, Movant argues that Mr. Merino should have subpoenaed her "helpers," who she identifies only as "Peter and Tony." (Docket No.**{2016 U.S. Dist. LEXIS 29}** 12-2 at 99.) According to Movant, both were present on the day that the agents arrived and found the marijuana; they "both managed to make it across

the street and hid in the tall grass." (*Id.* at 100.) Movant states that Peter and Tony could have provided helpful evidence, including corroboration of the following: she had not entered the tractor cab after it had been returned to her property; Peter had brought the marijuana wrappings into her residence; and Peter found the keys to the tractor in her mailbox the day after the agents discovered the marijuana.11 (*Id.* at 99-100.)

The Fifth Circuit has "repeatedly held that complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (citing *Bray v. Quarterman*, 265 F. App'x 296, 298 (5th Cir. 2008)). "[W]hen 'the only evidence of a missing witnesses' testimony is from the defendant, this Court views the claims of ineffective assistance with great caution.'" *Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 1997) (quoting *Sayre v. Anderson*, 238 F.3d 631, 636 (5th Cir. 2001)). To prevail on an ineffective assistance claim based on an uncalled witness, "the petitioner must name the witness, demonstrate that the witness was available to testify and would**{2016 U.S. Dist. LEXIS 30}** have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day*, 566 F.3d at 538. A defendant's failure to present some evidence from the uncalled witness regarding that witness's potential testimony and willingness to testify is usually fatal to an ineffective assistance of counsel claim. *Harrison*, 496 F.3d at 428; *see also Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985).

Movant has failed to make a sufficient showing regarding "Peter and Tony." Movant does not even provide their last names, let alone any evidence from them indicating that they would have been willing to testify and describing what they would have said. Because Movant's claim is based entirely on her own description of what her "helpers" would have said if called as witnesses, it must be viewed with "great caution." *Harrison*, 496 F.3d at 428.

Turning to Movant's argument that counsel was deficient in failing to present "papertrail" evidence, Movant asserts that she brought to trial a black briefcase containing evidence that was "crucial" to her defense. (Docket No. 12-2 at 104.) The briefcase held documents about her business. According to Movant, she was the sole owner of "Wild Mustang Express," which in turn was "leased to T.J. Truck Lines."**{2016 U.S. Dist. LEXIS 31}** (*Id.* at 105.) Movant thinks this is significant because at trial Government agents noted that the tractor where the marijuana was found had the name "T.J. Truck Lines" on it and that Movant appeared to be the owner/operator of "T.J. Truck Lines."12 Movant argues that she was improperly convicted for "TJ Trucking's drug trafficking involvement," when she should have been on trial only as "Wild Mustang Express."13 (*Id.* at 106-07.)

Movant complains that her attorney told her that they did not need the documents in her black briefcase showing that she was actually the owner of Wild Mustang Express. Mr. Merino's judgment call about this evidence was far from deficient. Movant was not convicted because the jury mistakenly believed that she owned TJ Trucking (rather than being leased to it); rather, Movant was convicted because the jury found that she personally conspired to possess and possessed with the intent to distribute the marijuana in the truck that was parked next to her residence. The evidence clearly showed that she had control over the truck, regardless of who technically owned the business that was identified on the side of the cab. It seems very unlikely that the jury would have been persuaded by any argument**{2016 U.S. Dist. LEXIS 32}** relating to Movant's ownership of Wild Mustang Express; to the contrary, the jury may well have considered evidence about Wild Mustang Express to be a waste of time or-worse-they may have considered it to be a disingenuous attempt to divert their attention from the real issues. Mr. Merino's strategic decision to forego presenting evidence of questionable value was well within the range of reasonably effective assistance of counsel.

Finally, Movant argues that her attorney should have used a 1998 Freightliner passenger door as a demonstrative exhibit to show the jury "how the small vent window had been opened." (Docket No. 12-2 at 108.) An agent testified that he had entered the cab of the tractor using a coat hanger to release the vent window, which allowed him to reach in and open the passenger door.14 Movant describes in detail the operation of the vent window in order to show that the agent could not have used a coat hanger but instead had broken into the tractor by some other method. (*Id.* at 108-09.) This, Movant believes, would have shown that the agent "deceived the jury" in saying that he got into the tractor using a coat hanger, and it would show that his method of getting into the cab was**{2016 U.S. Dist. LEXIS 33}** not authorized by her.

