

THE OPERATION AND JURISDICTION OF THE SUPREME COURT OF FLORIDA

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I. INTRODUCTION

The first comprehensive article about the operation and jurisdiction of the Supreme Court of Florida was written in 1993 and published the following year in this law review.¹ In more than ten years since, much has changed and a full revision of the earlier text is in order. For example, none of the Justices who sat on the Court in 1993 are still serving.² The change in membership alone has led to a number of significant refinements in Court protocol and analysis of its jurisdiction. Changes also appear to have been influenced by another historical fact: the ever-rising caseload of the Court. Immediately following jurisdictional reforms in 1980 that further limited the

1. Gerald Kogan & Robert Craig Waters, *The Operation & Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151 (1994).

2. The last, Justice Leander J. Shaw, Jr., retired in January 2003.

Court's jurisdiction, the total filings dropped from 1714 in 1980 to 1456 in 1981.³ Yet by 2003, filings had risen to 2486.⁴ This rise has been accompanied by actions by the Court to increase support staff while restricting its discretionary review jurisdiction in certain categories of cases.⁵

Another historical shift of the last decade is of great importance: the technological revolution of the 1990s—most particularly the advent of the World Wide Web⁶—has had a profound impact both on the Court's internal operations and on the way it interacts with the public and the media. At the time this article first was published, the World Wide Web was in its infancy.⁷ The original authors⁸ were only dimly aware that technology staff within the Office of the State Courts Administrator had posted a handful of pages on this medium in 1994. This made the Florida State Courts one of the first judicial bodies in the world—if not the first—to have a permanent presence on the Internet. From that single innovation, much else followed.

By 1995, the Supreme Court of Florida began greatly expanding its web presence with the addition of information dedicated solely to its own operations and procedures.⁹ In 1996, it posted its first press page,¹⁰ making briefs and other Court documents available instantaneously on a world wide basis. This use of the Web to distribute court documents and information was novel at the time, though soon widely imitated, and is standard practice today. This use resulted in the Court's first formal public information program,¹¹

3. See MANNING J. DAUER & FRED GODDARD, CONSTITUTIONAL AMENDMENTS ON FLORIDA SUPREME COURT JURISDICTION, AND ON CHANGES IN TAX PROVISIONS INCLUDING HOMESTEAD EXEMPTION, TO BE CONSIDERED AT MARCH 11, 1980 ELECTION, CIVIC INFORMATION SERIES, NO. 62, PUBLIC ADMINISTRATION CLEARING SERVICE, UNIVERSITY OF FLORIDA (1980); Arthur England, et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev. 147 (1980) [hereinafter *Constitutional Jurisdiction*].

4. Available from Clerk of Court's office, Supreme Court of Florida.

5. Some aspects of this increasing caseload and the Court's efforts to better conserve judicial resources are discussed in *Baker v. State*, 878 So. 2d 1236, 1245–46 (Fla. 2004).

6. The term "World-Wide Web" came into use about the time the earlier version of this article was published. Originally it meant a relatively new subset of the much older "internet," though the two terms now are virtually synonymous and will be used as such here.

7. See Robert Craig Waters, *An Internet Primer for Florida Legal Researchers*, 70 FLA. B. J., at 12, 20 (1996).

8. The original authors were Justice Gerald Kogan and Robert Craig Waters.

9. These pages have undergone several technological and stylistic renovations over the years and currently are located at <http://www.floridasupremecourt.org> (last visited Feb. 5, 2005).

10. This page subsequently was renamed the Public Information page and is located at http://www.floridasupremecourt.org/pub_info/index.shtml. (last visited Feb. 5, 2005).

11. The first version of this article suggested that the Court had no public information officer (PIO) or program, which was true at the time. See Kogan & Waters, *supra* note 1, at 1154. The first and only PIO to date, Mr. Waters, was named in 1996, and the position be-

but also led to still other innovations that, coupled with unforeseen events, would end the relative obscurity in which the Court largely operated in 1994. Some innovations were of particular importance: in September 1997 the Court began its first live, unedited television broadcasts of oral arguments, followed in October that year by its first live webcasts on the World Wide Web. That November the Court began its first live broadcasts via satellite available for downlink anywhere in North America.

The presence of this new technology and the happenstance of history later would prove potent. Perhaps the ultimate test came with the presidential election cases of 2000. For more than a month in November and December of that year, the Court's web and satellite technology gave the entire world a transparent view of its proceedings and decisions even as the Supreme Court Building was locked down, surrounded by armed security officers, and besieged by hundreds of reporters¹² and thousands more protesters and onlookers. Media such as the *New York Times* praised the Court's openness.¹³ Though these election cases may have comprised the Court's most visible and historic appeals, they were not the first time technology played a major role in a Court-related news event. As early as 1996, the Court found itself in international headlines when its two-year-old website was defaced by hackers at a time when similar attacks on federal websites had generated enormous media interest. Some predicted this event would end judicial use of the new technology. Even at this date, many still did not understand the Web's irrepressibility.

But it was one year before the 2000 presidential elections that the Court's web presence clearly revealed its unique potency as an unfiltered information medium. In 1999, it would magnify a single Justice's dissenting opinion into a worldwide news phenomenon that some believe altered the history of Florida death penalty law.¹⁴ In its 1994 version, this article began with a brief overview of routine Court operations followed by a study of a

came full-time in 1998. This reflects a growing trend among major courts in the United States to have full-time public information officers.

12. Police estimates put the number of reporters at between 300 and 800 at any given time during high profile proceedings and announcements. This almost certainly is an understatement of overall numbers because many media organizations rotated reporters in and out of Tallahassee to relieve them from the twenty-four hour a day, seven days a week operation and give others experience in covering an event of such historic proportions.

13. See Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 14, 2000, at A1.

14. Patrick Schmidt & Paul Martin, *State Supreme Courts on the World Wide Web*, 84 JUDICATURE 314, 314-15 (May/June 2001).

high profile case.¹⁵ Ironically, it is appropriate that this article begin much the same, but this time focusing on *Provenzano v. Moore*¹⁶ and the history-making dissent that Justice Leander J. Shaw, Jr., attached to it challenging the constitutionality of the continued use of the electric chair. In the eyes of many scholars, that dissent, and its attachment of vivid photographs of the body of an electrocuted person, were the impetus behind a chain of events leading to the abolition of electrocution as the state's sole method of execution.¹⁷ The events surrounding the *Provenzano* case are an instructive example of courts operating in full and intense public view in the age of the new media and technology.

II. THE ROUTINE OPERATIONS OF THE COURT

Despite extended media coverage of a handful of high-profile cases in the last decade, the judiciary in Florida remains—as it was in 1994¹⁸—the most poorly understood branch of government. A lack of general public knowledge about the routine operation of the judiciary arises chiefly from the nature of the institution itself. With limited exceptions, judges and their employees, unlike legislative or executive officials, are ethically restricted from talking publicly about pending matters. Even the Court's Public Information Officer (PIO) has severe limitations in public comment compared to PIOs in the other branches of government or in the private sector. Official silence is imposed by constitutional constraints and by codes of ethics requiring strict impartiality and providing that judges receive information on a case only through the closely regulated process of briefing, motions, and adversarial argument.¹⁹

There are many factors contributing to the poor public understanding of the Court. For one thing, the seven Justices and their staffs perform virtually all of their work and official duties away from public view, on the secured second floor of the Supreme Court Building in Tallahassee.²⁰ What is pub-

15. Kogan & Waters, *supra* note 1, at 1156–61 (studying *In re T.A.C.P.*, 609 So. 2d 588 (Fla. 1992)).

16. 744 So. 2d 413 (Fla. 1999), *cert. denied*, 528 U.S. 1182 (2000).

17. *Id.*

18. Kogan & Waters, *supra* note 1, at 1153.

19. See FLA. CODE JUD. CONDUCT, Canon 3B(7) (2004).

20. The current high-technology security barriers are a recent addition, dating only to the Fall of 1989. They were added as a result of violent attacks inside courtrooms that have occurred elsewhere in Florida and the nation, and because of threats received by some members of the court. Prior to 1989, security was far more lax, and it was not unusual for persons to walk off the street and into a justice's office.

lily known of the Court consists largely of its more formal and ceremonial aspects: black-robed Justices seated at the bench, listening and responding to arguments by lawyers often talking in legal jargon difficult for even the participants to understand. In its decisions, the Court speaks only through formal opinions and orders normally released through the Clerk's office and Public Information Office each Thursday morning at 11 a.m. with no advance notice to the public.

Although the internal procedures of the Court are not widely known, they follow a fairly straightforward and well-defined code. Some rules have been distilled into the Florida Supreme Court's Manual of Internal Operating Procedure²¹ and portions of the Rules of Judicial Administration,²² though these by no means contain all or even most of the principles and practices by which the Court operates. Some of the flavor of day-to-day Court operations can also be obtained from other works detailing the Court's history.²³ The purpose of this section is not to belabor material that can be obtained elsewhere, but to review the more significant operations regulated by the Court's customary, unwritten code,²⁴ some aspects of which date to the Court's first sessions in 1846.

Much of the mystery behind the Court's daily operations is simply because the internal machinery is not visible to public view. Unlike the legislature with its committee system or the executive branch with its cabinet meetings and routine press briefings, the Court's meetings and research—apart from oral arguments—are kept entirely confidential until the release of an opinion or order. The most important meetings of the seven Justices occur during conferences that are closed even to the Court's own staff. Further, until 1996 the Court did not have a public information officer²⁵ and did not use its website to distribute public documents as extensively as it does today.

This lack of daily contact with the public has been an unfortunate feature, but one largely born of necessity. The Court must retain absolute neutrality and impartiality until a case is decided. The constitutional require-

Kogan & Waters, *supra* note 1, at 1154, n.2.

21. *See generally* SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURE (2002), available at http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf (last visited Feb. 5, 2005).

22. *See generally* FLA. R. OF JUD. ADMIN.

23. *E.g.*, Joseph A. Boyd, Jr. & Randall Reder, *A History of the Florida Supreme Court*, 35 U. MIAMI L. REV. 1019 (1981).

24. Of course, it will be necessary to reiterate a few matters addressed in Florida's Supreme Court Manual of Internal Operating Procedures in order to lay the groundwork for a discussion of the Court's unwritten procedures. The authors also note that there are some aspects of Court operations that are confidential for a variety of reasons.

25. *See supra* note 11 and accompanying text.

ment of due process²⁶ gives litigants an absolute right to have their cases reviewed in an impartial forum by neutral judges. The *Florida Code of Judicial Conduct* also requires judicial impartiality and prohibits judges and their employees from talking about pending or impending²⁷ proceedings except through established and regulated procedures including briefing, internal discussions among Court personnel, and the adversarial process.²⁸ As a general rule, no such discussion outside the confidentiality of the Court's chambers is permitted while a case is pending unless all parties to the case are given a chance to participate and respond.²⁹ There is, in sum, a strict avoidance of anything that might be seen as an *ex parte* communication involving the Court, the Justices, or Court personnel. Despite the important reasons for such security in communications, it is clear that much of the public does not generally understand the reasons for such restricted communication. For example, Court staff received thousands of e-mails and phone calls during the 2000 election appeals urging the Justices to rule a certain way or to explain comments made during arguments or in recently released opinions. Of course, these communications could not ethically be considered by the Justices and were never forwarded to them.

The procedures leading up to the release of a written opinion or order are by far the most important work of the Court. Binding precedent is often created in this decision-making process, affecting the lives of all Floridians. Citizens elsewhere in the United States can also be affected by this process. Florida is a major state—the fourth most populous in the nation—and its courts' opinions are often used for guidance in other courts throughout the nation.³⁰ The 2000 election cases demonstrated that the interpretation of Florida election laws could have a profound impact on the nation, the world, and the subsequent election reform movement.

It appears paradoxical that a state like Florida, which is so deeply committed to government in the sunshine, is required by its constitution to conduct the bulk of its judicial proceedings in secret. However, there clearly is no other way to preserve litigants' rights under the rule of due process. Unlike legislators or governors, judges cannot be required or allowed to take

26. FLA. CONST. art. I, § 9.

27. There is an important distinction between the terms pending and impending. A case is pending if it has been properly filed in a court. A case is impending if Court personnel have reason to suspect that it will eventually be filed in a court.

28. FLA. CODE JUD. CONDUCT, Canon 3B(7), (9).

29. *Id.* Canon 3B(7).

30. *E.g.*, *Kerans v. Porter Paint Co.*, 575 N.E.2d 428, 431–32 (Ohio 1991) (adopting analysis developed in *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099 (Fla. 1989)).

public stands on pending or impending matters that are yet to be resolved.³¹ The purpose of this article is to dispel some of the mystery and lift some of the misconceptions about the Court's daily operations, including the exercise of its jurisdiction. Further, it is intended to expand and update its 1994 predecessor article, while serving the original purpose of providing information useful both to lawyers and to laypersons interested in how the Court operates.

On another level, this article will review the top level of a judicial system that has come into existence in Florida because of the various constitutional reforms that began with the adoption of the 1968 Florida Constitution and continued with the jurisdictional reforms of 1980. The authors believe that the present operations and jurisdiction of the Court are one of the success stories of Florida's efforts to modernize its governmental structure in recent decades. This article examines how that constitutional mandate is translated into the Court's daily functions.

A. *A Case Study: Provenzano v. Moore*

In an effort to dispel some of the lack of knowledge that this mandatory secrecy has created, this article will begin by reviewing the internal process by which the 1999 case of *Provenzano v. Moore*³² was decided. Understanding how this case was handled administratively may give a broader perspective on the Court's operations and exercise of its constitutional powers.

The case was chosen for several reasons. First, the decision is now final and thus there is no ethical impediment in discussing it to a limited extent.³³ Second, the issue at stake in *Provenzano*—the constitutionality of Florida's use of the electric chair—now has been rendered moot by a statute changing the principle method of execution to lethal injection.³⁴ Thus, the specific issue is unlikely to come before the Court again. Lastly, the case received widespread publicity and drew great public interest around the world. As a result, *Provenzano* is better known than most cases decided by the Court.

31. Despite this restriction, the Court's Public Information office and Clerk's office routinely receive calls asking for Justices to state their positions on issues like abortion or the death penalty when they are facing merit retention elections. Most callers are frustrated or incredulous when told the Justices cannot answer questions like these. Some controversy over this restriction on Justices has been raised by the United States Supreme Court's opinion in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

32. 744 So. 2d 413 (Fla. 1999).

33. The authors will not interpret the legal analysis of the case, only the process by which it was shepherded through the Court. In addition, matters that fall within the secrecy of the Court will not be discussed.

34. See FLA. STAT. § 922.105(1) (2004).

On Thursday, July 8, 1999, shortly after 7 a.m., a Florida death row inmate named Allen Lee “Tiny” Davis was executed in the state’s electric chair at the state prison near Starke.³⁵ Early press accounts of the event suggested that Davis bled from his chest³⁶ during the execution, resulting in a plate-sized blood stain on his white shirt.³⁷ State officials contended that the blood was from a nosebleed exacerbated by the fact that Davis used blood-thinning medication.³⁸ Nonetheless, attorneys for a man scheduled to be executed the following day—Thomas Provenzano—immediately filed motions with the Court seeking a stay and an opportunity to raise the often litigated question of the constitutionality of the use of the electric chair.

The combination of blood appearing during the execution and the possibility of a third serious constitutional challenge to the chair in a decade caused a media sensation. Within hours, media had flooded the Court’s public information office with more public records requests than it could handle, resulting in the creation of a special webpage to distribute those documents³⁹ in a portable document format.⁴⁰ Until that time, most media requests for documents related to pending executions were handled in person or by facsimile machine.⁴¹ This quickly became impossible in the *Provenzano* case as documents with a hundred or more pages were rapidly filed and dozens of media representatives sought copies before their deadlines. The Davis execution, in other words, had the effect of expanding the kinds of documents placed on the public information pages of the Court’s website, a trend that has continued since.⁴² Ironically, this same death-warrants website—created solely to deal with overwhelming media demand caused by the Davis execu-

35. Lesley Clark, *Controversy Erupts Over Execution*, MIAMI HERALD, July 9, 1999, at A1. [hereinafter Clark I].

36. *Id.*

37. *Id.*

38. *Id.*

39. That website remains a part of the Supreme Court public information collection and is located at http://www.floridasupremecourt.org/pub_info/deathwarrants/index.shtml. (last visited Feb. 5, 2005).

40. Usually called PDF, it has become a standard web format. Unlike other web formats, PDF documents do not lose the most important qualities of their paper originals, such as exact page breaks.

41. However, the Court began distributing briefs and opinions in cases from its website in 1996, and a more limited system of distribution using email was in use even earlier.

42. In 2000, the Court added a separate page in its “press page collection” for documents related to the discipline of judges for ethical breaches. Also in 2000, the Clerk’s office began placing nearly all merits briefs it receives in cases on its website. Later that same year all orders disposing of cases, not just opinions, were posted on the website the same day the orders were issued. In 2002, nearly all jurisdictional briefs were added to the briefs being posted. In late 2003, the docket for all cases was placed on the website.

tion—would itself later become the focus of international media attention weeks later.

By the time an evidentiary hearing was held in the *Provenzano* case, the Florida Department of Corrections revealed that one of its employees had taken color photographs of Mr. Davis shortly after his execution. These were used as evidence in hearings before the trial judge, who ultimately ruled that Florida’s use of the chair did not violate constitutional guarantees.⁴³ Media, however, did not publish copies of the photographs even though they were public records, apparently because of their gruesome nature.⁴⁴ The public received only written descriptions of the photographs penned by reporters. Mr. Provenzano appealed⁴⁵ to the Court, and the photographs were part of the record. The Court expedited the case and oral argument was heard on August 24, 1999.⁴⁶

43. Sydney P. Freedberg, *Judge Upholds Electric Chair Use*, ST. PETERSBERG. TIMES, Aug. 3, 1999, at 1A.

44. Their gruesomeness was much noted in the media. *E.g.*, Sue Anne Pressley, *New Debate About an Old Killer; Foes of Electric Chair Say Florida Engages in Cruel, Unusual Punishment*, WASH. POST, Aug. 26, 1999, at A03; David Cox, *Bloody Execution Photos Viewed the High Court Saw the Presentation During Arguments Over the Future of an Orlando Killer’s Trip to the Electric Chair*, ORLANDO SENTINEL, Aug. 25, 1999, at D1.

45. *See* FLA. CONST. art. V, § 3(b)(1)–(6). The Florida Constitution creates a distinction between the terms “appeal” and “review”. *Id.* Appeals constitute those appellate cases in which the Court must hear the case, such as cases in which the death penalty has been imposed. FLA. CONST. art. V, § 3(b)(1)–(2). Reviews are for those appellate cases in which the Court merely has discretionary jurisdiction. *See* FLA. CONST. art. V, § 3(b)(3)–(6). The Court traditionally has observed another standard for judicial nomenclature relevant to the distinction between appeals and reviews. For appeals, the Court either affirms or reverses the decision below; for reviews, the Court either approves or quashes the decision below. By contrast, when the Court expressly agrees or disagrees with a decision other than the one below, the Court “approves” or “disapproves” the decision. On occasion, there may be lapses in the use of this nomenclature, but the convention now is well established as a matter of Court custom.

46. This case was heard outside the regular calendar cycle. By tradition, the Court usually observes its regularly scheduled oral arguments during the first full business week of each month, with the exception of July and August when no oral argument usually occurs. However, the Chief Justice has discretion to schedule the oral argument calendar as necessary. For example, oral argument sometimes is scheduled for weeks in which Monday or Tuesday is the last day of the month. That occurred in August 1999 when Monday was August 30, so regular arguments were scheduled for that week. Special oral arguments can be scheduled at other times by the Chief Justice, a practice that especially occurs when the Court deems oral argument necessary on a pending death warrant, in some requests for advisory opinions, in cases involving pressing constitutional questions, and in other emergency matters. The Court, like most courts of last resort nationwide, traditionally observes a summer recess that usually occurs from the middle of July through the middle of August, but occasionally has been observed earlier or later. The suspension of a regular oral argument calendar in these two summer months is a traditional consequence of the summer recess.

Arguments consumed about an hour in a courtroom filled with reporters, and video of the arguments was distributed live from an electronic distribution box in the Court's press room⁴⁷ via satellite⁴⁸ and over the Internet.⁴⁹ Mr. Provenzano's attorney made the execution photographs a major feature of the arguments by holding at least one of them up for display. This argument was broadcast and photographs of it were published in newspapers, but not in any significant detail. In effect, the public still did not see the photographs. After arguments, the media held impromptu press conferences with the attorneys outside the Court, something that often follows a high-profile session.

In *Provenzano*, as with most other cases orally argued, the Court immediately held a closed-door conference. Neither the public nor the Court's own staff are allowed to attend such conferences. At conferences, the Justices tentatively voted on how the case would be decided. The official Court file was then transmitted by the Clerk's office to the office of the Justice assigned to write the majority opinion.⁵⁰

Provenzano was decided quickly because it was an expedited case involving a death warrant, a category of cases that always receives the Court's immediate attention. The normal lapse of time between oral argument and the release of an opinion in other categories of cases is usually a matter of months, and the Court attempts to render decisions within six months of oral argument or submission of the case without oral argument.⁵¹ Occasionally, the duration can be longer in difficult cases.⁵² The opinion in *Provenzano*

47. The press room now is located just inside the front doors of the Florida Supreme Court Building. Broadcast journalists can hook up their recording equipment to a "mult box" that can distribute the live feed to multiple users simultaneously.

48. The satellite used at the time of this writing is AMC-3 (KU band) at 87 degrees west, transponder 18, Virtual Channel 802. The downlink frequency is 12046.750 MHz. The uplink frequency is 14348.500 MHz. The L-band frequency is 1296.750 MHz. The symbol rate is 7.32. The FEC is 3/4. The satellite may be preempted during legislative sessions and emergencies.

49. All broadcasts are managed by Florida State University's WFSU television station under state contract. These broadcasts have been a permanent service offered to the public since they began in 1997.

50. The process of opinion writing and voting on cases is discussed more fully. See discussion *infra* Part II.B.

51. FLA. R. JUD. ADMIN. 2.085(e)(2).

52. See *id.* In rare cases, the Court fractures so badly that no single Justice is able to obtain the concurrence of three other Justices in a decision, which the Florida Constitution requires for any decision to be binding. See FLA. CONST. art. V, § 3(a). Release of any opinion thus may be delayed for long periods of time while members of the Court seek a compromise. It is very rare, however, that the Court is completely unable to reach some decision in which at least four Justices agree. When that happens, the Court's precedent holds that the lower-court opinion under review is automatically affirmed or approved for want of a majority

was issued on September 24, 1999, in a split decision joined by four Justices upholding the constitutionality of the electric chair,⁵³ while three dissented, including Justice Shaw.⁵⁴

But Justice Shaw did something novel in his dissent. He attached three photographs of the prior execution of Mr. Hill, to be released as part of the opinion.⁵⁵ Because opinions are posted in their entirety on the Court's website, the photographs were also posted.⁵⁶ They also were posted on the new death warrants webpage because of the media demand for all documents in the *Provenzano* case. Initial news reports noted that Justice Shaw had taken this "unusual step."⁵⁷ None noted that the photographs were available on this new page of the Court's website collection, which of course was created solely as a vehicle for distributing court documents to the media.⁵⁸ Their placement remained unnoticed by nearly everyone until a *Miami Herald* reporter published an article on October 1, 1999, including for the first time the address of the website where the photographs could be found.⁵⁹ The story was quickly picked up by news wire services and published by media around the world.

The effect was immediate. So many people began accessing the death warrants webpage that the Court's server—its connection to the Internet—repeatedly became overtaxed and unusable.⁶⁰ Nonetheless, the public demand to view the page rose. While some found this use of the Internet con-

or, if the Court's original jurisdiction is being invoked, the relief requested is deemed to be denied. Opinions issued in the absence of a four-member majority set no precedent and do not constitute a decision for legal purposes. See *State v. Hamilton*, 574 So. 2d 124, 126 n.5 (Fla. 1991) (citing *Powell v. State*, 102 So. 652 (Fla. 1924)); *E.g., State ex rel. Albritton v. Lee*, 183 So. 782 (Fla. 1938); *Honaker v. Miles*, 171 So. 212 (Fla. 1936). Thus, the doctrine of stare decisis does not apply to such cases. There is some question whether these cases remain good law, however, in light of the present constitutional requirement that "[t]he concurrence of four Justices shall be necessary to a decision." FLA. CONST. art. V, § 3(a).

53. *Provenzano v. Moore*, 744 So. 2d 413, 416 (Fla. 1999).

54. *Id.* at 422–51.

55. *Id.* at 442–44. The version in Southern Reporter, Second series is reproduced in black and white. Justice Shaw used color photographs.

56. The entire opinion—including the photographs—remained on the Court's website.

57. Steve Bosquet, *Electric Chair Staying on the Job*, MIAMI HERALD, Sept. 25, 1999, at 1A.

58. *E.g.*, Sydney P. Freedberg, *Court Upholds Use of Electric Chair Series: The Electric Chair*, ST. PETERSBURG TIMES, Sept. 25, 1999, at 1A.

59. Lesley Clark, *Execution Photos, Racist Tape On-line*, MIAMI HERALD, Oct. 1, 1999, at 1B. The reference to a "racist tape" was for an audio file posted on the Florida Department of Law Enforcement's website in the hope someone would recognize the voice of a man being sought for a bombing at Florida A&M University. *Id.*

60. Lesley Clark, *Death Photos Attract Crowds*, MIAMI HERALD, Oct. 6, 1999, at 1B.

troversial,⁶¹ the reaction of the general public in e-mails and web chat room discussions in the United States seemed to approve of both the death penalty and posting the photographs on the Internet as a deterrent.⁶² The discussion among the lay public, in other words, came to regard the death warrants website as a news phenomenon in itself. Many people made their own assumptions about why the photographs were on-line. Few seemed to grasp the true reason why the page had been created, and few expected it to alter the legal status of the death penalty in Florida.⁶³ Whether it did can only be a matter of speculation.

Nonetheless, without stating a reason, the United States Supreme Court accepted certiorari jurisdiction in the *Provenzano* case on October 26, 1999. This appeared to surprise some state lawmakers, who immediately suggested a special legislative session.⁶⁴ A session was convened in early January 2000 and legislation was passed providing that the death penalty be administered by lethal injection unless the inmate opts for electrocution. Following this change, the United States Supreme Court dismissed the case. Whatever action the Court might have taken thus cannot be known.

Some have suggested that Justice Shaw's actions in the *Provenzano* case created a climate that led to the reform.⁶⁵ However, the only thing that can be said with certainty is that his publication of the execution photographs marked the point in time at which courts and court watchers vividly realized, perhaps to their surprise, that the World-Wide Web is a powerful medium, and the information it provides reaches people unsummarized, unfiltered, and undelayed.

This experience contributed to the Court's subsequent approach to the most high profile cases it has recently considered—those associated with the 2000 presidential elections a year later. Thus, the two key ingredients for communicating to a watching world—web distribution of documents, and broadcasts of arguments—already were in place and had been tested by real events before the elections of 2000. Even the separate webpage created to

61. David Rovella, *Electrocution's Face on Display*, 22 NAT'L L.J., Nov. 8, 1999, at A4.

62. Jackie Hallifax, *Bloody Execution Photos Make Florida Court's Web Site Popular World Wide*, NAPLES DAILY NEWS, Oct. 29, 1999, available at <http://web.naplesnews.com/today/florida/d3751949.htm>.

63. Steve Bousquet, *Florida Faces Legal Crisis over the Chair*, MIAMI HERALD, Oct. 28, 1999, at 1A (noting that the later decision of the United States Supreme Court to accept certiorari jurisdiction in *Provenzano* was "unexpected.")

64. Marcia Gelbart & Jenny Staletoovich, *High Court Has State Asking: How Do We Keep killing?*, PALM BEACH POST, Oct. 28, 1999, at 1A.

65. See Schmidt & Martin, *supra* note 14.

distribute documents in those cases was modeled after the one created out of sheer necessity in the *Provenzano* case.⁶⁶ As commentators have noted:

Given the intense demand for immediate information on developments in the post-election legal fight, it was fortuitous that the battleground state was Florida. The Florida Supreme Court's ready capacity for distribution of parties' briefs and netcasts of oral arguments provided worldwide media and interested individuals with a relatively transparent view of the process. Although few Internet servers in the world can support such extreme and focused demand for bandwidth without some slowdown, Florida's experience with the *Provenzano* affair made it as ready as any state high court.⁶⁷

Moreover, the existing use of satellite broadcasts since 1997, fully tested by *Provenzano* and other cases, created media history: the two Supreme Court of Florida arguments associated with what later would be called *Bush v. Gore*⁶⁸ became and remain the only appellate arguments broadcast live in their entirety by all major television networks and cable news channels world-wide. Hence, the public nature of court proceedings in the United States was transformed in a very short period of time.

B. *Internal Case Assignments & Opinion Writing*

As the discussion about *Provenzano* suggests, the Court's work in writing official opinions is not conducted by all seven Justices simultaneously. Rather, work is randomly and proportionately delegated to individual offices. The system by which this delegation occurs is perhaps one of the least understood aspects of the Court's routine operations. As a result, parties sometimes have erroneously assumed that particular Justices have some unusual or unfair ability to control case assignments. The reality is the opposite. Justices, other than deciding general policy about assignments, play no role in the assignment process.

The actual method by which cases are assigned for opinion writing in the Supreme Court of Florida differs substantially from that used in the United States Supreme Court, in which seniority equates to power. In the latter Court, the assignment typically is made by the Senior Justice who is in the

66. Florida Supreme Court at http://www.floridasupremecourt.org/pub_info/election/index.shtml (last visited Feb. 5, 2005).

67. Schmidt & Martin, *supra* note 14, at 325.

68. None of the pleadings in Florida were so titled. This popular reference to the cases became common because the case argued before the United States Supreme Court on December 11, 2000, received this case style.

majority, with the Chief Justice always considered more senior than any other Justice. Thus, Senior Justices in the nation's highest court do, in fact, have an unusual ability to control case assignments.

In the Supreme Court of Florida, however, cases are assigned at random by the Office of the Clerk, and assignments typically are made as soon as briefing is completed. There are, however, some exceptions, discussed below.⁶⁹ In other words, case assignments in the Supreme Court of Florida are generally accomplished by a system of rotation. This can lead to situations in which the Justice assigned to write a majority opinion in a case may disagree with the majority viewpoint.

Under this rotation system, the case file is sent to the office of the designated Justice, who then usually will assign one of that office's law clerks⁷⁰ to begin preparing the case for ultimate disposition. The process that follows varies somewhat depending upon the type of case at issue. There are four broad categories of cases in which an opinion will be written or an order entered: 1) cases scheduled for oral argument and conferenced; 2) cases accepted without oral argument (no request cases) and conferenced;⁷¹ 3) petitions by death-row inmates (death cases); and 4) special cases, often requiring expedited consideration by the Court.

1. Oral Argument Cases

In all cases scheduled for oral argument, the law clerk assigned to the case is required to write a memorandum reflecting original research on the law and the facts, as well as analyzing the parties' arguments and the issues of the case. A recommendation regarding the case's disposition is included.⁷² Prior to oral argument, each Justice is presumed to have read all of the briefs and the staff memoranda as well as to have conducted any additional

69. See discussion *infra* Parts II.B.1-4.

70. Each of the Justices has three law clerks and a judicial assistant. Law clerks' exact titles vary according to seniority. The most junior are called staff attorneys followed by Senior Staff Attorney and then Career Staff Attorney. They are called law clerks, which is the term that will be used in this article.

71. The term "no request" is misleading. Many, if not most, of these cases had a request by at least one of the parties for oral argument. The term derives from the fact that the Court itself has not requested oral argument, meaning that any such request by the parties was denied.

72. This is a significant change since 1993, when law clerks only produced short summaries with no recommendation.

research into the law or the facts deemed necessary. The Justices normally do not formally meet to discuss the cases in advance of oral arguments.⁷³

As noted earlier in the discussion of *Provenzano*, a closed-door conference of the seven Justices is usually held the day of oral argument, although conference may be delayed up to a few days due to conflicts in the schedules of the Justices. In some district courts of appeal, law clerks are permitted to attend court conferences or are even asked to participate in the judges' discussion of cases. However, in the Supreme Court of Florida, law clerks do not attend.⁷⁴

If a law clerk needs access to a Justice during a conference, they are permitted only a single liberty that is seldom exercised: knocking on the conference room door. An old custom—one increasingly honored more in the breach—dictates that the most junior Justice in the room answers the door.⁷⁵ New technology has changed this custom in one regard. Because the conference room is now computerized and at least one Justice has a computer working during conference, the clerk can send e-mails to the Justices if required.

The confidentiality surrounding conferences means that the Justices, and especially the Justice assigned to write an opinion, must take notes regarding the positions or reasoning espoused by the other members of the Court. The conference also is memorialized electronically. One Justice now records, via computer, what occurred at conference in a conference action agenda. The Clerk of Court, but no one else, can access this document while the conference is proceeding. The Chief Justice presides over the conference. During the conference, all of the Justices—beginning with the Justice whose office was initially assigned to work up the case—are given a chance to indicate their initial and tentative preferences regarding a case's disposition and these tentative views are recorded for later reference.⁷⁶ After the

73. Oral argument summaries, bench memoranda, and other documents associated with the preparation of a case are internal court documents related to the decision-making process and thus cannot be released to the public or any person not on the court's staff. Violation of this rule is considered an ethical breach and can be punished by contempt of court. In 1974, for example, the Court ordered one of its law clerks to show cause why he should not be held in contempt for releasing copies of oral argument summaries to unauthorized persons. Based on the mitigating evidence, the Court withheld a contempt citation but publicly reprimanded the law clerk and placed him on probation for a period of two years under close supervision. *In re Schwartz*, 298 So. 2d 355, 356 (Fla. 1974).

74. With increasing frequency, the Court does require staff and others to discuss administrative matters under consideration. There is no discussion of cases during these colloquies.

75. By tradition, the Court sits by seniority in the conference room. There are two doors to the conference room. One door is immediately adjacent to where the junior Justices sit.

76. These preferences are by no means final. Justices frequently change their minds after giving a case more thought, after closer review of the record or the law, or after another Jus-

assigned Justice announces her or his views, the other Justices in order of seniority give their views, with the Chief Justice speaking last.

If the view of the assigned Justice prevails, that Justice then has the responsibility of drafting a majority opinion. If the assigned Justice is in the minority, the Chief Justice still has the option of having that Justice draft the majority opinion in accordance with the views of the majority, or of assigning the opinion to the most senior Justice in the majority. Responsibility for opinion drafting varies from office to office in the Court. Some Justices prefer to draft their own opinions, with law clerks often being asked only to check the finished product for accuracy and style. Other Justices may orally outline their views to a clerk and assign the clerk the responsibility of producing an initial draft, with the Justice then taking over until a final draft is circulated. In still other offices, opinion drafting is a shared responsibility of the Justice and the assigned law clerk, and in some instances, involve every staff member in that office.

Of course, the legal analysis and reasoning of all opinions is discussed and agreed to at conference. However, the exact way an opinion will be written may be discussed in conference, but it usually is left to the discretion of the assigned Justice subject to some significant exceptions. For example, the Court has promulgated a system of legal style contained in Rule 9.800 of *The Florida Rules of Appellate Procedure*.⁷⁷ For matters not covered in the Rule itself, style is governed by the latest edition of *The Bluebook: A Uniform System of Citation*.⁷⁸ If nothing in *The Bluebook* is on point, style is governed by the *Florida Style Manual*.⁷⁹ If none of these sources are on point, the Court generally considers that style should be governed by the closest analogous rule or example contained in the three sources listed here, in the same order of preference. As a practical matter, most authorities not covered by the rule and style manuals are Florida documents, and these typically are dealt with by reference to the closest analogous rule or example from the *Florida Style Manual*.

tice proposes a different method of analysis or disposition. On occasion, the Court has decided a case contrary to the initial conference vote, although such instances are the exception rather than the rule.

77. See FLA. R. APP. P. 9.800.

78. FLA. R. APP. P. 9.800(n). The Bluebook is a compiled publication created by respective law reviews at Columbia University, Harvard University, the University of Pennsylvania, and Yale University. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

79. FLA. R. APP. P. 9.800(n) (referencing *Florida Style Manual*, 19 FLA. ST. L. REV. 525 (1991)); see also *Florida Style Manual*, 15 FLA. ST. U. L. REV. 137 (1987). The *Florida Style Manual* is published by the Florida State University Law Review.

Another significant exception deals with gender-specific language. In the wake of a report by a court commission investigating gender bias,⁸⁰ the Court now has instructed its staff and The Florida Bar agencies charged with developing rules of court to avoid all gender-specific language wherever possible. The most common methods of complying with the rule are to use plural pronouns instead of singular,⁸¹ and to rewrite sentences so that gender-specific language is not needed.

In most instances, the parties have their greatest opportunity to influence the Court in their written briefs. While oral presentations happen only once, lawyers have substantial time to articulate the views of their clients in draft after draft of their briefs until they get it just right. Lawyers who fail to take advantage of this opportunity to get it just right do a disservice to their clients and their causes. Briefs are read, summarized, and subjected to vigorous critical analysis prior to oral argument. Briefs actually introduce the Court to the case.⁸² Obviously, a bad brief is a bad first impression, whereas a strong brief can strongly influence the initial views of the Justices on the case. Some cases may be won or lost in oral argument, but these are a minority and usually involve issues that were already close and difficult to resolve. Oral argument primarily allows the Justices to test the strengths and weaknesses of first impressions created by reading the briefs. In sum, attorneys should scrupulously prepare their briefs to the Court.

Style and content of briefs are governed by court rule.⁸³ Beyond that, counsel should avoid presentations that create confusion as to the facts or issues. One practice sometimes used by respondents or appellees, for example, is to ignore the sequence of issues or arguments presented by the petitioners or appellants. This usually creates needless confusion and should be avoided. If the issues in the briefs do not match one another, the Court then must perform a kind of mental “cut and paste.” The better practice is to address the issues in the same sequence, even if only to note that an issue is redundant or irrelevant, and then to list separately and discuss any issues the

80. See Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990).

81. In the English language, plural pronouns are inherently gender-neutral.

82. In another major change since the last version of this article, many documents must be submitted to the Court both on paper and electronically. See Fla. Admin. Order No. AOSC04-84 (Fla. Sept. 13, 2004) (on file with Clerk, Fla. Sup. Ct.), available at <http://www.floridasupremecourt.org/clerk/adminorders/2004/sc04-84.pdf> (last visited Feb. 5, 2005). In high-profile cases, the Court now routinely orders parties to submit all documents, including appendices, in an electronic format so they readily can be posted on the public information pages of the Court’s website.

83. FLA. R. APP. P. 9.210, 9.800.

opponent may have failed to raise but that are relevant to the disposition of the case.

Another practice to avoid is incorporating by reference an argument from a brief in a different proceeding or court, or even in the same case, except when the Court grants leave to do so. Often the other brief may not be readily available, or may require needless effort, and the net result renders the current brief unintelligible on its face. It is always better to make sure a complete statement of the argument can be found within the four corners of the brief.

One peculiarity of the Court's method of blind assignment of cases is that the initially assigned Justice's vote may not always be in the majority. However, under long-standing Court custom, this fact alone does not disqualify that Justice from writing the proposed majority opinion. Most often, the assigned Justice will agree to write an unsigned *per curiam* opinion⁸⁴ reflecting the views of the majority, with the Justice also writing a separate opinion expressing any contrary views. If an assigned Justice feels unable to develop the majority's proposed opinion or if there is an objection, the case can be reassigned to another Justice at conference. All reassignments lie within the discretion of the Chief Justice, though in practice the case is usually transferred to the senior Justice in the majority who first expressed the view adopted by the majority. However, on occasions when the conference vote is close or fails to establish a tentative majority, the assigned Justice may circulate a proposed majority reflecting that Justice's views, with the hope that other offices will find the analysis compelling. Less commonly, a Justice may circulate two or more proposed majority opinions in the same case, thereby giving the Court options from which to choose.

