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ESSAY

WHEN IS FINALITY . . . FINAL? REHEARING AND RESURRECTION IN THE SUPREME COURT

Aaron-Andrew P. Bruhl*

I. INTRODUCTION

It ain't over till it's over.

And yet the question remains: When, exactly, is it over? Perhaps the safest answer, when it comes to litigation, is that it is never over, at least if we mean absolutely and irretrievably *over*.[1] Nonetheless, while recognizing that absolute repose might not be found in this world, we often say that a case is over once the judgment becomes "final." Now, finality is a word of many meanings, so one has to be careful in using it.[2] The particular type of finality that concerns us here is the finality that attaches

* Associate Professor, University of Houston Law Center. I thank Gabriel (Jack) Chin, Margaret Cordray, Stephen McAllister, Brent Newton, and Stephen Shapiro for comments on an earlier version of this essay. I thank Melissa Grobler for helpful research assistance.

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

2. *See Clay v. U.S.*, 537 U.S. 522, 527 (2003) (observing that "[f]inality is variously defined" and listing several different meanings). For instance, one important meaning of finality that is *not* at issue in this Article concerns the time at which a trial court judgment becomes ripe for appeal under the "final judgment" rule.

when the direct appellate process has run its course. This type of finality is important because it marks the point at which a case outcome is no longer routinely subject to revision based on changes in the governing law. A case that is still on appeal is not yet final in this sense, and so an appellate court can reverse a trial court decision that was perfectly correct when rendered but that has become incorrect by the time of the appeal.[3] After finality attaches, however, the judgment stands even if the law later changes. To be sure, this is not an absolute and iron-clad rule; few things in the law (or in life) are. But, at the very least, the attachment of finality at the end of the appellate process marks a key turning point.

Because finality has important consequences, the precise moment that a case becomes final can matter a great deal. As just stated, finality attaches when the direct appeal concludes. But that is still inexact. To express it more precisely, a case becomes final, for federal-law purposes, when the date for petitioning for certiorari expires or, if a petition is filed, when the Supreme Court denies it.[4] The denial of certiorari is therefore a decisive event, inasmuch as it marks the boundary between the still-pending and the now-final, the live and the dead.

Given that it is simply the day certiorari was denied (or the day the period for seeking certiorari expired), identifying the moment of finality is ordinarily very easy and, seemingly, not the sort of thing that would reward much study. But that initial impression would be wrong, for there are some interesting issues that lurk just below the surface. First, note that the Supreme Court's case-handling practices introduce some discretion into the date of finality. When the Court has granted certiorari to rule

3. *U.S. v. Schooner Peggy*, 5 U.S. 103, 110 (1801) ("It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied."); *see also e.g. Johnson v. U.S.*, 520 U.S. 461, 467–69 (1997) (judging the correctness of the trial court's decision against a legal standard that post-dated the trial); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273, 280 (2d Cir. 2005) (relying on a new Supreme Court case to reverse a district court decision that was the culmination of over two decades of litigation). There are complexities lurking here, many of which concern the idea of retroactivity. *See infra* text accompanying nn. 15–22.

4. *See e.g. Clay*, 537 U.S. at 527 (post-conviction review context); *Bradley v. School Bd.*, 416 U.S. 696, 710–11 (1974) (civil context).

on a particular question, the Court could just deny any other petitions for certiorari that raise the same or similar issues. That would render those cases final and presumptively not eligible for the application of the rule the Court is poised to announce. But the Court's usual practice is not to deny all similar petitions but instead to hold them on its docket until the plenary decision comes down. Once the decision is announced, the Court will then summarily vacate the potentially affected cases and remand them so that the lower courts can apply the new law and make any appropriate modifications. To those conversant in the details of the Court's practices, this is called a GVR (for grant, vacate, and remand).[5] In this way, the Court controls whether cases live or die by controlling the date on which it rules on the petition for certiorari. Cases do not progress to finality as if on an unstoppable conveyor belt. Just as impersonal chance and dumb luck play a role in a particular case's track toward finality, so does judicial choice.

A second interesting feature of finality in the Supreme Court—and another point of entry for judicial discretion—is that a denial of certiorari might itself turn out not to be truly final. That is because the Court's rules allow a disappointed litigant to file a petition for rehearing of the denial of certiorari.[6] Many litigants file petitions for rehearing, and it is usually a futile gesture.[7] But it sometimes bears fruit. Perhaps the most notable recent grant of rehearing was the Court's decision, in June 2007, to grant certiorari on rehearing in two Guantanamo detainee cases after the Court had denied certiorari a few months before.[8] The Court granted certiorari in order to give the cases plenary

5. *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); *see also infra* text accompanying n. 55 (discussing the Court's practice of holding petitions).

6. 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.

7. *See* Eugene Gressman et al., *Supreme Court Practice* 814–15 (9th ed., BNA 2007) (providing statistics demonstrating the minute proportion of petitions for rehearing that are granted).

8. *Al-Odah v. U.S.*, 551 U.S. 1161 (2007); *Boumediene v. Bush*, 551 U.S. 1160 (2007).

consideration, and, after briefing and oral argument, the cases led to the landmark opinion known as *Boumediene v. Bush*.[9]

This Article concerns instances in which the Court grants rehearing not in order to give a case plenary review but instead in order to summarily remand for consideration of a new development. This is not an everyday occurrence either, but it happens more than most observers probably realize. Indeed, in 2005 the Supreme Court granted rehearing and then GVR'd in fourteen cases (or more, if one counts each lower court judgment separately).[10] All of those cases involved federal criminal defendants whose petitions for certiorari were denied before the Court's major ruling in *United States v. Booker*,[11] which held that the federal Sentencing Guidelines were unconstitutional if applied in a mandatory fashion. After deciding *Booker*, the Court granted rehearing and GVR'd the fourteen cases, along with hundreds of cases in which petitions for certiorari were still pending when *Booker* came down.[12] Even more recently, in June 2010, the Court again reheard a denial of certiorari and GVR'd, this time in *Melson v. Allen*,[13] which concerned the statute of limitations for habeas corpus petitions. The Court's actions in *Melson* and in the *Booker* cases rescued the petitioners from finality and gave them a new lease on life (quite literally so in Melson's case, as he was challenging a death sentence).

It may be too early to declare a trend, and yet, trend or not, these events provide an occasion for pondering the largely unpondered practice of rehearing. In its own unassuming way, the topic connects up with some broader themes, including the proper exercise of judicial discretion and the tradeoff between finality and other procedural values. As we will see, there are few if any strictly legal limits on the Supreme Court's power to grant rehearing, even when it comes to very tardy petitions for rehearing that reopen years-old cases. In that sense, finality is

9. 553 U.S. 723 (2008).

10. The Appendix contains a list of rehearing GVRs and supplies some details.

11. 543 U.S. 220, 226 (2005).

