No. 20-7968

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES AHUMADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner had a constitutional right to counsel, and thus to the effective assistance of counsel, for the purpose of filing a discretionary petition for rehearing or rehearing en banc in the court of appeals following the decision on his counseled appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 994 F.3d 958. The order of the district court (Pet. App. 5-22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2021. The petition for a writ of certiorari was filed on May 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on one count of conspiring to possess with intent to distribute and distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846, and 18 U.S.C. 2; and one count of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Judgment 1-2. He was sentenced to 156 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. 858 F.3d 1138. The district court denied petitioner's subsequent motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 5-23. The court of appeals affirmed. Id. at 1-4.

1. On December 29, 2014, petitioner was a passenger in a rental car that North Dakota law enforcement stopped for speeding. Presentence Investigation Report (PSR) ¶ 4. After giving the driver a warning for speeding, the officer, who was a K-9 (police dog) handler, had his certified K-9 drug dog sniff the area around the rental car. Ibid.; see D. Ct. Doc. 52, at 2 (Oct. 1, 2015). The dog alerted to the presence of drugs approximately eight-and-a-half minutes after the officer had issued the warning. 858 F.3d at 1140. The officer then searched the car and found drug paraphernalia, and the driver turned over a small amount of methamphetamine he had been carrying for personal use. D. Ct.

Doc. 52, at 2. The driver was arrested for possession of methamphetamine and petitioner was released. PSR ¶ 4.

A subsequent inventory search of the rental car, however, revealed that it contained about 4.5 pounds of heroin in the trunk. PSR ¶ 4; D. Ct. Doc. 52 at 2. Petitioner was arrested the next day. PSR ¶ 4. While in custody, petitioner admitted to officers that he had heroin and marijuana wrapped in a surgical glove in his rectum. PSR ¶ 8. Petitioner was taken to a hospital, where the surgical glove containing the controlled substances was removed from his body cavity. Ibid. Lab tests of the substances found in the glove confirmed that it contained 11.86 grams of heroin and 2.22 grams of marijuana. Ibid.

2. A federal grand jury returned an indictment charging petitioner with one count of conspiring to possess with intent to distribute and distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846, and 18 U.S.C. 2; and one count of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Indictment 1-3. Petitioner moved to suppress the evidence from the search of the rental car. D. Ct. Doc. 36 (Dec. 30, 2014). Petitioner argued that the time necessary to conclude the traffic stop was unlawfully extended by the officer's decision to conduct a dog sniff of the car. Id. at 3.

The district court rejected that argument and denied the motion to suppress, explaining that "[w]hen the police conduct a

search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not" require suppression. D. Ct. Doc. 52, at 4. The court observed that at the time of the stop, "Eighth Circuit precedent was clear that a seven to eight minute delay caused by a dog sniff during a traffic stop * * * did not violate the Fourth Amendment." Id. at 5 (citing United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014), vacated and remanded, 575 U.S. 348 (2015)). The court explained that because "the dog sniff did not unreasonably prolong the traffic stop" under that "binding Eighth Circuit precedent at the time," and because the officer "objectively and reasonably relied on" that precedent, suppression under the exclusionary rule was unwarranted. Id. at 5-6.

The case went to trial, and a jury found petitioner guilty on both counts. Judgment 1-2; PSR ¶ 3. The district court sentenced petitioner to 156 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. 858 F.3d 1138. The court rejected petitioner's argument that the dog sniff effected an unconstitutional seizure because it unreasonably prolonged the stop. Id. at 1139-1140. The court explained that "[t]he exclusionary rule does not apply when police make a seizure in objectively reasonable reliance on binding judicial precedent," and found no need to suppress the evidence here because the asserted extension of the stop lasted around eight minutes and

binding precedent stated that it was not unreasonable for officers to extend seizures for up to ten minutes. Id. at 1140 (citation omitted). The court also rejected petitioner's contention that the evidence was insufficient to support his conviction on the possession count, because petitioner's only contention was that the government had not proved the intentional transfer of heroin to another, which was not one of the elements of the charged offense. Id. at 1141.

