22-6698

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT GROSS

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CRIMINAL CASE

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QUESTIONS PRESENTED

This is a criminal case, which involves issues regarding ineffective assistance of counsel, frivolity, and first impression.

1. Is the *Roe v. Flores-Ortega* test for a non-frivolous appeal issue a case of First Impression? *Roe v. Flores-Ortega*, 528 U.S. 470, (2000).
2. What is the test for a non-frivolous issue, lacking any arguable legal points of merit or lacking any basis in law or fact?
3. What is the definition of a rational defendant as described in *Roe v. Flores-Ortega*, 528 U.S. 470, (2000) and must that include the 'totality of circumstances'?

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JURISDICTION

The 5th Circuit Court of Appeals judgement was entered on May 13, 2022. A docket entry, Application (22A122) granted by Justice Alito extending the time to file until October 10, 2022, was entered

STATEMENT OF THE CASE

This case is a criminal case involving issues of first impression and the test for frivolity. Robert Gross was ordered to pay a $100,000 fine at the time of sentencing. Gross pled guilty but retained the right to appeal. His attorney never consulted him about the advantages or disadvantages of an appeal but admitted that Gross could have "challenged" the reasonableness of the fine on appeal. ROA 693. The district court held that Gross' counsel did not consult with Gross about the advantages and disadvantages of appealing the $100,000 fine. Contrastingly, the court also stated that Gross' counsel was not constitutionally

obligated to consult with Gross because an appeal of the fine would be frivolous and that a rational man would not have appealed. This decision was appealed to the 5th Circuit Court of Appeals, which granted a COA (Certificate of Appealability) but ultimately found the case frivolous. The court held that there were no legal points arguable on their merits ,and, therefore, the case was frivolous.

The Supreme Court in *Roe v. Flores-Ortega* held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for

appeal)..." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Additionally, The Court described frivolity as "a determination that the appeal lacks any basis in law or fact." *McCoy v. Court of Appeals*, Dist. 1, 486 U.S. 429, 438 n. 10 (1988)

This Court has not yet decided the contours of the Flores-Ortega analysis concerning an attorney's duty to consult when a rational defendant would want to appeal a non-frivolous issue. "A case is said to be 'of the first impression' when it presents an entirely novel question of law for the decision of the court and cannot be governed by any existing precedent." *Blacks Law Dictionary*, Henry Campbell Black., M.A. 1990. This is a case of first impression.

Further, the Appellate Courts have differed in their interpretations of frivolity. Some courts argue lack of legal merits or lack of any basis in law or fact or a combination of both. This has led to confusion and lack of uniformity in the justice system. Justice should not be governed according to where one lives or the Circuit in which a crime is committed. The standard to determine if an appeal ground is frivolous cannot be higher than the test for frivolity for an *Anders* brief. *Anders v. California, 386 U.S. 738 (1967)*. Accordingly, This Court should hold that, based on *Flores-Ortega*, grounds for appellate appeal is 'non-frivolous' if it 'has any basis in law or fact.' *McCoy*, 486 U.S. at 438.

Additionally, the definition of a rational man remains undefined. The Court has never expressly established the standard or definition of a rational man. Consequently, this has led to discontinuity and confusion regarding which relevant factors can be applied. This Court should determine the meanings of the standard for a rational man and totality of circumstances.

REASONS FOR GRANTING THE PETITION

1. *FLORES-ORTEGA* FRIVOLITY PRESENTS A FIRST IMPRESSION ISSUE

The Sixth Amendment guarantees "reasonable effective" legal assistance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To show

ineffective assistance, the two-pronged Strickland test requires that a defendant shows that (1) counsel's representation fell below an objective standard of reasonableness, and (2) such deficient performance prejudiced the defendant." *United States v. Cong Van Pham*, 722 F.3d 320, 323 (5th Cir. 2013) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000).

