

A REPORTER'S GUIDE TO APPLICATIONS

Pending Before

The Supreme Court of
the United States



**A Reporter's Guide to
Applications Pending Before
The Supreme Court of the
United States**

*Prepared by the Public Information Office
Supreme Court of the United States.*

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A Reporter's Guide
To Supreme Court
Procedure For Applications

An application is a request for emergency action addressed to an individual Justice. Although most applications involve routine matters such as requests for extensions of the time limit for filing papers, some—such as late night applications for a stay of execution or a restraining order in a dramatic case—draw the attention of reporters. These newsworthy applications usually concern an effort to buy time, to maintain the status quo—to stay the implementation of a lower court order—pending final action by this Court (or under certain circumstances, a lower court).

Applications are addressed to a specific Justice, according to federal judicial circuit. The United States is divided into 13 federal circuits, with each Justice assigned to a specific circuit or circuits (see page 19).

Case law has established four general criteria that the applicant normally must satisfy in order for the Court to grant a stay. They are:

1. that there is a “reasonable probability” that four Justices will grant certiorari, or agree to review the merits of the case;
2. that there is a “fair prospect” that a majority of the Court will conclude upon review that the decision below on the merits was erroneous;
3. that irreparable harm will result from the denial of the stay;
4. finally, in a close case, the Circuit Justice may find it appropriate to balance the equities, by

exploring the relative harms to the applicant and respondent, as well as the interests of the public at large.

Applications are handled on "paper;" that is, there are normally no hearings or oral arguments. Applications and any related papers submitted to the Court are filed with the Clerk's Office and forwarded to the Justices. A Justice need not be physically present in the Court building in order to act on an application, although there are instances in which the Circuit Justice cannot be reached. In that case, the application is referred to the next junior Justice.

The Circuit Justice may act on an application alone or refer it to the full Court for consideration. The fact that an application has been referred to the full Court may not be known publicly until the Court acts on the application and the referral is noted in the Court's order. Applications for stays in capital cases are often, though not always, referred to the full Court. If an application is referred, the Justices do not meet officially or publicly, but confer, sometimes by phone, or through their law clerks.

Once the full Court has acted on an application, there is no further opportunity to request relief from this Court unless there are subsequent petitions based on different issues working their way through the judicial system.

If the full Court acts on an application, five Justices must agree in order for the Court to grant a stay, but the votes of only four Justices are required to grant certiorari. Quite often an application will request a stay from the Court pending the timely filing and disposition by this Court of the party's petition for writ of certiorari.

There are several possible scenarios for the disposition of an application:

- A Justice may simply deny without comment or explanation.
- If a Justice acts alone to deny an application, a petitioner may renew the application to any other Justice of his or her choice, and theoretically can continue until a majority of the Court has denied the application. In practice, renewed applications usually are referred to the full Court to avoid such a prolonged procedure.
- A Justice may call for a response from the opposition before reaching a final decision. Such responses are usually due by a date and time certain. The Justice may grant an interim stay pending receipt of a response.
- A Justice may grant. If an application is granted by an individual Justice, or if the full Court acts upon one, its disposition is indicated by a written order or sometimes, an opinion.

An order granting an application will indicate how long the order will remain in effect—usually until the Court acts on the petition for writ of certiorari. In fairly standard language, the order will often go on to state that if the petition is denied, the stay will automatically terminate, but if the Court grants full review, the stay will remain in effect until the Court hands down a decision on the merits and the mandate or judgment is issued.

- If a Circuit Justice, acting alone, grants an application, the other side may file a motion to

the full Court to vacate that Justice's stay. As a practical matter, these are rarely, if ever, granted.

Sometimes the application for a stay and the petition for writ of certiorari are filed simultaneously and acted on by the Court at the same time.

Sometimes an order will be accompanied by statements or opinions by Justices writing in support of, or dissent from, the action of the Court. If the opinion is written by a Circuit Justice acting alone, it is called an In-Chambers opinion.

