TO CERTIORARI AND BEYOND[1]

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Having your case accepted for consideration by the Court of Appeals is at least, and sometimes more than, half the battle. Many petitions for certiorari are filed, but relatively few are granted.[2] By reviewing some of the history, statutes, rules, cases, internal workings of the Court, and personal thoughts about the certiorari process, I hope you may find something in this paper to put to good use when you draft a petition to the Court on behalf of your clients.

OVERVIEW

The adjudicatory duties of the Court are divided into two segments. The first has to do with deciding which cases to accept for full review; the second has to do with deciding cases that are before the Court for plenary review.

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[1] With apologies to Buzz LightYear, "Toy Story."

[2] For example, in FY 2015 (July 1, 2014 – June 30, 2015), 370 petitions were considered in civil cases (55 were granted, or 14.9%) and 377 in criminal cases (37 were granted, or 9.8%). These numbers and percentages have varied somewhat over the last several fiscal years. In FY 2014 (July 1, 2013 - June 30, 2014), 359 petitions were considered in civil cases (42 were granted, or 11.7%) and 326 in criminal cases (40 were granted, or 12.3%). In FY 2013 (July 1, 2012 - June 30, 2013), 357 petitions were considered in civil cases (70 were granted, or 19.6%) and 304 in criminal cases (39 were granted, or 12.8%). In FY 2012 (July 1, 2011 - June 30, 2012), 349 petitions were considered in civil cases (78 were granted, or 22.3%) and 261 in criminal cases (35 were granted, or 13.4%).

These two segments exist because of current provisions dealing with the Court's jurisdiction. There are still a few categories of matters in which an appeal may proceed to the Court of Appeals as of right. Prominent among these are post-conviction review for DNA testing in criminal cases. *See* Md. Code, Crim. Proc. Art., § 8-201. Other cases that reach to the Court without benefit of the certiorari process include (by way of example only) certified questions of law from other jurisdictions, *see* Md. Code, Cts. & Jud. Proc. Art., §§ 12-601 through 12-613; Md. Rule 8-305; attorney discipline cases, *see* Md. Rules 16-701 through 16-781; final judgment by a circuit court in appeals from the District Court, *see* Md. Code, Cts. & Jud. Proc. Art., § 12-305; judicial disability matters, Md. Const. Art. IV, § 4B; Md. Rules 16-803 through 16-810; and challenges in election matters, *see* Md. Code, Elec. Art., §§ 12-201 and 12-204. Additionally, the Court of Special Appeals may certify a question to the Court of Appeals. *See* Md. Rule 8-305. For the most part, however, the Court determines its own docket through the exercise of the certiorari process.

The purpose of the certiorari process is to enable the Court to control its caseload by accepting for full review only those cases that have substantial precedential value or are otherwise of major public importance; that is, those in which review "is desirable and in the public interest . . . ." *See* Md. Code, Cts. & Jud. Proc. Art., § 12-203. The certiorari power may be exercised with respect to a case pending in or decided by the Court of Special Appeals. *See* Md. Code, Cts. & Jud. Proc. Art., § 12-201; Md. Rules 8-301 through 8-304. Additionally, it may be exercised with respect to a case in which a final judgment has been rendered by a circuit court on appeal from the District Court. *See* Md. Code, Cts. & Jud. Proc. Art., § 12-305; Md. Rules 8-301 through 8-303. The procedure may be invoked by

petition of a party, by certification of the Court of Special Appeals, *see* Md. Rule 8-304, or by the Court on its own initiative.

The Court conferences monthly throughout the year and one of the orders of business at these monthly conferences is the consideration of certiorari matters. Petitions for certiorari, whether dealing with cases pending in or decided by the Court of Special Appeals or with circuit court decisions of District Court appeals, are distributed approximately one month in advance of the conference to all the judges and carefully reviewed by each.[3]

The normal method of consideration of petitions is for each judge, beginning with the most junior in length of service, to make his or her recommendations as to the cases in which certiorari should be granted. The judges consider these recommendations and vote on them in order of ascending seniority, ending with the Chief Judge. If three votes are obtained, the writ is granted.[4] Once certiorari has been granted, the case is placed on the Court's regular docket, unless expedited review is granted.

