GROUND I: TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE DISTRICT COURT'S INTERFERENCE AND BIAS THEREFORE PREVENTING A FAIR TRIAL AND RELIEF ON APPEAL

Over the course of the four-week trial, District Court Judge Doumar interrupted, interfered with, degraded, and showed great bias against defense counsel, Mr. Broccoletti, defense witnesses, and the defendant Mr. Martinovich. Yet, over the course of the entire trial, encapsulating hundreds of errors, defense counsel Mr. Broccoletti stood silent and never once objected to the interference of the Court. Mr. Broccoletti never once attempted to protect and preserve Mr. Martinovich's rights at trial, or with subsequent appeal proceedings. This ineffectiveness prejudiced Mr. Martinovich by failing to protect his rights at trial while also forcing the appeals court to raise its standard of review to the extremely high bar of plain error review. This inexplicable performance by defense counsel fell well below professional norms for minimum effective assistance, as well as greatly prejudiced Martinovich in the eyes of the jury and in his right for the Fourth Circuit to vacate his conviction on appeal. Recently, in United States v. Carthorne, the Fourth Circuit clarified the necessity of counsel to make timely, preserving objections, as well as explained that even though the Appeals Panel may not find that an error eclipses the high bar of plain error review, counsel may still be deemed ineffective for not objecting to that error. [United States v. Carthorne, US App LEXIS 26118 (4th Cir. 2017)].

FOURTH CIRCUIT OPINION

To synopsize the severity of Mr. Broccoletti's failure to object, Mr. Martinovich first provides the direct opinions of the Fourth Circuit Court of Appeals. In the January 7, 2016 Opinion, Judges Floyd, Thacker, and Wynn wrote:

1) "(I)n light of the district court's demeanor at trial and its statements during sentencing regarding the nature of the guidelines, it is necessary for a different judge to be assigned to this matter."

2) "(T)he district court's actions were in error."

3) "(I)nterference in this case went beyond the pale."

4) "(T)he district court became so disruptive that it impermissibly interfered with the manner in which appellant sought to present his evidence."

5) "We agree that the district court crossed the line and was in error."

6) "More importantly, such conduct challenges the fairness of the proceedings."

7) "(T)he district court unnecessarily interrupted defense counsel's presentation of the defense at trial."

8) "The district court's general interference in defendant's trial -- which included examining witnesses, interrupting counsel, and controlling the presentation -- strayed too far."

9) "Here, there was much more than an appearance of improper interference."

10) "At its core, such conduct tends to undermine the public's confidence in the integrity of the judiciary."

11) "At some point, repeated injudicious conduct must be recognized by this Court as a compelling basis for finding plain error."

12) "Here we are once again presented with a case replete with the district court's ill-advised comments and interferences."

13) "We agree that the district court crossed the line and was in error."

14) "The district court's repeated comments were imprudent and

poorly conveyed."

15) "Considering the breadth of the district court's actions, from questioning witnesses and counsel to interrupting unnecessarily, we find the district court strayed too far from convention."

[United States v. Martinovich, 810 F. 3d 232 (4th Cir. 2016)].

The Fourth Circuit has rarely reprimanded a District Judge with such direct and expressive language. Obviously, the Appeals Panel wanted to ensure their dissatisfaction with the egregious and unacceptable behavior was clear and unambiguous. Yet, due to Mr. Broccoletti's inexplicable actions to never once object to Judge Doumar's voluminous errors, the Fourth Circuit panel of review was then constrained with the extreme bar of plain error review, as opposed to the much lower harmlessness standard of review which would have yielded a reversal of Martinovich's conviction. The Panel continued:

16) "(I)n light of the plain error standard of review."

17) "(W)e may not intervene."

18) "Accordingly we must uphold the jury's verdict."

19) "Again, however, we were constrained by plain error."

[United States v. Martinovich, 810 F. 3d 232 (4th Cir. 2016)].

At the harmlessness standard of review, there is a reasonable probability that the Court of Appeals would have overturned Martinovich's conviction.

STRICKLAND FIRST PRONG

Mr. Broccoletti's "representation fell below an objective standard of reasonableness [Strickland v. Washington, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984)]. Mr. Broccoletti's performance,

actually lack thereof, fell well below a minimum professional norm of effective assistance.

When the critical defense witness, independent hedge fund auditor Mr. Umscheid, asserted that he had vetted the stock valuation reports and valuation expert, as well as personally approved and supported the questioned $2.88 stock price, Judge Doumar rose from his chair, ordered the jury out of the courtroom, and berated Mr. Umscheid on the perils of perjury. When the jury returned, the key witness was clearly intimidated and discredited in the eyes of the jury. Mr. Broccoletti stood silent and did not object. [Tr. p.2453]. "The district court's actions were in error." [Martinvoich].

When key government witness, independent solar valuation expert Mr. Lynch, asserted that he had prepared the valuation reports, he had placed his signature directly below the questioned $2.88 stock price, and he believed that at that time it was a conservative valuation price, Judge Doumar attempted to now discredit the failed government witness by yelling in front of the jury, "So your appraisal is absolutely worthless." [Tr. p.487]. Mr. Broccoletti, again, did not object. "Interference in this case went beyond the pale." [Martinovich].