Once a proposed majority opinion is circulated, each Justice must vote on the proposal. Technology has again resulted in a major change in how voting is done. Previously, a written vote sheet was prepared and attached to each proposed opinion. The vote sheet included a listing of each kind of vote possible for the type of case in question.⁸⁵ All voting was then done manually on the vote sheets, with the Justices voting by placing their initials next to the voting category they prefer.⁸⁶ Now all voting on opinions is done via computer using an application developed by the Court's technology staff, called eVote. This application records votes electronically in a secure data-

84. *Per curiam* opinions as they are used by the Supreme Court of Florida are discussed within the text. See discussion *infra* Part II.D.

85. The possible votes vary according to the kind of case.

86. If a Justice is out of town and there is a pressing need for a vote on the case, the Justice by telephone or e-mail may authorize a staff member to indicate the proper vote.

base. However, the Justices continue to indicate their votes on paper copies as a backup, and these copies are kept by the Clerk's office.

By custom, the Justices usually cast only three types of votes that do not require a separate opinion. These are: concur, concur in result only, and dissent.⁸⁷ Of course, each Justice can write a separate opinion. The kinds of separate opinions are discussed more fully below.⁸⁸

During the voting process, it is not unusual for the Justices to continue to exchange views either in writing or by personal visits. Once all votes are recorded, one of two things will occur. If the case has generated no further debate among the Justices, it will be routed to a professional reporter of decisions in the Chief Justice's office to be checked for substantive and stylistic problems before being released to the parties and the public. However, if some debate remains, the case will be scheduled for a second court conference. When this happens, the case is routed to a staff member in the Chief Justice's office to be included on the next available conference agenda.⁸⁹ At conference, the Justices will discuss the case and decide on any further action that may be necessary. Frequently, only minor revisions are made in opinions to satisfy the concerns of particular Justices.

Occasionally it becomes apparent during a conference, or after voting, that a majority of the Court does not agree with the proposed majority opinion that was circulated, and the Chief Justice may reassign the case to be written by a Justice in the new majority.⁹⁰ Sometimes when it is apparent

87. These votes mean precisely what they say. Concur indicates a full acceptance of the majority opinion and decision. Concur in result only indicates an acceptance only of the decision, and a refusal to join in the analysis expressed in the opinion. Dissent indicates a refusal to join in either the decision or opinion. Members of the Court usually do not specially concur or concur in part and dissent in part unless they also write a separate opinion, although there are exceptions even here. *E.g.*, *Maison Grande Condo. Ass'n, Inc. v. Dorten, Inc.*, 600 So. 2d 463, 465 (Fla. 1992) (McDonald, J., concurring in part, dissenting in part). Moreover, in death penalty cases, each Justice votes separately as to conviction and sentence. Therefore, a Justice can concur as to the conviction but dissent as to the sentence without writing a separate opinion. *E.g.*, *Maharaj v. State*, 597 So. 2d 786, 792 (Fla. 1992) (McDonald, J., concurring as to conviction, dissenting as to sentence). Though less common, Justices also may vote separately as to punishment in cases of attorney discipline. *E.g.*, *The Florida Bar v. Morse*, 587 So. 2d 1120, 1121 (Fla. 1991) (McDonald, J., concurring as to guilt, dissenting as to punishment).

88. See discussion *infra* Part II.C.

89. Conference agendas are produced by the office of the Chief Justice.

90. For example, a Justice may have written a separate dissenting opinion that clearly reflects the views of at least four members of the Court. In such cases, the Court's majority and the Chief Justice may agree informally among themselves that the author of the dissent will simply recast the dissent as a majority and circulate it to the full Court without need for a conference discussion. In that case, the now failed majority opinion may be recast as a dissent.

that the proposed majority opinion has failed to garner four votes, the Clerk prepares a memorandum to the Chief Justice advising of that fact. However, the original author of the failed majority opinion sometimes may be given an opportunity to write a new *per curiam* opinion that conforms to the majority's views, perhaps accompanied by a separate opinion expressing any divergent views of the author.

Once all questions regarding a case are settled and the opinion or opinions have been proofread and approved for release, the Clerk's office will set a tentative date for the opinion to be released. However, no opinion can be issued except upon the signature of the Chief Justice. Typically, opinions are scheduled for release no earlier than a week in advance.⁹¹ Copies of the final version of the opinion or opinions are circulated by the Clerk to all Justices and each member of their staffs, and all staff attorneys who work for the court one week prior to the scheduled release the following Thursday. The purpose of this exercise is to allow for continuous quality control and further proofreading of opinions right up until the time of release. Justices, their staffs, and the Clerk's office sometimes find errors or inconsistencies not caught during the normal proofreading process.

When the Clerk's office determines that a case has the necessary votes for release, the case is sent to the Reporter of Decisions for technical review. The Reporter of Decisions then directs the Clerk in writing to file any opinion to which at least four Justices have subscribed.⁹² Copies of opinions ready for release to the public are delivered to each Justice no later than Thursday at noon the week before actual release. At any time before 10 a.m. on Thursday of the following week, any Justice may direct the Clerk not to release an opinion. Unless otherwise directed by this day and time, the Clerk and the Director of Public Information release the opinions at 11 a.m.

Another significant change since this article was first written in 1993 is the way in which opinions are released at the Court. Previously, the Court maintained a press room in which paper copies of opinions would be stacked on a large table for release to media. Only paper copies were considered the official release at this time. The door to the press room would remain locked until the time for release, and the opening of the door thus marked the official moment of release. Beginning in the mid-1990s, however, the Court began posting its opinions on its website at the time of release. Media and

91. This is not true, however, of some emergency cases such as collateral challenges by death-row inmates scheduled for execution. When some urgency is involved, the Chief Justice has discretion to order opinions released at any time after voting is finalized and the Justices have resolved any differences as fully as is possible.

92. A minimum of four Justices must concur at least in the result reached under the state constitution. FLA. CONST. art. V, § 3(a).

the public in general became increasingly accustomed to this electronic release, though many longtime members of the Tallahassee capital press corps continued to stand outside the door of the press room every Thursday. However, in 2001 the Clerk and the Court's Public Information Officer polled the press corps about their willingness to replace the existing system with a purely electronic one. With little dissent, the press corps accepted this change. Opinions now are posted on the Court's website under the Court Decisions & Rules link⁹³ as soon as possible after 11 a.m., and media are simultaneously notified by means of an e-mail list reserved exclusively for media. These electronic releases now constitute the official release of opinions, and paper copies are no longer produced. The press room now has been moved into a smaller room, since its only remaining use is as a distribution point for the video and audio of court arguments to broadcast media.⁹⁴

Opinions are not considered final until any motion for rehearing or clarification is disposed of. However, there are some cases in which the Court notes that rehearing or clarification will not be entertained. For example, the Court routinely notes that it will not entertain motions for rehearing or clarification in cases requiring immediate finality, such as cases in which a death warrant is pending, or after an opinion has been revised upon the granting or denial of a motion for rehearing or clarification.

2. "No Request" Cases

A substantial percentage of the Court's docket consists of cases in which oral argument is not granted. These can include cases in which oral argument was sought but denied, the majority of contested Florida Bar discipline cases, and a few other categories. These cases are decided in the same manner as oral argument cases except that no oral argument in the courtroom is entertained.

After all briefing is complete, the "no request"⁹⁵ case is randomly assigned to an office⁹⁶ much like oral argument cases. The assigned Justice

93. See Court Decisions & Rules at <http://www.floridasupremecourt.org/decisions/index.shtml> (last visited Feb. 5, 2005).

94. A live feed of video and audio is available at this location. A distribution device called a mult box allows multiple users to plug into the feed simultaneously and record it. Because the Court also broadcasts live via satellite, there has been a growing trend for broadcasters to prefer the satellite feed over the press room feed.

95. There is no absolute right to oral argument in any case, although the Court's Manual of Internal Operating Procedures requires that oral argument always be scheduled in every appeal from a judgment imposing a death sentence. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(B)(3), (2002) available at <http://www.floridasupremecourt.org>.

then directs a law clerk to prepare a summary and memorandum that is similar to the staff memorandum prepared in oral argument cases. The memorandum contains research on the law and facts and a recommended disposition.

The case is then scheduled for discussion at the next available court conference. At this time, the Justices discuss their views, again with the assigned Justice going first, and a vote is taken. The preparation of an opinion is done in the same way as in an oral argument case, and the proposed majority opinion is circulated to the entire Court. Any differences among the Justices are resolved in the same manner as would apply in oral argument cases, including additional conference discussions as needed. Once all the Justices are satisfied that no further debate remains about the case, the majority opinion and any separate opinions are prepared for public release.⁹⁷

3. Death Penalty Cases

Appeals from judgments imposing the death penalty are treated like any other oral argument cases, and are assigned for oral argument as soon as briefing is completed. The Court traditionally follows a somewhat different procedure in collateral challenges by death row inmates. Many of these cases involve appeals of claims raised via a traditional habeas corpus petition or through the related procedure set forth in Rule 3.850⁹⁸ of the *Florida Rules of Criminal Procedure* and its related rules 3.851, 3.852, and 3.853. Occasionally, other means of collateral review are sought, including the Court's all writs jurisdiction,⁹⁹ mandamus,¹⁰⁰ or other means. Of course, the most pressing of these cases involve claims by inmates who have been scheduled for execution by issuance of a death warrant by the Governor. These cases are put on a special scheduling track because they are expedited.

org/pub_info/documents/IOPs.pdf (last visited Feb. 5, 2005) (hereinafter MANUAL OF INTERNAL OPERATING PROCEDURES).

96. There are exceptions to the random assignment process, most commonly, where a number of cases all pose the same issue. In such circumstances, all the cases may be assigned to the same office. See discussion *infra* Part IV.B, regarding the discussion of cases involving similar issues, also called “tag cases”.

97. “No request” cases are prepared for release in the same manner as other cases.

98. Although habeas corpus and rule 3.850 and 3.851 have some differences, the Court has held that they constitute a procedural vehicle for providing relief otherwise available through habeas corpus. *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988); see discussion *infra* Part VII.D.

99. See discussion *infra* Part VII.E.

100. See discussion *infra* Part VII.A.

Appeals of collateral challenges in death penalty cases are handled much the same as other cases. Oral argument is almost always granted, but can be denied—unlike in appeals from judgments imposing the death penalty where oral argument is always granted.¹⁰¹ In addition to the staff research on the law and the facts, an assigned Justice’s staff attorney will include details of the entire procedural history of the case, from trial to the latest collateral challenge, and the issues previously raised and their outcomes.¹⁰² Opinions are usually issued for each collateral challenge filed, though the Court sometimes denies a claim in a summary order if it is determined that a claim clearly is barred or meritless.

When a death warrant is issued, the Court usually anticipates that some action will be taken in the trial court on behalf of the prisoner and the Court sets a briefing schedule and oral arguments for any subsequent appeal, to take place before the warrant period ends. The assigned Justice’s staff will prepare a chronological history of past proceedings in the case and provide that to all the Justices. If an appeal is filed, the Court adheres to the previously issued schedule, and staff memoranda are prepared and circulated on an expedited basis. The case is discussed and decided at a conference immediately after oral argument, and the assigned Justice expedites the preparation and circulation of an opinion. One of the factors that the Court considers in expediting the release of an opinion is whether there will be some time, however brief, for the prisoner to seek further relief in the federal courts after the state remedies are exhausted. Of course, depending on the circumstances of the individual case, it may also be necessary for the Court to issue a stay of the execution, either to permit adequate consideration of the claims, or because a particular claim may be found to have merit.

As the time for the inmate’s execution approaches, the Clerk of the Court, the assigned Justice, and assigned Justice’s staff remain on call twenty-four hours a day for any last minute petitions that may be filed. By custom, the Chief Justice or a Justice designated by the Chief Justice will be present in the Florida Supreme Court building at the time of execution and is usually assisted by the Clerk of the Court, the Public Information Officer,

101. MANUAL OF INTERNAL OPERATING PROCEDURES, *supra* note 94.

102. In order to better facilitate the decision-making process in death penalty cases, the Clerk’s office tracks all proceedings no matter what court is reviewing them, for death row inmates. This information is kept on what the Clerk’s office refers to as the death penalty module on the Court’s case management system. This allows the Court to determine the current status on any death row inmate. Because this information is used in the Court’s decision making process, it is exempt from public disclosure.

and sometimes also by the staff of the Justice assigned to the case.¹⁰³ There also are a number of deputy clerks on standby in case an emergency order needs to be issued. The Governor or a member of the Governor's staff opens a three-way telephone communication between the Governor's Office, the death chamber of the state prison, and the Clerk's office at the Court. The Chief Justice, the assigned Justice, the Clerk, and the Public Information Officer gather in the Clerk's office. All three groups remain on the phone to consider any last-minute issues, until the execution is completed and the inmate is declared dead. Under the Florida Constitution, any single Justice could order the execution stayed for good reason shown,¹⁰⁴ but this power has only been exercised in emergencies.¹⁰⁵ Any problems associated with the execution detected at this time are reported back to the full Court.¹⁰⁶

4. Other Cases

The Court sometimes receives other cases, often involving important or emergency issues that ultimately may be resolved in a written opinion. Examples include: pressing constitutional questions between the branches of state government,¹⁰⁷ requests for an advisory opinion by the Governor,¹⁰⁸ or a petition to invoke the Court's own emergency rule-making powers.¹⁰⁹ Oral argument is often granted in cases of this type, though not always, with argument usually scheduled as soon as possible. Whether accepted for argument or not, emergency matters are normally handled like any other case,

103. The law clerk's presence may be especially important if there is any concern that a legal issue might be raised at the last minute.

104. See FLA. CONST. art. V, § 3(b)(9). Of course, the full Court could probably dissolve any stay improvidently granted. See *id.*

105. Because of the timing of one execution, the Chief Justice, the Clerk, the Public Information Officer, and a number of the other Justices were not in the Supreme Court Building at the time of execution. A last-minute motion was filed. The senior-most Justice in the building at the time, the acting Chief Justice under the Court's rules, issued a temporary stay long enough to assemble the other Justices and the Clerk. A four-way phone connection was established.

106. For example, the problems associated with three executions in Florida's electric chair were reported back to the full Court by the Justices assigned to be present in the Supreme Court Building during the executions.

107. *E.g.*, Fla. House of Representatives v. Martinez, 555 So. 2d 839 (Fla. 1990); The Fla. Senate v. Graham, 412 So. 2d 360 (Fla. 1982).

108. *In re* Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

109. *In re* Emergency Petition to Extend Time Periods Under All Fla. Rules of Procedure, 17 Fla. L. Weekly S578 (Fla. Sept. 2, 1992) (emergency rule-making related to Hurricane Andrew). This particular case has been codified and supplemented by changes to Rule 2.030(a)(2)(B)(iv) of The *Florida Rules of Judicial Administration* granting the Chief Justice authority to toll time limits because of emergencies. *Id.*

except that the process and preparation of the opinions usually is expedited and the case is assigned to an office by the Chief Justice.¹¹⁰ The opinions themselves may be released outside the normal Thursday cycle if necessary to resolve the particular issue or emergency.

C. *Types of Separate Opinions*

As noted above, the Supreme Court of Florida follows the traditional practice of American appellate courts in assigning a single Justice to write the majority opinion in a case. However, Justices are not obligated to agree with the proposed majority opinion's viewpoint or even with the unsigned majorities they themselves have written. Any view apart from the majority's is expressed through the vehicle of a separate opinion attached to and published with the majority opinion.

Although most of the Court's decisions are unanimous, the public and press have a strong tendency to focus on disagreements embodied in separate opinions. Strongly worded dissents catch the most attention. This public focus can create a seriously exaggerated sense of division on the Court and may suggest that dissents carry a legal significance that they actually lack. Dissenting views usually are the least influential in the long term, because of the very nature of a dissent—the expression of a view contrary to that of the majority.¹¹¹ On the other hand, a well-reasoned concurring opinion, while technically not establishing any precedent,¹¹² may still be cited for persuasive authority in future cases and occasionally may become more influential than the majority opinion to which it was attached.¹¹³ Of course, there are occasions when future majority opinions directly reject the reasoning of earlier

110. Emergency cases are thus an exception to the Court's random assignment system. The Chief Justice has broad discretion over these assignments, subject as always to the will of the full Court, but often may assign the case to an office with special expertise in the field or one that is most current in its workload. This is rarely done.

111. *See* *Ephrem v. Phillips*, 99 So. 2d 257 (Fla. 1st Dist. Ct. App. 1957). It is worth noting, however, that dissents often contain statements that are dissent dicta because they exceed the scope of what the majority is deciding. A majority opinion should not be read as rejecting extraneous dissent dicta, but only as rejecting anything in the dissent contrary to what the majority has actually said. There are occasions when dissent dicta may later be embraced by a majority without overruling any prior opinion. Some attorneys erroneously assume that the majority necessarily has rejected everything stated in a dissent.

112. *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980).

113. *See, e.g., In re Forfeiture of 1976 Kenworth Tractor Trailer Truck Altered Vin 243340M*, 576 So. 2d 261, 262–63 (Fla. 1990) (applying *Wheeler v. Corbin*, 546 So. 2d 723, 724–26 (Fla. 1989)) (Ehrlich, C.J., concurring).

concurrences.¹¹⁴ Dissenting views also sometimes prevail in the long run,¹¹⁵ but this is a far rarer occurrence. To embrace a prior dissent, the Court usually must overrule its own precedent notwithstanding the doctrine of stare decisis;¹¹⁶ while a well-reasoned concurrence can be accepted without necessarily overruling anything, on grounds that it better illuminated or explained the majority opinion it accompanied.

Concurrences and dissents, however, constitute only two of five different kinds of separate opinions that are in customary usage by the Court, although there is a sixth type so rare it has been used only once. This variety has sometimes confused lawyers and the public alike, because the Court has never adopted precise rules governing the use of separate opinions. Confusion sometimes arises because the categories are not necessarily discrete and often blur into one another. Much depends on precisely what the individual author has stated in the separate opinion, although the choice of category is often a strong indicator of the strength of the author's feelings about the majority view.

There has been some concern in recent years that these traditional categories are not sufficient. The specific concern involves situations in which a Justice agrees with the result of an opinion and perhaps much of the analysis,

114. N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 665–66 (Fla. 2003).

115. E.g., Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659–60 (Fla. 1985), receding from Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980). In *Pullum*, the Court expressly embraced Justice McDonald's dissent in *Battilla*. Compare *Battilla*, 392 So. 2d at 874–75 (McDonald, J., dissenting) with *Pullum*, 476 So. 2d at 659–60.

116. Many people erroneously view stare decisis as rigidly inflexible. The Court, however, has held that “stare decisis is not an ironclad and unwavering rule that the present must bend to the voice of the past, however outmoded or meaningless that voice has become. It is a rule that precedent must be followed *except* when departure is necessary to vindicate other principles of law or to remedy continued injustice.” *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992) (citing *McGregor v. Provident Trust Co.*, 162 So. 323 (1935)). In a similar vein, the Court has said that “the common law will not be altered or expanded unless demanded by public necessity ... or where required to vindicate fundamental rights.” *In re T.A.C.P.*, 609 So. 2d 588, 594 (Fla. 1992). Although attorneys sometimes incorrectly argue that only the legislature can change the common law, the Court in actuality has not hesitated to change the law when proper reasons exist to do so, at least where the legislature has taken no action on the precise subject. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957); see, e.g., *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993) (abrogating common law doctrine of interspousal immunity); *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (abrogating common law doctrine of contributory negligence). Common law refers to law that has arisen from the customary practices of the courts of Florida and their predecessors, which exists in its most authoritative form when embodied in the written opinions of the Supreme Court of Florida. Once common law is codified within a legislative enactment, the Court is far more hesitant to overrule it, because of the doctrine of separation of powers. See FLA. CONST. art. II, § 3.

but not all of it. Justices sometimes have concurred in the result only—something that may suggest they only agree with the outcome but disagree with the entire analysis even if this is not the case. At other times, Justices have concurred in part and dissented in part in the same case, which can suggest that they do not agree with part of the result even if it is only part of the reasoning that they cannot join. There has been some discussion of adopting a practice used as the United States Supreme Court, where Justices sometimes write opinions concurring in the judgment or some variation such as concurring in part and concurring in the judgment. However, the Justices have chosen not to adopt this practice.

The following six categories of opinions utilized by the Justices are identified and their customary usage are described. This ranking begins with the category having the strongest sense of concurrence and ends with the category having the strongest sense of dissent.

1. Concurring Opinions

A separate concurring opinion usually indicates that the Justice fully agrees with the majority opinion but desires to supply additional reasons for supporting the decision and to make additional comments or observations. Concurring opinions often are used when a Justice wishes to explain individual reasons for concurring with the majority. As a general rule, concurring opinions should be presumed to indicate complete agreement with the majority opinion unless the concurring opinion says otherwise. Thus, a concurring opinion can constitute the fourth vote needed to establish both a decision and a Court opinion,¹¹⁷ subject only to any reservations expressly stated in the concurring opinion itself.¹¹⁸

117. See FLA. CONST. art. V, § 3(a). There is a distinction between the terms decision and opinion. The decision is the court's judgment, i.e., the specific result reached. Whereas, the opinion is the written document explaining the reasons for the decision. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958). Thus, so long as at least four members of the Supreme Court of Florida agree on the decision, it is irrelevant that no similar agreement was reached regarding a written opinion. Similarly, at least four Justices must concur in an opinion for it to have any precedential value beyond the case at hand. *Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980). However, the word decision may have a different meaning in the context of the Court's jurisdiction over particular categories of decisions. See discussion *supra* Part D.

118. Such reservations, depending on their strength, may give the concurrence the appearance of actually being a special concurrence or a concurrence in result only. However, the fact that the author has chosen to concur necessarily implies a greater sense of agreement with the majority view. However, attorneys and lower courts may still legitimately take note of any reservations expressed in a concurrence, especially where they may indicate that at least four Justices have not agreed on a relevant point.

2. Specially Concurring Opinions

A specially concurring opinion¹¹⁹ indicates general agreement with both the analysis and result of the majority opinion but implies some degree of elaboration of or addition to the majority's rationale, unless the separate opinion itself says otherwise. The most common use of a special concurrence is when the author believes the majority's analysis is essentially correct though, perhaps, in need of elaboration or clarification. For example, a specially concurring opinion may be used to explain why, in the author's view, a separate dissenting opinion has mischaracterized the majority's views and why the majority is correct.¹²⁰ Hence, the author believes something additional should be said, even if for a limited purpose.

A specially concurring opinion can constitute the fourth vote needed to create a binding decision under the state constitution¹²¹ and can be sufficient to establish an opinion as binding precedent. However, in this last instance, the true nature of the precedent would not necessarily consist of the plurality opinion, the special concurrence, or even both taken together. Rather, the Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed.¹²² In other words, it is possible for a special concurrence to be sufficiently narrow as to deprive a plurality opinion of precedential value with respect to matters about which the concurring Justice has expressed disagreement or reservations.

3. Opinions Concurring in Result Only

A concurring in result only opinion indicates agreement only with the decision, that is, the official outcome and result reached, but a refusal to join in the majority's opinion and its reasoning.¹²³ A separate opinion that concurs in result, only can constitute the fourth vote necessary to establish a

119. Members of the Court sometimes label this type of separate opinion concurring specially. This label is synonymous with specially concurring. The transposition is a matter of each individual Justice's preference.

120. *E.g.*, *Pub. Health Trust of Dade County v. Wons*, 541 So. 2d 96, 98–102 (Fla. 1989) (Ehrlich, C.J., concurring specially).

121. FLA. CONST. art. V, § 3(a).

122. An example of such a case is *In re T.W.*, in which Chief Justice Ehrlich specially concurred but expressed reservations about certain points in the plurality's analysis. 551 So. 2d 1186, 1197–1200 (Fla. 1989).

123. *Rowe v. Winn-Dixie Stores, Inc.*, 714 So. 2d 1180, 1181 (Fla. 1st Dist. Ct. App. 1998).

decision under the Florida Constitution,¹²⁴ but the effect in such a case is that there is no majority opinion of the Court and thus no precedent beyond the specific facts of the controversy at hand.¹²⁵ There may be cases in which a Justice writes a concurring in result only opinion that also appears to agree with more than just the result. However, it seems doubtful that such an action could constitute the fourth vote needed to give the opinion validity as precedent.

4. Opinions Concurring in Part, Dissenting in Part

An opinion that concurs in part and dissents in part is commonly used to indicate disagreement with only one or some of the results reached by the majority opinion, but may also be used to show disagreement with part of the analysis of the majority, depending on what the separate opinion itself actually says. Where an opinion of this type establishes part of the Court's majority, a careful reading of the different opinions may be needed to ascertain the votes on a particular issue or particular line of reasoning and, hence, the actual precedent of the case.¹²⁶

5. Dubitante Opinions

The rarest category of separate opinions are those issued dubitante,¹²⁷ a notation expressing serious doubt about the case. Only one such opinion has been issued in the Court's entire history.¹²⁸ With this sparse usage, it still is

124. FLA. CONST. art. V, § 3(a). For an example of a case in which the fourth vote concurred in result only, see *Dougan v. State*, 595 So. 2d 1, 6–8 (Fla. 1992). The result is that there is a decision in *Dougan*—in other words, a result in which at least four Justices concurred—but no court opinion.

125. See *Greene*, 384 So. 2d at 27.

126. The Supreme Court of Florida has not consistently followed the United States Supreme Court's practice of dividing opinions into numbered sections, in which members separately can indicate agreement or disagreement. There are exceptions, e.g., *Traylor v. State*, 596 So. 2d 957, 974–85 (Fla. 1992), but most opinions of the Supreme Court of Florida are not divided in this manner. This means that a careful reading may be necessary to determine the actual majority position; and in some cases, the true majority view simply may be unclear. However, the Supreme Court of Florida's practice has the grace of avoiding the fractured opinions sometimes found in the United States Supreme Court, in which two or more Justices may separately write and sign parts of opinions that collectively constitute the "majority" view.

127. The term dubitante means doubting. BLACK'S LAW DICTIONARY 499 (6th ed. 1990).

128. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 549 (Fla. 1992) (Barkett, J., dubitante). It should be noted that other separate opinions have been written that in effect constituted a species of dubitante opinion, but without using the designation dubitan-

not entirely clear in Florida whether a dubitante opinion should be regarded as a type of concurrence or dissent or something else,¹²⁹ or indeed, whether a dubitante opinion can constitute the fourth vote necessary to fulfill the constitutional requirement that four Justices must concur in a decision.¹³⁰ The failure of any Justice to issue a dubitante opinion since its single use in 1992 strongly implies that it has not been accepted by the Justices for routine use, a conclusion reinforced by the fact that dubitante does not appear as an option on the Court's computerized eVote system.

In the federal system, an opinion designated dubitante at least sometimes appears to constitute a very limited form of concurrence,¹³¹ and some federal judges have gone to the trouble of designating their opinions as concurring dubitante.¹³² At least one has issued a dubitante opinion that expressly concurred in part and dissented in part, although the author seemed to indicate doubts only as to the partial concurrence.¹³³ Other states have also used such opinions.¹³⁴

te. *E.g.*, *Johnson v. Singletary*, 612 So. 2d 575, 577-81 (Fla. 1993) (Kogan, J., specially concurring).

129. The single instance in which a dubitante opinion was issued in Florida suggests that it indicated neither a concurrence nor dissent, but rather a statement of complete doubt as to the disposition of the case. *See In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d at 549.

130. *See* FLA. CONST. art. V, § 3(a).

131. *See* *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967) (Douglas, J., dubitante); *Radio Corp. of America v. United States*, 341 U.S. 412, 421-27 (1951) (Frankfurter, J., dubitante). Indeed, some federal judges have marked their separate opinions with the heading concurring but have indicated in the text that the opinion is dubitante. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 619-21 (1947) (Rutledge, J., concurring).

132. *E.g.*, *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 390-93 (2d Cir. 1975) (Friendly, J., concurring dubitante).

133. *United States v. Walker*, 9 M.J. 892, 894-97 (A.F.C.M.R. 1980) (Mahoney, J., dissenting in part, concurring in part, and dubitante).

134. For example, in Georgia, the courts have sometimes issued "dubitante" dissents, apparently meaning dissenting views in which the author has serious doubt. *E.g.*, *Kelleher v. State*, 371 S.E.2d 450, 451 (Ga. Ct. App. 1988) (Deen, P.J., dissenting dubitante); *City of Fairburn v. Cook*, 372 S.E.2d 245, 255-56 (Ga. Ct. App. 1988) (Deen, P.J., dissenting dubitante). Thus, a dubitante dissent would seem to constitute a species of dissenting opinion less vigorous than a full dissent. However, there also seem to be times when an opinion marked merely dubitante is neither a dissent nor a concurrence, but an expression of doubts so grave that the judge or justice can neither agree nor disagree with the majority. *See Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d at 549. This probably is the best construction, for example, in those rare cases in other jurisdictions in which a judge votes "dubitante" without writing a separate opinion. *Adams v. Williams*, 838 S.W.2d 71, 73 (Mo. Ct. App. 1992) (Crandall, J., dubitante). In the absence of a written opinion, it is impossible to tell what the author's views were, other than an expression of doubt.

A statement that the Justice concurs dubitante certainly would seem necessary where the dubitante opinion is relied upon as the fourth vote needed to create a binding decision; but even then, it remains to be seen whether that concurrence would give the written opinion itself the value of precedent. Some diminished form of precedential value might be in order in such a situation, but only where it is clear from a careful reading of the different opinions that at least four members of the Court, in fact, have agreed on some rationale, not merely the result. Otherwise, there would be no opinion by the Court, and the plurality's view would not create precedent beyond the case at issue.

6. Dissents

A dissenting opinion should be presumed to indicate a complete refusal to join with the majority's decision and opinion. A close reading of some dissenting opinions may disclose that the author actually only disagrees with part of the majority opinion,¹³⁵ and such a dissent could be read as though it were an opinion concurring in part and dissenting in part. But the fact that the Justice has labeled the separate opinion as a full dissent almost certainly means the opinion could not constitute the fourth vote needed to create a binding opinion or decision by the Court.

D. *Per Curiam* Opinions

Per curiam is a Latin phrase meaning "by the court."¹³⁶ At one time, the Supreme Court of Florida followed the practice, still common in the district courts of appeal, of issuing cursory opinions designated *per curiam*, with the actual identity of the author not disclosed. This was the general sense conveyed by the Court in 1956 when it defined the term *per curiam* as indicating "the opinion of the court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by any extended discussion."¹³⁷ Historically, then, *per curiam* opinions came to imply short opinions devoid of a rationale. Some attorneys and even judges have ruefully noted the potential for abuse inherent in the power to

135. *E.g., In re T.W.*, 551 So. 2d 1186, 1204–05 (Fla. 1989) (McDonald, J., dissenting) (dissenting opinion agreeing with part of plurality's rationale).

136. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

137. *Newmons v. Lake Worth Drainage Dist.*, 87 So. 2d 49, 50 (Fla. 1956).

issue such opinions,¹³⁸ because even a “clear” rationale helps no one if left unstated.

After the creation of the district courts of appeal and the later adoption of jurisdictional reforms, the use of per curiam opinions in this sense has fallen into disuse in the Court.¹³⁹ The Court now seldom issues unsigned opinions devoid of an obvious rationale. The few that might qualify under this old definition typically involve questions of law now fully resolved in a recently issued opinion, to which the lower courts and parties are referred.¹⁴⁰ Instead, the Court’s per curiam opinions have metamorphosed into majority opinions with complete analyses whose authors simply are not identified.¹⁴¹ The news media typically call such opinions unsigned.¹⁴²

There are a variety of reasons for not identifying the true author or authors.¹⁴³ One is because the author of the majority opinion actually may disagree with its analysis, something that can occur because of the Court’s method of assigning cases for opinions.¹⁴⁴ Another reason may be that portions of the opinion were written by more than one Justice or contain a rationale requested by a Justice as a condition of joining the majority. As a matter of courtesy, Justices usually avoid claiming credit for material partially written or suggested by another Justice. Such a per curiam opinion might be issued, for example, when a majority of the Court has not agreed with the full analysis of a proposed majority opinion and has decided to engraft onto that opinion part of a separate analysis prepared by another Justice.

The decision to make an opinion per curiam is left to the discretion of the Justice who drafted the opinion. There also are some traditions or patterns that have emerged through the years. For example, subject to some exceptions, most Bar discipline cases and disciplinary actions against judges

138. Toby Buel, *Conflict Review in the Supreme Court of a DCA’s Per Curiam Decision*, 56 FLA. B.J. 849 (1982).

139. The bulk of the Court’s jurisdiction now is discretionary, in which case the Court has authority simply to deny jurisdiction. This is vastly different than the situation that existed when the Supreme Court of Florida was the state’s only appellate tribunal, with much broader mandatory jurisdiction.

140. *E.g.*, *State v. M.S.P.*, 647 So. 2d 847 (Fla. 1995).

141. *E.g.*, *Gordon v. State*, 863 So. 2d 1215, 1217 (Fla. 2003).

142. The media also sometimes mischaracterize such cases as being written by the Chief Justice. If the opinion is per curiam the concurring Justices names are listed at the end of the opinion by seniority, meaning if the Chief Justice is in the majority, he or she is always listed first. This sometimes has led the press to believe that the Chief Justice is the author.

143. Members of the Court, including the true author, still must indicate their votes regarding a per curiam opinion, and those votes are recorded with the published opinion. There is no anonymity in this sense. Moreover, only a majority opinion can be issued per curiam. The Court has never issued, for example, per curiam dissents or concurrences.

144. *See* discussion *supra* Part II.B.

are now issued per curiam. The same is true of most death penalty cases. There is no way for the public to know the reasons an opinion was issued per curiam, and it would be considered a breach of confidentiality for the Justice or staff to publicly identify the true author. In any event, the fact that an opinion is issued per curiam by the Supreme Court of Florida has no significant effect other than to identify the Court itself, as an institution, and not any particular Justices as the author. Per curiam opinions bear the same status as any other opinion in which the Justices have voted the same way.¹⁴⁵

E. *Role of the Chief Justice or Acting Chief Justice*

The Chief Justice is Florida's highest ranking judicial officer, serving both as head of the Court and chief executive officer of the entire Florida Judicial Branch.¹⁴⁶ The Chief Justice presides at all official Court functions and administers the state court system through the Office of State Courts Administrator. One of the Chief Justice's most significant powers in a legal sense is the ability to dispose of motions and procedural matters connected with pending cases.¹⁴⁷ This is a marked change from earlier court practice, which required a meeting of the Court to consider motions. Today, some motions may be placed on the full Court's agenda for further guidance, particularly on controversial matters; but by far, most currently are handled by another Justice designated by the Chief Justice. As the number of motions and other administrative duties has increased steadily over the years, Chief Justices have increasingly delegated authority to an Administrative Justice to resolve most pre-merits motions. Likewise, the Clerk has limited authority to dispose of certain categories of motions pursuant to express guidelines set by the Court.

Whenever the Chief Justice is absent or unable to act, the role of Acting Chief Justice automatically falls upon the next most senior Justice who is available. Most commonly, the Dean of the Court¹⁴⁸ is the acting Chief Justice, but on occasion when the Chief and Dean are both absent, that duty descends to the most senior Justice available. The *Rules of Judicial Administration* also specify that the Dean of the Court automatically becomes Acting Chief Justice if the sitting Chief leaves office for any reason; but in that event, the Court is also required to promptly elect a successor to serve the balance of the unexpired term.¹⁴⁹

145. See *Newmons*, 87 So. 2d at 50.

146. FLA. CONST. art. V, § 2(b).

147. FLA. R. JUD. ADMIN. 2.030(a)(2)(B)(ii).

148. The present Dean is Justice Charles T. Wells.

149. FLA. R. JUD. ADMIN. 2.030(a)(2)(A).

Each Chief Justice's term runs for a period of two years beginning and ending on July one of each successive even-numbered year.¹⁵⁰ Prior to the end of each two-year term, the Court must elect the Chief Justice who will serve during the next term. By a custom unbroken for three decades, the Court has elected as Chief Justice the next most senior Justice who has not yet held the office.¹⁵¹ In the rare event that a time comes when all seven have served, the Court presumably would begin the rotation again, starting with the longest serving Justice.

One beneficial result of this rotation system is that it lessens the possibility that any particular Justice or group of Justices could gain indefinite control of the Court's executive functions. This is vastly different from the United States Supreme Court, where the Chief Justice of the United States is nominated by the President, subject to Senate confirmation, and is life tenured. The Supreme Court of Florida's customary rotation system creates a significant check and balance omitted from the constitution itself, which specifies only that the Court must choose a Chief Justice by majority vote.¹⁵² By honoring the rotation system, the Court also eliminates the discord that seems inherent in any competitive election system and could hamper the Court's collegiality, an essential component of any multi-member decision-making body.

F. *Role of the Other Justices*

The power of the Chief Justice, however, is not limitless. Very significant powers reside in the Court as a body, particularly through the fact that all judicial opinions and many major administrative concerns require assent by at least four Justices. Moreover, the Chief Justice alone cannot possibly supervise all of the various entities under the Court's control. The effect is that the Court in practice operates on a highly collegial basis, with all of the Justices assigned and involved in some aspect of administration.

One aspect of shared responsibility and collegiality is expressed most noticeably in the fact that each Justice is assigned a variety of supervisory duties. These include: oversight of the internal committees and offices that govern the Court; liaison responsibility with Bar organizations and rules committee; and assignment to a variety of special commissions and committees created, from time to time, to address questions of public policy involv-

150. *Id.*

151. The custom actually predates the 1980s but was interrupted during the 1970s when some members of the Court were under investigation for alleged improprieties. The custom resumed in 1984 with the election of Justice Joseph A. Boyd, Jr.

152. FLA. CONST. art. V, § 2(b).

ing the courts. For example, members of the Court have chaired or supervised public commissions charged with reforming guardianship laws, investigating gender bias in Florida's judiciary, and examining ways to eliminate racial and ethnic bias from the judicial system. Each of these commissions ultimately produced extensive proposals for reform, most of which now have been implemented by the Governor, the legislature, and the courts.¹⁵³ To this extent, members of the Court use their offices to help effect changes in public policy beneficial to the state and consistent with the sound administration of justice.

G. *Role of the Judicial Assistants, Law Clerks, & Interns*

Because the Justices' duties are so extensive, they could not possibly discharge their obligations without the help of staff. Each Justice accordingly is permitted to hire four staff members: a secretary (more commonly known as a judicial assistant in the state court system) and three law clerks. The Chief Justice, with far greater responsibilities, has a larger staff. The staff includes two additional Judicial Assistants, a Reporter of Decisions, the Director of Public Information, and an Inspector General, all of whom remain attached to the office through different administrations. Also reporting to the Chief Justice is the Director of Central Staff, who supervises a staff of six other attorneys and an additional judicial assistant. Central staff assists the entire Court by processing many routine kinds of cases and handling other projects as assigned by the Chief Justice. Finally, the staffs of the Justices are usually supplemented three times a year by an internship program that brings law students into the Court to act as research aides.

