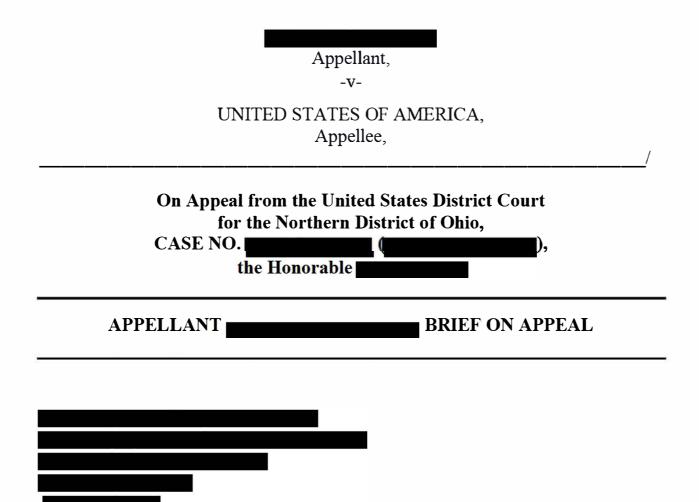


2723 South State Street, Suite 150, Ann Arbor, MI 48104 (866) 534 6177 LawCompany.com

CASE NO.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT



Attorney for Petitioner-Defendant

ORAL ARGUMENT REQUESTED



CORPORATE DISCLOSURES

The following information is submitted pursuant to 6 Cir. R. 26.1 and Fed. R. App. P. 26.1:

- Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list the identity of the parent corporation or affiliate and the relationship between it and the named party: NO.
- 2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: NO.

Respectfully submitted,



Counsel for Petitioner-Defendant

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Appellant-Defendant respectfully requests oral argument to address any questions the panel of the United States Court of Appeals for the Sixth Circuit may have regarding the facts and applicable law.

STATEMENT OF JURISDICTION

The District Court had original jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question). This Court has jurisdiction under 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b), following this Court's Order granting in-part and denying in-part Appellant's Order granting in-part and denying in-part Appellant's Denial of Defendant's 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence, and Entry of Judgment on



STATEMENT OF ISSUES

1. Did Appellant-Defendant's trial counsel perform ineffectively by failing to file a notice of appeal on Appellant-Defendant's behalf?

APPELLANT-DEFENDANT: YES

2. Did Appellant-Defendant's trial counsel perform ineffectively by failing to challenge the forfeiture proceedings against Appellant-Defendant's wishes or inform Appellant-Defendant of his right to challenge the proceedings?

APPELLANT-DEFENDANT: YES



STATEMENT OF THE CASE

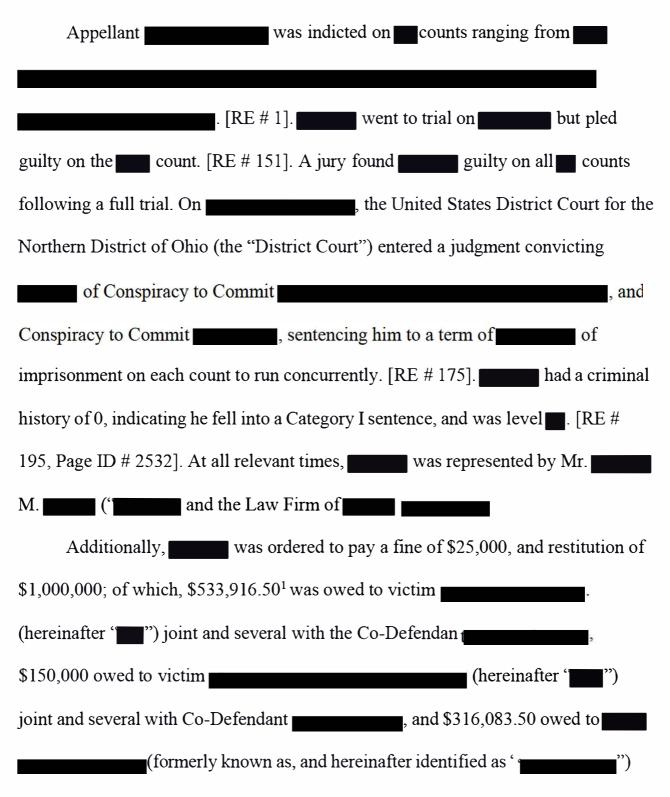
Appellant from a Judgment of the United States District Court (Hon. Jack dated and entered from a Mich denied from \$ 2255 Motion for Resentencing.

