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**Breaking News :**

This afternoon the court issued additional orders. The court added three new cases to its docket for this term.  
[In Hernandez v. Mesa, the court addresses a challenge to a cross-border shooting of a Mexican citizen.](#)  
[In three \(consolidated\) cases against former AG John Ashcroft and former FBI director Robert Mueller, the court addresses whether officials are liable for decisions made after the September 11 attacks; both Justices Sotomayor and Kagan are recused.](#)  
[In Midland Funding v. Johnson, the court addresses whether filing proof of claim in a bankruptcy proceeding outside of the statute of limitations violates the federal debt collection law.](#)  
[The order list is here.](#)



**Kevin Russell** *Contributor*

Posted Thu, May 17th, 2007 11:50 am

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**Commentary: Writing A Convincing Cert. Petition When There Is No Direct Circuit Split**

Tom has recently been writing about the state of the Court's docket and the low number of cases granted review this Term. In this and a few subsequent posts, I am going to look at the cert. process from the other end "" that is, from the perspective of a lawyer trying to get the Court to grant cert. in a particular case. In a future post, we will take a look at the cases granted by the Court this year and see if we can glean any useful insights about what made for a successful petition this Term. Today, I want to look at what good Supreme Court counsel try to do when they are unable to make a convincing showing of a substantial circuit split.

As most readers of this blog presumably know, the Supreme Court's most important criteria for granting certiorari is the existence of a significant division of authority on an important question of federal law. The Court views its principal role as ensuring uniformity of federal law and, as a result, the vast majority of cases granted implicate circuit splits (or splits involving state courts of last resort).

That's all well and good for the Court, but most often petitioner's counsel does not get to pick and choose which cases to seek cert. in; she has a client who has hired her to write a cert. petition and counsel has to make the best case she can with what she has. Quite often, the decision from which she will seek cert. does not, in fact, involve any question upon which the circuits are split to any significant degree. What to do?

In too many cases, inexperienced or unskilled counsel will simply assert that there is a split anyway, relying on snippets of language in dicta of opinions addressing entirely different questions. This, in my view, is a waste of time. The Justices' clerks are going to read the cited cases, immediately see that the assertion of a split is false, and tell the Justices so. At that point, even if there are other legitimate grounds for certiorari advanced in the petition, those arguments will be read in light of the petitioner's diminished credibility.

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MERITS CASE PAGES AND ARCHIVES

This Term's Merits Cases

Archives  or

TERM SNAPSHOT

This Week at the Court

We expect orders from the October 7 conference on Tuesday at 9:30 a.m. The court will also hear oral arguments on Tuesday, beginning at 10 a.m. The calendar for the October sitting is available on the court's [website](#). On Friday the justices will meet for their October 14 conference; our list of "petitions to watch" for

There are better alternatives. For example, savvy counsel may try to view the question presented more generally or find a division of authority on a critical component of the lower court's reasoning that would suggest an inevitable disagreement among the courts in the future. For example, former Solicitor General Drew Days, at Morrison & Foerster LLP, recently filed this [petition](#) in *Klein & Co. Futures, Inc. v. Board of Trade of the City of New York*, No. [06-1265](#), raising the question whether commodities futures commission merchants have standing to sue a commodities board under a statute that allows such suits by "a person who engaged in any transaction" on a regulated futures market. The Second Circuit held that a futures commission merchant (similar, I gather, to a stock brokerage firm on the stock market) lacks standing; only its customers may sue. The petition does not allege that any other circuit has addressed this specific question. Instead, the petition looks at the court of appeals' reasoning and asserts that the principle premise of the court's holding "" that only customers, and not merchants, engage in "transactions" on the futures commodity exchange "" conflicts with the recognition by other courts of appeals that merchants themselves are the entities buying and selling futures (albeit for the benefit of their clients). The point of the argument is to suggest that those other courts, when confronted by the question presented here, will predictably decide that specific question differently than the Second Circuit.

This form of argument is not as good as being able to show that there is a direct conflict on the specific question presented in the petition, but it is often the best one can do. At least on the split question. In such cases, however, it is critical to try to develop other grounds for certiorari, one of the most common of which is the general importance of the question. Thus, the petition in *Klein* (rightly, in my view) focuses not on the split (which is addressed at the end of the brief) but on the alleged consequences for the efficiency and stability of the futures market if the decision below is permitted to stand.

The difficulty with such arguments is that the Court hears them all the time "" everyone thinks that their loss signals the end of human civilization as we know it, and says so in their petition. Moreover, just as the Court knows that practitioners know that splits are important in the cert. calculus (and therefore views split assertions with a grain of salt), it likewise views with skepticism self-serving claims of the importance of the question presented. There are a few ways of trying to overcome that skepticism. One is objective evidence "" the *Klein* petition, for example, is peppered with statistics about the mind-boggling amount of money involved in the futures markets.

Another is an amicus brief from more objective parties telling the Court that the petitioner is actually right about the importance of the issue. Often, the filing of the brief and the identity of the party is as important as what the brief actually says (which is why such briefs can be quite short). In *Klein*, for example, petitioner was able to secure this [amicus brief](#) supporting cert. from the Futures Industry Association, represented by [Christopher Landau](#) of Kirkland & Ellis LLP. Rather than focus on the technical details of statutory construction addressed in the petition, the amicus brief (which is only 8 pages long) addresses the issue that the Court would be most interested in hearing from industry representatives about "" is this ruling really going to have the bad effects petitioner says it will?

