

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES : CRIMINAL ACTION
 : NO. 11-464
 v. :
 :
 MATTHEW KOLODESH :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

November 25, 2019

In 2013, Matthew Kolodesh was convicted of health care fraud, mail fraud, and money laundering. He is serving a 176-month sentence in federal custody.

Presently before the Court is Kolodesh's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Kolodesh claims that: (1) his trial counsel was ineffective for: (a) stipulating to the accuracy and authenticity of translated audiotape transcripts, (b) failing to argue for the admission of allegedly exculpatory statements under Federal Rule of Evidence 807, and (c) failing to object to the government's closing argument which he claims amended the indictment by broadening the basis for conviction in two ways; and (2) his appellate counsel was ineffective for failing to argue that Kolodesh was deprived of the right to his choice of trial counsel without good reason. Kolodesh is represented by counsel.

For the reasons set forth below, the Court will deny Kolodesh's Section 2255 motion.

I. PROCEDURAL AND FACTUAL HISTORY

After a nineteen-day trial, a jury convicted Kolodesh of one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349, 21 counts of health care fraud in violation of 18 U.S.C. § 1347, two counts of mail fraud in violation of 18 U.S.C. § 1341, and 11 counts of money laundering in violation of 18 U.S.C. § 1957. On May 23, 2014, the Court sentenced Kolodesh to 176 months of imprisonment, three years of supervised release, and restitution of \$16,200,000. Kolodesh appealed his conviction and sentence. The Court of Appeals for the Third Circuit affirmed. See United States v. Kolodesh, 787 F.3d 224 (3d Cir. 2015).

On September 29, 2016, Kolodesh filed the instant motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. On November 30, 2018, the Court held oral argument on all issues raised in the motion. On February 1 and 21, 2019, the Court held evidentiary hearings limited to "trial counsel's alleged ineffective assistance of counsel for stipulating to the accuracy and authenticity of translated transcripts, failure to obtain an alternative translation of the transcripts, and related issues." Testifying at the evidentiary hearings were Kolodesh; Malvina Yakobashvili, his wife; Tatianna

Hay, his translator; Jack McMahon, his trial counsel; and Special Agent Edward Conway, who helped prepare the transcript translations. After the hearings, the Court allowed the parties to file supplemental briefs.

The Third Circuit recited the pertinent underlying facts of the case as follows:

Kolodesh owned a home-health services company called Community Home Health, Inc. Around 1999, he approached one of his employees, Alex Pugman, with the idea of starting a company to provide home-based hospice care. Pugman, who had a background in hospice care, agreed. Kolodesh funded the new company, which they named Home Care Hospice, Inc. [(HCH)], and Pugman managed the day-to-day operations. Kolodesh's wife, Malvina Yakobashvili, and Pugman were listed as owning equal shares in the company; however, Kolodesh was intimately involved in forming and overseeing the management of [HCH].

As early as 2000 or 2001, Kolodesh, Pugman, and Pugman's wife, Svetlana Ganetsky, who was also employed by [HCH], began giving gifts and cash "kickbacks" to doctors in exchange for patient referrals. (App. at 979-82.) In addition, at Kolodesh's suggestion, Pugman placed some doctors or their employees on the [HCH] payroll with sham job titles. Those sham employees were then issued paychecks, in exchange for patient referrals.

About 90% of the revenue generated by [HCH] came from Medicare reimbursements. . . .

At some point, [HCH] began to submit to [Medicare] fraudulent claims for reimbursement. . . . [A]t Kolodesh's suggestion, [HCH] began submitting reimbursement claims for patients who did not qualify for hospice care. Kolodesh and Pugman had the employees of [HCH] falsify patient records to conceal the fraud. [HCH] employees also falsified records to show patients as eligible for and receiving continuous care—a more time-intensive and thus more expensive level of care—when those patients were neither eligible for nor received such care.

Id. at 229-30.

II. LEGAL STANDARD

A federal prisoner may bring a motion to vacate, set aside, or correct his or her sentence pursuant to 28 U.S.C. § 2255 on the basis that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). An evidentiary hearing on the merits of a prisoner's claims is necessary unless the motion, files, and records of the case conclusively show that he or she is not entitled to relief. 28 U.S.C. § 2255(b).