The court of appeals entered its judgment on June 5, 2017. 858 F.3d at 1138. In the letter to petitioner and his counsel accompanying the court's opinion, the Eighth Circuit advised the parties of the entry of judgment and the 14-day timeframe within which to file a petition for rehearing and a petition for rehearing en banc. See 16-1391 C.A. Doc. 4543287, at 1 (June 5, 2017). Petitioner's counsel, however, apparently "failed to notify [petitioner] until after the deadline [had] passed." Pet. App. 1. The mandate issued on June 27, 2017. 16-1391 C.A. Doc. 4551144.

On July 10, 2017, petitioner filed a pro se motion in the court of appeals for an extension of time within which to file a petition for rehearing or rehearing en banc. 16-1391 C.A. Doc. 4556066. The court granted the motion, recalled its mandate, and gave petitioner until July 19, 2017, to file a petition for rehearing. 16-1391 C.A. Doc. 4557881 (July 17, 2017).

Petitioner subsequently filed a pro se petition for rehearing or rehearing en banc. 16-1391 C.A. Doc. 4560889 (July 25, 2017).

The court of appeals denied the petition for rehearing en banc "as untimely filed," and also denied the petition for panel rehearing. 16-1391 C.A. Doc. 4568802, at 1 (Aug. 15, 2017). The certificate of service, required for "[e]very document filed by a pro se litigant" and "which provides the date the party mailed the document to the clerk," 8th Cir. R. 25B(c), indicated that the petition for rehearing was "served, this the 20th day of July, 2017," 16-1391 C.A. Doc. 4560889, at 10 (capitalization altered).

4. On September 4, 2018, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, in which he argued his trial and appellate counsel were ineffective. D. Ct. Doc. 125, at 4-12 (Sept. 4, 2018); see D. Ct. Doc. 125-6, at 3 (Sept. 4, 2018). As relevant here, petitioner asserted that his appellate counsel was ineffective for inaction and lack of communication after the opinion on direct appeal had been issued, resulting in petitioner's forfeiting his ability to seek rehearing or rehearing en banc. D. Ct. Doc. 125, at 8.

On November 20, 2019, the district court issued an order rejecting petitioner's claims of ineffective assistance of counsel and denying petitioner's 2255 motion. Pet. App. 5-22. Regarding petitioner's claim that appellate counsel was ineffective for his failure to communicate or take any action in filing a petition for rehearing or rehearing en banc, the court found no constitutional right to counsel for the filing of a petition for rehearing or rehearing en banc and thus no constitutional right to effective

assistance of counsel. Id. at 16-21. The court granted a certificate of appealability on the question whether a defendant has a constitutional right to counsel for the filing a petition for rehearing or rehearing en banc. Id. at 17.

The court of appeals affirmed. Pet. App. 1-4. The court rejected petitioner's suggestion of a constitutional right to counsel for discretionary post-decision requests for appellate relief that could encompass petitions for rehearing and rehearing en banc. Id. at 3. And the court explained that "[b]ecause [petitioner] has no constitutional right to rehearing counsel, he cannot claim ineffective assistance of counsel." Ibid. The court also rejected petitioner's contention that the right to counsel under the Criminal Justice Act of 1964(CJA), 18 U.S.C. 3006A; the court of appeals' Plan to Implement the Criminal Justice Act (CJA Plan); or Rule 44 of the Federal Rules of Criminal Procedure granted petitioner a constitutional right to counsel that could support a claim of ineffective assistance of counsel. Pet. App. 3-4.

ARGUMENT

Petitioner renews his contention (Pet. 5-7) that he had a right to counsel for the filing of a discretionary petition for rehearing or rehearing en banc in the court of appeals, and therefore a right to effective assistance of counsel at that stage of the proceedings. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision

of this Court or another court of appeals. Moreover, this case would be a poor vehicle in which to address the question presented because petitioner cannot show that he was prejudiced by his counsel's allegedly deficient performance, and so would not be entitled to relief even if he were to prevail on the question presented. Further review is unwarranted.

