

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 SUPREME COURT**

**APPENDIX**

Appendix A -	Kansas Supreme Court order denying review in <i>State v. Banister</i> , decided March 29, 2023.
Appendix B -	Kansas Court of Appeals decision affirming Kansas District Court in <i>State v. Banister</i> , decided July 1, 2022.
Appendix C -	Kansas District Court decision denying late appeal in <i>State v. Banister</i> , filed July 12, 2021.
Appendix D-	Excerpt of June 21, 2021 evidentiary hearing in <i>State v. Banister</i> , Sumner County Case No. 19 CR 230.

## Appendix A



**Court:** Supreme Court

**Case Number:** 124282

**Case Title:** STATE OF KANSAS, APPELLEE,  
V.  
MONTY J. BANISTER, APPELLANT.

**Type:** Petition for Review (re: opinion) by Appellant,  
Monty J. Banister

Considered by the Court and denied.

SO ORDERED.

/s/ Marla J. Luckert, Chief Justice

## Appendix B

NOT DESIGNATED FOR PUBLICATION

No. 124,282

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

MONTY J. BANISTER,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Sumner District Court; WILLIAM R. MOTT, judge. Opinion filed July 1, 2022.  
Affirmed.

*Randall L. Hodgkinson*, of Kansas Appellate Defender Office, for appellant.

*Natalie Chalmers*, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., BRUNS and GARDNER, JJ.

PER CURIAM: Monty Banister appeals from the district court's denial of his request to proceed with an untimely direct appeal of his criminal case. After the evidentiary hearing, the district court found Banister's motion meritless. In particular, the district court found that Banister was properly informed of his right to appeal as well as the deadline for filing an appeal. The district court also found that Banister had failed to request that his attorney file a notice of appeal on his behalf. Based on our review of the record, we conclude that the district court did not err in denying Banister's motion. Thus, we affirm the district court's decision.

## FACTS

A jury convicted Banister of aggravated battery, theft of a firearm, criminal possession of a firearm, and criminal damage to property. The underlying facts of these convictions are not material to the resolution of this appeal. On April 6, 2021, the district court sentenced Banister to 45 months in prison to be followed by 6 months in jail.

At this sentencing hearing, the district court informed Banister that he had 14 days to appeal his convictions and sentences. The district court also advised Banister that he would get a "free attorney" to help him with his appeal. On May 5, 2021—nearly a month after the sentencing hearing—Banister evidently placed a pro se notice of appeal in the jail mail. The notice of appeal was ultimately filed in the district court on May 25, 2021.

The district court treated Banister's untimely notice of appeal as a motion for a hearing under *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982). At an evidentiary hearing held on June 21, 2021, the district court heard the testimony of both Banister and his trial attorney. Banister testified that he did not remember being advised of his right to appeal at the sentencing hearing. Nevertheless, the transcript of the sentencing hearing reveals that the district court informed Banister of his right to appeal and his deadline for doing so.

Banister also testified that he discussed an appeal with his trial attorney and believed he was going to file a notice of appeal. In addition, Banister testified about a letter and email he allegedly sent to his trial attorney between his trial and sentencing asking about his jail time credit and inquiring "about what's going on, if he did file and what's going to happen? What I'm supposed to expect from all this?" However, Banister testified he did not discuss an appeal with his attorney at the sentencing hearing.

Banister's attorney testified that his client never requested him to file a notice of appeal. Although the attorney agreed that he had received a letter from Banister postmarked April 30, 2021, it was not admitted into evidence by either party. Still, the attorney testified that Banister did not ask him to file a notice of appeal in the letter. Moreover, the attorney testified he did not receive any emails from Banister.

After hearing the evidence, the district court took the issue under advisement in order to read the transcript from the sentencing hearing. On July 12, 2021, the district court issued an order denying Banister's motion to appeal out of time. In doing so, the district court ruled:

"[R]egarding the first *Ortiz* factor, the Court finds, subsequent to review the relevant transcript, that the Movant was properly and adequately advised of his right to appeal, and of the statutory timeframe set forth to perfect such appeal; regarding the second *Ortiz* factor, the Court determines that trial counsel Matt Metcalf had been properly appointed for all aspects of trial level representation, including perfecting a notice of appeal, should he have been directed to do so by Mr. Banister; and finally, the Court found the testimony of Matthew Metcalf to be relevant and credible, and that Mr. Banister had not made a timely request to his trial counsel to perfect a notice of appeal."

Thereafter, Banister timely filed a notice of appeal from the district court's denial of his motion.