Of course, the Court is aware that groups like trade associations have their own biases and agendas. The Court will not simply accept everything they have to say at face value. But even the fact that the association has taken the time (and, presumably, the money) to file an amicus brief at the cert. stage will often at least get the case noticed and the Court taking seriously the petitioner's claim that the case raises an important question.

Whether the petition in *Klein* will be granted remains to be seen (it is scheduled for a conference vote today). Petitions unable to assert clear circuit split are hard to get granted, even by very good Supreme Court counsel. But a well written petition can give a case a fighting chance when it would otherwise face truly daunting odds.

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that conference will be available soon.

Major Cases

Upcoming Petitions

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Twitter Feed

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Full Calendar

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SU	MO	TU	WE	TH	FR	SA
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

- Orders/Opinions
- Arguments
- Conferences
- Events
- Holidays
- Multiple

Case in *Viscotti v. Market No. 11-99008* archived on October 11, 2016

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Justice Kagan at dedication for Antonin Scalia Law School



On October 6, Justice Elena Kagan spoke at the dedication of Antonin Scalia Law School at George Mason University.

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*cited in Visciotti v. Martel, No. 11-99008 archived on October 11, 2016*

# Getting Your Foot in the Door: The Petition for Certiorari

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## INTRODUCTION

For nearly every decision by a federal court of appeals, there's at least one party that thinks the outcome is very, very wrong. Sometimes the losing party's lawyer agrees that the court was badly off the mark. Such cases often lead both clients and their lawyers to ask: Can't we take this up to the Supreme Court?

The answer is nearly always that you *can*. But *should* you? That's another question entirely. And, if you do, how do you go about it? Most lawyers know that the answer to the latter question, at the most basic level, is that you file a petition for a writ of certiorari. But, beyond that, many litigators have little or no experience with the nuts and bolts of how to prepare and file a "cert petition," to use the shorthand term common among Supreme Court litigators, clerks, and even Justices. This paper provides a brief introduction to that subject.

I am not pretending to be comprehensive, but aiming only to provide a useful introduction to the subject of readable length. For a complete discussion of nearly every aspect of Supreme Court practice and procedure, including petitions for certiorari, there is no better source than *Supreme Court Practice*, now in its Ninth Edition, with coauthors Eugene Gressman, Kenneth Geller, Stephen Shapiro, Timothy Bishop, and Edward Hartnett. Still referred to by longtime practitioners as "Stern and Gressman," after its original authors, this book is the standard reference work for all aspects of Supreme Court practice. Even the most experienced Supreme Court litigants regularly turn to it for guidance.

## THE SUPREME COURT'S CERTIORARI JURISDICTION

The Supreme Court's docket is almost entirely discretionary—that is, unlike the federal courts of appeals, to which parties may appeal as of right from final district court judgments as well as some nonfinal orders, the Supreme Court almost never is required to hear and decide any cases on the merits. For the most part, it chooses the cases it decides.

The mechanism the Court uses to bring those cases before it is the issuance of a writ of certiorari—an order that has the effect of transferring a case and its record from some lower court to the Supreme Court. The principal statutory bases for the Court's certiorari jurisdiction are 28 U.S.C. §§ 1254 and 1257. Section 1254 gives the

Court certiorari jurisdiction to review cases from the federal courts of appeals, while 1257 provides for certiorari review of final decisions of state courts of last resort.

The Court's certiorari jurisdiction, though sweeping in scope, is exercised very sparingly. In the Court's October 2008 Term, for example, about 7,700 petitions for certiorari were filed—approximately 1,600 in “paid” cases (i.e., those where the petitioner could afford to pay the Court's filing fee and the printing costs associated with filing a petition) and over 6,100 in “in forma pauperis” or “IFP” cases (those filed by or on behalf of indigent petitioners, often prisoners, who are not required to pay fees).

Of those 7,700 cases, the Court granted certiorari in about 80, a rate of about 1%. That statistic is somewhat misleading, as the prospects for review are considerably higher in paid cases, which make up the vast majority of the cases granted. But even for paid cases, the rate at which the Court grants petitions for certiorari is less than 5%.

### **CONSIDERATIONS GOVERNING THE GRANT OF CERTIORARI**

Given that a grant of certiorari is such a statistical long-shot, is there any way to predict which cases have the best chance at making the cut? The answer is yes. An understanding of the factors the Court considers in granting certiorari can help you distinguish the relatively few cases that can be predicted to have a good or even excellent chance of attracting the Court's attention from the many that, realistically, have not a 5% or even a 1% chance of being granted, but no chance at all.

The considerations that govern the Court's exercise of its certiorari jurisdiction are concisely set forth in the Court's Rule 10:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

It's worth breaking those considerations down. To begin with, the Court for the most part is little interested in, or suited to, resolving issues of fact. The lower courts are perfectly capable of resolving fact issues; indeed, much more capable than the Supreme Court. The Court sits to resolve unsettled issues of law.

