SUPREME COURT OF THE UNITED STATES

No. 25–5

EX PARTE CHARLESKANEKOA

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[July 19, 2025]

Petitioner has neither filed a brief on the merits within 5 days of the order granting the writ of certiorari, as required by Rule 23.1, nor requested an extension of time. Petitioner has declined an offer of a further extension. The writ of certiorari is accordingly dismissed.

CHIEF JUSTICE INSLEE, concurring.

We granted certiorari to decide whether the imposition of a maximum sentence violated the Eighth Amendment given the criminal conduct here. Up until the merits stage, petitioner did everything right. When we granted certiorari, petitioner had suddenly lost interest in pursuing this case by not filing a brief on the merits, as required by Rule 23.1. Failing to argue the merits is akin to failure to prosecute in the lower courts, which is subject to dismissal. See Fed. Rule Civ. Proc. 41(b). For us, failing to argue the merits presents adversity and "Case or Controversy" problems, alongside it being required by our rules. See, *e.g.*, *Baker* v. *Carr*, 369 U. S. 186, 204 (1962) ("concrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"). The Court therefore correctly and understandably dismisses the writ of certiorari, and I concur. I write to highlight how review through certiorari is often conflated with the normal appeals process.

INSLEE, C. J., concurring

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At first glance, cases that get reviewed by certiorari and appeal look the same: A party asks an appellate court to review the case below and render a favorable judgment. But there are a few key differences between certiorari review and an appeal.

To start with, reviewing a case on certiorari is discretionary. This Court chooses if it wants to hear a case, or said differently, it can decline to hear a case. Because of the discretionary nature, a case on certiorari runs in two phases: (1) the petition or "cert" stage where we decide whether to hear a case; and then (2) the merits stage where we consider the merits and the parties fight their side. A party seeking review on certiorari must first tell us why this Court should hear its case before briefing and arguing the underlying merits. We grant to hear a case on certiorari "only for compelling reasons." See this Court's Rule 9. Rule 9 spells out indicative characteristics of reasons why this Court may grant certiorari: Lower court judges reach different conclusions in similar cases (a judge split), or a petition raises important constitutional questions that should be decided by this Court. Notice how there is nothing that says "the District Court made an error." Certiorari is not an ideal pathway to seek review just because a party believes a judge made an error. It will most likely lead to the case not being heard because, again, we only consider a case on certiorari only for compelling reasons. There being an error below is not one of those reasons.

That is not to say that an aggrieved party must accept defeat because a single judge made an error. An appeal is different from certiorari. In most cases, an appeal can be taken as of right. That means—unlike discretionary review under certiorari—this Court must take up the case. An appeal as of right obliges the Court to hear a case, full stop. The Court cannot decline to hear it, nor does the Court have any threshold considerations before taking up a case (assuming jurisdiction requirements are met). Once a party

tells this Court it has jurisdiction to hear a case on appeal, this Court must hear the case. And an appeal does not run in two stages unlike a certiorari case (although it can). To initiate an appeal, a party must file a notice of appeal in the District Court. See this Court's Rule 17.1. Then, the parties brief and argue the merits, and the Court reaches its decision. See this Court's Rule 17.10 ("After considering the documents . . . the Court may dispose summarily of the appeal on the merits"). There is no cert stage in an appeal where a party must say why the Court should hear the case before deciding the underlying core merits. And even more importantly, we can decide an appeal holistically. This means that, on appeal, we can review and consider an entire case or order. Contrast this certiorari, where we usually only decide a singular question brought by a party. Since an appeal allows this Court to look at the entirety of the case, it is an ideal pathway for an aggrieved party to seek review (like an error review) rather than through certiorari.

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The present case involves an Eighth Amendment "Cruel and Unusual Punishment" claim. After roleplaying flatulence in a connected criminal case, the presiding magistrate judge initiated a contempt proceeding. The magistrate judge ultimately found Petitioner guilty of criminal contempt and sentenced him to the maximum sentence of 12 hours under F.C.C. §1341. Petitioner then filed a petition for a writ of certiorari seeking review of the District Court's judgment. In essence, he argued that criminal sentences must be proportional "to both the severity of the offense and the offender's criminal record." Pet. 6. After granting certiorari, petitioner lost interest in pursuing this case.

