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CASE NO. [REDACTED]

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

[REDACTED]

Appellant,

-v-

UNITED STATES OF AMERICA,  
Appellee,

**On Appeal from the United States District Court  
for the Northern District of Ohio,  
CASE NO. [REDACTED], ([REDACTED]),  
the Honorable [REDACTED]**

**APPELLANT [REDACTED] BRIEF ON APPEAL**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

*Attorney for Petitioner-Defendant*

[REDACTED]

**ORAL ARGUMENT REQUESTED**



## CORPORATE DISCLOSURES

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

App. P. 26.1:

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,

/s/ [REDACTED]  
[REDACTED]  
Counsel for Petitioner-Defendant



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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Oral argument is requested. Appellant-Defendant [REDACTED] [REDACTED] 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 [REDACTED] [REDACTED] Order granting in-part and denying in-part Appellant's [REDACTED], Motion For Certificate of Appealability, related to the District Court's [REDACTED] [REDACTED] Denial of Defendant's 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence, and Entry of Judgment on [REDACTED]



## 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 [REDACTED] proceedings?

**APPELLANT-DEFENDANT: YES**





## STATEMENT OF THE CASE

Appellant ██████████ ██████████ (“██████████” by and through counsel, seeks to appeal from a Judgment of the United States District Court (Hon. Jack ██████████ dated and entered ██████████, which denied ██████████ § 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 ██████████, this Court granted ██████████ a certificate of appealability for ineffective assistance of counsel of his previous attorney, ██████████ ██████████ as a result of ██████████ (1) failure to file a Notice of Appeal; and (2) failure to challenge the ██████████ proceedings against ██████████ wishes or inform ██████████ of his right to challenge the ██████████ 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

Appellant [REDACTED] was indicted on [REDACTED] counts ranging from [REDACTED] [REDACTED]. [RE # 1]. [REDACTED] went to trial on [REDACTED] but pled guilty on the [REDACTED] count. [RE # 151]. A jury found [REDACTED] guilty on all [REDACTED] counts following a full trial. On [REDACTED], the United States District Court for the Northern District of Ohio (the “District Court”) entered a judgment convicting [REDACTED] of Conspiracy to Commit [REDACTED], and Conspiracy to Commit [REDACTED], sentencing him to a term of [REDACTED] of imprisonment on each count to run concurrently. [RE # 175]. [REDACTED] had a criminal history of 0, indicating he fell into a Category I sentence, and was level [REDACTED]. [RE # 195, Page ID # 2532]. At all relevant times, [REDACTED] was represented by Mr. [REDACTED] M. [REDACTED] (“[REDACTED] and the Law Firm of [REDACTED] [REDACTED]”).

Additionally, [REDACTED] was ordered to pay a fine of \$25,000, and restitution of \$1,000,000; of which, \$533,916.50<sup>1</sup> was owed to victim [REDACTED] (hereinafter “[REDACTED]”) joint and several with the Co-Defendant [REDACTED], \$150,000 owed to victim [REDACTED] (hereinafter “[REDACTED]”) joint and several with Co-Defendant [REDACTED], and \$316,083.50 owed to [REDACTED] [REDACTED] (formerly known as, and hereinafter identified as “[REDACTED]”).

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<sup>1</sup> The restitution amount owed to [REDACTED] was off-set by the amount Petitioner paid to [REDACTED] in a civil settlement in the amount of [REDACTED]. [RE # 181, Page ID # 2430] and [RE # 182].

joint and several with Co-Defendant [REDACTED] with additional Special Assessment due in the amount of \$2,700. [RE # 186, Page ID # 2483]. On [REDACTED], the District Court issued an Amended Judgment reflecting the final amount of restitution [REDACTED] was ordered to pay after set-off. [RE # 186].

In [REDACTED], [REDACTED] made and accepted an *unauthorized* settlement with the Government regarding the forfeited property in the amount of \$1,423,958.00. [RE # 202-6]. [REDACTED] later retracted the settlement agreement on the basis that [REDACTED] never authorized the settlement offer. [RE # 202-8]. [REDACTED] further failed to advise [REDACTED] 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 [REDACTED] contested the forfeiture, the Court would have either ordered that the property was not derived with the *consent and advice of [REDACTED] Attorney*, the Government ultimately [REDACTED] property, and sold it back to [REDACTED] in exchange for a cash payment of roughly \$ [REDACTED]. [RE # 189]; [RE # 188-2]. The Government was not made to prove that the property [REDACTED] alleged to have obtained from the fraud was traceable back to the assets forfeited. The Government was relieved of its burden as a result of [REDACTED] failure to respond to both the Government's Preliminary Motion for [REDACTED], *and* Motion for a Final Order of [REDACTED]. In fact, not only did [REDACTED] 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 ██████. Astonishingly, ██████ attempts to take advantage of ██████ went so far as to request and obtain a ██████ from ██████ [RE # 202-11].

On ██████, ██████ filed a ██████ motion to vacate, set aside, or correct 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.

