



Basics of Certiorari Practice in the Alabama Supreme Court

**By Marc James Ayers and
Andrew L. Brasher**

The writ of certiorari (in Latin, “to be more fully informed”) is an extraordinary writ available to the Alabama Supreme Court by which the Court can “pull up” for review a decision of the Alabama Court of Civil Appeals or the Alabama Court of Criminal Appeals. While it is a commonly sought writ, there is, at times, some confusion about the writ. Seeking appellate review from the Alabama Supreme Court by way of a writ of certiorari is not like bringing a direct appeal, and should not be thought of as such. Instead, the writ provides a limited avenue by which the Alabama Supreme Court—solely upon its discretion—can decide one or more issues in a case originally within the jurisdiction of one of the lower appellate courts (or that had been “deflected” to the court of civil appeals). See Ala. R. App. P. 39(a) (“Certiorari review is not a matter of right, but of judicial discretion.”).

Maintaining a proper view of the nature and operation of the writ is important, and can increase one’s chances of success in petitioning for the writ. In cases falling within the jurisdiction of the lower appellate courts, there has been a tendency to consider review by the intermediate courts as a kind of “first step” of the appellate process, with the second

being review by the Alabama Supreme Court. This viewpoint is inaccurate, and can lead to mistakes in petitioning for certiorari review. It is more accurate (and safer) to view the relationship between Alabama’s lower appellate courts and the Alabama Supreme Court like the relationship between a federal circuit court of appeal and the United States Supreme Court. While the chances of obtaining certiorari review from the Alabama Supreme Court might be better than it would be before the United States Supreme Court, the nature of the relationship is essentially the same. Nobody considers an appeal to the Eleventh Circuit, for example, as merely a “first step” on their way to the United States Supreme Court. Accordingly, where a direct appeal is to one of Alabama’s lower appellate courts, that court is *the* appellate court for that matter; further review by a writ of certiorari is available with regard only to certain specific issues and extraordinary circumstances.

Not surprisingly, the Alabama Supreme Court grants only a small percentage of certiorari petitions, and it is the petitioner’s job to convince the court that there are “special and important reasons for the issuance of the writ” in his case. Ala. R. App. P. 39(a). Many petitions are summarily denied



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because they are procedurally noncompliant. Therefore, the easiest and best way to increase your chances of having issues reviewed by the Alabama Supreme Court on a writ of certiorari is to survive the court’s initial procedural review by closely following the directions of Rule 39, *Ala. R. App. P.* A clearly-presented, procedurally compliant certiorari petition tends to stand out from the crowd even before the merits of the petition have been examined.

Filing an Application for Rehearing before Seeking Certiorari Review

When you receive a decision from one of the lower appellate courts, the first question is not whether one should petition for certiorari review, but whether to file an application for rehearing. The answer is easy with regard to decisions from the Alabama Court of Criminal Appeals, because an application for rehearing is a jurisdictional prerequisite for certiorari review of that court’s decisions, with some narrow exceptions. *Ala. R. App. P.* 39(c), 40(d)(1). However, an application for rehearing is *not* a prerequisite with regard to decisions by the Alabama Court of Civil Appeals. *Ala. R. App. P.* 39(b), 40(d)(2). Applications for rehearing typically must be filed within 14 days of the decision. *See Ala. R. App. P.* 40(c).

Applications for rehearing can serve various purposes beyond simply attempting to get the deciding court to change its mind. A party may want to correct ambiguous or incorrect factual statements in the court’s opinion or clarify the court’s ruling. As discussed below, an application for rehearing can be particularly helpful if a party believes that the court’s reasoning conflicts with a decision of one of the lower appellate courts, the Supreme Court of Alabama, or the United States Supreme Court—as such a conflict provides a proper ground for certiorari review—but the opinion does not discuss the applicable precedent.

The Form of the Petition for a Writ of Certiorari

Under Rule 39(d), *Ala. R. App. P.*, a petition for a writ of certiorari must contain the following elements:

- The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal and the name of the court of appeals to which the petition for certiorari is directed;
- The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;
- A concise statement of the grounds (see discussion below);
- A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit;
- a concise statement of the facts, if needed (see discussion below); and
- A direct and concise argument amplifying the grounds relied on for allowance of the writ.

Caution should be exercised when using a “form petition,” *i.e.*, any previously-filed or “blank” petition. Ensure that the form petition satisfies the current rules, and that the petition does not contain information from some earlier-filed petition (this error is not uncommon). Changes to the appellate rules are posted on the Alabama Supreme Court Web site at <http://www.judicial.state.al.us/rules.cfm>.

