

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

AFFIRMATION IN
OPPOSITION TO MOTION

-against-

Ind. No. 379/2018

RICHARD LUTHMANN,

Defendant.

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ERIC NELSON, an attorney-at-law, affirms under the penalties of perjury, that the following statements are true:

1. I was assigned the Special District Attorney in and for the County of Richmond by the Administrative Judge of Richmond County and charged by him with the investigation which led to the prosecution of defendant with charges in the indictment, and submit this affirmation in opposition to the defendant's motion dated January 11, 2023.
2. Defendant seeks ten separate courses of relief and for the reasons set forth and in the memorandum of law, the sought after relief should be denied on each and every course of relief.
3. The plea/sentence minutes dated October 27, 2020 (Mundy. J.) are detailed regarding defenda waiver of his constitutional rights, that defendant had a detailed understanding as to what he was pleading guilty to, and that he received effective representation during the pendency of the case and the plea of guilt. Exhibit A.
4. On October 27, 2020, before this Court, defendant entered a plea of guilty to

several counts of Indictment No. 379/2018, namely the charges of Falsifying Business Records in the First Degree under count one of the indictment (P.L. §175.10) Falsifying Business Records in the First Degree under count three of the indictment (P.L. §175.10), Falsifying Business Records under count four of the indictment (P.L. §175.10) and two counts of Election Law misdemeanors under counts 14 and 15 of the indictment (E.L. §17-102(5)) and explicitly waived the right of appeal. See Exhibit A (Plea minutes of October 27, 2020) at pp. 17-20.

The Court as part of the sentence granted the issuance of Orders of Protection in favor of the five complaints, including the Richmond County District Attorney, Michael E. McMahon. He was sentenced to time served on the same day he pled guilty. Defendant additionally pled guilty to an unrelated Superior Court information involving the admitted theft of a client's monies from his firm's I.O.L.A. account.¹ Exhibit A.

5. During that proceeding, the defendant appeared by a video link, permitted by the Governor's Executive Order No. 5 during the COVID-19 pandemic. See: Executive Order No. 5/2021 of Governor Andrew M. Cuomo. Mr. Luthmann was incarcerated at the Allenwood Federal Correctional Facility in Pennsylvania. He appeared virtually on a video/audio link, while the attorneys and the Court appeared in person.² He and his attorneys gave their express consent and the record bears out his express consent. Exhibit A at p. 2-3. Mr. Luthmann was additionally advised a Court stenographer was transcribing the proceeding.

6. Mr. Luthmann, a former attorney, was serving his sentence in Federal Custody which

¹ The parameters of the pleas and sentenced were agreed on after extensive conferences between the Court, the Special District Attorney and both of Mr. Luthmann's counsel. Thiese charges had to be resolved before defendant was released from Federal custody into a half way house. Therefore, there was no State prison time was offered.

Further, since the Department of Probation indicated they could not monitor Defendant out of state, the sentence of probation was modified to a conditional discharge.

² This Court (Mundy, J.) and its staff went through great efforts to secure Mr. Luthmann's appearance with the United States Bureau of Prisons because Mr. Luthmann was in Federal custody at this time. Both of Mr. Luthmann's counsel represented they had his consent to appear virtually as he did.

imposed by the United States District Court, Eastern District of New York on September 9, 2019.

7. Defendant's motion should be denied for his allegations are not grounded in facts, but makes baseless, scurrilous allegations and are therefore meritless.

8. For example in ¶ 9 of his affirmation, Luthmann states, "Special Prosecutor Nelson should be disqualified, censured, referred to Attorney Discipline, prosecuted, convicted.....Nelson belongs in the shed next to Family Court, is on the lower end of the food chain , and is just incapable". Defendant goes on to state, "Luthmann's 'Hellbound Train' has left the station and 'Luthmann is a warrior' and he (Luthmann) wants to bring full force on Nelson and his masters in the Staten Island Swamp"". See ¶ 13 of Defendant's affirmation

A. As to the Request for Hybrid Representation

9. The defendant concedes there is no usual right to hybrid representation. It will be further addressed in the Memorandum of Law.

10. The decision to grant a defendant hybrid representation rests is in the discretion of the Court, and the Courts should not accept motion papers or arguments from a pro-se defendant which an attorney would be reluctant to make. An attorney certainly would not submit the papers Mr. Luthmann has done and the Court should hold defendant to the same standards as any individual seeking to file papers with the Court..

11. Defendant seeks to engage in baseless, divisive ad hominem attacks and in a "scorched earth" policy against the prosecutor and anyone who has stood in his way. No attorney worth his salt would ever put his name on the papers defendant filed in support of his motion. This should not be countenanced in any proceeding, whether by counsel or a pro se litigant and

granting the application for a hybrid representation would give defendant cover to do so.

B. As to the Request for Waiver of Luthmann's Physical Appearance

12. There is no need for the defendant's appearance or a zoom hearing. "CPL 440.30 contemplates that a court will in the first instance determine on written submissions whether the motion can be decided without a hearing." The matter can, and should be, determined on the written submissions.

