No. 21-6196

IN THE
SUPREME COURT OF THE UNITED STATES

I.A., a Juvenile,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To
The Kansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, pro se

ORIGINAL

QUESTIONS PRESENTED

1. Did I.A. have a Fourteenth Amendment Right to have a District Court Judge inform him of his right to appeal?

2. Was I.A.'s trial attorney, Scott Wasserman, ineffective for not advising and consulting I.A. of his right to appeal?

3. Was I.A.'s appellate attorney, Michael Bartee, ineffective for not raising the third exception to Ortiz on I.A.'s Appeal?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner I.A. respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

OPINIONS BELOW

The opinion of the Kansas Supreme Court is published at *In re I.A. 2021 Kan. LEXIS 79, 491 P.3d 1241 (2021).* Petition Appendix at 1a. ("Pet. App.") The opinion of Kansas Court of Appeals is published at In re I.A., *57 Kan. App. 2d 145, 450 P.3d 347 (2019)(Pet. App. At 10a).* The Order denying Appellants motion to remove counsel issued by the Kansas Supreme Court appears at 18a of the petition appendix. The Order granting a late appeal out of time under Ortiz issued by the District Court appears at 20a of the petition appendix.

JURISDICTION

The Kansas Supreme Court issued its opinion on July 23, 2021. Pet. App. Id. At 1a. It denied a motion to remove counsel on August 31, 2021. Pet. Id. At 18a. The Court has jurisdiction under *28 U.S.C. §1257(a).*

STATUTORY AND CONSTUTIONAL PROVISIONS

The Sixth Amendment states in relevant part: "In all criminal prosecutions, the accused shall....have the assistance of counsel for his defense." *U.S. Const. Amend., VI.*

The Fourteenth Amendment states in relevant part: "No state shall....deprive any person of life, liberty, or property without due process of law." *U.S. Const. Amend., XIV, §1.*

K.S.A. 21-4710 states in relevant part:

(d) Except as provided in K.S.A. 21-4716, and amendments thereto, the following are applicable to determining an offender's criminal history classification:

(5) For convictions of crimes committed before July 1,1993, a juvenile adjudication which would constitute a class A,B or C felony, if committed by an adult, would not decay. For convictions of crimes committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1,2,3,4 or 5 felony, or a drug severity level 1,2 or 3 felony, if committed by an adult, will not decay.

(6) All juvenile adjudications which would constitute a person felony will not decay of be forgiven.

K.S.A. 21-6810 states in relevant part:

(d) Except as provided in K.S.A. 2016 Supp. 21-6815, and amendments thereto, the following are applicable to determining an offender's criminal history classification:

(3) There will be no decay factor applicable for:

(B) A juvenile adjudication for an offense committed before July 1, 1993, which would have been a class A,B, or C felony, if committed by

an adult. Prior juvenile adjudications for offenses that were committed before July 1, 1993, shall be scored as a person or nonperson crime using a comparable offense under the Kansas criminal code in effect on the date the current crime of conviction was committed; or

(C) a juvenile adjudication for an offense committed on or after July 1, 1993, which would be an off-grid felony or a nondrug severity level 1 through 4 felony, if committed by an adult.

K.S.A. 38-1633 states in relevant part:

(b) When the respondent appears with an attorney in response to a complaint, the court shall require the respondent to plead guilty or not guilty to the allegations stated in the complaint or plead nolo contendere, unless there is an application for and approval of an immediate intervention program. Prior to making this requirement, the court shall inform the respondent of the following:

(1) The nature of the charges in the complaint;

(2) the right of the respondent to be presumed innocent of each charge;

(3) the right to trial without unnecessary delay and to confront and cross-examine witnesses appearing in support of the allegations of the complaint;

(4) the right to subpoena witnesses;

(5) the right of the respondent to testify or to decline to testify; and

(6) the sentencing alternatives the court may select as the result of the juvenile being adjudged to be a juvenile offender.

(c) If the respondent pleads guilty to the allegations contained in a complaint or pleads nolo contendere, the court shall determine, before accepting the plea and entering a sentence: (1) That there has been a voluntary waiver of the rights enumerated in subsections (b)(2), (3), (4), and (5); and (2) that there is a factual basis for the plea.

