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

19-6797 RE

May 30, 2019

Clerk of Courts
Fourth Circuit Court of Appeals
Lewis F. Powell U.S. Courthouse
1100 E. Main St., Suite 501
Richmond, VA 23219

Re: Martinovich v. United States (Appeal Case No._____)
(4:12cr101 / 4:2018cv28)

Dear Clerk:

Please process and docket the enclosed Motion-Informal Brief for Certificate of Appealability and subsequent Appeal pursuant to Fourth Circuit Local Rule 22(a)(1)(A)&(B).

Please also docket a copy of the Exhibit A - Statement of the Case already on the record, as well as the Certificates of Service and Compliance and this cover letter.

Thank you very much for your assistance.

Sincerely,

Jeffrey A. Martinovich

CERTIFICATE OF SERVE AND LEGAL MAIL

I, Jeffrey A. Martinovich, proceeding pro se, hereby swear under the penalty of perjury by 28 U.S.C. § 1746 that I have mailed a correct copy of the enclosed motion or petition to the below address by placing in the institution mailbox using legal mail institutional procedures on 06/04/2019 with first-class sufficient postage applied, to be mailed by BOP personnel to:

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

I, Jeffrey A. Martinovich, proceeding pro se, also hereby swear under the penalty of perjury pursuant to 28 U.S.C. § 1746, and in compliance with Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988), that I have mailed this enclosed Motion or Petition in compliance with the institution's legal mail procedures on 06/04/2019.

I, Jeffrey A. Martinovich, swear on 06/04/2019 that the above is true and correct.

Jeffrey A. Martinovich

Jeffrey A. Martinovich

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Mr. Martinovich respectfully suggests that oral arguments are necessary and is prepared to present his Grounds.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rules because this brief does not exceed 13,000 words (Specifically 12,623).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared on a Manual Brother ML300 typewriter in the FPC Beckley Prison Law Library.

By: Jeffrey A. Martinovich
Jeffrey A. Martinovich

AFFIDAVIT OF JEFFREY A. MARTINOVICH

I, Jeffrey A. Martinovich, proceeding pro se, hereby attest under the penalty of perjury that the enclosed Motion-Informal Brief is true and correct to the best of my knowledge, pursuant to Title 28 U.S.C. 1746.

Date: 05/30/2019

Jeffrey A. Martinovich
Jeffrey A. Martinovich

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JEFFREY A. MARTINOVICH,

Petitioner,

Case No._____

(4:12cr101)

v.

(4:2018cv28)

UNITED STATES OF AMERICA,

Respondent.

MOTION-INFORMAL BRIEF FOR CERTIFICATE OF APPEALABILITY PURSUANT TO FOURTH CIRCUIT LOCAL RULE 22(a)(1)(A)&(B)

NOW HERE COMES Jeffrey A. Martinovich, proceeding pro se, in a Motion-Brief for Certificate of Appealability pursuant to Fourth Circuit Local Rule 22(a)(1)(A)&(B).

PROCEDURAL

On May 6, 2019, the District Court filed an Order (Doc. 308) and Clerk's Judgment (Doc. 309) denying all eighteen (18) Grounds in Mr. Martinovich's Petition to Vacate pursuant to 28 U.S.C. § 2255. "(T)he district court has not granted a certificate of appealability ('certificate')." [LR 22(a)(1)].

On May 16, 2019, Mr. Martinovich filed 1) a Notice of Appeal to the District Court, 2) an Application for Certificate of Appealability for all eighteen (18) Grounds to the District Court, 3) a Notice of Appeal to this Fourth Circuit pursuant to Local Rule 22(a)(1), and 4) a Supplement to Mandamus Case No. 19-1463 urging the Fourth Circuit to direct the District Court to expedite any ruling to COA Application, if necessary step although plain language of LR 22(a)(1) states not necessary, and we have eclipsed fourteen (14) months in the life of this Petition which contains multiple grounds demanding the Vacation

of Conviction, as this Fourth Circuit is well aware.

LEGAL STANDARD

Mr. Martinovich respectfully submits that the standard, the threshold, to receive a COA is low, very low, and that he has submitted non-frivolous, non-conclusory arguments with thorough instant evidence and supportive precedent which in totality eclipse this threshold and demonstrate a substantial showing of the denial of a constitutional right. Herein by reference and submissions on the record, Mr. Martinovich incorporates the full data contained in Memorandums on the record (Docs. 277, 292), Amended Martinovich Affidavit (Doc. 293), and Exhibits 1-43 (Doc. 280).

"A Court of Appeals should limit its examination to a threshold inquiry into the underlying merit of the prisoner's claim, rather than ruling on the merit of the prisoner's claims." [Miller-El v. Cockrell, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)].

Mr. Martinovich's Grounds "satisf(y) the proper COA standard by demonstrating that jurists of reason could (a) disagree with a District Court's resolution of the prisoner's federal constitutional claims, or (b) conclude the issues presented are adequate to deserve encouragement to proceed further." [Miller-El].

The "reviewing court...placed too heavy a burden on the prisoner at the COA stage." [Buck v. Davis, 137 S. Ct. 759, 197 L.Ed.2d 1 (2017)].

"A claim can be debatable even though every jurist of reason might agree, after the certificate of appealability (COA) has been granted and the case has received full consideration, that petitioner will not prevail. 28 U.S.C. § 2253 sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then, if it is, an appeal in the normal course." [Buck].

ABRIDGED STATEMENT OF THE CASE

If not already, Mr. Martinovich implores this Court's clerks and panel to PLEASE READ THE TRUE, FACTUAL, EVIDENCE-BASED STATEMENT OF THE CASE already on the record in this instant case as submitted by Mr. Martinovich in the full Memorandum (Doc. 277), listed in the Martinovich Amended Affidavit (Doc. 293), and again attached as Exhibit-A for this Court's convenience.

For context, Mr. Martinovich herein provides a short synopsis. Mr. Martinovich was very fortunate to become Founder and CEO of MICG Investment Management, which over nearly two decades grew to $1 billion in assets, 3,000 clients in 42 states, and 100 associates, as well as providing services in asset management, financial planning, lending, insurance, investment banking, trusts, and alternative investments, with 8 branches in Virginia, Washington D.C., and New York.

Following the 2008 Financial Crisis, the firm experienced great distress with the regulatory body, FINRA. As a boutique firm, MICG did not possess the tremendous checkbook to appease the regulators, as occurred with all of their large Wall Street competitiors, therefore they demanded arbitration to defend MICG's employees and practices. Shortly before arbitration, Mr. Martinovich was informed that the last five years of MICG audited financials had mysteriously been "re-audited," and now they were million of dollars out of compliance and must shut the doors. These were the same financials audited monthly, quarterly, and yearly by the SEC, CFTC, SCC, Broker-Dealer auditors, and FINRA themselves. Yet, overnight MICG was out of business. As MICG was comprised of a mix of entities, shareholders, bondholders, and direct investments, numerous lawsuits and bankruptcies consumed Mr. Martinovich's creation. [see "The Fall of MICG, Ash Press, Amazon Books].

As CEO, Mr. Martinovich was then indicted following the bankruptcy of a solar company investment held in one of MICG's three private hedge funds following the solar industry implosion in 2009-2010 (Solyndra, et al). The government claimed that two years earlier Mr. Martinovich manipulated the valuation experts and the external auditors into pricing this stock too high, all the while knowing it would years later claim bankruptcy. As this holding was merely point-two-percent (.2%) of MICG's investments, Mr. Martinovich knew the allegations were ridiculous, and the defense attorneys repeatedly asserted that there was zero evidence of wrongdoing. Therefore, in an effort to do the right thing in defense of his employees and himself, Mr. Martinovich rejected government plea offers of 7-years, 5-years, and 3-years, and proceeded to trial.

The trial was a debacle from day one. The prosecution daily displayed on the monitors pictures of Mr. Martinovich's Bentley, Ferrari, beach house, and "mansion." They added testimony of lifestyle and luxury, and even the Bellagio pit boss was flown in to recount blackjack stories [Ground 17, § 2255].

The defense, in turn, attempted to explain hedge fund accounting and valuation industry practices to the jury comprised of hardworking citizens of Newport News, Virginia. The external solar valuation expert (a government witness) and the independent auditing firm both repeatedly claimed they had performed correct and conservative valuations and followed industry protocols. Yet, after the character assassination and the judge's theatrics, the fantastical narrative of Mr. Martinovich deceiving his entire management team, the valuation experts, and the auditors to all fraudulently generate an extra $140,000 fee seemed to make more sense to the jury (after being a hung jury and ordered to return for a fifth week to continue deliberations).

Yet, the overriding issue in the four-week trial was the egregious abuse of the defense by District Judge Robert A. doumar. The histrionics shocked the conscience of all parties with the Fourth Circuit panel later claiming his prejudiced assault "went beyond the pale...impermissibly interfered with the manner in which (Martinovich) sought to present his evidence...such conduct tends to undermine the public's confidence in the integrity of the judiciary." Judge Doumar abused the defense, objected for the prosecution, berated defense witnesses, interfered in Mr. Martinovich's own testimony 168 times, and the list is endless [Ground 1, § 2255]. Mr. Martinovich was convicted and sentenced to 12 years in prison and $1.75 million restitution.