1. Petitioner contends (Pet. 13-17) that he had a right to counsel to file a petition for rehearing or rehearing en banc, and that he was therefore denied his constitutional right to effective counsel when his appellate counsel did not assist him in filing a rehearing petition on direct review. That contention lacks merit.

a. The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. This Court has explained that an indigent defendant therefore has a constitutional right to appointed counsel at trial. Johnson v. Zerbst, 304 U.S. 458 (1938); see Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963). The constitutional right to counsel includes a corresponding right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); see Evitts v. Lucey, 469 U.S. 387, 396-400 (1985). That is because the Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results" and a "trial [that] is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984).

As this Court has observed, however, "the Sixth Amendment does not apply to appellate proceedings." Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152, 161 (2000). Nevertheless, this Court has held that a criminal defendant has a constitutional right to counsel -- and an indigent defendant the right to appointed counsel -- for "the first appeal, granted as a matter of right to rich and poor alike, from a criminal conviction." Douglas v. California, 372 U.S. 353, 356 (1963) (citation omitted). The Court rested that holding on principles of equal protection, explaining that when counsel is not appointed for an initial appeal as of right, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." Id. at 358.

But the constitutional right to counsel does not extend to second-order or discretionary appellate proceedings, because "the considerations governing a discretionary appeal are somewhat different." Evitts, 469 U.S. at 396 n.7. In Ross v. Moffitt, 417 U.S. 600 (1974), for example, this Court held that an indigent defendant has no constitutional right under principles of due process or equal protection to appointed counsel to pursue second- (or third-) order discretionary review in the state supreme court or in this Court. See id. at 614. The Court explained that the considerations set forth in Douglas v. California, supra, about providing indigent defendants meaningful access to the courts, did

not require counsel for discretionary appeals because "prior to [a defendant's] seeking discretionary review * * * , his claims ha[ve] 'once been presented by a lawyer and passed upon by an appellate court,'" and "[a]t that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." Ross, 417 U.S. at 614-615 (quoting Douglas, 372 U.S. at 356). The Court observed that those "materials, supplemented by whatever submission [the defendant] may make pro se, would appear to provide the [state supreme court] with an adequate basis for its decision to grant or deny review." Id. at 615. And the Court emphasized the specific "function served by discretionary review," where the "critical issue" is "not whether there has been 'a correct adjudication of guilt' in every individual case, but rather" considerations such as the importance of the case or whether it conflicts with other binding precedent. Ibid. (citation omitted).

That logic applies equally here. A criminal defendant seeking rehearing or rehearing en banc necessarily will have the benefit of a trial record, an appellate brief written by counsel, and possibly an opinion from the panel addressing the claims raised in that counseled brief. A court of appeals' decision to grant rehearing or rehearing en banc is purely discretionary. See Fed. R. App. P. 35 and 40. And like a discretionary decision of this

Court whether to grant certiorari, a court of appeals' discretionary decision to grant rehearing en banc often turns on considerations other than the commission of error. See Fed. R. App. P. 35(a) (providing that en banc rehearing is "not favored" and "ordinarily will not be ordered" unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance").

Although panel rehearing may be sought to correct errors, a petition generally must allege that the panel "overlooked or misapprehended" a legal or factual point, Fed. R. App. P. 40(a)(2) -- which necessarily means a point that was raised in counsel's appellate briefing. See United States v. Replogle, 678 F.3d 940, 942 (8th Cir.) ("[R]ehearing is not a vehicle for presenting new arguments.") (citation omitted), cert. denied, 568 U.S. 1053 (2012). Accordingly, "both the opportunity to have counsel prepare an initial brief" before the panel "and the nature of discretionary review" on rehearing are sufficient to "assure the indigent defendant an adequate opportunity to present his claim fairly." Ross, 417 U.S. at 616.

b. Petitioner acknowledges (Pet. 17) that "no constitutional mandate compels the provision of counsel at the petition for rehearing stage." He nevertheless contends that the CJA, the CJA Plan, and Rule 44(a) provided him a right to counsel at the rehearing stage, and therefore he can maintain a claim of

ineffective assistance of counsel arising from counsel's failure to file a petition for rehearing. The court of appeals correctly rejected that contention.

