APPENDIX

FILED

AUG 26 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTAK OVSEPIAN, Defendant-Appellant.	No. 21-55515 D.C. No. 2:20-cv-07717-VAP Central District of California, Los Angeles ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

ARTAK OVSEPIAN,

Defendant/Petitioner.

Case No. **CV 20-7717 VAP**
(CR 11-1075 VAP)

Memorandum and Order Denying Motion Under 28 U.S.C. Section 2255 and Dismissing Action [Doc. No. 1]

I. PROCEEDINGS

Artak Ovsepian ("Ovsepian" or "Petitioner") filed a Motion to Vacate, Set Aside, or Correct Sentence, etc. ("Motion") on August 25, 2020 (Doc. No. 1), accompanied by a supporting memorandum ("Mem.") on the same date. (Doc. No. 1-1). Respondent United States of America ("Respondent") filed its Opposition to the Motion ("Opp'n") on September 18, 2020. (Doc. No. 6.) Petitioner filed a Reply on October 9, 2020. (Doc. No. 7.)

II. BACKGROUND

During a three-week jury trial, the Government presented evidence that Petitioner held a leadership role in a complex healthcare fraud scheme that involved using and possessing the identities of many poor, mentally ill, and elderly victims. The scheme used the victims' identities to maintain the façade of a medical clinic and evade detection from government auditors,

obtain fraudulent prescriptions for psychotropic drugs to generate over $9 million of revenue from fraudulent billings to Medicare and Medi-Cal, and acquire those drugs to divert them into the black market for resale.

After deliberations, the jury convicted Petitioner on all counts charged against him, i.e., violations of 18 U.S.C. § 1349, conspiracy to commit health care fraud; 18 U.S.C. § 1028(f), conspiracy to possess at least five identification documents with authentication features with intent to use unlawfully; 18 U.S.C. § 1028A, aggravated identity theft; 18 U.S.C. § 371 and 21 U.S.C. § 331(k), conspiracy to engage in prescription drug misbranding; and 18 U.S.C. § 1001(a), false statement in a federal investigation. (Cr. Doc. Nos. 160, 737, 748.)

Petitioner filed a motion for judgment of acquittal as to Count Five — the aggravated identity theft charge — arguing that the evidence presented at trial was insufficient to support a conviction under § 1028A. (Cr. Doc. No. 770.) The Court denied the motion, sentenced Petitioner to 15 years (180 months) in custody followed by three years of supervised release, and ordered restitution to be paid jointly and severally by defendants. (Cr. Doc. No. 1020.)

Petitioner appealed the sentence to the Ninth Circuit Court of Appeals. (Cr. Doc. No. 1024.) The Ninth Circuit remanded to the district court to supplement factual findings on a sentencing issue unrelated to this petition and otherwise affirmed the sentence. (Cr. Doc. No. 1167.) On remand, the

Court made additional factual findings and re-imposed the 15-year term, which the Ninth Circuit affirmed. (Cr. Doc. Nos. 1188, 1189, 1220, 1222.)

This Motion followed.

III. DISCUSSION

Petitioner raises four claims for relief under § 2255. He claims actual innocence of the § 1028A aggravated identify theft conviction based on the later purported narrowing of the definition of "use" in United States v. Hong, 938 F.3d 1040 (9th Cir. 2019). He also claims that he received ineffective assistance of counsel when his trial attorney failed to make proper objections to jury instructions for the § 1028A offense under Hong; failed to object to jury instructions given on a Pinkerton theoryfor the § 1028A count; and failed to advise Petitioner properly about crtain sentencing issues and the advantages of pleading guilty in lieu of going to trial on the non-§1028A counts. (Mem. at 2.)

Section 2255 authorizes the Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be based on some constitutional error, jurisdictional defect, or an error resulting in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 783 -84 (1979).

If the record clearly indicates that a petitioner does not have a claim or that he has asserted "no more than conclusory allegations, unsupported by facts and refuted by the record," a district court may deny a § 2255 motion without an evidentiary hearing. United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986).