On Appeal, the Fourth Circuit vacated the sentence and replaced Judge Doumar on the case, noting the sentencing plain errors and the egregious conduct at trial. Yet, although writing a strong rebuke of the judge, to include a concurring second opinion, the Fourth Circuit upheld the conviction stating that the defense counsel, Mr. Broccoletti, inexplicably never once objected and preserved the errors which "challenge(d) the fairness of the proceedings." [Aff. 110-143] Other proceedings and remedies addressing the trial judge's conduct may, or may not, have occurred of which confidentially provisions may, or may not, currently restrict their public release.

When remanded for resentencing, the government then served a superseding indictment which they had saved just in case Mr. Martinovich won the appeal, and which was intended to prevent his release on resentencing and to hinder the case from being overturned on obvious collateral attack for ineffective assistance. After allegedly deceiving all these parties, the government now alleged that Mr. Martinovich had also tricked four law firms, engaged to represent

the individual fund shareholders, into creating six fraudulent contracts and opinion letters, and fraudulently authorizing all indemnification clause transactions. Mr. Martinovich responded that these Case 2 allegations were even more absurd than Case 1, provided court-appointed counsel Mr. Woodward voluminous documentation and evidence of his innocence, and demanded to proceed to trial, again. [see Ex. 1-9, Memorandum Gr. 9 (Docs. 277, 292), Aff. 51-69 (Doc. 293)].

Mr. Martinovich's later due diligence discovered that his second indictment had been illegally-sealed, had expired and unsealed, and was illegally-resealed after being shopped before three magistrate judges. This fraud was to conceal the statute of limitations which had expired. Then, once publicly uncovered [Ground 10 § 2255], the District Court colluded with the government by switching the statute of limitations code in a constructive amendment even though the previous statute had been the documented necessity for obtaining the indictment, for sealing the indictment, and for resealing the indictment after expiration [DOJ OIG, OPR, Exec. Off., FBI, VA AG, 4th Cir. 18-7061].

Prior to resentencing, the Court held Mr. Martinovich in county jail for eight months and employed court-appointed counsel Mr. Woodward to prevent Mr. Martinovich from proceeding to trial once again, now against the second indictment [Cont. Comm. Aff. 36, 49-78, 102, 104-105, 107-109, 230-238]. Eventually, Mr. Martinovich accepted what he believed to be an agreement amongst the Court, the prosecution, and the defense for Mr. Martinovich to accept an arrangement for a "5-6 years" aggregate resentencing in order for Martinovich to be released and begin restoring his shareholders, all in return for Martinovich "admitting to something" and "agreeing to stop sending in appeals to include the first case."

Unfortunately, the joint sentencing-resentencing was an orchestrated ambuscade from the first minute. As counsel once again sat silent, the District Court violated too many statutes, Guidelines and constitutional rights to enumerate in a histrionic presentation for the media and packed courtroom. New Judge Wright Allen proclaimed ten times that Mr. Martinovich suffered from "deep and complex" mental disease or defect [Gr. 4, § 2255], she ran the sentences consecutive instead of concurrent pursuant to the agreement and the correct Guidelines [Gr. 7, § 2255], she sentenced in Category II in contravention to the Guidelines [Gr. 8, § 2255], she proclaimed that he had fabricated his BOP record as a GED tutor, law library clerk, and business instructor, as well as refused to consider Mr. Martinovich's "positive attributes" [Gr. 11, § 2255]. Mr. Martinovich was not only not released, but his sentence was increased to fourteen (14) years and restitution to $2.5 million.

Mr. Martinovich had rejected three years to receive twelve years, then overturned twelve to receive fourteen, and has now served nearly six years in prison.

B.S., U.S. Air Force Academy
MBA, The College of William & Mary
USAF Officer, First Gulf War
CEO, MICG Investment Management

President, Big Brothers Big Sisters
Chairman, The Children's Village
Chairman, YPO Virginia
www.jeffmartinovich.com

GROUND I: TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING AND PRESERVING THE COURT'S MISCONDUCT AND MARTINOVICH WAS PREUDICED AT TRIAL AND ON APPEAL.

Herein by reference, Mr. Martinovich incorporates the full argument of Ground I in the Petition's memorandums (Docs. 277, 292) and specific Affidavits 1-35, 90, 106, 110-143 (Doc. 293).

SNAPSHOT

Over the course of Mr. Martinovich's four-week trial, Trial Judge Robert A. Doumar's egregious misconduct, interference, bias, and abuse of the defense violated Mr. Martinovich's constitutional rights as recorded by this Fourth Circuit. "We agree that the district court crossed the line and was in error." [U.S. v. Martinovich, 810 F. 3d 232 (4th Cir. 2016)].

Trial defense attorney, Mr. James O. Broccoletti, violated Mr. Martinovich's constitutional right by, inexplicably, never once objecting to Judge Doumar's abuse in order to protect and defend Mr. Martinovich in the eyes of the jury, or even more importantly to at least preserve these hundreds of errors for review on appeal. "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].

On appeal, Mr. Broccoletti's lack of one 15-second objection over the course of four weeks raised the standard of review to the nearly-unachievable level of plain error review, with which the Fourth Circuit did not overturn Mr. Martinovich's trial verdict and remand for a new, fair trial. The Fourth Circuit panel stated, "(I)n light of the plain error standard of review...we may not intervene...Accordingly we must uphold the jury's verdict...Again, however, we were constrained by plain error." [Martinovich].

And, the Fourth Circuit recently ruled in Carthorne that even though they may not find that an error eclipsed the high bar of plain error review, counsel may still be deemed ineffective for not objecting to that error. "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...claims of ineffective assistance of counsel are not limited by an appellate court's analysis whether a trial court plainly erred...counsel's alleged error satisfied the prejudice prong of Strickland because, if Carthorne's attorney had challenged... this Court would have remanded for resentencing." [U.S. v. Carthorne, 878 F. 3d 458 (4th Cir. 2017)].

For context, Mr. Martinovich herein lists a subset of this Fourth Circuit panel's further statements:

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. "More importantly, such conduct challenges the fairness of the proceedings."
6. "(T)he district court unnecessarily interrupted defense counsel's presentation of the defense at trial."
7. "The district court's general interference in defendant's trial -- which included examining witnesses, interrupting counsel, and controlling the presentation -- strayed too far."
8. "Here, there was much more than an appearance of improper interference."
9. "At its core, such conduct tends to undermine the public's confidence in the integrity of the judiciary."
10. "At some point, repeated injudicious conduct must be recognized by this Court as a compelling basis for finding plain error."
11. "Here we are once again presented with a case replete with the district court's ill-advised comments and interferences."

12. "The district court's repeated comments were imprudent and poorly conveyed."

13. "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 long standing District Judge with such direct and expressive language, to even include a concurring opinion with more alarm at the conduct of Mr. Martinovich's trial.

STRICKLAND'S FIRST PRONG

Without question, defense counsel Mr. Broccoletti's "representation fell below an objective standard of reasonableness" judged in light of "prevailing professional norms." [Thompson v. Gansler, 734 Fed Appx 846 (4th Cir. 2018); citing Strickland v. Washington, 104 S. ct. 2052, 80 L. Ed. 2d 674 (1984)].

In the face of the daily interference and abuse of defense counsel, defense witnesses, and Mr. Martinovich, all before the eyes and ears of the impressionable jury, Mr. Broccoletti never made one objection to this corrupting influence over four weeks.

"The first prong - constitutional deficiency - is necessarily linked to the practice and expectations of the legal community." [Padilla v. Kentucky, 559 US 356, 130 S. Ct. 1473 (2010)].

"Of course, we would not regard as tactical a decision by counsel if it made no sense or was unreasonable under prevailing professional norms." [Vinson v. True, 436 F. 3d 412 (4th Cir. 2006)].

"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)].

Mr. Martinovich provides a small number of examples, out

of the multitude recorded by the court, in which Mr. Broccoletti failed to object and preserve:

1. 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].

2. When the 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.

3. Prior to jury deliberation, with the non-sequestered jury having access to the "Daily Press," this 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]. Mr. Broccoletti did not object.

4. Court-appointed counsel, Mr. Woodward, submitted that Judge Doumar interrupted and interfered with Mr. Martinovich's personal testimony a shocking 168 times. Mr. Broccoletti did not object.

5. Judge Doumar, in front of the jury, objected to defense counsel's

litigation tactics and accused Mr. Broccoletti of going outside trial court procedures and conducting discovery depositions with the witness. Mr. Broccoletti did not object. [Tr. p. 1946].

6. When Judge Doumar interfered over 50 times in defense counsel's examination of the external fund auditors, even consuming over 8 continuous transcript pages before relinquishing the floor, Mr. Broccoletti failed to submit one objection to protect his client or even to allow the fund auditors to address the facts of the case. [Tr. p. 2532].

7. The government, itself, was so mystified by Mr. Broccoletti's failure to object and protect the defense that AUSA Mr. Brian 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 don't feel it's incumbent on us as the government to attempt to protect the record." [Tr. p. 2529]. Wow. The government knew Judge Doumar was out of control and that not only should Mr. Broccoletti have objected and preserved these errors for appeal, but that he should have moved for a mistrial on numerous occasions. AUSA Samuels wanted it on the record that it was not his job to provide constitutionally-effective assistance for Mr. Martinovich. Mr. Broccoletti stood silent.