1. Judicial Assistants

In Florida's judiciary, Judicial Assistants are the persons responsible for the general administration and the flow of work in a judge's or Justice's office. Their duties are broad and vary from office to office, but almost always include supervising the flow of judicial activity, paperwork, keeping files, overseeing the Justices' schedules, interacting with other offices, and dealing with correspondence and telephone calls. Judicial assistants also may help in the drafting of judicial opinions, especially in the preparation and editing of successive drafts. Members of the public who call individual Justices almost always deal with the Judicial assistant first. Judicial assistants are hired by and serve at the pleasure of their respective Justice.

153. *E.g.*, Tannen, *supra* note 80.

2. Law Clerks

As noted above, the duties of law clerks—now formally called Staff Attorneys—also vary among the offices, but they are usually responsible for conducting research and producing memoranda reflecting that research. Many also have the responsibility for the initial drafts of opinions for their Justices after receiving express instructions and guidance from the Justice. In this situation, law clerks typically are instructed on the result and analysis that should be used in the proposed opinion for the assigned Justice to review, revise, or edit.

Opinion writing is a responsibility that can be both time-consuming and labor-intensive.¹⁵⁴ Often, the most time-consuming task is creating the first draft, though this work is crucial in moving the opinion toward a form that can be circulated for review by the full Court. Few Justices would be able to manage their schedules unless at least some opinion drafting was done by their staffs. Members of the Court often choose law clerks not merely based on academic performance in law school but also on proven writing ability, often demonstrated in prior professional careers, law clerk experience at another court, or scholarly work completed in law school.¹⁵⁵ This professional writing ability is an absolute prerequisite to a legal position that requires not only constant and extensive research, but also the reduction of that research into a concise yet comprehensive memorandum. Of course, the writing of legal opinions can be very exacting, if only because impact opinions have on the law. Law clerks responsible for opinion drafting, thus, must be able to master a style of English that is not merely formal, but very precise as well.

Because of this heavy responsibility, it is somewhat paradoxical that the common public image of law clerks is of young people freshly graduated from law school, with no real experience,¹⁵⁶ who will leave to enter private practice after a year or two of clerking. While this may be the case in many instances, it should be noted that the Justices of the Supreme Court of Florida

154. As a result, law clerks, at a minimum, must have a law degree before the date they begin work. The Court previously required admission to The Florida Bar soon after law clerks began work, but this requirement was dropped as part of the job description in the mid-1980s. Justices, however, remain free to require Bar membership if they desire, and pay scales overwhelmingly favor those who have Bar membership. As a result, rarely are law clerks not members of The Florida Bar.

155. For example, past law clerks have included former journalists, former law professors, former assistant prosecutors and former appellate public defenders.

156. This perception is a reality for the United States Supreme Court. Most law clerks there serve only a one-year term.

throughout its history have often retained law clerks on a permanent basis.¹⁵⁷ These most often are attorneys whose skills and experience especially suit them for the tasks assigned, and who remain on staff indefinitely, at the pleasure of the Justice.

A number of factors have contributed to the movement to retain one or more permanent law clerks. Perhaps the most significant is that the administrative and public responsibilities of the Justices have so greatly increased in recent years that the need for quality legal support has increased dramatically. In essence, since no additional judicial resources are available to meet the increased responsibilities, Justices must rely on other legal professionals to help shoulder the work. The competence and experience of those professionals are at a premium.

3. Interns

Since 1993, the Court has dramatically altered its intern program. In 2001, it created the Supreme Court of Florida Internship Program for Distinguished Florida Law Students. This honors program is open to qualified law students from all accredited Florida law schools.¹⁵⁸ Previously, the Court accepted its interns in August and January only from students selected by the faculty of the Florida State University College of Law in Tallahassee and these students were in turn given academic credit for their work at the Court. Now all law schools in Florida are invited to send their best students to take part in the internship program during the fall, spring, and summer semesters. Usually students ranking in the top of their class are selected. Depending on the number selected for internship each semester, two interns are assigned to each office, the Clerk's office, and the Court's central staff of attorneys.

Internships starting in May and extending over the summer also are potentially available to students from any law school and may be more or less informal in nature.¹⁵⁹ These interns serve on a purely volunteer basis and are responsible for their own expenses. Academic credit is available only if the students make the necessary arrangements with their law schools.

157. Law clerks are not permanent in the sense of having a job with civil service-style protections. Rather, these law clerks, at the request of their Justices, agree to stay for some indefinite period beyond the two-year minimum commitment typically required by each Justice at the time the law clerk is hired.

158. On occasion similarly qualified students from out-of-state law schools are accepted.

159. An application is usually accomplished by the student sending in a cover letter, resume, and writing sample to a Justice at the Court, in late winter or early spring, prior to the summer in question. Standards for these internships vary from office to office, as do the number of interns that will be accepted. Some offices take only one intern, while others take two or three.

Job responsibilities of interns vary among the offices, but usually involve assisting the law clerks in preparing memoranda regarding the Court's determination of jurisdiction in discretionary review cases.¹⁶⁰ Many offices have a structured program in which student interns are given increasingly more responsibility as they demonstrate aptitude. Much of an intern's work, however, consists of more routine matters such as writing memoranda to the Justice on petitions for jurisdiction, photocopying research material identified by law clerks, and writing memoranda to the law clerks on legal issues that have been assigned by the supervising Justice. Interns in the Clerk's office provide assistance to the administrative Justice and do other special projects as directed by the clerk.

Perhaps the most valuable aspect of the Court's internship program is an insight into the Court's operation and an opportunity to work with a Justice of the state's highest tribunal. An internship coupled with a positive evaluation by a Justice or the Justice's staff can be a strong credential. Moreover, a very significant number of former interns have gone on to find jobs as law clerks at the Supreme Court of Florida or in other courts. Therefore, an internship can be an important stepping stone for a student interested in working as a law clerk after graduation. It is also a way in which the Court assists in educating succeeding generations of lawyers.

H. *Ethical Constraints on the Justices and Their Staffs*

The public, and even some members of the legal profession, do not fully appreciate the strict ethical constraints imposed upon judges and their staffs, including interns. The Clerk's office and the public information office frequently receive letters from people asking that particular cases be decided certain ways or that judges should correct some perceived oversight in a case. Members of the public are sometimes offended when queries of this type go unanswered. This occurred most notably during the 2000 presidential election appeals, in which the various staff offices throughout the building received thousands of phone calls and well over 100,000 emails and letters that essentially sought to "lobby" the Court in its decision-making process. However, the Court and its staff live under a very rigorous code of ethics that forbids them to consider such outside comments or to comment on pending matters.

160. See discussion *infra* Part VI.

1. Constraints on Justices

Perhaps the most common misunderstanding, especially among the lay public, is a widespread belief that judges or Justices can be approached about their official duties in much the same way a governor, a legislator, or their respective employees can. However, the United States and Florida Constitution¹⁶¹ and ethics codes¹⁶² absolutely require that judges be and appear to be impartial. For that reason, judges and Justices are not permitted to publicly discuss any aspect of pending or impending cases¹⁶³ as well as cases that have become final¹⁶⁴ or are pending in other courts.¹⁶⁵

Impartiality and neutrality are, of course, the bedrock upon which all who come before the courts must rely. Judicial independence is predicated upon the assurance of this evenhandedness or level playing field. Partisanship is strictly prohibited. In an effort to maintain public confidence in the judiciary's impartiality, judges and Justices are required to maintain a broad detachment from political activity. For example, the Supreme Court of Florida has determined that a judge or Justice may be reprimanded for writing public endorsement letters of a candidate even in a nonpartisan judicial election.¹⁶⁶ This conclusion was based on an ethics rule generally prohibiting a judge or Justice from lending the prestige of the office to any political cause.¹⁶⁷ As a result, judges and Justices are required to refrain from participation in most types of political activities beyond those necessary for their own judicial elections.

Even the personal finances of judges and Justices are closely regulated. For example, they are not permitted to be involved in any business transactions that might reflect poorly on their impartiality or job performance.¹⁶⁸ They are required to divest themselves of investments that result in their frequent recusal in cases before the Court, such as where a judge or Justice owns stock in a corporation that is a frequent litigant.¹⁶⁹ Gifts, loans, and

161. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 9.

162. FLA. CODE JUD. CONDUCT, Canons 2, 3.

163. *Id.* 3B(9).

164. These include, for example, the fact that matters were discussed at Court conference, the content of unpublished draft opinions, and the Court's initial vote or changes in votes prior to release of an opinion.

165. FLA. CODE JUD. CONDUCT, Canon 3B(9).

166. *See In re Glickstein*, 620 So. 2d 1000 (Fla. 1993); *see also In re Code of Judicial Conduct* (Canons 1, 2, & 7A(1)(b)), 603 So. 2d 494 (Fla. 1992).

167. FLA. CODE JUD. CONDUCT, Canon 7.

168. *Id.* 5D.

169. *Id.* 5D(4).

favours are closely regulated¹⁷⁰ and some restrictions even apply to the finances of a judge or Justice's family and household members.¹⁷¹ Judges and Justices must also file disclosures of their income, assets, and business interests.¹⁷² A compendium of other ethical constraints imposed upon judges and Justices are set out in considerable detail in the *Code of Judicial Conduct*.

Enforcing ethical constraints on Justices of the Court poses a unique concern because, in theory, the Court is almost always the final arbiter of what is ethical and what is not.¹⁷³ The Justices thus are the most highly visible examples for ethical conduct. As a result, the Florida Constitution has created special mechanisms to deal with any alleged impropriety by a Justice.¹⁷⁴ First, members of the Court are subject to inquiry by the Judicial Qualifications Commission ("JQC"), as are all Florida judges.¹⁷⁵ The JQC recommends proposed discipline for breaches of judicial ethics, subject to review by the Court. However, when a Justice of that court is being investigated, all sitting members of the Court are automatically recused. Thereafter, the seven most senior Chief Judges of Florida's twenty judicial circuits automatically sit as temporary Associate Justices¹⁷⁶ to review the case and to impose discipline if appropriate. Discipline can include reprimand, suspension, or removal from office.¹⁷⁷

Justices of the Court, like all judicial officers, are also subject to impeachment and to removal by the legislature. Grounds for impeachment include any misdemeanor in office as determined by a two-thirds vote of the Florida House of Representatives.¹⁷⁸ Once impeached, a Justice is automatically suspended and the governor can appoint a temporary replacement until completion of the trial.¹⁷⁹ Trial after impeachment occurs before the Florida Senate, and the Justice being tried can be removed from office upon a two-thirds senate vote. The Senate can also take the additional step of disqualifying the Justice from holding any future Florida office,¹⁸⁰ though this requires an affirmative act and is not an automatic consequence of removal.¹⁸¹

170. *Id.* 5D(5).

171. *Id.*

172. FLA. CODE JUD. CONDUCT, Canon 6B(1).

173. The Court itself promulgates the ethics rules. *See* FLA. CONST. art. V, § 2(a).

174. *See* FLA. CONST. art. V, §12.

175. FLA. CONST. art. V, § 12(a).

176. The significance of the term "Associate Justice" is discussed *infra* Part II.I.

177. FLA. CONST. art. V, § 12(a)(1).

178. FLA. CONST. art. III, § 17(a); *see also* *Forbes v. Earle*, 298 So. 2d 1,5 (Fla. 1974).

179. FLA. CONST. art. III, § 17(b).

180. FLA. CONST. art. III, § 17(c).

181. *Smith v. Brantley*, 400 So. 2d 443, 450 (Fla. 1981).

The Florida Constitution specifies that the Chief Justice of the Supreme Court of Florida must preside or choose another Justice to preside over the Senate at all trials after impeachment.¹⁸² If the Chief Justice is the one under investigation, the governor presides.¹⁸³

2. Constraints on Justices' Staffs

Judicial assistants, law clerks, and court interns are subject to much the same ethical constraints imposed on Justices, at least with respect to official matters on which they work.¹⁸⁴ For their tenure on the staff, these persons are effectively a part of the Justice's official position when dealing with the Court's official business. As a result, they are retained subject to strict rules of confidentiality and to the canons of judicial ethics in a derivative sense, though the JQC obviously lacks jurisdiction over persons who are not judges. However, it deserves emphasis that this conclusion applies only to official matters and not to all activities of staff members outside the Court.

Prior to 1992, many persons assumed that judicial staff members were subject to all of the constraints imposed upon the Justices, even for matters conducted on personal time.¹⁸⁵ In May 1992, the Florida Committee on Standards of Conduct Governing Judges—now called the Judicial Ethics Advisory Committee—reinforced this interpretation in an advisory opinion concluding that judicial assistants were prohibited from engaging in partisan political activities, just as judges and Justices are.¹⁸⁶ The committee's conclusions obviously implied that all judicial staff members were subject to the canons of judicial ethics as though they themselves were judges. This view, however, was rejected by the Supreme Court of Florida in a court conference in the fall of 1992. At that time, the Court took the unusual step of overruling¹⁸⁷ the advisory opinion and issuing its own statement on the question.

182. FLA. CONST. art. III, § 17(c).

183. *Id.*

184. FLA. CODE JUD. CONDUCT, Canon 3B(2).

185. See Scott D. Makar, *Judicial Staff and Ethical Conduct*, FLA. B.J., Nov. 1992, at 10.

186. See Comm. on Standards of Conduct Governing Judges Op. 92-33 (1992) (concerning FLA. CODE JUD. CONDUCT, Canon 7 (B)(1)(b) Judicial Assistant's Political Activity).

187. The Court has traditionally used a somewhat unusual method of commenting on advisory opinions of the Committee. This is something that, in any event, is rarely done. If a member of the Court disagrees with an advisory opinion, the matter may be discussed at a Court conference. If a majority of the Court agrees, a statement may be prepared commenting on the advisory opinion and that statement is then placed in the official minutes of the Court. At that time, the Clerk of the Court notifies the Committee chair of the Court's action and transmits a copy of the relevant portion of the minutes to *The Florida Bar News* for publication. The act of commenting on an advisory opinion in this manner obviously does not consti-

This occurred after some of the judiciary's employees voiced objections to the committee's reasoning.

In its statement, the Court found that judicial staff members have a First Amendment right to engage in political activities provided this is done outside of Court, on personal time, and without reference to the judge or the judge's office.¹⁸⁸ In support of this conclusion, the Court said that members of a judge's staff are analogous to the spouses of judges, who have a right to engage in political activities using their personal time and resources.¹⁸⁹ This reasoning implies that staff members may be treated the same as a judge's spouse in other contexts involving the use of free time, though the analogy obviously is not a perfect one¹⁹⁰ and could be less forceful outside the context of exercising free-speech rights.

A special variety of ethical problems may arise with respect to law clerks. Some law clerks decide to enter private practice after completing their work for the Court, and some firms have voiced confusion over the ethical standards that govern the process of hiring a law clerk. Obviously, a problem could develop if the hiring firm has a case pending before the Court. Thus, law clerks must disclose any possible conflict of interest to their Justices. To assist in proper disclosure to the Justice, a law firm should disclose to the law clerk any of its cases pending for review in the Court or that are likely to be pending, while employment negotiations are pending.¹⁹¹ At that time, the law clerk is bound to discuss the matter with the Justice and avoid contact with the disclosed cases. The law clerk may be segregated from these cases even after negotiations end or fail if the Justice deems it necessary.¹⁹²

Upon leaving the Court, former law clerks may not work on any case which was pending at the Court while they were employed at the Court, provided they participated personally and substantially in the case.¹⁹³ This last proviso was expressly adopted by the Court in 2003 to remove ambiguities from the previous rules and to ensure that Florida's Supreme Court law

tute a decision of the Court and, for that reason, is not absolutely binding, although highly persuasive.

188. Supreme Court of Florida Conference, minutes of meeting (Sept. 8, 1992) (on file with Clerk).

189. *Id.*

190. It is unlikely, for example, that the financial activities of a judge or Justice's judicial assistant would create a substantial conflict of interest. The financial activities of the judge or Justice's spouse could.

191. This should include any case in which the firm has an interest in its own right or as counsel to a party.

192. R. REGULATING FLA. BAR 4-1.12(b).

193. FLA. R. JUD. ADMIN. 2.060(b).

clerks—who often gain substantial knowledge about death penalty law in their jobs—would not be disqualified from every death case pending during their tenure at the Court.¹⁹⁴ The Court noted that it did not want to further limit the pool of qualified capital appeals lawyers.¹⁹⁵ Because some law clerks work for the Court for many years before entering practice, they virtually would be disqualified in every single capital case if a stricter rule applied.

The *Rules Regulating The Florida Bar* requires that law clerks who go on to work for law firms must be segregated from working on any case involving matters in which the law clerk participated personally and substantially, except upon consent by all parties after disclosure.¹⁹⁶ A problem of this type might occur, for example, where the firm, after hiring the law clerk, acquires a client who had a case pending in the Court. Moreover, law clerks are generally ethically restricted in discussing information learned at the Court, including the nature of their work assignments.

Similar restrictions apply as to judicial assistants and interns, though problems are less frequent in this regard. Judicial assistants are fewer in number and do not leave their positions with the Court as frequently as law clerks. Interns, meanwhile, are present at the Court for a few months at most and seldom are exposed to any but the most routine matters. However, both judicial assistants and interns must adhere to the rules of ethics and confidentiality applicable to law clerks.

Enforcement of ethical constraints imposed on judicial staff differs from that used in the case of Justices and judges. Ethical violations of a less serious nature typically are handled by the Justice as a personal issue and can include reprimand or termination of employment. Serious violations also can result in contempt proceedings being brought, though only one such incident has occurred in the last few decades.¹⁹⁷ Any staff member who is an attorney is also subject to professional discipline by The Florida Bar, with penalties ranging from a private reprimand to disbarment. Student interns who plan to become licensed attorneys can be investigated for ethical breaches by The Florida Board of Bar Examiners, possibly resulting in a denial of licensure.¹⁹⁸

194. Amendments to the Fla. Rules of Judicial Admin. (2-Year Cycle), 851 So. 2d 698, 699–700 (Fla. 2003).

195. *Id.*

196. R. REGULATING FLA. BAR 4-1.12(a).

197. *In re Schwartz*, 298 So. 2d 355 (Fla. 1974).

198. The Florida Board of Bar Examiners routinely sends detailed questionnaires regarding former interns to the Justices and their staffs. The questions probe such matters as the intern's thoroughness, promptness, work ethic, background, and personal problems. If the answer to any question raises a concern about fitness to practice law, the bar examiners will investigate further.

I. *Court Protocol*

In its day-to-day operations, the Supreme Court of Florida has followed a simple protocol that borders on the informal. The unifying factor of the protocol, and perhaps its most formal aspect, is a seniority system in which more senior Justices outrank their colleagues for certain procedural and formal purposes, with the sitting Chief Justice always deemed most senior. If more than one Justice is appointed to the Court simultaneously, seniority is determined by reference to the appointee's prior career using a standard adopted in 1968.¹⁹⁹ Virtually every other aspect of procedure in the Florida Supreme Court building is governed by this seniority ranking.

Justices are listed according to seniority in court stationery, choose their office suites in the same order, and appear formally in public ranked from most senior to most junior. When the Court is in session the Justices are seated with the Chief Justice presiding in the center, the next most senior Justice placed to the immediate right, the next most senior Justice placed to the immediate left, and so on until all are seated. Even the separate opinions attached to a majority opinion are ranked by reference to seniority.²⁰⁰

The seniority system also expresses itself in other ways. For example, a listing of Justices in a publication should adhere to the system. However, formal public introductions reverse the seniority ranking on the premise that

199. See The Fla. Supreme Court, minutes of meeting (Jan. 12, 1987) (on file with the Court). On October 14, 1968, the Supreme Court of Florida adopted the following resolution:

BE IT RESOLVED:

Seniority on this Court shall be determined by length of continuous service on this Court:

In the event more than one Justice assumes office on this Court at the same time, seniority of such Justices shall be determined in the following manner:

1. Former Justices of this Court;
2. Judges or former Judges of the District Courts of Appeal. Seniority of such District Court Judges shall be based upon the length of continuous service;
3. Judges or former Judges of the Circuit Court. Seniority of such Circuit Court Judges shall be based upon the length of continuous service;
4. Judges or former Judges of other courts of record of this State. Seniority of such Judges shall be based upon the length of continuous service;
5. Lawyer[s] without former judicial experience. Seniority of such lawyers shall be determined by length of time they have been admitted to The Florida Bar.

This Resolution shall become effective immediately.

Id. This policy was reaffirmed on January 12, 1987, when two Justices—Stephen Grimes and Gerald Kogan—assumed office simultaneously. Because Justice Grimes had served on a district court, he was accorded a higher seniority than Justice Kogan, who had served on a circuit court.

200. As a general rule, separate opinions are divided into the six separate categories and, within each category, are then ranked according to the author's seniority.

the most senior Justices should be introduced last, giving them the “last word.”²⁰¹

Formal modes of addressing Justices in writing have varied over time. However, in 1992, at the request of Allen Morris,²⁰² and through Justice Parker Lee McDonald, the Court established a few guidelines. The Court concluded that it would be appropriate in addressing correspondence to refer to the Chief Justice as “The Honorable (name), Chief Justice, Florida Supreme Court.”²⁰³ By analogy, letters addressed to other Justices would be the same but with the word “chief” omitted. The most common introductory salutation in a letter is “Dear Chief Justice (name)” or “Dear Justice (name).”

A member of the Court should not formally be called “Judge (name).” In the Florida judiciary, the title “Justice” is given exclusively to members of the Court²⁰⁴ because the Florida Constitution clearly distinguishes “Justices” from “judges” sitting on the state’s lower tribunals.²⁰⁵ Contrary to the practice in the United States Supreme Court, the term “Associate Justice” is not a proper title for any sitting member of the Supreme Court of Florida. The term is not used in the constitution. “Associate Justice” is the customary temporary title given to judges of a lower court assigned for temporary service on the Court.²⁰⁶ Thus, the title should not be used in any context except when a judge is temporarily assigned to the Court.

In less formal situations, or when addressing a Justice verbally, the members of the Court usually are called simply “Justice (name).” For example, this has become the standard method of addressing a member of the Court during oral argument. In the late 1980s, the Court completely abandoned the use of the gender-specific titles “Madam Justice (name)” or “Mister Justice (name).”²⁰⁷

201. ALLEN MORRIS, PRACTICAL PROTOCOL FOR FLORIDIANS 77 (rev. 4th ed. 1988).

202. Clerk-Emeritus/Historian, Florida House of Representatives.

203. Letter from Justice Parker Lee McDonald, Supreme Court of Florida to Allen Morris, Clerk-Emeritus/Historian, Florida House of Representatives (Nov. 2, 1992) (on file with author).

204. *Id.*

205. *See* FLA. CONST. art. V.

206. FLA. R. JUD. ADMIN. 2.030(g). Temporary assignments are made, for example, when a quorum of the Court is not available. *Id.* 2.030(a)(4)(A).

207. This change dates from the appointment of Rosemary Barkett, who was the first woman Justice appointed to the Supreme Court of Florida. Shortly after her appointment in 1985, Justice Barkett indicated she would not use the title “Madam Justice Barkett” but simply “Justice Barkett.” Later, the other members of the Court dropped the “Mister” from their titles, and this change was formalized by altering all name plates on the Justices’ suites in the Florida Supreme Court Building. The use of the unadorned title “Justice” is consistent with the court’s policy of avoiding gender-specific language wherever possible. However, some attorneys still use these gender-specific titles without incident. *See* Ricki Lewis Tannen,

Justices who have retired from the Court commonly are addressed by the courtesy title “Justice,” though this is not required and is subject to some ethical constraints. The courtesy title should not be used during the practice of law in which a former Justice may be engaged except for purely biographical purposes. Nor should the title be used in any other context in which the title may create a false impression. The title “Chief Justice” can be used only with respect to a sitting Chief Justice of the Supreme Court of Florida and is never used as a courtesy title.²⁰⁸

A few other matters of court protocol have been distilled into written form by Allen Morris, including details of the investiture ceremony for new Justices²⁰⁹ and protocol for funeral ceremonies of Justices.²¹⁰ By tradition, the Court also has generally adhered to these two protocols with some exceptions. In the case of investitures, for example, the exact details of the program are left to the new Justice. In the case of funeral ceremonies, the wishes of the family will be honored even if they wish to depart from the protocol. For example, deceased Justices by longstanding custom are permitted to lie in state in the Supreme Court Building rotunda with a Florida Highway Patrol Honor Guard assisting. In recent years, some families have foregone the lying in state. In 2004, with the passing of retired Justice Richard W. Ervin, the Court also returned to another tradition from earlier years: it convened a full ceremonial session in remembrance of the Justice’s life and achievements several weeks after his death. The full text of this ceremony was scheduled to be published in West Publishing Company’s Southern Second series, a tradition still in use in many of the state’s lower courts. Finally, the Court also lowers its flags to half-staff upon the death of any present or former Justice.

J. *The Clerk’s Office*

The vast majority of the Supreme Court of Florida’s contact with lawyers and the public occurs through the Office of the Clerk of the Court.²¹¹ Briefs are filed through the clerk, and virtually all routine communications with lawyers are handled by this office. Yet, the clerk’s staff does far more

Report of the Florida Supreme Court Gender Bias Study Commission, 42 FLA. L. REV. 803 (1990).

208. Letter from Justice Parker Lee McDonald, Supreme Court of Florida to Allen Morris, Clerk-Emeritus/Historian, Florida House of Representatives (Nov. 2, 1992) (on file with author).

209. MORRIS, *supra* note 201, at 122–24.

210. *Id.* at 113–14.

211. The present clerk is Thomas D. Hall, and the Chief Deputy Clerk is Debbie Causseaux.

than just deal with the public. The clerk, who serves at the pleasure of the Court,²¹² is charged with the responsibility of maintaining all papers, records, files, and the official seal of the Court. Moreover, the clerk's staff maintains the Court's docket, oversees the rigorous procedural requirements imposed on death penalty cases, arranges the exact timing of oral argument, issues certificates of good standing for attorneys, certifies law students for practice pursuant to chapter eleven of the *Rules Regulating the Florida Bar*²¹³ and prepares finalized opinions for release to the public. Orchestrating routine functions such as these requires considerable coordination among the lawyers, the parties, and the Court. All such matters are handled by the Clerk's office,²¹⁴ and the workload is substantial and steadily increasing. In 1992, the Clerk's office filed dispositions in 1890 cases and opened files in 1844 new cases, in addition to handling 314 motions for rehearing. In 2003, by contrast, the Clerk's office filed dispositions in 2295 cases and opened files in 2486 new cases, in addition to handling 245 motions for rehearing.

K. *The Library of the Supreme Court of Florida*

For its entire history, the Court has maintained its own law library, which consequently is Florida's oldest state supported library in continuous operation. An 1845 catalog in the library's possession still lists the 260 volumes that comprised the Court's first collection in the year Florida was granted statehood. By mid-2004, the library maintained around 117,908 volumes along with some 12,417 monograph titles, 1497 serial titles, and hundreds of linear feet of archival and manuscript material.²¹⁵

But the library has not lost touch with its considerable history. A number of rare Florida legal books are in the Court's collection, including Spanish texts that were of great importance in the years after the Spanish Crown ceded Florida to the United States.²¹⁶ The library also still retains and uses a large number of antique glass-front "barrister" book cases that have belonged to the Court since they were first purchased in 1913. These Globe-Wernicke sectional bookcases filled five railroad cars when originally delivered,

212. FLA. CONST. art. V, § 3(c).

213. R. REGULATING FLA. BAR 11.1.4.

214. Current Clerk's office staff assignments are listed at <http://www.floridasupremecourt.org/clerk/index.shtml>.

215. Some of the information used here was compiled by former Supreme Court Librarian Brian Polley.

216. The treaty ceding Florida bound both the United States and the future state government to honor matters already finalized under Spanish law. *Apalachicola Land & Dev. Co. v. McRae*, 98 So. 505, 524–25 (Fla. 1923). Thus, a large number of early court cases actually rested on an interpretation of Spanish law.

prompting a proud headline in the October 3, 1913 edition of a Tallahassee newspaper, *The Weekly True Democrat*.²¹⁷

The Office of the Court Librarian²¹⁸ has existed only since 1957, and the occupant serves at the pleasure of the Court. The current librarian also has been designated as the official court archivist and historian by the Chief Justice. Beginning in 1862, the Clerk also wore the hat of “head” librarian, though from 1899 until 1957, a full-time assistant librarian was employed. The library is open to the public, but it does not circulate books. Its hours of operation are 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays, although the stacks are available to Court Justices and staff at any time.

L. *The Office of the State Courts Administrator*

The Office of the State Courts Administrator was created on July 1, 1972, when the state courts were constitutionally unified under the administrative control of the Supreme Court. It is also located in the Supreme Court Building. Its initial purpose was to assist the Chief Justice and the Court with technical and fiscal problems associated with preparing the operating budget of the judicial branch, as well as compiling statistics on the need for new judges and specialized court divisions throughout Florida. Today, the Office of the State Courts Administrator²¹⁹ serves as the overall administrative office, overseeing the operations of the entire Justice system, including all of the trial and appellate courts and the state’s judicial education system. It also serves as the Court’s liaison to a number of other agencies, including the legislature, the Governor, auxiliary court agencies, and national judicial agencies. Under the supervision of the Chief Justice, the office oversees a variety of legal programs, information systems used by the courts, and the judicial branch’s accounting and fiscal activities.

M. *The Marshal*

The Court also appoints a marshal to be the custodian of the Supreme Court Building and grounds and to be the conservator of the peace in the building or any place where the Court is sitting. The marshal is also authorized to execute the process of the Court throughout Florida. To this end, the marshal is vested with constitutional authority to deputize the

217. See *Five Carloads of Book Cases for Tallahassee*, THE WEEKLY TRUE DEMOCRAT, Oct. 3, 1913.

218. The present librarian is Joan Cannon.

219. The present State Courts Administrator is Elisabeth Goodner, and the Deputy State Courts Administrator is Blan Teagle.

sheriff or a deputy sheriff in any Florida county.²²⁰ The marshal also is responsible for performing some court budgeting, purchasing and contracting, security, and property accountability and maintenance. Traditionally, the marshal also calls the courtroom to order whenever the Justices enter to sit at any official session. This call to order, often called the “oyez,” is: “Hear ye, hear ye, hear ye, the Supreme Court of the great state of Florida is now in session. All who have cause to plea, draw near, give attention, and you shall be heard. God save these United States, the great state of Florida, and this honorable court.”²²¹

III. AN OVERVIEW OF JURISDICTION

Of course, the most important aspect of the Supreme Court of Florida’s day-to-day operations is the exercise of its jurisdiction as the state’s highest court.²²² It is through the exercise of jurisdiction that the Court chooses the cases that it will hear and the issues that will be decided. Florida’s society is shaped by these decisions because the opinions that result from the exercise of jurisdiction become a part of Florida law and create the precedent that will control future cases. Moreover, the bulk of the Court’s jurisdiction is discretionary, meaning that the Court may decline to hear cases falling into particular categories even if it has jurisdiction over them.²²³ Accordingly, the Court has significant power to choose the issues it deems most important. Jurisdiction in discretionary cases, for example, usually is put to a vote by a panel of five Justices, with four votes being necessary to grant review.²²⁴ If the vote of the five Justices is three-to-two, the case is then sent to the remaining Justices.²²⁵ In all such cases a majority of Justices is necessary to the Court’s exercise of its discretionary jurisdiction.²²⁶

220. See FLA. CONST. art. V, § 3(c).

221. E.g., *Text of the Supreme Court Hearing on the Presidential Election Case*, ST. PETE. TIMES, Dec. 7, 2000, available at http://www.sptimes.com/News/120700/Election2000/Text_of_the_Florida_S.shtml (last visited Feb. 23, 2005).

222. The historical development of the Court’s jurisdiction is amply discussed elsewhere. E.g., Arthur J. England, Jr. & Richard C. Williams, Jr., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221 (1981); Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980).

223. See FLA. CONST. art. V, § 3(b)(3)-(6).

224. FLA. SUP. CT MANUAL OF INTERNAL OPERATING PROCEDURES § 2(A)(1)(a), available at http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf (last visited Feb. 23, 2005). [hereinafter MANUAL OF INTERNAL OPERATING PROCEDURES]. If review is granted, but four members do not agree on the need for oral argument, the Chief Justice decides the issue or places the matter on the court conference agenda for resolution. *Id.*

225. *Id.*

226. *Id.*

A. *The Nature of Jurisdiction*

Jurisdiction always involves a deceptively simple question: does the Court have the power to hear and to determine the case?²²⁷ In discretionary cases, a second question must also be addressed: why should the case be heard?²²⁸ Most of the time, the answers are obvious. But there are a significant number of cases that fall somewhere at the limits of the Court's jurisdiction. These can be exceedingly complicated, and opinions addressing them often take on the quality of philosophical abstraction. Yet such cases may be highly important in the law because they draw the line between what the Court will and will not hear. Much of the discussion below involves such cases, and for that reason, the remainder of this article will be of primary interest to lawyers and persons who may ask the Supreme Court of Florida to hear their cases.

To further complicate the issue, the Court's jurisdiction is not based upon a single unified concept. Rather, jurisdiction falls into five distinct categories, each of which involves different concerns. These categories are: advisory opinions, mandatory appellate jurisdiction, discretionary review jurisdiction, discretionary original jurisdiction, and exclusive jurisdiction.²²⁹ Each of these categories is addressed in detail below.

The basis of the Court's jurisdiction is not entirely uniform, but rather, can vary among the categories. The variations are too numerous to include in anything less than a treatise. However, the most important include: 1) the presumptions circumscribing the Court's jurisdiction; 2) the precedential value of decisions and opinions within each category; and 3) the limits placed on the Court's discretion.

1. Presumptions

The presumptions circumscribing jurisdiction usually depend on the question of whether the Court's jurisdiction is limited or plenary. The Supreme Court of Florida is a tribunal of limited jurisdiction.²³⁰ This means that the Court is forbidden to exercise any form of jurisdiction not expressly

227. See *State ex rel. Campbell v. Chapman*, 1 So. 2d 278, 281 (Fla. 1941).

228. See generally *Fla. Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988) (holding that Court has subject matter jurisdiction over appeal of decision of intermediate appellate court expressly citing a statute).

229. See FLA. CONST. art. V, § 3(b).

230. See generally *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976) (holding that the court has limited review); *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958) (holding that the court cannot go beyond its limited powers)..

provided in the Florida Constitution.²³¹ Unlike the circuit courts, the Supreme Court of Florida does not have a general grant of plenary jurisdiction,²³² a grant that would give the Court authority over any matter not expressly excluded from its jurisdiction.

This is an important distinction and one of the most misunderstood aspects of the operation of the Court. The public, and indeed, attorneys often cannot understand why the state's highest court cannot correct every perceived wrong that has occurred in the lower courts. It also is the reason why virtually every well written opinion issued by the Court begins with a statement referencing the basis of jurisdiction. The Supreme Court of Florida cannot act without an express basis in the constitution authorizing jurisdiction. On the other hand, the circuit court is presumed to have jurisdiction unless the constitution or statutes say otherwise.²³³ Put another way, the jurisdiction of the Court, being limited, tends to be strictly construed, while the jurisdiction of the circuit courts, being plenary, tends to be liberally construed.

Thus, in close cases, the presumptions would disfavor jurisdiction in a court of limited jurisdiction while favoring jurisdiction in a court of plenary jurisdiction. This has an important consequence. When parties invoke the jurisdiction of the Supreme Court of Florida, they usually are fighting against a presumption that the Court cannot hear the case, and they carry a heavy burden to demonstrate jurisdiction.

However, these limitations are not entirely uniform. The Court's authority may verge on being plenary, at least within the context of certain types of cases. For example, the Court has mandatory exclusive appellate jurisdiction over a final judgment imposing a sentence of death.²³⁴ As a result, once the Court finds that a case involves the death penalty, the Court, as a practical matter, probably has a form of plenary jurisdiction in that case and the presumption would favor taking the case, even if there is some doubt remaining.²³⁵ This is particularly true in light of the Court's "all writs" jurisdiction, discussed more fully below.²³⁶

231. See *Harrington*, 339 So. 2d at 201.

232. Compare FLA. CONST. art. V, § 3(b) with FLA. CONST. art. V, § 5(b).

233. See *id.* at § 5(b).

234. *Id.* at § 3(b)(1).

235. See *Tillman v. State*, 591 So. 2d 167,169 (Fla. 1991).

236. See discussion *infra* Part VII.E.

2. Precedential Value

Another factor that varies among the five categories is the precedential value of cases. Some types of opinions issued by the Court may lack the dignity accorded to others. This is especially true of advisory opinions, which, though they may be persuasive, do not establish controlling precedent.²³⁷ Opinions issued pursuant to the Court's exclusive jurisdiction also may lack the binding effect of precedent, but only to the extent that they deal with the Court's administrative and rule making functions. The Supreme Court of Florida's exclusive jurisdiction to regulate the bench and the bar is somewhat different. Court opinions disciplining judges and lawyers for improprieties may establish a kind of precedent, while in practice, such cases may be so fact-bound that the precedent is limited.

3. Discretion

Two categories of discretionary jurisdiction, discretionary review jurisdiction and discretionary original jurisdiction, involve a separate problem: the concept and use of "discretion"²³⁸ in deciding to hear the case. Discretion implies broad authority to choose, but the term has a somewhat different meaning in the present context. In *Florida Star v. B.J.F.*,²³⁹ the Court noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless.²⁴⁰ Discretion itself can be limited by the existing policy and applicable law restricting the Court's actions even though technical jurisdiction might exist.²⁴¹ In other words, when the Court's authority to act is discretionary, it can establish by its own case law rules governing the exercise of the discretion.

Restrictions on discretion may be most obvious when the Court's discretionary original jurisdiction is invoked seeking one of the so-called "extraordinary writs." The mere request for mandamus, for example, vests the Court with jurisdiction. However, well established law severely restricts the Court's actual exercise of discretion to issue writs of mandamus²⁴² and other extraordinary writs. Similar restrictions apply when the Court is asked to

237. *E.g.*, Fla. League of Cities v. Smith, 607 So. 2d 397, 399 n.3 (Fla. 1992).

238. Discretion can be involved to a lesser extent in other categories of jurisdiction, but the restriction usually is so obvious as to merit little discussion. For example, the Court has no discretion to refuse to hear a proper appeal pursuant to its mandatory jurisdiction. *See* FLA. CONST. art. V, § 3(b)(1)-(2).

239. 530 So. 2d 286 (Fla. 1988).

240. *Fla. Star*, 530 So. 2d at 288.

241. *Id.* at 288.

242. *See* discussion *infra* Part VII.A.

review an appellate decision that allegedly conflicts with a decision of another appellate court.²⁴³

As a practical matter, a determination of a lack of jurisdiction or lack of discretion results in the same outcome: the case is not heard by the Court. The distinction usually does not matter. However, there is at least one important consequence that justifies the distinction. In some cases, the deadline by which appeals must be taken to the United States Supreme Court hinges on whether the Supreme Court actually had jurisdiction of a case in which it has denied review. If the Court had jurisdiction but did not exercise discretion, then the time to take the further appeal is judged from the date the petition was dismissed or denied by the Court.²⁴⁴ But if the Supreme Court lacks jurisdiction, then the time to seek review in the higher court is judged from the date the lower court's opinion became final.²⁴⁵ This is crucial for litigants seeking an appeal to the United States Supreme Court. Thus, lawyers and litigants who hope to preserve all avenues of appeal must be mindful of the distinction between jurisdiction and discretion.

Finally, of course, even when discretion is not limited by the law, the Court still can refuse to exercise its discretion to hear any case falling within a discretionary category.²⁴⁶ Typically this may occur if the Court determines that the case does not present a significant issue or the result was essentially correct. For this reason, jurisdictional briefs in discretionary cases should always demonstrate that the case is significant enough to be heard. It is not enough to establish that jurisdiction exists and that discretion is unrestricted for present purposes, except in the rare case perhaps where the importance is obvious.

