UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - v. - JAMES SPINA, Defendant.	18 Cr. 625 (KMK) 23 Cv. 5885 (KMK)

THE GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO JAMES SPINA'S MOTION PURSUANT TO 28 U.S.C. § 2255

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I. Preliminary Statement

Defendant James Spina pleaded guilty to one count of conspiracy to commit healthcare fraud in connection with an elaborate, yearslong scheme operated out of his Dolson Avenue Medical practice ("DAM," or the "Practice") that endangered patients and caused millions of dollars in losses. At sentencing, the defendant received a within-Guidelines sentence of 108 months' imprisonment. Proceeding *pro se*, the defendant now seeks to challenge his conviction under 28 U.S.C. § 2255, claiming that his appellate counsel was ineffective for not raising on appeal supposed violations of Federal Rule of Criminal Procedure 11 at his plea colloquy. As explained below, the defendant's claims are meritless and contradicted by the transcript of his change-of-plea proceedings. The Court should deny the motion.

II. Background

A. Offense Conduct

The charges against the defendant arose from an investigation into DAM, a healthcare practice in Middletown, New York, that provided a variety of pain management and rehabilitation services. (PSR ¶ 13).[1] Besides DAM, at least nine other corporations—referred to here as the Practice's "associated businesses"—billed from the DAM location during the relevant period. (PSR ¶ 14).

The Practice and its associated businesses engaged in a widespread fraud from 2011 through September 2017. On paper, multiple different individuals owned the Practice and its

[1] "Mot." refers to the Section 2255 motion (D.E. 249), and citations to page numbers in the motion refer to the page numbers assigned by CM/ECF; "PSR" refers to the Presentence Investigation Report prepared by the United States Probation Office in connection with the defendant's sentencing. In opposing the defendant's Section 2255 motion, the Government incorporates by reference the more detailed factual summary set forth in its May 13, 2020 sentencing submission. (D.E. 50).

associated businesses. But in reality, the defendant and his brother, both trained chiropractors, owned and operated the different businesses, including the medical corporations. They made all decisions regarding finances, employees, and billing. In making such decisions, the defendant had little, if any, regard for which services or treatments were actually provided to patients, or even whether the treatments were medically necessary. Instead, the defendant operated the Practice and billed insurers to maximize the Practice's reimbursements and his own profits. By making it appear that other individuals owned and controlled the associated businesses, the defendant was able to, among other things, use different entities to bill for medical services for a single patient. That tactic decreased the volume of bills submitted by any one corporation, and thus decreased the risk of raising red flags with insurers. (PSR ¶¶ 16-17, 21).

The defendant, with the assistance of his co-conspirators, engaged in numerous fraudulent practices, including (a) billing for unnecessary medical procedures; (b) billing for services that were never provided; (c) double billing, *i.e.*, billing two insurance providers for the same medical service or procedure; and (d) altering and falsifying medical records. In an effort to conceal the fraud, the defendant obstructed and impeded numerous audits conducted by Medicare and other insurance providers by fabricating and withholding patient records. (PSR ¶ 16).

In connection with the fraudulent practices described above, the defendant encouraged Charles Bagley, a neurologist who worked at the Practice, to continue administering and billing for lucrative facet injections, despite being aware that several of Bagley's patients suffered adverse reactions from that procedure. In March 2017, a patient of the Practice died shortly after receiving a facet injection from Bagley. (PSR ¶ 33).

On August 29, 2018, a grand jury returned an Indictment charging the defendant and others with conspiracy to commit healthcare fraud (Count One), healthcare fraud (Count Two), and

obstruction of a federal audit (Count Three). (D.E. 2). The defendant was arrested the next day. (PSR ¶ 34).

B. The Plea Agreement and Guilty Plea

On May 2, 2019, the defendant, his counsel, and the Government executed a Plea Agreement, which contained the terms under which the defendant agreed to plead guilty to conspiracy to commit healthcare fraud, as charged in Count One of the Indictment. (Plea Agreement, attached as Exhibit A, at 1-7).

