

19-5513  
No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

MAY 12 2019

OFFICE OF THE CLERK

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

CHARLES HEAD — PETITIONER  
(Your Name)

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for the Ninth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CHARLES HEAD  
(Your Name) PRISONER #45494-112

F.C.I. CUMBERLAND, PO BOX 1000  
(Address)

Cumberland, Md. 21501-1000  
(City, State, Zip Code)

(301) 317-3100  
(Phone Number)

ORIGINAL

### QUESTION(S) PRESENTED

1. What remedy is available for petitioner when court appointed attorney failed to file timely petition for writ of certiorari in defiance of the petitioners written request that the same be done?
2. Does 18 U.S.C. 3006A grant petitioner a statutory right to the assistance of a lawyer in drafting his petition for certiorari?
3. Does Federal Rule of Criminal Procedure 44(a) give petitioner a statutory right to the assistance of counsel in drafting his petition for certiorari?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

- Wilkins v. United States, 441 US 468, 60 L Ed 2d 365, 99 S. Ct. 1829 (1979) 7, 9, 11
- Doherty v. United States, 404 US 28, 30 L Ed 2d 149, 92 S. Ct. 175 (1971) 8
- Schreiner v. United States, 404 US 67, 30 L. Ed 2d 222, 92 S. Ct 326 (1971) 8, 10

### STATUTES AND RULES

- 18 USC 3006 A 6, 8, 9, 10
- Federal Rules of Criminal Procedure 44 (a) 6, 10
- Ninth Circuit Rule of Appeal 4 (c) 11

### OTHER

- Judicial Conference Committee to Implement the Criminal Justice Act, 36 FRD 285, 291 (1965) 10
- House of Representatives Report Number 1709, 88th Congress., 2nd Session, 7 (1964) 10
- Bosky, The Right to Counsel in Appellate Proceedings, 45 Minn. Law Review 783 (1961) 11

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 6, 2019.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

18 USC 3006A

Federal Rules of Criminal Procedure 44(a)

## STATEMENT OF THE CASE

After conviction in the Eastern District Court of California, petitioner's court-appointed attorney filed an appeal in the Ninth Circuit Court. On appeal the convictions were affirmed and en banc rehearing denied. Petitioner then instructed counsel to petition the Supreme Court for writ of certiorari. Appellate counsel agreed to file the petition but then failed to do so after refusing to communicate with petitioner until well after the deadline to request review from the Supreme Court had passed.

Petitioner filed a pro se motion for appointment of counsel under the Criminal Justice Act in the United States Court of Appeals for the Ninth Circuit along with a motion that the court recall the mandate so that the court could vacate and reenter its judgment in order for petitioner to file a timely petition for certiorari with newly appointed counsel.

The Ninth Circuit Court denied petitioners motions citing *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (power to recall mandate "can be exercised only in extraordinary circumstances").

## REASONS FOR GRANTING THE PETITION

The petition should be granted because the Ninth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court, various other courts of appeals and the Criminal Justice Act.

Secondly, there are numerous instances throughout the United States whereas court-appointed counsel fails to file appeals and petitions for certiorari. Proof of this can be found in the district court records of failed habeas actions where pro se defendants are informed that they do not have a constitutional right to counsel at the Supreme Court review stage. There isn't a constitutional right in these circumstances but the Supreme Court has held in at least two precedent cases that defendants do have a statutory right to counsel for filing of a petition for certiorari under 18 USC 3006 and the Federal Rules of Criminal Procedure 44(a).

It is an extraordinary circumstance indeed where ineffective counsel abandons their clients and forfeits a statutory right that may actually be the client's last hope for relief.

In nearly identical circumstances to the instant case, the Supreme Court answered the question: "What remedy is available for petitioner when court-appointed attorney failed and refused to file timely petition for writ of certiorari in defiance of the petitioner's written request that the same be done?" *Wilkins v. United States*, 441 US 468, 60 L Ed 2d 365, 99 S Ct 1829 (1979).

As in the *Wilkins* case, petitioner's lawyer failed to file timely petition for writ of certiorari. Even worse, in the instant case, petitioner's counsel claimed that there was no remedy to correct his error. See Appendix B.

The *Wilkins* court stated that in circumstances as indicated above, the petitioner should present his dilemma to the Court of Appeals by way of a motion for appointment of counsel to assist him in seeking review in the Supreme Court. The Court expressed that the Court of Appeals "then could have vacated its judgment affirming the convictions and entered a new one, so that

this petitioner, with the assistance of counsel, could file a timely petition for certiorari."

The Supreme Court reached the same conclusion in two other cases under the same circumstances: *Doherty v. United States*, 404 US 28, 30 L Ed 2d 149, 92 S Ct 175 (1971); *Schreiner v. United States*, 404 US 67, 30 L. Ed 2d 222, 92 S Ct 326 (1971).

In the instant case, petitioner requested that his counsel, Barry Morris, file a petition for certiorari after his direct appeal to the Ninth Circuit Court resulted in affirmance and en banc rehearing was denied. Mr. Morris, who was appointed under the Criminal Justice Act, assured petitioner that the petition for certiorari would be handled in a timely manner as requested. Petitioner made numerous attempts to follow up with counsel regarding the status of the petition by way of various emails, letters and phone calls but counsel would not respond.

Finally on April 10, 2018 after the deadline to file the petition for certiorari had passed, Mr. Morris sent petitioner an email (Appendix B) explaining that the petition "got lost in the shuffle" and "was not completed on time." When asked if there was any way to file the petition after Morris missed the deadline through no fault of petitioner, Morris replied "Unfortunately, there is no way to file..." (Appendix B).

Following the suggestion of the Wilkins Court, petitioner filed a motion in the Ninth Circuit Court of Appeals for appointment of counsel under 18 USC 3006A along with a request that the court recall the mandate and reenter its judgment affirming his conviction so that timely petition for certiorari could be made.

On May 6, 2019 the Ninth Circuit denied appellant's motion and refused further filings to be made in the closed case. See Appendix A.

Under 18 USC 3006 A, petitioner has a

statutory right to the assistance of a lawyer in drafting his petition for certiorari. *Schreiner v. United States*, 404 US 67, 30 L Ed 2d 222, 92 S Ct 326 (1971). See also Judicial Conference Committee to Implement the Criminal Justice Act: "Counsel appointed on appeal should advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and to file such petition, if requested by the defendant." Report of the Committee to Implement the Criminal Justice Act, 36 FRD 285, 291 (1965).

This statutory right to the assistance of counsel is also expressed in Federal Rule of Criminal Procedure 44(a) and H.R. Rep. No. 1709, 88th Cong., 2d Sess., 7 (1964). "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." Federal Rules of Criminal Procedure 44(a).

According to the Doherty Court, the duty to process requests for counsel to assist

petitioner in cases such as this should lie with the courts of appeals. See also Bosky, The Right to Counsel in Appellate Proceedings, 45 Minn L Rev 783 (1961).

Though petitioner asserts that he requested his counsel file petition for certiorari and has provided email evidence of the same, the record of the docket of the Ninth Circuit Court of Appeals also reflects the absence of a statement signed by counsel and defendant verifying that defendant does not desire to seek certiorari as required under Ninth Circuit Rule App. 4(c) if a defendant represented by court-appointed counsel does not wish his lawyer to petition for certiorari. The lack of this court required document confirms that petitioner did request his counsel to file petition for certiorari and counsel failed to do so in a timely manner.

Accordingly, petitioner respectfully requests that this court appoint him counsel, grant certiorari, and remedy his dilemma in the same manner as the Wilkins Court.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Date: June 7, 2019