No. ____

In the Supreme Court of the United States

CHARLES AHUMADA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN R. MORRISON
Counsel of Record
The Morrison Law Practice
1526 Robertson Ct.
Grand Forks, North Dakota 58201
617-749-7817
steven.r.morrison@gmail.com

Counsel for Petitioner

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QUESTION PRESENTED

1. It is settled that criminal defendants have the constitutional right to counsel on direct appeal as of right, up to the point at which an appellate court files an opinion and judgment. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600, 607 (1974). It is equally settled that they do not have that right for filing petitions of writ for certiorari to this Court. *Austin v. United States*, 513 U.S. 5, 8 (1994). There is an unsettled circuit split as to whether the right to counsel exists for petitions for panel rehearing and rehearing en banc in a Circuit Court, after an adverse opinion and judgment have been filed. Should the constitutional right to counsel exist for such petitions?

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court, North Dakota, No. 1:15-cr-00044-DLH, United States v. Charles Ahumada, Feb. 3, 2016;

Eighth Circuit Court of Appeals, No. 16-1391, United States v. Charles Ahumada, June 5, 2017;

U.S. District Court, North Dakota, No. 1:15-cr-00044-DLH, United States v. Charles Ahumada, Nov. 20, 2019;

Eighth Circuit Court of Appeals, No. 19-3632, Charles Ahumada v. United States, April 22, 2021

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PETITION FOR CERTIORARI

This case offers the Court an ideal vehicle for clarifying the constitutional right that a criminal defendant has, or does not have, to counsel in Circuit Courts for filing petitions for panel rehearing and rehearing en banc. This Court has clearly stated that that right exists on direct appeal up to the point the Circuit Court files it opinion and judgment. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600, 607 (1974). It has also stated that that right does not exist for the filing of petitions for writ of certiorari. *Austin v. United States*, 513 U.S. 5, 8 (1994). It has never, however, addressed whether that right extends to the filing in Circuit Courts of petitions for panel rehearing and rehearing en banc.

As a result, different Circuit Courts of Appeal have filled this gap with inconsistent case law. Now, therefore, criminal appellants may or may not enjoy the right to counsel at the aforementioned stage, depending upon the Circuit in which they find themselves.

The Court could grant this petition for writ of certioirari in order to resolve this circuit split.

OPINION BELOW

The Eighth Circuit's opinion (Pet.App.1) is available at --- F.3d ----, 2021 WL 1567152 (8th Cir. 2021).

JURISDICTION

The Eighth Circuit rendered its decision on April 22, 2021. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3006A is reproduced in the appendix.

STATEMENT OF THE CASE

On March 4, 2015, the petitioner, Charles Ahumada, was indicted on one count of conspiracy to possess with intent to distribute and distribute 1 kg or more of heroin, and one count of possession with intent to distribute 1 kg or more of heroin, both in violation of 21 U.S.C. § 841(a)(1). (DCD 2).

On March 16, 2015, Ahumada pleaded not guilty. (DCD 8).

Between May and October 2015, the court heard argument regarding Ahumada's motion to suppress 4.5 lbs of heroin discovered during a car search, which provided the basis for his prosecution. (DCD 36, 37, 50, 113). The court denied that motion. (DCD 52).

A jury trial was held on October 6-7, 2015. (DCD 69). The jury found Ahumada guilty on both counts. (DCD 67).

Ahumada was sentenced on February 3, 2016. (TR., Feb. 3, 2016). He recommended a 120-month sentence, (DCD 96), and the government recommended a 168-month sentence or an upward variance to 188 months, (DCD 103). The court imposed a sentence of 156 months. (DCD 106).

Ahumada timely filed a notice of appeal on February 4. (DCD 108).

On February 16, Ahumada's trial attorney, Kent Morrow, was appointed under the Criminal Justice Act to represent Ahumada on appeal. (Gen. Docket, Eighth Circuit Court of Appeals, *United States v. Charles Ahumada*, No. 16-1391).

On March 15, the Eighth Circuit issued a brief deficiency notice, informing Morrow of the following problems with his brief: the pagination should, but did not, begin at the jurisdictional statement; the statement of issues lacked the most apposite cases; the standard of review was missing; the argument was missing; the conclusion was missing; the certificate of compliance was incorrect; the brief format was incorrect because the point type size was too small; and the attorney filed scanned versions of brief, which were not acceptable. The addendum contained deficiencies as well. See id.