Page Limitations

Petitions for writs of certiorari are limited to 15 pages, with the exception of death penalty cases, which have no page limit. *Ala. R. App. P.* 39(d). If a statement of facts (discussed below) is attached to the petition it is not counted against the page limit. *See* Committee Comments to Amendment to Rule 39 Effective June 1, 2005.

Color of Cover

Sometimes determining the proper cover color for appellate filings is confusing. This is not so with certiorari petitions: the cover of the petition should be white, *see* Ala. R. App. P. 28(d), 32(b)(3), and briefs filed upon the grant of a petition for a writ of certiorari follow the standard blue-red-gray format, *see* Ala. R. App. P. 28(d).

Docket Fee

The current docket fee for a petition for a writ of certiorari from a decision of the court of civil appeals is \$50. *Ala. R. App. P. 35A(a)(3), 39(b)(2)*. There is no docket fee for a petition from a decision of the court of criminal appeals. *See Ala. R. App. P. 35A(b)*.

The fee should accompany the petition, and should be made out to the clerk of the Alabama Supreme Court. Failure to file a docket fee is not a jurisdictional defect, but that failure can result in dismissal of the petition for noncompliance. *Accord H.C. Schmieding Produce Co. v. Cagle*, 529 So. 2d 243, 249 (Ala. 1988).

Briefs

Under a 2005 amendment to Rule 39, no briefs are to be filed—by the petitioner or the respondent—unless the court grants the petition. Rule 39(b)(4), *Ala. R. App. P.*, *see* Committee Comments to Amendment to Rule 39 Effective June 1, 2005. The court will determine whether to pull the case up for review solely on the basis of the petition (the court will not have the record on appeal unless and until it grants the writ). If the petition is granted, the petitioner and the respondent will file briefs according to the time frame discussed below. *See Ala. R. App. P. 39(g)*. Briefs should follow the standard brief format found in rules 28 and 32(a), *Ala. R. App. P. See Ala. R. App. P. 39(g)*.

Time Requirements

The time for filing a petition is 14 days from the date of the decision of the lower appellate court, or, if rehearing is sought, 14 days from the date of the decision on rehearing. *Ala. R. App. P. 39(b)(3)*. This

14-day time period is jurisdictional and cannot be enlarged except in death penalty cases. *Ala. R. App. P. 2(b), 39(a)(2)(C)*.

If the petition is granted, the petitioner has 14 days to file a brief on the merits of the specific grounds upon which the petition was granted. *Ala. R. App. P. 39(g)(1)*. However, the petitioner can waive the right to file an opening brief. *Id.* The respondent has 14 days to file a responsive brief, and then the petitioner's reply brief is due 14 days later. *Ala. R. App. P. 39(g)(2)&(3)*. These time periods are shortened to seven days in the case of a pretrial appeal by the state in a criminal case, and in such a case the petitioner does not file a reply brief. *See Ala. R. App. P. 39(g)*.

Grounds for Certiorari Review

Every petition for certiorari must include a concise statement of the issues and grounds upon which the petition is based. *Ala. R. App. P. 39(d)(3)*. In all civil cases and non-death penalty criminal cases, the supreme court can consider only those petitions for writs of certiorari stemming from the following types of decisions:

- decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the United States Constitution;
- decisions that affect a class of constitutional, state or county officers;
- decisions where a material question requiring decision is one of first impression for the Supreme Court of Alabama (this is the "first impression" ground, discussed further below);
- decisions in conflict with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of Criminal Appeals or the Alabama Court of Civil Appeals (this is the "conflict" ground, discussed further below); and
- where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals.

Ala. R. App. P. 39(a).

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The two most frequently-cited grounds for certiorari review are “first impression” and “conflict.”


The supreme court can hear a petition from a death-penalty case in one additional circumstance: if the petitioner alleges that the trial suffered from a prejudicial plain error, even if the error or defect was not brought to the attention of the trial court or court of criminal appeals. *Ala. R. App. P.* 39(a)(2)(B).

Each lower appellate court decision that a petitioner wants to have reviewed by the Alabama Supreme Court *must* fit into one of these specific grounds. Moreover, certiorari review is strictly limited to the issues that were addressed by the lower appellate court, *see, e.g., Ex parte LaCoste*, 733 So. 2d 889, 894 (Ala. 1998), and that are raised in the petition. If the court grants a certiorari petition, the court will address only those grounds upon which it granted the writ (which means it certainly will not review issues not included or properly presented in the petition). *See, e.g., Ex parte Hatfield*, ___ So. 2d ___, 2009 WL 153929, at *6 (Ala. Jan. 23, 2009) (refusing to address issues not raised in the petition); *Ex parte Franklin*, 502 So. 2d 828, 828 (Ala. 1987) (noting that it is well-established that the court can address only those grounds presented in the petition). Therefore, a petitioner should take great care to precisely identify the ground or grounds upon which certiorari review is being sought. The best practice is to cite the specific rule as to which ground is being asserted at the beginning of each issue that the petition raises. Do not be afraid to walk the court through your grounds using “baby steps”—clarity in stating grounds is half the battle. If the court has to guess at either what your grounds are or whether they fit within the list of proper grounds for a writ of certiorari, your petition is in trouble.