Without reaching the merits of the constitutional claims, without conducting an evidentiary hearing, and without holding oral argument, Judge ruled that the Motion for Resentencing (which was based upon ineffective assistance of counsel) had no merit.

On **Constant**, this Court granted **Constant** a certificate of appealability for ineffective assistance of counsel of his previous attorney, **Constant** as a result of **Constant** (1) failure to file a Notice of Appeal; and (2) failure to challenge the for proceedings against **Constant** wishes or inform **Constant** of his right to challenge the **Constant** proceedings.

As shown below, trial counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of trial would have been different. Therefore, this Court should grant instant appeal and vacate, set aside, or correct sentence.

I. STATEMENT OF RELEVANT FACTS

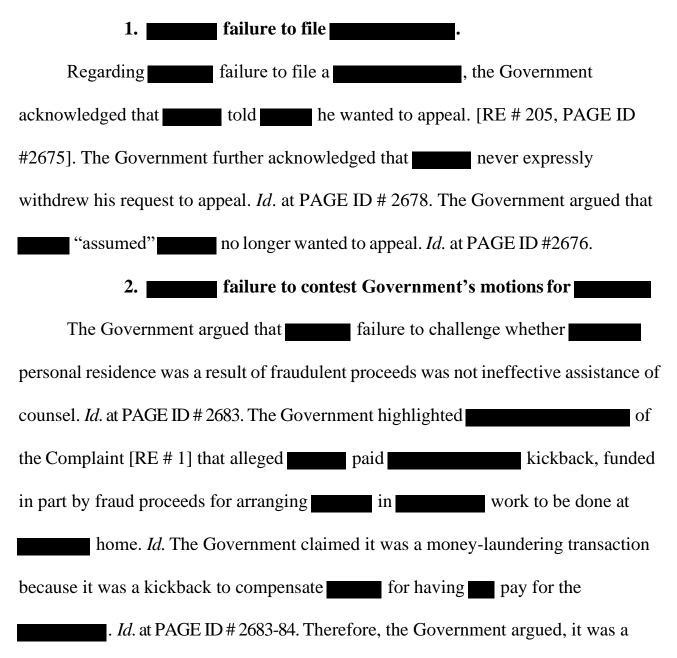


¹ The restitution amount owed to was off-set by the amount Petitioner paid to in a civil settlement in the amount of the settlement in the 2430] and [RE # 182].

joint and several with Co-Defendant with additional Special Assessment due in the amount of \$2,700. [RE # 186, Page ID # 2483]. On , the District Court issued an Amended Judgment reflecting the final amount of restitution was ordered to pay after set-off. [RE # 186]. made and accepted an *unauthorized* settlement In with the Government regarding the forfeited property in the amount of \$1,423,958.00. [RE # 202-6]. Later retracted the settlement agreement on the basis that never authorized the settlement offer. [RE # 202-8]. further failed to advise **of the right to respond to the Government's motions for** forfeiture, and failed to compel the Government to prove the property seized was derived from the alleged fraud. [RE # 202-5]. Had **contested the forfeiture**, the Court would have either ordered that the property was not derived with the consent and advice of Attorney, the Government ultimately property, and sold it back to in exchange for a cash payment of . [RE # 189]; [RE # 188-2]. The Government was not made to roughly \$ prove that the property alleged to have obtained from the fraud was traceable back to the assets forfeited. The Government was relieved of its burden as a result failure to respond to both the Government's Preliminary Motion for of , and Motion for a Final Order of **Example**. In fact, not only did fail to respond, but he *consented* to the forfeiture [RE # 161]. It is clear