In *Roe v. Flores-Ortega*, the Supreme Court elucidates on the way the Strickland test applies to various situations. Even if a defendant does not reasonably demonstrate to counsel that he/she is interested in an appeal, there remains a constitutionally imposed duty to consult. *Flores-Ortega* at 480. This constitutionally imposed duty to consult exists when there is a reason to believe that a rational defendant would pursue an appeal

(for example, because there are non-frivolous grounds for appeal). Id. This is an objective test. *Lara-Ortiz v. United States*, 2017 WL 4570378 at *7(S.D. Tex. June 21, 2017), rec. adopted, 2017 WL 4539843 (S.D. Tex. Oct. 11, 2017); *Valletta* v. *United States*, 195 F. Supp.2d 643, 646 n.3(D.N.J. 2002).

In *Christiansburg Garment Co. v.* EEOC, the Supreme Court finds that the legal issue, which is previously settled by the summary judgment, is one of first impression, and the argument is therefore not frivolous. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The present case, *Gross v. United States,* is similar to the *Christiansburg* case. Gross' attorney states, "This Court has not yet decided the contours of the Flores-Ortega prong concerning an attorney's duty

to consult 'when there is reason to think that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal)'" United States v. Gross, No. 20-10303, (5th Circuit Court of Appeals, May, 2022) (Attorney's Initial Brief dated July 21, 2021 at 14). "A case is said to be 'of the first impression' when it presents an entirely novel question of law for the decision of the court and cannot be governed by any existing precedent." *Blacks Law Dictionary*, Henry Campbell Black., M.A. 1990. This is a case of first impression, which identifies a *Flores-Ortega* non-frivolous issue.

Further, in *Cary v. Allstate Insurance*, the court holds, "cases of first impression are not frivolous if they present debatable issues of substantial public importance." *Cary v. Allstate Insurance,* 78 Wn.

App. 434, 440-41, 897 P.2d 409 (1975). It is clear that a debatable first impression issue offers significant substantial public importance, which can impact the lives of multiple people. Additionally, in *Overnite Transport. Co. v. Chicago Indus. Tire Co.*, the court holds that appeals that raise issues of first impression are not frivolous because to hold otherwise "would have a profound chilling effect upon litigants and would further interfere with the presentation of meritorious legal questions to this court." *Overnite Transport. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 794 (7th Circuit, 1983). Also, in *Castillo v. People S. Ct. Crim.* No. 2008-0072, 2010 WL 500439 (V.I. Jan. 27, 2010), the court states, that, "...by definition, an issue of first impression in this Court cannot be wholly frivolous even if it has been rejected by the

United States Court of Appeals for the Third Circuit, other Virgin Islands courts, or court in other jurisdictions." *Castillo v. People S. Ct. Crim.* No. 2008-0072, 2010 WL 500439 at 3. In truth, suggested changes in the law provide platforms that the courts should consider to potentially develop more effective ways to impart justice.

Gross' attorney contends that this is a case of first impression. The standard for first impression should be intact since "recognizing changes and advancements in the law only occur at the appellate level. The only way to create change is to initiate change." *Pingue v. Pingue,* No. 06-CAE-10-0077, 2007 WL 2713763 at 4. (Ohio Ct. App. Sept. 18, 2007) (unpublished). This Court should uphold that the Flores-Ortega test for frivolity is a first impression case.

2. DISPARATE APPROACHES TO FRIVOLITY HAVE LED TO DIVERSE ANALYSES OF JUDICIAL DECISIONS

The definition of frivolity among the Courts is challenging. The Supreme Court in *Anders* holds that an appeal is not in bad faith if it involves "legal points arguable on their merits (and therefore not frivolous)" *Anders v. California*, 386 U.S. 738, 744 (1967). The Supreme Court further defines 'frivolity' in *McCoy*. "Whatever term is used to describe the conclusion an attorney must reach as to the appeal before requesting to withdraw and the court must reach before granting the request, what is required is a determination that the appeal lacks any basis in law or fact." *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429 (1988) at 438 n. 10.

However, since *McCoy*, the Courts are incongruous regarding the way 'frivolity' is applied.

