No. .....

IN THE SUPREME COURT OF THE UNITED STATES

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Darryl Allen,
petitioner,

v.

Commonwealth of Pennsylvania,
respondent.

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On petition for a writ of *certiorari* to
the superior court of Pennsylvania

Petition for a writ of *certiorari*

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## QUESTIONS PRESENTED

Did the Pennsylvania courts err in denying collateral relief where prior counsel was ineffective for failing to consult fully with the petitioner, Darryl Allen, about taking an appeal, and in failing to preserve all post-sentence and appellate rights absent a knowing, intelligent, and voluntary waiver of those rights? More specifically, does the "knowing, intelligent, and voluntary" language of *Garza v. Idaho*, 139 S. Ct. 738, 745 n.6 (2019), govern the consultation requirement of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

RELATED CASES

*Commonwealth of Pennsylvania v. Darryl Allen*. MC-51-CR-0038554-2015, Municipal court of Philadelphia. Held for court March 3, 2016.

*Commonwealth of Pennsylvania v. Darryl Allen*. CP-51-CR-0002310-2016, Court of common pleas of Philadelphia county, Pennsylvania. PCRA relief denied by order entered Jan. 4. 2018.

*Commonwealth of Pennsylvania v. Darryl Allen*. 434 EDA 2018, Superior court of Pennsylvania. Judgment entered Dec. 24, 2018.

*Commonwealth of Pennsylvania v. Darryl Allen*. 23 EAL 2019, Supreme court of Pennsylvania. Petition for allowance of appeal denied by order entered June 12, 2019.

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## OPINIONS BELOW

The opinion of the highest state court to review the merits appears at appendix A to the petition and is unpublished. *Commonwealth of Pennsylvania v. Darryl Allen*, 203 A.3d 343 (table), 2018 WL 6735174, no. 434 EDA 2018 (Pa. Super. Ct., Dec. 24, 2018).

The opinion of the trial court appears at appendix B to the petition and is unpublished. *Commonwealth of Pennsylvania v. Darryl Allen*, no. CP-51-CR-0002310-2016 (Pa. C.P. Phila. county, Jan. 17, 2018).

The order of the state court of last resort, denying discretionary review, appears at appendix C to the petition and is unpublished. *Commonwealth of Pennsylvania v. Darryl Allen*, 2019 WL 2441341 (table), no. 23 EAL 2019 (Pa. Jun. 12, 2019).

## JURISDICTION

The date on which the highest state court decided this case was June 12, 2019. A copy of that decision appears at appendix C. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* U.S. Const. amend XIV.

## STATEMENT OF THE CASE

This is a timely petition for *certiorari* of a December 24, 2018, merits decision after the June 12, 2019, denial of a timely petition (filed January 23, 2019) to the state supreme court for allowance of appeal. The intermediate state court was acting on a timely direct appeal

(filed February 2, 2018) from a January 4, 2018, order of a Philadelphia trial court denying relief under Pennsylvania's Post-Conviction Relief Act ("PCRA").

The petitioner has been convicted of a crime, to wit: violating Pennsylvania's Uniform Firearms Act, 18 Pa. C.S.A. §§ 6105 and 6106, for which he is currently serving a sentence of imprisonment, probation or parole, to wit: Darryl Allen was sentenced on June 9, 2017, to five to ten years on the VUFA § 6105 charge, and a concurrent five to ten years on the VUFA § 6106 charge at the case docketed at CP-51-CR-0002310-2016. Although prior counsel filed a timely post-sentence motion after an earlier (May 17, 2017) sentencing, no notice of appeal was filed.

On August 11, 2017, a prison post-mark was applied to Mr. Allen's timely *pro se* PCRA petition, which specifically invoked *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and that federal case was the basis for all of the hearings and briefing that followed in the state courts.[1] Common pleas held an evidentiary hearing on December 19, 2017, and after written submissions, common pleas denied relief by order entered January 4, 2018. A timely notice of appeal was filed February 2, 2018.

