

NRAP 41(b)(3)(A) Research and Alternate Proposal

At the January 31, 2022 meeting, the Commission solicited proposed revisions to NRAP 41(b)(3)(A). Some members of the Commission expressed concern that adopting FRAP 41(d)(1)'s "substantial question" standard may be too burdensome in death penalty cases. This memo analyzes the meaning of the "substantial question" standard and its applicability to death penalty cases in federal court and certain states.

The Advisory Committee Notes to FRAP 41 indicate that the "substantial question" standard refers to the test established by in-chambers opinions of individual United States Supreme Court justices. *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379, 1380 (Fed. Cir. 2020) (applying *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) and *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301 (2014)). Federal courts have interpreted those individual opinions as requiring: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Id.*; see also *United States v. Silver*, 954 F.3d 455, 458 (2d Cir. 2020) (same in criminal case); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *Bricklayers Loc. 21 of Illinois Apprenticeship & Training Program v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers); *United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001).

On the first prong, the movant usually must show one of the grounds for certiorari under United States Supreme Court Rule 10. See *Silver*, 954 F.3d at 458. On the second prong, the Court must predict whether there will be five Supreme Court votes to overturn. *Id.* at 459; *Nanda v. Bd. of Trustees of Univ. of Illinois*, 312 F.3d 852, 854 (7th Cir. 2002) (Ripple, J., in chambers) ("The

present situation, by contrast, requires that I perform the predictive function of attempting to determine the future course of the Supreme Court’s jurisprudence.”). In close cases, the movant must also show that the balance of equities for the parties and the public weighs in favor of staying the mandate or remittitur. *Am. Axle & Mfg., Inc.*, 977 F.3d at 1380; *Nara*, 494 F.3d at 1133. Granting a stay of remittitur still lies within the Court’s discretion even if the movant establishes the requisite showing. *Silver*, 954 F.3d at 458.

FRAP 41(d)(1)’s “standard for presenting a ‘substantial question’ is high.” *Silver*, 954 F.3d at 458. Nonetheless, federal courts apply the standard to death penalty cases, sometimes staying the mandate and sometimes not. *See, e.g., Williams v. Chrans*, 50 F.3d 1358, 1359 (7th Cir. 1995) (denying stay in capital case applying prior version of FRAP 41(b)); *Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994) (en banc court denying capital defendant “Campbell’s motion for a stay of the mandate pending application to the Supreme Court for a writ of certiorari” and noting “the delay in this particular case has prejudiced the State of Washington.”); *see also Beaver v. Netherland*, 101 F.3d 977 (4th Cir. 1996) (extending stay of mandate but denying stay of execution in capital case over partial dissent by Judge Luttig who wrote, “I would also deny the motion for an extension of the stay of our mandate...It seems clear to me that, when all is said and done, Beaver’s counsel is engaged in the rather transparent and oft-repeated effort to delay Beaver’s execution as long as possible through seriatim motions—without regard to the processes of either this court or the Supreme Court.”); *Adamson v. Lewis*, 955 F.2d 614, 621 (9th Cir. 1992) (denying the state’s request to stay issuance of the mandate in a death penalty case); *Baldwin v. Maggio*, 715 F.2d 152, 152 (5th Cir. 1983) (denying capital habeas petitioner’s request to stay the mandate pending petition for writ of certiorari to the Supreme Court).

Some capital punishment states also apply a similar “substantial question” standard to requests to stay the mandate or remittitur. *See, e.g.*, Ark. R. Sup. Ct. & Ct. App. 5-3(c)(1)(A) (“substantial question”); Miss. R. App. P. 41(d) (“substantial federal question” in criminal cases only); Tex. R. App. P. 18.2 (“may grant a stay if it finds that the grounds are substantial”). If a state court denies a stay of the mandate or remittitur, the party may seek relief from the United States Supreme Court. *See White v. Florida.*, 458 U.S. 1301 (1982) (Powell, J., denying capital defendant’s request to stay mandate after state supreme court’s stay of mandate expired).

Accordingly, the FRAP 41(d)(1) “substantial question” standard is widely applied by federal and state courts in civil and criminal contexts, including death penalty cases. The Commission should adopt FRAP 41(d)(1)’s “substantial question” standard without exempting certain classes of cases. This standard sets an appropriate threshold to deter delay efforts by all manner of litigants while affording the Court discretion to stay the remittitur in cases with legitimate prospects of a cert grant and reversal.

Alternatively, FRAP 41(d)(1) could be modified to delete the reference to “substantial case” and solely use a “good cause” standard. This revision will lessen (but not entirely remove) the burden for all litigants seeking to stay remittitur pending a cert petition to the United States Supreme Court.

A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show ~~that the petition would present a substantial question and that there is good cause for a stay.~~

See Cal. R. Ct. 8.540(a)(2), (c)(2) (“The Supreme Court must issue a remittitur after a decision in: [a]n appeal from a judgment of death ... On a party’s or its own motion and for good cause, the court may stay a remittitur’s issuance for a reasonable period or order its recall.”); *see also People v. Riccardi*, No. B246949, 2014 WL 2982337, at *6 (Cal. Ct. App. July 3, 2014).