## ANALYSIS

On appeal, Banister contends that the district court erred in denying him relief under *Ortiz*. He argues that his trial attorney should have obtained a written waiver of his right to appeal and consulted with him regarding a possible appeal following the sentencing hearing. In response, the State argues that the district court appropriately considered the evidence presented at the motion hearing and found the testimony of Banister's trial attorney to be credible.

We review a district court's decision on whether an exception under *Ortiz*, 230 Kan. 733, applies under a dual standard. First, we review the facts underlying the district court's ruling for substantial competent evidence. *State v. Smith*, 303 Kan. 673, 677, 366 P.3d 226 (2016). "Substantial competent evidence is legal and relevant evidence a reasonable person could accept to support a conclusion. This court normally gives great deference to the factual findings of the district court. The appellate court does not reweigh evidence, assess the credibility of witnesses, or resolve conflicts in evidence." *State v. Talkington*, 301 Kan. 453, Syl. ¶ 3, 345 P.3d 258 (2015). Second, we review the ultimate legal conclusion reached by the district court on those facts under a de novo standard. *Smith*, 303 Kan. at 677.

A defendant's right to appeal is purely statutory. Neither the United States Constitution nor the Kansas Constitution guarantee a right to an appeal. See *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016). Under K.S.A. 2020 Supp. 22-3608(c), a defendant has 14 days in which to file a notice of appeal and appeals filed past the statutory deadline generally result in dismissal for lack of jurisdiction. See *Albright v. State*, 292 Kan. 193, 197, 251 P.3d 52 (2011). But in *Ortiz*, the Kansas Supreme Court recognized several exceptions to the timeliness requirement.

In *Ortiz*, our Supreme Court recognized three specific exceptions that justify the filing of a notice of appeal out of time: (1) the defendant was not informed of his or her right to appeal; (2) the defendant was not furnished an attorney to pursue the appeal; or (3) the defendant was furnished an attorney who failed to perfect the appeal. *State v. Patton*, 287 Kan. 200, 206, 195 P.3d 753 (2008) (citing *Ortiz*, 230 Kan. at 735-36). Yet, these exceptions are "narrowly defined" and are reserved for "truly exceptional circumstances." *Patton*, 287 Kan. at 217. Here, Banister claims the first and third exceptions excuse his untimely appeal.

First, Banister argues that the district court did not properly inform him of his right to appeal. He suggests that the district court should have told him that he "could appeal without paying the costs of the appeal nor did it inform [him] that he would be provided a free transcript for purposes of the appeal." He also suggests that the district court should have told him that his trial attorney was responsible for filing a timely notice of appeal or should have explained how to invoke his right to have appellate counsel appointed to represent him.

To the extent resolution of this issue requires interpretation of a statute, this panel's review is unlimited. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). K.S.A. 2020 Supp. 22-3424(f) requires that the district court "shall advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to appeal in forma pauperis." Under K.S.A. 22-4505(a):

"When a defendant has been convicted in the district court of any felony, the court shall inform the defendant of such defendant's right to appeal the conviction to the appellate court having jurisdiction and that if the defendant is financially unable to pay the costs of such appeal such defendant may request the court to appoint an attorney to represent the defendant on appeal and to direct that the defendant be supplied with a transcript of the trial record."

In this case, the transcript of the sentencing hearing confirms that the district court informed Banister: "You may appeal the verdict, sentencing, any and all rulings of the law that you believe are contrary to law. And you have fourteen days from today in which to do that and a free attorney to help you with that."

In *Patton*, 287 Kan. at 219, our Supreme Court held: "K.S.A. 22-4505 requires the district judge to inform an indigent felony defendant of the 'right to appeal . . . [a] conviction' and the right to have an attorney appointed and a transcript of the trial record produced for that purpose." While the statute requires a defendant be told of the right to

appeal and the right to have an attorney appointed to represent them on appeal, there is no requirement that the district court inform the defendant that it must produce a transcript to accomplish the appeal.

In *Patton*, our Supreme Court clarified the district judge must inform a defendant at sentencing that (1) a right to appeal exists; (2) the time in which to bring the appeal; and (3) "if the defendant is indigent, an attorney will be appointed for the purpose of taking any desired appeal." 287 Kan. at 220. Furthermore, it is the defendant's evidentiary burden to show "that the district judge failed to communicate one or more of these three pieces of information at sentencing" and "demonstrate deficiency from the transcript of the sentencing hearing." 287 Kan. at 220.

Here, we find that the district court complied with the statutory appeal notice requirements. The district court informed Banister (1) of his right to appeal; (2) the time in which he must bring his appeal; and (3) that he would be provided an attorney to do so if he was indigent. We also find that the district court's factual finding regarding the first *Ortiz* exception is supported by substantial competent evidence found in the sentencing transcript. In addition, we find that the district court's legal conclusions regarding the first *Ortiz* exception were proper based on these factual findings.