noncompliance. If you are relying on first impression grounds, it is vitally important that you tell the court precisely what the question of first impression is (it is also important to be sure that it is indeed a question of first impression). You do not want the court to have to hunt to find the question of first impression you claim is raised by the lower appellate court’s decision.

Similarly, if you are relying on conflict grounds, you must quote the relevant section of the opinion of the lower court and the part of the prior decision with which it conflicts. *Ala. R. App. P.* 39(d)(1). If it is impossible to quote the conflicting text, then you should explicitly say so, cite *Ala. R. App. P.* 39(d)(2), and state with particularity what the conflict is. Either way, explain precisely to the court what you are doing, and make sure to include proper citation to the relevant cases. It is also crucial to remember that not all conflicts count—such as conflicts with a statute, rule or a decision by a federal circuit court of appeals—only conflicts with the U.S. Supreme Court or with one of Alabama’s appellate courts.

Many petitions are denied because they are procedurally noncompliant. *See Ex parte Siebert*, 778 So. 2d 857, 857 (Ala. 2000) (Johnstone, J., concurring specially). Given the limited scope of certiorari review, and the extremely large number of such petitions that are filed with the court, the court rigorously examines petitions to ensure that they comply with the appellate rules. *See, e.g., Ex parte Save Our Streams, Inc.*, 541 So. 2d 549, 550-52 (Ala. 1989); *Ex parte King*, 797 So. 2d 1191 (Ala. 2001) (Brown, J., concurring specially). Such rigorous review is necessary to sort the truly certiorari-worthy petitions from those seeking further appellate review based on grounds outside the limited grounds for which certiorari is available. This rigorous review may result in some petitions being denied for procedural violations that, had they been properly presented, might have raised a certiorari-worthy issue. However, many of the petitions denied as procedurally noncompliant *did* not properly state a ground for certiorari review because they *could* not state a ground. For example, the reason that many petitions fail to quote the allegedly conflicting portions of a decision or explain specifically and “with



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Notes on Asserting “First Impression” and “Conflict” Grounds

The two most frequently-cited grounds for certiorari review are “first impression” and “conflict.” Unfortunately, they are also the grounds most frequently misstated, leading to denial for procedural

particularity” why a conflict exists is because no true conflict does exist. Again, the Alabama Supreme Court is not a “second court” for direct appeal; if the issues presented do not fit into one of the proper grounds of certiorari review, the court does not review those issues.

The Statement of Facts

One of the areas in which errors most often occur in petitions for writs of certiorari is with regard to the statement of facts. It is also one of the most important components of a petition, and can even determine whether your petition *can* be granted. Rule 39(k) makes clear that the court will be limited to the facts contained in the decision of the lower appellate court, unless the petitioner has properly included a statement of additional or corrected facts with the petition:

The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals, unless the petitioner has attempted to enlarge or modify the statement of facts as provided by Rule 39(d)(5). The scope of review includes the application of the law to the stated facts.

(This scope of review might be modified in death penalty cases where “plain error” is asserted. *See Ala. R. App. P. 39(a)(2)(D)*). Therefore, if you do not properly include a statement of facts when necessary, the court may have no facts with which to analyze your petition and cannot grant it. *See, e.g., Ex parte Winchester*, 544 So. 2d 967, 968 (Ala. 1989); *Ex parte Silas*, 909 So. 2d 190, 190-91 (Ala. 2005) (Harwood, J., concurring specially).

As stated in various sections of Rule 39(d)(5), the rules governing the statement of facts are as follows:

If you are satisfied with the facts as stated in the lower appellate decision, then you do not need to include any statement of facts.

If you want to add or correct facts included in the decision of the court of civil appeals, but did not seek rehearing, then you “*may* present to the supreme

court, either in the petition or as an attachment to the petition for the writ of certiorari, a proposed additional or corrected statement of facts or the applicant’s own statement of facts, with references to the pertinent portions of the clerk’s record and the reporter’s transcript.” Rule 39(d)(5)(C).