12. A few hundred of these GVRs can be found by examining the Court's January 24, 2005, order list, 543 U.S. 1097–1117 (2005).

13. ___ U.S. ___, 130 S. Ct. 3491 (2010).

discretionary and "ultimately depends on the Court's self-restraint."[14] It ain't over till it's over, in other words.

To briefly outline the organization of what follows: Part II explains why the moment of finality matters so much in our system and how the possibility of rehearing affects the cluster of values surrounding finality. Because the balance of considerations bearing on the propriety of allowing rehearing tips somewhat differently according to the circumstances, Part III then divides rehearings into three different categories and evaluates the soundness of the Court's practices in each category. An Appendix presents original data on cases in which the Court has granted rehearing in order to remand for consideration of a new legal development.

II. FINALITY AND REHEARING: THE STAKES, THE GOVERNING LAW, AND THE RELEVANT VALUES

To appreciate the importance of the date when finality attaches, one has to understand how our system handles changes in law. Our focus here is court-generated changes in law, as that is the type of change for which the date of finality is most significant.[15] The usual rule today is that new rulings apply to all cases that are still pending, both civil and criminal.[16] This means that a decision by a lower court can retroactively become wrong

14. *U.S. v. Ohio Power Co.*, 353 U.S. 98, 104 (1957) (Harlan, Frankfurter & Burton, JJ., dissenting).

15. New statutory law is usually prospective in that it does not govern conduct that occurred before the statute's effective date. Indeed, when it comes to criminal law, the Constitution's Ex Post Facto Clauses forbid retroactive liability. U.S. Const. art. I, § 10, cl. 1; art. I, § 9, cl. 3 (available at http://www.house.gov/house/Constitution/Constitution.html). In the civil context, where the constitutional constraints are minimal, the courts typically avoid retroactive application through statutory interpretation. That is, the courts presume that the legislature did not intend retroactive effect unless the statute clearly requires it. *See e.g. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–68, 280 (1994). Thus, changes in statutory law usually do not apply even to cases that are still pending in the courts, so the precise date at which a case becomes final is generally not particularly relevant for statutory changes.

16. *See Harper v. Va. Dept. of Taxn.*, 509 U.S. 86, 94–97 (1993) (civil cases); *Griffith v. Ky.*, 479 U.S. 314, 320–28 (1987) (criminal cases).

and in need of correction, even if it was correct when rendered.[17] But we take a different approach once a case becomes final. At that point, the opportunities for revisiting it are much more limited. Our reluctance to upset final judgments is particularly pronounced in civil cases.[18] Although Rule 60 of the Federal Rules of Civil Procedure permits reopening of final judgments in certain circumstances, the mere incorrectness of a judgment in light of new legal developments is ordinarily not sufficient.[19] In criminal cases, there is at least in theory more opportunity for collateral attack on final judgments, such as through habeas corpus proceedings. Changes in substantive law (i.e., new rulings limiting the kinds of conduct that can be criminalized or the kinds of punishments that are permitted) can support relief in post-finality collateral proceedings. The much more common kind of change in law, however, is a new rule of criminal *procedure*, and *that* kind of rule typically does not apply retroactively to invalidate final judgments.[20] For example, in

17. Not every flawed judgment will be reversed. A litigant seeking reversal might have to overcome obstacles such as forfeiture rules and unfavorable standards of review. *See* Aaron-Andrew P. Bruhl, *Deciding When To Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 Cornell L. Rev. 203, 212–14 (2011) (discussing the effect of appellate forfeiture rules); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 979–80 (2006) (discussing the effect of plain-error review).

18. *See James B. Beam Distilling Co. v. Ga.*, 501 U.S. 529, 541 (1991) (opinion of Souter & Stevens, JJ.) ("[R]etroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed.").

19. Rule 60(b)(5) of the Federal Rules of Civil Procedure permits a district court to vacate a judgment that was "based on an earlier judgment that has been reversed or vacated," *id.*, but that language only contemplates reopening judgments that were based on the preclusive effect of a since-invalidated judgment; the rule does not provide relief when a case relied on as precedent has been reversed. Charles Alan Wright et al., *Federal Practice and Procedure* vol. 11, § 2863, at 335 (2d ed., West 1995). Rule 60(b)(5) also provides relief when "it is no longer equitable that the judgment should have prospective application." *Id.* This allows relief in some cases involving continuing injunctions, but most judgments do not involve the requisite prospective effect within the meaning of the rule. *See* Wright et al., *supra* this note, at § 2863, p. 338 n. 14 (citing cases where prospective effect was not found). Rule 60(b)(6) has sometimes been used to provide relief based on a change in law, but in most courts the rule is limited to extraordinary cases; a mere change in law rendering the judgment wrong is insufficient. *E.g. DeWeerth v. Baldinger*, 38 F.3d 1266, 1272–75 (2d Cir. 1994); *see* James Wm. Moore et al., *Moore's Federal Practice* vol. 12, at § 60.48[5], p. 60-203 (3d ed., Matthew Bender 2010) (calling the more generous minority view "clearly erroneous").

20. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); *Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). Note that the discussion here concerns proceedings in federal court—both true habeas proceedings as

recent years the Supreme Court has decided several cases, most notably *Crawford v. Washington*,[21] forbidding use of certain out-of-court statements against criminal defendants. Defendants whose cases were still on direct appeal could benefit from the *Crawford* rules, but those whose direct appeals had concluded before *Crawford* could not.[22]

In sum, the date of finality marks the dividing line between the category of litigants who can benefit from a favorable change in law and the category of those who, most likely, cannot. And, as noted, the attachment of finality occurs when the period for filing a petition for certiorari expires or the Supreme Court denies certiorari. Except, that is, when the Court decides to grant rehearing.[23] The grant of rehearing can, accordingly, move a litigant from one category to the other.

We can illustrate the effect of rehearing by considering the fourteen cases in which the Court granted rehearing of a denial of certiorari and GVR'd in light of *Booker*.[24] These cases involved federal criminal defendants who raised constitutional challenges to judicial fact-finding at sentencing. Defendants had been raising these challenges for years to no avail, and these particular defendants' petitions for certiorari were denied in May

well as proceedings for federal prisoners under 28 U.S.C. § 2255 (2006). States are free to provide broader retroactive effect in post-conviction proceedings in their own courts if they choose. *Danforth v. Minn.*, 552 U.S. 264 (2008).

21. 541 U.S. 36 (2004). Later cases in the *Crawford* line include *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527 (2009), and *Davis v. Wash.*, 547 U.S. 813 (2006).

22. *Compare Giles v. Cal.*, 554 U.S. 353, 357, 377 (2008) (noting that the defendant's appeal had been pending when *Crawford* was announced and vacating the defendant's sentence based on *Crawford*) *with Whorton v. Bockting*, 549 U.S. 406 (2007) (holding that *Crawford* does not apply to cases that were final on appeal when it was decided).