Second, Banister argues that the third *Ortiz* exception justified his belated filing of his notice of appeal. The third exception applies where a defendant is represented by counsel, but that attorney failed to timely perfect an appeal. See *State v. Shelly*, 303 Kan. 1027, 1051, 371 P.3d 820 (2016). "Evaluation of the third exception allowing a late direct appeal under [*Ortiz*] requires consideration of whether the criminal defendant received effective assistance of counsel under *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)." *Shelly*, 303 Kan. 1027, Syl. ¶ 1.

As the United States Supreme Court explained in *Flores-Ortega*, 528 U.S. at 478, when a defendant is in the gray area where he or she has neither instructed counsel to file an appeal nor asked that an appeal not be taken, the question of counsel's potentially deficient performance is "best answered" by first asking "whether counsel in fact consulted with the defendant about an appeal." If counsel consulted with the defendant, "the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." 528 U.S. at 478. Only if there is no consultation does the analysis then move to the determination of "whether counsel's failure to consult with the defendant itself constitutes deficient performance." 528 U.S. at 478.

In *Flores-Ortega*, the United States Supreme Court stated that the "better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal." 528 U.S. at 479. However, the Court refused to establish a bright-line rule that every case in which counsel failed to "consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient." 528 U.S. at 479-80. The Court gave examples of situations in which a consolation might not be necessary, including the following example: "[S]uppose a sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then reasonably decide that he need not repeat that information." 528 U.S. at 479-80. The Court elaborated that "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." 528 U.S. at 479.

Despite Banister's argument to the contrary, our Supreme Court has held on several occasions that an attorney's failure to abide by K.A.R. 105-3-9—which applies to attorneys appointed to represent defendants under the Indigent Defense Services Act—is not determinative of counsel's performance. See, e.g., *State v. Northern*, 304 Kan. 860,

865, 375 P.3d 363 (2016); *State v. Phinney*, 280 Kan. 394, 405, 122 P.3d 356 (2005); *State v. Willingham*, 266 Kan. 98, 100, 967 P.2d 1079 (1998). Of course, as an intermediate appellate court, we are duty-bound to follow the precedent established by our Supreme Court precedent unless there is some indication that it is departing from its previous position. Regarding this issue, we see no indication that the Kansas Supreme Court is shifting its stance on K.A.R. 105-3-9. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017).

Here, the district court heard the evidence, evaluated the credibility of the witnesses, and determined that Banister did not ask his attorney for an appeal. This factual finding is supported by substantial competent evidence in the record. In fact, Banister's trial attorney testified that his client never requested him to file a notice of appeal. As the parties are aware, it is not our role to assess the credibility of witnesses, to reweigh the evidence presented at the evidentiary hearing, or to engage in independent factfinding. See *State v. Rizal*, 310 Kan. 199, 204, 445 P.3d 734 (2019). Consequently, we find that the district court's determination that the third *Ortiz* exception is not applicable to this case was supported by substantial evidence and was legally appropriate.

Affirmed.

## Appendix C

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CLERK OF THE SUMNER COUNTY DISTRICT COURT  
CASE NUMBER: 2019-CR-0000230



**Court:** Sumner County District Court  
**Case Number:** 2019-CR-0000230  
**Case Title:** State of Kansas vs. Monty J Banister  
**Type:** Journal entry of judgement regarding movant's notice of appeal and request

SO ORDERED.

/s/ Honorable William R. Mott, District Court Judge

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119

LARRY MARCZYNISKI #25506  
SUMNER COUNTY ATTORNEY  
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IN THE DISTRICT COURT OF SUMNER COUNTY, KANSAS  
THIRTIETH JUDICIAL DISTRICT

STATE OF KANSAS

PLAINTIFF

VS

CASE NO.: 19 CR 230

MONTY J. BANISTER

DEFENDANT

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**JOURNAL ENTRY OF JUDGMENT REGARDING MOVANT'S NOTICE OF APPEAL  
AND REQUEST FOR APPELATE COUNSEL**

NOW, on the 22<sup>nd</sup> and 29TH days of JUNE, 2021, the above-entitled case comes before the Court on the Defendant's Notice of Appeal and Request for Appellate Counsel. The State of Kansas appears by and through the Sumner County Attorney, Larry L. Marczynski II. Movant Monty Banister appears in person via Zoom from the El Dorado Correctional Facility, and by and through his counsel, **ELAINE M. ESPARZA**, appearing via Zoom from her office.

