IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12193-E

FRANCISCO ABREU TARTABULL,

Petitioner-Appellant,

versus

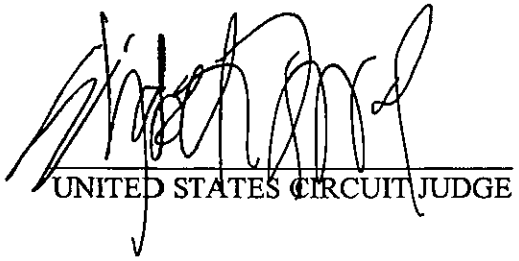
UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Francisco Abreu Tartabull's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).



UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-21606-CIV-ALTONAGA

FRANCISCO ABREU TARTABULL,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE came before the Court on Movant, Francisco Abreu Tartabull's Motion Under 28 U.S.C. [Section] 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [ECF No. 1] with supporting Memorandum of Law [ECF No. 1-1]. The Government filed a Response in Opposition to Movant's Motion [ECF No. 6] with supporting exhibits (*see* [ECF Nos. 6-1–6-3]). The Court has carefully considered the Motion, the record, the parties' written submissions, and applicable law. For the following reasons, the Motion is denied.

Background

Movant, presently incarcerated at FCI Miami, seeks to invalidate his sentence and conviction, raising several grounds of ineffective assistance of counsel. (*See generally* Mot.). The Court construes Movant's Motion liberally due to his *pro se* status. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

The Indictment. The Indictment [CR ECF No. 3[1]] charged Movant with conspiracy to commit health care fraud and wire fraud, in violation of 18 U.S.C. section 1349. (*See generally*

[1] References to docket entries in Movant's criminal case, case number 19-cr-20605, are denoted as "CR ECF No."

Indictment).

Movant's guilty plea. On February 7, 2020, Movant entered into a Plea Agreement [CR ECF No. 34] with the Government. (*See generally* Plea Agreement). Movant agreed to plead guilty to one count of conspiracy to commit health care fraud and wire fraud, in violation of 18 U.S.C. section 1349. (*See id.* 1). Movant and his attorney, Dennis Gonzalez, Jr., signed the Plea Agreement. (*See id.* 8).

In his Plea Agreement, Movant acknowledged he reviewed the Sentencing Guidelines with counsel, he understood his sentence would be imposed by the Court after consideration of the Guidelines, which were advisory and not binding, and that the Court had the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense. (*See id.* 1–2). Movant was aware that any estimate of the probable sentencing range or sentence that he may receive was a prediction, not a promise, and was not binding on the Court. (*See id.* 4). He confirmed he was guilty of the offense to which he was pleading guilty; it was his decision to plead guilty; and that his guilty plea was freely and voluntarily made and not the result of force, threats, coercions, or promises apart from those included in the Plea Agreement. (*See id.* 7–8). Movant affirmed he reviewed the Plea Agreement and entered it knowingly, voluntarily, and intelligently and with the benefit of assistance from his counsel. (*See id.*).

At Movant's change-of-plea hearing, the Court engaged in a thorough and complete plea colloquy with Movant: the Undersigned went over the elements of the offense (*see* Change of Plea Hr'g Tr. [ECF No. 6-1] 6:9–21); reviewed the written Plea Agreement with Movant (*see id.* 7:19–11:18); identified all the constitutional rights Movant was waiving (*see id.* 12:16–13:16); ascertained his acknowledgment of the Factual Proffer's accuracy (*see id.* 13:17–16:15); explained the sentencing process (*see id.* 8:1–11:4); and received Movant's confirmation he was satisfied with the representation his counsel had provided him (*see id.* 5:21–24).

The Undersigned verified Movant was not under the influence of drugs or alcohol at the time of his plea colloquy. (*See id.* 5:4–6). Movant's attorney stated he had reviewed the evidence with Movant and discussed with him the possible options and defenses if the case were to go to trial. (*See id.* 6:22–7:10). Movant denied any coercion (*see id.* 11:19–22) and denied he had been promised anything not stated in the Plea Agreement (*see id.* 11:23–12:4).