A LITTLE HISTORY IS IN ORDER

Walston v. Sun Cab Co., 267 Md. 559, 564-69, 298 A.2d 391, 395-97 (1973), supplies the history of the creation of the Court's modern certiorari process:

> The constitutional amendment adding Section 14A to Article IV of the Maryland Constitution, Chap. 10 of the Laws of 1966, ratified by the electorate on November 8, 1966, was a general

[3] It is the Court's practice that the judges, not their law clerks only, read the petitions.

[4] If the available complement of the Court's judges at a conference is only five (the minimum required by the State Constitution in order for the Court to conduct its business), only two votes are required to grant a petition.

grant of power to the General Assembly to create by law "such intermediate courts of appeal, as may be necessary" and to "prescribe the intermediate appellate jurisdiction of these courts of appeal, and all other powers necessary for the operation of such courts." The immediate purpose of this constitutional amendment was to enable the General Assembly to relieve this Court [the Court of Appeals] of the substantial increase of criminal appeals which had inundated the Court and yet provide at least one appeal as of right, either to this Court or to an intermediate court to be created by statute. There was also an underlying general purpose to provide sufficient flexibility in the grant of power by the constitutional amendment to provide for a grant of appellate power to the intermediate appellate court or courts to be created over certain – or perhaps ultimately all – civil cases. Chapter 11, § 1 of the Laws of 1966 created the Court of Special Appeals, Code (1957, 1966 Repl. Vol.) Art. 26, § 130, and defined its appellate jurisdiction in criminal cases where the sentence was other than death, "subject in each such case to a *further appeal* to the Court of Appeals as provided by § 21A of Article 5 of this Code . . . ." (Emphasis supplied) Chapter 12, § 1 of the Laws of 1966, Code (1957, 1968 Repl. Vol.) Art. 5, § 21A, originally a companion bill to Chap. 11 of the Acts of 1966, provided that in the cases subject to the jurisdiction of the Court of Special Appeals if it appeared "upon petition of any party, . . . that a review is desirable and in the public interest, [this Court] shall require, by certiorari or otherwise, any such case to be certified to the Court of Appeals for its review and determination . . . ."

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The constitutional amendment and implementing legislation was largely conceived and originally promoted by the Maryland State Bar Association. We note that the earliest reference to certiorari jurisdiction was in 1959 in which the Committee of the Maryland State Bar Association, appointed to consider the matter, referred to certiorari jurisdiction to relieve the case load of this Court as "abolishing the *absolute right of appeal* and substituting *permissive appeal* . . . ." 64 Transactions, Maryland State Bar Association at 398 (1959). (Emphasis supplied). Later, the State Bar Committee reconsidered the whole subject and on June 24, 1965,

recommended the creation of the Court of Special Appeals limited originally to appellate jurisdiction in criminal (other than death cases), post-conviction and defective delinquency cases. The Committee's basic premise was that "a litigant is entitled to at least *one appeal as a matter of right* in each case and where this appeal was to the Court of Special Appeals, a petition for a writ of certiorari could be filed to the Court of Appeals by the *litigant adversely affected* whether it be the accused or the State." (Emphasis supplied). This Report was unanimously adopted by the Maryland State Bar Association, 70 Maryland State Bar Association at 134 (1965).

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Our practice in regard to the certiorari procedure closely follows the certiorari practice of the Supreme Court of the United States.

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The creation of the Court of Special Appeals and the establishment of the certiorari procedure were designed to decrease the work of this Court and its then expanding case load. There was no intention to give to cases in which certiorari was granted a *larger and more extensive scope* than that afforded other appellate cases, thus frustrating the principal policy underlying the legislation.

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It should also be kept in mind that the statute contemplated that the desirability and public interest involved in granting certiorari are shown to us by petition and the matters presented to us by petition should logically be those considered by us unless we limit those matters for consideration in our order granting certiorari. In sum, except in most extraordinary circumstances, we will consider on an appeal resulting from a grant of a writ of certiorari only those questions raised in the petition and matters relevant to those questions, in the absence of a cross-petition raising additional questions, unless, of course, we have limited in our order granting certiorari the issues to be considered on that appeal.