Applications may be filed with the Clerk's Office after regular business hours, and may be acted on by the Court at any time. Copies of applications are made available to the Public Information Office by the Clerk's Office upon their receipt. The public information specialist is the primary press contact for information on applications. The Public Information Office makes filings available electronically when possible.

If an application is filed or acted on after regular business hours, the public information specialist will be notified at home by the Court, and may be contacted through the Court's switchboard (202-479-3000) or at pio@supremecourt.gov. The Public Information Office business-hours number is 202-479-3211 (press 1).

The Public Information Office maintains a list of press names, email addresses and phone numbers. We suggest that press who wish to be included on a "call-out" list for a specific application touch base with the Public Information Office.

"Call-out" is provided by the Public Information Office on a limited basis, usually upon request by a member of the press.

If you are following a particular application, you may alert the public information specialist and ask to be called when it has been decided. Similarly, if you are aware of an application likely to be filed with the Court, we will be happy to call you when the papers are filed.

Progress Of A
Capital Case

The following has been prepared by the U. S. Supreme Court Clerk's Office as a basic guideline for tracking a capital case through the judicial system.

1. Individual is found guilty of a capital offense.
2. In a separate proceeding defendant is sentenced to death either by a jury or a judge.
3. **Direct appeal** on the merits. Grounds may be any legal or constitutional error arising at the trial. The appeal is limited to the trial record.
 - a. A direct appeal of the conviction based on the case through the state courts (in some states an appeal is automatic and mandatory).
 - b. A direct appeal of the sentence to death. State supreme court, or court of last resort, may conduct a proportionality review to determine whether the sentence is proportionate to sentences imposed in similar cases.
 - c. A petition for certiorari, seeking direct review, filed in the U. S. Supreme Court (the Supreme Court will only hear cases where it believes a substantial federal issue is raised).
4. **Execution date** may be set. The warrant may be issued any time after the state supreme court, or court of last resort, affirms the death sentence.
5. **Applications for a stay of execution:** even if appeals are pending, an application for a stay or

modification of the execution date is required to stop an impending execution. After an application for a stay has been denied by either the highest state court or a federal court of appeals, the application may be filed with the U. S. Supreme Court.

6. **State petition for a writ of habeas corpus (post-conviction relief).** Review is not limited to the trial record. The petitioner may raise other issues such as newly discovered evidence, and state or federal constitutional claims, including ineffective assistance of counsel at the trial. (where the petition is filed varies from state to state):
 - a. File petition in the state trial court.
 - b. File the petition in the state court of appeals for the district where the trial occurred.
 - c. File the petition in the highest state court.
 - d. File a petition for Certiorari with the U. S. Supreme Court.

7. **Federal habeas corpus proceedings.** This is a civil remedy which permits a person in custody to challenge the constitutionality of his or her conviction or sentence. The court reviews whether the petitioner is in custody in violation of the Constitution or laws or treaties of the U. S.
 - a. **District Court:** (jurisdiction in both the district where the petitioner is confined and the district of the conviction):

1. May stay the state court proceeding (may be automatic when a petitioner seeks habeas relief for the first time in federal court).
2. May summarily dismiss petition.
3. May order an evidentiary hearing.
- b. **Court of Appeals:** State prisoners must obtain a certificate of appealability from the district court, a circuit judge, or circuit justice to appeal a decision to the court of appeals.
- c. **Supreme Court:** defendant may file a Petition for Writ of Certiorari.
8. May repeat steps 5, 6, and 7 with subsequent petitions. However, a U. S. court of appeals must authorize the district court to consider a second or successive federal habeas petition, and the grant or denial of such authorization is not reviewable on certiorari.
9. A death row inmate may file an original habeas corpus petition in the U. S. Supreme Court along with an application for stay of execution.