And not just any law, but *federal* law. State supreme courts are, of course, the ultimate arbiters of their own laws, so it would make no sense for the Supreme Court to waste its time addressing issues where its decisions would not even be authoritative. Indeed, the Court long ago held that it does not even possess jurisdiction to review a state-court decision that rests on state-law grounds (as long as those grounds are *adequate* to resolve the case without resort to federal law and *independent* of any principles of federal law). See *Murdock v. City of Memphis*, 87 U.S. 590 (1874); *Michigan v. Long*, 463 U.S. 1032 (1983). With respect to cases coming from the federal courts that turn on issues of state law, the Supreme Court is not without jurisdiction to review a federal appellate court's rulings on state law, but it is highly reluctant to do so, both because the district courts and regional appellate courts are more familiar with the laws of the states where they sit, and because any ruling the court might make on a state-law issue could be negated by a subsequent decision by the supreme court of the relevant state.

The federal-law issues the Court considers include both constitutional and statutory matters. It is a popular misconception that the Court considers constitutional issues to be somehow more worthy of its attention than statutory. In fact, the court hears at least as many cases involving important questions of federal statutory construction as it does constitutional cases. And the familiar principle that the Court should avoid constitutional questions whenever possible, though sometimes honored in the breach, means that the Court, at least in theory, has a preference for resolving cases on statutory rather than constitutional grounds.

How, then, does the Court decide which issues of federal law are "important" enough to merit its consideration? One of the key hallmarks of an issue the Court is likely to consider sufficiently important is that it is recurrent and has generated directly conflicting rulings by the federal courts of appeals and/or state supreme courts. S. Ct. R. 10(a). Such conflicts, by undermining the desired uniformity of federal law, are often considered to merit resolution by the Supreme Court because, absent such review, they will persist, having been decided by courts whose rulings are otherwise definitive within their territorial jurisdiction absent Supreme Court review. Conflicts among federal district courts or lower-level state courts, by contrast, do not present the same challenge to the uniformity of federal law, because such conflicts can be resolved by the federal appellate and state supreme courts. But when federal courts of appeals and/or state supreme courts are in disagreement, only the Supreme Court can resolve the conflict unless one or the lower courts overrules its own decisions or (in a statutory matter) Congress intervenes with clarifying legislation.

This is not to say that every conflict on a question of federal law is viewed by the Court as “certworthy.” Conflicts that are lopsided may be considered not worth resolving because the outlier courts may be likely to change their minds; conflicts that are “stale” because the decision or decisions on one side are comparatively old may also not strike the Court as worth resolving; conflicts over issues that arise only very rarely are generally less interesting to the Court than conflicts over issues that continually recur; conflicts over newly arising issues that few courts have yet weighed in on may be allowed to “percolate” further in the hope that a consensus will emerge; and other conflicts may appear likely to be resolved or effectively mooted by imminent legislation or regulatory action. Still other apparent conflicts may not appear to the Court to be genuine conflicts at all: Decisions may be reconcilable because they involved different fact patterns, even if the courts that rendered them made seemingly conflicting statements about the law. Other putative conflicts, such as the use by various courts of differently worded “tests” for addressing an issue, may make little or no difference in practice because they generally yield consistent results. And even where there is a real conflict over an issue, the Court is unlikely to accept a case to resolve it if the case would come out the same way regardless of which of the conflicting views the Court accepted: A conflict will generally be viewed as a reason for granting certiorari only if its resolution will control the outcome of the case in which the petition is filed.

Not every case, however, involves a conflict among the lower courts. The Court sometimes grants certiorari because a lower court’s decision is perceived as conflicting directly with controlling Supreme Court precedents, *see* S. Ct. R. 10(c), although such cases are often difficult to distinguish from cases in which the lower court merely made an error in applying precedent, which is generally not viewed as a very persuasive ground for granting certiorari. The Court has frequently remarked that it generally does not sit to correct errors. A fairly blatant disregard of Supreme Court precedent is generally necessary to induce the Court to grant certiorari based on a claimed conflict with decisions of the Supreme Court.

Despite the general principle that a claim of mere legal error will not suffice to justify a grant of certiorari, the Court sometimes does grant certiorari in cases where there is no real claim of a conflict either among the lower courts or with a directly applicable Supreme Court decision. It is difficult to generalize about such cases, except to say that there is something about the alleged error that makes it stand out in the Court’s eyes. In some cases, an important consideration seems to be that the lower court’s decision appears not just erroneous, but outlandishly so. Another factor that appears to distinguish some cases where “mere” claims of error have sufficed is that they involve issues where a single appellate court’s decision effectively resolves an issue on a nationwide basis, making it impossible or unlikely that a conflict among the lower courts can arise, as where a federal regulation is struck down on its face. And perhaps the most important factor that may serve to elevate a claim of error into an issue that the Court will find merits its review is the impact of the decision below. A credible argument that a decision will have widespread, deleterious effects, particularly on law enforcement, the conduct of government agencies, or the practices of im-

portant industries may sometimes be more effective than a claim of a circuit-split on an issue that the Court will not perceive as important. For example, in the past few Terms, the Court has granted certiorari in a number of environmental cases where there was no genuine claim of a conflict among the lower courts but the petitioners were able to argue that the lower courts' decision was of questionable correctness and would have far-reaching effects on regulated industries. The example also serves to illustrate that the Court's perception of importance may reflect ideological leanings of the Justices.