8. During counsel's questioning of critical defense witness Mr. Umscheid, Judge Doumar, completely usurped the role of the prosecutor:

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

UMSCHEID: "Well, remember the reason -- "

COURT: "Objection(!)"

Judge Doumar actually objected in place of AUSA Samuels, and Mr. Broccoletti, again, failed to object. Could there have been any question in the eyes of the jury of whose side the preeminent, influential judge was on? You can't make this up. [Tr. p. 2536].

"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; Justice Marshall].

"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." [U.S. v. Smith, 452 F. 3d 323 (4th Cir. 2006)].

"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 U.S. v. Cronic, 104 S. Ct. 2039 (1984)].

DEFENSE COUNSEL'S EXCUSES

Defense counsel, Mr. Broccoletti, submitted an Affidavit to explain his ineffective assistance, and Mr. Martinovich herein addresses:

1) Mr. Broccoletti's attempts to reference "multiple conversations" with Mr. Martinovich fail against all classifications of responsibility, "expectations of the legal community," and "prevailing professional norms." "(T)he primary responsibility for protecting a defendant's interests at trial lies with his attorney." [Carthorne]. This indecorous excuse accepted by the District Court would, at the most, require an evidentiary hearing as Mr. Martinovich has repeatedly denied any such conversations or authorizations occurred. Ridiculous.

2) Mr. Broccoletti's assertion to possibly gain "victim status" from the jury by intentionally permitting Judge Doumar to "interfere[] with the manner in which (Martinovich) sought to present his evidence," and the District Court's acceptance of this, is so far outside the professional norm for an effective or zealous defense that the Bar Association should censure everyone for even suggesting it.

3) Mr. Broccoletti's response that he believed he "would be able to appropriately respond to the Court," and the District Court's acceptance of this, flies in the face of everything the Fourth Circuit stated in their strong rebuke of the proceedings. The Fourth Circuit did not hold the same opinion of Mr. Broccoletti's abilities as they asserted "interference in this case went beyond the pale...impermissibly interfered...improper interference..."

4) Mr. Broccoletti's claim that an objection might have only "exacerbated the situation," and the District Court's acceptance of this, was thoroughly debunked with the in-trial case study provided by the government's own "objection" to Judge Doumar's egregious behavior in hopes of preventing a mistrial. Following the government's intervention, "the trial transcripts clearly show that Judge Doumar, for a couple of hours, assumed the role of an unbiased, preeminent administrator...did not react aggressively, or increase his egregious behavior, but instead this action had a calming and thoughtful effect on the Court." [Aff. 21 (Doc. 293), Ground I (Docs. 277, 292)]. Invalid by clear evidence.

5) Mr. Broccoletti's statement, and the District Court's acceptance, that attempting to prevent Judge Doumar from "impermissibly interfer(ing) with the manner in which (Martinovich) sought to present his evidence" would hurt Martinovich because the Judge might not also interrupt

the government is a nonsensical argument based in no reality of transcripts.

6) Mr. Broccoletti's attempted rationalization that he "did raise the issue of the Court's involvement and conduct directly to the government...(and) did advise the government of his concern," and the District Court's acceptance of this, is another inexplicable excuse as Mr. Broccoletti's "40 years" of experience certainly taught him that the government may not preserve an error for the defense. The government and the District Court both argue this fact emphatically in defense and denial of Mr. Martinovich's Ground XIV. Therefore, the District Court's acceptance in this argument creates a paradox, conclusions which are mutually exclusive. This excuse fails on multiple counts, or otherwise the Appeals Court must vacate its earlier Order (see Ground XIV).

"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].

"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...we hold that the defendant's trial counsel rendered ineffective assistance... by failing to make an obvious objection." [Carthorne].

Strickland's first prong is satisfied. Mr. Broccoletti violated Mr. Martinovich's Sixth Amendment Constitutional Right to Effective Assistance.

STRICKLAND'S SECOND PRONG

Mr. Broccoletti's ineffective assistance prejudiced Mr. Martinovich at trial and on appeal. Mr. Martinovich herein proves "'prejudice' - that is, 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'... A reasonable probability is a probability sufficient to undermine confidence in the outcome...In making this showing, Petitioner need not demonstrate that his counsel's unprofessional errors more likely than not altered the outcome of the case." [Thompson v. Gansler, 734 Fed Appx 846 (4th Cir. 2019; citing Strickland, 466 US at 688, emp. add.].

PREJUDICE ON APPEAL

If Mr. Broccoletti had made one 15-second objection, the Fourth Circuit Court of Appeals would not have been "constrained by plain error... we may not intervene." Mr. Broccoletti's failure, and only this failure, raised the Appeal Court's standard of review from harmlessness to the nearly-unachievable high bar of plain error review. The Fourth Circuit as well as sister Circuits, conduct the Strickland second prong analysis when reviewing whether counsel's lack of objection prejudiced the client at trial as well as on appeal. [see Ngo v. Holloway, 551 Fed. Appx 713 (4th Cir. 2014); Carthorne; Govt. of Virgin Islands v. Forte, 865 F. 2d 59 (3rd Cir. 1989); Parker v. Ercole, 666 F. 3d 830 (2nd Cir. 2012)].

If Mr. Broccoletti had not failed, the Fourth Circuit panel would have reviewed Judge Doumar's misconduct under the standard of harmlessness review, with the Fourth Circuit defining this much lower standard 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." [U.S. v. Hagar, 721 F. 3d 167 (4th Cir. 2013); citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967), emp. add.]. Also, "under harmless review, the judgment 'may stand only if there is no reasonable probability that the practice complained of might have contributed to the conviction.'" [U.S. v. Camacho, 955 F. 2d 950 (4th Cir. 1992); citing U.S. v. Hasting, 461 U.S. 499, 103 S. Ct. 1974 (1983) emp. add.]. Obviously, claiming Judge Doumar's misconduct "did not contribute" beyond a reasonable doubt, or that there's not a "reasonable probability" that his misconduct "might have contributed to" the conviction, would commit violence against common sense.

Fourth Circuit Judge Wynn, one of the reviewers on Mr. Martinovich's panel, describes this lethal increase to plain error as, "when a defendant raises a timely objection to judicial interference, an 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." [U.S. v. Ecklin, 528 F. Appx 357 (4th Cir. 2013)]. But, even on top of this increased standard, the Court imposes 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 of establishing that he was prejudiced by the complained-of-error." [U.S. v. Pitt, 482 Fed Appx 787 (4th Cir. 2011); citing U.S. v. Olano, 507 U.S. 725, 113 S. Ct. 1770 (1993)].

"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." [Carthorne; citing Puckett v. U.S., 556 U.S. S. ct. 129, 134 (2009)].

Strickland's second prong is satisfied. Mr. Broccoletti's violation of Mr. Martinovich's constitutional right to effective assistance severely prejudiced Mr. Martinovich. Although they clearly have and he has, Mr. Martinovich "need not demonstrate that his counsel's unprofessional errors more likely than not altered the outcome of the case." [Thompson, emp. add.].

PREJUDICE AT TRIAL

If Mr. Broccoletti had respectfully objected to Judge Doumar's abuse of, and interference with, the defense, once or multiple times, or moved for a mistrial, there is a reasonable probability that the results of the proceeding would have been different, as the government's "objection" case study referenced earlier proved. At a minimum, there is a plethora of evidence that reasonably undermines confidence in the outcome. [Thompson; Strickland].

As this court of review can never in retrospect be certain of what variables in the equation tipped the decision for a trier-of-fact, Mr. Martinovich posits that possibly it is much more accurate to review the proceedings as if the egregious errors (already determined error by the Fourth Circuit) were not part of the equation.

"Despite the broad discretion given, a trial judge occupies a position of preeminence 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 judge'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." [U.S. v. Ecklin, 528 Fed Appx 357 (4th Cir. 2013)].

Here, Mr. Martinovich respectfully requests this Court's clerks and panel of judges review the "10-11-2018" confidential communication between Mr. Martinovich and Chief Judge Gregory which the Fourth Circuit subsequently posted to the public internet on the docket on December 31, 2018, as Doc. No. 15 in Case 18-7061 and Doc. No. 13 in Case 18-2163.

Mr. Martinovich's layman jurors were never exposed to a fair and bipartisan trial, and due to their inexperience, as with most all jurors, were likely never aware of just how constitutionally-deficient were the proceedings. What if:

1) What would the jury verdict have been if the independent auditor, Mr. Umscheid, had been permitted to explain to the jury how he thoroughly vetted the valuation experts, the valuation reports, and the Wall street transactions by which he concluded the $2.88 price was the correct price? What if Judge Doumar had not, instead, risen to his feet, cut off this expert, berated him on the perils of perjury, thrown out the jury, and later returned everyone to a sterilized conclusion for this discredited key defense witness?

2) What would the jury verdict have been if once the key government witness, solar valuation expert Mr. Lynch, confirmed that he authored,

authorized, signed, and still believed that day that his valuations were correct and conservative, that Judge Doumar had not yelled in front of the jury, "So, your appraisal is absolutely worthless," or that Mr. Broccoletti had objected and defended the appraisals, or called for a mistrial? What if Mr. Broccoletti had not allowed Judge Doumar to discredit Mr. Lynch in the eyes of the jury now that he repeatedly supported the defense's case, or if he objected at least to Judge Doumar calling both Mr. Umscheid and Mr. Lynch "rubber stamps?" Judge Doumar knew these two experts, who actually performed all of the work, had destroyed the government's case, and he had to do everything possible to get this conviction. Mr. Broccoletti, the placeholder, was not going to stand in his way, and jeopardize his own lucrative station.