Prior to deliberation, with the non-sequestered jury having access to the "The Daily Press," the local newspaper provided the jurors with Judge Doumar's statements in front of the media, "There isn't a scintilla -- a scintilla -- of evidence that there was any reason to raise the value $2.15 to $2.88, not a single thing." [Tr. p.3237, Daily Press Art.]. Mr. Broccoletti did not object. "More importantly, such conduct challenges the fairness

of the proceedings." [Martinovich].

Court-appointed appeal counsel, Mr. Woodward, submitted that Judge Doumar interrupted and interfered with Mr. Martinovich's personal testimony a shocking 168 times. Mr. Broccoletti never once objected. [No. 13-4828, Brief]. "At its core, such conduct tends to undermine the public's confidence in the integrity of the judiciary." [Martinovich].

Judge Doumar, in front of the jury, objected to defense counsel's litigation tactics, accusing Mr. Broccoletti of going outside trial court procedures and conducting discovery depositions with the witness. Mr. Broccoletti did not object. [Tr. p.1946]. "The district court became so disruptive that it impermissibly interfered with the manner in which appellant sought to present his evidence." [Martinovich].

When Judge Doumar interfered over fifty times in defense counsel's examination of the external fund auditor, even consuming over eight continuous transcript pages before relinquishing the floor back to counsel, Mr. Broccoletti failed to submit one objection to protect his client or even to allow the fund auditor to properly address the facts of the case. [Tr. p.2532]. "We agree that the district court crossed the line and was in error." [Martinovich].

The government, itself, was so mystified by Mr. Broccoletti's failure to object and protect the defense that AUSA Mr. Samuels, himself, counseled Judge Doumar to hopefully prevent a mistrial. Mr. Samuels stated, "Judge, given the court's comments and concerns...I just want to be certain that the record is clear that we will raise and object to the concerns...I just

don't want there to be any issue with this down the road, so I dont' feel it's incumbent on us as the government to attempt to protect the record." [Tr. p.2529]. The government knew Judge Doumar was totally out of control and that not only should have Mr. Broccoletti objected and preserved these errors for appeal, but that he should have moved for a mistrial on numerous occasions. AUSA Samuels plainly stated that it was not his job to protect Mr. Broccoletti's client. Again, Mr. Broccoletti stood silent and failed to file any objection to protect and preserve for Mr. Martinovich. [Tr. p.2529].

During counsel's quetioning of defense witness Mr. Umscheid, Judge Doumar, totally usurped the role of the prosecutor:

BROCCOLETTI: "Did you consider the stock market crash of just a couple months before that?"

UMSCHEID: "Well, remember the reason -- "

COURT: "Objection(!)"

Judge Doumar surprisingly objected in place of AUSA Samuels, and Mr. Broccoletti, again, failed to object. [Tr. p.2536]. Could there have been any question in the eyes of the jury of whose side the preeminent judge was on? "Here, there was much more than an appearance of improper interference." [Martinovich].

Any attempt by the government to claim that Mr. Broccoletti's performance was a strategic or tactical strategy instead of ineffective assistance fails on all counts. Not only did the performance failure greatly harm Mr. Martinovich's defense at trial, but Mr. Broccoletti's lack of error preservation was lethal to Mr. Martinovich's case on appeal. "In

light of plain error standard of review...we may not intervene." [Martinovich].

Supreme Court Justice Marshall stated, "I agree that counsel must be afforded 'wide lattitude' when making 'tactical decisions,' but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example...making timely objections." [Strickland].

"Defense counsel's decision not to object could not be called strategic, the court further observed, insofar as there was no apparent cost to objecting...and only a significant benefit to be gained." [Jones v. Clarke, 783 F. 3d 987 (4th Cir. 2015) Gregory].

When AUSA Samuels counseled Judge Doumar to reduce his interruptions and abuse, the trial transcripts clearly show that Judge Doumar, for a couple of hours, assumed the role of an unbiased, preeminent administrator. Judge Doumar did not react aggressively, or increase his egregious behavior, but instead this action had a calming and thoughtful effect on the Court. This in-trial case study was provided for Mr. Broccoletti to see that, if he would have objected, he would have received a positive effect in protecting his client in the eyes of the jury, not to mention the concern of preserving the error for appeal. Any argument to claim an objection would have increased the Court's abuse fails by direct and contemporaneous example. "However, Appellant did not object to the district court's interference. Although counsel may be reticent to object to such interference by the Court, failing to do so creates a high bar for appellate review." [Martinovich; citing United States v.

Smith, 452 F. 3d 323 (4th Cir. 2006)("Failing to bring even a single alleged error (of judicial interference) to the district court's attention during trial (does not) preserve the issue for appeal.")].

"It is therefore apparent to the Court that counsel's decision not to object was deficient performance under the first prong of Strickland...It bears repeating that a functioning adversarial system requires actual adversaries, not placeholders." [Jones; citing United States v. Cronic, 104 S. Ct. 2039, 80 L. Ed 2d 657 (1984)(The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting the role of an advocate)].

