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# Gosch v. State Appellant's Brief 2 Dckt. 38791

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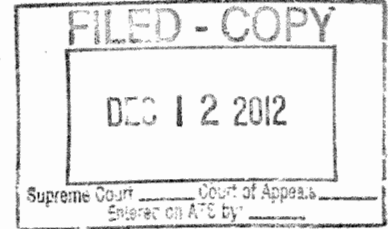
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SARA B. THOMAS  
State Appellate Public Defender  
I.S.B. #5867

COPY

ERIK R. LEHTINEN  
Chief, Appellate Unit  
I.S.B. #6247

SARAH E. TOMPKINS  
Deputy State Appellate Public Defender  
I.S.B. #7901  
3050 N. Lake Harbor Lane, Suite 100  
Boise, ID 83703  
(208) 334-2712



IN THE SUPREME COURT OF THE STATE OF IDAHO

KIRK JULLIARD GOSCH,	)	
	)	
Plaintiff-Appellant,	)	NO. 38791
	)	
v.	)	APPELLANT'S BRIEF
	)	ON REHEARING
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

The Idaho Court of Appeals has granted the State's Petition for Rehearing in this case on the limited issue of whether Idaho Appellate Rule 17 applies to limit the efficacy of a request for an appeal tendered prior to a judgment of conviction becoming final. Mr. Gosch submits that it does not. However, even assuming that this Rule applies to the question of when a request for an appeal is effective under the standards articulated

in *Roe v. Flores-Ortega*<sup>1</sup>, Mr. Gosch submits that the case law governing the efficacy of prematurely filed notices of appeal should guide this Court's analysis. Under the liberal standards applied with regard to prematurely filed notices of appeal, Mr. Gosch's request would fall within a cognizable time frame for purposes of a prematurely filed notice of appeal and therefore would be legally effective.

#### Statement of the Facts & Course of Proceedings

The prior Statement of Facts and Course of Proceedings for Mr. Gosch's underlying post-conviction action were previously set forth in Mr. Gosch's Appellant's Brief. (See Appellant's Brief, pp.2-10.) They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

On appeal, Mr. Gosch asserted that the district court erred in dismissing his post conviction petition because his trial counsel tendered ineffective assistance of counsel when trial counsel disregarded Mr. Gosch's directive to file an appeal following the jury verdict of guilt in his underlying criminal case. (Appellant's Brief, pp.12-21.) This Court held that the district court erred in dismissing this claim and in not granting Mr. Gosch relief in the form of re-entering his judgment of conviction and sentence so that he could file an appeal. (2012 Opinion No.47.)

Thereafter, the State filed a Petition for Rehearing with this Court, along with a brief in support of this petition. (See Petition for Rehearing; Respondent's Brief in Support of Petition for Rehearing.) Following the filing of the State's Petition for Rehearing and the Respondent's Brief in Support of Petition for Rehearing, this Court

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<sup>1</sup> *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

granted the State's petition for rehearing solely on the limited issue of "Idaho Appellate Rule 17."<sup>2</sup> (Order Granting Petition for Rehearing, entered on October 24, 2012.)

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<sup>2</sup> Mr. Gosch notes that the State, in its brief in support of the petition for rehearing, sought to re-litigate the appropriate standard of review for Mr. Gosch's claim of ineffective assistance of counsel under *Roe v. Flores-Ortega*. (See Respondent's Brief in Support of Petition for Rehearing, pp.7-8.) Given the limiting language of this Court's order granting the petition for rehearing, Mr. Gosch will not herein seek to re-litigate this issue that has been settled by this Court's prior opinion in this case. He does, however, note that he has previously responded to this argument and continues to assert the arguments presented in his prior Reply Brief as to the proper standards of review. (See Reply Brief, pp.3-7.)

## ISSUES

1. Is an unequivocal request for an appeal, clearly heard and understood by trial counsel, that was made following a jury verdict of guilt but prior to formal entry of a judgment of conviction and sentence, legally effective under the standards articulated in *Roe v. Flores-Ortega* and its progeny?
2. Assuming, *arguendo*, that trial counsel is permitted to disregard a clear directive to file an appeal where that directive is made prior to formal entry of a judgment of conviction and sentence, under the facts of this case, would Mr. Gosch's request for an appeal be legally effective under the application of I.A.R. 17(e) and case law regarding the validity of prematurely filed notices of appeal?

