

2010

When is Finality . . . Final?

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Repository Citation

Bruhl, Aaron-Andrew P., "When is Finality . . . Final?" (2010). *Popular Media*. 386.

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WEDNESDAY, FEBRUARY 17, 2010

When is finality . . . final?

At this Friday's conference, the Supreme Court is scheduled to consider a petition for rehearing in [Melson v. Allen](#). (SCOTUSblog posted [an item](#) on the case a couple of months ago, when the Court requested a response to the petition for rehearing.) It is pretty rare that a petition for rehearing has any chance of going anywhere, but this one is worth watching because the Court at least thinks it is worth requesting a response. The case involves an interesting problem of appellate procedure.

The basic facts, as I understand them, are these: Melson is a habeas petitioner. The Eleventh Circuit denied his habeas petition as untimely. He then petitioned for certiorari, which the Supreme Court denied on October 5, 2009. Then, on October 13, the Supreme Court granted certiorari in [Holland v. Florida](#), another Eleventh Circuit habeas case that raises a similar issue of timeliness. Melson then filed a petition for rehearing of the denial of cert., and the Court requested a response from the state. It is highly unlikely that the Court would grant Melson's case for plenary consideration; Melson's more reasonable hope is that the Court will now hold his case for *Holland* and then, if *Holland* comes out in a way that might help him, vacate the denial of certiorari and issue a GVR (grant, vacate, and remand for further consideration) in light of *Holland*.^[fn*]

The reason I find this case interesting is because it implicates the question of when we decide that a case is over. This gets very complicated because of the habeas context that is involved here, but to speak in more general terms, we usually treat a case as over when the Supreme Court denies certiorari. If the law changes before that, you might get a GVR instead of a denial of cert., but if the law changes after that, you don't. (I'm simplifying a lot here; for example, one could try to reopen the case in the district court, etc., etc.) In some ways it seems arbitrary to allow litigants' fate to turn on the difference between Monday and Tuesday, but it is hard to avoid that problem in any system with a cutoff date. Further, granting relief here would create its own arbitrariness, because this isn't the sort of thing the Court can or would want to do in every case. The Court wouldn't want to encourage lots of petitions for rehearing. All of these factors favor denying rehearing.

Yet on the other side, there are considerations that support holding the case and later granting rehearing and GVR'ing if *Holland* comes out in the petitioner's favor. The fact that the denial of cert. in Melson's case came so soon before the grant in *Holland* tends to heighten the sense of inequitable treatment. This is a capital case, which raises the stakes further. Plus, one can easily imagine a scenario in which the Melson petition was not denied on Oct. 5. The Court often realizes that multiple pending petitions raise related issues and processes them in a coordinated way. Perhaps that didn't happen here because the conference at which *Holland* was considered wasn't until Oct. 9; since the cases were on different timetables, maybe nobody inside the Court saw the possible connection. (As should be obvious, this is all speculation.)

In any case, there are reasons to go either way. I would note that, in a relatively small number of instances in the past, the Court has vacated a denial of certiorari, granted rehearing, and GVR'd in light of a case decided after the denial of cert. (See [here at p. 48 n.162](#).) One would expect the Court to be most willing to do that if it thinks that an imperfection in its own case-handling procedures led to a case not being held when it should have been, though I'm not sure that can explain all of the prior cases. If the Supreme Court's upcoming orders list doesn't show a denial of rehearing in *Melson*, we might have another case to add to the list.

[* For those who aren't familiar with GVRs, the Court issues these couple-sentence orders all the time. The most common situation in which they are used is when a new Supreme Court ruling casts doubt on a lower court case that was decided before the new precedent came down. The GVR lets the lower court take another look at the case under the new law.]