A. Petitioner's Actual Innocence Claim

Petitioner claims an intervening change in the law narrowed the meaning of § 1028A and established that Petitioner is actually innocent. (Mem. at 4.) The Court disagrees.

1. Applicable Law

A petitioner "has procedurally defaulted a claim by failing to raise it on direct review, [but] the claim may be raised in habeas … if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622 (1998) (citations omitted). "Actual innocence" is an equitable remedy that permits a petitioner to obtain collateral review of a procedurally defaulted claim. Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish actual innocence for the purposes of habeas relief, a petitioner "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006) (quoting Bousley, 523 U.S. at 623). "One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime." Vosgien v. Persson, 742 F.3d 1131, 1134 (9th Cir. 2014); see also Alaimalo v. United States, 645

F.3d 1042, 1047 (9th Cir. 2011) (finding a showing of actual innocence where, based on a subsequently decided case, the defendant's conduct was no longer an offense). Nonetheless, "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." Schlup, 513 U.S. at 321.

2. Actual Innocence Based on Subsequent Case Law in Hong

The jury found Petitioner to be guilty of Count Five of the indictment which charges that under 18 U.S.C. §§ 1028A and 2, "[b]eginning on a date unknown, and continuing through … October 27, 2011 … [Petitioner,] aiding and abetting the others, knowingly … possessed, and used,… without lawful authority, a means of identification of another person, that is, … H.T. … during and in relation to a felony violation of Title 18, United States Code, Section 1349, Conspiracy to Commit Health Care Fraud…"[1] (Cr. Doc. No. 160.) The aggravated identity theft statute carried with it a mandatory two-year consecutive prison term. See 18 U.S.C. § 1028A.

Petitioner contends that in Hong, the Ninth Circuit narrowed the definition of "use" to cover only instances where someone uses another's identification "to pass him or herself off as another person, or the transfer of such information to a third party for use in a similar manner." (Mem. at 4.) Under this definition, Petitioner's acts no longer fall within the meaning of "use" and therefore he is actually innocent of any § 1028A violation.

[1] H.T. was one of the victims of aggravated identity theft and she testified at trial. (Opp'n, Ex. A.) The government originally included eleven victims of aggravated identity theft but narrowed to H.T. by the time of trial.

The defendant in Hong provided massage and acupuncture treatments at a clinic to patients. Hong, 938 F.3d at 1044. Hong then misrepresented to Medicare, for billing purposes, that he provided physical therapy to his patients, entitling him to receive Medicare reimbursements. Id.

Petitioner is correct that the Ninth Circuit stated in Hong that the defendant's acts did not constitute "use" under § 1028A because he never attempted to "pass [himself] off as [a] patient[]"; however, the court did not thereby exclude all other types of conduct from falling within the meaning of "use." Id. at 1051. As the Government points out, the recent decision in United States v. Gagarin, 950 F.3d 596, 603 (9th Cir. 2020) reveals that Petitioner's application of Hong is misguided. (Opp'n at 19.)

In Gagarin, the Ninth Circuit explained that the defendant in Hong did not "use" the identification of another under § 1028A as he neither attempted to "pass [himself] off as [a] patient[] … [n]or did [he] purport[] to take some other action on another person's behalf through impersonation or forgery." Gagarin, 950 F.3d at 603 (quoting Hong at 1051 n.8) (internal quotations omitted). Instead, he merely misrepresented the nature of the treatment that his actual patients received. Id. The court went on, "'[t]he salient point, is whether the defendant used the means of identification to further or facilitate' the predicate felony for the aggravated identity theft charge." Id. at 603 (quoting United States v. Michael, 882 F.3d 624, 627-28 (6th Cir. 2018)). Hong did not. And thus, because the "means of identification" were not "central to the fraud" and did not "further[ ] and

facilitate[ ]" its commission, the court ultimately found Hong's acts did not constitute "use" under § 1028A. Gagarin, 950 F.3d at 604.