## ARGUMENT

### I.

#### An Unequivocal Request For An Appeal, Clearly Heard And Understood By Trial Counsel, Made Following A Jury Verdict Of Guilt But Prior To Formal Entry Of A Judgment Of Conviction And Sentence, Is Legally Effective Under The Standards Articulated In *Roe V. Flores-Ortega* And Its Progeny

##### A. Introduction

The State makes several arguments on appeal regarding the proper interpretation of the provisions of I.A.R. 17(e)(2) regarding the premature filing of a notice of appeal. However, the State's arguments on rehearing are notably devoid of any authority regarding one basic proposition – whether the time limits for when a notice of appeal may be filed are determinative of whether a defendant's request of counsel to appeal are legally effective.

Mr. Gosch submits that, where a defendant makes an unequivocal request for an appeal that is heard and understood by counsel, and this request is made at any time prior to the lapse of the trial court's jurisdiction through the **expiration** of the time to appeal, then the standards of *Roe v. Flores-Ortega* control and counsel is obligated to follow through with the ministerial task of filing a notice of appeal. Accordingly, the State's arguments regarding the proper interpretation of I.A.R. 17(e)(2) are irrelevant to the issue before this Court, as it is undisputed that Mr. Gosch's request for an appeal was made prior to the time for appeal actually lapsing.

B. An Unequivocal Request For An Appeal, Clearly Heard And Understood By Trial Counsel, Made Following A Jury Verdict Of Guilt But Prior To Formal Entry Of A Judgment Of Conviction And Sentence, Is Legally Effective Under The Standards Articulated In *Roe V. Flores-Ortega* And Its Progeny

The State makes several arguments on rehearing regarding the proper interpretation of the provisions of I.A.R. 17(e)(2) regarding prematurely filed notices of appeal. (See Respondent's Brief on Rehearing, pp.4-7.) However, the State's contentions on this narrow issue are ultimately irrelevant to this Court because the State has cited no authority whatsoever for the proposition that a request for an appeal, clearly conveyed to trial counsel prior to a judgment becoming final, is somehow rendered a legal nullity or otherwise inoperative simply because the request was made prior to the formal entry of a judgment of conviction and sentence.

Mr. Gosch has been unable to find a single published opinion in Idaho, nor from any federal or state court, where a request for an appeal was made prior to a judgment becoming final, but was deemed to be ineffective as a request because the defendant asked counsel to file an appeal prior to formal entry of a judgment of conviction and sentence.<sup>3</sup> Notably, the State provides no citations to any such authority to this Court in support of its position upon rehearing. A review of the published case law regarding an attorney's duty to file an appeal upon a request from a client to do so reveals no such limitation.

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<sup>3</sup> There is one unpublished opinion issuing from the Idaho Court of Appeals that indicates such a result, in part based upon a concession of the appellant on appeal. See *Saxton v. State*, 2012 Unpublished Opinion No. 561, p.4 (Ct. App. July 24, 2012.) As an unpublished opinion, the *Saxton* opinion cannot be cited as authority in future cases. Moreover, the *Saxton* opinion cites to no other authority for the proposition that a request for an appeal must be made within the time frame during which a notice of appeal may be filed in order to be effective. Accordingly, this opinion appears to be an aberration in the case law.

Beginning with the United States Supreme Court Opinion in *Roe v. Flores-Ortega*, the Court made clear that, where an attorney has been made aware of his or client's desire for an appeal in a criminal case, that attorney's obligation is clear and unequivocal: the attorney must perform the purely ministerial task of filing a notice of appeal in accordance with the client's wishes:

**We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.** This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so 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 client's wishes.

*Flores-Ortega*, 528 U.S. at 477 (internal citations omitted) (emphasis added).

