

CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15192-K

DORA MOREIRA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Dora Moreira has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 8, 2019, order denying a certificate of appealability and leave to proceed *in forma pauperis* in her appeal of the district court's denial of her *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct her sentence. Upon review, Moreira's motion for reconsideration is DENIED because she has offered no new evidence or arguments of merit to warrant relief.

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for the Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because she has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Her motion for leave to proceed *in forma pauperis* on appeal is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

DORA MOREIRA, Movant, vs. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI
DIVISION

2018 U.S. Dist. LEXIS 181069

Case Number: 17-20721-CIV-MARTINEZ-WHITE,13-20298-cr-Martinez

October 19, 2018, Decided

October 19, 2018, Entered on Docket

Editorial Information: Prior History

Moreira v. United States, 2018 U.S. Dist. LEXIS 98473 (S.D. Fla., June 11, 2018)

Counsel {2018 U.S. Dist. LEXIS 1}Dora Moreira, Plaintiff, Pro se, Coleman, FL.
For United States of America, Defendant: Noticing 2255 US
Attorney, LEAD ATTORNEY ; A. Brendan Stewart, U.S. Department of Justice, Washington,
DC; Sarah A. Wilson, U.S. Department of Justice, Brooklyn, NY.

Judges: JOSE E. MARTINEZ, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JOSE E. MARTINEZ

Opinion

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on Movant's *pro se* amended¹ motion to vacate, filed pursuant to 28 U.S.C. § 2255. Magistrate Judge White filed a Report and Recommendation [ECF No. 22], recommending that the amended motion be denied, this case be closed and that no certificate of appealability issue. Movant filed Objections to the Report and Recommendation [ECF No. 25]. This Court has reviewed the entire file and record, has made a *de novo* review of the issues that the Objections to the Magistrate Judge's Report and Recommendation present, and is otherwise fully advised in the premises. The Court finds the issues raised in Movant's Objections, to the extent they can be deciphered by this Court, are already addressed in Magistrate Judge White's Report{2018 U.S. Dist. LEXIS 2} and Recommendation.² As noted in Judge White's Report and Recommendation, the majority of Movant's allegations are conclusory and insufficient to state a claim for relief, and are either refuted by the record or lack factual support in the record. Moreover, when viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the petitioner due process of law. However, the Court will specifically address one of Movant's objections, below.

At trial, Movant's counsel sought to present a witness - Eugenio Olivares - to impeach prior testimony about Mr. Olivares made by another witness - Ivan Alejo [ECF No. 22 at 16]. The Trial Court and Government had no recollection of Mr. Olivares having been mentioned in Mr. Alejo's prior testimony. The Government objected to Mr. Olivares' testimony as irrelevant, believing that he had not been identified by Mr. Alejo. Defense counsel disagreed. To resolve the dispute, the court

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reporter searched her electronic transcript, and returned "no match" for Mr. Olivares. *Id.* Accordingly, Mr. Olivares was precluded from testifying{2018 U.S. Dist. LEXIS 3} as an impeachment witness. Magistrate Judge White recommended that Movant's amended motion to vacate be denied on this ground as Movant did not explain how the conclusion that there was no match was incorrect, thus there were no grounds for counsel to argue this issue. *Id.* In her Objections, Movant expands on her claim that witness Eugenio Olivares was improperly precluded from testifying to impeach Mr. Alejo's testimony, even though Mr. Alejo testified that Mr. Olivares was a patient recruiter [ECF No. 25 at 21]. Movant has located a portion of Mr. Alejo's testimony, where, in one line, Mr. Alejo refers to Mr. Olivares. It appears that because Mr. Olivares' name was misspelled, the court reporter was unable to locate the reference.

In order to prevail on an ineffective assistance of counsel claim, Movant must show that her attorney's performance was deficient, and that the deficient performance prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance must fall below "an objective standard of reasonableness." *Id.* In order to show prejudice, Movant must demonstrate that but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been{2018 U.S. Dist. LEXIS 4} different. *Id.* at 693. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* When evaluating counsel's performance, the Court must be highly deferential. *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000). Counsel's conduct is unreasonable only if Movant shows "that no competent counsel would have made such a choice." *Provenzano v. Singleton*, 148 F.3d 1327, 1332 (11th Cir. 1998). Moreover, when reviewing counsel's performance, the Court must evaluate the reasonableness of counsel's performance from counsel's perspective at the time the alleged error was made. *Id.* at 1316 (internal citations omitted).

Applying these guiding principles to the record, the Court concludes that Movant is due no relief. In light of the circumstances of the case, this Court finds that defense counsel's performance fell inside the range of reasonably competent assistance. Counsel attempted to solicit the testimony of Mr. Olivares to impeach the testimony of Mr. Alejo. The Court precluded defense counsel's attempt only after the court reporter was unable to find a match after searching her electronic transcript. While it appears that no match was returned because Mr. Olivares' name was misspelled, there is nothing deficient about defense counsel's performance. She attempted to solicit Mr. Olivares'{2018 U.S. Dist. LEXIS 5} testimony but was overruled by the Court, who precluded Mr. Olivares' testimony as irrelevant. Counsel must adhere to the Court's ruling and cannot be deemed deficient in doing so. Even if counsel's performance was deficient, Movant has not established that this deficiency prejudiced her. As noted above, when viewing the evidence in this case in its entirety, any error in precluding Mr. Olivares' impeachment testimony, standing alone, did not infuse the proceedings with unfairness as to deny Movant due process of law and is not sufficient to undermine this Court's confidence in the outcome of the proceedings. Indeed, as noted by the Eleventh Circuit in affirming the Movant's conviction, the record is replete with evidence supporting Movant's convictions.

Accordingly, after careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge White's Report and Recommendation [ECF No. 22] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Movant's *pro se* amended motion to vacate, filed pursuant to 28 U.S.C. § 2255 [ECF No. 8] is **DENIED**. No certificate of appealability shall issue. This case is **CLOSED**, and any pending motions are **DENIED AS MOOT**. A final judgment shall be entered by{2018 U.S. Dist. LEXIS 6} separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of October, 2018.

/s/ Jose E. Martinez

JOSE E. MARTINEZ

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58, and in accordance with the reasons stated in the Court's Order Adopting Judge White's Report and Recommendation, judgment is entered in favor of Respondent and against Movant.

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of October, 2018.

/s/ Jose E. Martinez

JOSE E. MARTINEZ

UNITED STATES DISTRICT JUDGE

Footnotes

1

Movant's initial motion consisted of a form motion and an attachment, with the attachment totaling 122 pages [ECF No. 1]. Because the initial motion exceeded the acceptable page limit, was akin to a shotgun pleading and the allegations/grounds for relief were difficult to decipher, Movant was directed to file an amended motion not exceeding the page limit and clarifying her allegations/grounds for relief [ECF No. 5].

2

The Court notes that Movant's Objections total 65 pages, are difficult to follow and contain a lengthy recitation of the evidence and an attack on the sufficiency of the evidence more appropriate for review on direct appeal. Moreover, many of Movant's Objections address credibility determinations made by the jury with respect to witness testimony. The jury was present for all testimony and made credibility determinations in favor of the Government and against Movant. Credibility of a witness is in the province of the factfinder, here, the jurors. This Court does not second-guess these credibility determinations. See *United States v. Lovett*, 662 Fed. Appx. 838, 850 (11th Cir. 2016) (citing *Crystal Entm't & Filmworks, Inc. v. Jurado*, 643 F.3d 1313, 1320 (11th Cir. 2011); *United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999)).