If you received a “no opinion” affirmation from the court of civil appeals, or an opinion containing no facts, but did not seek rehearing, then you “*shall* present to the supreme court, either in the petition or as an attachment to the petition for the writ of certiorari, the petitioner’s statement of facts, with references to the pertinent portions of the clerk’s record and the reporter’s transcript.” Rule 39(d)(5)(C) (emphasis added). If you do not present a statement of facts, there will be no facts for the court to review, rendering it impossible to review your petition.

If you want to add or correct facts included in the decision of the lower appellate court, and, on rehearing before that court, filed a statement of additional or corrected facts that were not included in a later opinion of that court, then “the proposed statement of additional or corrected facts or the applicant’s own statement of facts presented to the court of appeals in the application for rehearing *must* be copied verbatim and attached to

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or included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript," *and* the petitioner "*must include a verification* that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing." *Ala. R. App. P. 39(d)(5)(A)(i)&(ii)* (emphasis added). To "verify" the statement of facts, the best practice is to include a signature line at the bottom of your statement, and, using the language of this rule, state that you are verifying that "this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing." It is better to create a new document—do not simply photocopy your statement of facts submitted in the lower appellate court.

If you received a "no opinion" affirmation, and, on rehearing before that court, filed a statement of facts that were not included in a later opinion of that court, then "a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be either included in or presented as an attachment to the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript," *and* that statement of facts must contain a verification as described above. *Ala. R. App. P. 39(d)(5)(B)(i)&(ii)*. If you do not present a properly verified statement of facts, there will be no facts for the court to review, rendering it impossible to review your petition.

If you are not satisfied with the facts as stated in the main opinion of the lower appellate court, but you agree with some or all of the facts in a special writing or a dissent, Rule 39(d)(5) now recognizes—in light of recent amendments to that rule—a mechanism by which a petitioner can adopt those facts on rehearing and in a certiorari petition. *See Ala. R. App. P. 39(d)(5)(a)(i)&(iii), 39(d)(5)(C)(i)&(ii)*; Court Comment to Amendments to Rule 39(d)(5) Effective September 15, 2008.

When preparing a statement of facts, do not forget to include proper citations to the record on appeal, even though the court will not have the record before it unless and until it grants the writ. *Ala. R. App. P. 39(f)*.

Alabama Supreme Court's Review of Petitions for Writs of Certiorari

Petitions for writs of certiorari are reviewed by the Alabama Supreme Court in essentially the same format as a direct appeal. When a petition is filed, it is assigned to a justice on a rotating basis. The justice and his or her staff will evaluate the petition and draft a memorandum



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for the court with a recommendation to either grant or deny the petition depending upon whether the petition is procedurally compliant and whether the substantive issues presented have a "probability of merit." *Ala. R. App. P. 39(f)*. If five justices vote to grant the petition, the writ issues; if not, the petition is denied.

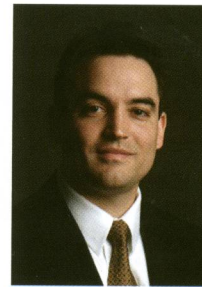
After the court "pulls up" a matter from one of the lower appellate courts by granting a writ, the record on appeal and other materials are transmitted to the court from the lower appellate court, *see Ala. R. App. P. 39(f)*, and the matter is reviewed as with other appeals with one exception. In addition to affirming or reversing the lower appellate court, the supreme court can—in its discretion—"quash the writ as improvidentially granted." *See, e.g., Ex parte State of Alabama Dep't of Revenue*, 993 So. 2d 898 (Ala. 2008). When this option is exercised, it is often because the court, after receiving full briefing upon granting the writ, determines that the issues presented did not truly fit into a proper ground for certiorari review. Respondents should remember that the

court retains this option, and that all respondents can argue (in their responsive brief) that the writ should be quashed because the issues presented in the petition were not certiorari-worthy. *See* Committee Comments to Amendment to Rule 39 Effective June 1, 2005.

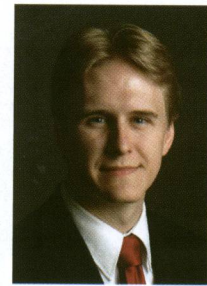
If the writ is denied (by being quashed or otherwise), that is the end of the Alabama Supreme Court's review. A party may not file an application for rehearing from the denial of a writ. *Ala. R. App. P. 39(1)*.

Conclusion

Being able to effectively and persuasively present a correctly-tailored petition for a writ of certiorari to the Alabama Supreme Court is an important tool in the arsenal of any Alabama litigator. While the avenue for review is appropriately limited, Rule 39 provides a clear roadmap for maximizing the chance of successfully catching the eye of the court and, accordingly, of obtaining a successful result for your client. ▲▼▲



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