IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Yomtov Scott Menaged,

Movant,

v.

United States of America,

Respondent.

No. CV 18-02417 PHX GMS (CDB)
No. CR 17-00680(1) PHX GMS

REPORT AND RECOMMENDATION

TO THE HONORABLE G. MURRAY SNOW:

Before the Court is Movant Yomtov Menaged's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Civil Docket "CV" ECF No. 1). Menaged asserts his sentence must be vacated because he was denied the effective assistance of counsel.

Background

A grand jury indictment returned May 16, 2017, charged Menaged with two counts of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371 (Counts 1 and 12); eleven counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts 2-6 and 13-18); and eleven counts of aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and 1028A(c)(5) (Counts 7-11 and 19-24). (Criminal Docket "CR" ECF No. 3).[1] The

[1] Ms. Castro was a named codefendant in all 24 counts of the indictment, and Mr. Pena and Mr. Flippo were named codefendants in Counts 12 through 24. (CR ECF No. 3). Ms. Castro pled guilty to a count of conspiracy and received a sentence of twenty months' imprisonment, a term of supervised release, and ordered to pay restitution in the amount of $1,145,392.81. *See* 2:17-cr-680(2) at ECF No. 240. All of the claims against Mr. Pena were dismissed on the Government's

indictment included a forfeiture allegation pursuant to 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. § 2461(c). (*Id.*).

An information filed October 17, 2017, charged Menaged with one count of conspiracy to commit money laundering. (CR ECF No. 133). The information alleged Menaged was, during all relevant times, "the sole owner and manager of several investment entities including Arizona Home Foreclosures, LLC." (CR ECF No. 133 at 1). The information further alleged: "DenSco Investment Corporation ("DenSco") was a hard money company formed by [Denny Chittick] in April 2001, whose primary business was to providing funding for short-term, high-interest loans to real estate investors for the purchase of real estate." (*Id.*). The factual background for the money-laundering charge stated in the information was summarized in the Presentence Investigation Report ("PSR"). With regard to charged conduct, the PSR states:

> On April 20, 2016, Menaged filed for Chapter 7 bankruptcy protection in the U.S. Bankruptcy Court, District of Arizona. Despite the requirement to disclose all creditors, Menaged failed to list DenSco as a creditor and therefore DenSco was not initially notified of the bankruptcy. The bankruptcy case was dismissed May 12, 2016, based on Menaged's failure to report all of his assets . . . Ultimately, a Chapter 7 trustee moved to reopen the case and the bankruptcy was reinstated by order June 2, 2016. Sometime in June 2016, DenSco discovered Menaged had filed for bankruptcy and began to investigate its open loans to Menaged.
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> Between January 2013 and June 2016, Menaged obtained approximately 2,712 loans made by DenSco, totaling approximately $734,484,440.67. Of the 2,712 loans made to Menaged and AHF, only 96 involved actual property transactions, the remaining 2,616 loans represent phantom real estate purchases made by Menaged and AHF. The number of loans and the aggregate loan amount grew to such a large number due to new loans being used to pay off old loans. Additionally, because the loans were fraudulent, and Menaged was paying interest on the fraudulent loans at a rate of 18%, the total number and frequency of subsequent loans increased significantly over time to keep the flow of money going. As a result of the phantom real estate fraud scheme, DenSco was defrauded of $31,446,001.79.

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motion. *See* 2:17-cr-680(3), at ECF No. 191. Mr. Flippo pled guilty to one count of misprision of a felony and received a sentence of twenty months' probation. *See* 2:17-cr-680(4) at ECF No. 176.

> In July 2016, Chittick recorded a conversation with Menaged. In the conversation, Menaged told Chittick he had not misappropriated any money from DenSco and $31.8 million was being held by a foreclosure trustee company called Auction.com. Menaged admitted he had destroyed all of his records of fake receipts and he would never testify that the $31.8 million existed or was being held by Auction.com. Menaged told Chittick he was waiting for his bankruptcy to be finalized before accessing the account and using the money to repay DenSco. Chittick committed suicide shortly after this recorded conversation with Menaged. Menaged later admitted he lied to Chittick and there was no money being held by Auction.com.

(CR ECF No. 181 at 7).

With regard to the uncharged conduct involving DenSco the PSR states:

> Menaged began borrowing money from DenSco in or around 2007 or 2008. At some point in 2011, Menaged learned the delay in the recordation of the Foreclosure Trustees' Deed to Buyer and the lending practices of DenSco allowed him to defraud DenSco and other hard money lenders by seeking two loans on property he purchased. When seeking loans from DenSco and other unrelated hard money lenders, both DenSco and the other lender were led to believe they would be the sole lender on the property and their loan would be secured against the property with a first position Deed of Trust. Menaged orchestrated this fraud, obtaining two hard money loans, on at least 126 properties.
>
> In November 2013, DenSco became aware of the fraud. On November 27, 2013, Chittick met with Menaged and confronted him about the fraud. Menaged lied and told Chittick his wife had cancer and his "cousin" had masterminded the fraud while Menaged was distracted caring for his wife. Menaged went on to say that his cousin had absconded to Israel with the proceeds from the fraud. Between November 2013, and April 2014, DenSco and Menaged sorted through all the properties that were double encumbered by DenSco and other lenders. In an effort to prevent DenSco from pursuing legal remedies for default, Menaged entered into a forbearance agreement in April 2014. The agreement also served to protect DenSco from potential claims by investors. Through that agreement, Menaged acknowledged the outstanding balance of loans payable to DenSco was $37,420,120.47. After the issuance of the forbearance agreement, Menaged continued to receive hard money loans from DenSco; however, a new protocol was put into place. Despite this new protocol, Menaged was able to further defraud DenSco by perpetrating the offense charged in the information and detailed above.

(CR ECF No. 181 at 7-8).