As this Court has explained, "the right to effective assistance of counsel is dependent on the right to counsel itself." Evitts, 469 U.S. at 397 n.7. Accordingly, an ineffective-assistance-of-counsel claim is cognizable only when a defendant has a constitutional right to counsel. This Court made that clear in Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam), where the Court summarily reversed a grant of habeas relief to a defendant who had argued that "he had been denied his right to the effective assistance of counsel by the failure of his retained counsel [on direct review] to file [an] application for certiorari [in the state supreme court] timely." Id. at 586-587. The Court explained that because the defendant "had no constitutional right to counsel" in "discretionary state appeals or applications for review in this Court," "he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." Id. at 587-588.

Similarly, in Pennsylvania v. Finley, 481 U.S. 551 (1987), the Court explained that because a defendant does not have a constitutional right to counsel in postconviction proceedings, he may not raise an ineffective-assistance claim in that context. "[T]he fact that the defendant has been afforded assistance of counsel in some form," the Court instructed, "does not end the

inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question." Id. at 556 (emphasis added). In Finley itself, because the defendant's "access to a lawyer [wa]s the result of the State's decision, not the command of the United States Constitution," the defendant could not maintain an ineffective-assistance claim. Ibid. The Court was "unwilling to accept" the premise "that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." Id. at 559.

Those precedents make clear that even if the CJA, the CJA Plan, and Rule 44(a) provided petitioner a right to counsel for purposes of filing a petition for rehearing or rehearing en banc, those sources would not support a constitutional claim of ineffective assistance of counsel if that counsel were to fail to file such a discretionary petition. See Finley, 481 U.S. at 556 ("[I]t is the source of th[e] right * * * that controls the constitutional question.") Petitioner suggests (Pet. 16) that an ineffective-assistance claim here should be cognizable on the ground that "the right to counsel for the [first] direct appeal itself does not originate with a constitutional mandate," and yet ineffective-assistance claims are cognizable at that stage of a criminal proceeding. That suggestion is incorrect because it relies on a mistaken premise. As explained above, the right of an

indigent defendant to appointed counsel for "the first appeal, granted as a matter of right," arises from the guarantee of "equality demanded by the Fourteenth Amendment," Douglas, 372 U.S. at 356, 358 (emphasis omitted), and therefore does in fact "originate with a constitutional mandate," Pet. 16. The court of appeals thus correctly determined that "[e]ven assuming there was a breach of the statute, the CJA, it does not give rise to a claim for ineffective representation of counsel" because "[a] constitutional right is required before [petitioner] can be deprived of []effective representation of counsel." Pet. App. 4.

2. Petitioner errs in contending (Pet. 9-12) that the decision below conflicts with decisions of the Second, Fourth, and Seventh Circuits. The decisions from those circuits on which petitioner relies (ibid.) hold only that the CJA, the Federal Rules of Criminal Procedure, or local circuit rules require the appointment of counsel for a criminal defendant throughout the direct appeals process, including to file petitions for rehearing. See Taylor v. United States, 822 F.3d 84, 90 (2d Cir. 2016); United States v. Masters, 976 F.2d 728, 1992 WL 232466, at *3 (4th Cir. 1992) (Tbl.) (per curiam), cert. denied, 507 U.S. 1007 (1993); United States v. Howell, 37 F.3d 1207, 1209 (7th Cir. 1994), cert. denied, 514 U.S. 1090 (1995); see also In re: Robert E. Luttrell, III, 749 Fed. Appx. 281, 285-286 (5th Cir. 2018) (per curiam).

None of those decisions holds that a criminal defendant has a constitutional right to counsel at the discretionary rehearing

stage. Indeed, none of those cases even addresses that question. And as petitioner acknowledges (Pet. 10 n.3, 11 n.4), when the Second and Fourth Circuits addressed that distinct question, they recognized in published decisions that defendants do not possess such a constitutional right. See Pena v. United States, 534 F.3d 92, 94-95 (2d Cir.), cert. denied, 555 U.S. 956 (2008); United States v. Taylor, 414 F.3d 528, 536 (4th Cir. 2005).

