NO. 19-6756

ORIGINAL

• • • • • • • • •

IN THE

SUPREME COURT OF THE UNITED STATES

• • • • • • • • •

RENE TORRES - Petitioner Pro Se

vs.

UNITED STATES OF AMERICA - Respondent

• • • • • • • • •

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH CIRCUIT COURT OF APPEALS

•PETITION FOR WRIT OF CERTIORARI•

• • • • • • • • •

Rene Torres, pro se

Reg. No. 87275-380

FCI Three Rivers

Satellite Camp

P.O. Box 4200

Three Rivers, TX 78071

QUESTIONS PRESENTED

[1] Does the plain language of Rule 42(b) of the Federal Rules of Appellate Procedure require counsel, when retained, to notify Appellant of dismissal?

LIST OF PARTIES

[X] All parties appear in the caption on the cover page.

TABLE OF CONTENTS

- OPINIONS BELOW 1
- JURISDICTION. 2
- CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 3
- STATEMENT OF THE CASE. 9
- REASONS FOR GRANTING THE WRIT 11
- CONCLUSION 17

INDEX TO APPENDICES

- FIFTH CIRCUIT COURT OF APPEALS DISMISSAL UNDER 42(b) . . . A
- FIFTH CIRCUIT COURT OF APPEALS LETTER REFUSING REOPENING . . . B
- FIFTH CIRCUIT COURT OF APPEALS DOCKET SHEET C
- MOTION TO DISMISS UNDER RULE 42(b) BY ATTORNEY FLORES . . . D
- MOTION TO REINSTATE APPEAL BY RENE TORRES (PETITIONER) . . . E
- LETTER REQUESTING STATUS UPDATE, FIFTH CIRCUIT RESPONSE, AND RENE TORRES'S REPLY . . . F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Amberg v. Fed. Deposit Ins. Corp, 934 F. 2d 681, 686 (5th Cir. 1991)	12
Anders v. California, 386 U.S. 738 (1967)	14
McCoy v. Louisiana, 584 U.S. ___, 138 S. Ct. 1500 (2018)	16
Molina-Martinez v. United States, 136 S. Ct. 1338 (2016)	15
Pennsylvania v. Finley, 481 U.S. 551 (1990)	16

STATUTES AND RULES

Federal Rules of Appellate Procedure - Rule 42(b) (Voluntary Dismissal)	10, 11
Federal Rules of Appellate Procedure: Local/Circuit Rules	12-14
2nd Circuit - Local Rule 42.2 (Dismissal of Criminal Appeal)	12, 13
4th Circuit - Local Rule 42 (Voluntary Dismissal)	12
5th Circuit - Circuit Rule 42 (Voluntary Dismissal)	14
8th Circuit - Local Rule 42A (Voluntary Dismissal of Criminal Appeals)	13
9th Circuit - Circuit Rule 42-1 (Dismissal for Failure to Prosecute)	13
Circuit Rule 42-2 (Termination of Bail following Dismissal)	13
10th Circuit - Circuit Rule 42.1 (Dismissal for Failure to Prosecute)	13
11th Circuit - Circuit Rule 42-1 (Dismissal of Appeals)	13
D.C. Circuit - Circuit Rule 42 (Voluntary Dismissal)	14
Constitution of the United States - Fourteenth Amendment	16

CASES	PAGE NUMBER
21 U.S.C. §846	9
21 U.S.C. §841(a)(1)	9
21 U.S.C. §841(b)(1)(B)(viii)	9

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

.....

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

OPINIONS BELOW

[X] For cases from **federal courts:**

- The opinion of the United States court of appeals appears at Appendix A to the petition and is **unpublished.**
- The memorandum of the United States court of appeals appears at Appendix B to the petition and is **unpublished.**

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on **August 24, 2018.** (Appendix A).

Reinstatement was sought on **February 24, 2019**, and was denied on **June 28, 2019.** (Appendix E at 4) (Appendix B).