On October 17, 2017, pursuant to a written plea agreement (CR ECF No. 135), Menaged pled guilty to Counts 1 and 10 of the indictment, i.e., conspiracy to commit bank fraud and aggravated identity theft, and to a single charge of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), which charge was alleged in an information filed October 17, 2017. (CR ECF No. 134). In the written plea agreement the Government and Menaged stipulated that the loss associated with Menaged's "unlawful conduct as it relates to the money laundering conspiracy in the information is $34,000,000.00." (CR ECF No. 135 at 3). Additionally, Menaged agreed to pay restitution in the amount of $2,112,405.97 with regard to Count 1: "Specifically, the defendant agrees to restitution in the amount of $1,145,392.81 to Wells Fargo Bank, N.A., and $967,013.16 to Synchrony Bank. In addition, the defendant understands that restitution is mandatory with respect to Count 1 of the information . . ." (*Id.*). In the written plea agreement the Government and Menaged stipulated that Menaged would be sentenced to no more than 204 months' incarceration. (*Id.*).

In the written plea agreement Menaged waived his right to an appeal and his right to collaterally attack his sentence, other than to assert a claim of ineffective assistance of counsel or prosecutorial misconduct, and he also agreed to an extensive and specific factual basis for his guilty plea. (CR ECF No. 135 at 6, 8-12). In return for Menaged's guilty plea the Government agreed to dismiss Counts 2 through 9 and 11 through 24 of the indictment. (CR ECF No. 135 at 5). Furthermore, in the written plea agreement Menaged averred he had read the plea agreement, discussed the plea agreement and the rights he was waiving with his counsel, discussed possible defenses to the charges against him with his counsel, and that he was knowingly and voluntarily agreeing to plead guilty. (CR ECF No. 135 at 12-13). Menaged also stated in the written plea agreement that he was "satisfied that [his] defense attorney [had] represented [him] in a competent manner." (CR ECF No. 135 at 13).

At a plea hearing conducted October 17, 2017, Menaged was placed under oath. (CR ECF No. 254 at 7). After being placed under oath Menaged told the Court he had

reviewed the charges against him, he had reviewed the plea agreement with his counsel and understood the terms of the plea agreement, and that he was knowingly and voluntarily pleading guilty. (CR ECF No. 254 at 8, 12, 13-14, 16). Menaged further stated he was satisfied with his counsel's advice and representation. (CR ECF No. 254 at 8). When the Court asked: "Is there anything you think that [counsel] should have done for you that she hasn't done?" Menaged replied: "No, Your Honor." (*Id.*).

At the hearing defense counsel stated:

> [DEFENSE COUNSEL]: Your Honor, if we could pause and I could just put on the record the — the times that we went over the plea agreement, as well? The plea negotiations have been back and forth between the parties between several months. We reached a deal on the major terms September 29th. On October 6th, I spent several hours with Mr. Menaged going over the terms line-by-line, word-by-word. We spoke about the plea agreement again on October 16th via a several-hour phone call, and again on October 17th. Mr. Menaged sought the counsel and advice of his family, and sought the legal advice of at least one other attorney before entering into this agreement.

(CR ECF No. 254 at 26).

Menaged told the Court he understood the rights he was waiving by pleading guilty, including his trial rights, his right to an appeal, and his right to collaterally attack his conviction and sentence other than to assert a claim of ineffective assistance of counsel or prosecutorial misconduct. (CR ECF No. 254 at 17-20). The Court explained the charges to which Menaged was pleading guilty and the maximum punishment that could be imposed for each crime. (CR ECF No. 254 at 21-23). Menaged also told the Court he and his counsel had discussed the federal sentencing guidelines and how they would apply to him if he pleaded guilty. (CR ECF No. 254 at 28-29).

With regard to the issues of forfeiture and mandatory restitution the following interchanges occurred:

> THE COURT: . . . So you and the government have stipulated that the loss associated with your unlawful conduct as it relates to the money laundering conspiracy, which is contained in the information, is $34 million. Do you understand that?
> THE DEFENDANT: Yes, Your Honor.

> ***
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> THE COURT: And you agree to pay restitution to your victims, as to Count 1: Restitution in the amount of $2,112,405.97, which is $1,145,392.81 to Wells Fargo Bank, and $967,013.16 to Synchrony Bank.
> THE DEFENDANT: Yes, Your Honor.
> ***
> THE COURT: As well, as we've already indicated in the offense set forth in the information, you have a restitution obligation that will not exceed $34 million. You understand that?
> THE DEFENDANT: I do, Your Honor.

(CR ECF No. 254 at 31-32). Menaged also agreed to the factual basis for each crime to which he was pleading guilty. (CR ECF No. 254 at 36-41).

At the conclusion of the Rule 11 hearing the Court heard argument on Menaged's request for release from custody pending sentencing. (CR ECF No. 254 at 46-75). At that time the Court was concerned as to whether Menaged had fully accounted for the ill-gotten funds, asking defense counsel: "How long would it take you to provide the government with a full accounting of assets as to those unascertained funds," i.e., the proceeds from the criminal activity. (CR ECF No. 254 at 57). The following colloquy occurred with regard to this issue:

> THE COURT: But we have a restitution order by virtue of the plea agreement that involves some $36 million. That's the money I'd be interested in having accounted for.
> [DEFENSE COUNSEL]: The defendant had a crippling gambling habit that the government is aware of, and millions and millions of dollars was gambled away at six or seven different casinos. The government has all of those records. And — and as the defendant has pointed out, the — the $34 million encompasses almost 20 percent interest that was — is charged by a hard money lender. So the defendant never had that money. That figure represents, you know, DenSco's interests that they were charging the defendant on the loans that they were providing. So the defendant never had that money in his hands.

(CR ECF No. 254 at 59).

An initial Presentence Investigation Report ("PSR") was prepared and docketed November 22, 2017. (CR ECF No. 166). Menaged's counsel filed a sentencing memorandum on December 7, 2017, asking the Court to sentence him to an aggregate term

of ten years' imprisonment, a downward departure from the applicable guideline sentence. (CR ECF No. 180). In the memorandum defense counsel noted Menaged's strong family ties and responsibility for his extended family, his remorse and acceptance of responsibility, and his lack of any prior criminal history. (*Id.*).