23. The mere *filing* of a petition for rehearing has no effect. *See* Sup. Ct. R. 16.3 ("The order of denial [of certiorari] will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice."). Finality for purposes of application of new law attaches at the denial of certiorari, that is, not upon denial of a petition for rehearing or the expiration of the period for filing for rehearing. *See Clay*, 537 U.S. at 527 (stating that "[f]inality attaches when this Court . . . denies a petition for a writ of certiorari," without mentioning rehearing); *cf. Giesberg v. Cockrell*, 288 F.3d 268 (5th Cir. 2002) (holding, in the habeas context, that a case becomes final for purposes of the Antiterrorism and Effective Death Penalty Act's limitations period with the denial of certiorari, not the denial of rehearing); *Robinson v. U.S.*, 416 F.3d 645 (7th Cir. 2005) (same, for § 2255 proceedings); *but cf. Hanover Ins. Co. v. U.S.*, 880 F.2d 1503 (1st Cir. 1989) (holding that a case was not final for purposes of a provision of the Internal Revenue Code until the expiration of the period for seeking rehearing of the denial of certiorari).

24. *See* text accompanying nn. 10–12, *supra* (discussing these grants of rehearing).

and June 2004. Then, at the end of June 2004, the Supreme Court finally embraced their constitutional argument in *Blakely v. Washington*,[25] which concerned a state sentencing system very similar to the federal Sentencing Guidelines.[26] The federal defendants now appeared to have a winning argument. But because these fourteen cases were already final when *Blakely* was decided, the new rule of criminal procedure announced in *Blakely* would not benefit them.[27] So the petitioners in those cases filed timely petitions for rehearing based on *Blakely*, which the Court held on its docket. In January 2005, the Court extended *Blakely* to the federal Sentencing Guidelines in *Booker*. The Court then granted rehearing and GVR'd the fourteen cases for further consideration in light of *Booker*.[28] By doing so, the Supreme Court rescued these cases from finality. The defendants were therefore eligible for the benefit of the new rule *Booker* announced. Indeed, some of them thereby obtained new sentencing hearings.[29]

Given the stakes involved in granting rehearing, one's thoughts naturally turn to the legal regime governing the Court's power to resurrect final cases. Congress has authorized the Supreme Court to prescribe rules of practice and procedure.[30] The rules the Court has promulgated under that authority expressly permit petitions for rehearing after a denial of certiorari and indeed contemplate that the proper grounds for a petition for rehearing include new developments that followed

25. 542 U.S. 296 (2004).

26. *Id.* at 324–26 (O'Connor & Breyer, JJ., dissenting) (emphasizing the similarity between the state and federal sentencing regimes).

27. *See e.g. U.S. v. Price*, 400 F.3d 844, 845, 849 (10th Cir. 2005) (holding that *Blakely* does not apply retroactively to convictions that became final before it was decided). Indeed, even if *Blakely* had applied to those fourteen cases, that probably would not have been sufficient, as *Blakely* did not invalidate the federal Guidelines. *Booker* did that over six months later. *See U.S. v. Rennert*, 182 Fed. Appx. 65 (3d Cir. 2006) (denying relief to a federal defendant whose conviction became final between *Blakely* and *Booker* because the former did not concern the federal Guidelines and the latter was not retroactive); *McReynolds v. U.S.*, 397 F.3d 479, 481 (7th Cir. 2005) (stating that the decision in *Booker*, not *Blakely*, marks the relevant date for federal defendants).

28. The cases are listed in the Appendix.

29. *E.g. U.S. v. Lauersen*, 287 Fed. Appx. 115 (2d Cir. 2008); *U.S. v. Campbell*, 150 Fed. Appx. 256 (4th Cir. 2005); *U.S. v. Van Alstyne*, 143 Fed. Appx. 45 (9th Cir. 2005).

30. 28 U.S.C. § 2071 (2006) (available at http://uscode.house.gov).

the denial of certiorari.[31] The rules currently permit the filing of petitions for rehearing for a period of twenty-five days following the denial of certiorari.[32] There is no particular timetable on which the Court must rule on the petition for rehearing; petitions have sometimes been left to linger for a couple of years, during which events ripened to a point where rehearing was granted based on an eventual change in the legal landscape.[33]

A nice question of authority concerns whether the Court can accept a petition for rehearing filed after the twenty-five-day deadline specified in its rules. Although the rules flatly state that the Clerk will not accept an untimely filing,[34] the Court's precedents show that the Court may—and in exceedingly rare instances does—entertain an untimely petition for rehearing if the petition is accompanied by a motion seeking leave to file out of time.[35] So, as far as the Court is concerned, it seems there is no strict legal barrier to the consideration of tardy petitions for rehearing. In defense of the Court's assertion of authority, it is perhaps relevant that the twenty-five-day deadline is the product of the Court's own rules rather than a congressional command, a distinction that has led the Court to exercise a freer hand in

31. 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").

32. *Id.*

33. *E.g. Fla. v. Rodriguez*, 461 U.S. 940 (1983) (granting, on May 23, 1983, rehearing of a denial of certiorari dated May 26, 1981); *Place v. Weinberger*, 426 U.S. 932 (1976) (granting, on June 14, 1976, rehearing of a denial of certiorari dated Nov. 25, 1974).

34. Sup. Ct. R. 44.4.

35. *See Foster v. Tex.*, ___ U.S. ___, 131 S. Ct. 1848 (2011); *Gondeck v. Pan Am. World Airways*, 382 U.S. 25 (1965); *Ohio Power*, 353 U.S. 98; Gressman et al., *supra* n. 7, at 809–15; *see also Carlisle v. U.S.*, 517 U.S. 416, 450–451 (1996) (Stevens & Kennedy, JJ., dissenting) ("On rare occasions . . . we have held that the interest in the evenhanded administration of justice outweighs the interest in finality and granted [petitions for rehearing] even though untimely and even though there is not a word in our Rules that authorized such action."). The Chief Justice, sitting as Circuit Justice for the D.C. Circuit, recently ruled that the Court's rules do not permit extensions of the time for filing petitions for rehearing after denial of certiorari. *Boumediene v. Bush*, 550 U.S. 1301 (2007) (Roberts, C.J., in chambers). His view is compelling as an interpretation of the Court's rules regarding extensions, but his opinion does not mention the separate matter of granting leave to file an admittedly untimely petition for rehearing. Although the leading cases asserting that power are aging, they have never been overruled. Therefore, it seems best to say that although the deadline for timely filing cannot be extended (per the Chief Justice), an untimely filing can still be accepted in the unusual case in which the Court wishes to so exercise its discretion (per the older cases).

excusing non-compliance with filing deadlines in other contexts.[36] Further, a power to grant rehearing out of time is consistent with the acknowledged (if rarely exercised) power of the federal courts of appeals to recall their mandates and entertain tardy petitions for rehearing.[37]