Recently, in United States v. Carthorne the Fourth Circuit confirmed the necessity of effective counsel to make timely and preserving objections, as well as to vigorously represent the defendant. The Fourth Circuit stated, "If counsel fails to raise a contemporaneous objection to a potential issue or error, the authority of an appellate court to remedy that problem is 'strictly circumscribed'...A litigant failing to object to an error generally forfeits his claim to relief on account of that error...'When a defendant's lawyer is confronted with error during a judicial proceeding, he has the responsibility to object contemporaneously, calling the question to the court's attention and preserving the issue for appellate review.'" [Carthorne; citing Puckett v. United States, 556 U.S. S. Ct. 129, 134 (2009)].

The Fourth Circuit continued, "Counsel must demonstrate a

basic level of competence...counsel may be constitutionally required to object." [Carthorne]. "(T)he failure to raise an objection that would be apparent...is a significant factor in evaluating counsel's performance." [Carthorne; citing Strickland 466 US at 690]. "(W)e do not regard a decision as 'tactical'...if it made no sense or was unreasonable." [Carthorne; citing Vinson v. True, 436 F. 3d 412 (4th Cir. 2006)]. "(W)e hold that the defendant's trial counsel rendered ineffective assistance...by failing to make an obvious objection." [Carthorne].

Respectfully, Mr. Martinovich asserts that Strickland's first prong is satisfied.

STRICKLAND SECOND PRONG

"The test for prejudice resulting from the ineffectiveness of criminal defense counsel requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Strickland].

PREJUDICE ON APPEAL

Mr. Martinovich first addresses the severe prejudice on appeal created by Mr. Broccoletti's ineffective assistance. Mr. Martinovich asserts that if Mr. Broccoletti would have objected one time and preserved the confirmed District Court errors, the Fourth Circuit Court of Appeals would not have been "constrained by plain error" and would have overturned Mr. Martinovich's conviction. Mr. Broccoletti's ineffective assistance, and only this failure, raised the standard of review from harmlessness to

the extremely high bar of plain error review. This failure caused the Fourth Circuit to assert, "Accordingly we must uphold the jury's verdict...in light of plain error...we may not intervene." [Martinovich].

The Fourth Circuit conducts the second Strickland prong analysis when reviewing whether counsel's lack of objection prejudiced the defendant at trial, as well as on appeal. "We agree...there is not a reasonable probability that either the outcome of the trial, or the direct appeal, would have been different had Ngo's trial counsel objected to the admission of Detective Ellis' testimony." [Ngo v. Holloway, 551 Fed. Appx. 713 (4th Cir. 2014)].

The Third Circuit supports this prejudice analysis on appeal. "The court reversed the decision of the district court denying defendant's request for habeas corpus relief because his trial attorney's constitutionally ineffective assistance in failing to object to the prosecutor's discriminatory use of preremptory challenges prejudiced his direct appeal," and, "The principles regarding constitutionally inadequate representation are applicable when the defendant was denied a just result on appeal because of the ineffectiveness of his attorney at the trial." [Govt. of the Virgin Islands v. Forte, 865 F. 2d 59 (3rd Cir. 1989)].

The Second Circuit also supports this prejudice review on the merits. "(T)o satisfy the second prong of the Strickland test, Parker must show that, but for his counsel's failure to preserve the sufficiency claim, there is a reasonable probability that the claim would have been considered on appeal and, as a

result, his conviction would have been reversed." [Parker v. Ercole, 666 F. 3d 830 (2nd Cir. 2012)].

If Mr. Broccoletti had preserved the errors, the appeals panel would have reviewed Judge Doumar's hundreds of errors under the standard of harmlessness. The Fourth Circuit explains this process as, "In determining whether a constitutional error is harmless, we consider whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. [United States v. Hagar, 721 F. 3d 167 (4th Cir. 2013); citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. The Fourth Circuit also describes this standard as, "under harmless review, the judgment 'may stand only if there is no reasonable possibility that the practice complained of might have contributed to the conviction.'" [United States v. Camacho, 955 F. 2d 950 (4th Cir. 1992); citing United States v. Hasting, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 96 (1983)].

Martinovich asserts that a fair and objective review of the record concludes there has to be a "reasonable possibility" that Judge Doumar's hundreds of errors "might have contributed to the conviction." Regardless of other variables, by definition, the Fourth Circuit would have reached this conclusion. Any other conclusion commits violence against common sense.

Unfortunately, Mr. Broccoletti's ineffective assistance raised the bar to the plain error standard of review, the bar implemented by the courts of review to correct errors only in the most egregious and broad-reaching circumstances. Fourth Circuit Justice Wynn described this lethal increase to plain error as,

"When a defendant raises a timely objection to judicial interference, an appeallate court reviews for harmless error. But, when a defendant fails to object at trial, the appellate court reviews only for plain error. Under plain error review, a trial judge's comments must be so prejudicial as to deny a party an opportunity for a fair and impartial trial." [United States v. Ecklin, 528 F. Appx. 357 (4th Cir. 2013)].

Review courts claim that a plain error must be so extreme that a failure to correct actually damages the integrity of the judicial process [Anderson Law Dict. 2002 Ed.]. But, even on top of this increased standard, the Courts impose another mountainous hurdle. "The primary difference between harmless-error review and plain-error review, of course, is the allocation of the burden of persuasion. Under harmless-error review, the government bears the burden of establishing the error was not prejudicial; under plain-error review, the defendant bears the burden establishing that he was prejudiced by the complained-of error." [United States v. Pitt, 482 Fed Appx. 787 (4th Cir. 2011); citing United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 12 L. Ed 2d 508 (1993)].

