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CASE NO.

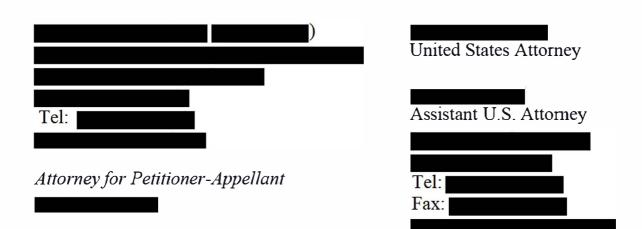
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner-Appellant, -v-

UNITED STATES OF AMERICA, Respondent-Appellee,

On Appeal from the United States District Court for the Northern District of Ohio

PETITION FOR REHEARING EN BANC



Attorney for Respondent-Appellee



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INTRODUCTION

Petitioner-Appellant, hereby petitions, under Federal Rule of Appellate Procedure 35, for rehearing en banc of the , panel decision (the "Panel Decision") related to this matter, to address the portion of the Panel Decision which conflicts with decisions of the United States Supreme Court (the "Supreme Court") and this Court.¹ The Supreme Court in *Roe*, supra, establishes a three-part test to determine whether a defense counsel was ineffective for failing to file a notice of appeal on his/her client's behalf. Roe, 528 U.S. at 477-478. The first part of the test asks whether the defendant explicitly requested that his/her counsel file an appeal. Id., at 477. When part one of the above test is satisfied, analysis under parts two and three is unnecessary. Id., at 478 (a court's analysis moves to part two "[i]n those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken."). Although both **manual** his defense counsel, and the Respondent-Appellee (the "Government") agree that explicitly requested that his trial counsel file a notice of appeal on behalf following trial, the Panel Decision considered

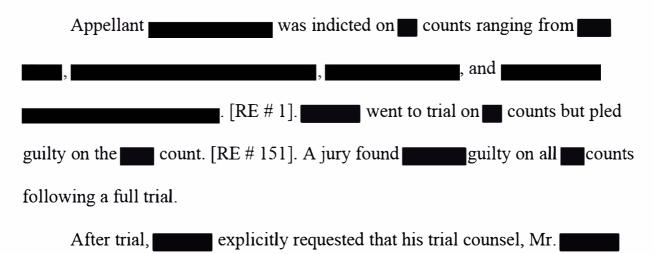
¹ See Fed. R. App. P. 35; [Doc # 15-2]; see also *Roev. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d. 985 (2000); *United States v. Doyle*, 631 F.3d 815 (6th Cir. 2011); *Galvin-Garcia v. United States*, 591 F. App'x 463 (6th Cir. 2015); *Higbee v. United States*, 20 F. App'x 465 (6th Cir. 2001); *Spence v. United States*, 68 F. App'x 669 (6th Cir. 2003); *Shelton v. United States*, 378 F. App'x 536 (6th Cir. 2010); *Regalado v. United States*, 334 F.3d 520 (6th Cir. 2003).

