

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FILED IN CLERK'S OFFICE  
U.S.D.C. Atlanta  
SEP 30 2008

SCOTT HINTZ,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent

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No. 1:08-CV-758-CC  
(No. 1:03-CR-131-CC)

JAMES N. HATTEN, Clerk  
Deputy Clerk

**PETITIONER'S SUPPLEMENTAL RESPONSE IN SUPPORT OF 2255 MOTION AND  
SUMMARY OF KEY ARGUMENTS AND EVIDENTIARY SUPPORT**

Petitioner, proceeding Pro Se, respectfully submits this filing in support of his §2255 motion.

**INTRODUCTORY STATEMENT**

Due to the facts of this case, Petitioner finds himself – as he has throughout all relevant proceedings – in the unenviable position of trying to convince the Court that the unusual and controversial allegations he has made are true. That fact, combined with the volume of habeas petitions this Court no doubt addresses, puts Petitioner at risk that his valid claims and evidentiary support might be overlooked. No doubt the volume of briefs on this issue only underscores this risk.<sup>1</sup>

As a result, Petitioner submits this supplemental response for one purpose: to synthesize the key arguments and evidentiary support he has presented thus far in the hopes the Court will find: (1) Petitioner's supported claims are credible and objective; (2) Petitioner has the legal justification for the relief sought; (3) Petitioner has the evidentiary support to warrant same; (4) Petitioner's requested relief will lessen the harsh effects of an unwarranted sentence on Petitioner and his family; and, thus, (5) such relief is just and equitable.

Indeed, Petitioner respectfully submits that cases such as this one – in which a man, through a confluence of factors, has been denied the justice that our legal system was designed to encourage if not ensure – are the reason that "The Great Writ" exists and has long been celebrated as the most efficient safeguard of the liberty of Americans. Petitioner prays this Court agrees and vacates, sets aside and/or

<sup>1</sup> On a related matter, Petitioner states that he has no interest in impugning the integrity of any innocent individual, but wishes only to vigorously pursue his rights via his habeas claims, including those regarding the Kadish-Baverman-Morochnik group. Any filings involving innocent individuals have been in the spirit of good faith, and any implications to the contrary are not intended.

corrects Petitioner's sentence to comply with the relief requested: time served, restitution of \$15,955.93 or less, and a correction of the record. In support hereof, Petitioner shows, in summary, as follows:

**THIS COURT HAS BOTH AUTHORITY AND JUSTIFICATION  
TO GRANT THE RELIEF PETITIONER SEEKS.**

**I. PLEA NOT VOLUNTARY.**

**The record contains testimony from individuals, and various other evidence, to support the involuntariness – and, therefore, illegality – of Petitioner's plea and to explain why Petitioner**

**had been fearful to come forward with same** (see, and herein incorporate, Doc.260). Indeed, such evidence, including various affidavits, and evidence expected to be elicited in upcoming evidentiary hearings, including testimonial and other evidence from additional sources, all support Petitioner's allegations about the Kadish-Baverman-Morochnik group and show, specifically, that:

- (1) Petitioner did not 'voluntarily' enter into his alleged plea agreement (see Doc.260, pgs.24-27);
- (2) Petitioner was, and has since been, hesitant to trust and fearful of personal or professional acquaintances of the Kadish-Baverman-Morochnik group because of this group's statements to him and to others (see Doc.250, pgs.24-27); and
- (3) because Petitioner was hindered, in various ways and beyond sentencing, from raising his just claims against the Kadish-Baverman-Morochnik group, this §2255 motion is the first true opportunity to assert same and to show their affect on the involuntariness of his plea (see Doc.260, pgs24-27).

**II. PLEA NOT KNOWING.**

**Even before any evidentiary hearings are held, this Court can provide the relief requested on the ground that Petitioner's Plea was unknowing. A valid plea and waiver must be not only 'voluntarily' entered, but must be also 'knowingly' entered.** The record clearly establishes --- both through the undisputed portions of the affidavits submitted by Petitioner and through the other items of record evidence --- that Petitioner could not have "knowingly" plead to, or waived any right to, any uncharged 'charges' of 18 USC §1344 (they were obviously not 'known' as defined charges at the time of the plea hearing) or any listed 'charge' other than the single charge 18 USC §1344 "as relates to" Petitioner, alone, not the "other people involved" (see, and incorporate herein, doc.269, pgs.3 through 6).

Additionally, the Government violated the plea agreement (see doc.269, pg.3) by: (1) bringing additional charges against the Petitioner after the plea hearing, (2) presenting and supporting positions,

after the plea hearing, to make the applied losses exceed \$2,500,000.00, and/or (3) presenting and supporting positions, after the plea hearing, to exceed the otherwise applicable sentencing guideline range. These violations of the plea agreement are additional evidence the plea was not both 'voluntary' and 'knowing'.