The Government's sentencing memorandum asserted:

> The United States of America, through undersigned counsel, recommends that the Court sentence Yomtov Scott Menaged ("Defendant Menaged") to 204 months incarceration. Defendant Menaged is a financial predator and con artist, but his actions should NOT be minimized or categorized as purely financial crimes; Defendant Menaged's brazen and greed-motivated decisions directly caused a business partner [Mr. Chittick, of DenSco] to take his own life, spelled financial ruin for countless others, and victimized elderly individuals and their families. The United States recommends the maximum sentence allowed by the plea agreement, followed by a three-year term of supervised release, and restitution in the amount of $33,558,407.76.

(CR ECF No. 178 at 1).

A final PSR was docketed December 12, 2017. (CR ECF No. 181). The final PSR determined that, because of Menaged's criminal conduct, the DenSco investors lost $31,446,001.79, Synchrony Financial suffered a total loss of $967,013.16, and the total intended loss to Wells Fargo Bank was approximately $1,145,392.81. (CR ECF No. 181 at 13). In calculating Menaged's Base Offense Level, the PSR determined, *inter alia*:

> The guideline for a violation of 18 U.S.C. § 1956 is USSG §2S1.1. Pursuant to §2S1.1(a), the base offense level is the offense level for the underlying offense from which the laundered funds were derived . . . The laundered funds were obtained from fraud which is referenced at USSG §2B1.1. The base offense level is 7. USSG 2B1.1(a)(1). *The offense involved $33,558,407.76 in total loss*; therefore the offense level is increased by 22 levels. USSG §2B1.1(b)(1)(L). *The offense resulted in substantial financial hardship to one or more victims*; therefore, the offense level is increased by two levels. USSG §2B1.1(b)(2)(A)(iii). T*he offense substantially jeopardized the safety and soundness of DenSco, a financial institution*; therefore the offense level is increased by four levels. USSG §2B1.1(b)(16)(B)(i). The base offense level is 35. USSG §2S1.1(a)(1).

(CR ECF No. 181 at 14) (emphasis added).

Menaged's offense level was increased by two points because he was deemed an organizer, leader, or manager of the illegal activity, and decreased by three points for acceptance of responsibility. (CR ECF No. 181 at 14-15). The final PSR assessed a Total Offense Level of 36 and Criminal History Category of I. The PSR noted the maximum twenty-year term of imprisonment pursuant to the money laundering charge. (CR ECF No. 181 at 21). The PSR noted the maximum five-year term of imprisonment on Count 1, conspiracy to commit bank fraud, and the required two-year consecutive term of imprisonment on Count 10, aggravated identity theft. (*Id.*). The PSR calculated an aggregate guideline sentencing range of 188 to 235 months' imprisonment with regard to Count 1 and the money laundering charge, followed by the consecutive minimum two-year term of imprisonment on Count 10. (CR ECF No. 181 at 22). The PSR further noted the parties had stipulated to a maximum term of 204 months' imprisonment. (CR ECF No. 191 at 24).

A sentencing hearing was conducted December 19, 2017. (CR ECF No. 225). At the sentencing hearing Menaged's counsel told the Court that the objections raised to the draft PSR had resulted in its amendment and the defense had no objections to the final PSR. (CR ECF No. 225 at 44-45). Two victims, relatives of the deceased Mr. Chittick, gave statements for the Government and Menaged's parents and Menaged himself spoke at the hearing. (CR ECF No. 225). Additionally, one of Menaged's codefendants, Ms. Castro, spoke at the hearing. (*Id.*). Ms. Castro told the Court that on the night she learned of Mr. Chittick's suicide she had a conversation with Menaged: "What — he goes — he said this — what this man has done, it's a gift. And that just resonated with me because he didn't leave a note, he killed himself, and that meant that it was a gift because it was a dead man's word against his." (CR ECF No. 225 at 9).

At the sentencing hearing Menaged addressed the Court, stating:

> This is all my fault. I know it's all my fault. That's no excuse for any of this.
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> ***
>
> Although I don't dispute the loss amount, I do want this Court — I don't want this Court to get the wrong impression on the dollar amount. I

> was always charged 18 percent interest, like every other customer of his, which was standard in the hard money business. Therefore, the $30 million was never in my possession. Over the time, the balance went from 10 million to 15 million to 20 million and so on, based on the interest accumulating year after year. Had I only told [Mr. Chittick] on year one what was going on, there is no way the balance would be anywhere close to $30 million because we wouldn't have years of interest accumulating. And that's all on me.
>
> ***
>
> No matter what was happening with me mentally, or in my life, I am responsible. I broke the law. Willingly and knowingly, I broke the law. . . .

(CR ECF No. 225 at 51-53, 59-61).

In sentencing Menaged the Court noted:

> You engaged in highly illegal conduct, fraud — fraudulent conduct, you did it for years. You couldn't have simply lost count of the fact that you were doing it because so few of the real estate transactions in which you were involved actually involved any real estate at all. And so you were doing it for a very, very long time.
>
> You did engage in fraudulent conduct up until the arrest was made, it appears, and it also appears, even though you told me you didn't do anything to hide any money, that you did move your money around in very many places and have very many accounts.
>
> The loss you caused was $34 million.

(CR ECF No. 225 at 69-70).

On December 20, 2017, the Court sentenced Menaged to an aggregate term of 204 months' imprisonment, i.e., the maximum term of 60 months on Count 1 of the indictment and 180 months on the count alleged in the information, to be served concurrently, and the required consecutive sentence of 24 months on Count 10 of the indictment, all followed by an aggregate 36-month term of supervised release. (CR ECF No. 195). Menaged was ordered to pay $33,558,407.76 in restitution: "The defendant shall pay restitution to the following victims in the following amounts: DenSco, in the amount of $31,446,001.79; Wells Fargo Bank, in the amount of $1,145,392.81; Synchrony Bank, in the amount of $967,013.16." (CR ECF No. 195 at 2).

