Alabama Rules of Appellate Procedure

Rule 39.

Petitions for writ of certiorari; review of decisions of courts of appeal.

(a) *Considerations governing certiorari review; grounds*. Certiorari review is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons for the issuance of the writ.

(1) CIVIL CASES AND NON-DEATH-PENALTY CRIMINAL CASES. In all civil cases and in all criminal cases other than cases in which the death penalty is imposed, petitions for writs of certiorari will be considered only:

(A) From decisions initially holding valid or invalid a city ordinance, a state statute, or a federal statute or treaty, or initially construing a controlling provision of the Alabama Constitution or the United States Constitution;

(B) From decisions that affect a class of constitutional, state, or county officers;

(C) From decisions where a material question requiring decision is one of first impression for the Supreme Court of Alabama;

(D) From decisions in conflict with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of Criminal Appeals, or the Alabama Court of Civil Appeals; provided that:

1. When subparagraph (a)(1)(D) is the basis of the petition, the petition must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or

2. Where it is not feasible to quote that part of the opinion either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state that this subparagraph is applicable and then state, with particularity, how the decision conflicts with a prior decision; and,

(E) Where the petitioner seeks to have overruled controlling Alabama Supreme Court cases that were followed in the decision of the court of appeals.

(2) DEATH-PENALTY CASES. When the Court of Criminal Appeals has affirmed a sentence imposing the death penalty, counsel who represented the appellant on the appeal to the Court of Criminal Appeals or successor counsel shall prepare and file in the Supreme Court a petition for a writ of certiorari for review of the decision of the Court of Criminal Appeals. That petition shall be governed by this rule, except that:

(A) In addition to the bases for consideration of petitions for the writ of certiorari listed in subsection (a)(1) of this rule, a petition for a writ of certiorari will also be considered from a decision failing to recognize as prejudicial any plain error or defect in the proceeding under review whether or not the error or defect was brought to the attention of the trial court or the Court of Criminal Appeals.

(B) In addition to the requirements of subdivision (d) of this rule, dealing with the form of the petition, when review is sought for failing to recognize as prejudicial any plain error or defect, the petition shall contain a concise statement of the grounds, including a description of the issue and circumstances warranting plain-error review.

(C) The Supreme Court may enlarge the time for filing the petition. See Rule 2(b).

(D) The scope of review discussed in subdivision (k) of this rule is modified only to the extent necessary to permit the Supreme Court to notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court or the Court of Criminal Appeals or set forth in the petition, and to take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner; provided, however, that nothing in this subsection shall require the Supreme Court to conduct an independent review for the purpose for determining the existence of plain error.

(E) The provisions of this subsection (a)(2) shall be effective May 19, 2000[1].

(b) *Review by petition for writ of certiorari of decisions of the Court of Civil Appeals.*

(1) APPLICATION FOR REHEARING NOT PREREQUISITE TO CERTIORARI REVIEW. The filing of an application for rehearing in the Court of Civil Appeals is

not a prerequisite to review by certiorari in the Supreme Court. If an application for rehearing was filed, however, it must have complied with Rule 40(e).

(2) DOCKET FEE. Payment of the amount prescribed in Rule 35A(a)(3) is to be made to the clerk of the Supreme Court when the petition for the writ of certiorari is filed.

(3) TIME FOR FILING. The petition for a writ of certiorari shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) after the release of the decision of the Court of Civil Appeals. If an application for rehearing has been filed with the Court of Civil Appeals, the petition for the writ of certiorari shall be filed within 14 days (2 weeks) of the decision of that court on the application for rehearing.

(4) WHEN BRIEFS ARE TO BE FILED; UNAUTHORIZED BRIEFS STRICKEN. No briefs shall be filed by the petitioner or the respondent before the writ issues unless ordered by the Court. If the writ issues, respondent may (as provided in subsection (g)(2) of this rule) brief the sufficiency of the grounds stated in the petition. Briefs filed in disregard of this subsection will be stricken.

(c) *Review by petition for writ of certiorari of decisions of the Court of Criminal Appeals.*

(1) APPLICATION FOR REHEARING PREREQUISITE TO CERTIORARI REVIEW. The filing of an application for rehearing in the Court of Criminal Appeals is a prerequisite to review by certiorari in the Supreme Court, except:

(A) In the case of a pretrial appeal by the state in a criminal case (see Rule 15.7, Alabama Rules of Criminal Procedure), or

(B) In the case of review of a decision by the Court of Criminal Appeals on an original petition for a writ of mandamus where the petitioner seeks review by the Supreme Court by petition for writ of mandamus pursuant to Rule 21(e) of these Rules.

