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

JEFFREY A. MARTINOVICH, Petitioner,	)	Case Nos. 4:12cr101 4:15cr50/4:18cv27
v.	)	Honorable Chief Judge Mark S. Davis
UNITED STATES, Respondent	)	

MOTION TO RESPOND TO GOVERNMENT'S REPSONSE TO PETITIONER'S MOTION FOR COMPASSIONATE RELEASE AND/OR IN THE ALTERNATIVE FOR SENTENCE REDUCTION OR REDUCTION TO TIME-SERVED PURSUANT TO 28 U.S.C. SEC. 2255 IN SUPPORT OF ALL STAKEHOLDERS' OBJECTIVES

NOW HERE COMES Jeffrey A. Martinovich, proceeding pro se and in forma pauperis, in a timely Motion to Respond to Government's Response to Motion for Compassionate Release or in the alternative to Reduce Sentence to Time-Served as opposed to five more years on Home Confinement [Doc. 159].

Although Mr. Martinovich in the preceding Motion had attempted to address this epic legal journey with focus on the positive outcomes, herein he is, again, forced to refute the U.S. Attorneys Office's inaccurate manipulation of the Court and subjective focus on repentance and control. With great respect to the U.S. Attorneys Office, Mr. Martinovich believes its decade-long impedance to restoration of shareholders and stakeholders is misguided, and Mr. Martinovich's now life-long pursuit for criminal justice reform in the United States will attempt to correct it.

Addressing the AUSA's claims that there are no extraordinary reasons, Mr. Martinovich herein confutes these claims and implores this current Honorable Court to allow for the restoration of so many stakeholders. Mr. Martinovich presents a subsection of what is, otherwise, a long list of extraordinary reasons.

EXTRAORDINARY AND COMPELLING OTHER REASONS

1. For nearly a decade, the U.S. Attorneys Office has repeatedly based its nearly entire presentation on the assertion that Mr. Martinovich has not repented, been rehabilitated, or taken responsibility. The demand for genuflection instead of the recognition of the extraordinary work of compliance and extreme aid to other inmates exhibited by Mr. Martinovich, is in direct contravention to the goals upon which the U.S. federal justice system was founded in 1789. Martinovich has shown exceptional actions, while the Government's responses use words of control and contrition. Mr. Martinovich has repeatedly expressed his regrets to this Court for years and years, yet never enough for the Government, simply because Mr. Martinovich has also repeatedly identified the falsities, fallacies, and fraud presented to this Honorable Court.

2. From the very beginning, these problematic proceedings were the expected result of a foundational core in which the most significant actor has "apologized and expressed sincere regret" on public record and submitted to "voluntary corrective action." The record also states, "interference in this case went beyond the pale," "the district court became so disruptive that it impermissibly interfered with the manner in which appellant sought to present his evidence," "such conduct challenges the fairness of the proceedings," and "at its core, such conduct tends to undermine the public's confidence in the integrity of the judiciary."

3. The Fourth Circuit Court of Appeals removed the trial judge, the Honorable Robert G. Doumar, from any further proceedings with Mr. Martinovich's case.

4. The Fourth Circuit Court of Appeals reversed the prior U.S. District Court for the Eastern Division of Virginia, for the second time, and approved Certificates of Appealability on two separate grounds which would reverse Mr. Martinovich's conviction, finding trial counsel, Mr. James Broccoletti, violated the first prong of Ineffective Assistance of Counsel.

5. The AUSA states that Martinovich has received a substantial benefit from the Bureau of Prisons (BOP) by being released early to a period of home confinement. Yet, the AUSA does not explain that this partial step was only possible because Mr. Martinovich was successful in filing suit against the BOP in The United States District Court for the District of New Jersey to be moved to a lower security facility, therefore eligible for this transition, all after exhausting years of denied administrative relief. The successful suit identified FOIA documents noting the collusion between the U.S. Attorneys Office and FCI Fort Dix to keep Mr. Martinovich for over four years in a higher-security, violent facility based on a fraudulent Greater Security Management Variable applied to his file. Following his suit, he was moved six (6) days later and became eligible for this future transition.

6. After the Fourth Circuit Court of Appeals reversed Mr. Martinovich's sentence, the Government presented a new indictment which had been illegally-sealed in order to first see if Martinovich won his appeal, which was then accidentally unsealed and expired, and was then placed before three separate federal magistrate judges before being quietly resealed, all the while knowingly containing expired statute of limitations. Finally, the prior District Court, itself, substituted a new statute of limitations for the Government when the entire process was uncovered by Mr. Martinovich.

7. And, yes, after being held in the county jail for another eight months, Mr. Martinovich agreed to a global settlement in the belief that his court-appointed attorney had arranged for his release, or near-term release, based on his agreement to put these proceedings behind for everyone. His voluminous, contemporaneous documentation on the record, and more to be presented at an evidentiary hearing, without question documents this agreement which turned into an orchestrated ambuscade to not release Martinovich but to sentence him to eleven (11) more years of incarceration.

