Jenkins v. State of Florida, 1980
Preliminary Remarks

Click here to skip these preliminary remarks and goto the start of the decision rendered by the court in the Jenkins case.

These preliminary remarks provide an overview of this decision's significance and the fraud behind it.

The Decision's Significance

The Jenkins decision set a precedent for per curiam affirmed (PCA) decisions by Florida's courts of appeal that affirm trial court judgments *without providing any reasons or justification.*

Such a decision was rendered in the case documented here, dismissing the appeal without saying a word about the evidence and authority pertaining to the "fraud upon the court" that was practiced upon the Appellant during the trial court proceedings or the fraud and undue influence that was practiced upon the Appellant's father Irving on the day Irving died, while Irving was under a Do Not Resuscitate order and being administered morphine.

Twenty years after the Jenkins decision, The Honorable Monterey Campbell, District Court Judge, Second DCA chaired a Committee on Per Curiam Affirmed Decisions (PCAs) and attributed on page ii of its May 2000 Final Report and Recommendations the following **significance to the Jenkins decision**

> *"I would strongly urge a thorough study of Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) ... No one concerned with and interested in the history and use of PCAs in the jurisprudence of Florida ... can afford not to be knowledgeable of Jenkins."* [1]

PRIOR TO THE JENKINS DECISION, article V, section 3(b)(3) of the Florida Constitution recognized the importance of reviewing a decision that directly conflicts precedent. It did so by assuring that any such appellate decision could be appealed to Florida's Supreme Court [2]

AFTER THE JENKINS DECISION, such a decision could no longer be appealed to Florida's Supreme Court unless the appellate court itself stated that its decision directly conflicted precedent. [3]

This was obviously a "dramatic" change, and the court responsible for it said so. [4]

The use of PCAs as a means to dispose of appeals without opinion has become so frequent that Florida court statistics for 1998-1999 show that nearly two-thirds of all civil, criminal and administrative appeals handled by Florida appellate courts that year were PCA'd, affirmed without opinion or any statement of reasons. [5], [6]

This use of PCAs is opposed by the ABA, which resolved that each case should receive a decision which, at a minimum, sets out the operative facts of the case, the issues presented, and the legal basis of ruling. [5]

The Decision's Fraud

The Jenkins decision is the culmination of a change that was made in 1980 to article V, section 3(b)(3) of Florida's constitution.[7] That change was proposed and promoted by the very same court that subsequently interpreted the change.[8]

In Jenkins, Justice Sundberg explains the change as follows:

> *"**PRIOR TO April 1, 1980** [ie. prior to the change] ... the provisions of section 3(b)(3) relating to review of conflicting decisions react as follows: May review by certiorari any decision of a district court of appeal ... that is in DIRECT CONFLICT with a decision of any district court of appeal or of the supreme court on the same question of law ...."* [9] (emphasis added)

and

> *"**POST April 1, 1980,** that section reads with respect to review of conflicting decisions: May review any decision of a district court of appeal ... that EXPRESSLY AND DIRECTLY CONFLICTS with a decision of another district court of appeal or of the supreme court on the same question of law ...."* [10] (emphasis added)

According to the above explanation, the change that was introduced in 1980 into the Florida constitution

1. addressed the review by certiorari of any decision of a district court of appeal ... that is in *DIRECT CONFLICT* with a decision of any district court of appeal or of the supreme court on the same question of law.
2. substituted *"EXPRESSLY AND DIRECTLY CONFLICTS"* for *"DIRECT CONFLICT"*.

But what does the change from *"DIRECT CONFLICT"* to *"EXPRESSLY AND DIRECTLY CONFLICTS"* mean?

This is the crux of the court's fraud.

The meaning of this change in wording is not obvious. It is not obvious because the the words *"EXPRESS"* and *"DIRECT"* are synonymous, at least according to the definition of *"EXPRESS"* in Black's Law Dictionary

> *"The word [EXPRESS] is usually contrasted with 'implied'". It means "Clear; definite; explicit; plain; DIRECT; unmistakeable; not dubious or ambiguous ... and not left to inference"* (emphasis added)

Other dictionaries, including Webster's, offer a similar definition for the word *"EXPRESS"*. [11]

"EXPRESS" does have another definition, and Justice Sundberg exploits this ambiguity by ignoring the above definition and citing another instead

> *"The dictionary definitions of the term EXPRESS include 'to represent in words'"* [12] (emphasis added)

Justice Sundberg then concludes that the single word *"AFFIRMED* does not comport with this

definition." [13]

Why wouldn't it? Justice Sundberg does not explain why.

And why wouldn't it comport with the other, principal meaning of the word *"EXPRESS"*?

Why can't a "Per Curiam Affirmed" decision be in *"DIRECT"* and *"EXPRESS"* conflict with another decision?

For example, why wouldn't a Per Curiam Affirmed decision that denies the appeal of a party that is wrongly removed from the courtroom using the witness sequestration rule be in *"DIRECT"* and *"EXPRESS"* conflict with other decisions that grant appeals on such grounds or clearly state that an appeal should be granted on such grounds? [14]

Because Justice Sundberg says so? Because Justice Sundberg says that such a Per Curiam Affirmed decision can never be in *"DIRECT"* and *"EXPRESS"* conflict with any other decision? *Never*?

What Justice Sundberg and his colleagues did is FABRICATE a precedent that enables appellate courts to cut off without explanation further review of decisions which are in direct conflict with precedent.

Is this how the law should operate? Obviously not. But this is how the law now operates in the majority of appeals.

In summary, the crux of the fraud that is exposed here is that members of the Florida Supreme Court deliberately misled voters who were not familiar with their intentions by not placing on the ballot wording that made clear those intentions, namely their intent to subsequently ignore appeals of per curiam affirmed decisions that were entered without a written majority opinion.

Unfortunately, requiring the courts to provide a written explanation for their decisions would not stop them from committing similar frauds, such as writing fraudulent opinions. Click here for a newspaper account of such an opinion that was authored by former Montana Supreme Court Justice John Sheehy.

Status: Precedential

Citations: 385 So. 2d 1356

Docket Number: 59087

Judges: Sundberg

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385 So.2d 1356 (1980)

Philip H. JENKINS, Petitioner,
v.
STATE of Florida, Respondent.

No. 59087.

Supreme Court of Florida.

June 26, 1980.

*1357 Edward A. Garrison of Kohl, Springer, Springer & Garrison, Palm Springs, for petitioner.

Jim Smith, Atty. Gen., and John D. Cecilian, Asst. Atty. Gen., West Palm Beach, for respondent.

SUNDBERG, Justice.

We here address the question whether this Court currently has jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. We answer the question in the negative.

Review of the decision of the District Court of Appeal, Fourth District,[*] was sought in this cause by notice to invoke the certiorari jurisdiction of this Court filed April 11, 1980. By his application petitioner asserts that the decision of the district court is in conflict with decisions of other districts or with Supreme Court decisions upon the issue of whether uncorroborated hearsay information from a confidential informant, who had not divulged the source of his information, was sufficient to establish probable cause for a warrantless search of a vehicle. Prior to trial, petitioner moved to suppress evidence seized in a search of his vehicle. The trial court denied the motion to suppress. Petitioner subsequently entered a plea of nolo contendere preserving his right to appeal the trial court ruling. On review the district court affirmed the ruling of the trial court without opinion. On member of the three-judge panel dissented to the decision of the majority in a comprehensive opinion which recited the facts extensively and concluded that under prevailing law the search violated petitioner's fourth amendment rights.

After ratification by the people of this state at an election held on March 11, 1980, article V, section 3 of the Florida Constitution pertaining to the jurisdiction of the Supreme Court was substantially revised. In particular, section 3(b)(3) underwent a dramatic change. Prior to April 1, 1980 (the effective date of the amendment), the provisions of section 3(b)(3) relating to review of conflicting decisions read as follows:

> May review by certiorari any decision of a district court of appeal ... that is in direct conflict with

> a decision of any district court of appeal or of the supreme court on the same question of law... .

Post April 1, 1980, that section reads with respect to review of conflicting decisions:

> May review any decision of a district court of appeal ... that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law....

(Emphasis supplied.)

The constitutional amendment must be viewed in light of the historical development of the decisional law extant at the time of its adoption and the intent of the framers and adopters. Our inquiry must begin with the amendment to article V of the Florida Constitution occurring in 1956, whereby the district courts of appeal were created. In grappling with the significance of the revised jurisdiction of this Court, a tone was set early on. In *Ansin v. Thurston,* 101 So.2d 808, 810 (Fla. 1958), speaking through Justice Drew, the Court said:

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. *Diamond Berk Insurance Agency, Inc. v. Goldstein,* Fla., 100 So.2d 420; *Sinnamon v. Fowlkes,* Fla., 101 So.2d 375. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions *1358 as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

This was followed by *Lake v. Lake,* 103 So.2d 639 (Fla. 1958), where Justice Thomas again reviewed the history of and purposes for the 1956 amendment to article V and held that in order to fulfill those purposes, a "per curiam" decision without opinion of a district court of appeal would not be reviewed by this Court upon petition for certiorari based on "direct conflict" jurisdiction except in those rare cases where the "restricted examination required in proceedings in certiorari [revealed] that a conflict had arisen with resulting injustice to the immediate litigant." *Id.* at 643. Some seven years later, however, in an opinion which observed that the rule of *Lake v. Lake* had been eroded *de facto* if not *de jure* by subsequent actions of the Court, a majority of the Court determined that there was jurisdictional power under section 3(b)(3) to review district court decisions rendered "per curiam" without opinion if from the "record proper" conflict with another decision could be discerned. *Foley v. Weaver Drugs, Inc.,* 177 So.2d 221 (Fla. 1965).

In the interim the Court had already concluded that conflict certiorari jurisdiction could be founded on a dissenting opinion to a per curiam majority decision rendered without opinion. *Huguley v. Hall,* 157 So.2d 417 (Fla. 1963). This position was adopted by a majority of the Court without discussion or rationale and has been subsequently followed without amplification of reasoning. *E.g., Autrey v. Carroll,* 240 So.2d 474 (Fla. 1970); *Commerce National Bank in Lake Worth v. Safeco Insurance Co.,* 284 So.2d 205 (Fla. 1973). In the *Commerce National Bank* decision, however, the impediments to relying on the factual statement contained in a dissenting opinion to establish conflict jurisdiction were observed:

> When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based. However, a dissent does not rise to a similar level of dignity and is not considered as precedent; note, for example, that West Publishing Company does not offer headnotes for dissents, regardless of their legal scholarship. By definition, a dissent contains information, interpretations or legal analysis which has been rejected in whole or part, by the majority. It is also possible that the majority accepts matters set forth in the dissent, but for other reasons declines to follow its line of thought. The majority is under no compulsion to respond to a dissent or to set out the measure of their reluctance to agree. The issuance of a per curiam opinion without comment or citation of authority remains the prerogative of the majority.

Id. at 207.