The Gagarin court found the defendant's acts did constitute "use" under § 1028A. Id. at 604. Gagarin prepared a fraudulent insurance application by twice forging her cousin's signature to convince a life insurance policy of the legitimacy of fraudulent policies. Id. at 601. The Court pointed out that the means of identification used, i.e., the forged signatures, were central to the fraud and furthered and facilitated its commission. See United States v. Blixt, 548 F.3d 882, 886 (9th Cir. 2008) (forging another's signature constitutes the use of that person's name and thus qualifies as a 'means of identification' under 18 U.S.C. § 1028A). The court explained in its reasoning, "[a]s our sister circuits have recognized, 'the use of another person's means of identification makes a fraudulent claim for payment much harder to detect.'" Gagarin, 950 F.3d at 604 (quoting United States v. Medlock, 792 F.3d 700, 707 (6th Cir. 2015) (quoting United States v. Abdelshafi, 592 F.3d 602, 610 (4th Cir. 2010)). Thus, Gagarin's forgery of her cousin's signature ultimately "obscure[ed] her own role in the fraudulent application," and consequently was central to the fraud and furthered its commissions. Id. at 604.

Accordingly, Petitioner is mistaken in asserting that Hong narrowed down the meaning of "use" in § 1028A in a way that makes Petitioner no longer liable under the statute. Under Gagarin, Hong does not support the construction Petitioner urges, where the definition of "use" excludes any

acts apart from attempting to "pass oneself or cause another to pass oneself off" as another. Id. at 604.[2]

The factual similarities between Gagarin and the present case are striking. Gagarin forged her cousin's signature on insurance applications to further and facilitate the fraud and maintain the façade of legitimate policies. Id. at 601, 604. Here, co-conspirators forged H.T.'s signature on at least three separate documents to further and facilitate the healthcare fraud and maintain the façade of a legitimate medical clinic. (Opp'n, Exs. C, E, F.)

As the government explains, in October 2010, co-conspirators gave a Medicare auditor, Demaree, fraudulent "retraction statements"—letters bearing forged signatures (including H.T.'s) purporting to withdraw those victims' claims of identity theft. (Opp'n, Ex. E.). Co-conspirators sent these "retraction statements" as a response to an inquiry made by Demaree, because 26 elderly identity theft victims (including H.T.) had filed claims that their identities had been used to submit unauthorized drug billings. (Cr. Doc. No. 1066 at 22-23.) Moreover, H.T.'s handwriting and signature were also forged on another document provided to Demaree claiming that H.T. received medications prescribed in her name. (Opp'n, Ex. A at 8; Ex. F.) It is undisputed that by September 2010, Petitioner had joined the conspiracy and held a leadership role over the drivers. (Cr. Doc. No. 844, Reporter's

[2] The Ninth Circuit confirmed this understanding in an opinion published on December 29, 2020 in United States v. Harris, 983 F.3d 1125, 1128 (9th Cir. 2020), issued after the parties here submitted their briefing. For purposes of this Order, the Court need not rely on Harris. But the Court notes that the Ninth Circuit's conclusions in Harris support its reasoning here.

Transcript ("RT") at 2733-34.) Hence, in light of the evidence presented at trial, it is foreseeable that Petitioner would have known about the need to doctor retraction statements and forge signatures.[3] See cf. United States v. Rocha, 598 F.3d 1144, 1153 (9th Cir. 2010) (holding that when overturning a jury conviction based on sufficiency of evidence, the court "must consider the evidence presented at trial in the light most favorable to the prosecution" and "'presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution" and "defer to that resolution."').

Just as the Ninth Circuit determined Gagarin's acts constituted "use" under § 1028A, here the Court finds Petitioner's acts did so as well. The evidence presented at trial revealed that conspirators "used" the identity of H.T. to further and facilitate the fraud in a way that was central to the fraudulent scheme. Maintaining the façade of a legitimate medical clinic and evading Medicare auditors was central to the implementation of the fraud. Id. at 604. (determining Gagarin's forgeries "obscure[ing] her own role in the fraud[ ]" was central to the fraud and furthered its commissions).