was not only negligent, but actively working against the interest of attempts to take advantage of went so far as to Astonishingly, request and obtain a from [RE # 202-11]. filed a motion to vacate, set aside, or correct On sentence under 28 U.S.C. § 2255, stating that he received ineffective assistance of counsel from as failed to file a . [RE # 193]. also asserted the Court erred in not advising him of his right to appeal during the Sentencing Hearing. [RE # 173]. On , the Court granted newly retained attorney's Motion to Adjourn Hearing on Motion pursuant to 28 U.S.C. § 2255 [RE # 200], to allow counsel the opportunity to supplement the motion. newly retained counsel filed a Supplemental On § 2255 Motion to Vacate, Set Aside, or Correct Sentence based on ineffective assistance of counsel based on a number of reasons, including, inter alia, ; failure to contest or respond to the failure to file Government's deficient motions for **sector**; and failure to inform of the right to contest the Government's motions or to force the Government to prove that the was proceeds of criminal activity and not legitimate business income. [RE 202 at PAGE ID # 2609-1].

A. The Government's Response To se §2255 Motion On see §2255 Motion [RE # 197], and on see §2255 Supplemental §2255 Motion. [RE # 205]. The Government's response, as it relates to issues on appeal here, is summarized below.



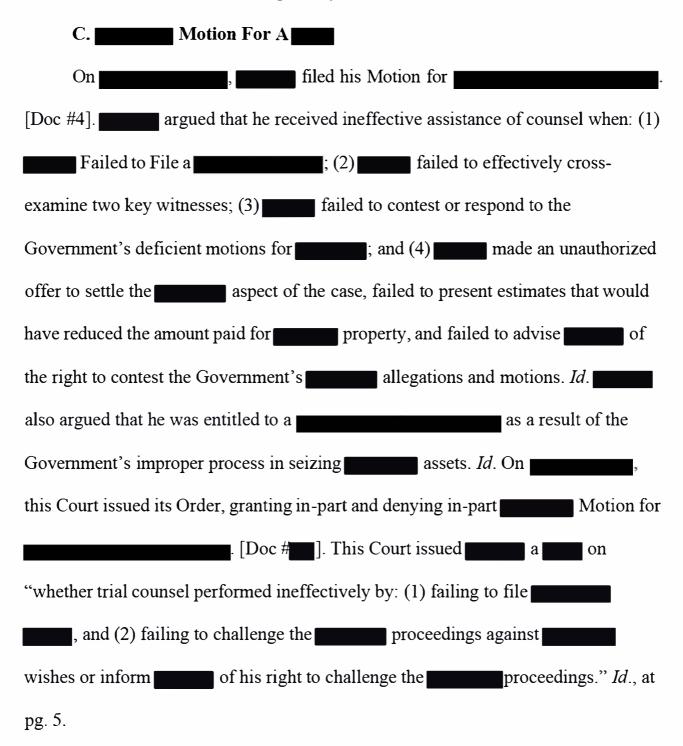
payment of fraud proceeds to "**Constant and therefore**, subject to **Example**." and therefore, subject to **Example**. *Id.* at PAGE ID # 2684.

Next, the Government took the position that **making** making of an unauthorized settlement, and its eventual retraction, did not prejudice **making** in negotiating with the Government. *Id.* at PAGE ID # 2685.