Movant has failed to show that counsel was in any way deficient regarding Movant's proposed demonstrative exhibit. Whether the agent had consent to enter the tractor using a coat hanger or any other method was not an issue for the jury. The District Court decided this issue after conducting a pretrial suppression hearing. After hearing the testimony from several agents and Movant, the Court found that Movant had given the agents consent to attempt to enter the tractor, that the consent "had no implied limitations on it," and that the agents had probable cause to enter the tractor in any event. (Cr. Docket No. 63, Suppression Tr. 30.) The method the agent used to enter the tractor was irrelevant to Movant's trial.15

In sum, Movant has failed to show that counsel was deficient in failing to present evidence in support of her defense. This claim should be denied.

e. Failure to Confront Lab Chemist

Movant claims that counsel "failed to mitigate the Confrontation Clause as to the Lab Chemist." (Docket No. 1 at 7(ii).) Movant faults her attorney for agreeing to a stipulation stating that the chemist found that the samples from the bundles found in the tractor cab were marijuana. Movant argues**{2016 U.S. Dist. LEXIS 34}** that at the time the bundles were found she could not see what was in them, and she apparently doubts that they really contained marijuana. (Docket No. 12-2, at 114-15.) She also wanted to cross-examine the chemist to verify Agent Spivey's testimony that he did not submit for analysis the marijuana wrappings found in her residence; Movant believes that he did submit the wrappings for analysis but that the results were negative. (Docket No. 12-2 at 117, 119.)

Movant has fallen far short of showing that Mr. Merino was deficient in failing to require the chemist to testify at trial. An attorney's decision on whether to call a witness is "considered to be essentially strategic, and 'speculations as to what [uncalled] witnesses would have testified is too uncertain." *United States v. Bernard*, 762 F.3d 467, 473 (5th Cir. 2014) (quoting *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985)). Here, Movant's suggested reasons for insisting that the chemist testify are rank speculation. The record reflects no reason to believe that the chemist's testimony would have helped Movant's case in any way. To the contrary, it is more likely that such testimony would have been harmful to Movant since it would have further emphasized to the jury that about five hundred pounds of marijuana were found in the cab of**{2016 U.S. Dist. LEXIS 35}** the tractor that Movant used for her business and kept parked next to her house (within a securely gated compound). To avoid such harmful consequences, defendants routinely stipulate regarding chemists' findings. As the Supreme Court explained:

> Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a

witness whose testimony defense counsel does not intend to rebut in any fashion. The *amicus* brief filed by District Attorneys in Support of the Commonwealth in the Massachusetts Supreme Court case upon which the Appeals Court here relied said that "it is almost always the case that [analysts' certificates] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony." Brief for District Attorneys in Support of the Commonwealth in No. SJC-09320 (Mass.),**{2016 U.S. Dist. LEXIS 36}** p. 7 (footnote omitted).*Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (footnote omitted).

Because Movant has failed to show any way in which counsel was deficient in failing to insist that the chemist testify at trial, Movant's ineffective assistance claim on this issue should be rejected.16

f. Miranda Warning

Movant faults her trial counsel for failing "to mitigate the Miranda warning violation." (Docket No. 1 at 7(ii).) According to Movant, after the agents found the marijuana in the tractor, one of the agents coerced her into signing the waiver of her Miranda rights by threatening to call animal control officers to remove her "pet children" (her dogs). (Docket No. 12-3 at 122.) Movant argues that counsel should have moved to suppress the statements that she made after she was forced to sign the waiver form.

It is unnecessary to address whether counsel was deficient in this respect because Movant has failed to show that she was prejudiced. As Movant acknowledges in her brief: "In this case, the unlawful arrest and illegal interrogation did not result in any incriminating statements, nor did it produce any incriminating evidence." (Docket No. 12-3 at 123.) Thus, even assuming that Movant would have prevailed on a motion to suppress**{2016 U.S. Dist. LEXIS 37}** her allegedly coerced statements-which seems questionable at best-the statements she made did not tend to incriminate her.17 Movant has failed to show that there is a reasonable probability that, but for counsel's alleged error regarding the motion to suppress, the result of her case would have been different. Because Movant has failed to meet *Strickland*'s prejudice requirement, this claim should be denied.