B. *Invoking the Court's Jurisdiction*

The jurisdiction of the Supreme Court of Florida usually must be invoked by an affirmative act of one of the parties to the cause. This can occur in several ways. In the advisory opinion category, jurisdiction is invoked by the Governor or Attorney General by the mere filing of a letter with the

243. See discussion *infra* Part VI.D.

244. See *Florida Star*, 530 So. 2d at 289.

245. *Id.* This problem sometimes has been addressed by saying that a court has “jurisdiction to determine jurisdiction.” However, the Supreme Court of Florida has avoided this type of analysis, which does not really solve the problem. If a court merely has jurisdiction to determine jurisdiction, then the decision not to hear a case could be construed as retroactively depriving the court of actual jurisdiction over the controversy. This would create a Catch-22 for lawyers who hope to appeal their cases to the United States Supreme Court.

246. See FLA. CONST. art. V, § 3(b)(3)-(6).

Court outlining the issues.²⁴⁷ In the mandatory appellate jurisdiction category, the Court's jurisdiction is automatic in death penalty appeals.²⁴⁸ The Court's jurisdiction is invoked by notice of appeal²⁴⁹ and petition in the other subcategories. Discretionary review jurisdiction is invoked by filing a notice of appeal to invoke discretionary jurisdiction and is followed by jurisdictional briefs. However, in some types of cases, briefing on jurisdiction is skipped and the case proceeds directly to merit briefing.²⁵⁰ In the discretionary original jurisdiction category, review is sought by petition. Finally, the Court's exclusive original jurisdiction can be invoked by petition;²⁵¹ and in the case of the decennial review of legislative apportionment, the Attorney General must file the petition.²⁵²

By far, the largest single category of petitions for review are based on the assertion that jurisdiction exists because the decision under review conflicts with an opinion of another Florida appellate court. This category is discussed in greater detail below.²⁵³

IV. ADVISORY OPINIONS

Any discussion of advisory opinions usually begins with the observation that they are disfavored.²⁵⁴ This principle hinges on the nature of advisory opinions. As a broad rule, an advisory opinion is any conclusion of law stated by a court in the absence of an actual controversy.²⁵⁵ The reasons are obvious; courts exist to resolve real disputes, not to address abstract questions. Thus, the rule prohibits parties from bringing spurious lawsuits in order to create precedent. The rule equally forbids judges to establish law irrelevant to the matters at hand.²⁵⁶

However, the rule is subject to exceptions, partly because some controversies do not fall into the neat categories the rule might suggest. Reasona-

247. See FLA. CONST. art. V, § 3(b)(10); FLA. CONST. art. IV, § 10.

248. FLA. CONST. art. V, § 3(b)(1).

249. Technically, since review is mandatory after the death sentence is imposed, no notice is actually required. However, because filing the notice triggers various time periods under the *Rules of Appellate Procedure*, a notice is almost always filed and, if not, the Court enters an order advising the parties what it deems to have been a notice.

250. See discussion *infra* Part VI.

251. The Court also may exercise its exclusive original jurisdiction over rule-making and regulation of The Florida Bar on its own motion, but this is not done often.

252. FLA. CONST. art. IV, § 10.

253. See discussion *infra* Part VI.D.

254. See, e.g., *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 995 (Fla. 1976); *Dep't of Admin. v. Horne*, 325 So. 2d 405 (Fla. 1976).

255. See *Interlachen Lakes Estates*, 341 So. 2d at 995.

256. See *id.*

ble people often differ over the true scope of legal controversies. Moreover, judicial opinions must be conveyed through the inherently inexact medium of human language, and sometimes it is useful for judges to comment on trends in developing case law and give guidance on ambiguous or unresolved questions of law.

There is established precedent, for example, for judges to write what often are called “scholarly” opinions creating an in-depth analytic framework to resolve particular issues. Opinions of this type almost always go beyond the bare analysis required to answer the specific question presented by the case but rest on thorough research and reasoning contained in the text. As cases from the United States Supreme Court have demonstrated, they often are admired, honored, and address a wide range of issues.²⁵⁷ Thus, the rule against advisory opinions does not apply to scholarly analyses, though such opinions sometimes are criticized for their expansiveness.

Florida appellate opinions also have a long-standing tradition of containing obiter dicta, a phrase usually shortened to “dicta,” which by definition are statements in a court’s opinion that are extraneous or absolutely unnecessary to the resolution of the issues.²⁵⁸ Scholarly opinions, almost by definition, are often built on dicta. Moreover, dicta are so common in opinions that a well-established body of cases govern their interpretation, and obviously, tolerate their continued use. Thus, dicta are extraneous statements of law that are permissible, though not always taken as seriously as the holding in a case. Here again, the rule against advisory opinions does not reach so far as to prohibit the use of dicta where it is deemed necessary to help support the resolution of the issue being decided.

In any event, dicta are subject to strong limitations. Courts sometimes say that dicta binds no one, not even the ones who wrote them,²⁵⁹ though this assertion may be unreliable in many instances. In actual practice, dicta can have persuasive force in much the same way that a concurring opinion can, depending on the circumstances.²⁶⁰ This is most apparent in scholarly opinions. In other words, dicta should be considered if relevant, can be ignored if poorly reasoned or distinguishable, and gain greater force with repetition.

Whatever border separates dicta from advisory opinions has never been finely drawn, and there probably can be no bright line rule. Clearly, dicta can verge into an advisory opinion and thus, may be abused. In broad terms

257. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

258. *See Therrell v. Reilly*, 151 So. 305, 306 (Fla. 1932).

259. *E.g.*, *Hart v. Stribling*, 6 So. 455, 456 (Fla. 1889).

260. *See Milligan v. State*, 177 So. 2d 75, 76 (Fla. 2d Dist. Ct. App. 1965); *but see Continental Assurance Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986) (stating dicta is never regarded as “ground-breaking precedent”).

however, statements that illuminate or place in context any relevant issue have long been considered acceptable as a useful feature of opinion writing, especially in forecasting the law's evolution. The rule against advisory opinions would be most applicable to attempts to address wholly irrelevant issues.

Even then, other long standing exceptions to the rule against advisory opinions exist. In a few instances, even moot or completely abstract questions can be answered by the Court. For example, the mootness doctrine generally requires dismissal of a cause in which the issues have been resolved so fully that any decision would have no actual effect.²⁶¹ There is, however, an important exception for moot cases that present important questions capable of repetition yet likely to evade review. If the Court finds this situation to exist, jurisdiction may be determined as though the controversy had never become moot.²⁶²

Likewise, the Florida Constitution itself expressly authorizes the Court to consider questions of law and issue advisory opinions to the Governor and Attorney General in two narrow circumstances.²⁶³ Like all advisory opinions, these opinions may not constitute binding precedent, though they can be persuasive.²⁶⁴ They are authorized by the constitution to deal with situations in which the Court's opinion on a legal question can advance the public interest, discussed below.

A. *Advisory Opinions Requested by the Governor*

The Supreme Court of Florida may issue advisory opinions to the Governor on any question affecting the Governor's constitutional powers and duties.²⁶⁵ By tradition, the question or questions are posed in a simple letter to the Court from the Governor.²⁶⁶ Often, the letter is quite detailed and may include an in-depth briefing on the relevant law, including reasons why the Governor believes the questions should be answered in a particular way.

Here, jurisdiction is mandatory; the Court must hear the case and issue an opinion.²⁶⁷ Upon receipt of the Governor's request, the Clerk's office creates a case file and the letter is immediately routed to the Chief Justice,

261. *Hollywood, Inc. v. Clark*, 15 So. 2d 175, 181 (Fla. 1943).

262. *In re T.A.C.P.*, 609 So. 2d 588, 589 n.2 (Fla. 1992) (citing *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984)).

263. FLA. CONST. art. IV, §§ 1(c), 10.

264. *See Smith*, 607 So. 2d at 399.

265. *See* FLA. CONST. art. IV, § 1(c).

266. This is consistent with the applicable rule which only requires that the Governor's request be in writing. *See* FLA. R. APP. P. 9.500(a).

267. *Id.*; *see* FLA. CONST. art. IV, § 1(c).

who will call a court conference to determine if the question can be answered and if oral argument is desired.²⁶⁸ If the case is accepted, the Chief Justice may keep the case or assign it to another Justice.²⁶⁹ Oral argument is usually granted,²⁷⁰ except where at least four Justices determine that the question is not subject to answer for reasons discussed below.²⁷¹ Any person whose substantial interest may be affected by the advisory opinion also may be permitted to participate.²⁷² Time limitations on briefing and scheduling of argument lie within the Court's discretion.²⁷³

An opinion is then issued on an expedited basis, subject to one exception: the constitution provides that the opinion must be rendered “not earlier than ten days from the filing and docketing of the request, unless in [the Court’s] judgment the delay would cause public injury.”²⁷⁴ The opinion is written in the form of a letter addressed to the Governor and signed by the concurring Justices, and the letter will be published like any other court opinion. Any concurring or dissenting views are written in separate statements to the Governor signed by the Justices agreeing with that particular viewpoint, and are appended to the majority’s letter.

Under the constitution’s requirements, in the strictest sense, the Court’s discretion to answer a request for an advisory opinion is confined solely to questions of the Governor’s constitutional powers.²⁷⁵ If the questions are determined to be beyond constitutional concern, then the Court lacks discretion and must refuse to answer.²⁷⁶ There is precedent that an advisory opinion cannot address issues of the Governor’s purely statutory powers.²⁷⁷

Over the years, however, the distinction between constitutional and statutory concerns has become a subject of some debate. In some cases the Court’s majority has answered questions about statutory matters if there was some significant and identifiable nexus with the Governor’s constitutional

268. See MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(1).

269. *Id.* Advisory opinions almost always fall into the “special” category of case assignments. See discussion *supra* Part II.B.4.

270. See discussion *supra* Part II.B.1.

271. FLA. R. APP. P. 9.500(b)(1).

272. FLA. R. APP. P. 9.500(b)(2); MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(1).

273. FLA. R. APP. P. 9.500(b)(2).

274. FLA. CONST. art. IV, § 1(c).

275. *Id.*

276. See, FLA. R. APP. P. 9.500(b)(1); MANUAL OF INTERNAL OPERATING PROCEDURES § II(a)(1).

277. See *In re Advisory Opinion to the Governor*, 225 So. 2d 512 (Fla. 1969) [hereinafter *Advisory Opinion to the Governor, Jul. 1969*].

powers or duties.²⁷⁸ For example, the Court has held that the Governor’s constitutional powers are implicated by questions posed to the Court about new statutory tax schemes.²⁷⁹ This was done on grounds that the fiscal stability of the state was at stake, which implicated the Governor’s fiscal duties under the Florida Constitution.²⁸⁰

A similar result was reached in a case involving a statute modifying Florida’s appellate districts and creating judicial vacancies.²⁸¹ There, the Court found discretion to act because “irreparable harm”²⁸² otherwise might result, and the constitutional nexus relied upon was the Governor’s duty to fill judicial vacancies.²⁸³ Thus, in actual practice, the Court sometimes has found it has discretion to answer questions about statutes significantly related to any one of the Governor’s express constitutional powers or duties.

“Statutory” advisory opinions of this type, even if proper, are not without problems. Advisory opinions to the Governor have important limitations beyond the fact that they are not technically binding precedent. For example, the Court has held that advisory opinions cannot address federal issues.²⁸⁴ The Court has also held that they can address Florida constitutional issues only for prima facie validity.²⁸⁵ As a result, all federal questions remain unresolved, as well as any challenge to the statute’s constitutionality as applied to specific individuals.²⁸⁶ A Justice in one of the tax cases suggested that an advisory opinion of this type can win the Governor, at best, a fragment of an answer.²⁸⁷

Advisory opinions to the Governor, in other words, appear most useful when they are confined to the stricter parameters suggested by the Florida Constitution itself: the Governor’s constitutional powers and duties.²⁸⁸ The Supreme Court of Florida is the final authority on the meaning of the state

278. *E.g. In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987). [hereinafter *Advisory Opinion to the Governor, Jul. 1987*].

279. *Id.*

280. *See In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987) (citing *In re Advisory Opinion to the Governor*, 243 So. 2d 573, 576 (Fla. 1971)).

281. *In re Advisory Opinion to the Governor Request of June 29, 1979*, 374 So. 2d 959 (Fla. 1979) [hereinafter *June 29, 1979 Opinion*].

282. *Id.* at 962

283. *Id.*

284. *Advisory Opinion to the Governor, Jul. 1987*, 507 So. 2d at 302.

285. *Id.* at 301–02.

286. *Id.* at 302. *This restriction is self-evident. Advisory opinions deal with abstract questions of law, not the concerns of single individuals not present in the court. “As applied” challenges, by their very nature, require a controversy raised by individuals. See id.*

287. *Id.* at 319–20. Justice Barkett declined to answer the questions. *Id.*

288. FLA. CONST. art. IV. § 1(c).

constitution, subject to the people's power of amendment.²⁸⁹ Advisory opinions confined to a question of pure Florida constitutional law are thus far more persuasive than ones that delve into the potential challenges to the validity of statutes or into matters regulated by federal law.

B. *Advisory Opinions Requested by the Attorney General*

A second type of advisory opinion authorized by the constitution is requested by the Attorney General. Cases of this type are confined solely to the question of whether a citizen's petition to amend the state constitution complies with technical requirements of the amendment process.²⁹⁰ This type of jurisdiction is of recent vintage.²⁹¹ It was added to the constitution by the people of Florida to lessen the possibility that citizens might expend considerable time and resources on a petition initiative later declared invalid on technical grounds. Previously, there was no way for initiative proponents to obtain an advance court ruling on the validity of their petition.

Such a ruling is important because citizen petition initiatives are subject to two requirements imposed by state law. The proposed amendment must contain only a single subject²⁹² and must include a fair and accurate ballot summary of no more than seventy-five words.²⁹³ The Supreme Court of Florida has determined that it cannot consider any issue beyond these two, including whether the amendment, if enacted, would violate the United States Constitution.²⁹⁴ Nor can the Court rewrite an unfair or inaccurate ballot summary.²⁹⁵ However, these are restrictions imposed not by the constitu-

289. See *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988); see also FLA. CONST. art. XI, § 3.

290. See FLA. CONST. art. IV, § 10; see also FLA. CONST. art V, § 3(b)(10).

291. The relevant constitutional amendment creating this form of jurisdiction was adopted by the voters of Florida on November 4, 1986, and enabling legislation was approved the following year.

292. See FLA. CONST. art. XI, § 3.

293. See FLA. STAT. § 101.161(1) (2004).

294. See *In re Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991) [hereinafter *Limited Political Terms in Certain Elective Offices*]. In early 1994, a case was pending before the Supreme Court of Florida in which several parties argued that advisory opinions to the attorney general may properly address federal constitutional questions. *In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994) [hereinafter *Restricts Laws Related to Discrimination*]. In effect, these petitions asked the Court to recede from its earlier decision that the constitutional issues are not justiciable. *Limited Political Terms in Certain Elective Offices*, 592 So. 2d at 227. At the time this article was being finalized, no decision had yet been rendered on these petitions.

295. *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621–22 (Fla. 1992).

tion, but by the enabling legislation, which could be amended to lift the restrictions. A bill to accomplish just that was approved by the 1993 Florida Legislature but vetoed by the Governor²⁹⁶ and never became law. However, in 2004, the voters overwhelmingly approved an amendment to the Constitution requiring that anyone circulating an initiative petition must file the appropriate paperwork with the custodian of State records no later than February 1 of the year in which the general election is held. Further, the Supreme Court of Florida must render its written opinion no later than April 1 of the same year.²⁹⁷

An action requesting an advisory opinion of this type is commenced by the Attorney General, who is required by law to petition the Court once certain threshold requirements are met.²⁹⁸ The enabling legislation provides that proponents of the citizen petition initiative must register as a political committee; must submit the ballot title, substance, and text to the Secretary of State; and must obtain a letter from the state Division of Elections that a certain number of verified signatures have been obtained on the petition.²⁹⁹ At this juncture, the Secretary of State must submit the petition to the Attorney General,³⁰⁰ who is required to petition the Court within thirty days.³⁰¹

The Court has determined that advisory opinions of this type are handled substantially like those requested by the Governor.³⁰² By analogy to gubernatorial advisory opinions, the Attorney General has adopted the practice of submitting the case to the Court by means of a letter addressed to the Justices.³⁰³ The two relevant questions must be posed and answered, because neither the Attorney General nor the Court has any discretion to expand or to restrict the issues.

The Attorney General is not required to brief the issue nor to take any particular side in the case. However, the Attorney General's letter usually includes a statement outlining the facts, issues, and relevant law in an objec-

296. See H.B. 195, 1993 Leg., Reg. Sess. (Fla. 1993); S.B. 1278, 1993 Leg., Reg. Sess. (Fla. 1993).

297. See Division of Elections, Florida Department of State, Constitutional Amendments Proposed by Initiative, at <http://election.dos.state.fl.us/initiatives/fulltext/10-60.htm> (last visited Feb. 18, 2005).

298. FLA. CONST. art. IV, § 10.

299. FLA. STAT. § 15.21 (2004). The number required is determined by a formula contained in this statute. *Id.*

300. *Id.*

301. § 16.061.

302. MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(2).

303. See *In re Advisory Opinion to the Attorney General English—the Official Language of Florida*, 520 So. 2d 11, 12 (Fla. 1988) [hereinafter *Official English Language*] (noting case was submitted by letter).

tive manner. While most of the letter requests do not advocate any particular result, there have been exceptions.³⁰⁴ Any interested party may file responses in the case, which usually is scheduled for oral argument. There have been instances where the cases are expedited.³⁰⁵

Although consideration of cases of this type is of relatively recent origin, the Court nevertheless decides these cases by drawing on precedent. Previously, challenges to proposed constitutional amendments could be brought by means of a mandamus action filed at any time prior to the date of the election.³⁰⁶ The Court has concluded that its new advisory jurisdiction is similar to cases presenting the same issues previously considered by way of mandamus, while subject to the inherent limitations of advisory opinions.³⁰⁷ Thus, earlier mandamus actions involving initiatives are relevant in determining the applicable law.

At one time the fact that this newer form of jurisdiction was regarded as “advisory” was assumed to mean that any opinion issued by the Court was persuasive but technically not binding, in keeping with the traditional understanding of advisory opinions.³⁰⁸ Nonetheless, it is increasingly hard to square this limited conception with the way the Court actually treats these cases. First, the Court still can entertain a later petition for mandamus provided that it does not attempt to relitigate issues already addressed in the advisory opinion.³⁰⁹ To this extent the advisory opinion is not, strictly speaking, “advisory” at all because it does establish a kind of law of the case. More importantly, the Court clearly looks to its prior precedents in determining how to analyze and resolve such cases. The analysis does not simply change from case to case, and it clearly has evolved beyond the earlier decisional law established by mandamus.³¹⁰

The standard for addressing the “single-subject” requirement wavered during the early 1980s but has become more stable recently. All that is required is that the proposed amendment have “a logical and natural oneness

304. Advisory Opinion to the Attorney General, re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 892–93 (Fla. 2000) (showing that Attorney General firmly took the position that the proposed initiative violated ballot requirements).

305. *E.g.*, Advisory Opinion to the Attorney General, re Patients’ Right to Know About Adverse Medical Incidents, 880 So. 2d 617 (Fla. 2004).

306. *See Smith*, 607 So. 2d at 398.

307. *See Id.* at 398–99.

308. *Id.*

309. *Id.* at 399.

310. *See Race Amendment Opinion*, 778 So. 2d at 888.

of purpose,³¹¹ which occurs if all parts of the amendment may be ‘viewed as having a natural relation and connection as component parts, or aspects of a single dominant plan or scheme.’³¹² The Court also has held that it is not necessarily relevant that the proposed amendment affects more than one provision of the Florida Constitution or more than one branch of government provided it meets the “oneness” standard.³¹³ This analysis has been criticized for its subjectivity³¹⁴ but currently remains the standard of review.³¹⁵

The standard for addressing the ballot summary issue has a more stable history. The Court has consistently held that the “summary must state ‘in clear and unambiguous language the chief purpose of the measure,’³¹⁶ but need not explain every detail or ramification.”³¹⁷ The chief evil addressed by this standard of review is to prevent the voters from being misled and to allow votes to be cast intelligently.³¹⁸ For example, the Court has held ballot summaries defective for suggesting that new rights were to be given to the people, when in fact rights were being taken away.³¹⁹ Moreover, the failure to include an adequate ballot summary cannot be cured by the fact that public information about the amendment was widely available.³²⁰

The Court has not adopted the practice of answering the Attorney General’s questions in the form of a letter signed by the concurring Justices, as happens with gubernatorial advisory opinions. Instead, the Court has issued its conclusions in the form of an opinion, possibly because this was done in the earlier mandamus actions.

311. Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991) [hereinafter *Political Terms Opinion*], (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)).

312. *Id.* ((citing *Fine v. Firestone*, 448 So. 2d at 990) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318, 320 (Fla. 1944)).

313. *Id.* (discussing *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976)).

314. *Id.* at 231 (Kogan, J., concurring in part, dissenting in part).

315. See *Race Amendment Opinion*, 778 So. 2d at 892.

316. *Political Terms Opinion*, 592 So. 2d at 228 (quoting *Askew v. Firestone* 421 So. 2d 151, 155 (Fla. 1982)).

317. *Id.*

318. *Id.* (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)).

319. *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984)(discussing *Askew*, 421 So. 2d at 151); *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991).

320. *Wadhams v. Bd. of County Comm’rs*, 567 So. 2d 414, 417 (Fla. 1990).

V. MANDATORY APPELLATE JURISDICTION

The Supreme Court of Florida is vested with mandatory appellate jurisdiction over four specific categories of cases. These are: 1) death appeals;³²¹ 2) appeals involving the validity of public-revenue bonds;³²² 3) appeals from the Florida Public Service Commission;³²³ and 4) appeals from opinions of a district court declaring a state statute or provision of the Florida Constitution invalid.³²⁴ Jurisdiction in the first three subcategories is exclusive, meaning that no other state appellate court can hear the case.³²⁵ All cases brought under the Court's mandatory jurisdiction are called "appeals," as distinguished from "reviews."³²⁶

The reasons for vesting the Court with some limited forms of mandatory, exclusive appellate jurisdiction are varied. In death appeals, for example, the Court has noted that its mandatory appellate jurisdiction rests in part on the need to ensure uniformity of the applicable law throughout Florida.³²⁷ Uniformity is essential in death cases because of a variety of federal constitutional restrictions. Similar but not necessarily the same reasoning applies to bond validations and appeals to the Public Service Commission, where the public policy implications are apparent. Enormous amounts of public money and great potential liability often are at stake in these cases, and a determination by the state's highest court is necessary to dispel questions as to whether publicly issued bonds are valid and whether utility regulations and rates are lawful. Without such finality, bonds might be considered a poor risk by investors who might suddenly be cast in doubt by lingering and unresolved legal issues and utility services might be delayed or impeded by protracted appellate litigation or unresolved doubts in the law. Thus, the framers of the constitution vested the Supreme Court of Florida with mandatory appellate jurisdiction to resolve these matters.³²⁸

321. FLA. CONST. art. V, § 3(b)(1).

322. FLA. CONST. art. V, § 3(b)(2).

323. *Id.*

324. FLA. CONST. art. V, § 3(b).

325. FLA. CONST. art. V, § 3.

326. *See* FLA. CONST. art. V, § 3(b)(1) (using terms "appeal" and "review" in contradistinction). The distinction apparently has a long history in Florida, where Courts sometimes have said that the word "appeal" denotes an appellate proceeding that may be had as a matter of right. *See* *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

327. *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).

328. *See* FLA. CONST. art. V, § 3(b)(1), (2).

A. *Death Appeals*

The Court's authority over death appeals is one of the most straightforward. Very simply, the Court has exclusive, mandatory, and plenary jurisdiction over any final judgment imposing a sentence of death³²⁹ and all other matters arising from the same trial and sentencing.³³⁰ Moreover, jurisdiction is automatic, meaning the Court must hear the case even if the inmate sentenced to death does not wish to appeal.³³¹ In fact, this is the only category of jurisdiction that is automatic. In the others, failure to bring an appeal or seek review deprives the Court of jurisdiction.³³² A murder conviction resulting in any penalty less than death is appealed to the appropriate district court.

The disputes over this form of jurisdiction often relate to the collateral proceedings that follow the conclusion of the appeal. The Court commonly cites its constitutional jurisdiction over death appeals as a basis for hearing collateral challenges.³³³ This suggests the plenary nature of the jurisdiction granted once the Court finds there is a final judgment of death in the case, a conclusion reinforced by the Court's habeas corpus³³⁴ and "all writs" jurisdiction.³³⁵ On rare occasions the Court has agreed to review such matters by way of writ of prohibition.³³⁶

Interlocutory appeals in ongoing trials that might result in a death penalty also have raised issues of jurisdiction. The argument against the Court hearing these cases rests chiefly on the fact that the constitution grants jurisdiction only where there is a final judgment imposing the death penalty.³³⁷ Thus, while it is clear that the Court can hear interlocutory matters in *post conviction* death cases—those in which the death sentence has been imposed

329. § 3(b)(1).

330. *See* *Asay v. Florida Parole Comm'n*, 649 So. 2d 859 (Fla. 1994). *See also* *Savoie v. State*, 422 So. 2d 308 (Fla. 1982) (stating once the Court accepts jurisdiction to resolve a legal conflict, it has discretion to consider other issues).

331. *Muehleman v. State*, 503 So. 2d 310, 313 (Fla. 1987) (citing FLA. STAT. § 921.141(4) (1985)), *cert. denied*, 484 U.S. 882 (1987).

332. There are limited but rare exceptions when the Court exercises its administrative jurisdiction *sua sponte* to make rules and regulate The Florida Bar. Moreover, administrative acts of the court are not judicial acts, properly speaking.

333. *E.g.*, *Johnson v. Singletary*, 612 So. 2d 575, 576 (Fla. 1993), *cert. denied*, 508 U.S. 901 (1993).

334. *See* discussion *infra* Part VII.D.

335. *See* discussion *infra* Part VII.E.

336. *See E.g.*, *State v. Donner*, 500 So. 2d 532 (Fla. 1987); *State v. Bloom*, 497 So. 2d 2 (Fla. 1986). The writ of prohibition is discussed *infra* part VII.C.

337. *See* FLA. CONST. art. V, § 3(b)(1).

and remains intact³³⁸—the same conclusion is less clear where the death sentence has been vacated or is only a future possibility. In 1979, the Court stated that there is no reason interlocutory appeals in death cases should not go to a district court of appeal when they involve matters routinely reviewed there.³³⁹ The Court’s 1979 analysis of this issue came prior to the jurisdictional reforms of 1980, but the rationale remains the same.³⁴⁰ However, the Court has established that it retains its exclusive appellate jurisdiction over collateral matters on remand if it has vacated the death sentence but not the underlying conviction.³⁴¹

In 1988, the Court appeared to hold that decisions in interlocutory appeals to a district court in a capital case become “law of the case,” perhaps even when no further appeal to the Supreme Court of Florida was possible at the time.³⁴² This suggestion contradicted a 1984 holding to the contrary.³⁴³ A possible result is that the Court could be deprived of its ability to consider an interlocutory issue that affects the validity of a later death sentence; a result that appears contrary to the principle of automatic and full review in death cases.³⁴⁴ Possible solutions to this issue include the recognition of some form of exclusive supreme court jurisdiction in all interlocutory appeals in capital cases or to hold that the law of the case doctrine does not apply in this context. Exclusive jurisdiction could be premised on the Court’s jurisdiction over judgments of death or its all writs power.³⁴⁵ However, this view apparently was rejected by the Court in 2000.³⁴⁶

Moreover, either of these approaches strains the constitution’s language and risks burdening the Court’s docket with interlocutory appeals from cases that may or may not result in a death penalty. Limiting the law of the case doctrine seems more consistent both with the pre-1988 case law³⁴⁷ and the language of the constitution itself. The Supreme Court of Florida’s jurisdiction requires a final judgment of death, not mere speculation that such a

338. *Trepal v. State*, 754 So. 2d 702, 705-06 (Fla. 2000). However, the standard for determining whether to accept such interlocutory matters is whether the order below “does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate.” *Id.* at 707. There are other strict filing requirements. *Id.*

339. *State v. Preston*, 376 So. 2d 3, 4–5 (Fla. 1979).

340. *State v. Fourth Dist. Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997).

341. *Id.*

342. *LeCroy v. State*, 533 So. 2d 750, 754 (Fla. 1988), *cert. denied*, 492 U.S. 925 (1989). *But see* *Preston v. State*, 444 So. 2d 939, 942 (Fla. 1984).

343. *Preston*, 444 So. 2d at 942.

344. *See id.*

345. *See* discussion *infra* Part VII.E.

346. *See Trepal*, 754 So. 2d at 707.

347. *See* discussion *supra* Part II.B.

judgment will be entered.³⁴⁸ Moreover, interlocutory appeals in death cases rarely involve matters the district courts do not routinely consider, a statement that the Court itself has now specifically endorsed in the context of death cases³⁴⁹ and that district courts have applied.³⁵⁰

B. *Bond Validation*

The second form of mandatory, exclusive appellate jurisdiction deals with a trial court's validation or rejection of bond issues made for some public purposes.³⁵¹ Typically, the bonds are issued by governmental units to build infrastructure, to finance public projects, or to otherwise advance the public welfare. This is a type of jurisdiction authorized by the Florida Constitution but requires enabling legislation³⁵² that has been enacted.³⁵³

The jurisdictional grant is narrow. The Court has said that its sole function in such cases is to determine whether the governmental agency issuing the bonds had the power to act as it did, and whether the agency exercised its power in accordance with the law.³⁵⁴ Some procedural time limits are abbreviated in bond cases to allow expedited review.³⁵⁵ The determination of legality can include questions that might impugn the bond issue, such as the propriety of an election in which voters approved a funding source securing the issue.³⁵⁶ Moreover, many types of bonds are proper only if issued for public, municipal, or other specific purposes.³⁵⁷ But these restrictions are sometimes broadly construed. "Public purpose," for instance, has been found to include even some projects of primary benefit to relatively small segments of the public³⁵⁸ or even private enterprise.³⁵⁹ Perhaps the most fa-

348. See FLA. CONST. art. V, § 3(b)(1).

349. *Richardson v. State*, 706 So. 2d 1349, 1357 (Fla. 1998) (citing *State v. Pettis*, 520 So. 2d 250, 253 (Fla. 1988) (involving interlocutory matters in case not involving capital punishment)).

350. *E.g.*, *State v. Richards*, 843 So. 2d 962, 968 (Fla. 3d Dist. Ct. App. 2003).

351. FLA. CONST. art. V, §3(b)(2).

352. See FLA. CONST. art. V, § 3(b)(2).

353. FLA. STAT. § 75.08 (2004).

354. *State v. Leon County*, 400 So. 2d 949, 950 (Fla. 1981).

355. FLA. R. APP. P. 9.110(i), 9.330(c).

356. *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991).

357. *E.g.*, *State v. City of Orlando*, 576 So. 2d 1315, 1316–18 (Fla. 1991) (receding from *State v. City of Panama City Beach*, 529 So. 2d 250 (Fla. 1988)); see FLA. CONST. art. VII, §§ 2, 10-17; FLA. STAT. §75.01-.17 (2004).

358. *N. Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992).

359. *E.g.*, *Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97, 101 (Fla. 1983); *State v. Osceola County Indus. Dev. Auth.*, 424 So. 2d 739, 742 (Fla. 1982).

mous of these cases involved the validation of bonds for reclamation and water control in the vicinity of Walt Disney World.³⁶⁰

C. *Public Service Commission Appeals*

The third form of mandatory, exclusive jurisdiction governs appeals from orders of the Florida Public Service Commission affecting rates or services of electric, gas, or telephone utilities.³⁶¹ Jurisdiction requires enabling legislation, which has been enacted.³⁶² It deserves emphasis that the orders under appeal must relate to rates or services.³⁶³ Other types of issues often arise in Public Service Commission cases and, therefore, do not fall within the Supreme Court of Florida's exclusive jurisdiction.³⁶⁴

The enabling legislation adds a few insights into the Court's jurisdiction. For instance, it specifies that appeal is obtained "upon petition."³⁶⁵ Additionally, one statute equates the term "telephone service" with "telecommunications company,"³⁶⁶ thus defining the Supreme Court of Florida's jurisdiction to reach most forms of communication for hire within the state.³⁶⁷ There appear to be no cases addressing whether this statutory definition comports with the strict language of the constitution, which only uses the word "telephone,"³⁶⁸ or indeed whether the term "telephone" now must be read more inclusively as new forms of communication emerge in an era of technology unforeseen when this constitutional language was framed.

D. *Statutory/Constitutional Invalidity*

The final form of mandatory jurisdiction differs from the other three because it is not exclusive. Cases involving statutory or constitutional invalidity are appealed from a district court decision that has stricken a provision of the *Florida Statutes* or Florida Constitution.³⁶⁹ The plain language of the constitution requires that this decision must actually and expressly hold the statuto-

360. *State v. Reedy Creek Improvement Dist.*, 216 So. 2d 202 (Fla. 1968) (case arose prior to adoption of the 1968 Constitution).

361. *See* FLA. CONST. art. V, § 3(b)(2).

362. FLA. STAT. §§ 364.381, 366.10 (2004).

363. *See* § 364.381.

364. *E.g.*, *State v. Lindahl*, 613 So. 2d 63 (Fla. 2d Dist. Ct. App. 1993). For a discussion of jurisdiction in other types of cases, *see* England, et al., *supra* note 222.

365. FLA. STAT. § 366.10 (2004).

366. FLA. STAT. § 364.381 (2004).

367. *See* § 364.02(7).

368. *See* FLA. CONST. art. V, § 3(b)(2).

369. FLA. CONST. art. V, § 3(b)(1).

ry or constitutional provision invalid.³⁷⁰ Apparently, it is not enough that the opinion can merely be construed to have reached the same result tacitly.³⁷¹ Likewise, jurisdiction does not exist if only a single judge on a three-judge district-court panel “held” the statute invalid, even if that judge’s opinion is characterized as the “opinion” of the Court. This rests on the sound principle that the actual holding of the Court is what a majority has voted to approve, not what the minority has opined.³⁷²

Commentators have suggested that the Court might properly exercise this type of jurisdiction in the rare event that a district court has summarily affirmed a lower court’s ruling expressly invalidating a statute.³⁷³ This is a view the Court directly rejected in 2006.³⁷⁴ In so holding, the Court noted that the district court itself must “declare” the statute or constitutional provision invalid, which by definition does not occur in an unelaborated dismissal. Even then, another possible—but more difficult—basis for review could be the Court’s all writs jurisdiction, discussed below.³⁷⁵ It is possible that serious disruption in the state’s legal process could occur if a trial court’s plain declaration of statutory invalidity remained unreviewable by the Supreme Court simply because it is shielded behind a district court’s “per curiam affirmed” decision.

There has been concern that this form of jurisdiction might only apply when a statutory or constitutional provision is declared facially invalid and not where invalidity is determined on an “as applied”³⁷⁶ challenge. However, the Court has not recognized this distinction. “As applied” invalidity has been used as the basis for jurisdiction, though the Court sometimes has done

370. *Id.* Any direct statement by a district court that a statute or constitutional provision is invalid almost certainly would be construed as a holding and thus part of the decision, even if unnecessary to the case. Review then could be had on that basis. However, the Supreme Court of Florida did decline review in one case with peculiar facts. In *Hanft v. Phelan*, the court dismissed jurisdiction where invalidity was only one of several alternative holdings and the district court had remanded for an evidentiary hearing to determine which of the holdings was proper in the specific case. 488 So. 2d 531 (Fla. 1986). Absent the remand for an evidentiary hearing, it seems unlikely that *Hanft* would have been dismissed merely because there were alternative holdings. *Id.*

371. For a discussion of this “inherent invalidity” argument, see England, et al., *supra* note 222. As this article notes, the first “inherent invalidity” case in which jurisdiction was denied apparently was *Southern Gold Citrus v. Dunnigan*, 399 So. 2d 1145 (Fla. 1981)(unpublished table decision). For a discussion of the now-abolished inherency doctrine see discussion *infra* Parts VI.A.-B.

372. *Byrd v. State* 880 So. 2d 616, 617 (Fla. 2004).

373. England, et al., *supra* note 222, at 169–70

374. *Jackson v. State*, 926 So. 2d 1262, 1265-66 (Fla. 2006).

375. See discussion *infra* Part VII.E.

376. See England et al., *supra* note 222, at 170.

so without comment by extension from earlier case law.³⁷⁷ Before the 1980 reforms, “as applied” jurisdiction had proven controversial, being rejected in 1961,³⁷⁸ and then authorized again in 1963 by a divided court.³⁷⁹ The practice was reaffirmed in 1979 shortly before the most recent jurisdictional reforms, again by a fragmented court,³⁸⁰ and has remained in use since with little discussion.³⁸¹

Earlier criticisms may still have some merit in that an “as applied” decision invalidates a statute or constitutional provision only in cases with similar and limited facts. Thus, there is a less pressing reason for mandatory review, because the decision under appeal essentially leaves the statute or provision in effect, subject to a fact-specific exception. However, much of the earlier criticism focused on the fact that trial court orders declaring a statute invalid were directly appealable to the Court.³⁸² This direct review is no longer available.

It also is worth noting that the apparent purpose of mandatory jurisdiction in these cases is to achieve a degree of finality and uniformity of law. If the Court were not required to hear an appeal, the district court decisions in question might remain on the books for years without being either approved or disapproved. As a result, statutes or constitutional provisions might be enforced in some appellate districts but not others. Mandatory supreme court jurisdiction greatly diminishes these possibilities.

Such concerns cannot be completely eliminated, however. For example, any state court decision striking a provision of the Florida Constitution could do so only on grounds that the provision violated the United States Constitution, a federal statute, or a treaty binding upon the state through the Supremacy Clause.³⁸³ That necessarily means that the resolution of the issue by the Supreme Court of Florida would rest entirely on federal questions that could be decided differently by federal courts. Thus the determination of the case by the Supreme Court of Florida would not necessarily be the final word.

377. See *Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 420 (Fla. 1992) (accepting jurisdiction for “as applied” invalidity).

378. *Stein v. Darby*, 134 So. 2d 232, 237 (Fla. 1961).

379. *Snedeker v. Vernmar, Ltd.*, 151 So. 2d 439, 441–42 (Fla. 1963).

380. *Cross v. State*, 374 So. 2d 519, 521 (Fla. 1979).

381. *E.g.*, *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995).

382. See *England et al.*, *supra* note 222, at 166.

383. U.S. CONST. art. VI, cl. 2. Of course we are not talking here about the far different situation in which a constitutional amendment is stricken because of ballot defects, which has occurred at least once after the vote on the amendment. See *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000).

VI. DISCRETIONARY REVIEW JURISDICTION

The discretionary review jurisdiction of the Supreme Court of Florida accounts for the largest share of the petitions that it receives.³⁸⁴ This type of jurisdiction is discretionary because the Court, in every instance, can decline to hear a case and in some instances will decline because its case law has restricted discretion.³⁸⁵ All cases brought under this type of jurisdiction technically are called “reviews,” as distinguished from “appeals,” though lawyers and justices alike sometimes use the terms interchangeably.³⁸⁶ The distinction between the terms is found in the constitution itself.³⁸⁷ In a more colloquial sense, “reviews” in this category do, in fact, constitute a broad type of “appellate” jurisdiction because the Court is reviewing actions taken by lower courts.