The practical importance of an issue is not, of course, a relevant consideration only when there is no conflict. In any petition for certiorari, no matter how square a circuit-split you may have, an explanation to the Court of how the case matters, whether to an industry, to the criminal or civil justice system, to the environment, to employee-employer relations, to litigants who repeatedly face the issue—whatever—is essential. Although a circuit-split is probably the best predictor of a grant of certiorari, the Court regularly declines to hear cases that, at least on their face, appear to involve conflicts among the lower courts, so anything a petitioner can point to that may elevate the perceived importance of a case can only be helpful. In cases where there is no conflict, however, it is even more essential to point to such factors.

A few other considerations, not mentioned in Rule 10, are also worth discussing here. One is finality. In cases coming from the state courts under 28 U.S.C. § 1257, finality of the decision below is a jurisdictional requirement. If the appeal to the state supreme court was interlocutory, or the state supreme court remanded for further proceedings that could alter the outcome of the case, this requirement may not be met, though the Court has interpreted the requirement with some flexibility and held that some state court decisions that do not end a case but nonetheless are effectively definitive with respect to the federal issue may qualify as final. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The statute granting the Court certiorari jurisdiction over cases from the federal courts of appeals, 28 U.S.C. § 1254, by contrast, does not require finality, and indeed permits the Court to take a case from a court of appeals even before the court has issued a decision (though the Court does so only very, very rarely). But the Court has long expressed a preference for granting certiorari in cases where the court of appeals' judgment is final, as further proceedings following a non-final appellate decision could obviate the need for the Court's intervention. *See Virginia Military Institute v. U.S.*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

Another factor that affects the likelihood that the Court may grant review on an otherwise important issue is whether there is an obvious alternative ground for affirmance that would avoid the need to decide that issue. In such cases, the Court will be less likely to grant certiorari.

And finally, it bears emphasis that the Court generally grants certiorari only to decide questions that were actually decided below, or at least that were properly raised below and *should* have been decided for an appropriate resolution of a case.

See *Clingman v. Beaver*, 544 U.S. 581, 597 (2005). A claim that was waived below, or that the court below either did not mention or noted but expressly declined to decide, is therefore generally a poor candidate for certiorari.

All these factors must be considered by the advocate not only as they bear on how to prepare the most effective petition for certiorari, but also insofar as they affect the decision *whether* to file a petition. A petition for certiorari is costly to the client and delays the final resolution of a case. It also has costs for the attorney, not only in consuming time that might be better spent on matters where success is more likely, but also in its effect on his or her credibility before the Court. Especially for a lawyer who aspires to practice before the Court with some degree of regularity, petitioning in a case where there is no realistic possibility that the Court will grant certiorari is the jurisprudential equivalent of crying wolf, and may adversely affect the seriousness with which the lawyer's filings are taken by the Court. For these reasons, in the huge majority of cases lost in the lower courts, the right answer for both the lawyer and the client is not to file a petition for certiorari.

### TIME FOR FILING

If your case is one of the few where filing a petition for certiorari makes sense, the first thing you need to know is when you must file. Petitions for certiorari in both civil and criminal cases must be filed within 90 days of the decision of the lower court. S. Ct. R. 13.1. For civil cases, the time limit is set by statute, 28 U.S.C. § 2101(c), and the Court considers that time period "jurisdictional" and will not accept a petition filed outside the time allowed. S. Ct. R. 12.2.

When a petition arises from a state-court proceeding and the state's supreme court denied discretionary review, the time for filing runs from the denial of review, even though the petition seeks review of the judgment of a lower-level state court. S. Ct. R. 12.1. When a *timely* request for rehearing has been made in the lower court (state or federal), or when a lower court excuses and entertains the untimely filing of a rehearing petition or considers rehearing sua sponte, the time for filing the petition for certiorari runs from the date of the order denying rehearing. S. Ct. R. 12.3.

It is important to remember that when review is sought of a judgment from a court that separately issues a "mandate" sometime after it renders its decision, the time for filing does *not* run from the date of the mandate, but from the date of decision. S. Ct. R. 12.3. The timing of the mandate of the lower court is essentially irrelevant to the Supreme Court.

The time for filing a petition for certiorari may be extended (even the "jurisdictional" time limit for civil cases) by up to 60 days. S. Ct. R. 13.5. The procedure for obtaining an extension is to file an application with the Circuit Justice whose circuit covers the court whose decision is at issue. (The Court's website lists the current circuit assignments of the Justices.) The application must be filed, except in exceptional circumstances, 10 days before the petition would otherwise be due, and the Rule 13.5 sets forth its required contents. Although Rule 13.5 states that such applications are disfavored, most of the Justices grant them fairly routinely, though often for 30 ra-

ther than 60 days, especially in the common circumstance where a party has retained new counsel to prepare or assist in preparing the petition for certiorari. However, Justice Scalia, the Circuit Justice for the Fifth Circuit genuinely does disfavor applications to extend the time for petitions, and counsel for parties seeking review of a decision of the Fifth Circuit or of state courts in Mississippi, Louisiana, or Texas should not expect an application to be routinely granted.