In the Plea Agreement, the parties stipulated that the United States Sentencing Guidelines (the "Guidelines" or "U.S.S.G.") applied to the defendant's sentencing as follows:

- The parties agreed that the base offense level was six, under U.S.S.G. § 2B1.1(a)(2), because the offense had a statutory maximum prison term of 10 years; two levels were added, under U.S.S.G. § 2B1.1(b)(2)(A)(1), because the offense involved 10 or more victims; two levels were added, under U.S.S.G. § 2B1.1(b)(10)(C), because the offense involved sophisticated means; two levels were added, under U.S.S.G. § 2B1.1(b)(16)(A), because the offense involved conscious or reckless risk of death or serious bodily injury; four levels were added, under U.S.S.G § 3B1.1(a), because the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; and three levels would be subtracted, under U.S.S.G. § 3E1.1, for acceptance of responsibility. (*Id.* at 2-3).
- The parties disputed two aspects of the Guidelines calculation. First, they disputed the applicable loss amount under U.S.S.G. § 2B1.1(b)(1): the Government contended that a 22-level enhancement applied because the loss

> exceeded $25 million but did not exceed $65 million, and the defendant contended that a 16-level enhancement applied because the loss exceeded $1.5 million but did not exceed $3.5 million. Second, the parties disputed the applicability of a two-level enhancement, under U.S.S.G. § 2B1.1(b)(7), for loss to a Government healthcare program—here, Medicare—exceeding $1 million. (*Id.* at 2).

Accordingly, the parties agreed in the Plea Agreement that the total offense level was either 29 or 37. (*Id.* at 3). The parties further agreed that the defendant had zero criminal history points, resulting in a Criminal History Category of I. (*Id.*).

As a result, the parties agreed that the applicable Guidelines range was either (i) 87 to 108 months' imprisonment, if the loss amount was more than $1.5 million but no greater than $3.5 million and the loss to Medicare did not exceed $1 million; or (ii) 210 to 262 months' imprisonment, if the loss amount was more than $25 million but no greater than $65 million and the loss to Medicare exceeded $1 million. But under U.S.S.G. § 5G1.2, because Count One carried a statutory maximum of 120 months' imprisonment, the resulting Guidelines range stipulated in the Plea Agreement became 87 to 120 months' imprisonment (the "Stipulated Guidelines Range"). (*Id.*).

In addition to stipulating to the applicable Guidelines range, the parties agreed "that neither a downward nor an upward departure from the Stipulated Guidelines Range" was warranted. (*Id.*). The parties further agreed not to seek "any departure or adjustment pursuant to the Guidelines that is not set forth" in the Plea Agreement or "in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines." (*Id.*). The parties agreed, however, that "either party may seek a sentence outside of the Stipulated Guidelines Range based

upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a)," and that "nothing in this Agreement limits the right of the parties . . . to present to the Probation Office or the Court any facts relevant to sentencing." (*Id.* at 3-4). The defendant also agreed that he would "not file a direct appeal . . . of any sentence within or below the Stipulated Guidelines Range of 87 to 120 months' imprisonment," and that he would not "appeal any term of supervised release that is less than or equal to the statutory maximum" or "any fine that is less than or equal to $400,000." (*Id.* at 4-5).

On May 2, 2019—the same day the parties executed the Plea Agreement—the defendant, pursuant to the terms of the Plea Agreement, pleaded guilty to Count One of the Indictment before Judge McCarthy, who conducted a careful and thorough hearing that complied with Rule 11 of the Federal Rules of Criminal Procedure. (Plea Transcript, D.E. 22).

At the outset of the proceeding, after placing the defendant under oath, Judge McCarthy established that the defendant was competent to plead guilty. (*Id*. at 4-6). The defendant confirmed that he consented to proceed with his guilty plea allocution before a United States Magistrate Judge. (*Id.* at 6-9). Judge McCarthy then confirmed that the defendant had discussed the case with his attorney and was satisfied with his attorney's representation. (*Id.* at 10-11). The defendant was advised of the elements of the crime to which he would be pleading guilty, and the maximum penalties that he faced as a result of that guilty plea. (*Id.* at 13-14, 28-29). Judge McCarthy also confirmed that the defendant understood the rights he was giving up by pleading guilty, including his rights: (a) to persist in his previously entered plea of not guilty; (b) to a speedy and public jury trial where he would be presumed innocent and the Government would bear the burden of proving his guilt beyond a reasonable doubt; (c) to the assistance of counsel, including court-appointed counsel if necessary, at trial and at every other stage of the proceedings; (d) to confront and cross-

examine witnesses; (e) to testify, present evidence, and compel the attendance of witnesses; and (f) against compelled self-incrimination. (*Id.* at 26-27). The defendant stated that he was willing to waive those rights by pleading guilty. (*Id.* at 27). The defendant also confirmed that his decision to plead guilty was voluntary and made of his own free will, and was not influenced by any threats, coercion, or improper pressure. (*Id.* at 13, 33-34).

The defendant stated that he had reviewed the Plea Agreement with his attorney and understood its terms. (*Id.* at 12-13). The defendant also stated that he understood that he was giving up his right to appeal any sentence within or below the Stipulated Guidelines Range of 87 to 120 months' imprisonment, any fine of $400,000 or less, or any lawful sentence of supervised release. (*Id.* at 24-25).

