

**SUCCESSFUL REHEARING AND CERTIORARI  
IN THE ALABAMA COURTS**

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So, you've lost your case in the Court of Appeals and you must analyze and advise your client as to whether he has any realistic options for further appellate review and if so, how he should proceed. These materials will address how you make that evaluation and how you proceed if you determine that further appellate review should be sought.

**I. READ THE RULES !!!!!!!!!!!!!!!!!!!!!**

There is no substitute for reading and analyzing the applicable rules. Appellate Rule 40 sets forth the requirements for applications for rehearing. Petitions for writs of certiorari are governed by Rule 39. A clear understanding of the requirements of each of these rules – and the interplay between the two – is essential to accurately evaluating whether to seek additional appellate relief, and if so, how to proceed.

## **II. Should your client seek further review?**

To make this determination, you must first analyze the courts' opinion - objectively.

Is the opinion well reasoned?

Is the decision really as bad as it seems at first glance (i.e. if you seek further review could you end up in an even less favorable position)?

Did the court fail to consider or misconstrue evidence relevant to the issue on appeal?

Did the court fail to consider applicable case law, statutes or constitutional provisions?

Did the court misinterpret governing law?

Is the court's decision contrary to other applicable law or principles?

Did the Court apply the wrong standard of review?

What are the practical ramifications of the decision in other circumstances, both for your client and others?

If the decision doesn't terminate the case, can you live with the ramifications of the decision in further proceedings? The law of the case doctrine may necessitate seeking further review.

Are there issues upon which your opponent might seek further review? If so, you may need to seek further review as a protective mechanism.

What will it cost your client, not just for your fees but also in terms of the emotional costs?

**III. If you decide to proceed, should you apply for rehearing or immediately petition for certiorari?**

If no ground for certiorari review is presented, see Ala. R. App. P. 39(a)(1)(A)-(E), then obviously your only avenue for further appellate review is by way of rehearing.

An application for rehearing is no longer a prerequisite for filing a petition for writ of certiorari in a civil case, Ala. R. App. P. 39(b), so if a ground for certiorari review is presented, you may proceed immediately with a certiorari petition. However, it may be preferable in some cases to apply for rehearing prior to filing a petition for certiorari review. If you choose to file an application for rehearing, it must comply with Rule 40(e) to support a later petition for writ of certiorari.

Factors that may militate in favor of filing for rehearing

- none of the grounds for certiorari is clearly presented
- no-opinion cases
- case decided on basis not fully brief in the court of appeals (i.e. jurisdictional ground)
- cases with dissenting opinions
- courtesy to the Court
- two bites at the apple

Factors that may militate against applying for rehearing:

- issues of first impression
- economics
- sometimes you may not want the court to explain itself further (i.e. a modified opinion might leave you in a worse position for filing a cert petition)
- if you fail to comply with Rule 40 in filing your application for rehearing, certiorari review is precluded.

**IV. Requirements for Rehearing**

A party that failed to file a brief on original submission cannot, as a matter of right, apply for rehearing. Ala.R.App.P. 40(a)(2).

If an application for rehearing is filed that does not comply with Rule 40, certiorari review is precluded. Ala.R.App.P. 39(b)(3).

A. Points of law or fact overlooked or misapprehended

The application must state “with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended.” Ala.R.App.P. 40(b).

Authority must be cited in the application for rehearing (not just in the supporting brief) or the application will be dismissed.

**Note:** Although the rules no longer require that the court of appeals have overruled an application for rehearing directed to the “point, issue or decision complained of” as a prerequisite to certiorari review, the

Supreme Court will consider on certiorari only issues that were properly raised and argued in the intermediate appellate court. *See Ex parte Liberty Nat'l Life Ins. Co.*, 797 So. 2d 457 (Ala. 2001).

B. Statement of facts

Rule 40 provides that if the court of appeals issues an opinion or unpublished memorandum containing a statement of facts and a party is not satisfied with the court's statement of facts, the party applying for rehearing "may" include in his application a proposed additional or corrected statement of facts or the applicant's own statement of facts. If he does not do so, it is presumed that he is satisfied with the facts stated in the opinion. If the court of appeals issues a no-opinion decision or issues an opinion that does not contain a statement of facts, the applicant "shall include" a statement of facts in the application for rehearing. Ala.R.App.P.40 (e).