Menaged filed a notice of appeal and was appointed appellate counsel. (CR ECF No. 206). The Ninth Circuit Court of Appeals granted his motion for voluntary dismissal of the appeal on February 9, 2018. (CR ECF No. 219).

In his § 2255 motion Menaged asserts his counsel was ineffective for failing to: (1) investigate the loss amount; (2) investigate the restitution amount; (3) object to a sentence enhancement for substantial financial hardship to one or more victims; (4) object to the presentence report; (5) object to a sentence enhancement for substantially jeopardizing the soundness of a financial institution; and (6) properly advise him of the right to file a motion for modification of sentence that was waived by pleading guilty. Menaged asks the Court to vacate his conviction or vacate his sentence and resentence him "after recalculation of applicable USSG Advisory Guidelines." (CV ECF No. 1 at 10).

Analysis

A. Standard of Review

1. Relief under § 2255

A federal court may vacate, set aside, or correct a federal prisoner's sentence pursuant to § 2255 if the sentence was imposed in violation of the Constitution or laws of the United States, the court was without jurisdiction to impose the sentence, the sentence was in excess of the maximum authorized by law, or if the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *Davis v. United States*, 417 U.S. 333, 344-45 (1974); *United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016).

2. Ineffective assistance of counsel

The two-part test stated in *Strickland v. Washington*, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel arising out of the plea process. *See*, *e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *Gonzalez v. United States*, 33 F.3d 1047, 1051-52 (9th Cir. 1994). To succeed on a *Strickland* claim the movant must show his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability the result of the criminal proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694. The

"prejudice" prong of the *Strickland* test is modified when a movant challenges a conviction or sentence resulting from a plea agreement; in this circumstance the movant must show there is a reasonable probability that, but for counsel's "erroneous advice," he would not have pled guilty but instead would have insisted on going to trial. *See Hill*, 474 U.S. at 59-60; *United States v. Baramdyka*, 95 F.3d 840, 846-47 (9th Cir. 1996).

It is Menaged's burden to establish both prongs of the *Strickland* test. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1347-48 (9th Cir. 1995). Menaged must overcome a strong presumption that his counsel's representation was within a wide range of reasonable professional assistance. *See United States v. Ferreira–Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1986). Pursuant to section 2255, "[r]eview of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation." *Id.* Notably, counsel is not ineffective for failing to raise a meritless legal argument. *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989); *Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982).

> For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, 474 U.S. at 59.

When considering whether counsel's investigation of the facts of a case was deficient counsel's performance is entitled to a presumption of adequacy. *Strickland*, 466 U.S. at 690-91. Furthermore, the probability of prejudice may not be based upon mere conjecture or speculation, and the court's prediction about whether the movant had a reasonable chance of obtaining a more favorable result in his criminal proceedings "should

be made objectively . . .'" *Hill*, 474 U.S. at 60, *quoting Strickland*, 466 U.S. at 695. Unsupported, conclusory allegations are not sufficient to support a claim for habeas relief on a claim of ineffective assistance of counsel. *United States v. Popoola*, 881 F.2d 811, 813 (9th Cir. 1989), *abrogated on other grounds by Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992); *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987). Bare accusations, without more, are insufficient to compel relief under section 2255. *United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996).

B. Merits

1. Loss amount

Menaged asserts his counsel was ineffective because counsel failed to adequately investigate and argue the loss amount, i.e., he asserts the allegation that DenSco's "actual" loss was approximately $34 million "was completely wrong." (CV ECF No. 1 at 19). Defendant Menaged claims the fraud he perpetrated on DenSco resulted in a lesser loss amount because the $34 million sum included the interest due on the amount of money borrowed by Menaged pursuant to his fraud, rather than just the sum of money actually loaned by DenSco.[2]

Federal criminal defendants are entitled to the effective assistance of counsel at sentencing. *See United States v. Yamashiro*, 788 F.3d 1231, 1235 (9th Cir. 2015). However, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the Government's case: "When . . . the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do." *United States v. Decoster*, 624 F.2d 196, 210 (D.C. Cir. 1976), *quoted in Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). In light of

[2] Menaged's substantive argument regarding the loss amount relies on the assumption that DenSco only "lost" the sum of money which Menaged at one time possessed, i.e., the sum loaned, rather than acknowledging that DenSco investors lost not only the sum of the money actually borrowed by Menaged but also the sum due under the terms of the loan, i.e., the accrued interest. The investors "lost" this money if only because loaning this money to Menaged meant the money was not put into legitimate investments which would have repaid to the investors both the principal and the interest.

the strength of the case against Menaged, known to counsel through discovery, counsel's advice that he accept the plea agreement and agree to the loss amount as stated in the plea agreement was sound advice. Menaged has not met his burden of showing that counsel's representation fell below an objective standard of reasonableness.

Menaged presents only a conclusory allegation that counsel failed to adequately investigate the loss amount; the allegation that counsel's performance was deficient in this regard is belied by the record which demonstrates counsel had a thorough command of the facts regarding the loss amount. Notably, at the hearing following Menaged's Rule 11 hearing, counsel presented the Court with the argument that the calculated amount of the loss incurred by DenSco included a sum attributable to accrued interest, which sum was not comprised of cash Menaged ever actually possessed.

Additionally, at the plea hearing, after Menaged agreed to the factual basis for his crimes, the Court asked of counsel whether she "knew of any valid defense that would likely prevail at trial" with regard to each count to which Menaged was entering a guilty plea, and counsel responded "No, I don't, Your Honor." (CR ECF No. 254 at 39, 41). At the conclusion of this portion of the Rule 11 hearing, during which Menaged was informed of the elements of the crimes and he agreed to the factual basis for his crimes, the Court inquired of him: "Is there anything else you would like to say to me?" and Menaged responded: "No, Your Honor." (CR ECF No. 154 at 41). When the Court asked if Menaged had understood "everything we've covered today?" Menaged responded: "Yes, Your Honor." (*Id.*). When asked by the Court if he had any questions, Menaged responded: "No, Your Honor." (*Id.*). Menaged then entered a guilty plea to Counts 1 and 10 of the indictment and the sole count of the information. (CR ECF No. 254 at 41-42). Notwithstanding both counsel and Menaged's argument to the Court at the hearing after his Rule 11 colloquy and at sentencing regard the loss amount, the Court concluded: "The loss you caused was $34 million." (ECF No. 225 at 69-70). Accordingly, Menaged is unable to establish any prejudice from counsel's alleged failure to present an argument regarding the loss amount.