(footnotes omitted) (emphasis in original).

A WORD ABOUT CROSS-PETITIONS

When your opponent files a petition for certiorari, should you should file a cross-petition (conditional or otherwise)? By not filing a cross-petition in certain instances, you might limit your ability, and that of the Court, to consider issues that you (and perhaps the Court) might find desirable. Moreover, whether you do so in the cross-petition or an answer to a petition, if there are procedural obstacles or other "defenses" to the proper consideration of the proffered certiorari question(s), raising them may persuade the Court not to grant certiorari.

As noted *supra*, the Court's certiorari procedure closely follows that of the U.S. Supreme Court. Accordingly, the Court observed favorably in *Walston* as follows:

> Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed. 1951) summarizes the Supreme Court practice in regard to cross-petitions for certiorari in § 428, pages 860-62, as follows (footnotes omitted):
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> > "In the absence of a cross petition respondent is not entitled to be heard in opposition to the parts of the decision below which were adverse to him, the general rule applied by the Supreme Court being that consideration of the case will be confined to an examination of errors asserted by petitioner where respondent has failed to present a cross petition for certiorari. The court has stated, however, in a careful and well reasoned dictum that these decisions simply announce a rule of practice which generally has been followed, without denying the power of the Court to review objections urged by respondent to the decree below, although he has not applied

> for certiorari, if the Court deems there is good reason to do so. This power, however, is not exercised."

Walston, 267 Md. at 568-69, 298 A.2d at 396-97.

Even when a party files a cross-petition, the Court sometimes will deny it, despite a viable argument of non-preservation, in order to reach an important legal question or issue presented in a petition. One case is revealing, I submit, of not only generalities regarding petitions and cross-petitions, but also introduces the notion of a perceived difference in approach between a certiorari court and an error-correcting court, such as the Court of Special Appeals, with regard to the rigor of application of the principles of preservation of issues.[5]

Additional guidance bearing on the need to file a cross-petition is found in Md. Rule 8-131(b)(1):

> Rule 8-131. Scope of review.
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> (b) In Court of Appeals - Additional limitations. (1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either

[5] In the particular case selected, the Court of Special Appeals concluded that the issue on the merits had been preserved. *See Jones v. State*, 125 Md. App. 168, 175, 724 A.2d 738, 741 (1999). This notwithstanding, some perceive that the Court of Special Appeals is a more religious observant of strict application of the principles of non-preservation than is the Court of Appeals. This, of course, is a debatable premise.

> expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

THE FORM AND CONTENT OF A PETITION

- In addition to the mechanical requirements applicable to a petition for certiorari, pay close heed to the admonition of Md. Rule 8-303(b)(1):

> Petition. (1) Contents. The petition shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring consideration. Except with the permission of the Court of Appeals, a petition shall not exceed 3900 words. It shall contain the following information:
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> * * *
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> (G) A particularized statement of why review of those issues by the Court of Appeals is desirable and in the public interest.

- Md. Rule 8-112 provides additional guidance on the typeface and margins of your petition:
  - Text and footnotes shall not be smaller than 13 point
  - Type shall be double-spaced between lines, except that headings, indented quotations, and footnotes may be single-spaced
  - Margins shall not be less than 1 inch
- Your original petition should be filed along with seven copies. Any answer to the petition is due within 15 days from the filing date of the petition and must include an original answer as well as seven copies. A cross-petition also requires an original petition as well as seven copies.

- A filing fee is required for original and cross petitions. There is no filing fee for answers.
- Regarding the issues you would like considered, as a practical matter:
    - limit the number presented
    - frame an issue concisely, yet explain why its resolution may have an impact beyond your particular case
    - do not merely tell us the lower court erred in some respect; we are not primarily an error-correcting court
- Make certain any photocopied attachments are legible.
- If there is a written opinion of the lower court, attach it as well as docket entries evidencing the judgment of the circuit court.
- Do not misstate or skew the factual statement section.
- Review some prior certiorari petitions in cases where certiorari was granted to get a feel for what has proven effective.

IMPROVIDENTLY GRANTED?

