

OPPOSING PETITIONS FOR WRITS OF CERTIORARI

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Prior to the August 1, 2000, amendments to the Alabama Rules of Appellate Procedure, Rules 39 and 40 presented a plethora of pitfalls, and consequently, an almost infinite source of arguments for opposing petitions for writs of certiorari. The Amended Rules have simplified the process somewhat by eliminating the requirement that an application for rehearing be filed before a petition for certiorari may be filed. However, the Amended Rules also contain several pitfalls into which your opponent may fall.

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 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). If the petition is not timely filed, the respondent should immediately move to dismiss the petition and raise in his initial brief the untimeliness of the petition.

Substantive grounds. Generally, the respondent's brief will address primarily the grounds cited by petitioner for certiorari review. Rule 39(a)(1)(A)-(E) enumerates the exclusive grounds for review by certiorari: (A) the decision initially held valid or invalid a city ordinance, a state statute, a federal statute, or treaty, or initially construed a controlling provision of the Alabama or federal Constitution; (B) the decision affects a class of constitutional, state, or county officers; (C) the decision involves a material issue of first impression in this state; (D) the decision is in conflict

with prior decisions of the United States Supreme Court, the Alabama Supreme Court or the Alabama courts of appeals; or (E) the petitioner seeks to have controlling supreme court cases overruled, which cases were followed by the court of appeals. Remember, the petitioner bears the burden of convincing the Court that it can (based on the existence of one of the five grounds for certiorari review) and that it should issue the writ and review the case. In opposing the petition, you need not attempt to demonstrate that **no** ground for certiorari review exists, but rather, only that the ground petitioner relies upon does not, in fact, apply to the case. *See Ex parte Canidate*, 2002 WL 1880698 (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 the conflict in the petition).

Rule 39(f) provides that respondent’s initial brief should be “limited solely to the issue whether any of the grounds set forth in [Rule 39](a)(1)(A)-(E) ... authorizes the issuance of the writ.” Ala. R. App. P. 39(f)(2). This does not mean that it is never appropriate for the respondent to address to any extent the merits of the issue upon which petitioner seeks certiorari review. Indeed, where the petitioner asserts as

a ground for review that the court of appeal's decision is in conflict with prior precedent (Rule 39(a)(1)(D)), it would be virtually impossible to demonstrate that this ground does not exist without addressing the merits to some extent. What Rule 39(f)(2) does preclude respondent from arguing is that the petition for writ of certiorari should be denied because the court of appeals' decision is correct for the reason cited or some other reason. *See, e.g., Ex. parte Saunders*, 770 So.2d 615, 616 n.3 (Ala. 2000)(Lyons, J., dissenting)(noting that respondents' supplemental argument – that even if the Court of Civil Appeals improperly relied upon judicial estoppel in affirming summary judgment, the affirmance was proper based upon lack of standing – was an argument addressed to the merits of the issue which was inappropriate under Rule 39(f)).

The Supreme Court has observed that “[i]n the event a petition for a writ does not comply with Rule 39, as amended, it will be subject to being stricken on motion of a party or ex mero motu by the court.” *Hanvey v. Thompson*, 243 So.2d 748 (Ala. 1971). For example, if petitioner fails to specifically state one of the grounds listed in Rule 39(a)(1)(A)-(E), the writ will not issue on that ground, even though that ground for certiorari review may well exist. *See Ex parte Canidate*, 2002 WL 1880698 (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 the conflict in the petition). *See also In re Stallworth v. Alabama*, 229 So.2d 27, 29-30 (Ala. 1969), *modified in part by Hanvey*, 243 So.2d at 752 (striking a petition that failed to lay out the grounds for certiorari and suggesting language that would comply with the requirements of Rule 39). Similarly, a petitioner must invoke one of the proper grounds for review in the petition itself; raising a basis for certiorari in the brief is insufficient. *See Ex parte Arthur*, 2002 WL 598839, at *5 n.3 (Ala. 2002)(refusing to consider on certiorari review issue that petitioners raised only in their brief). The court will not address grounds raised only in the brief. *See id.*

If the petitioner relies upon Rule 39(a)(1)(D), the ground that the decision is in conflict with a prior decision, the petitioner must quote in the petition that part of the opinion of the court of appeals and that part of the prior decision that the petitioner contends are in conflict or state specifically and with particularity wherein the decisions conflict. *See Ala. R. App. P. 39(a)(1)(D)(1) & (2) and 39(d)(3)(A) & (B)*. If the petitioner simply states that a conflict exists without explaining the conflict, certiorari may be denied. *See Phelps v. State*, 339 So.2d 124 (Ala. 1976); *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.). *See also Ex parte King*, 797 So. 2d 1191, 1194 (Ala. 2001)(Brown, J., concurring specially)(noting that while petition asserted a conflict, it did not comply with the particularity requirements in asserting that conflict and that she would have voted to deny the petition for that reason had she been a member of the division of the Court that granted the petition).

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).