More recently, the wisdom of the jurisdictional policies expressed in *Foley* and *Huguley* have been brought into question by several members of this Court. *See Florida Greyhound Owners & Breeders Association, Inc. v. West Flagler Associates, Ltd.*, 347 So.2d 408, 408 (Fla. 1977) (England, J., concurring; Overton, C.J., concurring specially); *Golden Loaf Bakery, Inc. v. Charles W. Rex Construction Co.*, 334 So.2d 585, 586 (Fla. 1976) (England, J. and Overton, C.J., concurring); *AB CTC v. Morejon*, 324 So.2d 625, 628 (Fla. 1975) (England and Overton, JJ., dissenting).

It was against this jurisprudential backdrop and in the face of a staggering case load that in November, 1979, this Court urged the legislature, meeting in special session, to enact a proposed amendment to *1359 section 3 of article V of the Florida Constitution to limit the jurisdiction of the Supreme Court. Times were not unlike the year 1956 when the challenge confronting the drafters of that amendment to the judicial article was described thus:

> The means and procedure required to accomplish the improvement were difficult, complicated, tedious and onerous.
>
> Yet the determination was not lacking for congestion in the court of last resort had become almost intolerable. The time had come when the court, working at top speed, with cases, except extremely emergent ones, set in the order of their maturity, was hearing arguments as late as fourteen months after the cases were ready for oral presentation.
>
> .....
>
> For about eighteen months after its creation the [Judicial] Council, in periodic meetings, debated and deliberated the method which might most effectively modernize a system that by overloading had ceased to function as it should to assure litigants justice without undue, or even ruinous, delay. The words of Gladstone were often heard: "Justice delayed is justice denied."

Lake v. Lake, 103 So.2d 639, 640-41. The legislature responded through enactment of Senate Joint Resolution No. 20-C, which forms the language of the current section 3 of article V.

At hearings before the legislature and in countless meetings with representatives of The Florida Bar, The Conference of Circuit Judges of Florida, the Appellate Judges' Conference, The League of Women Voters as well as other interested organizations too numerous to recount, members of this Court represented that one of the intents and effects of the revision of section 3(b)(3) was to eliminate the jurisdiction of the Supreme Court to review for conflict purposes per curiam decisions of the district courts of appeal rendered without opinion, regardless of the existence of a concurring or dissenting opinion. These same representations were made consistently to the public at large preceding the ballot on the proposed amendment. There can be little doubt that the electorate was informed as to this matter, because opponents of the amendment broadcast from one

end of this state to the other that access to the Supreme Court was being "cut off," and that the district courts of appeal would be the only and final courts of appeal in this state. With regard to review by conflict certiorari of per curiam decisions rendered without opinion, they were absolutely correct.

The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabr.). The single word "affirmed" comports with none of these definitions. Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the *decision* of the district court of appeal. As stated by Justice Adkins in *Gibson v. Maloney,* 231 So.2d 823, 824 (Fla. 1970), "[i]t is conflict of *decisions,* not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." (Emphasis in original.)

Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court. The application for review in the instant case having been filed subsequent to March 31, 1980, it is therefore dismissed.

ENGLAND, C.J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

*1360 ENGLAND, C.J., concurs specially with an opinion.

ADKINS, J., dissents with an opinion.

ENGLAND, Chief Justice, concurring specially.

A detailed recitation of the relevant history of the 1980 jurisdictional amendment is relevant to an understanding of the majority's conclusions as to its applicability in this case.[1]

In his 1978 Report to the Legislature, then Chief Justice Ben Overton recommended the creation of a commission, having broad based participation, to determine the need for an additional district court and to consider district court rather than supreme court review of workmen's compensation cases. In the summer of 1978, newly-elected Chief Justice Arthur England implemented Justice Overton's recommendation by appointing an Appellate Structure Commission chaired by Justice Overton and composed of district, circuit and county court judges, legislators, laymen and members of the bar. Chief Justice England expanded the scope of the commission's inquiry, however, to include a review of the entire appellate system in light of the 1956 goal "to ensure that the district courts of appeal are courts of final appellate review as contemplated by Article V of the Constitution."

In response to its expanded duty, the commission analyzed each category of the supreme court's jurisdiction to determine if cases in those categories were significant or important enough to justify the attention of a then overloaded state high court. Tentative votes, taken at the October 12, 1978 meeting, indicated the commissioners' view that, ideally, mandatory jurisdiction should be restricted to death penalty cases, decisions invalidating statutes or construing the constitution, and bond validation proceedings. Nonetheless, after six months of work, the commission rejected constitutional change to achieve this goal and recommended only that the supreme court's jurisdiction be modified by statute and by rule.

After weeks of intense discussion within the Court and numerous internal drafts of proposed changes, the

chief justice, on behalf of a unanimous court, presented virtually every aspect of the commission's recommendations for appellate court reforms to the 1979 legislature. The most notable exception was the Court's rejection of the commission's proposal to alter the jurisdiction of the supreme court solely by rule and by statute. The Court viewed the commission's data as conclusive of the need for a constitutional adjustment, and it refused to deny the voters of Florida the right to refine the jurisdictional role which the constitution had created in 1956.

Statistics developed by the commission had demonstrated, for the first time, that the Court's growing problems were not (as generally believed) attributable to the Court's liberality in accepting cases for review, but rather to the effects of its constitutionally assigned mandatory jurisdiction and the numbers of cases being brought as a result (among others) of *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965). The commission found that "the Court has in reality exercised great restraint in accepting for review the cases over which it has any freedom of choice" and has "granted [discretionary petitions] in less than 5 percent of the cases... ."

The Court proposed a constitutional amendment in April 1979, which was filed by Senator Mattox Hair, chairman of the Senate Judiciary-Civil Committee, as Senate Joint Resolution 714, for consideration at the 1979 regular session of the Florida Legislature. The Court's discretionary jurisdiction under SJR 714 was predicated on district court certifications of decisions in conflict or of questions of great public importance, plus a "safeguard" provision authorizing *1361 the supreme court, on its own initiative, to reach down and obtain for review trial court orders and district court decisions which had substantial importance and required immediate statewide resolution.

The Judicial Council endorsed and supported SJR 714. Under pressure to accept or reject the Court's proposal on very short notice, however, the Board of Governors of The Florida Bar, by a vote of 18 for and 12 against, failed to endorse SJR 714 by the two-thirds vote required by the Board's by-laws. The members of the Board principally objected to SJR 714 because attorney-filed petitions for conflict certiorari review were eliminated, and because the initiative, or so-called "reach down" provision, did not appear to allow attorney-filed suggestions to the Court.

Two Senate Judiciary-Civil Committee hearings were held. Despite the Court's expression of intent to limit severely the exercise of the safeguard or "reach down" provision, that provision was ridiculed by opponents of SJR 714 as "pluck up" power which would destroy the finality of all cases throughout the judicial system. Opposition to SJR 714 also developed from attorneys who expressed a lack of trust in district court judges, or at least in their ability or willingness to recognize, concede, and certify conflicting decisions. At the suggestion of the bill's sponsor, SJR 714 was withdrawn from further consideration during the 1979 regular session, in order to give the Court an opportunity to discuss alternatives with opponents and critics and to seek a consensus substitute by the time of an announced special legislative session in the fall of 1979.

Notwithstanding the fate of SJR 714, the Court gained support for its position that structural change was essential to avoid a potential decline in the quality of its work and its increasing backlogs and delays. Justice Sundberg scheduled a series of meetings with a committee appointed by the president of The Florida Bar, in an effort to review the controversial aspects of the Court's original proposal. A statement of agreed principles was eventually drafted by the bar committee and Justice Sundberg, to advise the bar's Board of Governors and the Court of a consensus that could be reached. This included a proposal to retain discretionary review of written opinions of district courts invoked by attorney-filed petitions asserting decisional conflict. The bar committee made clear the intent to overrule the *Foley* decision regarding conflict, however, by declaring that only an opinion which "articulates a rule of law ..." should qualify for discretionary review.

At the urging of attorney Tobias Simon and others who feared too severe a narrowing of the Court's review authority, the bar committee presented, as an acceptable alternative plan, discretionary review of "decisions of a district court of appeal which substantially affect the general public interest or the proper administration of justice throughout the state" a standard based on the American Bar Association model for constitutionally

unlimited discretionary review.

After the bar's deliberations, Justice Overton reconvened the Appellate Structure Commission to review the bar committee's statement of principles. At their meeting on September 5, 1979, the commission disagreed with the bar committee's preferential guidelines for discretionary review. At the urging of commission member Tobias Simon the commission opted instead for the alternative constitutionally unlimited discretionary review to be restricted by the Court's adoption of rules setting guidelines for its own exercise of discretion.

On September 15, 1979, the bar committee's principles were presented formally to the Board of Governors by the committee's chairman, attorney Benjamin Redding of Panama City. Tobias Simon argued for the alternative, commission-approved approach of constitutionally unlimited discretionary review. The members of the Board of Governors, at the request of Justice Sundberg, agreed to support a Court proposal for constitutional change based either on the committee's principles or the alternative.

*1362 As the Court prepared to submit to the November special legislative session a proposed substitute for SJR 714, the chairman of the American Bar Association's Committee to Implement Standards of Judicial Administration expressed an interest in Florida's court reform effort and chose Tallahassee as the site for the next scheduled ABA Committee meeting. The Committee's national expertise with appellate courts focused, in accordance with the ABA standards, on constitutionally unlimited discretionary review for the supreme court. In discussions with legislative committee members, the Court, and the bar immediately preceding the legislative session, however, the ABA committee members recognized unusual features in the Florida system of which they had not previously been aware. Principal among these was the incredibly large number of appeals (35 per year) filed in death penalty cases, each requiring full record and sentence review. This compared, they noted, with only eight death cases a year in the state with the next highest volume. They also noted the special concern for constitutional conflict resolution jurisdiction, due to the diversity in geographical regions of the state. These and other unique factors, the Committee concluded, adequately explained Florida's proposed deviation from the ABA's model standard of constitutionally unlimited discretionary review.

When the combined Senate-House Judiciary Committees met to consider the Court's new constitutional amendment on the opening day of the three-day November 1979 special session, only two issues in the proposal were very controversial, and these quickly became the focus of attention. The first was the Court's suggestion to remove the constitutional restriction on the selection of supreme court justices, which required appellate district representation on the Court. The other publicly controversial issue concerned review of public utility decisions, most of which were proposed to be transferred from the supreme court for review in the district courts of appeal. The Court's proposal SJR 20-C emerged from committees of both chambers of the legislature in essentially the form suggested by the Court, as derived from the bar committee's statement of principles.

SJR 20-C, as amended, was adopted by the Senate by a vote of 38 to 2 on November 28, together with a companion bill (SB 21-C) to accelerate submission to the voters by allowing the proposed amendment to be considered at the special presidential primary election scheduled for March 11, 1980. Immediately following the vote in the Senate, both measures were certified to the House, substituted for comparable House legislation, and adopted without further amendment by a vote of 110 to 2.

During the period between November 28, 1979, and March 11, 1980, active public support for SJR 20-C was undertaken by six of the seven justices of the supreme court,[2] the governor, the attorney general of Florida, and the organized bar. Endorsements for the proposal were sought and received from the conferences of district court, circuit court, and county court judges, the League of Women Voters, the prosecuting attorneys' association, the sheriffs' association, and numerous newspaper and television editorial boards.