3. Appellate Counsel

Movant asserts that her appellate counsel, like her trial counsel, rendered ineffective assistance of counsel. Movant's briefing regarding appellate counsel is devoted almost entirely to the argument that her appellate counsel did not provide reasonable assistance because counsel failed to challenge the sufficiency of the evidence, particularly as to the conspiracy charge. (Docket No. 12 at 19.) Movant believes that the Fifth Circuit affirmed her convictions as a result of appellate counsel's failure to challenge the sufficiency of the evidence presented at trial.

Like a claim of ineffective assistance of trial counsel, a claim of ineffective assistance on appeal is also governed by the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires the defendant to establish both constitutionally**{2016 U.S. Dist. LEXIS 38}** deficient performance and actual prejudice. *See Smith v. Murray*, 477 U.S. 527, 535-36, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) (applying *Strickland* to a claim of ineffective assistance of counsel on appeal). To establish that appellate counsel's performance was deficient in the context of an appeal, the movant must show that her attorney was objectively unreasonable "in failing to find arguable issues to appeal-that is, that counsel unreasonably failed to discover non-frivolous issues" and raise them. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). If the movant succeeds in such a showing, then she must establish actual prejudice by demonstrating a "reasonable probability" that, but for her counsel's deficient performance, "[s]he would have prevailed on his appeal." *Id.*

Counsel is not deficient for failing to raise meritless arguments. Indeed, appellate counsel is not

deficient for failing to raise every non-frivolous issue on appeal. *United States v. Reinhart*, 357 F.3d 521, 524 (5th Cir. 2004) (citing *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 2000)). Counsel's failure to raise an issue on appeal will be considered deficient performance only when that decision "fall[s] below an objective standard of reasonableness." *Id.* This standard requires counsel "to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful." *Id.* "Solid, meritorious arguments based on directly controlling**{2016 U.S. Dist. LEXIS 39}** precedent should be discovered and brought to the court's attention." *Id.*

Movant faults appellate counsel for failing to challenge the sufficiency of the evidence and for acknowledging that there was some evidence presented at trial that would support the conspiracy charge.18 Movant's sufficiency-of-the-evidence argument is based on the Fifth Circuit's divided panel ruling. As noted, that ruling was vacated and replaced by the en banc decision. In considering the sufficiency of the evidence, the Fifth Circuit found that the "evidence clearly supports the conclusion that [Movant] Delgado knowingly participated in a plan to distribute drugs."19 *Delgado*, 672 F.3d at 333. At another point in the en banc opinion, the Fifth Circuit observed that the Government presented "overwhelming evidence" against Movant. *Id.* at 338. It is obvious from the en banc ruling that Movant's appellate counsel did not err in failing to challenge the sufficiency of evidence on appeal. To do so would have been futile because the contention that there was insufficient evidence of Movant's guilt is baseless.

Because Movant has failed to show any deficiency by appellate counsel, her ineffective assistance claim against appellate counsel fails.

C. Alleged District Court Errors

Movant's remaining three claims (grounds three, four, and five) assert that the District Court erred in denying her motion to suppress, that the Court erred in failing to instruct the jury properly on the law of conspiracy, and that the cumulative errors at trial violated Movant's due process rights.

1. Motion to Suppress

Movant argues that the District Court "erred by ruling that the agents were credible" and "misinterpreted the circumstances" in concluding that Movant's limited consent to search allowed the agents to essentially break into the tractor. (Docket**{2016 U.S. Dist. LEXIS 41}** No. 12-3 at 133-34.) In support of this argument, Movant discusses the suppression hearing at length and gives her interpretation of the evidence that was presented to the Court. (*Id.* at 129-59.) She reasons that because the marijuana seized from the tractor should have been suppressed as unconstitutionally obtained, her conviction must be overturned.