Consequently, this petition for writ of certiorari is being timely filed within 90 days of judgment and the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1):

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petitioner of any party to any civil or criminal case, before or after rendition of judgment or decree.

Id.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

•Constitution of the United States - Fourteenth Amendment

Section 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

.....

•Federal Rules of Appellate Procedure - Rule 42(b) (Voluntary Dismissal)

Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

.....

•Federal Rules of Appellate Procedure - **2nd Circuit Local Rule 42.2** (Dismissal of Criminal Appeals)

A stipulation or motion to voluntarily dismiss a counseled defendant's criminal appeals must be accompanied by the defendant's signed statement that (a) counsel has explained the effect of voluntary dismissal of the appeal, (b) the defendant understands counsel's explanation, and (c) the defendant desires to withdraw and voluntarily dismiss the appeal.

.....

•Federal Rules of Appellate Procedure - **4th Circuit Local Rule 42** (Voluntary Dismissal)

In civil cases, the stipulation of dismissal or motion for voluntary dismissal may be signed by counsel. In criminal cases, however, the agreement or motion must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant.

.....

42.1. Dismissal By Appellant. In all cases where the appellant or petitioner files an unopposed motion to withdraw the appeal or agency review proceeding, the clerk will enter an order of dismissal and issue a copy of the order as the mandate.

42.2. Frivolous and Unmeritorious Appeals. If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

42.3. Dismissal for Failure to Prosecute

42.3.1. In direct criminal appeals proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 and 42.3.1.2 apply. In habeas cases, actions filed under 28 U.S.C. §2255, and other prisoner matters proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 apply if the appellant is represented by counsel; prisoners proceeding pro se will be given an initial written deadline for filing a certificate of appealability, filing any briefs, for paying fees, or for complying with other directives of the court. If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date.

42.3.1.1. Appeals with Counsel. If appellant is represented by appointed or retained counsel, the clerk will issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary actions against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The clerk may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge.

42.3.1.2. Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal.

42.3.2. In all other appeals when appellant fails to order the transcript, fails to file a brief, or otherwise fails to comply with the rules of the court, the clerk must dismiss the appeal for want of prosecution.

42.3.3. In all instances of failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4. An order dismissing an appeal for want of prosecution must be issued to the clerk of the district court as the mandate.

42.4. Dismissals Without Prejudice. In acting on a motion under 5th Cir. R. 27.1.3 to stay further proceedings, the clerk may enter such appeals or agency review proceedings as dismissed without prejudice to the right of reinstatement of the appeal within 180 days from the date of dismissal. Any party desiring reinstatement, or an extension of the time to seek reinstatement, must notify the clerk in writing within the time period allowed for reinstatement. This procedure does not apply where the stay is sought pending a decision of this court in another case, a decision of the Supreme Court, or a stay on the court's own motion. If the appeal is not reinstated within the period fixed, the appeal is deemed dismissed with prejudice. However, an additional period of 180 days from the date of dismissal will be allowed for applying for relief from a dismissal with prejudice which resulted from mistake, in advertence, or excusable neglect of counsel or a pro se litigant.

.....

•Federal Rules of Appellate Procedure - **8th Circuit Local Rule 42A**
(Voluntary Dismissal of Criminal Appeals)

A criminal appeal may be dismissed only with the consent of the defendant. No motion to voluntarily dismiss a criminal appeal will be granted unless the defendant either signs the motion or consents, in a written attachment to the motion, to dismissal of the appeal.

.....

•Federal Rules of Appellate Procedure - **9th Circuit Rule 42-1 and 42-2**
(Dismissal for Failure to Prosecute and termination of Bail following Dismissal)

When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order may be entered by the clerk dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal. **R. 42-1**

Upon dismissal of an appeal in any case in which an appellant has obtained a release from custody upon a representation that he is appealing the judgment of the district court, the Clerk will notify the appropriate district court that the appeal has been dismissed and that the basis for the continued release on bail or recognizance no longer exists. **R. 42-2**

.....

