NRAP 41 Subcommittee:
Report for March 2, 2022 NRAP Commission Meeting

At the January 31 meeting, Justice Silver proposed amending NRAP 41(d)(3)(A) (stay of remittitur / application for certiorari to the United States Supreme Court) as follows:

> A party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari. 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.

This language is adopted from FRAP 41(d)(1). JoNell Thomas expressed concern with this "substantial question" and "good cause" language and suggested adding "except in death penalty cases" to the amendment. Justice Pickering suggested that research should be conducted to determine how other state courts address this, and Justice Silver recommended that the research focus on death penalty states.

Phaedra Kalicki and Kim Edwards researched court rules in states that have the death penalty—specifically, Alabama, Arizona, Arkansas, Florida, Georgia, Mississippi Texas, Utah—as detailed below. Because the proposed language is taken from FRAP 41(d)(1), the section from Wright and Miller that addresses the federal rule may also be helpful and is attached to this document. The relevant text is very short—the two highlighted sentences on the first page—but more detailed information can be found in the three footnotes appended to that text, footnotes 4-6.

Alabama:

Alabama's rules do not appear to have a provision relevant to a stay of the remittitur/mandate pending a cert petition to SCOTUS. Alabama Rule of Appellate Procedure 41 addresses the mandate and stays of it but does not mention stays pending a SCOTUS cert petition (it only addresses such petitions to the Alabama Supreme Court).

Arizona:

Arizona has different rules on this topic for civil and criminal appeals, Ariz. R. Crim. P. 31.22 and Ariz. R. Civil App. P. 24, and within the criminal rule there are different provisions for death penalty direct appeals.

Ariz. R. Crim. P. 31.22(c) actually alters the date that the mandate will issue in death penalty direct appeals to account for the time to file a SCOTUS cert petition, so in those cases a motion to stay the mandate is not required:

> (c) Capital Case Appeals.
>
> (1) Generally. In an appeal in which the Supreme Court has affirmed a death sentence, the Supreme Court clerk will issue the mandate:

> (A) when the time expires for filing a petition for writ of certiorari in the United States Supreme Court challenging the decision affirming the defendant's conviction or sentence on direct appeal; or
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> (B) if the defendant has filed a petition for writ of certiorari, when the Supreme Court clerk receives notice from the United States Supreme Court of a denial of the petition or, in a case in which the United States Supreme Court grants the petition, receives notice that the United States Supreme Court has issued its mandate.

Neither rule uses the FRAP 41(d)(1) language about a motion for stay of remittitur having to show that the cert petition would present a substantial question and that there is good cause for the delay.

Arkansas:

Ark. S. Ct. R. 5-3(c)(1) states:

> Parties desiring to prosecute proceedings to the Supreme Court of the United States by filing a petition for a writ of certiorari may obtain an order either staying the issuance of a mandate or recalling a mandate upon motion to the Court and a showing that: (A) the petition for a writ of certiorari presents a substantial question; (B) there is good cause for a stay or a recall; and (C) an order has been placed with the Clerk for a copy of the record, with payment of an advance deposit of $50.00.

Arkansas also has separate rules of appellate procedure-civil and rules of appellate procedure-criminal, but those rules do not include any provisions governing the mandate or stay of its issuance.

Florida:

Fla. R. App. P. 9.340 addresses the mandate but does not mention motions to stay the mandate pending a SCOTUS cert petition. Fla. R. App. P. 9.310 appears to govern stays in Florida but does not set forth a standard.

Georgia:

Ga. S. Ct. R. 61 states:

> Any party desiring to have the remittitur stayed in this Court in order to appeal to, or seek a writ of certiorari in, the United States Supreme Court shall file in this Court a motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for reconsideration or, if no motion for reconsideration is filed, within the time allowed for the filing of the same.

Mississippi:

Miss. R. App. P. 41 requires a showing of a substantial question and good cause only in criminal cases (the exact opposite of what the defense attorney members of our commission requested). The relevant provisions are Rule 41(c) (stating the general rule) and Rule 41(d) (stating additional requirements for stay of mandate in criminal cases):

> (c) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the United States Supreme Court for a writ of *certiorari* may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 90 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of Supreme Court a notice from the clerk of the United States Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by that Court. Upon the filing of a copy of an order of the United States Supreme Court denying the petition for writ of *certiorari*, the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.
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> (d) Stay of Mandate and Release in Criminal Cases. Stay of the mandate in criminal cases shall be governed by Rule 41(c), but, in addition, the petitioner must set forth good cause for the stay and clearly demonstrate that a substantial federal question previously presented on appeal is to be presented to the United States Supreme Court. In order to obtain release, the petitioner must also post a fully executed and approved appearance bond in a penal sum equal to double the amount of the bond upon which the petitioner was released from custody after conviction.

