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

JEFFREY A. MARTINOVICH,	)	
Petitioner,	)	Case NO. 4:2018cv27
	)	(4:15cr50)
v.	)	4:2018cv28
	)	(4:12cr101)
UNITED STATES,	)	
Respondent.	)	

MOTION TO OBJECT TO EXTENSION, TO STRIKE AFFIDAVIT, AND REQUEST VACATION OF 4:15CR50 SENTENCE AND PLEA AND 4:12CR101 SENTENCE, OR IN THE ALTERNATIVE REQUEST RESENTENCING IN BOTH CASES IN LIEU OF EVIDENTIARY HEARING

NOW HERE COMES, Jeffrey A. Martinovich, proceeding pro se, in a Motion to respectfully object to another extension for the government, to strike Mr. Woodward's second successive Affidavit applied in Case 4:15cr50, and to request the vacation of Case 4:15cr50's sentence and plea agreement along with Case 4:12cr101's sentence. Or, in the alternative, Mr. Martinovich respectfully requests resentencing in both cases in lieu of an evidentiary hearing or other proceedings.

ANOTHER EXTENSION

Mr. Martinovich respectfully submits that G. Zachary Terwilliger, Mr. Brian Samuels, and Ms. V. Kathleen Dougherty's request for extension is another dilatory, unprofessional tactic to further prolong these proceedings of nearly six years. For these very same issues, these U.S. Attorneys already requested to the Appeals Court an Extension Out of Time without good cause or excusable neglect, all for being out of the office eight days during the Newport News School System Spring Break. This request follows, of course, the illegally-held and sealed superseding indictment in anticipation of Mr. Martinovich overturning his sentence,

and then the illegal resealing and manipulation of expired statutes of limitations, all to further extend Mr. Martinovich's incarceration. Mr. Terwilliger, Mr. Samuels, and Ms. Dougherty now claim they must extend "due to scheduled time away from the office and the press of other business." Mr. Martinovich, who seems to meet all court deadlines amidst lockdowns, stabbings, and stolen legal paperwork, respectfully questions whether they possibly need a fourth U.S. Attorney added to the team. Mr. Martinovich respectfully requests this Court deny this request for extension.

SECOND & SUCCESSIVE AFFIDAVIT IN 4:15CR50

Mr. Martinovich respectfully submits that the request for another Affidavit from attorney Mr. Lawrence Woodward is another dilatory tactic, as well as academic, moot and in violation of Mr. Martinovich's due process rights. First, in repsonse to the Case 4:12cr101 § 2255 Petition, which contains the duplicate issues now being addressed, Mr. Woodward submitted a comprehensive Affidavit filed February 22, 2019, in which he states, "Counsel had reviewed in summary fashion the multiple and lengthy claims by Mr. Martinovich in preparation of this Affidavit."

Second, in the government's lengthy and dramatic Response to the Appeals Court in this instant Case 4:15cr50, they already submitted Mr. Woodward's Affidavit on the record in this case. The government stated in their Response, "Although not submitted in the 2015 Section 2255 proceedings, Martinovich's counsel provided an affidavit," and proceeded to reference the statements and issues from this Affidavit throughout their response, all in violation of FRAP 10(e), of course.

Third, the District Court for the Eastern District of Virginia has previously established that these argument are "duplicated" among the two cases in the Court's dismissals of Mr. Martinovich's submissions,

and the Court adjusted their responses accordingly.

Now, the government wants a second bite at the apple to submit a second Affidavit since the first one failed, as well as to get a second chance at the defense of these Grounds in another Response. Mr. Martinovich respectfully submits this second and successive opportunity violates Mr. Martinovich's right of due process, as well as the AEDPA strict procedures. Mr. Martinovich respectfully requests this Court strike a second counsel Affidavit in Case 4:15cr50, as well as a second try at a Response.

RESENTENCING IN LIEU OF EVIDENTIARY HEARING

In support of direct resentencing, Mr. Martinovich cites the plain language of the Fourth Circuit's Unpublished Per Curiam Order. The Fourth Circuit was thorough to record that it had absolutely vetted Mr. Martinovich's submissions, as well as the government's detailed Response to these specific three issues, and that the Court of Appeals had determined "(1) counsel's performance was constitutionally deficient and (2) such deficient performance was prejudicial." To determine the prejudice prong, the court of review determined that Martinovich "demonstrate(d) that counsel's performance fell below an objective standard of reasonableness under 'prevailing professional norms.'" The Fourth Circuit continued that they even evaluated these three grounds "'from counsel's perspective at the time' and appl(ied) 'a strong presumption that counsel's representation was within the wide range of reasonable professional assistance in order to eliminate the distorting effects of hindsight.'" Yet, the Appeals Court vacated all three Grounds. The Fourth Circuit also determined that Martinovich overcame the burden "to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment," and Martinovich "demonstrated(d) that 'there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.'"

