UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

LISA MARIE CASEY,

Petitioner/Movant,

Civ. Case No. _____

v.

Crim. Case No. DVAW106CR000071-001

UNITED STATES OF AMERICA,

Respondent.

_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. §2255

NOW COMES the Petitioner, Lisa Marie Casey (hereinafter "Casey"), pro se, pursuant to 28 U.S.C. §2255, and files this Memorandum in Support of her Motion to Vacate, Set Aside or Correct her sentence in the above referenced criminal case.

Per the Supreme Court in Haines v. Kerner, 404 U.S. 519, 30 L. Ed 2d 652, 92 S. Ct. 594 (1972), pro se pleadings are to be construed and held to a less stringent standard than formal pleadings drafted by lawyers; if the Court can reasonably read pleadings to state a valid claim on which litigant can prevail, it should do so despite failure to cite proper legal authority, confusing legal theories, poor syntax, and sentence structure, or litigant's unfamiliarity with pleading requirements.

Casey is not an attorney, but is proceeding pro se, to safeguard her Constitutional rights and in the best interests of justice.

Casey respectfully submits to the Court that the events which transpired in the instant case constitute a denial of her right to effective assistance of counsel as guaranteed by the Sixth

Amendment to the U.S. Constitution. Further, Casey's Fifth Amendment right to due process was also violated in this matter. These errors were not merely procedural, but substantially infringed upon her Constitutional rights to due process of law. At a minimum, Casey requests a hearing to be held on these matters. She also respectfully urges this Honorable Court to grant all and the most liberal considerations with respect to this §2255 petition.

STATEMENT OF JURISDICTION

Federal law provides an avenue for those whose sentences have been lengthened unconstitutionally. Title 28 U.S.C. §2255 is a statute that provides an avenue for redress of federal constitutional violations in a federal court. "A prisoner in custody under sentence of a court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States...may move the Court which imposed the sentence to vacate, set aside, or correct the sentence..." per 28 U.S.C. §2255.

Casey's petition under §2255 is timely filed as the date of imposition of Judgment was July 11, 2007.

STATEMENT OF ISSUES

I. INEFFECTIVE ASSISTANCE OF COUNSEL

II. UNREASONABLE AND UNLAWFUL SENTENCE, INCLUDING IMPROPER UPWARD VARIANCE IN VIOLATION OF BOOKER, 18 U.S.C. §3553(a), & RELEVANT GUIDELINE PROVISIONS

STAETMENT OF CASE

On 11/13/06, a 15 count indictment was returned by the grand jury against Casey, alleging in Counts One-Thirteen that she fraudulently caused to be ordered and printed money orders

in violation of 18 U.S.C. §1343, and in Counts Fourteen-Fifteen that she attempted to cash and deposit forged and stolen checks in violation of 18 U.S.C. §1344. On 4/10/07, Casey signed a Waiver of Indictment and consent that the proceeding may be by information rather than by indictment. The same day, an Information including one count was filed, charging that on or about 8/21/06, Casey as a principle and aider and abettor, transmitted and caused to be transmitted, causing to be ordered and printed money order number 4795121422 in violation of 18 U.S.C. §2 and §1343.

On 3/2/07, a court order was entered, on the motion of the United States, that defense counsel Dennis Jones be disclosed the psychiatric evaluation of Casey filed under seal with the court on 7/30/02 in the case of United States v. Casey, No. 1:02cr00032.

On 4/5/07, at the advice of her counsel, Casey signed a Plea Agreement, entering a plea of guilty of Count Fourteen of the Indictment and Count One of the Information.

On 6/22/07, the government filed for an upward departure. On 7/2/07, the government issued subpoenas to the Roanoke City Jail for all medical documentation regarding Casey and to James Graninger, Casey's husband, for all letters received by him from Casey.

On 7/11/07, Casey was sentenced to 96 months, 5 years supervised release, a special assessment of $200, and fine of $400. No restitution was applicable or ordered. The court determined Casey's total offense level to be 9, with a criminal history category of V (imprisonment range 18 - 24 months). The court

varied upward from the sentencing range maximum of 24 months to 96 months, thereby increasing Casey's sentence by 400% or 6 years, based upon the government's motion, listing as its reason for departure, 4A1.3 Criminal History Inadequacy. The PSR had suggested an offense level of 11, which included 2 additional points for obstruction of justice, however, the court did not find that defendant obstructed justice.

On 7/18/07, Casey through her counsel filed a Notice of Appeal at the district court. On 7/19/07, AUSA Bockhorst sent a letter to defense counsel indicating, "If the appeal is not withdrawn promptly, the United States may pursue any of the remedies set out in Section 18 of the agreement." On 7/30/07, counsel's paralegal sent a letter to Casey indicating she needed to endorse the Motion to withdraw her appeal. On 8/20/08, the Fourth Circuit entered an Order to dismiss the appeal.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

As an initial matter, Casey notes that she has not previously brought this claim forward because, generally an appellate court does not consider ineffective assistance of counsel claims on direct appeal. See Massaro v. United States, 538 U.S. 500, 504, 155 L. Ed 2d 714, 123 S. Ct. 1690 (2003)("In light of the way our system has developed, in most cases a motion brought under [28 U.S. C.] §2255 is preferable to direct appeal for deciding claims of ineffective assistance").