Texas:

Tex. R. App. P 18.2 states:

> A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

Utah:

Utah R. App. P. 36(c) states:

> A stay or supersedeas of the remittitur or an injunction pending application for review to the United States Supreme Court may be granted on motion and for good cause. Any motion for a stay of the remittitur or for approval of a supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the appeal must be filed in the Utah Supreme Court. Reasonable notice of the motion must be given to all parties. The period of the stay, supersedeas, or injunction will be for such time as the court orders, up to and including the final disposition of the application for review. A bond or other security on such terms as the court deems appropriate may be required as a condition to the grant or continuance of relief under this paragraph. If the stay, supersedeas, or injunction is granted until the final disposition of the application for review, the party seeking the review must, within the time permitted for seeking the review, file with the clerk of the court that entered the decision sought to be reviewed, the notice of appeal, petition for writ of certiorari, or other application for review, or must file a certificate that such application for review has been filed. Upon filing an order of the United States Supreme Court dismissing the appeal or denying the petition for a writ of certiorari, the remittitur will issue immediately.

16AA Fed. Prac. & Proc. Juris. § 3987.1 (5th ed.)

Federal Practice and Procedure (Wright & Miller) | April 2021 Update

Jurisdiction and Related Matters

Chapter 9A. Federal Rules of Appellate Procedure
Catherine T. Struve

Title VII. General Provisions

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

§ 3987.1 Stay of Mandate Pending Certiorari

Primary Authority

- Fed. R. App. P. 41

Forms

- 1C West's Federal Forms, Court of Appeals §§ 7:138 to 7:146

As provided in Federal Rule of Appellate Procedure 41(d), the court of appeals may stay the mandate pending certiorari proceedings in the Supreme Court.[1] A party filing a motion requesting a stay for this purpose must serve the motion on all other parties.[2] The rule obviously contemplates that the other parties may oppose the motion, as indeed they do on occasion.[3] In fact, the grant of a motion to stay the mandate in these circumstances is far from a foregone conclusion.[4]

Rule 41(d)(1) requires the motion to "show that the petition would present a substantial question"[5] and also to show "that there is good cause for a stay."[6] The stay may be conditioned on the filing of a bond or other security.[7] The stay is presumptively limited to 90 days.[8] But the Rule provides three ways that the period can be extended beyond 90 days: (1) if the court extends it for good cause; or (2) if the party who obtained the stay notifies the circuit clerk (in writing and within the stay period) of (A) an extension of the time for filing a petition, in which case the stay lasts as long as the extension[9] or (B) the filing of the certiorari petition, in which event the stay lasts "until the Supreme Court's final disposition."[10] If the petition for certiorari is granted, the stay continues until the case is finally resolved on its merits by the Supreme Court. But if the Supreme Court denies certiorari, Rule 41(d)(4) directs that the court of appeals "must issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition, unless extraordinary circumstances exist."[11] By stating the court of appeals' authority to order a further stay based on extraordinary circumstances, Rule 41(d)(4) resolves a question that had been left open in earlier Supreme Court decisions.

One of those decisions, Bell v. Thompson, [12] involved a case in which the court of appeals disregarded the Rule's directive to issue the mandate "immediately" after the Supreme Court denied the petition; none of the parties appeared to notice; the court of appeals decided to revisit the merits of the case (sua sponte, and without telling any of the parties); and, months later, the court of appeals vacated its first opinion and issued a second opinion reaching a different result. The Court's analysis centered on the then-applicable provision, which at the time was numbered Rule 41(d)(2)(D). The district court dismissed the habeas petition of a state prisoner (Thompson) who had been convicted of murder and sentenced to death. The Sixth Circuit affirmed the dismissal of Thompson's habeas petition but stayed the issuance of its mandate pending the disposition of Thompson's certiorari petition. The Supreme Court denied certiorari on December 1, 2003. Thompson then asked the Sixth Circuit to extend the stay of the mandate—this time until the Supreme Court disposed of his petition for rehearing. The Sixth Circuit agreed, ordering that "the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court disposes of the case." [13] The Supreme Court denied the rehearing petition on January 20, 2004, and a copy of that order of denial was filed in the court of appeals on January 23, 2004.

Inexplicably, though, the Sixth Circuit did not issue the mandate at that point, even though the stay was no longer in effect — or, if a stay was in effect, the Sixth Circuit had not told anyone about it. Almost as inexplicably, neither the state nor Thompson noticed that the mandate had not issued. Instead, over the next few months, the parties engaged in further litigation in both state and federal court, with parties, attorneys, and judges all assuming that the federal habeas litigation had ended when the Supreme Court denied rehearing.

