

4-17-2012

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

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KIRK JULLIARD GOSCH, )  
 )  
 Petitioner-Appellant, ) NO. 38791  
 )  
 v. )  
 )  
 STATE OF IDAHO, ) REPLY BRIEF  
 )  
 Respondent. )  
\_\_\_\_\_ )

REPLY BRIEF OF APPELLANT

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

---

HONORABLE BENJAMIN R. SIMPSON  
District Judge

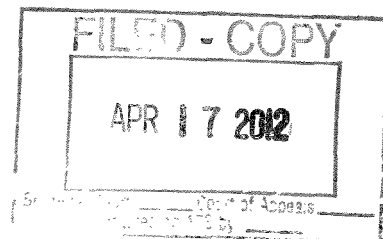
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## STATEMENT OF THE CASE

### Nature of the Case

There is no dispute in this case as to two salient and dispositive facts regarding Kirk Gosch's claim – tried by the consent of the parties at Mr. Gosch's evidentiary hearing – that his trial counsel was ineffective for failing to file a notice of appeal upon his request: first, that Mr. Gosch had requested that his trial counsel file an appeal in his case immediately following the jury's verdict of guilty as to the charges of felony possession of a controlled substance and manufacturing of a controlled substance; and, second, that no notice of appeal was ever filed. The remaining question for this Court is whether, under the controlling case law, Mr. Gosch was entitled to post-conviction relief in the form of the re-entry of his judgment of conviction so that he may exercise his right to an appeal.

Mr. Gosch asserts that, under a proper reading of the case law governing such circumstances, he was entitled to this relief, and that the district court erred in failing to grant it.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Gosch's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it denied Mr. Gosch's petition for post-conviction relief?

## ARGUMENT

### The District Court Erred When It Denied Mr. Gosch's Petition For Post-Conviction Relief

In this case, there is no dispute that, although Kirk Gosch only raised one claim of ineffective assistance of his trial counsel in his post-conviction petition, there were two claims that were actually litigated and tried by consent of the parties. (See Respondent's Brief, p.5 n.1.) It is the second claim, raised by Mr. Gosch during the evidentiary hearing on his post-conviction petition, and tried by consent of the parties, that is at stake in this appeal. That claim is: whether Mr. Gosch received ineffective assistance of counsel when his trial counsel ignored his specific request to "appeal everything," following his convictions at trial.

It is also undisputed in this case that the primary authority in resolving the issue raised by Mr. Gosch in this appeal is the case of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), as this case is relied upon by both Mr. Gosch and the State. (Appellant's Brief, pp.16-21; Respondent's Brief, p.6.) However, the State's reliance on the *Roe* Opinion in this case is misplaced, as all of the portions of this Opinion that are cited to within the Respondent's Brief address a different issue than the one that is presented to this Court. (See Respondent's Brief, pp.6-11.)

The U.S. Supreme Court in *Roe* presented legal standards for two distinct circumstances in articulating the duty of defense counsel with regard to the filing of an appeal. The first set of circumstances addressed by *Roe* is straightforward and is the circumstance present in this appeal – where a defendant asks his or her counsel to file an appeal and counsel fails to do so. *Roe*, 528 U.S. at 477. In this case, there is no dispute that both circumstances are present in this case. In fact, the undisputed

evidence shows that Mr. Gosch made asked his counsel to appeal everything upon the jury's verdict, trial counsel heard and understood the request, but that counsel did not file a notice of appeal based upon counsel's subjective assessment of Mr. Gosch's state of mind when he told counsel to "appeal everything." (Tr., p.12, Ls.9-13, p.14, Ls.1-9, p.19, Ls.12-14, p.22, Ls.6-11, p.35, L.25 – p.36, L.21, p.37, Ls.2-5, p.44, Ls.2-19.) See also *Beasley v. State*, 126 Idaho 356, 360-361 (Ct. App. 1994) (finding deficient performance and presuming prejudice where it was undisputed that the defendant advised trial counsel of his desire to file an appeal and counsel heard and understood this request, but failed to file an appeal). The district court likewise found that Mr. Gosch asked his trial counsel to file an appeal in his case. (R., pp.105-106.)

Under the first portion of the *Roe* Opinion, dealing with the standards governing counsel's conduct when faced with a request for an appeal, this was *per se* ineffective assistance of counsel:

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 on 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 defendant's wishes.

