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CASE NO. [redacted]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[redacted]
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

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INTRODUCTION

Petitioner-Appellant, [redacted] ("[redacted] hereby petitions, under Federal Rule of Appellate Procedure 35, for rehearing en banc of the [redacted], 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 [redacted] his defense counsel, and the Respondent-Appellee (the "Government") agree that [redacted] explicitly requested that his trial counsel file a notice of appeal on [redacted] 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 [redacted] trial counsel was not ineffective despite failing to file the notice of appeal. [redacted] at 6-9. The Panel Decision conflicts with *Roe*. Indeed, post-*Roe* cases considered by this Court also support [redacted] argument that the Panel Decision reached a decision contrary to *Roe*. See *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). En banc consideration is therefore necessary to secure and maintain uniformity of both Courts' decisions.

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

BACKGROUND

Appellant [redacted] was indicted on [redacted] counts ranging from [redacted], [redacted], [redacted], and [redacted]. [RE # 1]. [redacted] went to trial on [redacted] counts but pled guilty on the [redacted] count. [RE # 151]. A jury found [redacted] guilty on all [redacted] counts following a full trial.

After trial, [redacted] explicitly requested that his trial counsel, Mr. [redacted]

[redacted] ("[redacted] file a notice of appeal on his behalf. [Doc #8], at 9-10; [Doc #9], at 21-23; [Doc #15-2], at 6; see also 6 Cir. R. 101(a) ("Trial counsel in criminal cases, …, is responsible for the continued representation of the client on appeal until specifically relieved by this Court."). [redacted] confirmed [redacted] explicit request and added that he told [redacted] that [redacted] would need to get new counsel to prosecute the appeal. [Doc #9], at 21-23. [redacted] also stated that between trial and sentencing he had discussions with [redacted] where [redacted] stated that he only wanted to appeal if his sentence was excessive. *Id.* [redacted] and [redacted] agree that [redacted] never told [redacted] not to file a notice of appeal. [Doc [redacted]], at 9-10; [Doc [redacted]], at 23 ("[redacted]

[redacted]

[redacted]."").

On [redacted], the United States District Court for the Northern District of Ohio (the "District Court") entered a judgment convicting [redacted] of [redacted], [redacted], and [redacted], sentencing him to a term of [redacted] months of imprisonment on each count to run concurrently. [RE #[redacted]].

On [redacted], [redacted] filed a *pro se* motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, stating that he received ineffective assistance of counsel from [redacted] as [redacted] failed to file a Notice of Appeal. [RE

[redacted]. [redacted] also asserted the Court erred in not advising him of his right to appeal during the Sentencing Hearing. [RE # [redacted]]. On [redacted], the Government responded to [redacted] *pro se* §2255 Motion. [RE # 197].

On [redacted], [redacted] newly retained counsel filed a Supplemental § 2255 Motion to Vacate, Set Aside, or Correct Sentence based on [redacted] ineffective assistance of counsel based on a number of reasons, including, *inter alia*, [redacted] failure to file notice of appeal. [RE [redacted] at PAGE ID # [redacted]]. On [redacted], the Government filed its response to [redacted] Supplemental §2255 Motion. [RE # [redacted]].

On [redacted], Judge [redacted] filed his [redacted] Opinion denying [redacted] petition without holding oral argument (the "District Court Opinion"). [RE # [redacted]]. The District Court Opinion adopted the factual summary in the Government's briefings in full, and failed to discuss in detail any of [redacted] arguments for ineffective assistance of counsel except for the argument that [redacted] failed to file a notice of appeal. *Id.* Judge [redacted] found, contrary to [redacted] and [redacted] that there was '[redacted]." *Id.* The other issues brought forth in [redacted] §2255 Motion were rejected without discussion or reason. See generally *Id.*

On [redacted], [redacted] filed his Motion for Certificate of Appealability, which this Court granted in-part and denied in-part on [redacted]

[redacted]. [Doc [redacted]; [Doc [redacted]]. This Court issued [redacted] a Certificate of Appealability on two issues, including whether trial counsel performed ineffectively by failing to file a notice of appeal. [Doc #[redacted], at pg. 5].

[redacted] filed Appellant [redacted] Brief On Appeal ("[redacted] Appeal"). [Doc [redacted]]. In [redacted] Appeal, [redacted] argued that the District Court Opinion reached an erroneous conclusion regarding [redacted] ineffective assistance of counsel, particularly where: (1) [redacted] failed to file a Notice of Appeal on [redacted] behalf despite [redacted] admission that [redacted] requested that [redacted] file a Notice of Appeal; and (2) [redacted] failed to make [redacted] legitimate claims against the Government's deficient motions for forfeiture or even perform the basic attorney function of informing [redacted] of his right to challenge the Government's deficient motions for forfeiture. *Id.*, at 9-20.