Recently in United States v. Carthorne, the Fourth Circuit clarified that on appeal, even though they may not find that an error eclipses the high bar of plain error review, counsel may still be deemed ineffective for not objecting to that error. The Fourth Circuit stated, "Upon our review, we conclude that the standards for plain error and ineffective assistance of counsel are distinct and do not necessarily result in equivalent outcomes for the defendant." [Carthorne].

Also in Carthorne, "(t)he magistrate judge acknowledged that counsel's alleged error satisfied the prejudice prong of Strickland because, if Carthorne's attorney had challenged the ABPO predicate offense, this Court (of Appeals) would have remanded for resentencing." [Carthorne]. If the attorney would have objected, the Appeals Court would not have been constrained by plain error and would have vacated the judgment.

"These differences, considered collectively, demonstrate why claims of ineffective assistance of counsel are not limited by an appellate court's analysis whether a trial court plainly erred." [Carthorne].

The Fourth Circuit continued, "The plain error standard therefore reflects the view that the primary responsibility for protecting a defendant's interests at trial lies with his attorney, not with the court...These failures by counsel resulted in prejudice to the defendant...VACATED AND REMANDED." [Carthorne].

Just as it is impossible to retrospectively determine what was actually occurring inside the minds of a jury when presented with extreme errors, we now cannot definitely determine which variables in the equation were given more or less weight by the Appeals Court, and which variables would have tipped the conclusion to the left or to the right. Martinovich was prejudiced.

Respectfully, Mr. Martinovich asserts that Strickland's second prong is satisfied.

PREJUDICE AT TRIAL

Mr. Martinovich, secondly, addresses the severe prejudice endured at trial due to Mr. Broccoletti's failures to object to Judge Doumar's egregious behavior and to not vigorously defend Martinovich and critical defense witnesses in the eyes of the jury.

Mr. Broccoletti's refusal to stop Judge Doumar's month-long barrage of interruptions, interference, and bias against the defense severely impacted Martinovich's constitutional rights of due process, equal protection, and right to present his defense to a jury of his peers. Martinovich had rejected three separate government plea offers in the belief that a fair and unbiased trial would serve the greater good. Yet, a fair and objective review of the record can only conclude that the trial "undermine(d) the public's confidence in the integrity of the judiciary," and that Broccoletti's failures to object violated Martinovich's rights from beginning to end. [Martinovich].

Even in the Fourth Circuit's restrained Opinion, the Judges replaced Judge Doumar and declared he "impermissibly interfered with the manner in which appellant sought to present his evidence," "went beyond the pale," and "challenge(d) the fairness of the proceedings." Yet, Mr. Broccoletti never once objected or attempted to restrain, or influence, the judge's behavior.

To even entertain a discussion that there is not a reasonable probability that Broccoletti's lack of objections might have contributed to the conviction, would violate all precedent concerning the preeminent role and tremendous persuasion held by a federal judge, the precedent confirming the importance of a vigorous defense by counsel, and simply just

common sense.

"Despite the broad discretion given, a trial judge occupies a position of preeminance and special persuasiveness in the eyes of the jury and must ensure that his participation during trial - whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct - never reaches the point at which it appears clear to the jury that the court believes the accused is guilty. For example, when a judge cross-examines a defendant and his witnesses extensively and vigorously, he may present to others an appearance of partisanship and, in the minds of the jurors, so identify his high office with the prosecution as to impair the jury's impartiality. A judge's apparent disbelief of a witness is potentially fatal to the witness's credibility. And the credibility of a testifying defendant is often of crucial importance in a criminal trial." [United States v. Ecklin, 528 Fed Appx. 357 (4th Cir. 2013)].

Respectfully, this court, the government, Mr. Broccoletti, or Mr. Martinovich could not read the minds of the jurors during trial, and still cannot years later. Regardless of any other variables in the equation, by Fourth Circuit definition, it is impossible to state that there is not a reasonable probability that Broccoletti's lack of objections might have contributed to the jury's final decision. Any attempt to state otherwise breaks all accepted curriculum of psychology, group psychology, and evidence interpretation. Without question, Mr. Martinovich's jurors were never exposed to a fair trial, and due to their inexperience, as with most all jurors, they likely never even knew how constitutionally-deficient were the proceedings. A few examples are provided for consideration:

1) As the transcripts confirm that the government's own counseling to Judge Doumar greatly deterred his interference for a period of time, what would the jury verdict have been had Mr. Broccoletti once, or multiple times, objected and reduced Judge Doumar's abuse of the defense?

2) What would the jury verdict have been if the critical defense witness, the independent auditor Mr. Umscheid, had been respectfully permitted to explain to the jury that he had thoroughly vetted the valuation expert, the valuation reports, and the other supporting Wall Street data, by which he concluded the $2.88 price was reasonable and procedurally correct? What if this testimony was presented for the jury to objectively analyze instead of the jury being thrown out of the courtroom and witnessing the belittling and discrediting of this critical defense witness? [No. 13-4828, Brief].

3) What would the jury verdicat have been if once the government key witness, solar valuation expert Mr. Lynch, confirmed that he authorized and supported the critical $2.88 stock price, that Mr. Broccoletti had prevented Judge Doumar from interjecting himself to discredit the expert? What if Judge Doumar had not said in front of the jury, "So, your appraisal is absolutely worthless," or that Mr. Broccoletti had then objected and defended the appraisal, or asked for a mistrial? Mr. Broccoletti knew Mr. Lynch's own testimony had destroyed the government's case, and then he allowed Judge Doumar to discredit Mr. Lynch in the eyes of the jury, not only discrediting his work, but even allowing

Judge Doumar to refer to Mr. Lynch as a "rubber stamp." [No. 13-4828, Brief, Pro Se Brief].

4) What would have been the outcome if Mr. Broccoletti had not only objected to Judge Doumar's abuse, but had timely motioned for mistrial, as was required of effective assistance, multiple times throughout the trial? If Judge Doumar had been removed from the case at this point instead of by the Fourth Circuit after the damage was already inflicted, or if a new jury was never exposed to this bias, a fair proceeding may have been possible. If Judge Doumar had denied the timely motion for mistrial, Mr. Broccoletti could have objected and preserved this error, and based on the language of the Fourth Circuit's Order, the Appeals Court would have reviewed this denial under the abuse of discretion standard and overturned Martinovich's conviction. [FRCP 33, 4:12cr101].

5) What would have been the jury verdict if Mr. Broccoletti had objected to Judge Doumar's abuse and deterred the judge from interrupting Martinovich's testimony 168 times, or at least defended Mr. Martinovich in the eyes of the jury? How could Mr. Martinovich explain the intricacies of hedge fund valuations to a layman jury while being interfered with 168 times? How could Mr. Martinovich possibly present a cogent, understandable, and believable explanation? [No. 13-4828, Brief].

6) After multiple days of deliberation, there was a hung jury. Reportedly, nearly a third of jurors were still convinced of Mr. Martinovich's innocence even after the egregious onslaught and

lack of objections. Directed by Judge Doumar to return again the next week, after an exhausting month, the jurors capitulated with a guilty verdict and were able to return to their normal lives. What would have possibly been the outcome if these jurors on the edge were not so heavily influenced by the preeminent ruler of the proceedings? Any argument to contend that their split decision shows a lack of coercive influence runs contrary to all organizational behavior research. Group think and behavioral economics studies prove the opposite conclusion. The government earlier referred to United States v. Cornell, 4th Cir. 2015, as an example where split verdicts communicate a lack of coercion, yet, respectfully, Cornell is comparing apples and oranges with Martinovich. Cornell decides whether multiple Allen Charges (directions to continue deliberations) are coercive to a jury's opinion. This scenario is incomparable to four weeks of interference and bias against the defense conducted by the persuasive judge before the jury even thought to begin formulating a verdict opinion. Cornell addressed the process at the very end while Mr. Martinovich has proven that the lens through which the trial was presented to the jury was tainted from beginning to end. The input was corrupted. Judge Doumar "impermissibly interfered," just as Cornell states the instruction cannot be "impermissibly coercive." The Fourth Circuit states "it must be fair, neutral, and balanced." [United States v. Cropp, 127 F. 3d 354 (4th Cir. 1997)]. How many more of the jurors would have agreed with the initial not guilty conclusions if the lens had been fair, neutral, and balanced? "(B)ecause we do not know what the jury would have concluded had

there been no instructional error, a new trial on the counts of conviction is in order." [Bravo-Fernandez v. United States, 196 LED 2d 242, 137 S. Ct. (2016)].

Just as it is impossible to retroactively determine the thought process inside the minds of the Appeals Panel, we now cannot definitely determine which variables in the equation were given more or less weight by the impressionable jurors, and which variables would have tipped the conclusion to the left or to the right. An objective review of the record determines, without question, that there is a reasonable probability that, but for Mr. Broccoletti's ineffective assistance, the result of the trial proceedings would have been different. [Strickland].

Finally, for the purpose of a comprehensive Ground One argument, Mr. Martinovich addresses the issues of the jury instruction and the evidence in relation to Mr. Broccoletti's ineffective assistance. Even though Judge Doumar's behavior was determined error, Mr. Broccoletti's failure was ineffective assistance, the Appeals Panel was constrained by plain error, and there was a reasonable possibility that the failure might have contributed to the jury verdict, the government has attempted to convince the Courts that these errors are harmless.

JURY INSTRUCTION

The government has claimed that an instruction to the jury at the end of Mr. Martinovich's trial cures the hundreds of errors committed by Judge Doumar.

At the end of the four-week barrage against the defense, as detailed in this Ground One, Judge Doumar addressed the jury and stated, to paraphrase, "But, don't listen to me. I'm just the Judge." Any attempt by the government to call this a curative jury instruction, simply propagates this "conduct (which) tends to undermine the public's confidence in the integrity of the judiciary." If Pepsi steals Coke's secret formula, but later apologizes, is it cured? If the wife beater takes his wife out to a nice dinner after each time he assaults her, is this abuse cured?

This reasoning would not stand in any court of law, or

certainly not in a court of public opinion. This tortured logic flies in the face of all group pyschology and organizational behavior dynamics related to a judge's influence on a jury. "Moreover, the district court's jury instructions could not cure the fatal defect." [United States v. Kingrea, 573 F. 3d 186 (4th Cir. 2009)].