As for failure to challenge the Government to meet its burden to support the alleged amount of restitution, the Government argued that was in the best position to what its loss was. *Id.*

B. Judge Memorandum Opinion

On ______, Judge _____ filed his _____ Opinion denying petition without holding oral argument (the "District Court Opinion"). [RE # ____]. The District Court Opinion adopted the factual summary in the Government's briefings in full. *Id.* The District Court Opinion failed to discuss in detail any of augments for ineffective assistance of counsel except for the argument that failed to file a______. *Id.* Judge ______ found that there was ______. *Id.* However, that fact was undisputed as even the Government agreed that there was an ________ to _____. but that after the passing of certain events, ______ assumed it was intention not to ______. *Id.* The other issues brought forth in _______ §2255 Motion were rejected without discussion or reason. See generally Id.



II. STANDARD OF REVIEW

To prevail on an ineffective assistance of counsel claim, an appellant must

satisfy the two-pronged *Strickland* test. *Strickland* v *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

First, the appellant must show that his counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness." *Id.* at 688. The Court determines "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. The Court's review is deferential, as "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690-691.

Second, the appellant must show that the deficiency prejudiced his defense; in other words, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 695.

III. ARGUMENTS

A. Received Ineffective Assistance Of Counsel When Failed To File

The District Court Opinion reached an erroneous conclusion regarding ineffective assistance of counsel, particularly where **and the failed to file a** on **and the behalf despite admission that** requested that **admission** file **admission**. "Trial counsel in criminal cases, whether retained or appointed by the district court, is responsible for the continued representation of the client on appeal until specifically relieved by this Court." 6 Cir. R. 101(a). "The decision whether to appeal is generally not the sort of tactical decision on which a lawyer is permitted to override his client's wishes." *United States v. Pankey*, 1989 WL 78939 *4 (6th Cir. July 18, 1989)(citing *United States v Anderson*, 409 F Supp 2d 925, 926 (SD Ohio, 2005)).

Generally, "'a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Waldron v. Jackson*, 348 F. Supp. 2d 877, 883 (2004) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000)). Further, "[t]he failure to perfect a direct appeal when requested by the defendant violates the Sixth Amendment without regard to the probability of success on appeal." *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir.1998); see also *Shelton v United States*, 378 F. App's 536, 539 (6th Cir. 2010) (quoting *Roe v Flores-Ortega*, 528 U.S. 470, 478 (2000) ("When there is consultation, meaning specifically 'advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes,' counsel's conduct is unreasonable only if he fails to follow the defendant's express instruction to file a notice of appeal.").

admits in a declaration under penalty of perjury filed with the District Court that told him he wanted to file an appeal immediately after the jury verdict. [RE # 197-1]. There is no dispute that this is was an "

alleges that sometime thereafter, he proposed that **obtain** obtain new counsel to prepare the appeal brief, and recommended attorneys that he would reach out to. [RE # 197-1, Page ID # 2566]. nevertheless reassured that he would , as he is required to do so. [RE # 193, Page ID # 2512]. knew wanted him to file the notice of appeal even though would likely not represent him on appeal. [RE # 193, Page ID # 2515]. In any event, was never relieved of his duties to and thus was required to follow his instructions regarding filing of the , Mrs. submitted a declaration stating that directly after the jury announced its verdict, and while in the courtroom, she witnessed tell that he wanted to the turned to Mrs. while was present, and said that he just wants to preserve his [RE # 202-2]. confirms this occurred. [RE # 197-1]. However, on **a second s** , he was informed that there was no appeal pending. [RE # 193, Page ID] 2512]. Thus, was misled by with the belief that his would be filed to preserve his right to appeal his sentence on failure to file the pursuant to Petitioner's specific instruction is professionally unreasonable and amounts to ineffective assistance of counsel. Assuming arguendo, that the appeal lacked merit, **still** had an

obligation to file the **second second** to ensure the **second** right was preserved. *Campbell v. U.S.*, 686 F. 3d 353, 358 (6th Cir. 2012).