The view from within the Sixth Circuit panel that had decided Thompson's appeal, however, was different. In September 2003, after one of the judges on the panel realized that the panel may have overlooked key documents concerning one of Thompson's psychological experts, the court of appeals called for the entire certified district court record. [14] That record contained the expert's report and deposition, which, by supporting the view that Thompson was schizophrenic when he committed the murder, supplied a key piece of evidence that a concurring member of the panel had found missing in the initial appellate review of the case. [15] The panel determined that this evidence would likely have impacted the district court's determination (on habeas review) concerning the adequacy of Thompson's state trial counsel's investigation of Thompson's background. Because the expert report and deposition were not part of the record on appeal from the summary judgment dismissing the petition, the court of appeals relied on its equitable authority to supplement the record with the expert's deposition. [16] On June 23, 2004—five months after the Supreme Court had denied rehearing—the Sixth Circuit issued an amended opinion, this time vacating the district court's judgment and remanding the case for an evidentiary hearing. [17]

The state sought review, and the Supreme Court granted certiorari. The state argued that the Sixth Circuit was required by Rule 41(d)(2)(D) to issue its mandate "immediately" after it received a copy of the order denying certiorari and thus that the Sixth Circuit had no authority to issue even the second stay, much less the "silent" third stay. Thus, in the view of the state, what the Sixth Circuit had actually done was recall its mandate—an action that was forbidden except in the narrow circumstances described in Calderon v. Thompson. [18] Thompson disagreed:

> Thompson counters by arguing that Rule 41(d)(2)(D) is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. The provision, Thompson says, does not affect the court of appeals' broad discretion to enter a stay for other reasons. He relies on Rule 41(b), which provides the court of appeals may "shorten or extend the time" in which to issue the mandate. Because the authority vested by Rule 41(b) is not limited to the period before a petition for certiorari is denied, he argues that the Court of Appeals had the authority to stay its mandate following this Court's denial of certiorari and rehearing. Although the Court of Appeals failed to issue an order staying the mandate after we denied rehearing, Thompson asserts that the court exercised its Rule 41(b) powers by simply failing to issue it. [19]

A five-to-four majority reversed. To the majority, the court of appeals engaged in procedural irregularity to the detriment of the state's interests. The majority ducked the larger question of the Sixth Circuit's authority under Rule 41, [20] holding that, even if the Sixth Circuit had the authority to issue a third stay of the mandate following the denials of the petitions for certiorari and rehearing, and even if the Sixth Circuit had the authority to do so without entering an order or notifying the parties, the Sixth

Circuit abused its discretion under the circumstances of the case.[21] The majority took the view that under the circumstances, the state had reasonably relied on the notion that the federal habeas litigation was at an end. This was especially true, the Court reasoned, in the light of the length of time between the Supreme Court's denial of rehearing and the Sixth Circuit's issuance of the amended opinion, Thompson's failure to request an extension of the stay, the Sixth Circuit's failure to issue an order extending the stay of the mandate after the Supreme Court denied rehearing, and the Sixth Circuit's failure to give notice to the parties that it was reconsidering the merits of the case. Concerns specific to federal habeas review of state-court convictions weighed heavily in the Court's decision:

> In *Calderon*, we held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate. This case also arises from federal habeas corpus review of a state conviction. While the State's reliance interest is not as strong in a case where, unlike *Calderon*, the mandate has not issued, the finality and comity concerns that animated *Calderon* are implicated here.[22]

To the dissenting Justices, in contrast, the case manifested the occasional tension between compliance with rules and justice in the individual case (here, a death penalty case). The dissenters noted that the state's lawyers should have checked whether the court of appeals' mandate had issued, and should have known that until the mandate issued, the case was not over. In the dissenters' view, the court of appeals had not abused its discretion: "When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result."[23]

In Ryan v. Schad,[24] the Supreme Court applied the same principle as in Bell v. Thompson. Schad, like Bell, involved a capital habeas petition. After the court of appeals ordered further proceedings on Schad's claim of ineffective assistance in the sentencing phase, the Supreme Court granted certiorari, vacated, and remanded in light of Cullen v. Pinholster.[25] Subsequently, the court of appeals affirmed the district court's denial of Schad's habeas petition, and denied Schad's requests for rehearing. Schad had timely moved to stay the mandate; the court of appeals granted the stay "pending the filing of the petition for writ of certiorari" and provided that the stay "shall continue until final disposition by the Supreme Court." Then, in March 2012, the Supreme Court decided Martinez v. Ryan.[26] In July 2012, Schad sought vacatur of the court of appeals' judgment and remand in light of Martinez, but the court of appeals denied this request. Schad then timely petitioned for certiorari; the Supreme Court denied certiorari, and—in January 2013—denied rehearing. At that point, Schad sought from the court of appeals a further stay of its mandate in light of a separate en banc proceeding that concerned the interaction between Pinholster and Martinez. In February 2013, the court of appeals denied the request for a stay of the mandate, but construed that request as a motion to reconsider the court of appeals' July 2012 denial of Schad's request for vacatur, and remanded for the district court to consider Schad's Martinez argument. Arizona then set a date to execute Schad; the court of appeals stayed the execution; and the Supreme Court granted certiorari.