Finally, Judge McCarthy confirmed that an adequate factual basis supported the plea. (*Id.* at 33-45). The defendant stated, in relevant part: "In 2011 to 2017, I did knowingly and intentionally agree with others to participate with medical corporations that billed medical insurance companies for services rendered. These corporations falsely appeared as they were owned by a medical doctor, but were in fact controlled by myself and my brother, in which we exercised control over the finances and the expenses of these corporations. Claims were submitted to healthcare insurance companies to obtain payment. We thereby financially benefitted from these corporations, which were otherwise—which we were not otherwise entitled to under the New York State Law. I knew what I was doing was in violation of the law." (*Id.* at 43-44). The defendant also confirmed that, at the time he submitted the claims, he knew that the ownership information on the bills was fraudulent. (*Id.* at 44). The Government also provided a detailed description of the evidence it would prove at trial regarding the defendant's leadership role in the DAM healthcare fraud scheme. (*Id.* at 29-32).

Following Judge McCarthy's report and recommendation (*id.* at 45-46; D.E. 14), the Court accepted the defendant's plea allocution and adjudged the defendant guilty. (D.E. 13).

C. The Sentencing Proceeding

Before sentencing, the Probation Office prepared the Presentence Report. Adopting the Government's positions in the Plea Agreement, the Probation Office determined that the defendant's total offense level was 37. (PSR ¶¶ 6, 39-53, 88-89). Consistent with the Plea Agreement, the Probation Office determined that the defendant had zero criminal history points and was in Criminal History Category I. (PSR ¶ 56). Accordingly, and consistent with the Government's position in the Plea Agreement, the Probation Office determined that the Guidelines sentencing range would be 210 to 262 months' imprisonment but for the 120-month statutory maximum penalty, which resulted in an advisory Guidelines sentence of 120 months' imprisonment. (PSR ¶ 88). The defense objected to the Probation Office's adoption of the Government's loss calculations, and the Probation Office, in response, acknowledged the disputed issues regarding the loss amounts and declined to change the Presentence Report. (PSR at 22). The Probation Office recommended a Guidelines sentence of 120 months' imprisonment. (PSR at 24).

Before sentencing, Spina notified the District Court that the parties had resolved their dispute in the Plea Agreement about the applicable loss enhancement under U.S.S.G. § 2B1.1(b)(1). Specifically, the parties agreed that the loss amount exceeded $3.5 million but did not exceed $9.5 million, resulting in an 18-level enhancement to the offense level under U.S.S.G. § 2B1.1(b)(1)(J). (D.E. 42 at 1).

In his sentencing submission, the defendant asked the Court to impose a below-Guidelines sentence of 18 to 24 months' imprisonment. (D.E 44). The defendant argued that the loss-amount enhancements made the Guidelines unduly punitive, and that the sentencing factors in 18 U.S.C.

§ 3553(a) weighed in favor of a below-Guidelines sentence given the defendant's personal background and the need to avoid unwarranted sentencing disparities. (*Id.*).

The Government's sentencing submission requested a Guidelines sentence of 120 months' imprisonment. (D.E. 50). The Government argued, among other things, that the defendant was the mastermind of a widespread, sophisticated fraud spanning more than seven years, representing a calculated effort to maximize profits over patient safety. The defendant's actions, the Government further argued, carried real and tragic consequences for patients, including severe adverse reactions and even a death from the lucrative facet injections that the defendant wanted the Practice to administer. In discussing the defendant's personal history and characteristics, the Government noted evidence that the defendant manipulated and demeaned others at the Practice. (*Id.* at 21-31).

On April 13, 2021, the defendant appeared for sentencing. (Sentencing Transcript, D.E. 120). The sentencing proceeding complied with Rule 32 of the Federal Rules of Criminal Procedure. The Court first confirmed that it had received and reviewed the parties' submissions. (*Id.* at 2-4). The Court then addressed the applicable Guidelines calculation. (*Id.*). At the outset, The Court noted that an 18-level enhancement for loss under U.S.S.G. § 2B1.1(b)(1) applied, in light of the parties' post-plea agreement. (*Id.* at 5). Next, the Court heard argument about the applicability of the two-level enhancement under U.S.S.G. § 2B1.1(b)(7). (*Id*. at 5-32). Following argument, the Court concluded that the Government had failed to meet its burden of showing that Medicare losses exceeded $1 million, and therefore ruled that he would not apply the enhancement. (*Id*. at 31-32). Accordingly, the Court determined that the total offense level was 31, with an applicable Guidelines range of 108 to 120 months' imprisonment. (*Id.* at 32-33).