In *Campbell, supra*, the defendant participated in a mortgage-fraud conspiracy. *Id.* at 355. The defendant agreed to waive indictment and plead guilty to the charges as set forth in the information. *Id.* Further, the defendant agreed to waive the right to challenge his conviction or sentence on either direct or collateral appeal. *Id.* After sentencing, the defendant asserted that he *did* want to file an appeal, but his attorney failed to file a notice of appeal on his behalf. *Id.* at 356. The defendant filed a motion to vacate under 28 USC §2255, alleging ineffective assistance of counsel because his attorney failed to file an appeal. *Id.* In the Court's decision, the Court held that,

> ... even when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel that entitles the defendant to relief in the form of a delayed appeal.

Id. at 359. In addition, the Court noted that ". . .although appeal rights are often stringently narrowed pursuant to a defendant's plea agreement, there nevertheless are some instances in which a defendant seeking an appeal are still entitled to their day in court." *Id.* at 358. Further, ". . . even where an appeal appears frivolous, an attorney's obligations to his or her client do not end at the moment the guilty plea is entered." *Id.* at 358.

Both and the Government agree that specifically instructed

to file a [RE # 193, PAGE ID # 2512, 15; RE # 205, PAGE
ID #2675]. The Government's response argued that after the sentence was imposed,
and never discussed an appeal. [RE # 205, PAGE ID # 2676]. The
Government states that
." Id., (emphasis added). While and the
Government propose some competing facts, the record is clear on three points: 1)
explicitly instructed to file a provide the file a
retracted the express instruction to file a second second , and 3) second "assumed"
no longer wanted to file EXAMPLE . [RE # 193; RE # 205].
Furthermore, and and exchanged a series of emails which include
recommendation for other appellate attorneys he was familiar with who
could prepare an appellate brief for Petitioner. [RE # 202-3]. The very fact that
proposed an appellate lawyer proves that wanted knew wanted to
appeal. made an assessment of the Petitioner's case including issues that
could be raised on appeal. Id. made statements in his emails such as
." [RE # 202-4]. also stated, "
," regarding obtaining a lower sentence using what a called the

"Id. The E-mail identifies both intent for to file
a awareness of the second intent to appeal. [RE #
202-3]. admits that a never told that he did not want an appeal
after instructing to do so. [RE # 197-1, ¶ 4].
As set forth above, trial counsel's performance fell below an
objective standard of reasonableness and there is a reasonable probability that, but for
trial counsel's unprofessional errors, the result of trial would have been
different. Therefore, this Court should grant set and set and set
aside, or correct sentence.

B. Received Ineffective Assistance of Counsel When Failed To Challenge The Proceedings Against Wishes Or Inform Of His Right To Challenge the Proceedings

The District Court Opinion reached an erroneous conclusion regarding ineffective assistance of counsel, particularly where failed to make legitimate claims against the Government's deficient motions for failed or even perform the basic attorney function of informing for of his right to challenge the Government's deficient motions for failed. The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right extends beyond the mere presence of counsel to include "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (To establish a claim of ineffective assistance, the appellant must demonstrate two essential elements: (1) that counsel's performance was deficient, that is, below the standard of competence expected of attorneys in criminal cases; and (2) that counsel's deficient performance prejudiced the defense, i.e. deprived the defendant of a fair trial, rendering the outcome of the trial unreliable).

Pursuant to 18 U.S.C. § 982(a)(1), the Government maintains the burden of proving that the assets sought to be forfeited are traceable to the offense. The Government must prove forfeiture by a preponderance of the evidence. *United States v. Hall*, 411 F.3d 651, 654-55 (6th Cir. 2005); see also 21 U.S.C. § 853(a); Fed. R. Crim. P. 32.2(b)(1) (A district court must order the forfeiture of a defendant's interest in property when a nexus is drawn between the defendant's criminal conduct and the property). The Government can acquire through forfeiture no greater interest than that held by the defendant at the time the criminal acts were committed. *United States v. Jones*, 502 F.3d 388, 391-92 (6th Cir. 2007); citing *United States v. O'Dell*, 247 F.3d 655, 685 (6th Cir. 2001).