Petitioner has not demonstrated that he is actually innocent based on these subsequent Ninth Circuit cases decided after Hong. The Court thus

[3] Witnesses testified at trial that after Demaree first confronted one of the pharmacies participating in the scheme, the clinic sent out drivers to beneficiaries' homes to obtain retraction statements from those beneficiaries. (Cr. Doc. No. 10.)

rejects Petitioner's claim that an intervening change in law occurred making him actually innocent of criminal liability under § 1028A.[4]

B. Petitioner's Ineffective Assistance of Counsel Claims

Petitioner claims his trial lawyer's performance was objectively unreasonable because his attorney: (1) failed to make a proper

[4] The government argues in the alternative that even if Petitioner met his burden in demonstrating actual innocence based on intervening case law in Hong, he is still criminally liable under the "possession" prong of § 1028A, which was pledin the indictment. (Opp'n at 18-19; Cr. Doc. No. 160.) The plain reading of the statute makes clear that it imposes criminal liability under any of the three prongs, "transfers, possesses, or uses." 18 U.S.C. § 1028A (emphasis added); See e.g., United States v. Wasef, 2018 WL 3472562, at *9 (S.D. Cal. July 19, 2018) (finding criminal liability under § 1028A under the "possession" prong alone if the government can show possession of the credit cards was during and in relation to the predicate felony).

The government points to the conspirators' possession of H.T.'s patient file, which included her means of identification and was kept at the clinic ("Manor") to maintain the façade of a legitimate medical clinic. (Cr. Doc. No. 1066 at 4-5.) Those patient files were seized at Manor in October 2011, well after Petitioner joined the conspiracy. Petitioner also testified that he was "one of the leaders of the clinic" demonstrating that he had constructive possession of the files. (Cr. Doc. No. 840, RT at 2377).

Petitioner argues in the Reply that since the Ninth Circuit failed to affirm the district court's decision in Hong based on the "possession" prong, this implies that the same narrowing it applied to "use" applied to "possession." This argument is meritless. The Ninth Circuit answered the question whether "fraudulent billing … constitute[d] a "use" … [under] the aggravated identity theft statute." Hong, 938 F.3d at 1050. It did not discuss the "possession" prong because it did not need to.

Because the Court already finds Petitioner failed to meet its burden in demonstrating actual innocence based on the "use" prong, the Court does rely on the "possession" prong to find that Petitioner failed to demonstrate actual innocence. Nevertheless, the Court agrees with the government here that Petitioner has also failed to make an affirmative showing that it is not "more likely than not that no reasonable juror would have convicted him" on the basis of the "possession" prong. Herrera, 464 F.3d 898.

objection to the jury instructions for the § 1028A offense based on the court's definition of "use" in Hong, (2) failed to object to the *Pinkerton* instruction regarding 1028A, and (3) failed to advise him properly regarding acceptance of responsibility and grouping principles under the United States Sentencing Guidelines and instead improperly advised him to go to trial and admit culpability as to all non-1028A counts on the witness stand rather than pleading guilty earlier to the non-1028A accounts. (Mem. at 8.) These alleged failings, according to Petitioner, would have led to the jury reaching a different result or a likely reduction of his sentence based on a guilty plea. (Mem. at 5-11.)

1. Applicable Law

To demonstrate ineffective assistance of counsel, a habeas petitioner must satisfy the test set forth by the Supreme Court in Strickland: "First, the [Petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the [Petitioner] must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to show prejudice, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The prejudice must be such that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. A claim of ineffective

assistance of counsel requires proof of both of these elements. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant. ... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Strickland, 466 U.S. at 697.

The petitioner bears a heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy. Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001). A habeas petitioner must therefore make a sufficient factual showing to substantiate the claims. United States v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984). Conclusory allegations not supported by specifics do not warrant relief. Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995). The relevant inquiry is not what counsel could have pursued but whether the choices made were reasonable. Turner v. Calderon, 281 F.3d 851, 877 (9th Cir. 2002).

2. Failure to Object to Jury Instructions Based on Hong

a. Defective Performance

Petitioner claims that his trial lawyer's failure to object to jury instructions that did not include the Ninth Circuit's subsequent definition of "use" in Hong was neither reasonable nor the result of sound strategy. (Mem. at 5.) This argument fails. In assessing counsel's performance, a court is required to eliminate the distorting effects of hindsight, reconstruct the circumstances surrounding counsel's performance, and evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 694. And the relevant inquiry in determining whether counsel's assistance was sufficient

is not what counsel could have pursued but whether the choices made were reasonable. Turner, 281 F.3d at 877.

