No.

IN THE SUPREME COURT OF THE UNITED STATES

MONTY J. BANISTER, Petitioner

v.

STATE OF KANSAS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

RANDALL L. HODGKINSON
Counsel of Record
JENNIFER C. ROTH
KANSAS APPELLATE DEFENDER OFFICE
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484
E-mail: rhodgkinson@sbids.org

Counsel for Petitioner

QUESTION PRESENTED

Does this Court's decision in *Roe v. Flores-Ortega,* 528 U.S. 470 (2000), establish at least a rebuttable presumption that trial counsel has a Sixth Amendment duty to meaningfully consult with a client following a jury trial conviction to determine whether the client wishes to file a notice of appeal and start the appeal process?

LIST OF PARTIES

The parties to this case are as stated in the caption, Monty J. Banister, petitioner, and the State of Kansas, respondent. In the courts below, the petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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The District Court for Sumner County, Kansas found that Monty J. Banister was not entitled to appeal after his appointed trial counsel failed to file a timely notice of appeal. The Kansas Court of Appeals affirmed that decision in an unpublished decision. *State v. Banister*, Appeal No. 124,282, 2022 WL 2392666 (Kan. App. July 1, 2022)(unpublished). The Kansas Supreme Court denied review by order dated March 29, 2023.

STATEMENT OF JURISDICTION

The Kansas Supreme Court is the court of last resort in Kansas. The Kansas Supreme Court rejected Mr. Banister's claim that he was improperly denied his first appeal as of right after his appointed trial counsel failed to file a timely notice of appeal after his jury trial conviction. This Court has jurisdiction under 28 U.S.C. § 1257(a).

The question presented is: Does this Court's decision in *Roe v. Flores-Ortega,* 528 U.S. 470 (2000), establish at least a rebuttable presumption that trial counsel has a Sixth Amendment duty to meaningfully consult with a client following a jury trial conviction to determine whether the client wishes to file a notice of appeal and start the appeal process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states the following in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution states the following in relevant part:

> 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.

K.S.A. 2020 Supp. 22-3608(c):

> For crimes committed on or after July 1, 1993, the defendant shall have 14 days after the judgment of the district court to appeal.

STATEMENT OF THE CASE

The State of Kansas charged Monty Banister with aggravated battery (battery causing great bodily harm), theft of a firearm, criminal possession of a firearm, and criminal damage to property. After a three-day trial, a jury convicted Mr. Banister of a lower severity of aggravated battery (battery done in a manner whereby great bodily harm can be inflicted), given as a lesser included offense, and otherwise as charged. On April 6, 2021, the state district court imposed a controlling 45-month prison sentence and a consecutive 6-month jail sentence, and remanded Mr. Banister to the custody of the Kansas Department of Corrections.

On or before May 5, 2021, from jail, Mr. Banister mailed a pro se notice of appeal and request for appointment of appellate counsel to the state district court clerk. Kansas law requires that a notice of appeal be filed with the state district court within fourteen days of sentencing. K.S.A. 2020 Supp. 22-3608(c). On June 21 and 29, 2021, the state district court held a hearing related to whether Mr. Banister was permitted to proceed with his appeal even though the notice of appeal was filed more than fourteen days after sentencing. See Appendix D (transcript of June 21, 2021 hearing "Tr.").

During the hearing, Mr. Banister acknowledged that he spoke generally with appointed trial counsel about a possible appeal during trial and before

sentencing; he thought that appointed trial counsel would be filing an appeal on his behalf. Tr. at 10. Mr. Banister testified that appointed trial counsel did not consult with him regarding an appeal at sentencing or after sentencing. Tr. at 11-12, 17. Mr. Banister indicated that he had sent a letter to appointed trial counsel after sentencing, wondering what would happen next in his case and asking for the sentencing journal entry. Tr. at 15-16. Mr. Banister indicated that he never heard back from appointed trial counsel. Tr. at 12.