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

which the Government argued it was not, since [redacted] sentence fell within the sentencing guidelines. *Id*. In its response, the Government also argued that its motions for [redacted] were not deficient and [redacted] negotiations with the Government allowed [redacted] to keep his home; so, [redacted] actions related to [redacted] could not have fallen below the *Strickland* standard and [redacted] was not prejudiced by [redacted] actions related to [redacted]. *Id*., at 31-40.

On [redacted], this Court issued the Panel Decision. [Doc #[redacted]]. Although both [redacted] and [redacted] agree that [redacted] explicitly requested that [redacted] file an appeal on [redacted] 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 [redacted] and [redacted] which took place between trial and sentencing in this matter, somehow negated [redacted] explicit request. *Id*., at 6-9. The Panel Decision upheld the District Court's decision and further agreed with the Government, finding that [redacted] only wanted [redacted] to appeal if [redacted] sentence was "excessive." *Id*. However, in its analysis of this argument the Panel Decision fails to cite to relevant authority which would support the finding that [redacted] negated his explicit request for [redacted] to file an appeal on [redacted] behalf. *Id*. (the Panel Decision cites to *Roe* to point out that [redacted] claim is based on *Roe*, and cites to cases related to forfeited arguments only). The Panel Decision also followed the Government's reasoning regarding [redacted]

conduct related to [redacted], holding that [redacted] performance did not fall below the *Strickland* standard and [redacted] was not prejudiced as a result of [redacted] performance. *Id*., at 14-17.

For the reasons set forth below, [redacted] respectfully requests that this Honorable Court grant [redacted] 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 [redacted] decision not to file a notice of appeal and finding [redacted] performance not ineffective, despite agreement between [redacted] and the Government that [redacted] explicitly requested that his trial counsel file a notice of appeal on [redacted] 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

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 [redacted] trial, [redacted] explicitly requested that [redacted] file a notice of appeal on [redacted] behalf, because [redacted] the Government, and the panel agree that he did. [Doc [redacted]], at 9-10; [Doc [redacted]], at 21-23; [Doc [redacted]], at 4. Rather, the question is whether discussions between [redacted] and [redacted] which took place after trial, but before sentencing, somehow negated [redacted] explicit request. The Government, the District Court, and the panel believe that the above-mentioned discussions negated [redacted] 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*

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 in fact consulted with about an appeal. [Doc], at 25-31; [Doc #], at 6-9. Noting that attests that he did consult with 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 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 explicitly requested that file an appeal on behalf. [Doc], at 9-10; [Doc], at 21-23. Further, there is no evidence that ever retracted his explicit request for an appeal or ever explicitly requested that *not* file an appeal on behalf, indeed admits to quite the opposite. [Doc], at 23 ("[t]o be clear [never

[redacted].”). Under part one of the *Roe* test, [redacted] failure to file a notice of appeal on [redacted] 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 #[redacted]], 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.” *Doyle*, 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 [redacted] explicitly requested that [redacted] file an appeal in this matter after trial and jumps right to consideration of part two of the *Roe* test. [Doc #[redacted]], at 6-9. Indeed, the Panel Decision spills more ink blaming [redacted] 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, [redacted] explicitly requested that [redacted] file a notice of appeal and never explicitly told [redacted] not to, even after the discussions attested to by [redacted] [Doc [redacted]], at 9-10; [Doc [redacted]], at 23 (“[redacted] [[redacted].”).

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 [redacted] attestations, there were discussions between [redacted] and [redacted] regarding the pros and cons of filing a notice of appeal. [Doc [redacted]], at 21-23. Like *Regaldo*, [redacted] believed that his duty to file the notice of appeal was based on some condition, which [redacted] believed did not occur. *Id*. But, importantly, unlike *Regaldo*, there is no argument regarding whether [redacted] explicitly requested that [redacted] file a notice of appeal on his behalf after trial. *Id*. It is critically important that [redacted] knew that [redacted]

wanted [redacted] to file a notice of appeal, and knew that [redacted] 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 [redacted]], 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, [redacted] respectfully requests that this Honorable Court grant [redacted] instant petition and rehear this matter en banc.

Respectfully submitted,

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