PETITIONS FOR CERTIORARI

AND

FURTHER APPELLATE REVIEW

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THE PETITION FOR CERTIORARI

Mechanics:

- See www.supremecourtus.gov, case handling guides, guide to IFP cases
- Sup. Ct. Rule 13 (must file within 90 days of SJC opinion, or denial of petition for rehearing, or denial of FAR, *not* from date of rescript or mandate, federal petition for rehearing en banc only does not toll time for certiorari)
- Sup. Ct. Rule 29 (filing effective upon date of postmark)
- Sup. Ct. Rule 33 (party proceeding IFP may file on 8 ½ by 11 paper, instead of booklet)
- Sup. Ct. Rule 39 (party proceeding IFP may file 10 copies and 1 original of petition, instead of 40, IFP application must be attached to the front of the petition)
- The Clerk's office is *wonderful*! Call them with questions: 202-479-3014
- Four of the nine justices must vote to grant a writ of certiorari. A decision is made based on one memo prepared by a clerk in the "cert. pool" (Justice Stevens does not participate in the pool.)

Statistics:
In recent years, the Court grants around 100 of 7,500 petitions or between 1% and 3%. This percentage is much lower than past years because there are more petitions being filed (up from 2,313 in 1960) and fewer being accepted (about one-half of the number they used to accept). The Court accepts well over half of prosecutors' petitions.

Strategy:
Pay attention to the *agenda of the court* in framing the question presented. What are they interested in currently? Have the justices given speeches indicating their concern about particular topics? Have they recently granted certiorari on related issues? (e.g., *Crawford* issues, *Apprendi* issues, the scope of habeas review) Check the Criminal Law Reporter and www.scotusblog.com.

Remember, certiorari review is totally discretionary. You have to get them interested right away. Think about the clerk writing the "cert. pool" memo. Make it easy for that clerk to distill the case into a bench memo. If you make them work, you're going to get a bad memo, and you're not going to get certiorari

The primary considerations for granting certiorari are *conflict* in the lower courts (state and federal) or extraordinary public *importance*. Sup. Ct. Rule 10. It must be a genuine and important conflict. The case must present the issue *without complication* (e.g., fact-bound, procedural default, insufficient federalization). This means *one* question presented if at all possible. You can move later to expand the scope of the grant.

Note that it is *not* necessary to seek certiorari to "preserve" issues for habeas. Indeed, it is a rarely-invoked remedy that, in appointed cases, requires prior approval from C.P.C.S.

See also http://www.appellate.net/articles/certpractice.asp (taken from Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice* (1993)).

THE PETITION FOR FURTHER APPELLATE REVIEW

Mechanics:

- Governed by Mass. R. App. P. 27.1
- Timing: Must be filed with 20 days of the Appeals Court's opinion. The filing of a petition for rehearing does not affect the timing.
- Page length: 10 pages excluding the procedural history and statement of facts.
- Form: Rule 27.1(b) is very explicit. Just read the rule and follow it. The petition must conform to the font and margin requirements of Mass. R. App. P. 20.
- It takes three votes from the seven SJC justices to obtain FAR. The justices do not have a "pool" memo like the U.S. Supreme Court. Each individual justice works off their own materials, which may be simply the petition itself or it may be a memo from a clerk.
- Pay attention to the order granting FAR. If it does not limit the grant to one specific issue, all issues contained in the FAR are available.
- If FAR is granted, counsel may seek permission to file a substitute brief but not a supplemental brief.

Statistics:
The SJC currently accepts between 4% and 6% of FAR applications. The odds go up if the opinion below was published. The odds increase further if it contained a dissent. Prosecutors' FAR applications are granted far more frequently.

Strategy:
The standard is whether the petition presents issues "affecting the public interest or the interest of justice".

Similar to the petition for certiorari, pay attention to the SJC's current agenda (e.g., claims arguing for broader rights under the Massachusetts constitution than under the federal constitution, *Bishop/Dwyer* issues, right to counsel issues). Also similar to certiorari, the petition stands the best chance of being granted if it is concise and does not make the reader work. Quickly flag the issue that deserves the Court's attention.

But there are significant differences between FAR and certiorari. They are laid out below.

First, FAR explicitly permits review for simple error-correction in individual cases. While asking for review on that basis alone is not preferred, counsel can and should do so if that is all you have.

Second, counsel should seek FAR as a matter of course. *See Committee for Public Counsel Services Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters*, § 19. Unlike certiorari, FAR is an integral and nearly automatic part of the criminal appellate process.

Third, one *must* present a claim both in the Appeals Court and in the FAR petition as a federal claim in order to later raise that claim in a habeas corpus petition. *O'Sullivan v.*

Boerckel, 526 U.S. 838 (1999). Otherwise, the claim is not "exhausted". The *minimum* requirements for "federalizing" a claim are: (1) citation to the federal constitution, (2) citation to at least one federal (preferably Supreme Court) case, and (3) at least a sentence or two that explicitly argues the federal claim (not just bald assertions). *See Fortini v. Murphy*, 257 F.3d 39, 45 (1st Cir. 2001). Counsel should always federalize claims unless there is an important tactical reason not to do so. *See Committee for Public Counsel Services Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters*, § 14.

For this and other reasons, counsel should include in the FAR *all* claims that were submitted to the Appeals Court. But counsel need not use up precious pages on issues submitted simply for purposes of exhaustion. One way to do this is to argue the attractive issue in an extended discussion. Then, rather than omitting the other claims, simply present them very briefly and exclusively on federal grounds in a short section at the end of your FAR petition. For example:

> The defendant respectfully requests that this Court review the following federal constitutional claims of error. First, the prosecutor deprived the defendant his Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and an impartial jury where the prosecutor's closing argument repeatedly equated the defendant with a notorious criminal. *Darden v. Wainright*, 477 U.S. 168, 181-82 (1986); *Donnelly v. DeChristoforo*, 416 US 637 (1974) (Tr. 11/20/96 at 43-54); (Def. Br. at 40-44). Second, the defendant was denied his Sixth and Fourteenth Amendment rights to compulsory process for witnesses in his favor when a subpoena for a police witness was ignored. *Washington v. Texas*, 388 U.S. 14 (1967); Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006); (Tr. 11/20/96 at 24); (Def. Br. 44-46).

If the client insisted upon the submission to the Appeals Court of frivolous claims pursuant to *Commonwealth v. Moffett*, 383 Mass. 201 (1981), counsel should submit those claims (including the *Moffett* preface) in the FAR petition as well.

It is acceptable to try to persuade the client to agree to omit claims from the FAR petition. Such a discussion must include informing the client of the consequences of omitting the claim. But if the client insists on submitting the claim, counsel should implement the client's decision.