On March 16, the Eighth Circuit issued another brief deficiency notice, informing Morrow of the following problems: the table of contents incorrectly reflected updated pagination; the standard of review had to be in the argument section; the summary of argument was missing; and the brief format was incorrect because the point type size was still too small. See id.

On March 17, the Eighth Circuit issued a third brief deficiency notice, informing Morrow that the order of contents was incorrect. See id.

On March 21, an acceptable original brief was finally filed. See id. Ahumada made two arguments related to the motion to suppress, and one argument that there was insufficient evidence to find him guilty of possession. See id.

On June 5, 2017, the Eighth Circuit rejected Ahumada's appeal. (DCD 117). That Court notified Morrow in a standard letter dated the same day that there was a 14-day deadline for submission of petitions for rehearing. Morrow sent a copy of the decision and judgment to Ahumada with a cover letter dated June 5. However, this

letter was affixed with postage only on June 20. Furthermore, in the letter Morrow did not explain anything about petitions for rehearing in the Eighth Circuit. As for filing a petition for writ of certiorari in the United States Supreme Court, Morrow wrote, "You can file a Petition for Certiorari with the U.S. Supreme Court. Since I have never done one, you would need to contact the Clerk's Office in St. Louis, Missouri." (DCD 125-3).

On June 27, the Eighth Circuit issued its mandate in Ahumada's appeal. (DCD 125-4). On July 10, Ahumada filed a pro se motion for a 14-day extension of time to file a petition for rehearing. (Gen. Docket, Eighth Circuit Court of Appeals, *United States v. Charles Ahumada*, No. 16-1391; DCD 125-3). The Eighth Circuit extended the time to file to July 19. (DCD 125-5). It was only on July 25, however, that it received Ahumada's pro se petition for rehearing. (DCD 129-1). On August 15, that Court denied Ahumada's pro se petition as untimely. This Court issued its mandate on August 23, 2017. (DCD 125-6).

On September 7, 2018, Ahumada filed a pro se motion under 28 U.S.C. § 2255. Ahumada made a number of claims. Relevantly, Ahumada alleged that Morrow abandoned him without notice, in violation of the Fed. R. App. P., the Eighth Circuit's rules, the Supreme Court rules, and the rules of the Criminal Justice Act of 1964. (DCD 125). Ahumada wrote,

> Due to counsel's abandonment, counsel and the Circuit Clerk failed to provide requisite information to [Ahumada] on how to file post-appeal petitions for rehearing, rehearing en banc, and petition for writ of certiorari to the Supreme Court, as a result mandate was issued,

> recalled, and thereafter denied as untimely, proving prejudice to counsel's abandonment.

Id.

Ahumada also alleged that Morrow failed to communicate with him and failed to provide to him requested court files and documents. Id.[1] Ahumada wrote, "Numerous request[s] were made to counsel to provide case information, provide court document(s) and case file, petition for rehearing/rehearing en banc, and petition for writ of certiorari to the Supreme Court . . . But counsel failed to respond, [and] never withdrew from this case." Id.

On November 20, 2019, the district court filed its order denying Ahumada's § 2255 motion. As relevant to this petition, the court considered Ahumada's claim that Morrow abandoned him at the petition for rehearing stage. The court observed that in the Eighth Circuit, "there is neither a constitutional right nor statutory right to counsel in habeas proceedings." Therefore, Ahumada's claim of ineffective assistance of counsel at the petition for rehearing stage was not valid. (DCD 133)

For support, the district court cited to *Morris v. Dormire*, 217 F.3d 556, 558 (8th Cir. 2000) (denying attorney for a § 2254 habeas corpus petition); *United States v. Craycraft*, 167 F.3d 451, 455 (8th Cir. 1999) (denying attorney for a § 2255 motion); *Blair v. Armontrout*, 916 F.2d 1310, 1332 (8th Cir. 1990) (holding there is no right to effective counsel in a habeas action); *Boyd v. Groose*, 4 F.3d 669, 671 (8th Cir. 1993) (no right to counsel in state post-conviction proceedings); *Steele v. United States*, 518

[1] On a related note, undersigned counsel for Ahumada requested Morrow's case file in December 2019. Morrow responded that his office might have lost or misplaced the file. Confirming the nature of the communications between Ahumada and Morrow, therefore, may be impossible.