The Supreme Court's power to grant rehearing out of time can have striking results vis-à-vis finality. In perhaps the most famous case[38] the Court granted a petition for rehearing filed over three years after the denial of certiorari. The Court's avowed standard for deciding whether to permit an untimely filing is whether doing so would advance "the interests of justice."[39]

The power to grant rehearing, timely or not, implicates a number of traditional procedural values such as accuracy, repose, equal treatment, and judicial economy. The clash between accuracy and repose is particularly sharp: We want cases decided correctly, but there must at some point be an end to litigation. The notion of finality, after all, is premised on the need to limit the continuing quest for present accuracy in light of the countervailing value of repose; the date of finality marks the point at which we have decided the former value is eclipsed by the latter. Rehearing, which potentially extends the finality date, sacrifices some repose. Tardy rehearings sacrifice it much more, which is one reason they are especially controversial.[40] The Court's authority to accept late petitions also implicates classic

36. *See Bowles v. Russell*, 551 U.S. 205, 211–12 (2007) (citing *Schacht v. U.S.*, 398 U.S. 58 (1970), and distinguishing the time period for petitioning for certiorari in a civil case, which is fixed by statute, from the period in a criminal case, which is set forth only in the Court's rules and "can be relaxed by the Court in the exercise of its discretion"). The situation is different for untimely petitions for rehearing in cases originating in the Tax Court: The Court has held that it lacks the power to entertain an untimely petition for rehearing in those cases, as the Internal Revenue Code specifies when such cases become final. *R. Simpson & Co. v. C.I.R.*, 321 U.S. 225 (1944); Gressman et al., *supra* n. 7, at 814.

37. *See* Charles Alan Wright et al., *Federal Practice and Procedure* vol. 16AA, § 3986, pp. 597–98 (4th ed. West 2008) (explaining that this power exists, though only for use in extraordinary circumstances).

38. *Gondeck*, 382 U.S. 25.

39. *Ohio Power*, 353 U.S. at 99.

40. Several justices, led by Justice Harlan, opposed the practice of granting rehearing out of time. *Gondeck*, 382 U.S. at 30 (Harlan, J., dissenting); *Ohio Power*, 353 U.S. at 99 (Harlan, Frankfurter & Burton, JJ., dissenting); *see also Gondeck*, 382 U.S. at 28 (Clark, J., concurring in the judgment) (criticizing the Court's "rule of 'no finality'" but considering himself bound by precedent to permit untimely rehearings).

debates over rules versus standards and the role of equitable discretion.[41]

Equality plays an important but complicated role in the rehearing context. On the one hand, part of the reason for granting rehearing is to ensure that the same rule applies to all litigants who are similarly situated—similar, that is, except for the fact that one case became final before the other. That two cases proceeded through the judicial system at different rates often has nothing to do with the litigants or their entitlements to relief; it is in that sense arbitrary.[42] Of course, there may be no stopping point to this logic: Wherever we push the line of finality—the twenty-five days provided in the rules or some other limit—there will be another slightly older case just on the other side of it. Further, reopening cases threatens its own kind of inequality if the Court exercises its power haphazardly, granting rehearing to one lucky litigant but not to others with similar claims.[43] That is, before granting rehearing the Court should ask itself whether it is prepared to take such action in every similar case. Here too arises the question of judicial economy, for although no particular grant of rehearing involves

41. There is a vast literature on these topics. For a few recent entries that focus on procedural matters in particular, see Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 Cardozo L. Rev. 1961, 2002–23 (2007), and Jonathan Remy Nash, *Instrument Choice in Federal Court Jurisdiction: Rules, Standards, and Discretion* (Emory Public Law Research Paper No. 10-92), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553584 (2010) (accessed Aug. 31, 2010; copy on file with Journal of Appellate Practice and Process).

42. For statements to the effect that case outcomes should not turn on arbitrary matters of timing, see, for example, *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, Marshall & Blackmun, JJ., dissenting); *U.S. v. Johnson*, 457 U.S. 537, 555–56 (1982).

43. *See e.g. Weed v. Bilbrey*, 400 U.S. 982, 984 (1970) (Douglas & Black, JJ., dissenting) ("The facts of this case are even more compelling than those in [*Gondeck*]. . . All [this litigant] asks is that the Court apply the law in her case that was applied in the one following hers."). It is hard to say whether the Court's rehearing practices can be charged with causing arbitrarily disparate treatment. *Weed* involved an untimely petition for rehearing, the grant of which is so exceedingly rare that perhaps it is fruitless to seek any sort of consistency. In the context of timely petitions for rehearing, it can make a bit more sense to speak of a petitioner having a legitimate expectation of relief if the relevant standard—intervening circumstances under Sup. Ct. R. 44.2—is satisfied. I have looked into the circumstances of a number of cases, and I have often found it hard to say why the Court did not grant rehearing in light of a seemingly relevant intervening development. Of course, that does not mean that the Court did not have a valid reason (e.g., the Justices believed that the new development was not quite on point, or there were other grounds that amply supported the existing judgment); it is just that the decisions are hard for an outsider to explain, given that the Court typically does not provide reasons for these actions.

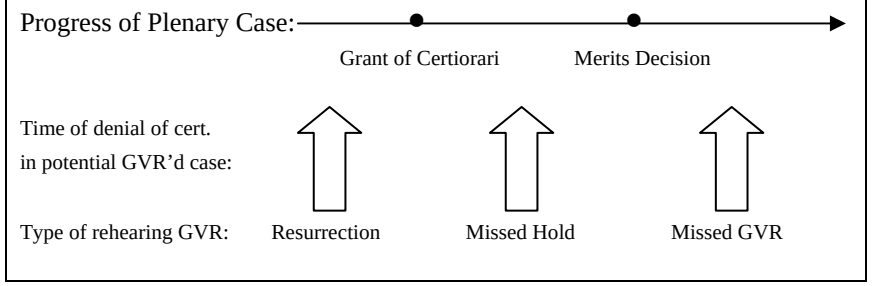
much work, the Court's behavior will affect, at the margin, how many petitions for rehearing litigants decide to file, which does involve a cost to the judicial system in the aggregate.

III. DISAGGREGATING REHEARINGS

So how do these competing considerations come out, on balance? What would a defensible regime of rehearing look like, and does the Supreme Court currently have one?

To answer these questions, it is useful to begin by dividing up rehearings into distinct categories. The different categories reflect the different alignments of critical dates in two separate cases: (1) the case in which certiorari has been denied and in which rehearing is sought, and (2) the plenary case that would supply the basis for the potential GVR on rehearing.[44] In Figure 1 below, the line represents the progress of the plenary case. The arrows show the different points at which certiorari might have been denied in the case that is the candidate for a GVR on rehearing.

