24 Litigation 25 (1998)

CERTIORARI PRACTICE: THE SUPREME COURT'S SHRINKING DOCKET

by Stephen M. Shapiro

Stephen Shapiro is with Mayer, Brown & Platt in Chicago. He previously served as Deputy Solicitor General of the United States and is co-author of Supreme Court Practice (BNA 1993) by R. Stern, E. Gressman, S. Shapiro, and K. Geller.

TEXT:

[*25] Ten years ago, Congress passed new legislation making almost all Supreme Court review discretionary rather than obligatory. Prior to this legislation some Justices complained that the Court was badly overworked, indeed too busy to do anything about being too busy. The Court, it was feared, could not adequately screen five thousand petitions for certiorari every year while shouldering the burden of writing opinions on the merits in some 150 cases. But in recent terms the number of opinions rendered by the Court has fallen almost in half. And through its reliance on an enlarged "certiorari pool" for screening cases, the Court has tightened up its own centralized mechanism for quickly disposing of almost seven thousand annual requests for review. This screening system is the Court's Maginot Line, designed to repel legions of petitioners. Few people today suggest that the Court is overworked. Concern runs in the opposite direction: the Court is not deciding enough important cases.

In this period of contraction, even seasoned Court watchers hesitate to predict which cases will make the cut. The problem is particularly acute for private litigants. While the Court grants 70 percent to 90 percent of the federal government's petitions, it grants only 3 percent of private paid petitions and only 1/3 of 1 percent of in forma pauperis petitions. The Court's explanations for grants of certiorari in published opinions are terse and largely uninformative ("We granted certiorari because of the importance of the question," or "Given disagreement among the lower courts on the question presented, we granted certiorari"). Despite rare dissents from a denial of certiorari shedding light on the Court's internal deliberations, almost all denials of certiorari come without explanation. Adding to the difficulty is the erratic nature of the grants. Although lawyers believe that conflicts among the lower courts are the most significant ground for a grant of certiorari, the Court regularly turns down cases involving strong claims of widespread conflict. Despite repeated statements that the Court does not sit as a court of error, it occasionally takes cases for no apparent reason other than correction of an egregious error. And while public importance is a well-known certiorari criterion, this standard is plainly in the eye of the beholder. The Court passes over very important controversies every term while continuing to hear some cases rather narrow in scope. Few would quarrel with the Chief Justice's statement that "whether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment." William H. Rehnquist, *The Supreme Court, How it Was, How It Is* 265 (1987). As Justice John Harlan put it, "frequently the question whether a case is 'certworthy' is more a matter of 'feel' than of

precisely ascertainable rules." "Manning the Dikes," 13 Rec. *Ass'n of the Bar of City of New York* 541, 549 (1958).

Yet much depends on counsel's ability to make informed predictions about what will generate interest among at least four Justices. Absent guidance, litigants waste large amounts of resources (millions of dollars annually) on hopeless requests for Supreme Court review. Those who have a truly "certworthy" case must guess about how best to explain that their case is the needle in the haystack. And lawyers opposing certiorari lack information needed to effectively expose deficiencies in the petition.

This article describes the certiorari criteria used by the Court today in the most restrictive period known to a generation of lawyers. The practice recommendations made here derive from comments of individual Justices, former personnel in the Solicitor General's office, and former Supreme Court clerks. Full citations to applicable rules and authorities appear in Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (1993). Practitioners also should consult a recent study by Harvard political scientist H.W. Perry, Jr., *Deciding to Decide* (1991), which reports detailed interviews with five Supreme Court Justices and 62 former clerks shedding new light on the Court's internal screening process.

The Supreme Court's main jurisdictional statutes, 28 [*26] U.S.C. 1254(1) and 1257, and Supreme Court Rule 10, describe in general terms the kinds of cases arising from federal courts of appeals and state courts of last resort that are potentially "certworthy." Section 1254(1) broadly extends certiorari jurisdiction to all cases, civil or criminal, in the federal courts of appeals. Rule 10 nonetheless removes any suggestion of liberality by declaring that review is "not a matter of right, but of judicial discretion" to be exercised "only for compelling reasons." Although not controlling or fully measuring the Court's discretion, Rule 10 refers by way of example to cases in which there is a "conflict with a decision of another federal court of appeals on the same important matter" or a "conflict" on an "important federal question" with a "decision by a state court of last resort." As amended in 1995, Rule 10 places emphasis not only on the existence of a "conflict" but a conflict over an *important* issue of federal law. Quite deliberately, the Rule makes no mention of conflicts over the meaning of state law that arise in diversity cases, intra-circuit conflicts with prior decisions of the same federal court of appeals, or conflicts with trial or intermediate state appellate rulings, none of which ordinarily warrants a grant of certiorari. While Rule 10 makes clear that conflict review lies at the heart of certiorari jurisdiction, it leaves discretion to reach exceptional situations by reciting that the Court retains authority to review federal cases where the court of appeals has "departed from the accepted and usual course of judicial proceedings," a rarely invoked basis for Supreme Court review.

Section 1257 empowers the Court to review "final judgments or decrees" rendered by the highest court of a State in which a decision can be had where the validity of a federal or state statute has been drawn into question on federal grounds, or where any right is "specially set up or claimed" under federal law. This statute, unlike Section 1254, places significant limitations on the Court's certiorari jurisdiction. Review of state decisions encompasses only "final judgments," subject to a narrow list of exceptions. *Supreme Court Practice* at 92-111. And review extends only to questions of federal law raised in compliance with state procedural rules governing the preservation of issues for appeal. A disappointed litigant cannot raise a federal

law issue for the first time in a petition for certiorari. Nor can a litigant argue federal law in the Supreme Court when the decision of the state court clearly rests on an independent and adequate state law ground. *Id.* at 140-161. Rule 10 further limits the domain of certworthiness in state appellate cases, by advising counsel that, as in federal appellate cases, the Court is principally concerned with "conflicts" over "important federal questions" with decisions rendered by state supreme courts or federal courts of appeals.

Rule 10 confirms that the Supreme Court may, in compelling circumstances, accept petitions from either a federal court of appeals or a state court of last resort when the court below has decided an "important issue of federal law" that "has not been, but should be, settled by this Court" -- with or without a conflict -- or "has decided an important federal law question in a way that conflicts with relevant decisions of this Court." But as amended in 1995, Rule 10 states that the Court will not ordinarily entertain a case where the asserted error "consists of the misapplication of a properly stated rule of law." In other words, where the applicable rule of law is settled, the Court will not supervise its application to particular facts and circumstances even if the application is arguably wrong. Nor, Rule 10 admonishes, will the Court grant certiorari to review "erroneous factual findings."

The Screening Process

Every week a cart rumbles down the halls of the Supreme Court building bearing its weekly burden of approximately 140 petitions for certiorari. Each case comes complete with a lengthy appendix setting out the decisions of the courts below, and many come with a brief in opposition and a reply. Most petitions are stuffed with citations to statutes, opinions, and transcripts. Some are accompanied by amicus briefs as well. To carefully review any such case would, of course, consume many hours, and reading cited authorities would consume many more. To screen these documents efficiently, eight of the nine Justices have formed a certiorari pool. A single clerk in the pool has front-line responsibility for screening each petition. This individual, ordinarily a recent law school graduate with a year's experience as a clerk in one of the courts of appeals, produces a memorandum (referred to formerly as a "flimsy") that sets out certain required facts (including the identity of the judges below, the questions presented, a summary of the facts and holdings, and a summary of the arguments in favor of certiorari). The pool memorandum evaluates the case and concludes with a recommendation in favor of a grant or denial of certiorari. These documents, according to participants in the certiorari pool, vary in quality and detail depending upon the particular author, but most are extremely short (usually two to five pages). Significantly, they represent the largest commitment of time that the Court makes to the review of certiorari requests. Pool participants estimate that the amount of time committed to the preparation of a pool memorandum ranges from 15 minutes to one day (a rare circumstance).

The certiorari pool memorandum next proceeds to "markup" in the chambers of some of the Justices. That means that other clerks, stationed in the chambers of other Justices, quickly review the pool memorandum and endorse it: "I agree. Certiorari should be denied for the reasons stated." In the alternative, the second screening clerk may write a short supplemental memorandum, stating a different conclusion or citing additional reasons. When the case reaches

a Supreme Court Justice, the review is, by every-one's [*27] estimate, a fleeting one. Scholars estimated in past decades (when the flow of certiorari petitions was roughly half what it is today) that a Justice could devote at most ten minutes on average to each petition. Now the number has dropped to five minutes or less. Even those Justices (like Justice Brennan) who dispensed with law clerk screening altogether acknowledged that most cases could be screened out based on a review of the question presented alone. It should not be imagined that any Justice reads all of the certiorari papers personally, or goes beyond reviewing a handful of the most controversial candidates for review.

A small fraction of the petitions screened every week makes the "discuss list" compiled by the Chief Justice based upon his own review and suggestions from other Justices. During the Court's Friday conference, which begins with a discussion of argued cases and later turns to certiorari cases and other business, the Justices consider grants of certiorari. Justices who have participated in this process (and who gave interviews to Professor Perry) make clear that the discussion of individual cases is remarkably brief. The Chief Justice succinctly summarizes the case and announces his vote. The other Justices, proceeding in order of seniority, announce their votes without extended debate. *Deciding to Decide* at 47-49. Four Justices must agree to a grant of certiorari. Five must agree to summarily reverse a decision without briefing and argument. Four Justices may call for the Solicitor General to file an amicus brief stating the views of the United States, and any one Justice can call for a response when the respondent waives the right to file. On some occasions the Justices relist a case for further study.

The inexorable growth of the certiorari pool to include all Justices except Justice Stevens has generated concern among commentators and former members of the Court. Does this system put too much responsibility in the hands of a single, inexperienced clerk? Should there be at least two independent evaluations? But despite reservations, the certiorari pool is a fact of life today. How can counsel hope to penetrate this "screen," which results in favorable disposition of fewer than one hundred out of seven thousand petitions every year? Participants in the process give only limited attention to any case and the least amount of time comes from the Justices themselves. Inexperienced law clerks do the lion's share of screening. Counsel's finely tuned prose will not have any impact unless the clerk is duly impressed. And no clerk worth his or her salt is easily impressed.

Deconstructing the Petition

Law clerks screen cases with a strong presumption: the petition at hand is uncertworthy. If a petition fails to meet traditional criteria for certworthiness the Court ordinarily rejects it out of hand. Even if it seemingly satisfies traditional criteria, that is only the beginning of the inquiry. At that point the screening clerk labors to find flaws and problems warranting a denial of certiorari. If the issue presented is truly important, of course, it will arise again through a more suitable vehicle, so nothing is lost by a denial. (Justices have been known to remark to clerks that it is never a mistake to deny a certworthy petition; it is only a mistake to grant a non-certworthy petition, which can embroil the Court in factual or procedural squabbles and lead to an embarrassing dismissal of the case after argument.) Only a handful of petitions survive this process of deconstruction. Here are the basic ground rules.

Year in and year out, counsel file petitions for certiorari in diversity cases or in state court cases that turn solely on state law. On very rare occasions the Court grants certiorari to supervise a federal appellate court's application of state law on the theory that the lower court has fundamentally misperceived the requirements of the *Erie* doctrine. But this happens only once or twice in a decade. The Court never grants certiorari to review state court applications of state law, no matter how vehemently the petitioner contends that there is a "conflict." All too frequently, counsel discovers that a state law ruling is not "certworthy" and attempts to smuggle in a federal law issue at the rehearing stage or for the first time in a petition for certiorari. These tactics almost never succeed; the Court consistently rejects these cases as resting exclusively on state law. Screening clerks characterize cases of this variety as "frivolous."

"Fact-bound" cases also fall quickly by the wayside. This term of opprobrium applies to a variety of different cases. In some situations it means that the petitioner is trying to relitigate the facts or debate the sufficiency of the evidence, a function the Supreme Court eschews; in some situations it means that the case applies only to a few people and has little realworld importance; in other situations, it conveys the notion that the case is odd or unusual and that any ruling would have limited precedential importance. All of these characterizations are the kiss of death to a petition for certiorari.

Where the law is settled, and the petitioner wishes to debate the application of that law to particular facts and circumstances, the Court also routinely denies review, as stated in Rule 10. While this is not an ironclad screening criterion (witness the Court's occasional grant of certiorari in Fourth Amendment cases to demonstrate the correct application of the law to recurring factual situations), it is, at a minimum, a significant negative factor.

By now, lawyers have been trained to claim in certiorari petitions that an unfavorable ruling "conflicts" with the law in other circuits or state courts of last resort. The Court does not accept these claims at face value. First, the conflict may not be a genuine one; the difference in opinion may be only a matter of dictum, or the cases may be factually distinguishable. Second, the conflict may be too old; a decision rendered decades ago that is out of harmony with modern cases elsewhere is always subject to reconsideration without Supreme Court intervention. Third, the conflict may be too new; the Court benefits from "percolation" among the circuits and ordinarily stays its hand until several circuits have addressed an issue. Fourth, the conflict may be too narrow; most circuits may follow a consistent line of analysis, suggesting that a hold-out ruling in another circuit is a "sport" that will eventually be harmonized. Fifth, the conflict may be "tolerable"; as the Supreme Court's rules indicate, many conflicts are not important to the general public [*28] (for example, minor differences in federal court procedure) and many such conflicts linger for decades without Supreme Court resolution. Sixth, the conflict may be subject to ready resolution by another body (including Congress, an administrative agency, or the U.S. Sentencing Commission), making Supreme Court review unnecessary.

Even if a true conflict warranting Supreme Court review appears, the clerks and Justices look skeptically at the case to determine if it is the right vehicle to resolve the issue. In many cases the certworthy issue lies buried in the midst of other issues, themselves fact-bound and unworthy of review. If the Court cannot reach the certworthy issue without cutting through this

thicket, that strongly suggests the case is a poor vehicle. Likewise, if the question presented has been inadequately preserved, or inadequately discussed and explored in the opinions below, the particular case is not a good vehicle for Supreme Court review. By the same token, if the facts are snarled in confusion the Court will deny review. Such a case presents the danger of an unpleasant and costly surprise: once the true facts have been unraveled, it may appear that the "issue presented" is not really presented at all.

In determining whether a particular case is an appropriate vehicle, the clerks and Justices also consider what is in the pipeline. The respondent may cite other cases raising the same question that are better vehicles for resolution of the issue presented. The existence of similar cases pending elsewhere assures that the Court will have numerous opportunities to settle the disputed point of law and weighs against a grant at any particular moment -- certainly at an early stage in the evolution of the law.

Claims of "importance," too, are capable of deconstruction when it appears that other remedies short of Supreme Court review are available. A simple change in business practices or governmental administration may make it unnecessary for the Court to grant review. A regulation can be amended to remove problems or ambiguities. And Congress may overhaul a statute that has received an unwarranted judicial interpretation. Especially where debatable policy considerations are at issue, the legislative fix may be not only sufficient but greatly superior.

Finally, some cases may appear to the Justices as "intractable." The petition may contain no reasonable solution to the problem raised in the litigation, or the Court may be uncertain that it can devise a remedy significantly different from (or better than) that devised by the court below. Cases of exceptional complexity which are not illuminated by thoughtful scholarship or focused analysis in conflicting opinions of the lower courts naturally fall into this category. So do sprawling cases with numerous parties and claims but no central, dispositive legal issue.

Any one of these objections suffices to defeat a petition for certiorari. Given the range of these potential objections, it is the rare petition that escapes rejection. In fact, a relentless application of the foregoing criteria would support the conclusion that "certworthy" cases are a null set with no viable examples.

The Needle in the Haystack

Since most certiorari petitions have one or more of these defects, how is it that the Court finds 80 or 90 cases every term for review? The answer, explained in the Perry interviews, is that the clerks and Justices look for combinations of positive factors that outweigh the negatives. *Deciding to Decide*, p. 245. The Chief Justice has elaborated on the most important positive factors (referred to more cryptically in Supreme Court Rule 10) as follows: "One factor that plays a large part with every member of the Court is whether the case sought to be reviewed has been decided differently from a very similar case coming from another lower court." "Another important factor is the perception of one or more justices that the lower-court decision may well have been both an incorrect application of Supreme Court precedent or of general importance beyond its effect on these particular litigants." *The Supreme Court, How It Was,*

How It Is at 265. Professor Perry's interviews with the Justices and screening clerks shed further light on the weighing of these positive factors.

All agree that conflicts are the most fertile ground for a grant of certiorari. As noted previously, however, the clerks quickly ferret out false conflicts. A genuine conflict arises when it can be said with confidence that another court of appeals or state supreme court would reach an opposite result, based on a clear ruling in a very similar case. The most compelling evidence of a conflict is an overt expression of disagreement: "We reject the rule applied in the Fifth Circuit and accordingly reverse the defendant's conviction." If a conflict is less direct, consisting of disagreement over general reasoning, different outcomes in differing circumstances, or divergent dicta, the conflict is not a genuine one. Nonetheless, "inconsistency," "confusion," or "conflict in principle" can influence a grant of certiorari. Some opinions remark that the Court granted certiorari to resolve a "conflict in principle" or "disagreement among the lower courts." *Supreme Court Practice* at 168, 170, 173. While commentators sometimes suggest that all sophisticated lawyers can readily agree on the existence of a conflict, this is not always the case. There is room to argue whether an inconsistent holding has been rendered in a case that is, in the Chief Justice's words, "very similar," [*29] or whether the inconsistency is central or tangential to the court's judgment. The greater the "similarity" and "centrality" the stronger the argument for certiorari.

In contrast to cases lacking certworthiness, a certworthy case presents a conflict that has percolated among several circuits, one over which the split is widespread and the difference is current. And the conflict relates to an important issue as to which inter-circuit disagreement is intolerable. Procedural differences may not, for example, be intolerable if they do not fundamentally affect the administration of justice. Slight differences in the phrasing of instructions to deadlocked juries, or minor differences in articulation of the standard of review of directed verdict motions, may not require Supreme Court attention. As stated in the *Report of the Federal Courts Study Committee*, 124-125 (1990), "the Court has long since given up granting certiorari in every case involving an inter-circuit conflict. . . . Conflicts over some procedural rules and laws affecting actors in only one circuit at a time may have a negligible effect."

The *Study Committee* cites the following examples as indicative of a truly "intolerable" inter-circuit split: the conflict "imposes economic costs or other harm to multi-circuit actors, such as firms engaged in maritime and interstate commerce"; the conflict "encourages forum shopping among circuits"; the conflict creates unfairness to litigants in different circuits, for example, by allowing federal benefits in one circuit that are denied elsewhere; or the conflict "encourages non-acquiescence" by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions. *Id.* at 125. Once again, what is "intolerable" lies in the eye of the beholder; there is ample room for creative argument.

A conflict with past Supreme Court rulings may be as important as an inter-circuit conflict in characterizing a case as "certworthy." In fact, a true conflict would invite summary reversal. But such a conflict rarely arises, for obvious reasons. Even in the absence of a genuine conflict, prior relevant Supreme Court decisions may bolster a petition if the lower Court has

misperceived Supreme Court doctrine, if the Court's own precedents are confused, or if the Court has specifically "left open" an issue for future resolution. Such references signal that the Court takes the issue seriously and intends to reach it. The case at hand may be an important chip in the mosaic which the Court is constructing in a field of law, which requires several related rulings over time.

Absent a conflict, extraordinary public importance usually is the only ticket for admission to the Supreme Court. Decisions invalidating acts of Congress or state statutes on constitutional grounds are ordinarily sufficiently important to warrant Supreme Court review, whether or not a conflict exists. Sustaining a law over a strong constitutional objection (grounded in Supreme Court precedent) also may rise to the level of exceptional importance. Other earmarks of general public importance are the widespread impact of the decision below on large groups of people, on federal or state law enforcement efforts, or the administration of a statute or governmental program. If the issue is a frequently recurring one, which arises in many cases and consumes the resources of judges and litigants time and again, that too may call for Supreme Court resolution. Stated otherwise, widespread confusion in the lower courts sometimes warrants review of an important and frequently recurring question even absent a genuine conflict among the circuits. Enormous financial liabilities also may contribute to a finding of importance, particularly if the threat of liability extends to many entities and has general adverse economic consequences.

Scholars have debated the relevance of "error" in determining the certworthiness of a case. That debate has been settled in favor of the relevance of error, at least as an important supplemental consideration. As the Chief Justice notes, a perception of "incorrect application of Supreme Court precedent," even if not rising to the level of a genuine conflict, is a material factor. *The Supreme Court, How It Was, How It Is* at 265-66. Disharmony with the plain language of federal statutes also demonstrates the kind of error considered seriously at the certiorari stage. The fact that the Court reverses in two out of three cases after granting certiorari confirms the general relevance of apparent error. This does not, of course, suggest that error, standing by itself, is a sufficient ground for certiorari. But it is one of the positive factors that contributes to a grant of review. *See* William Brennan, "Some Thoughts On The Supreme Court Workload," 66 *Judicature* 230, 231 (1983) ("I must admit frankly that we too often take cases that present no necessity for announcement of a new proposition of law but where we believe only that the court below has committed error"). Justices and law clerks interviewed by Professor Perry also referred to "egregious error." By this they meant one of two things: flagrant disregard for Supreme Court teaching in a field of law, or extraordinarily harsh and unreasonable results on the record -- an appalling decision. Egregious error further tips the balance in favor of review. *Deciding to Decide* at 265-68.

A certworthy case is also a case that requires immediate decision. If the issue can await further percolation, delay is a virtue, not a vice. Many conflicts work themselves out over time, and percolation provides a firmer basis for a wise decision from the Supreme Court. Consideration by other courts and academic scholarship may better illuminate the issue, given sufficient time. But conflicts sometimes have an "emergency" aspect that triggers certiorari. If, for example, a multistate business does not know how to conduct its operations in view of

conflicting judgments, or law enforcement agencies are subject to inconsistent requirements, there is a real-world problem that cries out for prompt resolution. In all cases the practical need for immediate resolution must be weighed against the substantial advantages of a "wait and see" approach.

A certworthy case also must be a "good vehicle," the antithesis of the kind of case discussed previously in which the certworthy issue depends on resolution of messy factual disputes or other questions of lesser importance. If cited by counsel, the Court will compare the case to others "in the pipeline" to make that judgment. Resolution of the certworthy [*30] issue also must affect the outcome of the particular case. The quality and clarity of the opinion below, preferably joined with a dissenting opinion or a reasoned dissent from denial of rehearing, help to make a case a good vehicle for Supreme Court review.

Interviews with Justices and former law clerks also confirm the relevance of a number of general "signals" regarding certworthiness. The makeup of the panel is telling, as reflected in the requirement that the pool memorandum list the judges at all stages and the authors of the opinions below. A majority opinion written by a respected judge is more likely to accurately evaluate the facts and law, and a dissent from a distinguished judge helps to explore grounds for reasonable disagreement. Amicus briefs also signal general public importance. A distinguished amicus organization would not expend money and institutional capital in advocating Supreme Court review if the matter were not unusually important. Statistical research demonstrates a very significant correlation between amicus participation and grants of certiorari. *Deciding to Decide* at 137-38. Towering over other amici is the Solicitor General, whose certiorari recommendations are followed roughly 70 percent of the time. Amicus support from state government officials, although not as significant as support from the Solicitor General, also signals the Court that a case has general public importance. Likewise, the field of law in which a case arises constitutes a signal. The Court takes particular interest in different fields of law at different times -- witness the Court's romance with FELA and Jones Act jury verdicts 30 years ago, with securities law issues 20 years ago, and with racial and gender issues today. A case arising in a "hot" legal field commands more attention in the certiorari review process.

A final signal mentioned in interviews is the quality of counsel. Given its wide choice of test cases, the Court prefers to grant review in cases involving experienced counsel who can brief and argue the issues in a sophisticated manner. Pool memoranda often refer to "good lawyering" or "poor lawyering" in their certworthiness evaluations, and they list the counsel named in the petition and brief in opposition.

Effective Petitions

An effective petition for certiorari takes account of the realities of the screening process described above; the draftsman should provide the information needed to write the certiorari pool memorandum with a positive bottom line. Keep in mind that the Court's formal requirements (set out in Supreme Court Rules 12-14, 33-34) such as the placement of the question presented on the first page inside the petition, the recital of information regarding the

Court's jurisdiction, and the description of the petitioner's efforts to preserve federal issues in state court litigation, are all critical to the Court's efficient processing of several thousand petitions every year. If not scrupulously followed these requirements ensure a rejection of the petition by the Clerk's office. Advice on applicable requirements appears in *Supreme Court Practice* at 308-69.

The overriding goal in drafting the petition is to address the certiorari factors critical to the screening process, to avoid unintended admissions of weakness stemming from the text or format of the document, and to present the entire petition in a brisk manner that can be comprehended "on the run." The conventional advice to brief writers in the appellate courts applies in spades to Supreme Court advocacy. Although the rules allow a 30-page petition, it often can be much shorter than that. Keep sentences and paragraphs short; use informative headings to assist the bleary-eyed reader; reduce footnotes to a bare minimum; and delete adjectives while enlivening the text with active verbs. Make sure that the importance of the case rings clearly from the question presented and the first few pages of text, and condense the petition until it can be read and understood in 20 minutes. Never use rhetoric suggesting that your case is "unique" or one of "first impression." These characterizations effectively concede a lack of "certworthiness," since they acknowledge that there is no current confusion in the lower courts. Never suggest that the focus of the petition is on mere "error." The petition must raise an important and recurring federal issue urgently requiring clarification by the highest court in the land.

The Colorful Fly Question

Question presented. The very first page of the petition, setting forth the question presented, is the most important page in the entire document. It should be the colorful fly that irresistibly leads to a strike. Too often, it is a confession that the case is not even arguably certworthy. As Justice Brennan's practice made clear, most cases can be rejected based on a review of the question presented alone.

Many lawyers sabotage their own certiorari prospects by reciting numerous questions presented. It is not credible to argue that a single case presents multiple "certworthy" questions. The best strategy is to set out one well-phrased question. Include a second question only if that is absolutely essential. The Court's rules permit the petitioner to argue subsidiary points fairly encompassed by the question presented, so it is not necessary to reel off variants of the question or numerous repetitive sub-issues.

The question presented should be short and easily comprehended, but not conclusory. Never state the question at such a high level of generality that it conveys no information, e.g., "Whether the award of punitive damages violated the Due Process Clause." The same question, better phrased, can galvanize attention: "Whether the $ 36,000,000 punitive damages award in this case, based on unintentional error in giving notice to an individual consumer, satisfies the Due Process Clause where the jury found actual damages of only $ 1,000." A properly phrased question captures in a few words the essential features of the case, including the federal law

dimension, and suggests the reasons why Supreme Court review is imperative. At the very least, the case requires a further look.

Sometimes the reader cannot grasp the question presented without a short recital of background. The Supreme Court's rules permit this. But the introductory paragraph, describing the nature of the case and the holding below, should not exceed four or five sentences. The entire recital, including the introductory paragraph and the question presented, should appear on a single page. Without argument, this page should encapsulate the petition.

Professor Gressman has provided a good test of a well-tempered question presented, which helps in many cases. Try to turn your question presented into an affirmative sentence preceded by the words "We hold that . . ." "Is that the ruling you want the Court to make? Is it an important ruling? Would it make a clear and intelligent and complete precedent, having an impact beyond the parochial concerns of your client?" "Anatomy of a Petition for Certiorari," *Practical Litigator* [*31] 61, 66-67 (May 1991). If not, counsel should return to the drawing board.

Statement. The factual recital in the petition should inform the Court of the features of the case necessary to understand its certworthiness, but nothing more. Keep the recital simple and lean. A lengthy factual summary, bristling with citations to complex factual matters, is self-defeating. It strongly suggests to the reader that the case is "fact-bound," turning on case-specific circumstances, and unworthy of Supreme Court review. Most factual statements run five or six pages in length.

An introductory paragraph in the statement of facts, even if slightly argumentative, can succeed in orienting the reader as to the nature of the case and the results reached by the courts below. If the decision conflicts with the law in several other circuits, mention this briefly at the outset to whet the reader's appetite. Then break down the sections of the statement with informative subheadings.

In a case arising in an unfamiliar statutory or regulatory context, it is helpful to include a short description entitled "Statutory Framework." After this, summarize the proceedings in the trial court and the appellate court. Quote briefly from the decision of the court of appeals to focus attention on those aspects of the ruling that create the certworthy issue; if a dissenting opinion has been rendered, quote briefly from that as well. Without overt argument, the statement of facts should reveal the certworthiness of your case.

The petition should support factual assertions with references to the findings, conclusions, and opinions of the lower courts, which appear in the appendix. A simple "Pet. App. " or "App., *infra*, " citation will suffice. Whenever possible, rely on the opinions below rather than the original record; this conveys the impression that the facts are readily ascertainable and not in dispute. If you must cite something outside the opinions below, include a reference to the transcript, exhibit, or pleading in the joint appendix filed in the court of appeals.

In cases arising from state court, bear in mind Supreme Court Rule 14.1(g)(i), which requires a petitioner to specify in the statement of the case "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." Mandatory in all cases, this is especially important in cases in which the state supreme court gives only cursory treatment to a federal law claim. You must convince the Supreme Court that you really preserved the issue.

Bear in mind the audience for your statement of facts. The screening clerk is in a rush. Avoid long recitations of events at trial, background controversies, evidentiary squabbles -- all of the necessary preoccupations of trial counsel. The Supreme Court shies away from messy and convoluted cases. Convey the impression that your question presented arises on a basis of simple and undisputed fact, even if the facts at trial were hotly disputed.

Reasons for granting the petition. Following the statement of the facts comes the argumentative portion of the petition. First address the certworthiness of the case -- the reasons why Supreme Court review is imperative. Then explain briefly why the decision below is in error. Never lead off the discussion with a general argument on "error," cribbed from the brief in the court of appeals. Mere error is not, standing by itself, a sufficient ground for Supreme Court review.

Subheadings help the reader follow the progress of the argument. The first subsection might be entitled: "The Fifth Circuit Has Decided An Important And Recurring Issue Of Federal Antitrust Law In A Manner That Conflicts With Recent Rulings Of the Second and Seventh Circuits." This immediately alerts the screening clerk to your intention to demonstrate the certworthiness of the case. But it is not enough to allege the existence of a conflict. The conflict must be proven. Describe the decisions asserted to be in "conflict" in sufficient detail, and with sufficient quotations, to make your conflict argument unmistakable to a busy clerk or Justice who may not have time to go to the bookshelves. If the Supreme Court has shed light on the same issue, but not clearly resolved it, and if lower courts are in doubt as to the Court's views, stress this dilemma with appropriate quotations.

The petition also needs to prove that the issue is "important" or "recurring." Cite other cases showing the commonly recurring nature of the issue and the pervasive confusion in the lower courts. Government studies, treatises, law review articles, and even newspaper coverage can contribute to a plausible demonstration that the issue has general public importance. Admissions from opponents in the courts below can sometimes be quoted to good effect. In demonstrating general public importance, use your creative imagination and good research skills: refer to other cases that are affected, list similar proceedings or statutes, detail the amount of money at stake and the threat of increased litigation, set forth the consequences for law enforcement, statutory administration, or efficient judicial administration, summarize the unfairness resulting from discrepant legal rulings, and describe the practical dilemma of persons who must comply with a perplexing body of law. Try to convince the Supreme Court that a nationally binding rule of law is imperative, not that your client has suffered an individual injustice. Make clear that your case is a good vehicle for settling a question of law important to many other people. And make clear that the time is ripe for the ruling you desire: there is a crying need for immediate Supreme Court intervention.

The merits issues can, of course, be interwoven with the demonstration of certworthiness, and in many cases there is no clear or convenient division. Where possible, however, it is most effective to follow the discussion of certworthiness with a separately headed merits argument, captioned in the following fashion: "The Decision Of The Fifth Circuit Cannot Be Reconciled With This Court's Recent Antitrust Rulings And Threatens Adverse Economic Consequences." The Justices interviewed by Professor Perry agreed that the merits issues should be canvassed. *Deciding to Decide* at 101-102.

Be sure to refocus and condense the merits arguments made in the court of appeals. Effective merits arguments in the Supreme Court turn on prior decisions of the Court itself, [*32] clear statutory language and statutory structure, as well as constitutional language and history. Demonstrate that the decision below misperceives the Supreme Court's current interpretive approach and appeal to the evolving interests of the Court. Quotations from respected scholars can reinforce merits arguments and convey the impression that the issue is ripe for Supreme Court resolution. The Court also is impressed with practical, common-sense arguments, and arguments of public policy that reinforce traditional legal arguments, and these should be included as well.

Devastating Oppositions

Since so many cases clamor for the Court's attention every year, the Court is prone to seize on any legitimate ground for denial of certiorari. In most cases, the grounds are numerous and obvious. Where a great deal is at stake, however, the respondent will take pains to lay bare all of the deficiencies in the petition.

An initial judgment must be made whether to file a brief in opposition at all. The Court permits the respondent to "waive" a response if this is done promptly upon receipt of the petition. Rule 15.5. The federal government does so in a large percentage of its routine criminal cases. Little is risked by waiving since the Court normally will not grant certiorari without calling for a response. In cases that are not frivolous on their face, however, it is helpful to both the Court and the client to submit a short opposition. Although the rules allow thirty pages for the brief in opposition, many are much shorter. In some cases the defects in the petition can be exposed in four or five pages.

The brief in opposition need not set forth a question presented or restate the facts. If the petition has done a particularly bad job in stating the question or reciting the facts, you may wish to leave them as they stand. A misleading question or factual statement in the petition can, of course, be effectively countered by the respondent's own (more accurate) statement of questions and facts. Most respondents opt to restate these matters.

The argumentative portion of the brief in opposition, entitled "REASONS WHY THE PETITION SHOULD BE DENIED," explains why the case is not certworthy and that the ruling below is correct. Respondent's job is to show that none of the traditional criteria for Supreme Court review have been satisfied; the questions raised have no general importance; and the case at bar is a bad vehicle for resolution of the questions raised by the petition in any event. The

opposition builds on and reinforces the general presumption of uncertworthiness that characterizes the Supreme Court's entire screening process.

A good brief in opposition cites multiple grounds for a denial of certiorari, particularly in a close case. A valuable inventory of arguments appears in articles by Frey, Geller & Harris, "Opposing Review: The Art Of Finding Uncertworthiness," *Inside Litigation*, at 27 (March 1987), and "Opposing Cert: Addressing The Issues Presented," *Inside Litigation*, at 26 (May 1987), which disclose the opposition strategies of veteran litigators from the Solicitor General's office. Here is a checklist of potential arguments:

- The petition is out of time. In a civil case, this is a jurisdictional defect. In a criminal case, it is an important discretionary ground for denial of certiorari.

- The case is interlocutory. In a state case, this is almost always dispositive. In a federal case, it is a significant discretionary ground for denial, particularly when further proceedings may alter or refine the issues. It is generally most efficient for the Supreme Court to await an appeal from a final judgment which allows the Court to consider all issues in a single certiorari package.

- The issue is not ripe, the petitioner lacks standing, or the case is moot. The Court wants these objections to be raised conspicuously to avoid wasteful briefing and argument in cases that cannot properly be decided.

- The case turns solely on state law. In a state court case, this is dispositive. In a federal diversity case, this is almost always dispositive unless the petitioner establishes a complete disregard of *Erie* standards warranting Supreme Court supervision.

- The case is fact-bound. This characterization is perhaps the most common basis for rejecting a petition for certiorari. Even if a certworthy issue is present, it may be mired in factual disputes unworthy of Supreme Court review.

- An independent ground supports the decision below. In a state appeal, an adequate and independent state law ground completely defeats Supreme Court jurisdiction. In a federal case, an alternative ground for decision means that the assertedly "certworthy" issue is of no practical importance in the present case.

- The issue was not properly preserved below. This defect is generally fatal, unless the court below has actually decided the federal law question.

- The issue is not discussed at all or is only fleetingly mentioned in the opinion below. The Court is not [*33] likely to review an opinion that does not meaningfully analyze the question presented.

- There is no conflict among the circuits. As stated by Justice Byron White, "the Court makes virtually no grants in purely statutory cases unless there are conflicts, a clear difference from former practice, when we often took statutory cases where the issue was important." *The Federal Judiciary in the Twenty-first Century* at 146 (Federal Judicial Center 1989).

- Certiorari has been denied on the same issue previously. Respondent can argue persuasively that nothing has changed that would warrant a different decision now.

Skillful briefs in opposition also rebut claims of "conflicts" among the circuits or among state supreme courts in a variety of ways, which build on the screening criteria previously discussed:

- The conflict is not a genuine one. The difference is simply a matter of dicta or the cases are factually distinguishable.

- The conflict has not percolated sufficiently. The Court benefits from numerous perspectives on difficult legal issues. The issue presented can await another day.

- The conflict is capable of resolving itself. Subsequent decisions may make clear that the circuit in question is coming into harmony with the law elsewhere. If the conflict is an old one, the respondent can predict that the circuits will come into alignment through reconsideration of obsolete doctrine.

- The conflict is tolerable or unimportant. If the issue arises infrequently or has minor practical importance, the Court will likely deny certiorari.

- Congress, an administrative agency, or the U.S. Sentencing Commission can best settle the conflict. Respondents often point to pending legislative or regulatory amendments that would eliminate the need for Supreme Court intervention.

- The record is inappropriate for resolution of the conflict. The facts may be unresolved or messy, making the case a poor test case. Another case will present the issue in cleaner form.

- The conflict is immaterial to the outcome. The respondent may be able to show that the petitioner would lose under any articulation of the law, robbing the issue of any practical significance. The Court can await a case where resolution of the conflict makes a difference.

Finally, respondent should include a short defense of the decision below on the merits, presenting the arguments in terms most persuasive to the Court. An apparently correct decision is a less tempting subject for review by certiorari. It also is protected from summary reversal. The opposition should demonstrate that the court below has reasonably construed prior Supreme Court precedent. The Supreme Court cannot review every lower court decision that interprets and applies past Supreme Court decisions; percolation in this context means that the lower courts should retain latitude to explore the implications of Supreme Court pronouncements for a period of time before the Court returns to the same issue.

These are only illustrations of the kinds of points that can be made to defuse the certworthiness of a case. The Supreme Court's rules call for a full exposition of such defects. As stated in Rule 15.2, "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

Amicus Support

Amicus support can dramatically signal that a case has widespread importance. As noted above, the likelihood of certiorari being granted rises sharply when amici participate. In fact, amicus support at the certiorari stage may be more important to a petitioner than support on the merits. Once certiorari is granted, the petitioner has a fighting chance with or without amicus support. But in most cases the petitioner has only a minuscule chance of obtaining a grant of certiorari and amicus help is most crucially needed at the threshold. (By contrast, amicus support rarely helps a respondent; it sends the unhelpful signal that the case at hand has general importance.)

The most impressive amicus support comes from the Solicitor General, who represents the views of the United States before the Supreme Court. The Solicitor General only rarely files an amicus brief at the certiorari stage without an invitation from the Court. But with some regularity the Court asks the Solicitor General to state the government's views in cases raising federal law issues of apparent concern to federal agencies or enforcement officials.

A petitioner seeking support from the Solicitor General needs to start with the administrative agency, executive office, or division within the Justice Department that has particular interest in the subject matter. Especially if the Court has asked for the government's views, these personnel will welcome explanations why the government should support one side or the other. Appeals to government lawyers should be made in terms of the interests of the federal government itself. Explain why the government's institutional interests would be served by a grant of review and a reversal of the decision below. Presentations of this kind are customarily made in writing with a follow-up meeting or telephone conference call. As the matter ascends to the office of the Solicitor General, further conferences usually occur, together with requests for more information needed to evaluate the case. It is not uncommon for different offices within the federal government to develop different views about a case. The petitioner needs to seek out and attempt to persuade likely allies within the federal bureaucracy.

State attorneys general, public interest organizations, labor groups, and trade associations also may have an interest in a case, although many decline to commit institutional resources until the Supreme Court grants certiorari. Petitioners seeking such help need to keep in mind the lengthy decision-making process that exists in most amicus organizations. It may take

[*74contd] >CONTD> >CONTD2> months of time to evaluate a case and reach an organizational consensus. That means that the time to seek amicus curiae support is sooner rather than later -- preferably, as soon as the adverse decision is handed down. Multiple amicus

curiae briefs can reinforce the impression that the case is exceptionally important, especially when they come from different sectors of the public.

An amicus brief at the certiorari stage is ordinarily quite short (typically, eight to ten pages). It is due 30 days after the petition for certiorari is placed on the docket, and need not (indeed, should not) repeat points made in the petition. Rather, the brief must focus on realworld reasons why the Supreme Court should hear the case. The amicus brief can point out the disruptive and harmful consequences of the decision below, and its adverse impact on broad sectors of industry, the general public, or the law enforcement community. Citations to secondary authorities typically support these claims of importance. Amici may also provide their own information as to the recurring nature of legal problems and the great practical need for a prompt and authoritative resolution.

The Supreme Court's rules, as amended during the last three years, warn that while an amicus brief "that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court," an amicus brief "that does not serve this purpose burdens the Court, and its filing is not favored." Rule 37.1. Amicus organizations need to understand this stricture. To avoid ghostwriting and hidden subsidies by parties to amicus organizations, Rule 37.6 adds that the amicus brief must disclose "whether a party authored the brief in whole or in part" and identify every person or entity, other than the amicus curiae, its members, or its counsel, "who made a monetary contribution to the preparation or submission of the brief." This disclosure must appear on the first page of text.

These provisions are not designed to discourage petitioners from soliciting amicus support. They do not, in particular, require disclosure of coordination or discussion between petitioner's counsel and amicus counsel; nor do they interfere with the normal practice of giving potential amici lower court briefs, opinions, and record materials, or drafts of the petition for certiorari. This kind of cooperation is expected and necessary to avoid repetition and ensure that the amicus fully comprehends the case. Beyond this, Rule 37 does not require disclosure of the fact that petitioner's counsel may have reviewed an amicus brief in order to identify inaccuracies or avoid repetition. That such a review may result in advice by petitioner's counsel to correct, delete, or add limited explanation or clarification would not appear to constitute writing the amicus brief "in whole or in part." But Rule 37.6 may well require disclosure when petitioner's counsel rewrites a substantial portion of the amicus brief. What crosses the line must depend on the individual situation as well as the common sense and good faith of counsel, with borderline situations referred to the Clerk's office for advice. The common sense of the new rule is that while general comment and correction are permitted, ghostwriting in any form is forbidden without disclosure.

Rule 37.6 also requires disclosure of all persons and entities who made a monetary contribution to the preparation or submission of the amicus brief. The Court wants to know who (other than the amicus, its members, or its counsel) paid the lawyers who prepared the amicus brief. This language, literally construed, requires disclosure of any subsidy for legal work on the amicus brief, as well as for printing, filing or service. The Court is not interested in the amounts involved, only the identity of the person or entity footing the bill. Not all questions are answered by the language of Rule 37. If a party to a proceeding is also a member of an

organization that is filing an amicus brief, should that fact be disclosed? Or if such a party makes a monetary contribution to the preparation or submission of the brief beyond that of other members of the organization, should that fact be disclosed? The Clerk's view, though not dictated by the terms of Rule 37.6, is that prudent counsel should disclose the facts in those two situations. See Stern, Gressman, Shapiro & Geller, *Supreme Court Rules, The 1997 Revisions* 4-7 (BNA 1997).

These new standards reflect judicial ambivalence toward amicus briefs. Amicus briefs help the Court when they add relevant information and reflect an independent perspective. But the Court should not be misled about the independence of amici or be exposed to a mirage of amicus support that really emanates from the petitioner's word processor. Ghostwriting and concealed subsidies for amicus briefs only diminish the respect and credibility accorded to the arguments and expertise that amici can legitimately bring to a Supreme Court case.