

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Kenneth Ray Borders, *Petitioner*,

v.

United States of America, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the “presumption of prejudice” recognized in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), apply where a criminal defendant instructs his trial counsel to file an interlocutory appeal and trial counsel fails to do so?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Ray Borders respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION AND ORDER BELOW

The opinion of the Eighth Circuit Court of Appeals (Case No. 18-1451) appears at appendix A to this petition. The court’s opinion remains unpublished at this time.

JURISDICTION

The Eighth Circuit Court of Appeals (Case No. 18-1451) issued its opinion of May 31, 2018. A copy is attached at Appendix A. The Eighth Circuit Court of Appeals denied a Rehearing on August 14, 2018. A copy of the denial is attached at appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

INTRODUCTION

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must satisfy the court that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has recognized that where such a claim is based upon trial counsel's forfeiture of the defendant's right to an appellate proceeding by failing to file a notice of appeal, the defendant need not show "actual prejudice" by "specify[ing] the points he would raise were his right to appeal reinstated." *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (quoting *Rodriguez v. United States*, 395 U.S. 327, 330 (1969)). Rather, to satisfy *Strickland's* second prong, the defendant need only show that "but for counsel's deficient conduct, he would have appealed." *Flores-Ortega*, 528 U.S. at 486. This result obtains from a long line of precedent, which draws a clear line between constitutionally deficient performance that causes "a judicial proceeding of disputed reliability" and constitutionally deficient performance that causes "the forfeiture of a proceeding itself." *Flores-Ortega*, 528 U.S. at 483 (citing *Smith v. Robbins*, 528 U.S. 259 (2000); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronin*, 466 U.S. 648 (1984)). Because an attorney who fails to file a notice of appeal deprives his client not only of "a *fair* judicial proceeding," but "of the appellate proceeding altogether," his conduct falls in the latter category and "demands a presumption of prejudice." *Id.*

STATEMENT OF THE CASE

On December 14, 2012, an indictment was returned in the Western District of Missouri charging Borders with 15 violations of federal law for his involvement in a conspiracy to possess stolen goods in interstate commerce. (DE-1).¹ The Government thereafter dismissed seven counts, leaving eight counts for trial (DE-148, 150). On February 18, 2014, a nine-day jury trial began (DE- 187).

At the start of the second day of trial, an allegation that one of the jurors was biased against the defendants was raised. (Tr. 87-148.)² The allegation was that one of the jurors stated that the defendants were “all guilty.” (Tr. 87-88.) A witness to the alleged statement was sworn. (Tr. 90-91.) The witness stated that he was present for moral support for codefendant Reginald Tidwell. (Tr. 91.) The witness stated he addressed two jurors on the elevator and offered congratulations for being selected for the jury. (Tr. 91-92.) One of the jurors allegedly responded with the statement that “they’re all guilty.” (Tr. 92.) The second juror did not respond to the comment and “rushed off the elevator.” (Tr. 94.) The witness stated that the conversation took place at the end of the day. (Tr. 95.)

The court brought the jurors to the courtroom so the witness could identify the jurors present in the elevator. (Tr. 100.) Afterwards, the witness identified the juror who allegedly made the statement they’re “all guilty.” (Tr. 100-01.) The witness also

¹ “DE” designates the Docket Entry Number for U.S. District Court Western District of Missouri (Kansas City) in Criminal Case #: 4:12-cr-00386-DGK-1.

² “Tr” designates Trial Transcripts for U.S. District Court Western District of Missouri (Kansas City) in Criminal Case #: 4:12-cr-00386-DGK-1.

expanded his testimony and included allegations regarding a third juror. (Tr. 101-02.) The court further inquired about the witness's past criminal history before excusing him. (Tr. 102-03.) After hearing the testimony, another individual, who was related one of the defendants, confirmed the second allegation. (Tr. 104.) The court developed a plan of inquiry of the jurors. (Tr. 104-14.)

A juror was questioned by the court and admitted that he made the statement "they're all guilty of something." (Tr. 114-15.) After discussion and further questioning, that juror was dismissed. (Tr. 115-23.) A female juror alleged to have made a statement about guilt denied the allegation, and denied hearing anyone else make statements concerning guilt. (Tr. 123-24.) There was further discussion regarding the female juror. (Tr. 124-27.) The defense attorneys requested a mistrial, based upon the statement of the first juror and that it was purportedly made in front of additional jurors. (Tr. 127.) Defense counsel for Borders joined in the request for mistrial, while other counsel reserved the right to request a mistrial at a later time. (Tr. 127-30.) A separate request for an inquiry of all the jurors individually was also sought. (Tr. 128.)

The court ultimately dismissed the female juror as a precaution (Tr. 144-45), and admonished the gallery not to have any contact with the jurors. (Tr. 145-46.) The court further questioned the jurors as a group (Tr. 139-40), provided them information about the issues raised (Tr. 146-47), and inquired about statements overheard and the impartiality of the jurors. The remaining jurors denied making or

hearing any statements presuming guilt. (Tr. 147-48.) The jury was then impaneled. (Tr. 148.)