*Roe*, 528 U.S. at 477.

This is consistent with Idaho case law, which has consistently held that "it is prejudice *per se* when a criminal defendant requests that an appeal be filed and his counsel fails to comply with this request." *Beasley*, 126 Idaho at 359. The only showing required under *Roe*, and under Idaho cases addressing the issue of the failure to file a notice of appeal where one has been requested, is that: (1) the defendant instructs



counsel to file an appeal or asks that an appeal be taken; (2) counsel heard and understood the request; and (3) trial counsel failed to take the steps necessary to file a notice of appeal. *Roe*, 528 U.S. at 477; *Beasley*, 126 Idaho at 359-362; *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993). Because this showing was made at the evidentiary hearing in this case, Mr. Gosch demonstrated ineffective assistance of counsel and the district court erred in denying him relief.

The entire substance of the State's argument in this case, however, is made in reliance on a separate portion of the *Roe* Opinion that deals with a separate set of circumstances. The subsequent portion of the *Roe* Opinion, which contains the "totality of the circumstances" and prejudice analyses set forth by the State in its Respondent's Brief, deals with the separate question of what duties are owed by defense counsel, "[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 470 (emphasis added) (Respondent's Brief, pp.6-11). In other words, the analysis invoked by the State has been held by the *Roe* Court to only apply in **absence** of any express statement on the part of the defendant as to whether he or she wants an appeal. Accordingly, this analysis does not apply under the facts in this case, where even the State in its Respondent's Brief acknowledges that the evidence and court findings demonstrate that Mr. Gosch requested an appeal. (See Respondent's Brief, p.10.)

Notably, the State presents this Court with no cases where the analysis provided in *Roe* defining the duties of counsel in **absence** of a request to file an appeal has been applied to vitiate a defendant's express request for an appeal or otherwise sanction counsel's disregard of such a request. And appellate counsel, in reviewing subsequent

federal and state cases analyzing the standards in *Roe*, has found none that would support the State's position. Moreover, adopting the analytical approach advanced by the State to cases where the defendant requests an appeal would result in a conflict both with the *Roe* Opinion itself and with clear Idaho precedent.

"The determination of whether an appeal should be taken or not rests solely with the accused and is not to be decided by his attorney." *Gardner v. State*, 91 Idaho 909, 912 (1967). Additionally, even where otherwise well-intentioned, counsel's failure to file an appeal upon the request of the defendant is not permitted because it "reflects inattention to the defendant's wishes." *Roe*, 528 U.S. at 477. Given this, the case law does not make room for trial counsel to second guess the expressed desire of a defendant for an appeal following a conviction. However, this is what occurred in this case.

Additionally, the case law does not support conditioning the defendant's right to an appeal on forcing the defendant to undergo further consultation once he or she expresses her wishes for an appeal. Filing a notice of appeal is a "purely ministerial task," to be undertaken by counsel; and the "failure to do so cannot be considered a strategic decision." *Roe*, 528 U.S. at 477. Permitting trial counsel to condition a defendant's right to appeal on fulfilling additional tasks or convincing counsel of the genuineness of the defendant's desire for an appeal would contradict *Roe*, which held that a defendant is entitled to rely upon trial counsel to file a notice of appeal once one is asked for, and that such reliance is inherently reasonable. *Id.* Under the pertinent standards governing counsel's duties upon a request for an appeal, this was ineffective

assistance that entitles Mr. Gosch to relief in the form of being granted the opportunity for that which he asked his trial counsel for: the ability to pursue his right to an appeal.

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 17<sup>th</sup> day of April, 2012.



SARAH E. TOMPKINS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

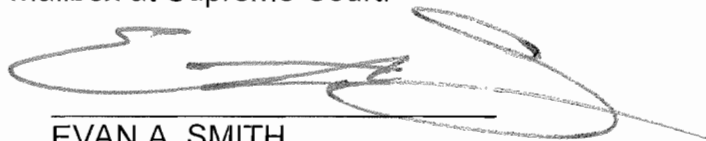
I HEREBY CERTIFY that on this 17<sup>th</sup> day of April, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KIRK JULLIARD GOSCH  
INMATE #63663  
ISCI  
PO BOX 14  
BOISE ID 83707

BENJAMIN R SIMPSON  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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EVAN A. SMITH  
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SET/eas