WHEREUPON, the Defendant prays the court grant his motion to file a Notice of Appeal. The State of Kansas objects on the grounds that movants request is not timely pursuant to KSA 22-3608. On June 22<sup>nd</sup>, 2021, the parties appear via Zoom for the presentation of evidence. The Movant, through counsel, testifies on his own behalf. The State of Kansas presents the testimony of Mr. Banister's appointed trial counsel, Matthew Metcalf. The Court determines that a transcript of the sentencing hearing, conducted on April 6<sup>th</sup>, 2021, is necessary to make a determination on the merits of the Movant's motion, and so orders the preparation of such transcript.

On June 29<sup>th</sup>, 2021, after preparation of and time for the parties to obtain and review the transcript of the sentencing hearing, the parties reconvene for closing arguments and the Court's ruling on the matter. The Court determines that the Movant's request is dictated by the factors set forth in *State v. Ortiz*, 230 Kan. 733 (1982). Specifically, an untimely appeal may be allowed when:

170

(1) the defendant was not informed of his or her right to appeal; (2) the defendant was not furnished an attorney to pursue the appeal; or (3), the Defendant was furnished an attorney who failed to perfect the appeal. *State v. Smith*, 482 P.3d 586 (Kan. 2021)(citing *Ortiz*).

As such, the Court makes the following findings: regarding the first *Ortiz* factor, the Court finds, subsequent to review the relevant transcript, that the Movant was properly and adequately advised of his right to appeal, and of the statutory timeframe set forth to perfect such appeal; regarding the second *Ortiz* factor, the Court determines that trial counsel Matt Metcalf had been properly appointed for all aspects of trial level representation, including perfecting a notice of appeal, should he have been directed to do so by Mr. Banister; and finally, the Court found the testimony of Matthew Metcalf to be relevant and credible, and that Mr. Banister had not made a timely request to his trial counsel to perfect a notice of appeal.

**THE COURT**, after reviewing the file, and being fully advised in the premises by counsel, the Court finds that defendant's motion shall be **denied**, as defendant has not met factors as set forth in *State v. Ortiz*, 230 Kan. 733 (1982), and is therefore out of time to file his appeal. The Court further advises the Movant of his right to appeal this ruling of the court.

**IT IS SO ORDERED**, effective as of the date and time of the electronic file stamp.

/s/ Larry Marczynski \_\_\_\_\_  
LARRY MARCZYNISKI #25506  
ATTORNEY FOR PLAINTIFF

/s/ Elaine M. Esparza \_\_\_\_\_  
ELAINE M. ESPARZA #8823  
ATTORNEY FOR DEFENDANT

71

## Appendix D

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CLERK OF THE SUMNER COUNTY DISTRICT COURT  
CASE NUMBER: 2019-CR-0000230

IN THE THIRTIETH JUDICIAL DISTRICT  
DISTRICT COURT SUMNER COUNTY KANSAS

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STATE OF KANSAS

Plaintiff

-v-

Case 2019 CR 230

MONTY BANISTER

Defendant

---

TRANSCRIPT OF ZOOM HEARING

before

THE HONORABLE WILLIAM R. MOTT

DISTRICT COURT JUDGE

---

held on

JUNE 21ST, 2021

APPEARANCES:

For the Plaintiff: MR. LARRY MARCZYNISKI

For the Defendant: MS. ELAINE ESPARZA

1 call Mr. Metcalf and get him on, okay? As a  
2 matter of fact, you might tee him up and tell  
3 him he'll be on in a few minutes, while we're  
4 taking Mr. Banister's testimony.

5 MR. MARCZYNSKI: Okay.

6 THE COURT: All right, Ms. Esparza, any  
7 opening statement?

8 MS. ESPARZA: No, Judge. I believe that  
9 we all understand the requirements of *Ortiz*,  
10 *State v. Ortiz*. The Judge needs to tell the  
11 Defendant of his rights to appeal. If that's  
12 overlooked, then the Defendant has a right to  
13 competent counsel to file the appeal. If he  
14 gives notice, and there's no appeal filed,  
15 that's, I think, a *per se* violation of the duty  
16 of the attorney and shows that the Defendant  
17 did not have competent counsel.

18 And we're ready to proceed.

19 THE COURT: All right. You may call your  
20 first witness.

21 MS. ESPARZA: The defense calls Monty  
22 Banister.

23 THE COURT: All right, Mr. Banister.

24 MONTY BANISTER

25 having been first duly sworn, testifies as follows:

1                   THE COURT: Can you say that again? I  
2                   didn't hear you.

3                   THE DEFENDANT: Yes, I do.

4                   THE COURT: Okay. I heard. All right,  
5                   Ms. Esparza, you may inquire.

6                   DIRECT EXAMINATION

7                   BY MS. ESPARZA:

8                   Q     All right, Mr. Banister, we spoke about  
9     this earlier. This is being recorded. You need to  
10    speak out loud and with enough volume that everybody  
11    can hear you.

