

2013

When is Finality Final? Second Chances at the Supreme Court

Aaron-Andrew P. Bruhl

William & Mary Law School, apbruhl@wm.edu

Repository Citation

Bruhl, Aaron-Andrew P., "When is Finality Final? Second Chances at the Supreme Court" (2013). *Popular Media*. 368.
https://scholarship.law.wm.edu/popular_media/368

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When is Finality Final?

SECOND CHANCES AT THE SUPREME COURT

by Aaron-Andrew P. Bruhl

It ain't over till it's over.

Truer words were never spoken, and yet the question remains: When, exactly, is it over? Perhaps the safest answer, when it comes to litigation, is “never.” Even a years-old judgment could, in unusual circumstances, be reopened.¹ Nonetheless, it is usually safe to say that a case has run its course – that the advocate has exhausted the possibilities for further review – once the United States Supreme Court has denied a petition for certiorari.

But it's not always over yet, even once the Supreme Court has denied a petition for certiorari. That is because the Supreme Court's rules allow a disappointed litigant to file a petition for rehearing of a denial of certiorari.² Many litigants file petitions for rehearing, and it is usually a futile gesture that merely burdens the Court.³ The purpose of this article is to bring to your attention a small but real category of cases in which a petition for rehearing has a fighting chance of being granted.

To understand when a petition for rehearing might bear fruit, one first has to understand the Supreme Court's GVR practice. A GVR is an order summarily *granting* certiorari, *vacating* the judgment below, and *remanding* to the lower court for reconsideration.⁴ The GVR order is

most frequently used when a judgment of a lower court has been called into question by a subsequent decision of the Supreme Court. Rather than giving such cases full merits consideration on the one hand or simply denying review on the other, the Court uses the GVR procedure to return such cases to the lower courts so that the lower courts can apply the Supreme Court's new precedent and make any necessary modifications. Thus, even if your case is not otherwise a good candidate for Supreme Court review – and, of course, most cases are not – it is often advisable to file a petition for certiorari if the Supreme Court issues a relevant decision during the period for filing a petition for certiorari, which typically runs for ninety days after the judgment below.⁵ –Continued on Page 3.



1. See, e.g., Fed. R. Civ. P. 60(b) (providing for reopening judgments in certain circumstances).

2. Sup. Ct. R. 44.2. A litigant can also seek rehearing of a decision on the merits, Sup. Ct. R. 44.1, but that is not our concern here.

3. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 814–15 (9th ed., BNA 2007) (providing statistics demonstrating that only a tiny proportion of petitions for rehearing are granted).

4. See generally Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711 (2009) (discussing the GVR practice); Arthur D. Hellman, “Granted, Vacated, and Remanded”—Shedding

Light on a Dark Corner of Supreme Court Practice, 67 JUDICATURE 389 (Mar. 1984) (same).

5. See Sup. Ct. R. 13. Another approach is to file a petition for rehearing in the court below or, if that period has passed, a motion to recall the mandate. The federal courts of appeals vary in their willingness to grant relief based on legal developments postdating their decisions; some are especially stingy.

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When that happens during your period for seeking certiorari, you may file a petition for certiorari asking the Court to hold your case on its docket and, if the new precedent turns out to be relevant once it comes down, issue a GVR at that time.

Now that we have discussed the Court's GVR practice, let us return to rehearing, which extends the life of the case a bit further still. Even after the denial of a petition for certiorari, one could still obtain a GVR via a petition for rehearing based on a new development that followed the denial of certiorari.⁶ The catch is that the rules provide a window of only twenty-five days following the denial of certiorari in which to seek rehearing.⁷ (In rare and extraordinary circumstances, the Court might entertain an untimely petition for rehearing, but you should not count on such an act of grace.⁸)

What types of new developments could warrant filing a petition for rehearing following the denial of certiorari? The most pertinent here are a new Supreme Court ruling that casts doubt on the judgment in your case and the grant of

6. See Sup. Ct. R. 44.2 (stating that a petition for rehearing should assert "intervening circumstances of a substantial or controlling effect or . . . other substantial grounds not previously presented").

7. *Id.*

8. Although the Supreme Court rules flatly state that the Clerk will not accept an untimely filing, Sup. Ct. R. 44.4, the Court's precedents show that the Court may in extraordinary circumstances entertain an untimely petition for rehearing if the petition is accompanied by a motion seeking leave to file out of time. See *Foster v. Texas*, 131 S. Ct. 1848 (2011); *Gondeck v. Pan Am. World Airways*, 382 U.S. 25 (1965); *United States v. Ohio Power Co.*, 353 U.S. 98 (1957); GRESSMAN ET AL., *supra* note 3, at 808-14.

certiorari in a case that could turn out to do so. The Court has granted rehearing and GVR'd in such circumstances on a number of occasions.⁹

To close, a note of caution: The petition for rehearing after denial of certiorari should not be a routine part of your practice. It should be used only in rare circumstances, and in fact the Supreme Court's rules require that an attorney seeking rehearing certify that the request is based on the grounds listed in the rule and is not being used for purposes of delay.¹⁰ But it does have its place. In any event, setting aside the matter of rehearing, appellate counsel should certainly be familiar with the Court's ordinary GVR practice, which offers a fairly reliable way to take advantage of helpful new developments that postdate the judgment of a court of appeals.

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Aaron-Andrew P. Bruhl is Associate Professor of Law at the University of Houston Law Center. Further discussion of the topics addressed in this article can be found in Aaron-Andrew P. Bruhl, *When Is Finality . . . Final?*, 12 J. APP. PRAC. & PROCESS 1 (2011); and Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – and an Alternative*, 107 MICH. L. REV. 711 (2009). Both articles are available for free download at www.ssrn.com.

9. See Aaron-Andrew P. Bruhl, *When Is Finality . . . Final?*, 12 J. APP. PRAC. & PROCESS 1, 21-24 (2011) (listing cases).

10. Sup. Ct. R. 44.2.