**Note:** Remember that a "fact" that may need to be included can be a procedural fact, like the fact that an objection was made or the date upon which a motion was made. *See Douglas Johnstone, The Two Most Common Fatal Defects in Petitions for Writs of Certiorari*, 64 Ala. Law.166, 167-68 (May 2003).

**Caution:** If a proposed additional or corrected statement of facts or the applicant's own statement of facts is not included in the application for rehearing, additional facts may not be considered by the Supreme Court on petition for writ of certiorari. *See* Ala.R.App.P. 39(d)(5)(A)&(B).

C. Brief

A brief must be filed in support of an application for rehearing. Ala.R.App.P. 40(a)(1). The brief must comply with Rule 32, except that it need not contain a statement of facts, which will be set forth in the application itself. Ala.R.App.P. 40(g). The supporting brief must point out clearly and intelligently any error in the opinion. Filing the same brief originally filed on appeal is insufficient. *Cox v. State*, 380 So. 2d 384 (Ala. Crim. App. 1980).

d. Time for filing

Application for rehearing and the supporting brief must be filed within 14 days of the date of the court's decision. Ala.R.App.P. 40(c). The application will be deemed timely **only** if it is received in the clerk's office by the due date **or** it is post marked by the due date and is sent by certified, registered or express United States mail. Ala. R. App. P. 25(a). Use of commercial delivery services will not toll the time for filing. Facsimile transmission does not equate to filing. *See Ex parte Tuck*, 622 So. 2d 929 (Ala. 1993).

**V. Requirements for Certiorari Petition**

The petition must contain the style of the case, the name of the petitioner, the circuit court from which the case was appealed, the name of the court of appeals to

which the writ would be 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. Ala. R. App. P. 39(d)(1)&(2). The petition also must contain a concise statement of the grounds supporting certiorari review, Ala.R.App.P. 39(d)(3), and a copy of the opinion of the court of appeals must be attached as an exhibit to the petition. Ala. R. App.P. 39(d)(4). If the party is not satisfied with the statement of facts included in the lower court's decision or if a no-opinion decision was issued, a statement of facts must also be included. Ala.R.App.P. 39(d)(5). A supporting brief must be filed with the petition.

The petition must be in form prescribed by Rule 39 and Rule 32(a). The petition shall not exceed 15 pages in length. Ala. R. App. P. 32(b)(2).

A petition for a writ of certiorari that does not comply with the requirements of Rule 39, as amended, may be stricken on motion of a party or ex mero motu by the court. *Hanvey v. Thompson*, 243 So.2d 748 (Ala. 1971). A LARGE percentage of the petitions for certiorari that are filed are denied because they fail to comply with the rules.

A. Statement of the grounds for certiorari review

Rule 39(d)(3) requires that the **petition** contain a “concise statement of the grounds ... on which the petition is based. Raising a basis for certiorari in the

supporting brief is insufficient. *See Ex parte Arthur*, 835 So. 2d 981, 984 n.3 (Ala. 2002) (“In their brief, Ashley and Richard argue that the juror misconduct resulted in both actual and presumed prejudice, but in their petition they raise only presumed prejudice. We, therefore, address only that issue.”).

Petitions for writs of certiorari are considered only:

(1) “From 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” Rule 39(a)(1)(A)

(2) “From decisions affecting a class of constitutional, state or county officers” Rule 39(a)(1)(B)

(3) “From decisions where a material question requiring a decision is one of first impression in Alabama” Rule 39(a)(1)(C)

**Note:** The question must be one of first impression in the state not just one of first impression in the Supreme Court. If the question has been considered by one of the courts of appeal, it is not an issue of first impression within this provision.

(4) “From 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 of the Alabama Court of Civil Appeals” Rule 39(a)(1)(D)

**Note:** A conflict with a statute, regulation, rule, constitutional provision, or decision of another state court or a lower federal court is not a ground for certiorari review. However, the decision may conflict with a case that has interpreted the rule, statute or constitutional provision, a case that stated a rule of construction for the rules, statutes or constitutional provisions or a case that requires the courts to obey the

rules, statutes or constitutional provisions or forbidding them from usurping the authority of the legislature. Douglas Johnstone, *The Two Most Common Fatal Defects in Petitions for Writs of Certiorari*, 64 Ala. Law.166, 167 (May 2003).