Those decisions are thus in accord with the assertedly conflicting decisions that petitioner cites (Pet. 11-12), which have also addressed the constitutional question and -- in accordance with every court of appeals to have addressed the issue, including the court below -- likewise have found no constitutional right of the sort that petitioner claims here. See United States v. Coney, 120 F.3d 26, 28 (3d Cir. 1997); Jackson v. Johnson, 217 F.3d 360, 365 (5th Cir. 2000); McNeal v. United States, 54 F.3d 776, 1995 WL 290233, at *1-*2 (6th Cir. 1995) (Tbl.).

3. In any event, this case would be a poor vehicle in which to review the question presented because this Court's resolution of that question would not affect the outcome. As noted, petitioner's ineffective-assistance-of-counsel claim is based on his claim that appellate counsel failed to assist in the filing of a petition for rehearing or rehearing en banc. But to establish ineffective assistance, petitioner would have to prove both deficient performance and prejudice. See Strickland, 466 U.S. at 687. Even assuming that petitioner could prove that his appellate

counsel performed deficiently, he could prove prejudice only by showing a "reasonable probability" that, but for counsel's deficient performance, "the result of the proceeding would have been different." Id. at 694.

Petitioner cannot make that prejudice showing because the record provides no basis to find a reasonable probability that he would have prevailed in a petition for rehearing or rehearing en banc. See Steele v. United States, 518 F.3d 986, 988-989 (8th Cir. 2008) (explaining that to prove prejudice from appellate counsel's failure to file a petition for a writ of certiorari, a defendant "would have to show not only that she would have succeeded in obtaining a writ of certiorari if counsel had filed a petition, but also a reasonable probability that she would have obtained relief as to her sentence"). Petitioner raised two claims in his pro se petition for rehearing (and has not identified any others that counsel should have raised), neither of which would have warranted a grant of rehearing, much less of substantive relief.

First, petitioner contended that the evidence was insufficient to support his convictions because of alleged "discrep[a]ncies" in the arresting officer's affidavit; assertedly "inconsistent testimony during the suppression hearing, and during trial given under oath" by the officer; and a putative failure of the indictment to "accurately define the penalty provision of the statute." 16-1391 C.A. Doc. 4560889, at 7-8. But none of those

case-specific issues was raised in petitioner's opening brief in the court of appeals, which petitioner has not directly contended was itself constitutionally deficient. Cf. 16-1391 C.A. Doc. 4379951 (Mar. 15, 2016). That court has made clear that "rehearing is not a vehicle for presenting new arguments, and [the court] do[es] not ordinarily consider arguments raised for the first time in a petition for rehearing." Replogle, 678 F.3d at 942 (citation omitted). Accordingly, petitioner cannot show a reasonable probability that rehearing would have been granted -- much less that he eventually would have prevailed -- on this claim.

Second, petitioner renewed his contention that the district court erred in denying his motion to suppress on the ground that the eight or nine minutes taken for the dog sniff unlawfully prolonged the traffic stop. 16-1391 C.A. Doc. 4560889, at 5-7. Several months after the traffic stop in this case, this Court held in Rodriguez v. United States, 575 U.S. 348 (2015), that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." Id. at 350. The court of appeals panel correctly determined, however, that even if the dog sniff here might have unreasonably prolonged the stop under Rodriguez, suppression was unwarranted because the officer had reasonably relied on binding circuit precedent at the time of the stop holding that "seizures of less than ten minutes were permissible as de minimis intrusions and did not amount to an unreasonable seizure."

858 F.3d at 1140 (brackets and citation omitted). As this Court has explained, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." Davis v. United States, 564 U.S. 229, 241 (2011). Petitioner thus cannot demonstrate a reasonable probability that a counseled petition for rehearing would have been successful on this claim either.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

JAVIER A. SINHA
Attorney

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