In those cases in which an application for rehearing is required, the application must comply with Rule 40(e).

(2) TIME FOR FILING. The petition for the writ of certiorari shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) of the decision of the Court of Criminal Appeals on the application for rehearing, except that in the case of a pretrial appeal by the state in a criminal case, the petition for the writ of certiorari must be

filed within 7 days (1 week) of the judgment of the Court of Criminal Appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(3) NO BRIEFS TO BE FILED PRIOR TO ISSUANCE OF THE WRIT. No briefs shall be filed by the petitioner or the respondent unless ordered by the Court. Respondent may address the sufficiency of the grounds stated in the petition in the respondent's brief if the writ issues

(d) *Form of and length of petition.* The petition shall comply with the provisions of Rule 32(a) and (b)(2) governing form and shall not exceed 3,000 words (15 pages for a petition filed pro se) (except in capital cases). The petition shall contain:

(1) The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, 39(a)(1)(A)-(E), supra, on which the petition is based — and in a death-penalty case a statement in accordance with 39(a)(2)(A) and (B) — provided that:

(A) When subparagraph (a)(1)(D) is the ground for the petition, the petitioner must quote that part of the opinion of the court of appeals and that part of the prior decision the petition alleges are in conflict; or

(B) Where it is not feasible to quote that part of the opinion either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state that this subsection is applicable and then state, with particularity, how the decision conflicts with a prior decision;

(4) A copy of the opinion or the unpublished memorandum of the court of appeals and the court of appeals' order or notice on the application for rehearing, if an application for rehearing was filed, attached to the petition as an exhibit; and

(5) If a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53, a copy of

a concise statement of the facts may be either included in the petition or attached to the petition. If a party is not satisfied with the facts stated in the main opinion or the unpublished memorandum of the court of appeals, but the party is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the court of appeals, the party shall indicate those facts with which the party is in agreement and indicate in which part of the dissent or special writing the facts are found.

(A) Statement of facts where application for rehearing was filed with court of appeals after an opinion or an unpublished memorandum was issued.

(i) If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and the party applying for rehearing is not satisfied with that statement, the party applying for rehearing in that court may include in the application an additional or corrected statement of facts or the applicant's own statement of facts. If an applicant is not satisfied with the facts stated in the main opinion or the unpublished memorandum of the court of appeals, but the applicant is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the court of appeals, the applicant shall indicate those facts with which the applicant is in agreement and indicate in which part of the dissent or special writing the facts are found. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, in order for the Supreme Court to consider those facts in addition to the facts as stated in the court of appeals' opinion or unpublished memorandum, the proposed statement of additional or corrected facts or the applicant's own statement of facts presented to the court of appeals in the application for rehearing must be copied verbatim and attached to or included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript.

(ii) If the petitioner proposes his or her own statement of facts, the petitioner must include a verification that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(iii) If the petitioner does not present with the petition an additional or corrected statement of facts or the petitioner's own statement of facts or indicate which part of the dissent or special writing the petitioner agrees with, it will be presumed that the

petitioner is satisfied with the facts as stated in the court of appeals' main opinion or unpublished memorandum.

(B) Statement of facts where an application for rehearing was filed with court of appeals in a "no-opinion" decision or an opinion that does not state the facts.

(i) If a court of appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion or unpublished memorandum that does not contain a statement of facts, the applicant shall include in the application for rehearing the applicant's statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be either included in or presented as an attachment to the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript.

(ii) The petitioner must verify that the statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(C) Statement of facts where no application for rehearing was filed with the Court of Civil Appeals.