The basic allotment of ninety days, plus the possibility of an extension, allows ample time for preparation of a petition for certiorari in most cases. Attorneys preparing petitions in paid cases should remember, however, that they must allow time for formatting the petition and appendix into the Court's required booklet form and having them commercially printed. Since most lower court decisions are now available in electronic form, formatting the appendix is no longer a terribly time-consuming task, but the printing process adds at least a day (if the attorney is able to format the documents and deliver camera-ready copy to the printer) or more (if the printer will be formatting the documents as well as printing them). On the other hand, since Supreme Court Rule 29 provides that the filing date of the petition is the date it was mailed to the Court (or delivered to a commercial carrier for delivery within three days), and since most printers who are experienced in preparing documents for the Court will also handle the filing, there is no need to build in additional time to allow for delivery of the printed petition to counsel before it is filed.

## **CONTENTS OF THE PETITION**

The petition for certiorari should be a relatively succinct document. It was long limited to 30 printed pages, but more recently the rule was changed to 9,000 words, or a little longer than a reply brief in a federal court of appeals. Using the Court's required formatting and fonts, 9,000 words works out to a little more than 30 pages, but counsel should by no means aim to use all the words allotted. Conventional wisdom is that the ideal length for a petition for certiorari is closer to 15-20 pages, but different circumstances may call for petitions of different length. A petition based on a clear conflict among the circuits over a federal statutory question that the Court will recognize as involving an important subject can usually be effectively written in far fewer than 30 pages. But a case where success depends on demonstrating to the Court that an issue that has not generated a conflict is sufficiently important to merit certiorari may require more explaining, and the Court has certainly granted its share of full-length petitions. Other things being equal, however, shorter is better.

The required contents of the petition, and the order in which they must appear, are set forth in Supreme Court Rule 14, except that the contents of the petition's cover are set forth in Rule 34.1. This article will not discuss every required element (e.g., listing of parties, tables of contents and authorities) but will focus on the major substantive parts of the petition.

### ***The Questions Presented***

The first and one of the most important parts of the petition is the listing of the questions presented, which appears immediately after the cover and before the list of

parties and tables of contents and authorities. S. Ct. R. 14.1(a). The questions presented do not count toward the word limits of the document, and the page on which they appear is usually numbered with a lower-case Roman numeral i. Although they are thus not a part of the body of the petition, they are critically important because the Court's general practice once it grants certiorari is to limit its consideration to the questions presented in the petition or matters fairly included in them (or to alternative grounds for *affirmance* that your opponent may suggest). S. Ct. R. 14.1(a). Alternative grounds for reversing the court below that are not in the questions presented will generally not be addressed by the Court.

The question or questions presented are the issues you are asking the Court to decide *if it grants the petition for certiorari*. You should therefore avoid the mistake of framing a question along the lines of "Should this Court grant a petition for certiorari to review ..." or "Did the court of appeals create a conflict among the circuits by holding ...." Those are not the questions that you will be briefing and asking the Court to decide once it grants certiorari, so they should not be framed that way in the petition.

A number of corollaries follow from the general principle that the questions presented are the issues that you want the Court to decide. First, the questions must be issues that were properly raised and decided in the lower court. Second, the questions must reflect the aspects of the lower court's decision that present issues appropriate for Supreme Court review under the general principles addressed earlier in this article—that is, they should be the important questions of federal law as to which there is a conflict among the lower courts or some other reason requiring review by the Court. Third, answers to the question or questions that are favorable to your position must be sufficient to dispose of the case in your favor. If the questions are framed in such a way that answering them either way would not affect the outcome of the case, the Court will be disinclined to accept the petition, as its job is not to decide abstract questions but concrete cases.

You need not have a separate question to cover each nuance of each of your theories as to why you should prevail, but you must take care that your questions are framed in such a way that each of the arguments you will want to present on the merits is fairly encompassed in one of your questions. That means, as a general matter, that without resorting to a strained or implausible reading of the questions, the Court would recognize each of your arguments as being aimed at providing a way of answering one of your questions that should result in reversal of the judgment below.

You should have as many questions as necessary to accomplish this end, while recognizing that an excessive number of questions is usually a bad sign. Supreme Court practitioners start being skeptical of petitions that have more than three questions. Indeed, most cases are granted to resolve what is essentially one issue, though the issue may have variants that are usefully divided into two or three questions. Because it is rare that a single case presents even one certworthy issue, let alone several, the presentation of too many questions begins to suggest that the petitioner's counsel may not know the difference between issues that merit the Court's attention

and those that do not, or may have failed to exercise good judgment in distinguishing between them.

Because of the function of questions presented in Supreme Court practice—to define clearly what the Court will consider and decide—convoluted or argumentative framing of the questions may interfere with their effectiveness. This realization is contrary to the instincts of many attorneys who have been trained to frame questions presented in a one-sided or argumentative way. But Rule 14.1(a) clearly expresses the Court’s preference that the questions be “concise[],” “without unnecessary detail,” and “short,” and that they “should not be argumentative or repetitive.”

