MR

Jeffrey A. Martinovich
Reg. No. 81091-083
FPC - Beckley
P.O. Box 350
Beaver, WV 25813

RECEIVED
2019 APR -8 PM 1:21

April 2, 2019

Clerk of Courts Fourth Circuit Court of Appeals
Lewis F. Powell, Jr. U.S. Courthouse
1000 East Main St.
Richmond, VA 23219-3517

Re: MARTINOVICH Case No. 18-7061

Dear Clerk:

Please process the enclosed Petition for Rehearing, Rehearing En Banc, and Reconsideration, and please post to the docket along with this cover letter. Thank you very much for your assistance.

Sincerely,

Jeffrey A. Martinovich

Jeffrey A. Martinovich

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

...IVED
2019 APR -8 PM 1:21
...COURT

UNITED STATES OF AMERICA,

Plaintiff - Appelee,

v.

Case No. 18-7061
(4:18-cv-00027-AWA)
(4:15-cr-00050-AWA-LRL-1)

JEFFREY A. MARTINOVICH,

Defendant - Appellant.

PETITION FOR REHEARING, REHEARING EN BANC, AND RECONSIDERATION OF DENIAL OF CERTIFICATE OF APPEALABILITY

NOW HERE COMES Jeffrey A. Martinovich, proceeding pro se, in a Petition for Rehearing pursuant to FRAP 34, for Rehearing En banc pursuant to FRAP 35, and for Reconsideration of this Court's denial of three specific Grounds for Certificate of Appealability/Appeal in this civil § 2255 proceeding for Case No. 18-7061/4:18cv00027/4:15cr00050.

ENCOURAGEMENT TO PROCEED FURTHER

Miller-El v. Cockrell, 537 U.S. 322 (2003) established the showing a petitioner must make to obtain a COA under 28 U.S.C. § 2253(c). As this Court explained, "a prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right...A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

The Supreme Court further explained that a petitioner seeking

a COA is not required to prove "that some jurists would grant the petition for habeas corpus." Id. at 388. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id.

As the foregoing makes clear, the COA standard is not difficult to satisfy. The requirements of § 2253(c) are "non-demanding." [Wilson v. Belleque, 554 F. 3d 816, 826 (9th Cir. 2009). A COA should be granted unless the claim presented is "utterly without merit." [Wilson citing Jefferson v. Welborn, 222 F. 3d 286, 289 (7th Cir. 2000)]. Martinovich's voluminous, thoroughly-documented Grounds noted in this instant Petition, to include 304-factual item Martinovich Amended affidavit and 43 Exhibits more than satisfy these standards, and this Court should conduct a rehearing on these three Grounds.

PROCEDURAL

On March 28, 2019, Mr. Martinovich received this Court's March 26, 2019, Order Granting COA on three issues and denying all other claims. Herein, Mr. Martinovich respectfully Petitions this Court for reconsideration of three previously denied robust Grounds in which the panel decision conflicts with decisions of the Supreme Court and the Fourth Circuit, as supported by incontrovertible evidence and precedent noted in this Petition, and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. [FRAP 35(a)(1)] This denial of Certificate of Appealability is considered "in" the Appeals courts consistent with Hohn v. United States, 524 US 236, 141 L. Ed. 2d 242, 118 S. Ct. 1969 (1988) [Supreme Court

held to have jurisdiction to review Federal Court of Appeals denial of certificate of appealability concerning Federal District Court's denial of accused's Motion under 28 UCSC § 2255 to vacate federal conviction.].

This Petition is timely within 45 days in this civil proceeding with the United States as one of the parties, as well as within 14 days after entry of judgment. [FRAP 40(a)(1)].

ISSUE 1:

The initial denial of GROUND ONE: COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO AND INTERVENE AGAINST THE VIOLATION OF MARTINOVICH'S FIFTH AMENDMENT RIGHT OF DUE PROCESS IN REGARDS TO MENTAL DISEASE OR DEFECT directly conflicts with the unambiguous instructions of 18 U.S.C. § 4241 Determination of Mental Capacity to Stand Trial or Undergo Post-release Proceedings, U.S.S.G. § 5k2.13 Diminished Capacity, F.R.Crim.P. 11 Pleas, and 18 U.S.C. § 4242 Determination of the Existence of Insanity at the Time of the Offense, as well as U.S. v. Broaddus (4th Cir. 2002) and Drope v. Missouri (U.S. S. ct. 1975)["The conviction of a defendant when he is legally incompetent is a violation of due process."]; Walton v. Angelone (4th Cir. 2003)["A defendant may make a procedural competency claim by alleging that the court failed to hold a competency hearing after the defendant's mental capacity was put in issue. Although there are no immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed, proof of a defendant's irrational behavior (is) relevant."]; U.S. v. Broaddus (4th Cir. 2002)["A person has a procedural right to a competency hearing if there is a reasonable cause to believe that a defendant may be presently suffering from a mental disease