The Florida Bar and the Young Lawyers Section of The Florida Bar developed and disseminated promotional

literature, and provided speakers both for civic clubs and for media discussions and debates. Promotional literature was distributed widely throughout the state, including targeted explanations of the amendment to employees of the state's electric and telephone companies, and to residents of condominium associations.

Articles supporting passage of the amendment, most authored by justices of the Court supporting the amendment, were published in trade publications such as the journals or monthly newsletters of the Florida Bankers Association, the cattlemen's association, the county commissioners' association, the League of Municipalities, and the *1363 like. Television appearances and radio spots were scheduled whenever possible for the justices supporting the amendment, and for others offering public support for its adoption.

Two dominant themes of persuasion were argued by the proponents. First, the amendment would eliminate delay in the supreme court, both by removing from the Court's docket those district court decisions which had no written opinion, and by eliminating all direct appeals to the supreme court from trial courts (except in bond validation cases and cases in which a death penalty had been imposed). Second, the amendment would reduce the cost of litigation by reducing the number of multiple appeals and by making the district courts truly final in the bulk of matters brought to Florida's appellate courts.

Opposition to the amendment developed from a small group of Florida attorneys organized by Tobias Simon as "Floridians against Limited Access," from one current and one former member of the supreme court,[3] and from the public defenders' association. The main efforts of the opponents were to develop newspaper and television editorial support against the amendment, to develop opposition in local bar associations, and to urge public rejection of the amendment through media appearances. Five dominant themes were espoused.

First, it was suggested to the media that the amendment would limit or cut off entirely their access to the supreme court for the resolution of first amendment cases. Second, local bar associations and the public were told that general access to the Court would be curtailed. Third, it was suggested that district court judges would be given the power to prevent review of their decisions by the supreme court. Fourth, it was urged that the Florida Supreme Court should be like the United States Supreme Court and the ABA's model high tribunal, having constitutionally unlimited discretionary review of district court decisions. Lastly, the opponents inferred that the amendment was unnecessary because the Court's caseload was in fact diminishing and the justices traveled too much.

Immediately before the March 11 vote, the 1980 amendment was endorsed editorially by almost every major, daily newspaper in the state. The official vote for passage on March 11 was 940,420 to 460,266 a 67 percent ratio of voter approval.

The significance of the public discussion concerning the amendment is that it provides a frame of reference by which to ascertain the intent of the voters in adopting the amendment.[4] In this case, the public debate and informational literature make abundantly clear that the voters were asked to approve an appellate court structure having these features:

1. a supreme court having constitutionally limited, as opposed to unlimited, discretionary review of intermediate appellate court decisions; and

2. finality of decisions in the district courts of appeal, with further review by the supreme court to be accepted, within the confines of its structural review, based on the statewide importance of legal issues and the relative availability of the Court's time to resolve cases promptly.

ADKINS, Justice, dissenting.

I dissent.

We are embarking on a course which limits our jurisdiction to matters concerning deep questions of law, while the great bulk of litigants are allowed to founder on rocks of uncertainty and trial judges steer their course over a chaotic reef as they attempt to apply "Per Curiam Affirmed" decisions. When the constitutional amendment is considered in light of historical development of the decisional law (as suggested by the majority), we find regression instead of progression. The majority admits that many will not obtain justice for our jurisdiction will be limited to resolving questions of importance to the public as distinguished *1364 from that of the parties. In *Ansin v. Thurston,* 101 So.2d 808, 811 (Fla. 1958), cited by the majority, the Court said:

> [T]here should be developed consistent rules for limiting issuance of the writ of certiorari to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between decisions.

The opinion in *Ansin v. Thurston, supra* was authored by Justice Drew. This interpretation lasted for seven years and then a progressive Court adopted *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965). The rule in *Ansin* had created problems which were resolved in *Foley.* In a special concurring opinion in *Foley,* Justice Drew said:

> Many problems have arisen in the interpretation of amended Article V. But there has been no dispute that under the constitutional plan for the administration of justice at the appellate level in this State the responsibility was placed in this Court to keep the law harmonious and uniform... . We must assume, in the absence of something in the record to indicate a contrary view, that an affirmance of a *decision* of a trial court by a decision of the District Court of Appeal makes the trial court decision the decision of the District Court. So far as the trial judge is concerned and so far as the Bench and Bar who are familiar with the decision of the trial judge are concerned, such judgment is the law of that jurisdiction. I think it would result in utter chaos in the judicial system of this State with three separate District Courts, and the possibility of a fourth in the near future, if it were impossible for this Court to maintain consistency and uniformity of the law in such cases. A different rule of law could prevail in every appellate district without the possibility of correction. The history of similar courts in this country leads to the conclusion *that some of such courts have proven unsatisfactory simply because of the impossibility of maintaining uniformity in the decisional law of such state.*

177 So.2d at 230.

In *Seaboard Air Lines Railroad Company v. Williams,* 199 So.2d 469, 472 (Fla. 1967), Justice Drew reiterated his views, saying:

> In my concurring opinion in *Foley v. Weaver Drugs,* Fla. 1965, 177 So.2d 221, I observed: "I think it would result in utter chaos in the judicial system of this State with three separate District Courts, and the possibility of a fourth in the near future, if it were impossible for this Court to maintain consistency and uniformity of the law in [decisions of such district courts merely affirming without opinion] * * *." What has occurred in this case fulfills that prophecy. I, therefore, concur in the foregoing majority opinion.

Under the construction proposed by the majority we will have well-written uniform *opinions,* but the *decisions* of the five district courts of appeal will be in hopeless conflict.

The majority says there was little doubt "that the electorate was informed" and proceeds to construe a purported constitutional amendment, the terms of which were not placed on the ballot nor were they explained to the public. While discussions with some segments of the public on background and debates concerning the proposed amendment were instructive, nevertheless, what was submitted to the people for

adoption was a statement on the ballot which read: "[p]roposing an amendment to the State Constitution to modify the jurisdiction of the Supreme Court." In discussing the proposed amendment, one news analyst contended:

> The ballot says simply that the proposal would "modify the jurisdiction of the Supreme Court," giving the public little insight into the changes it would make in court appeals procedures.
>
> Given the complex nature of those procedures, few voters understand the issue.

Van Gieson, Reform Sought to Ease Court's Load, Tallahassee Democrat, March 9, 1980 at 5b, col. 1.

*1365 A pamphlet entitled "Constitutional Amendments on Florida Supreme Court Jurisdiction ... to be Considered at March 11, 1980, Election" prepared by Manning J. Dauer and Fred Goddard discussed the content of the change in the constitution as follows:

> The proposed change to Article 5 does not modify the organization of the State Supreme Court. There was a proposal from the Supreme Court to permit all justices of the State Supreme Court to be from the state at large. The legislature, however, retained subsection A of Section 3 which requires at least one of the justices to be from each of the districts in which the state is divided for district courts of appeal. In sub-section B there are a number of modifications as to the jurisdiction of the Supreme Court. The attempt has been made to retain appellate jurisdiction for the most important cases involving new point of law, the death penalty, constitutional questions, affecting the state constitution or that of the U.S., affecting the construction of new statutes passed by the legislature, *affecting disagreements among two or more district courts of appeal,* affecting bond validation, and affecting certain cases certified for review by the district courts of appeal. Also, the jurisdiction of the Supreme Court has been changed in one case category, that is, cases from administrative agencies of the state affecting rates charged to consumers or service provided by the electric utilities and gas and phone companies.
>
> On the other hand, many other types of cases will be cut off with the appeal being exhausted at the level of the district courts of appeal. For example, cases involving life imprisonment will now be constitutionally limited to the level of the appellate district court unless the case involves a constitution question, a new statute, or a disagreement in construction among district courts. Writs of certiorari (requests for appeal) would be much more limited. Appeals from state administrative agencies' decisions would ordinarily stop at the district courts of appeal. The Supreme Court would retain, of course, the right to issue writs of certiorari, writs of habeas corpus, writs of prohibition, writs of injunction, and writs of mandamus when it entertained jurisdiction.
>
> The aim of these and other changes is to reduce the caseload on the Supreme Court. The estimate given by the Court is that instead of handling 3000 cases per year, the changes will permit the reduction of the caseload from 3000 to 2000 or less. At the same time, the citizen will be guaranteed justice by having cases heard more quickly and by appeals being adequately considered at the district court level. Finally, in the categories of new issues, *or in case of disagreement by lower courts,* review is still available at the level of the State Supreme Court.

DAUER, *Amendment to Limit Appellate Jurisdiction of the Florida State Supreme Court,* 62 Pub.Ad. Clearing Service, Univ. of Fla. Civic Information Ser. 2, 4-5, (1980). (Emphasis supplied.)

The proposed amendment was conceived and composed by the justices of this Court. After the proposal was approved by the legislature, it was decided to place the proposed amendment on the ballot at a special election. *See* article XI, section 5(a), Florida Constitution. Hopefully, this special election would create

interest in the voting populace because it was a special presidential primary election in which a popular homestead amendment giving tax relief would also be considered. The substance of the amendment to be placed on the ballot (section 101.151, Florida Statutes), was as follows: "An amendment to the State Constitution to modify the jurisdiction of the Supreme Court." Justices of the Court and others attempted to explain the contents of the proposed amendment to the public, and there were many discussions.

While the discussions relating to the intent of the framers, referred to by the majority, were instructive as to background, nevertheless, there was only one provision submitted to the voters for adoption: "an amendment to the state constitution to modify the jurisdiction of the *1366 supreme court." Any discussions or debate which may have taken place does not change the provision on the ballot that was approved by the voters. *See In Re Advisory Opinion,* 223 So.2d 35, 40 (Fla. 1969). Construing this provision (as placed upon the ballot) under the ordinary rules of construction, the voters gave us absolute discretion in determining whether we had jurisdiction of a particular case.

Also, I disagree with the judgment of the majority that language and expressions found in a dissenting or concurring opinion cannot support jurisdiction. The effect of the 1980 amendment is to give us jurisdiction for review of a decision that *expressly* and directly conflicts with a decision of another district court of appeal. A "Per Curiam Affirmed" is a decision, but no decision can be rendered unless three judges of the district court of appeal participate. Art. V, § 4(a), Fla. Const. (1972). A concurring or dissenting opinion is used by trial judges throughout the state in determining the effect of a "Per Curiam Affirmed" decision. We should glance through the window of our ivory tower and attempt to adjust any confusion in the law which may arise by virtue of statements made in a concurring or dissenting opinion, as it is an integral part of the decision of the district courts of appeal.

There will be occasions when a "Per Curiam Affirmed" decision will cite another case. In some instances the cited case had admittedly been in conflict with other decisions, but, because of the failure of the parties to seek our jurisdiction, the law remained unsettled. Under the construction of the present constitutional amendment, the law will remain unsettled. A heavy case load does not justify our spawning confusion in the judicial system.

The decision of the district court of appeal conflicts with other decisions and creates instability in the law. I would accept jurisdiction.

NOTES

[*] *Jenkins v. State,* 382 So.2d 83 (Fla. 4th DCA 1980).

[1] This recitation is extracted from an article to be published later this year in 32 U.Fla.L.Rev., Vol. 2 (Winter 1980), entitled "Constitutional Jurisdiction of the Florida Supreme Court: 1980 Reform." Detailed, supporting footnotes have been omitted here. For an abridged version of this article, *see* England, Hunter & Williams, *An Analysis of the 1980 Jurisdictional Amendment,* 54 Fla.B.J. 406 (1980).