Movant signed a Factual Proffer attesting to the facts underlying his guilty plea. (*See generally* Factual Proffer [CR ECF No. 35]). As stated in the Factual Proffer, from July 2016 to December 2017, Movant knowingly and willfully combined, conspired, confederated, and agreed with his co-conspirators to commit heath care and wire fraud, in violation of 18 U.S.C. section 1349. (*See id.* 1). The Factual Proffer summarized Movant's fraudulent scheme:

> South Dade Medical Center Inc. ("South Dade") was a Miami medical clinic that purportedly provided commercial private insurance beneficiaries with various medical treatments and services. [Movant] was the owner, operator, and registered agent of South Dade. During the relevant period, [Movant] and his co-conspirators knowingly used South Dade to submit false and fraudulent claims to Blue Cross Blue Shield ("BCBS"), via interstate wire, for purported therapy services and treatments provided at the clinic. In fact, and as [Movant] knew, the services were not medically necessary, and not provided. Once BCBS paid South Dade for these fraudulent claims, [Movant] and his co-conspirators then knowingly and willfully concealed and diverted the fraud proceeds for their personal use and to further the fraud.
>
> During the relevant period, the conspirators recruited insured beneficiaries to [Movant's] clinic, in exchange for cash kickbacks. Many of these recruited beneficiaries worked at Pepsico, Assurant, and Simply, and were also insured by these companies, as the companies offered their employees Administrative Services Only [] insurance plans that were managed by BCBS. In furtherance of the scheme, [Movant] and his co-conspirators specifically recruited these beneficiaries to South Dade so that their insurance information could be used to submit false and fraudulent claims to BCBS for services that they did not need, want, or receive. In exchange for allowing the clinic to use their information to fraudulently bill BCBS, [Movant] and his co-conspirators paid and caused to be paid cash kickbacks to these recruited beneficiaries.
>
> In furtherance of the fraudulent scheme, [Movant], through De La Rosa and Martinez, recruited co-conspirator Izquierdo to help create the false and fraudulent claims that were ultimately submitted to BCBS through [Movant's] clinic, in

> exchange for a 10% fee. Additionally, in furtherance of the scheme, the co-conspirators at South Dade also knowingly and willfully submitted and caused to be submitted false and fraudulent claims to BCBS for recruited beneficiaries that were "back billed," meaning [Movant] submitted and caused to be submitted claims for services purportedly rendered before the patient was referred to the clinic and thus could not have received services on the dates in question.
>
> When the recruited beneficiaries came to the clinic for their initial visit, the conspirators would ask them to provide their insurance information, and sign stacks of blank therapy treatment forms. This information was used by [Movant] and his co-conspirators to knowingly submit and cause to be submitted false and fraudulent claims to BCBS for services that the recruited beneficiaries did not qualify for, want, or receive. As owner, operator, and person identified on the paperwork as the billing manager and billing point of contact, [Movant] personally submitted many of these false and fraudulent claims. [Movant] and his co-conspirators also took steps to avoid detection and conceal the fraud. For example, [Movant] paid the patient recruiters via cash, and paid Izquierdo via checks made out to his shell companies.
>
> As a result of [Movant] and his co-conspirators' knowing and willful participation in the fraudulent scheme, [Movant] submitted or caused to be submitted, via wire, approximately $2,161,065 in false and fraudulent claims, for which BCBS then paid South Dade approximately $920,664. [Movant] was the sole signatory on the South Dade bank account into which this fraudulently obtained money from BCBS was deposited. The above facts are corroborated by, among other things, medical records, BCBS claims data and records, certified business records, bank documents, wage and earnings records, and witness testimony.

(*Id.* 1–3 (alterations added)).

Sentencing and appeal. On April 30, 2020, the Court sentenced Movant to 64 months' imprisonment and 3 years of supervised release. (*See* J. [CR ECF No. 51] 2–3). Movant directly appealed his conviction and sentence (*see* Notice of Appeal [CR ECF No. 55]), but the Eleventh Circuit dismissed his appeal for want of prosecution (*see* Order of Dismissal [CR ECF No. 62]).

The Motion and Response. In his Motion, Movant raises three claims of ineffective assistance of counsel. (*See* Mot. 4; *see also generally* Mem. of Law). The Government's Response addresses each of Movant's three claims, insisting the Motion must be denied because Movant establishes neither the deficient performance nor the prejudice prong of *Strickland v. Washington*,

466 U.S. 668 (1984). (*See generally* Resp.).

Applicable Law

Section 2255 motions. Under section 2255, "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence." 28 U.S.C. § 2255(a) (alterations added). Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments under section 2255 are extremely limited. *See United States v. Frady*, 456 U.S. 152, 165 (1982) (citations omitted). A prisoner is entitled to relief under section 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States; (2) exceeded its jurisdiction; (3) exceeded the maximum authorized by law; or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011) (citation omitted). "[R]elief under 28 U.S.C. [section] 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (alterations added; quotation marks and citations omitted).

Ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that counsel's performance was deficient, and (2) a reasonable probability the deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 694; *Harrington v. Richter*, 562 U.S. 86, 104 (2011). To establish prejudice, the movant must establish that but for counsel's deficient performance, the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 694; *Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 754 (11th Cir. 2010). If the

movant cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. *See Strickland*, 466 U.S. at 697.

Movants bear the burden of proof in habeas proceedings. *See Blankenship v. Hall*, 542 F.3d 1253, 1270 (11th Cir. 2008). "There is a strong presumption that counsel's performance was reasonable and adequate. . . . To overcome that presumption, a [movant] must establish that no competent counsel would have taken the action that his counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (alterations added; quotation marks and citations omitted).

Analysis

As noted, Movant raises three ineffective-assistance-of-counsel claims. (*See generally* Mot.; Mem. of Law). The Court addresses each in turn.

Movant first contends his counsel rendered ineffective assistance when counsel "willfully deceived" Movant by lying to him that the Government "had an alleged audio recording" of Movant. (Mem. of Law 3 (quotation marks omitted); *see also* Mot. 4). Movant insists "being lied to by his lawyer clearly falls [below] any objective standard of reasonableness." (Mem. of Law 3 (alteration added)). Movant conclusively states he would have gone to trial had counsel performed effectively. (*See id.*).

Movant's contention is palpably incredible and refuted by the record. First, Movant agreed to be plead guilty because he was "in fact . . . guilty as charged" (Change of Plea Hr'g Tr. 12:2–4 (alteration added)); and agreed "all the[] facts" in the Factual Proffer were "true and correct" (*id.* 13:17–16:15 (alterations added)). (*See also* Factual Proffer 3 (affirming all the facts were corroborated "by, among other things, medical records, [] claims data and records, certified business records, bank documents, wage and earnings records, and witness testimony" and sufficient "to prove beyond a reasonable doubt a violation of" 18 U.S.C. section 1349 (alteration added)); Sentencing Hr'g Tr. [ECF No. 6-2] 10:11–12:6 (expressing remorse for his conduct by

stating he "cannot go back and fix what [he] did" but "will prevent it from occurring again" (alteration added))). Movant did not raise any issues (or objections) with the Government's evidence when presented with the proffer at the change-of-plea hearing. (*See generally* Change of Plea Hr'g Tr.).

Second, in his sworn affidavit, Mr. Gonzalez specifically attests (1) he "reviewed Discovery in pertinent detail" with Movant; (2) "[t]here are no audio recordings" of Movant and his co-conspirators in his criminal case; (3) he did not tell Movant that such audio recordings existed in his criminal case; and (4) that "[t]he only digital recordings in []his case [were] of [Movant] as he [] pass[ed] through the drive-thru of the bank[,]" which he "reviewed with" Movant. (Aff. of Dennis Gonzalez, Jr. ("Gonzalez Aff.") [ECF No. 6-3] ¶¶ 11–13 (alterations added)). Third, Movant agreed he was "satisfied with [his] counsel[] [and] the representation and [] advice that [he] received from [his] attorney[.]" (Change of Plea Hr'g Tr. 5:21–24 (alterations added)). Fourth, when Movant signed his Plea Agreement, he confirmed he was "guilty of the offense[]" and affirmed he "reviewed th[e] agreement and enter[ed] into it knowingly, voluntarily, and intelligently, and with the benefit of assistance by [his] attorney." (Plea Agreement 7–8 (alterations added)).

In short, Movant's first ineffective-of-assistance-of-counsel claim is contradicted by the record. Relief based on the arguments raised in ground one is denied.

Movant next insists counsel "did not effectively explain the parameters of the plea agreement — leading [Movant] to believe [he] would get very little prison time or none at all[.]" (Mot. 4 (alterations added)). Movant's conclusory allegation falls short of establishing incompetent representation.