To obtain reversal of a conviction on the basis of ineffective assistance of counsel in violation of the Sixth Amendment, a prisoner must establish: (1) his or her "counsel's representation fell below an objective standard of reasonableness," and (2) the deficient performance prejudiced his or her defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Holland v. Horn, 519 F.3d 107, 120 (3d Cir. 2008). If a prisoner fails to satisfy either prong of the Strickland standard, the claim will fail. Strickland, 466 U.S. at 697.

A court will consider the reasonableness of counsel's performance under all of the circumstances, and the court's "scrutiny of counsel's performance must be highly deferential."

Id. at 689. The court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.; Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

To satisfy the first prong of Strickland, a prisoner must: (1) identify acts or omissions that did not result from "reasonable professional judgment," and (2) establish that the identified acts and omissions fall outside of the "wide range of professionally competent assistance." Id. at 690.

To prove prejudice, a prisoner must affirmatively show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is probability sufficient to undermine confidence in the outcome."

Id.

III. DISCUSSION

A. Ground One: Ineffective Assistance of Trial Counsel

1. Trial counsel's stipulation to the translation of Russian audiotape transcripts

Kolodesh's primary argument is that the assistance of McMahon, his trial counsel, was constitutionally deficient

because McMahon stipulated to the accuracy and authenticity of translated transcripts of telephone conversations in Russian between Kolodesh and Pugman, did not obtain independent translations thereof, and did not inquire into the qualifications and skills of the government's translator.

On November 17, 2007, while already acting as a cooperating witness, Pugman recorded a telephone conversation in Russian with Kolodesh in which they discussed an audit of HCH by a Medicare administrator. The government provided Kolodesh an initial translated transcript of this conversation in November 2011. Parts of the transcript were marked as [UI], meaning those portions were unintelligible. Shortly before trial, the government produced a new version of the transcript ("Second Translation") where the translator is said to have apparently deciphered the unintelligible words and ascribed Kolodesh as stating to Pugman, "We have to fuck them over this time, one more time and be smart about it. . . ." (the "F-Medicare Statement"). "Them" in the F-Medicare Statement presumably referred to the Department of Health and Human Services which oversees the Medicare program. Kolodesh testified that he repeatedly told McMahon that the F-Medicare Statement was not an accurate translation of his conversation with Pugman. Ultimately, however, McMahon stipulated to the accuracy of the Second Translation without serious challenge.

At trial, an FBI Special Agent testified that when a translation of a recorded telephone call is prepared, it is independently reviewed for accuracy by a second language specialist. He further testified that this procedure was followed for all of the translated transcripts in this case. While on the stand, Pugman also verified the accuracy of the government's Second Translation. Moreover, the government was prepared to call at trial the FBI translator who would have verified the accuracy of the Second Translation. Ultimately, the government referred to the F-Medicare Statement multiple times during the trial and especially in its opening and closing arguments.

At the evidentiary hearing, Kolodesh called Tatianna Hay, a native Russian speaker and a qualified interpreter, who testified that she had translated the F-Medicare Statement as: "[UI] don't know how to fuck [UI] over this time, intelligently." Hay further testified that the government's Second Translation was not accurate and that the actor in the sentence could not be "we" and instead translated to either "they" or "I" but she thought, based on the context, it was "they," making the phrase "they don't know how to fuck us over intelligently." There is no evidence that, at the time of trial, Kolodesh or his family suggested this or a similar formulation to McMahon.

McMahon testified that he believed at the time of trial, and based on the translation of the conversation between Kolodesh and Pugman provided to him by Kolodesh and his wife, that the government's Second Translation was not significantly different from the original and would not have been received differently by the jury. He understood Kolodesh's main concern as being that there was no Russian equivalent to the English word "fuck." He believed that regardless of the exact translation, the F-Medicare Statement was still problematic and he did not believe fighting over what he considered to be a slight difference in translation would be beneficial to Kolodesh's case. McMahon testified that he did not think Kolodesh "was best served" by spending time refuting the translation because that would have just highlighted the statement. Instead, McMahon thought the better course of action was to downplay it as an off-hand comment that was not central to the case. McMahon testified that he believed it was better to spend time and energy at trial on the more major issues such as the credibility of Pugman and his wife, the main cooperating witnesses.

