

No. 19-5931

IN THE SUPREME COURT OF THE UNITED STATES

Darryl Allen,
petitioner,

v.

Commonwealth of Pennsylvania,
respondent.

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

Petition for rehearing

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TABLE OF CONTENTS

Reasons for granting rehearing	1
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TABLE OF AUTHORITIES

CASE	
<i>Collier v. State</i> , 2019 WL 5301808 (Ga. Oct. 21, 2019)	3
<i>Garza v. Idaho</i> , 139 S. Ct. 738 (2019)	1, 3
<i>Gamble v. United States</i> , 2019 WL 5698093 (D.S.C. Nov. 4, 2019)	3
<i>Neill v. United States</i> , 937 F.3d 671 (6 th Cir. Sept. 5, 2019)	1, 2, 3
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000)	1, 3
<i>Stephen v. United States</i> , 706 F. App'x 954 (11 th Cir. 2017) (<i>per curiam</i>)	2
<i>United States v. Jones</i> , 777 F. App'x 177 (8 th Cir. Sept. 18, 2019) .	2

Reasons for granting rehearing

Darryl Allen, the petitioner herein, respectfully requests rehearing of the October 15, 2019, order denying his September 10, 2019, petition for a writ of *certiorari*, because the full import of *Roe v. Flores-Ortega* and *Garza v. Idaho* will remain to be litigated as long as this court leaves unmodified its *obiter dictum* implying that a criminal defendant who says not to appeal has waived his right to appeal and his right to have counsel consult with him (fully) about whether to file a notice of appeal.¹

The most thorough case identifying the problem is *Neill v. United States*, 937 F.3d 671 (6th Cir. 2019).² Although the court of appeals there did not cite *Garza v. Idaho*, the court did identify as “*dicta*” this court’s remark about a criminal defendant who tells his attorney not to appeal, and did identify that as a problem for clients who subsequently alleged ineffective assistance of counsel for failing to pursue an appeal. The sixth circuit explicitly recognized that it was creating a circuit split with the

¹ This petition is timely. The twenty-fifth day after October 15, 2019, was November 9, 2019, which fell on a Saturday. Monday, November 11, 2019, was a federal holiday, and this petition is being filed electronically and by mail on the first business day thereafter, Tuesday, November 12, 2019.

² *Neill* was filed September 5, 2019, but the undersigned was not aware of it when preparing the September 10, 2019, petition for *certiorari*.

eleventh circuit on whether or not to examine the adequacy of a lawyer’s consultation that led to a client’s saying, “do not appeal.” *Neill*, 937 F.3d at 677 n.3 (rejecting *Stephen v. United States*, 706 F. App’x 954 (11th Cir. 2017) (*per curiam*)). After correctly identifying this court’s remark as *dicta*, and after holding that the courts should review the adequacy of a lawyer’s consultation in this context, the sixth circuit ultimately rejected Neill’s claim for reasons with which the petitioner here disagrees, but for purposes of *certiorari* and rehearing, the *Neill* case provides strong support that this court should accept petitioner’s case (or *Neill*, for that matter, if either party files a petition in the next month). A circuit split does exist, courts are influenced by this court’s *dicta*, and granting *certiorari* would enable this court to make clear that counsel cannot just induce a criminal defendant to say “do not appeal” without a knowing and intelligent waiver (as explained in the September 10, 2019, petition).

Another intervening case demonstrating the need for this court to clarify the law is *United States v. Jones*, 777 F. App’x 177 (8th Cir. Sept. 18, 2019) (completely omitting any discussion of counsel’s duty to consult).

It is true that some lower courts are recognizing the sea change

in the law. *Collier v. State*, 2019 WL 5301808 (Ga. Oct. 21, 2019) (overruling four decades of precedent to align Georgia law with *Garza* and *Roe*, but no discussion of clients who were convinced to say “do not appeal”); *Gamble v. United States*, 2019 WL 5698093 (D.S.C. Nov. 4, 2019) (granting motion seeking appeal where defendant swore he asked his attorney to file appeal, despite waiver of appeal in plea agreement).

The question presented by this petitioner remains one that will recur throughout the country until this court eliminates any doubt sown by the *obiter dictum* in *Roe v. Flores-Ortega*, and all parties would benefit from this court’s announcement that that case and *Garza v. Idaho* mean that a criminal defendant can only waive his appeal if he does so by a knowing, intelligent, and voluntary waiver.

Even if, however, this court does not wish to use this case as a merits-case vehicle for making the announcement, the petitioner respectfully seeks in the alternative that this court rehear its October 15, 2019, order, grant his September 10, 2019, petition, vacate the judgment below, and remand for reconsideration in light of *Garza v. Idaho* and *Neill v. United States*, which were both filed in 2019 after the briefing below had concluded.

For the foregoing reasons and those stated in the September 10, 2019, petition, Darryl Allen respectfully requests that his petitions be granted.

Respectfully submitted,

/s/ Richard T. Brown, Jr.

Richard T. Brown, Jr.

CERTIFICATION UNDER RULE 44.2

I certify that this petition for rehearing is restricted to the grounds specified in rule 44.2, and that it is presented in good faith and not for delay.

/s/ Richard T. Brown, Jr.