[2] Justice Adkins publicly opposed the amendment.

[3] Former Justice B.K. Roberts publicly opposed the amendment.

[4] *Myers v. Hawkins,* 362 So.2d 926 (Fla. 1978).

CONFRONTING A PCA: FINDING A PATH AROUND A BRICK WALL

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An appellant dreads nothing more than the receipt of a thin envelope from the district court of appeal containing an adverse per curiam affirmance (not so affectionately known to appellate lawyers as a "PCA"). After months, and perhaps years, of effort in the trial and appellate courts, the appellant is rewarded with the equivalent of "you lose" without a word of explanation. Worse yet, in most circumstances, a PCA is the end of the line for an appeal.[1] In Florida, with one possible exception, a PCA cannot be reviewed by the Florida Supreme Court.[2]

But is this unfair? As appellate judges (and appellees) will hasten to point out, most cases receiving a PCA deserve such treatment.[3] The issues were likely routine and well-settled, and the appeal was probably doomed from the start.[4]

Not every PCA is deserved, however. Consider, for example, the case of Clarence Earl Gideon.[5] Mr. Gideon filed a petition for writ of habeas corpus that was denied by the Florida Supreme

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1. *Infra* nn. 65–74.
2. *Infra* nn. 129–140.
3. *E.g. Whipple v. State*, 431 S.2d 1011, 1012 (Fla. Dist. App. 2d 1983) (explaining that the court issued a PCA because a written opinion would merely refute the appellant's arguments, would not show any conflict in law, and would not have been of any significant assistance to the bench or bar).
4. *Id.*
5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Court without an opinion.[6] Instead of giving up, Gideon filed a petition for writ of certiorari in the United States Supreme Court.[7] His perseverance was rewarded with the landmark decision of *Gideon v. Wainwright,*[8] the famous case granting criminal defendants the right to counsel.[9] Mr. Gideon's receipt of the denial without opinion was not deserved, but fortunately, it did not spell ultimate defeat in his case.

What should counsel do if he or she believes that the client's case presents a special situation in which an adverse PCA should not end the case? How does one find a path around the brick wall that is the PCA? This Article addresses this problem and provides several suggestions for achieving further appellate review in those cases in which the PCA issued by the district court of appeal is wrong or in which resolution by a per curiam affirmance was inappropriate. These options include (1) filing a motion for rehearing coupled with a motion for rehearing en banc, (2) filing a motion for clarification or a motion to write an opinion, (3) asking the court to certify an issue or a conflict to the Florida Supreme Court, (4) appealing directly to the United States Supreme Court, and (5) perhaps, in extremely rare circumstances, appealing to the Florida Supreme Court.

THE PCA IN FLORIDA COURTS

PCAs are commonplace in the Florida District Courts of Appeal (DCAs).[10] In 1998, for example, 8,193 of 13,542 DCA rulings were PCAs.[11] Because of its commonality, the most maddening aspect of a PCA is its effect on the reviewability of the appeal: with one possible exception, a PCA issued by a DCA cannot be reviewed by the Florida Supreme Court.[12] According to the Florida Constitution, the Florida Supreme Court has discretionary review

6. *Gideon v. Cochran*, 135 S.2d 746 (Fla. 1961), *rev'd, sub nom. Gideon v. Wainwright*, 372 U.S. 335 (1963).

7. *See Gideon*, 372 U.S. at 338 (citing *Gideon v. Cochran*, 370 U.S. 908, 908 (1962)) (noting that the U.S. Supreme Court granted certiorari to review the issue of a defendant's right to counsel).

8. 372 U.S. 335.

9. *Id*.

10. Comm. on Per Curiam Affirmed Dec., *Final Report and Recommendations* <http://www.flcourts.org/sct/sctdocs/library.html#reports> (May 2000).

11. *Id*. Between July 1998 and July 1999, 45.7% of civil appeals were PCAs, 69.2% of criminal appeals were PCAs, and 65.7% of administrative appeals were PCAs. *Id*.

12. *Infra* nn. 129–135.

over appeals from DCA decisions only if they "*expressly* and directly" conflict with other DCA or Florida Supreme Court decisions, *expressly* declare a statute valid, *expressly* construe the constitution, or *expressly* affect a class of state officers.[13] Because a PCA does not "express" anything, the Florida Supreme Court has no jurisdiction to consider a petition for discretionary review from a PCA.[14]

A court will issue a PCA if the points of law are so established that a written opinion would serve no purpose.[15] Though frustrating to appellate attorneys, some argue that PCAs are necessary to relieve pressure on an already overburdened judicial system.[16] Others point out that PCAs prevent the proliferation of unnecessary case law on settled propositions, and as a result avoid duplicative opinions and simplify legal research.[17]

Nevertheless, complaints about PCAs far surpass their praises.[18] First, PCAs often are used in cases in which there are unresolved debatable legal issues, as evidenced by written dissenting opinions from PCAs issued by the majority.[19] Second,

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13. Fla. Const. art. V, § 3(b)(3) (emphasis added). Article V, section 3 allows the Florida Supreme Court discretionary review of

> any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Id.

14. *Jenkins v. State*, 385 S.2d 1356, 1359 (Fla. 1980).

15. *See e.g. Elliot v. Elliot*, 648 S.2d 137, 138 (Fla. Dist. App. 4th 1994) (stating that it is black-letter law that PCAs without opinion are given when the points of law are well settled).

16. *See* Jack W. Shaw, Jr., *"Per Curiam Affirmed": Some Historical Perspectives*, 1 Fla. Coastal L.J. 1, 6 (1999) (citing *Patton v. State Dept. of Health & Rehabilitative Servs.*, 597 S.2d 302, 303 (Fla. Dist. App. 2d 1991), in which the Second DCA observed that "[l]awyers may have a good faith belief that a written opinion is appropriate when this court has come to an opposite conclusion. Each judge on this court must now review and decide more than 1000 cases each year. This caseload sometimes requires that we affirm a case without written opinion when we would prefer to write.")

17. *E.g. Jones v. State*, 468 S.2d 253, 254 (Fla. Dist. App. 2d 1985) (citing *Whipple*, 431 S.2d at 1012–1014).

18. *See* Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Federal System*, 45 Fla. L. Rev. 21 (1993) (arguing that the issuance of PCAs is unregulated in Florida).

19. *Id*. at 79 (citing Harry L. Anstead, *Selective Publication: An Alternative to the PCA?* 34 Fla. L. Rev. 189, 203 (1982)). Neither a PCA followed by a dissenting or concurring opinion, nor a PCA followed by a case citation has any effect on the reviewability of the PCA at the Florida Supreme Court level. *Jenkins*, 385 S.2d at 1358–1359.

PCAs often are used as a compromise when the judicial panel agrees on the result but cannot agree on the underlying reasoning.[20] Last, PCAs are erratically issued by the district courts of appeal as a natural result of the courts' different customs and opinion-writing philosophies.[21] One judge worried that, without written standards, "there will be a greater 'margin of error and variance of view between districts in determining precedential value.'"[22]

Because of the frustration surrounding PCAs, the Florida Judicial Management Council appointed a Committee on Per Curiam Affirmed Decisions (PCA Committee), which issued a useful report in May 2000.[23] In this report, the PCA Committee gathered statistics and met with attorneys, judges, and The Florida Bar in an attempt to obtain various perspectives on PCAs.[24] Through several conferences, the PCA Committee developed a list of recommendations to promote the proper use of PCAs, including suggestions for opinion writing, and suggestions for when a PCA is inappropriate.[25] This report is a useful tool for appellants when attempting to determine whether it may be appropriate to seek further review from an adverse PCA.

THE HISTORY OF PCAs

The increased use of PCAs is a direct effect of the rising number of appellate cases in the Florida DCAs.[26] Overburdened courts and cluttered dockets have plagued the judicial system for decades.[27] Before 1956, there were no DCAs, and the Florida Supreme Court handled all appeals.[28] When the Florida Legislature

20. *Id*. (citing *Anstead*, *supra* n. 19, at 203).
21. *Id*. (citing *Anstead*, *supra* n. 19, at 203, 207, 216).
22. *Id*. (quoting *Anstead*, *supra* n. 19, at 207).
23. Comm. on Per Curiam Affirmed Dec., *supra* n. 10.
24. *Id*.
25. *Id*. The PCA Committee included the following among its recommendations: (1) reject the proposed abolishment of PCAs, (2) amend the Florida Rules of Appellate Procedure to allow parties to request a written opinion, (3) develop a curriculum to suggest opinion writing techniques when teaching judges, and (4) discourage PCA use whenever there is a dissent. *Id*.
26. *Id*. (finding that an increase in PCAs corresponded to an increase in appellate filings).
27. *See Jenkins*, 385 S.2d at 1357 (noting that Florida DCAs were created in 1956 because the Supreme Court was inundated with a heavy caseload and consequently, justice was delayed).
28. *Id*. at 1357–1358.

created the district courts of appeal in 1956 to decrease the Florida Supreme Court's workload, it intended that the district courts of appeal would serve as courts of appellate review in most cases, thus removing a large portion of the workload from the Florida Supreme Court.[29] In *Jenkins v. State*,[30] the Court explained,

> It was never intended that the district courts of appeal should be intermediate courts . . . . To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.[31]

Despite the admonishment that the DCAs not be treated as intermediate courts, in the period before 1980 the Florida Supreme Court found itself increasingly burdened by petitions for certiorari from DCA decisions.[32] At that time, the Florida Constitution allowed the Florida Supreme Court to hear any case decided by the DCAs when there was a direct conflict with another DCA or the Florida Supreme Court.[33] Thus, the Florida Supreme Court had jurisdiction to hear *all* cases decided by the DCAs, including per curiam affirmances.[34] The justices could simply examine the underlying record of a particular case to determine whether the decision was in direct conflict with Florida Supreme Court precedent or case law in other districts, or determine some other jurisdictional basis to accept the case.[35]

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29. *See Ansin v. Thurston*, 101 S.2d 808, 810 (Fla. 1958) (stating that district courts were intended to be the final court of review); *Lake v. Lake*, 103 S.2d 639, 640 (Fla. 1958) (discussing the motivations for creating district courts); *Whipple*, 431 S.2d at 1013–1014 (clarifying that Florida litigants do not have a right to review in the Florida Supreme Court, but rather have a general right to review).

30. 385 S.2d 1356.

31. *Id*. at 1357–1358.

32. Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev. 147, 152–153 (1980). Before 1980, discretionary review to the Florida Supreme Court was invoked by a petition for certiorari. In 1980, the certiorari petition was replaced by a notice to invoke the discretionary review of the Florida Supreme Court. Fla. R. App. P. 9.120 (2002); Phillip J. Padovano, *Florida Appellate Practice* § 27.3 (2001–2002 ed., West 2001).

33. Fla. Const. art. V, § 4 (1956) (repealed 1980 by Fla. Const. art. V, § 3).

34. *See* England et al., *supra* n. 32, at 152 (stating that *Foley v. Weaver Drug, Incorporated*, 177 S.2d 221 (Fla. 1965), demonstrated the Florida Supreme Court's willingness to review cases unaccompanied by a written opinion).