Figure 1



As Figure 1 shows, there are three different types of rehearing GVRs that can result: (1) those cases in which certiorari is denied—and finality attaches—before the grant of certiorari in the plenary case (what I call "resurrection" cases, because the grant of rehearing saves a case that to all

44. The discussion here focuses on GVRs that are triggered by new Supreme Court decisions, which are the large bulk of all GVRs. *See* Bruhl, *supra* n. 5, at 720 (providing statistics on GVRs by category). The same general principles could be applied to rarer types, *mutatis mutandis*.

appearances was over), (2) those cases in which certiorari was denied after the grant of certiorari in the plenary case ("missed holds," because these could and perhaps should have been held pending the plenary decision), and (3) those cases in which certiorari is denied after the issuance of a decision on the merits in the plenary case ("missed GVRs," because these could and perhaps should have been GVR'd rather than denied). I should note that this terminology of "missed holds" and "missed GVRs" perhaps suggests a lapse on the Court's part. Some defect in case management might indeed be involved, but it need not be, as discussed below.[45]

The Appendix presents a list of rehearing GVRs from 1965 to present, classified according to the above criteria. The different categories present different balances of the relevant considerations. In the material below, I discuss the categories in the order of easiest to hardest to justify.

A. Missed GVRs

The easiest category is what we might call the "missed GVR." Here the Court's denial of certiorari follows the plenary decision that arguably supports a GVR. The petition could or should have been GVR'd in light of the new plenary decision, but for whatever reason it was not.

The key fact about this category of case is that, because the law changed before the denial of certiorari—and thus before finality attached—our current retroactivity doctrines tell us that the case should be governed by the new law. By granting rehearing and GVR'ing, the Supreme Court can readily bring about the necessary reconsideration. But even without a GVR, that same reconsideration really should be available through some procedure or another—whether it be a recall of the appellate mandate,[46] a motion under Federal Rule of Civil

45. *See infra* nn. 51–54 and accompanying text.

46. *See e.g. Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427, 428–30 (2d Cir. 1970) (granting rehearing out of time—and after the denial of certiorari—where a change in law had occurred before the case became final); *U.S. v. Skandier*, 125 F.3d 178, 182–83 (3d Cir. 1997) (recalling the mandate and granting rehearing based on a Supreme Court decision issued approximately one month after the prior ruling of the court of appeals).

Procedure 60(b),[47] or a proceeding for collateral review.[48] The reason, again, is that the case was not final when the law changed, and so the new law should apply to it.

Once it is understood that new law should apply, the question becomes which procedural route makes the most sense as a matter of judicial administration. If one were starting from scratch, it might be hard to identify the ideal method of securing reconsideration in these cases. Nonetheless, taking current institutional arrangements more or less as they now stand, it seems sensible that the Supreme Court should go ahead and grant rehearing and GVR, at least if the petition for rehearing is timely.[49] For one thing, the petition for certiorari has just been before the Supreme Court, and the Court might have failed to GVR only because of a glitch in its own internal case management. For another thing, although the other review mechanisms mentioned above have sometimes been used in these kinds of situations, courts tend to use them sparingly. That reluctance is ordinarily altogether appropriate, for litigation does at some point need to come to an end. Unfortunately, the disinclination to grant relief from final judgments sometimes spills over into circumstances like this, where reconsideration really *is* proper because finality had not yet attached when the

47. *See e.g. Schmitt v. Am. Family Mut. Ins. Co.*, 187 F.R.D. 568 (S.D. Ind. 1999) (granting Rule 60(b)(6) relief where a change in law occurred over a year after the judgment but before the case became final on appeal).

48. *See e.g. U.S. v. Becker*, 502 F.3d 122, 127–29 (2d Cir. 2005) (affirming district court's grant of § 2255 relief based on a new case decided before the period for seeking certiorari had expired, even though no petition for certiorari was filed); *see also Derman v. U.S.*, 298 F.3d 34, 39–42 (1st Cir. 2002) (similar). This route might not be available to habeas petitioners in state custody in light of amendments in the Antiterrorism and Effective Death Penalty Act of 1996, which arguably imposed a slightly different retroactivity trigger according to which the relevant date for determining the defendant's entitlement to the benefit of new law is the date of the state court decision, not the date of the denial of certiorari. *See Smith v. Spisak*, ___ U.S. ___, ___, 130 S. Ct. 676, 681 (2010) (noting uncertainty on the question). The Supreme Court has recently granted certiorari to decide the question. *Greene v. Palakovich*, 606 F.3d 85 (3d Cir. 2010), *cert. granted sub nom. Greene v. Fisher*, ___ U.S. ___, 131 S. Ct. 1813 (2011). If the Supreme Court rules that habeas relief is unavailable when a change in law occurs after the state court's ruling but before the case becomes final on direct appeal, that would increase the importance of the GVR procedure.

49. It is hard to see why the Court should consider a late petition for rehearing in this kind of case. The GVR-generating event was already on the books when certiorari was denied, and twenty-five days is sufficient time for a litigant to bring the apparent oversight to the Court's attention.

law shifted.[50] Lower courts should change their practices in this regard. But as long as the prospect for relief through alternative avenues remains dicey, it makes sense for the Supreme Court to GVR.

A few words regarding blame are now in order. So far we have been speaking as if the Court's failure to GVR was traceable to some lapse on its part: It "missed" the need to GVR. In certain cases, it seems that some internal mistake may indeed have occurred.[51] But it can also happen that the Court will fail to GVR because the petition for certiorari in the missed case raised other questions, not the question decided in the plenary case. When that happens, the Court probably cannot be blamed for failing to see, lurking in the record, the relevance of the recent plenary decision. Depending on the timing of the relevant events, perhaps the petitioner should have included an additional point in the petition for certiorari or supplemented the certiorari filings to bring a new development to the Court's attention before the Court's consideration of the petition.[52] If the

50. Concerning recall of the mandate, for instance, consider *U.S. v. Fraser*, 407 F.3d 9, 10–11 (1st Cir. 2005) (refusing to recall the mandate in light of a Supreme Court decision issued approximately two months after the circuit court's prior ruling); and *Richardson v. Reno*, 175 F.3d 898, 899 (11th Cir. 1999) (similar).