•Federal Rules of Appellate Procedure - **10th Circuit Rule 42.1 and 42.2** (Dismissal for Failure to Prosecute and Reinstatement)

When an appellant fails to comply with the Federal Rules of Appellate Procedure or these rules, the Clerk will notify the appellant that the appeal may be dismissed for failure to prosecute unless the failure to comply is remedied within a designated time. If the appellant fails to comply within that time, the Clerk will enter an order dismissing the appeal and issue a copy of the order as the mandate. The appellant may not remedy the failure to comply after the appeal is dismissed, unless the court orders otherwise. **R. 42.1**

A motion to reinstate an appeal dismissed for failure to prosecute may not be filed unless the failure is remedied or the remedy for the failure accompanies the motion. **R. 42.2**

.....

•Federal Rules of Appellate Procedure - **11th Circuit Rule 42-1** (Dismissal of Appeals)

(a) Motions to Dismiss by Appellants or Petitioners and Joint Motions to Dismiss. If an appellant or petitioner files an unopposed motion to dismiss an appeal, petition, or agency proceeding, or if both parties file a joint motion to dismiss an appeal, petition, or agency proceeding, and the matter has not yet been assigned to a panel on the merits, the clerk may clerically dismiss the appeal, petition, or agency proceeding and in such circumstance will issue a copy of the order as and for the mandate. If the appeal, petition, or agency proceeding has been assigned to a panel on the merits, any motion to dismiss will be submitted to that panel.

A joint motion to dismiss must be signed by counsel for each party encompassed by the motion, or by the party itself if proceeding pro se. All motions to dismiss must contain a Certificate of Interested Persons and Corporate Disclosure Statement in compliance with FRAP 26.1 and the accompanying circuit rules. If an appellant's or petitioner's motion to dismiss is opposed, it will be submitted to the court. For motions to dismiss criminal appeals, see also 11th Cir. R. 27-1(a)(7) and 27-1(a)(8).*

---

*These rules require counsel to notify appellant and to determine if appellant approves or disapproves of the motion to dismiss. See next page for these rules in their entirety.

(b) Dismissal for Failure to Prosecute. Except as otherwise provided for briefs and appendices in civil appeals in 11th Cir. R. 42-2 and 42-3, when appellant fails to file a brief or other required papers within the time permitted, or otherwise fails to comply with the applicable rules, the clerk shall issue a notice to counsel, or to pro se appellant, that upon expiration of 14 days from the date thereof the appeal will be dismissed for want of prosecution if the default has not been remedied by filing the brief or other required papers and a motion to file documents out of time. Within that 14-day notice period a party in default must seek leave of the court, by appropriate motion, to file documents out of time or otherwise remedy the default. Failure to timely file such motion will result in dismissal for want of prosecution.

The clerk shall not dismiss an appeal during the pendency of a timely filed motion for an extension of time to file appellant's brief or appendix, but if the court denies such leave after the expiration of the due date for filing the brief or appendix, the clerk shall dismiss the appeal forthwith. The clerk shall not dismiss an appeal during the pendency of a timely filed motion to file documents out of time or otherwise remedy the default which is accompanied by the brief or other required papers, but if the court denies such leave the clerk shall dismiss the appeal forthwith.

If an appellant is represented by appointed counsel, the clerk may refer the matter to the Chief Judge for consideration of possible disciplinary action against counsel in lieu of dismissal. **R. 42-1**

11th Circuit Rule 42-4
(Frivolous Appeals)

If it shall appear to the court at any time that an appeal is frivolous and entirely without merit, the appeal may be dismissed. **R. 42-4**

11th Circuit Rule 27-1(a)(7)*

Both retained and appointed counsel who seek leave to withdraw from or to dismiss a criminal appeal must recite in the motion that the party they represent has been informed of the motion and either approves or disapproves of the relief sought and show service of the motion on the party they represent.