Procedural requirements. The biggest pitfalls in certiorari practice – and fertile ground for opposing a petition – traditionally have been the requirement that the court of appeals have overruled an application for rehearing “addressed to the point, issue or decision complained of” and the application of former Rule 39(k).

Rule 39(k) required that a motion to add or correct facts have been made in conjunction with the application for rehearing if the petitioner was not satisfied with the facts contained in the opinion of the court of appeals. *See, e.g., Ex parte Save Our Streams*, 541 So. 2d 549 (Ala. 1989)(denying petition for writ of certiorari and noting that “noncompliance with Rule 39(k) prevents review by this Court where the intermediate appellate court has passed judgment with no opinion”). As noted above, while certiorari practice has been simplified by the elimination of the requirement of filing an application for rehearing, many potential procedural arguments are presented by the amended rules, particularly where a party chooses to file an application for rehearing.

For example, Rule 39(d)(5) requires that the petition for writ of certiorari contain a statement of facts if the petitioner is not satisfied with the facts stated in the court of appeals’ opinion or if the case was decided without opinion. Rule 39(d) specifically prohibits the petitioner from incorporating or adopting facts by reference to another document, such as the party’s brief. Consequently, the petition should be challenged as deficient if it includes no statement of facts in a no-opinion case, if it includes no statement of facts where the opinion of the court of appeals does not state

the facts relevant to the issue being raised in the petition or if it incorporates facts from another document.

In addition, subdivisions (A) through (C) of Rule 39(d)(5) set forth the specific requirements for the statement of facts in particular cases. Subdivision (A) applies where an application for rehearing was filed in the court of appeals where that court had issued an opinion or unpublished memorandum containing a statement of facts. Rule 40 provides that if the 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 petitioner included in his application for rehearing a proposed additional or corrected statement of facts or his own statement of facts and those facts were not included by the court of appeals in a subsequent opinion, in order for the Supreme Court to consider those facts, the proposed additional or corrected statement of facts or his own statement of facts from his application for hearing must be copied verbatim into the statement of facts in the petition for writ of certiorari, complete with record references. The petition also must include a verification that this statement of facts is a verbatim copy. If the petitioner does not present such a statement of facts in his

petition, it will be presumed that the petitioner is satisfied with the facts stated in the court of appeal's opinion.

These provisions provide numerous bases upon which a party might oppose a petition for certiorari. Just like 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) and the party does not include in his application for rehearing a statement of facts which incorporates that fact, then the court of appeals cannot consider that fact. If he doesn't include a statement of facts in his application for rehearing, petitioner 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 the 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. In each of those circumstances, the respondent should argue that based upon the only facts the Court may consider (those in the opinion of the court of appeals) grounds for certiorari do

not exist — or stated alternatively, that a fact necessary to the petitioner’s argument that a ground for certiorari exists is not, in fact, before the court because petitioner did not comply with Rule 39(d)(5)(A). If the petitioner does include a statement of facts in his petition, but it is not copied verbatim from his rehearing application, or he does not certify that it was so copied, the respondent can challenge the petition on procedural grounds.

Subdivision (B) of Rule 39(d)(5) addresses the requirement for the statement of facts where an application for rehearing was filed in a no-opinion case or a case in which the opinion contains no statement of facts. Under these circumstances, 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, and the petition must include a verification that the statement of facts is a verbatim copy. Ala. R. App. P. 39(d)(5)(B). While the imperative language of this subdivision might make its requirements less susceptible than those of subdivision (A) to misinterpretation or oversight, the fact remains that if the statement of facts is not included in the application for rehearing and copied into the petition for certiorari, the petition is insufficient and respondent

should oppose it on that basis. As with subdivision (A), if the petitioner does include a statement of facts, but it is not copied verbatim from his rehearing application, or he does not certify that it was so copied, the respondent can challenge the petition on procedural grounds.

Subdivision (C), which deals with the requirements for the statement of facts where no application for rehearing was filed, is the clearest of the subdivisions and provides the fewest opportunities for procedural challenges. If the case was decided by the court of appeals without opinion or if no statement of facts was included in the opinion, the petitioner “shall include” in the petition his own statement of facts, with record references. Of course, if such a statement is not included in the petition, it is defective and should be opposed and denied on that basis. If an opinion with a statement of facts was issued by the court of appeals, 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. Here again, if there is some fact or evidence that is necessary to petitioner’s argument that was not included in the facts recited by the court of appeals and petitioner does not include a statement of facts incorporating that

fact or evidence, the respondent should oppose the petition on the basis that a fact necessary to the petitioner's argument that a ground for certiorari exists is not, in fact, before the court because petitioner did not comply with Rule 39(d)(5)(A).

Conclusion

This is by no means an exhaustive discussion of the bases for opposing a petition for writ of certiorari. Remember, there is no substitute for reading the applicable rules – often and thoroughly. When you receive a petition for writ of certiorari, don't assume it is timely. Don't assume it complies with the procedural aspects of the rules. Don't assume that it is substantively proper. Review every aspect of it carefully and compare it with the requirements of the rules. You may be entitled to win on the merits if the petition is granted, but why take that chance, if you have a basis for arguing that the petition should be denied outright?