The Court concludes that Kolodesh has not overcome the strong presumption that McMahon acted reasonably in deciding not to spend additional time, or focus the jury's attention, on the F-Medicare Statement. McMahon's testimony shows that he had a

reasonable strategy in mind when he stipulated to the accuracy of the translated transcripts. While after the adverse trial result, one might argue that McMahon's decision was wrong or not the best strategic choice, the Supreme Court has cautioned against relying on the "distorting effects of hindsight." Strickland, 466 U.S. at 689. As a matter of strategy, McMahon believed that battling over the meaning of a few words, in the larger context of the trial, was "foolish" and not "beneficial" to Kolodesh. Additional government witnesses on the meaning of one or just a few words, likely would have resulted in what McMahon feared—further focusing the jury's attention on a collateral issue. The Court concludes that McMahon's conduct

regarding the translations fell "within the wide range of reasonable professional assistance." Id.^{1 2}

Kolodesh also argues that McMahon's representation was constitutionally deficient because stipulating to the

¹ Kolodesh further contends that, after he alerted McMahon to the alleged translation error, McMahon failed to conduct a reasonable pretrial investigation by obtaining an additional independent translation. See Strickland 466 U.S. at 691 (providing that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). He claims that a different accurate translation, like that of Hay, would have undercut the government's case. Similarly, Kolodesh contends that it is not possible to determine whether McMahon made a strategic choice because he failed to investigate and obtain facts that would support his choice. See United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made.").

The Court concludes it was not unreasonable for McMahon to rely on the translations offered by Kolodesh and his wife rather than obtain an additional translation from a third party. Kolodesh and his family reported to McMahon what they believed was said and not said during the recorded conversation with Pugman. With the contrasting versions of the conversation in mind, McMahon nevertheless concluded that the government's Second Translation was not sufficiently different or damaging to bring the issue to the forefront. Therefore, the Court concludes that McMahon did not breach his duty to engage in a reasonable investigation.

² In any event, even if McMahon had challenged the Second Translation, the government was prepared to defend it by offering witnesses who would have testified as to the accuracy of the translations. See Campbell v. United States, No. 06-CR-41, 2015 WL 1062176, at *5 (S.D.N.Y. Mar. 9, 2015) ("[C]ourts routinely deny ineffective assistance claims where a petitioner challenges a stipulation to facts or evidence that would otherwise have been introduced by a witness." (citing cases)).

authenticity and accuracy of the transcripts deprived him of his Sixth Amendment right to confront a witness, namely the translator. Kolodesh claims the translation is out-of-court testimonial hearsay and McMahon should have inquired into the government's translator's "qualification, skills and motive to mislead" before agreeing to the stipulation.³

However, at the time, there was no indication that the government's translator lacked the requisite skill or had any motive to mislead, and Kolodesh offers only speculation. Therefore, the Court concludes that McMahon's representation was not constitutionally deficient in this regard.

Moreover, the Court disagrees with Kolodesh's premise that the use of the transcripts at trial amounted to impeachable hearsay by the translator (who did not testify at trial).⁴ See

³ In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court recounted the roots of the Sixth Amendment right to confront witnesses and explained that its primary purpose is to protect against the misuse of testimonial hearsay. Id. at 53.

⁴ Kolodesh relies on the factually distinguishable Eleventh Circuit case, United States v. Charles, 722 F.3d 1319 (11th Cir. 2013), in which an officer conducted an interview of a Creole-speaking defendant with the help of a translator participating by telephone. Id. at 1321. At trial, the officer testified as to what the interpreter told him the defendant had said. Id. However, the officer could not independently verify the accuracy of the oral translation from Creole to English since he did not speak Creole. Id. Under those circumstances, the presence of the translator was needed at trial to avoid a Confrontation Clause violation. Id. at 1330-31. Here, as in United States v. Curbelo, 726 F.3d 1260 (11th Cir. 2013) and unlike in Charles, Pugman provided an independent basis for the