11th Circuit Rule 27-1(a)(8)*

Appointed counsel who seek leave to withdraw from representation in a criminal appeal must follow procedures set forth by the Supreme Court in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). It is counsel's responsibility to ensure that the record contains transcripts of relevant proceedings in the case, including pre-trial proceedings, trial proceedings (including opening and closing arguments and jury instructions), and sentencing proceedings. Counsel's brief in support of a motion to withdraw under Anders must contain a certificate of service indicating service on the party represented as well as on the other parties to the appeal.

.....

•Federal Rules of Appellate Procedure - **D.C. Circuit Rule 42** (Voluntary Dismissal)

See Circuit Rule 27(g) (Motions (Dispositive Motions)).*

.....

•21 U.S.C. §841(a)(1)

(a) Unlawful Acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

•21 U.S.C. §841(b)(1)(B)(viii)

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 U.S.C. §849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) ...

(B) In the case of a violation of subsection (a) of this section involving --

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.

•21 U.S.C. §846

Attempt and Conspiracy. Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

---

*This rule addresses the timeliness of filing a motion which "would dispose of the appeal...in its entirety." It makes no mention of counsel obtaining permission from the appellant before filing a Rule 42(b) motion.

STATEMENT OF THE CASE

Rene Torres, Petitioner, was convicted on June 01, 2017, under the terms of a plea agreement, for violating 21 U.S.C. §846, §841(a)(1), and §841(b)(1)(B)(viii): Conspiracy to Possess with Intent to Distribute a Controlled Substance [1 count]. He was sentenced on February 07, 2018, to 151 months' imprisonment in the United States Bureau of Prisons by the United States District Court for the Northern District of Texas, Dallas Division. Following his term of imprisonment, Mr. Torres will serve two years of supervised release.

Following Mr. Torres's sentencing, and prior to his self-surrender, he retained Mr. Oscar Rene Flores ("Attorney Flores") as his appellate attorney. (see Appendix C at 1, 3). Attorney Flores filed Mr. Torres's notice of appeal on February 21, 2018 (id. at 1), and he proceeded to supply the record on appeal (R.O.A.) by ordering transcripts on March 29, 2018 (id. at 5), and otherwise ensured all procedural steps were completed for an appeal to proceed.

Attorney Flores then filed a Request for a Level 1 Extension on June 11, 2018. (Appendix C at 5). The Fifth Circuit granted this request on June 12, 2018, and changed the filing deadline for the Appellant's Brief from June 18, 2018, to July 18, 2018. (id.). Attorney Flores then filed a second Request for a Level 1 Extension on July 12, 2018. (id.). This request was denied, initially, by the Fifth Circuit on July 13, 2018, and the Court held that no action would be taken at that time because an extension had already been granted until July 18, 2018. (id.). The Fifth Circuit, however, reversed this decision on July 16, 2018, and granted the extension to file the Appellant's Brief until August 20, 2018. (id.).

On August 20, 2018, Attorney Flores, without the knowledge or permission

from Mr. Torres, filed an Unopposed Motion to Dismiss Appeal Pursuant to Federal Rules of Appellate Procedure 42. (see Appendix D). On August 24, 2018, the Fifth Circuit dismissed Mr. Torres's appeal. (Appendix A).

Mr. Torres's wife, Criselda Rodriguez, discovered later that Attorney Flores had filed to dismiss the appeal. She immediately notified Mr. Torres who then, on February 04, 2019, filed a "Motion to Reinstate Appeal, Alternatively Motion to Recall Mandate and Motion to Reinstate Appeal Subject Thereto" (hereafter "Motion to Reinstate Appeal"). (see Appendix E). The Fifth Circuit stamped this motion as received on February 07, 2019. (id. at 1).