51. Because the Court's deliberations are private, and because grants of petitions for rehearing are usually not explained, it is hard to know exactly what motivated the Court to act in any given case. In some cases, however, one can engage in informed speculation based on statements in the parties' briefs and, more interestingly, evidence from retired Justices' papers. Based on these sources, it appears that a rehearing has sometimes been occasioned by a mistake or misjudgment on the Court's part. For example, the Blackmun papers suggest that the petition for certiorari in *Adams v. Evatt*, 511 U.S. 1001 (1994), was held in anticipation of one case, and then denied when that case did not help the petitioner; but the petition probably should have also been held in anticipation of another case that turned out to be more relevant to the petitioner's claims. (The pool memo had recommended a hold in light of both cases.) After the initial denial of certiorari, the Court granted a petition for rehearing and GVR'd based on the second case. *See* Lee Epstein et al., *The Digital Archive of the Papers of Justice Harry A. Blackmun*, File for No. 92-6259 at 18, 20, 22, 34, http://epstein.law.northwestern.edu/research/blackmunMemos/1993/Denied-pdf/92-6259.pdf (reproducing relevant portions of internal memos) (accessed Sept. 1, 2011; copy on file with Journal of Appellate Practice and Process). In another case, *Friend v. U.S.*, 517 U.S. 1152 (1996), the Court denied certiorari even though the government's response to the petition for certiorari suggested a GVR. Br. of the U.S., *Friend v. U.S.*, 1996 WL 33439756 (No. 95-642, 517 U.S. 1152 (1996)) at 7. On petitioner's motion, the Court granted rehearing and GVR'd, which suggests that the initial denial may have been a mistake.

52. *See* Sup. Ct. R. 15.8 (permitting petitioner to file a supplemental brief "calling attention to new cases, new legislation, or other intervening matter").

petitioner fails to do so, it might be defensible for the Court to employ a type of forfeiture rule: no grants of rehearing based on developments that could have been—but were not—brought to the Court's attention before the denial of certiorari.

Whether the Court ever employs such a forfeiture rule is impossible to know, as there is no formal statement one way or the other, but it appears that the Court will sometimes GVR based on a new issue that was not presented before the denial of certiorari.[53] Of course, even if the Supreme Court does not firmly impose a forfeiture rule, some lower courts might nonetheless do so on remand. Indeed, one of the secrets of the GVR practice is that, at least in some circuits, many GVRs do not trigger any reconsideration at all.[54] I do not take a position on forfeiture here, except to point out that a rational procedural system could choose to treat petitioners differently based on whether the issue raised in their petition for rehearing should have been presented earlier.

B. Missed Holds

Sometimes several petitions for certiorari filed around the same time present the same or a similar question. If the Court decides to grant certiorari to decide this question, one possibility

53. *E.g. Hawkins v. U.S.*, 543 U.S. 1097 (2005) (issuing GVR on rehearing where the petition for rehearing (2004 WL 1672185) concedes that the relevant issue was not raised in the petition for certiorari); *Criston v. U.S.*, 543 U.S. 1117 (2005) (same; petition for rehearing on file with author); *see also* Gressman et al., *supra* n. 7, at 821 ("Questions not presented in the original petition are not foreclosed upon rehearing . . . ."). Because there are many denied petitions for rehearing, and the reasons for a denial are hard to discern, it may be true that the Court does in certain cases apply a forfeiture rule. *Cf. Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996) (suggesting that the Court will consider the equities of the case and could withhold a GVR in cases of manipulative litigation strategy).

54. Courts of appeals hold strikingly divergent attitudes about how to respond to GVRs that are based on issues raised late in the day. *Compare e.g. U.S. v. Taylor*, 409 F.3d 675, 676 (5th Cir. 2005) (holding that, "absent extraordinary circumstances," the court would not consider an issue raised for the first time in a petition for certiorari, despite the Supreme Court's GVR for reconsideration), *and U.S. v. Levy*, 416 F.3d 1273 (11th Cir. 2005) (deeming an issue forfeited where it was raised for the first time in a petition for rehearing in the court of appeals, even though the litigant subsequently obtained a GVR from the Supreme Court on the same issue), *with e.g. U.S. v. Young*, 160 Fed. Appx. 518, 519–20 (7th Cir. 2005) (noting that the litigant raised an issue for the first time in a supplemental petition for certiorari but not mentioning the possibility of forfeiture), *and U.S. v. Drewry*, 133 Fed. Appx. 543, 544 (10th Cir. 2005) (similar, where issue was raised for the first time in the petition for certiorari).

would be for the Court simply to deny certiorari in all of the cases besides the one given plenary consideration. But that is not the usual practice. Rather, the Court holds the rest of the petitions. Still more petitions might come in while the plenary case is pending, and these too are held.[55] Then, once the plenary decision is announced, the Court will GVR those cases that might be impacted and deny certiorari in those that clearly are not.

From time to time, the Court denies a petition that could have been a candidate for a hold. The denial of certiorari makes the case final, such that the petitioner cannot benefit should the plenary case later come out in his favor. To avoid this fate, the petitioner can seek rehearing and try to persuade the Court that the petition should be held pending the plenary case. If the Court agrees, it can vacate the prior denial of certiorari and GVR when the plenary decision comes down, assuming it comes down in a way that might help the petitioner.

As with missed GVRs, these cases also seem, in the main, fairly easy to justify. If the Court is going to hold cases that might be affected by a forthcoming decision, it should do so in a consistent way. It seems unfair that similarly situated petitioners should be treated differently. And this is especially true when the cause is simply that the Court's internal mechanisms for coordinating cases let one slip through the cracks. (As before, note that the Court might not be at fault here: The denied petition might not have focused on the issue that becomes crucial only after the grant of certiorari in another case. The petitioner might not be at fault either, especially if his petition for certiorari was denied very soon after the grant in the plenary case, so that there was no reasonable opportunity to point out the relationship between the cases. Again, the point is just that one could imagine the Court considering these sorts of equitable

55. For descriptions of the Court's hold practices, see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067, 1109–31 (1988), and Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5 (1983). Some petitions for certiorari expressly request a hold rather than plenary consideration. *E.g.* Pet. for Writ of Cert., *U.S. v. Praylow*, ___ U.S. ___, 131 S. Ct. 1467, 2010 WL 3501270 (Sept. 7, 2010); Pet. for Writ of Cert., *Sonic Automotive v. Watts*, ___ U.S. ___, 131 S. Ct. 2872, 2010 WL 3452212 (Aug. 31, 2010).

factors. It would be desirable for the Court to state its policy expressly.)

C. Resurrected Cases

The final category, and the most difficult, involves resurrected cases. These are cases in which certiorari was denied—and thus finality apparently attached—but certiorari was later granted in a case presenting a related question. At the time certiorari was denied, in other words, there was no basis for either a hold or a GVR, as there was no plenary case presenting the same issue.

Granting rehearing in this type of case is at least potentially problematic. It happens all the time that a petition for certiorari is denied and then, sooner or later, the Court determines to decide the very question presented by the earlier petition. Circuit splits and other serious legal uncertainties can persist for years, with numerous denied petitions for certiorari, until the Court is finally moved to settle the issue.[56] Granting rehearing in light of such later developments pits the value of repose against the desire to govern like cases by like law. At what point is a matter finally closed?