The First, Second, Third, Fifth, Eighth and Tenth Circuits appear to employ the legal definition of frivolity exclusively when there are no legal points arguable on the merits. In *Purvis v. Ponte*, the court states that the complaint is dismissed as frivolous under 28 U.S.C. Sec. 1915(d) because there is no arguable legal merit to withstand summary dismissal sua sponte. *Purvis v. Ponte*, 929 F.2d 822, 826 (1st Circuit, 1991). Further, in *United States v. Cline,* if the court "concludes that any legal points are arguable on their merits, then it must deem the appeal non-frivolous..." *United States v. Cline*, 24 F.4d 613 (8th Circuit, 2022). See also, *United States v. Tula-Mani*, 333 Fed. Appx. 672 (3rd Circuit, 2009),

United States v. Youla, 241 F.3d 296, (3rd Circuit, 2001), *Padilla v. United States*, 777 Fed. Appx. 111 (5th Circuit, 2019), *Perea v. United States*, 743 Fed. Appx. 569 (5th Circuit, 2018), *United States v. Lieras-Rodriguez*, 764 Fed. Appx. 562 (8th Circuit, 2019).

Regarding the present case, *United States v. Gross*, the Court of the Fifth Circuit, "relies on the *Anders* standard, holding an appeal is not in bad faith if it involves 'legal points arguable on their merits (and therefore not frivolous).'" *United States v. Gross,* No. 20-10303, (5th Circuit Court of Appeals, 2022)(unpublished) at 4. "We see no reason to apply a different standard here..." Id. The court appears to follow the *Anders* terminology of frivolity, whereby if there are no legal points

arguable on their merits, the issue is frivolous. *Anders* at 744.

Alternatively, there are courts that appear to refer to frivolity based exclusively on the definition in *McCoy*, without basis in law or fact. *McCoy* at 438 n.10. The Supreme Court of the Virgin Islands holds that it is "not a frivolous argument unless it...is not only against the overwhelming weight of legal authority *but also* entirely without any basis in law or fact *or* without any logic supporting a change of law." *State v. Turner*, No. W1999-01516-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 248, *5, 2000 WL 298 696, at *2 (Tenn. Crim. App. Mar. 17, 2000) (unpublished) *Castillo v. People*, 210 V.I. Supreme Lexis 39. The Fourth Circuit Court of Appeals also supports any basis in law or fact as a

frivolous issue. See *United States v. Fiel*, 35 F.3d 997 (4th Circuit, 1994).

The Seventh, Ninth, and Eleventh Courts of Appeals seem to support disparate definitions of frivolity, depending on the circumstances of the case. In *United States v. Cannon*, the court concludes that the defendant has no issue of arguable legal merit available to pursue and the case is, therefore, frivolous. *United States v. Cannon*, 253 Fed. Appx. 590 (7th Circuit, 2007). Conversely, the court in *Talley v. Lane* states that the defendant's civil rights claims are dismissed as frivolous because the allegations have no arguable basis in fact or law. *Talley v. Lane*, 13 F.3d 1031 (7th Circuit, 1994).

Further, in the Eleventh Circuit Court of Appeals, *Bailey v. Silberman*, the court holds that

the defendant's complaints are frivolous if they lack any arguable basis in fact and law. *Bailey v. Silberman*, 226 Fed. Appx. 922 (11th Circuit, 2007). Conversely, in *United States v. Davila*, the court finds that any of the legal points are arguable on their merits and are, therefore, not frivolous. *United States v. Dalia*, 749 F.3d 982 (11th Circuit, 2014).

The disparity in the courts' interpretations of frivolity illustrates the lack of clarity in the courts, which has major practical implications for the criminal defense system. Even though a criminal defendant's right to representation is a fundamental component of the American justice system, justice is dependent on the geographic region in which one lives and the domain of the Circuit Court in which the crime has occurred. One

can be tried under a singular interpretation of the frivolity clause and be precluded from justice. Further, because the Supreme Court has not implemented a consistent approach or enforced uniformity regarding the definition and application of frivolity, it has resulted in divergent, yet equally valid, analyses of judicial decisions.