Furthermore, in the written plea agreement which Menaged averred he had discussed with his counsel and he also apparently had reviewed with "at least one other attorney," (CR ECF No. 254 at 26), Menaged stipulated to this loss amount. The plea agreement states: "Stipulation-Fraud Loss for Money Laundering Conspiracy. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant stipulate that the loss associated with the defendant's unlawful conduct as it relates to the money laundering conspiracy in the information is $34,000,000.00." (CR ECF No. 192 at 3). And in the written plea agreement signed by Menaged the parties' agreement regarding restitution was clearly delineated:

> . . . Pursuant to 18 U.S.C. § 3663 and/or 3663A, *the defendant specifically agrees to pay restitution as ordered by the Court to all victims directly or proximately harmed by the defendant's "relevant conduct," including conduct pertaining to any dismissed counts or uncharged conduct*, as defined by U.S.S.G. § 1B1.3, regardless of whether such conduct constitutes an "offense" under 18 U.S.C. § § 2259, 3663 or 3663A, *but in no event more than $34,000,000.00*. The defendant understands that restitution will be included in the Court's Order of Judgment and that an unanticipated restitution amount will not serve as grounds to withdraw the defendant's guilty plea or to withdraw from this plea agreement.

(*Id.* (emphasis added)).

At his plea hearing Menaged avowed that he fully understood the terms of the plea agreement and all relevant stipulations, and he admitted to having committed the fraud charged in both the indictment and information. He also told the Court, under oath, that he was satisfied with his counsel's representation. "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal[.]" *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (citations omitted). Menaged never object to the factual information contained in the PSR regarding the additional crimes committed against DenSco, nor did he dispute that the loss amount to DenSco was at least $34 million dollars either during his plea allocution or at sentencing. The fact that Menaged did not assert any misunderstanding at his plea colloquy and sentencing is an indication that his guilty plea was knowing and

voluntary and not the result of counsel's deficient performance. *See United States v. Lunsford*, 787 F.2d 465, 466 (9th Cir. 1986) (finding without a hearing that defendant's "guilty plea was entered voluntarily and knowingly" where defendant did not object during plea colloquy or sentencing).

Moreover, Menaged has not established prejudice regarding his counsel's alleged deficient performance, i.e., that but for his counsel's alleged error regarding the loss amount he would not have accepted a plea bargain but instead would have insisted upon going to trial. During the plea hearing counsel made a record of Menaged's consideration of and understanding of the plea agreement:

> [DEFENSE COUNSEL]: Your Honor, if we could pause and I could just put on the record the — the times that we went over the plea agreement, as well? . . . We reached a deal on the major terms September 29th. On October 6th, I spent several hours with Mr. Menaged going over the terms line-by-line, word-by-word. We spoke about the plea agreement again on October 16th via a several-hour phone call, and again on October 17th. Mr. Menaged sought the counsel and advice of his family, and sought the legal advice of at least one other attorney before entering into this agreement.

(CR ECF No. 254 at 26).

Entering into the plea agreement was advantageous to Menaged. The Government asserts: "The plea agreement required the Government to stipulate to a loss of no more than $34 million, in light of unrefuted evidence that more than $700 million dollars changed hands during the course of Menaged's criminal conduct." (CV ECF No. 11 at 9). The information, to which Menaged pled guilty, states: "Between January 2014 and June 2016, Menaged and AHF obtained a total of 2,712 loans from DenSco totaling approximately $734,484,440.67." (ECF No. 133 at 2). The final PSR states that "[b]etween February and October 2015" DenSco wired "$133,087,329.85" to Menaged. (ECF No. 181 at 6). The final PSR also states: "Between January 2013 and June 2016, Menaged obtained approximately 2,712 loans made by DenSco, totaling approximately $734,484,440.67. Of the 2,712 loans made to Menaged and AHF, only 96 involved actual property transactions . . ." (ECF No. 181 at 7). The final PSR further states that in April of 2014 "Menaged

acknowledged the outstanding balance of loans payable to DenSco was $37,420,120.47." (ECF No. 181 at 8). Accordingly, the plea deal limiting the amount of restitution due to $34 million was favorable to Menaged and, accordingly, his counsel's advice to enter into the plea agreement was not deficient and he is unable to show that but for counsel's advice he would not have entered into the plea agreement.

Additionally, the plea agreement capped Menaged's sentence at an aggregate term of 204 months' imprisonment and provided Menaged would receive a reduction in his offense level and sentencing guideline range for acceptance of responsibility. Because of the plea agreement's sentencing cap the imposed sentence was eight months below the low end of the applicable sentencing guideline range after taking into account the mandatory consecutive two-year sentence required for the aggravated identity theft conviction. Furthermore, had Menaged not accepted the plea agreement and proceeded to trial, it was likely he would have been convicted of all of the other 22 counts stated in the indictment, and it is possible a superseding indictment would have alleged additional charges. By limiting the loss amount and limiting his sentencing exposure the plea agreement greatly benefitted Menaged and he has not shown that but for his counsel's advice he would have insisted on going to trial rather than entering into the plea agreement. Moreover, Menaged stated at his sentencing that he had entered into a plea agreement because he was guilty and he wished to accept responsibility for his actions and offer whatever relief he could afford his victims. (CR ECF No. 225 at 52). This belies his claim that he would not have entered a plea agreement but for his counsel's alleged failure to adequately investigate the loss amount. *See United States v. Grewal*, 825 F.2d 220, 223 (9th Cir. 1987).

