

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District <i>Southern Dist. of NY</i>
Name (under which you were convicted): <i>JAMES SPINA</i>		Docket or Case No.: <i>18 CR 625 (KMK)</i>
Place of Confinement: <i>FEDERAL PRISON CAMP, OTISVILLE</i>		Prisoner No.: <i>86089-054</i>
UNITED STATES OF AMERICA		Movant (include name under which you were convicted) <i>v. JAMES SPINA</i>

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:  
*U.S. District Court, Southern District of New York*

(b) Criminal docket or case number (if you know): *18 CR 625 (KMK)*

2. (a) Date of the judgment of conviction (if you know):

*April 13, 2021*

(b) Date of sentencing: *April 13, 2021*

3. Length of sentence: *108 MONTHS*

4. Nature of crime (all counts):

*CONSPIRACY TO COMMIT HEALTHCARE FRAUD*

5. (a) What was your plea? (Check one)

(1) Not guilty

(2) Guilty

(3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

*N/A*

6. If you went to trial, what kind of trial did you have? (Check one)

Jury

Judge only

*N/A*

- 7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes  No
- 8. Did you appeal from the judgment of conviction? Yes  No
- 9. If you did appeal, answer the following:

(a) Name of court: *US Court of Appeals, Second Circuit*  
 (b) Docket or case number (if you know): *UNKNOWN*  
 (c) Result: *Dismissed*  
 (d) Date of result (if you know): *July 20, 2022*  
 (e) Citation to the case (if you know): *UNKNOWN*  
 (f) Grounds raised:  
*Sentence was substantially unreasonable*

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes  No

If "Yes," answer the following:

(1) Docket or case number (if you know): *N/A*  
 (2) Result: *N/A*  
 (3) Date of result (if you know): *N/A*  
 (4) Citation to the case (if you know): *N/A*  
 (5) Grounds raised: *N/A*

- 10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes  No

- 11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: *N/A*  
 (2) Docket or case number (if you know): *N/A*  
 (3) Date of filing (if you know): *N/A*

(4) Nature of the proceeding: *N/A*

(5) Grounds raised:

*N/A*

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes  No  *N/A*

(7) Result: *N/A*

(8) Date of result (if you know): *N/A*

(b) If you filed any second motion, petition, or application, give the same information: *N/A*

(1) Name of court: *N/A*

(2) Docket or case number (if you know): *N/A*

(3) Date of filing (if you know): *N/A*

(4) Nature of the proceeding: *N/A*

(5) Grounds raised:

*N/A*

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes  No  *N/A*

(7) Result: *N/A*

(8) Date of result (if you know): *N/A*

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application? *N/A*

(1) First petition: Yes  No  *N/A*

(2) Second petition: Yes  No  *N/A*

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: *N/A*

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: *PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

*See PAGES 5A-5F*

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

*NOT COGNIZABLE ON DIRECT APPEAL*

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: *N/A*

Name and location of the court where the motion or petition was filed: *N/A*

## PARAGRAPH 12(a), SUPPORTING FACTS

(i) Appellate Counsel, Michael Burke, Esq., was aware that the petitioner waived his right to appeal any sentence that did not exceed 120 months imprisonment. The petitioner was sentenced to 108 months imprisonment on April 13, 2021.

(ii) Despite the expressed terms of the appeal waiver, Appellate Counsel appealed the petitioner's sentence on the ground that it was substantially unreasonable.

(iii) The government moved to dismiss the appeal based on the petitioner's appeal waiver.

(iv) On May 9, 2022, the petitioner filed a pro se opposition to the government's motion to dismiss the appeal in the Court of Appeals. In his

pro se opposition, the petitioner asserted that: (a) the District Court failed to inform the petitioner of the elements of the offense, personally, as required by Rule 11(A)(6) of the Federal Rules of Criminal Procedure; (b) During the plea proceedings, Asst. U.S. Attorney Martin incorrectly stated the elements of conspiracy to commit healthcare fraud, as follows: "ONE, that two or more people entered into an agreement to commit healthcare fraud; AND TWO, that each defendant knowingly AND intentionally joined in the agreement." (Plea Transcript, MAY 2, 2019, Tr. P. 28); AND (c) During the plea, the petitioner stated to the Court that he knew that his conduct violated the "New York State Medical Practice Law". This did NOT state a Federal violation of conspiracy to commit healthcare fraud. Thus, there was NO factual basis for

the petitioner's guilty plea, in violation of Rule 11(d)(3).

(v) On May 19, 2022, the Pro Se Clerk's Office in the Court of Appeals Forwarded the petitioner's pro se opposition to the government's motion to dismiss appeal to appellate counsel.

(vi) On or about May 22, 2022, appellate counsel informed the petitioner that he would not include the issues reflected in the petitioner's pro se opposition in the appeal.