or defect rendering him mentally incompetent."]; U.S. v. Song (4th Cir. 2013)["An examination regarding the defendant's sanity at the time of the offense was therefore required by statue: thus, we need only decide whether the district court properly ordered the examination be conducted."]; U.S. v. Brewer (4th Cir. 2008)["We lack authority to review a sentencing court's denial of a downward departure unless the court failed to understand its authority to do so."]; U.S. Frazier (4th Cir. 2014)["(A) criminal defendant may not plead guilty unless he does so competently and intelligently."]; and, of course Strickland v. Washington (US S. Ct. 1984).

No objective observer, to include the packed courtroom, the Hampton Roads media, subsequent legal observers, Mr. Martinovich's blog readership, and the upcoming book's publisher, could or did possibly believe that the Honorable Judge Wright Allen did not demonstrably proclaim "there is a reasonable cause to believe that the defendant may be presently suffering from a mental disease or defect."

Whether Judge Wright Allen deep down in her own psyche did honestly believe her ten (10) unambiguous, specific proclamations of Mr. Martinovich's "mental health," or if her beyond the pale histrionics were all an attempt to reconcile for the crowd the fantastic allegations of the superseding indictment against Martinovich's history of success for his clients and extraordinary service to his community, is legally irrelevant and not for this Court of Review to interpret her inner beliefs. She said it. She yelled it. She repeated it over and over. And, court-appointed counsel never once objected or called for a competency

hearing and psychiatric or psychological examination, or moved to withdraw the plea contract, or moved for a downward departure, or objected to the "specific intent" requirements.

Judge Wright Allen proclaimed:

1. "It's something wrong with his brain." [Tr. p.92].
2. "There's something wrong, and I don't know what's wrong." [p.92].
3. "But there's something wrong, and we're going to get you mental health treatment under my case, because there's something wrong, and it's not been fixed." [p.92].
4. "It's breaking my heart not to be able to figure out what's wrong." [p.92].
5. "(I)t's not been fixed." [p.92].
6. "I know you're not polluting your brain with poison." [p.92].
7. "There's something wrong. I'm not a doctor, we're going to get mental health treatment, but there's something wrong." [p.102].
8. "So I don't know what's wrong. I don't. It's complex and sophisticated." [p.102].
9. "And I'm hoping you get some help to fix that, because you've got a very deep problem." [p.102].
10. "I'm going to recommend mental health treatment as well." [p.106].

"Proof of a defendant's irrational behavior (is) relevant." [Walton].

By definition, these proceedings, evidence, documentation and thorough arguments are consistent with previous Fourth Circuit and Supreme Court precedent correctly enforcing the Congressional statutes and Sentencing Guidelines demands. As this Court is well aware, this case is replete with judicial misconduct and abuse of discretion, exacerbated by incorrigible ineffective assistance of counsel. Further condoning behavior by this Honorable Court of Review simply, further, "undermines the public's confidence in the integrity of the judiciary." [U.S. v. Martinovich (4th Cir. 2016). Denying this Ground is clearly a miscarriage of justice.

Mr. Martinovich respectfully requests this Honorable Court GRANT a COA for this ground. Reasonable jurists could conclude that Martinovich's claim is meritorious and not procedurally defaulted. [Included by reference herein: Ground 1 (Docs. 74, 89); Amended Affidavits #'s 158-183 (Doc. 90, p. 41-46)].

ISSUE 2:

The initial denial of GROUND SIX: COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE TAINTED INDICTMENT AND COUNT EXCEEDING STATUTE OF LIMITATIONS directly conflicts with the true and plain verbiage of Fed.R.Crim.P. 6(e)(4)["may direct that the indictment be kept secret until a defendant is in custody or has been released pending trial," nothing else.]; the true and plain language of U.S. v. Mitchell (11th Cir. 1985)["and can toll the statute" once a "rules-based" decision to seal has been approved]; U.S. v. Upton (1st Dist. 2004)["Delay in unsealing an indictment is unreasonable if there is no legitimate prosecutorial need for it...(and) an improperly sealed indictment does not toll the statute of limitations."]; U.S. v. Spector (1st Cir. 1999)[Court did not overlook governments unsealing-expiration mistake even though it was "likely the result of some unintended clerical error."]; and it is well-settled in this Court that the overreach of U.S. v. Ramey (4th Cir. 1986) including the misquote of Rule 6(e)(4), founded upon a mistaken 1949 comment by Judge Maris in U.S. v. Michael (3rd Cir. 1949), is bad precedent and why it is very-rarely referenced by prosecutors in the Fourth Circuit.