The Court ruled that the court of appeals abused its discretion when, in February 2013, it decided not to issue its mandate and instead granted reconsideration of its July 2012 ruling. In Schad, as in Bell, the Court saw no need to decide whether a court of appeals has some discretion to withhold its mandate after a denial of certiorari, because such authority would exist, if at all, only under "extraordinary circumstances."[27] The Court stressed that Schad delayed in seeking vacatur based on the Martinez decision, and that the court of appeals' February 2013 Martinez-based remand came long after both Martinez itself and the court of appeals' original refusal to vacate its decision in Schad based on Martinez. In sum, the Court found "no indication that there were any extraordinary circumstances here that called for the court to revisit an argument sua sponte that it already explicitly rejected."[28] The Court in Schad also rejected the court of appeals' attempt to rely on "inherent authority to withhold a mandate." That rationale, the Court observed, was based on a pre-Bell Ninth Circuit decision that, in turn, had relied upon the Sixth Circuit opinion that the Court later reversed in Bell.[29]

As noted above, another question left open in Bell v. Thompson was "whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction."[30] Original Rule 41 had provided that "[t]he mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order." The words "by order" were deleted as part of the 1998 restyling, which moved the relevant part of the rule from subdivision (a) into subdivision (b).

Though it seems likely that this change was—as the Committee Note put it—"intended to be stylistic only," it created ambiguity. In 2018 Rule 41(b) was revised to restore the words "by order," making clear that staying the mandate requires a court order.

Footnotes

1 **Court of appeals**
See generally Phillips, Comment, "It Ain't Over 'Til It's Over," But Will It Ever Be?: The Elusive Procedural Finality of Bell v. Thompson and an Appellate Court's Mandate, 60 Ark. L. Rev. 319 (2007).
A district court cannot stay the mandate of a court of appeals. Brinkman v. Department of Corrections of State of Kan., 857 F. Supp. 775 (D. Kan. 1994).
If a stay of mandate is not obtained, the issuance of the mandate may make the judgment of the district court final for some purposes, even though a petition for certiorari is timely filed and eventually denied.
For example, in U.S. v. Scalf, 760 F.2d 1057 (10th Cir. 1985), the court of appeals reasoned that under the Speedy Trial Act, the time for retrying a criminal defendant following reversal on appeal runs from "the date the action occasioning the retrial becomes final." The action occasioning retrial is issuance of the court of appeals mandate. If issuance of the mandate is not stayed, the act does not authorize continuance of the trial pending a decision by the government whether to seek certiorari. A continuance based on that ground in this case went beyond the permitted time for retrial, so the indictment must be dismissed.
760 F.2d at 1058–1059. See also U.S. v. Arrellano-Garcia, 471 F.3d 897, 900 (8th Cir. 2006) (court of appeals' unexplained two-and-a-half-month delay in issuing mandate after deciding appeal from ruling in limine was excludable for Speedy Trial Act purposes); U.S. v. Pete, 525 F.3d 844, 854 (9th Cir. 2008) (addressing excludability of various time periods under Speedy Trial Act in case involving unsuccessful interlocutory appeal, followed by refusal to recall mandate, followed by denial of certiorari petition).
On the other hand, the issuance of the court of appeals' mandate is not the relevant milepost for *all* collateral purposes. For example, "[a] motion by a federal prisoner for postconviction relief under 28 U.S.C. § 2255 is subject to a one-year time limitation that generally runs from 'the date on which the judgment of conviction becomes final.' § 2255, ¶ 6(1). * * * For the purpose of starting the clock on § 2255's one-year limitation period * * * a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." Clay v. U.S., 537 U.S. 522, 524–525, 123 S. Ct. 1072, 1074, 155 L. Ed. 2d 88 (2003).

2 **Serve the motion**
Fed. R. App. P. 41(d)(1). Prior to 2018, this provision was numbered Rule 41(d)(2)(A).

3 **Other parties may oppose**
Plaintiffs were awarded attorney fees for time spent in responding to the defendant's motion to stay the mandate of the court of appeals pending the petition for certiorari, even though the plaintiffs did not prevail. Chrapliwy v. Uniroyal, Inc., 583 F. Supp. 40, 50–51 (N.D. Ind. 1983), **quoting Wright, Miller, Cooper & Gressman.**

4 **Not foregone conclusion**
Habeas petitioner—who had been convicted in state court of child pornography and sexual assault—sought federal habeas relief concerning the sexual assault convictions. After district court denied relief, court of appeals reversed and remanded with directions to issue habeas writ with respect to the sexual assault convictions unless state chose to retry petitioner on those charges. Sussman v. Jenkins, 636 F.3d 329, 361 (7th Cir. 2011). Judge Ripple later denied a request for a stay of the mandate pending the State's petition for certiorari. Among other things, he noted that the State had failed to seek panel or en banc rehearing, and he reasoned that it was unlikely that the petitioner would soon be released in light of the child pornography convictions and the possibility of detention pending retrial on the sexual assault charges. Sussman v. Jenkins, 642 F.3d 532, 536–537 (7th Cir. 2011) (Ripple, J., in chambers).