Appointed trial counsel acknowledged that he did not have any recollection of consulting with Mr. Banister about the right to appeal at the sentencing proceeding. Tr. at 20. He also indicated that he had never had a conversation about appeal strategy, before or after sentencing. Tr. at 20. Appointed trial counsel indicated that he was focused on helping Mr. Banister deal with the substantial prison sentence imposed at sentencing and didn't "remember specifically a conversation regarding the right to appeal." Tr. at 20. Appointed trial counsel indicated that on the day of sentencing and in the fourteen days following, Mr. Banister did not request that he file a notice of appeal. Tr. at 21. Appointed trial counsel never testified that he consulted with Mr. Banister regarding an appeal on the day of sentencing or in the fourteen days following sentencing.

Appointed trial counsel acknowledged that he never gave Mr. Banister

written notice of his right to appeal and time limitations, and acknowledged that Mr. Banister did not sign a written waiver of appeal. Tr. at 23.

In its written order, the state district court found, after reviewing the sentencing transcript, that it had properly and adequately advised Mr. Banister of his right to appeal and of the statutory framework for such an appeal. See Appendix C (state district court order dated July 12, 2021). Furthermore, the state district court found that appointed trial counsel had been appointed to perfect an appeal for Mr. Banister, but that "Mr. Banister had not made a timely request to his trial counsel to perfect a notice of appeal." *Id.* As a result, the state district court denied Mr. Banister's request to file his appeal out of time. *Id.* The state district court did not make any findings regarding whether appointed trial counsel consulted with Mr. Banister regarding an appeal or was required to consult with Mr. Banister regarding an appeal. Mr. Banister filed a timely notice of appeal from those findings. *Id.*

On appeal, Mr. Banister asserted both (1) that he was not adequately informed of the right to appeal by the state district court and also (2) that his appointed trial attorney was ineffective for failing to consult with him regarding a possible appeal at or after the sentencing proceeding. The Kansas Court of Appeals either misunderstood or ignored Mr. Banister's second claim regarding the duty to consult. The Kansas Court of Appeals entirely failed to make critical

findings required by this Court's precedent in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), regarding (1) whether appointed trial counsel consulted with Mr. Banister at sentencing or within the time limits for filing an appeal and (2) whether the failure to consult with Mr. Banister during that critical time period was deficient performance under the Sixth Amendment. Instead, the Kansas Court of Appeals simply parroted and confirmed the state district court's finding that Mr. Banister did not explicitly ask his attorney to appeal, a fact that had not been contested on appeal. Appendix B, slip op. at 8. The Kansas Court of Appeals did not even discuss whether appointed trial counsel consulted with Mr. Banister or would have been required to consult with Mr. Banister regarding a potential appeal.

Mr. Banister filed a timely petition for discretionary review with the Kansas Supreme Court specifically arguing that the Kansas Court of Appeals failed to make sufficient determinations required under *Roe v. Flores-Ortega*. That Court denied review without comment. Appendix A.

REASONS FOR GRANTING THE WRIT

Introduction

After felony jury trial convictions and imposition of the maximum prison sentence, appointed trial counsel never consulted with Mr. Banister regarding whether he wished to pursue his first appeal as of right. Pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a court should presume that a trial attorney that has failed to consult with their client after a felony jury trial conviction has provided deficient performance under the Sixth Amendment.

Appointed trial counsel has a constitutional duty to consult with client regarding an appeal, especially after a jury trial conviction

The state district court appointed counsel to represent Mr. Banister in the state district court because he was indigent. Among other responsibilities, appointed trial counsel was responsible for filing a notice of appeal for Mr. Banister. *See State v. Patton*, 287 Kan. 200, 206, 195 P.3d 753 (2008) (whether appointed or retained, trial counsel is "furnished" to help client perfect appeal); *State v. Redmon*, 255 Kan. 220, 223, 873 P.2d 1350 (1994)(trial counsel is responsible to file notice of appeal, not appellate public defender); K.A.R. 105-3-9(a)(3)(regulation imposing duty on trial counsel appointed to indigent clients to file a notice of appeal unless written waiver of appeal obtained).