Jurisdiction over discretionary review cases is invoked when a party files two copies of a notice that review is being sought, which must be done within thirty days of rendition³⁸⁸ of the order in the case.³⁸⁹ The notice must be filed with the clerk of the district court, must be accompanied by the proper fee, and must be in the form prescribed by rule.³⁹⁰ Briefing on jurisdiction is allowed in all cases except where the district court has certified a question of great public importance, or has certified that the case is in direct conflict with the decision of another district court.³⁹¹ The Court has not required briefing on jurisdiction in these cases beyond the filing of the notice.

A. *Declaration of Statutory Validity*

The first type of discretionary review jurisdiction governs district court decisions expressly declaring a state statute valid.³⁹² For jurisdiction to exist, the decision under review must contain some statement to the effect that a

384. For example, more than 1,000 discretionary review cases were added to the docket in 2004.

385. For a discussion of “discretion” see *supra* Part III.A.3.

386. For a discussion distinguishing reviews from appeals, see *supra* text accompanying note 315.

387. See FLA. CONST. art. V, § 3(b).

388. Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to some exceptions. See FLA. R. APP. P. 9.020(h).

389. *Id.* at 9.120(b).

390. See *id.* at 9.200(b)-(c), 9.900.

391. *Id.* at 9.120(d). “Certified question” is discussed *infra* Part VI. E. “Certified conflict” is discussed *infra* Part VI. F. The historical reason underlying the lack of jurisdictional briefing in this category of cases now has been called into question by subsequent refinements in the Court’s jurisdictional case law. See *infra* notes 570–71 and accompanying text.

392. FLA. CONST. art. V, § 3(b)(3).

specified statute is valid or enforceable.³⁹³ The constitution does not directly say whether the statement must be necessary to the result reached.³⁹⁴ In an analogous context, however, the Court has expressly premised its jurisdiction on statements that were dicta.³⁹⁵

While this conclusion may be justifiable in the sense that dicta have persuasive force, it does seem somewhat at odds with the constitution's requirement that jurisdiction be based on a "decision."³⁹⁶ At least in other contexts, it has been held that the decision is the result reached and is not gratuitous dicta in the opinion.³⁹⁷ However, in an earlier decision the Court indicated that the term "decision," as used in the constitution's jurisdictional sections, encompasses not merely the result but also the entire opinion.³⁹⁸ Of course, the fact that a statute is declared valid in dicta may provide a less compelling basis for the Court to exercise its discretion over the case.

Importantly, the 1980 constitutional jurisdictional amendments overruled the much criticized "inherency doctrine"³⁹⁹ by which review might be had if the Court believed that an opinion tacitly found a statute valid.⁴⁰⁰ This might occur, for example, where the opinion applied the statute as though it were valid but did not directly discuss or make a finding of validity.

B. Construction of State or Federal Constitutions

The second form of discretionary jurisdiction arises when the decision of the district court below expressly construes a provision of the state or federal constitutions.⁴⁰¹ The operative phrase "construes a provision" was imported into the 1980 jurisdictional reforms essentially unchanged from what

393. See *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986).

394. See FLA. CONST. art. V, § 3(b)(3).

395. See *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (involving express and direct conflict of decisions).

396. See FLA. CONST. art. V, § 3(b)(3).

397. The Court has recognized the importance of the distinction in analogous contexts. See *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (jurisdiction based on express and direct conflict of decisions of different courts of appeal or the supreme court).

398. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

399. See *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959).

400. See *England et al.*, *supra* note 222, at 183. The situation contemplated by the inherency doctrine, involving statutory *validity*, should be contrasted with the situation where a trial court declares a statute *invalid* and the district court then affirms by per curiam affirmed decision. In the latter case, the Court still might have jurisdiction based on other provisions of Article V, section 3, of the Florida Constitution. See discussion *infra* Parts VI.B-H.

401. FLA. CONST. art. V, § 3(b)(3).

had existed previously, except that the word “expressly” was added.⁴⁰² Commentators in 1980 stated their view that the new requirement of “expressness” merely codified prior case law.⁴⁰³ Thus, it does seem likely that pre-1980 case law on this type of jurisdiction remains persuasive and that the addition of the word “expressly” may signal either an affirmation of existing case law or a more stringent test for jurisdiction than was mandated earlier.

Prior to the 1980 reforms, the Court held that the inherency doctrine does not apply to this type of jurisdiction.⁴⁰⁴ Rather, the decision under review had to “explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.”⁴⁰⁵ The key word was “doubts;” the opinion under review had to contain a statement recognizing or purporting to resolve some doubt about a constitutional provision. Thus, jurisdiction does not exist if only a single judge on a three-judge district-court panel “construed” a statute or provision of the Constitution, even if that judge’s opinion is characterized as the “decision” of the Court.⁴⁰⁶ This rests on the sound principle that the actual holding of the Court is what a majority has voted to approve, not what the minority has opined.⁴⁰⁷ For much the same reason, the statement of construction must be a “ruling”⁴⁰⁸ that was more than a mere application of a settled constitutional principle.⁴⁰⁹ Absent the obligatory act of construction, it was not enough that a petitioner simply alleged an unconstitutional result.⁴¹⁰ Commentators called this the “explain or amplify” requirement.⁴¹¹

This analysis still would appear to be sound, especially in light of the additional requirement that the construction be express. The Supreme Court of Florida is the one state court that can resolve legal doubts on a statewide basis. Resolving constitutional doubts is a highly important function because it results in more predictable organic law. No similar purpose is served by the Court hearing a case that has merely reiterated settled principles. The Court’s jurisdiction, for example, may be exercised to say whether an evolution in constitutional law developed by the lower appellate courts is prop-

402. See England et al., *supra* note 222, at 184–85.

403. *Id.* at 184.

404. Ogle v. Pepin, 273 So. 2d 391, 392 (Fla. 1973).

405. *Id.* (quoting Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958)).

406. Byrd v. State, 880 So. 2d 616, 617 (Fla. 2004).

407. *Id.*

408. Dykman v. State, 294 So. 2d 633, 635 (Fla. 1973), *cert. denied*, 419 U.S. 1105 (1975).

409. Rojas v. State, 288 So. 2d 234, 236 (Fla. 1973), *cert. denied*, 419 U.S. 851 (1974).

410. Carmazi v. Bd. of County Comm’rs, 104 So. 2d 727, 728–29 (Fla. 1958).

411. *Appellate Reform, supra* note 356, at 240.

er,⁴¹² or to resolve a doubt those courts have expressly noted.⁴¹³ The Court's more recent cases appear to be in accord with the pre-1980 analysis outlined above.⁴¹⁴

Issues have arisen, however. For one thing, the line that separates "explain or amplify" from "mere application" has sometimes been hard to distinguish. In the 1975 case *Potvin v. Keller*,⁴¹⁵ for example, a district court opinion merely mentioned the appellants' Fourteenth Amendment argument and then affirmed the trial court's order without stating whether the Fourteenth Amendment had any bearing on the decision.⁴¹⁶ The Supreme Court of Florida's majority in *Potvin* buttressed its jurisdiction by noting that the district court had "ruled" that "no constitutional infirmity" existed based on the specific facts at hand.⁴¹⁷ Later in the opinion's analysis, the majority noted that the district court's opinion "may" have overstated federal case law when talking about constitutional and statutory rights that were not further identified.⁴¹⁸ Thus, the district court arguably had tried to eliminate a doubt about the Fourteenth Amendment. A misapplication or misstatement of settled law can be viewed as an evolutionary development deserving correction; but on *Potvin's* peculiar facts, it appears that some straining was needed to reach so far, especially because the lower court's result was affirmed.

The difficulty becomes especially evident when a second question is posed: how specifically must the district court identify a constitutional provision it is construing? The district court in *Potvin* did not premise its actual holding on any specific constitutional provision, though it did construe a federal case dealing with the Fourteenth Amendment. In fact, a reader could not finally determine that the Fourteenth Amendment was being construed in *Potvin* without considering the opinion of the federal case cited therein.⁴¹⁹

This analysis may risk creating a kind of "incorporation-by-reference" jurisdiction any time an opinion cites to other authorities analyzing a constitutional provision. Such a possibility is especially difficult to square with the

412. Any evolution in law by a lower court inherently creates a "doubt:" Is the new principle or the new application correct?

413. A district court sometimes may outline its doubts about what appears to be a settled constitutional principle it is applying. The statement of doubt creates an issue that sometimes may deserve resolution by the Supreme Court of Florida.

414. *E.g.*, *Foster v. State*, 613 So. 2d 454 (Fla. 1993); *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992); *City Nat'l Bank v. Tescher*, 578 So. 2d 701 (Fla. 1991).

415. 313 So. 2d 703 (Fla. 1975), *aff'g* 299 So. 2d 149 (Fla. 3d Dist. Ct. App. 1974).

416. *Id.* at 704 & n.1.

417. *Id.* at n.1.

418. *Id.* at 705 & n.4.

419. *See Potvin v. Keller*, 299 So. 2d 149, 151 (Fla. 3d Dist. Ct. App. 1974) (citing *In re Gault*, 387 U.S. 1 (1967)).

1980 amendment's requirement that construction must be "express." In fact, the 1980 jurisdiction amendments could be viewed as superseding *Potvin* by adding the requirement that constitutional construction be "express."⁴²⁰ *Potvin* probably is now best understood as a case of limited precedential value in which the Court stretched the envelope of its jurisdiction to correct a deficient lower court analysis that, nevertheless, had reached a correct result.

Perhaps a better approach is the one suggested in the Court's earlier cases. For jurisdiction to exist, the district court's opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point.⁴²¹ Misapplication of earlier law could rise to this level to the extent that it can be considered an evolutionary development; but even then, the decision must contain a discussion of a specific constitutional provision. While it would be needlessly technical to require a specific of citation, any reference sufficient to identify a particular constitutional provision may qualify.⁴²²

It remains to be seen whether the Court will recognize dicta as a sufficient basis for jurisdiction in cases of this type. The Court has expressly used dicta to establish jurisdiction in analogous contexts,⁴²³ and thus, probably could do so here as well. Dicta establishing some new principle of constitutional law would have persuasive value, though perhaps not quite amounting to "rulings."⁴²⁴ Review might be justified on that basis, especially where the dicta could be disruptive of established law. In any event, jurisdiction remains discretionary and could be declined if the dicta seem harmless.

C. *Opinions Affecting Constitutional or State Officers*

The third basis of discretionary review jurisdiction exists when a decision of a district court expressly affects a class of constitutional or state officers.⁴²⁵ Again, the operative language here was imported into the 1980 revisions nearly unchanged from the pre-1980 constitution, but again with the word "expressly" added. Commentators in 1980 noted that the "expressness" requirement had the principle purpose of foreclosing any review of a

420. FLA. CONST. art. V, § 3(b)(3).

421. *Ogle v. Pepin*, 273 So. 2d 391 (Fla. 1973); *Dykman v. State*, 294 So. 2d 633, 634 (Fla. 1973).

422. *See Holbein v. Rigot*, 245 So. 2d 57, 59 (Fla. 1971).

423. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984).

424. *See Dykman*, 294 So. 2d at 635; *but cf. Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958) (stating term "decision" as used in the constitution's jurisdictional provisions includes the entire written opinion).

425. FLA. CONST. art. V, § 3(b)(3).

district court decision issued without opinion.⁴²⁶ The Court has adopted this view.⁴²⁷ In that light, the pre-1980 case law was largely unaffected and probably remains persuasive.

Consistent with the “expressness” requirement, the Court in 1974 held that a decision does not fall within this type of jurisdiction unless it meets a very restrictive test; it must “*directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination[,] or regulation of a particular class of constitutional or state officers.”⁴²⁸ Thus, the decision must do more than simply modify, construe, or add to the general body of Florida law. If other criteria are met, it is not necessarily dispositive that members of a valid class were or were not litigants in the district court.⁴²⁹ The Court has said that jurisdiction could exist even where no class members were parties to the action, provided the decision affects the entire class in some way “unrelated to the specific facts of [that] case.”⁴³⁰

In most instances, it would appear safe to assume that the parties to the proceedings below are the only ones allowed to seek review in the Supreme Court of Florida, even though they may not be members of the “affected class.” However, this has not always been true. One case, *In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender*,⁴³¹ was accepted even though review was sought by governmental agencies not actually a party in the proceedings below.⁴³² In any event, the case had very unusual facts, and some may question whether it was erroneously assigned to this particular subcategory of jurisdiction.

The case arose in 1990 when a district court entered a sua sponte order prohibiting a public defender from bringing appeals arising outside his own circuit.⁴³³ This, of course, would require public defenders in other circuits to handle their own appeals. Because the public defenders in other circuits lacked adequate resources, it appeared that county governments would be forced to pay for court-appointed private lawyers in their own circuits. As a consequence, several county governments then filed a “motion for rehearing,” which was summarily denied. The county governments then sought and obtained review in the Supreme Court of Florida, based not on their own

426. See England et al., *supra* note 222, at 187.

427. See School Bd. of Pinellas County v. Dist. Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).

428. Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974).

429. *Id.* at 701–02.

430. *Id.* at 702.

431. 561 So. 2d 1130 (Fla. 1990).

432. *Id.*

433. *Id.* at 1132.

constitutional status, but on the basis that the district court's order affected the duties of public defenders in other counties.⁴³⁴

The act of filing the "motion for rehearing" somehow made the county governments a "party," but this is not at all clear. This situation also could be viewed as a determination that the counties, as affected parties, were granted the right to intervene, albeit not explicitly. The summary order of dismissal is equally consistent with the view that the district court refused to recognize the county governments as a party. Importantly, however, it appears that no one raised or argued any objections to jurisdiction when the matter was brought to the Supreme Court of Florida. It thus seems highly unlikely that the Court was creating any form of "third-party standing."

Whatever the case, *In re Order on Prosecution of Criminal Appeals* may be characterized as an exercise of the Court's "all writs" jurisdiction, which is discussed in greater detail below.⁴³⁵ "All writs" review previously has been allowed to bring serious governmental crises for expedited review where some factual or procedural quirk threatens to deprive the Court of its "ultimate jurisdiction."⁴³⁶ That situation almost certainly existed here, where a technical lack of standing might have frustrated the Court's ultimate ability to review an important case that could have been brought to the Court by someone else or in some other form.⁴³⁷

Another problem in this form of jurisdiction is the definition of the phrase "class of constitutional or state officers." The Court has held that the word "class" means there must be more than one officer of the type in question,⁴³⁸ and there thus is no jurisdiction over a decision affecting only a single board with multiple members where the sole powers affected are those of the board as a single entity.⁴³⁹ In such a situation, the entity constitutes only one "officer."⁴⁴⁰ The fact that an office or board is unique, thus, would appear to mean that there is no jurisdiction.⁴⁴¹ At a minimum, there must be two or

434. *Id.* at 1131–33; see Brief on Jurisdiction of Collier County, *In re Order on Prosecution of Criminal Appeals* By the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990) (No. 74,574).

435. See discussion *infra* Part VII.E.

436. *E.g.*, Fla. Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982).

437. See discussion *supra* Part III.A.3 for a discussion of the reasons why the lack of standing might have frustrated the Court's ultimate ability to review the case.

438. *State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963).

439. *Id.*

440. *Id.*

441. The opinion in *State v. Bowman*, 437 So. 2d 1095 (Fla. 1983), at first blush, seems to reach a contrary result; the district court's opinion primarily affected the Attorney General, a unique office. Moreover, the Attorney General brought the case to the Supreme Court of Florida. However, *Bowman* involved a question of whether a particular duty fell to the Attorney General or to the various state attorneys throughout Florida. Thus, there was a "class" of

more officers or entities who separately and independently exercise identical powers of government that are peculiarly affected by the district court's decision.⁴⁴² Jurisdiction would exist, for example, where a decision affects every board of county commissioners in the state in some way peculiar to them as a class.

The Court has rejected the view that the "class" requirement applies only to constitutional officers, not to state officers.⁴⁴³ Indeed, the Court has never clearly distinguished the two types of officers. It is clear from the language of the cases that the Court considers a "constitutional officer" to include any office of public trust actually created by the constitution itself.⁴⁴⁴ But it is apparently insufficient that the officer or entity is merely named in the constitution in an indirect or general way.⁴⁴⁵

The term "state officer" remains somewhat vague. It apparently does not include purely local entities not created by the constitution itself,⁴⁴⁶ but beyond that, the Court has said little. There has been no definitive statement that all local officials and entities are excluded if they fail to qualify as constitutional officers. A good argument can be made that a "class of state officers" should include offices of trust created by statute and authorized to independently exercise identical powers of government as part of some larg-

constitutional officers whose duties were at stake. *Bowman* may be significant in that sense because the district court's opinion had determined that the duty in question fell to the Attorney General, not to the State Attorneys. Thus, *Bowman* tacitly recognizes jurisdiction where the district court's decision holds that the "class" of officers has no duty to act in a particular situation. *Bowman* is also significant in that it tacitly recognizes jurisdiction even where the petition for review is not brought by a member of the affected class—a conclusion supported by other cases. See *Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1130.

442. *Lewis*, 149 So. 2d at 43.

443. See *Larson v. Harrison*, 142 So. 2d 727, 728 (Fla. 1962) (Drew, J., concurring specially).

444. E.g., *Skitka v. State*, 579 So. 2d 102 (Fla. 1991) (stating that public defenders, created by Article V, Section 18 of the Florida Constitution are constitutional officers); *Ramer v. State*, 530 So. 2d 915 (Fla. 1988) (stating that sheriffs, created by Article VIII, Section 8(1)(d) of the Florida Constitution are constitutional officers); *Bystrom v. Whitman*, 488 So. 2d 520 (Fla. 1986) (stating that property appraisers, created by the Article VIII, Section 1(d) of the Florida Constitution are constitutional officers); *Jenny v. State*, 447 So. 2d 1351 (Fla. 1984) (stating that state attorneys, created by the Article V, Section 17 of the Florida Constitution are constitutional officers); *Taylor v. Tampa Elec. Co.*, 356 So. 2d 260 (Fla. 1978) (stating that clerks of the circuit court, created by the Article VIII, Section 1(d) of the Florida Constitution are constitutional officers).

445. For example, the Florida Constitution mentions "municipal legislative bodies." FLA. CONST. art. VIII, § (2)(b). Yet, the case law indicates that a city official is not a constitutional or state officer. *Estes v. City of N. Miami Beach*, 227 So. 2d 33, 34 (Fla. 1969).

446. *Estes*, 227 So. 2d at 34; *Hakam v. City of Miami Beach*, 108 So. 2d 608 (Fla. 1959) (holding that a police officer is not a constitutional or state officer).

er statewide scheme.⁴⁴⁷ Examples might include the governing boards of Florida's water management districts.⁴⁴⁸ However, this is an issue that remains undecided.

Finally, dicta theoretically might constitute a basis for exercising this type of jurisdiction. But in practice, the prerequisites for review here are so rigorous that dicta rarely would appear to qualify. Dicta by definition are not binding,⁴⁴⁹ and a petitioner presumably would need to show some real likelihood that the dicta could be enforced against the "affected" class. A detailed and scholarly court opinion, for example, sometimes might pose such a threat. Otherwise, there would be no actual legal effect on a class of constitutional or state officers, and thus no discretion to hear the case.

D. *Express and Direct Conflict*

By far the largest and most disputatious subcategory is jurisdiction premised on express and direct conflict,⁴⁵⁰ usually called simple "conflict jurisdiction."⁴⁵¹ Jurisdiction of this type exists where the decision of the district court expressly and directly conflicts with a decision⁴⁵² of another district court of appeal or of the Supreme Court of Florida on the same question of law.⁴⁵³ This relatively straightforward statement has taken on great complexity in practice. Conflict jurisdiction also is the subcategory most affect-

447. The Florida Constitution juxtaposes "constitutional officers" with "state officers." If a constitutional office is one created by the constitution, then it is reasonable to say that a state office is one created by statute. The "class" requirement obviously suggests that the office must exist in more than one location throughout the state. Unique local offices would not qualify. Finally, the rationale for exercising jurisdiction over a constitutional class of officers applies with equal force to a statutory class of officers; a district court opinion affecting either class could result in serious disruption of governmental services, requiring resolution by the state's highest court. On the whole, both the language of the constitution and public policy considerations support jurisdiction over a statutory class of officers that meet the other criteria.

448. See FLA. STAT. §§ 373.069-373.073 (1991) (creating districts and governing boards).

449. See *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (stating that language in a previous case was simply obiter dicta and should not be relied upon as case authority).

450. FLA. CONST. art. V, § 3(b)(3).

451. The term "conflict jurisdiction" is almost never used by the Court to refer to "certified conflict," which is a separate subcategory. See discussion *infra* Part VI.F.

452. In a case that preceded the 1980 amendments to Article V, the term "decision" was held to include both the judgment and opinion for purposes of the Supreme Court of Florida's jurisdiction over "decisions." *Seaboard Air Line R.R.*, 104 So. 2d at 358.

453. FLA. CONST. art. V, § 3(b)(3).

ed by the somewhat arcane, but critical, distinction between “jurisdiction” and “discretion.”⁴⁵⁴

Historically, the 1980 jurisdictional reforms had one of the greatest effects on this type of jurisdiction. Prior to the amendments, a much broader form of conflict jurisdiction existed in practice. It had come into existence in 1965 when a divided Supreme Court of Florida held that conflict jurisdiction could exist over decisions affirming the trial court without opinion, in which the entire opinion usually said nothing but “per curiam” and was affirmed.⁴⁵⁵ These opinions often are identified by the acronym “PCA.”⁴⁵⁶ Obviously, the determination of “conflict” in such cases only could be made by looking at the record, and not from a review of the opinion under review. By definition, a PCA establishes no precedent beyond the specific case, and Supreme Court of Florida review thus was believed by many to be of questionable utility. Through the years, the ability to review PCAs grew increasingly onerous and was sternly criticized, even by members of the Court.⁴⁵⁷ The criticisms, along with the Court’s overburdened docket, led directly to the 1980 constitutional reforms and the end of review for PCAs.⁴⁵⁸

1. The Elements of Obtaining Conflict Review

As a result of the 1980 reforms and the cases construing them, the Court potentially has conflict jurisdiction only over a district court decision containing at least a statement by a majority⁴⁵⁹ or a majority citation to authority.⁴⁶⁰ Petitions seeking jurisdiction are brought to the Justices and at least four of them, a majority of the Court, is required to accept or deny jurisdiction.

The Court’s determination of jurisdiction is constrained by the “four-corners” rule; conflict must “appear within the four corners of the majority

454. See discussion *supra* Part III.A.

455. See *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958), *overruled by* *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221 (Fla. 1965).

456. PCAs should be distinguished from “per curiam” opinions issued by the Supreme Court of Florida, which are very different in nature. See discussion *supra* Part II.D.

457. *E.g.*, *Florida Greyhound Owners & Breeders Ass’n v. West Flagler Assocs.*, 347 So. 2d 408, 410–12 (Fla. 1977) (England, J., concurring).

458. See *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

459. The court has held that discussion of the “legal principles which the court applied supplies a sufficient basis for a petition for conflict review.” *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). There is no requirement that the district court opinion must explicitly identify conflicting decisions. *Id.*

460. See *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

decision” brought for review.⁴⁶¹ There can be no examination of the record, no second-guessing of the facts stated in the majority decision, and no use of extrinsic materials to clarify what the majority decision means. Dissenting or concurring opinions in the district court cannot supplement what is left unstated in the majority opinion. Moreover, the Court has strictly applied the four-corners rule even after a 2002 amendment to the *Florida Rules of Appellate Procedure*⁴⁶² that authorized attorneys, as part of their motions for rehearing in the district courts, to request that the lower court withdraw a PCA and replace it with an opinion that potentially would be reviewable by the Supreme Court of Florida.⁴⁶³ The Court held that the four-corners rule still must be applied despite the changed *Florida Rules of Court*. In the vast majority of cases, the Court strictly honors the four-corners rule, though there may be rare cases difficult to square with it.

Within the constraints of the four-corners rule, review will be allowed only if the following questions are all answered in the affirmative: 1) does jurisdiction actually exist?; 2) does discretion exist?; and, 3) is the case significant enough to be heard? The three elements are easy to see in some types of cases, but are harder to see in others.

a. *Does Jurisdiction Exist?*

The most obvious effect of the 1980 reforms was to eliminate completely the Court’s jurisdiction over PCAs—those decisions issued without statement or citation. If a PCA includes no statement by a majority and no majority citation to authority, then the Court completely lacks jurisdiction to review the case.⁴⁶⁴ This is a fact of great importance for attorneys who wish to seek further appellate review of PCA decisions, because it means that the only possible appeal is to the United States Supreme Court.⁴⁶⁵ Statements in a separate opinion, whether dissenting or concurring, are not sufficient if there is no majority statement or citation.⁴⁶⁶

It deserves to be stressed that the Court has held that jurisdiction is completely absent in these cases; it is not that the Court simply will not exer-

461. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Here, the court clearly is using the term “decision” to encompass both the result and the entire opinion; *accord Seaboard Air Line R.R.*, 104 So. 2d at 358.

462. Amendment to Rules of Fla. Appellate Procedure, 827 So. 2d 888 (Fla. 2002).

463. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 988–89 (Fla. 2004).

464. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

465. *See Fla. Star v. B.J.F.* 530 So. 2d 286 (Fla. 1988).

466. *Id.*

cise discretion to hear the cause.⁴⁶⁷ As a consequence, the Clerk of the Court has been authorized by the Court to issue a form summary denial in most cases brought for review to the Court based on a PCA that lacks a majority statement or citation to authority. The Justices and their staffs do not review these petitions, and filing them thus is a complete waste of time, resources, and money, especially client money.

The case law has established only one other category of district court opinions over which the Court may lack conflict jurisdiction as a matter of law.⁴⁶⁸ These are PCAs that contain nothing but a citation to authority (called “citation PCAs”). In 1988, the Court distilled much of its earlier law on this question into a single formula. In *Florida Star v. B.J.F.*,⁴⁶⁹ the Court said that there is no jurisdiction over a citation PCA unless “one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court.”⁴⁷⁰ As noted earlier, the failure of the district court opinion to meet any of these requirements forecloses the possibility of jurisdiction in the Court, and attempts to assert jurisdiction in such cases can have significant consequences when further appeal may be sought in the United States Supreme Court.⁴⁷¹

As is apparent from the language quoted here, the citation to authority must be to a case⁴⁷² issued by a Florida district court of appeal or by the Supreme Court of Florida.⁴⁷³ A citation to a statute, administrative or other rule, federal case, or case from another jurisdiction is insufficient to establish discretion for review. There is no jurisdiction, for example, where the alleged conflict is between the decision below and a *Florida Rule of Court*.⁴⁷⁴

On the other hand, jurisdiction exists if there is any notation in a citation PCA (or any other type of opinion, for that matter) of contrary case law issued by another district court of appeal or the Supreme Court of Florida.⁴⁷⁵

467. *Id.* at n.3. In other words, any further appeal from a PCA issued without a majority statement or citation can be had only in the United States Supreme Court, in its discretion. Attempting to bring the case for review in the Supreme Court of Florida may have the effect of barring an appeal to the United States Supreme Court, because the time to file the appeal most likely will be consumed. *Id.*

468. Theoretically there could be another: PCAs that contain only a statement insufficient to establish a point of law, without citation.

469. 530 So. 2d at 286.

470. *Id.* at 288 n.3 (citing *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)).

471. See discussion *supra* Part III.A.3.

472. *Florida Star*, 530 So. 2d at 288 n.3 (citing *Jollie*, 405 So. 2d at 420).

473. FLA. CONST. art. V, § 3(b)(3).

474. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995).

475. See *Stevens v. Jefferson*, 436 So. 2d 33, 34 (Fla. 1983), *aff'g* 408 So. 2d 634 (Fla. 5th Dist. Ct. App. 1981). A district court may seem foolish recognizing contrary authority from

This may be as simple as a citation beginning with the signals “contra” or “but see,”⁴⁷⁶ because they indicate contradiction. A citation beginning with “but cf.” may be insufficient⁴⁷⁷ because the signal indicates contradiction only by analogy,⁴⁷⁸ which may not meet the constitutional requirement of “direct” conflict.⁴⁷⁹

Further, citation to a case from the same district court of appeal can establish jurisdiction only if that case is pending for review in or has been reversed by the Supreme Court of Florida.⁴⁸⁰ Thus, a conflicting opinion or a “contra” or “but see” citation to an opinion of the same district court would not in itself establish conflict. This rests on a simple rationale. The fact that a district court decides to expressly or silently depart from its own case law does not establish conflict, because there is no such thing as “intradistrict conflict” as a basis for supreme court jurisdiction. The latest inconsistent opinion is deemed to overrule the earlier.⁴⁸¹

Often, a citation PCA may include a parenthetical statement that conflict exists. The statement can establish jurisdiction only if it is accurate⁴⁸² and identifies a specific decision of another district court or the Supreme Court of Florida as the basis for conflict. But when this happens, it is possible that jurisdiction may exist on a completely independent basis—the Court’s separate “certified conflict” jurisdiction, discussed below.⁴⁸³ The possibility always should be considered, because “certified conflict” jurisdiction may be easier to obtain, though not always.⁴⁸⁴

the Supreme Court of Florida, but this sometimes happens with good reason. In *Watson Realty Corp. v. Quinn*, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983), the First District Court of Appeal noted that it was departing from dicta issued by the Supreme Court of Florida in *Canal Auth. v. Ocala Mfg., Ice, & Packing Co.*, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983) (citing *Canal Auth. v. Ocala Mfg., Ice & Packing Co.*, 332 So. 2d 321, 327 (Fla. 1976)). The district court believed the dicta to be incorrect, and the Supreme Court of Florida later agreed. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568 (Fla. 1984).

476. See *Frederick v. State*, 472 So. 2d 463, 464 (Fla. 1985), *aff’g* 472 So. 2d 463 (1985).

477. Such citations are rare. See, e.g., *Cherry v. State*, 618 So. 2d 255 (Fla. 1st Dist. Ct. App. 1993); *Phelps v. State*, 368 So. 2d 950 (Fla. 2d Dist. Ct. App. 1979). No further review was taken in either of these cases.

478. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R. 1.2(c), at 23 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000).

479. FLA. CONST. art. V, § 3(b)(3).

480. *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

481. *State v. Walker*, 593 So. 2d 1049, 1050 (Fla. 1992).

482. The accuracy requirement arises from the plain language of the constitution that there must be express and direct conflict appearing on the face of the decision below. FLA. CONST. art. V, § 3(b)(3). The fact that the parties assert conflict in their jurisdictional briefs will not supply this requirement, even if both parties erroneously conclude that conflict exists.

483. See discussion *infra* Part VI.F.

484. See *id.*

b. *Does Discretion Exist?*

Except for PCAs that fail to meet the criteria outlined above, the Supreme Court of Florida technically has potential jurisdiction to review all other district court opinions. However, the Court may still lack discretion to hear the particular case.⁴⁸⁵ As noted earlier, the distinction between “jurisdiction” and “discretion” is somewhat arcane and in many instances really is relevant only in determining the time to bring appeals to the United States Supreme Court. So, in common usage, lawyers and Justices often tend to speak of both under the rubric “jurisdiction,” although this technically is incorrect.

Nevertheless, in 1988, the Court indicated that, apart from the special rules governing PCAs, the problem of “conflict” involves a constitutional limit on the Court’s discretion to hear a case rather than a limit on jurisdiction.⁴⁸⁶ If there is no conflict, then there is no discretion, and the petition for review must be denied or dismissed on that basis.⁴⁸⁷ Thus, the existence of conflict is an absolute prerequisite for a review.⁴⁸⁸ In addition, conflict cannot be “derivative.” It is insufficient that a decision cites as controlling authority a completely separate decision that supposedly is in conflict with a third decision,⁴⁸⁹ unless some other basis for jurisdiction exists. In other words, there is no such thing as “daisy-chain” conflict.

The jurisdiction/discretion distinction has prompted “creative” efforts to expand conflict jurisdiction, which the Court consistently has declined. After *Florida Star* established the distinction, some parties seized upon language in that opinion to argue that conflict jurisdiction can be merely “hypothetical.” This was a misreading of the opinion of *Florida Star* and a misapprehension of the difference between “jurisdiction” and “discretion.”

In *Florida Star*, the Court said that jurisdiction exists if a district court decision contains any statement or citation that “hypothetically could create conflict if there were another opinion reaching a contrary result.”⁴⁹⁰ However, discretion is still limited by the conflict or “opinion reaching a contrary result” requirement.⁴⁹¹ In other words, a petitioner still must establish that discretion to hear the case genuinely exists. Any petition arguing “hypothet-

485. *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288–89 (Fla. 1988).

486. *Id.* at 288

487. *Id.*

488. *Id.*

489. *Dodi Publ’g Co. v. Editorial Am., S.A.*, 385 So. 2d 1369, 1369 (Fla. 1980).

490. *Fla. Star*, 530 So. 2d at 288.

491. *See id.*

ical conflict” alone without establishing actual conflict would fail to establish the Court’s discretion to take the case.

In a larger sense, the overriding purpose of conflict review remains the elimination of inconsistent views within Florida about the same question of law.⁴⁹² But this does not necessarily mean the Court can review a case only when necessary to resolve a conflict of holdings. Many conflict cases accepted by the Court fall within this last grouping, but not all do. Part of the reason is that a genuine “conflict” also can be manifested in more than just a holding. The result is that several types of conflict have been recognized. In actual practice, the Court tends to accept cases that fall into four broad and sometimes overlapping categories: (i) “holding” conflict, (ii) misapplication conflict, (iii) apparent conflict, and (iv) “piggyback” conflict.

(i) “Holding” Conflict

The most obvious conflict cases involve “holding conflict.” The majority opinion below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court or of the Supreme Court of Florida. In other words, there is an actual conflict of controlling, binding precedent. Where this is true, conflict jurisdiction unquestionably exists.

For example, a district court in 1992 issued an opinion expressly applying the doctrine of interspousal immunity in a particular case.⁴⁹³ While review was pending, the Supreme Court of Florida issued an opinion in another case holding that the doctrine of interspousal immunity no longer existed in Florida.⁴⁹⁴ Hence, these two opinions were in actual and irreconcilable conflict with one another, because the holding of one could not stand if the other was correct.

Conflict is not always so plain as this example, however. In many instances, the cases in question may be factually distinguishable to a greater or lesser extent and these distinctions may be critical to a conflict analysis. As a result, the “holding conflict” category probably should not be considered entirely discrete from other categories. “Holding conflict” sometimes may blur into the next two kinds of conflict, which themselves are not entirely distinct.

(ii) Misapplication Conflict

492. *E.g.*, *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985); *see* FLA. CONST. art. V, § 3(b)(3).

493. *McAdam v. Thom*, 610 So. 2d 510, 512 (Fla. 3d Dist. Ct. App. 1992), *quashed by Thom v. McAdam*, 626 So. 2d 184 (Fla. 1993).

494. *Waite v. Waite*, 618 So. 2d 1360, 1361 (Fla. 1993).

A separate kind of conflict occurs when the decision of the district court misapplies controlling precedent.⁴⁹⁵ “Misapplication conflict” thus is not precisely the same as “holding conflict,” because the cases involved are distinguishable. The conflict arises because the district court has failed to distinguish the cases properly. In other words, no conflict would have existed had controlling precedent been properly construed. Though sometimes controversial even among members of the Court,⁴⁹⁶ it has been used time and again. Misapplication conflict usually comes in three varieties: “erroneous reading” of precedent, “erroneous extension” of precedent, and “erroneous use” of facts.

“Erroneous reading” cases are perhaps the most clearly justifiable of the three because they involve the purely legal problem of whether the controlling law was properly stated. Thus, they verge on being “holding conflict” cases. For example, in 1982, the Court confronted a case in which the district court first had misinterpreted controlling precedent on awards of punitive damages and then had applied the misinterpretation to the case.⁴⁹⁷ The Court accepted jurisdiction expressly because of misapplication conflict.⁴⁹⁸ This was not precisely a “holding conflict” case, however. Two dissenting Justices argued that the district court actually read the precedent correctly.⁴⁹⁹ In other words, misapplication was not necessarily clear until the Court’s majority decided the matter and construed the precedent.

“Erroneous extension” cases are those in which the district court may correctly state a rule of law, but then proceeds to apply the rule to circumstances for which it was not intended. In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two. This type of conflict is easily masked as some other type of conflict, and for that reason is seldom expressly identified in opinions. The existence of the “erroneous extension” is sometimes noted in opinions dissenting to a denial of jurisdiction.⁵⁰⁰ Prior to 1980, the Court expressly recognized “erroneous extension” as a valid basis of conflict jurisdiction.⁵⁰¹

495. *E.g.*, *Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986).

496. *Knowles v. State*, 848 So. 2d 1055, 1059 (Fla. 2003) (Wells, J., dissenting) (expressing considerable doubt over whether misapplication conflict has a valid constitutional basis).

497. *Id.*

498. *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1040 (Fla. 1982).

499. *Id.* at 1043 (Sundberg, C.J., dissenting, joined by Adkins, J.).

500. *E.g.*, *Salser v. State*, 613 So. 2d 471, 473 (Fla. 1993) (Kogan, J., dissenting).

501. *Sacks v. Sacks*, 267 So. 2d 73, 75 (Fla. 1972).

“Erroneous use” cases are those in which the district court misapplies a rule of law based on its own misperception of the facts.⁵⁰² This is the most troublesome form of misapplication conflict, because it often tests the strength of the four-corners rule. Sometimes the factual error may be evident on the face of the opinion, but often it is not. For example, in 1985, the Court accepted jurisdiction in a case where the district court had “overlooked” a relevant factual finding of the trial court.⁵⁰³ Although controlling law was stated properly, the district court’s opinion improperly applied the law because it failed to consider the overlooked finding.⁵⁰⁴

The discretion to review such cases really may be justifiable where the factual error is apparent within the four corners of the opinion being reviewed.⁵⁰⁵ In *State v. Stacey*,⁵⁰⁶ for example, the district court opinion did in fact “overlook” the relevant finding.⁵⁰⁷ However, at best, the possibility of the error could be inferred from the district court opinion, but the facts stated therein were not complete enough to make the error apparent. “Inferential” factual error is a very slim reed to support a finding of express and direct conflict,⁵⁰⁸ and the justification for review becomes questionable if the existence of the error cannot be inferred from material contained within the four corners of the district court opinion. Thus, the Court may have overlooked the four-corners rule in accepting jurisdiction, and the case is probably best understood as marginal for purposes of precedent.

From the case law it appears that all instances of misapplication conflict expressly noted in the jurisdictional statement of opinions have involved the misapplication of Supreme Court decisions, not those of the district courts.⁵⁰⁹ The unanswered question is whether misapplication conflict of district court decisions even exists. It may be that such cases are simply being analyzed as something other than misapplication cases, at least where the district court does not directly announce that it is applying the law set forth in an opinion of a separate district court. In any event, the reasons for permitting misapplication conflict are little different if there is an obvious conflict caused by a

502. *E.g.*, *Acensio*, 497 So. 2d at 641.

503. *State v. Stacey*, 482 So. 2d 1350, 1351 (Fla. 1985).

504. *Id.*

505. The court elsewhere has said that in determining conflict there can be no consideration of facts outside the four corners of the opinion. *E.g.*, *Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988).

506. 482 So. 2d 1350 (Fla. 1985).

507. *Id.* at 1351.

508. *See Dep’t of Health & Rehab. Servs. v. Nat’l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (holding conflict cannot be inferred or implied).