F.3d 986, 988 (8th Cir. 2008) (citing *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982)) (no right to counsel in petitions for certiorari to the United States Supreme Court); and *Simpson v. Norris*, 490 F.3d 1029, 1033 (8th Cir. 2007) (no right to counsel in state post-conviction proceedings). Id.

None of these cases that the district court cited addresses whether there is a right to effective counsel for rehearing petitions in the Eighth Circuit.

The court acknowledged that Morrow had been appointed to represent Ahumada under the Criminal Justice Act of 1964. The court further noted that "[i]t is undisputed the letter [in June 2017 that Morrow sent to Ahumada] was postmarked one day after the expiration of the 14-day period in which to file a petition for rehearing." Id.

The court then noted that "[t]he issue of whether failure to file or to communicate regarding the filing of a petition for rehearing constitutes ineffective assistance of counsel appears to be a matter of first impression in the Eighth Circuit." The court referred to *Steele v. United States*, 518 F.3d 986 (8th Cir. 2008), for the Eighth Circuit's holding that "a habeas petitioner did not have a constitutional right to counsel for the filing of a certiorari petition." Id. According to the district court, the Eighth Circuit in *Steele* found that neither the Eighth Circuit's Criminal Justice Act Plan nor Rule 44(a) of the Fed. R. Crim. P. were constitutional requirements; thus, alleged violations of them could not be the basis for an ineffectiveness claim. Id.

The district court did, however, observe that this conclusion is directly at odds with holdings in the 2d and 7th Circuits, which, according to the district court, held

that "criminal defendants *do* have a right to the continued representation of appointed counsel throughout the course of an appeal, including the filing of post-opinion pleadings." Id.[2]

In the end, the district court observed that "[t]he record clearly establishes that Ahumada's appellate counsel's performance did not adhere to the Eighth Circuit's CJA Plan. Appellate counsel's letter to Ahumada did not mention the process for filing a petition for rehearing." Id.

The district court denied Ahumada's § 2255 motion, however, because it found that the Eighth Circuit "does not consider its CJA Plan to create a constitutional right to counsel and, thus, a violation of the CJA Plan cannot be the basis for an ineffective assistance of counsel claim." Because Ahumada had "no constitutional right to counsel for post-opinion pleadings, he likewise ha[d] no claim for ineffective assistance of counsel." Id.

The district court denied Ahumada's motion, but issued a certificate of appealability, ordering:

> Because the issue appears to be a matter of first impression in the Eighth Circuit, the Court issues a certificate of appealability on the limited issue of whether a criminal defendant has a right to counsel for the filing to a petition for rehearing or a petition *en banc* because the dismissal of the motion is debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings.
>
> Id.

[2] For support, the district court referred to *Taylor v. United States*, 822 F.3d 84 (2d Cir. 2016), and *United States v. Howell*, 37 F.3d 1207 (7th Cir. 1994). (DCD 133).

Ahumada's appeal to the Eighth Circuit followed. Ahumada argued that he does have the constitutional right to counsel at the petition for rehearing stage in Circuit Court.

The Eighth Circuit rejected this claim. *Ahumada v. United States of America*, --- F.3d ----, 2021 WL 1567152 (8th Cir. 2021). That Court based its opinion on this Court's holding in *Austin v. United States of America*, 513 U.S. 5, 8 (1994), that there is no constitutional right to counsel for "discretionary appeals," and that petitions for panel rehearing and rehearing en banc are discretionary.

Yet there is a circuit split as to whether the constitutional right to counsel extends to petitions for rehearing and rehearing en banc. Ahumada set forth this circuit split in his briefing to the Eighth Circuit, but that Court didn't address it.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's opinion rested on one side of the circuit split noted above. This Court should grant certiorari to resolve that circuit split. It should find that criminal appellants have the constitutional right to counsel at the petition for rehearing and rehearing en banc stages. This would represent a natural expression of the constitutional right that criminal appellants have to counsel on direct appeal, which extends from 18 U.S.C. § 3006A, providing counsel for direct appeals and "ancillary matters appropriate to the proceedings."