12                  You understand that, sir?

13                  A     Yes, ma'am.

14                  Q     All right. Mr. Banister, are you the  
15    Defendant in the Sumner County case 2019-CR-230?

16                  A     Yes, ma'am.

17                  Q     And we are here because you filed a Notice  
18    to Appeal Out Of Time, appeal out of time. Do you  
19    recall the date of your sentencing in this case?

20                  A     I do. I believe it was April 6th, I  
21    think.

22                  Q     Okay. And, at that time, do you recall  
23    being advised by the Judge of your right to appeal?

24                  A     I do not.

25                  Q     So you don't recall the Judge telling you

1 about that?

2 A No, I do not.

3 Q Did you ever discuss with Mr -- well, your  
4 defense counsel was Matt Metcalf; is that correct?

5 A Yes, ma'am.

6 Q And did you ever discuss an appeal with  
7 Mr. Metcalf?

8 A Yes, ma'am.

9 Q And when did you do that?

10 A In the midst of trial and after trial.

11 Q So during trial and after trial, you asked  
12 Mr. Metcalf to file a notice of appeal for you?

13 A Yes. He notified me he was doing it on  
14 his behalf, yes.

15 Q Well, he wouldn't be filing an appeal on  
16 his behalf. He would be filing on appeal on your  
17 behalf.

18 A Right.

19 Q When did he tell you that he was filing an  
20 appeal?

21 A After trial.

22 Q Was that immediately after trial?

23 A Yes.

24 Q Prior to sentencing?

25 A Prior to sentencing.

1           Q     Did you contact Mr. Metcalf either -- in  
2     any way, phone, e-mail or letter, inquiring about  
3     your right to appeal?

4           A     I believe I e-mailed him, and I sent him a  
5     letter.

6           Q     And in the letter and the e-mail, did you  
7     specifically request him to file a Notice of Appeal?

8           A     No.

9           Q     Okay. So what was the contact, content  
10    and purpose of those letters and e-mail?

11          A     I was asking about my jail time credit and  
12    asking about what's going on, if he did file and  
13    what's going to happen? What I'm supposed to expect  
14    from all this?

15          Q     And do you remember when you sent the  
16    e-mail and/or letter?

17          A     I can't, no. I can't recall that. It was  
18    in the midst of sentencing and trial, around that  
19    era. It was after trial and before I came to  
20    prison. I came May 26th, so... and it was before I  
21    filed on my behalf of the intention to appeal,  
22    Notice of Appeal.

23          Q     At your sentencing, did you and  
24    Mr. Metcalf discuss your right to appeal?

25          A     No.

1           Q     Were you aware of the time limitation on  
2     filing an appeal?

3           A     No.

4           Q     At some point, did you become aware of the  
5     time limitation on filing an appeal?

6           A     Today.

7           Q     And did you ever receive any response from  
8     Mr. Metcalf regarding your letter or your e-mail?

9           A     No.

10           MS. ESPARZA: No other questions, Judge.

11           THE COURT: Any cross examination,  
12     Mr. Marczynski?

13           MS. ESPARZA: Oh, he's muted.

14           You're muted, Mr. Marczynski.

15           MR. MARCZYNSKI: Sorry for that,  
16     Mr. Banister.

17     CROSS EXAMINATION

18     BY MR. MARCZYNSKI:

19           Q     Were you present at the time of your  
20     sentencing hearing?

21           A     Yes, sir.

22           Q     And I believe that you advised the Judge  
23     today that you thought that was on or around April  
24     the 12th or April the 6th; is that right?

25           A     Yes, sir.

1           Q     And let's talk about that sentencing a  
2     little bit. Do you recollect, what was the overall  
3     sentence from that hearing?

4           A     I believe that was imprisonment.

5           Q     For how long?

6           A     It would have been fifty-one months, if  
7     you count the six months consecutive. It's  
8     forty-five, if you just count prison.

9           Q     Was there any --

10          A     And ran concurrent to the 17 CR 326.

11          Q     So you would remember it being run  
12     concurrent to your prior case?

13          A     Yes.

14          Q     Do you remember any other special  
15     conditions of that sentencing? Was there any  
16     restitution ordered?