There is absolutely nothing in the Court's language in *Flores-Ortega* that remotely suggests that a client who requests that counsel file a notice of appeal must do so only after a formal judgment of conviction has been entered in order for the request to be effective. Rather, the *Flores-Ortega* Court clearly held that the duty to file a notice of appeal is triggered by the simple act of communicating the defendant's desire for an appeal – once this instruction is communicated and understood by counsel, then counsel has to obligation to accede to this request by filing a timely notice of appeal.

This is consistent with all of the published case law in Idaho dealing with the failure of trial counsel to file a timely notice of appeal upon the request of his or her client. Uniformly, this case law speaks to counsel's duty to file an appeal upon the request of the defendant, and **none** of this case law has any language conditioning the efficacy of such a request upon the entry of a formal judgment of conviction and sentence. See, e.g., *Hoffman v. State*, 277 P.3d 1050, 1059-1060 (Ct. App. 2012) ("An



attorney who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”); *Goodwin v. State*, 138 Idaho 269, 272 (Ct. App. 2002) (“An attorney who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”); *LaBelle v. State*, 130 Idaho 115, 119 (Ct. App. 1997) (“Where counsel refuses a defendant’s request to appeal, prejudice is presumed.”); *Wilbanks v. State*, 126 Idaho 341, 345 (Ct. App. 1994) (“When a defendant directs his attorney to take an appeal, and the attorney neglects or refuses to do so, a deprivation of the right to effective assistance of counsel occurs.”); *Beasley v. State*, 126 Idaho 356, 360 (Ct. App. 1994) (“Where a defendant advises his or her attorney of a desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his or her constitutional right to the effective assistance of counsel at a critical stage of the proceedings.”); *Ricca v. State*, 124 Idaho 894, 898 (Ct. App. 1993) (“Where a defendant asks his attorney to appeal and the attorney refuses, the defendant is deprived of effective assistance of counsel.”); *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993) (same); *Sanders v. State*, 117 Idaho 939, 940 (Ct. App. 1990) (“Where a criminal defendant advises his attorney of his desire to appeal, and the attorney fails to take the necessary steps to file the appeal, the defendant has the basis for a claim that he has been denied the right to effective assistance of counsel.”); *Flores v. State*, 104 Idaho 191, 194-195 (Ct. App. 1983) (“It has been held that where a criminal defendant advises his attorney of his desire to appeal, and the attorney fails to take the necessary steps to file an appeal, the defendant has been denied his

constitutional right to the effective assistance of counsel at a critical stage of the proceedings.”).

The State has provided no legal authority to this Court for the proposition that a request for an appeal that is tendered following a jury verdict, but prior to formal entry of a judgment of conviction and sentence, is a legal nullity or otherwise inoperative to trigger counsel’s duty to fulfill this request. Accordingly, this Court should deem the State’s argument regarding the provisions of I.A.R. 17(e)(2) waived, as the State has shown no authority that the provisions of this rule have any material bearing on the issues at stake in this appeal. *State v. Zitchko*, 129 Idaho 259, 263 (1996) (claim that is unsupported by both argument and legal authority is waived on appeal). In fact, the case law on this issue reflects no such conditioning of the defendant’s right to appeal on the making of a request only after the formal entry of a judgment of conviction.

An additional point of clarification is necessary to address the State’s contentions on rehearing. The State appears to suggest that Mr. Gosch’s argument on appeal is that trial counsel was under the obligation to file a notice of appeal at the very moment that the jury returned its verdict of guilt in this case. (Respondent’s Brief on Rehearing, pp.5-6.) The State thereafter claims that, “Given the state of the law, as set forth above, filing a notice of appeal immediately after the verdict and before sentencing would create an enormous risk that the appeal would be dismissed.” (Respondent’s Brief on Rehearing, pp.6.)