3) What would the jury verdict have been if Mr. Broccoletti had objected and deterred the Court from interrupting, cutting off, and attacking Mr. Martinovich 168 times during his own testimony, or at least defended Mr. Martinovich in the eyes of the jury. How could Mr. Martinovich explain the innerworkings of hedge fund valuations to the Newport News jury when interfered with 168 times? How could he possibly present a cogent, understandable and believable explanation?

The list is endless of missed opportunities for a fair trial which could have generated "confidence in the outcome." Again, Mr. Martinovich "need not demonstrate that his counsel's unprofessional errors more likely than not altered the outcome of the case." [Thompson; Strickland].

ANY AND ALL DEFENSES AGAINST ADMITTING PREJUDICE

Finally, Mr. Martinovich adresses the fallible defenses presented

by the government in attempts to discredit the obvious prejudice, to include 1) "overwhelming evidence," 2) jury instructions, and 3) split jury decisions.

1) For the sake of continuity in this instant Ground, Mr. Martinovich has addressed in thorough detail the government's delusive claims of "overwhelming evidence" at the end of this instant Application. Mr. Martinovich strongly asserts that, yes, the evidence is overwhelming, but in favor of Mr. Martinovich's innocence, certainly when reviewed by an objective, reasonable jurist without the onslaught of prejudicial influence from the preeminent judge.

2) At the end of the four-week assault, Judge Doumar addressed the jury and stated, to paraphrase, "But, don't listen to me, I'm just the judge." An attempt to term this a curative instruction simply propagates this "conduct (which) tends to undermine the public's confidence in the integrity of the jury." This eleventh-hour throw-in cannot logically be termed a remedy, in a court of law and certainly in a court of public opinion. This grasping logic flies in the face of all Master-Servant psychology research, as well as a long list of Group Think studies.

"Moreover, the district court's jury instructions could not cure the fatal defect." [U.S. v. Kingrea, 573 F. 3d 186 (4th Cir. 2009)].

Admirably, the Fourth Circuit already concluded in this case, "We recognize that one curative instruction at the end of an extensive trial may not undo the court's actions throughout the entire trial." [Martinovich].

3) The government has leaned on the issue that the jury did not convict Mr. Martinovich on all twenty-six (26) counts as proof that Judge Doumar's egregious misconduct did not influence the jurors'

decisions. This simplistic and failed logic even denotes U.S. v. Cornell as support, yet this is emblematic of the government's similar failure of illegally sealing and resealing the indictment by attempting to rely on the flawed judicial statement by Judge Maris in U.S. v. Michael (3rd Cir. 1949). [Ground X]. Here, comparing Cornell to Martinovich is apples to oranges, as Cornell addresses multiple Allen charges (directions to continue stalled jury deliberations) as not coercive to a jury's opinion. Cornell addresses a procedural judicial intervention at the very end of proceedings, while Martinovich addresses hundreds of errors (already concluded errors by the Fourth Circuit) conducted daily for a month leading up to these final deliberations. The input was overwhelmingly corrupted. Bad data in equals a confirmation bias result. Cornell, itself, states the Court cannot be "impermissibly coercive," and Martinovich's panel stated the Court "impermissibly interfered."

Actual Group Think and Group Psychology studies note a "starting point" from which the improper influence "moves the needle." The needle was possibly at not guilty on all counts, or most counts, and the misconduct moved it to most counts. To claim a split jury or split decision proves no coercive influence is to contravene all psychology and statistical analysis, as the "starting point" in the minds of the jury cannot be known. This is failed logic grasping at excuses. "(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. U.S., 196 LED 2d 242, 137 S. Ct. (2016)].

CONCLUSION

1. Judge Doumar violated Mr. Martinovich's constitutional right. "(T)he district court's actions were in error." [Martinovich].

2. Defense counsel violated Mr. Martinovich's constitutional right on appeal. "(I)n light of plain error standard of review...we may not intervene...Although counsel may be reticent to object to such interference by the Court, failing to do so creates a high bar of appellate review." [Martinovich].

3. Defense counsel also violated Mr. Martinovich's constitutional right at trial. "It is therefore apparent to the Court that counsel's decision not to object was deficient under the first prong of Strickland...It bears repeating that a functioning adversarial system requires actual adversaries, not placeholders." [Jones].

4. "(S)tandards for plain error and ineffective assistance of counsel are distinct and do not necessarily result in equivalent outcomes for the defendant...claims of ineffective assistance of counsel are not limited by an appellate court's analysis whether a trial court plainly erred." [Carthorne].

5. Mr. Martinovich was prejudiced on appeal. "If counsel fails to raise a contemporaneous objection to a potential issue or error, the authority of the 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 the error." [Carthorne].

6. Mr. Martinovich was prejudiced at trial. There is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different...(and this) reasonable probability is a probability sufficient to undermine confidence in the outcome...(Mr. Martinovich) need not demonstrate that his counsel's unprofessional errors more likely than not altered the outcome of the case." [Thompson; Strickland].

Mr. Martinovich respectfully requests this Honorable Court GRANT a COA for this Ground I issue and, in turn, VACATE Mr. Martinovich's conviction and sentence, as required by this instant Ground and Application.

GROUND II: COUNSEL FAILURE TO SUBMIT STRUCTURAL ERROR ON APPEAL

Mr. Martinovich herein by reference incorporates all claims and evidence of Ground II submitted in Memorandums (Docs. 277, 292) and Affidavits 144-149 (Doc. 293). It is well-settled law that judicial misconduct is structural error, including misconduct corrected by "voluntary corrective action," and reversal is automatic, by definition. Mr. Martinovich, again, respectfully points this Court's clerks and panel to the Fourth Circuit's posting of "10-11-2018" communication (Doc. 13, Case 18-2163 and Doc. 15, Case 18-7061).

"(O)nce the appellate court has concluded that judicial misconduct did occur, reversal is automatic due to the structural nature of the error." [McMillan v. Castro, 405 F. 3d 405 (6th Cir. 2005)]. Therefore, Mr. Martinovich's conviction must be reversed.

"(T)here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome. This language refers to 'structural errors.' Although the U.S. Supreme Court has expressly reserved the question of whether structural errors automatically satisfy the third prong of United States v. Olano, the United States Court of Appeals for the Fourth Circuit has held that such errors necessarily affect substantial rights, satisfying Olan's third prong." [U.S. v. Ramirez-Castillo, 748 F. 3d 205 (4th Cir. 2014)].

As the Petition and Affidavits detail, Mr. Martinovich presented all of the duplicate information to appeal counsel Mr. Woodward as he submitted to the Fourth Circuit, and urged Mr. Woodward to submit structural error. Yet, Mr. Woodward refused and even proactively

requested plain error review.

With what this Court of Appeals knows, to include Chief Judge Gregory, this Court, by definition, must reverse Mr. Martinovich's conviction. Effective assistance of counsel must understand and submit obvious judicial misconduct, structural error, on behalf of his client, certainly when being noticed and urged to file by the defendant. Reasonable jurists provided with full information on all proceedings in this case to include proceedings possibly confidential due to confidentiality provisions, would, without question, find this issue "reasonably debatable" and would "conclude the issues presented are adequate to deserve encouragement to proceed further and receive a COA.

GROUNDS IV, V, VI: MENTAL DISEASE AND DEFECT AND CAPACITY DUE PROCESS

For Grounds 4,5 and 6, to say "jurists of reason could (not) conclude the issues presented are adequate to deserve encouragement to proceed further" would commit violence against common sense. All objective observers reviewing the actual, specific, repeated statements by the District Court, and counsel's ineffective assistance to not object or move to protect Mr. Martinovich, have concluded extreme denials of constitutional rights. The District Court's denial re-frames and sidesteps the clear facts in black and white in the transcripts as unfortunately the violations are not flattering of the Court. Mr. Martinovich's history or education have nothing to do with the District Court's emphatic, demonstrable proclamations, without ambiguity that Mr. Martinovich was suffering from mental disease or defect and his capacity to negotiate and enter contracts was in question, as well as counsel's ineffectiveness by definition.

The statutes and Sentencing Guidelines are crystal clear on

the required steps that had to be taken to protect Mr. Martinovich's constitutional rights by Mr. Woodward at sentencing, and then by definition Mr. Broccoletti at trial. We can either take everything the District Court repeatedly proclaims at sentencing as truthful, or we can disregard all as histrionics, but cannot do both. This Court of Appeals cannot create a paradox, a mutually-exclusive equation in sentencing Mr. Martinovich. A reasonable jurist, and likely most reasonable jurists, would agree with Mr. Martinovich after reading:

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

(Tr. pps. 92-106)

Mr. Martinovich incorporates herein by reference the full arguments included in Grounds 4,5,6 in Memorandums (Doc. 277, 292) and Affidavits 44-48, 158-197 (Doc. 293).