The Court then considered the defendant's objections to certain factual statements in the Presentence Report. (*Id*. at 34-38). In response, the Court agreed to remove a portion of the

Presentence Report characterizing "everything" about the Practice as fraudulent, and further agreed to add a sentence noting that the defendant disputed whether certain lease and marketing agreements were illegitimate. (*Id.* at 34-43). The Court also heard from the Government, defense counsel, and Spina himself about the appropriate sentence. (*Id.* at 43-107).

After hearing from the parties, the Court formally adopted the Guidelines calculation in the Presentence Report, as modified by the parties' post-plea agreement and the Court's determination that the two-level enhancement under U.S.S.G. § 2B1.1(b)(7) did not apply, resulting in a Guidelines Sentencing range of 108 to 120 months' imprisonment. (*Id.* at 107-09).

Next, the Court considered the 18 U.S.C. § 3553(a) sentencing factors. (*Id*. at 110-19). The Court acknowledged the defendant's arguments about prior good deeds and charitable endeavors, and determined that "good deeds should be take[n] into consideration." (*Id.* at 111). The Court also found that not everything about the defendant or the Practice "was fraudulent." (*Id*. at 112-13). But the Court emphasized the seriousness of the offense, observing that it was "sophisticated," was "long running," and involved an "extraordinary amount of money." (*Id.* at 114-15). The Court further noted that the defendant continued to encourage the use of dangerous facet injections even after a patient death and other adverse reactions. (*Id.* at 115-16). The Court discussed the need for both specific and general deterrence, explaining that medical professionals are "some of the most admirable people in our society," and that when they engage in "a massive, long-running, callous fraud, . . . there needs to be a consequence that dissuades people." (*Id.* at 116-17). Responding to the defendant's arguments regarding the Guidelines loss enhancements, the Court found that "this is a case where the loss amount is not the sole driver," and that the Guidelines range of 108 to 120 months' imprisonment "doesn't overrepresent the seriousness of the criminal conduct" by the defendant. (*Id.* at 118-19).

In light of those factors, the Court imposed a Guidelines sentence of 108 months' imprisonment, the bottom of the Guidelines range. (*Id.* at 119). The Court also imposed a three-year term of supervised release, a $100 mandatory special assessment, forfeiture of $9,105,741.61, and restitution of $9,760,555.20. (*Id.* at 119-20).

D. The Appeal

Notwithstanding the appellate waiver in the Plea Agreement, the defendant's counsel filed a timely notice of appeal, which claimed that the defendant's sentence was substantively unreasonable.[2] *United States v. Spina*, 21-1453 (2d Cir.). The Government moved to dismiss the appeal pursuant to the defendant's knowing and voluntary waiver of his right to appeal. On July 20, 2022, the Court of Appeals granted the Government's motion and dismissed the defendant's appeal. (D.E. 163).

III. Applicable Law

A. Section 2255 Review

Under Section 2255, a prisoner who is in custody serving a federal sentence "may move the court which imposed the sentence to vacate, set aside or correct the sentence" on the grounds that it was "imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). To obtain relief, the petitioner must demonstrate "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Cuoco v. United States*, 208 F.3d 27, 30 (2d Cir. 2000).

Generally, habeas review, "an extraordinary remedy," is not a substitute for direct appeal. *Bousley v. United States*, 523 U.S. 614, 621-22 (1998) ("Where a defendant has procedurally

[2] Michael K. Burke represented the defendant before this Court and the Court of Appeals.

defaulted a claim by failing to raise it on direct review, the claim may be raised in [a Section 2255 motion] only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'"). But ineffective-assistance-of-counsel claims are an exception to this general rule, and failure to raise such claims on direct appeal is not a bar to bringing them in "a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003).

Where a Section 2255 motion and the files and records of the case conclusively show that the prisoner is not entitled to relief, the Court need not grant a hearing to determine the issues and to make findings of fact and conclusions of law. 28 U.S.C. § 2255(b); *see also Puglisi v. United States*, 586 F.3d 209, 214 (2d Cir. 2009).

In addition, because the defendant has filed his habeas motion *pro se*, it should be construed liberally, and interpreted to raise the strongest arguments that it suggests. *E.g.*, *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006).

B. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel fails unless a defendant (i) overcomes a "strong presumption" that his counsel's conduct was reasonable, and shows that his representation "fell below an objective standard of reasonableness" under "prevailing professional norms"; and (ii) "affirmatively prove[s] prejudice," that is, shows that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 693-94 (1984); *accord, e.g.*, *United States v. De La Pava*, 268 F.3d 157, 163 (2d Cir. 2001). The defendant bears the burden of establishing both elements. *Strickland*, 466 U.S. at 687.