Curbelo, 726 F.3d 1260. In Curbelo, a cooperating witness testified that a transcript prepared by the government translator was an accurate account of his conversation in the Spanish language with the defendant. The Eleventh Circuit found that “[i]nsofar as the [written] transcripts are simply English versions of [a cooperating witness’s] telephone conversations [with the defendant], they do not contain any hearsay statements by the translator.” Id. at 1272. The court explained that:

The transcripts can only be testimonial to the extent they reflect the translator’s statement (implicit here) that the English translation accurately reflects the Spanish conversation. Yet this is exactly what [the cooperating witness]—a participant in the conversations—testified to based on his independent review of the recordings and transcripts. In fact, the anonymous translator’s implicit statement was never admitted at trial. The only statement the jury heard regarding the transcripts’ accuracy came from [the cooperating witness]. Thus, even if the translator made a testimonial statement out of court, he or she did not become a “witness against” Defendant at trial.

Id. at 1274.

Here, the situation is the same as in Curbelo: Pugman, a participant in the conversation with Kolodesh, testified to the accuracy of the Second Translation by the government’s translator and was subject to cross examination on that very point. The translator never testified and, as in Curbelo, never became a “witness against” Kolodesh. Therefore, the Court

accuracy of the translation of the conversation between Kolodesh and himself.

concludes that Kolodesh's Sixth Amendment rights were not violated as he had no constitutional right to confront the translator.

Finally, Kolodesh contends that McMahon should have requested a Starks hearing, which would not have been before the jury, to determine the authenticity of the transcripts. In Starks, the Third Circuit held that "[w]hen a colorable attack is made as to [an audio] tape's authenticity and accuracy, the burden on those issues shifts to the party offering the tape, and the better rule requires that party to prove its chain of custody." United States v. Starks, 515 F.2d 112, 122 (3d Cir. 1975). The court listed seven factors that should be considered at the hearing when the authenticity of a sound recording is challenged:

- (1) That the recording device was capable of taking the conversation now offered in evidence.
- (2) That the operator of the device was competent to operate the device.
- (3) That the recording is authentic and correct.
- (4) That changes, additions or deletions have not been made in the recording.
- (5) That the recording had been preserved in a manner that is shown to the court.
- (6) That the speakers are identified.
- (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

Id. at 121 n.11 (citation omitted).⁵ A Starks hearing goes primarily to the authenticity and chain of custody of recordings, not to a battle between translations. The Starks factors largely do not address Kolodesh's concerns. As McMahon testified, he believed he could rely on Kolodesh's translation of the tapes and that the differences between Kolodesh's version and the Second Translation were not material or helpful. It was not objectively unreasonable to forgo a Starks hearing under these circumstances and, thus, the Court concludes that McMahon's performance was not constitutionally deficient in this regard.

Because McMahon's representation did not fall below an objective standard of reasonableness, a prejudice analysis is not necessary. However, the Court notes that had Kolodesh introduced a competing translation, the government was prepared to call two qualified translators who agreed with Pugman that the Second Translation was accurate. Thus, Kolodesh has not

⁵ Starks pre-dates Federal Rule of Evidence 901(a) which provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). While there is some uncertainty regarding whether Rule 901(a) supersedes the Starks standard, see United States v. Madera, No. 17-CR-298, 2019 WL 2509896, at *3 (M.D. Pa. June 14, 2019), the Third Circuit has continued to consider the Starks factors. See, e.g., Flood v. Schaefer, 754 F. App'x 130, 133 (3d Cir. 2018) (non-precedential).

affirmatively shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

2. Trial counsel's failure to argue for the admission of exculpatory statements under Federal Rule of Evidence 807

During the trial, McMahon sought to cross-examine Pugman on several out-of-court statements Kolodesh made while being recorded by Pugman. Specifically, McMahon wanted to introduce statements Kolodesh made to Pugman ostensibly directing him to do things legally. The government moved to exclude these statements as hearsay and McMahon opposed the motion on various grounds. The Court granted the government's motion.

In his motion for a new trial, McMahon argued for the first time that the statements should have been admitted under the residual exception to the hearsay rule, Federal Rule of Evidence 807. Because McMahon had not previously raised this particular argument at trial, the Court did not consider his Rule 807 argument.