It is entirely reasonable that Petitioner's trial attorney chose to not object to jury instructions based on a prediction of future case law. Counsel's failure to predict a potential change in law cannot render counsel's performance defective. See Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). Thus, the Court finds Petitioner's trial attorney acted reasonably when he did not object to the definition of "use" in § 1028A.

Consequently, Petitioner fails to satisfy the first requirement under Strickland, i.e., conduct falling below an object standard of professional competence, which dooms his claim for relief. The Court thus need not reach the second requirement of prejudice. Strickland, 466 U.S. at 697.

3. Failure to Object to Jury Instructions Involving Pinkerton

a. Defective Performance

Petitioner claims that his trial lawyer should have objected to Pinkerton jury instructions on two separate grounds: (1) Pinkerton doesn't apply to § 1028A, and (2) Pinkerton only applies to objects of a conspiracy. (Mem. at 6.) Both these contentions fail.

First, Petitioner fails to support the claim that liability under a Pinkerton theory cannot be imposed as to a § 1028A charge.[5] As the government

[5] Pinkerton renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy

states, Petitioner cites to no authority that holds that Pinkerton cannot apply to § 1028A charge. (Opp'n at 22.) The two cases that Petitioner cites do not support his claim.

For example, Petitioner cites to the Supreme Court's decision in Honeycutt v. United States, 137 S. Ct. 1626, 1634 (2017) for the proposition that Congress rejected the notion that it enacts criminal statutes based on Pinkerton liability. Honeycutt does not stand for that proposition; there, the Court only stated that the plain text and structure of 21 U.S.C. § 853 (criminal forfeiture) left no doubt that Congress did not incorporate the background principles of conspiracy liability. Honeycutt, 137 S. Ct. at 1634. The Supreme Court's reasoning was specific to § 853 only. Id. Petitioner also cites United States v. Hamm, 952 F.3d 728, 744-47 (6th Cir. 2020) for the proposition that a district court erred in giving a Pinkerton jury instruction in an analogous context. (Mem. at 7-8.) As the government points out, Hamm is non-controlling authority involving very different circumstances, where the Sixth Circuit imposed a 20-year mandatory minimum prison term for drug trafficking resulting in death. (Opp'n at 22.)

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they have joined, whether they were aware of the acts of their co-conspirators or not. Pinkerton, 328 U.S. at 640; United States v. Hernandez-Orellana, 539 F.3d 994, 1007 (9th Cir. 2008). Pinkerton does not require actual knowledge as to the crime committed by a co-conspirator. See United States v. Castaneda, 9 F.3d 761, 768 (9th Cir. 1993), overruled on other grounds by United States v. Nordby, 225 F.3d 1053, 1059 (9th Cir. 2000).

The government cites multiple authorities where courts have applied Pinkerton to § 1028A, albeit none of them controlling here.[6] (See Opp'n at 22-23.); see also United States v. Hinkeldey, 811 F. App'x 402, 404 (9th Cir. 2020) (affirming § 1028A conviction based on Pinkerton liability where jury was given Pinkerton jury instructions alongside the elements of § 1028A).

Second, Petitioner fails to show that Pinkerton liability can only apply to the objects of the conspiracy. Again, Petitioner cites to no authority directly supporting his argument, and the government cites case law holding otherwise. For instance, in United States v. Christian, the court held that Pinkerton "exists to punish conspirators for crimes committed by a coconspirator that are not the object of the conspiracy itself but are foreseeable and in furtherance of the conspiracy." 942 F.2d 363, 367 (6th Cir. 1991); see also United States v. Nakai, 413 F.3d 1019, 1023 (9th Cir. 2005) (Pinkerton "broadens a defendant's liability beyond the aiding and abetting charge implicit in any indictment," and thus "attaches to the defendant's conduct the consequences of his having committed a crime with which he has not been charged").