Under the first *Strickland* prong, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, bearing in mind that there are countless ways to provide effective assistance in any given case and that even the best criminal defense attorneys would not defend a particular client in the same way." *United*

States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990) (internal quotations omitted). A defendant cannot prevail on an ineffective assistance claim merely because he believes that his counsel's strategy was inadequate. *United States v. Sanchez*, 790 F.2d 245, 253 (2d Cir. 1986). Further, a defense counsel's "failure to make a meritless argument does not rise to the level of ineffective assistance, and strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995) (internal citations omitted).

Under the second prong, the defendant bears the "heavy burden" of showing "actual prejudice." *Strickland*, 466 U.S. at 692. To show prejudice, the defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693-94. It is not enough to show "some conceivable effect" on the result: "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693. In the context of a guilty plea, *Strickland*'s second prong requires the defendant to demonstrate that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Only where the defendant meets his burden under both prongs of *Strickland* can the Court conclude that the defense attorney "was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Finally, in advancing ineffective assistance of appellate counsel arguments, "it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made." *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (explaining that a petitioner "may establish constitutionally inadequate performance if he shows that counsel omitted *significant and obvious*

issues while pursuing issues that were clearly and significantly weaker") (emphasis added). Moreover, to "establish prejudice in the appellate context, a petitioner must demonstrate that there was a 'reasonable probability' that [his] claim would have been successful before the [Court of Appeals]." *Id.* at 534 (internal citation and quotation marks omitted).

IV. Discussion

A. The Defendant's Claims of Ineffective Assistance of Counsel Should Be Rejected

The defendant claims his appellate counsel was ineffective for failing to raise arguments concerning supposed deficiencies in his Rule 11 plea allocution: First, the defendant claims Judge McCarthy did not ensure he understood the nature of the charge—as required by Rule 11(b)(1)(G)—because (i) the Court failed to "personally" inform him "of the elements of the offense"; and (ii) the Government "incorrectly stated the elements of conspiracy to commit healthcare fraud." (Mot. at 6). Second, the defendant claims there was no factual basis for his guilty plea under Rule 11(b)(3) because the defendant stated during his allocution that he "knew that his conduct violated the 'New York State Medical Practice Law'" and not a "federal violation of conspiracy to commit healthcare fraud." (*Id.*).

As explained below, the defendant's ineffectiveness claims are legally and factually meritless and frivolous. As such, the defendant cannot show that his appellate counsel omitted any nonfrivolous issues on appeal, let alone that there was even a remote possibility that such claims would have been successful.

1. The Defendant Understood the Nature of the Charge to Which He Pleaded Guilty, as Required by Rule 11(b)(1)(G)

First, there is no question that Judge McCarthy informed the defendant of, and made sure the defendant understood, "the nature of each charge to which the defendant [was] pleading." Fed R. Crim. P. 11(b)(1)(G). Contrary to the defendant's claim, the Court did not need to recite "the

elements of the offense" personally (Mot. at 6), but rather "determine by some means that the defendant actually understands the nature of the charges." *United States v. Saleh*, 2023 WL 2530742, at *1 (2d Cir. Mar. 16, 2023) (citing *United States v. Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997)). To satisfy this rule, the Court "need not adopt a particular method of inquiry or recite a set of magic words," as "matters of reality, and not mere ritual, should be controlling." *Id.* (internal citation omitted). Indeed, the Second Circuit explained that "Rule 11 does not require that the judge personally explain the elements of each charge to the defendant on the record as long as the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *United States v. Farooq*, 58 F.4th 687, 692 (2d Cir. 2023) (internal citation and quotation marks omitted). The Court may do so by "asking the defendant whether he understood the nature of the offense to which he was entering a guilty plea, asking the defendant to describe his participation in the offense, or requesting that the government describe the elements of the offense." *United States v. Spear-Zuleta*, 2022 WL 17347243, at *4 (2d Cir. Dec. 1, 2022) (internal citations and quotation marks omitted).