C. Disqualification of the Special Assistant District Attorney

13. There is no basis to disqualify the Special Assistant District Attorney.

14. As discussed in Point C of the Memorandum of Law, a public prosecutor should not be removed unless necessary to protect a defendant from 'actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence. No such showing has been made here.

15. On the one hand, Luthmann tells the Special Prosecutor he (the Special Prosecutor will "walk away" if he gives up McMahon. Defendant stated in Exhibit E, a letter to your affiant "Give him to me willingly, and you walk away scot free. I am requiring your truthful testimony as to McMahon's misdeeds". Defendant Exhibit E at pp.3. When defendant's attempt to scorch the earth fail, he goes on the offensive. Again, he resorts to vitriol, to attacks on lawyers and judges when he does not get his way, which were similar to the attacks on the persons who he impersonated, created fake social media accounts on, stalked and photo-shopped lewd and lascivious images on some of their pictures.

16. Regarding his claim that the indictment should be dismissed or the Special District Attorney removed, defendant references an e-mail conversation with Mr. Reich, which merely sought interpretation of decisions posed in a hypothetical setting. This had no effect on the Grand Jury, was not presented to the Grand Jury during the presentation. Defendant's claim does not rise to an unauthorized practice of law. The practice of law it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. *Thornton on Attorneys at Law*, in section 69, defines the practice of law in the same terms. An e-mail communication from an attorney asking a former attorney regarding a question about the meaning of a case cannot be deemed the practice of law and there is no client who Mr. Reich was representing.

17. Further, regarding if defendant's defense is based on First Amendment claims, he could have raised that as a trial defense. In any event, Mr. Luthmann waived all claims about Grand Jury sufficiency by pleading guilty.

D. The Defendant's claims regarding the presentation of the case in the Grand Jury.

18. Defendant then goes on the offensive by citing principles about the Grand Jury presentation and what he claims is law to back up his contentions. Defendant's counsel was provided with the Grand Jury testimony before any plea was accepted and there was never a motion to dismiss the Indictment. Further, he admitted his guilt to three counts of Falsifying Business records, based upon creating business records, by means of Criminal Impersonation.

19. Defendant had every opportunity to offer a First Amendment defense and not accept

the pleas. In fact, there was no circumstances of coercion surrounding the plea, for defendant appeared virtually from another state and could have terminated the session at any time.

E. Vacating of Judgment of Conviction

20. Defendant was convicted upon a plea of guilty. Therefore, in the absence of a motion to withdraw the plea or to bring a postconviction motion to vacate the plea as involuntary, the plea and the resulting conviction are presumptively voluntary, valid and not otherwise subject to collateral attack.

21. There is simply no basis to find the plea involuntary. The record demonstrates a substantial colloquy that more than satisfies constitutional requisites. It shows that the defendant related that he had had ample opportunity to discuss the plea bargain with counsel and was satisfied with counsel's performance, that nobody had made any promises or threats, and that he was pleading guilty voluntarily, he admitted to the conduct constituting the crimes, and there was nothing in the record that cast doubt upon his guilt. Such a plea stands.

22. The Special District Attorney provided counsel with all discovery, including the Grand Jury minute and exhibits. See: C.P.L. Article 245. Defense counsel never moved to Dismiss and/or Reduce the counts in the Indictment and by his plea of guilt has waived the sufficiency and conduct of the prosecutor in the Grand Jury.

23. Moreover, the defendant was afforded meaningful representation when he received an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel

F. Dismissal with Prejudice

24. There is simply no authority for a dismissal with prejudice in this circumstance. Presumably, if defendant were successful on a CPL 440.10 application in this circumstance, the proper corrective action would be vacatur of the plea and the case is restored to its prepleading status.

G. and H. Challenge to Fees Paid and to Be Incurred

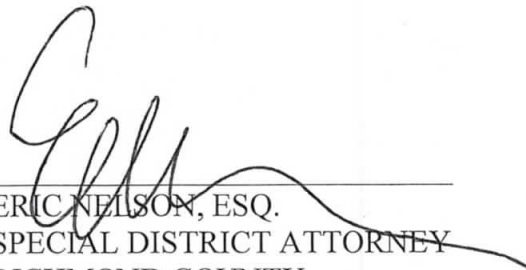
25. Although probably not an issue that can be raised in the criminal proceeding, it is sufficient to note that defendant had “not paid the fee[]s . . . and is not subject to a demand for payment of the fee, it cannot establish either an injury or the threat of injury resulting from [the payment by the City and thereby lacks standing to challenge it.

I. Censoring Prosecutor and Other Referrals

26. Defendant points to nothing that the special prosecutor has done to warrant any kind of sanction or referral.

Accordingly, the motion should be denied in its entirety.

Dated: February 6, 2023
Staten Island, New York


ERIC NELSON, ESQ.
SPECIAL DISTRICT ATTORNEY
RICHMOND COUNTY

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: CRIMINAL TERM**

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THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-against-

RICHARD LUTHMANN

Defendant.

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AFFIRMATION IN OPPOSITION TO MOTION

ERIC NELSON, ESQ.
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(718) 356-0566

Signature (Rule 130-1.1-a)


Eric Nelson, Esq.