

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District MARYLAND	
Name <i>(under which you were convicted)</i> : ELIAS COSTIANES		Docket or Case No.: 0416 1:21cr00458-001	
Place of Confinement: N/A		Prisoner No.: N/A	
UNITED STATES OF AMERICA		Movant <i>(include name under which convicted)</i> V. ELIAS COSTIANES	

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MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND 101 W Lombard St, Baltimore,
MD 21201

(b) Criminal docket or case number (if you know): DKT. 0416 1:21cr00458-001
2. (a) Date of the judgment of conviction (if you know): 6/8/2023
(b) Date of sentencing: 9/25/2023
3. Length of sentence: 24 Months
4. Nature of crime (all counts):
18 U.S.C. § 922(g)(3), 18 U.S.C. § 924(a)(c)
5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
Plead guilty to 18 U.S.C. § 922(g)(3), 18 U.S.C. § 924(a)(c) however in the original indictment the 2nd count was 18 U.S.C. § 924(2)(a). And not guilty to 21 U.S.C. § 841(a)(1) four counts, 21 U.S.C. § 843 (b) three counts.
6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐
7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

AO 243 (Rev. 09/17)

8. Did you appeal from the judgment of conviction?

Yes ☐

No ☒

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐

No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

AO 243 (Rev. 09/17)

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐

No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐

No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

AO 243 (Rev. 09/17)

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Sixth Amendment right to the effective assistance of counsel. Mr. Tomko failed to provide effective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

In February Mr. Tomko sent me the 1st plea deal (EXHIBIT 1) on a Friday while I was at work. He told me that he thinks I have a good shot at probation and that I need to sign it and send back ASAP. Trusting him I quickly skimmed it and signed and sent to him. As I was able to then read the plea over the weekend I was shocked to see that it included things I was not guilty of namely lying on a government form from 2011 (I believe Federally the statute of limitation is 5 years for perjury). I sent him a multitude of emails and text messages stating why I signing this was wrong and that I could no longer move forward. He sent me an email 02/06/23 stating "I will call you later, but I can tell you, without a shadow of a doubt that attempting to rescind would turn out to be the worst decision in your life". (EXHIBIT 3). I emailed Mr. Tomko a few days later with 9 different reasons and questions that I had. (EXHIBIT 4). He did not reply, instead insisted that I bring my sister and travel to Baltimore to discuss in his office. I was okay with this as I felt like he wanted to talk in person to determine if I was sincere and honest in my answers. Later Mr. Tomko was able to talk to the prosecutor and get me another plea deal (EXHIBIT 2) without the gun charge but agreeing to all other charges reducing the points from 21 to 14. I felt as if the prosecutor was combining substances which is a violation (EXHIBIT 5) and decided I had no other choice but to go to trial to seek justice.

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

AO 243 (Rev. 09/17)

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Sixth Amendment right to the effective assistance of counsel. Mr. Tomko failed to provide effective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. Tomko failed to email me or send me a copy of the sentencing report (EXHIBIT 6) as he is required to do. When my sentencing hearing started, Judge Bredar asked if I had received a copy and I told him no. Court was adjourned so that I could review with my attorney. Along with the 18 U.S.C. § 922(g)(3) there was another code which I have never seen before 18 U.S.C. § 924(a)(c) and when I asked Mr. Tomko twice what this was and twice he said "I don't know". Then I asked the prosecutor if this is where they are trying to say I lied on a form 11 years ago and he said no this is the regulation. I still do not fully understand what this is as it directs you to multiple subsections of the law. Additionally on page 18 of the report number 91. & 92. it expressly says that probation is NOT eligible. However Mr. Tomko told me repeatedly the thought he could get me probation if I took the gun charge. This is in direct opposition to the Statutory provisions 18 U.S.C. § 3561(a)(2) and the guideline provisions 18 U.S.C. § 5B1.1(b)(2). I believe this is why he withheld this report from me along with the additional charge that he was unable to communicate with me in court. This is in direct contradiction to what he told me repeatedly.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

AO 243 (Rev. 09/17)