I. The Court should grant review to resolve the circuit split noted above

A. There is a circuit split between Circuits that do and do not hold that appellants have the right to counsel at the petition for rehearing stage

It is settled that defendants have the constitutional right to counsel on direct appeal as of right, up to the point at which an appellate court files its opinion and judgment. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600, 607 (1974). It is equally settled that defendants do *not* have the right to counsel for the filing of petitions for writ of certiorari to the United States Supreme Court, whose consideration is discretionary. *Austin v. United States*, 513 U.S. 5, 8 (1994); *Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008); *but see Plan to Implement the Criminal Justice Act of 1964*, "Duty of Counsel as to Certiorari," at p. A-15, available at https://www.ca8.uscourts.gov/appeal-preparation-information ("The representation of counsel on appeal . . . shall extend to his advising the defendant of the right to file a petition for certiorari . . . and to his preparing and filing such a petition if the defendant so requests.").

There is a circuit split, however, as to whether the right to counsel exists as to petitions for panel rehearing and rehearing en banc in a Circuit, after an adverse opinion and judgment have been filed.

The 7th Circuit has held that the Criminal Justice Act and the Rules "make it clear that the defendant in a direct criminal appeal has the right to have the continued representation of appointed counsel throughout the course of the appeal, including the filing of post-opinion pleadings in the court of appeals and the filing of a petition for certiorari in the Supreme Court of the United States." *United States v.*

Howell, 37 F.3d 1207, 1209 (7th Cir. 1994). This right does not, of course, require counsel to file any frivolous pleading. *Id.* at 1209.

The 2d Circuit came to the same conclusion. In *Taylor v. United States*, 822 F.3d 84 (2d Cir. 2016), that Court considered a case similar to Ahumada's, in which the defendant filed a pro se § 2255 motion, alleging that "his counsel provided ineffective assistance of counsel by failing to timely notify [him] that his appeal had been decided, which had the effect of depriving [him] of an opportunity to petition for rehearing and rehearing *en banc*." The defendant "alleged that he first learned that his appeal had been decided . . . past the fourteen-day period during which a petition may be filed." The district court assumed that the defendant had a right to the effective assistance of counsel at this stage, but denied the motion because it found no prejudice. *Id.* at 87.[3]

On appeal, the 2d Circuit held that "the CJA affords financially eligible defendants the right of representation when petitioning for rehearing and rehearing *en banc*." *Id.* That Court came to this conclusion because the CJA provides for counsel "at every stage of the proceedings from [a defendant's] initial appearance before the United States magistrate judge or the [district] court through appeal, including ancillary matters appropriate to the proceedings." *Id.* at 88 (citing 18 U.S.C. § 3006A(c)). That Court concluded, in short, that the CJA entitles defendants "to representation when seeking rehearing and rehearing *en banc*." *Id.* at 89.

[3] *But see Pena v. United States*, 534 F.3d 92, 94-95 (2d Cir. 2008) (finding that the right to effective assistance of counsel did not extend beyond a "first-tier appeal" into filing a petition for writ of certiorari and other discretionary appeals).

The 4th Circuit considered a case in which a defendant's attorney refused to file a petition for rehearing in that Court because he did not believe it would be meritorious. *United States v. Masters*, 976 F.2d 728, *3 (4th Cir. 1992). According to the 4th Circuit, "[i]f his client wishes to petition for certiorari of a judgment affirming a criminal conviction, a court-appointed lawyer must represent him in filing the petition." *Id.*[4]

Other Circuits have come to a different conclusion than the 7th, 2d, and 4th Circuits.

The 3d Circuit has found that "counsel, having appropriately briefed and argued an appeal, is not under an obligation to file a petition for rehearing or rehearing en banc." *United States v. Coney*, 120 F.3d 26, 27 (3d Cir. 1997). That Court based its decision on Supreme Court precedent that defendants have the constitutional right to an appellate brief filed on their behalf by an attorney, but that "that right does not extend to forums for discretionary review." *Id.* at 28 (quoting *Austin v. United States*, 513 U.S. 5, 8 (1994)). The 3d Circuit then noted that en banc rehearing is discretionary. *Id.*

The 6th Circuit similarly found that while defendants are entitled to an attorney on their original appeal, they are not entitled to counsel for discretionary review applications, either petitions for writ of certiorari or petitions for en banc rehearings. *McNeal v. United States*, 54 F.3d 776, 1-2 (6th Cir. 1995). According to that Court,

[4] Perhaps contrary to *Masters*, the 4th Circuit later held that "a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction." *United States v. Taylor*, 414 F.3d 528, 536 (4th Cir. 2005).