This Honorable Court and Mr. Martinovich both know what truly happened here. AUSA Mr. Samuels and AUSA Ms. Dougherty knew that Mr. Martinovich's sentence would likely be vacated,

and his trial conviction would also likely be overturned on appeal, or at a minimum on collateral attack. So, the prosecutors conceived a superseding indictment to act as a sword of Damocles over Martinovich's head to coerce a plea contract. Yet, the prosecutors fraudulently moved the District Court to seal the indictment, even though Martinovich was already securely in custody, in order to wait and see if they needed it - all illegal. Next, the prosecutors erred and let the indictment expire and unseal, allowing the statute of limitations to clearly expire (even though they were illegally tolling to begin with) - the very specific statute of limitations for which the prosecutors had compelled the grand jury for an indictment, and then for which they also compelled the District Court to seal, all clearly spelled out on the record.

Faced with this dilemma, the prosecutors judge-shopped the motion to illegally re-seal the indictment, and conceal the expired statutes of limitations, before Magistrate Judge Miller, then to Magistrate Judge Krask, then to Magistrate Judge Leonard, and then back again to Magistrate Judge Miller who eventually signed the illegal motion, and not as nunc pro tunc. [AUSA Samuels also singed this one motion, and only this one motion, "For AUSA Kathleen Dougherty").

Finally, once this artifice to defraud was uncovered by Martinovich, to include FOIA request communications between the prosecutors and the BOP, instead of correcting this fraudulent and illegal conduct, the District Court post hoc replaced the statute of limitations - the very statute recorded on the record as the compelling need for the indictment, to illegally seal the indictment, and again to illegally re-seal the indictment.

Again, no objective observer, to include recent publications and publishers, for one second believe this not to be egregious corruption and fraud by the Department of Justice, during a time period when obvious fraud and illegal activities by the FBI and the Department of Justice seem to be uncovered daily. This case, replete with judicial misconduct and abuse of discretion, along with incorrigible ineffective assistance of counsel, also clearly contains prosecutor fraud to achieve a "win-at-all-cost" objective. Counsel was ineffective over and over in not identifying and objecting to this fraud.

Denying this Ground is clearly a miscarriage of justice. Mr. Martinovich respectfully requests this Honorable court GRANT a COA for this Ground. Reasonable jurists could conclude that Martinovich's claim is meritorious and not procedurally defaulted. [Included by reference herein: Ground 6 (Docs. 74, 89); Amended Martinovich Affidavit #'s 78A-82, 239-250 (Doc. 90); newly discovered evidence - BOP Emails/Memorandums].

ISSUE 3:

The initial denial of GROUND FIVE: COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE A DEFENSE OF INNOCENCE AT TRIAL AND INSTEAD COERCED MARTINOVICH INTO ACCEPTING A DETRIMENTAL PLEA CONTRACT directly conflicts with Lafler v. Cooper (US 2012)["In the context of pleas a defendant must show that the outcome of the plea process would have been different with competent advice."]; Lee v. U.S. (US 2017)[There was a reasonable probability that, but for counsel's ineffective assistance, defendant would have rejected a guilty plea..."Judges should look to contemporaneous evidence to substantiate a defendant's expressed preferences."]; Townsend

v. Sain (83 S. Ct. 757)[The Supreme Court held that the district court must hold an evidentiary hearing if the prisoner alleges facts that, if true, would entitle him to relief]; and Fontaine v. United States (93 S. Ct. 1463)[If the record of the case does not "'conclusively show' that under no circumstances could the [movant] establish facts warranting relief under § 2255," the movant must be afforded a hearing in the district court.].

Mr. Martinovich respectfully submits to this Court the understanding of the voluminous nature of this thoroughly-documented Ground and the quantity of Affidavit factual submissions and Exhibits of contemporaneous notes and communications between Martinovich and court-appointed counsel. This is certainly a time-consuming Ground for the Fourth Circuit clerk to initially vet and discern. Yet, Mr. Martinovich respectfully asserts that a reasoned analysis in the totality leaves no other finding than an admission that a reasonable jurist could conclude that Martinovich's claim is meritorious, taking the alleged facts as true. If this Court "look(s) to the contemporaneous evidence to substantiate a defendant's expressed preferences," it would approve a COA on this Ground for which, at a minimum, the District Court must have held an evidentiary hearing for these nonfrivolous, non-conclusory, contemporaneous facts and evidence.