509. *E.g.*, *Knowles v. State*, 848 So. 2d 1055, 1058 (Fla. 2003); *Robertson v. State*, 829 So. 2d 901, 904 (Fla. 2002).

misapplication of controlling law. That would be most clear where the district court opinion being misapplied itself merely restated law already established in Supreme Court opinions.⁵¹⁰

Where the “misapplied” district court opinion establishes a new point of law, however, the rationale becomes strained. This is because the Supreme Court first must construe the new point of law in order to find that it has been “misapplied”, which raises the possibility that the Supreme Court’s construction may extend beyond what the district court intended. In other words, a question would exist as to exactly which court has committed the misapplication. On the whole, this argues against the Supreme Court extending conflict jurisdiction to this narrow category of cases, especially where the decision brought for review expressly declares that it is applying a new point of law established by another district court. At least in that instance, the two holdings are the same and uniformity is maintained. In such an instance, it is difficult to say conflict is evident within the four corners of the opinion brought for review if that opinion says precisely the contrary, unless some other basis for jurisdiction exists.

Finally, a case may involve an alleged misapplication of dicta. In 1984, the Court accepted a case based on conflict with dicta in a prior Supreme Court of Florida opinion, although the Court overruled the dicta rather than the district court’s decision.⁵¹¹ If “dicta conflict” existed in that context, it probably also could exist as a form of misapplication conflict. “Dicta conflict” may be justified in light of the fact that the Court previously suggested that its jurisdiction over “decisions” can rest on anything in a written opinion, not merely a judgment or result.⁵¹² For example, a scholarly opinion may make broad statements of law that are actually dicta, yet these statements express an opinion about some legal point. Later a district court could conceivably find the dicta persuasive but then misapply it. In such a situation, all the reasons justifying review of misapplication conflict also apply, and review would be warranted to the extent the misapplication may create confusion in the law or reach an incorrect or unfair result.

(iii) Apparent Conflict

510. The four-corners rule applies to the decision brought for review. There is no similar restriction affecting the separate opinions with which it is in conflict, though attorneys would be wise in their jurisdictional briefs to rely on conflict with Supreme Court cases when arguing misapplication conflict jurisdiction.

511. *Watson Realty Corp. v. Quinn*, 435 So. 2d 950, 950 (Fla. 1st Dist. Ct. App. 1983).

512. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

Another category is “apparent conflict,” arising when a district court opinion only seems to be in conflict, even though there actually may be some reasonable way to reconcile it with the case law. A cramped or overly strict reading of the constitution might suggest that discretion should not be allowed here.⁵¹³ However, such an approach would ignore a very real problem. Until the Supreme Court of Florida harmonizes cases that seem to be in conflict, for all intents and purposes, there is an actual conflict.

Moreover, it would not appear to be sound policy to deprive the Court of discretion merely because there is some way to harmonize cases without overruling any of them. This amounts to saying that the Court, in conflict cases, can review only if it negates, which will not always be desirable policy. The authority to review and harmonize decisions when appropriate would appear to be a legitimate and effective means for the Court to address the issue of uniformity of the law. The Supreme Court of Florida should not be forced either to decline jurisdiction or overrule essentially sound decisional law whose relation to other cases is simply uncertain.

In any event, review of “apparent conflict” cases is now a well established feature of the Court’s jurisdiction, and it may or may not result in the overruling of precedent from a Florida appellate court. In fact, this review can include “receding” from the Court’s own cases.⁵¹⁴ In 1991, for example, the Court accepted jurisdiction to resolve an “apparent conflict” with overbroad statements of law that it had made in one of its own opinions two years earlier.⁵¹⁵ The Court ultimately receded from those statements, but without actually reversing the result it previously had reached; and the Court approved the district court’s decision, harmonizing the cases and eliminating the apparent conflict.⁵¹⁶

“Apparent conflict” sometimes may arise from a prior district court opinion simply lacking in precision. In 1988, for example, the Court accepted a case for review based on “apparent conflict” with an earlier district court opinion that had not set out sufficient facts in order to determine whether the ruling was correct.⁵¹⁷ In that sense, the earlier case could be considered overbroad, but was not necessarily so, depending on the facts. The Supreme Court of Florida resolved the “apparent conflict” by disapproving the earlier case “only to the extent that it may be inconsistent with [a correct and com-

513. See FLA. CONST. art. V, § 3(b)(3).

514. “Recede” is the term of art used when the Court overrules its own decisions in whole or in part.

515. Pub. Health Trust of Dade County v. Menendez, 584 So. 2d 567, 568 (Fla. 1991).

516. *Id.* at 569–70.

517. D’Oleo-Valdez v. State, 531 So. 2d 1347, 1348 (Fla. 1988).

plete statement of the relevant law].”⁵¹⁸ In a similar case, the Court said that conflict may exist if a rule of law is stated so vaguely or imprecisely as to create a “fair implication” of conflict.⁵¹⁹

(iv) “Piggyback” Conflict

The final category of conflict is “piggyback” conflict. Discretion over these cases arises because they cite as controlling precedent a decision of a district court that is pending for review in, or has been subsequently overruled by, the Florida Supreme Court; or they cite as controlling precedent a decision of the Florida Supreme Court from which the Court has subsequently receded.⁵²⁰ A considerable number of cases falling within this category, but not all, are citation PCAs. The district courts sometimes issue lengthy opinions resting on precedent that is currently pending review in the Florida Supreme Court or precedent that is later overruled.

There are good reasons for allowing this type of discretion. For example, the lower appellate courts often have a large number of cases before them dealing with the same legal issue. To save both time and resources, one case may be selected as the “lead case” to be decided with a full opinion, while the others are resolved in short opinions that often do little more than cite to the decision in the lead case. Logic and fairness would dictate that the Court has discretion to review the lead case along with its “companion” cases. For this reason, the Court accepts the bulk of “piggyback” cases for review, though these may be handled as no request cases or disposed of by order.⁵²¹

It is worth noting, however, that “piggyback” conflict by definition would not exist for the “lead” case in this example. “Piggyback” conflict exists only if a decision cited as controlling precedent already has gotten into the courthouse door on some other jurisdictional basis, or the decision has been disapproved or receded from.

There may be another problem: “piggyback” conflict sometimes may be only an inchoate, unrealized possibility at the time when review must be

518. *Id.*

519. *Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988). These examples also demonstrate applications of the four corners rule: the Court should confine its determination to the four corners of the conflicting district court opinions, making no attempt to review the record in the earlier district court. The decision whether discretion exists must be made based on the facts as stated in the four corners of the “conflicting” opinions, though these may be numerous. *Id.*

520. *The Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988) (citing *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)).

521. See discussion *supra* Part II.B.2.

sought. For example, the Florida Supreme Court may be uncertain for a time whether it will accept a lead case for review. Perhaps the Justices are uncertain as to whether they have discretion to hear it. During the interim, jurisdiction remains inchoate and only a possibility.

In such instances, the Court typically follows a practice of postponing its decision on jurisdiction while sometimes permitting parties to brief the substantive issues in the interim.⁵²² However, once the lead case is accepted for review, the companion cases may be accepted, except on some occasions when “piggyback” cases actually reached the correct result. Of course, a denial of jurisdiction in the lead case may eliminate the possibility of “piggyback” jurisdiction, meaning that review will be declined in the companion cases unless some other basis for jurisdiction exists.

c. *“Is the Case Significant Enough?”*

The final element in obtaining review of a conflict case is a showing that the issues are significant enough for the Court to exercise its discretion. Often the importance or lack of significance of the decision is obvious to everyone. At other times, a decision may seem trivial at first blush, yet in fact involves a potential for serious disruption. For that reason, persons trying to invoke the Court’s conflict jurisdiction are well advised to also explain why the case is important enough to be heard. It is always important to realize that conflict jurisdiction is discretionary. Even if discretion exists, the Court is free to deny the petition if the issues seem unimportant or the result is essentially fair or correct,⁵²³ among other reasons.

It is worth noting that the act of accepting review based on conflict vests the Court with power to hear every issue in the case, not merely the conflict issues.⁵²⁴ As a result, these “nonconflict” issues sometimes may weigh with the Court in deciding whether to accept review. However, the fact that these issues may seem important will not cure a lack of conflict or act as a substitute for it. Finally, the Court has absolute discretion not to address nonconflict issues.⁵²⁵ By doing so, the Court does not establish precedent regarding these issues.

522. FLA. R. APP. P. 9.120(e).

523. See *Wainwright v. Taylor*, 476 So. 2d 669, 670–71 (Fla. 1985) (petition dismissed in the interests of judicial economy where outcome would not be different and where erroneous statement of law had been corrected by other means).

524. *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 531 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).

525. See, e.g., *Thom v. McAdam*, 626 So. 2d 184 (Fla. 1993).

2. Briefing on Conflict Jurisdiction

For parties to invoke the Court's conflict jurisdiction, they must file jurisdictional briefs with the Court. The *Rules of Court* limit these briefs to ten pages.⁵²⁶ The most persuasive briefs on conflict jurisdiction are short and make their points with direct, plain language. If conflict truly exists, all the brief need do, in most instances, is quote the law from the district court opinion and the law from the allegedly conflicting opinion, and then explain the importance of the case. For "piggyback" jurisdiction, it is sufficient and imperative to expressly note the fact that a case cited in the district court opinion is pending review or has been disapproved or receded from.

In many cases, the actual point of the jurisdictional brief usually can be established in far less than the ten pages allotted.⁵²⁷ Of course, where the existence of conflict is not as clear, a brief must engage in a lengthier and more complex analysis to demonstrate the conflict. Nowhere is brevity and precision more valued than in a jurisdictional brief.

Appendices may consist only of a copy of the decision below and a copy of the alleged conflict cases. Anything else is irrelevant and will be stricken by the Clerk's Office. Under the four corners rule, the record cannot be used to establish conflict, and attorneys who ignore this fact do themselves and their clients a disservice. The Court sometimes receives voluminous appendices that obviously required much work and expense to compile, reproduce, and bind. However, such material has no purpose other than adding to the Court's drive to collect recyclable paper.⁵²⁸

Except for PCAs in which jurisdiction is clearly lacking, nearly all jurisdictional briefs are handled and decided by the Justices. Justices have their staffs prepare brief memoranda summarizing relevant facts and holdings and analyzing the jurisdictional issues. New law clerks and interns frequently are assigned to work on jurisdictional memoranda as their first learning experience at the Court, on the theory that jurisdiction is the first thing a new law clerk or intern must learn.

When the Justices' staffs prepare memoranda on DOJ's, these necessarily must focus on the three questions relevant to conflict cases: 1) Does jurisdiction exist?; 2) Does the Court have discretion to hear the case?; and 3) Why should the discretion be exercised? As noted earlier, a case can be accepted for review only upon the affirmative vote of at least four Justices,

526. FLA. R. APP. P. 9.210(a)(5). This rule is strictly enforced, and the Court currently grants no request for an extension of the page limit.

527. Sometimes multiple conflicts exist.

528. The Court has instituted a very successful paper recycling program in recent years.

though the decision whether to grant oral argument sometimes can be determined by fewer votes or by the Chief Justice.

3. Opinion-Writing in Conflict Cases

Conflict cases are randomly assigned and treated the same as other cases for purposes of opinion writing. There is an important point, however, that must be consistently addressed in any opinion in conflict cases. A conflict opinion should do one of three things before it concludes: disapprove a district court decision in whole or in part, recede from a Florida Supreme Court decision in whole or in part, or harmonize cases. This practice arises from the very nature of conflict jurisdiction, which exists only when two or more relevant cases are directly or apparently irreconcilable. Thus, for jurisdiction to exist, something must be wrong that the Court determines needs “fixing.” Fixing always requires that at least one previous statement of law be overruled or harmonized.

E. *Certified Questions of Great Public Importance*

The next subcategory of discretionary review jurisdiction exists when a decision of a district court passes upon a question certified by it to be of great public importance.⁵²⁹ Commentators have noted that the operative language essentially was unchanged by the 1980 reforms, although the pre-1980 constitution specified that the question be one of great public “interest.”⁵³⁰ This last change, however, may only have been semantic when the case law under the earlier scheme is examined. Even prior to 1980, certified questions routinely involved important issues in which the general public may actually have had little “interest,” generally speaking.⁵³¹ So, the requirement of “importance” appears to have existed even before 1980.

At one time, the Justices routinely accepted cases in this category, a historical fact reflected in the rule still in force dispensing with jurisdictional briefs.⁵³² That fact now has changed, though there were hints for many years that this might happen. Some time ago, a Justice had argued that certified questions should not be reviewed unless the case involves some minimum level of immediacy.⁵³³ That particular view was silently rejected when first

529. See FLA. CONST. art. V, § 3(b)(4).

530. See *Constitutional Jurisdiction*, *supra* note 222, at 191–92.

531. FLA. R. APP. P. 9.030 (1980 amendment committee notes).

532. FLA. R. APP. P. 9.120(d).

533. *Dep’t of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 736–37 (Fla. 1981) (England, J., dissenting as to jurisdiction).

made after the 1980 reforms,⁵³⁴ but the general concern underlying it never fully vanished and finally came to full flower in the late 1990's. Even before this change began, the Court had suggested that it would not use its discretion boundlessly. A number of earlier certified questions were treated summarily,⁵³⁵ and the Court showed no unwillingness to characterize a certified question as "irrelevant."⁵³⁶ Moreover, the Court has firmly established that it will not review a certified question that the district court actually failed to pass upon⁵³⁷ or that was based upon speculative facts.⁵³⁸ The rationale for these last restrictions ultimately is rooted in the sound principle that courts, with limited exceptions, do not give advisory opinions.⁵³⁹

One of the first outright dismissals of a previously accepted certified question of great public importance appeared in 1998, though in a summary form that called little attention to the potentially significant policy shift it represented.⁵⁴⁰ By the following year, the Court was directly expressing misgivings in some certified questions. In one case accepted for review, the Court noted that the certified question "appears to be more of a request for our approval of the conclusion reached by the court below," something the Court expressly discouraged.⁵⁴¹ In *State v. Sowell*⁵⁴² and *Dade County Property Appraiser v. Lisboa*,⁵⁴³ the Court finally dismissed certified questions in unvarnished terms.⁵⁴⁴ The Court in *Sowell* found that the question presented affected "an extremely narrow principle of law, and, as phrased, [did] not present an issue of 'great public importance.'"⁵⁴⁵ The vote to dismiss jurisdiction as improvidently granted was unanimous, with all Justices participating.⁵⁴⁶ Likewise, in *Lisboa*, the Court dismissed a certified question involving what it described as "a narrow issue with very unique facts."⁵⁴⁷

While in the past the Court would routinely accept jurisdiction even if it followed with a summary disposition,⁵⁴⁸ it now had established a principle

534. *Id.* at 735.

535. *E.g.*, *Varney v. State*, 659 So. 2d 234, 234 (Fla. 1995).

536. *Fawcett v. State*, 615 So. 2d 691, 692 (Fla. 1993).

537. *Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973, 974 (Fla. 2001); *Gee v. Seidman & Seidman*, 653 So. 2d 384, 384–85 (Fla. 1995).

538. *State v. Schebel*, 723 So. 2d 830, 830–31 (Fla. 1999).

539. *Id.*; see discussion *supra* Part IV.

540. *State v. Thompson*, 721 So. 2d 287, 287 (Fla. 1998).

541. *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483, 485 n.3 (Fla. 1999).

542. 734 So. 2d 421 (Fla. 1999).

543. 737 So. 2d 1078 (Fla. 1999).

544. *Sowell*, 734 So. 2d at 422; *Lisboa*, 737 So. 2d at 1078.

545. *Id.*

546. *Id.*

547. *Lisboa*, 737 So 2d at 1078. The vote in *Lisboa* was five to one. *Id.*

548. *E.g.*, *Fawcett v. State*, 615 So. 2d 691, 692 (Fla. 1993).

obvious in the constitutional grant of jurisdiction: it could decline to review such cases, in its discretion, if they do not meet some minimum threshold. This shift came apace with other opinions restricting review in some cases in which a district court certified conflict with another state appellate case⁵⁴⁹ and in cases involving “pass-through” jurisdiction.⁵⁵⁰ All appeared to be based on the same policy concerns and occurred during the same time in which both the Court’s caseload and the complexity of its cases were increasing.⁵⁵¹ These circumstances, combined with the obvious reluctance of the Court to use resources on relatively minor legal issues,⁵⁵² have combined to produce a new threshold for review.

The exact nature of this threshold will continue to be fleshed out in future cases. At present, however, the discernible rule is that the Court will not necessarily review questions certified to be of great public importance if they involve narrow issues or unique facts, or both, thus supporting a conclusion that the certified question is not actually of great public importance.⁵⁵³ Although much of the case law after 1999 contains no discussion of why the certified question is being dismissed,⁵⁵⁴ other cases focus on the existence of narrow issues and unique facts.⁵⁵⁵ In that regard, the exact phrasing of the question by the district court may be of crucial importance, a conclusion suggested by the language of *Sowell*.⁵⁵⁶ The Court indicated years earlier, for example, that jurisdiction is “particularly applicable” to cases of first impression,⁵⁵⁷ perhaps implying a greater presumption that review should be granted.

Other points deserve mention. The decision to certify falls within the “absolute discretion” of the district court,⁵⁵⁸ and thus cannot be required or

549. See discussion *infra* Part VI.F.

550. See discussion *infra* Part VI.G.

551. See THE OFFICE OF THE STATE COURT ADMINISTRATOR, WORKLOAD OF THE SUPREME COURT OF FLORIDA 54 (2000), http://www.floridasupremecourt.org/pub_info/workload/workloadcomplete.pdf (last visited Feb. 25, 2005) [hereinafter WORKLOAD].

552. This reluctance is reflected in other contemporaneous jurisdictional refinements. In *Harvard v. Singletary*, the Court announced it would cease considering routine writs petitions if they could instead be transferred to a lower court with concurrent jurisdiction over the matter. 733 So. 2d 1020, 1023 (Fla. 1999).

553. This is not to say that the cases dismissed are not important, merely that they do not rise to the level of great public importance.

554. *E.g.*, *Murphy v. Fla. Dep’t of Transp.*, 769 So. 2d 1040 (Fla. 2000).

555. *State v. Brooks*, 788 So. 2d 247 (Fla. 2001).

556. *Sowell* noted that the question “as phrased” did not meet the standard. *State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999).

557. *Duggan v. Tomlinson*, 174 So. 2d 393, 393 (Fla. 1965).

558. *Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970).

undone by the Supreme Court of Florida. It is not sufficient, of course, for a party to assert great public importance where the district court itself has not done so.⁵⁵⁹ Jurisdiction over cases in this subcategory is absolutely dependent on the act of certification by a district court, which operates as a condition precedent.⁵⁶⁰ Once the case is certified, the condition precedent has been fully met, and no review or redetermination of the point is necessary or proper,⁵⁶¹ other than the Court's decision whether to exercise its discretionary jurisdiction.

As a corollary, the failure to certify a question eliminates this potential basis for the Supreme Court of Florida's jurisdiction. Thus, once a district court opinion becomes final and is not subject to rehearing or to clarification, the time has passed for a question to be certified.⁵⁶² However, the Supreme Court of Florida has indicated that "any interested person" can ask for a certification by the district court at any time before the opinion becomes final.⁵⁶³

Under the pre-1980 constitution, a common practice for many years was for the district courts simply to certify the case without actually framing a question. Later, the Supreme Court of Florida urged the district courts to explicitly state the question being posed,⁵⁶⁴ and finally, in 1995 the Court virtually required a framed question.⁵⁶⁵ As a rationale, the Court noted that the failure to frame the question makes review more difficult, though technically not extinguishing the possibility of jurisdiction.⁵⁶⁶ Framing the question is important and clearly the prevailing practice.⁵⁶⁷ Interestingly, when questions actually are framed, the Court sometimes rephrases them in a manner that it believes better suits the purposes of review.⁵⁶⁸ This implies no disrespect to the court below, but merely reflects the Court's belief that re-framing sometimes is necessary for a proper resolution of the case.

In the past, when the question was left unframed, the Supreme Court of Florida also sometimes proceeded to discuss the issue without actually framing it.⁵⁶⁹ At other times, the Court framed the question at the start of an opin-

559. *See* Allstate Ins. Co. v. Langston, 655 So. 2d 91 (Fla. 1995).

560. *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832, 834 (Fla. 1959).

561. *Id.* at 834–35.

562. *Whitaker v. Jacksonville Expressway Auth.*, 131 So. 2d 22, 24 (Fla. 1961).

563. *Id.*

564. *Duggan*, 174 So. 2d at 394.

565. *Finkelstein v. Fla. Dep't of Transp.*, 656 So. 2d 921, 922–24 (Fla. 1995).

566. *Id.*

567. *See, e.g., Reed v. State*, 470 So. 2d 1382, 1383 (Fla. 1985) (quoting question as framed); *Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984) (quoting question as framed).

568. *E.g., Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993).

569. *See Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982).

ion, though occasionally it was not entirely clear what the question was.⁵⁷⁰ One case was accepted for review even though the district court had issued its opinion as a summary PCA and then certified the “question.”⁵⁷¹ This prompted a dissent from one justice who argued that the Court should decline to review PCAs, even if certified, because the unstated “question” simply was not clear.⁵⁷² The approach reflected in these earlier cases clearly is disfavored today.⁵⁷³

Sometimes a special problem arises in cases involving certified questions; the losing party fails to seek review of the Supreme Court of Florida. The Court has held that the party who prevailed on the issue embodied in a certified question cannot seek review solely on that basis. In other words, the Court will not review the case if the losing party on the certified question does not petition for review, unless some other basis of jurisdiction exists.⁵⁷⁴

When a certified question is properly brought by the parties, they sometimes ask the Supreme Court of Florida to relinquish jurisdiction to the district court for some reason.⁵⁷⁵ In one such case, upon relinquishment, the district court granted rehearing and issued a new opinion that failed to include a certified question.⁵⁷⁶ The Florida Supreme Court dismissed the case when it came back for review, apparently for want of jurisdiction.⁵⁷⁷ Similarly, the Court does not have jurisdiction if the en banc panel of the district court divided equally on the issue facing review, effectively meaning it reached no “decision” apart from certifying a question.⁵⁷⁸

F. *Certified Conflict*

Discretionary review jurisdiction also exists when the district court certifies that its decision is in direct conflict with a decision of another district court of appeal.⁵⁷⁹ This form of jurisdiction was created by the 1980 constitutional reforms and had no earlier analogue.⁵⁸⁰ Case law on certified conflict has done little to illuminate its scope, though—with some early excep-

570. See, e.g., *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983).

571. *Id.*

572. *Id.* at 332–33 (Alderman, C.J., dissenting).

573. *Finkelstein*, 656 So. 2d at 922.

574. See *Petrik v. N.H. Ins. Co.*, 400 So. 2d 8, 9–10 (Fla. 1981); *Taggart Corp. v. Benzing*, 434 So. 2d 964, 966 (Fla. 4th Dist. Ct. App. 1983).

575. See FLA. R. APP. P. 9.110, 9.600.

576. *State v. Smulowitz*, 486 So. 2d 587, 588 (Fla. 1986).

577. *Id.*

578. *Boler v. State*, 678 So. 2d 319, 320 n.2 (Fla. 1996).

579. FLA. CONST. art. V, § 3(b)(4).

580. See *Constitutional Jurisdiction*, *supra* note 222, at 193.

tions—the district court opinions accepted in this way almost uniformly meet two requirements: they use the word “certify” or some variation of the root word “certif.”⁵⁸¹ in connection with the word “conflict;” and they indicate a decision from another district court upon which the conflict is based. The Court sometimes has accepted jurisdiction even if some study of the district court opinion is needed to find the exact conflict case.⁵⁸²

On the other hand, all of the cases—with few exceptions⁵⁸³—in which the district court has merely “acknowledged” conflict are treated as petitions for “express and direct” conflict, and some are accepted for review on that basis. The distinction between “acknowledged conflict” and “express conflict” can have an important consequence, however, because express and direct conflict historically has been subject to more rigorous requirements. This history, however, has seen some significant changes in recent years.⁵⁸⁴

Certified conflict cases differ in two important ways from the “express and direct” conflict subcategory, discussed above.⁵⁸⁵ First, no briefing on jurisdiction is permitted.⁵⁸⁶ Historically the prohibition against jurisdiction briefs was based on the fact that certified conflict cases were accepted routinely. That has now changed. With no discussion, the Court in 1996 apparently dismissed its first certified conflict case on grounds that jurisdiction was granted improvidently.⁵⁸⁷ This has been followed with a handful of similar summary dismissals.⁵⁸⁸ Because this change in custom occurred simultaneously with a similar shift in the analysis of certified questions of great public importance,⁵⁸⁹ the Court may be motivated by a similar rationale. That is, it may be rejecting certified conflict cases because they involve narrow issues, unique facts, or both. However, the number of cases actually rejected in this manner appears to be small.⁵⁹⁰

581. One district court used the words “certificate of direct conflict.” *State v. Dodd*, 396 So. 2d 1205, 1208 n.7 (Fla. 3d Dist. Ct. App. 1981), *approved by* 419 So. 2d 333, 336 (Fla. 1982). In one case, the Court accepted “certified conflict” solely because a citation PCA contained a “contra” cite. *See Parker v. State*, 406 So. 2d 1089, 1090 (Fla. 1981), *rev’g* 386 So. 2d 1297, 1298 (Fla. 5th Dist. Ct. App. 1980).

582. *E.g.*, *Hannewacker v. City of Jacksonville Beach*, 402 So. 2d 1294, 1296 (Fla. 1st Dist. Ct. App. 1981), *approved as modified*, 419 So. 2d 308, 312 (Fla. 1982).

583. Some cases may slip through the initial review process.

584. *See* discussion *infra* Part VI.F.

585. *See* discussion *infra* Part VI.D.

586. FLA. R. APP. P. 9.120(d).

587. *Vega v. Indep. Fire Ins. Co.*, 666 So. 2d 897 (Fla. 1996).

588. *E.g.*, *Famiglietti v. State*, 838 So. 2d 528, 529 (Fla. 2003); *Blevins v. State*, 829 So. 2d 872 (Fla. 2002).

589. *See* discussion *supra* Part VI.E.

590. If the number grows larger, the Court may need to revisit its rule that jurisdictional briefing is not permitted in cases of certified conflict. FLA. R. APP. P. 9.120(d).

Second, the Court has found discretion to hear certified conflict cases even if it ultimately finds no conflict, something that cannot be done for express and direct conflict.⁵⁹¹ The policy for accepting such cases, of course, is that the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court, a view the Court has approved.⁵⁹² In one 1993 case, for example, the Supreme Court of Florida reviewed a certified conflict but then harmonized the cases.⁵⁹³ In sum, review may be easier to obtain for certified conflict than for “express and direct” conflict—apart from the handful of cases where the Court finds that jurisdiction was granted improvidently.

Finally, there is one important procedural fact that may deprive the Supreme Court of Florida’s jurisdiction even where conflict is properly certified. As with certified questions,⁵⁹⁴ the Court has held that the party who prevailed on the “certified conflict” issue cannot seek review based on this form of jurisdiction. In other words, the Court will decline to accept jurisdiction if the losing party does not petition for review, except where some independent basis for jurisdiction exists.⁵⁹⁵ This situation may arise when the party who prevailed on the conflict issue disagrees with some other aspect of the district court opinion.

G. “Pass-Through” Jurisdiction

The next subcategory of discretionary review jurisdiction commonly has been called “pass-through” jurisdiction.⁵⁹⁶ It essentially is a variation of a certified question for very important and pressing appeals.⁵⁹⁷ It must be stressed, however, that the matter certified by the district court must be an appeal, not some other category of case such as petitions for common law certiorari.⁵⁹⁸ Cases over which the district court has original jurisdiction thus cannot be certified.⁵⁹⁹ After certification, the principle feature is that the case “passes through” the district court without being heard and is sent directly to the Supreme Court of Florida for immediate resolution. This substantially

591. Actual conflict must exist in “express and direct” cases for the Court to have discretion to hear the case. *See* discussion *supra* Part VI.D.1.

592. *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001).

593. *See Harmon v. Williams*, 615 So. 2d 681 (Fla. 1993).

594. *See* discussion *supra* Part VII.E.

595. *See Davis v. Mandau*, 410 So. 2d 915, 915 (Fla. 1981).

596. For an opinion using the informal name, *see Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1146 (Fla. 1985).

597. FLA. CONST. art. V, §3 (b)(5).

598. *State v. Matute-Chirinos*, 713 So. 2d 1006, 1007 (Fla. 1998).

599. FLA. CONST. art. V, §3 (b)(5).

speeds the appellate process.⁶⁰⁰ Its classic use was shown during the 2000 presidential election cases, in which district courts routinely certified the cases directly to the Florida Supreme Court.⁶⁰¹

The Supreme Court of Florida can hear such cases only if: 1) an appeal is pending in the district court brought from a trial court's order or judgment; 2) the district court certifies that the case is "of great public importance" or may "have a great effect on the proper administration of justice throughout the state;" and 3) the district court certifies that immediate resolution by the Supreme Court of Florida is required.⁶⁰² Certification can occur on the district court's own motion, or at the suggestion of a party if done within ten days of appealing to the district court.⁶⁰³ As noted above, it is crucial that the matter pending in the district court be an appeal. Under the constitutional language, there is no jurisdiction if the pending matter is something else, such as a petition for common law certiorari.⁶⁰⁴

While the three elements above appear mandatory from the constitutional language, the Supreme Court of Florida has been lenient in accepting district court certifications fairly susceptible of meeting the requirements. The root word "certif.-" probably should be used by the district court, but it is doubtful that a case of obvious importance would be refused for failure to do so. The policy reasons for requiring a term of art in certified conflict cases do not exist here.⁶⁰⁵ Typically, the district courts scrupulously meet the certification requirement.⁶⁰⁶

600. For a considerable history underlying the development of this form of jurisdiction, see *Constitutional Jurisdiction*, *supra* note 222, at 193–96.

601. *E.g.*, *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

602. FLA. CONST. art. V, § 3(b)(5).

603. FLA. R. APP. P. 9.125(a), (c). The method of making and filing a "suggestion" is heavily regulated by rule. See FLA. R. APP. P. 9.125(c)-(f).

604. *Matute-Chirinos*, 713 So. 2d at 1007.

605. See discussion *supra* Part VI.F. for policy reasons which require a term of art in certified conflict cases. "Acknowledged" conflict cases can be "mopped up" by the "express and direct" category. There is no other category to "mop up" pass-through cases in which the district court failed to use the root word "certif.-"

606. *In re Pearson*, Case No. 92-0942 (Fla. 4th Dist. Ct. App., March 30, 1992) (unpublished order). In the "Baby Theresa" case, for example, the Fourth District Court of Appeal issued the following certificate:

We hereby certify to the Florida Supreme Court that the order of the trial court of March 27, 1992, requires immediate resolution by the Supreme Court, because it rules on an issue of great public importance and because the relief sought in the trial court may be mooted by the natural death of the infant child of appellants.

Id.

The Supreme Court of Florida's jurisdiction over pass-through cases attaches immediately on rendition⁶⁰⁷ of the district court order certifying the case.⁶⁰⁸ Thus, the district court loses jurisdiction at that point unless the Supreme Court of Florida relinquishes its jurisdiction.⁶⁰⁹ In theory, a defective certification would not actually divest the district court of jurisdiction nor vest the Court with jurisdiction. For that reason, it is important that all concerned be certain that certification is done properly.

There is no requirement that the district court frame a question, although most district court panels do so.⁶¹⁰ Framing a question may be useful, but these cases almost always involve questions that are apparent to everyone. Where a question is framed, the Supreme Court of Florida usually quotes it.⁶¹¹ If no question is framed, the Court sometimes states the issue to be reviewed⁶¹² and sometimes does not.⁶¹³ In any event, the presence or absence of a framed question may make no difference in the Court's jurisdiction, but it can serve a useful purpose when the parties disagree on the exact nature of the question being decided.⁶¹⁴

The jurisdictional history of pass-through cases has evolved over the years in much the same way as with certified questions of great public importance and certified conflict cases. Pass-through cases clearly fall within the Court's discretionary jurisdiction and can be refused, though the Court seldom has done so until more recently. In 1987, the Court first hinted at this by admonishing the district courts not to use pass-through jurisdiction "as a device for avoiding difficult issues by passing them through to this Court."⁶¹⁵ In 2002, the Court directly rejected jurisdiction of a pass-through case.⁶¹⁶ A

607. Rendition occurs when a "signed, written order is filed with the clerk of the lower tribunal," subject to a few exceptions usually not applicable in these cases. FLA. R. APP. P. 9.020(h).

608. FLA. R. APP. P. 9.125(g).

609. See FLA. R. APP. P. 9.110, 9.600.

610. See, e.g., *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317 (Fla. 1987); *Div. of Pari-Mutuel Wagering v. Fla. Horse Council, Inc.*, 464 So. 2d 128, 129 (Fla. 1985).

611. See, e.g., *Fla. Nurses Ass'n*, 508 So. 2d at 317.

612. E.g., *In re T.A.C.P.*, 609 So. 2d 588, 589 (Fla. 1992).

613. *Chiles v. United Faculty of Fla.*, 615 So. 2d 671 (Fla. 1993).

614. For example, *T.A.C.P.* presented a situation in which some parties and amici curiae not only disagreed about the nature of a relevant medical syndrome (anencephaly), but also framed the issues in widely differing ways. 609 So. 2d at 589. Some saw the issue as whether organs could be "harvested" from a living child, while others saw the issue as whether there was a right of privacy in deciding what would happen to the body of a child who was, for all intents and purposes, dead. *Id.* When the court framed the issue at the start of the opinion, it signaled the true scope of what was being decided. *Id.*

615. *Carawan v. State*, 515 So. 2d 161, 162 n.1 (Fla. 1987).

616. *Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 824 So. 2d 167 (Fla. 2002).

concurring Justice suggested that the matter certified was not ripe for review because it involved an interlocutory question.⁶¹⁷ This prompted an opinion from one district court in which it went to some pains to suggest why its certification was pressing enough, and why the facts at hand were ripe enough, to be heard.⁶¹⁸

Usually, the cases certified in this manner truly have been pressing. These cases most commonly involve urgent questions of governmental authority,⁶¹⁹ constitutional rights that could be undermined if the case is not expedited,⁶²⁰ or personal liberties that could be jeopardized by a lengthy appeal.⁶²¹ With rare exceptions,⁶²² all these cases have involved a significant level of both immediacy and finality of fact finding. As a result, almost all such cases are handled on an expedited basis by the Court. Attorneys handling such cases thus must be prepared to respond immediately to the Court's orders and concerns.

H. *Questions Certified by Federal Appellate Courts*

The final subcategory of discretionary review jurisdiction concerns cases involving a question of law certified by the federal appellate courts. Jurisdiction is allowed here only if: 1) the United States Supreme Court or a federal court of appeals certifies a question; 2) the question is determinative of "the cause;" and 3) there is no controlling precedent of the Florida Supreme Court.⁶²³ By rule, the federal court is required to issue a "certificate" containing the style of the case, a statement of the facts showing the nature of the cause and the circumstances from which the questions of law arose, and the questions to be answered.⁶²⁴ The certificate must be sent to the Florida Supreme Court by the federal court clerk.⁶²⁵ The jurisdiction granted here was not a part of the pre-1980 constitution. However, much the same pro-

617. *Id.* at 168.

618. *See Harris v. Coalition to Reduce Class Size*, 824 So. 2d 245, 248 (Fla. 1st Dist. Ct. App. 2002).

619. *E.g., Chiles*, 615 So. 2d at 672 (concerning the constitutionality of legislature abrogating state employees' collective bargaining agreement).

620. *See State v. Dodd*, 561 So. 2d 263 (Fla. 1990) (concerning the constitutionality of statute restricting political contributions when election was nearing).

621. *See T.A.C.P.*, 609 So. 2d at 593 (regarding the right to donate organs of child soon to die where death would make organs unable to be donated).

622. *See, e.g., Carawan*, 515 So. 2d at 162, n.1.

623. FLA. CONST. art. V, § 3(b)(6).

624. FLA. R. APP. P. 9.150(b).

625. *Id.*

cess had arisen earlier by court rule and from decisional law.⁶²⁶ Thus, the 1980 reforms largely codified these procedures within the constitution.⁶²⁷

Perhaps the most significant requirement, other than the detailed formal certificate,⁶²⁸ is that there must be a “cause” from which the certified questions arise.⁶²⁹ This means that the Florida Supreme Court cannot accept questions in the abstract, but only if they are “determinative” of a particular case. In practice, this means that there must be an actual suit pending review in the federal appellate courts. Thus, certified questions do not ask the Florida Supreme Court to issue a purely advisory opinion. The federal courts are bound to honor and to apply the response given by the Florida Supreme Court to the actual controversy before them. Thus, all such cases involve an actual application of Florida law, often in cases premised on federal diversity jurisdiction.⁶³⁰

Certified questions accepted from federal courts are answered by way of a formal opinion, a requirement that stems in part from state statute.⁶³¹ The holdings of that opinion can become precedent for future cases, on the theory that the Florida Supreme Court’s opinion actually resolves controlling legal questions. In answering the questions, however, the Court does not “remand”⁶³² the cause to a federal court as it would to an inferior court. Some Florida Supreme Court opinions misuse the word “remand” in this way, but the better practice is for the Court to “transmit” or “return” the cause to the federal court for further proceedings.⁶³³

The Court has obvious discretion to decline to answer a federal certified question. However, in practice, the federal appellate courts have been conscientious in confining certification to cases that genuinely meet the rather strict constitutional requirements. Review might be declined, for example, where a federal appellate court overlooked controlling precedent previously issued by the Florida Supreme Court.⁶³⁴ In that situation, the most construc-

626. *E.g.*, *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969).

627. *See Constitutional Jurisdiction*, *supra* note 222, at 196.

628. For an example of a certificate, see *Aldrich v. Aldrich*, 375 U.S. 249 (1963).

629. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741 (Fla. 1961).

630. *See, e.g.*, *Allen v. Estate of Carman*, 486 F.2d 490, 492 (5th Cir. 1973).

631. FLA. STAT. § 25.031 (2003). There is no requirement to accept the case, only to issue an opinion once the case is accepted. *Id.*

632. The term “remand” implies mandate and therefore suggests a direction to an inferior court. *See BLACK’S LAW DICTIONARY* 1293 (6th ed. 1990). The federal appellate courts are not inferior to the Supreme Court of Florida.

633. *E.g.*, *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1270 (Fla. 1987); *Bates v. Cook, Inc.*, 509 So. 2d 1112, 1115 (Fla. 1987).

634. *See* FLA. CONST. art. V, § 3(b)(6).

tive response would be for the Court to cite the controlling precedent in the order declining review.⁶³⁵

VII. DISCRETIONARY ORIGINAL JURISDICTION

The Supreme Court of Florida's discretionary original jurisdiction involves a class of legal "writs" that, with some exceptions, originated centuries ago in the English common law. Most Floridians know little about these writs, with the possible exception of habeas corpus, and even some lawyers tend to lose sight of the creative ways the writs can be used. In some circumstances, one of these so-called "extraordinary writs" may provide jurisdiction when nothing else can.

Because most of the writs are of ancient origin, there is a highly detailed body of case law governing their use. The constitution itself does little more than identify the writs and assign the Court jurisdiction over them,⁶³⁶ so the Florida Supreme Court almost always gauges these cases based on long-standing judicial precedent. As a result, these cases tend to be analyzed under a kind of "common law" approach, although, strictly speaking, the jurisdiction arises from the constitution itself. There are some limitations imposed by the constitution that did not arise from the common law, but these usually involve the specific class of persons to whom a writ may be issued by the Court.⁶³⁷

Technically speaking, the Supreme Court of Florida has jurisdiction over any petition that merely requests some form of relief available under this category. The Court's discretion, however, is limited by the body of case law and common law principles defining the scope of permissible judicial action. If the Court lacks discretion to issue a writ, it cannot grant relief as surely as if it lacked jurisdiction.

Nevertheless, there are aspects of the controlling case law that can be explained only by the distinction between jurisdiction and discretion. For example, the Court's discretion to issue any of the extraordinary writs is defined by the applicable standard of review, which differs with each writ. It is

635. *Id.* The Court probably would lack jurisdiction, not merely discretion, in this situation. The constitution's strict language suggests that it is not enough for the federal appellate court to certify the case; there also must be an actual lack of controlling precedent of the Florida Supreme Court. *Id.* In any event, whether the case was dismissed for lack of jurisdiction or lack of discretion would make no difference here.

636. FLA. CONST. art. V, § 3(b)(7)-(9). In most instances, however, jurisdiction is not exclusive. The lower courts would also have jurisdiction to consider issuing one of the writs, except that petitioners usually are forbidden to seek the same remedy from another court simply because they did not like the last court's decision.

637. FLA. CONST., art. V, § 3(b)(8).

common, though not precise, to use the word “jurisdiction” in its loose sense to include limitations on discretion, in which case the Court’s “jurisdiction” over the extraordinary writs also would be determined by the standard of review. However, there are cases where the Court expressly accepts jurisdiction, hears the case, and issues a full opinion determining that the standard of review has not been met and a writ cannot be issued.⁶³⁸ If the Court determined that it lacked jurisdiction of such cases, then arguably it could not even hear them, much less accept jurisdiction and issue a full opinion.

There is another aspect of “discretion” that deserves some mention. The fact that the Court’s discretion to issue the writs is limited by judicially created case law leaves open the possibility of the Florida Supreme Court refining or modifying the standards of review. Such modifications are unusual, but they do happen.⁶³⁹ It would be hard to say in these cases that the Court somehow has modified its own “jurisdiction,” because this would imply some inherent power to depart from the constitution. These infrequent modifications made to standards of review are best understood as changes in discretion, not changes in jurisdiction.⁶⁴⁰

There have been four highly significant changes in the way the Court exercises its discretion over writs in the last decade. First, the Court in *Harvard v. Singletary*,⁶⁴¹ announced in 1999 that it would pursue a policy of administratively transferring writs cases to lower courts with concurrent jurisdiction absent a pressing need, especially where there are facts in dispute.⁶⁴² The number of such cases had increased significantly over the prior decade, straining the Court’s docket. Moreover, the Court concluded that ordinarily trial courts are in a better position to conduct fact finding in such cases, so they are the obvious bodies to resolve factual disputes raised by writs.⁶⁴³ To enforce the *Harvard* rule, the Court developed an informal screening system to decide which cases should be transferred. The Court in *Harvard* stressed, however, that this did not constitute a change in jurisdiction.⁶⁴⁴ Indeed, the decision is readily explained as establishing a new rule for exercising the

638. See, e.g., *Fla. League of Cities v. Smith*, 607 So. 2d 397, 398, 400–01 (Fla. 1992).

639. E.g., *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (modifying writ of error *coram nobis*); *Richardson v. State*, 546 So. 2d 1037, 1039 (Fla. 1989) (modifying writ of error *coram nobis*).

640. In theory, modifications to “discretion” could be so drastic as to essentially constitute a change in jurisdiction. In practice, it is unlikely the Court would take any such drastic step, which probably would invite efforts to curb the Court’s actions by way of statute or constitutional amendment.

641. 733 So. 2d 1020, 1023 (Fla. 1999).

642. *Id.* at 1023.

643. *Id.* at 1024.

644. *Id.*

Court's discretion, similar to the evolutionary refinements over the Court's discretion to review certified questions of great public importance.⁶⁴⁵ The Court's current application of *Harvard* means very few, if any, such writs are actually considered on the merits by the Court.

Second, starting in the late 1990s and continuing through the present, the Court established that the rules otherwise applicable to express and direct conflict cases will apply to reviews sought by extraordinary writ. That is, the Court will not exercise its writs jurisdiction to review either a PCA⁶⁴⁶ or a PCA issued with a citation⁶⁴⁷ unless it meets the rule of law explained in *Florida Star v. B.J.F.*⁶⁴⁸ This was a result obviously implied by earlier case law holding that at least one of the extraordinary writs could not be used as a device for circumventing the limitations upon the Court's ability to review PCAs.⁶⁴⁹ With this determination, the Court now has established that its discretion to review PCAs and citation PCAs is very limited indeed, no matter what basis for jurisdiction is asserted.⁶⁵⁰ This is an obvious reflection of steps being taken to address an increasingly burdensome caseload that now is well documented.⁶⁵¹

Third, the Court has determined that persons are prohibited from filing pro se petitions for extraordinary writs raising issues related to a pending case for which they already have counsel.⁶⁵² The Court based this ruling on the premise that there is no constitutional right to be simultaneously represented by counsel and act pro se.⁶⁵³ Rather, the person who otherwise wishes to file the pro se petition must either discharge counsel and affirmatively choose self-representation or must work through counsel.⁶⁵⁴ In reaching this decision, the Court went to some lengths to stress that this rule will apply to all future cases of a similar nature unless the petitioners clearly state their desire to discharge counsel.⁶⁵⁵ Otherwise the pro se petitions will be dismissed as unauthorized.⁶⁵⁶

645. See discussion *supra* Part VI.E.

646. *Grate v. State*, 750 So. 2d 625, 626 (Fla. 1999).

647. *Persaud v. State*, 838 So. 2d 529, 533 (Fla. 2003).

648. 530 So. 2d 286, 288 (Fla. 1988).

649. *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304–05 (Fla. 1980) (seeking review under the “all writs necessary clause of article V, section 3(b)(7) of the Florida Constitution). This rule was reiterated in *Stallworth v. Moore*, 827 So. 2d 974, 978 (Fla. 2002).

650. The possible exception remains a PCA leaving intact a lower court order striking a state statute as unconstitutional. See discussion *supra* note 467 and accompanying text.

651. See WORKLOAD, *supra* note 551, at 21–35.

652. *Logan v. State*, 846 So. 2d 472, 476 (Fla. 2003).

653. *Id.* at 474 (citing *State v. Tait*, 387 So. 2d 338, 339–40 (Fla. 1980)).

654. *Id.* at 474–76.

655. *Id.* at 479.

656. *Id.*

Fourth, the Court has now established a bright-line rule governing all orders that dismiss extraordinary writ petitions summarily, without elaboration. This settled a troubling problem. Summary dismissals of this type could have been based on the merits of the case or could have been a simple refusal to exercise discretionary jurisdiction. If the former, then the dismissal would have been with prejudice; if the latter, then it would have been without prejudice. There was no way of knowing from the face of the order itself. To address this problem, the Court held that all unelaborated orders dismissing extraordinary writs petitions will be deemed *not* to be decisions on the merits “unless there is a citation to authority or other statement that clearly shows that the issue was considered by the court on the merits and relief was denied.”⁶⁵⁷

A. *Mandamus*

The first extraordinary writ is “mandamus,” which in Latin means “we command.”⁶⁵⁸ As the name suggests, mandamus is a writ of commandment, a fact underscored by its history. In ancient times, the writ issued as a command from the sovereigns of England when they sat personally as judges; but, it later came to be a prerogative of judges of the Court of King’s Bench.⁶⁵⁹ Because of the writ’s coercive nature, its use is subject to severe restrictions developed in Florida and earlier English case law. In broad terms, the Florida Supreme Court today may issue mandamus only to compel state officers and state agencies to perform a purely ministerial action where the petitioner otherwise would suffer an injury and has a clear and certain right to have the action done.

In the Supreme Court of Florida, unlike other state courts, mandamus may issue only to state officers and state agencies.⁶⁶⁰ This limitation arises from the constitution itself, and is the only restriction on mandamus expressly imposed there.⁶⁶¹ The Court has never fully defined what the terms “state officers” and “state agencies” mean. The cases appear to assume that these terms include agencies and public office holders within the three branches of state government, but nothing establishes this with any finality. Arguably,

657. *Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004).

658. BLACK’S LAW DICTIONARY 980 (6th ed. 1990).

659. *See State ex rel. State Live Stock Sanitary Bd. v. Graddick*, 89 So. 361, 362 (Fla. 1921).

660. Thus, the Florida Supreme Court presently cannot issue a writ of mandamus to private individuals or businesses, as it sometimes could in the past. *See, e.g., State ex rel. Ranger Realty Co. v. Lummus*, 149 So. 650 (Fla. 1933).

661. FLA. CONST. art. V, § 3(b)(8).

state officers could include persons holding an office created by the Florida Constitution,⁶⁶² but the Court has never clearly said so. Moreover, the constitution itself seems to contrast “state officers” with “constitutional officers” elsewhere, implying they are not the same thing.⁶⁶³ It thus is possible that the term “state officers” is more inclusive than the term “constitutional officers.” Thus, this question remains an open one.

Someone seeking mandamus also must establish that the action being sought is “ministerial.” “An action is ministerial only to the extent that the respondent has no discretion over the matter.”⁶⁶⁴ There are self-evident reasons for this requirement. No court can compel that lawful discretion be exercised to achieve a particular result, however fair it may seem to do so.⁶⁶⁵ The existence of discretion takes an action out of the ministerial realm. Any other rule would permit judges to exercise powers not vested in them through the simple expedient of mandamus. Thus, a respondent's lack of discretion is an absolute prerequisite to mandamus.

However, the lack of discretion can be partial because it is possible for an action to be partly ministerial and partly discretionary. This most commonly arises where the law grants discretion to take some action but specifies a particular kind of review process and factors that must be considered when and if discretion is exercised. Sometimes a respondent may depart from the required process. When so, mandamus can issue only to require the proper process, not to mandate that any particular discretionary outcome must be reached at the end of the process. However, mandamus may be used to compel official action that falls within an established legally permissible range if that official fails to act within the range and is required by the law to do so. The fact that a court may need to interpret a statute to discern the permissible range does not make the legal right any less clear.⁶⁶⁶

Thus, the Court has held that mandamus cannot compel the discretionary act of granting parole to an inmate; yet mandamus potentially could be used to compel the Florida Parole and Probation Commission to conform its parole review process to the clear requirements of the constitution.⁶⁶⁷ Likewise, mandamus cannot be used to compel the Florida Department of Corrections to perform the discretionary act of awarding “early release” credits

662. Examples include sheriffs, clerks of the circuit court, and property appraisers. *See* FLA. CONST. art. VIII, § 1(d).

663. *See* FLA. CONST. art. V, § 3(b)(3).

664. Kogan & Waters, *supra* note 1, at 1250; *See, e.g.,* Kobayashi v. Kobayashi, 777 So. 2d 951, 952 (Fla. 2000) (Shaw, J., dissenting).

665. *E.g.,* Moore v. Fla. Parole & Prob. Comm’n, 289 So. 2d 719, 720 (Fla. 1974).

666. Schmidt v. Crusoe, 878 So. 2d 361, 363 (Fla. 2003).

667. Moore, 289 So. 2d at 719–20.

to inmates; yet mandamus can be used to require the Department to employ a constitutionally required process in review of such cases.⁶⁶⁸

However, mandamus cannot be used to compel an act that is purely discretionary—that is, where the official has the authority either to do or not to do it. Thus, mandamus cannot be used to compel The Florida Bar to commence disciplinary proceedings against an attorney where it has found no reason to do so, just as it cannot be used to compel a prosecutor to commence criminal proceedings.⁶⁶⁹

The person seeking mandamus also must show the likelihood that some injury will actually occur if the writ is not issued.⁶⁷⁰ If there is no possibility of injury, then mandamus is an inappropriate remedy.⁶⁷¹ Thus, mandamus will not be issued if doing so would constitute a useless act⁶⁷² or would result in no remedial good.⁶⁷³ This situation might exist, for example, where the action that would be compelled already has been done.⁶⁷⁴ For example, the Court has found the writ inappropriate where a license was taken away improperly but had been obtained in the first instance through fraud or deceit.⁶⁷⁵ In other words, a valid reason existed to revoke the license and it would be a useless act to issue mandamus merely because an improper reason had been given for revocation. Moreover, injury does not exist if petitioners are able to perform the ministerial acts in question for themselves.⁶⁷⁶

However, injury can include some generalized harm, such as a disruption of governmental functions⁶⁷⁷ or the holding of an illegal election.⁶⁷⁸ Mandamus in particular is the appropriate vehicle for testing the constitutionality of new statutes “where the functions of government would be adversely affected without an immediate determination.”⁶⁷⁹ This conclusion is reinforced if the statute in question implicates a matter over which the Court has exclusive appellate jurisdiction or exclusive original jurisdiction.⁶⁸⁰

668. *Waldrup v. Dugger*, 562 So. 2d 687, 693 (Fla. 1990).

669. *Tyson v. The Fla. Bar*, 826 So. 2d 265, 267 (Fla. 2002) (citing *State v. Cotton*, 769 So. 2d 345, 350 (Fla. 2000)).

670. *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992).

671. *Id.*

672. *E.g.*, *Bishoff v. State ex rel. Tampa Waterworks Co.*, 30 So. 808, 812 (Fla. 1901).

673. *E.g.*, *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420, 421 (Fla. 1944).

674. *E.g.*, *State ex rel. Fid. & Cas. Co. of N.Y. v. Atkinson*, 149 So. 29, 30 (Fla. 1933).

675. *State ex rel. Bergin v. Dunne*, 71 So. 2d 746, 749 (Fla. 1954).

676. *E.g.*, *Gallie v. Wainwright*, 362 So. 2d 936, 939 (Fla. 1978).

677. *E.g.*, *Dickinson v. Stone*, 251 So. 2d 268, 271 (Fla. 1971).

678. *See Fla. League of Cities*, 607 So. 2d at 398.

679. *Allen v. Butterworth*, 756 So. 2d 52, 55 (Fla. 2000) (quoting *Div. of Bond Fin. v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976)).

680. *See id.* at 54 (identifying exclusive appellate jurisdiction over death penalty and exclusive original jurisdiction over practice of law).

Petitioners seeking mandamus also must establish that they have a “clear” and certain right imposing a corresponding duty on the respondents to take the actions sought.⁶⁸¹ A right is clear and certain only if it is already plainly established in preexisting law or precedent.⁶⁸² Thus, the opinion in which mandamus will be issued cannot be used as the vehicle for creating a right previously uncertain or not yet extended to the situation at hand. The right already must have come into existence through some other legal authority.⁶⁸³

However, the fact that some judicial interpretation of existing law may be required does not make the right it establishes any less certain.⁶⁸⁴ Moreover, the right must be “complete” and unconditional at the time the petition is brought.⁶⁸⁵ The existence of any unfulfilled condition precedent renders mandamus improper.⁶⁸⁶ Likewise, mandamus cannot be used to achieve an illegal or otherwise improper purpose⁶⁸⁷ because there is no right to break the law or violate public policy.

Florida courts also have frequently imposed a requirement that there be no other adequate remedy.⁶⁸⁸ This requirement was imposed on the grounds that mandamus exists to correct defects in justice, not to supersede other adequate legal remedies. The extraordinary nature of the writ supports this rationale. In 1985, the Florida Supreme Court suggested that the “no adequate remedy” requirement no longer was essential, at least in cases involving “strictly legal constitutional questions.”⁶⁸⁹ The opinion appeared to have misread the precedent on which it relied⁶⁹⁰ and was largely ignored by later

681. *State ex rel. Eichenbaum v. Cochran*, 114 So. 2d 797, 800 (Fla. 1959).

682. *See Fla. League of Cities*, 607 So. 2d at 401.

683. *Id.*

684. *Schmidt v. Crusoe*, 878 So. 2d 361, 363 (Fla. 2003).

685. *Bergin*, 71 So. 2d at 749.

686. *Id.*

687. *See, e.g., State ex rel. Edwards v. County Comm’rs of Sumter County*, 22 Fla. 1, 7 (1886).

688. *E.g., Shevin ex rel. State v. Pub. Serv. Comm’n*, 333 So. 2d 9, 12 (Fla. 1976); *State ex rel. Long v. Carey*, 164 So. 199, 205 (Fla. 1935).

689. *Hess v. Metro. Dade County*, 467 So. 2d 297, 298 (Fla. 1985). *Contra* Dep’t of Health & Rehab. Servs. v. *Hartsfield*, 399 So. 2d 1019, 1020 (Fla. 1st Dist. Ct. App. 1981).

690. The *Hess* court cited *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984), which involved an alleged defect in a constitutional amendment that would be put to voters. The Court in *Fine* did not mention the “no adequate remedy” requirement. *Id.* at 985–96. However, it was clear that no other adequate remedy existed there; the right to a fair election was at stake, and a fair election would not be possible if a defective constitutional amendment was allowed to remain on the ballot. *Id.* at 985. The Court has extended this reasoning to legislatively proposed amendments challenged before an election, though the decision finding the ballot language defective occurred after the election. *Armstrong v. Harris*, 773 So. 2d 7, 22 (Fla. 2000).

case law.⁶⁹¹ The “no adequate remedy” serves a useful purpose in that it requires petitioners to exhaust other sufficient means before burdening the Court’s docket.

The terms “state officers and state agencies” as used in the constitution include judges and courts.⁶⁹² In these cases, one specialized use of the writ is to require the respondent-judges to exercise jurisdiction that has been wrongly denied in the lower court. At earlier common law, this device was known as the writ of procedendo,⁶⁹³ though today the same concept has been subsumed under mandamus.⁶⁹⁴ However, mandamus would be inappropriate unless the law clearly required the lower court to exercise its jurisdiction and it failed to do so.⁶⁹⁵

Finally, the Supreme Court of Florida has a long-standing custom—but one not uniformly followed—regarding the actual issuance of mandamus. As a matter of courtesy, the Court usually withholds issuing the writ because the Justices are confident a respondent will conform to the majority opinion.⁶⁹⁶ In any event, if a respondent later refused to conform, the Court could still issue a previously “withheld” writ on a proper motion to enforce the Court’s earlier decision.

B. *Quo Warranto*

Another extraordinary writ is quo warranto, which means “by what authority.”⁶⁹⁷ As the name suggests, quo warranto is a writ of inquiry.⁶⁹⁸ Historically, the English crown developed the writ as a means of calling upon subjects to explain some alleged abuse of the power of an office, franchise, or liberty within the Crown’s purview.⁶⁹⁹ Today, quo warranto continues in Florida as the means by which an interested party can test whether any indi-

Justice Harding’s concurring opinion expressly discusses the lack of an adequate remedy in that situation. *Id.* at 24 (Harding, J., concurring).

691. *E.g.*, *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000) (holding that no adequate remedy is a requirement of mandamus).

692. *See* FLA. CONST. art. V, § 3.

693. *See* *Linning v. Duncan*, 169 So. 2d 862, 866 (Fla. 1st Dist. Ct. App. 1964) (citing *Newport v. Culbreath*, 162 So. 340 (Fla. 1935)).

694. *E.g.*, *Pino v. Dist. Court of Appeal, Third Dist.*, 604 So. 2d 1232, 1233 (Fla. 1992).

695. *Id.*

696. *E.g.*, *Caldwell v. Estate of McDowell*, 507 So. 2d 607, 608 (Fla. 1987).

697. BLACK’S LAW DICTIONARY 1285 (8th ed. 2004).

698. *Fouts v. Bolay*, 795 So. 2d 1116, 1117 (Fla. 5th Dist. Ct. App. 2001).

699. *State ex rel. Watkins v. Fernandez*, 143 So. 638, 639 (Fla. 1932).

vidual improperly claims or has usurped some power or right derived from the State of Florida.⁷⁰⁰

Standing to seek quo warranto has been held to be broad and inclusive. The Supreme Court of Florida has held that any citizen may bring suit for quo warranto if the case involves “enforcement of a public right.”⁷⁰¹ In practice, quo warranto proceedings almost always involve a public right because the Florida Supreme Court can issue the writ only to “state officers and state agencies,”⁷⁰² a term that apparently includes legislators and certain legislative officials.⁷⁰³ This limitation is the only express restriction contained in the constitution, all others being derived from case law. Thus, the cases taken to the Court usually are limited to those involving some allegedly improper use of state powers or violation of rights by these officers or agencies.

One use of quo warranto is to test the outcome of a disputed election, such as where one person has claimed the powers of the elective office but another contends this was unlawful.⁷⁰⁴ Actions of this variety are governed in part by the *Florida Statutes* specifying that the petition be brought by the Attorney General or, if the latter refuses, by the person claiming title to the office.⁷⁰⁵ If the Court grants the petition, it can issue a judgment of ouster⁷⁰⁶ which has the effect of vesting the claimant with title to the office. However, if the Attorney General did not consent to the suit, the judgment remains subject to challenge by the state.⁷⁰⁷

There are other uses of quo warranto. For example, quo warranto has been used by a legislator who argued that the Governor exceeded his constitutional authority in calling a special session of the legislature.⁷⁰⁸ In that instance, the petition for quo warranto was filed by the legislator as an original proceeding in the Court.⁷⁰⁹ The writ has also been used to decide whether a state public defender’s office exceeded its statutory authority by represent-

700. *Id.* at 640; *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989).

701. *Martinez*, 545 So. 2d at 1339 (citing *State ex rel. Pooser v. Wester*, 170 So. 736, 737 (Fla. 1936)).

702. FLA. CONST. art. V, § 3(b)(8). For a discussion of this limitation and its likely meaning, see discussion *supra* Part VII.A. Under earlier law, quo warranto sometimes could be used to test the validity of actions done pursuant to a franchise granted by the state, including the right to incorporate. Thus, the writ sometimes could issue against a private concern. *E.g.*, *Davidson v. State ex rel. Banks*, 20 Fla. 784, 790 (1884). The Florida Supreme Court no longer has such authority. See FLA. CONST. art. V, § 3(b)(8).

703. *Chiles v. Phelps*, 714 So. 2d 453, 456–57 (Fla. 1998).

704. *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 2 (Fla. 1938).

705. FLA. STAT. § 80.01 (2004).

706. § 80.032.

707. § 80.04.

708. *Martinez*, 545 So. 2d at 1338.

709. *Id.*

ing indigent clients in federal court proceedings⁷¹⁰ and, similarly, whether the Office of the Capital Collateral Regional Counsel exceeded its authority by filing claims in federal court.⁷¹¹ It has been used to test the validity of the legislative override of gubernatorial vetoes⁷¹² and the authority of the governor to name certain persons to the Public Service Commission Nominating Council.⁷¹³

As in mandamus, the Supreme Court of Florida usually withholds issuance of a writ of quo warranto as a matter of courtesy where it appears the Court's decision will be honored.⁷¹⁴ This custom has not been followed uniformly, however, and the failure to withhold issuance has no real significance.

C. *Writs of Prohibition*

The third extraordinary writ is that of prohibition. Like the two writs discussed above, the writ of prohibition has an ancient origin in English law.⁷¹⁵ It arose out of the early struggle between the royal courts controlled by the crown and the ecclesiastical courts controlled by the church.⁷¹⁶ Its primary purpose was to prevent an ecclesiastical court from encroaching upon the prerogatives of the sovereign. Thus, the writ of prohibition came into being as a preventive writ and retains that quality to this day.

In Florida, prohibition is now the process by which a higher court prevents an inferior tribunal from exceeding its jurisdiction.⁷¹⁷ The writ may be obtained only by a petitioner who can demonstrate that a lower court is without jurisdiction or is attempting to act in excess of jurisdiction regarding a future matter, and the petitioner has no other adequate legal remedy to prevent an injury that is likely to result.⁷¹⁸

The writ may only be directed by the Florida Supreme Court to a lower court and not to state agencies, state officers, or state commissions.⁷¹⁹ This restriction is imposed by the constitution as a result of the 1980 jurisdictional reforms that omitted the Florida Supreme Court's specific grant of authority

710. *State ex rel. Smith v. Jorandby*, 498 So. 2d 948, 950 (Fla. 1986).

711. *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 406 (Fla. 1998).

712. *Phelps*, 714 So. 2d at 455.

713. *State ex rel. Bruce v. Kiesling*, 632 So. 2d 601, 602 (Fla. 1994).

714. *Greenbaum v. Firestone*, 455 So. 2d 368, 370 (Fla. 1984).

715. *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977).

716. *Id.*

717. *Id.*

718. *Id.* at 296–97; *accord Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986).

719. FLA. CONST. art. V, § 3(b)(7).

to issue writs of prohibition to some quasi-judicial commissions.⁷²⁰ In effect, this ended the Court's earlier practice of exercising jurisdiction over state administrative agencies when they acted in their quasi-judicial capacities.⁷²¹ Of course, under long-standing precedent, writs of prohibition clearly cannot reach an action that is purely legislative or executive in nature.⁷²²

Due to the 1980 amendments, the Florida Supreme Court's power to issue writs of prohibition to courts is now the same for both the district courts⁷²³ and the circuit courts.⁷²⁴ Prior to the 1980 reforms, the authority over trial courts had been limited to "causes within the jurisdiction of the supreme court to review."⁷²⁵ The restriction was deleted in 1980, effectively vesting the Supreme Court of Florida with potential prohibition jurisdiction over any cause arising in a trial court.⁷²⁶

Petitioners must also show that the lower court is without jurisdiction or is attempting to act in excess of jurisdiction. For example, prohibition is proper to restrain a lower court that clearly lacks jurisdiction over the subject matter.⁷²⁷ The Court often has contrasted "lack of jurisdiction" with those situations in which a court merely exercises jurisdiction erroneously. In theory, perhaps a writ of prohibition is not proper for the latter.⁷²⁸ In practice, however, there is no realistic way to draw a clear distinction between the lack of jurisdiction and the erroneous exercise of jurisdiction as the two often blur together. The case law often reaches results that seem hard to reconcile with a strict "lack of jurisdiction" element. In several cases, for example, the Supreme Court of Florida has used prohibition to prevent a lower court from imposing restraints on a prosecutor's discretion to seek the death penalty in a criminal trial. This has occurred even though the lower court plainly had jurisdiction over the issues but had merely engaged in conduct usually characterized as a clear error.⁷²⁹

720. *Moffitt v. Willis*, 459 So. 2d 1018, 1020 (Fla. 1984).

721. For an example of this superseded form of jurisdiction, see *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487 (Fla. 1973), where the Court issued a writ against quasi-judicial proceedings of the Florida Real Estate Commission. *Id.* at 492.

722. *State ex rel. Swearingen v. R.R. Comm'rs of Fla.*, 84 So. 444, 445 (1920).

723. *See, e.g., Peltz v. District Court of Appeal, Third District*, 605 So. 2d 865 (Fla. 1992).

724. *See, e.g., Dep't of Agric. & Consumer Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

725. ARTHUR J. ENGLAND, JR. & TOBIAS SIMON, *FLORIDA APPELLATE PRACTICE MANUAL* § 2.23(a) (1997) [hereinafter *APPELLATE PRACTICE MANUAL*].

726. *Id.*

727. *Crill v. State Rd. Dep't*, 117 So. 795, 797 (Fla. 1928).

728. *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977).

729. *E.g., State v. Donner*, 500 So. 2d 532 (Fla. 1987); *State v. Bloom*, 497 So. 2d 2 (Fla. 1986). *But see Peacock v. Miller*, 166 So. 212 (Fla. 1936) (holding prohibition not proper where inferior court has jurisdiction but commits error). The use of prohibition in the prosecutorial discretion cases following the 1980 jurisdiction reforms apparently began with *Bloom*,

On policy grounds, such a use of prohibition may be justified because it could promote judicial economy by allowing the Florida Supreme Court to prevent a clear error from infecting the entire proceeding. This would forestall the likelihood of a useless trial that must inevitably be reversed on appeal. Nevertheless, such a rule comes close to vesting the Court with a kind of interlocutory appellate jurisdiction, which could become onerous if not used with restraint. As a practical matter, however, it seems unlikely the Court will extend this use of prohibition beyond the unusual factual patterns presented in such cases.

The next element a petitioner must show in order to obtain a prohibition writ is that the alleged improper actions of the lower court will occur in the future.⁷³⁰ The Florida Supreme Court often has noted that prohibition is a preventive writ, not a “corrective” one.⁷³¹ Thus, prohibition can be directed only to future acts, not past ones. The cases suggest that the future act must to some degree be “impending.”⁷³² “Past acts” can include an order already entered or proceedings already completed.⁷³³ Additionally, prohibition has been allowed for orders previously entered if the primary effect is on a proceeding that has not yet occurred.⁷³⁴ This use is justifiable in that such orders are directed to the future, but the result is a blurring of the distinction. The best interpretation probably is that a “past act” is one involving a significant degree of finality, whereas a “future act” does not.

To obtain prohibition, a petitioner must also show that no other adequate remedy exists.⁷³⁵ The key word is “adequate.”⁷³⁶ Other remedies may exist that are inadequate, incomplete, or unavailable to the petitioner; if so,

which cited as authority *Cleveland v. State*, 417 So. 2d at 653–54 (Fla. 1982). However, this is an obvious overextension of *Cleveland*, which was a case that “expressly and directly conflicts” and the Court held only that a court could not interfere with a prosecutor’s discretion to refuse to allow a defendant to be placed in a pretrial intervention program. *Id.* at 654. *Cleveland* had nothing to do with prohibition. Nevertheless, the “abuse of discretion” cases do gain some support by analogy to the well established precedent that prohibition sometimes may be used as a means of disqualifying biased judges even though they clearly have jurisdiction. *E.g.*, *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978); *State ex rel. Bank of Am. v. Rowe*, 118 So. 5 (Fla. 1928). Judicial disqualification comes much closer to being a question of abuse of discretion than abuse of jurisdiction.

730. *English*, 348 So. 2d at 296–297.

731. *E.g.*, *Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986).

732. *E.g.*, *Joughin v. Parks*, 143 So. 145 (Fla. 1932).

733. *English*, 348 So. 2d at 297.

734. *E.g.*, *Donner*, 500 So. 2d at 532–33; *Bloom*, 497 So. 2d at 2–3.

735. *English*, 348 So. 2d at 297.

736. *Id.*

then prohibition is not foreclosed.⁷³⁷ As a general rule, the fact that an appeal will give the petitioner an adequate and complete remedy renders the extraordinary writ of prohibition unavailable.⁷³⁸ If another extraordinary writ provides an adequate and complete remedy, then prohibition also should be denied.⁷³⁹ However, the Court still might review the case by treating the petition as though it had requested the proper alternative remedy.⁷⁴⁰

The final requirement is that prohibition can be issued only to prevent some likely and impending injury.⁷⁴¹ Prohibition is not available if the issues have become moot by the passage of time,⁷⁴² nor can it be used to issue a purely advisory opinion establishing principles for future cases.⁷⁴³ Opinions discussing the writ also often describe it as being appropriate only in “emergencies,”⁷⁴⁴ implying that the likelihood of some injury must be real and immediate. As with many of the other extraordinary writs, the Court often withholds formal issuance even when prohibition is granted.⁷⁴⁵

D. *Habeas Corpus*

Probably the best known of the extraordinary writs is habeas corpus, whose name in Latin means “that you have the body.”⁷⁴⁶ The name arises from the fact that the writ always began with these words, which were directed to someone who was detaining another person. The writ typically required the respondent to bring the body of the detained person into court so that the legal validity of the detention might be examined.⁷⁴⁷ Habeas corpus thus arose as a writ of inquiry used to determine whether the detention is proper⁷⁴⁸ or, put more accurately, whether the restraint on liberty is lawful.⁷⁴⁹

737. See, e.g., *Sparkman*, 498 So. 2d at 895; *Curtis v. Albritton*, 132 So. 677, 680 (Fla. 1931).

738. *Sparkman*, 498 So. 2d at 895.

739. E.g., *State ex rel. Placeres v. Parks*, 163 So. 89 (Fla. 1935) (holding that if mandamus is available, prohibition should be denied); *State ex rel. Booth v. Byington*, 168 So. 2d 164, 175 (Fla. 1st Dist. Ct. App. 1964) (holding that if quo warranto is available, prohibition should be denied).

740. Cf., *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990) (treating petition writ of habeas corpus as petition for writ of mandamus).

741. *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977).

742. *Wetherell v. Thursby*, 129 So. 345, 345–46 (Fla. 1930).

743. *English*, 348 So. 2d at 297.

744. *Id.* at 296.

745. E.g., *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986).

746. BLACK’S LAW DICTIONARY 728 (8th ed. 2004).

747. There no longer is any absolute requirement that the detained person be brought to court, and this earlier practice rarely occurs in the Supreme Court of Florida today.

748. *Allison v. Baker*, 11 So. 2d 578, 579 (Fla. 1943).

Potentially, any deprivation of personal liberty can be tested by habeas corpus, and for that reason it is often called the “great writ.”⁷⁵⁰

The obvious relationship to the fundamental constitutional right of liberty⁷⁵¹ explains why habeas corpus is the only writ specifically guaranteed by the Florida Constitution’s Declaration of Rights, which forbids suspension of habeas corpus except in cases of rebellion or invasion.⁷⁵² Habeas corpus is also the most frequently used and most generously available of the extraordinary writs. For that reason, the case law is exceedingly large and complex. Entire treatises have been written addressing the writ’s many nuances. A full discussion of habeas corpus thus is not possible within the limited space of this article. Moreover, in the last decade significant changes have been made to the *Florida Rules of Criminal Procedure* associated with habeas corpus,⁷⁵³ discussed briefly below.

The standard used in considering habeas claims can also be complex. In very broad and general terms, the Court has said that habeas cannot be issued except where the petitioner shows reasonable grounds to believe that a present, actual, and involuntary restraint on liberty is being imposed without authority of law and that no other remedy exists. Habeas is not appropriate if the restraint has ended,⁷⁵⁴ if there is no actual restriction on liberty,⁷⁵⁵ or if restrictions on liberty are mere future possibilities⁷⁵⁶ or have not been coercively imposed.⁷⁵⁷ However, even limited restraints on liberty can be sufficiently coercive to justify habeas relief, including an unlawfully imposed parole.⁷⁵⁸

Habeas is proper only if the restraint is without legal justification⁷⁵⁹ and no other remedy exists to correct the problem.⁷⁶⁰ It is often said that habeas

749. *Sylvester v. Tindall*, 18 So. 2d 892, 894 (Fla. 1944).

750. *See State ex rel. Deeb v. Fabisinski*, 152 So. 207, 209 (Fla. 1933). In ancient times, the writ of habeas corpus was divided into many subcategories, most of which now are irrelevant or have been superseded by other devices such as the *capias* or bench warrant. *Id.* at 210.

751. FLA. CONST. art. I, § 9.

752. FLA. CONST. art. I, § 13. However, habeas corpus to some extent is regulated by statute. *See* FLA. STAT. §§ 79.01-79.12 (2004).

753. FLA. R. CRIM. P. 3.850, 3.851, 3.852, 3.853. The latter two were not adopted until after the previous version of this article was written, and the former two have been the subject of repeated amendments, litigation, and legislative action.

754. *See Rice v. Wainwright*, 154 So. 2d 693 (Fla. 1963).

755. *See Moon v. Smith*, 189 So. 835, 837-38; *but see Sellers v. Bridges*, 15 So. 2d 293 (Fla. 1943).

756. *Thompson v. Wainwright*, 328 So. 2d 487, 488 (Fla. 1st Dist. Ct. App. 1976).

757. *See Sullivan v. State*, 49 So. 2d 794, 796 (Fla. 1951).

758. *Carnley v. Cochran*, 123 So. 2d 249, 250-251 (Fla. 1960), *rev'd on other grounds*, 369 U.S. 506 (1962); *Sellers*, 15 So. 2d at 293.

759. *State ex rel. Davis v. Hardie*, 146 So. 97 (Fla. 1933).

cannot substitute for remedies available by appeal, by motion to dismiss, or by proper use of procedural devices that were available prior to the time the restraints on liberty were imposed.⁷⁶¹ Likewise, habeas is not appropriate to the extent that the restraint on liberty itself is not the true issue. This often hinges on fine distinctions. For example, inmates alleging that “early release” credits were computed in an unconstitutional manner would not be entitled to habeas. In that instance, the Court determined that the real issue was not the self-evident restraint on liberty, but the improper performance of a ministerial act—computing “early release” credits—that may or may not reflect on the lawfulness of the detention, meaning that habeas was not the proper remedy.⁷⁶²

Under this analysis, habeas is not a proper remedy if some unfulfilled condition precedent still must occur to render any further restraint on liberty unlawful even if the writ were issued. But habeas would be one possible remedy at a later date if “early release” credits were properly computed, the inmate clearly was entitled to release, and prison officials failed to honor the law. It is worth noting, however, that an allegedly invalid death penalty itself constitutes a restraint on liberty even where there is no question that the defendant will remain in prison even if the penalty is vacated.⁷⁶³ But the habeas petitioner’s claim must genuinely be directed at the validity of the penalty itself, not at some other matter.⁷⁶⁴

There are three additional aspects of habeas corpus that deserve further mention. The most common and obvious use of habeas corpus is by inmates who wish to challenge the lawfulness of their present imprisonment. Dozens of petitions to this effect come to the Court every week,⁷⁶⁵ almost all of which now are subject to the administrative transfer rule of *Harvard*.⁷⁶⁶ However, habeas corpus is not strictly confined to a penal or even a criminal-

760. See *Brown v. Watson*, 156 So. 327, 331 (Fla. 1934).

761. See *Adams v. Culver*, 111 So. 2d 665, 668 (Fla. 1959).

762. *Waldrup v. Dugger*, 562 So. 2d 687, 693 (Fla. 1990).

763. Compare *Fitzpatrick v. Wainwright*, 490 So. 2d 938 (Fla. 1986) (holding the death penalty vacated on habeas petition, and case remanded for new proceedings), with *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) (reducing death penalty ultimately to life imprisonment for same defendant).

764. The Court itself sometimes overlooks the fine distinctions that can be involved in determining whether a petition genuinely is challenging a restraint on liberty, not some other matter.

765. These petitions often are in the form of handwritten notes that do not meet the Court’s usual filing requirements. However, the court accepts such “pro se” petitions if they fairly appear to be seeking some form of relief, sometimes even assigning volunteer counsel to assist in exceptional cases. The Court has held that even informal communications can be sufficient to petition for habeas corpus. *Crane v. Hayes*, 253 So. 2d 435, 442 (Fla. 1971).

766. See *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999).

law setting. “Civil detention” of a person can potentially be tested by the writ of habeas corpus, including matters beyond the obvious example of involuntary commitments for psychiatric treatment.⁷⁶⁷ Even detention imposed on someone by a private individual potentially can be tested by habeas corpus. For example, the writ has been used where one parent alleges that the other parent has taken custody of a child wrongfully.⁷⁶⁸

The second point deserving mention is that the remedy available by habeas corpus has been supplemented and modified since the 1960s by innovations in the *Florida Rules of Court*. Most post-conviction claims previously raised by inmates through habeas now must be brought under Rule 3.850 of the *Florida Rules of Criminal Procedure*⁷⁶⁹ and other associated rules⁷⁷⁰ in the trial court where the matter in question originated. Rule 3.850 was originally created by the Florida Supreme Court as an emergency means of dealing with the turmoil created by the decision of the United States Supreme Court in *Gideon v. Wainwright*.⁷⁷¹ At the time, the rule’s immediate purpose was to prevent the Florida Supreme Court and courts where state prisons were concentrated from being overwhelmed by habeas petitions prompted by *Gideon*’s holding that Florida had violated the rights of hundreds of indigent felony offenders convicted without benefit of counsel.⁷⁷² Rule 3.850 redirected these claims to the trial courts from which the cases originated.

Over the years, Rule 3.850 and its associated rules have retained the original purpose of creating a procedural “channel” through which a large class of habeas claims must flow. Of major importance, this includes deadlines for filing certain types of claims. In 2004, the Court emphasized the important purpose of these deadlines and made explicit what had been implicit in its rulings since the aftermath of *Gideon*—in non-capital cases,⁷⁷³ petitioners cannot expand the time limitations imposed by Rule 3.850 nor resurrect any other claim procedurally barred by the rule merely by charac-

767. *E.g.*, *Ex parte Hansen*, 162 So. 715, 717 (Fla. 1935).