On ██████, ██████ newly retained counsel filed a Supplemental § 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 file ██████; ██████ failure to contest or respond to the Government's deficient motions for ██████; 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 [REDACTED] §2255 Motion

On [REDACTED], the Government responded to [REDACTED] *pro se* §2255 Motion [RE # 197], and on [REDACTED], filed its response to [REDACTED] Supplemental §2255 Motion. [RE # 205]. The Government's response, as it relates to issues on appeal here, is summarized below.

### 1. [REDACTED] failure to file [REDACTED].

Regarding [REDACTED] failure to file a [REDACTED], the Government acknowledged that [REDACTED] told [REDACTED] he wanted to appeal. [RE # 205, PAGE ID #2675]. The Government further acknowledged that [REDACTED] never expressly withdrew his request to appeal. *Id.* at PAGE ID # 2678. The Government argued that [REDACTED] "assumed" [REDACTED] no longer wanted to appeal. *Id.* at PAGE ID #2676.

### 2. [REDACTED] failure to contest Government's motions for [REDACTED]

The Government argued that [REDACTED] failure to challenge whether [REDACTED] personal residence was a result of fraudulent proceeds was not ineffective assistance of counsel. *Id.* at PAGE ID # 2683. The Government highlighted [REDACTED] of the Complaint [RE # 1] that alleged [REDACTED] paid [REDACTED] kickback, funded in part by fraud proceeds for arranging [REDACTED] in [REDACTED] work to be done at [REDACTED] home. *Id.* The Government claimed it was a money-laundering transaction because it was a kickback to compensate [REDACTED] for having [REDACTED] pay for the [REDACTED]. *Id.* at PAGE ID # 2683-84. Therefore, the Government argued, it was a

payment of fraud proceeds to “██████████” and therefore, subject to ██████████. *Id.* at PAGE ID # 2684.

Next, the Government took the position that ██████████ making of an unauthorized settlement, and its eventual retraction, did not prejudice ██████████ 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 ██████████ arguments 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.*

**C. [REDACTED] Motion For A [REDACTED]**

On [REDACTED], [REDACTED] filed his Motion for [REDACTED]. [Doc #4]. [REDACTED] argued that he received ineffective assistance of counsel when: (1) [REDACTED] Failed to File a [REDACTED]; (2) [REDACTED] failed to effectively cross-examine two key witnesses; (3) [REDACTED] failed to contest or respond to the Government's deficient motions for [REDACTED]; and (4) [REDACTED] made an unauthorized offer to settle the [REDACTED] aspect of the case, failed to present estimates that would have reduced the amount paid for [REDACTED] property, and failed to advise [REDACTED] of the right to contest the Government's [REDACTED] allegations and motions. *Id.* [REDACTED] also argued that he was entitled to a [REDACTED] as a result of the Government's improper process in seizing [REDACTED] assets. *Id.* On [REDACTED], this Court issued its Order, granting in-part and denying in-part [REDACTED] Motion for [REDACTED]. [Doc # [REDACTED]]. This Court issued [REDACTED] a [REDACTED] on "whether trial counsel performed ineffectively by: (1) failing to file [REDACTED], and (2) failing to challenge the [REDACTED] proceedings against [REDACTED] wishes or inform [REDACTED] of his right to challenge the [REDACTED] proceedings." *Id.*, at pg. 5.

**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 ██████ failed to file a ██████ on ██████ behalf despite ██████ admission that ██████ requested that ██████ file a ██████. “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 (6<sup>th</sup> 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 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 ██████. ██████ then 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 ██████, when ██████ reported to the ██████, 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 ██████████ to ensure the ██████████ 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



“██████████.” Id. The E-mail identifies both ██████████ intent for ██████████ to file a ██████████, and ██████████ awareness of the ██████████ intent to appeal. [RE # 202-3]. ██████████ admits that ██████████ 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 ██████████ instant appeal and vacate, 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 f ██████████ or even perform the basic attorney function of informing ██████████ of his right to challenge the Government’s deficient motions for ██████████. 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 ██████, the Government filed an “██████” Motion for Preliminary Order of ██████, wherein the Government sought ██████ of the Petitioner’s family home and roughly ██████ of heavy construction equipment. [RE # 161]. On February 21, 2018, the Government filed a

Motion for Final Order of [REDACTED] [RE # 188]. [REDACTED] failed to respond to the Motion, resulting in the Court entering the Government's proposed Order on [REDACTED], *without Petitioner present at hearing*. [RE # 189]. [REDACTED] failure to respond, or even contest the Government's Motion for [REDACTED] is nothing short of ineffective assistance of counsel.

[REDACTED] failure to either respond or challenge the Government's motions for [REDACTED] are particularly galling where there is a colorable argument that no nexus can be drawn between the defendant's criminal conduct and much of [REDACTED] [REDACTED] 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."). [REDACTED] was found to have fraudulently obtained [REDACTED] through certain transactions however, judgment was entered against [REDACTED] in the form of restitution in the amount of [REDACTED] after deducting amounts already paid to victims. [RE # 186]. The amount alleged by the Government to have been obtained by [REDACTED] via fraud is merely a fraction of the amount [REDACTED] made in legitimate business. The Government would likely not have satisfied its burden for [REDACTED], had it been challenged, as the Government could not prove that the [REDACTED] property was derived from the fraud, and not from the millions of dollars [REDACTED] made in legitimate business dealings.