Party seeking stay of mandate pending certiorari must show that the petition presents a substantial question. Grant of the motion is not a foregone conclusion. Party seeking stay must show both reasonable probability of success on merits and irreparable injury if no stay is granted. "In order to demonstrate a reasonable probability of succeeding on the merits of the proposed certiorari petition, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a 'fair prospect' that five Justices will vote to reverse the judgment of this court." Here, the movant failed to do so; the court of appeals' opinion relied on a prior court of appeals decision in a case in which certiorari was denied. Al-Marbu v. Mukasey, 525 F.3d 497, 498–499 (7th Cir. 2008) (Ripple, J., in chambers), **citing Wright, Miller & Cooper**.

Court of appeals, having remanded to district court for consideration of case-specific prudential doctrines such as political question doctrine, denied motion to stay mandate pending petition for certiorari. The panel majority (on the stay application) explained: "[W]e consider the Corporations' application for Supreme Court review to be premature. And in the absence of an adverse ruling on the issue of case-specific deference or other prudential doctrines, the Corporations' claim that they have demonstrated a likelihood of irreparable injury without a stay is unpersuasive." Khulumani v. Barclay Nat. Bank Ltd., 509 F.3d 148, 153 (2d Cir. 2007). With the Chief Justice and three other Justices taking no part, the Supreme Court affirmed the underlying decision by the court of appeals: "Because the Court lacks a quorum, 28 U.S.C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court." American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028, 128 S. Ct. 2424, 171 L. Ed. 2d 225 (2008).

Appellants failed to show either a reasonable probability of a grant of certiorari or a reasonable possibility of a reversal. "Most of the arguments presented in the dissent to the panel's opinion were not preserved in the district court, and none of the arguments in the dissent to the order denying rehearing en banc has ever been advanced by the appellants. Before it could reach these questions, the Supreme Court would have to disregard a series of forfeitures. It is unlikely that the Court would do so, especially given the strength of the government's case." U.S. v. Warner, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers), **citing Wright, Miller & Cooper**. The majority of a three-judge panel denied a subsequent motion for stay of mandate, for the reasons stated by Judge Wood. See 507 F.3d at 511.

Party seeking stay of mandate must show "(1) a reasonable probability that the Supreme Court will grant *certiorari*; (2) a reasonable possibility that at least five Justices would vote to reverse this Court's judgment; and (3) a likelihood of irreparable injury absent a stay. In a close case, the movant should make a showing that, on balance, the interests of the parties and the public favor a stay." Finding that this test was not met, the panel denied a stay. Nara v. Frank, 494 F.3d 1132, 1133 (3d Cir. 2007).

After court of appeals rejected constitutional challenges to state law imposing residency restrictions on certain sex offenders, court of appeals denied motion to stay mandate even though the case "present[ed] several issues of constitutional law, including one that divided the panel, and five members of our court thought the case worthy of en banc review." The court reasoned: "Given the relatively modest showings by the appellees on the likelihood of further review and the risk of irreparable harm, we believe that the equities and the public interest ultimately tip the balance against a stay of the mandate. As always, a stay may be available from the Supreme Court itself if a Justice of the Court concludes that the governing factors weigh differently." John Doe I v. Miller, 418 F.3d 950, 952–953 (8th Cir. 2005).

Movant's arguments in support of a stay were unpersuasive. Contention that court had erred in its statutory interpretation was undeveloped; contention that court's decision created an inter-circuit conflict did not succeed in showing a likelihood of success for the certiorari petition; and movant's factual contention was unpromising given the deference accorded to district court findings. Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration, Inc., 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers).

Judge Ripple denied a motion of the University of Illinois for a stay of mandate in Nanda v. Board of Trustees of University of Illinois, 312 F.3d 852 (7th Cir. 2002) (Ripple, J., in chambers). In Nanda, the Seventh Circuit had held that Title VII of the Civil Rights Act of 1964 validly abrogated Illinois's sovereign immunity under the Eleventh Amendment. Given the Seventh Circuit's "careful study" of the issue, and given that the only other circuit to rule on the issue agreed with the Seventh, Judge Ripple

concluded that there was not a reasonable possibility that the Supreme Court would review the case or, if it did review the case, reverse the Seventh Circuit.

"Given the importance of the issue, the conflict among the circuits that have ruled on the matter and the injury that the County could suffer if it is required to prepare for trial before the Supreme Court takes action," Judge Ripple granted a stay of mandate. U.S. ex rel. U.S. ex rel. Chandler v. Cook County, 282 F.3d 448, 451 (7th Cir. 2002) (Ripple, J., in chambers), **citing Wright, Miller & Cooper**.