Here, Judge McCarthy confirmed the defendant was competent to plead guilty; that he discussed the case with his attorney and was satisfied with his representation; and that he had reviewed the Plea Agreement with his attorney and understood its terms. (D.E. 22, at 4-14). Judge McCarthy also described each of the three counts of the Indictment to the defendant (including the conspiracy to commit healthcare fraud count to which he pleaded guilty), confirmed the defendant understood them, and verified that the defendant discussed the charges he intended to plead guilty to and the consequences of pleading guilty with his attorney. (*Id.* at 9-11). Finally, Judge McCarthy also explained that, per the Plea Agreement, the defendant was agreeing to plead guilty to conspiracy to commit healthcare fraud from 2011 through September 2017, in violation of 18

U.S.C. § 1349. (*Id.* at 13). The defendant stated that he understood. (*Id.*) Against this backdrop, it beggars belief that the defendant could claim he was not informed of the nature of the charge he pleaded guilty to, or that such a claim would be in any way meritorious on appeal. *See Saleh*, 2023 WL 2530742, at *1-2 (Rule 11 satisfied when the Court, among other things, "read the charges from the indictment"); *Spear-Zuleta*, 2022 WL 17347243, at *4 (Rule 11 satisfied when defendant confirmed he had read the indictment and discussed it with counsel, the Government described the elements of the offense, and also summarized the evidence it would introduce at trial).

Second, contrary to the defendant's claim, the Government correctly described the elements of the offense conduct during the plea allocution, which further reinforced that the defendant understood the nature of the charge. Specifically, the Government explained:

> Mr. Spina is pleading to Count One of the indictment, which is conspiracy to commit healthcare fraud. To prove a conspiracy to commit healthcare fraud in violation of Section – Title 18, United States Code, Section 1349, the Government must demonstrate:
>
> 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.
>
> To prove a violation of Section 1347, which is healthcare fraud, the Government must prove:
>
> One, a scheme to defraud or a scheme to obtain money or property by means of material, false and fraudulent pretenses, representations or promises in connection with the delivery of or payment for healthcare benefits;
>
> Two, the defendant knowingly and willfully executed or attempted to execute that scheme with the intent to defraud; and
>
> Three, the target of the scheme was a healthcare benefit program.

(D.E. 22 at 28-29). Nothing more is required. Indeed, the Government's description tracked Judge Sand's Modern Federal Jury Instructions on both the elements of conspiracy (minus the overt act instruction, which is not required under Section 1349) and healthcare fraud. *Sand*, Modern Federal

Jury Instructions, 19-3, 44-14. And the defendant confirmed he understood the nature of this charge, not only in response to Judge McCarthy's questions, but also through his own allocution and his stipulation that the fraudulent scheme targeted healthcare benefit programs. (D.E. at 4-14, 33-45). Furthermore, the defendant's claim he 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" (Mot. at 8) is squarely contradicted by the elements the Government recited during the proceeding (*e.g.*, "that each defendant knowingly and intentionally joined in the agreement [to commit healthcare fraud]").

Finally, the defendant's citation to *Irizarry v. United States*, 508 F.2d 960 (2d Cir. 1974), is not accurate or applicable. Nothing in *Irizarry* suggests that a defendant must be "informed of [the elements of conspiracy], personally, by the judge." (Mot. at 7-8). Indeed, the Second Circuit held to the contrary in *Farooq*. 58 F.4th at 692. The *Irizarry* panel found Rule 11 deficiencies when "the full charge—conspiracy to possess and distribute cocaine—was never even identified" during the change-of-plea, and "[t]he closest that the court came was to identify the charge was 'conspiracy'; conspiracy to do what was never mentioned." 508 F.2d at 964. Nor was the *Irizarry* defendant asked whether he understood the nature of the offense.[3] *Id.* As explained above, those facts in no way compare with Judge McCarthy's careful and thorough Rule 11 colloquy here.

[3] The defendant similarly misreads *United States v. Blackwell*, 199 F.3d 623 (2d Cir. 1999) to include a requirement for the Court to "personally advise the appellant of the elements of conspiracy." (Mot. at 9). The *Blackwell* panel found Rule 11 deficiencies when the Court, among other things, did not call attention to the appellate waiver in the plea agreement; never asked the defendant whether he understood the nature of the offense; and never asked the defendant to describe his participation in the offense. *Blackwell*, 199 F.3d at 626. As explained above, none of these issues arose here. Moreover, *Blackwell* also explains that Rule 11 is satisfied in this context "where the charging instrument plainly describes the offense and defendant acknowledges that he read, understood, and discussed with his attorney that legal document." *Id.*

Accordingly, the defendant was clearly informed of, and fully understood, the nature of the conspiracy to commit healthcare fraud charge that he pleaded guilty to before Judge McCarthy. The defendant cannot credibly claim that his appellate counsel was ineffective for not pursuing on appeal an issue that was frivolous and contradicted by the record.