The Sixth Amendment to the U.S. Constitution guarantees that criminal defendants are entitled to the assistance of counsel in

presenting their defense. The High Court has stated, "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process". See Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); also U.S. Const. Amend. VI. Furthermore, the Court has recognized that "the right to counsel is the right to **effective assistance** of counsel". See McMann v. Richardson, 397 U.S. 759, 771 (1970) [emphasis added].

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2055 (1984), has held that the two prongs to prevailing on an ineffective assistance of counsel claim include (1) that the representation received "fell below an objective standard of reasonableness", and (2) "a reasonable probability exists that, but for counsel's unprofessional errors, the results of the proceedings would have been different". See Lockhart v. Fretwell, 113 S. Ct. 838 (1993). However, the prejudice that must be shown need not be anything more than something as small as one additional day in jail. See Glover v. United States, 531 U.S. 198 (2001).

A six year increase over the two years indicated by the sentencing guidelines to eight years (96 months) constitutes considerable prejudice. The basis for the government's motion for upward departure appears to have even been caused by defense counsel. Letters from Casey to her husband, James Grainger, were used by the prosecuton to request an increase in sentence due to obstruction of justice in which she was begging James to "take care" of the case for her (Refer also to PSR, ¶20). In the first of these letters dated January 12th, Casey indicates

her defense counsel "told me if convicted I'm gone for life cause of my criminal history" (See Exh. A). The Presentence Report ("PSR") indicates that Casey had 11 total criminal history points for a Category of V. Three of these points were due to a perjury charge in Criminal Case 1:02cr00032 over her testimony at her husband's bond hearing on 7/31/00. Casey testified that "her husband had never threatened her, that her husband had not made her fearful for her own safety, that her husband did not threaten to blow her up, and that her husband had not hit her since December of 1999, all in violation of Title 18, U.S.C. Section 1623." (Sealed Competency to Stand Trial Evaluation, p. 1, MCC New York). Doug Fleenor, Casey's defense counsel, requested she be evaluated forensically due to her previous psychiatric history. "He reported that he was also concerned about Ms. Casey's competency, because she was insistent of pleading guilty to her perjury charge. This evaluator spoke to Ms. Casey about this matter, she stated that she wanted to plead guilty and 'leave herself to the mercy of the court.' She further reported that if she pled guilty she would get three points for a downward departure and three points for an acceptance of responsibility. She also reported that the ATF agents working on her case would testify to the fact that she was coerced into committing perjury." (Competency Evaluation, p. 7).

According to the Criminal Responsibility Evaluation dated 7/19/02, a telephone interview was conducted on 7/11/02 with AUSA Eric Hurt (p. 7, See Exh. B). AUSA Hurt "reported that Ms. Casey's husband was prosecuted for making bombs at their house", and that "Mr. Casey beat Ms. Casey and was unfaithful to her, and on

one occasion nearly beat her to death. Mr. Hurt further stated that Mr. Casey's abuse toward his wife would be hard to exaggerate and that Mr. Casey had been charged with malicious wounding as a result of beating her when she was pregnant. Mr. Hurt described Mr. Casey's mother as an evil, mean and manipulative woman who will say anything to protect her son. She reportedly threatened to revoke Ms. Casey's bonds, which they did, and take her child from her... Mr. Hurt reported that Ms. Casey was scared for her life and reported this to the ATF agents handling her case" (p. 7, See Exh. B). Under Clinical Impression, Opinions, and Recommendations, it was observed that Casey has "suffered years of physical, sexual and emotional abuse from early childhood, which resulted in serious psychiatric problems...In her most recent marriage she has been seriously physically abused, having her earrings ripped from her ears, her teeth knocked out requiring dentures and nearly being beaten to death. It appears that when she prejured herself and denied that her husband harmed her, she was facing credible threats that to testify truthfully would have resulted in serious harm or death at the hands of her husband's family" (pgs. 7-8, See Exh. B).

An additional 2 points were added to Casey's criminal history score because this perjury offense was committed less than two years following release on 5/26/06. Thus, 5 points of the total 11 points comprising Casey's criminal history, or almost half of them, are due to her reaction to having not just her but that of her unborn child's life placed in jeopardy. Such a basis used by the current prosecution, and a woman at that (AUSA

Bockhorst), in order to justify a 400% increase in prison over the sentencing guidelines, just makes it all the more outrageous in its abusive nature, particularly when it is considered the individual is supposed to represent law enforcement. That a defense attorney would go along with it indicates this counsel was not only non-functional and incompetent as such, but that he was also engaging in collusion with the prosecution agaisnt his charge. The record establishes that a different previous defense attorney, Doug Fleenor, understood that Casey had a viable affirmative duress defense, and for that matter, so did a previous Assistant U.S. Attorney, Eric Hurt.

Duress is an affirmative defense that has been developed through the common law and adopted by the federal courts. See United States v. Bailey, 444 US 394, 409-10, 100 S. Ct. 624, 62 L Ed 2d 575 (1980); United States v. Dixon, 413 F. 3d 520, 523 (5th Cir., 2005).