assistance related to the proceedings against was not only ineffective, it was non-existent. On proceedings against was an "most" Motion for Preliminary Order of most", wherein the Government sought for the Petitioner's family home and roughly for of heavy construction equipment. [RE # 161]. On February 21, 2018, the Government filed a Motion for Final Order of **Control** [RE # 188]. **Control** failed to respond to the Motion, resulting in the Court entering the Government's proposed Order on **(RE # 189)**, *without Petitioner present at hearing*. [RE # 189]. **Control** failure to respond, or even contest the Government's Motion for **Control** is nothing short of ineffective assistance of counsel.

failure to either respond or challenge the Government's motions for are particularly galling where there is a colorable argument that no nexus can be drawn between the defendant's criminal conduct and much of

property. See *Jones*, 502 F.3d 388, 393-94 (6th Cir. 2007) (The Court held that "something more than an agent's hunch is necessary in order for the Government to meet its burden of proof under 21 U.S.C. § 853."). **Was** found to have fraudulently obtained **Wassers** through certain transactions however, judgment was entered against **Wassers** in the form of restitution in the amount of **Wassers** after deducting amounts already paid to victims. [RE # 186]. The amount alleged by the Government to have been obtained by **Wassers** via fraud is merely a fraction of the amount **Wassers** made in legitimate business. The Government would likely not have satisfied its burden for **Wassers**, had it been challenged, as the Government could not prove that the **Wasser** property was derived from the fraud, and not from the millions of dollars **Wassers** made in legitimate business dealings.

owed in restitution. The Government forfeited

home and required him to pay for release of the property. Surely, failure to contest the amounted to ineffective assistance of counsel, particularly where might have worked out a deal for to pay in restitution directly, without of the family home, thus the saving **Sector**. Instead of filing a response to the Government's Preliminary Motion for *conceded* to the Government's request, and agreed to have pay for a release of the property. Compounding his ineffective assistance, also failed to advise of his right to contest the proceedings. In . and his met with to discuss the criminal forfeiture aspect of son, case. [RE # 202-5]. During the meeting, they discussed the value of the family residence and of the equipment sought to be by the Government. *Id.* They further discussed the option of excluding the garding the equipment on the basis that the equipment was owned by "), not by and was not convicted of a crime. *Id.* and his ('' son also discussed with that they would rather pay cash than allow the Government to the family's home. *Id.* There was no discussion of a settlement offer, or even that a settlement offer would be made at that time. Id. Nevertheless, on made an unauthorized settlement offer to the Government to pay for the family home and for the

equipment, totaling [RE # 202-6]. On notified **that the Government had accepted the settlement offer.** That was the first time learned that an offer was ever made and the first-time hearing of the settlement terms. [RE # 202-5]. was not authorized to make a settlement offer, let alone agree to settlement terms without first discussing them with Id.; see also Bradford Exchange v. The Trein's Exchange, 600 F.2d 99, 102 (7th Cir.1979) ("An attorney may not consent to a final disposition of his client's case without express authority."); cited in *Capital Dredge & Dock Corp v City of Detroit*, , admitted in an e-mail 800 F2d 525, 534 (CA 6, 1986). On that he inadvertently failed to notify of the settlement offer. [RE # to 202-7]. That excuse is no excuse at all, as never authorized the settlement terms to begin with. [RE # 202-5]. Later that day, sent Assistant U.S. Attorney an e-mail retracting the offer for the payment for equipment, *because never authorized the settlement.* [RE # 202-8]. Next, **manual** informed **manual** and his son **that the Government was** going to take the family home and the equipment because was very upset over the retraction of the settlement offer. [RE # 202-5]. unauthorized settlement offer severely prejudiced **settlement** in negotiations from that point on. Id. inappropriately convinced **that** his best option was to settle with the Government regarding the **should** of property. Id. **should** have advocated

on behalf of **and** and contested the **and** on the grounds that the Government could not prove that the **and** property was derived from the fraud, and not from legitimate business dealings, or at the very least, offer a cash payment for the restitution amount of **and**. See *Jones*, 502 F.3d 388, 391-92 (6th Cir. 2007); *O'Dell*, 247 F.3d 655, 685 (6th Cir. 2001).