(i) If the petition for a writ of certiorari seeks review of a decision of the Court of Civil Appeals and the petitioner has not filed an application for rehearing with the Court of Civil Appeals, and if the Court of Civil Appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion that does not contain a statement of facts, the petitioner shall present to the Supreme Court, either in the petition or as an attachment to the petition for the writ of certiorari, the petitioner's statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the Court of Civil Appeals issues an opinion containing a statement of facts and the party petitioning for the writ of certiorari is not satisfied with that statement of facts, the petitioner may present to the Supreme Court, either in the petition or as an attachment to the petition for the writ of certiorari, a proposed additional or corrected statement of facts or the petitioner's own statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If a petitioner is not satisfied with the facts stated in the main opinion of the Court of Civil Appeals, but the petitioner is satisfied with the facts as stated in a dissent or a special

writing by a judge or judges of the Court of Civil Appeals, the petitioner shall indicate those facts with which the petitioner is in agreement and indicate in which part of the dissent or special writing the facts are found.

(ii) If the petitioner does not present with the petition an additional or corrected statement of facts or the petitioner's own statement of facts or indicate which part of the dissent or special writing the petitioner agrees with, it will be presumed that the petitioner is satisfied with the facts as stated in the Court of Civil Appeals' main opinion; and

(6) A direct and concise argument amplifying the grounds relied on for allowance of the writ.

(e) *Number of copies of petition; filing and service.* Only the original petition, regardless of whether it is filed in the traditional paper format or e-filed pursuant to Rule 57, shall be filed with the clerk of the Supreme Court; one (1) copy shall be filed with the clerk of the appropriate court of appeals; and one (1) copy shall be served on each party to the proceeding in the court of appeals, including those parties not joining in the petition.

(f) *Issuance of writ of certiorari.* If the Supreme Court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, the Court shall so order, and official notice, in the form of a writ of certiorari, shall be given by the Supreme Court clerk to the parties or their counsel and to the clerk of the appropriate court of appeals. The writ is the official directive of the Supreme Court to the appeals court to deliver the record in the case to the Supreme Court for review. The record and one copy of the briefs and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The order may also include a directive that the parties address only a particular issue or issues in their brief. The case shall stand for submission as herein provided.

(g) *Briefing upon issuance of writ.*

(1) PETITIONER'S BRIEF. If the writ issues, the petitioner may file, within 14 days (2 weeks) — or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) — after the clerk of the Supreme Court has given notice that the writ has been issued either a brief addressing the merits of the case or a waiver of the right to file such brief. The petitioner's brief shall be in a form prescribed by Rules 28 and 32(a), and copies shall be served and filed as prescribed by Rule 31 for the service and filing of briefs. The brief must contain all arguments addressing the substantive issues that the petitioner wishes the court to consider on certiorari review.

(2) RESPONDENT'S BRIEF. The respondent may file, within 14 days (2 weeks) — or, in the case of a pretrial appeal by the state in a criminal case, within 7 days (1 week) — a brief in response to the petitioner's brief. The respondent's brief, if any, shall be in a form prescribed by Rules 28 and 32(a), and copies shall be served and filed as prescribed by Rule 31 for the service and filing of briefs. A responsive brief shall address the substantive issues presented for review in the petition or, if issues are limited by the Court in its order granting the petition for writ of certiorari, to those issues stated by the Court. The brief may also address whether the petition complies with the procedural requirement of grounds set forth in subparagraphs (a)(1)(A)-(E)—or, in a death-penalty case, subparagraphs (a)(2)(A) and (B). If the respondent chooses not to file a brief, the respondent must file a waiver of the right to file such brief.

(3) PETITIONER'S REPLY BRIEF. The petitioner may file a brief in response to the respondent's brief within 14 days (2 weeks) of the filing of the respondent's brief. The petitioner's reply brief shall be in a form prescribed in Rules 28 and 32(a). The petitioner shall not be permitted to file a reply brief in response to the respondent's brief in a pretrial appeal by the state in a criminal case.

(h) *Oral argument.* There will be no oral argument on the preliminary examination of a petition for a writ of certiorari. In the event the writ is issued, either party may request oral argument. The request shall be made in briefs as provided in Rules 28(a)(1) and 34(a). The request shall contain a statement of the reasons the Supreme Court should hear oral argument.

(i) *Submission.* If either party requests oral argument, the clerk of the Supreme Court shall endorse that fact on the proper docket and if, after examining the criteria of Rule 34, the Supreme Court determines that oral argument is necessary, the clerk shall set the case down for oral argument and notify the parties or their attorneys of record in writing that oral argument has been set. If neither party requests oral argument as herein provided, or if the Supreme Court determines that oral argument is unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with the clerk as herein provided, immediately submit the case upon the record and brief.