As Respondent points out, Movant's attempt to challenge the District Court's suppression ruling on collateral review is barred by *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). (Docket No. 18 at 40.) In *Stone*, the Supreme Court held that a state prisoner cannot raise a Fourth Amendment challenge in a collateral attack if the prisoner had a full and fair opportunity to litigate that issue in the state courts. 428 U.S. at 494-95 & n.37. The Fifth Circuit has extended the rule in *Stone* to apply to federal prisoners (such as Movant) collaterally challenging their convictions in a § 2255 motion. *United States v. Ishmael*, 343 F.3d 741, 742 (5th Cir. 2003). A Fourth Amendment claim will not be considered in a § 2255 action where the movant "had a full and fair opportunity to litigate [her] Fourth Amendment claim in pre-trial proceedings and on direct appeal." *Id.*

Movant's challenge to the Court's suppression is thus barred unless she did not have a full and fair opportunity to litigate her Fourth Amendment claim at trial and on appeal. Liberally construed,**{2016 U.S. Dist. LEXIS 42}** Movant argues that she did not have a full and fair opportunity to litigate the

suppression issue on appeal because her appellate attorney rendered ineffective assistance of counsel in failing to raise the issue on appeal.

Movant has failed to show that her appellate counsel was deficient in not raising the suppression claim on appeal. As noted previously (*see supra* Part II.B.3), appellate counsel does not err by failing to raise meritless issues on appeal. *United States v. Reinhart*, 357 F.3d 521, 524 (5th Cir. 2004) (citing *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 2000)). In this case, a challenge to the Court's suppression ruling would have been baseless and futile.

Movant argues that the Court erred in its factual determination that she had given consent for the agents to enter the tractor. According to Movant, the Court was wrong in finding that the testimony of the agents was credible. Although on appeal legal determinations would have been reviewed de novo, factual findings-including credibility determinations-are reviewed for clear error. *United States v. Gomez*, 623 F.3d 265, 268 (5th Cir. 2010). The clear error standard presents a high hurdle for defendants seeking to overturn a suppression ruling. As the Fifth Circuit has explained:

> "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole."**{2016 U.S. Dist. LEXIS 43}** *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001). "Where a district court's denial of a suppression motion is based on live oral testimony, the clearly erroneous standard is particularly strong because the judge had the opportunity to observe the demeanor of the witnesses." *United States v. Santiago*, 410 F.3d 193, 197 (5th Cir. 2005). Finally, we review the evidence in the light most favorable to the Government as the prevailing party. *Id.Gomez*, 623 F.3d at 268-69.

Here, there was no clear error that Movant's appellate counsel could have pointed to; indeed, the record shows that there was no error at all. The District Court's suppression ruling is fully supported by the agents' testimony at the hearing. After observing the demeanor of Movant and the agents, the Court was justified in finding that the agents' testimony was more credible. Movant's appellate counsel was not deficient in failing to raise the suppression issue on appeal because it was clearly meritless.

Because Movant had a full and fair opportunity to litigate her Fourth Amendment suppression claim, it is barred from review in this § 2255 action. *Ishmael*, 343 F.3d at 742. In any event, even if it were appropriate to consider Movant's suppression claim, it lacks merit based on the record in this case.

2. Conspiracy Instructions

Movant also claims that the District Court erred in its instructions to**{2016 U.S. Dist. LEXIS 44}** the jury on the law of conspiracy. (Docket No. 12-4 at 160.) In support of this claim, Movant states "what more can I say that the Panel for the Fifth Circuit, had not said," and she relies entirely on the panel opinion in support of her claim. (*Id.*)

Unfortunately for Movant, the divided panel decision was vacated, and all the other judges of the Fifth Circuit disagreed with the panel's decision regarding the District Court's conspiracy instructions. *Delgado II*, 672 F.3d at 341-44. The en banc Fifth Circuit found that the "district court's conspiracy instructions were more than adequate." *Id.* at 341. No more need be said. This claim is frivolous in light of the Fifth Circuit's en banc ruling.

3. Cumulative Errors

Movant's fifth (and final) ground for relief alleges that the cumulative effect of the individual errors during her trial resulted in the denial of her due process rights and require that her convictions be vacated. (Docket No. 12-4 at 160-66.)

Here again, Movant's argument is foreclosed by the Fifth Circuit's en banc ruling. The Fifth Circuit has "repeatedly emphasized that the cumulative error doctrine necessitates reversal only in rare instances." *Delgado*, 672 F.3d at 344. Applying the cumulative error doctrine in Movant's case, the en**{2016 U.S. Dist. LEXIS 45}** banc Fifth Circuit stated:

> Its application is especially uncommon where, as here, the government presents substantial evidence of guilt. The doctrine justifies reversal only in the unusual case in which synergistic or repetitive error violates the defendant's constitutional right to a fair trial. That did not happen here. *Id.* Movant's attempt-yet again-to re-argue an issue decided on appeal is frivolous and should be rejected.