First, Mr. Gonzalez flatly refutes Movant's contention, stating he "personally went over all possible sentencing outcomes with" Movant and "expounded to him [] the Court ha[d] discretion

to vary upwards or downwards from sentencing guidelines, notwithstanding a plea agreement." (Gonzalez Aff. ¶ 14 (alteration added)). Second, and most importantly, Movant affirmed — under oath and at his change-of-plea hearing — his sentencing exposure. (*See* Change of Plea Hr'g Tr. 9:10–11 (Q: "Do you understand [the sentencing process]?" A: "Yes, Your Honor." (alteration added)); *id.* 9:18–20 (Q: "Do you understand what your maximum possible sentence may be?" A: "Yes, Your Honor.")). Third, when Movant signed his Plea Agreement, he acknowledged the Court "ha[d] the authority to impose any sentence within and up to the statutory maximum . . . [of] twenty (20) years[.]" (Plea Agreement 2 (alterations added); *see also* Change of Plea Hr'g Tr. 7:15–18 (Q: "Did you have the opportunity of reading [the Plea Agreement] and discussing it fully with your attorney before you signed it?" A: "Yes, Your Honor." (alteration added))).

In sum, Movant fails to make the requisite showing required by *Strickland*, and he is thus not entitled to relief on this claim.

Movant further argues counsel provided ineffective assistance by "not mak[ing] changes to the plea deal [Movant] asked [counsel] directly to do[,]" maintaining counsel "did everything possible to avoid going to trial." (Mot. 4 (alterations added); *see also* Mem. of Law 2). The record evidence fails to support Movant's contention. Movant affirmed under oath he "ha[d] the opportunity of reading and discussing" the Plea Agreement "fully" with his counsel prior to signing. (Change of Plea Hr'g Tr. 7:15–18 (alteration added)). Further, Movant's own sworn statements regarding his counsel's performance contradict his present argument. (*Id.* 6:22–7:10 (agreeing that he and defense counsel "reviewed the discovery, [] discussed the pros and cons of going to trial versus working out an arranged plea agreement with the Government[;] [and] . . . discussed all options, the contract, the proffer . . . [and] went through everything." (alterations added))). Ground three is meritless.

Movant makes passing references to counsel's deficient performance in his Memorandum of Law, all of which not only lack merit but also are contradicted by the record. (*See generally* Mem. of Law). Movant first states he was "emotional and psychologically traumatized at the time" he executed the Plea Agreement. (*Id.* 2; *see also id.* 1, 4). Movant's vague assertions are refuted by the express statements in the signed Plea Agreement and Movant's testimony at the change-of-plea hearing. (*See* Plea Agreement 7–8 (confirming Movant's "decision to plead is the decision that [Movant] [] made; and that nobody [] forced; threatened; or coerced [him] into pleading guilty" (alterations added)); Change of Plea Hr'g Tr. 11:19–22 (Q: "[Movant], is anyone putting pressure upon you, forcing you or coercing you to plead guilty and agree to the[] terms [of the Plea Agreement]?" A: "No, Your Honor." (alterations added))). Movant then conclusively avers he "did not direct appeal . . . because his counsel told him that he forfeited that right" (Mem. of Law 2 (alteration added)); yet the Eleventh Circuit dismissed Movant's direct appeal for want of prosecution (*see* Order of Dismissal).

To recap, Movant's ineffective-assistance-of-counsel claims are either refuted by the record or too vague and conclusory to warrant habeas relief. Movant's Motion is thus denied.

Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the movant to establish the need for a federal evidentiary hearing. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011). "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (alteration added); *see also Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318–19 (11th Cir. 2016). Here, the issues presented in this case can be resolved on the basis of the record. Because the Court can "adequately assess [Movant's] claim[s] without further factual development[,]" *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003)

(alterations added), Movant is not entitled to an evidentiary hearing.

Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). Movant fails to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Upon consideration of the record, the Court denies the issuance of a certificate of appealability.

Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that Movant, Francisco Abreu Tartabull's Motion Under 28 U.S.C. [Section] 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody **[ECF No. 1]** is **DENIED**. A certificate of appealability shall not issue. Final judgment shall issue by separate order. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Miami, Florida, this 31st day of May, 2021.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record; Movant, *pro se*

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FOR THE ELEVENTH CIRCUIT

No. 21-12193-E

FRANCISCO ABREU TARTABULL,

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 BRANCH, Circuit Judges.

BY THE COURT:

Francisco Abreu Tartabull filed a counseled motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated November 3, 2021, denying his *pro se* motion for a certificate of appealability in his appeal from the district court's denial of his *pro se* 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Because Tartabull 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.