The balance struck by current practice seems sensible enough. The magnitude of the threat to repose depends on the length of the period for upsetting the apparent finality that accompanies the denial of certiorari. Under the Court's current rules, that period is only twenty-five days,[57] which seems minor given the lifespan of a typical case. Thus the downside is limited. There is, moreover, an important affirmative advantage in allowing a brief window for reviving cases that are otherwise final. One might initially think that resurrection rehearings cannot plausibly be blamed on any sort of defect in the Court's case management procedures: After all, no case presenting related issues had been granted or decided when the petition was

56. *E.g. Vaden v. Discover Bank*, 556 U.S. 49, __, 129 S. Ct. 1262, 1270 (2009) (citing conflicting lower court opinions stretching back over more than fifteen years); *Smith v. City of Jackson*, 544 U.S. 228, 230 (2005) (deciding the important question of whether a disparate-impact theory was available under the Age Discrimination in Employment Act, which was enacted in 1967).

57. Sup. Ct. R. 44.2; *supra* text accompanying nn. 31–32.

denied, so there was no occasion for a GVR or hold. But that is not exactly right. Consider *Melson*, the recent grant of rehearing mentioned at the outset.[58] The Supreme Court originally denied certiorari in *Melson* on October 5, 2009. Then, at the conference of October 9, the Supreme Court granted certiorari in *Holland v. Florida*,[59] another Eleventh Circuit habeas case that raised a similar issue. As discussed above, the Court often realizes that multiple pending petitions raise related issues and processes them in a coordinated way, granting one case and holding others. One can easily imagine a scenario in which the *Melson* petition for certiorari was not denied on October 5 but was considered together with *Holland*. That did not happen, of course. This failure does not necessarily reflect any negligence on the part of the Court or the parties. Still, it does seem that this kind of near miss would not occur under a more perfect system of coordination. Thus, one virtue of permitting a short window for reconsideration after the denial of certiorari is that it provides a rough means of remedying the problem of petitions that pass in the night.

And yet the nature of things is that, wherever one draws the line, there will be cases on the other side of it that call out for attention. Sometimes a case may be so compelling that special treatment is warranted despite the need for finality and the value of preserving bright lines. Perhaps this is why the Court has asserted the power to accept an untimely petition for rehearing.[60] The power had never been exercised freely and, over the course of the last few decades, it had fallen into disuse.[61] But then in April 2011 the Court granted a stay of execution and simultaneously granted leave to file an untimely petition for rehearing in *Foster v. Texas*.[62] (The next month, the Court

58. *See* text accompanying n. 13, *supra*.

59. ___ U.S. ___, 130 S. Ct. 398 (2009). The order granting certiorari in *Holland* was issued on October 13, 2009, *see id.*, but the Court's online docket shows that the case was considered at the October 9 conference. (The Court's online docket is available at http://www.supremecourt.gov, where one can highlight "Docket" on the main page and then click "Docket Search" to reach a search box.)

60. *See* text accompanying nn. 34–37, *supra*.

61. *See* Gressman et al., *supra* n. 7, at 813 (opining that the Court has "decided no longer to grant out-of-time petitions for rehearing even for the most equitable of reasons" but acknowledging uncertainty).

62. ___ U.S. ___, 131 S. Ct. 1848. It was not the first time the Roberts Court had dusted off a nearly forgotten special procedure. *See e.g. In re Davis*, ___ U.S. ___, 130 S.

denied the petition for rehearing.[63]) It seems unlikely that the Court is back in the business of permitting untimely petitions for rehearing with any sort of regularity. But time, which is after all our chief concern here, will tell.

IV. CONCLUSION

Litigation must at some point come to an end. For purposes of applying new legal developments, the denial of a petition for certiorari usually marks the end. Occasionally the Supreme Court will grant a reprieve in the form of rehearing after denial of certiorari. This action is relatively rare, but it holds some unexpected interest both theoretically and practically. The Court's rehearing practice involves a delicate balance of economy, equality, accuracy, and repose. It also shows that something as seemingly mechanical as the date of finality is not influenced only by chance but also by judicial choice, namely the Court's decisions to hold petitions for certiorari on its docket while the legal landscape changes and, sometimes, to revive a case that had been left behind.

Ct. 1 (2009) (employing "original habeas" procedure in a capital case for the first time in several decades).

63. ___ U.S. ___, 131 S. Ct. 2951 (2011). Foster sought rehearing on the ground that his case could be affected by a case in which the Court had granted certiorari shortly after his twenty-five day period for seeking rehearing expired. Pet. for Rehg. of Order Denying Pet. for Writ of Cert., *Foster v. Tex.*, No. 10-8317, http://sblog.s3.amazonaws.com/wp-content/uploads/2011/04/Foster-rehearing-petition.pdf (accessed Sept. 1, 2011; copy on file with Journal of Appellate Practice and Process). The Court's online docket indicates that the potentially relevant case, *Maples v. Thomas* (No. 10-63), was set to be heard during the Court's following term. The Court could have held Foster's petition for rehearing until *Maples* was decided, but it chose not to do so. One cannot say whether the Court determined that *Maples* would not affect the result in Foster's case or whether it simply decided that it was inappropriate to postpone finality in order to find out.

APPENDIX

This Appendix presents two tables showing cases, from 1965 to present, in which the Supreme Court initially denied certiorari and then, on rehearing, vacated and remanded in light of a new legal development.* The list of cases, which was generated through keyword searches of electronic databases, should be at least reasonably comprehensive, but I cannot exclude the possibility of having missed some cases.** In none of these cases did the Court grant an untimely petition for rehearing.

Because many rehearing GVRs were triggered by *United States v. Booker*, those are separated out and presented on their own table in a slightly different format.

* There were a few cases in which the Solicitor General apparently first disclosed some potentially relevant fact in responding to a petition for rehearing. *E.g. Schipani v. U.S.*, 385 U.S. 372 (1966) (resulting in the decision reported as *U.S. v. Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968), which notes that "[t]he Supreme Court, upon being informed by the Solicitor General that the defendant . . . was a participant in a number of conversations which had been electronically monitored by agents of the Federal Bureau of Investigation and which led to the use of tainted evidence against the defendant, vacated the defendant's conviction . . . and remanded," *id.* at 45). These confession-of-error situations are not included here. Also excluded are cases in which the original disposition was not a denial of certiorari but was instead a decision on the merits. *E.g. Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976) (affirming by reason of an equally divided court), *vacated on rehearing*, 433 U.S. 903 (1977) (remanding for reconsideration in light of a subsequent case).

The decision to start with 1965 is not completely arbitrary. In the 1960s the Court was in the midst of gradually transitioning from implementing intervening decisions through summary reversals to using GVRs. *See* Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 836–38 (1983). Because the GVR is the relevant device today, it makes some sense to begin the study at approximately the time when GVRs were becoming more common.