On December 24, 2018, the superior court affirmed the order. The petition to the state supreme court for discretionary relief was filed within thirty days thereafter, and the present petition is being filed electronically and by mail within ninety days after the June 12, 2019, order of the state supreme court.

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[1] *Garza v. Idaho*, 139 S. Ct. 738 (2019), was not filed until February 27, 2019, after all opinions and petitions in this case had been filed in the state courts.

## REASONS FOR GRANTING THE PETITION

On February 27 of this year, this court adopted (or in the alternative, used language assuming the principle to have been universally adopted already) a "knowing, intelligent, and voluntary" standard for determining whether a criminal defendant waived his right to appeal. *Garza v. Idaho*, 139 S. Ct. 738, 745 n.6 (2019). In *Garza*, this court returned more fully to a 1983 case that distinguished a lawyer's possible power to truncate or omit particular arguments a criminal defendant might want to pursue on appeal, from the bare legal duty to file the appeal at all. *Jones v. Barnes*, 463 U.S. 745 (1983). In between, this court in the year 2000 , by use of the "*see*" signal, suggested (perhaps inadvertently) that *Jones v. Barnes* somehow supported the idea that if a lawyer could get a criminal defendant to say the simple words "do not appeal," the lawyer might have no duty to do any more. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Some lower courts, including the ones in this case, have since interpreted *Flores-Ortega* to put a burden on uneducated criminal defendants to pursue an appeal, and have tolerated a less-than-full consultation by attorneys about whether the client might want to appeal.

This petition asks this court to say that the *Flores-Ortega* duty to consult means that the government must show a *Garza* "knowing, intelligent, and voluntary" waiver of appellate rights, and that the law will not tolerate informal waivers of appellate rights any more than it tolerates informal waivers of a right to a jury trial, or to a trial at all, or any other area of the criminal law where the "knowing, intelligent, and voluntary" standard is routinely used.

Criminal defense attorneys have a duty, whether or not their clients ask them to file an appeal, to consult (fully) with the clients regarding this question. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Commonwealth v. Carter*, 21 A.3d 680 (2011); *Commonwealth v. Touw*,

781 A.2d 1250 (Pa. Super. 2001). If there are any non-frivolous grounds for an appeal, it must be filed unless the client after a full consultation waives that right.

The previous defense attorney did not consult (fully, in the *Flores-Ortega* sense) with Mr. Allen, and therefore Mr. Allen is entitled to reinstatement of his appellate rights, including retroactively to whatever post-sentence motion he was entitled to file as of the May 17, 2017, sentencing date (so that he can preserve for appeal any weight-of-the-evidence and reconsideration-of-sentence grounds).

The testimony of Mr. Allen's previous (privately retained) defense attorney is replete with examples of potential appellate issues about which he did not consult with Mr. Allen.[2] N.T. Dec. 19, 2017, at 9-10 (counsel refused to say whether he had a conversation regarding weight-of-the-evidence claim) ("We had a general conversation"; "I'm not going to say I do or I don't"; "I don't remember"; did not take notes); *id.* at 10 ("I don't recall" any consultation about challenges to the sentence [other than the one challenge to whether the offense gravity score should have been a 9 or a 10]; *id.* at 10-11 (although counsel remembered the Hon. Earl W. Trent, Jr., denying earlier motions to dismiss[3], he did not recall any consultation with Mr. Allen about appealing those judicial determinations); *id.* at 11 (although counsel

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[2] There is a single place in the transcript of the evidentiary hearing on the PCRA petition where the attorney for the commonwealth got prior counsel to say (with respect to the May 17, 2017, conversation) "yes" to a conclusory question about general disadvantages or advantages of filing an appeal. N.T. Dec. 19, 2017, at 17. Counsel described it as "more than a feeling, it was a conclusion," and he claimed to remember no words spoken by him or Mr. Allen in that conversation. In light of every other answer counsel gave to more specific questions, it is clear that there is no evidence of any consultation within the meaning of *Roe v. Flores Ortega.*

[3] The common pleas docket shows these denials on November 7, 2016, and January 30, 2017.