2. Restitution

Menaged asserts his counsel was ineffective for failing to investigate the actual loss to DenSco that was used to determine the restitution figure. Menaged asserts that awarding $31,446,001.79 in restitution to the DenSco investors resulted in their "unjust enrichment," rather than making them whole or fully compensating them. (CV ECF No. 1 at 28). He asserts that the DenSco receiver's bank's check register reflects that the DenSco investors

have received a total of $7,000,000.10 as a result of the receivership, information he asserts was available to his counsel at the time of his sentencing and, therefore, that the judgment regarding the restitution owed to the DenSco investors should be decreased by this amount. (*Id.*). Menaged notes he recently received his GED while in prison and that because he has been able to determine that the DenSco investors' loss was "inflated" and not due solely to his actions, his counsel's alleged failure to arrive at a similar conclusion exhibits deficient performance. (CV ECF No. 1 at 29-30).

This claim may be denied for the reasons stated with regard to Menaged's claim regarding the loss amount. Menaged stipulated to the specific restitution figures in the written plea agreement and at his Rule 11 hearing, and he did not object to these figures at sentencing. Furthermore, as stated *supra*, Menaged has not shown that but for his counsel's alleged deficiency in "investigating" the amount of restitution he would have insisted upon going to trial where he faced convicted on all 24 counts alleged in the indictment and the count charged in the indictment.

3. Substantial financial hardship to one or more victims

Menaged asserts his counsel was ineffective because counsel did not object to the sentence enhancement based on substantial financial hardship to one or more victims. Menaged claims that counsel identified Mr. Chittick as the victim referred to under the substantial financial hardship enhancement, and he argues that counsel's failure to object to this enhancement was deficient because documents available on a website support the assertion that Mr. Chittick was not a DenSco creditor and that prior to his death: "Mr. Chittick had a significant personal net worth and significant liquid assets, and was far from filing bankruptcy or being insolvent, thus strongly suggesting this enhancement should not apply." (CV ECF No. 1 at 33). In support of this claim Menaged attaches a one-page print-out titled "Simon Consulting, LLC, Arizona Corporation Commission v. DenSco Investment Corporation," which was prepared after September 19, 2016. (CV ECF No. 1-3 at 38). This "document" states: "Chittick was a DenSco investor with a total balance of

$3,625,313" as of December 23, 2014, and that this balance was "eliminated" on approximately December 31, 2014. (*Id.*).

The term "substantial financial hardship" is defined in the notes to the relevant sentencing guideline:

> (F) Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—
>
> (i) becoming insolvent . . .
>
> (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
>
> (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
>
> (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home . . .

U.S.S.G. §2B1.1 cmt. n.4(F).

Attached and supplemented to the final PSR are the statements of several DenSco investors: "If not for [Menaged], after 28 years of hard work, my life's retirement dreams and financial goals could be realized . . . Losing a material amount of my family's wealth and my future income to this scam has been heartbreaking." (CR ECF No. 181-3 at 2); "Since the collapse of DenSco, at the age [of] 72, I have had to become employed again to support a comfortable lifestyle that is not in the least extravagant." (CR ECF No. 181-3 at 5); "As a result of Mr. Menaged's willful and intentional actions to defraud DenSco, my family has lost nearly $150,000, a significant portion of what we considered to be retirement funds for our future. . . . we have had to alter our expectations of retirement, and will be forced to work longer than we had planned to ensure our future . . ." (CR ECF No. 171-3 at 6); "My wife and I invested a total of $250,000. As of today, we expect to recover ~ 14%, or $35,000 . . . our retirement plans were irrevocably altered." (CR ECF No. 186-1 at 1); "Our family suffered huge and catastrophic losses because of Mr. Menaged's criminal behavior . . . Because of this situation, our monthly DenSco income which was approximately a positive $16,150.00 is now a negative $3150.00," and "our life has changed in a significant way. Our once anticipated retirement . . . is no longer an option

. . . " (CR ECF No. 186-1 at 5); "I opened an account with [DenSco] using inheritance proceeds from my parents . . . What took my father 40 years to save is now gone . . ." (CR ECF No. 186-1 at 10); "I am now 80 years old and not able to get out into the workplace to recoup what I have lost ($1000,000 @ 12% annually)." (CR ECF No. 188-1 at 1).

Menaged makes only a conclusory statement that counsel "identified" Mr. Chittick as being the apparent victim referenced with regard to the substantial financial hardship enhancement. Menaged has not established that the "fact" he has "discovered" regarding Mr. Chittick would have resulted in a different offense level, as he fails to establish that Mr. Chittick was the only victim who allegedly suffered substantial financial hardship. The record in this matter clearly indicates that more than one victim suffered "substantial financial hardship" as that term is used in the sentencing guidelines. *See United States v. Stewart*, 728 F. App'x 651, 654 (9th Cir. 2018) ("At least five victims stated that they had lost either all or a large portion of their retirement funds or savings accounts or that the loss caused them to make substantial changes to their employment or living arrangements."), *cert. denied*, 139 S. Ct. 792 (2019); *United States v. Minhas*, 850 F.3d 873, 877-78 (7th Cir. 2017) ("The same dollar harm to one victim may result in a substantial financial hardship, while for another it may be only a minor hiccup. Much of this will turn on a victim's financial circumstances, as the district court recognized when it noted that "[a] loss that may not be substantial to Bill Gates may be substantial to a working person."). Accordingly, Menaged's counsel's performance was not deficient for failing to object to the application of this sentencing guideline because counsel is not ineffective for failing to raise a meritless claim.