"[T]here is no constitutional right of counsel, [thus] the client's constitutional rights cannot be violated by the allegedly defective performance of his lawyer." *Id.* at 2.[5]

The 5th Circuit held "that a criminal defendant has no constitutional right to counsel on matters related to filing a motion for rehearing following the disposition of his case on direct appeal." *Jackson v. Johnson*, 217 F.3d 360, 365 (5th Cir. 2000). This is so because such proceedings are discretionary, and as such do not require the appointment of a lawyer. *Id.*; *see also Clark v. Johnson*, 227 F.3d 273, 283 & n. 5 (5th Cir. 2000) (that Court did not need to consider whether an attorney was ineffective for failing to prepare a motion for rehearing or a petition for certiorari "[b]ecause there is no constitutional right to counsel for discretionary appeals.").

The 5th Circuit, however, may be open to revising its ruling. In *In re: Robert E. Luttrell, III*, that Court considered district court sanctions against attorney Robert Luttrell. 749 Fed. Appx. 281, 283 (5th Cir. 2018). Luttrell was appointed under the CJA to represent a criminal defendant in district court, and was informed that his appointment obligations extended "through any appeal . . ." *Id.* Among other instances of misconduct, Luttrell did not file a petition for rehearing after the 5th Circuit's ruling in his client's criminal case. *Id.* at 284. The 5th Circuit noted that Luttrell "fail[ed] to adhere to his responsibilities with respect to the rehearing petition . . ." *Id.* The 5th Circuit concluded that the district court was correct in imposing sanctions "for failing to competently represent [the defendant] through the

[5] Perhaps contrary to *McNeal*, the 6th Circuit later *refrained from* determining whether a motion for a rehearing was a "first-tier" appeal (for which a defendant has a right to counsel) or a separate review (which is discretionary and thus does not require the appointment of counsel). *See Nichols v. United States*, 563 F.3d 240, 251-52 (6th Cir. 2009).

conclusion of his appointment." *Id.* at 286. Based in part on the fact that "Luttrell never advised [his client] of his right to a rehearing . . . Luttrell acted in a manner unbecoming of a member of the bar . . ." *Id.*

B. 18 U.S.C. § 3006A, the Eighth Circuit's CJA plan, and Fed. R. Crim. P. 44(a) all lead to the conclusion that appellants *do* have the right to counsel at the petition for rehearing stage

Three points about the law are clear. First, defendants have the right to counsel, and thus the right to effective assistance of counsel, in their direct appeals of right to federal circuit courts of appeals. Second, defendants do not have such a right to counsel in petitions for writ of certiorari to the United States Supreme Court, which takes cases on a discretionary basis. Third, whether defendants have a right to counsel, and effective assistance of counsel, in petitions for panel rehearing and rehearing en banc in federal circuit courts of appeals is an open question. Circuits are split, often confusingly so. This Court may now decide whether the right to counsel extends into this stage. It should find that the right does so extend.

18 U.S.C. § 3006A(c) provides that "[a] person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court *through appeal, including ancillary matters appropriate to the proceedings*." (emphasis added).

In 2015, the Eighth Circuit revised Part V of its plan to implement the CJA. Eighth Circuit Court of Appeals, *Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964-Effective August 1, 2015*, available at https://www.ca8.uscourts.gov/news/revision-part-v-eighth-circuit-plan-implement-cr

iminal-justice-act-1964-effective-august-1-2015. In this revision, that Court provided that

> the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions.

The Eighth Circuit furthermore provided that if the defendant requests the filing of any of these petitions, and counsel determines there are reasonable grounds to do so, counsel "must" file the petitions. Id.

If counsel determines that it would be frivolous to file any of these post-appeal petitions, counsel cannot simply abandon his or her client; counsel must inform the Eighth Circuit of his or her decision and move to withdraw. Id. In doing so, counsel must certify that he or she has informed the appellant of the procedures for filing *pro se*, and must request an extension of time of 28 days within which the appellant can file a *pro se* petition. In short, counsel has duties *as counsel to the appellant*, that extend beyond the appeal in the main and into post-appeal petitions.