On 2/27/07, it was already clearly evident from the court's record that there were problems serious enough between defense counsel and Casey so as to warrant it being brought up on the record (See Exh. C). Other evidence that defense counsel was hostile to his client and her best interests include (1) his refusal to pursue her cause through appeal, given the Fourth Circuit case law on upward departures and variances accruing in Casey's favor, instead demanding that she withdraw her appeal; (2) his 1/11/08 written response to Casey's request for information to prepare her §2255 in which he is hostile and threatening and in which he refuses to provide her with the requested information (See Exh. D); and (3) that Casey had to file a written complaint with the Virginia State bar, which resulted in the threat of sanctions by James Brodie, Intake Counsel, on

3/11/08 (See Exh. E), before counsel would provide Casey with the legal documents necessary to prepare this petition.

The rest of Casey's so-called extensive criminal history consist of 6 points deriving from petty offenses and misdemeanors, such as a worthless check on 5/2/02 and a theft under $300 on 8/20/97. If anything, 11 points overstate Casey's criminal history, and any competent defense attorney could have readily submitted this to the court as the case law in the Fourth Circuit is abundant on this point. (See Issue II).

Casey was not granted a two level reduction for acceptance of responsibility because "while under oath at her guilty plea and during the course of the presentence investigation, Ms. Casey insisted that she was pregnant" (PSR, ¶ 23). Casey was tested by Roanoke Jail staff on 1/30/07 for pregnancy and it was found positive. On 5/8/07, Casey was re-tested and it was determined she was not pregnant (PSR, ¶ 23). Rather than making the normal and rational assumption that Casey probably had a miscarriage due to the enormous stress she was under, having been arrested and her bond revoked, the report contends that a urine cup was "probably left there for the defendant and then later collected and tested" (PSR, ¶ 23). For sentencing, the government provided Exhibit 1, a Memorandum of Interview, in which inmate Bobbi Jo Bishop, who was pregnant, was questioned regarding giving her urine to Casey (See Exh. F). Bishop first denied the allegations, but when assured no further action would be taken, then admitted to giving Casey her urine. This interview was conducted on 6/28/07. On 7/6/07, the Office of U.S. Attorney advises Casey's defense counsel that Bishop

was going to give, or had already given, "a sworn affidavit" to this effect (See Exh. G). A letter from Bishop to Casey on 4/29/07 establishes that it is unlikely to be true that Bishop gave her urine to Casey on 1/30/07. Bishop asks, "When is your due date?" (See Exh. H). Had Bishop actually given her urine to Casey to effectuate this so-called fraud upon the court, then she would have known Casey was not pregnant and she would not have asked Casey when her baby was due. In addition, included in Casey's medical records subpoenaed from the jail, is a "Sick Call Request" time stamped on 1/30/07 in which it indicates that medical collected the urine specimen during their 8:00 p.m. rounds. Casey further attests that they took her upstairs and watched her pee. (See Exh. I). On 3/4/07, a "Sick Call Request" indicates that Casey was having cramps in her stomach (See Exh. J). It is certainly more likely Casey had a miscarriage than it is that Bishop provided the specimen. No jail or prison is going to engage in collecting a urine specimen for any reason from a prisoner in the absence of official supervision and to argue otherwise is not reasonable. It is also a simple matter for an prison official to obtain a statement from an inmate attesting to whatever that official wants as the courts are rife with such examples. The absence of a sworn affidavit from Bishop only confirms it.

It was indicated in the PSR that the "Probation Office believes that it is possible that the defendant developed this pregnancy ruse in attempt to impact her sentence as well as her placement by the B.O.P. pursuant to rehabilitative efforts as things to be considered when determining an acceptance of responsibility reduction."

Ms. Casey testified falsely under oath at her guilty plea hearing regarding her pregnancy and she continued this ruse during the course of the presentence investigation. Therefore, the probation office does not recommend a reduction for acceptance of responsibility" (PSR, ¶ 24).

The Fourth Circuit has held that in the instance where the defendant denies the "key facts of the offense conduct" or the "overt acts" of the offense conduct of "which he was convicted", a responsibility adjustment under §3E1.1 would be reversed. See United States v. May, 359 F. 3d 683, 694 (4th Cir., 2004). Such was not the circumstance in the instant case. This so-called pregnancy "ruse" is irrelevant to the responsibility adjustment application. Casey fully accepted responsibility for the offense conduct as admitted in the PSR and she further expressed remorse over her conduct (PSR, ¶ 22). Casey was entitled to the two-level responsibility adjustment and defense counsel should have objected to its denial in the PSR.

Whether or not Casey was pregnant, or even whether or not she may have made the pregnancy up as a "ruse" has absolutely nothing to do with the offense conduct of 18 U.S.C. §1343 or §1344 or the sentencing on it. Federal courts and federal prosecutors are not noted for their mercy. In addition, U.S.S.G. §5H1.4, Physical Condition, states, "Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted." Further, §5H1.6, Family Ties and Responsibilities, states these are "not ordinarily relevant in determining whether a departure may be warranted." Had

Casey actually carried a full-term pregnancy, her husband James could also have been a care giver. Thus, there was no basis upon which she would have been eligible or able to "manipulate" her sentence in such a manner. This instead appears to be the result of a malicious prosecution, and as such, should not be permitted to stand.