2. There Was Ample Factual Basis for the Defendant's Guilty Plea, as Required by Rule 11(b)(3)

The Court can easily dispense with the defendant's claim that there was no factual basis for his guilty plea, as required by Rule 11(b)(3). The Second Circuit has explained that this rule "requires the district court 'to assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty.'" *Spear-Zuleta*, 2022 WL 17347243, at *2-3 (quoting *United States v. Lloyd*, 901 F.3d 111, 123 (2d Cir. 2018)). Contrary to the defendant's suggestion, the Court "is not required to rely solely on the defendant's own admissions" in making this determination, but may instead rely on—among other things—statements "of the defendant, of the attorneys for the government and the defense." *Id.*

Here, the defendant's own allocution included the admission that he and others caused the submission of healthcare claims to insurance companies that contained fraudulent information about the practices' ownership, and that he did so knowingly and intentionally. (D.E. 22, at 43-45). As part of that scheme, the defendant admitted that he received money that he knew he was not entitled to, and that he knew his conduct was illegal. (*Id.*) And, as noted above, the defendant stipulated that the targets of the scheme included healthcare benefit programs. (*Id.* at 37). The Government also provided a detailed explanation of the other evidence it would introduce at trial regarding the defendant and his role in the DAM healthcare fraud scheme. (*Id.* at 28-32). Against that backdrop, Judge McCarthy had more than sufficient information to find a factual basis for the defendant's plea. Although the defendant now tries to minimize his conduct by suggesting he

violated only New York State law, his own admissions from his plea allocution show that he knowingly and willfully participated in a scheme to defraud healthcare benefit programs. As the Court knows, that scheme caused millions of dollars in losses to those programs and endangered the lives of patients. Because this argument was clearly meritless, the defendant cannot claim his appellate counsel was ineffective for not raising it.

V. Conclusion

Accordingly, the Court should deny the defendant's motion without a hearing.

Dated: White Plains, New York
September 25, 2023

Respectfully submitted,

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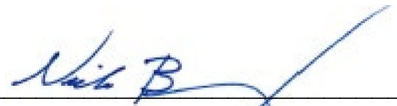
United States Attorney
Southern District of New York

By: 
Nicholas S. Bradley
Assistant United States Attorney
(212) 637-1581

Enclosures:

Exhibit A (Plea Agreement)

AFFIRMATION OF SERVICE

I, Nicholas S. Bradley, affirm under penalty of perjury as follows:

1. I am an Assistant United States Attorney in the Southern District of New York.

2. On September 25, 2023, I caused a copy of the foregoing to be served on petitioner James Spina via U.S. mail at the following address:

James Spina (86089-054)
FCI OTISVILLE
FEDERAL CORRECTIONAL INSTITUTION
SATELLITE CAMP
P.O. BOX 1000
OTISVILLE, NY 10963

Dated: September 25, 2023
White Plains, NY

Nicholas S. Bradley
Assistant United States Attorney

EXHIBIT A

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

ORIGINAL

May 2, 2019

Michael K. Burke, Esq.
Hodges Walsh & Burke LLP
55 Church Street, Suite 211
White Plains, New York 10601

Re: *United States v. James Spina*, 18 Cr. 625 (KMK)

Dear Mr. Burke:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from James Spina ("the defendant") to Count One of the above-referenced three-count Indictment.

Count One charges the defendant with conspiracy to commit healthcare fraud from in or about 2011 through in or about September 2017, in violation of Title 18, United States Code, Section 1349. This charge carries a maximum sentence of years' 10 years' imprisonment, a maximum term of 3 years' supervised release, a maximum fine, pursuant to Title 18, United States Code § 3571 of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to a person other than the defendant as a result of the offense, and a mandatory $100 special assessment.

In consideration of the defendant's plea to the above offense, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations, if any, as to which this Office cannot, and does not, make any agreement) for his participation, from in or about 2011 through in or about September 2017, in a healthcare fraud conspiracy relating to Dolson Avenue Medical and its associated businesses, as charged in the Indictment, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Government will move to dismiss any open Count(s) against the defendant. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegation with respect to Count One of the Indictment and agrees to forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(7) a sum of money of at least $1,500,000 but not more than $65,000,000 in United States currency, representing proceeds traceable to the commission of said offense (the "Money

Judgment"). It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture.

It is further understood that the defendant shall make restitution in an amount to be specified by the Court of at least $1,500,000 but no more than $65,000,000, in accordance with 18 U.S.C. §§ 3663, 3663A, and 3664. This amount shall be paid according to a plan established by the Court.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The applicable Guidelines manual is the manual in effect as of November 1, 2018.

2. The base offense level is six, pursuant to U.S.S.G. § 2B1.1(a)(2).

3. The parties dispute the loss amount. The defendant contends that the loss was more than $1,500,000 but not more than $3,500,000, thus sixteen levels are added pursuant to U.S.S.G. § 2B1.1(b)(1)(I). The Government contends that the loss was more than $25,000,000 but not more than $65,000,000, thus twenty-two levels are added pursuant to U.S.S.G. § 2B1.1(b)(1)(L). The parties each reserve the right to argue at sentencing their position regarding which loss amount applies.