Questions Most Often Asked
By Reporters

Q: How much notice does the Court usually have that an execution is imminent and an application for a stay of execution may be filed?

A: The Clerk's Office distributes a list of scheduled executions on a weekly basis to the Justices' chambers. Many on the list have had cases at the Supreme Court before, and copies of those case filings are made available to chambers. Lower courts will notify the Supreme Court of their decisions and will transmit copies of their rulings as they are announced so that the Justices can be kept informed. Meanwhile, legal counsel will usually call the Clerk's Office in advance of the scheduled execution to "check in," to be advised of filing procedures, and to advise the Court whether he/she intends to appeal to the Court.

Q: Who are the best contacts for guidance on the facts of a particular case? Where can copies of papers filed with the Court be obtained?

A: The Public Information Office staff at the Court are the best contacts for information on what has been filed and when, as well as for updates on status. There is one press copy of all case filings, which may be copied in the pressroom during business hours. After hours, the Public Information Office staff often handle press calls from their homes, but usually arrangements can be made for a reporter to get copies of filings if the need arises. For more substantive guidance on the facts of a case, the best contacts are usually the lawyers handling the case.

Q: How is it determined which Justice will handle an application?

A: The country is divided into 13 federal judicial circuits and each Supreme Court Justice is assigned one or more of these circuits. The Justices decide among themselves who will be responsible for which circuits, and those assignments are announced in a written order of the Court. The assignments usually change only when the Court's membership changes (see page 19).

Q: What if that Justice is unavailable?

A: The application goes to the next Justice junior in seniority; the Chief Justice ranks first, followed by Justices Clarence Thomas, Stephen G. Breyer, Samuel A. Alito, Jr., Sonia Sotomayor, Elena Kagan, Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett.

Q: Who is at the Court when an application is pending after hours?

A: The applications attorney remains in the Clerk's Office after hours until the application has been acted on by the Court. Much of the attorney's time is spent processing any papers filed in the case and distributing them to chambers, and notifying parties and the Public Information Office of changes in the case's status. This requires constant contact with the Justices' chambers, other courts that may still be involved in deciding some aspect of the case, and the parties' lawyers. The applications attorney also oversees the publication of the final order or opinion disposing of the application, and its release to the parties and the Public Information Of-

ficie. The Justices' law clerks stay in chambers as well, to help keep the Justices abreast of developments in the case. The Justices need not be present in the building to be available to handle an application.

Q: What might TV be able to capture on camera when a "big" application is pending, or lawyers are about to file papers with the Court?

A: Not much. The fact is, most after-hour filings are either delivered by messenger or emailed to the Court. Since cameras are not permitted inside the building, unless a lawyer involved in a case has indicated he/she will be available to answer questions from the press outside, there's nothing to see. In any event, clearance for setting up a tripod on the Court's grounds must be obtained from the Court's Public Information Office. If no public information specialist is in the building, someone from the office may be reached at home through the Court's main number at 202-479-3000 or at pio@supremecourt.gov.

Q: How can a reporter find out when an application has been acted on by the Court, and what action the Court took, particularly after hours?

A: During business hours, call the Court's Public Information Office: 202-479-3211 (press 1). After hours, call the Court's main number at 202-479-3000. You may also reach the office by emailing pio@supremecourt.gov. The Court's operator will answer until 8 p.m., and a Court police officer will answer the phone after that. Either will connect you or take your name, email address and phone number to pass on to the public information specialist on call. If an opinion or court order is re-

leased, either the Clerk's Office or Public Information will email it to the wire services. Upon request, we will email to other interested reporters as well, if time allows.

Q: Will anyone at the Court speak on camera or agree to be recorded for radio regarding a Court decision?

A: We follow the example of the Court. Sorry, the answer is "No."

Q: Does the Court have to act within certain time constraints when considering an application?

A: There is no law or rule requiring the Court to act by a time certain, but as a practical matter, an application by definition implies a deadline of some sort.