(j) *Review in Supreme Court of decisions of courts of appeals on petitions for extraordinary writs.* A party aggrieved by a decision of a court of appeals on a petition for a writ of mandamus or prohibition or other extraordinary writ is entitled to review in the Supreme Court as provided in Rule 21(e).

(k) *Scope of review.* The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the

particular court of appeals, unless the petitioner has attempted to enlarge or modify the statement of facts as provided by Rule 39(d)(5). The scope of review includes the application of the law to the stated facts.

(l) *Rehearing.* No application for rehearing shall be received in the Supreme Court if the petition for the writ of certiorari is denied, quashed, or stricken.

[Amended 10-2-78, eff. 12-1-78; Amended 5-4-81, eff. 5-18-81; Amended 6-2-81, eff. 7-15-81; Amended 2-6-84, eff. 4-1-84; Amended 12-6-88 and 12-13-88, eff. 12-6-88; Amended 9-6-89, eff. 3-1-90; Amended 2-12-90, eff. 3-12-90; Amended 6-12-90, eff. 8-1-90; Amended 8-27-91, eff. 10-1-91; Amended 11-26-91; Amended 11-17-93, eff. 2-1-94; Amended 11-19-96, eff. 1-1-97; Amended eff. 5-19-2000, as to death-penalty cases and 8-1-2000, as to all other cases; Amended eff. 11-21-2001; Amended eff. 6-1-2002; Amended 1-12-2005, eff. 6-1-2005; Amended eff. 10-31-2005; Amended eff. 9-15-2008; Amended 5-7-2015, eff 8-1-2015; Amended eff 10-13-2015; Amended 7-24-2020, eff. 10-1-2020; Amended 4-4-2023, eff. 10-2-2023; Amended 10-20-2023, eff. 1-1-2024.]

[1] Ordered August 30, 2000, in the Supreme Court of Alabama:

> "The order of this court issued on May 19, 2000, amending Rule 39, Alabama Rules of Appellate Procedure, provided in rule 39(a)(2)(E) that the amended rule was effective May 19, 2000, as to death-penalty cases. IT IS ORDERED that that sentence shall be interpreted to mean that Rule 39, as amended, is applicable in death-penalty cases in which the petition for certiorari review was filed in this Court on or after May 19, 2000.
>
> "That order further provided that the amendment of Rule 39 was effective August 1, 2000, as to all other cases. IT IS ORDERED that that provision shall be interpreted to mean that Rule 39, as amended, is effective, in non-death-penalty cases, to cases in which the lower appellate court releases its decision on or after August 1, 2000."

Committee Comments on 1975 Adoption

Rule 39 follows former Supreme Court Rule 39, as amended, except for a few changes.

The first changes are in subdivision (c). In (c)(1), provision is made for the review of any decision which, for the first time, determines whether the ordinance, statute, etc., is valid or invalid.

Subdivision (c)(4) is the same as in former Rule 39(4) except that in a few instances a conflict will appear in a court of appeals opinion with one of its own prior opinions which was not cited or discussed. Ordinarily, this could be corrected on application for rehearing, but, if not, the ground would support a petition for certiorari.

Subdivision (c)(5) is new. The courts of appeals, by statute, Cod of Ala., §12-3-16, are governed by the decisions of the Supreme Court, and it is difficult to get a proper ground for certiorari when possibly the weight of authority is contrary to the Alabama position.

Subdivision (c)(5) would permit a court of appeals to follow the decision of the Supreme Court but still to invite this court to take another look at the question.

The provision in (c) relating to the death penalty was included because of the present state of the law as to that question resulting from the holding in *Furman v. Georgia*, 408 U.S. 238. The same reasoning applies to Rule 8(c)(1).

The mere fact that petitioner alleges one or more of the grounds listed in (c)(1)—(5) does not mean that, as a matter of right, the writ will be granted. The writ will still be denied if, in the court's opinion, (1) the validity has already been decided correctly, (2) the decision does not affect the officers, (3) the case is not one of first impression, (4) there is no material conflict with prior decisions, or (5) the controlling cases should not be overruled.

Permissible language for stating the grounds is suggested in *Stallworth v. State*, 285 Ala. 72, 229 So.2d 27.