"The grant of a motion to stay the mandate 'is far from a foregone conclusion.'" Boim v. Quranic Literacy Institute, 297 F.3d 542, 543 (7th Cir. 2002) (Rovner, J., in chambers) (quoting Books v. City of Elkhart, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers)).

A stay of mandate is akin to a temporary injunction, although there is a difference when at least one court has decided the case on the merits. In deciding whether to stay the mandate affirming a criminal conviction pending petition for certiorari, the court should ask "whether there is a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five will vote to reverse the judgment of this court." The motion to recall and stay was denied. U.S. v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers).

A stay of mandate pending a petition for certiorari is granted only in unusual cases. "Ordinarily, where a party has won on appeal after losing in the district court, it is appropriate to put the appellate court decision into effect pending the Supreme Court's ruling." A stay was denied in this case. The plaintiffs had won an injunction against enforcement of Treasury Department regulations that interfere with travel to Cuba. A stay might seem desirable because of the foreign-policy interests involved. On the other hand, the plaintiffs asserted an important interest in the right to travel, and it seemed unlikely that the Supreme Court would reach a different decision on the merits. Wald v. Regan, 708 F.2d 794, 803–804 (1st Cir. 1983) (per Breyer, J.), judgment rev'd on the merits, 468 U.S. 222, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984).

In denying a motion for stay of mandate pending filing of a petition for certiorari, the court took occasion to reiterate its "most recent pronouncement concerning the State's legal responsibilities for the prompt desegregation of the St. Louis public school system." Liddell v. Board of Ed. of City of St. Louis, 667 F.2d 643, 656–659 (8th Cir. 1981).

The Court of Appeals for the District of Columbia Circuit has noted that its clerk has long followed the policy of automatically withholding the court's mandate on receiving notice that petitions for certiorari have been filed with the Supreme Court. The members of the panel said that they would ask the Judicial Council of the circuit to determine whether this policy is appropriate in future cases. For the present case, it was so clear that a stay of mandate was appropriate that it would be entered, without determining the propriety of the clerk's practice and without indicating any inclination toward taking such action sua sponte in ordinary cases. Deering Milliken, Inc. v. F.T.C., 647 F.2d 1124 (D.C. Cir. 1978).

5 **Substantial question**

"[T]he standard for presenting a 'substantial question' is high. Silver's proposed petition presents no 'substantial question[s]' that raise a 'reasonable probability' that four justices will vote to grant certiorari, nor is there a 'fair prospect' that five justices will vote to reverse the Panel's judgment." United States v. Silver, 954 F.3d 455, 458 (2d Cir. 2020).

6 **Good cause for stay**

"[W]e interpret [Rule 41(d)(1)] as requiring application of the standard articulated by the Supreme Court in *Hollingsworth* and the Justices' in-chambers opinions." The applicant for the stay must "show '(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. In close cases the [decisionmaker] will balance the equities and weigh the relative harms to the applicant and to the respondent.'" American Axle & Manufacturing, Inc. v. Neapco Holdings LLC, 977 F.3d 1379, 1380-1381 (Fed. Cir. 2020) (quoting Hollingsworth v. Perry, 558 U.S. 183, 190, 130 S. Ct. 705, 710, 175 L. Ed. 2d 657 (2010)). Here, the applicant had failed to show irreparable injury. See American Axle, 997 F.3d at 1382.

Defendant's argument that failure to stay the mandate would send him to prison on a conviction that might later be reversed "is true for virtually every criminal defendant seeking a writ of certiorari." Also, the defendant's intended certiorari petition did not attack all of the counts on which he was convicted —"making it all but certain that he would serve at least some time in prison even in the unlikely event that

he were to succeed before the Supreme Court on the other counts of conviction." The court found a lack of good cause and refused to stay the mandate. United States v. Silver, 954 F.3d 455, 460 (2d Cir. 2020).

After holding "that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex," the court of appeals stayed its mandate. "In consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal to our circuit, we conclude it is appropriate to STAY our mandate pending the disposition of any subsequently filed petition for writ of certiorari." Kitchen v. Herbert, 755 F.3d 1193, 1230 (10th Cir. 2014).

Party seeking stay must show both irreparable injury and reasonable probability of success on merits; the applicant here had shown neither. "[I]n order to demonstrate a reasonable probability of succeeding on the merits of the proposed certiorari petition, a party must demonstrate a reasonable probability that four Justices will vote to grant certiorari and that five Justices will vote to reverse the judgment of this court." Senne v. Village of Palatine, Ill., 695 F.3d 617, 619 (7th Cir. 2012) (Ripple, J., in chambers).

After holding that the district court had authority to issue a habeas writ requiring the deliverance of a state prisoner into federal custody for trial on federal capital charges, the en banc majority found no good cause to stay the mandate pending certiorari. There is a strong public interest in speedy criminal prosecutions, and here, the passage of time could render witnesses unavailable or require the government to try a co-defendant separately. U.S. v. Pleau, 680 F.3d 1, 23 (1st Cir. 2012).