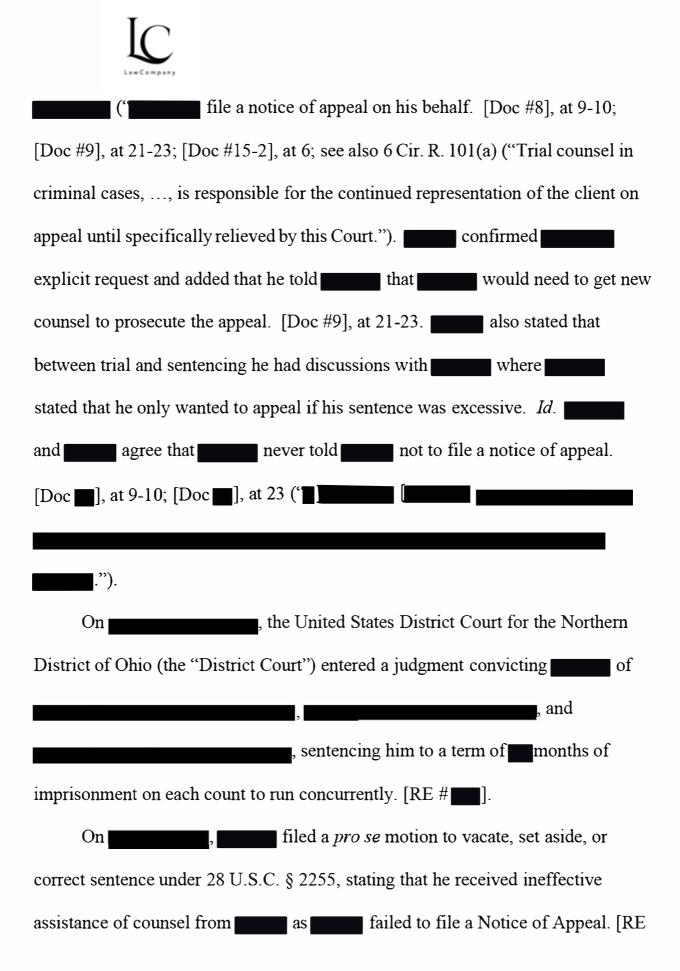


part two of the above test and held that **and the second s**

Therefore, for the reasons set forth below, respectfully requests that this Honorable Court grant restance instant petition and rehear this matter en banc.

BACKGROUND







also asserted the Court erred in not advising him of his right to # appeal during the Sentencing Hearing. [RE # ____]. On _____ , the Government responded to pro se §2255 Motion. [RE # 197]. 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 file notice of appeal. [RE at PAGE ID #]. On , the Government filed its response to Supplemental §2255 Motion. [RE # , Judge filed his Opinion denying On 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, and failed to discuss in detail any of arguments for ineffective assistance of counsel except for the argument that failed to file a notice of appeal. Id. Judge found, contrary to and and that there was ' " Id. The other issues brought forth in \$2255 Motion were rejected without discussion or reason. See generally Id. filed his Motion for Certificate of On **.** Appealability, which this Court granted in-part and denied in-part on

On ______, Respondent filed its Brief Of Respondent-Appellee (the "Government's Response"). [Doc #]]. In the Government's Response, the Government conceded that, after trial, ______ explicitly requested that ______ appeal ______ convictions. *Id.*, at 21-22. But the Government argued that discussions between ______ and _____ which took place between trial and sentencing in this matter, somehow negated ______ explicit request. *Id.*, at 19-31. The Government alluded to the creation of a "condition precedent" where



which the Government argued it was not, since sentence fell within the sentencing guidelines. Id. In its response, the Government also argued that its motions for were not deficient and negotiations with the Government allowed to keep his home; so, actions related to could not have fallen below the *Strickland* standard and was not prejudiced by actions related to action. Id., at 31-40. , this Court issued the Panel Decision. [Doc # On]. and agree that explicitly requested that Although both file an appeal on behalf, the Panel Decision, contrary to the Supreme Court's decision in *Roe*, supra, stated the panel's agreement with the Government that discussions between and and which took place between trial and sentencing in this matter, somehow negated explicit request. Id., at 6-9. The Panel Decision upheld the District Court's decision and further agreed with the Government, finding that **only** wanted **to** sentence was "excessive." *Id.* However, in its analysis of this appeal if argument the Panel Decision fails to cite to relevant authority which would support the finding that negated his explicit request for to file an appeal on behalf. Id. (the Panel Decision cites to Roe to point out that claim is based on Roe, and cites to cases related to forfeited arguments only). The Panel Decision also followed the Government's reasoning regarding

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conduct related to performance, holding that performance did not fall below the *Strickland* standard and was not prejudiced as a result of performance. *Id.*, at 14-17. For the reasons set forth below, respectfully requests that this

Honorable Court grant **matter** instant petition and rehear this matter en banc.

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND THIS COURT AND CONSIDERATION BY THE FULL COURT IS THEREFORE NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS.

The Panel Decision conflicts with precedent, particularly where it upheld

decision not to file a notice of appeal and finding performance not ineffective, despite agreement between and the Government that explicitly requested that his trial counsel file a notice of appeal on behalf after trial. "A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness ...' and (2) that counsel's deficient performance prejudiced the defendant." *Roe*, 528 U.S. at 476-77; citing *Strickland* v. *Washington*, 466 U.S. 668, 688-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The above *Strickland* test "applies to claims ... that counsel was constitutionally ineffective for failing to file a notice of appeal." *Id.*, at 477. "[C]ourts must 'judge



the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct,' ... and 'judicial scrutiny of counsel's performance must be highly deferential." Id.; quoting Strickland, 466 U.S. at 689. The Supreme Court held that when a defendant explicitly requests that his counsel file a notice of appeal, counsel is ineffective if he fails to perform the purely ministerial task of filing a notice of appeal. Id. ("a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."). Counsel's failure to file a notice of appeal upon request from the defendant "cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." Id. "At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." Id., citing Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983) (accused has ultimate authority to make fundamental decision whether to take an appeal).