35. *See supra* n. 32 (explaining the basis for Florida Supreme Court jurisdiction).

But faced with an ever-increasing number of cases seeking review of DCA decisions, the Florida Supreme Court decided in *Lake v. Lake*[36] that it would no longer examine the underlying record to determine whether a decision that had been per curiam affirmed by the DCA conflicted with other Florida Supreme Court or DCA cases.[37] The Florida Supreme Court stated,

> We assume that an appeal to a district court of appeal will receive earnest, intelligent, fearless consideration and decision. When it does . . . the litigant gets a decision by a final appellate court. Thus justice is assured to all, injustice to any is prevented.[38]

Despite the Florida Supreme Court's self-restrictions, it had difficulty abiding by the *Lake* ruling and continued to examine the underlying record when considering petitions for review.[39] For example, in *Foley v. Wearer Drugs, Incorporated,*[40] the Court reviewed the record proper of a PCA decision that conflicted with a later decision of another appellate court to "make uniform and harmonious the law on the particular point involved in the two decisions."[41] In *Foley*, the Court realized that it was regularly reviewing the underlying record to find a conflict. Thus, the Florida Supreme Court officially changed its procedure and held that it would review the record proper to determine whether a decision that had been per curiam affirmed by the DCA conflicted with other supreme court or DCA cases.[42]

Again, the burden of examining the underlying record combined with an increasing caseload became overwhelming.[43] The Court requested that the Legislature remedy this problem, and in 1980, the Florida Legislature amended Article V of the Florida Constitution to state that the Florida Supreme Court's conflict jurisdiction was restricted to situations in which a district court's

36. 103 S.2d 639.
37. *Id*. at 643.
38. *Id.*
39. *Foley*, 177 S.2d at 223.
40. 177 S.2d 221.
41. *Id*. at 223.
42. *Id*. at 225 (holding that the Florida Supreme Court "may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal").
43. England et al., *supra* n. 32, at 152.

decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."[44]

This amendment finally rid the Florida Supreme Court of discretionary review over PCAs. The Court could no longer hear a case that had been per curiam affirmed by a DCA because a PCA created no "express or direct" conflict with other case law.[45] According to the Florida Supreme Court, the mere use of the word "affirmed" did not meet dictionary definitions of the word "express," which definitions include "to represent in words" and "to give expression to."[46] Therefore, any DCA opinion with only the words "affirmed" or "affirmed per curiam" does not "express" anything and cannot be appealed to the Florida Supreme Court.[47]

Consequently, an express or direct conflict is created only when the DCA contemplates a legal question "within the four corners of the opinion itself."[48] Therefore, the opinion must state the point of law that forms the basis of the decision.[49] Although it is not necessary that the DCA explicitly cite conflicting case law in its opinion,[50] there must be at least some language from the court indicating its reasoning for ruling a particular way.[51]

Interestingly, because a dissent or concurrence is not part of the DCA's official "opinion," a PCA is not reviewable even when there is a dissenting or concurring opinion attached to an affirmance or denial without opinion.[52] This is true even if the dissent or concurrence points out a direct conflict or other jurisdictional basis supporting further review.[53] Receipt of this sort of mixed

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44. Fla. Const. art. V, § 3(b)(3). The other provisions of Article V, section 3(b) were similarly amended to require an "express" jurisdictional prerequisite. *Id*. The decision had to *expressly* declare a state statute valid, or *expressly* construe the constitution, or *expressly* affect a class of constitutional officers. *Id*.

45. *Jenkins*, 385 S.2d at 1359.

46. *Id.* (quoting *Webster's Third New International Dictionary* 803 (Ency. Britannica, Inc. 1961)).

47. *Id.*

48. *Fla. Star v. B.J.F.*, 530 S.2d 286, 288 (Fla. 1988), *rev'd on other grounds*, 491 U.S. 524 (1989).

49. *Id*.

50. *Ford Motor Co. v. Kikis*, 401 S.2d 1341, 1342 (Fla. 1981).

51. *See id*. (stating that a discussion of applicable legal principles was sufficient to form the basis of a conflict-review petition).

52. *Jenkins*, 385 S.2d at 1359.

53. *Reaves v. State*, 485 S.2d 829, 830 (Fla. 1986) (holding that there was no direct or express conflict when the basis of the conflict was recited only in the dissent).

opinion is particularly frustrating to litigants, considering that a dissenting opinion clearly indicates some dissension among the judges and is strong evidence that the case did not merit a PCA.[54]

Opinions followed by citations (often called "citation PCAs") also do not create an express conflict allowing for Florida Supreme Court review, even if the cited precedent conflicts with another DCA or Florida Supreme Court opinion.[55] The Florida Supreme Court can review citation PCAs only if the controlling precedent has been reversed,[56] or if the controlling precedent is pending review by the Florida Supreme Court.[57] In other words, all PCAs with dissenting or concurring opinions and most PCAs followed by citations are not reviewable by the Florida Supreme Court.

Last, an appellant cannot circumvent the "express or direct conflict" language by filing an extraordinary writ to obtain review of a PCA.[58] In *St. Paul Title Insurance Corporation v. Davis*,[59] the Florida Supreme Court stated,

> We will not allow the [extraordinary writ] to be used to circumvent the clear language of section 3(b)(3) and [the court's] holding in *Jenkins v. State* that [it] lack[s] jurisdiction to review per curiam decisions . . . rendered without opinion when the basis for such review is an alleged conflict of that decision with another.[60]

CONFRONTING A PCA

The Legislature's 1980 revision of the Florida Constitution has caused a great deal of frustration among litigants who are faced with a PCA.[61] One author commented that, "[d]espite the

54. Cope, *supra* n. 18, at 79 (stating that dissenting opinions in PCAs are evidence that PCAs are issued despite a debatable legal issue); *see id*. at 59 (noting that some states, such as Arkansas, Connecticut, North Dakota, South Carolina, Texas, and Georgia, grant discretionary review based on the existence of a divided panel).

55. *Dodi Publg. Co. v. Editorial Am.*, 385 S.2d 1369, 1369 (Fla. 1980).

56. *Jollie v. State*, 405 S.2d 418, 421 (Fla. 1981).

57. *Jollie*, 405 S.2d at 421; *e.g. Taylor v. State,* 601 S.2d 540, 541 (Fla. 1992); *State v. Lofton*, 534 S.2d 1148, 1149 (Fla. 1988).

58. *Grate v. State*, 750 S.2d 625, 626 (Fla. 1999); *St. Paul Title Ins. Corp. v. Davis*, 392 S.2d 1304, 1304, 1305 (Fla. 1980).

59. 392 S.2d 1304.

60. *Id*. at 1304–1305.

61. *See* Cope, *supra* n. 18, at 25 (noting that, unlike other states, Florida does not provide procedural alternatives to litigants when a court issues a PCA); Shaw, *supra* n. 16,

usefulness of a PCA in saving scarce judicial resources, appellants who receive a PCA sometimes feel shortchanged or have a legitimate reason to ask the court to issue a written opinion."[62] Because PCA decisions are commonplace today,[63] appellate counsel will inevitably, though rarely, confront cases in which a PCA is obviously inappropriate. Perhaps the case presented important issues of first impression that were thoroughly briefed by the parties. Perhaps a conflict in the cases was apparent in a concurring or dissenting opinion. Perhaps the issues presented were important beyond the parties to the litigation. Perhaps the court made an obvious mistake. In such cases, the litigant, and indeed the justice system, has been shortchanged.

Fortunately, a PCA is not always the end of the litigation process.[64] Sometimes, in appropriate situations, there are paths that a litigant may take around the brick wall formed by the PCA. While rarely appropriate (and rarely successful), these alternatives can be effective, if used wisely and sparingly. The remainder of this article discusses those possible paths, which include (1) filing a motion for rehearing coupled with a motion for rehearing en banc, (2) filing a motion for clarification or a motion to write an opinion, (3) asking the court to certify an issue or a conflict to the Florida Supreme Court, (4) appealing directly to the United States Supreme Court, and (5) convincing the Florida Supreme Court that the PCA had the effect of declaring a statute or constitutional provision invalid.

A. Filing a Motion for Rehearing Coupled with a Motion for Rehearing En Banc

Filing only a motion for rehearing in response to a PCA is usually ineffective.[65] A party may file for rehearing "where careful analysis indicates a point of law or a fact which the court has overlooked or misapprehended, or where clarification of a written opinion is essential."[66] This presents an unfortunate problem for

at 1 (stating that PCAs have been "the subject of considerable, and often heated, debate in the legal community").

62. Shaw, *supra* n. 16, at 9.

63. *See* Comm. on Per Curiam Affirmed Dec., *supra* n. 10 (noting that from July 1998 through June 1999, 62.5% of all DCA opinions were PCAs).

64. *Infra* nn. 76, 106–111, 129–140, 154, 170–196.

65. *Infra* nn. 67–74.

66. *Whipple*, 431 S.2d at 1013.

an attorney faced with a PCA: How can counsel persuasively argue that the court has overlooked or misapprehended something?

Inevitably, courts will interpret an appellant's motion for rehearing as an attempt to reargue the case, and generally frown upon such motions as a waste of time.[67] For example, as early as 1958, in *State v. Green*,[68] one judge complained,

> Certainly, it is not the function of a petition for rehearing to furnish a medium through which the counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.[69]

Moreover, in *Lawyers Title Insurance Corporation v. Reitzes*,[70] in disgust, the court denied the appellant's motion for rehearing, noting that "[w]e find nothing in the instant motion for rehearing that appellant did not argue in his briefs or in oral argument."[71] Also, in *Elliot v. Elliot,*[72] the court summarily denied the appellant's motion for rehearing after the appellant's lawyer remarked in his motion that the court's opinion "was a simple per curiam affirmance of the trial court's Final Judgment, and the undersigned attorney found it impossible to discern the Court's reasoning."[73] The lawyer went on to state that he "was extremely surprised at this Court's per curiam affirmance and presumed that his argument had been overlooked by this Court."[74]

Thus, in most cases, the PCA is the end of the line.[75] If the attorney has adequately presented the issues in the briefs and can

67. *See id*. (noting that motions for rehearing or clarification may be misused to reargue the case or express dissatisfaction with the court's ruling).

68. 105 S.2d 817 (Fla. Dist. App. 1st 1958).

69. *Id*. at 818–819.

70. 631 S.2d 1100 (Fla. Dist. App. 4th 1994).

71. *Id*. at 1100.

72. 648 S.2d 137 (Fla. Dist. App. 4th 1994).

73. *Id*. at 138 (emphasis removed). The attorney's explanation was a response to the court's order to show cause why he should not be sanctioned for a "flagrant violation" of appellate rules regarding a motion for rehearing. *Id*.

74. *Id.* (emphasis removed).

75. *Supra* nn. 66–74.

do nothing more than reargue, counsel generally should respect the court's not-so-subtle signal about the strength of the case.

If the issue presented is of exceptional importance, however, or if counsel is convinced that the panel decision necessarily conflicts with other precedent within the same DCA, a petition for rehearing en banc, coupled with a motion for rehearing, has at least some small chance of success.[76] At a minimum, and assuming the case is appropriate, a rehearing en banc allows the appellant to file a motion firmly within the confines of the appellate rules.[77]

There are several advantages to this procedure. First, as noted above, the request fits within the rules so long as counsel can make the required certification discussed below.[78] Second, the case stays alive. Third, the appellant has the opportunity to present its arguments to "fresh" judges.[79] Perhaps one of those judges will be struck by the importance of the issue and become convinced that an injustice has been done or that an error has been committed.

Obviously, this procedure is appropriate only for the exceptional case, and the rules make clear that such motions should not be routine.[80] A party may file for rehearing en banc only if counsel can certify that the case is of "exceptional importance" or that such consideration is "necessary to maintain uniformity" in the court's decisions.[81]

Unfortunately, there is not much guidance on what exactly is a case of exceptional importance. This is particularly true when the court decides to grant en banc review after the panel has is-

76. En banc review will be ordered only if the case is exceptionally important or if the review is necessary to maintain uniform decisions in the court. Fla. R. App. P. 9.331(a).

77. Pursuant to Florida Rules of Appellate Procedure 9.331(d)(1), an appellant must file for en banc consideration in conjunction with a motion for rehearing, or the motion will be denied. *E.g. La Grande v. B & L Servs., Inc.*, 436 S.2d 337, 337 (Fla. Dist. App. 1st 1983) (dismissing the appellant's motion for en banc review because it was not filed with a motion for rehearing). An en banc hearing is considered by a majority of active judges participating with the case and not just the original panel of three. Fla. R. App. P. 9.331(a). The judges will vote whether to hear the case en banc, and if there is a tie, the original panel decision will stand. *Id*.

78. *Infra* n. 81.

79. *See* Fla. R. App. P. 9.331(a) (noting that the en banc decision will be made by a majority of active judges actually voting on the case).

80. *Id*.

81. *Id*. 9.331(d)(2).

sued a PCA.[82] Only rarely do courts explain why they have changed their minds.[83] Indeed, at least one judge has pointed out the due-process concerns that arise from the appellate courts' failure to better articulate the standard for selecting certain cases for en banc review.[84] In a dissenting opinion, Judge Joseph A. Cowart, Jr. admonished the Fifth District Court of Appeal:

> The vague standard for selection of cases for en banc consideration coupled with no appellate review of the selection decision can combine to deny the litigant equal protection of the law and deprive him of his constitutional right to have his case on appeal heard and decided by the three judge panel to which it was duly, and constitutionally, assigned for decision . . . . The lack of a ready remedy for improper en banc consideration is a real problem. Separate (special concurring and dissenting) opinions have discussed the problem but majority en banc opinions need not address the issue, and seldom do, so there is no building body of law construing the term "exceptional importance" and no opportunity for a majority en banc opinion to certify direct conflict and no incentive to certify the en banc question to be of great public importance.[85]

Judge Cowart was certainly correct that the lack of explanations creates an aura of arbitrariness and uncertainty. However, the root of the problem often is not the decision for en banc review, but the initial decision to decide an important case by a PCA. If the case has attracted the attention of the court en banc, the earlier PCA almost certainly was inappropriate.

Unlike Florida courts, federal courts have articulated two types of cases of exceptional importance appropriate for en banc review: "(1) cases that may affect large numbers of persons and (2) cases that interpret fundamental legal or constitutional rights."[86] While Florida courts have not explicitly defined "excep-

82. *E.g. Hoechst Celanese Corp. v. Fry*, 753 S.2d 626, 627 (Fla. Dist. App. 5th 2000) *mandamus denied*, 773 S.2d 55 (Fla. 2000) (explaining only that the per curiam affirmance was "improvident in light of established case authority and the facts of this case").

83. *E.g. id*.; *State v. Georgoudiou*, 560 S.2d 1241, 1247–1248 (Fla. Dist. App. 5th 1990) (Cowart, J., dissenting).

84. *Id*. at 1248.

85. *Id*. at 1248 n. 9.

86. *In re D.J.S. v. State Dept. of Health & Rehabilitative Servs.*, 563 S.2d 655, 657 n. 2 (Fla. Dist. App. 1st 1990) (citing Neil D. McFeeley, *En Banc Proceedings in the United States Courts of Appeal*, 24 Idaho L. Rev. 255, 265 (1987–1988)).

tional importance,"[87] they seem to follow the federal approach. For example, in *Kinder v. State,*[88] the court recognized the importance of discerning fundamental legal rights when acknowledging that "the question of whether a person awaiting an involuntary civil commitment proceeding pursuant to the [Commitment of Sexually Violent Predators] Act may be released pending trial" is an issue of exceptional importance.[89] However, in *Gainesville Coca-Cola v. Young*,[90] the court found that the case did not concern matters of exceptional importance.[91] The case did not affect large numbers of people; rather, the court complained that appellant's motion for rehearing en banc was inappropriate because the motion did not suggest that the court's decision had any impact upon the workers'-compensation jurisprudence of the State, and in fact, only affected the individual plaintiffs.[92]

Counsel's other predicate for seeking en banc review from a PCA is a bit more problematic. Nothing about the PCA inherently prevents counsel from arguing that the case is of exceptional importance.[93] However, it is more difficult to suggest that a PCA affirmance, which lacks prejudicial value, conflicts with anything.[94] Still, the en banc rule does not require an express or direct conflict but only a representation that the decision is contrary to other decisions by the same court.[95] As demonstrated by the Florida Supreme Court's pre-1980 practice of delving into the record to find a conflict, nothing in the en banc rule prevents counsel from arguing that the PCA is contrary to other decisions.[96]

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87. *See State v. Diamond*, 1989 Fla. App. LEXIS 7460 at *25 (Fla. Dist. App. 1st Dec. 28, 1989) (Nimmons, J., concurring) (stating that "there has to date been no analytical development by the district courts concerning why a particular case merits en banc consideration on the ground of exceptional importance. None of the courts' opinions which have decided to review the cases on that ground have attempted any detailed explanation for their decisions, and a reader is required to make an examination of the facts and issues in each case to determine how the court arrived at its conclusion.").

88. 779 S.2d 512 (Fla. Dist. App. 2d 2000).

89. *Id*. at 515.

90. 632 S.2d 83 (Fla. Dist. App. 1st 1994).

91. *Id*.

92. *Id*.

93. *Supra* nn. 80–82.

94. *Contra Hoechst*, 753 S.2d at 626–627, 628 (finding that the court's prior per curiam affirmance granting class certification conflicted with Florida Supreme Court precedent that fraud claims are not suitable for a class action).

95. Fla. R. App. P. 9.331(d)(2).

96. *See Foley*, 177 S.2d at 225 (holding that the Florida Supreme Court may review PCAs when the PCA was in conflict with the Florida Supreme Court or another DCA).

When relying on a conflict, the en banc motion must demonstrate that the panel could have decided the opinion only by ignoring established case law.[97] For example, in *Hoechst Celanese Corp. v. Fry*,[98] after receiving a PCA certifying a class, the defendant's counsel filed a motion for rehearing en banc.[99] The Fifth District Court of Appeal granted the defendant's motion and reversed its decision granting class status to the plaintiffs.[100] The court stated that its prior affirmance was "improvident in light of established case authority."[101] A 3–0 PCA turned into an 8–0 en banc reversal![102]

When attempting to convince a court that there is contradictory case law, the appellant must show that conflicting decisions are "so inconsistent and disharmonious that they would not have been rendered by the same panel of the court."[103] In *Schreiber v. Chase Federal Savings and Loan Association*,[104] the court emphasized the need for consistent case law, explaining that the main purpose of en banc review is to harmonize decisions of the districts to minimize the disparity in decisions caused by the "luck of the draw."[105]

While rare, lightning does strike. In addition to the *Hoechst Celanese* case described above,[106] there are other reported Florida decisions in which PCAs have been attacked successfully by a motion for rehearing en banc.[107] For example, in *State v. Navarro*,[108] the court granted the appellant's motion for rehearing en banc, and in reversing, adopted the dissenting opinion of the original

97. *E.g. Russo v. State*, 814 S.2d 463, 464 (Fla. Dist. App. 4th 2001) (denying en banc review when there were factual dissimilarities preventing *Russo* from conflicting with a recent court opinion); *Lett v. State*, 805 S.2d 950, 951 (Fla. Dist. App. 2d 2001) (granting review based on conflict with another case).

98. 753 S.2d 626.

99. *Id*. at 626.

100. *Id*. at 628.

101. *Id*. at 627.

102. *Id*. at 626–628.

103. *Schreiber v. Chase Fed. Sav. & Loan Assn.*, 422 S.2d 911, 912 n. 1 (Fla. Dist. App. 3d 1982).

104. 442 S.2d 911.

105. *Id*. at 912 n. 1 (quoting *McAllister v. McAllister*, 345 S.2d 352, 354 (Fla. Dist. App. 4th 1977)).

106. *Supra* nn. 98–102.

107. *Infra* nn. 108–111.

108. 464 S.2d 137 (Fla. Dist. App. 3d 1984).

panel decision.[109] Additionally, in *Teca, Incorporated v. WM-Tab, Incorporated*,[110] although the appellant moved only for rehearing, the court decided sua sponte to hear the case en banc after the court noticed a discrepancy in its own case law.[111]

Despite these successful examples, in the vast majority of cases, requesting an en banc hearing is inappropriate and a waste of both the court's time and the client's money.[112] Consequently, an application for en banc review should be used in limited circumstances.[113] Improper motions for review test the courts' patience and unnecessarily increase the courts' work load.[114] Appellants must not reargue issues in a last-ditch effort to convince the court that their position is correct,[115] and should file such motions only when they believe in good faith that their case is contrary to other precedent within the same DCA or that their case presents an issue of exceptional importance.

Such motions should be clear and, above all, concise. Counsel should assume that other members of the court will be reading the motion in the middle of a large stack of outside reading. Counsel's case must be presented compellingly and must catch the attention of the court almost immediately. If the argument cannot be made compellingly while still being simple and concise, it probably is not appropriate for en banc review.

B. Asking the District Court of Appeal for Clarification or to Write an Opinion

Sometimes an appellant can simply petition the court to clarify its reasoning or to write an opinion in a case in which it has previously issued a per curiam affirmance.[116] This is also a remedy the court might invoke to avoid a potential rehearing en banc.[117]

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109. *Id*. at 140.

110. 726 S.2d 828 (Fla. Dist. App. 4th 1999).

111. *Id*. at 831 (Klein, J., concurring specially).

112. *See Lawyers Title Ins. Corp.*, 631 S.2d at 1101 (noting that misusing motions for rehearing wastes "the time and effort of three judges").

113. Fla. R. App. P. 9.331(a).

114. *See Lawyers Title Ins. Corp.*, 631 S.2d at 1101 (noting that misusing motions wastes the "time, energy and effort of the clerk's office and the other persons who function in the court's processes").

115. *See id*. (stating that motions for rehearing should not be used to try "to persuade [the] court to change its mind").

116. Padovano, *supra* n. 32, at § 19.3.

117. *See Higgins v. State*, 553 S.2d 177 (Fla. Dist. App. 1st 1989) (choosing to grant a

Before January 1, 2003, no specific rule governed a request for an opinion,[118] and most counsel included such requests within a motion for clarification.[119] Thus, counsel's task was daunting. To file a motion for clarification pursuant to Florida Rule of Appellate Procedure 9.330, the movant was required to "state with particularity the points of law or fact in the court's decision that in the opinion of the movant are in need of clarification."[120] How does one ask for clarification when the court has said nothing?

Courts have held that such motions should be used sparingly, and only when it is clear that the court has erroneously decided the case via a PCA.[121] Judge Phillip J. Padovano explained the view from the bench:

> While the rules do not prohibit the filing of a motion for clarification when the appellate court has issued a per curiam affirmed decision without an opinion, this practice should be discouraged. The need for clarification implies that there is something about an opinion that requires further explanation. Asking the court to clarify a per curiam decision summarily affirming a case is tantamount to asking the court to write an opinion in the case.[122]

Counsel's task became easier on January 1, 2003, with the adoption of an amendment to Rule 9.330(a) that specifically permits counsel to request an opinion.[123] According to the rule, "[w]hen a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion."[124]

The grounds provided by the rule are narrow. If counsel believes that a written opinion could legitimately provide grounds

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motion for rehearing as opposed to the motion for rehearing en banc to clarify the basis of the PCA).

118. *See* Fla. R. App. P. 9.330 (providing guidance regarding motions for rehearing, clarification, and certification).

119. *See e.g. Devlin v. State*, 766 S.2d 490, 490 (Fla. Dist. App. 5th 2000) (finding that counsel made a "good argument" for a written opinion and granting the appellant's motions for rehearing and clarification of the PCA).

120. Fla. R. App. P. 9.330(a).

121. *Lawyers Title Ins. Corp.*, 631 S.2d at 1101.

122. Padovano, *supra* n. 32, at § 19.3.

123. *Amend. to Fla. App. P.*, 2002 Fla. LEXIS 1810 at *10, **99–100 (Aug. 29, 2002).

124. *Id.* at **99–100.

for supreme court review, counsel must certify that the belief was "based upon a reasoned and studied professional judgment [ ] that a written opinion will provide a legitimate basis for supreme court review."[125] Then, counsel must state specific reasons why the supreme court would likely grant review.[126]

In drafting a motion for clarification or to write an opinion, counsel should consult the PCA Committee report. In that report, the Judicial Management Council suggested the types of cases that may warrant a written opinion.[127] These include cases in which

- the decision conflicts with another district;
- an apparent conflict with another district may be harmonized or distinguished;
- there may be a basis for Supreme Court review;
- the case presents a new legal rule;
- existing law is modified by the decision;
- the decision applies novel or significantly different facts to an existing rule of law;
- the decision uses a generally overlooked legal rule;
- the issue is pending before the court in other cases;
- the issue decided may arise in future cases;
- the constitutional or statutory issue is one of first impression;
- previous case law was "overruled by statute, rule or an intervening decision of a higher court";
- there is a written dissent identifying an issue that may be a basis for Florida Supreme Court review.[128]

Appellants should consider all of these factors when filing a motion for clarification or a motion to write an opinion. Certainly, the more factors on which an appellant convincingly can rely, the more likely a court will be to grant a motion for clarification or to

125. *Id*. at *100.

126. *Id*.

127. Comm. on Per Curiam Affirmed Dec., *supra* n. 10. The Commission hoped that by presenting factors to consider, judges would choose to write opinions in cases warranting a written opinion, rather than issuing a PCA. *Id*.

128. *Id*. Because the DCA could use any of the listed factors to certify a conflict or a question of great public importance, arguably, all of the grounds could serve as a basis for supreme court review.

write an opinion in the appellant's case. Because appellate courts likely will respect the time and effort that went into compiling the facts and opinions contained within the PCA Committee report, counsel should refer to the report when making such a motion for clarification or a motion for a written opinion.

Although the recent amendment to Rule 9.330(a) is yet untested, before its adoption, motions for clarification have been occasionally successful in prodding appellate courts to issue an opinion in cases that originally were decided by PCAs.[129] For example, in *Hampton v. Duda and Sons*,[130] the appellant brought a motion for clarification following the appellate court's per curiam affirmance.[131] Although the appellate court adhered to its initial affirmance of the trial court's grant of summary judgment, it corrected a misapplication of law, vacated its prior PCA, and reissued the opinion affirming the trial court.[132] While the DCA did not ultimately change the result it had originally reached, the written opinion enabled the appellant to petition the Florida Supreme Court to review the case.

Similarly, in *McCord v. State*,[133] the court granted the appellant's motion for clarification, withdrew its previous PCA, and substituted an opinion for the PCA.[134] Again, the court did not reverse itself, but did address the four issues the appellant raised in its claim, thereby allowing review at the Florida Supreme Court level.[135]

Similar motions also were successful in *Denson v. State*,[136] in which the court granted a motion for clarification of a PCA pursuant to the appellant's request,[137] and *King v. State*,[138] in which the court clarified the basis for the defendant's conviction.[139] Both of these cases illustrate the simplicity with which the court need address such requests for clarification — both courts responded to

129. *Infra* nn. 127–132.
130. 511 S.2d 1104 (Fla. Dist. App. 5th 1987).
131. *Id*. at 1104.
132. *Id*. at 1104, 1105.
133. 795 S.2d 101 (Fla. Dist. App. 5th 2001), *cert. denied,* 122 S. Ct. 1612 (2002).
134. *Id*. at 102.
135. *Id*. at 102–103.
136. 1993 Fla. App. LEXIS 4537 (Fla. Dist. App. 5th Apr. 21, 1993).
137. *Id*. at *1.
138. 706 S.2d 880 (Fla. Dist. App. 5th 1998).
139. *Id*. at 880.

the appellants' motions with a mere half page of text, sufficient to allow review by the Florida Supreme Court.[140]

Like a motion for rehearing en banc, a motion for clarification or a motion for a written opinion should be utilized only in rare situations in which it is apparent that the court has erroneously utilized a PCA to decide a case.[141] For example, the Fourth DCA criticized an unsuccessful motion for clarification because the appellant had done nothing more than reargue the case.[142] In *Moore v. Hayward*,[143] the appellant filed a motion for clarification, written opinion, or rehearing.[144] The appellee countered that the appellant did not give sufficient reasons justifying the motion as there were neither issues of great public importance, nor any legal basis for certifying conflict with other DCA opinions.[145] Accordingly, the Fourth DCA summarily denied the motion.[146]

Using the PCA Committee checklist should help avoid such an admonishment. If counsel cannot demonstrate that the case is appropriate for an opinion using the factors listed by the committee, counsel should give up the fight.

C. Asking the Court of Appeal to Certify an Issue to the Florida Supreme Court

Rule 9.330 of the Florida Rules of Appellate Procedure allows an appellant to move for certification to the Florida Supreme Court.[147] Appellants may request certification when there are issues "of great public importance requiring immediate resolution by the [Florida] [S]upreme [C]ourt,"[148] or where the court's decision conflicts with opinions of other DCAs or the Florida Supreme Court.[149]

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140. *King*, 706 S.2d at 880; *Denson*, 1993 Fla. App. LEXIS 4537 at *1.

141. *Moore v. Hayward*, 1992 Fla. App. LEXIS 14102 at **1, 2, 3 (Fla. Dist. App. 4th Aug. 26, 1992), *motion denied*, 530 S.2d 611 (Fla. Dist. App. 4th 1992).

142. *Id*. at *1.

143. 1992 Fla. App. LEXIS 14102.

144. *Id*. at *1.

145. *Id*. at *3.

146. *Moore*, 530 S.2d at 611.

147. Fla. R. App. P. 9.330(a).

148. *E.g. Fladell v. Labarga*, 775 S.2d 987, 987 (Fla. Dist. App. 4th 2000).

149. *See Clark v. State*, 783 S.2d 967, 967 (Fla. 2001) (reviewing a case that was certified based on conflict with another district court opinion); *Edwards v. State*, 679 S.2d 772, 772 (Fla. 1996) (accepting jurisdiction because of the district court's certification of conflict with a decision from another district); *Jenkins*, 385 S.2d at 1360 (noting that the court's

Counsel should approach the motion for certification much like the motion for rehearing en banc discussed above.[150] In moving for certification of an issue of great importance, counsel should be prepared to argue that the case affects large numbers of people or presents an issue of exceptional importance.[151] In fact, any motion for rehearing en banc that is based on an issue of exceptional importance is also a case that is appropriate for a motion to certify.[152] Thus, counsel often will include an alternative request for certification in the en banc motion.[153]

Occasionally, such motions are successful.[154] For example, in *Higgins v. State*,[155] a defendant filed a motion for rehearing en banc coupled with a motion for certification after the DCA issued a per curiam affirmance of his conviction.[156] The panel court found that second-degree arson was not a lesser-included offense of first-degree arson, despite the defendant's contrary arguments.[157] After rehearing the case, the DCA found that dates surrounding the revised arson laws made it confusing to determine which version of the law to apply to the defendant's case.[158] As a result, the court certified the legal question to the Florida Supreme Court.[159]

While examples of such successful motions rarely arise in the PCA context, other cases are illustrative of when motions to certify are appropriate. For instance, in *Beverly Enterprises-Florida, Incorporated v. Knowles*,[160] the Fourth DCA granted the appellant's motion for certification, noting that the case raised an issue of great public importance in that it would affect many elderly

jurisdiction was based on the district court's certification of decisions in conflict or of great public importance).

150. *Supra* nn. 145–147 and accompanying text.

151. *Supra* n. 86 and accompanying text.

152. *E.g. State v. GTech Corp.*, 816 S.2d 648, 655–656 (Fla. Dist. App. 1st 2001) (certifying questions as involving issues of great public importance following motions for rehearing en banc and certification of questions).

153. *E.g. id*.

154. *See Higgins v. State*, 553 S.2d at 178, 179 (certifying a question to the Florida Supreme Court following a PCA); *Howard v. State*, 571 S.2d 507, 507 (Fla. Dist. App. 5th 1990) (granting a motion for certification following a PCA).

155. 553 S.2d 177.

156. *Id*. at 178.

157. *Id*.

158. *Id*. at 179.

159. *Id*.