Movant failed to show "a reasonable probability of success on the merits." Moreover, movant failed to show irreparable injury because it did not "explain, with any specificity, why it is unlikely that [its opponent] will be able to repay the judgment if it is reversed." McBride v. CSX Transp., Inc., 611 F.3d 316, 317–318 (7th Cir. 2010) (Ripple, J., in chambers).

"A party seeking a stay of mandate pending the filing of a petition for writ of certiorari must establish that the petition will present a substantial question and that there is good cause for a stay. We therefore ask whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury. To demonstrate a reasonable chance of success on the merits, the applicant must show a reasonable *probability* that at least four Justices will vote to grant certiorari *and* a reasonable *possibility* that at least five Justices will vote to reverse the judgment of this court. This task requires that I view the case from a different perspective than I ordinarily would take in deciding a case in the regular course of business. In deciding a case, a circuit judge must not anticipate future changes in jurisprudential course by the Supreme Court of the United States; it is the task of a circuit judge to apply established doctrine. 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." Nanda v. Board of Trustees of University of Illinois, 312 F.3d 852, 853–854 (7th Cir. 2002) (Ripple, J., in chambers) (citations omitted; emphasis in original).

Judge Ilana Diamond Rovner denied the motion of a party ("HLF") for a stay of mandate, which stay, the party argued, was necessary to give it time to consult with counsel about whether to seek a writ of certiorari from the Supreme Court. "The factors we normally consider in deciding whether to grant such a motion include whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury. These factors are difficult to consider here because HLF seeks a stay not to file a petition for a writ of certiorari but to have time to decide whether it wishes to file such a petition in the first place. HLF cites no authority for this novel use of rule 41(d)(2)(A). Moreover, * * * HLF does not explain why it has not had sufficient time to consult with its attorneys in the five weeks since the opinion was issued." Boim v. Quranic Literacy Institute, 297 F.3d 542, 543–544 (7th Cir. 2002) (Rovner, J., in chambers) (citation omitted).

An applicant for a stay of mandate pending the filing of a petition for a writ of certiorari must demonstrate "a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse the judgment of th[e] court." An applicant must also demonstrate that "irreparable injury will take place if the stay is not granted." Finally, the court "must take into consideration the public interest." In this case, the application would be granted, even though the applicant would not likely succeed on the merits, because remedying the constitutional violation found by the court would be a time consuming and complex matter, and "the public interest is best served by affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote

attention to formulating and implementing a remedy." Books v. City of Elkhart, 239 F.3d 826, 827–829 (7th Cir. 2001) (Ripple, J., in chambers), **citing Wright, Miller & Cooper.**

7 **Bond or other security**

Fed. R. App. P. 41(d)(3). Prior to 2018, this rule was numbered Rule 41(d)(2)(C).

8 **90-day limit**

Until 1998 the rule had limited a stay to not more than 30 days unless the period was extended for good cause. The 90-day limit fits much better with the time periods Congress has allowed in which to petition for certiorari.

See Boskey & Gressman, The Supreme Court's 1999 Revisions of Its Rules, 1999, 183 F.R.D. 603, 610–611 (1999).

9 **Extension of time to petition**

This provision, contained in Rule 41(d)(2)(B)(i), was added in 2018.

10 **Final disposition**

See Fed. R. App. P. 41(d)(2)(B)(ii). The predecessor to this provision was originally in Rule 41(b); in 1998, the provision was revised and renumbered Rule 41(d)(2)(B); in 2018, it was renumbered Rule 41(d)(2)(B)(ii).

For a case applying the original provision in what was then Rule 41(b), see Board of Ed. of City School Dist. of City of New York v. Harris, 444 U.S. 130, 137, 100 S. Ct. 363, 368, 62 L. Ed. 2d 275 (1979).

11 **Extraordinary circumstances**

Fed. R. App. P. 41(d)(4). The 2018 Committee Note to Rule 41(d) states that "[s]uch a stay cannot occur through mere inaction but rather requires an order."

Compare

In a case decided under the pre-Dec. 1, 2018 version of Rule 41, the court of appeals had stayed its mandate, apparently for reasons not relating to the appellant's then-pending certiorari petition. The court therefore rejected the contention that the subsequent denial of the certiorari petition required the immediate issuance of the mandate. Poyson v. Ryan, 879 F.3d 875, 887 n.5 (9th Cir. 2018), cert. denied, 138 S. Ct. 2652, 201 L. Ed. 2d 1063 (2018). See also infra note 29 (discussing Poyson).

12 **Bell v. Thompson**

545 U.S. 794, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005).

13 **Sixth Circuit order**

Bell v. Thompson, 545 U.S. 794, 800, 125 S. Ct. 2825, 2829–2830, 162 L. Ed. 2d 693 (2005).

14 **Called for record**

Bell v. Thompson, 545 U.S. 794, 819, 125 S. Ct. 2825, 2840, 162 L. Ed. 2d 693 (2005) (Breyer, J., dissenting).

