

No.

21-6437

IN THE
SUPREME COURT OF THE UNITED STATES

J.S., a Juvenile

Petitioner,

v.

ORIGINAL

STATE OF KANSAS,

Respondent.

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

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SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did J.S. have a Fourteenth Amendment right to be advised by the Court of his right to appeal?
2. Did J.S. have a right to appeal out of time, because he was denied his Sixth Amendment right to effective counsel?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, J.S., respectfully petitions for a writ of certiorari to review the judgment of the Kansas Appellate Court.

OPINION BELOW

The opinion of the Kansas Court of Appeals is unpublished at In the Matter of J.S. (Petitioner Appendix at 2a.) ("Pet. App.") The Order denying Petitioner's review of the Kansas Supreme Court appears at 1a of the petition appendix.

JURISDICTION

The Kansas Supreme Court denied its review on October 20th, 2021. Pet App. Id. at 1a. The Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY & CONSTITUTIONAL 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. 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 pleas 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 after a trial or plea.

In re I.A., 2021 Kan. Lexis 79, 2, 491 P.3d 1241 (2021). 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 statutes 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 from the Sixth Amendment to the United States. *Patton*, 287 at 222-225.

In rare times Kansas Courts have expanded *Ortiz* beyond criminal proceedings, and 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). One of those reasons was ineffective assistance of counsel when an attorney failed to notify the defendant of their right to appeal and did not file a timely appeal for them.

A. Factual Background And Trial Court Proceeding

On March 22, 1991, the State charged J.S., for a single count of theft of an automobile in juvenile case no. 91-JV-104. On June 12, 1991, J.S. entered a guilty

plea pursuant to a negotiated plea agreement. J.S. was placed on one year of probation. The journal entry states that, J.S., “knowingly, voluntarily and intelligently waived all applicable Fifth and Sixth Amendment rights under the federal and state constitutions” but, the journal entry does not reflect that J.S. was advised by the court of all his rights under *K.S.A. 38-1633(b)*, waived his right to appeal, and that the court or his counsel advised him of his right to appeal. The district court judge accepted his plea. (*Pet. App. 11a-12a*). On September 16, 1992, J.S. was discharged from probation.

On November 8, 2017, J.S. filed a notice of appeal out of time. The filing stated that his attorney failed to perfect and complete an appeal of his sentence and conviction. J.S. further stated that his counsel and the judge failed to inform him of his right to appeal.

On May 29, 2018, J.S. filed an affidavit in support of his notice of appeal out of time. J.S. stated, he did not “recall” the court or his attorney advising him of his right to appeal, that his right to jury trial was violated, and that the court failed to advise him of his rights under *K.S.A. 38-1633*.

On March 4, 2019, a hearing was held on J.S.’s untimely appeal. J.S. informed the court that he was not advised of his right to jury trial or right to appeal according to the best of his recollection. The court ruled that J.S. submitted his notice of appeal and other motions out of time and dismissed that matter. (*Pet. App. 10a*).

B. Kansas Appellate Court Proceedings

On June 12, 2020, the Court of Appeals issued their opinion. (*Pet. App. 2a*). The Court of Appeals dismissed J.S.'s appeal for a lack of jurisdiction, holding the district court was not required by law to advise J.S. of his statutory right to appeal, and the first exception to *Ortiz* did not apply to juvenile adjudications. The Court of Appeals did not address whether the third exception to *Ortiz* applied. The third exception deals with whether or not J.S. could appeal out of time due to ineffective assistance of counsel when an attorney fails to advise or complete an appeal of a defendant.

C. Kansas Supreme Court Proceedings

J.S. sought review of the Kansas Supreme Court, but the Court denied review on October 20, 2020. (*Pet. App. 1a*).

REASONS FOR GRANTING THE BRIEF

1. The Kansas Supreme and Kansas Appeal Courts have decided an important federal question in a way that conflicts with the Fourteenth Amendment.

States are not required by the Constitution to grant appeals as of right to 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). The Constitution also does not require States to grant juvenile offenders the right to appellate review. *In re Gault*, 387 U.S. 1, 58, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967). The Fourteenth

Amendment does require that 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. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

The United States Supreme Court uses one test for criminal procedural due process, and a different test for civil procedural due process. The Supreme Court primarily uses the test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) for civil procedural due process. See *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed. 2d 353 (1992). The *Mathews* test requires a balancing of three factors: "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*, 424 U.S. at 335.

Since, *Mullane v. Central Hanover Bank and Trust Co.* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), the Supreme Court has regularly applied the *Mathews* test when confronted with questions regarding the adequacy of the method used to give notice. *Dusenberry v. United States*, 534 U.S. 161, 168, 122 S.Ct. 694, 151 L.Ed. 2d 597 (2002). The Supreme Court is yet to decide if the *Mathews* test applies to notices of appellate rights in civil juvenile proceedings.

The criminal due process proceedings that are outlined in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 281 (1977), applies mainly in criminal cases. *Nelson v. Colorado*, 137 S.Ct. 1249, 1257, 197 L.Ed. 2d 611 (2017), (citing *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed. 2d 353 [1992]). The *Patterson* test recognizes that a state has a right to define its criminal procedures and the criminal procedures do not violated 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.” The Kansas Supreme Court has applied this test to juvenile civil proceedings. The Kansas Court of Appeals applied the *Mathews* test in juvenile civil proceedings, but failed to explain why it has applied the *Mathews* test. See *In re I.A.*, 2021 Kan. LEXIS 79, 7-12, P.3d 1241 (2021).

A. The Kansas Supreme Court Erred In Dismissing J.S.’s Appeal By Using The Patterson Test.

The Kansas Supreme Court has erred by applying the *Patterson* test for criminal due process proceedings in a juvenile proceeding. The United States Supreme Court has consistently used the *Mathews* test in civil proceedings dealing with notices. The Fourteenth Amendment Due Process and Equal Protection clauses require that J.S. was entitled to a fair appellate process and proper notification of his appellate rights.

B. Due Process Under the Mathews Test Applies to J.S.’s Case.

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, or (2) that this particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. at 480.

First, J.S. had a rational reason to appeal. The plea he accepted failed to follow the strict guidelines of *K.S.A. 38-1633(b)* and *K.S.A. 381633(c)*. Those guidelines were set to protect many constitutional rights. Second, even though J.S. was unaware of his appellate right, when he became aware he appealed immediately. So, he was more than interested in an appeal.

A. The District Court And Appellate Court Erred.

The district court and appellate court erred when they failed to consider whether J.S. had a right to appeal out of time when his attorney failed to advise him of his right to appeal. Well established laws outlined in *Strickland* and *Flores-Ortega* grant defendants the right to appeal out of time when attorneys are found ineffective for not advising or assisting defendants with appeals constitutionally under the Sixth Amendment.

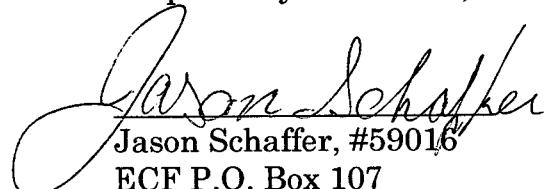
3. Petitioner's Case Is An Excellent Vehicle To Consider These Issues.

This case is an ideal vehicle to correct the approach used by the Kansas Supreme Court in analyzing if juveniles have a right to be informed of their right to appeal by the court or their attorney.

CONSLUSION

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

Respectfully Submitted,


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