After opening statements, and hearing evidence on the first day of trial, the court again took up the matter regarding the jurors. (Tr. 367-74.) Counsel for Borders requested a mistrial and for the case to be tried in front of a different jury. That request was joined in by the other co-defendants. (Tr. 367-73.) The court denied the request for a mistrial. (Tr. 373-74.) At the conclusion of the nine-day jury trial, Borders was convicted of seven of the eight counts charged. (DE-209.)

Borders filed a timely *pro se* Motion to Vacate, Set-Aside or Correct Sentence under 28 U.S.C. § 2255 raising a claim that trial counsel was ineffective for failing to seek an interlocutory appeal from the denial of motion for mistrial predicated on juror taint. (DE-430). The Government responded. (Attached as Appendix C). The motion was denied by the district court on January 23, 2018 (DE-436) (Attached as Appendix D). Borders filed for a Certificate of Appealability in the Eight Circuit Court of Appeals. (Attached as Appendix E). The circuit court denied the COA (Appendix A). A timely request for rehearing was filed. (Attached as Appendix F). Rehearing was denied on August 14, 2018. (Appendix B).

REASONS FOR GRANTING THE PETITION

I.

The Question Presented Is Important Because It Was Neither Addressed Nor Excluded In The Holding In *Roe v. Flores-Ortega*

The record below is undisputed. The district court applied the *Strickland* standard to Borders' claim of ineffective assistance of counsel for failing to file an interlocutory appeal. The district court agreed with the Government's response to Borders' § 2255 motion and wrote:

Ultimately, the Court agrees with Respondent's assessment that the jury's "acquittal of Borders as to Count Sixteen clearly shows the jury properly considered all the evidence [and that] Borders was not prejudiced[.]" Therefore, relief is denied on Ground (1). (Appendix D)

The Government's response was quite specific and stated:

Borders has failed to demonstrate "a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different," as required by *Strickland*. (Appendix C)

The Government went into detail as to why it believed that Borders had not demonstrated prejudice and cited the Eighth Circuit case *United States v. Needham*, 852 F.3d 830, 839-40 (8th Cir. 2017), claiming it was instructive on the issue. *Needham* held that, to obtain a new trial based on juror responses, the moving party must establish that (1) the juror "answered dishonestly, not just inaccurately"; (2) the juror was "motivated by partiality"; and (3) "the true facts, if known, would have supported striking [the juror] for cause." *Needham*, 952 F.3d at 839 (quoting *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998)). "Absent a juror's profession of

the inability to be impartial, juror bias may be implied [only] in certain egregious situations.” *Needham*, 952 F.3d at 840 (internal quotations omitted) (discussing such “egregious situations”).

The only prejudice that should have been considered here was the prejudice that Borders suffered by having to forfeit an appellate proceeding which he instructed his trial attorney he wished to avail himself of. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court recognized that where such a claim is based upon trial counsel’s forfeiture of the defendant’s right to an appellate proceeding by failing to file a notice of appeal, the defendant need not show “actual prejudice” by “specify[ing] the points he would raise were his right to appeal reinstated.” *Id.* at 485 (quoting *Rodriguez v. United States*, 395 U.S. 327, 330 (1969)). Rather, to satisfy *Strickland*’s second prong, the defendant need only show that “but for counsel’s deficient conduct, he would have appealed.” *Id.* at 486.

Nevertheless, the *Strickland* standard was undeniably applied to Borders’ claim that his attorney failed to file an interlocutory appeal. The Government argued in its response to the § 2255 motion that:

The record establishes that this Court specifically inquired of the remaining jurors about statements overheard and potential bias. The jurors denied making or hearing any statements presuming guilt. (Tr. 147-48.) Borders has failed to provide any evidence that would contradict the statements. Borders has not met that burden. Borders started his analysis by presuming that the jurors should have been discharged. Borders does not point to any evidence which defense counsel failed to present to this Court. Without providing evidence of actual juror bias, that claim is simply a conclusory allegation.

Finally, the jury's failure to find a verdict regarding defendant Carr, full acquittal of defendant Tidwell, and acquittal of Borders as to Count Sixteen clearly shows the jury properly considered all the evidence, Borders was not prejudiced, and therefore the actions of Borders's counsel were not prejudicial. (Appendix C)

Applying the *Strickland* prejudice standard to Borders' claim resulted in a fundamentally unfair outcome. Borders was denied his right to challenge the district court's denial at the time it mattered most. If an interlocutory appeal had been filed, the proceeding could have been stayed until an appellate decision was made. It is impossible to determine the outcome of a hypothetical appeal at this point, but there are other realistic scenarios that could have occurred. Perhaps the case would have resolved in a plea agreement. The point is, Borders' right to appellate review was denied at that time.

This leads to the question presented in this case, does the "presumption of prejudice" apply where a criminal defendant instructs his trial counsel to file an interlocutory appeal and trial counsel fails to do so?

II.

A Similar And Related Issue Is Pending Before The Court

A related issue to the presumption of prejudice recognized in *Roe v. Flores-Ortega* and whether that presumption should apply to a defendant that has signed a plea waiver is currently before the Court. *See, Garza v. Idaho*, Case No.:17-1026. This Court has already been briefed and has heard oral argument in that case. Addressing the question now can only be seen as beneficial to courts, prosecutors, and defendants.

CONCLUSION

For the reasons stated in this Petition for Writ of Certiorari it should be granted.

Respectfully submitted,



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