Once the District court asserted its repeated proclamations, the Sixth Amendment, the Fifth Amendment, 18 U.S.C. § 4241, "specific intent," U.S.S.G. § 5k2.13, and FRCP 11 all demanded that Mr. Woodward must have objected and intervened to protect the rights of Mr. Martinovich. [Broaddus; Drope; Williams; Mason; Renfroe; Walton; Song; Wynn; Brewer; Brown; Patel]. In violation of Mr. Martinovich's

constitutional rights, Mr. Woodward failed to 1) move to halt and vacate the joint setencing for Case 4:12cr101 and 4:15cr50, 2) move for a psychological or psychiatric examination and competency hearing, 3) move for the Court to consider a § 5k2.13 downward departure in the joint resentencing, and at minimum determine on the record that the District Court understood its authority to consider this departure, 4) based on the timeframe emphatically-determined by the Court, move to vacate the plea agreement as not knowingly, willingly, and voluntarily entered into as well as lack of legal capacity to enter the contract, 5) move for each charge containing elements of "specific intent" and "knowing to conceal or disguise" to be voided, and 6) again based on the determined timeframe, move for the 4:12cr101 trial conviction to be vacated as the District Court determined that Mr. Martinovich's mental capacity and competency was in question.

Mr. Martinovich's grounds include a comprehensive explanation of the severe prejudice suffered by Mr. Martinovich as a result of this ineffectiveness and multitude of denials of constitutional rights. Mr. Martinovich respectfully requests a COA for Grounds 4,5,6.

GROUNDS VII & VIII: TOTALITY OF SENTENCE

Mr. Martinovich herein incorporates by reference all arguments and evidence presented in grounds 7 & 8 in Memorandums (Docs. 277, 292) and Affidavits 198-229 (Doc. 293), and submits that a reasonable jurist would find that this claim is reasonably debatable in order to proceed further. Mr. Martinovich was denied his Sixth Amendment right to effective assistance by counsel's failure to object to and intervene against the District Court's erroneous application of the Sentencing Guidelines, resulting in the incorrect "starting point" and wrong framework for the sentencing proceedings."

[Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016)].

The District Court clearly sentenced Mr. Martinovich to a total sentence she meant to achieve at the close of the joint sentencing-resentencing performed September 29, 2016. Mr. Martinovich's thorough Grounds provide incontrovertible evidence and Guidelines data which mandates that Mr. Martinovich's sentences must have been run concurrent and administered in Category One, based on the overlapping relevant conduct, timing of acts and vacations and sentencings, and crossover procedural considerations to include trial witnesses, sentencing witness, victim letters, and financial transactions. The plea contract and negotiations encompassed the totality of sentence, as well as the restrictions and bargains overlapping both cases. [Ex. #22 "OBJECT to Category II"].

Mr. Martinovich's Grounds, once thoroughly reviewed, provide factual Guidelines concurrency data and Category data which a reasonable jurist would believe must be taken into consideration for the totality of Mr. Martinovich's sentence. The District Court, without question, violated U.S.S.G. § 5G1.3 and § 3D1.2 in view of the long list of evidence Mr. Martinovich provides. Counsel Mr. Woodward was woefully ineffective for allowing the Court to implement a total sentence in contravention to the plea agreement, the Guidelines, and the obvious relevant conduct treatment.

Mr. Martinovich urges this Court's clerks and panel to please review the details of the submitted Ground to include the Memorandums and Affidavits, which will make obvious the necessity to proceed with an appeal in the normal course. The one plea agreement controlled the joint-sentencing. Mr. Martinovich respectfully requests a COA for Grounds 7 and 8. [Ex. #23 "OBJECT - Cat. II"].

GROUND IX: RESENTENCING GROSS NEGLIGENCE AND INEFFECTIVE ASSISTANCE

Mr. Martinovich herein incorporates by reference the full arguments of Ground 9 in the Petition Memorandums (Docs. 277, 292), Affidavits 49-78, 102, 104-105, 107-109, and 230-238 (Doc. 292), and Exhibits 1,5,7,10,12,24-25,27-29,31,38 (Doc. 293). Mr. Martinovich's remarkable contemporaneous documentation paints a clear picture of ineffective and gross negligence or incompetence by counsel Mr. Woodward for resentencing. The thorough documentation addresses Mr. Martinovich's demands to proceed to trial on the superseding indictment and Mr. Woodward's coercion and manipulation to achieve a plea contract and arrangement radically different than the "arrangement" presented to Mr. Martinovich. The contemporaneous documentation, the supporting affidavits, and the correspondence confirmations with Mr. Woodward are incontrovertible.

Mr. Martinovich urges this Court's clerks and panel to actually review the submitted Memorandum arguments, the submitted Affidavits and Exhibits, the Replies to Responses, and the following question: Why would Mr. Martinovich fight day and night for three years to overturn his sentence and then passively agree to reinstating the same sentence? Mr. Woodward's incorrigible assistance and detainment of Martinovich in county jail for 8 months until the objective was accomplished is reprehensible and a miscarriage of justice. The documentation is clear and voluminous. Any reasonable jurist allowed to review this story, like an episode of "House of Cards," will vote for encouragement to proceed further. Mr. Martinovich respectfully requests this Court grant a COA for Ground 9.

GROUND X: ILLEGAL INDICTMENT, ILLEGAL RESEALING & FRAUD ON THE COURT

The fraudulent actions of the prosecution, and the ineffectiveness of counsel Mr. Woodward to detect and stop this fraud, was the

sword of Damocles to corrupt this case's resentencing for Mr. Martinovich. Ground 10 provides this Court such a clear Mueller Report of prosecutor fraud on Martinovich and the District Court, and the blatant ineffective assistance to not object or oppose this fraud, that any jurist not at least granting a COA would be held in contempt and labeled an obstructionist by Nancy Pelosi. The evidence provided, to include "FOIA-EXEMPT" emails and memorandums obtained, paints an obvious picture of illegal activity by AUSA Mr. Brian Samuels and AUSA Ms. V. Kathleen Dougherty, as well as the fraudulent manipulation of Honorable Magistrate Judges Miller, Leonard, and Krask.

The DOJ Office of Inspector General forwarded this issue to the DOJ Office of Professional Responsibility General Counsel and the DOJ Executive Office of U.S. Attorneys General Counsel. The Executive Office of U.S. Attorneys directed Mr. Martinovich to file a Criminal Complaint with the Federal Bureau of Investigation, to which he complied to the National and Regional Offices, as well as to the Virginia Attorney General. Reactions to public releases of this evidence have been overwhelming, to include concern at our Nation's highest levels. These illegal indictment activities were deployed by AUSA Samuels and Dougherty in order to be the controlling factor in Case 4:12cr101 negotiations and resentencing. It controlled, tainted, and destroyed any possibility of a fair and legal Case 4:12cr101 resentencing. Mr. Woodward's failures to address and protect his client from this fraud fell below even the lowest professional bar of representation. Mr. Martinovich respectfully asserts that any reasonable jurist allowed to see this evidence by this transparent Court would encourage us to move further. Mr. Martinovich requests this Court grant a COA for Ground 10.

GROUND XI: COURT DEMONSTRABLY RELIED UPON MATERIAL FALSE INFORMATION

This Ground and these issues have already been approved by the Fourth Circuit for a Certificate of Appealability in the March 26, 2019, Order for Case No. 18-7061 stating, "We grant a certificate of appealability on the following issues: whether Martinovich received ineffective assistance of counsel when his attorney failed to object to (1) the presentence report's and the district court's conclusions that Martinovich was overstating his employment and volunteer work at the prison; (2) the district court's determination that it would not consider Martinovich's positive work in the community in determining his sentence;"

As Mr. Martinovich has detailed in Grounds 7, 8, 9, and this instant Ground, the September 29, 2016, morning joint sentencing theater was the histrionic culmination of one long imbroglio to include the joint negotiations, joint plea agreement, joint PSR meetings and preparations, crossover witnesses, crossover victim impact letters, sentence concurrency changed to partial consecutive, one allocution to cover all, relevant conduct crossover in the plea as well as prosecution statements and demonstrable confirmations in District Court statements.

To attempt to splice and bifurcate which specific, material false submissions in the PSR, and demonstrably relied upon by the angry statements of the District Court, affected one separate sentence versus another sentence, or not the totality of Mr. Martinovich's sentence, would be a clear miscarriage of justice. There was one PSR interview, Judge Wright Allen reviewed and analyzed all information prior to the sentencing morning, to include the false material information, and the Court's harmful misconceptions of Mr. Martinovich were formed, and her entire sentencing calculus formed and documented

before she entered the courtroom on September 29, 2016. To attempt to argue that her anger for Martinovich "inflating what you're doing in the BOP(!)" and refusals to consider "Martinovich's positive work in the community" only affected certain parts of Martinovich's sentence, and not others, commits violence against common sense, and would be a clear miscarriage of justice.

As the Affidavits and Exhibits clearly delineate, Mr. Martinovich submitted these PSR Objections and corrections to defense counsel Mr. Woodward and would have no reason to believe that Mr. Woodward had not submitted them, or had lied about submitting everything. It is not the defendant's role to double check up on the duties and statements of effective, professional counsel. Also, Mr. Martinovich's answers to all colloquies were 100% congruent with his belief that all objections had been submitted and Mr. Martinovich's corrections were on the record.