III. CONCLUSION

For the foregoing reasons, the undersigned respectfully recommends that Respondent's Motion to Dismiss (Docket No. 18) be GRANTED, that Movant's § 2255 Motion to Vacate (Docket No. 1) be DENIED, and that this action be DISMISSED. For the reasons discussed below, it is further recommended that Movant be denied a certificate of appealability.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Movant has not yet filed a notice of appeal, the recently-amended § 2255 Rules instruct that the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."**{2016 U.S. Dist. LEXIS 46}** Rule 11, Rules Governing Section 2255 Proceedings. Because the undersigned recommends the dismissal of Movant's § 2255 action, it is necessary to address whether Movant is entitled to a certificate of appealability (COA).

A COA "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). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). To warrant a COA as to claims denied on their merits, "[t]he petitioner 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, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *see also United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (applying *Slack* standard to a COA determination in the context of § 2255 proceedings). An applicant may also satisfy this standard by showing that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *see also Jones*, 287 F.3d at 329. As to claims that a district court rejects solely on procedural grounds, the prisoner must show both that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was**{2016 U.S. Dist. LEXIS 47}** correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Here, Movant's § 2255 claims should be dismissed on their merits. For the reasons explained in this report, the undersigned believes that reasonable jurists would not find debatable or wrong the conclusion that Movant's ineffective assistance of counsel claims and claims alleging errors by the District Court lack merit, nor are the claims adequate to deserve encouragement to proceed further. Accordingly, Movant is not entitled to a COA.

NOTICE TO THE PARTIES

The Clerk shall send copies of this Report and Recommendation to Movant and counsel for

Respondent, who have fourteen (14) days after receipt thereof to file written objections pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file timely written objections shall bar an aggrieved party from receiving a de novo review by the District Court on an issue covered in this Report and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

DONE at McAllen, Texas on July 26, 2016.

/s/ Peter E. Ormsby

Peter E. Ormsby

United States Magistrate Judge

Footnotes

1

Docket entry references are to the civil action, unless otherwise noted.

2

In her McAllen criminal case, Movant has also filed a motion for retroactive application of an amendment to the Sentencing Guidelines. (Cr. Docket No. 118.) That motion is pending before the District Court and is not addressed in this report.

3

The facts in this section are drawn principally from the Fifth Circuit's en banc decision on Movant's direct appeal. *United States v. Delgado*, 672 F.3d 320 (5th Cir. 2012). The Presentence Investigation Report (PSR) prepared by the Probation Office also contains a detailed summary of the facts underlying the charges brought against Movant in this case. (Cr. Docket No. 45.) "On collateral review, we view the facts in the light most favorable to the verdict." *United States v. Drobny*, 955 F.2d 990, 992 (5th Cir. 1992) (citing *United States v. Marcello*, 876 F.2d 1147, 1149 (5th Cir. 1989)).

4

Fourteen Fifth Circuit judges joined in the en banc decision affirming Movant's convictions and sentence. The only dissenters were the two judges who had joined in the initial panel ruling.

5

About one week after Movant was indicted in the McAllen Division, she was also indicted on multiple drug trafficking charges in the Western District of Louisiana, Lafayette Division. These charges remained pending during Movant's criminal proceedings in the McAllen Division. The Presentence Investigation Report (PSR) in Movant's McAllen case summarized the case in the Western District of Louisiana case as follows:

> According to a "Verified Complaint for Forfeiture *In Rem*" filed as 2-06-CV-1869 LC in the U.S. District Court for the Western District of Louisiana, Lake Charles Division, on June 9, 2005, officers from the Louisiana State Police conducted a traffic stop on a vehicle driven by the [Movant] and bearing a Texas vehicle license plate with the name "MAIDE." The vehicle was registered to the [Movant]. The [Movant's] brother, Victor Valdez, and a female, Ana Maria Montoya, and her son, were also in the vehicle. A search of the vehicle led to the discovery of $77,500 in U.S. currency. The [Movant] executed a written Disclaimer of Property stating that she was not the owner of the funds, that she had no interest in, or claim to, the currency, and that she did not know who owned the currency.