(vii) In *Trizzary v. United States*, 508 F.2d 960, 966 (2d. Cir. 1974), the Second Circuit held that before a guilty plea to conspiracy can be accepted, a defendant must be informed of the following three elements, personally, by the judge: proof of an agreement between two or more persons to

COMMIT A CRIME; PROOF OF KNOWLEDGE OF THE EXISTENCE OF THE CONSPIRACY; AND AN INTENT TO PARTICIPATE IN THE UNLAWFUL ENTERPRISE". IN THE INSTANT CASE, THE PETITIONER WAS NEVER INFORMED THAT

"KNOWLEDGE OF THE EXISTENCE OF THE CONSPIRACY; AND THE INTENT TO PARTICIPATE IN AN UNLAWFUL ENTERPRISE" WERE ELEMENTS OF THE OFFENSE. NOR WAS THERE A

FACTUAL BASIS FOR PETITIONER'S GUILTY PLEA TO CONSPIRACY TO COMMIT HEALTHCARE FRAUD, WHERE HE STATED HE KNEW HIS CONDUCT VIOLATED "NEW YORK STATE MEDICAL PRACTICE LAW".

(VIII) THE ISSUE APPELLATE COUNSEL RAISED WAS "DEAD ON ARRIVAL", BECAUSE IT WAS BARRED BY THE EXPRESSED TERMS OF THE APPEAL WAIVER. ON THE OTHER HAND, THE CHALLENGES TO THE RULE 11 PROCEDURES PROPOSED BY THE PETITIONER WERE VALID AND WOULD NOT HAVE BEEN SUBJECT TO

Appellate waiver. *Pointedly*, in *United States v. Blackwell*, 199 F3d 623, 626 (2d. Cir. 1999), the Second Circuit held that appeal waivers are unenforceable where an appellant challenges the district court's failure to personally advise the appellant of the elements of conspiracy.

(ix) Appellate counsel was clearly ineffective where he elected to pursue an issue that was dead on arrival, versus presenting the one urged by the petitioner, which was valid, and more importantly, not subject to appeal waiver. See *JACKSON v. LEONARDO*, 162 F3d 81 (2d. Cir. 1998) (finding appellate counsel ineffective for pursuing significantly weaker issue over one that had merit). Had appellate counsel raised the Rule 11 violations, the outcome of the appeal would have been different because under *Blackwell*, supra, the appellant's appeal waiver was unenforceable.

Under these circumstances, AND his  
guilty plea would have been vacated.  
see JACKSON V. LEONARDO, SUPRA.

Docket or case number (if you know): *N/A*  
Date of the court's decision: *N/A*  
Result (attach a copy of the court's opinion or order, if available): *N/A*

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No  *N/A*

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No  *N/A*

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No  *N/A*

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

*N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: *N/A*

GROUND TWO: *N/A*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

*N/A*

**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No  *N/A*

(2) If you did not raise this issue in your direct appeal, explain why:

*N/A*

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No  *N/A*

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: *N/A*

Name and location of the court where the motion or petition was filed:

*N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No  *N/A*

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No  *N/A*

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No  *N/A*

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

*N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

**GROUND THREE:**

N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

**(b) Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No  N/A

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No  N/A

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available):

*N/A*

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No  *N/A*

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No  *N/A*

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No  *N/A*

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

*N/A*

Docket or case number (if you know):

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available):

*N/A*

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

*N/A*

GROUND FOUR:

*N/A*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

*N/A*

**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No  *N/A*

(2) If you did not raise this issue in your direct appeal, explain why:

*N/A*

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No  *N/A*

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: *N/A*

Name and location of the court where the motion or petition was filed:

*N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No  *N/A*

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No  *N/A*

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No  *N/A*

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

N/A

(b) At arraignment and plea:

Michael Burke, Esq.

(c) At trial:

N/A

(d) At sentencing:

Michael Burke, Esq.

(e) On appeal:

*Michael Runke, Esq.*

(f) In any post-conviction proceeding:

*N/A*

(g) On appeal from any ruling against you in a post-conviction proceeding:

*N/A*

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes  No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

*N/A*

(b) Give the date the other sentence was imposed: *N/A*

(c) Give the length of the other sentence: *N/A*

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes  No  *N/A*

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*

Motion Filed within one year of July 20, 2022, date appeal was dismissed.

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

*A NEW DIRECT APPEAL; AND VACATE GUILTY PLEA.*

or any other relief to which movant may be entitled.

*N/A*

\_\_\_\_\_  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on \_\_\_\_\_ (month, date, year).

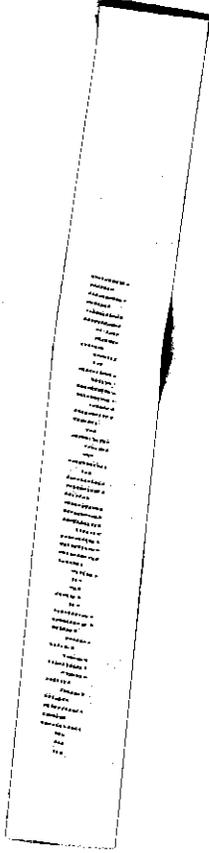
Executed (signed) on *May 11, 2023* (date).

*James Spina*  
\_\_\_\_\_  
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

↔ 86089-054 ↔

James Spina  
FCI OTIS TWO MILE DR  
PO BOX 1000  
Otisville, NY 10963  
United States



↔ 86089-054 ↔

U S Court House -  
Judge Kenneth M. Karas  
300 Quarropas ST  
White Plains, NY 10601-4100  
United States