The copies of the contemporaneous communications to Mr. Woodward clearly document Mr. Martinovich's corrections and submissions to counsel. Ex. #13 "PSI Objections - DSM - How Handled." Ex. #17 "PSR Objections...Activities since 1st Sentence...Charity & Community Stressed." Ex. #18 "I am comfortable with submitting 'Defense Counsel, for the record, reiterates its objection to inclusion of numerous paragraphs in the presentence report which he argues they are either inaccurate or inconsistent with trial testimony, per details submitted prior as Unresolved Objections by the Defendant, to include paragraphs: 6,11-13,19,24,27,32,33,36-38,40-43,45-48,50, 52-54,56-66,71-73, and 77-86, as well as the following Specific Objections..." Ex. #23 "OBJECT - 6 Objections per Case #1 PSR Objections...p.19 #49 - 'General Education Degree,' delete law library asst. (said assisted other clerk), - Yes, Asst. to Director

& Yes - Education Program if matters." Ex. #33 "Inmate History Work Detail." Ex. #41 "Gary Vaughn Law Library Clerk Affidavit." Ex. #43 "Sally Yi, FCI Ft. Dix Education Specialist Memorandum.'

Not only did Mr. Woodward's failures severely harm and prejudice Mr. Martinovich in the totality on the morning of September 29, 2016, but he deprived Martinovich of the positive impact these altruistic deeds, and previous contributions, should have contributed to the District Court's total sentencing consideration. [Pepper v. U.S., 179 LED 2D 196, 562 US 476 (2011)].

Mr. Martinovich herein by reference incorporates the full argument and evidence submitted in Memorandums (Docs. 277, 292), Affidavits Nos. 83-89, 251-263 (Doc. 293), and Exhibits Nos. 13, 17-23, 33, 41, 43 (Doc. 280). This thorough submission provides incontrovertible evidence, precedent, and prejudice proving Mr. Woodward's ineffective assistance severely prejudiced the sentencing of Case 4:12cr101. Mr. Martinovich respectfully requests a COA for Ground 11 and these issues.

GROUND XII: COUNSEL VIOLATION OF RULE 408 AND PRIMARY STIPULATION

Mr. Martinovich herein incorporates by reference the full argument and evidence submitted in Memorandums (Doc. 277, 292), Affidavits #246-270 (Doc. 293), and Exhibit #39 (Doc. 280).

On February 1, 2011, Mr. Martinovich agreed, in his personal capacity and as CEO of MICG Investment Managmenet, LLC, to a Settlement Agreement with the Financial Industry Regulatory Authority (FINRA), in which Mr. Martinovich did "not admit or deny the allegations of the Complaint." [Ex. 39]. In exchange for rescinding his demand for arbitration hearings to defend his firm and for surrendering his personal and corporate industry licenses, FINRA agreed not to impose a $1 million fine and not to pursue forfeiture of MICG's

management team's industry licenses as threatened [See "Fall of MICG, Vol. I," Ash Press, Amazon Books].

Further, the Settlement Agreement stated, "Respondents also submit this offer upon the condition that FINRA shall not institute or entertain, at any time, any further proceeding as to Respondents based on the allegation of the Complaint, and upon further condition that it will not be used in this proceedings, in any other proceeding, or otherwise, unless it is accepted by the National Adjudicatory Council (NAC) Review Subcommittee, pursuant to FINRA Rule 9270."

Trial counsel Mr. James O. Broccoletti entered into a Stipulation Agreement with the government and with the Court's approval to classify this agreement as inadmissible evidence. As the District Court stated, "That agreement was based on uncertainty as to the FINRA settlement's admissibility under Rule 408(a)(1) of the Federal Rules of Evidence" [R. 33 Doumar]. Not only was the settlement's details in question, but the derivation of the evidence, statements, admissions, and allegations were in question per the parties' acknowledgement of Rule 408. Rule 408(a)(1) states that "Evidence of the following is not admissible - on behalf of either party - either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: furnishing, promising, or offering - or accepting, promising to accept, or offering to accept - a valuable consideration in compromising or attempting to compromise the claim." [FRE 408]. Without question, all issues, details, and information regarding the FINRA settlement were inadmissible evidence pursuant to Rule 408, and further protected by the joint Stipulation Agreement.

Trial counsel Mr. Broccoletti was ineffective for failing to abide by Rule 408 and the Stipulation Agreement. Mr. Broccoletti's

failures caused extreme prejudice to Martinovich. As Mr. Broccoletti, himself, stated, "The introduction of the FINRA results so compromised the defendant's right to be tried upon the evidence presented in the courtoom...as to preclude his rights to a fair trial. [Mot. Acq. & New Tr.]. Mr. Broccoletti's failures not only compromised the defense, but also opened the door for the government to also violate said Rules and Agreements, as well as permit the Court to allow the extreme prejudice against Martinovich.

The District Court, itself, listed Mr. Broccoletti's ineffective assistance. "Defendant is as much responsible for the introduction of testimony concerning the closing of Defendant's investment firm and the loss of his brokerage license as the Government. In his opening statement, defense counsel acknowledged that Defendant's investment firm had to close its doors. Defendant's counsel further claimed that Defendant's investment firm flourished and, 'but for the significant financial downturns in the market in 2008,' would have continued flourishing. The opening statement was consistent with Defendant's strategy throughout trial." [R. 33].

"Defendant's counsel continued to make reference to the results of the FINRA investigation in his closing argument, emphasizing to jurors that neither 'the fact that his [Defendant's] business closed' nor 'the fact that he [Defendant] no longer has a license' is evidence of criminal conduct. Defendant, therefore, made the reason for his firm's closure a central theme and repeatedly brought up the 'results' of the FINRA investigation throughout trial." [R. 33].

Trial Judge Doumar furthered his itemization of counsel's ineffective assistance as he addressed counsel's post-trial complaint of a government witness being allowed to violate the Stipulation Agreement. "Defendant's counsel did not object to any of those

questions when they were asked. Defendant's counsel did not object to that line of questioning prior to engaging the witness in cross-examination. In fact, Defendant's counsel did not object to that line of questioning on the day it occurred...Defendant did not move for a mistrial...Defendant's (later) objection to the testimony was untimely...Defendant repeatedly failed to raise timely objections to that testimony." [R. 33]. Also, "The Court stated that it was providing a copy of the indictment to the jury for use during its deliberations. Defendant's counsel did not object to the jury's review of the indictment (which)...makes express reference to those results." [R. 33]. Finally, Judge Doumar emphasized that, in direct contravention to Rule 408's explicit directions, "Defendant's counsel also saw fit to introduce dozens of pages of sworn testimony before FINRA investigators in an effort to discredit a key Government witness...more often than not, defense counsel was responsible for the results being referenced." [R. 33 emp. add.].

LEGAL STANDARD

"The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government." [FRE 408, Nts. 2006 Am.].

"A target of a potential criminal investigation may be unwillig to settle civil claims against him if by doing so he increases the risk of prosecution and conviction." [Fishman, Jones, § 22:16 (2003)].

"Statements made in negotiations cannot be used to impeach by prior inconsistent statement or through contradiction." [McCormick, Evidnece at 186 (5th ed. 1999)].

"Settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them." [Pierce v. Triples & Co., 955 F. 2d 820 (2nd Cir. 1992)].

Mr. Broccoletti satisfied Strickland's first prong by violating FRE 408 and the Stipulation Agreement by 1) introducing facts and issues of Martinovich's FINRA settlement in his opening and closing statements, as determined by the District Court, 2) failing to timely object to the government's questioning which violated Rule 408 and the Stipulation Agreement, as determined by the District Court, 3) failing to move for a mistrial when appropriate as the government violated Rule 408 and the Stipulation Agreement, as determined by the District Court, 4) failing to object to the Court providing a copy of the indictment to the jury which violated Rule 408 and the Stipulation Agreement, as determined by the District Court, and 5) introducing dozens of pages of sworn testimony before FINRA investigators in an attempt to impeach by a prior inconsistent statement or a contradiction, as determined by the District Court.

Mr. Martinovich was prejudiced and Strickland's second prong was satisfied, as 1) Mr. Broccoletti himself urged, "The introduction of the FINRA results so compromised the defendant's right to be tried upon the evidence presented in the courtroom, and not on some other investigation by another body, as to preclude his rights to a fair trial...All of the information undoubtedly left the jury with the impression that a high ranking official with likely more experience in the field of securities had already found Martinovich guilty of the fraudulent activities. see United States v. Root, 103 F. 3d 823 (5th Cir. 1997)...Would evidence that a former jury determined guilt be admissible if that judgment was reversed on appeal? The defendant thinks not, therefore the introduction of this evidence is relevant and prejudicial to the extent it warrants a new trial." [R. 33]. Mr. Martinovich could not have expressed the prejudice caused by Mr. Broccoletti better himself,

2) Mr. Broccoletti continued to violate this Stipulation, even Judge Doumar believed the errors were so prejudicial that he determined a curative jury instruction was in order, but he "doubly-violated" Rule 408 and the Stipulation Agreement. He stated, "I'll tell them they're not to consider any investigation of any kind." Unfortunately, the imbroglio initiated by Mr. Broccoletti kept degrading as Judge Doumar became confused and adlibbed, stating the exact opposite instruction as to the one agreed upon. He yelled, "(t)he defendant's organization was put out of business(!)" [Tr. p.1106]. "(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. U.S., 196 LED 2d 242, 137 S. ct. (2016)], 3) counsel's failures severly prejudiced Martinovich in the eyes of the jury in violation of Rule 408 and the protections of FRE 403 providing that the court may exclude relevant evidence if its value is substantially outweighed by a danger of unfair prejudice, and against the specific protection of the Stipulation Agreement, 4) counsel permitted the jurors during deliberation to review the indictment which included prejudicial information meant to be precluded by the Stipulation Agreement, FRE 408, and FRE 403, 5) counsel did not timely move for a mistrial when, per the Court's Order, it would have been properly considered and had a reasonable probability of being granted [Order, FRCP 33], and 6) Mr. Broccoletti severely prejudiced Mr. Martinovich on Motion for Acquittal per FRCP 29 and New Trial per FRCP 33 by his repeated failures and ineffective assistance causing both Motions to be denied even though the District Court repeatedly did not deny the errors and substantial prejudice to Martinovich, but repeatedly rebuked Mr. Broccoletti for ineffectiveness and the cause of the harm.

