

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Case No. 7:23-CV-05885-KMK
Cr. No. 18CR625-KMK

V.

JAMES SPINA,
Movant.

MOVANT'S REPLY TO GOVERNMENT'S OPPOSITION TO SECTION 2255
MOTION

The movant, James Spina, pro se, hereby replies to the government's
opposition to his motion under 28 U.S.C. Section 2255, as set forth below:

1. In its opposition, the government argues that the movant's appellate counsel
was not ineffective because the District Court fully complied with the
requirements of Rule 11 of the Federal Rules of Criminal Procedure. Not so.
Irizzary v United States, 508 F2d 960, 966 (2d. Cir. 1974), holds that before a
guilty plea to the offense of conspiracy can be accepted, a defendant must be
personally informed by the judge of the following three elements:

- (a) Proof of an agreement between two or more persons to commit a crime.
- (b) Proof of knowledge of the existence of the conspiracy; and,
- (c) Proof of an intent to participate in the unlawful enterprise.

2. In the instant case, the Court failed to “personally” inform the movant that “proof of knowledge of the existence of the conspiracy” and “proof of the intent to participate in an unlawful enterprise” were essential elements of the offense charged, in violation of Rule 11 (b)(G) of the Federal Rules of Criminal Procedure.

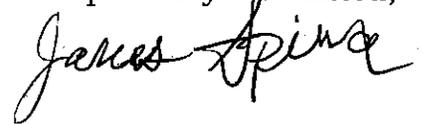
3. In addition, there was no factual basis for movant’s guilty plea to conspiracy to commit healthcare fraud within the meaning of Rule 11(b)(3), where movant stated during the Rule 11 proceedings that he knew his conduct violated the “New York State Medical Practice Law”, which is not a federal offense.

4. Contrary to the government’s assertions, had appellate counsel raised the aforementioned Rule 11 violations, the outcome of the appeal would have been different because the movant’s appeal waiver would not have been sustained by the Second Circuit. See *Jackson v Leonardo*, 162 F3d 81 (2d. Cir. 1998) (finding appellate counsel ineffective for failing to raise solid claim); and *United States v Blackwell*, 199 F3d 623, 626 (2d. Cir. 1999) (holding appeal waiver unenforceable where appellant argued on appeal that he was not properly advised by the court of the elements of conspiracy before entering guilty plea).

CONCLUSION

The movant's claim of ineffective assistance of appellate counsel should be sustained.

Respectfully submitted,



s/James Spina

JAMES SPINA, Pro Se

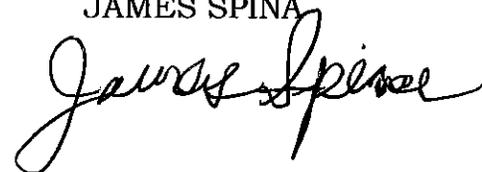
Dated: September 28, 2023

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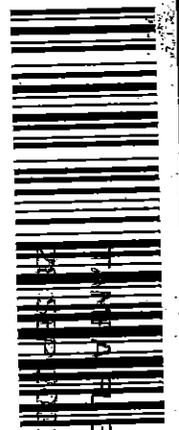
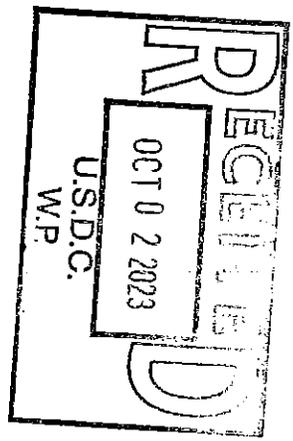
This is to certify that a copy of the foregoing Movant's Reply to Government's Opposition to Section 2255 Motion has been mailed to U.S. Attorney, SDNY, 1 St. Andrews Plaza, New York, NY 10007, this 28th day of September 2023, via first class mail.

s/James Spina

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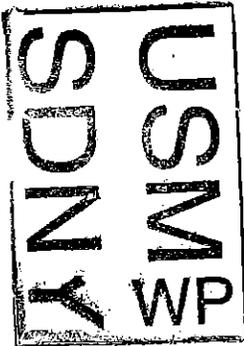
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