remembered the trial court's adverse rulings concerning 9-1-1 tapes, Crawford, the 6th amendment, and the Pennsylvania constitution, he didn't recall the content of any conversations relating to appealing those determinations, nor whether he consulted with Mr. Allen at all about that topic "I don't recall whether I did or did not"); *id.* at 11-12 (as to the one issue counsel included in the May 25, 2017, motion for reconsideration (whether the sentencing judge could make a finding without a jury determination[4]), counsel never consulted with Mr. Allen about appealing from the denial of that claim; "no, not specifically, I don't recall"[5]); the only discussion counsel had with Mr. Allen about the possibility of trial counsel filing a notice of appeal and then seeking to withdraw so that an appellate attorney could be appointed was the on-the-record colloquy.[6] *Id.* at 13-14. Yet when one reads the on-the-record colloquies, however, they mis-state the law[7] and certainly reflect no consultation. N.T. June 9, 2017 (argument on post-

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[4] Prior counsel articulated this argument and specifically identified the problem as being that the sentencing judge (without a jury finding) was being asked to make a finding that would increase the penalty; the court rejoined that increasing the guidelines does not increase the penalty, focusing on the unchanged statutory maximum. N.T. June 9, 2017, at 6-7. Yet *Alleyne* changed that analysis in 2013, and despite having raised the issue in common pleas, counsel took it no further.

[5] At this point in his testimony, counsel referred to Mr. Allen saying he did not want to file an appeal. This conversation occurred, however, on the day of Mr. Allen's initial sentencing (May 17, 2017), not on or after the second sentencing (June 9, 2017). N.T. Dec. 19, 2017, at 8-9. Counsel confirmed that prior to sentencing, there was no consultation about an appeal. *Id.* at 15.

[6] At one point in his direct testimony, prior counsel used the passive voice: "He was advised." N.T. Dec. 19, 2017, at 14. Yet earlier and later, he intimated incorrectly that he himself had that discussion, N.T. Dec. 19, 2017, at 13, lines 23-25, and at 18, lines 18-19. The transcripts from both sentencings make clear that it was the court, not counsel, who advised Mr. Allen. N.T. May 17, 2017, at 44-46; N.T. June 9, 2017, at 12-13.

[7] The version of the law stated by the common pleas court (and endorsed by the panel opinion, at 6) is as if *Roe v. Flores-Ortega* had never been decided.

sentence motion, and re-sentencing), at 12-13 (virtually nothing is said by counsel ["No, I'm private"], but judge erroneously puts the burden on Mr. Allen to notify counsel and/or the court he wants to appeal); N.T. May 17, 2017 (first sentencing), at 44-46 (then also, virtually nothing is said by counsel ["I'm private, your honor"], but judge erroneously puts the burden on Mr. Allen; judge implicitly and conditionally informed counsel he might have to file appeal). At the evidentiary hearing on the PCRA petition, Mr. Allen was available by video for examination by the attorney for the commonwealth, but she chose not to call him. N.T. Dec. 19, 2017, at 23-24.[8]

A useful discussion of the duty to consult in a meaningful fashion is found in *Harvey v. State*, 285 P.3d 295 (Alaska Ct. App. 2012). One difference in form, however, is that Alaska's rule 1.2 explicitly refers to an appeal. In Pennsylvania, the text of rule 1.2 does not so refer, but Pennsylvania substantive law at least as far back as 1981 has required that the decision to appeal be made by the client. *Commonwealth v. Vanistendael*, 616 Pa. 420, 48 A.3d 1220 (2012) (*per curiam*) (granting appeal, vacating decision below, and remanding for thorough *Roe v. Flores-Ortega* analysis).

For the subsidiary point in Mr. Allen's PCRA petition that his relief should include full reinstatement to where he was at the instant after he was sentenced, at least two cases provide support: *Lincoln v. Palakovich*, 2014 WL 1327521 (E.D. Pa. 2014) (Pennsylvania's post-sentence-motion rules cannot interfere with reinstatement of defendant's federal appellate rights); *Commonwealth v. Halley*, 582 Pa. 164, 870 A.2d 795 (2005) (failure to perfect appeal

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[8] Pursuant to Pennsylvania law, any relevant attorney-client privilege was waived by Mr. Allen's claim of ineffective assistance of counsel. 42 Pa. C.S.A. § 9545(d)(3). The trial court was thus correct in reminding the attorney for the commonwealth that she could call Mr. Allen to testify about these matters.

implicates *Roe v. Flores-Ortega* as much as failure to file notice of appeal).