Instead, had Casey had access to competent defense counsel, he should have argued for a reduction or mitigating factor based upon her mental condition, a condition acknowledged by the government. The Insanity Defense Reform Act did not prevent defendant from presenting mental disease evidence for purpose of negating intent element of specific intent crimes of wire fraud and conspiracy under which she was charged. See United States v. Dupre, 339 F Supp 2d 534 (S.D.NY, 2004). Further, U.S.S.G. §5K2.13 provides for a downward departure if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.

The conviction was reversed and remanded in United States v. Kauffman, 109 F 3d 186, 187, 190 (3rd Cir. 1997), where defense counsel's performance fell below objective standard of reasonableness under Strickland test where he failed to pursue any investigation into insanity defense before advising client to plead guilty despite having seen a letter from defendant's treating psychiatrist stating the defendant was manic and psychotic when the offense was committed. See Williamson v. Ward, 110 F 3d 1508 (10th Cir. 1997). The Williamson case further held that, "An attorney

has expanded duties when representing a client whose condition prevents him from exercising proper judgment (cites omitted). Indeed, the evidence of which [defense counsel] was aware triggered not only a duty to investigate further, but also his duty to seek a competency hearing to determine whether [defendant] was mentally able to consult with his attorney and aid in his defense with a reasonable degree of understanding. Counsel's failure to do so is both unreasonable and difficult to understand." Id. at 1518.

Competency to enter a guilty plea depends on whether the defendant has a sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and has a rational as well as a factual understanding of the proceedings against him or her. See Galowski v. Berge, 117 S. Ct 202, 136 L. Ed 138 (1996). To be valid, a plea or guilty or nolo contendere must be made by one competent to know the nature and consequences of the plea. See Godinez v. Moran, 509 US 389, 113 S Ct 2680, 125 L. Ed 2d 321 (1993). The conviction of an incompetent defendant violates due process. See Pate v. Robinson, 383 US 375, 86 S Ct 836, 15 L Ed 2d 815 (1966). United States v. Damon, 191 F. 3d 561, 562 (4th Cir., 1999), 238 F. 3d 415 (2000) Remanded, has held, the "usual rememdy for violation of rule for government acceptance of guilty pleas that involves questions of competence or voluntariness is to vacate the defendant's guilty plea. Fed.Rules Crim. Proc. Rule 11, 18 U.S.C.A.".

The Supreme Court has held that a guilty plea must be made knowingly, voluntarily and intelligently. See Boykin v. Alabama, 395 US 238 (1969). Hill v. Lockhart, 474 US 52, 56, 106 S Ct. 366, 88 L Ed 2d 203 (1985), has held that a "guilty plea entered by defendant who has received ineffective assistance of counsel is

generally deemed to be involuntary." Ineffective assistance of counsel at the plea stage of a proceeding will render the plea involuntary and hence invalid.

In reviewing case law, there is some question among the circuits whether the conduct in which Casey engaged in Count 14 of the indictment is even a federal crime. United States v. Staples, 435 F. 3d 860, 866-67 (8th Cir., 2006), has indicated that, "Several circuits have held that the bank fraud statute does not extend to situations where the defendant has no intent to expose the bank to an actual or potential loss, see United States v. Thomas, 315 F. 3d 190, 200 (3rd Cir., 2002); United States v. Laljie, 184 F. 3d 180, 189 (2nd Cir., 1999); United States v. Rodriguez, 140 F. 3d 163, 167 (2nd Cir., 1998); or does not place the bank at risk of civil liability. United States v. Odiodio, 244 F. 3d 398, 401 (5th Cir., 2001); United States v. Sprick, 233 F. 3d 845, 852 (5th Cir., 2000); United States v. Davis, 989 F. 2d 244, 246-47 (7th Cir., 1993).

For example, a "scheme to pass bad checks", and a "pigeon drop" scheme, in which the victim is induced to withdraw money from a bank and entrust it to the defendant, have been held insufficient to establish bank fraud. Laljie, 184 F. 3d at 190. The reasoning of these courts is typified by the statement of the Seventh Circuit that the purpose of the bank fraud statute "is not to protect people to write checks to con artists but to protect the federal government's interest as an insurer of financial institutions. Davis, 989 F. 2d at 247; see also Thomas, 315 F. 3d at 199 ("Money is taken from banks every day for countless foolish purposes, but in such instances, banks are not exposed to liability nor is their integrity compromised."). Staples concluded, "we granted that the government

must prove that the defendant 'deliberately made false representations to the bank,' because '[o]therwise, there would be no scheme or artifice to defraud.'" Id.; see also United States v. Ponec, 163 F. 3d 486, 489 (8th Cir., 1998).