4. Presentence report

Menaged asserts his counsel was ineffective because counsel did not object to the final presentence report. Counsel did file objections to the initial PSR.[3] Menaged alleges:

[3] It is not entirely clear what objections were asserted with regard to the draft PSR. At the sentencing hearing defense counsel stated: "The objections that we raised at the draft stage were amended, and so we've reviewed the final and we have no objections to that." (ECF No. 225 at 44-45). In response to the Court's question "So any corrections that you sought to make have been incorporated to your satisfaction," counsel responded "Yes." (ECF No. 225 at 45). The only

"I never saw the final draft of the PSR or what corrections had been made [to the draft PSR] by the Probation Department and what was remaining to be objected to at sentencing." (CV ECF No. 1 at 34). Menaged alleges that, specifically, the final was "not accurate at all" because it alleged the "fraud spanned over 6 years." (*Id.*). He asserts that had he "known that was in the final PSR I would have objected and provided the loan documents to show that the statement was very inaccurate . . ." (*Id.*). He also asserts he never saw the "addendum" to the PSR recommending the forfeiture of the $709,405.40 from his father's account. (CV ECF No. 1 at 35). He alleges the forfeiture was not "listed in the PSR, [and] was not agreed to in the plea agreement." (CV ECF No. 1 at 36).

At the sentencing hearing defense counsel told the Court that she had reviewed the draft and final PSRs with Menaged "in [their] entirety." (CR ECF No. 225 at 44-45). Menaged did not interject anything to the contrary either at that time or later during his allocution. The draft and final PSRs state that "at some point in 2011, Menaged learned the delay in the recordation of the Foreclosure Trustees' Deed to Buyer and the lending practices of DenSco allowed him to defraud DenSco . . ." (CR ECF No. 166 at 7; CR ECF No. 181 at 7). The draft and final PSRs also alleged Menaged's schemes continued through 2017. The PSRs state: "The instant offense involved a fraud spanning over the course of approximately six years." (CR ECF No. 166 at 27; CR ECF No. 181 at 7). Accordingly, Menaged did know that the PSR alleged the fraud spanned the course of six years and he did not object at sentencing to this allegation. He offers only a conclusory statement that

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statement made by Menaged at his sentencing was his statement regarding the loss amount, as stated *supra*.

The final PSR states:

> The report has been revised at paragraph 52 to remove the two level enhancement under USSG §2B1.1(b)(11)(C)(i), for the offense involving the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification. This enhancement was incorrectly applied as the defendant pled guilty to a count of aggravated identity theft. The correct base offense level is 35. All paragraphs affected by the change have also been revised to reflect the correct total offense level, guideline imprisonment range and fine range.

(ECF No. 181 at 32).

this allegation is untrue and, accordingly, he fails to show his counsel's performance was deficient for failing to object to this statement in the final PSR. Nor does he demonstrate that this allegation in the final PSR had any impact on his sentence.

The record also demonstrates Menaged was well-aware of the allegation regarding the forfeiture of the funds in his father's account. Five days after the draft PSR was prepared the Court entered a Preliminary Order of Forfeiture, determining that all of the funds in this account were traceable to Menaged's criminal conduct and, therefore, subject to forfeiture. (CR ECF No. 173). In its Order, the Court made the following findings:

> 1. Defendant defrauded DenSco Investment Corporation out of tens of millions of dollars. Defendant, through Arizona Home Foreclosures, transferred $709,405.40 of those fraud proceeds to [Joseph Menaged/Menaged's father's] bank account; and
> 2. The $709,405.40 that the government seized from [Joseph Menaged's/Menaged's father's] bank account are proceeds traceable to defendant's criminal conduct, they are property involved in defendant's money laundering offenses, and they are proceeds obtained directly or indirectly as result of defendant's bank fraud; and
> 3. The $709,405.40 seized from Account #0927 is subject to forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(A) and (C), 982(a)(1)(A) and 982(a)(2), and 28 U.S.C. § 2461.

(CR ECF No. 235, *quoting* CR ECF No. 173).

The PSRs' inclusion of those facts to which Menaged now objects and the proceedings regarding the forfeiture of the sums in his father's account gave him notice that these facts were alleged, and the Court did allow Menaged the opportunity to object to those facts and that forfeiture at the sentencing hearing; at the sentencing hearing Menaged used his allocution to express his remorse and asserted only that the calculated loss amount included accrued interest which he never actually possessed. Additionally, although counsel did not file objections to the final PSR (CR ECF No. 181 at 32), counsel did file an eloquent and well-argued sentencing memorandum asking the Court to depart downward from the applicable sentencing guidelines range and impose a sentence of ten years' imprisonment. (CR ECF No. 197).

Menaged is unable to establish that his counsel's performance was deficient or any prejudice arising from his counsel's alleged deficiency, i.e., that the outcome of his sentencing would have been different but for counsel's alleged errors.

5. Substantially jeopardizing the soundness of a financial institution

Menaged asserts his counsel was ineffective because counsel did not object to a sentence enhancement for substantially jeopardizing the soundness of a financial institution. Menaged alleges counsel did not "understand" the facts of his case, and that she failed to make "any effort to investigate and properly inform herself or to have a professional grasp on the applicability of various provisions of the U.S.S.G." (CV ECF No. 1 at 38). He asserts he has discovered "DenSco was insolvent as of 2012" and that he "should not have been held criminally responsible for business decisions made by DenSco." (*Id.*). Menaged also asserts DenSco was not a "financial institution" as that term is used in the relevant sentencing guideline. (CV ECF No. 1 at 39).

The PSR states, with regard to Menaged's Base Offense Level: "The offense substantially jeopardized the safety and soundness of DenSco, a financial institution; therefore the offense level is increased by four levels. USSG §2B1.1(b)(16)(B)(i) . . ." (CR ECF No. 181 at 14).