Admirably, the Fourth Circuit's Opinion stated, "We recognize that one curative instruction at the end of an extensive trial may not undo the court's actions throughout the entire trial." The Fourth Circuit then even wanted to, again, stress the dire impact of Mr. Broccoletti's ineffective assistance by adding, "but we are also cognizant that Appellant failed to alert the district court of what Appellant now perceives as improper." [Martinovich]. "A trial judge occupies a position of preeminence and special persuasiveness in the eyes of the jury and must thus ensure that his participation during trial never reaches the point at which it appears clear to the jury that the court believes the accused is guilty." [United States v. Parodi, 703 F. 2d 768 (4th Cir. 1983)]. A curative instruction argument is impossible.

EVIDENCE

Throughout the government motions, the number of witnesses and documents presented have been referred to as "overwhelming evidence." Mr. Martinovich asserts that high volume presentations are consistently the prosecutorial strategy when actual evidence is lacking, or simply not available. To combat

Judge Doumar's statement during the pre-trial hearing that this was a weak case against Martinovich to begin with, the government piled on the volume, not to be confused with actual evidence. The government has consistently presented "28 witnesses and 250 exhibits" as a metaphor for overwhelming evidence. Mr. Martinovich asserts this mis-characterization stems from the following strategy: If there is not one condemning witness, then provide 28, and if there is not one damning piece of evidence, then present 250.

The government's continued use of the word "overwhelming" is an attempt to persuade an overworked judiciary, unable to actually review 3,300 pages of the trial record and a tremendous Appendix of Exhibits, that volume equals evidence. There is no overwhelming evidence. There is underwhelming evidence presented skillfully through a timely narrative of greed and luxury, and then aided by a complacent placeholder defense counsel and the outrageous judge behavior necessary to ensure a conviction.

First, the case against Martinovich alleges conspiracy, mail fraud, and wire fraud which are founded on false and fraudulent representations made by Mr. Martinovich. According to the trial jury instructions, "false or fraudulent...is defined as a statement known to be untrue at the time it is made or used with reckless indifference as to whether it was true or not." Also, "To convict a person of mail fraud or wire fraud...the government must prove that the defendant acted with specific intent." [United States v. Wynn, 684 F.3d 473 (4th Cir. 2012)]. Mr. Martinovich asserts that clearing away the prosecution's well-worn narrative of greed after the Financial Crisis, there were

zero representations made that were known to be untrue, and there was zero evidence of any specific intent to defraud.

Second, the government can rise no higher than the evidence and sworn testimony presented by its key prosecution witness, Mr. Lynch. Mr. Lynch, the solar valuation expert, was called by the government, was not given immunity, and was the only witness to testify that he performed the EPV Solar valuations and set the per share pricing. Mr. Lynch adamantly continued to stand behind the accuracy of his valuation and the specific $2.88 per share price. Note a sample of Mr. Lynch's testimony:

QUESTION: "When you fixed it on the last amount of $2.88, you felt that also was a reasonable figure based upon the value of the company?"

LYNCH: "Correct." [Tr. p. 445].

QUESTION: "And in the attachment you say 'consequently it is my conclusion that the share value of $2.88 and the overall company valuation of approximately $500 million arrived at earlier in this memo is conservative,' correct?"

LYNCH: "Yes."

QUESTION: "And the share value of $2.88 is highlighted, correct?"

LYNCH: "Correct."

QUESTION: "And by signing this you are representing the contents of that valuation under your signature, correct?"

LYNCH: "Correct." [Tr. p. 479].

JUDGE DOUMAR QUESTION: "And yet your value went to $2.88 after the crash?"

LYNCH: "Well, because the market crashes doesn't mean all the stocks in it crash." [Tr. p. 485].

There is no false or fraudulent representation, nor specific intent, upon which to legally base a conspiracy, mail fraud, or wire fraud.

Third, the testimony of the independent, external hedge fund auditor, Mr. Umscheid, who was also a member of the AICPA

Auditing Standards Board, also refuted the government's narrative. Note a sample of Mr. Umscheid's testimony:

> UMSCHEID: "(S)o my audit was focused on the cash transactions in and out and the valuations of the companies that the hedge fund held...because of the bond raise (Jefferies & Co. $77 million raise for EPV) there was an intrinsic value to the stock of $2.88 per share, based on the bond raise...Yes, I -- I approved -- I gave my opinion that the asset value that they put at $2.88 was reasonable, yes." [Tr. p. 2453, 2532, 2542].

Plainly based on the testimony of the government's own expert witness, as well as the testimony of the independent auditor, there cannot legally be a false or fraudulent representation, or reckless indifference, by Mr. Martinovich when he represented the $2.88 value of EPV Solar. There is no legal foundation, no evidence.