United States v. Thomas, 315 F. 3d 190, 202 (3d Cir., 2002), has held, "Even a scheme which does expose a bank to a loss must be so intended. '[A] scheme to pass bad checks [to merchants] is not bank fraud,' because, even though the bank might honor the checks and be civilly liable, the defendant did not anticipate that the bank, rather than the merchant, would bear the loss. United States v. Jacobs, 117 F. 3d 82, 93 (2d Cir., 1997)."

United States v. Blackmon, 839 F. 2d 900, 906 (2nd Cir., 1988), has held, "Where the victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under section 1344(a)(2)."

Of the circuits which have rejected the requirement of an intent to harm or create a risk of loss to a financial institution, and have upheld convictions in the absence of any such intent, see United States v. McNeil, 320 F. 3d 1034, 1038 (9th Cir., 2003); United States v. De La Mata, 266 F. 3d 1275, 1298 (11th Cir., 2001); United States v. Kenrick, 221 F. 3d 19, 27 (1st Cir., 2000)(en banc); United States v. Sapp, 53 F. 3d 1100, 1103 (10th Cir., 1995); some of these courts have required the government at least prove the defendant intended to deceive the bank, see Kenrick, 221 F. 3d at 29; De La Mata, 266 F. 3d at 1298.

Only one circuit has gone so far as to say that there is a violation of §1344(2) if the defendant merely intends to defraud

someone, and then causes a bank, as an unwitting instrumentality, to transfer funds pursuant to a fraudulent scheme. See United States v. Everett, 270 F. 3d 986, 991 (6th Cir., 2001). Staples, 435 F. at 867.

Staples concluded, "subsection (2), appears to require "some loss to the institution, or at least an attempt to cause a loss." Id. The Fourth Circuit was not mentioned in this case, however, a circuit split on an issue is precisely the type of issue favored for consideration in the Supreme Court, indicating a possible reason the prosecutor was so adament that the instant case not be appealed. There was no evidence that Casey intended to victimize an insured federal institution or that the bank suffered a loss. Therefore, the government's charge of bank fraud pursuant to 18 U.S.C. §1344 fails as a matter of law. Effective assistance of counsel would have raised this issue on behalf of his charge, and his lack of advocacy on this point may constitute grounds to void the plea. Certainly, Casey should never have had an enhancement applied on a charge which may not even have been valid!

United States v. Michelsen, 141 F. 3d 867, 872, n. 3 (8th Cir.), cert. denied, 525 U.S. 942 (1988), has held that a §2255 challenge to an illegal sentence cannot be waived; one who is actually innocent of a crime may always challenge an illegal sentence.

On 7/11/07 during sentencing, court was adjourned for a 10 minute recess after the prosecution had asked for an upward departure sentence of 37 months (2 level offense level increase to 13, criminal history V). When Casey was returned to the courtroom, the sentence of 96 months had been written on a piece of paper and

this is the sentence that was pronounced. Another defendant in an unrelated criminal case was sentenced on the same day, a Chris Maness. According to the U.S. Marshals, the judge pronounced a 2 year sentence on Maness, but because the judge was "disoriented and confused", Maness had to be resentenced to 9 months. Senior Judge Glen Williams is elderly and sight-impaired. Any competent defense counsel would have objected on Casey's behalf to the manner in which she was sentenced given these circumstances.

United States v. Witherspoon, 231 F. 3d 923 (4th Cir., 2000), has held that an attorney who fails to file an appeal after being instructed by his client to do so is per se ineffective.

Becton v. Barnett, 920 F. 2d 1190 (4th Cir., 1990), held that counsel's failure to investigate defendant's competence and failure to file an appeal, constituted a colorable claim of ineffective assistance of counsel, which required an evidentiary hearing to resolve the claim.

In Casey's instance, defense counsel filed a timely notice of appeal as she requested, however, he refused to pursue the appeal once AUSA Bockhurst objected to the appeal. Jones demanded that Casey sign a Motion to Withdraw Appeal, thereby depriving her of the ability to have a supervisory court review the propriety of the bank fraud charge and the outrageous and improper upward departure. Casey clearly wanted to appeal the upward departure or she would not have requested the notice of appeal or submitted this petition under §2255 making the upward departure the main focal point of it.

The Supreme Court in Strickland v. Washington, 466 U.S. 668, 692 (1984), has concluded that interference with counsel's assistance

"cause" for failure to raise the error. See United States v. Cook, 45 F. 3d 388 (10th Cir., 1995).

In United States v. Booker, 543 U.S. 220, 226-27, 234 (2005), the Supreme Court considered it more significant for purposes of Sixth Amendment analysis that "departures are not available in every case, and in fact are unavailable in most," since in most the Sentencing Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible.

No competent counsel is unaware of the Booker case. By refusing to properly object to the enhancement at sentencing and further refusing to pursue the issue through appeal, counsel has acted as an advocate for the prosecution. Thus, Casey's Sixth Amendment right to effective assistance of counsel was violated, causing her to be further denied her Fifth Amendment right to due process. The matter should be remanded for rehearings consistent with the findings of an Article III court and the constitutional principles of fair play and substantial justice.