Late appeals in Kansas

Under Kansas law, to appeal from a criminal judgment, the defendant must file a notice of appeal within fourteen days of sentencing. See K.S.A. 2020 Supp. 22-3608(c). Although this time limit has been described as jurisdictional in some cases, the Kansas Supreme Court has recognized several exceptions, both in terms of the Due Process Clause and the Assistance of Counsel Clause, which will permit a late appeal. *See generally State v. Patton*, 287 Kan. 200, 206-219 (2008)(discussing *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982) and its prodigy that describe exceptions permitting appeals notwithstanding statutory time limits). One exception—relied upon by Mr. Banister in the instant case—is when a defendant is furnished an attorney to perfect an appeal, but that attorney fails to do so. *Patton*, 287 Kan. at 223-24. When determining whether this exception applies, the Kansas Supreme Court acknowledged this Court's binding precedent and applied: the "measure of the adequacy of appellate counsel . . . found in *Roe v. Flores-Ortega*, [528 U.S. 470 (2000)]." 287 Kan. at 224. Therefore, application of *Roe v. Flores-Ortega* is directly implicated in this case.

Roe v. Flores-Ortega

In *Roe v. Flores-Ortega*, an appointed attorney failed to file a timely notice of appeal on behalf of her client after the client had pleaded guilty and been sentenced to life in prison. 528 U.S. at 473-74. This Court recognized that, for

defense counsel at the trial court level, filing a notice of appeal is primarily a ministerial task that places no burden on counsel. *Flores-Ortega*, 528 U.S. at 474. Nonetheless, this Court rejected a *per se* rule categorically resulting in a finding of ineffective assistance of counsel *in every case* if appointed counsel failed to file a notice of appeal. Instead, this Court held that appointed counsel's performance should be judged depending on the nature of the individual case and the nature of the interaction between the lawyer and the client. *Flores-Ortega,* 528 U.S. at 478. This Court recognized that there are three scenarios as it relates to counsel's responsibility to file a notice of appeal: (1) the client explicitly directs trial counsel to file a notice of appeal, (2) the client, after proper consultation, explicitly directs trial counsel to not file a notice of appeal, and (3) the client does not explicitly provide any direction, one way or the other. *Flores-Ortega*, 528 U.S. at 477.

The first of these possibilities, where the client explicitly directs that trial counsel file a notice of appeal and trial counsel fails to do so, would result in ineffective assistance of counsel and would justify a late appeal. *Flores-Ortega*, 528 U.S. at 477. On the other hand, a client who, after proper consultation, explicitly directed trial counsel to NOT file a notice of appeal cannot later complain about counsel following his or her explicit directions. *Flores-Ortega*, 528 U.S. at 477.

But other cases fall into a middle ground—where a client does not explicitly provide directions to appointed counsel one way or the other. While this Court did not hold that consultation is constitutionally required *in every case*, it did note that the better practice would always be to consult with the client and obtain the client's directions. *Flores-Ortega,* 528 U.S. at 478. This Court did presage that, in many or most cases, an attorney is *constitutionally required* to consult with a client regarding a potential appeal. This Court held that whether trial counsel has a duty to consult depends on whether "there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega,* 528 U.S. at 479-80.

This Court opined, for example, that it might not be deficient performance for an attorney to not consult with a client who had pleaded guilty and received a bargained-for sentence. *Flores-Ortega,* 528 U.S. at 479-80. Even related to convictions after guilty pleas, this Court held "in the vast majority of cases, that counsel had a duty to consult with the defendant about the appeal." *Flores-Ortega,* 528 U.S. at 481.

But this Court reiterated that there is a significant difference between an appeal after a guilty plea and an appeal after a conviction resulting from a trial.