Despite these exhortations, it is sometimes difficult to frame a direct and straightforward question that fairly comprehends the issues in a way that will be understandable without some background knowledge of the legal framework of the case. To address these difficulties, many Supreme Court practitioners have, over the last ten to fifteen years, begun including a prefatory paragraph for their questions presented that supplies some context for the questions so that the questions themselves may be stated more simply and comprehensibly without building in a lot of background matter—something along the lines of the following:

The Smith-Jones-Tom-Dick-Harry Act of 1843, XX U.S.C. § XXXX, provides that XXX. The Act applies to members of the AAAA industry and determines whether they may BBBB. In this case, the United States Court of Appeals for the Fourteenth Circuit held that the Act requires YYYY. Although two circuits agree with that rule, other courts of appeals have variously held that the Act requires ZZZZ, ZZZZ’, and ZZZZ’. The question presented is:

Nothing in the Court’s rules says whether such prefaces may be included, but the Court has been accepting petitions whose questions include prefaces for filing and has granted many of them in recent years. Because the questions presented do not count against word limits, however, counsel should avoid giving the appearance that they are trying to smuggle argument or excessive factual exposition into the preface, and limit it to what is legitimately and fairly needed to provide useful context for the questions presented. Some prefaces have expanded to multiple paragraphs covering a full page. I am not aware of any petition being rejected because of such abuse of the prefatory paragraphs, but the better practice would be not to push the envelope.

### ***The Introduction***

Rule 14 does not call for an introduction to the petition, but does not forbid one either. It has long been customary among many practitioners to start the petition with a one-sentence paragraph saying “Petitioner so-and-so respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Xth Circuit.” This boilerplate statement (like the interior caption used by some practitioners on the first page of the petition) is not required and seemingly serves no function. It is not as if the Court is unaware that a document with a white cover and the title “Petition for a Writ of Certiorari” is asking it to issue a writ to review the judgment of the lower court.

However, with some expansion, the opening paragraph can be of use. Because the first few pages of the petition are otherwise filled with relatively uninformative matter involving the citation of the decisions below, the basis of the Court's jurisdiction, and quotation of relevant constitutional and statutory provisions, it can be useful to tell the reader up front what the case is about and why the petition is being presented. I therefore recommend a short introduction (preferably a single paragraph) that says what the case is about, what the lower court held, and identifies briefly the relevant conflict among the circuits or other reasons why the case is of sufficient importance to merit review.

### ***Citation of Decisions Below and Statement of Jurisdiction***

These two sections, which begin the petition (following any introduction), are short and straightforward, but there are a couple of points worth remembering.

First, in the "decisions below" section, you should not only provide citations to the relevant decisions and orders on rehearing, but also say where they are to be found in your appendix, the principal function of which is to provide the decisions to the Court for easy reference. The order in which they are to be set forth in the appendix is specified by Rule 14.

Second, in the "jurisdiction" section, it is important to remember to provide the dates of the decisions below and of any decision on rehearing, and to recite that the rehearing petition below (if any) was timely filed. If an extension of the time for filing the petition was obtained, the petition must so state and identify the date to which the time was extended. The paragraph must also identify the statutory basis of the Court's jurisdiction (usually 28 U.S.C. § 1254 or 1257) and there are a couple of other requirements applicable to particular kinds of cases, but the most critical function of this paragraph is to allow the Court to understand that the petition was timely filed.

### ***Constitutional and Statutory Provisions***

Next the petition must set forth the text and citation of relevant constitutional, statutory, and regulatory provisions involved. If these are lengthy, they may be set forth in the appendix. Remember that this section of the petition counts against your word limit, but that the appendix does not, so in addition to avoiding having your petition start with pages of eye-glazing statutory language, you benefit from setting forth lengthy provisions in the appendix if you are anywhere near the word limits.

Even if the length of the provisions requires that they be fully set forth in the appendix, however, it may be helpful to quote some of the most pertinent language in the petition. If, as is true in many statutory cases, the outcome turns on the construction of a particular statutory phrase, it is useful to have that language front and center in the reader's mind, together with enough context to make it understandable while not obscuring it.

### ***Statement of the Case***

Supreme Court Rule 14.1(g) stresses that the statement of the case—like the rest of the petition—is to be "concise." Its most indispensable function is to explain to the

Court how the questions of which you are seeking review are relevant to and dispositive of the case, and how they were raised and decided in the courts below. Indeed, in cases arising from state courts, the rule requires that the statement include a “specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e. g., court opinion, ruling on exception, portion of court’s charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.” Although there is no similar express requirement as to cases coming up from federal courts, it is equally critical to explain how the issue was raised or decided below in such cases, as well as to state the basis for jurisdiction of the lower federal courts (as the rule expressly requires).

Beyond that, the statement of the case should include a sufficient discussion of the facts (including not only the adjudicative facts of the particular case, but also any necessary background facts about the statutory or regulatory framework and the real-world setting affected by the legal issues) to allow the Court to understand how the issues you are raising affect the case and the parties as well as their broader significance.