Only one set of briefs is required of each party, and the respondent has the choice of filing his brief immediately after receipt of petitioner's brief, or waiting until notice that the writ has been granted. This eliminates refiling of briefs as was previously necessary when the writ was granted.

The scope of review is generally that which is now used and with which the Bar is familiar. This includes the presumption of correctness of the findings of the court of appeals, *Ex parte Newbern*, 286 Ala. 348, 239 So.2d 792, appeal dismissed 409 U.S. 813, 93 S.Ct. 60, 34 L.Ed.2d 69; the rule that this court does not review the application of the harmless error rule by a court of appeals unless authorized by statement of facts in the opinion, *Jones v. City of Birmingham*, 288 Ala. 242, 259 So.2d 288; and the rule that in many instances, this court can go to the record for a more complete understanding of those features treated in the

opinion of a court of appeals. See cases cited in both the opinion and concurring opinion, *Johnson v. State*, 287 Ala. 576, 253 So.2d 344, and this action of the court may be ex mero motu, *Wilbanks v. State*, 289 Ala. 171, 266 So.2d 632.

This rule permits a petitioner to ask a court of appeals for additional facts on rehearing, and if the request is not granted, he may include the additional facts in his petition for certiorari and, if correct, they will be considered by this court as part of the facts.

For years there has been a conflict in Alabama cases as to whether the application of the law to the facts stated in an opinion of a court of appeals could be considered by the Supreme Court on petition for certiorari. The cases of *Postal Telegraph Co. v. Minderhout*, 195 Ala. 420, 71 So. 91; *Ex parte Gray*, 204 Ala. 358, 86 So. 96; *Ex parte Commonwealth Life Ins. Co*., 204 Ala. 560, 86 So. 522, so hold. The majority of cases hold according to the rule stated and three recent cases so holding are *Prince v. Kennemer*, 292 Ala. 168, 291 So.2d 152; *Union Camp Corp. v. Blackman*, 289 Ala. 635, 270 So.2d 108; *Ex parte Duggar*, 288 Ala. 309, 260 So.2d 395. The last sentence in subdivision (k) settles the conflict.

See Form 22 for petition.

Court Comment to Amendments to Rule 39(a), (b), (f), (h), and (i), Effective April 1, 1984

Temporary Rule 17, A.R.Crim.P., became effective on April 1, 1984. That rule provided for certain pre-trial appeals by the state in criminal cases. Certain amendments in Rule 39(a), (b), (f), and (h) were necessary to make this rule correspond to the certiorari procedure set out in Temporary Rule 17, A.R.Crim.P., for those pre-trial appeals by the state. Rule 39(a) was amended to make it clear that in an appeal pursuant to Temporary Rule 17, A.R.Crim.P., the denial of an application for rehearing in the court of criminal appeals is not a jurisdictional prerequisite for the filing of a petition for writ of certiorari. Sections (b), (f), and (h) were all amended to reflect the shorter time periods applicable under Temporary Rule 17 for pre-trial appeals by the state.

Rule 39(i) was amended to conform to Rule 34, which had been amended in 1981 to provide that oral argument is not routinely granted upon request. Rule 39(i) was also modified to refer to “the supreme court” rather than to “this court.”

Court Comment to Amendment to 39(a) and Addition of 39(*l*), Effective December 6, 1988

In cases governed by Rule 21(e), application for rehearing is not a prerequisite to review in the supreme court; the aggrieved party has the choice of proceeding by way of application for rehearing and then petition for writ of certiorari under Rule 39 or applying for immediate review in the supreme court under Rule 21(e) without filing an application for rehearing.

Comment to Amendment to Rule 39(d)
Effective March 1, 1990

The March 1, 1990, amendment to Rule 39(d) substituted the term "letter-size paper" for the term "legal-size paper" in the first sentence of that section.

Court Comment to Amendment to Rule 39(c)
Effective March 12, 1990

This amendment was to Rule 39(c)(4), which was reworded to make it clear that a certiorari petition could assert as grounds for review of the court of appeals' decision an alleged conflict with a prior decision of the United States Supreme Court.

Court Comment to Amendments
Effective October 1, 1991

These amendments omitted masculine pronouns and references to the appendix system.

Committee Comments to Amendments to Rule 39(e) and (f)
Effective February 1, 1994

The references to "nine" copies of petitions and briefs was changed to "ten" to correspond to actual Supreme Court practice. The rule was also amended to refer to the writ as being "issued" rather than "granted."

