

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 17-21643-CIV-GAYLES/WHITE

ERICK JAVIER DIAGO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER AFFIRMING AND ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE comes before the Court on Magistrate Judge Patrick A. White’s Report of Magistrate Judge (“Report”) [ECF No. 5]. Petitioner filed a pro se motion to vacate pursuant to 28 U.S.C. §2255 attacking the constitutionality of his sentence and/or requesting that his conviction not be classified as a crime of violence (the “Motion”) [ECF No. 1]. The matter was referred to Judge White, pursuant to 28 U.S.C. § 636(b)(1)(B) and Administrative Order 2003-19 of this Court, for a ruling on all pretrial, non-dispositive matters, and for a Report and Recommendation on any dispositive matters. [ECF No. 3]. Judge White’s Report recommends that the Court deny the Motion to the extent it was brought pursuant to §2255, or, in the alternative, dismiss the Motion for lack of exhaustion to the extent it was brought pursuant to §2241. Petitioner has failed to timely object to the Report.

A district court may accept, reject, or modify a magistrate judge’s report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections “pinpoint the specific findings that the


party disagrees with.” *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App’x 781, 784 (11th Cir. 2006).

This Court finds no clear error with Judge White’s well-reasoned analysis and agrees that the Motion must be denied or dismissed.

Accordingly, after careful consideration, it is **ORDERED AND ADJUDGED** as follows:

- (1) Judge White’s Report and Recommendation [ECF No. 5] is **AFFIRMED AND ADOPTED** and incorporated into this Order by reference;
- (2) the Motion [ECF No. 1], when viewed as a Motion pursuant to 28 U.S.C. §2255 is **DENIED**;
- (3) the Motion [ECF No. 1], when viewed as a Motion pursuant to 28 U.S.C. §2241 is **DISMISSED** for lack of exhaustion;
- (4) no certificate of appealability shall issue; and
- (5) this case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of May, 2017.



DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE