Practice Tips

Increasing the Odds for the Supreme Court to Grant Certiorari

By Cynthia Hujar Orr

1. No other authority reviews the Supreme Court

Counsel should keep in mind that the Supreme Court's decisions are not reviewed by any other authority. Thus, it is unlike any other court. It frequently decides issues that were not preserved or were not raised. Less frequently, it decides cases that reached the Court out of time.

And unlike other courts it decides cases based on a large variety of persuasive sources. Most recently, it raised controversy by deciding that juveniles should not be executed by relying in part upon international standards of decency. History, legislation, practices in other jurisdictions, legal scholarship, statistics, studies, developments in technology and science and many other matters influence the Court's decisions.

2. Write to survive the screening process

However, it is of foremost importance that counsel seeking a grant of certiorari prepare a thorough petition and seek support for the grant of certiorari from appropriate amici. Remember, that petitions are subject to a screening process. Supreme Court Law clerks are given the work by all but one Justice to review the writs of certiorari and recommend whether each petition should be granted or denied.

Since more than 7,000 petitions are filed each year, most of the Justices divide their initial review among the clerks each week on a random basis. The clerks then prepare memos which recommend denial or grant of certiorari.

Memos usually contain the following information:

(a) a statement as to whether it is a writ of certiorari case or an appeal;

(b) Identification of the Judge who wrote the opinion of the court below, and identifying any judge who may have written a concurring or dissenting opinion;
(c) an outline of the facts and the lower court holdings;
(d) Identification of the questions presented for review and the contentions of the parties with respect to why the case should or should not be given plenary review; and
(e) the law clerk's conclusions and recommendation as to whether the petition should be granted or denied.
Stern, Gressman, Schapiro, Geller, *Supreme Court Practice,* pages 39-40 (eighth ed. 2002).

These memos are circulated, commented upon by the other clerks and provided to the Justices with the pending petitions. In some cases, the Justice will rely on the memo without reading the petition. However, it is the conference of the Justices and the favorable vote of four which secures a grant of certiorari. The clerks' memos are simply tools used to aid the Court.

Moreover, as Justice Harlan once noted, "the question of whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules." That kind of "feel" is something that no law clerk can address in a certiorari memo; nor can a clerk's memo hide, let alone dictate, a particular Justice's "feel" that a given case comes within the Justice's own agenda or that of the Court. Nor is a law clerk's recommendation capable of overriding, or even influencing, the Justices' joint consideration of the case on the "discussed list." A case on that list means that the "certworthiness" of the case will be discussed by all nine justices in their weekly conference from which the law clerks are excluded. The relative few certiorari petitions that are granted owe their success not to a blind following of law clerk recommendations but to the favorable vote of at least four justices following a conference discussion among all nine Justices.
Stern, Gressman, Schapiro, Geller, *Supreme Court Practice,* pages 39-40 (eighth ed. 2002).

It should be noted that while clerks are particularly sensitive to recommending the grant of certiorari, the decision whether to grant certiorari is made by the Justices in a conference which the clerks do not attend.

Cynthia Eva Hujar Orr co-chairs the ABA CJS Defense Function Committee and is the Treasurer to the National Association of Criminal Defense Lawyers and a Past-President of the Texas Criminal Defense Lawyers Association.

3. **Starting with the basics**.

The Court's certiorari jurisdiction is not employed to simply review the position of the defeated party in the Courts of Appeals. As you well know, the Court exercises discretion with respect to writs of certiorari. Therefore the Court's jurisdiction has been fashioned to address matters of far-reaching importance, beyond the particular facts and parties involved in a case. Certiorari will be granted to cases presenting important federal principles or questions that will affect a great many people and courts across the country. About 3% of petitions for writ of certiorari are granted.

Rule 10 of the Supreme Court Rules sets out the general rule for the grant of certiorari.

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that the Court considers:
> (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
> (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
> A petition for writ of certiorari is rarely[1] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

4. Where to look for guidance.

A. What the Court says
Counsel should review the reasons that the Supreme Court granted certiorari in cases surrounding the area of law with respect to which his or her petition seeks review. Where the Court has engaged in dicta which the federal Courts of Appeals and state courts have applied with variations, this presents a cert-worthy area. Where federal statutes leave terms undefined, certiorari may be granted to supply the definition or declare the statute vague.

B. When inferior courts fail to follow guidance
It is safe to say that where the Courts of Appeals or state courts of last resort refused to follow or fail to follow Supreme Court precedent, certiorari is likely. This is considered the strongest area in which certiorari may be merited.

C. Splits among the high courts
Another area offering a good chance for the grant of certiorari is where the federal Courts of Appeals or state high courts reach differing results regarding the same federal question. This area is traditionally referred to as a split. A split may exist within a circuit court of appeals. However, a split within a circuit is not considered sufficient reason for the grant of certiorari alone. While it is attractive, it is not a sure thing. The issue must also be of sufficient importance. In addition, the Supreme Court will often allow the lower courts to "percolate" such questions and resolve the conflict themselves in "the laboratory" of their future opinions.

5. Decided issues

In recent years, the Court is more likely to grant cert. in order to reexamine Supreme Court precedent. While traditionally certiorari is granted regarding points reserved or left undecided in previous Supreme Court cases, where a question concerns prior decisions of the Supreme Court which are inconsistent or cannot be reconciled, or where the decision is based on a Supreme Court opinion that needs clarification, the Court will also grant cert.

6. What are important constitutional issues?

In order to increase the chance that your case is granted certiorari it is important to argue not only that your case presents an important federal question, but also that the question has broad implications beyond the parties involved in the case. Whether yours is a case that involves

American foreign policy, or involves disparate application of the same federal statute in different jurisdictions, it is imperative that you described the pressing and broad implications of the court's failure to decide the issue.

Of course, there are certain areas where certiorari is likely to be granted. For example, some fact bound cases involving the 1St Amendment are frequently granted review. Another area where the Supreme Court frequently grants Certiorari is in cases involving the extent to which the government may become involved in personal and family decisions. Of the criminal cases granted certiorari each year, many involve statutory interpretation or application of the death penalty. And the Court will be certain to act in areas where Congress has recently acted or may act such as with regard to the sentencing guidelines or amendments to the habeas statutes. Finally, the Court traditionally becomes involved in areas where it is setting the benchmark for constitutional rights.

I will close by telling the story of a federal public defender, Jack Carter, who had the nerve to question the application of the commerce clause in the context of federal gun in school zone cases. Decades of litigation before had resulted in seemingly limitless extension of the commerce clause and, with it, federal jurisdiction. This did not seem right to Jack Carter. And he was right. In *U.S. v.Lopez* the Court struck down the gun in school zone statute because the law did not require a sufficient federal nexus, an effect on commerce.

It is never too soon to start framing your issue for certiorari. Think about these practical tips in each case at the trial level and onward as you preserve error and develop the facts in support of your claim. Soon you will be in the unenviable position of appearing before our highest Court.

Endnotes

[1.] This is the reference to the rare case of national importance in which the Court will grant certiorari to correct perceived error. A good example is Bush v. Gore, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996).

Interviewing Company Employees

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2. *Discuss the Possibility of Waiver.* Given the continuing uncertainty over the benefits of waiving the privilege, it remains good practice to explain in more detail that the company may elect — at its discretion and its discretion alone — to turn over the statements made in the interview to the government.

3. *Make a Clean Record.* Because of the potential import of these issues, it also makes sense to have an unambiguous record memorializing your statements and the employee's understanding of them. Since the record may one day be seen by third parties, it also makes sense, if possible, to distinguish between pure facts, mental impressions, and legal advice — although such distinctions are far easier to describe abstractly than to apply in real life.

4. *Be empathetic.* Let's not kid ourselves — these can be exceedingly difficult issues. The company seeks to learn the true facts, so that it can make reasonable judgments, and report wrongdoing, if wrongdoing has actually occurred, in order to demonstrate its cooperation. For the employee who may have possible exposure, difficult choices also await, among them: decline to be interviewed and face termination; agree to be interviewed, make incriminating statements, and risk prosecution; or agree to be interviewed, make false exculpatory statements, and still risk prosecution. The McNulty Memorandum does nothing to make any of this easier, for you or your client.

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