[REDACTED] owed [REDACTED] in restitution. The Government forfeited [REDACTED]

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 the ██████████ in restitution directly, without ██████████ of the family home, thus saving ██████████ ██████████. 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 son, ██████████ met with ██████████ to discuss the criminal forfeiture aspect of ██████████ 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 ██████████ regarding 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 [REDACTED] [RE # 202-6]. On [REDACTED], [REDACTED] notified [REDACTED] that the Government had accepted the settlement offer. That was the first time [REDACTED] learned that an offer was ever made and the first-time hearing of the settlement terms. [RE # 202-5]. [REDACTED] was not authorized to make a settlement offer, let alone agree to settlement terms without first discussing them with [REDACTED] 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*, 800 F2d 525, 534 (CA 6, 1986). On [REDACTED], [REDACTED] admitted in an e-mail to [REDACTED] that he inadvertently failed to notify [REDACTED] of the settlement offer. [RE # 202-7]. That excuse is no excuse at all, as [REDACTED] never authorized the settlement terms to begin with. [RE # 202-5]. Later that day, [REDACTED] sent Assistant U.S. Attorney [REDACTED] an e-mail retracting the offer for the payment for equipment, *because [REDACTED] never authorized the settlement.* [RE # 202-8].

Next, [REDACTED] informed [REDACTED] and his son [REDACTED] that the Government was going to take the family home and the equipment because [REDACTED] was very upset over the retraction of the settlement offer. [RE # 202-5]. [REDACTED] unauthorized settlement offer severely prejudiced [REDACTED] in negotiations from that point on. Id. [REDACTED] inappropriately convinced [REDACTED] that his best option was to settle with the Government regarding the [REDACTED] of property. Id. [REDACTED] should have advocated

on behalf of ██████ and contested the ██████ on the grounds that the Government could not prove that the ██████ 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 ██████. 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 ██████ in cash in order to retain the ██████ property. [RE # 188-2]. ██████ ability to quickly pay ██████ in indisputably legitimate funds to buy back the ██████ 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, ██████ ability to quickly pay the ██████ demonstrates that he could have paid the ██████ owed in restitution, without the Government ██████ his family home, which would have saved him ██████.

Under any circumstance, 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, particularly where ██████ failed to make ██████ legitimate claims against the Government's deficient motions for ██████ or even perform the basic attorney function of informing ██████ of his right to

challenge the Government's deficient motions for [REDACTED]. Therefore, this Court should grant [REDACTED] instant appeal and vacate, set aside, or correct [REDACTED] sentence.

#### IV. CONCLUSION

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

By: /s/ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]



**CERTIFICATE OF COMPLIANCE**

I, [REDACTED], certify that this brief compliance with the length, word, and type-volume limitations specified in FRAP 32(7)(B)(i) and 6<sup>th</sup> Cir. 32 (b)(1), containing 5,735 words, and is therefore within the allowable limits under these rules.

By: /s/ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]



**CERTIFICATE OF SERVICE**

I hereby certify that on [REDACTED] 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.

/s/ [REDACTED]  
[REDACTED]



## ADDENDUM

### Designation of Relevant Originating Court Documents

Pursuant to 6<sup>th</sup> Cir. R. 30, Petitioner-Defendant [REDACTED] designates the following filings in the District Court for inclusion of the record on Appeal:

- [REDACTED] Complaint  
[REDACTED]
- [REDACTED] Plea Proceeding Transcript  
[REDACTED]
- [REDACTED] Jury Trial Transcript [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED] Preliminary Motion for [REDACTED]  
[REDACTED]
- [REDACTED] Sentencing Order  
[REDACTED]
- [REDACTED] Judgment  
[REDACTED]
- [REDACTED] Joint Proposed Stipulation for Restitution  
[REDACTED]
- [REDACTED] Stipulation and Order for Restitution

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

- RE [REDACTED] Declaration of [REDACTED]  
Page ID # [REDACTED]  
Page ID # [REDACTED]
- RE [REDACTED] [REDACTED] [REDACTED] Unauthorized Settlement Offer to Government  
Page ID # [REDACTED]
- RE [REDACTED] [REDACTED] [REDACTED] Email Acknowledging Failure to Receive [REDACTED]  
Consent.  
Page ID # [REDACTED]
- RE [REDACTED] [REDACTED] [REDACTED] Email to Government Retracting Settlement  
Agreement  
Page ID # [REDACTED]
- RE [REDACTED] [REDACTED] Email Requesting [REDACTED]  
Page ID # [REDACTED]
- RE [REDACTED] Government's Response to Motion to Vacate Under 28 U.S.C. 2255  
Page ID # [REDACTED]  
Page ID # [REDACTED]  
Page ID # [REDACTED]  
Page ID # [REDACTED]
- RE [REDACTED] Order Denying Motion to Vacate  
Page ID # [REDACTED]
- RE [REDACTED] Judgment Entry  
Page ID # [REDACTED]