17          A     Yes, I believe there was.

18          Q     Do you remember how much restitution there  
19     was?

20          A     Not top of my head, no.

21          Q     Do you remember who that restitution was  
22     ordered to?

23          A     I believe so. Yes, sir.

24          Q     Who was that?

25          A     Daryl Leverenz.

1           Q     So you advised Ms. Esparza in your  
2     testimony that you sent Mr. Metcalf a letter; is  
3     that correct?

4           A     Yes, sir.

5           Q     But am I to understand in your testimony  
6     that that letter was sent sometime prior to the  
7     sentencing hearing, sometime after the trial, but  
8     prior to the sentencing hearing?

9           A     It was either after sentencing or --  
10     'cause I was wondering what was going to happen  
11     next. Yeah, it was prior to that, me filing the  
12     intention of appeal on my behalf and after trial.

13           Q     After trial or after sentencing? Two  
14     different occasions.

15           A     Yeah. I can't -- I said it was after  
16     trial but before I sent the Notice to Appeal by  
17     myself, because I didn't get -- I wasn't hearing  
18     back from him.

19           Q     Did you receive a copy of your journal  
20     entry in regards to this case?

21           A     No, I don't believe I did. I got the  
22     Judge's.

23           Q     What do you mean?

24           A     The -- I -- that's what else I put into  
25     the letter to Metcalf, too. I was asking where my

1 journal entry was at, so I could see what was going  
2 on.

3 Q And did you receive that?

4 A No, I did not.

5 Q And when did you send the letter to  
6 Mr. Metcalf asking for a copy of your journal entry?

7 A After trial and before I sent the Notice  
8 of Appeal on my behalf.

9 Q So you don't really know? Sometime in a  
10 three-month period of time, you sent a letter?

11 A Yeah, sometime in a one month after --  
12 yeah.

13 Q Now, you acknowledge that your trial  
14 was --

15 A April. I think it would have been in  
16 April, maybe, or late March.

17 Q Now, was this letter the same letter  
18 inquiring, or was this a different letter?

19 A It was the same letter inquiring.

20 Q So in the same letter you were asking  
21 about your appeal, you also asked for a copy of your  
22 journal entry?

23 A Yes, sir.

24 Q And you think that you may have sent that  
25 sometime in April?

1           A     Early April or late March.

2           Q     Which would have been prior to the  
3 sentencing hearing, which occurred on April 6th?

4           A     (no audible response)

5           Q     Was that a, Yes?

6           A     Yes.

7           Q     You also advised that prior to trial or  
8 during the period of trial that you and Matt spoke  
9 in person about an appeal; is that correct?

10          A     Yes, sir.

11          Q     And what did Mr. Metcalf advise you about  
12 that appeal?

13          A     He told me I was going to get it granted,  
14 because he asked for a mistrial. It's preserved on  
15 record, and that's what our whole defense was based  
16 upon, was the appeal that we were going...

17          Q     Hum. Did you file this Notice of Appeal  
18 on your own behalf; is that correct?

19          A     Yes.

20          Q     In that appeal, did you put any issues  
21 that you had planned to appeal to the Court of  
22 Appeals?

23          A     No, I did not. I didn't know if I needed  
24 to or not.

25          Q     So you advised that you and Mr. Metcalf

1 had spoken specifically about an appeal, potentially  
2 in regards to a mistrial objection, but you didn't  
3 put that in your Motion for Appeal; is that correct?

4 A That's correct.

5 Q And it's your testimony today that at no  
6 time after sentencing did Mr. Metcalf discuss with  
7 you your right to appeal?

8 A No.

9 Q And your testimony today is that you did  
10 not hear Judge Mott advise you of your right to  
11 appeal and the fact that you had fourteen days to do  
12 so, at the time of your sentence hearing?

13 A I did not hear -- I do not recollect any  
14 of that information, no.

15 MR. MARCZYNSKI: No further questions Your  
16 Honor?

17 MS. ESPARZA: Okay, Judge. You're muted.

18 THE COURT: Any redirect, Ms. Esparza?

19 MS. ESPARZA: I don't believe so, Judge.

20 THE COURT: Okay. Very good.

21 Any further evidence, Ms. Esparza?

22 MS. ESPARZA: No, Judge.

23 THE COURT: All right. Mr. Marczynski, do  
24 you wish to present any evidence?

25 MR. MARCZYNSKI: I do, Your Honor. The

1           State of Kansas would call Mr. Matthew Metcalf,  
2           who appears to be waiting in a waiting room.

3           THE COURT: Well, I think he's there.

4           He's just muted. There he is. All right,  
5           Mr. Metcalf, will you raise your right hand.

6                            MATTHEW METCALF

7           having been first duly sworn, testifies as follows:

8           THE COURT: Mr. Marczynski, you may  
9           inquire.

10           MR. MARCZYNSKI: Thank you, sir.

11           DIRECT EXAMINATION

12           BY MR. MARCZYNSKI:

13           Q        Mr. Metcalf, can you please state your  
14           name for the record.

15           A        Matthew Metcalf.

16           Q        What's your current occupation, sir?

17           A        I'm an attorney here in Wellington,  
18           Kansas.

19           Q        In your job as an attorney, did you have  
20           an opportunity to represent a Mr. Monty Banister?