If the State is characterizing this as Mr. Gosch’s claim on appeal, then the State is substituting a straw-man for Mr. Gosch’s actual claim. Mr. Gosch never claimed that trial counsel was obligated to file a notice of appeal at the very instant that the jury’s

verdict was announced. Rather, Mr. Gosch claims that, upon being clearly informed of Mr. Gosch's desire for an appeal immediately following the verdict, trial counsel in this case tendered ineffective assistance of counsel in failing to file a timely notice of appeal **at all**. (See Appellant's Brief, pp.12-21; Reply Brief, pp.3-7.) At no point in the briefing in this appeal, or at oral argument before this Court, did Mr. Gosch argue that the filing of the notice of appeal itself had to occur immediately following the jury's verdict and prior to the entry of the judgment of conviction. Mr. Gosch's contention on appeal is rather that his act of **communicating** his desire for an appeal was legally effective, regardless of whether the request itself was tendered before the formal filing of a judgment of conviction and sentence. Following the clear communication of this request, the duty of counsel **thereafter** was to file a timely notice of appeal. (See Appellant's Brief, pp.12-21; Reply Brief, pp.3-7.)

Upon trial counsel hearing and understanding Mr. Gosch's request for an appeal, which is a fact not in dispute in this case, it was incumbent upon trial counsel to act upon it by filing a timely notice of appeal from the judgment of conviction and sentence. This is amply borne out by the standards of law regarding those cases where a defendant has expressed his or her desire for an appeal. And this was correctly recognized by this Court when it initially determined that Mr. Gosch was entitled to post-conviction relief. The State's implied assertion to the contrary is in error.

II.

Assuming, *Arguendo*, That Trial Counsel Is Permitted To Disregard A Clear Directive To File An Appeal Where That Directive Is Made Prior To Formal Entry Of A Judgment Of Conviction And Sentence, Under The Facts Of This Case, Mr. Gosch's Request For An Appeal Was Legally Effective Under The Application Of I.A.R. 17(E) And Case Law Regarding The Validity Of Prematurely Filed Notices Of Appeal

A. Introduction

Assuming, for purposes of argument, that the legal efficacy of a request for an appeal made by a criminal defendant to his or her counsel is tied to the time frame governing when a notice of appeal is effective, as provided for by court rule, Mr. Gosch asserts that his request for an appeal following the entry of a jury verdict in this case is nonetheless effective pursuant to I.A.R. 17(e)(2) and case law interpreting this provision.

B. Assuming, *Arguendo*, That Trial Counsel Is Permitted To Disregard A Clear Directive To File An Appeal Where That Directive Is Made Prior To Formal Entry Of A Judgment Of Conviction And Sentence, Under The Facts Of This Case, Mr. Gosch's Request For An Appeal Was Legally Effective Under The Application Of I.A.R. 17(E) And Case Law Regarding The Validity Of Prematurely Filed Notices Of Appeal

Mr. Gosch continues to vigorously assert that there is no legal basis in support of the State's claim that the request for an appeal by a criminal defendant to his or her counsel has no legal effect if made prior to the formal entry of a judgment of conviction and sentence. However, assuming *arguendo* that the request for an appeal is tied to the time limits provided for by court rule as to when a notice of appeal may be initially filed, Mr. Gosch asserts that his request for an appeal immediately following the jury's verdict would fall within the provisions of I.A.R. 17(e)(2), which make liberal provisions for the premature filing of notices of appeal.

Idaho Appellate Rule 17(e)(2) provides for the filing of premature notices of appeal, and provides in pertinent part that, “A notice of appeal filed from and appealable judgment or order before formal written entry of such document shall become valid upon the filing and placing the stamp of the clerk of the court on such appealable judgment or order, without refiling the notice of appeal.” I.A.R. 17(e)(2). Final judgments of conviction, **as well as** judgments imposing sentence following a conviction, are both recognized as appealable orders. See I.A.R. 11(c)(1), (6). Under the case law, a legal conviction occurs when a verdict is accepted by the trial court upon a finding of guilt following trial. *United States v. Sharp*, 145 Idaho 403, 404-407 (2008); *State v. Wagenius*, 99 Idaho 273, 278 (1978); I.C. § 19-2317.

Under the liberal construction that this Court applies to prematurely filed notices of appeal, Mr. Gosch submits that the entry of the jury verdict in this case, and his request for an appeal upon such, falls within the ambit of I.A.R. 17(e)(2). Two of the primary cases cited to on rehearing by the State actually support this conclusion.