8. The Fourth Circuit Court of Appeals reversed the prior U.S. District Court for the Eastern Division of Virginia for the third time, and approved Certificates of Appealability on three separate grounds and issued Final Orders on all three Grounds after analyzing whether court-appointed counsel, Mr. Lawrence Woodward, violated both the First and Second Prongs of *Strickland* to determine ineffective assistance of counsel, as well as this failure prejudiced Mr. Martinovich on two separate Grounds, and required an evidentiary hearing for the third.

9. The U.S. District Court Judge who assumed authority over Mr. Martinovich's case after the first U.S. District Court Judge was removed, recused herself from all further proceedings following the above rulings by the Fourth Circuit Court of Appeals.

Mr. Martinovich prays that this current Honorable Court finds these factual submissions, documented repeatedly in court filings, as "extraordinary and compelling other reasons." He cannot imagine this to be representative of the system which the Founding Fathers created in 1789, or certainly of the great nation they envisioned, the nation Mr. Martinovich and his father have both fought to defend.

EXTRAORDINARY AND COMPELLING EVIDENCE

As the current Honorable District Court was not present for the foundation of this case and the years of litigation, Mr. Martinovich, respectfully, presents a subset of evidence previously introduced to the Fourth Circuit Court of Appeals, resulting in Certificates of Appealabilty and reversals of District Court rulings. Mr. Martinovich herein submits that this compelling evidence, all documented on the court record, at a minimum provides uncertainty to these outcomes and allows for consideration of a comprehensive remedy today in favor of the stakeholders' restoration:

1. Mr. Peter Lynch, the Government's star witness, not given immunity, 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. 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].

2. The testimony of the independent, external hedge fund auditor, Mr. Michael Umscheid, member of the AICPA Auditing Standards Board, supported Mr. Lynch'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 (Jeffries & Co. $77 million raise for EPV Solar) 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. 245, 2532, 2542].

3. The fantastic narrative that Martinovich tricked his entire management team, tricked the valuation experts, and tricked the licensed auditors to all prepare and approve a fraudulent valuation was repeatedly refuted. Mr. Lynch testified that he had zero contact or communication with Mr. Martinovich. Testimony confirmed that EPV Solar was one of over 1,000 investments managed by MICG's 100 associates with seven separate lines of services, represented less

than point-two percent (0.2%) of MICG's billion dollars under management, and provided a negligible fee for the firm, and certainly to Mr. Martinovich. [No. 13-4828; 1, 2].

4. The independent, external solar valuation expert was qualified to perform the valuation:

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].

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].

JUDGE DOUMAR: "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].

5. Mr. Martinovich provided no changes to any valuations, and all were correct:

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

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

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].

CADIEUX (COO): "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. 262].

6. Claims of Martinovich taking precedence over other investors and not distributing redemptions were repeatedly rebuked by testimony and subsequent Auditor Reports [see $4,606,221 of distributions returned to investors in the 2008-2009 period of review, outside of

distributions to owners and employees; Exhibit Hedge Fund Redemptions 2008-2009, No. 13-4828, Brief].

These six examples are but a small subset of overwhelming evidence supporting Mr. Martinovich's belief that his opinions of this investment and his actions were correct, and are why respected counsel James Broccoletti repeatedly claimed there was no evidence to the contrary and supported Mr. Martinovich's rejection of three separate plea deals in support of bringing the truth to light. The reason for years of Government and judicial waste of resources is not based on the Government's claims of the defense's "scorched earth strategy," but yet because it was based on a lie from the very beginning. This Court is well aware of the political actors, contributors and competitors behind the very beginning of this imbroglio, and Mr. Martinovich prays this Honorable Court will now bring an end to these proceedings and allow Mr. Martinovich to restore his stakeholders well beyond the requirements of the Government.

LEGAL SUPPORT FOR MARTINOVICH REDUCTION, RELEASE OR DISCHARGE

1. As Martinovich's 28 U.S.C. Sec. 2255 proceeding remains in force, he respectfully cites ***Umberger v. United States*** in which this very Honorable Court cited ***United States v. Hadden***, 475 F. 3d 652 (4th Cir. 2007)(discussing the district court's authority to grant habeas relief in the form of a sentence correction that is imposed without a resentencing hearing) see 28 U.S.C. Sec. 2255(b) (providing the Court's authority to vacate the original judgment and discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate) [***Umberger v. United States***, E. D. Virginia (2017), **GRANTED**, Hon. Judge Mark S. Davis].

2. "As a result of the First Step Act, there is simply a procedural gap that the Sentencing Commission— currently lacking a quorum and unable to act—has not yet had the chance to fill.

