

No.

IN THE SUPREME COURT OF THE UNITED STATES

ARTAK OVSEPIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether this Court should hold this petition and then grant, vacate, and remand for reconsideration in light of the pending opinion in *Dubin v. United States*, No. 22-10.

STATEMENT OF RELATED CASES

- *United States v. Artak Ovsepian*, No. 11CR01075-VAP, U.S. District Court for the Central District of California. Judgment entered April 28, 2021.
- *United States v. Artak Ovsepian*, No. 20CV07717-VAP, U.S. District Court for the Central District of California. Judgment entered April 28, 2021.
- *United States v. Artak Ovsepian*, No. 15-50338, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 9, 2017.
- *United States v. Artak Ovsepian*, No. 17-50231, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 5, 2018.
- *United States v. Artak Ovsepian*, No. 21-55515, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 26, 2022.
- *Artak Ovsepian v. United States*, No. 18-7262, Supreme Court of the United States. Judgment entered October 7, 2019.

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OPINIONS BELOW

The Ninth Circuit's decision in petitioner's first direct appeal affirming in part and reversing in part can be found at *United States v. Ovsepian*, 674 Fed. Appx. 712 (9th Cir. Jan. 9, 2017). The Ninth Circuit's decision in petitioner's second direct appeal affirming after resentencing can be found at *United States v. Ovsepian*, 739 Fed. Appx. 448 (9th Cir. Oct. 5, 2018). The district court's decision denying petitioner's 28 U.S.C. § 2255 motion and the Ninth Circuit's denial of a certificate of appealability ("COA") have no citations but are included in the Appendix ("App").

JURISDICTION

The court of appeals denied a COA on August 26, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Title 18 U.S.C. § 1028A(a) provides: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years."

STATEMENT OF THE CASE

In 2011, a federal grand jury in the Central District of California returned an

indictment charging petitioner and numerous codefendants with several offenses, including aggravated identity theft. The charges were based on the defendants' involvement with Manor Medical Imaging, Inc. ("Manor"), a business located in Glendale, California. CR 160.¹ The indictment generally alleged that Manor functioned as a "prescription mill" for expensive medications that patients did not need and that Medicare and Medi-Cal paid millions of dollars for the fraudulent prescriptions. *Id.* The defendants recruited beneficiaries of those programs, who would be given cash or other inducements to go to Manor to receive the fraudulent prescriptions. *Id.* The prescriptions were signed by a medical doctor, but he would not properly examine the patients and instead allowed other codefendants to examine the beneficiaries and to issue them prescriptions under his name. *Id.*

The indictment alleged that petitioner's role was to drive the beneficiaries from Manor to the pharmacies to fill the fraudulent prescriptions. *Id.* He also managed other drivers for Manor. *Id.* After the prescriptions were filled, the drivers would collect the medications from the beneficiaries and deliver them back to Manor. *Id.* The specific overt acts alleged against petitioner were various dates in 2010-11 when he drove recruited beneficiaries to pharmacies to fill Manor prescriptions. *Id.*

¹ "CR" refers to the Clerk's Record and cites the relevant docket entry.

This petition focuses on Count 5 of the indictment, which charged aggravated identity theft under 18 U.S.C. § 1028A. Count 5 alleged: “Beginning on a date unknown, and continuing through on or about October 27, 2011 . . . defendants . . . knowingly transferred, possessed, and used . . . without lawful authority, a means of identification of another person, that is, the names and unique government-issued public health care identification numbers of H.T., A.V., M.V., R.E., R.R., Q.T., E.P., S.M., E.R., T.D., and J.H., during and in relation to a felony violation of Title 18, United States Code, Section 1349, Conspiracy to Commit Health Care Fraud” CR 160.

Petitioner proceeded to a jury trial in 2014. CR 711. As to the § 1028A charge, the jury instructions did not require the jurors to find that a person’s identity was assumed and stated that “a defendant violates Section 1028A even if a person gives the defendant permission to use his or her means of identification to commit health care fraud.” CR 740. The jury convicted petitioner on all counts. CR 748. At the initial sentencing hearing, the district court imposed a sentence of 180 months (15 years), which was comprised of concurrent sentences totaling 156 months and a consecutive 24-month sentence for the aggravated identity theft conviction. CR 1020.

On January 9, 2017, the Ninth Circuit filed a memorandum decision reversing petitioner’s sentence based on his challenge to the district court’s

application of the Sentencing Guidelines. CR 1167. On remand, however, the district court imposed the same 180-month sentence, which again included a 2-year consecutive sentence for the § 1028A conviction. CR 1188. On October 5, 2018, the Ninth Circuit affirmed petitioner’s sentence. CR 1220. On October 7, 2019, this Court denied his petition for a writ of *certiorari*. See *Ovsepian v. United States*, 140 S. Ct. 157 (2019).

Petitioner then filed a timely motion under 28 U.S.C. § 2255 in which he contended that he was actually innocent of the aggravated identity theft charge and that the jury instructions for the charge were erroneous and he received ineffective assistance of counsel because his attorney failed to make proper objections to the instructions. The district court denied his motion. It reasoned that petitioner was not actually innocent because there was evidence that co-conspirators forged a person’s signature. App. 6-11. The district court also rejected his ineffective assistance of counsel claim, holding that defense counsel’s performance was not deficient for failing to make a “prediction on future case law.” App. 13-14. Both the district court and the Ninth Circuit denied a COA. App. 1.

ARGUMENT

This Court recently granted the petition for a writ of *certiorari* in *Dubin v. United States*, No. 22-10, which presents related questions regarding the scope of 18 U.S.C. § 1028A. This Court should therefore hold this petition and then,

depending upon the opinion in *Dubin*, grant, vacate, and remand for reconsideration in light of *Dubin*. This Court's opinion in *Dubin* will likely implicate the validity of the lower courts' analyses as to whether petitioner was actually innocent of the § 1028A charge and, at the very least, whether the jury instructions for that charge were adequate.

As far as actual innocence, petitioner notes that even if *Dubin* concludes that forging someone's name is sufficient to constitute a § 1028A violation, that was not the conduct that was alleged in the indictment, nor was it the government's theory at trial. Instead, the indictment alleged the combined use of patients' names and unique health care numbers.

Furthermore, even if *Dubin* does not affect petitioner's actual-innocence claim, he nevertheless received ineffective assistance of counsel under the two-pronged Sixth Amendment test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) because his trial attorney did not lodge proper objections to the jury instructions for the § 1028A jury charge. As mentioned, the instructions did not require the jury to find that a person's identity was assumed and that the defendant passed himself off as another person; instead, the instructions stated that "a defendant violates Section 1028A even if a person gives the defendant permission to use his or her means of identification to commit health care fraud." CR 740.

Petitioner was prejudiced by his attorney's deficient performance in failing

to obtain correct jury instructions, as the evidence was exceedingly thin as to whether any defendant attempted to pass himself or herself off as another person, let alone during the time that petitioner was part of the conspiracy. Had the jury been provided correct jury instructions on the § 1028A offense, the jury may not have convicted petitioner on that count, particularly because there was no evidence that petitioner had any knowledge of or involvement with the purported forged documents.

CONCLUSION

For the foregoing reasons, the Court should hold this petition pending the decision in *Dubin*, and then grant, vacate, and remand depending upon the outcome in *Dubin*.

Dated: November 17, 2022

Respectfully submitted,

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