Instead, allowed the Government to take advantage of Indeed, paid the Government Income in cash in order to retain the Income property. [RE # 188-2]. Income ability to quickly pay Income in indisputably legitimate funds to buy back the Income property seriously calls into question whether the Government could ever have proven that the property was proceeds of criminal activity if tested in Court. Moreover, Income ability to quickly pay the Income demonstrates that he could have paid the Income owed in restitution, without the Government Income his family home, which would have saved him Income.

Under any circumstance, as set forth above, **trial counsel's** trial counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of

trial would have been different, particularly where failed to make legitimate claims against the Government's deficient motions for or even perform the basic attorney function of informing for of his right to challenge the Government's deficient motions for the set of the court should grant instant appeal and vacate, set aside, or correct sentence.

IV. CONCLUSION

As a result of the foregoing, respectfully requests that this Honorable Court grant this appeal from the United States District Court for the Northern District of Ohio and grant 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence, and Entry of Judgment.





CERTIFICATE OF COMPLIANCE

I, _____, certify that this brief compliance with the length,

word, and type-volume limitations specified in FRAP 32(7)(B)(i) and 6^{th} Cir. 32

(b)(1), containing 5,735 words, and is therefore within the allowable limits under these rules.





<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on I electronically filed the foregoing paper with the clerk of the Court using the ECF system which will send notification of such filing to counsel of record.



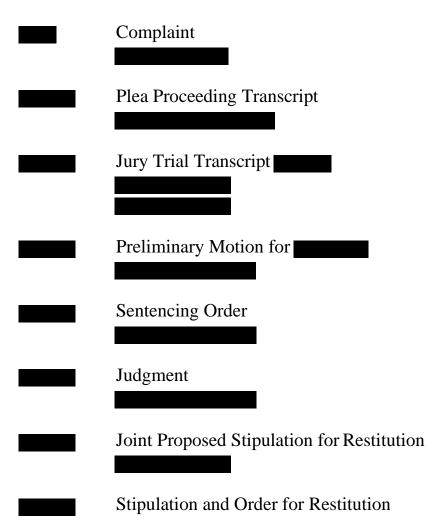


ADDENDUM

Designation of Relevant Originating Court Documents

Pursuant to 6th Cir. R. 30, Petitioner-Defendant designates the

following filings in the District Court for inclusion of the record on Appeal:



LawCompany	
	Amended Judgment
	Final Motion for
	Settlement Agreement
	Final Order Directing
	Motion to Vacate under 28 U.S.C. 2255
	Transcript of Sentencing Proceedings
	Government's Response to Motion to Vacate Under 28 U.S.C. 2255
	Affidavit of # # # # # # # # # # # # # # # # # #
RE	Marginal Entry Order Granting Motion to Appear Pro Hac Vice
RE	Supplemental Motion to Vacate Under 28 U.S.C. 2255 Page ID #
RE	Declaration of
	Page ID #
RE	Email from Recommending Appellate Attorney Page ID #
RE	Emails from Recommending Appeal Page ID #

RE	Declaration of Page ID # Page ID # Page ID #
RE	Page ID #
RE	Email Acknowledging Failure to Receive Consent. Page ID #
RE	Agreement Page ID #
RE	Email Requesting Page ID #
RE	Government's Response to Motion to Vacate Under 28 U.S.C. 2255 Page ID # Page ID # Page ID # Page ID #
RE	Order Denying Motion to Vacate Page ID #
RE	Judgment Entry Page ID #