Your discussion of the decisions below should provide the framework for your later argument that the case merits a grant of certiorari. That is, you should describe what the lower courts did in a way that sets up your arguments. For example, if you are claiming that there is a conflict among the circuits, it is especially helpful to quote any parts of the opinion below in which the court rejected or criticized contrary decisions of other circuits or state supreme courts. You may also want to highlight elements of the lower court’s reasoning that will strike the Supreme Court as particularly suspect or that will otherwise feature prominently in your discussion of the reasons the Court should grant the writ.

In general, you should aim to present both the facts and decisions below in a way that is sympathetic to the position of the petitioner and that allows the reader to begin to understand why this is a likely case for a grant of certiorari even before you’ve made your arguments. You must, however, be careful not to appear excessively argumentative or to omit information that will call your candor into question when the respondent presents in the brief in opposition. If it is obvious to you that the respondent is likely to argue that there are reasons why the issues you say are presented are not really present in the case, that there is some obstacle to the Court’s consideration of the issues, or that there are alternative grounds for affirmance, it may be advisable to anticipate and start defusing those arguments by including in your statement of the case the circumstances you will rely on to counter them. Also, if there is any doubt about the existence of a case or controversy (that is, if there are possible arguments that the case is moot or that the petitioner lacked standing), it may be advisa-

ble to include information in the statement of the case to satisfy any doubts the Court may have on the subject.

Finally, a word of caution: Although it's important to present the factual information necessary to allow the Court to understand the issues and their significance, it's also extremely important not to go to excess. The law clerks who play the primary role in evaluating petitions and summarizing them for the Justices, as well as the Justices themselves, have very little time to devote to any one petition. Mind-numbing and tedious factual detail risks losing their attention and interest, and it also may suggest that you don't understand that the Court rarely takes cases that turn on particular facts ("factbound" cases, in the parlance of the Court and its bar) and that you are merely trying to relitigate factual matters you lost below. Even if there is a certworthy question lurking in the case, you may bury it under the weight of factual detail.

### ***Reasons for Granting the Writ***

The final substantive section of the petition is its argument, which in keeping with the purpose of the petition is usually headed "REASONS FOR GRANTING THE WRIT"; the heading "ARGUMENT" is usually dispensed with, although Rule 14.1(h) does refer to this section as a concise argument.

The heading serves as a useful reminder to the advocate of what this document is aiming to do. Unlike the usual legal brief, which is designed to demonstrate that your position is correct, the petition for certiorari is principally aimed at persuading the Court that it should *decide whether you are correct*. The arguments you make should be focused on the goal of addressing the considerations discussed at the outset of this paper that determine whether the Court will be willing to hear your case. The merits of the issue usually form some part of that discussion, but they are not the be-all and end-all of the petition.

The general practice is to divide the "reasons for granting the writ" section into Roman-numeral-headed main divisions, which in turn may have subdivisions following a conventional outline structure (capital letters, Arabic numerals, lower case letters, etc., although the nature and length of the document don't usually make it appropriate to go very far with subdivisions). It may be helpful to start off with an introductory paragraph or two before Roman numeral I that summarizes the major reasons for granting the writ, although that may be superfluous if you have already done so in the introduction to the petition itself.

There is not necessarily any one correct or even preferable way to structure the reasons for granting the writ, but if you are relying primarily on a solid conflict among the circuits, or a blatant disregard by the lower court for directly applicable Supreme Court precedent, it is usually helpful to start there, then proceed to a relatively brief and punchy description of why the lower court chose the wrong side of the conflict, and then to a discussion of why the issue is of great significance. It is usually important to provide at some point the highlights of your argument that the lower court is wrong so that the Court knows not only that there is a conflict but that your

side has some chance of prevailing, as the Court generally seems to have a preference even in conflict cases for granting in cases where it thinks the lower court probably got it wrong. Still, you don't want your merits argument to suggest that your principal goal is error correction as opposed to the presentation of an important issue requiring the Court's review. Your objective should be to put forward the principal points that show that you have a strong argument rather than to nail down every last point as you might attempt to do in a merits brief.

Framing the reasons for granting the writ is more complicated in cases where there is no square conflict among the lower courts and your task is to convince the Court that the correctness of the lower court's decision is nonetheless an important enough question to deserve plenary review by the Court. In such cases, a more extensive discussion of the merits may be necessary, coupled with a more than usually extensive discussion of the reasons that it is of national importance that the Supreme Court address the issue. You must convince the Court that the lower court's decision is so far outside the norm of judicial decisionmaking that it requires further review, even while avoiding the appearance that you are just rearguing the merits of a case lost below. Success in such cases may also depend on factors wholly outside your control—whether the issue coincides with matters that are of particular interest or concern to specific Justices, and whether the members of the Court may have a suspicion that the lower court in question is particularly prone to error such that an exercise of the Court's "supervisory authority" is called for.