Flores-Ortega, 528 U.S. at 480. In the former case, by pleading guilty, the client may have indicated a desire to end the litigation and, in any case, the potential issues on appeal are necessarily narrowed. *Flores-Ortega*, 528 U.S. at 481. In the latter case, the client will normally want to appeal. In the vast majority of cases, if an indigent client has gone to trial and been convicted, there is little risk of filing an appeal. Even in a case where trial counsel is not aware of particular issues, after review of the record on appeal, appointed appellate counsel may find non-frivolous issues that can be raised on appeal. *See Lozada v. Deeds*, 498 U.S. 430, 431 (1991)(defendant is not required to specify potential issues for appeal to present colorable claim of ineffective assistance of counsel by failure to consult regarding appellate rights).

This is even truer in a jurisdiction like Kansas where the state appellate courts will not accept no-merits briefs in direct appeals from trial convictions. *See* Randall L. Hodgkinson, No-Merit Briefs Undermine the Adversary Process in Criminal Appeals, 3 J. APP. PRAC. & PROCESS 55 (2001) (noting that "Kansas appellate courts, by informal rule, do not allow no-merit briefs"). If appointed trial counsel had filed a notice of appeal in Mr. Banister's case, Mr. Banister would have been appointed appellate counsel and appellate counsel would have reviewed the case and filed a brief on Mr. Banister's behalf. In terms used by this Court in *Flores-Ortega*, there are always non-frivolous issues in direct appeals

from jury trials in Kansas; therefore, trial counsel generally has a constitutional duty to consult with their client regarding a possible appeal after a jury trial conviction.

Similarly, even though Mr. Banister was convicted of a lesser-included offense, he was not at risk of retrial on the charged greater offense because Kansas law clarifies that when a person is convicted of a lesser-included offense, they are acquitted of the greater offense. K.S.A. 2020 Supp. 21-5110(a)(3). So for a client in Mr. Banister's circumstances, even if his chance of success was small, there was no appreciable risk in proceeding with an appeal and especially just with starting the appellate process. But no one ever discussed these advantages and disadvantages with Mr. Banister in a meaningful way.

Application of Roe v. Flores-Ortega in the instant case

The state district court found that Mr. Banister did not explicitly direct his attorney to file a notice of appeal at sentencing nor within the fourteen-day time limit after sentencing and therefore that the third *Ortiz* exception did not apply. Appendix C. Mr. Banister did not contest the state district court's factual finding (i.e. that Mr. Banister did not explicitly tell his trial attorney to file a notice of appeal) in this appeal. But Mr. Banister *did* contest the state district court's legal conclusion that this finding was sufficient under the Sixth Amendment to strip him of his right to a direct appeal. In fact, the state trial and appellate court's

conclusions misconstrue this Court's Sixth Amendment precedent regarding the middle ground where a defendant neither explicitly requests nor refuses to appeal.

In the instant case, although there was some evidence that appointed trial counsel had generally discussed a potential appeal with Mr. Banister during trial and/or between trial and sentencing, there was *no* evidence that appointed trial counsel consulted with Mr. Banister during or after sentencing, which is when Mr. Banister would need to decide about whether to appeal and when knowledge of the time limits and procedure for starting the appeal process would be crucial. Until there is a judgment, counsel cannot fully or meaningfully consult with a client regarding "the advantages and disadvantages of taking an appeal." *See Flores-Ortega*, 528 U.S. at 487. Defense counsel admitted that he did not obtain a written waiver of the right to appeal from Mr. Banister. Tr. at 23.

This Court recognized that states "are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented." *Flores-Ortega,* 528 U.S. at 479. In fact, Kansas has done exactly that. Pursuant to K.A.R. 105-3-9(a)(3), for persons appointed counsel under the Indigent Defense Services Act like Mr. Banister, appointed trial counsel is required to either (1) file a timely notice of appeal or (2) obtain a written waiver of the right to appeal. The regulation specifically indicates that it is promulgated to "protect a convicted

defendant's right to appeal." K.A.R. 105-3-9(a). Notwithstanding this regulation, the Kansas Court of Appeals followed Kansas Supreme Court precedent holding that failure to comply with this regulation is meaningless. Appendix B, slip op. at 7-8. As a result, Mr. Banister is left arguing that the lower courts' determinations misconstrue this Court's decision in *Roe v. Flores-Ortega*.