In *Roe*, the Supreme Court lays out a test to determine whether a defense counsel was ineffective for failing to file a notice of appeal on his/her client's behalf. *Roe*, 528 U.S. at 477-478. Part one of the test asks whether the client made an explicit request for an appeal; in this situation, a defense counsel is

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ineffective for not filing a notice of appeal. *Id.* Part two of the test occurs "[i]n those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken." *Id.* Part two of the test asks whether defense counsel consulted with his/her client about an appeal. *Id.* If defense counsel has consulted with his/her client then he/she is professionally unreasonable "only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* Part three of the test, which is not at issue here, occurs when the defendant has not explicitly requested an appeal and defense counsel has not consulted with his/her client about an appeal. *Id.* (in part three a court asks "whether counsel's failure to consult with the defendant itself constitutes deficient performance.").

The question here is not whether, at the end of trial, trial, trial, explicitly requested that file a notice of appeal on the behalf, because the Government, and the panel agree that he did. [Doc], at 9-10; [Doc], at 21-23; [Doc]], at 4. Rather, the question is whether discussions between and which took place after trial, but before sentencing, somehow negated explicit request. The Government, the District Court, and the panel believe that the above-mentioned discussions negated explicit request, however, their belief does not comport with the holdings in *Roe* or certain cases decided by this Court.

The Government correctly pointed out to the panel that the Court in Roe

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contemplates a spectrum of possible outcomes related to whether a defense counsel has a constitutional duty to file a notice of appeal. [Doc], at 25. The Government also correctly cited to the panel the test spelled out by the Court in *Roe* which was meant to help courts reach consistent holdings in cases similar to the instant matter. *Id.* Nevertheless, both the Government and the panel reached a conclusion regarding the facts of this matter that contradicts *Roe*.

To support its case, both the Government and the Panel Decision latch on to part two of the above *Roe* test which discusses whether **and** in fact consulted with **about** an appeal. [Doc **about**], at 25-31; [Doc **#about**], at 6-9. Noting that **attests** that he did consult with **about** regarding an appeal, the Government and the Panel Decision inexplicably use that attestation to skip over the first part of the *Roe* test to somehow negate **about** explicit request for an appeal. *Id. Roe* clearly notes that courts should only get to the second part of its test "[i]n those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken." *Roe*, 528 U.S. at 478.

Here, all relevant parties agree that \mathbf{m} explicitly requested that \mathbf{m} file an appeal on \mathbf{m} behalf. [Doc], at 9-10; [Doc], at 21-23. Further, there is no evidence that \mathbf{m} ever retracted his explicit request for an appeal or ever explicitly requested that \mathbf{m} not file an appeal on \mathbf{m} behalf, indeed admits to quite the opposite. [Doc], at 23 ("[t]o be clear [**m** never



."). Under part one of the *Roe* test, **service** failure to file a notice of appeal on **service** behalf equates to ineffective assistance of counsel. *Roe*, 528 U.S. at 477. Consideration by the panel of any part of the *Roe* test other than part one was inappropriate, and notably, the Panel Decision does not cite to any case in support of its skipping part one of the *Roe* test. [Doc #**100**], at 6-9.

Indeed, the argument, that consideration by the panel of any part of the Roe test other than part one, was inappropriate and is highlighted by comparison to other cases decided by this Court. For example, in United States v. Doyle, 631 F.3d 815 (6th Cir. 2011), the Court applied *Roe* and reached part two of the test because the defendant "did not instruct his counsel to file a notice of appeal." Dovle, 631 F.3d at 818. In Galvin-Garcia v. United States, 591 F. App'x 463 (6th Cir. 2015), the defendant never explicitly requested an appeal, so the Court considered part two of the Roe test. Galvin-Garcia, 591 F. App'x at 464. The Court upheld the district court's denial of the defendants § 2255 motion, finding that "counsel had a discussion with [the defendant] about his appellate rights and whether there were any viable issues for appeal." Id. Further, "[a]t the conclusion of the hearing, counsel advised [the defendant] that he should not appeal, and [the defendant] told the court that he would 'think it over." Id. Finally, "[a]fter the sentencing hearing, counsel explained [the defendant's]