Committee Comments to Amendment to Rule 39(h)
Effective February 1, 1994

The third sentence, requiring a statement of the reasons for requesting oral argument, was added to make practice under Rule 39 consistent with practice under Rule 34(a). This amendment also changed the phrases "In the event the writ is granted" and "notice of the granting of the writ" to "In the event the writ is issued" and "notice of the issuance of the writ."

Committee Comments to Amendment to Rule 39(k)
Effective February 1, 1994

Rule 39(k) was amended to refer to Rules 53 and 54, which became effective January 1, 1993, and to clearly state that in a case where the court of appeals has provided no statement of facts or where an applicant for rehearing is dissatisfied with the statement of facts given by the court of appeals in its opinion, the applicant for rehearing must present to the court of appeals, on application for rehearing, a proposed additional or corrected statement of the facts in order to be able later to put before the Supreme Court on certiorari review those additional or "corrected" facts. The motion by which the rehearing applicant places those additional or "corrected" facts before the court of appeals is commonly called a "Rule 39(k) motion," and the applicant's proposed statement of additional or "corrected" facts is commonly called a "Rule 39(k) statement of facts."

Under Rule 39(g) the Supreme Court preliminarily reviews each petition for writ of certiorari for "probability of merit." Upon that preliminary review, the Supreme Court has before it only the petition, the supporting brief, the opinion of the court of appeals, and perhaps a Rule 39(k) motion (if the petitioner has followed the Rule 39(k) procedure). The court of appeals transfers the record to the Supreme Court only after the Supreme Court has granted a petition for writ of certiorari and has issued the writ. Because the Supreme Court does not have the record when it makes its preliminary review, the only facts before it will be those stated in the opinion of the court of appeals (if the court of appeals has issued an opinion) and those proposed in the Rule 39(k) motion (if the petitioner has copied the proposed statement of facts into the certiorari petition).

Court Comment to Amendment to Rule 39(c)
Effective January 1, 1997

The amendment to Rule 39(c) removes gender specific pronouns.

Court Comment to Amendment to Rule 39
Effective May 19, 2000, as to death-penalty cases and
August 1, 2000, as to all other cases.

The amendment completely revises Rule 39.

The amendment changes the standard for certiorari review of criminal cases in which the death penalty is imposed. For provisions relating to death-penalty cases, see subsection (a)(2)(A)-(E). The amendment removes the provision in the former Rule 39(c) that provided that a petition for a writ of certiorari to the Supreme Court in a case in which the death penalty was imposed would be granted as a matter of right. With this amendment, review of death-penalty cases will be at the discretion of the Supreme Court. The Supreme Court retains the authority to notice any plain error or defect in the proceedings under review in those cases. In a death-penalty case, the petitioner must concisely state the grounds when review is sought based on a failure to recognize as

prejudicial any plain error or defect. That statement must include a description of the issue and circumstances warranting plain-error review. The Supreme Court retains the authority to enlarge the time for filing a petition for a writ of certiorari in a death-penalty case. Lastly, the Supreme Court may notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court or the Court of Criminal Appeals, but it is not required to do so.

In civil cases, an application for rehearing is not a prerequisite for certiorari review by the Supreme Court. Note, however, that if an application for rehearing is filed with the Court of Civil Appeals, it must comply with Rule 40 and the scope of review will be pursuant to Rule 39(k). In those cases in which an application for rehearing is filed with the court of appeals, the party should pay close attention to those sections of Rules 39 and 40 relating to the statement of facts.

Because the Supreme Court does not have the record before it when it preliminarily reviews the petition for the writ of certiorari, the brief in support of the petition, and the opinion or unpublished memorandum, if any, of the court of appeals, the facts before the court at that time will be the fact statement contained in the petition and in the opinion or unpublished memorandum if the opinion or the unpublished memorandum contains a statement of facts. A statement of facts is not to be included in the brief; it must appear in the petition itself.