Finally, one explanation for the paucity the court may find of reported cases discussing the issue where an uninformed defendant was led to utter the words "do not appeal," yet thereafter brought an ineffective-assistance-of-counsel claim, is that there is *obiter dictum* (strikingly explicit, but still *obiter dictum*) in *Roe v. Flores-Ortega* itself that a defendant "who explicitly tells his attorney not to file an appeal plainly cannot later complain that . . . his counsel performed deficiently." This was not the issue for Mr. Flores-Ortega: he did not say either way; furthermore, the court used the citation signal "see," which means that the case it was about to rely on did not actually support that proposition, but was related to it somehow. Sure enough, *Jones v. Barnes*, 463 U.S. 745 (1983), was about an appellate attorney who did take an appeal and did submit a brief, but who refused to brief some additional issues the client wanted to pursue; the holding was that the attorney was allowed to brief some issues and omit others (leaving for another day whether the client could pursue those issues on collateral review). Very clearly, the accused in that case asked for an appeal and got one (albeit with disagreements about claim selection). Nothing in *Jones v. Barnes* established that a client who unknowingly tells his attorney not to appeal is bound by that mistake; as noted above, this court in *Roe v. Flores-Ortega* implicitly acknowledged this disconnect by using the "see" signal, but some later courts have mistakenly repeated the court's language without repeating the limitation.[9]

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[9] As noted above, *Garza v. Idaho*, 139 S. Ct. 738 (2019), adopted (or at least endorsed) the knowing, intelligent, and voluntary standard, and contained a much fuller discussion of *Jones v. Barnes*. In *Garza*, there was an explicit waiver of appellate rights, but the defendant later instructed his lawyer to appeal; the lawyer refused. This case presents the opportunity to say that *Jones v. Barnes*, *Roe v. Flores-Ortega*, and *Garza v. Idaho* together mean that the duty to consult means to consult fully, and that appellate rights cannot be waived unless the attorney (or the government, on a defendant's subsequent collateral attack) sustains the

The universe of defendants who unknowingly say not to appeal would contain a large number who fall under one of the substantive prongs of *Roe v. Flores-Ortega*: ones where nonfrivolous grounds for appeal exist in the record. The evidentiary hearing in Mr. Allen's case amply demonstrated that there were a number of contested legal matters where the court ruled against Mr. Allen's position, and appealing from those rulings would not have permitted a withdrawal via an *Anders* brief. Similarly, the law would not permit Mr. Allen to waive his right to a jury just by saying, "that's okay, let the judge decide alone," or waive his right to a trial of any sort by saying simply, "that's okay, I did it." In matters of waiving a jury or entering a guilty plea, we require full colloquies to establish "knowing, intelligent, and voluntary" waivers. To permit an appellate attorney to withdraw, we require a searching review of the record for any non-frivolous claims. *Anders v. California*, 386 U.S. 738 (1967). In Mr. Allen's case, the petition together with the evidentiary hearing established that trial counsel failed to conduct the meaningful consultation about advantages and disadvantages required by the constitution, and that Mr. Allen did not knowingly waive his right to an appeal, and that he is now entitled to reinstatement of his full appellate rights, as of the moment he was sentenced.

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burden of demonstrating that the client has knowingly, intelligently, and voluntarily waived his or her appellate rights.

## CONCLUSION

For all these reasons, the petitioner seeks a writ of *certiorari*, reversal of the denial of PCRA relief, reinstatement of his full appellate rights, and in the alternative a new trial, and in the alternative a new sentencing hearing; he also seeks such other relief as is just.

Respectfully submitted,

/s/ *Richard T. Brown, Jr.*

Richard T. Brown, Jr.

Counsel of record for the petitioner