appellate rights to his authorized representative on several occasions, and counsel told the representative to contact him if [the defendant] wanted to appeal." Id. Further, in *Higbee v. United States*, 20 F. App'x 465 (6th Cir. 2001), the defendant never explicitly requested that his attorney file an appeal on his behalf. *Higbee*, 20 F. App'x at 466. Indeed, the Court, contemplating part two of the *Roe* test, found that the defendant admitted that his counsel "consulted with him about an appeal" ... and that the defendant "knew that counsel was not going to proceed with the appeal, and that he, should he wish to pursue the matter, would be proceeding pro se." Id. Where the defendant did not allege that he instructed his counsel to file an appeal, the Court held that "counsel's performance was not deficient, and he did not render ineffective assistance." Id. In Spence v. United States, 68 F. App'x 669 (6th Cir. 2003), the Court noted that "the district court concluded that [the defendant] failed to allege that he had instructed his attorney to appeal." Spence, 68 F. App'x at 671. In Shelton v. United States, 378 F. App'x 536 (6th Cir. 2010), the Court noted that the district court's finding that the defendant's counsel was not specifically instructed to file an appeal was not "clearly erroneous." Shelton, 378 F. App'x at 539. Then the Court turned to part two of the *Roe* test, ultimately holding that "[s]ince petitioner did not prove he gave any express instruction, it is clear that counsel did not render ineffective assistance of counsel in this way." Id.

In each of the above-mentioned cases, this Court reached part two of the Roe



test *only* after determining that the defendant had failed to explicitly request that his/her attorney file a notice of appeal. On the contrary, the Panel Decision quickly glosses over the fact the everyone is in agreement that **set of** explicitly requested that **set of** file an appeal in this matter after trial and jumps right to consideration of part two of the *Roe* test. [Doc **#**], at 6-9. Indeed, the Panel Decision spills more ink blaming **set of** for not making certain arguments than it does considering whether analysis under part two of the *Roe* test is even necessary. *Id.* Consideration of part two of the *Roe* test is not necessary here, where unlike the above-mentioned cases, **set of** explicitly requested that **set of** file a notice of appeal and never explicitly told **set of** not to, even after the discussions attested to by **[Doc]**], at 9-10; [Doc **]**], at 23 (*****

.").

For further clarification, consider the especially analogous case of *Regalado v. United States*, 334 F.3d 520 (6th Cir. 2003). In *Regaldo*, the Court considered conflicting testimony from the defendant and her attorney. *Regalado*, 334 F.3d at 523. The defendant claimed "that she placed a phone call to her lawyer the day after sentencing and told him 'that no matter what I still wanted him to appeal my case." *Id*. But the defendant's attorney insisted that the defendant "'never instructed' him to file an appeal." *Id*. Ultimately, the Court found the defendant's



attorney's testimony "credible that [the defendant] never instructed him to file an appeal and that [the defendant] agreed to proceed only on obtaining relief under Rule 35(b)." *Id.*, at 525. The Court also cited the magistrate judge's report which found that the defendant "never 'explicitly directed' her attorney to file an appeal." *Id.* Discussing the findings of the magistrate judge, the Court noted that the defendant agreed with her attorney's decision to pursue a sentence reduction and the defendant's attorney's "legitimate fear that after obtaining a sentence reduction from the district judge of fifteen years under the Sentencing Guidelines, an appeal actually might have resulted in a longer sentence." *Id.*, at 525-26. Given the above, the Court affirmed the district court's decision to deny the defendant's § 2255 motion. *Id.*, at 526.

The *Regaldo* case is quite similar to this matter, but with an important distinction which illustrates where the Panel Decision strayed from the ruling in *Roe*. Like *Regaldo* and according to ______ attestations, there were discussions between ______ and _____ regarding the pros and cons of filing a notice of appeal. [Doc __], at 21-23. Like *Regaldo*, ______ believed that his duty to file the notice of appeal was based on some condition, which ______ believed did not occur. *Id*. But, importantly, unlike *Regaldo*, there is no argument regarding whether ______ explicitly requested that ______ file a notice of appeal on his behalf after trial. *Id*. It is critically important that ______ knew that ______



wanted **wanted** to file a notice of appeal, and knew that **wanted** never explicitly told him *not* to file a notice of appeal. *Id.* It is also critical that the Panel Decision confirms the above yet, nevertheless, conducted a protracted analysis of part two of the *Roe* test where doing so was unnecessary. [Doc **was**], at 6-9. For these reasons, and the reasons set forth above, the Panel Decision conflicts with *Roe* and the above cases decided by this Court, and en banc consideration is necessary.

CONCLUSION

For the reasons set forth above, respectfully requests that this Honorable Court grant restance instant petition and rehear this matter en banc. Respectfully submitted,