As with the statement of the case and, indeed, everything about the petition, the reasons for granting the writ should be, as the Court's rules emphasize, as "concise" as possible consistent with presenting your best arguments that the case is important enough to justify granting certiorari. In the case of petitions premised on a square circuit split, for example, the more you have to say to explain why the lower court decisions are in conflict, the less persuasive your claim of a conflict is likely to seem. Similarly, in explaining the national importance of the case, your aim is to make it seem obvious to the Court that the case is of great significance at least to some important sector of society, government or the economy. If the importance of an issue is very hard to explain, the Court is likely to think the reason may be that it isn't really that important. And finally, if your claim is that even absent a conflict the decision of the lower court has, in the words of Supreme Court Rule 10, "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power," it should be possible to characterize that departure reasonably simply and succinctly. And again, remember that your audience—clerks and Justices reviewing dozens or hundreds of petitions in preparation for a conference of the Court at which they will be considered—necessarily has a limited attention span for any one case.

### ***The Conclusion***

Unlike the conclusion of a court of appeals brief or Supreme Court merits brief, which must explain exactly what disposition the court is being requested to make in a case—a task that sometimes requires some detail and precision—the conclusion of a

petition for certiorari makes an entirely straightforward request: The petition for a writ of certiorari should be granted. While conclusions that sum up the arguments already made are sometimes used, in a document as short and straightforward as a petition for certiorari, that is seldom actually necessary.

## **FORMATTING THE PETITION AND APPENDIX**

I've referred above on a few occasions to the Court's distinctive formatting requirements for printed petitions and briefs. These are set forth in Supreme Court Rule 33.1, which describes the Court's "booklet format," which requires briefs to be presented as typeset and bound booklets measuring 6 1/8 by 9 1/4 inches. Among other distinctive features of the rules, the Court requires that booklet-format documents be set in a "Century" family 12-point typeface.

If you choose a printer that is experienced in preparing Supreme Court briefs, its employees will be able to assist you with the formatting. If you or others in your office are adept at document formatting, you can save money by formatting your petition in-house and providing camera-ready copy to your printer. Either way, you should take care to ensure that your petition complies with the Court's requirements.

If your client is indigent (including a federal criminal defendant entitled to representation under the Criminal Justice Act), you are exempt from the requirement of presenting your petition in booklet format and can instead prepare it as a typewritten document on letter-sized paper. In forma pauperis petitions in general have a much smaller statistical likelihood of being granted than paid cases, but particularly in federal criminal matters as well as in death penalty and other habeas corpus cases arising from state criminal proceedings, the Court is used to receiving petitions in typewritten format and taking them very seriously.

## **AMICUS SUPPORT**

Because the point of the petition for certiorari is that the case is so important that it demands review by the Court, it can be extremely helpful to have the support of amicus curiae briefs that support the granting of the writ. This is particularly true when the pitch you are making is not based on a conflict among the circuits, but on a decision that you claim is important because it threatens to have some broad and deleterious real-world impact. Having groups affected by the impacts you are relying on chiming in to tell the Court that the case is, indeed, very important to them appears to have some impact. It is certainly not necessary—many, and probably most cases in which the Court grants certiorari do not involve cert-stage amicus briefs—but if your case is one where persuading the Court that the practical import of a decision is a principal reason for review, it helps to provide the Court with something beyond your own say-so that that is the case.

If you are going to attempt to obtain amicus support, it should be lined up before you file your petition, because an amicus brief supporting the petition must be filed within 30 days of the docketing of the petition, and that time cannot be extended. In addition, notice must be given to the parties (including the respondent) of intent to file a cert-stage amicus brief at least ten days before it is filed. The purpose of these

rules (which are set forth in the Court's Rule 37.2) is to enable the respondent, if it chooses, to obtain an extension of time to file a brief in opposition that will allow it to address any arguments made in the amicus briefs supporting the petition as well as in the petition itself.

A cert-stage amicus brief, like an amicus brief on the merits, requires the consent of both parties or a motion for leave to file (unless it is filed by the Solicitor General or an attorney representing some other governmental body). Most experienced practitioners routinely consent to the filing of amicus briefs because withholding consent is largely pointless: Although the Court's rules say that motions for leave to file cert-stage amicus briefs are "not favored" (S. Ct. R. 37.2(b)), they are in fact routinely if not invariably granted. If you are seeking amicus support for your petition for certiorari, you have little reason to fear that permission to file will be denied.

## CONCLUSION

There is much more to be said on the topic of the certiorari process, but it is beyond the scope of a paper of this length. I have addressed some other aspects of the process elsewhere, including the way the Court reviews certiorari petitions, the timetable of the Court's consideration of petitions, and the preparation of briefs in opposition. See Scott L. Nelson, "Opposing Cert: A Practitioner's Guide," <http://www.citizen.org/documents/OpposingCertGuide.pdf>.

As for this paper, I will end it where I began: The overwhelming majority of cases decided by federal courts of appeals and state supreme courts are not credible candidates for certiorari. Even most cases in which petitions are filed are not credible candidates. And even the best and most experienced Supreme Court advocate cannot make a silk purse out of a sow's ear; indeed, lawyers who specialize in Supreme Court advocacy regularly turn down paying clients who want to file petitions for certiorari for precisely this reason. They don't want to waste their time, their credibility, or their client's money on a useless exercise.

But an advocate's understanding of what makes for an effective petition probably can make a difference as to whether one of the perhaps 200 cases annually that have a realistic shot at certiorari ends up being one of the about 80 actually chosen. Certainly a poorly done petition can result in denial in a case where a better petition could make the difference. The most effective advocacy will reveal itself in those cases that are on the margin.