II. UNREASONABLE AND UNLAWFUL SENTENCE, INCLUDING IMPROPER UPWARD VARIANCE IN VIOLATION OF BOOKER, 18 U.S.C. §3553(a), & RELEVANT GUIDELINE PROVISIONS

Sentences that are "greater than necessary" exaggerate "the seriousness of the offense", do not "promote respect for the law", and do not "provide just punishment for the offense". See 18 U.S.C. §3553(a)(2)(A). See United States v. Simpson, 430 F. 3d 1177, 1186 (D.C.Cir., 2005); United States v. Pickett, Case No. 05-3179 (D.C. Cir., 2007).

The Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a

reasonable doubt." See United States v. Gaudin, 515 U.S. 506, 509-510, 132 L Ed 2d 444, 115 S Ct 2310 (1975); In re Winship, 397 U.S. 358, 363-364 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 466, 147 L Ed 2d 435, 120 S. Ct 2348 (2000). In Blakely v. Washington, 542 US 296 (2004), the Supreme Court held that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

In the instant case, the Commonwealth of Virginia did not pursue charges against Casey in regards to the alleged stolen check (Count 14 in indictment) because there was question as to whether Casey committed the crime. Federal prosecutors have engaged in the practice of picking up such cases for prosecution when they can count on collusive "defense" counsel to advise their charge to plead guilty or "else". When the additional factor that this charge may not even have been a valid charge under federal law is considered, the ability for the government to sustain the charge really is thrown into doubt. Thus, it is questionable whether Casey's sentencing guideline was properly calculated. Removing the 2 points for an offense over $5,000 would make the offense calculation a 7, causing the corresponding sentence to be reduced accordingly.

All manner of irrelevancies were improperly used as "relevant conduct" to unjustly increase Casey's sentence by an enhancement

stated to be based upon the government's motion for criminal history inadequacy under §4A1.3 (Statement of Reasons, Sentencing Judgment). Such an enhancement cannot be supported by the case law of the Fourth Circuit.

The Supreme Court has indicated that the "exception to the Apprendi line of cases for judicial factfinding" is that which "concerns a defendant's prior convictions". See Shepard v. United States, 544 U.S. 13, 27, 161 L Ed 2d 205, 125 S. Ct (2002) (Justice Thomas concurring).

The justification used by the government to depart upward on Casey's sentence did not "concern" a prior conviction nor was it "relevant conduct" to the offenses charged. It cannot even be rationally argued that it is a "crime" for a woman to say she is pregnant when she is not pregnant or to later find out if she believed she was pregnant to not be pregnant. In addition, other "criminal" conduct considered was that of an allegedly falsified divorce decree. This also is not relevant conduct or prior criminal conduct. Casey was never charged with any crime in regards to these two instances. A person can commit a crime only be violating a pre-existing criminal statute. See United States v. Maloney, 287 F. 3d 236 (2nd Cir., 2002). United States v. Brierton, 165 F. 3d 1133 (7th Cir., 1999), has held the vagueness doctrine holds that a person cannot be held liable for conduct he could not reasonably have been expected to know was a violation of law. Both of these issues are protected under "Right of Privacy", which has been held to encompass personal decisions relating to marriage, procreation, family relationships and child rearing. See Quill v. Vacco, 80 F.

3d 716 (2nd Cir., 1996). These are not issues in which a federal prosecutor should involve themselves and the use of them tends to suggest the presence of a malicious prosecution.

The imposition of the upward departure was in violation of Fourth Circuit case law, and it should be reversed.

U.S.S.G. §4A1.3, Departures based on inadequacy of criminal history category pursuant to (a)(1), Standard for Upward Departure, states that if reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted. §4A1.3(a)(2) covers the type of information forming the basis for upward departure:

(A) prior sentences not used in computing criminal history;
(B) prior sentences of substantially more than one year imposed as result of independent crimes committed on different occasions;
(C) prior similar misconduct established by a civil adjudication or by failure to comply with administrative order;
(D) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
(E) prior similar adult criminal conduct not resulting in a criminal conviction.

§4A1.3(a)(3) prohibits a prior arrest record itself being considered for purposes of an upward departure under this policy statement. Amendment 406 has stated, "In determining whether an upward departure from Criminal History VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is ofen more indicative of the seriousness of the defendant's criminal record. For examlpe, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Cateogry VI, yet

have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. [emphasis added]. The effective date of this amendment is November 1, 1992. Clearly, the upward departure in the instant case was against long-standing guidelines policy.

This is further evidenced by Fourth Circuit cases such as, United States v. Rusher, 966 F. 2d 868, 883 (4th Cir., 1992), where the sentence was vacated because the district court could not raise the offense level up to meet whatever sentence level it wished to impose. Remand for resentencing was required for district court to point out what aspects of defendant's criminal history it thought guidelines did not adequately consider and to determine on the record whether those aspects were of sufficient importance and magnitude to justify departure. The district court had essentially bypassed the criminal history categories entirely in its desire to impose a particular sentence. "This cannot be done under the sentencing guidelines regime." Once district court has decided to depart upward in criminal history category under Sentencing Guidelines, Court must refer first to next higher category and may move on to still higher category only upon finding that next higher category fails adequately to reflect seriousness of defendant's record. U.S.S.G. §4A1.3; 18 U.S.C.A. §3742.