** The following searches were run in the Supreme Court databases in both Lexis and Westlaw: (1) "petition for rehearing is granted" or "petition for rehearing granted" or "upon consideration of the petition for rehearing"; (2) "vacat! /s remand! /s (proceedings or consideration) and rehearing /s grant!"; and (3) "rehearing /s vacat! /p remand! /p petition." Multiple searches were used because the language used in rehearing orders is not always identical (perhaps because the orders are too infrequent to acquire a uniform boilerplate format). The risk that I have missed a case increases the further back one goes, because the Court's summary disposition practices were not always as routinized as they have become.

Table 1
Cases GVR'd on Rehearing (excluding *Booker* Cases)

Case Type*	Case	GVR Date	Cert. Denial Date	Trigger Case and Cert. Date	Trigger Case Argued	Trigger Case Decided
Resurr.	Melson v. Allen, 130 S. Ct. 3491	6/21/10	10/5/09	Holland v. Fla. 10/13/09	3/1/10	6/14/10
MGVR	Friend v. U.S., 517 U.S. 1152	4/22/96	1/22/96	Bailey v. U.S. 4/17/95	10/30/95	12/6/95
MHold	Fuentes v. U.S., 516 U.S. 1022	12/11/95	5/30/95	Bailey v. U.S. 4/17/95	10/30/95	12/6/95
MGVR	Adams v. Evatt, 511 U.S. 1001	3/28/94	6/14/93	Sullivan v. La. 10/19/92	3/29/93	6/1/93
Resurr.	Hitchcock v. Fla., 505 U.S. 1215	6/29/92	10/15/91	Espinosa v. Fla. 6/29/92	n/a**	6/29/92
MGVR	West v. N.W. Airlines, 505 U.S. 1201	6/22/92	6/8/92	Morales v. TWA 11/27/91	3/3/92	6/1/92
Resurr.	Booker v. Miss., 472 U.S. 1023	6/24/85	10/1/84	Caldwell v. Miss. 10/9/84	2/25/85	6/11/85
Resurr.	Leverson v. Conway, 472 U.S. 1014	6/17/85	10/29/84	Williams v. Vt. 12/10/84	3/19/85	6/4/85
MGVR	Cal. v. Howard, 469 U.S. 806	10/1/84	4/30/84	Cal. v. Beheler 7/6/83	n/a**	7/6/83
Resurr.	Simmons v. Sea-Land Servs., 462 U.S. 1114	6/13/83	10/12/82	Pallas Shipping v. Duris 11/15/82	4/25/83	5/23/83
Resurr.	Fla. v. Rodriguez, 461 U.S. 940	5/23/83	5/26/81	Fla. v. Royer 11/30/81	10/12/82	3/23/83
Resurr.	Harris v. Reederei, 451 U.S. 9654	5/4/81	10/1/79	Scindia Steam v. De Los Santos 5/12/80	12/1/80	4/21/81
MHold	Lee Way Motor v. Resendis, 431 U.S. 952	6/6/77	5/24/76	E. Tex. Motor v. Rodriguez 5/24/76	1/10–11/77	5/31/77
Resurr.	Place v. Weinberger, 426 U.S. 932	6/14/76	11/25/74	Brown v. GSA 5/27/75	3/1–2/76	6/1/76
Resurr.	McKenzie v. Director, 408 U.S. 916	6/26/72	11/22/71	McNeil v. Director 12/20/71	4/20/72	6/19/72

* Resurr. = resurrected; MHold = missed hold; MGVR = missed GVR.

** *Espinosa* and *Beheler* were summarily reversed.

Table 1 (continued)
Cases GVR'd on Rehearing (excluding *Booker* Cases)

Case Type	Case	GVR Date	Cert. Denial Date	Trigger Case and Cert. Date	Trigger Case Argued	Trigger Case Decided
MGVR	Balistrieri v. U.S., 395 U.S. 710	6/16/69	4/21/69	Alderman v. U.S.; Giordano v. U.S. 1/29/68; 3/24/69	10/14/68; n/a***	3/10/69; 3/24/69
MHold	Jones v. U.S., 392 U.S. 299	6/10/68	10/9/67	Bruton v. U.S. 10/9/67	3/11/68	5/20/68
Resurr.	McBride v. Smith, 390 U.S. 411	3/18/68	3/29/67	Schneider v. Smith 10/9/67	12/12–13/67	1/16/68
Resurr.	Forgett v. U.S., 390 U.S. 203	3/4/68	2/28/66	Haynes v. U.S. 6/12/67	10/11/67	1/29/68
MGVR	O'Connor v. Ohio, 382 U.S. 286	12/13/65	10/11/65	Griffin v. Cal. 6/22/64	3/9/65	4/28/65

*** *Giordano* was summarily vacated.

Table 2
Cases GVR'd on Rehearing in Light of *Booker*[*]

Case	GVR Date	Cert. Denial Date
Hawkins v. U.S., 543 U.S. 1097	**Jan. 24, 2005**	**June 21, 2004**
Lauersen v. U.S., 543 U.S. 1097	**Jan. 24, 2005**	**May 17, 2004**
Rideout v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 28, 2004**
Jimenez-Velasco v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 14, 2004**
Epps v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 14, 2004**
Van Alstyne v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 21, 2004**
Carbajal-Martinez v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 21, 2004**
McDonnell v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 14, 2004**
Pearson v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 21, 2004**
Salas v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 21, 2004**
Criston v. U.S., 543 U.S. 1117	**Jan. 24, 2005**	**June 21, 2004**
Campbell v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 21, 2004**
Valadez Soto v. U.S., 543 U.S. 1117	**Jan. 24, 2005**	**June 21, 2004**
Newsome v. U.S., 543 U.S. 1116	**Jan. 24, 2005**	**June 14, 2004**

* *Blakely* was decided on June 28, 2004. Certiorari was granted in *Booker* on August 2, 2004; it was argued on October 4, 2004, and decided on January 12, 2005. The fourteen cases in this table are those in which the Supreme Court denied certiorari very shortly before (or on) June 28, 2004, the disappointed litigants timely filed petitions for rehearing in light of *Blakely*, and then the Court granted rehearing after *Booker* was decided.

These *Booker*-rehearing GVRs are difficult to characterize. They might be called missed holds on the ground that the petitions for certiorari should have been held pending *Blakely* and then GVR'd. But I believe it is better to consider them resurrection cases. First, the Court generally did not hold and GVR federal cases in light of *Blakely*. Second, a remand in light of *Blakely*, which concerned state sentencing, would not have entitled the petitioners to relief; they obtained relief only because the finality of their cases was extended past the decision in *Booker*. *See supra* n. 27.

Some of these cases involved petitions covering multiple lower court judgments. *See e.g. Newsome v. U.S.*, 543 U.S. 1116 (2005) (more than ten lower court cases); *see also* Sup. Ct. R. 12.4 (allowing use of a single petition for certiorari to cover multiple judgments from the same court involving closely related legal issues). Thus, if the lower court judgment were treated as the unit of analysis, the number of rehearings would be higher.