[6] United States v. Gilbert, 725 Fed. App'x 370, 373-75 (6th Cir. Feb. 23, 2018); United States v. Davis, 586 F. App'x 534, 538-39 (11th Cir. Oct. 2, 2014) (affirming Section 1028A conviction predicated on a co-conspirators filing of a false tax return in an identity theft victim's name, in furtherance of the charged wire fraud conspiracy); United States v. Norman, 465 F. App'x 110, 117 n.10 (3d Cir. March 7, 2012) (conviction on seven Section 1028A counts was supported by sufficient evidence because they "were foreseeable crimes committed in furtherance of the conspiracy); United States v. Fowler, 2016 WL 616317 (W.D. Va. Fb. 9, 2016); see also United States v. Ramanthan, 2008 WL 650297 (D. Neb. March 5, 2008) (denying defense motion to dismiss indictment charging the defendant with Section 1028A violation on Pinkerton theory).

Petitioner falls short of demonstrating conduct falling below an object standard of professional competence by his trial attorney. Petitioner thus fails to satisfy the first requirement under Strickland, and this claim fails. Accordingly, the Court need not reach the issue of prejudice. Strickland, 466 U.S. at 697.

4. Failure to Advise Regarding Sentencing Issues and Guilty Plea

a. Defective Performance

The Sixth Amendment guarantee to effective assistance of counsel applies at the plea negotiation stage of criminal proceedings, Lafler v. Cooper, 566 U.S. 156, 163 (2012), and counsel's failure to advise his or her client of a plea offer falls below the standard of professional competence. United States v. Blaylock, 20 F.3d 1458, 1465-66 (9th Cir. 1994).

Petitioner claims, in related contentions, that his trial attorney failed to advise him properly a\out certain specific adjustments for acceptance of responsibility and grouping principles under the United States Sentencing Guidelines. U.S.S.G. § 3E1.1. Petitioner also asserts his attorney failed to advise him to plead guilty rather than proceeding to trial. Instead, Petitioner claims, his attorney improperly advised him to go to trial and then testify that he was guilty of all non-section 028A counts. (Mem. at 11-12.) To support his claim, Petitioner offers his own declaration. (Motion, Ex. A.)

This claim is belied by the record. The Government attached to its Opposition a report of a reverse proffer session attended by law enforcement agents, Government counsel, defense counsel and Petitioner.

(Opp'n Ex. F.) During that meeting, Petitioner was informed in detail about the probable Guideline calculations, and told that if he chose to proceed to trial rather than accepting the Government's plea offer – an offer that would not have required Petitioner to plead to the section §1028A charge -- his Guideline range would increase and he would face an advisory sentencing range of 235 to 293 months. (Opp'n Ex. H at 2.) In light of the detailed explanation given to Petitioner at the reverse proffer session, even if the Court accepts Petitioner's statement in his declaration that his *counsel* did not explain the plea offer and the Guideline calculations sufficiently, Petitioner has not shown deficient performance.

The government also points out that Petitioner has not shown deficient performance because his trial attorney could reasonably conclude that the district court would treat Petitioner's admissions during his trial as testimony equivalent to a guilty plea to those counts. This is supported by the language in Guideline § 3E1.1, providing that defendants who go to trial and demonstrate acceptance of responsibility can still receive a reduction in sentence after conviction. See U.S.S.G. § 3E1.1, cmt.2. And in fact, here the trial court did consider Petitioner's admission of guilt on the witness stand of all non-§1028A counts when sentencing Petitioner: "there should be some adjustment or consideration because [Petitioner] did take the witness stand [and confess to the non-1028A crimes], even though it was late." (Cr. Doc. No. 63-64.) The Court sentenced Petitioner to 15 years in custody, two years less than the Government sought. (Id. at 66.)