STATEMENT OF CASE

In Kansas juvenile offenders have no statutory or constitutional right to have a district court judge inform him or her of their right to appeal. In 1998 during the time of I.A.'s adjudication juveniles did not have the right to jury trials even though they were being prosecuted in a way akin to an adult prosecution. *In re L.M., 286 Kan. 460, 470, 186 P.3d 164 (2008).* The Kansas Supreme Court held that those statutes denying juveniles the right to jury trials were unconstitutional. *In re L.M. 286 Kan. 460.*

I.A. argued due process under the 14th Amendment and fundamental fairness outlined in *State v. Patton, 287 Kan. 200, 195 P.3d 753 (2008)* should apply to him because, he was never informed of his right to appeal. He sought to challenge the constitutionality of his adjudications because he was denied the right to a jury trial. The Kansas Supreme Court disagreed.

The Kansas Supreme Court held due process did not apply because juvenile offenders have no statutory or constitutional right to have a district court judge

inform him or her of their right to appeal. *In re I.A., 2021 Kan. 79, 20, 491 P.3d 1241 (2021).*

A. Kansas Law

In *State v. Ortiz, 230 Kan. 733, Syl. ¶3, 640 P.2d 1255 (1982),* the Kansas Supreme Court held adult criminal defendants could file late appeals where a defendant was either: (1) not informed of the rights to appeal; (2) was not furnished an attorney to perfect an appeal; or (3) was furnished an attorney for that purpose who failed to perfect and complete an appeal. *Ortiz, 230 Kan. at 735-36.* Those are often called *Ortiz* exceptions.

The first exception rest on the concept of procedural due process and fundamental fairness arising from three Kansas statues that provides procedural safe guards of the right to appeal by certain criminal defendants. *State v. Patton, 287 Kan. 200, 219, 195 P.3d 753 (2008).* The second and third exceptions are rooted in the right to effective counsel. *Patton, 287 at 222-225.*

In the Kansas revised juvenile code no comparable statutory provision directing judges to inform offenders of their right to appeal exist. *In re I.A., 2021 Kan. LEXIS 79, 16,491 P.3d 1241 (2021).* Therefore, juveniles cannot follow the same path to remedy used in criminal procedures. *In re I.A., 2021 Kan. LEXIS 79 at 16.* In rare times Kansas Courts have expanded *Ortiz* beyond criminal proceedings, and has found that a statutory right or constitutional right has been denied. *Brown*

v. State, 278 Kan. 481, 484-85, 101 P.3d 1201 (2004); Albright v. State, 29 Kan. 193, 202, 251 P.3d 52 (2011).

B. Factual Background And Trial Court Proceeding

On August 30, 1998, in 98JV2434, I.A. was charged in juvenile court with committing one count of aggravated battery. On August 31, 1998, I.A. was released on house arrest after having a detention hearing. On September 9, 1998, at his first appearance, I.A. pleaded not guilty, and a trial was scheduled for October 5, 1998. On September 29, 1998, the state filed an amended complaint. The amended complaint alleged four counts of aggravated assault, one count of aggravated battery, and four counts of criminal damage to property. I.A. appeared with counsel on November 30, 1998 and pleaded guilty to two felony counts of aggravated battery, and the other charges were dismissed. I.A. was placed on probation for one year and was ordered to pay court cost and restitution of $685.55. The Court sustained the State's motion for release of jurisdiction on November 17, 1999.

On August 1, 2017, I.A. filed a Notice of Appeal Out of Time alleging his trial attorney, Scott Wasserman, failed to perfect and complete an appeal for him. I.A. further alleged Scott Wasserman failed to discuss an appeal with him or get a waiver of his appellate right. I.A. further stated he did not recall the Court giving him notification of his right to appeal.

The Court appointed Counsel, and an appeal was docketed. The Court of Appeals remanded the case back to the district court for an *Ortiz* hearing. The

district court found after an *Ortiz* hearing that I.A. had not been informed of his right to appeal, and granted his motion to file an appeal out of time. (Pet. App. 20a) I.A.'s court appointed attorney and the state filed their briefs.

C. Kansas Appellate Court Proceedings

On June 20, 2019, the Court of Appeals ordered Supplemental Briefing to address whether the *Ortiz* exceptions applied to I.A. at the time when he was sentenced, whether subsequent changes to the juvenile justice code afforded I.A. different protections, and whether procedural fairness required I.A. be given a chance to appeal his adjudications and sentence. I.A. through his counsel, Michael Bartee, argued the first exception to *Ortiz*. I.A.'s appellate counsel, Michael Bartee, never raised the third exception to *Ortiz*.