"We recognized in Cervantes that in extraordinary circumstances, even the highest of the six categories might be inadequate. But as we noted, '[O]nly the most compelling circumstances--for example, prior misconduct accompanied by wanton cruelty' would justify a 4A[1.3] departure above Category VI." Id. at 885. (quoting United States v. Cervantes, 878 F. 2d 50, 55 (2nd Cir., 1989).

The above case and its progeny were pre-Booker. United States v. Moreland, 437 F. 3d 424, 432 (4th Cir., 2006), has held that the guidelines are non-binding in the wake of Booker does not mean that they are irrelevant to the imposition of a sentence. "To the contrary, remaining provisions of the Sentencing Reform Act require the district court to consider the guideline range applicable to the defendant and pertinent policy statements of the Sentencing Commission. See 18 U.S.C.A. §3553(a)(4), (a)(5); Booker, 125 S. Ct. at 767 (stating that district courts 'must consult [the] Guidelines and take them into account when sentencing')." "[I]n reviewing a variance sentence, this court must consider--in light of the factors enumerated in §3553(a) and any relevant guideline provisions--whether the district court acted reasonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance. See Booker, 125 S. Ct 15 765-66; United States v. Mashek, 406 F. 3d 1012, 1017 (8th Cir., 2005); United States v. Hairston, 96 F. 3d 102, 106-107 (4th Cir., 1996)(noting that the decision to depart and the extent of departure are subject to review for abuse of discretion)." Id. at 433-34. "However, when the variance is a substantial one--such as the two-thirds reduction from the bottom of the advisory guideline range that is at issue here--we must more carefully scrutinize the reasoning offered by the district

court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be". Id. "Congress directed the Sentencing Commission to 'assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized' for offenders who repeatedly commit felonies involving drugs or violence, 28 U.S.C. §994(h). This directive evidences Congress' view that certain offenders should receive markedly longer sentences than other repeat offenders or those with little or no criminal history". Id. at 435. "For an example of truly compelling circumstances justifying the imposition of a sentence nearly twice the maximum of the advisory guideline range", See United States v. Jordan, 435 F 3d 693 (7th Cir. 2006), Id. at 437.

In the Jordan case, the defendant was sentenced by an upward variance exceeding the top of the guidelines range by 103 months. There were at least 10 specific areas of concern justifying such a variance, including repeated and prior sexual abuse of defendant's own daughter when she was five years old; prolonged duration and pronounced manipulation characterizing defendant's 6 month relationship with a 15 year old girl; history of "trolling" the Internet to solicit adolescent girls for sex; threats of violence against the victim's family; bringing a gun when going from Ohio to Wisconsin to stalk a 15 year old girl and her family; trauma suffered by victim's family because of her lengthy disappearance. The variance was based upon his "previous conviction for molesting his prepubsecent daughter over a two year period". Id. at 697-98.

In United States v. Kise, 369 F 3d 766, 775 (4th Cir. 2004), it was held the district court did not abuse its discretion in

departing upward from Criminal History Category I to Criminal History II on the basis that Category I under-represented defendant's admitted history of child molestation and predatory conduct. The defendant's conduct was considered the very epitome of that which is "unusually heinous, cruel, brutal, or degrading to a victim". The defendant was a 63 year old pedophile, whose offense level of 34, Category I was increased four levels to 39, and one level to Category II because the victims were younger than 12 years old and because he "admits he has had sexual contact with 'several hundred' children throughout his lifetime". Id. at 768.

The sentence was vacated in United States v. Davenport, 445 F 3d 366 (4th Cir. 2006) because the imposition of a ten year sentence, which was more than three times the top of the advisory guideline range, was unreasonable. The defendant had an adjusted offense level of 12, with 26 criminal history points, placing him in Criminal History VI for a resulting advisory guideline range of 30-37 months. He was charged with 18 U.S.C. §1029(a)(5). The government asserted that the defendant "was heading...a nationwide pickpocket ring that would travel from event to event", that he was "coaching" the other defendants not to cooperate, and that he was the "ring leader and organizer of this group". Id. at 368. The Fourth Circuit in vacating the sentence as unreasonable held, "The sentence imposed by the district court--120 months imprisonment--is more than three times the top of the advisory guideline range. So great a divergence requires 'compelling...reasons', Moreland, 437 F 3d at 434, that simply do not appear on the record...the explanation by the district court was lacking in that the court 'did not explain how [the] variance sentence better served the competing

interests of §3553(a) than [a] guidelines sentence would'. United States v. Hampton, 441 F. 3d 284, 2006 WL 724811, at *3 (4th Cir., Mar. 23, 2006)."

The sentence was vacated and remanded in United States v. Ruhbayan, 406 F. 3d 292 (4th Cir., 2005), where upward adjustment pursuant to §4A1.3(a) and other enhancements were "prejudicial" on defendant charged with drug trafficking, witness tampering and subornation of perjury. The defendant, charged with 18 U.S.C. §922(g)(1), a felon in possession of a firearm, had written letters to his girlfriend asking she testify in court to claiming the gun.