Counsel Mr. Broccoletti, himself, emphatically urged the District Court that these violations against Mr. Martinovich were so prejudicial that they must warrant a new trial, and the District Court, itself, repeatedly, with numerous examples, stated that Mr. Broccoletti is solely responsible for these prejudicial violations. Herein lies, by definition, the satsifaction of Strickland's first and second prongs, and at a bare minimum, satisfaction for a reasonable jurist to find this issue debatable and vote for encouragement to proceed further with a COA. As it must be clear to this court of review over eighteen Grounds, if Mr. Broccoletti had decided to not even show up for trial, and Mr. Martinovich was executed by firing squad because of that, the current District Court would not claim Mr. Broccoletti violated Strickland's first or second prongs, as the Honorable Court has already concluded he is "one of the best attorneys in Virginia...if not the United States of America." Mr. Martinovich respectfully requests this Court GRANT a COA for Ground XII. If it wasn't of utmost importance, why must a Stipulation Agreement have been put in place? If it wasn't prejudicial or didn't matter, then why all the preparation before and the pointing fingers after among the defense, the prosecution, and the Court itself? "At its core, such conduct tends to undermine the public's confidence in the integrity of the judiciary." [Martinovich].

GROUND XIV: GOVERNMENT OBJECTION PRESERVES JUDICIAL ERROR FOR REVIEW

Mr. Martinovich re-asserts his claims of Ground XIV as submitted in Memorandums (Docs. 277, 292) and Affidavits #92, 275-280 (Doc. 293).

Here, we meet another paradox, more mutually-exclusive conclusions by the District Court. The District Court accepts defense counsel Mr. Broccoletti's excuse for not objecting and preserving the Ground I egregious violations by Judge Doumar for appeal because

"he raised concerns to the Government about the Court's comments and that the Government raised the same concerns to the Court." But, here in Ground 14, the District Court's Denial states, "The Fourth Circuit has never taken the position that an objection by the Government, or even by a co-defendant, can preserve an appealable issue for defendant." If Ground 14's answer by the District Court is correct, then Mr. Broccoletti is ineffective for failing to object to preserve the egregious errors for harmlessness review on appeal in Ground 1. Or, if Ground 1's excuse is correct, then Mr. Martinovich's Ground 14 must hold, and the error must have been reviewed at harmlessness standard of review.

Also, in response to the District Court's comment on the specificity of the objection, the Courts have repeatedly concluded that substance is preferred over form. For instance, "Rule 51, which requires that party make known to court action which he desires court to take or his objection and grounds therefore, ought not to be applied in a ritualistic fashion and where problem has been brought to court's attention and court has indicated in no uncertain terms what its views are, to require further objection would exalt form over substance." [U.S. v. Williams, 561 F. 2d 859 (App. DC 19770].

At trial, during the abusive interference in counsel's questioning of key defense witness, Auditor Mr. Umscheid, AUSA Samuels motioned the Court for both the government and defense counsel to hold a sidebar at the bench. With all parties present, Mr. Samuels stated, "Judge, I did want to raise something. I'd like to do it out of the hearing of the witness if we could...Judge, given the court's comments and concerns...I just want to be certain that the record is clear that we will raise these and object to those concerns when we feel they are appropriate and raise it during cross-examination.

I just don't want there to be an issue with this down the road, so I don't feel its incumbent on us as the government to protect the record and just bring this up now in terms of the court's concerns." [Tr. p. 2529]. And, following this joint objection and counseling session, Judge Doumar was remarkably constrained and respectful for at least a couple hours, as discussed in Ground 1.

As recent as 2014, the Fourth Circuit has left undecided the issue of whether an "objection or argument made by the government could be sufficient to preserve an appellate issue for a criminal defendant." [U.S. v. Isdell, 598 Fed Appx 139 (4th Cir. 2014)]. The District Court's denial states, "The Fourth Circuit has never taken a position that an objection by the Government...can preserve an appealable issue for the defendant," but that is the point that this Court did not say it could not. As the Petition details how Mr. Martinovich urged counsel Mr. Woodward to allow this Court to determine the standard of review as it was in question. Instead, providing ineffective assistance, counsel did not make this argument, but proactively requested plain-error review. "Successive panels of this court have stated that we do not apply plain-error review unless a party asks." [U.S. v. Martinez, 432 Fed. App. 526 (6th Cir. 2011)]. "Because the government has not asked for plain-error review, we review Cribb's claims using an abuse of discretion standard, despite the fact that he did not object." [U.S. v. Cribbs, 522 Fed Appx. 280 (6th Cir. 2013)].

As this preservation issue was the paramount variable in the equation to overturn Mr. Martinovich's conviction, Mr. Woodward's failure to submit this proper argument and to block Mr. Martinovich's request is clearly below an acceptable level of professionalism and zealous representation, and by definition, Mr. Martinovich was

prejudiced at the nearly-unachievable level of plain-error review.

As the District Court's answers to Ground 1 and Ground 14 are mutually exclusive, certainly a reasonable jurist would find this issue debatable and worthy of, at a minimum, a COA by this Court. Mr. Martinovich respectfully requests a COA for Ground 14.

GROUNDS XVII & XVIII: INFLAMMATORY EVIDENCE EXCEEDING PROBATIVE VALUE

The outrageous, orchestrated histrionics of Mr. Martinovich's trial, from the already-determined misconduct of the judge to the character assassination at the highest level, finds its genesis in the fact that the U.S. Attorneys Office believed Martinovich would certainly be in the 98% of defendants who accept a plea agreement and move forward. Instead, Mr. Martinovich rejected plea offers of 7-years, 5-years, and 3-years (why did the government keep lowering?), and the government and the District Court were left with a "high-profile case in a small fishbowl" without any actual evidence of fraud, and most certainly without mens rea, in the 88,000 emails and thousands of documents seized. The defense counsel, Mr. Broccoletti, whom the District Court labeled "one of the best attorneys in Virinia... if not the United States of America," claimed throughout preparation with Mr. Martinovich that the government had no actual evidence and only a thorough character assassination would be successful. [Affidavit #31-34 (Doc. 292)]. The prosecution knew they must present a well-rehearsed theater to make the jury and the courtroom believe that Martinovich had suddenly, unexplainably, turned into a horrific fraudster, and away from his decades as President of Big Brothers Big Sisters, Chairman of the Children's Village, Chairman of YPO, and the long list more. And, with the help of the egregious misconduct and control by the judge, it worked.

LEGAL STANDARD

"(T)he evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the factfinding process." [U.S. v. Torrez, U.S. App LEXIS 16411 (4th Cir. 2017)].

"We recognize that the government has a strong case against Johnson and the question of whether the errors at trial were harmless is for us a very close one. Despite the strength of the prosecution's case, however, we cannot say this inflammatory evidence did not sway the jury in this case." [U.S. v. Johnson, 600 Fed. Appx. 872 (4th Cir 2014)]

"Because Titan failed to object at the time the 'inflammatory' evidence was initially offered, we determine that the district court did not abuse its discretion when it denied the Rule 59 motion." [Shaw v. Titan, U.S. App. LEXIS 10080 (4th Cir. 1997)].

"The term 'unfair prejudice' as to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." [Old Chief v. U.S., 519 US 172 (1997)].

"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 v. Clarke, 783 F. 3d 987 (4th Cir. 2015)].

The government daily displayed pictures of what were alleged to be Mr. Martinovich's home on the James River, Nags Head beach house, Bentley Continental Flying Spur, and Ferrari 355 Spyder, even though Martinovich urged Mr. Broccoletti to object, even stating, "That's not even my car." [Aff. #316]. Counsel stood silent. "(T)he prosecutor engaged in a continuous course of conduct that was

designed to equate wealth with wrongdoing and appeal to the potential bias of not-so wealthy jurors against the very wealthy appellant, The court reversed and remanded." [U.S. v. Stahl, 626 F. 2d 30 (2nd Cir 1980)].

By trial, two junior advisors, Ms. Daknis and Ms. DiVincenzo, had transferred the majority of Martinovich's personal clients to under their control at a competitor investment firm and made inflammatory accusations with their first answer when brought to the stand by the prosecution:

GOVERNMENT: "In 2008 did you observe any changes in Mr. Martinovich as a boss or a leader of MICG that were concerning to you?"

DAKNIS: "I lost probably two or three clients around the summer of '08 because of his affair on his wife." [Tr. p. 1705].

GOVERNMENT: "And did you notice any changes in Mr. Martinovich during your time at MICG?"