> An on-going investigation by the U.S. Department of Homeland Security, Immigration and Customs Enforcement, in LaFayette, Louisiana, established that the funds had been received by the [Movant], her brother and Ms. Montoya, in payment for contraband**{2016 U.S. Dist. LEXIS 10}** they had illegally transported from Texas to LaFayette, Louisiana, on or about June 9, 2005. Both the transport of the contraband to Louisiana and the receipt of the [Movant's] funds are part of an ongoing criminal enterprise involving the smuggling of cocaine and marihuana into the United States from Mexico. The [Movant] was federally indicted in this case, styled Criminal Docket Number CR-06-50074-05[], in Louisiana.(Cr. Docket No. 45 at ¶¶ 36-37.)

The indictment filed in the Western District of Louisiana named Movant in several counts alleging drug trafficking charges, including a charge alleging that she conspired to possess with intent to distribute cocaine and marihuana. *See United States v. Delgado*, Crim. No. 6:06-60074-05, 2010 U.S. Dist. LEXIS 34446, 2010 WL 1418659, at *1 (W.D. La. Feb. 24, 2010) (citation omitted). Movant pleaded guilty to the drug conspiracy charge; in pleading guilty, Movant signed a stipulation of facts in which she agreed to facts that supported her guilty plea. *Id.* Although Movant later filed a pro se motion to withdraw her guilty plea, the District Court in Louisiana denied her motion. *United States v. Aide Delgado*, Crim. No. 6:06-60074-005, 2010 U.S. Dist. LEXIS 34439, 2010 WL 1407206, at *1 (W.D. La. Apr. 6, 2010). Movant was sentenced to 240 months imprisonment, which was to be served consecutive to her sentence in the McAllen Division case. Movant appealed her conviction and sentence from the Western District of Louisiana, but the Fifth Circuit dismissed her appeal because it presented "no nonfrivolous issue for appellate review. *United States v. Delgado*, 510 F. App'x 330 (5th Cir. 2013).

6

Movant's filings are excessive. Neither the circumstances of Movant's case nor the nature of her claims justify such voluminous filings. Nevertheless, in light of Movant's pro se status and in an abundance of caution, the undersigned has reviewed and considered all her pleadings and papers.

7

Movant lists nine ways in which her trial counsel was allegedly deficient. (Docket No. 1, at 6-7(ii).) Points (1), (2), (4), and (5) all appear to fault counsel for failing to challenge the sufficiency of the evidence and will be considered together.

8

Movant tries to make much of the plain error standard applied in the Fifth Circuit's en banc ruling. While it is true that a plain error standard of review applied, the Fifth Circuit's analysis made clear that the evidence presented at Movant's trial was "more than sufficient" even under a less deferential standard of review. *Delgado*, 672 F.3d at 332-34. The Fifth Circuit found that the "evidence clearly supports the conclusion that [Movant] Delgado knowingly participated in a plan to distribute drugs." *Id.* at 333.

9

Apart from being unpersuasive, Movant's attempt to re-cast the evidence in the light most favorable to her runs directly counter to the applicable standard of review. "On collateral review, we view the facts in the light most favorable to the verdict." *United States v. Drobny*, 955 F.2d 990, 992 (5th Cir. 1992) (citing *United States v. Marcello*, 876 F.2d 1147, 1149 (5th Cir. 1989)).

10

Movant describes this claim as counsel's failure to file a "Motion for Acquittal for government's inadequate evidence of the firearms, not contained in the Indictment, in violation of Apprendi v. New Jersey." (Docket No. 1 at 6.) This claim will be liberally construed to challenge failure to object to the

firearms sentencing enhancement.
11

Movant also injects a lengthy discussion about the "prosecutor's improper argument" in which he suggested that she had lied to the agents about the location of the keys to the tractor (among other things). (Docket No. 12-2 at 97-104.) However, this issue was discussed in detail in the Fifth Circuit's en banc decision and decided against Movant. *Delgado*, 672 F.3d at 334-38. It need not be addressed again here.
12

At trial, this business was also sometimes referred to as "TJ Trucking," which is apparently an assumed business name for "T.J. Truck Lines."
13