160. 763 S.2d 1285 (Fla. Dist. App. 4th 2000).

people in Florida.[161] Despite the DCA's initial decision affirming the lower court's judgment, counsel's motion convinced the court that the case was important enough to be certified.[162]

Counsel also may be able to convince the Court that its decision conflicts with other district courts of appeal or Florida Supreme Court case law. For example, in *Padgett v. State*,[163] despite the DCA's belief that it had made the correct decision in affirming the trial court, it certified a conflict to the Florida Supreme Court on the basis that two apparently conflicting decisions may have been confusing.[164] Similarly, in *Watson v. State*,[165] the DCA recognized the existence of conflicting case law regarding standing and certified the issue to the Florida Supreme Court.[166]

D. Appealing a PCA Directly to the United States Supreme Court

Despite the fact that review of a PCA by the Florida Supreme Court is unavailable, an appellant can bypass the Florida Supreme Court and seek review of a PCA directly in the United States Supreme Court.[167] Reviewing decisions without opinions is not new territory for the U.S. Supreme Court.[168] Unlike the Florida Supreme Court, the U.S. Supreme Court can and does grant review even when there is no opinion below.[169] A famous example is *Gideon v. Wainwright*, in which the U.S. Supreme Court granted review following the Florida Supreme Court's denial without opinion of Gideon's petition for habeas corpus.[170] The resulting landmark decision granted criminal defendants the right to counsel.[171]

Counsel need not file a futile attempt at review in the Florida Supreme Court to preserve the right to go to the United States

161. *Id*. at 1285.
162. *Id*.
163. 551 S.2d 1259 (Fla. Dist. App. 5th 1989).
164. *Id*. at 1262.
165. 763 S.2d 1143 (Fla. Dist. App. 4th 2000).
166. *Id*. at 1143.
167. *Fla. Star*, 530 S.2d at 288 n. 3.
168. *See e.g. Gideon*, 372 U.S. 335 (reviewing case after habeas corpus was denied without an opinion by the Florida Supreme Court).
169. *Id*.; *Fla. Star*, 530 S.2d at 288 n. 3.
170. *Gideon*, 372 U.S. at 338.
171. *Id*. at 339.

Supreme Court.[172] In *The Florida Star v. B.J.F.*,[173] the Florida Supreme Court specifically noted that an appellant may bypass the Florida Supreme Court and appeal directly to the U.S. Supreme Court when seeking review of a PCA.[174] In *Florida Star*, the appellant challenged the constitutionality of a statute prohibiting it from printing information regarding the identities of victims of sexual crimes.[175] After losing at trial, Florida Star appealed to the First District Court of Appeal, which affirmed without discussion the trial court's validation of the statute.[176] Florida Star appealed the DCA decision to the U.S. Supreme Court after Florida Supreme Court review was summarily denied.[177]

The U.S. Supreme Court did not render a decision because it was unclear whether Florida Star was required to first appeal to the Florida Supreme Court.[178] The U.S. Supreme Court remanded the case to the Florida Supreme Court to decide whether the Florida Constitution conferred Florida Supreme Court jurisdiction to hear the appellant's appeal.[179]

Upon remand, the Florida Supreme Court interpreted Article V, Section 3(b)(3) of the Florida Constitution to allow review only of district court of appeal cases that contained a "statement or citation in the opinion that hypothetically could create conflict" with other DCA or Florida Supreme Court opinions.[180] The Court noted that a "district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the case."[181] Therefore, because the appellants must exhaust review within a state system before proceeding to the U.S. Supreme Court, the *Florida Star* Court officially verified that appellants who receive PCAs from the district court of appeal may proceed directly to the U.S. Supreme Court.[182]

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172. *Fla. Star*, 530 S.2d at 288 n. 3.
173. 530 S.2d 286.
174. *Id*. at 288 n. 3.
175. *Id*. at 287.
176. *Id*.
177. *See Fla. Star v. B.J.F.*, 509 S.2d 1117, 1117 (Fla. 1987) (declining to accept jurisdiction in the Florida Supreme Court).
178. *See Fla. Star v. B.J.F.*, 484 U.S. 984, 984 (1987) (certifying the question of whether the Florida Supreme Court had jurisdiction).
179. *Id*.
180. *Fla. Star*, 530 S.2d at 288.
181. *Id*. at 288 n. 3.
182. *Id*. Before this case, there was a fear among appellants that by moving directly to

While appealing a PCA decision to the U.S. Supreme Court may seem daunting, this procedure has been successful.[183] For example, in *Hobbie v. Unemployment Appeals Commission of Florida,*[184] the U.S. Supreme Court reversed a per curiam decision.[185] In *Hobbie*, the employer fired Hobbie when she refused to work certain hours due to religious convictions developed after she began her employment.[186] When the employer contested Hobbie's unemployment-compensation claim, she sued.[187] Following an unsuccessful appeal to the Fifth DCA, Hobbie appealed directly to the U.S. Supreme Court, which reversed the per curiam affirmance and noted that the denial of benefits to the appellant violated the Free Exercise Clause of the First Amendment.[188]

Similarly, in *Palmore v. Sidoti*,[189] a mother was denied custody of her child solely because she lived with and then remarried an African-American man.[190] The trial court verified that there was no question about the parental abilities of the mother, and instead stated that its decision was based on the mother's choice of a lifestyle that placed her own gratification ahead of her child's welfare.[191] The Second DCA affirmed in a per curiam decision.[192] The U.S. Supreme Court reversed, noting that the trial court's reasoning did not satisfy the Fourteenth Amendment prohibition against discrimination.[193]

Additionally, in *Brooks v. State*,[194] the U.S. Supreme Court reversed the district court of appeal's PCA because the trial court had allowed an involuntary confession to be admitted into evi-

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the U.S. Supreme Court they risked the objection that state-court remedies were not exhausted. *Id*. at 289. However, if they filed only in the Florida Supreme Court and were denied review, appellants risked the objection that the subsequent appeal to the U.S. Supreme Court was untimely as not occurring within ninety days of the lower court's opinion. *Id*. at 288, 289. This case alleviated those fears.

183. *E.g. Fla. v. Rodriguez*, 469 U.S. 1, 2, 5 (1984) (reversing a PCA in light of U.S. Supreme Court precedent); *infra* nn. 184–196.

184. 480 U.S. 136 (1987).

185. *Id*. at 139, 139 n. 4.

186. *Id*. at 138.

187. *Id*. at 138–139.

188. *Id*. at 139, 146.

189. 466 U.S. 429 (1984).

190. *Id*. at 430–431.

191. *Id*. at 431. The court was thus concerned that because of the mother's chosen lifestyle, the child would be subject to "social stigmatization." *Id*.

192. *Id*.

193. *Id*. at 432, 434.

194. 389 U.S. 413 (1967).

dence at trial.[195] The U.S. Supreme Court examined the circumstances surrounding the defendant's confession and found that a confession exacted after fifteen days in solitary confinement with no bed, meager meals, and no human contact except with an investigating officer was not "voluntary."[196]

However, the U.S. Supreme Court will not reverse a case that presents issues only of Florida law.[197] Counsel must be prepared to prove that the case involves an important issue of federal or constitutional law worthy of review by the U.S. Supreme Court.[198] Such attempts are an obvious long shot because the U.S. Supreme Court accepts only a small fraction of the certiorari petitions filed every year.[199]

E. Filing an Appeal with the Florida Supreme Court

There may be an exception to the general rule that the Florida Supreme Court may not review a PCA. Article V, Section 3(b)(1) of the Florida Constitution states that the Florida Supreme Court "[s]hall hear appeals . . . from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution."[200] If a DCA issues a per curiam affirmance that necessarily declares a state statute invalid, is the Florida Supreme Court required to hear such an appeal?

Of course, this begs the question of whether a PCA can "declare" a statute invalid. Logically, one might argue that a PCA does not declare anything (just as it does not "express" anything).[201] However, the Florida Supreme Court has long exercised the power to review the record proper to determine whether it has conflict jurisdiction.[202] It lost this power when a 1980 constitutional amendment added the requirement that the conflict be "ex-

195. *Id*. at 414, 415.

196. *Id*. at 413–415.

197. *Mich. v. Long*, 463 U.S. 1032, 1040–1041 (1983).

198. For an excellent discussion of when an issue is "certworthy," see Robert L. Stein, et al., *Supreme Court Practice* 162–167 (8th ed., BNA 2002).

199. *Id.* at 164.

200. Fla. Const. art. V, § 3(b)(3). The Florida Constitution states that the Florida Supreme Court "[s]hall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution." Fla. Const. art. V, § 3(b)(1).

201. *Supra* nn. 45–47.

202. *Supra* nn. 35–38.

press and direct."[203] But when this "express and direct conflict" language was added in 1980 to section 3(b)(3), it was not simultaneously added to section (3)(b)(1).[204] According to section (3)(b)(1), for the Florida Supreme Court to grant review, the DCA must declare the statute invalid, but there is no requirement of an express declaration, unlike the requirements existent in the remainder of section (3)(b).[205] Because the Legislature purposely omitted the "express" language from section 3(b)(1), arguably the Florida Supreme Court has jurisdiction when a PCA results from a decision that implicitly declares a statute invalid.[206]

Judge Padovano seems to agree that the Florida Supreme Court has appellate jurisdiction under Article V, section (3)(b)(1) when an appellate court issues a PCA affirming an order of a trial court that declares a state statute invalid.[207] As long as the Court has the power to review the record proper, counsel should be able to attempt to convince the Court that the only way the district court of appeal could reach its decision was to declare a statute invalid.[208] This untested theory still awaits its first reported decision.

Such an appeal poses a practical problem. The typical notice of appeal from a PCA is dismissed by the Florida Supreme Court long before there is any briefing on the merits. Thus, counsel should bring the basis for the Court's jurisdiction to its attention as soon as possible. For example, counsel could file a "speaking" notice of appeal that explicitly raises the question and discusses the Court's jurisdiction.[209]

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203. Fla. Const. art. V, § 3(b)(3).

204. Padovano, *supra* n. 32, at § 3.4.

205. *Id*.

206. *See id*. (stating that the Florida Supreme Court would likely hold that it has jurisdiction to review decisions inherently declaring invalid state statutes or constitutional provisions).

207. *Id*. (citing *State v. Cohen*, 568 S.2d 49 (Fla. 1990); *State v. Jenkins*, 469 S.2d 733 (Fla. 1985); *Gardner v. Johnson*, 451 S.2d 477 (Fla. 1984)).

208. *Id*.

209. In practice, a speaking notice of appeal is one that goes beyond the required formal language and presents an explanation and argument about the jurisdictional basis for the notice.

CONCLUSION

A PCA should be the end of the line for most Florida appellants.[210] In most cases, the PCA is a clear expression to the appellant that the appeal is not meritorious and presents no issue worthy of further review.[211] As one court warned, "[C]ounsel should carefully and seriously consider the necessity or desirability of asking the court to rehear a case."[212] Burdening a court with frivolous motions for rehearing or clarification only creates more work for the court, a problem that the PCA is meant to remedy.[213] Moreover, appealing a PCA to the U.S. Supreme Court will be useless if the case does not present an important issue of federal law or U.S. constitutional law.[214] But as *Gideon v. Wainwright* illustrated, there are rare cases in which the appellants should not give up.[215] Although a PCA may be a brick wall in the vast majority of cases, in the appropriate case there are paths around that brick wall waiting for use by creative counsel. The next time that thin envelope arrives bearing bad news, do not automatically assume that the case is dead. Instead, stop and consider whether your client's case may be that rare one deserving of further review.

210. *Supra* nn. 65–74.

211. *See supra* nn. 3–4, 15 (noting that most cases receiving a PCA do not need a written opinion).

212. *Whipple,* 431 S.2d at 1013.

213. *Lawyer's Title Ins. Corp.*, 631 S.2d at 1101.

214. *Long*, 463 U.S. at 1040 (citing *Minn. v. Natl. Tea Co.*, 309 U.S. 551, 556 (1940)).

215. *Supra* nn. 5–9; *see supra* nn. 76, 106–111, 129–140, 151, 170–196 (noting cases in which there have been successful paths around PCAs).