DIVINCENZO: "Sadly, yes...One opportunity I had to express concerns to Mr. Martinovich was at 9:30 in the morning at a Marriott Hotel. He was drinking Sauvignon Blanc at 9:30 in the morning. I mentioned to him I was very concerned that he might have a drinking problem, and he blew up at me...You know, lots of trips to New York, Vegas. He would disappear for days. I heard he had left his spouse --" [Tr. p. 1359].

Mr. Broccoletti stood silent. Following Ms. Daknis' testimony, even Judge Doumar again scolded Mr. Broccoletti, "All you had to do was object." [Tr. p. 1706]. Clearly, these two witnesses were coached. "In a federal criminal prosecution the (defense attorney) may cross-examine the (witness) as to the extent of any coaching." [Geders v. U.S., 425 U.S. 80, 96 US S. Ct. 1330 (1976)]. "(The prosecutor) may have conversations with his witness. He may not coach the witness." [U.S. v. Guthrie, 537 F. 3d 243 (6th Cir. 2009)].

The government flew in Diana Hewitt, Director of Pit Clerk Operations at the Bellagio Casino and Hotel in Las Vegas, Nevada to testify about luxurious trips and spas for the hardworking jury.

HEWITT: "Of course, we have high-end gambling at the Bellagio... Oh yes, hotel rooms, spa, a whole resort facility...It's a breakdwon of his play, his comps...he's played 145 hours,

> and 38 minutes...each hand of like black jack that he played, the average throughout his time of playing was $273...so his rooms were generally free."

PROSECUTOR: "And the same thing with food and beverage."

Mr. Broccoletti stood silent. "The court held that the prosecutor did intend to arouse the prejudices of jurors against appellant because of his wealth and engaged in calculated and persistent efforts to arouse that prejudice throughout the trial." [Stahl].

Mr. Broccoletti's failures greatly prejudiced Mr. Martinovich in the eyes of the jury and satisfies Strickland's second prong. The responses from the government and the Court that Mr. Broccoletti was not ineffective because he "decided to focus on other things," is a nonsensical argument with no legal foundation. The Court's claim that "evidence presented at trial connected the fraud proceeds to specific expenditures," is a template response for fraud cases and 100% false for this trial. There was no specific nexus proven or even alleged by the government. What was proven was that Martinovich never increased his personal salary since 1998 although increasing MICG's cash flow over 800%, and that he had returned over $4.6 million to hedge fund investors in 2008 and 2009, the period in question.[Ex.34,35]

The prejudice is both obvious and specific. The lead jurist, Forewoman Ms. Margaret Corbin Hines, stated to The Daily Press, "Hotel bills from the Bellagio showed spa treatments, room service, and two different female guests who were not Mrs. Martinovich. That didn't sit well with us, certainly not me." [7/21/13 Rep. Dujardin].

The sentencing Judge Doumar was clearly exasperated by Mr. Martinovich's wealth and could not control his prejudice.

> "He drove that Bentley around...He drove a Maserati...It was all to impress people. Who was he impressing? He was impressing gullible stockholders who would invest with him because they thought somebody who had both Bentleys and Maseratis and expensive homes and apartments were absolutely wonderfully successful." [Tr. P. 3651].

In Weir, the Eighth Circuit reversed the conviction because the government had introduced prejudicial, non-related evidence to sway the jury. The Appeals court reversed, concluding that the evidence prejudicially invited a guilty verdict, because it tended to show "the defendants were 'bad' men and should be convicted because they were 'bad.'" [U.S. v. Weir, 575 F. 2d 688 (8th Cir. 1978)].

"The public interest requires that the court of its own motion protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." [New York C.R. Co. v. Johnson, 73 LED 706, 279 US 310 (1929)].

Mr. Martinovich respectfully submits that a reasonable jurist would find this issue, at a minimum, debatable and would authorize the court to proceed further. Mr. Martinovich respectfully requests a COA for this issue and vacation of conviction. Trial counsel was ineffective at trial and appeal counsel was ineffective for not submitting this Ground on appeal. Mr. Martinovich was prejudiced at trial and on appeal.

EVIDENCE IN 4:12CR101

Throughout this 5-year legal journey, the government has attempted to manipulate this Court's assiduous clerks and panel by repeatedly claiming "overwhelming evidence" as the counterbalance to the long list of constitutional violations experienced during this embarrassing embroilment.

Yet, the government has simply applied "high volume," which it has fraudulently presented as actual evidence. Once Martinovich rejected three separate plea offers, a statistical anomaly for his demographic, the government was left without any actual evidence, most certainly not any mens rea, and was forced to execute their tired template, high volume, character assassination parade of clients

"who didn't understand," and the one investment banker who was blackmailed to completely reverse his previously, repeated sworn testimony exonerating Mr. Martinovich. This parade had nothing to do with fraudulently raising the price of one solar company stock in one of MICG's investment funds, the Counts of the indictment.

The government has consistently presented "28 witnesses and 250 exhibits" as a metaphor for overwhelming evidence. This mis-characterizati is derived from their strategy: If there's not one condemning witness, then provide 28, and if there's not one damning piece of evidence, then present 250. A short synopsis of Actual Evidence:

a) There was zero evidence presented, because there was none, that Mr. Martinovich believed the EPV Solar investment was fraudulent or would not work out to be a successful venture. "To convict a person of mail fraud or wire fraud...the government must prove that the defendant acted with specific intent." [U.S. v. Wynn, (4th Cir. 2012)].

b) The prosecution can rise no higher than the evidence and sworn testimony of its key witness, solar valuation expert Mr. Lynch, called by the government, not given immunity, and the only witness to testify he performed the valuations and set the specific per share pricings. A small sample of his testimony:

COUNSEL: "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]

COUNSEL: "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."

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

LYNCH: "Correct."

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

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

JUDGE: "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]

c) The Fund's independent lead auditor, a member of the AICPA Auditing Standards Board, repeatedly confirmed the proper procedures, analysis and audit oversight. A small sample of Mr. Umscheid's testimony:

UMSCHEID: "(S)o my audit was focused on the cash transaction in and out and the valuations of the companies that the hedge fund held...because of the bond raise (Jefferies & Co. $77mm 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." [p. 2453, 2532, 2542].

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

d) Although all valuations and accounting could have legally been conducted in-house, as with thousands of other firms, MICG utilized external independent experts. Mr. Lynch was thoroughly vetted by the Auditors and Martinovich had zero contact with Lynch (all evidence at trial). Mr. Umscheid's firm was a licensed Broker-Dealer Auditor, and he was highly-regarded as an AICPA Committee Member.

e) Even if Mr. Martinovich desired a higher EPV Solar stock price, which 88,000 seized emails, voicemails, and thousands of documents never once identified, it would have been completely legal and compliant with the SEC, FINRA, FASB, and AICPA regulations and guidelines, as occurs daily in the industry.

f) The government's repeated claim that the valuations are invalid because, allegedly, Mr. Lynch didn't know MICG was one of the specific firms which applied his valuations, is a nonsensical argument by people who don't understand the industry:

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

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

COUNSEL: "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: "He never qualified any of the valautions?"

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

Open valuation is the most common form which denotes the valuation is suitable for multiple purposes and may be taken at face value.

g) The government's repeated claim that Mr. Lynch was not qualified to perform this valuation was thoroughly rebuked at trial:

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

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." [p. 446]

COUNSEL: "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."

COUNSEL: "And what was that decision?"

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

h) The trial proved the pricing came from Lynch and New York, regardless of government unfounded allegations:

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

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

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

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

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

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

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

COO: "Bruce (Glasser) said that that was a valid number for the funds...I assumed he got it from Gifis and/or Lynch." [p. 2362]

i) Government narratives of Martinovich receiving personal benefits ahead of clients and refusing transactions were repeatedly debunked by the evidence. The evidence proved Martinovich personally seeded the multiple hedge funds with over $500,000. During the period of investigation, Martinovich personally invested another $500,000 into MICG to fund acquistions from Merrill Lynch and UBS Securities. And, during this same period, MICG returned $4,606,221 to hedge fund investors by distributions and redemptions [Exhibit #34,35].

There is "overwhelming evidence," overwhelming proof, that Martinovich and his management team are innocent. At a minimum, this evidence debunks any learned consideration that the evidence would eclipse, or offset, the harmlessness standard of review by this Court.

CONCLUSION

Mr. Martinovich respectfully requests a COA for these Grounds presented, as well as the vacation of conviction and sentence for Case 4:12cr101 and the interwoven Case 4:15cr50.

Respectfully,

Date: 05/30/2019

Jeffrey A. Martinovich

Atchs:

1. Ex. A - Statement of Case
2. Certificate of Service
3. Certificate of Compliance
4. Martinovich Affidavit

⇔81091-083⇔
Jeff Martinovich
Reg. No. 81091-083
PO BOX Box 350
Fed. Pris. Camp - Beckley
Beaver, WV 25813
United States

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL®

7017 0660 0000 6053 1563

PRIORITY ★ MAIL ★

TRACKED ★ ★ ★ INSURED ★

UNITED STATES POSTAL SERVICE®

For Domestic Use Only

Label 107R, July 2013

[redacted]

⇔81091-083⇔
Lewis F Powell Courthouse
Attn: Clerk of Court
1100 E MAIN ST
Suite 501
Richmond, VA 23219
United States

UNITED STATES POSTAL SERVICE®

1006

23219

U.S. PO
PM 2-D
BEAVER
25813
JUN 04
AMOUN
$0
R2304M

"LEGAL MAIL"