In any case, the Kansas regulation simply reflects what was stated by this Court in *Flores-Ortega*: the default should be for trial attorneys to consult with their clients regarding an appeal. And, as implied by this Court in *Flores-Ortega*, this is especially true after a jury trial conviction. The implication of *Flores-Ortega* is clear: cases where trial counsel does not have a duty to consult with a client regarding an appeal *after a jury trial conviction* would be rare indeed. Absent some affirmative showing of how starting the appellate process might be disadvantageous to a client, the normal presumption would be that a client would want to appeal, not the opposite. This Court should grant certiorari and make this presumption clear in cases involving jury trial convictions.

Had appointed counsel consulted with Mr. Banister in this case regarding the legal advantages and disadvantages of filing a notice of appeal, the *only* correct legal advice would have been to recommend filing the notice of appeal. In fact, for an indigent defendant in Mr. Banister's circumstances, there is no legal disadvantage to filing a timely notice of appeal. Even if the client later decided

that he or she does not want to pursue an appeal (for whatever reason), an appeal can always be voluntarily dismissed by appellate counsel. But the failure to file a timely notice of appeal can completely destroy the client's ability to enforce his right to his first appeal as of right, as demonstrated in this case.[1] Under *Flores-Ortega*, such a drastic outcome should only be tolerated after a jury trial conviction if trial counsel has consulted with their client and obtained a valid waiver.

In the instant case, accepting the state district court's factual findings as true, Mr. Banister did not explicitly request that his attorney file a notice of appeal. But the state district court did not find—nor would the record support a finding—that Mr. Banister ever explicitly directed his attorney to NOT file a notice of appeal. And the state district court did not find—nor would the record support a finding—that trial counsel consulted with Mr. Banister regarding a possible appeal at the time of sentencing or within fourteen days after sentencing. In fact, appointed trial counsel admitted that he did not consult with Mr. Banister about an appeal during or after sentencing or at any time prior to the expiration of the time limit for filing a notice of appeal. This case falls into the

[1] Of course, if trial counsel cannot or does not want to consult with their client after a jury trial conviction and sentence, another viable route would be to simply and quickly complete the ministerial task of filing a notice of appeal and securing appointment of appellate counsel. Without some affirmative showing of how starting the appellate process might be disadvantageous to a client, the normal presumption would be that a client would want to appeal, not that the client does not want to appeal.

middle ground described in *Flores-Ortega*, where the client does not explicitly direct his or her attorney either way. But this case also falls into the clear category of cases implied in *Flores-Ortega* where an attorney had an unequivocal and constitutional duty to consult with his client.

So the question in the instant case is whether appointed trial counsel was effective despite not consulting with Mr. Banister regarding filing a notice of appeal at the time of sentencing or within fourteen days after sentencing. Under *Flores-Ortega*, the answer is a resounding no. Mr. Banister had no legal reason to not file a notice of appeal from his jury trial conviction and at least start the appellate process. This case involved a three-day jury trial with a conviction on a lesser-included offense and imposition of the maximum possible sentence. This case does not involve a guilty plea and bargained-for sentence. If appointed trial counsel had consulted with Mr. Banister at the time when it mattered, the *only* reasonable advice would have been to recommend filing the notice of appeal and seeking appointment of appellate counsel. Then appointed appellate counsel could have reviewed the case and proceeded with the appeal.