Nothing in 3852(c)(1)(A)(i) requires courts to sit on their hands in situations like these. Rather, the statute's text directly instructs courts to "find that" extraordinary circumstances exist. Therefore, this Court has discretion to assess whether [Mr. Martinovich] presents "extraordinary and compelling reasons" for his release outside of those listed in the nonexclusive criteria of subsections (A)-(C) of the old policy statement...None of these reasons alone is extraordinary and compelling. Taken together, however, they constitute reasons for reducing his sentence "[b]eyond what is usual, customary, regular, or common," and reasons "so great that irreparable harm or injustice would result if [the relief] is not [granted]." Extraordinary, Black's Law Dictionary (11th ed. 2019); Compelling Need, Black's Law Dictionary (11th ed. 2019)." [***U.S. v. Rodriguez***, No. 2:03-cr-00271-AB-1, U.S. Dist. Ct. E. Pa. (**2020**)]. Mr. Martinovich posits and prays that this Honorable Court, who has assumed this case subsequent these proceedings, does not believe Martinovich's subset of issues to be ordinary and non-compelling in the United States Federal Criminal Justice System.

3. "He has also shown rehabilitation in prison. While serving his sentence, Mr. Rodriguez took GED classes and earned his GED. See U.S. Probation Office Memo (Mar. 31, 2020). In 2019, he completed an apprenticeship in computer operations. He has also taken classes about fitness and nutrition, anger management, parenting, financial education, decision-making, and hobbies. Furthermore, Mr. Rodriguez has had only two infractions in seventeen years of incarceration, one for alcohol and one for having a cell phone. Neither were violent or raise concerns about recidivism. The government objects that rehabilitation is not an appropriate basis for granting compassionate release. It cites Congress's directive to the Sentencing Commission that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). Mr. Rodriguez's rehabilitation alone would not constitute an extraordinary and compelling reason. But the qualifier "alone" implies that rehabilitation can contribute to extraordinary and compelling reasons. That is how the

Commission has understood the statute. See U.S.S.G. § 1B1.13 cmt. n.3 ("Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.") (emphasis added); Brown, 411 F. Supp. 3d at 449 ("[T]he Commission implies that rehabilitation may be considered with other factors."). I consider rehabilitation in conjunction with the other reasons outlined here

). [***U.S. v. Rodriguez***, No. 2:03-cr-00271-AB-1, U.S. Dist. Ct. E. Pa. (**2020**)]. Mr. Martinovich respectfully asserts that his rehabilitation actions in prison far exceed Mr. Rodriguez's (noted in Initial Motion), as well as Mr. Martinovich had zero infractions to Mr. Rodriguez's two.

4. "The Commission's policy statement, which provides helpful guidance, provides for granting a sentence reduction only if "[t]he defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13(2). Mr. Rodriguez is not a danger to the safety of others or to the community under the factors listed in in 18 U.S.C. § 3142(g)… Mr. Rodriguez's criminal history involves a series of convictions for drug dealing as well as the firearm offenses in this case. While this history is serious, I find that Mr. Rodriguez does not pose a danger to others…. I will sentence him to time served." [***U.S. v. Rodriguez***, No. 2:03-cr-00271-AB-1, U.S. Dist. Ct. E. Pa. (**2020**)]. Mr. Martinovich respectfully submits that he is a significantly lower "danger to the safety of any other person" than Mr. Rodriguez.

CONCLUSION AND REMEDY

Herein, Mr. Martinovich, proceeding pro se and in forma pauperis, respectfully requests this Honorable Court GRANT Compassionate Release, and/or in the alternative a Reduction or Time Served pursuant to 28 U.S.C. Sec. 2255 or other authority and discretion of this Honorable District Court. The Government and Court have implemented tremendous punishment and deterrence, well beyond the three separate plea agreements offered by the Government and well beyond an innumerable number of sentences of similar conduct, and now Mr. Martinovich

again appeals for the restoration of all stakeholders, to include himself and his family. As noted in his Motion, Mr. Martinovich has complied with and accomplished everything the Government and Court have asked of him, plus so much more, and he respectfully entreats the Government and this Honorable Court to act in the best interests of the Government, Court, Employees, Clients, Shareholders, and United States Taxpayers.

With Great Respect,

Date: 12/4/2020

Jeffrey A. Martinovich, pro se

AFFIDAVIT AND CERTIFICATE OF SERVICE

I, Jeffrey A. Martinovich, proceeding pro se, submit under the penalty of perjury pursuant to 28 U.S.C. Sec 1746, that the above is true and correct to the best of my knowledge, and that a true and correct copy of this Motion has been mailed with sufficient first-class postage on 12/4/20 to:

U.S. Attorneys Office
Attn: Mr. Brian Samuels, AUSA
101 W. Main St., Suite 8000
Norfolk, VA 23510

Date: 12/4/2020

Jeffrey A. Martinovich