No response from the Fifth Circuit came as a result of this motion being filed. On June 01, 2019, Mr. Torres submitted a letter to the Fifth Circuit and inquired as to the motion's status. (Appendix F at 1, 2). The Court responded on June 11, 2019, and informed Mr. Torres that "[The Fifth Circuit] has no record of having received [Mr. Torres's] motion to reinstate [his] appeal." (Appendix F at 3). Mr. Torres responded on June 19, 2019, and he provided the Court with a copy of the file-stamped motion-in-question (the "Motion to Reinstate Appeal") and a letter explaining the surrounding events. (Appendix F at 4). The Fifth Circuit replied on June 28, 2019, in a "Memorandum to Counsel or Parties Listed Below," and held that "The court has denied appellant's motion to reopen the appeal." (Appendix B).

This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THE PLAIN LANGUAGE OF RULE 42(b) of the FEDERAL RULES OF APPELLATE PROCEDURE REQUIRES APPELLANT'S KNOWLEDGE OR NOTIFICATION OF A DISMISSAL OF APPEAL PURSUANT TO THIS RULE.

Counsel retained for the service of a direct, criminal appeal must pursue the appeal. Yet, from time-to-time, an occasion might arise which prompts counsel to move to voluntarily dismiss that very appeal. The Federal Rules of Appellate Procedure address this issue:

> **Dismissal in the Court of Appeals.** An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Id. Rule 42(b).

This case presents the question of whether counsel may file a Rule 42(b) motion without the knowledge of the defendant-appellant. The plain language of the rule supports requisite notification, in that an attorney, once retained, must not move to dismiss an appeals sans notifying his or her client.

Petitioner Rene Torres ("Torres" or "Petitioner") retained Mr. Oscar Rene Flores ("Attorney Flores") to pursue an appeal. He paid Attorney Flores the agreed-upon sum on $10,000 and then self-surrendered to the Bureau of Prisons. Despite adhering to the formalities necessary for an appeal to proceed (viz., supplying the record, ordering transcripts, remitting payment, and obtaining trial counsel's file), and despite filing for and receiving two Level 1 Extensions, Attorney Flores, without the knowledge of defendant-appellant Torres, ultimately moved under Rule 42(b) to dismiss the appeal.

This appears to be an issue of first impression whereby retained appellate counsel would motion the court to dismiss an appeal without notification of the appellant. Additionally, the appellate courts are split on the subject of notification, for which local rules have been promulgated in some circuits to require counsel to notify and receive permission from the appellant when

voluntarily dismissing an appeal under Rule 42(b). (see Local Rules of the Federal Rules of Appellate Procedure Rule 42 - 2nd, 4th, and 8th Circuits all requiring written consent of the appellant; whereas, 5th, 9th, 10th, 11th, and DC Circuits address voluntary dismissal but make no such notification requirement; 1st, 3rd, 6th, 7th Circuits do not address Rule 42 through a Local Rule). The Supreme Court, therefore, should grant certiorari to resolve the incongruency and address this issue of first impression.

For our governing system, "[t]he Federal Rules are diametrically opposed to a tyranny of technicality and endeavor to decide cases on the merits. Strict enforcement of defaults has no place in the Federal Rules...."). Amberg v. Fed. Deposit Ins. Corp., 934 F. 2d 681, 686 (5th Cir. 1991). Simply, a defendant-appellant's claims must favor review over dismissal, especially in light of a wayward appellate attorney who roguishly moves to voluntarily dismiss the appeal. According to Rule 42(b), a retained appellate attorney who first reviews the record, but fails to find any non-frivolous issues for appeal, has a minimum requirement to notify the defendant-appellant of counsel's intent to file a motion seeking voluntary dismissal.

As stated above, several circuits have addressed this issue and have promulgated local rules which require counsel to not only notify the client about the voluntary dismissal, but to receive permission from the client. The Fourth Circuit has Local Rule 42 (Voluntary Dismissal), which holds:

> In criminal cases...the agreement or motion [for voluntary dismissal] must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant.