Menaged presents no published legal opinion or legal document establish DenSco was not a "financial institution" as that term is used in the relevant sentencing guideline. Application note 1 to U.S.S.G. §2B1.1 provides: "'Financial institution' includes . . . any state or foreign bank, trust company, . . . *investment company*, mutual fund . . . and any similar entity, whether or not insured by the federal government. . . ." (emphasis added). The plea agreement describes DenSco as a "hard money lender," (CR ECF No. 135 at 10), and the draft and final PSRs describes DenSco as a "private lender," and as a "financial institution." (CR ECF No. 166 at 5, 14; CR ECF No. 181 at 5, 14). The draft and final PSRs reference DenSco as "DenSco Investment Corporation," (CR ECF No. 166 at 5; CR ECF

No. 181 at 5), and it is apparent from all of the victim statements and the other pleadings in this matter that DenSco was an investment company.[4]

Additionally, the United States Circuit Courts of Appeal have held that an investment company, even a sham investment company, is considered a "financial institution." *Cf. United States v. Hoffecker*, 530 F.3d 137, 198 (3d Cir. 2008) ("The Guidelines Commentary defines 'financial institution' to include any . . . investment company . . . and any similar entity . . ."); *United States v. Collins*, 361 F.3d 343, 347 (7th Cir. 2004) (holding that the Sentencing Commission intended to expand the definition of "financial institutions" beginning in 1997, and that this definition, as used in U.S.S.G. §2F1.1, "expressly includes 'investment companies.'").

Counsel had no obligation to take a futile position by objecting to the application of the enhancement and Menaged is unable to establish any prejudice arising from his counsel's alleged error.

6. Counsel's advice regarding the waiver of rights

Menaged asserts his guilty plea was unknowing because his counsel "never explained to [him] that [he] was giving up a right to file a Motion for Modification of Sentence, under 18 U.S.C. 3582(c)." (CV ECF No. 1 at 41). Menaged contends his counsel "never explained to me I was giving up my future rights to file for a modification of sentence if the guidelines are lowered. Had I known this I would not have agreed to my plea agreement." (*Id.*).

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[4] Both the draft and final PSRs state:

> Denny J. Chittick was the owner and president of DenSco, which was made up of 110 *investors*. Chittick was cautious regarding who he allowed to *invest* with DenSco and personally knew approximately 99 of the *investors*, who were family, friends or former employees. The remaining *investors* were friends or associates of other *investors*. As a result of this fraud, and the damage he knew it would cause to his *investors*, Chittick took his own life in 2016. DenSco is now insolvent and the *investors* have lost millions of dollars. A civil case was filed in Maricopa County Superior Court, Phoenix, case number CV2016-014142, and the judge entered an order that the *investors comprising DenSco* are owed $31,446,001.79.

(ECF No. 166 at 13; ECF No. 181 at 13) (emphasis added).

"A plea of guilty entered by an individual fully aware of the plea's *direct* consequences must stand unless induced by threats . . ., misrepresentation . . ., or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." *United States v. Seng Chen Yong*, ___ F.3d ___, 2019 WL 2400639, at *5 (9th Cir. 2019) (emphasis added and internal quotations omitted). *See also United States v. Wills*, 881 F.2d 823, 825 (9th Cir. 1989); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977). Although a defendant must be informed of the *direct* consequences of the plea, due process does not require that he be informed of "all possible collateral consequences." *United States v. Wills*, 881 F.2d 823, 825 (9th Cir. 1989) (quotation omitted). *See also Sanchez*, 572 F.2d at 211. A "direct consequence" of a plea is "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Wills*, 881 F.2d at 825.

The relevant section of the United States Code provides:

> The court may not modify a term of imprisonment once it has been imposed except . . .
>
> > (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court *may* reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2) (emphasis added).

The relief provided by § 3582(c)(2) is discretionary and, accordingly, it does not have a definite, immediate, or largely automatic effect on the range of punishment imposed on Menaged. Therefore, Menaged did not have any right to be informed of the existence of this statute's provisions prior to pleading guilty. *See Dillon v. United States*, 560 U.S. 817, 825 (2010) ("By its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding."); *United States v. Chapple*, 847 F.3d 227, 231 (5th Cir. 2017);

United States v. Maiello, 805 F.3d 992, 1000 (11th Cir. 2015). Furthermore, because the Sentencing Guidelines have not been altered Menaged is unable to establish any prejudice arising from this asserted error by counsel.

Conclusion

Menaged is unable to establish that his counsel's performance was deficient or any prejudice arising from any of counsel's alleged errors. Menaged received a significant benefit from the plea agreement, which provided for the dismissal of eleven counts of wire fraud, ten counts of aggravated identity theft, and a charge of conspiracy to commit bank fraud. A review of the PSR, the plea hearing, all of the pleadings in this matter, and the transcript of the sentencing hearing reveal that the evidence against Menaged was substantial. Menaged received a significant benefit from his plea agreement because it capped his sentence at a term of 204 months when the relevant sentencing guideline provided for a higher sentence, and it also capped the amount of restitution. Accordingly, counsel's performance was not prejudicial in negotiating the plea agreement accepted by Menaged. *See Baramdyka*, 95 F.3d at 845-47 (concluding counsel may commit serious errors, but as long as counsel succeeds in substantially reducing the sentence defendant would have likely received had he gone to trial, there is no prejudice).

Menaged's contemporaneous statements regarding his understanding of the plea agreement and that he was satisfied with his counsel's representation and advice carry substantial weight. *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008) ("Statements made by a defendant during a guilty plea hearing carry a strong presumption of veracity in subsequent proceedings attacking the plea."); *United States v. Kaczynski*, 239 F.3d 1108, 115 (9th Cir. 2001). Because "it is difficult to probe the highly subjective state of mind of a criminal defendant, the best evidence of his understanding when pleading guilty is found in the record of the Rule 11 colloquy." *United States v. Jimenez-Dominguez*, 296 F.3d 863, 869 (9th Cir. 2002). "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's

expressed preferences." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017). Because Menaged's claims regarding his counsel's alleged deficiencies are without support in the record, they do not provide a basis for habeas relief. *See United States v. Rivera-Ramirez*, 715 F.2d 453, 458 (9th Cir. 1983).

Accordingly,

IT IS RECOMMENDED that Menaged's Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255, (CV ECF No. 1), be **DENIED.**

This report and recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have 14 days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days within which to file a response to the objections. Failure to timely file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order of judgement entered pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

Dated this 28th day of June, 2019.

Camille D. Bibles
United States Magistrate Judge