If this “conflict with prior decisions” ground is relied upon,

- (a) “the petition must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are conflict;” or,
- (b) “if it is not feasible to quote that part of the opinion of either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition must state specifically and with particularity how the decision conflicts with a prior decision.” Rule 39(a)(1)(D)

**Note:** If the petitioner simply states that a conflict exists without explaining the conflict, the petition is defective. *See Ex parte Duchac*, 292 Ala. 251, 292 So. 2d 139 (1974)(noting that petition is insufficient where it simply asserts “conflict with a prior decision of this court on the same point of law” without describing the portions of the relevant decisions that are in conflict.).

(5) “Where petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeal” Rule 39(a)(1)(E).

**Note:** The decision the petition is seeking to have overruled must be a controlling decision of the Alabama Supreme Court, not a decision of one of the courts of appeal.

**Caution:** Be very careful which ground(s) you allege in your petition, because the ground(s) alleged is(are) the **only** ground(s) the Court will consider in determining

whether certiorari is warranted. *See Ex parte Canidate*, 842 So.2d 648, 649 (Ala. 2002)(Johnstone, J., concurring specially)(observing that while the decision of the Court of Civil Appeals appeared to conflict with a prior decision of the Court of Criminal Appeals quoted in petitioner’s brief, the Supreme Court could not consider this issue on certiorari review as petitioner failed to raise this conflict in his petition). Also, remember that you must assert a jurisdictional ground for certiorari review of *each* holding by the court of appeals that the Supreme Court would need to hold erroneous to reverse the judgment of the court of appeals. *See Douglas Johnstone, The Two Most Common Fatal Defects in Petitions for Writs of Certiorari*, 64 Ala. Law.166, 167 (May 2003).

B. Statement of facts

The petition for writ of certiorari must contain a statement of facts:

- (1) if the petitioner is not satisfied with the statement of facts in the opinion or memorandum of the court of appeals; **or**
- (2) if the court of appeals issued a no-opinion decision.

**Note:** The statement of facts must be set forth **in the petition itself** (not just the supporting brief or documents). Rule 39(d)(5) (“The statement of facts shall not be incorporated or adopted by reference from any other documents including the party’s brief in support of the petition.”)

Remember, all the court has before it in considering a petition for certiorari is the petition and exhibits, and the briefs in support of and in opposition to the petition. The record on appeal is not before the court for consideration unless and until the petition is granted. Consequently, any facts the petitioner wishes the court to consider that are not recited in the opinion of the lower court must be brought before the Court in the manner set forth in Rule 39(d)(5) or the Court cannot consider those facts. The manner in which those facts are brought before the Court depends upon the posture of the case.

1. If no application for rehearing was filed.

If the Court of Civil Appeals affirmed the case without opinion, the petition **must** include a statement of facts, with references to the pertinent portions of the record. Rule 39(d)(5)(B). If the Court of Civil Appeals issued an opinion, but the petitioner is not satisfied with the statement of facts, he “may” present in his petition a statement of additional or corrected facts or his own statement of facts, with record references. If he does not do so, the Court must presume that the petitioner is satisfied with the facts contained in the court of appeal’s opinion and cannot consider any additional facts.

2. If an application for rehearing was filed.

Where an application for rehearing was filed in a no-opinion case or a case in which the opinion contains no statement of facts, the applicant “shall include” in his application for rehearing his statement of facts. Ala. R. App. P. 40(e). If the court of appeals does not incorporate those facts in a subsequent opinion, a verbatim copy “must be” included in the petition for writ of certiorari, complete with record references. Ala. R. App. P. 39(d)(5)(B).

Similarly, where an application for rehearing is filed in a case in which the court of appeals’ opinion includes a statement of facts, but it does not include all the facts the applicant deems necessary, he “may” include in his application for rehearing proposed additional or corrected facts or the applicants own statement of facts (**note:** he must do so if he wants the court to consider those additional facts). If he does so and court of appeals does not incorporate those facts in a subsequent opinion, then “the statement of facts must be copied **verbatim** in the statement of facts in the petition, with references to the clerk’s record and the reporter’s transcript.” Rule 39(d)(5)(A)(emphasis added).

**Note:** This statement of facts cannot be incorporated by reference from any other document. *See* Rule 39(d)(5)

In either case, “[t]he petition 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.” Rule 39(d)(5)(B)(emphasis added).