Need to grant certiorari

In *Roe v. Ortega-Flores*, this Court held that when a criminal defendant has not expressed their view regarding an appeal, a court must determine (1) whether appointed trial counsel consulted with their client

regarding an appeal and, if not, (2) whether appointed trial counsel was constitutionally required to consult with their client regarding an appeal after his jury trial conviction. *Flores-Ortega*, 528 U.S. at 479-80. The state district court and the Kansas Court of Appeals failed to make either of these determinations. This reflects the need for this Court to grant certiorari and clarify (1) that such determinations are required when considering cases in the middle-ground described in *Flores-Ortega*, and (2) that, in the case of a jury trial conviction, there should be at least a rebuttable presumption that trial counsel has a duty to consult with their client regarding a possible appeal. Absent some affirmative showing of a reason NOT to consult after a jury trial conviction, trial counsel should either consult with their client regarding an appeal or simply file the notice of appeal and start the appellate process.

This distinction is not lost on courts from other jurisdictions. The Nevada Supreme Court has recognized that this Court's decision in *Flores-Ortega*, means that trial counsel may not have a duty to consult with a client about the right to a direct appeal when their client has been convicted by guilty plea. *Toston v. State*, 267 P.3d 795, 799 (Nev. 2011). But that Court went on to recognize the difference when dealing with a conviction after a jury trial:

> In contrast, when a defendant has been convicted pursuant to a jury verdict, trial counsel has a constitutional duty to inform his client of the right to appeal; that duty includes "informing the client of the procedures for filing an appeal as well as the advantages and disadvantages of filing an appeal." [*Toston*, 267 P.3d at 800 n.2.]

Similarly, in *Melanson v. State*, the Maine Superior Court followed *Flores-Ortega* to find a duty to consult regarding an appeal after a jury trial conviction and sentence:

> In determining whether counsel has abrogated that duty, the court is to focus on the totality of the circumstances then existing. A highly relevant factor in this inquiry is whether the appeal is to follow a trial or a plea of guilty because the latter reduces the scope of potentially appealable issues, and may indicate that the defendant wishes to end the judicial proceedings. *Conversely, it may be inferred, when there is a trial, the potential number of issues for an appeal is greater and the defendant can be said to have demonstrated a willingness to contest the proceedings*. [*Melanson v. State*, No. CR-03-435, 2004 WL 1925568, at *2 (Me. Super. July 22, 2004)(citations omitted)(emphasis added)].

Although premised on its own state rules, the New Mexico Court of Appeals also recognized the reality that "criminal defendants convicted at trial generally file a notice of appeal." *State v. Cannon*, 326 P.3d 485 (N.M. App. 2014)(applying conclusive presumption of ineffective assistance of counsel where counsel filed an untimely notice of appeal following a jury trial conviction).

In comparison to these cases, counsel could find no case law describing circumstances where a trial attorney did not have a duty to consult with a client regarding a possible appeal after a jury trial conviction. It is likely that such cases

rarely occur because of what this Court implied in *Flores-Ortega* but was ignored by the lower courts in the instant case: that in almost all convictions after a jury trial, trial counsel has a duty to consult with their client regarding a possible appeal.

CONCLUSION

This Court should grant certiorari to clarify what was apparently lost on the Kansas courts, but understood by courts in other jurisdictions. Under *Flores-Ortega*, there is at least a rebuttable presumption that trial counsel has a constitutional duty to consult with their client regarding a possible appeal after a jury trial conviction. In the absence of an affirmative showing of some exceptional circumstances, failure to consult with a client in such circumstances results in deficient performance in violation of the Sixth Amendment.

Because neither the state district court nor the Kansas Court of Appeals even considered the duty to consult and because the record establishes that appointed trial counsel did not consult with Mr. Banister at sentencing or within the time limits for filing a notice of appeal, this Court should reverse the judgment of the Kansas Court of Appeals and remand with directions to fully comply with *Flores-Ortega*.

Respectfully submitted,

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RANDALL L. HODGKINSON
Counsel of Record
JENNIFER C. ROTH
KANSAS APPELLATE DEFENDER OFFICE
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484
E-mail: rhodgkinson@sbids.org
Counsel for Petitioner