4. Because the offense involved 10 or more victims (health insurance companies), two levels are added, pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(i).

5. Because the defendant was convicted of a Federal health care offense involving a Government health care program (Medicare) and the loss to the Government health care program was more than $1,000,000, two levels are added pursuant to U.S.S.G. § 2B1.1(b)(7). The defendant contends that the loss to Medicare was less than $1,000,000. The parties each reserve the right to argue at sentencing their position regarding whether the enhancement pursuant to U.S.S.G. § 2B1.1(b)(7) applies.

6. Because the offense involved sophisticated means and the defendant intentionally engaged in or caused the sophisticated means, two levels are added pursuant to U.S.S.G. § 2B1.1(b)(10)(C).

7. Because the offense involved the conscious or reckless risk of death or serious bodily injury, two levels are added pursuant to U.S.S.G. § 2B1.1(b)(16)(A).

8. Because the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, four levels are added pursuant to U.S.S.G. § 3B1.1(a).

9. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is or 29 or 37.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has the following criminal history:

1. On or about August 7, 1982, the defendant was arrested and charged, in Monticello Village Court, with operating a motor vehicle while intoxicated, a misdemeanor. The case was adjourned in contemplation of dismissal and ultimately dismissed on December 31, 1982. Pursuant to U.S.S.G. § 4A1.2(e), this results in no criminal history points.

In accordance with the above, the defendant has zero criminal history points and is in Criminal History Category I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated Guidelines range is 87 to 108 months' imprisonment if the loss amount is more than $1,500,000 but not more than $3,500,000 and the loss to Medicare is less than $1,000,000, and 210 to 262 months' imprisonment if the loss amount is more than $25,000,000 but less than $65,000,000 and the enhancement pursuant to U.S.S.G. § 2B1.1(b)(7) applies, yielding a total sentencing range of 87 to 262 months' imprisonment. The statutory maximum for Count One, however, is 120 months. Thus, the total sentencing range is 87 to 120 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 29, the applicable fine range is $30,000 to $300,000. At Guidelines level 37, the applicable fine range is $40,000 to $400,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241, of any sentence within or below the Stipulated Guidelines Range of 87 to 120 months' imprisonment, and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the

above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any fine that is less than or equal to $400,000, and the Government agrees not to appeal any fine that is greater than or equal to $30,000. The defendant also agrees not to appeal any restitution amount that is less than or equal to $65,000,000, and the Government agrees not to appeal any restitution amount that is greater than or equal to $1,500,000. The defendant also agrees not to appeal any forfeiture amount that is less than or equal to $1,500,000, and the Government agrees not to appeal any forfeiture amount that is greater than or equal to $65,000,000. The defendant also agrees not to appeal any special assessment that is less than or equal to $100. Notwithstanding the foregoing, nothing in this paragraph shall be construed to be a waiver of whatever rights the defendant may have to assert claims of ineffective assistance of counsel, whether on direct appeal, collateral review, or otherwise. Rather, it is expressly agreed that the defendant reserves those rights.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, or impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his removal from the United States is presumptively mandatory and that, at a minimum, he is at risk of being removed or suffering other adverse immigration consequences. If the defendant is a naturalized citizen of the United States, he recognizes that pleading guilty may have consequences with respect to the defendant's immigration status. For example, under federal law, an individual may be subject to denaturalization and removal if his naturalization was procured by concealment of a material fact or by willful misrepresentation, or otherwise illegally procured. The defendant acknowledges that he has discussed the possible immigration consequences (including removal or denaturalization) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration or denaturalization consequences that may result from the guilty plea and conviction, even if those consequences include denaturalization and/or removal from the United States. The defendant understands that denaturalization and other immigration consequences are typically the subject of a separate proceeding, and the defendant understands that no one, including his attorney or the District Court, can predict with certainty the effect of the defendant's conviction on the defendant's immigration or naturalization status. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including removal or denaturalization) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section

2241, on the basis of any actual or perceived adverse immigration consequences (including removal or denaturalization) resulting from his guilty plea and conviction.

It is further agreed that should the conviction(s) following the defendant's plea(s) of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

GEOFFREY S. BERMAN
United States Attorney

By: Kathryn Martin
Kathryn Martin
Assistant United States Attorney
(914) 993-1963

APPROVED:
Perry Carbone
Chief, White Plains Division

AGREED AND CONSENTED TO:

James Spina

DATE 5/2/19

APPROVED:

Michael K. Burke, Esq.
Attorney for James Spina

DATE 5/2/19