Presumably, petitioner may have lost interest in this case because of fatigue. And that problem may have begun before petitioner even filed his petition. Recall that we run certiorari cases in two stages: The cert stage and the merits

stage. This means that to win his case the petitioner must—at a minimum—file two separate documents arguing two distrinct things: Why the Court should hear the case, and then the underlying merits itself. For the petitioner, the former comes through the petition and the latter comes through briefs.

For the most part, petitioner writes his petition for certiorari like he is in the merits stage—like a brief on the merits. So too was the Government's *amicus* brief. But at that point, we were not at the merits stage yet, we were in the cert stage. After granting certiorari, petitioner has already expended large amounts of time and research to his petition, that he is fatigued to produce a simple merits brief. Writing two separate documents could have been avoided if petitioner sought review through appeal rather than through certiorari.

And there is another. Because an appeal allows us to review and look at the *whole* case, we could have looked for other issues in the case too, not just petitioner's Eighth Amendment question that he presented. Take this: Federal Rule of Criminal Procedure 42 governs criminal contempt. Suppose Rule 42(b), which governs summary contempt, was used in this case. When looking at the whole case, there are clear issues present. First, Rule 42(b) explicitly forbids magistrate judges to punish a person under summary contempt, nor does any statute authorize a magistrate judge to do so. But that is exactly what happened below. The magistrate judge held petitioner in contempt which ultimately led to his conviction. Second, Rule 42(b) requires a contempt order to "recite the facts" relating to the earlier conduct. Fed. Rule Crim. Proc. 42(b). As is apparent here, Rule 42(b) was violated. And because courts must "follow established procedures," see *A.A.R.P.* v. *Trump*, 604 U. S. ____ (2025) (Alito, J., dissenting), those are clear issues we could have considered on appeal. But because petitioner brought this case on certiorari, we were only limited to considering the Eighth Amendment question he presented.

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I do not fault petitioner for overlooking these nuanced distinctions. Almost all of the cases that have come before us were through certiorari. It is the same for our real-life counterpart. But our community does not have an intermediate appellate court where appeal as of right commonly occur. Our real-life counterpart can take an appeal as of right in the Courts of Appeals, and then certiorari review in the Supreme Court. We have no such courts of appeals. The Supreme Court in our community is the only appellate court. It necessarily follows then that our job includes similar purposes to that of the Courts of Appeals, alongside being reflective of the real-life Supreme Court. It is time for this Court to rise to that occasion, and for litigants to utilize that appellate function.

Litigants can start using it now. Current law on the books authorizes and enumerates numerous instances where criminal defendants and the Government can take an appeal by right with the most notable being the Judicial Procedure and Criminal Justice Enhancement Act (the Act). See, *e.g.*, §§ 402 ("A defendant may appeal . . . a final judgment or order entered by a district court of the United States in a criminal case."); 403(a) ("The government may appeal . . . a decision, judgment, or order entered by a district court of the United States in a criminal case, dismissing an indictment or information or terminating a prosecution in favor of a defendant on one or more counts."); 403(b); 404(a) ("defendant may file a notice of appeal . . . for review of a final sentence imposed for a felony if the sentence includes a fine or a term of imprisonment or a term of probation higher than the maximum established by law or by the Sentencing Commission."); 404(b) ("he government may . . . file a notice of appeal . . . for review of a final sentence imposed for a felony if the sentence includes a fine or a term of imprisonment or a term of probation higher than the maximum established by law or by the Sentencing Commission."). For example, consider

Section 402 of the Act. Section 402 allows a criminal defendant to appeal a final judgment or order to the Supreme Court. If a criminal defendant does not like their final judgment or order, he can ask us to review it and give it another shot. To do so, he must first file a notice of appeal in the District Court and then file his brief and argument in the Supreme Court. See this Court's Rule 17.

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Certiorari is considered the normal pathway for review in this Court. There is nothing wrong with that. But it currently means that appeals are underutilized when there is overwhelming value to them. It should be utilized more by criminal defendants and the Government alike. It offers significant value to the parties that use them, and it enables our community's judicial economy to become active and flourish. This case might have been better off going through the appeals process rather through certiorari. In going through certiorari, petitioner fatigued himself of legalese which ended off with him losing the case on his own accord.