

2011

Did the Supreme Court Recently Exercise a Power that had Lain Dormant for Decades?

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Repository Citation

Bruhl, Aaron-Andrew P., "Did the Supreme Court Recently Exercise a Power that had Lain Dormant for Decades?" (2011). *Popular Media*. 377.

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TUESDAY, MAY 10, 2011

Did the Supreme Court recently exercise a power that had lain dormant for decades?

The Supreme Court rules permit a petitioner to seek rehearing of a denial of certiorari. The deadline for doing so is 25 days after the denial of certiorari, and the rules really seem to mean it, as they state that "[t]he Clerk will not file" an untimely petition (Rule 44.4). Nonetheless, the Court has long asserted the power to grant a petitioner leave to file a petition for rehearing out of time. The leading cases for this proposition, which are getting pretty old, are *Gondeck v. Pan Am. World Airways* (1965) and *US v. Ohio Power Co.* (1957). This practice was never common, and it had seemed like the Supreme Court had gotten out of the business of granting leave to file rehearing out of time. Based on some quick research, the most recent instance I could find in which the Court had accepted an untimely petition for rehearing of a denial of certiorari was about 40 years ago (in *Tidewater Oil Co. v. US*, 405 U.S. 986 (1972)).

Until last month, that is.

On April 5, the Supreme Court granted a petitioner leave to file an out-of-time petition for rehearing in *Foster v. Texas*. This is a capital case, and the Court simultaneously granted a stay of execution pending disposition of the petition for rehearing. The Court had previously denied cert. in January. The potential ground for rehearing is evidently that Foster's case could be affected by *Maples v. Thomas*, a case in which the Court granted cert. in late March. (See SCOTUSblog coverage here.) To be clear, the Court has not yet vacated the denial of certiorari; it merely granted leave to file the petition for rehearing out of time. The petition for rehearing is set for consideration at this Friday's conference. At the conference the Court could deny rehearing, such as if it thinks that the issues in the two cases are too far apart for there to be any effect on Foster's case. Or the Court could hold *Foster* on its docket until *Maples* is decided next Term and then at that time either deny rehearing or remand for further consideration in light of *Maples*.

There are some interesting issues here. (At least interesting enough to me that I'm writing a very short article about it.) On the one hand, at some point litigation must be final. It often happens that the Court denies cert. and then some time later the law changes in a way that could have led to a different outcome. Ordinarily we view that as unfortunate, but we don't do anything about it. On the other hand, the nature of the death penalty changes the usual calculations about finality. In addition to the theoretical questions, there is the factual question of when the Court last granted leave to file an out-of-time petition for rehearing of a denial of certiorari. As noted above, it currently looks to me like it was 1972, but these things can be tricky to find. If anyone knows of anything since then, I'd be most grateful to hear about it!

Posted by Aaron Bruhl on May 10, 2011 at 08:26 AM in [Civil Procedure](#), [Criminal Law](#) | [Permalink](#)

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