On August 16, 2019, the Court of Appeals issued their opinion. (Pet. App. 10a) The Court of Appeals dismissed the appeal for a lack of jurisdiction, holding that the first prong of *Ortiz* does not apply to juvenile offenders because the juvenile offender code does not require a court to inform a juvenile of his right to appeal.

D. Kansas Supreme Court Proceedings

I.A. sought review by the Kansas Supreme Court, and review was granted on February 25, 2020. On July 23, 2021, the Kansas Supreme Court issued their opinion. (Pet. App. 1a) The Kansas Supreme Court affirmed the judgment of the Court of Appeals dismissing the appeal, holding a juvenile offender has no statutory

or constitutional right to have a district court judge inform him or her of their right to appeal. Therefore, due process does not demand that appellate courts extend the deadline for a juvenile to file an appeal even if a judge fails to mention the right to appeal when sentencing and adjudicating the juvenile.

After the Kansas Supreme Court issued their opinion I.A. filed a pro se Motion to Remove Counsel and sent in a Motion for Rehearing or Modification with it. The court clerk held the motion for rehearing or modification pending the Supreme Court decision on I.A.'s motion to remove counsel. On August 31, 2021 the Kansas Supreme Court denied I.A.'s motion to remove counsel, so I.A.'s motion for rehearing or modification could not be filed. I.A. tried to argue that Michael Bartee was ineffective for not raising the third exception to *Ortiz,* but pro se litigants cannot file a motion for rehearing or modification unless counsel is removed. (Pet. App. 18a)

REASONS FOR GRANTING THE BRIEF

1. The Decision By The Kansas Supreme Court Has Denied An Important Federal Question In A Way That Conflicts With The Fourteenth Amendment.

The Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v.* Durston, *153 U.S. 684, 687-88, 14 S. Ct. 913, 915, 38 L. Ed. 867 (1984).* Nor does the Constitution require States to grant juvenile offenders a right to appellate review. *In re Gault, 387 U.S. 1, 58, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).* (citing *Griffin v.*

Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 [1956]). But the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Griffin v. Illinois, 351 U.S. at 18.*

The United States Supreme Court applies a three factor balancing test when considering civil procedural due process. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).*

The United States Supreme Court applies a different test when considering criminal procedural due process. The test that applies to criminal procedural due process was set out in *Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L.* Ed. *2d 281 (1977).* The *Patterson* test recognizes that a State has a right to define its criminal procedures and that State specific rules of criminal procedures do not violate the Due Process Clause unless they "offend some principle of justice so rooted in the traditions and conscience of our people as to rank as fundamental." *Patterson, 432 U.S. at 201-02.* The Kansas Supreme Court applied this test in considering whether or not the first exception to *Ortiz* applied to civil juvenile appeals.

A. The Kansas Supreme Court Erred By Using The *Patterson* Test Over The Mathews Test.

The Kansas Supreme Court in its opinion recognized that *Patterson* partially stems from concepts of federalism and states' rights relevant in that case because the federal court was reviewing a state judgment. The Kansas Supreme Court also recognized that that circumstance does not apply to I.A.'s case. *In re I.A. 2021 Kan. LEXIS 79, 11, 491 P.3d 1241 (2021).* However, the Court held that the core test of *Patterson* applies to any court and they had previously applied *Patterson in State v. Patton, 287 Kan. 200, 220, 195 P.3d 753 (2008). In re I.A. 2021 Kan. LEXIS 79, 11-12 (2021).*

Kansas juvenile cases are civil and not criminal. *Patterson* was applied to *Patton* because *Patton* was appealing under the criminal procedure. I.A. was appealing under the civil procedure. The Kansas Supreme Court should have used the *Mathews* test in considering whether the first exceptions to *Ortiz* applied to civil juvenile proceedings. Therefore, the Court erred in applying *Patterson.*

B. Due Process Under The *Mathews* Test Applies To Juvenile Proceedings.

Juveniles in Kansas have a private interest that is affected by Courts not advising them of their appellate rights. All juveniles are at risk of losing their freedom. Juveniles face incarceration for their adjudications, and can receive heavier penalties as adults for subsequent convictions in Kansas. Kansas for many years has used juvenile adjudications to increase the penalties for adults when later convicted of new crimes. *K.S.A. 21-4710, K.S.A. 21-6810.* (Pet. App. 22a). Second,

juveniles face great risk of deprivation of their liberties because of State laws that use juvenile records for criminal history purposes. (Pet. App. 22a). Finally, no Governmental interest exists because no additional fiscal or administrative burdens would be placed on the States. Juvenile appellate rights already exist. Therefore, it is necessary under the due process and equal protection clauses to have district court judges inform juveniles of their right to appeal.