3. THE SUPREME COURT SHOULD SET THE STANDARD FOR THE RATIONAL MAN

In *Flores-Ortega*, the Supreme Court holds that counsel has a duty to consult with a defendant regarding an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this

particular defendant reasonably demonstrates to counsel that he is interested in appealing. " *Flores - Ortega*, 528 U.S. at 480. The existence of a duty to consult is assessed in accordance with "all the information counsel knew or should have known at the time (focusing on the totality of the circumstances)" *Pham*, 722 F.3d at 324 (citing *Flores-Ortega*, 528 U.S. at 480). However, although The Supreme Court examines some relevant factors, it has never expressly established a standard that articulates what a rational defendant would do. "Whether the conviction followed a trial or a guilty plea is 'highly relevant,' although not determinative, as is whether the defendant waived his right to appeal and whether he received a sentence for which he bargained." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 481). "Only by

considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal...". *Id.* at 480.

The courts have differed in their opinions regarding the meaning of the totality of circumstances. In *United States v. Cheevers*, the Court states, "the record confirms that Cheevers cannot show that, 'considering all relevant factors, "a rational defendant would have desired an appeal." *Flores-Ortega*, 528 U.S. at 480. *United States v. Cheevers*, 2022 US App. Lexis 12213, 9th Circuit, May 5, 2022. The Court considers the totality of circumstances to be merely facts on the record. "Facts not presented to the district court are not part of the record on appeal and provide no basis for overturning that court's decision." *Id.* This

was also illustrated in *Corcoran v. Helling*, in which the court simply states there are no non-frivolous grounds for appeal, and Corcoran does not reasonably demonstrate to his counsel that he is interested in appealing. There is nothing on the record. *Corcoran v. Helling*, 178 Fed Appx. 655, (9th Circuit, 2006).

Alternatively, some courts expand the definition of 'totality of the circumstances' beyond the record. In *McAllister v. United States*, the court considers and examines the timeline of the defendant's correspondences with his/her attorney and their verbal interactions to determine what a reasonable defendant would do. *McAllister v. United States*, 2021 US App. Lexis 36163. Further, in *Sarocca v. United States*, the court examines many factors to determine totality of circumstances. *Sarocca v. United States*, 250

F.3d 785 (2nd Circuit, 2001). The factors include: 1) the defendant's lack of interest in an appeal after a section 2255 denial, 2) a statement in an affidavit by the defendant's former attorney indicates that an appeal was never requested, 3) the record does not reflect any indication that the defendant requested an appeal, and 4) both time and expenses are spared by signing a plea agreement and foregoing trial are circumstances considered in their inquiry. *Id.* at 788.

In the present case, *Gross v. United States*, the district court finds that the appeal is frivolous by relying on the record, citing the plea agreement, and noting that all parties agreed to the sentence received. *Gross v. United States*, 2019 U.S. Dist. LEXIS 227770. However, the court does not consider the totality of circumstances. Gross' attorney did not disclose vital information of which she was aware or should have been aware, including details regarding Gross' medical

billing practices for deceased patients over a five-year period. Gross had 47 billing errors over a 5-year period and was informed by his attorney that, because there were no other physicians who had billed in this manner, Gross should accept the plea. However, in 2011, Medicare published a public article, "*Medicare Payments Made On Behalf of Deceased Beneficiaries in 2011*," which states that 46, 093 providers and suppliers billed for deceased patients in a single year (2011) and that Medicare inappropriately paid 23 million dollars after beneficiaries' deaths in 2011. Contrastingly, Gross never received any monies from Medicare as a result of his billings during the five-year period (2009-2014). Further, the Inspector General identified 251 providers (out of more than 1 million nationwide) who had high numbers of claims for dead patients that may have indicated fraud, waste or abuse. "*Medical Providers in Oklahoma Accused of Billing*

For Dead People." None of this information was known to defendant Gross prior to signing a plea agreement. Of course, a rational defendant who is aware of this information would want to appeal and/or decline to sign this deficient plea agreement.

Neither the Supreme Court nor the Fifth Circuit Court of Appeals has expressly established the standard that should be applied when considering the legal action that a hypothetical rational defendant would take. Some courts have simply relied on the information that is available in evidence and on the record, while other courts have relied on the totality of circumstances and considered factors, such as professional guidance, social and occupational circumstances, and breakdown of adversarial process. Given the high volume of cases of ineffective assistance of counsel, it is imperative that criminal defense lawyers have clear guidance on how to

proceed with a rational man analysis. It is also important to delineate a singular standard to ensure an equitable and uniform justice system.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

October 12, 2022

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