This amendment changes the former practice under Rule 39(k) of attaching to the petition for writ of certiorari a copy of the Rule 39(k) motion to adopt a corrected or proposed statement of facts filed with court of appeals. Instead, if an application for rehearing has been filed in, and denied by, the court of appeals, the party shall put in the petition for the writ of certiorari the statement of facts presented to the court of appeals in the application for rehearing and shall verify that the statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

The amendment continues to require reference to the record in the statement of facts. Although the Supreme Court does not have the record before it on preliminary review, if certiorari review is granted, the record will be forwarded to the Supreme Court from the court of appeals and, upon the record's being transferred to the Supreme Court, the reference to the record in the statement of facts will be useful to that court.

The amendment clarifies the briefing schedule on preliminary review and in the event certiorari review is granted.

Court Comment to Amendment to Rule 39(d), (f), and (h)
Effective June 1, 2002

The revisions to Rule 39(d), (f), and (h), effective June 1, 2002, are necessitated by revisions to Rules 32. Rule 39(d), dealing with the form of the petition, is amended so as to cross-reference Rule 32(b)(2), imposing a limit of 15 pages on a petition (except in capital cases, where the limit is 20 pages). Rule 32(b)(2) also incorporates provisions governing form in Rule 32(a), thereby making applicable to petitions the standards prescribing paper size and font and type style. See Rules 32(a)(4) and (5). Subdivisions (f) and (h) of Rule 39, dealing with form of briefs, are also amended to cross-reference Rule 32(a). See Rule 32(a)(2), second sentence, for specific directions for colors of the covers of briefs in certiorari proceedings.

Committee Comments to Amendment to Rule 39
Effective June 1, 2005

Some members of the Bar have had a difficult time complying with Rule 39(d)(5). That subsection requires that if the petitioner presented new, additional, or corrected facts in the application for rehearing filed with the court of appeals, the petitioner must present the same facts to the Supreme Court in the petition for the writ of certiorari. Before this amendment to Rule 39, the Supreme Court allowed a brief on the merits to be filed with the petition as a timesaving device. However, too many petitioners put their facts in the brief rather than in their petition. The Committee believes that this was the result of allowing the petition and the brief to be filed at the same time. The Court, however, reviews only the petition to determine if it will issue the writ of certiorari calling for the record. Because there is no record before the Supreme Court and because the Court will look only to the petition to determine whether the writ shall issue, a high number of petitions have been denied because the Supreme Court had no facts to review. Facts may be considered by the Supreme Court only if presented to that Court in the form required by Rule 39.

The Committee believes that eliminating the requirement that a brief be filed with the petition may avoid such confusion. Consequently, this rule has been amended to eliminate the requirement that a brief accompany the petition. Rule 39(d)(5). Rule 39(d)(5)(A)-(C) has been amended to allow the statement of facts to be submitted as an attachment to the petition, rather than contained in the petition.

If the petition is granted and the Supreme Court issues a writ of certiorari, then the petitioner may file a brief on the merits. Thereafter, the respondent may address whether the petition for writ of certiorari complies with Rule 39(a)(1)(A)-(E) and may address the merits in a responsive brief.

Language has been added to Rule 39(a)(1)(D)(2) requiring the petitioner to refer to this subsection if the petitioner is proceeding under it.

If the statement of facts is attached to the petition, it does not count against the page limitation of Rule 39(d). Further, there is no longer a limitation on the number of pages in petitions in which the petitioner is seeking certiorari review of a direct appeal in a death-penalty case. See *Smith v. Jones*, 256 F.3d 1135 (11th Cir. 2001), and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

Subparagraph (d)(3)(B) has been amended to conform with the amendment of Rule 39(a)(1)(D)(2).

The amendment to subdivision (f) explains that the writ of certiorari is the official directive of the Supreme Court to the appeals court to deliver the record. The Supreme Court may also identify, in the order, the particular issue or issues it wishes the parties to brief.

Court Comment to Amendments to Rule 39(d)(5)
Effective September 15, 2008

At times, the petitioner may not agree with the facts as stated in the court of appeals' main opinion but agrees with facts stated in a dissent or a special writing. The amendments to Rule 39(d)(5), (d)(5)(A), and (d)(5)(C) provide that, in such a case, the petitioner shall indicate in the petitioner's statement of facts which part of the facts in the dissent or special writing the petitioner agrees with and indicate in which part of the dissent or special writing those facts can be found.