Id. 4th Cir. L.R. 42.

The Second Circuit has Local Rule 42.2 (Dismissal of Criminal Appeal), which holds:

> A stipulation or motion to voluntarily dismiss a counseled defendant's criminal appeal must be accompanied by the defendant's signed statement that (a) counsel has explained the effect of voluntary dismissal of the appeal, (b) the defendant understands counsel's explanation, and (c) the defendant desires to withdraw and voluntarily dismiss the appeal.

Id. 2nd Cir. L.R. 42.2.

The Eighth Circuit, too, has crafted Local Rule 42A (Voluntary Dismissal of Criminal Appeals) which holds:

> A criminal appeal may be dismissed only with the consent of the defendant. No motion to voluntarily dismiss a criminal appeal will be granted unless the defendant either signs the motion or consents, in a written attachment to the motion, to dismissal of the appeal.

Id. 8th Cir. L.R. 42A.

Taken together, these three circuits place a positive duty on counsel to notify, and to receive permission from, the appellant when filing a Rule 42(b) motion.

Other circuits, too, have addressed voluntary dismissals; however, they have remained silent concerning the rule's applicability to criminal defendants. The Ninth Circuit has crafted Circuit Rule 42-1 (Dismissal for Failure to Prosecute) and Circuit Rule 42-2 (Termination of Bail Following Dismissal); neither rule, however, addresses the voluntary dismissal of criminal defendants. The Tenth Circuit, too, has crafted similar rules such as Circuit Rule 42.1 (Dismissal for Failure to Prosecute) and Circuit Rule 42.2 (Reinstatement); yet, like the Ninth Circuit, no local rule addresses voluntary dismissals by criminal defendants.

The Eleventh Circuit has promulgated a more extensive circuit rule regarding voluntary dismissals, dividing it into Circuit Rule 42-1 (Dismissal of Appeals), Circuit Rule 42-2 (Dismissal in a Civil Appeal...), Circuit Rule 42-3 (Dismissal in a Civil Appeal...), and Circuit Rule 42-4 (Frivolous Appeals). Again, no local rule from the Eleventh Circuit advises attorney conduct when pursuing a voluntary dismissal under Rule 42(b). The District of

Columbia (D.C.) Circuit has established Circuit Rule 42 (Voluntary Dismissal), but, like the other circuits in this category, this rule makes no mention of criminal appeals.

Lastly, there are the local rules for the Fifth Circuit, which is where Mr. Torres's direct appeal transpired. Attorney Flores specifically made reference to Fifth Circuit Rule 42.1 (Dismissal by Appellant) when moving to dismiss the appeal. (Appendix D). This rule holds, in part:

> **Dismissal by Appellant.** In all cases where the appellant or petitioner files an unopposed motion to withdraw the appeal or agency review proceeding, the clerk will enter an order of dismissal and issue a copy of the order as the mandate.

Id. 5th Cir. L.R. 42.1.

The Fifth Circuit local rules for Rule 42 also address Frivolous and Unmeritorious Appeals (42.2), Dismissal for Failure to Prosecute (42.3 et seq.), and Dismissals Without Prejudice (42.4). None of these rules specifically address a criminal defendant's attorney's voluntarily dismissing an appeal.

Nevertheless, and regardless of a specific rule existing to require an attorney notify his or her client of an impending voluntary dismissal motion, such notification should be expected and regulated. When a court appoints counsel to represent a criminal defendant in a direct appeal, the attorney is required to review the record. If no non-frivolous issues are found upon which to draft an appellate brief, counsel is required to draft and file an Anders brief, in which it is declared that the entire record has been reviewed and no such issues have emerged. (see Anders v. California, 386 U.S. 738 (1967)). After receiving the Anders brief, the appellant then has 30 days to file, if he or she should so choose, a pro se brief which raises any and all issues the appellant feels has merit. On occasion, such pro se claims have proven

meritorious. (see Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) Defendant filed a pro se brief on appeal following his attorney's Anders brief, and this Court reversed the Fifth Circuit's denial of relief.)