### III. COURT HAS JUSTIFICATION TO VACATE, SET ASIDE AND/OR CORRECT SENTENCE.

Petitioner was sentenced for at least thirty-two (32) offenses over which the sentencing court could not have held jurisdiction for two reasons: (1) jurisdictionally-required elements were not alleged for offenses not listed in the charging document, and (2) jurisdictionally-required elements were not 'knowingly & voluntarily' admitted nor found by jury for all the listed charges except the single charge accepted --- the one charge against Petitioner, alone, "not the other people involved". The Court was alerted to unreviewed & disputed allegations prior to the Court's acceptance of Petitioner's conditional plea to only a single charge 'as relates to' Petitioner, alone, and not multiple 'charges' as relate to the 'other people involved' (see, and herein incorporate, Doc. 269, pgs.3-9). The Government has already conceded Petitioner has been sentenced to numerous 'charges'. The Petitioner was sentenced for a minimum of thirty-three (33) charges which include at least thirty-two (32) charges for which Petitioner was never found guilty and numerous 'charges' for which Petitioner was not even charged.

The thirty-three (33) offenses for which Petitioner was sentenced are readily broken into identifiable units as evidenced on pages 2 through 5 of Doc.265. The 11<sup>th</sup> Circuit has ruled:

Offenses do not constitute single course of relevant conduct if "schemes may readily be broken into identifiable units that are meaningful for purposes of sentencing." U.S. v. Blanc, 146 F.3d 847 (11th Cir. 1998). "Thus, 'when illegal conduct does exist in identifiable units' apart from the offense of conviction, the Guidelines anticipate a separate charge for such conduct." US v. Maxwell, 34 F3d 1006 at 1010-11 (11<sup>th</sup> Cir 1994).

Petitioner was sentenced for offenses for which he was never charged (offense #'s 19-33; see Doc.265, pgs.2-5); Petitioner was sentenced for offenses for which he did not plead guilty (offense #'s 1-16 and #18; see Doc.265, pgs.2-5) --- and as a result, the sentencing court lacked jurisdiction to sentence Petitioner to at least thirty-two (32) offenses (see Doc.265, pgs.2-5).

"It is as much a **violation of due process** to send an accused to prison following conviction of a charge on which he was never tried as it would be **to convict him upon a charge that was never made.**" Cole et al v. State of Arkansas, 68 S.Ct. 514, 517 ( U.S. Supreme Court, 1948; emphasis added).

**"Court cannot permit a defendant to be tried on charges that are not made in the indictment against him"** Stirone v. U.S., 80 S.Ct. 270, 272-273 (U.S. Supreme Court 1960; emphasis added).

**A §2255 motion can be used to attack a restitution order** when, as in the case at bar, Petitioner attempted to attack the restitution loss calculations during the district court proceedings (see, and herein incorporate, Doc.253-3, pgs.16-17; Doc.253-4 pgs.51-54; Doc.260, pgs.7-15), and attempted to attack the restitution loss calculations on direct appeal (see, and herein incorporate, Doc.253-4, pgs.45-50; and Doc.260 pgs.15-21), but was frozen out of the proceedings because of the actions and/or inactions of Petitioner's attorney(s). There are circumstances §2255 is appropriate for attacking a restitution order – the facts of this case are not only exceptional, but also show both cause and prejudice requiring review during this §2255 proceeding; see *Cani v. United States*, 331 F.3d 1210 (11<sup>th</sup> Cir. 2003); see also *Dohrmann v. United States*, 442 F.3d 1279, 1280-81 (11<sup>th</sup> Cir. 2006).

***The single charge would provide for a sentencing guideline range of 0-6 months of incarceration and no more than \$15,955.93 in restitution*** (see Doc.269, pgs.3-9).

#### **CONCLUSION**

The Court, in the record, has previous stated an expectation to reduce Petitioner's sentence. Petitioner has endured approximately eight years of punishment (beginning with the involvement of Kadish and Baverman) and continues to be punished through supervised release (after serving years of incarceration). Petitioner has feared for the safety & security of his minor children. Petitioner and his family are financially ruined. There is evidence before the Court which supports others were, at a minimum, responsible for causing the losses included in this case for their own personal profit.

Petitioner prays for the Court's mercy -- not only to find justice under the laws of our nation -- but also to find an equitable end to this case. For any and/or all of the reasons above, this Court has the authority, sufficient justification, and the duty to vacate, set aside and/or correct Petitioner's Sentence in favor of the relief requested in Petitioner's §2255 motion: time served, restitution of \$15,955.93 or less, and a correction of the record. Respectfully submitted this 30<sup>th</sup> day of September 2008.

Sincerely,



Scott Hintz,  
Petitioner

**CERTIFICATE OF SERVICE**

I, Scott Hintz, certify I have served a hand-delivered copy of the foregoing:

**PETITIONER'S SUPPLEMENTAL RESPONSE IN SUPPORT OF 2255 MOTION AND  
SUMMARY OF KEY ARGUMENTS AND EVIDENTIARY SUPPORT**

in an envelope addressed to:

U.S. Attorney's Office  
AUSA Charysse Alexander  
75 Spring Street SW  
Atlanta, GA 30303

This 30th day of September 2008.

Sincerely,



Scott Hintz