The conduct upon which the court based such a substantial upward departure or variance was not suitable for such an increase per the case law of the Fourth Circuit. There was no violence or drug trafficking involved. There was no unusually heinous, cruel or brutal conduct. Thus, the variance violated disparity in sentencing under 18 U.S.C. §3553, it violated the sentencing guidelines policy, it violated Booker, and it violated the available case law in the Fourth Circuit. In regards to the letters that Casey wrote to her husband, the court did not find that this was an obstruction of justice, most likely because when James Graninger took the stand at sentencing in regards to the offense conduct, he took the Fifth. Casey contends that the signature endorsement on the back of the check is not even her handwriting (See Exh. K).

Casey should have been granted a responsibility adjustment. The Fourth Circuit awards a Responsibility Adjustment, even if the defendant exercises her right to trial, if she admits the factual elements of the charges and did not falsely deny her relevant conduct. See Elliott v. United States, 332 F. 3d 753, 766 (4th

Cir., 2003); see also United States v. Kise, 369 F. 3d at 771, "[I]n order to receive a reduction under §3E1.1 for acceptance of responsibility, the defendant must prove by a preponderance that he has clearly recognized and affirmatively accepted personal responsibilty for his criminal conduct." The denial of responsibility adjustment was reversed where "the district court punished [defendant] for admitting to and attempting to remedy his mental disorder. [Defendant] did not challenge the fact that what he did was legally wrong". In the instant case, Casey was charged with §1343 both as a principle and as aiding and abetting. Thus, asking that her husband tell the truth in her letters to him did not obstruct justice nor did it detract in any way from the acceptance of responsibility.

Therefore, Casey should have been sentenced at an offense level of 7 with a 2 level reduction for acceptance of responsibility at a Criminal History Category of IV for a corresponding sentencing range of 4-10 months (offense level of 5).

Then there is the issue that the calculation of Casey's criminal history substantially over-represented her criminal history. The PSR reflects that Casey received a total of 11 criminal history points, 6 of which were due to petty offenses and misdemeanors. U.S.S.G. §4A1.2, Note 4, states that a sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g. $1,000 fine or ninety days imprisonment) is treated as a non-imprisonment sentence and not counted. All 6 points would fall into this category (¶ 39, 40, 41, 42 & 44). Defense counsel was ineffective for failing to object on this issue. Thus, Casey's criminal history category should be reduced to a category III. This would further reduce the applicable sentencing

range to 1-7 months. A new amendment reflecting new policy by the Sentencing Commission was sent to Congress on 5/1/07 with proposed changes to modify two areas of Chapter Four (4) "Criminal History Rules" (Chapter 4A1.1 and 2) in the Sentencing Guidelines, specifically Amendment 12, which included the counting of Multiple Prior Sentences and the Use of Misdemeanor and Petty Offenses in determining a defendant's criminal history score and when they are counted. Based on the study, the Commissioner responded to concerns that (1) some misdemeanor and petty offenses counted under the guidelines involve conduct that **is not** serious enough to warrant increased punishment upon sentencing for a subsequent offense, and (2) the presence of a prior misdemeanor or petty offense in arare case can affect the sentence in the instant offense in a way that is greatly disproportionate to the seriousness of the prior offense (such as when such a prior offense alone disqualifies a defendant from safety valve eligibility, and (3) jurisdictional differences in defining misdemeanor and petty offenses which can result in inconsistency in application of criminal history points for substantially similar conduct. Thus, in the event of a resentencing in the instant case, Casey would submit that this new amendment should apply to her.

The Supreme Court in Johnston v. Zerbst, 302 U.S. 458, 468 (1938), has held the publis conscience must be satisfied that fairness dominates the administration of justice. This determination cannot be made in the instant case. United States v. Woods, 986 F 2d 669 (3rd Cir. 1993), cert. denied, 510 U.S. 826 (1993), has held in respect to imprisoning a defendant "for a period significantly longer than was appropriate under the law", that it is "unacceptable", because "injustices befall the guilty as well as the innocent, for

justice consists not only of convicting the guilty, but also of assigning them a lawful and just punishment." Casey's sentence was unlawful, unjust, miscalculated, against Sentencing Commission policy, and unreasonable according to Booker. She should be resentenced accordingly.

CONCLUSION

Casey is entitled to an evidentiary hearing on these matters. In order to be granted an evidentiary hearing, a habeas corpus petition must allege sufficient facts, which if true, would support the conclusion of law advanced. See Townsend v. Sain, 372 US 293, 312 (1963); Fisher v. Lee, 215 F. 3d 438, 454 (4th Cir., 2000). In the instant case, Casey would submit that she has set forth sufficient facts in her petition that would entitle her to relief. Therefore, at a minimum, the court should consider an evidentiary hearing.

Casey also respectfully moves this court to vacate, set aside or correct her conviction on Count 14 and sentencing on all counts in this case. She further requests the court grant her any other relief to which she may be entitled in this matter.

Respectfully submitted,

Date: 5-15-08

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VERIFICATION

I, Lisa Marie Casey, do hereby declare under penalty of perjury that the facts stated in the foregoing motion are true and correct to the best of her knowledge.

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