Q: Will there always be something in writing released when a Justice or the Court acts on an application?

A: When a Justice denies an application, there is usually nothing in writing. When a Justice grants an application, or if the full Court acts on an application, there is usually at least an order setting out the terms of the action, and sometimes there will be separate statements or opinions.

Q: How many petitions for writ of certiorari are filed with the Court each term? How many are granted full review? How long does a party have to file a petition with the Court?

A: The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court

grants and hears oral argument in about 80 cases. A petition seeking review of the final judgment by the court of last resort below must be filed within 90 days of the entry of that judgment.

Q: How long does it take the Court to act, once a petition has been filed?

A: On the average, about six weeks. Once a petition has been filed, the other party has 30 days within which to file a response brief, or, in some cases waive his/her right to respond. Once the 10 day period for receiving a reply brief has passed, the case is circulated to the Justices and placed on a conference list, for consideration at one of the Justices' private Friday conferences. Copies of conference lists are available to news reporters for their convenience ONLY, and not for publication. Cases appearing on a conference list may reasonably be expected to appear on the following Monday's Order List (the announcement of dispositions in pending cases) although this is not always the case. If a case does not appear, it will be relisted for consideration at a future conference. If the petition is granted, the petitioner has 45 days within which to file a brief on the merits, and the respondent has 35 days within which to file the brief in response, for a total of about 80 days. The petitioner may then file a reply brief up to one week prior to the date oral argument has been scheduled.

Q: Are cases granted during a term always heard that same term?

A: No. Cases granted after mid-January are typically carried over until the next term begins the following October, unless the case is expedited by the Court.

Justices of the Supreme Court
of the United States and
Judicial Circuits

John G. Roberts, Jr., nominated by President Bush, took his seat as Chief Justice of the U. S. September 29, 2005.

Clarence Thomas, nominated by President Bush, took his seat as an Associate Justice October 23, 1991.

Stephen G. Breyer, nominated by President Clinton, took his seat as an Associate Justice August 3, 1994.

Samuel A. Alito, Jr., nominated by President Bush, took his seat as an Associate Justice January 31, 2006.

Sonia Sotomayor, nominated by President Obama, took her seat as an Associate Justice August 8, 2009.

Elena Kagan, nominated by President Obama, took her seat as an Associate Justice August 7, 2010.

Neil M. Gorsuch, nominated by President Trump, took his seat as an Associate Justice April 10, 2017.

Brett M. Kavanaugh, nominated by President Trump, took his seat as an Associate Justice October 6, 2018.

Amy Coney Barrett, nominated by President Trump, took her seat as an Associate Justice October 27, 2020."

Circuit	Justice	States Included	Clerk's Office
Federal	Roberts	Nationwide	Washington
D. C.	Roberts	District of Columbia	Washington
First	Breyer	Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico	Boston
Second	Sotomayor	New York, Vermont, Connecticut	New York
Third	Alito	New Jersey, Pennsylvania, Delaware, Virgin Islands	Philadelphia
Fourth	Roberts	Maryland, West Virginia, Virginia, North Carolina, South Carolina	Richmond
Fifth	Alito	Mississippi, Louisiana, Texas, Canal Zone	New Orleans
Sixth	Kavanaugh	Ohio, Michigan, Kentucky, Tennessee	Cincinnati
Seventh	Barrett	Indiana, Illinois, Wisconsin	Chicago
Eighth	Kavanaugh	Minnesota, Iowa, Missouri, Arkansas, Nebraska, North Dakota, South Dakota	St. Louis
Ninth	Kagan	California, Oregon, Nevada, Montana, Washington, Idaho, Arizona, Hawaii, Alaska, Guam	San Francisco
Tenth	Gorsuch	Colorado, Wyoming, Utah, Kansas, Oklahoma, New Mexico	Denver
Eleventh	Thomas	Alabama, Florida, Georgia	Atlanta