As the Fourth Circuit vacated the District Court's Denial of Mr. Martinovich's Motion to Vacate on two Grounds by documenting plain error which requires vacation of sentence, and potentially further vacation, Mr. Martinovich respectfully queries whether an evidentiary hearing for a third issue, also vacated, is academic and moot.

A) First, as noted in Martinovich's previous Reply to the Fourth Circuit, and thoroughly documented in the current Defense Position Paper True Statement of the Case, the government's fabricated narrative is a conclusory, vague tale for theatrical impact, and contravenes the thorough evidence of six law firms, transparent documentation, and tax and audit compliance submitted on the record by Mr. Martinovich. For the purpose of brevity in this instant Motion, Mr. Martinovich respectfully refers this Court to the Position Paper's True statement of the Case for the facts.

B) Reference the issue of "inflating his good works in prison," Mr. Martinovich submits that the Fourth Circuit has carefully considered, yet overruled, the following defenses and explanations:

1. The District Court claimed "Martinovich represented there were no errors in the PSR,"
2. The District Court claimed it "fully considered all the relevant sentencing factors,"
3. The government "relies on Martinovich's adoption of the PSR,"
4. The government claimed "the district court did not err in failing to specifically address this 'vague and conclusory' claim," and
5. The government claimed "Martinovich cannot establish prejudice, given the district court's reliance on numerous other factors." [U.S. v. Martinovich, No. 18-7061].

All five of these defenses were overcome by the Fourth Circuit as they concluded:

1. "The district court erred,"
2. "Martinovich made a credible showing that his proffer regarding his volunteer and employment work in prison was truthful,"
3. "His statements that he informed his attorney of this and requested

that the objections be made are undisputed," [And documented in writing with Exhibits #18-23, Aff. # 84-86].

4. The errors "bolstered the sentencing court's belief that Martinovich was trying to 'game' the system,"
5. "(H)is attorney nonetheless failed to object to the sentencing court's conclusion that he was exaggerating his work in prison," and
6. "(W)e vacate the district court's order." [Martinovich].

C) Reference the issue of the Court "would not consider 'any of the positive things,'" Mr. Martinovich submits that the Fourth Circuit has carefully considered, yet overruled, the following defenses and explanations:

1. The District Court claimed it "considered all the appropriate sentencing factors,"
2. The government claimed "the district court was analyzing the changes in sentencing factors," and
3. The government claimed "Martinovich failed to state what facts the district court ignored." [Martinovich].

All three of these defenses were overcome by the Fourth Circuit as they concluded:

1. "(T)he court's explicit statement that it would not consider Martinovich's positive work in the community while sentencing him is troubling,"
2. "(T)he court was required to consider all the § 3553 factors,"
3. "(T)he Government's contention that Martinovich did not explicitly state what information the sentencing court failed to consider is without merit,"
4. "Considering how strongly this factor favored Martinovich, it is concerning that counsel did not challenge the court's statement,"
5. "(W)hile the Government appears to believe that the sentencing court was only considering Martinovich's actions after his first sentencing, this in itself would be error,"
6. "(I)t appears that the district court also failed to consider Martinovich's positive work in prison," and
7. "(W)e vacate this portion of the district court's order." [Martinovich]

D) Reference the issue of the District Court stating that counsel had agreed to the high end of the Guidelines range, Mr. Martinovich submits that the Fourth Circuit has carefully considered, yet overruled, the following defenses and explanations:

1. The District Court claimed to rely on counsel's written memorandum "requesting Martinovich be sentenced 'substantially below the agreed

guideline range,"

2. The government claimed that "counsel was agreeing that the sentence run concurrent, not that it be at the high end,"
3. The government claimed "such lack of objection did not prejudice the defendant,"
4. The government claimed "the guidelines did not consider (1) the defendant's conduct in putting his needs ahead of his attorney," [as bizarre as it is to even make the statement, or the assumption it should be otherwise],
5. The government claimed the "court further concluded the defendant had not demonstrated acceptance of responsibility, but permitted him to have this reduction," [another bizarre, oxymoronic statement], and
6. The government, in direct opposition to the Fourth Circuit's conclusion, claimed "the record revealed counsel requested a range far below the guidelines." [Martinovich].