In order for a hearsay statement to be admissible under Rule 807, it must: (1) have equivalent circumstantial guarantees of trustworthiness; (2) be offered as evidence of a material fact; (3) be more probative on the point for which it

is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) best serve the purposes of the rules and the interests of justice. Fed. R. Evid. 807(a). The opposing party must also have reasonable notice of the intent to offer the statement. Fed. R. Evid. 807(b).

Kolodesh argues that McMahon was ineffective for failing to raise the Rule 807 argument prior to the motion for new trial. Kolodesh contends that the exculpatory directions he gave to Pugman not to engage in illegality meet the Rule 807 standard and that failure to raise the issue at the appropriate time was conduct falling below professional norms. Kolodesh also argues that the error resulted in prejudice because the statements would have bolstered other statements that were heard by the jury between Kolodesh, Pugman, and Ganetsky (Pugman's wife) that all of their actions were legal.

As noted by the government, the jury heard many exculpatory statements during Pugman's direct examination. McMahon also used them during his cross-examination of Pugman. These statements included Kolodesh telling Pugman, "Nobody committed fraud" and "We don't have the right to cheat anybody, nobody"; Pugman telling Kolodesh, "Yeah, we did not do anything illegal" and "There was no fraud"; Kolodesh telling Pugman and Ganetsky, "Guys, we didn't do anything bad, right?" and Ganetsky telling Kolodesh and Pugman "Nothing bad here" and "We did not

do anything bad." McMahon argued in his closing that these statements showed Kolodesh had no knowledge of the fraudulent activity occurring at HCH.

The Court concludes that McMahon was not ineffective for failing to initially raise an argument specifically based on Rule 807. In fact, McMahon argued for the admission of the very statements at issue during trial and he successfully used similar statements in cross-examination and during his closing argument. McMahon was not required to provide perfect advocacy, only reasonable competence. Yarborough v. Gentry, 540 U.S. 1, 8 (2003). McMahon's attempts to introduce the statements and his use of other similar exculpatory statements shows, at a minimum, reasonable competence.

In any event, the Court finds no prejudice because the statements likely would not have been admitted under Rule 807. The statements at issue were made after the FBI searched HCH's business office, putting Kolodesh on notice that he was under investigation. Therefore, under the first prong of Rule 807, the hearsay statements lacked circumstantial guarantees of trustworthiness. Moreover, under the third prong of Rule 807, the evidence was also not more probative than similar statements McMahon was successfully able to use during Pugman's cross examination.

The Court concludes that McMahon did not render constitutionally deficient performance in failing to timely raise an argument based on Rule 807.

3. Trial counsel's failure to argue that the government's closing argument constructively amended the indictment to include tax evasion

Kolodesh argues that during the government's closing argument, it constructively amended the indictment to include tax evasion and that McMahon was ineffective for failing to object to it. The Fifth Amendment prohibits a defendant from being tried on charges that are not in the indictment. United States v. Centeno, 793 F.3d 378, 389 (3d Cir. 2015). An indictment is constructively amended when "the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." Id. at 389-90 (quoting United States v. Daraio, 445 F.3d 253, 259-60 (3d Cir. 2006)).

During its closing argument, the government discussed evidence regarding Kolodesh's participation in false invoicing schemes. The evidence showed that Kolodesh and Pugman required contractors doing business with HCH to submit fake invoices for work not performed, which HCH would ostensibly pay to the contractors, but instead, Kolodesh and Pugman would keep the

money for themselves. See Kolodesh, 787 F.3d at 230. In closing, the government argued that this evidence was relevant to show how Kolodesh and Pugman used the false invoices to conceal the origin of the funds in order to generate money for themselves and for kickbacks to doctors who were providing inappropriate patient referrals. The government's closing discussion of these invoice schemes spans seven pages of the transcript. At one point, the government asked the jury to consider "Pugman's testimony about how all of these invoices schemes and—and rent schemes were done to hide the money, to—to line their pockets, reduce their tax liability, as well, for their own personal enrichment." This is the only reference to taxes in the government's closing argument in relation to fraudulent invoice schemes.