As part of her argument on this point, Movant contends that she was unfairly prejudiced by Agent Spivey's response to a question from her attorney about TJ Trucking in which the agent stated that they had prior knowledge of TJ Trucking being involved with narcotics. (Docket No. 12-2 at 105-06.) However, the District Court sustained counsel's objection to the agent's response, struck the answer from evidence, and instructed the jury to disregard it. The Fifth Circuit addressed this issue in its en banc ruling. *Delgado*, 672 F.3d at 338-40. The Fifth Circuit found no error. Here again, it is unnecessary to explore an issue decided on Movant's direct appeal.
14

The agent entered the tractor in this way because Movant claimed that she did not have a key to the door. After opening the door of the tractor, the agent discovered the marijuana that was the basis of the charges brought against Movant.
15

Even if the agent's mode of entering the tractor had some relevance at trial, Movant's counsel would not have been deficient in failing to pursue this issue. It is unlikely that the jury would have been more inclined to return a not guilty verdict because the agent found the marijuana by entering the tractor in a way that Movant allegedly had not authorized. Instead, the jury may well have concluded that Movant's selective consent showed that she knew that the marijuana was in the tractor cab. On the one hand, Movant allowed the agents to search the unlocked trailer, knowing that the agents would find nothing there. Movant also allowed the agents to try to unlock the cab of the tractor using the many keys found in her home; here again, she knew that none of the keys would work. On the other hand, however, Movant claims that she refused to allow the agents to attempt to enter the tractor using any other means. The jury could reasonably have concluded that this refusal showed that she knew the marijuana was in the tractor and did not want to risk that the agents would be able to enter the cab and find it.
16

Movant makes the same confrontation claim as to "the Translator of the tape recordings." (Docket No. 1 at 7(ii).) Movant does not explain why she thinks that the translator should have been examined, although presumably it would be to confirm the accuracy of the transcripts of the telephone conversations between Movant and the Government's informant (Vasquez). Because Movant does not affirmatively show how the testimony of the translator would have helped her, this claim likewise lacks merit.
17

During her testimony at the suppression hearing, Movant did not mention being coerced to sign the waiver form. The agents who were present when she signed the waiver form would likely have told a much different story. Movant suggests no reason to believe that the District Court would have found

her version of events to be more credible. In denying Movant's motion to suppress the evidence found in the tractor, the Court found-contrary to Movant's testimony-that she consented to the search. (Cr. Docket No. 63, Suppression Hearing Tr. at 30.) In making this finding, the Court noted inconsistencies in Movant's testimony. (*Id.*)
18

Movant lists the following ways in which appellate counsel allegedly erred:

(1) She failed to raise the Actual Innocence Claim; (2) She failed to raise the Ineffective Assistance of Counsel; (3) She failed to raise the insufficiency**{2016 U.S. Dist. LEXIS 40}** of the evidence; (4) She failed to raise the court's abuse of discretion to deny the Motion to Suppress the Evidence; (5) She failed to raise the Apprendi violation as to the Firearms; (6) She failed to mitigate the Confrontation Clause, as to the lab Chemist and the Translator for the Tape Recordings; (7) She failed to raise that the Sentence exceeded the maximum authorized by law, pursuant to title 18 U.S.C. § 371; and (8) Failed to raise the Cumulative errors, pursuant to the Fed. R. Crim. P. Rule 52(b).(Docket No. 12 at 18.) However, Movant's briefing addresses only the insufficiency of evidence issue. (*See id.* at 11-19.) After considering each of the issues listed by Movant, the undersigned concludes that they all lack merit. This report will discuss only the insufficiency issue since that is the only issue relating to appellate counsel that Movant has addressed. Movant's claim that appellate counsel was deficient in failing to raise the suppression issue will be discussed in connection with her argument that the District Court erred in denying her motion to suppress. *See infra* Part II.C.1. As to Movant's remaining points regarding appellate counsel, they fail for many of the same reasons that the issues she raises regarding trial counsel fail. *See supra* Part II.B.2.
19

It is true, as Movant emphasizes, that the Fifth Circuit discussed and applied the plain error standard of review since trial and appellate counsel did not preserve and raise an insufficiency claim. *Delgado*, 672 F.3d at 328-32. However, it is also abundantly clear from the Fifth Circuit's analysis and conclusions that an insufficiency claim would have failed even if it had been preserved at trial and raised on appeal. *Id.* at 332-34.

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