Fourth, government allegations that Mr. Martinovich was the driving force behind valuation increases, and that he was involved in a scheme to do whatever was necessary to inflate the value, are simply conclusory accusations relying on a greed narrative at a time when concerned jurors had just experienced their 401k's cut in half and their home mortgages in jeopardy. EPV Solar was point-two-percent (.2%) of Martinovich's $1 billion under management, was one of 1,000 direct investments managed under Martinovich, with 100 associates and seven separate lines of investment services. As Mr. Lynch confirmed at trial, Mr. Martinovich had zero contact or communication with the valuation expert. The fantastic conspiracy theory that Mr. Martinovich tricked his entire management team, tricked the valuation experts, and tricked the licensed auditors to all prepare and approve a fraudulent $2.88 price on an asset representing only

.2% of his firm's investments commits violence against common sense. There is no overwhelming evidence. [No. 13-4828, Arg. 1, 2].

Fifth, allegations that Mr. Martinovich promoted the MICG Venture Fund and the underlying investments, as well as believed the EPV Solar price was rising while a public offering was imminent, are all addressing legal, industry practice, and were fully supported with the investment analyses received by MICG's Investment Banking Division. Legally, all valuations and accounting could have simply been conducted internally under relevant securities and accounting guidelines, as most firms operate. Yet, Mr. Martinovich chose to incorporate external valuation experts and independent, licensed auditors in order to increase transparency and compliance redundancy. [No. 13-4828, Arg. 1, 2].

Sixth, after 88,000 seized emails and hundreds of ducuments were analyzed, the only alleged link to Mr. Martinovich desiring a higher stock price was the testimony of one banker, Mr. Glasser in New York, who was given immunity in exchange for completely reversing his previous under-oath testimony. Ironically, even if the admitted perjurer was correct, Martinovich desiring a higher price for his firm's investment would be legal and compliant with SEC and FINRA securities regulations, as well as FASB and AICPA accounting guidelines. To borrow from Judge Doumar, there is not "a scintilla of evidence" that Mr. Martinovich believed EPV Solar was not a sound investment, or that the initial public stock offering was not going to occur. Also, out of 88,000 communications reviewed, there was not one piece of evidence

identifying Mr. Martinovich even requesting a higher price. There is no overwhelming evidence.

Seventh, the government's allegation that Mr. Lynch was not qualified to perform a valuation of EPV Solar was quickly repudiated by trial testimony:

LYNCH: "I've been involved in and around the solar industry since 1977...My experience was in analyzing various solar companies and in performing work as an equity analyst on public solar companies and in assisting solar companies to raise financing...I was considered to be an expert in the segment of the solar industry that involved technology." [Tr. p. 446].

GLASSER: "I think this will be the absolutely best, most valued analysis that we could ever get...(Lynch) is a brilliant technology analyst and investor and focuses almost entirely on solar." [Tr. p. 717].

QUESTION: "Now, based upon the questions and answers that you received, did you make a determination about Mr. Lynch being competent and objective?

AUDITOR: "I did."

QUESTION: "And what was that decision?"

AUDITOR: "I believed he was competent and objective to do the job." [Tr. p. 2462].

There is no overwhelming evidence.

Eighth, the government alleged the valuation was fraudulent because Mr. Lynch reportedly didn't know MICG was also using the report. Again, this allegation shows a lack of understanding of industry regulation and both FASB and AICPA Valuation Standards. Note the testimony which proves the valuation met the auditor's requirements:

GIFIS: "The auditor looked at (the report) and wanted some improvement in its presentation, some refernce to FASB standards, some information about Mr. Lynch's background and qualifications as an appraiser. And he had seven points he was raising."

QUESTION: "Is there any qualification for what the purpose of the opinion letter was?"

AUDITOR: "No, there is no qualification on this whatsoever at all."

QUESTION: "Did you ever see any qualifications on any of the valuations from Mr. Lynch as to the purpose of the valuation?"

AUDITOR: "Mr. Lynch never qualified his valuation in any of the valuations I saw."

JUDGE DOUMAR QUESTION: "He never qualified any of the valuations?"

AUDITOR: "No, Your Honor, they were all open valuations which means -- (interrupted by Court)." [Tr. p. 636, 2549].

For the Court, an open valuation is the most common form which denotes the valuation is suitable for multiple purposes and may be taken at face value. There is no overwhelming evidence.

Ninth, the government allegation that Mr. Martinovich authored valuations for his personal benefit and transmitted for Mr. Lynch 's approval is totally unfounded. Note the testimony:

Government-witness Glasser, testified that he made any changes to the valuations with Mr. Lynch in New York.

QUESTION: "Did you make those changes on that (valuation report)?"

GLASSER: "I did." [Tr. p. 834].

Judge Doumar asked the fund auditor directly.

JUDGE DOUMAR: "So Mr. Martinovich really had nothing to do with the value; it was only Glasser. Is that correct?"

AUDITOR: "That would be my assumption, yes, Your Honor." [Tr. p. 2523].

And, the MICG Chief Operation Officer, Mr. Cadieux, confirmed.

QUESTION: "Were you part of that meeting?"

CADIEUX: "I was."

QUESTION: "Did you know what the number was at that time?"

CADIEUX: "I think there was a discussion of it being around $2.88."

QUESTION: "And how did that discussion come to play?"

CADIEUX: "Bruce (Glasser) said that that was a valid number for the funds."

QUESTION: "Do you know how he arrived at that number?"

CADIEUX: "I assumed he got it from Gifis and/or Lynch." [Tr. p. 2362].

There is no overwhelming evidence.