The Idaho Court of Appeals decision in *State v. Gissel* is particularly instructive for this Court, given its elaboration of the sharp departure from prior case law regarding prematurely filed notices of appeal that was occasioned by the adoption of I.A.R. 17(e)(2). See *State v. Gissel*, 105 Idaho 287, 289-290 (Ct. App. 1983). After discussing the prior state of the case law, which dismissed those appeals where the notice of appeal had been filed prematurely, the *Gissel* Court turned to the effect of the adoption of I.A.R. 17(e)(2) by the Idaho Supreme Court. *Id.* The court noted:

This amendment clearly calls in line with the authorities from other jurisdictions which recognize that a premature notice of appeal – filed after the pronouncement of an otherwise appealable decision but before entry of a written order, decree, or judgment – is not a nullity but is held in

abeyance and matures upon the filing by the clerk of a formal written judgment, order or decree. The approach reflected by this amendment is a diametric change from the earlier decisions of our Supreme Court concerning premature notices of appeal. **It indicates to us a policy of judicial fairness, preserving appeals for determination on their merits rather than penalizing litigants for their eagerness in seeking appellate review.**

*Gissel*, 105 Idaho at 290.

Moreover, the Idaho Supreme Court decision in *Spokane Structures, Inc. v. Equitable Inv., LLC.*, also relied on by the State on rehearing, lends additional support for Mr. Gosch's claim. See *Spokane Structures, Inc. v. Equitable Inv., LLC.*, 148 Idaho 616, 618-621 (2010). While the appellant in *Spokane Structures* originally filed a notice of appeal from the district court's order granting summary judgment – which is not an appealable order – the Court ultimately held that this did not require dismissal of the appeal due to the operation of I.A.R. 17(e)(2). *Id.* That was because the Court determined that the notice of appeal became valid once the entry of the final judgment occurred. *Id.* at 621.

Finally, the State's argument ignores case law indicating that the provisions of I.A.R. 17(e)(2) are to be construed liberally in favor of determining the merits on appeal. See *Weller v. State*, 146 Idaho 652, 654 (Ct. App. 2008) In *Weller*, the Idaho Court of Appeals deemed a notice of appeal from the district court's notice of intent to dismiss in a post-conviction case to be within the ambit of I.A.R. 17(e)(2), even though such an order was not, of itself, a final appealable order. *Id.* at 653-654. The court did so on the basis that, "our state appellate courts have generally been liberal in their treatment of premature notices of appeal." *Id.* at 654. Moreover, the *Weller* Court held that the "adoption of I.A.R. 17(e)(2) indicates a 'policy of judicial fairness, preserving appeals for


determination on their merits rather than penalizing litigants for their eagerness in seeking appellate review.” *Id.* (quoting *Gissel*, 105 Idaho at 290).

In this case, the return of the jury verdict constituted a legal conviction in Mr. Gosch’s underlying case. A judgment of conviction is itself an appealable order under the appellate rules. Accordingly, even if a request for an appeal must be made following the issuance of an appealable order, the operation of I.A.R. 17(e)(2) would apply to extend a request made following the entry of a jury verdict of guilt in a criminal case.

#### CONCLUSION

Mr. Gosch respectfully requests that this Court vacate the district court’s order dismissing his petition for post-conviction relief and remand this case with instructions for the district court to vacate and re-enter Mr. Gosch’s judgment of conviction in his underlying criminal case so as to permit him to file a notice of appeal.

DATED this 12<sup>th</sup> day of December, 2012.

  
SARAH E. TOMPKINS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

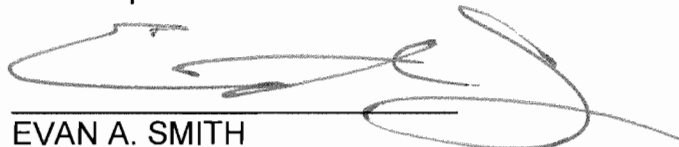
I HEREBY CERTIFY that on this 12<sup>th</sup> day of December, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KIRK JULLIARD GOSCH  
INMATE #63663  
ICC  
PO BOX 70010  
BOISE ID 83707

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DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010

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EVAN A. SMITH  
Administrative Assistant

SET/eas