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

AO 243 (Rev. 09/17)

GROUND THREE: Sixth Amendment right to the effective assistance of counsel. Mr. Tomko failed to provide effective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

In a pre-trial hearing in front of the Honorable Judge Bredar stated that the court was very busy and as I do have a constitutional right to trial, if there were a plea deal worked out prior that, the Court would look very favorably upon that. At that point I decided a plea was what I should do. I communicated this with Mr. Tomko in the hallway after the hearing and followed up with him multiple times in the following weeks to facilitate this. I was given two choices for plea deal. The first was plea to 18 U.S.C. § 922(g)(3) -which is 21 points (37-46 months) and the second plea deal was to all the other charges without the gun charge which is 14 points (15-21 months). Mr. Tomko told me that "I have to pick one" so I asked him what he thinks I should do as he is the attorney. He said that he believed that I have a better chance of probation with the gun charge as I owned them legally and they were in cases in the basement. This makes no sense whatsoever considering the points and what I have now learned but I took his word for it and trusted him. Additionally the sentencing report at the bottom specifically states that probation is NOT an option per 18 U.S.C. § 3561(a)(2) and USSG § 5B1.1(b)(2). Also gun related offences do not offer the opportunity for First Step Act credits. I have spoken with some local attorneys here in WV and they told me that this doesn't pass the smell test at all. They stated clearly he should have never told me to do this.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

AO 243 (Rev. 09/17)

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: Sixth Amendment right to the effective assistance of counsel. Mr. Tomko failed to provide effective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. Tomko did not speak with me for over a month after I told him that I decided to take a plea deal. Stating he was busy with a murder trial. After finalizing the coerced plea deal I emailed him repeatedly asking if I needed to write a letter to the Honorable Judge Bredar. He never replied to me. I was unprepared to speak at sentencing. Mr. Tomko failed to speak on the two most important factors. One my car accident 05/22/20 where someone lost control of their vehicle and came across 5 lanes on the interstate and hit me head on. Causing me to suffer a severe traumatic brain injury. I was unable to work for months, had to endure rehab for my brain multiple times per week, and was unable to even string together a sentence coherently without my brain freezing up. As a result I made terrible decisions and was repeatedly self medicating myself during this time. Second and most importantly Mr. Tomko told me that he would "beg" the court for probation or if incarceration was justified that I could serve my time in house arrest as I am the sole caretaker for my sister who suffers with Parkinsons disease. She has never been married, no children, she only has me in her life to take care of her. Insurance does not pay for home health care and it will be a death sentence for her if somethings happens to me. Neither was never spoken of in court.

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

AO 243 (Rev. 09/17)

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

I have not presented anything until now. I have tried diligently to find an attorney to represent me and have been unable to do so. As a result I am filing myself now. Additionally Mr. Tomko said he would be willing to fall on the sword for me" for ineffective assistance of counsel and contacted an attorney he knows that would help me. He spoke at length with the attorney and told me to reach out to him for help (EXHIBIT 7). I have called and texted this attorney repeatedly with no reply whatsoever (EXHIBIT 8).

AO 243 (Rev. 09/17)

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

Michael Tomko N. Charles St Suite 2304 Baltimore, MD 21201

(b) At the arraignment and plea:

Michael Tomko N. Charles St Suite 2304 Baltimore, MD 21201

(c) At the trial:

N/A

(d) At sentencing:

Michael Tomko N. Charles St Suite 2304 Baltimore, MD 21201

(e) On appeal:

N/A

(f) In any post-conviction proceeding:

N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:

N/A

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

AO 243 (Rev. 09/17)

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

AO 243 (Rev. 09/17)

Therefore, movant asks that the Court grant the following relief:
Withdrawal of my coerced plea deal (EXHIBIT 1) and acceptance of secondary plea deal (EXHIBIT 2).

or any other relief to which movant may be entitled. *And/or modification of current sentence to house arrest so that I may be able to continue to provide the life saving care that my sister needs. Thank you, very respectfully. -BE*

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____

(month, date, year)

Executed (signed) on 10/17/2023 (date)


Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.