15 **Key evidence**

Concurring in the panel's initial affirmance of the dismissal of Thompson's habeas petition, Judge Moore wrote: "I cannot conclude that Thompson's trial counsel was constitutionally ineffective in hiring Dr. Copple in this case because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." Thompson v. Bell, 315 F.3d 566, 595 (6th Cir. 2003) (Moore, J., concurring in result).

16 **Record supplemented**

Thompson v. Bell, 373 F.3d 688, 691 (6th Cir. 2004), rev'd, 545 U.S. 794, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005).

17 **Amended opinion**

Thompson v. Bell, 373 F.3d 688 (6th Cir. 2004), rev'd, 545 U.S. 794, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005).

18 **Calderon case**

523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). Calderon held that "where a federal court of appeals sua sponte recalls its mandate to revisit the merits of an earlier decision denying habeas corpus

relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." 523 U.S. at 558, 118 S. Ct. at 1502.

19 **Thompson's argument**

Bell v. Thompson, 545 U.S. 794, 803, 125 S. Ct. 2825, 2831, 162 L. Ed. 2d 693 (2005).

20 **Authority under Rule 41**

In a pre-Thompson case, the Ninth Circuit held that the court of appeals has inherent authority to stay the mandate following denial of certiorari, but that Rule 41's provision that the mandate issue at that point creates a requirement of exceptional circumstances for such a stay. Beardslee v. Brown, 393 F.3d 899, 901 (9th Cir. 2004).

21 **Abuse of discretion**

Bell v. Thompson, 545 U.S. 794, 803–814, 125 S. Ct. 2825, 2832–2837, 162 L. Ed. 2d 693 (2005).

22 **Habeas concerns**

Bell v. Thompson, 545 U.S. 794, 812, 125 S. Ct. 2825, 2836, 162 L. Ed. 2d 693 (2005).

23 **Dissenters' view**

Bell v. Thompson, 545 U.S. 794, 830, 125 S. Ct. 2825, 2846, 162 L. Ed. 2d 693 (2005) (Breyer, J., dissenting).

24 **Schad decision**

570 U.S. 521, 133 S. Ct. 2548, 186 L. Ed. 2d 644 (2013) (per curiam).

25 **Cullen decision**

563 U.S. 170, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

26 **Martinez decision**

566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

27 **Extraordinary circumstances**

As noted previously in the text, the 2018 amendments resolved this question by amending Rule 41(d) to provide that a court of appeals can order a stay of the mandate after the denial of certiorari, but only if extraordinary circumstances exist.

In Henry v. Ryan, 766 F.3d 1059 (9th Cir. 2014), Judge Fletcher had argued that the "extraordinary circumstances" test applied only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari. See Henry v. Ryan, 766 F.3d at 1063 (Fletcher, J., concurring in grant of reh'g en banc) ("The fact that there are reasons to stay proceedings other than for the purpose of allowing the Supreme Court to consider Henry's petition for certiorari means that this case is governed instead by Rule 41(b), with the result that 'extraordinary circumstances' within the meaning of Bell and Schad are not required.").

28 **No extraordinary circumstances**

Schad, 133 S. Ct. at 2551–52 & n.3.

29 **Inherent authority rejected**

Schad, 133 S. Ct. at 2552.

30 **Stay through inaction?**

Bell v. Thompson, 545 U.S. 794, 805, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005).

The court of appeals appears to have employed the stay-through-inaction method for a period of time in Poyson v. Ryan, 879 F.3d 875, 886 (9th Cir. 2018), cert. denied, 138 S. Ct. 2652, 201 L. Ed. 2d 1063 (2018). In November 2013 the court of appeals denied Poyson's petitions for panel and en banc rehearing, and its order made no mention of a stay of the mandate. But the mandate did not issue, and in April 2014 the court amended its November 2013 order to provide that the panel rehearing petition "remains pending," that proceedings on that petition would be stayed pending en banc proceedings in a different case, and that the mandate was to be stayed.

In Henry v. Ryan, 766 F.3d 1059 (9th Cir. 2014), a capital habeas case, the en banc court entered an order that had the effect of staying the mandate in Henry pending the court of appeals' en banc rehearing proceeding in a different case. The opinions concurring in and dissenting from this order disagreed on several points—one of which was whether the court's failure to issue the Henry mandate in due course

after the denial of panel rehearing and rehearing en banc constituted a stay of the mandate. Compare Henry, 766 F.3d at 1062 (Fletcher, J., concurring in grant of reh'g en banc) ("Acting on behalf of the panel, the clerk's office in this case stayed the mandate pursuant to Rule 41(b), as it routinely does in all capital cases."), with Henry, 766 F.3d at 1067 (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[N]o order staying the mandate was ever entered by the panel or by the Clerk's office. Withholding issuance of the mandate is not the same as entering a stay order.").

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