**Caution:** Although rule 39 has been simplified by the amendments made in 2000, just as with the prior rule, if a party decides to file an application for rehearing and is not careful in doing so, he may inadvertently prevent review by certiorari. For example, if there is one fact that the party needs to support his argument for rehearing and/or for certiorari (i.e. some piece of evidence that creates an issue of fact in the summary judgment context, or that distinguishes his case from the case relied upon by the court of appeals, or that demonstrates that an issue was properly preserved), if the party does not include in his application for rehearing a statement of facts which incorporates that fact, then the court of appeals must assume that that fact does not exist. If he doesn’t include a statement of facts in his application for rehearing, he cannot include one in his petition for certiorari, and the Supreme Court must assume that that fact does not exist and deny the petition. If he includes a statement of facts in his application for rehearing, but fails to include it in his petition for certiorari, the Supreme Court likewise must assume that that fact does not exist and deny the petition.

C. Supporting brief:

The petition must be accompanied by a supporting brief. Rule 39(f)(1). Merely refiling the brief filed in the Court of Appeals is insufficient. *Bland v. State*, 277 Ala. 4, 166 So. 2d 735 (1964). Grounds not argued in the brief will not be considered by the Court even if set forth in the petition. *Jackson v. State*, 265 Ala. 690, 93 So. 2d 808 (1957). The brief must be in form prescribed by Rule 32(a). The brief must contain all arguments in support of the petition that the petitioner intends to present, both arguments as to why certiorari review is warranted and as to the merits of the issues presented if the court grants the petition. Ala. R. App. P. 39(f)(1)

D. A copy of the court of appeals' opinion.

The opinion or the unpublished memorandum of the court of appeals (or order of affirmance in a no-opinion case) must be attached to the petition as an exhibit. If rehearing was sought, the order disposing of the application for rehearing also must be attached.

E. Timing

The petitioner has fourteen days from the date of the decision of the court of appeals (or, if an application for rehearing is filed, fourteen days from the date the application is ruled upon) to file a petition for writ of certiorari. The respondent has fourteen days to file an initial reply brief opposing the petition. This initial brief is

limited to the issue of whether any proper ground for certiorari review exists. Ala. R. App. P. 39(f)(2). Rule 32(a) prescribes the form and length for this reply brief.

The Supreme Court may **not** enlarge the time for filing a petition for certiorari, Ala. R. App. P. 26(b), and if a petition for certiorari is not timely filed, it must be dismissed. *See Accardo v. State*, 268 Ala. 293, 105 So. 2d 865 (1958). A petition for certiorari is timely if it is received in the clerk's office by the due date. The petition is considered to have been received on the date post marked if certified, registered or express United States mail is utilized. Ala. R. App. P. 25(a). Use of a commercial delivery service does not toll the time for filing, so if a commercial service is used, the petition must be received in the clerk's office by the due date. Facsimile transmission does not equate to filing. *See Ex parte Tuck*, 622 So. 2d 929 (Ala. 1993).

## **VI. Miscellaneous**

Certiorari review serves a law-correcting function. The purpose of certiorari review is **not** to assure that the lower court reached the correct result in this particular case, but to review errors of law that set dangerous precedents. Thus, the focus of your petition and argument should not be on why the result reached was wrong or inequitable to your client in this particular case, but on why the precedent set by the

lower court's alleged error is wrong in the whole scheme of the law (in addition to being wrong and/or inequitable to your client). Don't make a jury argument.

Review by certiorari is discretionary. Even if one of the jurisdictional bases for certiorari review exists, the court has the discretion to deny certiorari, so you have to make the court want to take your case. You do that by demonstrating that a dangerous precedent has been set by the lower court.

Don't attack or be disrespectful of the lower court (i.e. focus on why the court's analysis or rationale is flawed, not on how stupid the court was in reaching its conclusion.

The Supreme Court will consider on certiorari review only issues that were first raised in the intermediate appellate court. While the Court of Appeals need not have addressed the issue, the issue must have been properly raised and argued to that court. *See Ex parte Liberty Nat'l Life Ins. Co.*, 797 So. 2d 457 (Ala. 2001)(refusing to review the issue of justifiable reliance because the petitioner did not raise that issue before the Court of Civil Appeals).