21           A        Yes.

22           Q        Can you advise the Court what stages of  
23           litigation you represented Mr. Banister on?

24           A        Throughout the course of trial and  
25           sentencing.

1           Q     Were you Mr. Banister's appointed counsel  
2     at the time of sentencing?

3           A     Yes, sir.

4           Q     Were you present with Mr. Banister at the  
5     time of sentencing?

6           A     Yes, sir.

7           Q     First of all, Mr. Metcalf, do you have any  
8     independent recollection, one way or the other, if  
9     Judge Mott advised Mr. Banister of his right to  
10    appeal at that sentencing hearing?

11          A     I don't recall specifically at that  
12    hearing. I would say that I practice in front of  
13    Judge Mott frequently, and it is his practice to  
14    advise the Defendant of his right to appeal and the  
15    time frame. I don't recall not hearing him do that.  
16    So I guess I would say it would be unusual, or I  
17    think it would be memorable had he not.

18          Q     Prior to the time of the sentencing  
19    hearing, had you and Mr. Banister had any  
20    discussions about his right to appeal or potential  
21    appeal strategies?

22          A     Yes, we did.

23          Q     At the time of the sentencing hearing, did  
24    you and Mr. Banister have any discussions about his  
25    right to appeal or potential appeal strategies?

1           A     I -- I know that we had a conversation  
2     regarding what the sentence was and how sentencing  
3     went. I don't recall if on that particular occasion  
4     we talked about the right to appeal at that point.  
5     I know we did. I know that we never had a  
6     conversation about appeal strategy, not then or  
7     prior.

8           Q     So, in candor, you can't recollect if you  
9     had a conversation with Mr. Banister on the day of  
10    sentencing about his right to appeal?

11          A     I don't know that I specifically told him  
12    that he had a right to appeal the sentence or trial  
13    that day when I talked to him. I remember our  
14    conversation. I spent a lot of time with  
15    Mr. Banister. And he received a pretty substantial  
16    sentence. And I was, you know, trying to be  
17    empathetic and compassionate in support of  
18    Mr. Banister. I remember that. I don't remember  
19    specifically a conversation regarding right to  
20    appeal. I do know that there wasn't a request for  
21    me to file an appeal at that point.

22          Q     Can you recollect, Mr. Metcalf, in your  
23    conversations prior to the sentencing hearing day  
24    that we were just discussing, you did acknowledge  
25    that you had some conversations with Mr. Banister

1      about appeal rights. Can you recollect, as part of  
2      any of those conversations, had you advised him that  
3      that there are time limitations, a time deadline for  
4      filing those notices?

5            A      I don't recall specifically, but it would  
6      be shocking to me if I hadn't told him that.

7            Q      Now, your testimony today is that on  
8      April 6th, when this sentencing hearing occurred,  
9      that the -- well, let me ask a question. On  
10     April 6th, when this sentencing hearing occurred,  
11     did Mr. Banister advise or request that you file a  
12     Notice of Appeal or file an appeal in this matter?

13           A      No.

14           Q      Any time after April 6th and prior to  
15     April 20th, did you receive any correspondence from  
16     Mr. Banister?

17           A      I -- no. I did receive a letter that was  
18     postmarked April 30th from Mr. Banister. And I  
19     don't know what -- when he wrote that letter, of  
20     course. There's not a date on the letter. But the  
21     postmark on the envelope is April 30th.

22           Q      In that letter on April 30th, does  
23     Mr. Banister ask you or direct you to file an appeal  
24     or Notice of Appeal on his behalf?

25           A      Not that I see. I'm -- let me review the

1 letter, if you don't mind. I just want to make sure  
2 that I've looked at it again.

3 Q If that would help to refresh your  
4 recollection, sir.

5 A No.

6 Q Then again, just to be clear, you received  
7 no other correspondence from Mr. Banister after the  
8 time of sentencing and prior to that April 13th  
9 date?

10 A Not to my knowledge. There is an e-mail  
11 system that he can send correspondence. And if  
12 there was something there that I missed, I didn't --  
13 again, I wasn't sure that -- what was going on  
14 today. So I did not go back through and review all  
15 of that. But I don't -- I never saw anything  
16 requesting an appeal, period, other than, of course,  
17 the correspondence that came to the Court.