Finally, Fed. R. Crim. P. 44(a) provides that indigent defendants have the right to appointed counsel "at every stage of the proceeding from initial appearance *through* appeal . . . ." (emphasis added).

On the face, then, of federal statute, the Eighth Circuit's CJA plan, and the Fed. R. Crim. P., appointed appellate counsel has a "duty" to extend his or her work into post-opinion petitions. Counsel "must" file these petitions if they have merit and the

client requests it. Counsel also has a duty to advise the client regarding these "ancillary matters appropriate to the proceedings."

A textualist read of § 3006A should settle the issue, as should a common sense reading of the Eighth Circuit's CJA plan. As to the former, "ancillary matters" appropriate to an appellate proceedings in a federal circuit court certainly include post-opinion petitions. As to the latter, it seems axiomatic that a "duty" necessarily envisions a breach of duty, which naturally anticipates a resulting judicial remedy. *See Vaca v. Sipes*, 386 U.S. 171, 187 (1967) ("If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy"); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 207 (1944) (courts have a "duty to afford a remedy for a breach of statutory duty").

Furthermore, after a Circuit Court issues its judgment and opinion in a case, the time to file a petition for rehearing begins to run. Fed. R. App. P. 40. The Circuit Court retains jurisdiction of the case during that time, relinquishing jurisdiction only when it issues its mandate. *Taylor v. United States*, 822 F.3d 84, 89 (2d Cir. 2016). Mandates generally issue only *after* the time to file a petition for rehearing expires. Fed. R. App. P. 41(b). It would be strange to tell a client that an appellate court still has his case, but that counsel no longer has any duty to litigate it or that his case is no longer "on appeal." It makes much more sense that the right to assistance "through appeal" encompasses the right to assistance with seeking petitions for rehearing.

"Further, given that the CJA has been uniformly interpreted to provide defendants with the assistance of counsel when seeking review in the Supreme Court,

it would be anomalous to find that defendants have no right to representation in the antecedent process of seeking rehearing in the court of appeals." *Taylor*, 822 F.3d at 89.

With its 2015 revision to its CJA plan, the Eighth Circuit has already signaled that it would find that defendants have the right to counsel at the post-opinion petition stage — or at least the 2d Circuit in *Taylor* thought so. *Id.* (citing this Court's 2015 revision).

It is not a relevant factor that counsel is not explicitly constitutionally required. Consider that the right to counsel for the direct appeal itself does not originate with a constitutional mandate. *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940) (the appeal is "not a necessary ingredient of justice"); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, . . . is not now, a necessary element of due process of law."). Ineffective assistance claims, however, arise from this stage, which the Eighth Circuit recognizes as valid. *Zinzer v. State of Iowa*, 60 F.3d 1296, 1299 (8th Cir. 1995).

For a similar example, the Eighth Circuit has found that aliens facing removal proceedings have no constitutional right to effective counsel at those hearings, *Meda-Morales v. Mukasey*, 293 Fed. Appx. 431, 432 (8th Cir. 2008), yet it has also suggested that ineffectiveness claims can arise from counsel's failings at those hearings, if the ineffectiveness results in a fundamentally unfair hearing. *Habchy v. Gonzales*, 471 F.3d 858, 866 (8th Cir. 2006).

Just as surely, even though no constitutional mandate compels the provision of counsel at the petition for rehearing stage, statute and court rules do. Thus, ineffectiveness claims can arise from counsel's conduct at that stage.

C. Relief requested

This Court should find that the right to counsel extends into a criminal appellant's desire to file a non-frivolous petition for rehearing or rehearing en banc after an unsuccessful appeal in a Circuit Court.

CONCLUSION

Ahumada presents the Court with the opportunity to establish a consistent rule whether criminal appellants do or do not have the right to counsel for petitions for rehearing and rehearing en banc. It can resolve the circuit split, and establish consistent law among all circuit courts.

Respectfully submitted,

STEVEN R. MORRISON
Counsel of Record
The Morrison Law Practice
1526 Robertson Ct.
Grand Forks, North Dakota 58201
617-749-7817
steven.r.morrison@gmail.com

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