In Mr. Torres's case, he was ill-afforded this crucial step; for, by Attorney's Flores's filing of the Rule 42(b) motion was Mr. Torres denied the opportunity to voice his claims. Had Mr. Torres been in the Second, Fourth, or Eighth Circuit, his attorney would have been required to notify Mr. Torres, to explain the process and impact of a Rule 42(b) motion, and to have received permission from Mr. Torres to file the motion. A review of Attorney Flores's Motion to Dismiss Appeal reveals that no such notification of Mr. Torres occurred, nor were any efforts made to notify Mr. Torres of the Rule 42(b) motion. (Appendix D). Simply, Attorney Flores accepted $10,000 from Mr. Torres, supplied the record, obtained two Level 1 Extensions, and then, outside the purview of Mr. Torres, filed a motion for voluntary dismissal - thereby alleviating himself, Attorney Flores, of the responsibility and professional duty of drafting an Anders brief.

It is wrong to allow retained counsel to abandon the appellant under the ruse of a Rule 42(b) "voluntary" dismissal motion - especially when no effort was made to notify the appellant. If allowed to stand, such behavior undermines the credibility of the entire judicial process. What is to stop the next attorney, when proceeding in the Fifth Circuit, to abandon the appellant at any stage by filing a Fifth Circuit Rule 42 (Voluntary Dismissal)? The Second, Fourth, and Eighth Circuits have expanded Rule 42 with local rules that prevent attorneys from abusing the appeal's process, and by which Mr. Torres's case, if held to such standards, would not have gotten to this point. The remaining circuits beg unification of this standard, whereby appellate counsel cannot abandon the appellant via a Rule 42(b) motion unless the appellant agrees to

the filing of the motion and the terms therein.

The Fourteenth Amendment of the United States Constitution provides the right to effective assistance during the appellate process. (see McCoy v. Louisiana, 584 U.S. ___, 138 S. Ct. 1500). This means that retained and appointed counsel are held to the same basic standard of representation. For appointed counsel, the Anders brief is not an independant constitutional command, but, rather, is a prophylactic framework; it's imposition is a protective feature for appellants to voice any claims perhaps not addressed by appointed counsel. This, however, is not the only framework which could adequately vindicate the right to effective appellate counsel. (Pennsylvania v. Finley, 481 U.S. 551 (1990). Retained counsel, despite not being addressed specifically in Anders, must adhere to essential elements of representation, too.

It is obvious that a criminal defendant's paid attorney may not shirk the legal responsibility owed to the appellant by first taking the client's money and next filing a Rule 42(b) motion without notifying the client. The petitioner respectfully urges the Court to accept this petition for review to answer this question of first impression and to unify the circuits in their expressed holdings concerning direct criminal appeal voluntary dismissals.

CONCLUSION

In order to establish circuit unity regarding the application of Rule 42(b) of the Federal Rules of Appellate Procedure, as well as to address this issue of first impression, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Rene Torres, pro se
Reg. No..87275-380
FCI THREE RIVERS
FEDERAL CORRECTIONAL INSTITUTION
SATELLITE CAMP
PO BOX 4200
THREE RIVERS, TEXAS 78071

DECLARATION

I, Rene Torres, do hereby declare under penalty of perjury in accordance with 28 U.S.C. §1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 8th day of November, 2019.

Rene Torres, pro se

CERTIFICATE OF SERVICE

I, Rene Torres, do hereby certify that the foregoing was served upon the United States Supreme Court via first class mail with prepaid postage affixed on November 08, 2019, at the following address: UNITED STATES SUPREME COURT
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543

Rene Torres, pro se

APPENDICES

APPENDIX A