b. Prejudice

To satisfy Strickland's prejudice prong prejudice here, Petitioner must show that there was a reasonable probability he would have heeded properly given advice regarding the sentencing guidelines and pleaded guilty prior to trial. See, e.g., United States v. Blaylock, 20 F.3d 1458, 1467 (9th Cir. 1994), as amended (May 6, 1994). Here, however, Petitioner maintained his innocence of the charged offenses post-arrest and all the way through most of the trial. As the government pointed out, it was not until after he was shown camera footage at trial showing him at the clinic "organizing the beneficiaries, loading them up, taking them to pharmacies" that Petitioner decided to show acceptance of responsibility. (Cr. Doc. No. 843, RT at 2806.) It was not until after he heard testimony from a cooperating defendant, Lisa Mendez, who worked under Petitioner in the scheme, about Petitioner's role as the manager of the drivers as well as his involvement with the scheme and scope of authority within it that he decided to confess to the crimes on the witness stand. (Id. at 2806-07.) And it was not until after Petitioner was shown evidence about the undercover operation where he admitted that he's the manager of the drivers "to put the pharmacists at ease" and about surveillance of him corralling beneficiaries and getting them to the clinic, that he admitted guilt to the non-1082A crimes. (Id. at 2807.)

Petitioner points to no evidence other than his bald statement in his declaration that, had he been properly advised, he would have pled guilty"to all the charges with the exception of the § 1028A count." (Mem. at 11.) Of course, as noted above, he was so advised at the reverse proffer session.

Thus, his claim that if his lawyer had advised him of the benefits of pleading guilty, he would have done so, lacks merit. See cf. Lee v. United States, 137 S. Ct. 1958, 1969 (2017) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certai [n]" conviction (emphasis omitted)).

Moreover, Petitioner fails to demonstrate that, even if he had pled guilty, the Court would have been inclined to grant him an adjustment for acceptance of responsibility. See United States v. Nielsen, 371 F.3d 574, 582 (9th Cir. 2004) ("To receive the two-point downward adjustment [for acceptance of responsibility under U.S.S.G. § 3E1.1(a)], a defendant must at least show contrition or remorse.").[7] Indeed, Petitioner's decision to proceed to trial is not dispositive of the grant or denial of such an adjustment. See United States v. Innie, 7 F.3d 840, 848 (9th Cir. 1993) ("Although a district court may not punish a defendant for failing to participate in fact-gathering at a presentence interview or for not pleading guilty, the defendant must carry the burden of demonstrating the acceptance of responsibility."); U.S.S.G. § 3E1.1, cmt. 2 ("Conviction by trial ... does not automatically preclude a defendant from consideration for such a reduction."); U.S.S.G. § 3E1.1, cmt. 3 ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.").

[7] As the government pointed out, Petitioner made false statements unlike other co-defendants who took pleas without going to trial and received reduced sentences. (Cr. Doc. No. 56.) Although other co-defendants had submitted some false statements, they were "nothing like what [Petitioner] submitted. (Id.)

Here, as the government argues, Petitioner had the opportunity to receive a greater reduction in his sentence, but his own post-arrest conduct precluded that outcome. (Opp'n at 24-25.) The government points to the Court's recognition of Petitioner's claims of PTSD from his arrest because it involved "grenades," even though it is now undisputed that no grenades were involved during his arrest. (Cr. Doc. No. 1066 at 46-49.) Petitioner also claimed to start an educational organization post-arrest called "Armenians Against Crime," which the government claimed is nothing more than a website and Facebook page with no activity from its creation in August 2014 until the day of the sentencing hearing in July 2015, with no sign of the formation of a non-profit or fundraising. (Id. at 17-18.) Additionally, the Court found it pertinent that Petitioner failed to make any good-faith attempts to pay restitution. (Id. at 60-61.) Instead, two months after he was arrested, Petitioner transferred his real property from himself to his wife via quitclaim deed, who then transferred that same real property via quitclaim deed to his brother-in-law. (Id. at 15-16.)

Accordingly, Petitioner has failed to demonstrate there was a reasonable probability he would have heeded properly given advice and pleaded guilty prior to trial. His claim for ineffective assistance of counsel thus fails. See Strickland, 466 U.S. at 687.

IV. CONCLUSION

For the reasons set forth above, the Court DENIES the Motion and dismisses this action with prejudice.

IT IS SO ORDERED.

Dated: 4/28/21

Virginia A. Phillips
United States District Judge