All six of these defenses were overcome by the Fourth Circuit as they concluded:

1. "(T)he request for a lower-than-Guidelines range sentence was only with regard to the 2012 case,"
2. "The district court's reasoning is illogical,"
3. "If indeed counsel requested a below-Guidelines sentence in presenting memoranda in the 2015 case, the sentencing court's determination that counsel had agreed to the top of the Guidelines range was obvious and clear error,"
4. "(I)f counsel had objected, it is arguable that the district court might have imposed a sentence in the middle of the Guidelines range as it did in the 2012 case, and perhaps might have run less of it consecutively, in order to keep the consecutive percentage the same [the Appeals Court has determined plain-prejudicial error for either side of counsel's or the government's excuse which could be determined in a hearing], and
5. "(W)e vacate this portion of the district court's order." [Martinovich].

RESENTENCING FOR BOTH CASE 4:15CR50 & 4:12CR101

Based on the Fourth Circuit's specific conclusions of the Honorable Judge Wright Allen's misperceptions, false conclusions, and her resulting errors and misjudgment, all occurring within minutes of the Case 4:12cr101 sentencing - in which she had subjective control pursuant to Booker, and in which she and the government repeatedly stated she fully-considered Case 4:15cr50 - it would be a miscarriage of justice to not

also vacate this contiguous, juxtaposed sentencing hearing.

In support:

1. The applied plea agreement jointly controlled both sentences and sentencings.

2. Case 4:15cr50 (Case 2) conduct and issues were repeatedly confirmed to be fully considered in the Case 4:12cr101 (Case 1) sentencing calculus. The plea states that "relevant conduct may be considered in conjunction with the defendant's offense of conviction," and at sentencing the government stated that "the Court could consider the second offense conduct when deciding the resentencing on the first case."

3. The subsets and supersets of the victims in the two cases are the same investors and shareholders with crossover timeframes, investment periods, and distributions.

4. The same victims and shareholders submitted victim impact letters which the District Court demonstrably considered and crossed over both sentencings.

5. The government and the District Court verbally expressed at the joint sentencing that they are jointly considering letters and victims across both cases.

6. The same victims and shareholders testified at the Case 1 trial and sentencing and the Case 2 sentencing and addressed the exact same conduct.

7. Case 2 District Court repeatedly verbalized its interpretation of crossover relevant issues with Case 1, and Case 2 conduct occurred chronologically after Case 1, and hence by transitive property Case 1 is relevant conduct of Case 2.

8. Case 1 and Case 2 were joined by the Court for the Appeal, as well as for Petition for Writ of Certiorari.

The government, themselves, claim in their Response to the Fourth Circuit that this was all one intertwined proceedings. "(D)efense counsel acquiesced to a top of the guideline sentence given his efforts in the same proceedings to obtain a below guideline sentence of 30-60 months on the 2012 case." [18-7061, Response, p. 38, emp. add.]. To propose that these errors which infuriated Judge Wright Allen into believing Martinovich was "gaming the system" did not also affect her subjective sentencing calculus only minutes earlier would be a clear miscarriage of justice, especially considering the plea, government and Court's repeated iterations that the Case 4:12cr101 proceedings fully considered all aspects of Case 4:15cr50.

Any argument that the assumptions, plain errors and abuse of discretion in which the Fourth Circuit has found error and prejudice in the second half of the morning of September 29, 2016, were not also present in the first half of the same morning, commits violence against common sense. Mr. Martinovich respectfully requests this Honorable Court Order a resentencing for both Cases 4:15cr50 and 4:12cr101.

CONCLUSION AND REMEDY

Mr. Martinovich respectfully requests this Honorable Court not permit the government to relitigate these issues at the District Court as Mr. Martinovich has faithfully and compliantly plodded through every procedure and proceeding demanded by the District Court and then the Fourth Circuit Court of Appeals. The government has submitted their Counsel Affidavit, their narrative and their detailed Responses to these very issues. To allow the government to try it all over again would be reminiscent of the Russian Olympic Basketball Team repeatedly re-setting the clock until they finally made the last-second shot to beat the United States of America.

Mr. Martinovich respectfully requests this Court deny the government request for extension, strike another counsel affidavit, vacate case 4:15cr50 sentence and plea, vacate case 4:12cr101 sentence, and order resentencing in lieu of an evidentiary hearing.

Respectfully,

Date: 08/22/2019

Jeffrey A. Martinovich

CERTIFICATE OF SERVICE 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 8/22/19 with first-class sufficient postage applied, to be mailed by BOP personnel.

Mailed 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 that I have mailed this enclosed motion or petition in compliance with the institution's legal mail procedures on 8/22/19.

I, Jeffrey A. Martinovich, swear on 8/22/19 that the above is true and correct.

Jeffrey A. Martinovich