Committee Comments to Amendment to Rule 39(d)(4)
Effective August 1, 2015

Although Rule 39(d)(2) provides that the petition is to include the date any application for rehearing was filed and the date of any order on rehearing, the amendment to Rule 39(d)(4) requires that a copy of the court of appeals' order or notice on the application for rehearing be attached to the petition as an exhibit. A copy of the court of appeals' order or notice is needed because the Supreme Court does not have the record before it for its preliminary review of the petition for the writ of certiorari.

Committee Comment to Amendment to Rule 39(d)
Effective October 1, 2020

Rule 39(d) has been amended to provide a word limit for most petitions consistent with the amendment to Rule 32, but to retain a page limit for petitions filed pro se.

Note from the reporter of decisions: The order amending Rule 39, effective immediately as to death-penalty cases and as of August 1, 2000, as to all other cases, is published in that volume of *Alabama Reporter* that contains Alabama cases from 755 So.2d.

Note from the reporter of decisions: The order amending Rule 39(c)(1), effective November 21, 2001, is published in that volume of *Alabama Reporter* that contains Alabama cases from 798 So.2d.

Note from the reporter of decisions: The order amending Rule 5, Rule 21(d), Rule 27(d), Rule 28, Rule 32, Rule 39(d), Rule 39(f), Rule 39(h), and Rule 40(g), effective June 1, 2002, is published in that volume of *Alabama Reporter* that contains Alabama cases from 798 So.2d.

Note from the reporter of decisions: The order amending Rule 39(a)(1)(C), effective July 11, 2003, is published in that volume of *Alabama Reporter* that contains Alabama cases from 848 So.2d.

Note from the reporter of decisions: The order amending Rule 21(a), Rule 28, Rule 31(b), Rule 32(a) and (b), Rule 34(a), Rule 39, and Rule 40(g), effective June 1, 2005, and adopting Rule 25A, effective June 1, 2005, is published in that volume of *Alabama Reporter* that contains Alabama cases from 890 So. 2d.

Note from the reporter of decisions: The order amending Rule 10(b), Rule 10(c), Rule 28, Rule 32(a), and Rule 32(b), and adopting Rule 39(c)(3) and the Court Comment to Rule 10(b) and Rule 10(c), effective October 31, 2005, is published in that volume of *Alabama Reporter* that contains Alabama cases from 914 So.2d.

Note from the reporter of decisions: The order amending Rule 39(d)(5)(A) and (C) and the introductory paragraph in Rule 39(d)(5), and Rule 40(e) and Rule 40(g), Alabama Rules of Appellate Procedure, and adopting the Court Comment to Amendments to Rule 39(d)(5) Effective September 15, 2008, and the Court Comment to Amendment to Rule 40(e) Effective September 15, 2008, effective September 15, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from 994 So. 2d.

Note from the reporter of decisions: The order amending Rule 3(d)(1), Rule 11(c), Rule 39(d)(4), and Rule 57(j)(1), effective August 1, 2015, and adopting the Committee Comments to the amendments to Rule 3(d)(1), Rule 11(c), and Rule 39(d)(4) is published in that volume of *Alabama Reporter* that contains Alabama cases from 160 So. 3d.

Note from the reporter of decisions: The order amending Rule 32(b)(4), Rule 5(b), Rule 5(d), and Rule 39(e), Ala. R. App. P., effective October 13, 2015,

is published in that volume of *Alabama Reporter* that contains Alabama cases from 173 So. 3d.

Note from the reporter of decisions: The order amending Rule 5(e), Rule 21(d), Rule 27(d), Rule 28(a), Rule 28(j), Rule 28A(c), Rule 28B, Rule 32, Rule 39(d), Rule 40(f), and Rule 40(g), effective October 1, 2020, and adopting Committee Comments to those amendments is published in that volume of *Alabama Reporter* that contains Alabama cases from __ So. 3d.

Note from the reporter of decisions: The order amending Rule 39(d)(5), Rule 40(e), Rule 53, and Rule 54, Alabama Rules of Appellate Procedure, effective October 1, 2023, is published in that volume of *Alabama Reporter* that contains Alabama cases from __ So. 3d.

Note from the reporter of decisions: The order amending Rule 5(e), Rule 21(d), Rule 27(d), Rule 31(b), Rule 39(e), and Rule 57, Alabama Rules of Appellate Procedure, and adopting the Court Comment to the amendment of Rule 57, effective January 1, 2024, is published in that volume of *Alabama Reporter* that contains Alabama cases from __ So. 3d.