The Court, sometimes, after granting a party's petition for certiorari, may dismiss the writ of certiorari as improvidently granted.[6] Traditionally, no elaboration of the reasons

[6] The following figures represent the statistics for improvidently granted petitions for writ of certiorari over the past four fiscal years: FY 2015 (July 1, 2014 – June 30, 2015), one; FY 2014 (July 1, 2013 – June 30, 2014), seven; FY 2013 (July 1, 2012 - June 30, 2013), four; and FY 2012 (July 1, 2011 - June 30, 2012), seven.

for this action are provided.[7] The most prevalent reason for such a dismissal is that, after consideration of the briefs, extract, and/or oral argument, it becomes obvious to the Court that the certiorari petition (and possibly the answer as well) misled us. The issue that the Court thought was "cert-worthy" may not be presented by the case upon fuller review.

FURTHER OBSERVATIONS

- If you intend to ask the Court to stay a lower court judgment, you should join the stay request with a petition for certiorari.
- Search for certiorari petitions that the Court granted (but has not decided the underlying case) that may present the same or similar questions as in your case and point that out in your petition.
- Your chance of success increases somewhat where you are seeking certiorari in a case involving a reported opinion of the Court of Special Appeals or, if unreported, where a dissent was filed.
- Sufficiency of the evidence issues, unless a policy question is explicit or implicit, rarely capture 3 votes.
- Some other factors the Court might look for in choosing to grant a petition are:
    - divided opinions around the country,
    - statutory or rule interpretations,
    - unsettled questions of law that are likely to recur,

[7] Chief Judge Bell wrote a Dissenting Opinion from Dismissal of Petition for Certiorari as improvidently granted in *Koenig v. State*, 368 Md. 150 (2002).

- divided opinions in the same circuit court or between circuit courts in Maryland,
- lower court holdings of unconstitutionality of a statute or ordinance,
- re-examination of settled precedent in light of changed economic, political, or social environment.

BEYOND CERTIORARI

After we grant certiorari in your case and you have briefed and argued it, how do we go about getting you a decision? Following each day's oral argument, the Court conferences and decides, at least tentatively, the cases it has heard that day. The discussion and voting goes by inverse order of seniority, with the most junior judge expressing his or her views first and then zig-zagging down the table, with the Chief Judge expressing his or her views last. At the end of each month's four days of arguments, the Chief Judge assigns the opinion-writing duties with respect to those cases in which he or she has voted in the majority. If the Chief Judge is in the minority, the senior judge among the majority makes the assignment. The original record in each case and a CD of oral argument are delivered to the judge assigned to write the opinion in that case.

The judges then return to their chambers and proceed, with the assistance of their law clerks, to the activities of opinion preparation. When an opinion is completed, it is distributed to all the other members of the Court via internal e-mail. Some members will respond with comments by telephone or return e-mail to the author, while responsive comments from others are reserved until the next conference of the full Court at which

opinions ready for consideration are discussed. The discussion begins with the senior judge (other than the Chief Judge), proceeding through the Court to the most junior judge, and ending with the Chief Judge. Discussion tends to be extensive, ranging from correction of typographical errors to major jurisprudential differences.

If, as is sometimes the case, the opinion is agreed to without major changes, the author proceeds to file it. It is more often the case that adjustments have to be made and, if they are extensive, the opinion will be rewritten and resubmitted at a subsequent conference. If the author declines to accept suggestions made by another member of the Court, a concurring or dissenting opinion also may be forthcoming. Indeed, if a member of the Court concludes before the conference that he or she definitely will dissent, the majority opinion is not taken up then at all. Instead, the dissent is prepared and circulated and both the majority opinion and dissent are considered together. Sometimes a dissent may pick up three additional votes, in which event its author becomes the author of the majority opinion and the original author may become a dissenter. If there is a proposed concurrence, the majority opinion is held until the concurrence has been circulated and discussed at a subsequent conference.

In any case, the process eventually produces, or almost always produces, at least a majority opinion for the Court, if not a unanimous one. When that point is reached, the opinion, and any dissents or concurrences, are filed with the clerk's office and at that point distributed to the parties and counsel.

Occasionally, a motion to reconsider an opinion is filed. *See* Md. Rule 8-605. A motion to reconsider is referred to the author of the majority opinion for recommendation. Such a motion is rarely granted.