2. I.A.'s Trial Attorney, Scott Wasserman, Was Ineffective.

Defendants have a U.S. Const. Amend. VI right to "reasonably effective" legal assistance. *Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct.* 2052 (1984). A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation fell below an objective standard of reasonableness, *Id at 688*, and (2) that counsel's deficient performance prejudiced the defendant. *Id at 694.* This test applies to claims that counsel was constitutionally ineffective for failing to file a notice of appeal. *Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).* Counsel has a constitutionally-imposed duty to consult with the defendant about 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 demonstrated to counsel that he was interested in appealing. *Strickland, 466 U.S. at 690.*

I.A. in his original motion for "Notice of Appeal Out of Time" alleged that Scott Wasserman, his trial attorney, (1) failed to perfect and complete and appeal; (2) failed to discuss an appeal with him and get a waiver of his appellate right; and (3) I.A. had a desire to appeal. I.A. had numerous non-frivolous claims he could have raised. First, I.A. was denied the right to jury trial. Second, the Court ordered restitution for charges I.A. was acquitted of. Third, there is no record of I.A. waiving any of his constitutional right under *K.S.A. 38-1633* which was a statutory requirement under *K.S.A. 38-1633(c).*

In April of 2018 an *Ortiz* hearing was held. During the *Ortiz* hearing discussion about whether the third exception to *Ortiz* took place. The Court never came to a finding on the issue, but the State does not dispute that no one ever advised I.A. of his appellate rights. *In re I.A., 57, Kan. App. 2d 145, 148, 450 P.3d 347 (2019).* Based on the record and facts of the case, there is sufficient evidence to support that Scott Wasserman was ineffective for not perfecting an appeal or discussing any appellate rights with I.A. after his plea hearing.

3. I.A.'s Appellate Attorney, Michael Bartee, Was Ineffective For Not Raising The Third Exception to *Ortiz* On I.A.'s Appeal.

The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel, both at trial and on appeal. *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(trial); Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)(appeal).* Although "the Constitution does not require States to grant appeals as of right to criminal

defendants," States that provide such appeals "must comport with the demands of the Due Process and Equal Protection Clauses." *Evitts v. Lucey, 469 U.S. 387 at 393.*

United Supreme Court cases make clear that the constitutional right of effective assistance of appellate counsel is also critically important. The Court wrote in *Douglas v. California, 372 U.S. 353, 357, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963),* that "where the merits of the one and only appeal...as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." The Court held in *Evitts* that "[a] first appeal as of right...is not adjudicated in accord with process of law if the appellant does not have the effective assistance of an attorney." *469 U.S., at 396, 105 S. Ct. 830 83 L. Ed. 2d 821.* The Court added that "the promise of *Gideon [v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963),]* that a criminal defendant has a right to counsel at trial...would be a futile gesture unless it comprehended the right to the effective assistance of counsel" "on appeal." *Id., at 397, 105 S. Ct. 830, 83 L. Ed. 2d 821.* And the Court stated in *Martinez* that "if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process." *Martinez v. Ryan, 566 U.S. 1, 11, 132 S. Ct. 1309, 1311, 182 L. Ed. 2d 272 (2012); (citing Coleman v. Thompson, 501 U.S. 722, 754, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); Evitts, supra, at 396; Douglas, supra, at 357-358).*

I.A. was denied effective counsel on appeal by Michael Bartee, because he failed to raise the non-frivolous claim that the third exception to *Ortiz* applied in

order to allow I.A. to appeal his case out of time. Federal and Kansas case law support the claims, (1) when a lawyer does not provide a defendant effective assistance on direct appeal the defendant is entitled to a new appeal; and (2) attorneys have a duty to consult and perfect an appeal for a defendant when there are non-frivolous claims. *Martinez v. Ryan, 566 U.S. 1, 1, 132 S. Ct. 1309, 1311, 182 L. Ed. 2d 272 (2012); Albright v. State, 29 Kan. 193, 202, 251 P.3d 52 (2011).*

4. Petitioner's Case Is An Excellent Vehicle To Consider These Issues.

This case is an ideal vehicle to correct the approach used by the Kansas Supreme Court in analyzing whether or not juveniles have a right to be informed of their right to appeal. It is also an excellent vehicle to correct the denial of I.A.'s right to appeal due to ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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