18 MR. MARCZYNSKI: I don't think I have any  
19 further questions at this time, sir.

20 THE COURT: All right. Ms. Esparza, do  
21 you have any questions for Mr. Metcalf?

22 MS. ESPARZA: Yes, I do, Judge.

23 CROSS EXAMINATION

24 BY MS. ESPARZA:

25 Q Mr. Metcalf, did you ever provide written

1 Notice of Appeal to Mr. Banister of his rights to  
2 appeal and time limitations?

3 A I don't recall anything specifically, and  
4 he did not sign a written waiver.

5 Q And by that you mean a Written Waiver of  
6 Appeal?

7 A Correct.

8 Q At any time during the trial or after  
9 sentencing, do you recall Mr. Banister telling you  
10 that he did want to perfect an appeal?

11 A No.

12 Q Had you received other e-mails from Mr.  
13 Banister while he was incarcerated?

14 A Yes.

15 Q It's your testimony that you did not, have  
16 not reviewed those e-mails, to see if you received  
17 one after sentencing from Mr. Banister; correct?

18 A Correct.

19 MS. ESPARZA: All right. I don't believe  
20 I have any other questions, Judge.

21 THE COURT: Any redirect, Mr. Marczynski?

22 MR. MARCZYNSKI: Very briefly, Your Honor,  
23 if I might. Thank you.

24 REDIRECT EXAMINATION

25

1 BY MR. MARCZYNSKI:

2 Q Mr. Metcalf, to your knowledge, is there  
3 any statutory or case law authority requiring you to  
4 prepare a written Waiver of Appeal?

5 A Not that I'm aware of.

6 Q Are you familiar or can you advise the  
7 Court, did you ever send Mr. Banister a copy of his  
8 Journal Entry of Judgment regarding this case?

9 A Yes, I did. I was looking at jail time  
10 credit, and Mr. Banister had sent me a letter, and  
11 he was very concerned about that credit. So I had  
12 been in contact with KDOC, the County Attorney's  
13 Office, trying to make sure that I got all of that  
14 jail credit done. It appears that when we sent the  
15 letter out to Mr. Banister, we sent it to the Sumner  
16 County Jail. Then it was returned to us, and I  
17 believe he is correct, and that would be why he did  
18 not get it. So when we sent that final letter out,  
19 he was being moved, and it came back to us.

20 Q Now, you indicate that Mr. Banister was  
21 concerned about a jail credit issue; is that right?

22 A Correct. He wanted -- he had a pretty  
23 substantial sentence, and he wanted to make sure  
24 that he was credited with all the time that was  
25 appropriate.

1           Q     How did he advise you of his concerns  
2     regarding that journal entry or that jail credit  
3     issue?

4           A     Through letter on April -- that was  
5     postmarked April 30th.

6           Q     Is that the letter that we've been  
7     discussing prior in your testimony?

8           A     That's the letter that -- that's the  
9     letter that I -- that I got from Mr. Banister, I've  
10    got in front of me.

11          Q     Okay.

12          A     So that's the letter -- that's the letter  
13    I was talking about.

14          Q     And, again, that letter you said was  
15    received on what day?

16          A     I don't know when I received it. I just  
17    know it was postmarked April 30th. It was in town.  
18    So probably the first part of May.

19          Q     So you received it sometime shortly after  
20    April 30th?

21          A     Yeah. I don't know what date, but it  
22    would have been April -- after April 30th, because  
23    that was the postmark day.

24          Q     Would you agree that that would be  
25    approximately, then, twenty-four days after the time

1 of the sentencing here that you received that letter  
2 or sometime after that?

3 A Without looking, I don't know, but that  
4 sounds about right.

5 MR. MARCZYNSKI: No further questions,  
6 Your Honor. Thank you.

7 THE COURT: Any further cross,  
8 Ms. Esparza?

9 MS. ESPARZA: No, Your Honor.  
10 THE COURT: All right. Any further  
11 evidence, Mr. Marczynski, other than perhaps  
12 judicial notice of the actual hearing  
13 transcript or read back?

14 MR. MARCZYNSKI: No, sir.

15 THE COURT: I do have my notes from it.

16 And that doesn't matter. But I did -- I  
17 specifically drafted a Notice of Appeal  
18 particularly for sentencing after jury trial.

19 And usually I say, You may appeal the verdict,  
20 the sentencing and any and all rulings of this  
21 Court, if you believe they are imposed contrary  
22 to law, and you have fourteen days from today  
23 in which to do that and a free attorney to help  
24 you do that. So I guess we need to -- I'm  
25 going to see if we can get ahold of