The Court concludes that the sole reference to Pugman's testimony mentioning tax liability does not create a substantial likelihood that the jury may have convicted Kolodesh for tax evasion in addition to health care and mail fraud and money laundering. A reading of the trial transcript shows that the extensive discussion of the invoice schemes in the government's closing was used to bolster the argument that Kolodesh was involved in the frauds, used proceeds from the frauds to enrich himself, and continued the Medicare fraud by using these funds to pay doctors for patient referrals. McMahon

was not ineffective for failing to raise this challenge as it had no merit.⁶

4. Trial Counsel's failure to argue that the government's closing argument amended the indictment in relation to the money laundering count by using the term proceeds rather than profits

Kolodesh was convicted of money laundering in violation of 18 U.S.C. § 1957 which prohibits engaging in "a monetary transaction in criminally derived property of a value greater than \$10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a). "Criminally derived property" is defined in the statute as "property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2) (emphasis added). Three times during its closing the government mentioned money laundering of more than \$10,000 in criminal proceeds.

Kolodesh argues that by using the word "proceeds" instead of "profits" in connection with the money laundering counts, the government broadened the indictment to allow for a conviction based on the movement of gross receipts rather than

⁶ For the same reason, the Court rejects Kolodesh's argument that "[a]t a minimum counsel should have requested a limiting instruction informing the jury that it could not base its decision regarding the crimes charged in the indictment on crimes not charged in the indictment." The Court also notes that it described to the jury in great detail of what crimes the government was charging Kolodesh and the elements of those crimes.

net profits. He bases this argument on United States v. Santos, 553 U.S. 507 (2008). As a plurality opinion, Santos is limited to its narrowest holding agreed upon by a majority of the justices. Santos, 553 U.S. at 523. The narrowest holding of Santos is that, in regards to 18 U.S.C. § 1956, the term "proceeds" can potentially mean net profits or gross receipts depending on the legislative history associated with the underlying specified unlawful activity, and that illegal lottery proceeds in particular refer to the profits of that unlawful activity under Section 1956. Id. at 522-25.⁷

It is unclear to the Court how the government's use of the term "proceeds" could broaden the indictment when that is the term used in the statute. It is also not evident that, under Section 1957, proceeds in the context of mail and health care fraud would be limited to profits rather than gross receipts. Indeed, while non-precedential, one year before Kolodesh's trial, the Third Circuit indicated in a similar situation that fraud proceeds meant gross receipts. United States v. Moro, 505 F. App'x 113, 116 (3d Cir. 2012) (concluding that "proceeds" from wire, mail, and bank fraud meant gross receipts in the context of Section 1957 money laundering).

⁷ The term "proceeds" in Section 1957 has the same meaning as in Section 1956. 18 U.S.C. § 1957(f)(3).

The Court concludes that McMahon was not ineffective for failing to raise this dubious novel argument. Again, competency does not require counsel to raise every imaginable argument. See Marshall v. Hendricks, 307 F.3d 36, 91 (3d Cir. 2002) (“[Courts] are not to question whether there was a ‘better’ response possible—only whether the attorney’s response was constitutionally adequate.”).

B. Ground Two: Ineffective Assistance of Appellate Counsel

Kolodesh claims that his appellate counsel, Gary Greene, was ineffective for failing to challenge on appeal this Court’s disqualification of Mark Sheppard, Kolodesh’s attorney of choice.

On October 14, 2011, Sheppard entered his appearance for Kolodesh.⁸ Sheppard had begun representing Kolodesh in connection with this matter in 2008 when the government executed a search warrant at HCH. On February 27, 2012, the government filed a motion to disqualify Sheppard asserting that there was an actual conflict of interest between Sheppard and Kolodesh and that Sheppard was a potential trial witness.

Part of the mail fraud counts involved a loan that Kolodesh obtained from the Philadelphia Industrial Corporation

⁸ McMahon entered his appearance as co-counsel on February 9, 2012.

("PIDC") by falsely claiming that one of his other businesses maintained an office and had employees working at the HCH business office when, in fact, it did not. The government alleged that Sheppard helped prepare documents which were sent to PIDC in an attempt to establish the legitimacy of the transaction. An HCH employee, Luiza Roitshtein, testified that she did not see evidence of the alleged business in the HCH office, that she communicated about the documents to Sheppard, and that Kolodesh had emailed her the final documents stating that "Mark [Sheppard]" had approved them.