Without question, Mr. Martinovich was thwarted at every turn from taking this improbable superseding indictment to trial, as he had already shown his propensity by rejecting three plea offers and proceeding to trial on the initial case. [Lee]. And, any objective analysis of the Affidavit and Exhibits paints

a clear picture of the incorrigible ineffective assistance, or fraud, employed by the court-appointed counsel to then trick Martinovich into an agreement with the new judge (to whom he "Switched the case") and the prosecution, claiming Martinovich would be released if he would finally just "go along." [Amburn Affidavit].

The voluminous communications between Martinovich and counsel (which were consistently emailed to counsel for confirmation - see exhibits) can yield no other conclusion. But for counsel's refusal to pursue trial, and his belligerant and repetitive manipulation of a false agreement, Martinovich would have proceeded to trial, without question. Herein, as his temper boiled over with counsel, Martinovich provides a few of over sixty (60) statements and exhibits which, at a minimum, demand an evidentiary hearing:

"Wouldn't an attorney be able to show a jury of at least 8th grade education how with 4 law firms and accountants so intimately involved in handling every setp - how would or could Horrible Martinovich take cash out of hedge fund accounts (Ridiculous), take expense reimbursements unauthorized (Ridiculous), and trick and manipulate 4 law firms in a magic act not to let them know where the money was coming from (Ridiculous!) - Just as Martinovich secretly manipulated in a wild conspiracy his Mgt. Team, the Valuation Expert, and the Auditors...Again, commits violence against common sense." [Ex. 7, Aff.# 69].

"Trial Defense Support - I will not let lawyers 'off the hook'".

"Trial Defense Support - No Intent/Will/Mens Rea"

"Trial Defense Support - Theme: Factual & Authorized & Legal." [Ex. 4, 5; Aff.# 109].

Mr. Martinovich respectfully asks this Court to read the documented quotations and contemporaneous exhibits, and to GRANT a COA for this Ground. Reasonable jurists could conclude that Martinovich's claim is meritorious and not proceduraly defaulted. [Included by reference herein: Ground 5 (Docs. 74, 89); Amended

Martinovich Affidavit #'s 49-78, 102, 104-105, 107-109, and 230-238 (Doc. 90) and referenced Exhibits #1-43 (Doc. 74)].

CONCLUSION

Mr. Martinovich respectfully requests this Court GRANT this Petition for Rehearing, Rehearing En Banc, and Reconsideration of the above one, two, or three Grounds for COA approval and allow for a transparent review.

Respectfully,

Date: 04/02/2019

Jeffrey A. Martinovich

MARTINOVICH AFFIDAVIT

I, Jeffrey A. Martinovich, hereby attest under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, pursuant to title 28 U.S.C. 1746, & under word count.

Date: 04/02/2019

Jeffrey A. Martinovich

CERTIFICATE OF SERVICE - LEGAL MAIL

I, Jeffrey A. Martinovich, hereby attest under the penalty of perjury pursuant to Title 28 U.S.C. 1746 that I deposited this Petition in this institution's legal mail system in accordance with Houston v. Lack on 04/02/2019 and sent a true copy on 04/02/2019 to the below recipient.

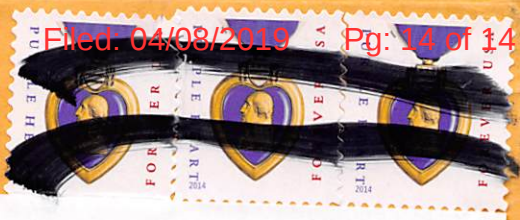
Mr. Brian Samuels, AUSA
U.S. Attorneys Office
101 W. Main St., Suite 800
Norfolk, VA 23510

Date: 04/02/2019

Jeffrey A. Martinovich

⇔81091-083⇔
Jeff Martinovi
Reg. No. 810
PO BOX Box
Fed. Pris. Camp - Beckley
Beaver, WV 25813
United States

⇔81091-083⇔
Lewis F Pow
Attn: Clerk of
1100 E MAIN
Suite 501
Richmond, VA
United States



UNITED STATES POSTAL SERVICE

1000

23219

U.S. POSTAGE PAID
FCM LG ENV
BEAVER, WV
25813
APR 03, 19
AMOUNT
$0.00
R2305K141865-04

ll Courthouse
Court
ST

23219

INSPECTED

APR 0 8 2019

U.S. MARSHALS