Tenth, the government allegations that Mr. Martinovich invested in front of clients or received priority in redemptions or distributions, again, does not comply with the strict compliance protocols administered by MICG's Finance and Compliance Divisions. Mr. Martinovich had personally seeded multiple MICG hedge funds, and had also liquidated partial positions which were, in turn, re-deposited directly back into MICG to fund the acquisitions of multiple investment practices from Wall Street firms under duress during the Financial Crisis. [Tr. CFO, Feldman]. Multiple MICG management members testified to the proper documentation, priorities, front-running regulations, and audit reviews. [Tr. p.2259, Russel]. The government also failed to include the significant client distributions which were incongruent with their false narrative, to include the $4,606,221 returned to investors, outside of owners and employees, in the 2008-2009 period cited by the government for fraudulent conduct. [Exhibit - Hedge Fund Redemptions 2008-2009, No. 13-4828, Brief]. There is no overwhelming evidence.

Finally, in relation to evidence claims, with Mr.

Martinovich's above repudiations aside, it is important to note that the Supreme Court has determined that the prejudice calculus does not involve an inquiry into the strength of the evidence against the defendant. When the lower Court in Supreme Court Case Strickler found no prejudice because "the record contained ample, independent evidence of guilt," the Supreme Court stated, "The standard used by that court was incorrect." [Strickler v. Greene, 527 US, at 290, 144 L. Ed 286, 119 S. Ct. 1936 (1999)].

The Supreme Court emphasized that it is not for this Court to determine that without Mr. Broccoletti's ineffective assistance, whether Mr. Martinovich would have received a different verdict based on ample evidence. That is the wrong question. The Supreme Court states that the question is whether with Mr. Broccoletti's ineffective assistance did Mr. Martinovich receive a fair trial.

"The question is not whether (Martinovich) would more likely than not have received a different verdict with (effective assistance), but whether in its abscence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. On the record before us, one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the (ineffective assistance not been present)." [Banks v. Dretke, 540 US 668, 157 L. Ed 2d 1166, 124 S. Ct. 1256 (2004); citing Kyles v. Whitley, 131 LED 2d 490, 115 S. Ct. 1555 (1995); Stickler].

Also, the recent Fourth Circuit decision in United States v. Lefsih and the Seventh Circuit decision in United States v. El-

Bey have re-confirmed that even with substantial evidence determinations by the Court, all defendants who elect to defend themselves at trial are, at least, guaranteed a fair trial in the United States of America. [5th Am., 6th Am., 14th Am. U.S. Const., United States v. Lefsih, 867 F. 3d 459 (4th Cir. 2017); United States v. El-Bey, 873 F. 3d 1015 (7th Cir. 2017)]. Lefsih, El-Bey, and Martinovich are nearly indistinguishable in regards to legal factors. All three cases contained egregious Court interference and bias, exacerbating errors with curative jury instructions, government intervention to protect the record, Court determination of substantial evidence, and a lack of preserving objections creating a plain error standard of review on appeal. The Courts stated, "Lefsih cannot prevail on his claim of insufficient evidence...(w)here the case against a defendant is 'compelling and overwhelming,' the court has been prepared to infer that a jury did not convict because of a court's erroneous interventions." [Lefsih]. And, the Court stated, "Although there is more than enough evidence of El-Bey's guilt." [El-Bey].

Yet, the Appeals Courts overturned these convictions, stating, "(W)e must...conclude that the unfairness of the trial requires reversal. Any other holding would constitute the adoption of the principle that a defendant the Court thinks is obviously guilty is not entitled to a fair trial." [El-Bey]. And, "Because the error was of the kind that could seriously affect the fairness, integrity, or public reputation of judicial proceedings, the court corrected it by vacating defendant's conviction." [Lefsih]. In lock step, the Appeals Court in

Martinovich stated, "More importantly, such conduct challenges the fairness of the proceedings...such conduct tends to undermine the public's confidence in the integrity of the judiciary." [Martinovich].

Mr. Martinovich respectfully asserts that both prongs of Strickland are satisfied, whether following the recent Fourth Circuit clarification set in Carthorne that "the standards for plain error and ineffective assistance of counsel are distinct and do not necessarily result in equivalent outcomes for the defendant," or following recent Fourth Circuit clarification in Lefsih confirming that although "(a)t no point did Lefsih object to the district court's questions or comments, (and)...Lefsih cannot prevail on his claim of insufficient evidence...the district court's interventions were not only plainly erroneous but also so prejudicial as to deny defendant an opportunity for a fair trial."

Based on the plain language of the Fourth Circuit in United States v. Martinovich, Mr. Martinovich must prevail based on the confirmations set in Lefsih and El-Bey. And, at a minimum, Mr. Martinovich must prevail at the harmlessness standard of review invoked with the distinction set by the clarification of Carthorne.

REMEDY

Mr. Martinovich respectfully asserts that he has proven that trial counsel, Mr. Broccoletti, provided ineffective assistance and that Mr. Martinovich was prejudiced by this failure. Both Strickland prongs have been thoroughly satisfied, while any

arguments of harmlessness have been disproven. Without question, there is a reasonable probability that, but for Mr. Broccoletti's ineffective assistance, the results of the proceedings would have been different. Mr. Martinovich respectfully requests this Court Vacate the Case No. 4:12cr101 Full Judgment, to include conviction, sentence, restitution, and forfeiture.