This Court granted the government's motion to disqualify Sheppard finding that Sheppard could not provide conflict-free representation to Kolodesh because Sheppard had: (1) an actual conflict of interest in that there was "evidence from which a fact finder could reasonably infer that Mr. Sheppard was involved in or had intimate knowledge of Defendant Kolodesh's alleged efforts to intentionally conceal facts from and defraud PIDC"; and (2) two serious potential conflicts of interest because the evidence "suggests that Mr. Sheppard is a potential witness to explain the statements contained in the report to the PIDC" and that if Sheppard "were to represent [Kolodesh] at trial, Mr. Sheppard would run the risk of becoming an unsworn witness by providing implicit testimony when addressing events of which he has first-hand knowledge." United

States v. Kolodesh, 11-cr-464, 2012 WL 1156334, at *6-8 (E.D. Pa. April 5, 2012).

In his motion for a new trial, Kolodesh argued that the Court erred in disqualifying Sheppard because the government did not actually call him as a witness. The Court found no error since it had also found an actual conflict and second serious potential conflict. United States v. Kolodesh, 11-cr-464, 2014 WL 1876214, at *3-4 (E.D. Pa. May 12, 2014), aff'd, 787 F.3d 224 (3d Cir. 2015). The Court also provided that:

even if the benefit of hindsight were to demonstrate that Mr. Sheppard was not a "necessary witness," the Supreme Court has explicitly cautioned against judging the potential for, and severity of, conflicts of interest based on "the wisdom of hindsight," rather than in the "murkier pre-trial context" through which a trial court must make the decision whether or not to disqualify counsel.

Id. at 3 (quoting Wheat v. United States, 486 U.S. 153, 162 (1988)).

The Strickland test and the presumption of counsel's effectiveness applies to appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000); see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017). The presumption is overcome when appellate counsel ignored an argument that was clearly stronger than the issues presented on appeal. Smith, 528 U.S. at 288. If the petitioner meets the first Strickland prong, he must still "show a reasonable probability that, but for his counsel's unreasonable failure to [raise the argument], he would have

prevailed on his appeal." Id. at 285; see also Weaver, 137 S. Ct. at 1910-11. Appellate counsel has discretion to choose the issues for appeal and is not required to raise every argument. Smith, 528 U.S. at 288; Sistrunk, 96 F.3d at 670.

Kolodesh argues that this issue was clearly stronger than other issues raised on appeal because, as an alleged structural error, he would not have been required to show prejudice. See United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006). While the burden of proof would have been more favorable to Kolodesh, that does not indicate that the argument itself was strong. The evidence this Court discussed when it granted the motion to disqualify Sheppard and when it denied the motion for new trial strongly points to the conclusion that a fact finder could reasonably infer that Sheppard was involved in or knew about the loan scheme. It is sound strategy to avoid arguments that are weak on the merits to avoid "the risk of burying good arguments." Sistrunk, 96 F.3d at 670 (quoting Jones v. Barnes, 463 U.S. 745, 753 (1983)).

Given the strong evidence of conflict, the Court concludes that Kolodesh has not overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" by showing that "the challenged action" was not "sound trial strategy." Id. (quoting Strickland, 466 U.S. at 689). For the same reasons, Kolodesh cannot establish a

reasonable probability that he would have prevailed on this claim. Therefore, the Court concludes that Greene was not ineffective for failing to raise this argument on appeal.

IV. CONCLUSION

For the reasons set forth above, the Court will deny Petitioner's § 2255 motion.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES : CRIMINAL ACTION
 : NO. 11-464
 v. :
 :
 MATTHEW KOLODESH :

O R D E R

AND NOW, this **25th** day of **November, 2019**, upon consideration of Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 195) and the various briefs and supplements in response, and after oral argument on November 30, 2018 and evidentiary hearings on February 1 and 21, 2019, for the reasons set forth in the accompanying memorandum, it is hereby **ORDERED** that:

1. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 195) is **DENIED**.
2. No certificate of appealability shall issue.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.