768. *E.g.*, *Crane*, 253 So. 2d at 440; *Porter v. Porter*, 53 So. 546, 547 (Fla. 1910).

769. FLA. R. CRIM. P. 3.850.

770. FLA. R. CRIM. P. 3.800, 3.851, 3.852, 3.853. *See also* FLA. R. APP. P. 9.141(c), which is now the procedural substitute to raise claims for ineffective assistance of appellate counsel, which were previously raised via a habeas petition. Rule 9.141 does not apply to death penalty cases. FLA. R. APP. P. 9.141(a).

771. 372 U.S. 335 (1962). The problems *Gideon* caused, as well as the Florida Supreme Court’s response, are recounted in *Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963).

772. *Roy*, 151 So. 2d at 827.

773. Starting in 2001, post-conviction cases in capital claims have been governed exclusively by Rule 3.851, which includes its own time limitations. *See* FLA. R. CRIM. P. 3.851. Public records claims made by inmates under a death sentence are governed by Rule 3.852. *See* FLA. R. CRIM. P. 3.852.

terizing their claims as habeas corpus. Habeas petitions of this type are not merely denied by the Court; they now are dismissed as unauthorized.⁷⁷⁴

Beyond this, there is already a detailed body of case law interpreting these rules, so large that an adequate outline cannot be given in an article of this kind. However, the Court has not lost sight of the rules' origin as a refinement of habeas corpus⁷⁷⁵ and has expressly noted that it "will continue to be vigilant to ensure that no fundamental injustices occur."⁷⁷⁶ These refinements show how even the use of extraordinary writs evolve over time. Obviously, further evolution will occur in years ahead as new problems arise that are unanticipated in the thousand years of Anglo-American precedent upon which Florida's legal system draws. The upheaval caused by *Gideon*, for example, was met and overcome through the Court's rule-making powers, described more fully below.⁷⁷⁷ The Court "channelized" habeas corpus into an orderly procedural process that not only was consistent with the constitution but helped ensure that fundamental rights would be honored without delay.

E. "All Writs"

The state constitution grants the Supreme Court of Florida authority to issue "all writs necessary to the complete exercise of its jurisdiction."⁷⁷⁸ The operative constitutional language has remained essentially unchanged for many decades now,⁷⁷⁹ although the construction placed on that language has fluctuated at times. As a result, the Court's "all writs" authority remains one of the most unsettled areas of jurisdiction, a problem worsened by the infrequency of all writs filings. The all writs clause cannot be understood apart from its history.

774. *Baker v. State*, 878 So. 2d 1236, 1245–46 (Fla. 2004).

775. In a 1988 case, for example, the Court described Rule 3.850 as "a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus," one that creates a fact-finding function in the trial courts and a uniform method of appellate review. *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988) (citing *State v. Wooden*, 246 So. 2d 755, 756 (Fla. 1971)). In 1992, the Court further suggested that Rule 3.850 must be construed in a manner consistent with the Florida Constitution's stricture that habeas corpus shall be "grantable of right, freely and without cost." *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992) (quoting FLA. CONST. art. I, § 13).

776. *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999).

777. See discussion *infra* Part VIII.C.

778. FLA. CONST. art. V, § 3(b)(7). For a discussion of the history underlying this provision and the case law, see Robert T. Mann, *The Scope of the All Writs Power*, 10 FLA. ST. U. L. REV. 197 (1982).

779. Compare FLA. CONST. art. V, § 3(b)(7) with *Couse v. Canal Auth.*, 209 So. 2d 865, 867 (Fla. 1968) (quoting FLA. CONST. of 1885, art. V (1957)).

Prior to 1968, the cases dealing with the all writs clause plainly stood for two things. First, the all writs power could not be invoked unless a cause was already pending before the Court on some separate and independent basis of jurisdiction. Second, the Court's authority in this regard could only be directed at purely ancillary matters. In sum, "all writs" meant ancillary writs in pending proceedings.⁷⁸⁰

Then, in the 1968 case of *Couse v. Canal Authority*,⁷⁸¹ the Court overruled its earlier standard of review. Under *Couse*, the "all writs" authority would now exist over any matter falling within the Court's "ultimate power of review" even if no case on the matter was pending in the Florida Supreme Court at the time.⁷⁸² The Court sua sponte amended the *Rules of Appellate Procedure* to set forth its new standard: all writs jurisdiction exists "only when it is made clearly to appear that the writ is in fact necessary in aid of an ultimate power of review."⁷⁸³ In sum, the standard of review was broadened from "ancillary writs" to "aiding ultimate jurisdiction," though it was not altogether clear in *Couse* what this change would mean.

Two years later, the Court mentioned its all writs powers in a way that apparently expanded them even further. In a case involving a dispute between the Governor and the Legislature, the Court seemed to suggest that it was exercising some form of original all writs jurisdiction because the case "vital[ly] affect[ed] the public interest of the State."⁷⁸⁴ However, the reasoning of the case is not entirely clear and actually may have focused on the use a writ of prohibition, with the Court imprecisely referring to "the all writ section" as the basis for jurisdiction,⁷⁸⁵ a questionable reference that has happened before.⁷⁸⁶

Later cases have read this same language expansively. In 1974, the Court confronted a case involving the all writs authority of the district courts of appeal. In deciding the case, the Court reiterated the 1968 standard of

780. *E.g.*, *State ex rel. Watson v. Lee*, 8 So. 2d 19, 21 (Fla. 1942).

781. 209 So. 2d 865 (Fla. 1968).

782. *Id.* at 867.

783. *Id.* (quoting FLA. R. APP. P. 4.5(g)(1) (as amended)). Apparently, the new standard merely expanded jurisdiction. The Court still continued to issue ancillary writs in pending proceedings under its all writs power. *See, e.g.*, *Booth v. Wainwright*, 300 So. 2d 257, 258 (Fla. 1974).

784. *State ex rel. Pettigrew v. Kirk*, 243 So. 2d 147, 149 (Fla. 1970).

785. *See id.* The headnote says that prohibition was issued, though the text of the opinion is vague on this point. *Id.*

786. *E.g.*, *City of Tallahassee v. Mann*, 411 So. 2d 162, 163 (Fla. 1981) (citing all writs clause as basis of jurisdiction in granting prohibition). The misreference also was tempted by another fact; both prohibition and "all writs" are authorized by the same sentence in the constitution, though the two actually are distinct and subject to radically different standards of review. *See* FLA. CONST. art. V, § 3(b)(7).

review and added to it: the Florida Supreme Court's original all writs jurisdiction now would extend to "certain cases [that] present extraordinary circumstances involving great public interest where emergencies and seasonable consideration are involved that require expedition."⁷⁸⁷ It was unclear whether this statement was a revision of the *Couse* standard or added an additional requirement that must be met before all writs jurisdiction could be invoked.

For the next two years, the Court did little to explain how its all writs power would operate.⁷⁸⁸ Another dramatic reversal occurred in 1976—the Court appeared to have embraced its pre-1968 standard of review. No explanation was given,⁷⁸⁹ and the Court did not discuss or overrule the other cases it had issued since the late 1960s. Nor did the Court note that the relevant *Rules of Appellate Procedure* still contained the language added sua sponte to enforce *Couse*.⁷⁹⁰ The Court's decision was subsequently criticized by one commentator as being "rightly decided but wrongly explained."⁷⁹¹

The older ancillary writs standard does seem dated in light of modern procedural innovations. Common-law "ancillary writs" such as *audita querela* have vanished from the law, replaced by procedural rules no longer even identified by the term "writ."⁷⁹² In the Florida Supreme Court, modern-day descendants of the old ancillary writs are sometimes still seen, such as the writ of injunction and the related concept of a judicial "stay."⁷⁹³ "However, the Court in recent years has never attempted to use the all writs clause as the basis of jurisdiction over such matters."⁷⁹⁴ Rather, the Court routinely

787. *Monroe Educ. Ass'n v. Clerk, Dist. Ct. App.*, 3d Dist., 299 So. 2d 1, 3 (Fla. 1974).

788. *E.g.*, *McCain v. Select Comm. on Impeachment*, 313 So. 2d 722 (Fla. 1975). The McCain case involved an effort by a sitting Justice of the Florida Supreme Court to stop impeachment proceedings against him. *Id.* When he sought relief under the all writs clause, the Court rejected it on the grounds that it failed to set forth "a claim within the jurisdiction and responsibility of the court." *Id.* This statement, while vague, seemed much more limited than the sweeping statements the court had made only a year earlier in 1974.

789. The Court cited only one case that had nothing to do with the all writs clause and a 1942 case that clearly had been overruled in 1968. *Shevin ex rel. State v. Pub. Serv. Comm'n*, 333 So. 2d 9, 12 (Fla. 1976) (citing *Wilson v. Sandstrom*, 317 So. 2d 732 (Fla. 1975); *State ex. rel. v. Lee*, 8 So. 2d 19 (Fla. 1942)).

790. FLA. R. APP. P. 4.5(g)(1). The rule's language was even quoted two years later in an opinion apparently applying the pre-1968 standard of review. *Besoner v. Crawford*, 357 So. 2d 414, 415 (Fla. 1978).

791. Mann, *supra* note 778, at 212.

792. Kogan & Waters, *supra* note 1, at 1264.

793. *Id.*

794. *Id.*

finds some other basis of jurisdiction.⁷⁹⁵ In this light, an ancillary writs standard risks converting “all writs” into something essentially meaningless, contrary to the settled rule that all constitutional language should be construed to have an effect.⁷⁹⁶

Nevertheless, by the late 1970s, the Court seemed to be applying the restrictive ancillary writs standard, though it typically did so with a minimum of explanation.⁷⁹⁷ Then, in 1982, another dispute between the Legislature and the Governor came to the Court that was hard to pigeonhole into any particular basis of jurisdiction. To hear the case, the Court abruptly returned to the less restrictive *Couse* standard it had adopted in 1968.⁷⁹⁸ Significantly, the 1982 Court made no mention of its earlier statements suggesting that all-writs jurisdiction would exist if the case was simply important enough.⁷⁹⁹ Rather, the Court applied the earlier “aid[ing] ultimate jurisdiction” standard that had been developed in 1968 by *Couse*.⁸⁰⁰ The Court found that it had all-writs jurisdiction in this particular case because the Governor had taken actions that might restrict the Legislature’s ability to reapportion the state’s legislative and congressional districts.⁸⁰¹ Florida’s Constitution requires the Court to review all apportionment plans for constitutionality,⁸⁰² so the Governor’s actions could have limited the Court’s ultimate exercise of that jurisdiction.

Little has happened in recent years to illuminate the all writs power. In 1984, the Court cited the all writs clause as the basis for hearing a death-row inmate’s request for a judicial order requiring a competency hearing, though no relief was granted.⁸⁰³ Exercising jurisdiction in this manner appeared to be consistent with the “aiding ultimate jurisdiction” standard since the state constitution assigns the Florida Supreme Court exclusive and mandatory appellate jurisdiction over cases involving death sentences.⁸⁰⁴ Thus, the Court has the ultimate jurisdiction to ensure that executions are conducted

795. *E.g.*, *Jones v. State*, 591 So. 2d 911, 912, 916 (Fla. 1991) (granting stay of pending execution based on Court’s jurisdiction over judgments imposing sentence of death); *The Fla. Bar v. Dobbs*, 508 So. 2d 326, 327 (Fla. 1987) (granting writ of injunction against unlicensed practice of law).

796. *Burnsed v. Seaboard Coastline R.R. Co.*, 290 So. 2d 13, 16 (Fla. 1974).

797. *Id.*; *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304–05 (Fla. 1980) (determining that all writs clause cannot confer jurisdiction over district court PCA); *Burnsed*, 290 So. 2d at 16.

798. *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982).

799. *See id.*

800. *Graham*, 412 So. 2d at 361.

801. *Id.*

802. FLA. CONST. art. III, § 16(c).

803. *Alvord v. State*, 459 So. 2d 316, 317 (Fla. 1984).

804. FLA. CONST. art. V, § 3(b)(1).

lawfully. Under this theory, the all writs clause could be invoked to review any matter or to issue any order necessary to ensure the propriety of a death sentence.

Moreover, the Court now has established that its all writs authority cannot be used in itself to establish jurisdiction over an otherwise unreviewable district court ruling in which the entire opinion consisted of the words “PER CURIAM.”⁸⁰⁵ This holding was a strong reaffirmation of the four-corners rule discussed above.⁸⁰⁶ It came after a 2002 amendment to the *Rules of Appellate Procedure*⁸⁰⁷ authorized attorneys, as part of their motions for rehearing in the district courts, to request that the lower court replace its PCA opinion with one that potentially would be reviewable by the Supreme Court of Florida.⁸⁰⁸ The Court held, as it has done elsewhere,⁸⁰⁹ that an extraordinary writ cannot be used to circumvent other limitations placed on its jurisdiction, such as the four-corners rule.⁸¹⁰

The *Couse* standard is probably best seen as very limited and cases qualifying under it would be rare. The policy of “aiding ultimate jurisdiction” makes most sense when confined to a class of cases over which the Court normally would have some form of original or appellate jurisdiction, but where the full and complete exercise of that jurisdiction seems likely to be curtailed or defeated before the Court could otherwise hear the case. That would mean there are two elements: the existence of “ultimate jurisdiction” found in the text of the constitution, and some unusual and impending factor likely to limit or frustrate the complete exercise of that jurisdiction.⁸¹¹ This is consistent with the constitution, which itself says that the purpose of “all writs” is to allow a “complete exercise” of jurisdiction.⁸¹²

The “ultimate jurisdiction” requirement would also mean that petitions to invoke this jurisdiction should identify at least two constitutional provisions establishing jurisdiction. One would be the provision creating the ultimate basis of jurisdiction, and the other would be the all writs clause. In

805. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 988 (Fla. 2004).

806. *See Reaves v. State*, 485 So. 2d 829 (Fla. 1986).

807. Amendments to Fla. Rules of Appellate Procedure, 827 So. 2d 888 (Fla. 2002).

808. *Kenyon*, 882 So. 2d 987.

809. *E.g.*, *Persaud v. State*, 838 So. 2d 529, 532–533 (Fla. 2003).

810. *Kenyon*, 882 So. 2d at 990; *accord St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304–05 (Fla. 1980).

811. Obviously, this could include such traditional ancillary concerns as issuance of a temporary injunction or the stay of lower court proceedings. *See City of Tallahassee v. Mann*, 411 So. 2d 162, 163–64 (Fla. 1981).

812. FLA. CONST. art. V, § 3(b)(7).

other words, “all writs” as conceived in *Couse* appears to have a “dual jurisdiction” requirement.⁸¹³

Some cases already decided in this subcategory suggest another conclusion: the Court’s all writs power is on its firmest footing in death cases, especially those involving pending executions,⁸¹⁴ and in pressing governmental crises.⁸¹⁵ In that vein, it is worth noting that the case *In re Order on Prosecution of Criminal Appeals*,⁸¹⁶ is probably best understood as an all writs case. The case obviously involved a pressing governmental crisis, as the Court expressly noted.⁸¹⁷ A strong argument existed that the county governments affected by the district court’s *sua sponte* order should have been joined as parties below under the rule of due process. Moreover, the Court had “ultimate jurisdiction” over the kind of case involved,⁸¹⁸ and the district court’s failure to join the counties threatened to deprive the Florida Supreme Court of the full exercise of its ultimate jurisdiction because of a technical lack of standing. This would justify “all writs” review under the *Couse* standard.

A few other aspects of all writs jurisdiction deserve comment. As noted above, the Court occasionally has cited the all writs clause as a basis for jurisdiction over writs such as prohibition, which are actually authorized by separate clauses or provisions of the constitution.⁸¹⁹ This is a practice that promotes confusion and should be avoided. The Court’s all writs authority now has evolved into a distinct concept, so it muddies the waters to use the phrase “all writs” as a generalized reference to any or all of the extraordinary writs.

In this vein, it should be noted that there is at least one extraordinary writ—the writ of error *coram nobis*—for which the Court has tended to cite the all writs clause as a basis for jurisdiction.⁸²⁰ However, that is an unusual case and in any event, error *coram nobis* now has been completely subsumed

813. See *Couse v. Canal Auth.*, 209 So. 2d 865, 867 (Fla. 1968); accord *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (citing both all writs clause and ultimate basis of jurisdiction).

814. E.g., *Alvord v. State*, 459 So. 2d 316 (Fla. 1984).

815. E.g., *Graham*, 412 So. 2d at 360; accord *Mize v. County of Seminole*, 229 So. 2d 841, 842 (Fla. 1969).

816. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990).

817. *Id.* at 1131.

818. “Ultimate jurisdiction” potentially existed here on a number of bases, including the Florida Supreme Court authority to review cases affecting a class of state or constitutional officers, the basis actually cited for jurisdiction in the case. See FLA. CONST. art. V, § 3(b)(3).

819. See discussion *supra* Part VII.E.

820. E.g., *Richardson v. State*, 546 So. 2d 1037, 1037 (Fla. 1989). *Coram nobis* is not mentioned in the state constitution’s grant of jurisdiction. See FLA. CONST. art. V, § 3(b).

under existing rules of criminal procedure. The writ of error *coram nobis*⁸²¹ was the previous method by which a prior conviction could be challenged on the basis of newly discovered evidence.⁸²² In 1989, the Supreme Court of Florida essentially abolished the writ as it applied to persons still in custody,⁸²³ though the term “error *coram nobis*” still tended to be used to identify at least some of these cases. Challenges by such persons now must be presented to the trial court pursuant to Rule 3.850 of the *Rules of Criminal Procedure*.⁸²⁴

Initially, there were doubts whether the two-year time limitation for filing a Rule 3.850 case would apply to proceedings in the nature of error *coram nobis*. These were dispelled in 1999 when the Court held that the time limitation did indeed apply, but it gave all potential claimants two years from the date of this decision before actions would begin to be barred.⁸²⁵ The Court also addressed the problem caused by Rule 3.850’s “in custody” requirement in the same opinion.⁸²⁶ This restriction was hard to justify, since it left open the possibility that persons already released from custody would have access to a traditional form of error *coram nobis* to correct a judgment, while those still in custody would not. To eliminate this problem, the Court in 1999 amended the rule to remove the “in custody” requirement.⁸²⁷ Error *coram nobis* cases for persons not in custody frequently arise in the context of immigration proceedings.⁸²⁸ In this specific context, the Court has held that the two-year limitation applies from the date they discover they may be deported.⁸²⁹

Attempts have sometimes been made to use the all writs clause as a means of resurrecting a variety of writs that existed in earlier common law.⁸³⁰ An example is the common-law writ of certiorari. This is an extraordinary “writ of review” that should be distinguished from the separate “appellate certiorari”⁸³¹ jurisdiction previously granted to the Court by provisions of the

821. The name is a peculiar blending of English and Latin. “*Coram nobis*” means “before us.” BLACK’S LAW DICTIONARY 543 (6th ed. 1990). The writ exists to bring an error “before us” for review, i.e. before the court. *Id.*

822. *Richardson*, 546 So. 2d at 1037.

823. See discussion *infra* Part VII.E.

824. *Id.* For a discussion of Rule 3.850, see discussion *infra* Part VI.D.

825. *Wood v. State*, 750 So. 2d 592, 595 (Fla. 1999).

826. *Id.*

827. *Id.*

828. *E.g.*, *State v. Kalici*, 767 So. 2d 451 (Fla. 2000); *Somintac v. State*, 767 So. 2d 1171 (Fla. 2000).

829. *Peart v. State*, 756 So. 2d 42, 46 (Fla. 2000).

830. See *Kilgore v. Bird*, 6 So. 2d 541, 544–45 (Fla. 1942).

831. *Id.* at 544.

Florida Constitution deleted in 1980. Common-law certiorari exists to review and correct actions by a lower tribunal that violates the essential requirements of the law where no other adequate remedy exists.⁸³² However, it is now clear that the Florida Supreme Court cannot issue the writ or review a writ “transferred” from a lower court.⁸³³ The Court’s authority in this regard was abolished in the 1957 jurisdictional reforms that created the district courts of appeal⁸³⁴ and was not revived by the 1980 reforms.⁸³⁵

English common law at one time had developed many other legal devices labeled “writs.”⁸³⁶ In theory, any of these could be revived by interpreting the Florida Constitution’s all writs clause as a generalized reference. In practice, however, such a thing is unlikely. Most of the common-law writs dealt with problems fully covered by a variety of modern legal practices and procedures, most of which are no longer even considered to be “writs.”⁸³⁷ On the whole, it appears likely that the Florida Constitution’s reference to “all writs” should be understood as creating a single highly specialized writ available in the extraordinary circumstances contemplated by *Couse*.⁸³⁸

VIII. EXCLUSIVE JURISDICTION

The Florida Constitution assigns the Supreme Court of Florida exclusive original jurisdiction in six categories, most of which deal with regulation of Florida’s Bench and Bar.⁸³⁹ Jurisdiction is both exclusive and original because most of the topics embraced within this category involve the Court’s administrative powers over the state’s judiciary and lawyers. The two exceptions of the six are in the case of legislative apportionment and determining incapacity of the Governor, which are unique concerns.⁸⁴⁰ In the case of apportionment, jurisdiction is premised on the necessity of a final and swift legal determination that Florida’s electoral districts are constitutionally valid each time they are altered. As for gubernatorial incapacity, jurisdiction im-

832. *E.g.*, *Kilgore*, 6 So. 2d at 541.

833. *1-888-Traffic Schools v. Chief Cir. Judge, Fourth Jud. Cir.*, 734 So. 2d 413, 417 (Fla. 1999).

834. *Robinson v. State*, 132 So. 2d 3, 5 (Fla. 1961).

835. *See Allen v. McClamma*, 500 So. 2d 146, 147 (Fla. 1987).

836. BLACK’S LAW DICTIONARY 1608 (6th ed. 1990).

837. For example, the writ of *audita querela* now has been supplanted by the motion for relief from judgment authorized in the *Rules of Civil Procedure*. *See* BLACK’S LAW DICTIONARY 131 (6th ed. 1990).

838. *Couse v. Canal Auth.*, 209 So. 2d 865 (Fla. 1965).

839. FLA. CONST. art. V, § 3.

840. *See* discussion *infra* Part VIII.E.

plicity rests on the very dramatic constitutional crisis that would occur if there is a dispute over a governor's ability to fulfill the duties of office.

A. *Regulation of The Florida Bar*

The state constitution assigns the Supreme Court of Florida exclusive jurisdiction over the discipline of persons admitted to practice law.⁸⁴¹ As a result, attorneys constitute the only profession not subject to regulation through agencies created by the legislature. They fall within the exclusive purview of the Court. Moreover, on June 7, 1949, the Florida Supreme Court “integrated” The Florida Bar;⁸⁴² that is, it designated it as an arm of the Court for purposes of regulating the practice of law. The Florida Bar maintains that function to this day.⁸⁴³ Integration also means that no one can practice law in Florida without first becoming a member of The Florida Bar.⁸⁴⁴

Regulation of attorneys operates on a number of levels. For one thing, the Court controls admissions to the Bar and promulgates rules that regulate the profession's governance and the procedures used in court.⁸⁴⁵ The Court's most significant power is its ability to discipline lawyers for improprieties based on a detailed set of ethical rules governing attorney conduct,⁸⁴⁶ with The Florida Bar serving as primary enforcer.⁸⁴⁷ In this context, the Court has said that The Florida Bar's discretion to pursue disciplinary action against an attorney is analogous to that of a prosecutor in determining whether to bring a case.⁸⁴⁸ Specifically, the decision whether to do so cannot be compelled by mandamus.⁸⁴⁹

Allegations of unethical conduct are investigated and, if meritorious, may be reviewed by Bar counsel or Bar grievance committees.⁸⁵⁰ The matter then may be examined by the Board of Governors of The Florida Bar.⁸⁵¹ Subject to the control of the Board of Governors, Bar counsel then may file a complaint with the Florida Supreme Court, which initiates formal charges

841. FLA. CONST. art. V, § 15.

842. *In re Fla. State Bar Ass'n*, 40 So. 2d 902, 909 (Fla. 1949).

843. R. REGULATING FLA. BAR 3-3.1.

844. *Fla. State Bar Ass'n*, 40 So. 2d at 904.

845. *See* discussion *infra* Part VIII.C.

846. *See generally* R. REGULATING FLA. BAR.

847. *Id.*

848. *See* *Tyson v. The Fla. Bar*, 826 So. 2d 265, 267–68 (Fla. 2002) (quoting *State v. Cotton*, 769 So. 2d 345, 351 (Fla. 2000)).

849. *Id.* at 268.

850. *See* R. REGULATING FLA. BAR 3-3.1.

851. *Id.*

against the lawyer in question.⁸⁵² At this point, the Chief Justice usually directs the Chief Judge of the appropriate court to appoint a “referee” to resolve factual issues and make recommendations regarding discipline.⁸⁵³ Referees ordinarily are sitting county or circuit judges; however, retired judges also can be appointed.⁸⁵⁴

Procedures before the referee are highly regulated by court rules and are conducted as adversarial proceedings, like a trial.⁸⁵⁵ After hearing the evidence, the referee will issue a report setting down factual findings and recommended discipline, if any.⁸⁵⁶ The report is then forwarded to the Court.⁸⁵⁷ At this point, many attorneys decline to challenge the referee’s findings and recommendations, which the Court then summarily affirms. These are called undisputed Bar cases. If attorneys dispute the reports, their cases usually are accepted for review as a “no request” without oral argument, although in rare cases oral argument is granted. The Bar also can challenge a referee’s report.

Factual findings contained in the referee’s report are presumptively correct and are accepted as true by the Court unless such findings lack support in the evidence,⁸⁵⁸—or stated another way—unless clearly erroneous.⁸⁵⁹ Proceedings before the Supreme Court of Florida are not trials de novo in which all matters might be revisited.⁸⁶⁰ However, the referee’s purely legal conclusions—including disciplinary recommendations—are subject to broader review,⁸⁶¹ though they come to the Court with a presumption of correctness.⁸⁶² In practice, the Court will depart from recommended discipline deemed too harsh or too lenient. However, the Court almost never exceeds the discipline actually requested by Bar counsel.

Discipline can range from a reprimand to disbarment.⁸⁶³ Nearly all forms of discipline result in a public record of the attorney’s misconduct. Disbarred attorneys typically cannot be readmitted to practice law unless at least five years have passed and they prove they have been rehabilitated⁸⁶⁴—

852. See R. REGULATING FLA. BAR 3-3.2.

853. R. REGULATING FLA. BAR 3-7.6(a).

854. *Id.*

855. R. REGULATING FLA. BAR 3-7.6(b).

856. R. REGULATING FLA. BAR 3-7.6(m)(1)(A), (C).

857. R. REGULATING FLA. BAR 3-7.6(m)(2).

858. *The Fla. Bar v. Bajoczky*, 558 So. 2d 1022, 1023 (Fla. 1990).

859. *The Fla. Bar v. McKenzie*, 442 So. 2d 934 (Fla. 1983).

860. See *The Fla. Bar v. Hooper*, 507 So. 2d 1078, 1079 (Fla. 1987).

861. See *The Fla. Bar v. Langston*, 540 So. 2d 118, 121 (Fla. 1989) (citing *The Fla. Bar In re Inglis*, 471 So. 2d 38, 41 (Fla. 1985)).

862. *The Fla. Bar v. Poplack*, 599 So. 2d 116, 118 (Fla. 1992) (citing *The Fla. Bar v. Lipman*, 497 So. 2d 1165, 1168 (Fla. 1986)).

863. R. REGULATING FLA. BAR 3-5.1(a)-(f).

864. *The Fla. Bar re Hipsh*, 586 So. 2d 311, 313 (Fla. 1991).

a difficult thing to do in many cases. Occasionally, the Court disbars without leave to reapply, in which case readmission is possible only by petitioning the Court for permission.⁸⁶⁵

B. *Admission to The Florida Bar*

The Florida Constitution also grants the Florida Supreme Court exclusive jurisdiction over admitting persons to practice law.⁸⁶⁶ The Court has created the Florida Board of Bar Examiners to oversee Bar admissions. This agency reviews all applications for admission using detailed standards included in the *Rules of Court*.⁸⁶⁷ Every applicant to the Florida Bar must undergo a rigorous background investigation conducted by the Bar Examiners, must successfully complete a two-day examination on legal knowledge, and must pass a separate examination on legal ethics, which now can be taken while the student is still in law school.⁸⁶⁸

If the background investigation reveals anything reflecting poorly on an applicant's character or fitness, the Bar Examiners are also authorized to conduct a series of hearings to resolve the matter. Any decision coming out of this process can be taken to the Court by petition for further review. The Court can then accept, reject, or modify the recommendations of the Bar Examiners. Bar admission cases are usually confidential, though a few are occasionally made public and published in *Southern Second*, often with the applicant identified only by initials.⁸⁶⁹

C. *Rules of Court*

The development and issuance of all rules governing practice and procedure before Florida courts lies within the exclusive jurisdiction of the Florida Supreme Court.⁸⁷⁰ The Court has developed a very public and thorough process for rule making. Development of rules has been delegated to various committees of The Florida Bar, except local rules, which are developed by the state's lower courts, reviewed by the Local Rules Committee, and submitted to the Supreme Court of Florida for approval.

In 1993, these committees submitted proposals for revisions every four years. This quadrennial revision process now has been replaced with a stag-

865. *Id.*

866. FLA. CONST. art. V, § 15.

867. *See* R. REGULATING FLA. BAR 1-14, 1-16 (2003).

868. *Id.*

869. *E.g.*, Fla. Bd. of Bar Exam'rs, *re: S.M.D.*, 619 So. 2d 297 (Fla. 1993).

870. *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991).

gered two-year cycle that started in 2002. Proposed amendments to roughly half the rules are made in every even-numbered year, with the remaining half made in every odd-numbered year.⁸⁷¹ The Court then accepts, rejects, or modifies the amendments. This process is sometimes supplemented with special proposals by the committees, petitions for revisions filed by Bar members, and the much rarer sua sponte revisions issued by the Court “if an emergency exists that does not permit reference to the appropriate committee of The Florida Bar for recommendations.”⁸⁷² Out-of-calendar rules revisions sometimes are necessary to address changes in statutory law. Though it seldom happens, court rules can be repealed by a two-thirds vote in each house of the Legislature.⁸⁷³ The lower courts cannot ignore or amend controlling rules.⁸⁷⁴

The Court’s rule-making authority extends only to procedural law, not substantive law. Though the boundary separating the two is not entirely precise, the Court has said that “procedural” law deals with the “course, form, manner, means, method, mode, order, process, or steps” by which substantive rights are enforced.⁸⁷⁵ “Substantive” law “creates, defines, and regulates rights.”⁸⁷⁶ In other words, “procedure” is the “machinery of the judicial process” while “substance” is the product reached.⁸⁷⁷

These distinctions are important because they separate the rule-making authority of the Court from the lawmaking authority of the Legislature. Thus, it is possible for the Legislature to enact a “procedural” statute that can be superseded by court rule⁸⁷⁸ just as it is possible for the Court to enact a rule so substantive in nature that it violates the legislature’s prerogative.⁸⁷⁹ Disagreements between the two branches of government have occurred, most noticeably in the development of the *Florida Evidence Code*.⁸⁸⁰ For the most part, however, the Court has enacted rules consistent with legislative amendments to the Evidence Code, sometimes even when The Florida Bar

871. FLA. R. JUD. ADMIN. 2.130(c)(1).

872. FLA. R. JUD. ADMIN. 2.130(a).

873. FLA. CONST. art. V, § 2(a). This occurred in early 2000 during passage of a package of death-penalty statutes subsequently found unconstitutional by the Court. *See Allen v. Butterworth*, 756 So. 2d 52, 64 (Fla. 2000).

874. *State v. McCall*, 301 So. 2d 774, 775 (Fla. 1974).

875. *Kirian*, 579 So. 2d at 732 (citing *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

876. *Id.* (citing *State v. Garcia*, 229 So. 2d 236 (Fla. 1969)).

877. *Id.* (citing *Fla. Rules of Criminal Procedure*, 272 So. 2d at 66 (Adkins, J. concurring)).

878. *Id.*

879. *E.g.*, *State v. Furen*, 118 So. 2d 6, 12 (Fla. 1960).

880. *E.g.*, *In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339, 342 (Fla. 2000) [hereinafter *Evidence Amendments I*].

recommended against doing so.⁸⁸¹ On occasion, the Court has even called for a “cooperative” effort with the legislature to eliminate problems between conflicting statutes and rules⁸⁸² and occasionally has deferred adopting a legislative change to the *Florida Evidence Code* until the legislative committee could provide additional information requested by the Justices.⁸⁸³ However, the Court lacks any authority to issue rules governing state administrative proceedings, which fall within the legislature’s authority.⁸⁸⁴ This includes executive branch agencies that are quasi-judicial in nature, such as the courts of compensation claims.⁸⁸⁵

It is worth noting that by promulgating a rule, the Court does not vouch for its constitutionality.⁸⁸⁶ A court rule could thus be challenged in a future proceeding on any valid constitutional ground. This is because rules are issued as an administrative function of the Court, not as an adjudicatory function. There are no parties arguing an actual dispute, the nature of which may be unforeseen at the time the rule is adopted.⁸⁸⁷ In sum, there is no case or controversy to resolve in a rule-making case.⁸⁸⁸ For much of the same reason, the act of promulgating a rule does not foreclose challenges that it contains “substantive” aspects that are invalid. Questions such as these can only be decided when affected parties bring an actual controversy for resolution. Thus, ruling on the constitutional aspects of a newly adopted rule risks giving an advisory opinion.⁸⁸⁹

881. *In re Amendments to the Fla. Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002) [hereinafter *Evidence Amendments II*].

882. *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992).

883. *Amendments to the Fla. Evidence Code*, 29 Fla. L. Weekly S787 (Fla. 2004) [hereinafter *Evidence Amendments III*].

884. *Gator Freightways, Inc. v. Mayo*, 328 So. 2d 444, 446 (Fla. 1976); *Bluesten v. Fla. Real Estate Comm’n*, 125 So. 2d 567, 568 (Fla. 1960).

885. *Amendments to the Fla. R. of Workers’ Comp. P.*, 29 Fla. L. Weekly S738, S739 (Fla. 2004).

886. *Report of the Supreme Court Workgroup on Pub. Records*, 825 So. 2d 889, 890 (Fla. 2002).

887. *See, e.g., Evidence Amendments I*, 782 So. 2d at 341. This opinion declined “to address the substantive/procedural issues until such time as the issue comes before the Court in a true ‘case or controversy.’” *Id.* It should be emphasized, however, that this comment was made in the context of refusing to adopt a purported statutory change to the hearsay rule. *Id.* at 340–41.

888. *Evidence Amendments II*, 825 So. 2d at 341.

889. *See discussion supra Part IV for discussion of the policy against giving advisory opinions.*

D. *Judicial Qualifications*

The next form of exclusive jurisdiction governs “judicial qualifications,” which exist solely for the purpose of disciplining the state’s judges and justices for ethical improprieties. It is analogous to Bar discipline, though accomplished through a different agency. Jurisdiction here rests on a constitutional provision that specifies in considerable detail how such cases are reviewed.⁸⁹⁰ As noted earlier, cases of this type are commenced at the instance of the Judicial Qualifications Commission (“JQC”), which is authorized to investigate alleged impropriety by any judge or justice.⁸⁹¹ Upon recommendation of the JQC, the Supreme Court of Florida is then vested with jurisdiction to consider the case.

Jurisdiction here is exclusive because the discipline proposed by the JQC is considered to be only a recommendation.⁸⁹² The JQC is a separate body with its own rule-making authority.⁸⁹³ The JQC’s factual findings are given a presumption of correctness on review while its recommendations are persuasive but not conclusive,⁸⁹⁴ and the Florida Supreme Court has sometimes departed from recommended discipline.⁸⁹⁵ Indeed, the Supreme Court “may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations” brought before it.⁸⁹⁶ Moreover, the JQC does not constitute a “court” in itself and is not subject to the writ of prohibition.⁸⁹⁷ Discipline recommended by the JQC will be imposed only when supported by clear and convincing proof of the impropriety in question.⁸⁹⁸

The Court has held that judicial qualification proceedings are not in the nature of a criminal prosecution and are not subject to the constitutional restraints peculiar to criminal law.⁸⁹⁹ The doctrines of *res judicata* and double jeopardy do not apply⁹⁰⁰ and the JQC can, therefore, inquire into matters previously investigated in other contexts. As noted earlier, the Florida Constitution automatically disqualifies the sitting Justices of the Florida Supreme Court to hear a proceeding brought against one of their own number. Instead, a panel of specially appointed “Associate Justices” will hear the case.

890. FLA. CONST. art. V, § 12.

891. See discussion *supra* Part II.H.1.

892. *State ex rel. Turner v. Earle*, 295 So. 2d 609, 610–11 (Fla. 1974).

893. FLA. CONST. art. V, § 12(a)(4).

894. *Turner*, 295 So. 2d at 610–11 (Fla. 1974).

895. *In re Norris*, 581 So. 2d 578, 579–80 (Fla. 1991).

896. FLA. CONST. art V, § 12(c)(1).

897. *Turner*, 295 So. 2d at 611.

898. *In re LaMotte*, 341 So. 2d 513, 516 (Fla. 1977).

899. *In re Kelly*, 238 So. 2d 565, 569 (Fla. 1970).

900. *Id.* at 570.

E. *Review of Legislative Apportionment*

In every year ending in the numeral two, the Florida Legislature is required to reapportion the state's legislative and congressional districts to reflect the latest United States Census.⁹⁰¹ Reapportionment must be finalized before the fall's elections that same year, which might not be possible if lawsuits on the question began in some lower court and wended through the appellate system. Accordingly, the state constitution has given the Court exclusive, original, and mandatory jurisdiction to review each decennial reapportionment plan approved by the legislature.⁹⁰²

The Court's authority in this regard is extraordinary and limited.⁹⁰³ All questions regarding validity of the reapportionment plan can be litigated to finality in a single forum, for both trial and appellate purposes.⁹⁰⁴ Moreover, if the legislature is unable to reapportion within certain time constraints, the Court itself has authority to impose a reapportionment plan by order.⁹⁰⁵ Judicial apportionment, for example, was necessary in 1992 with respect to some of the state's districts.⁹⁰⁶ In that instance, the Court was swayed by arguments of the United States Justice Department regarding the federal Voting Rights Act.⁹⁰⁷ Thus, federal issues are an important concern here. It should be noted, however, that the Supreme Court of Florida's determination of validity does not necessarily bind the federal courts or the Justice Department.⁹⁰⁸

F. *Gubernatorial Incapacity*

The last form of exclusive jurisdiction vests the Florida Supreme Court with authority to decide if the governor cannot fulfill the duties of office due to incapacity. Any inquiry into this form of jurisdiction must begin with a brief explanation of laws governing succession in other contexts. It is clear, for example, that the Lieutenant Governor succeeds to the office of Governor immediately upon the occurrence of a vacancy, whether by death, by resigna-

901. FLA. CONST. art. III, § 16(a).

902. FLA. CONST. art. III, § 16(c).

903. *See In re* Constitutionality of House Joint Resolution 1987, 817 So. 2d 819 (Fla. 2002).

904. *See id.*

905. *See id.*

906. *In re* Constitutionality of Senate Joint Resolution 2G, 601 So. 2d 543, 544 (Fla. 1992).

907. *Id.* at 544–45.

908. *Id.* at 545.

tion, or by removal following impeachment.⁹⁰⁹ The Lieutenant Governor likewise becomes acting Governor automatically once the Governor is impeached and until acquittal by the Senate.⁹¹⁰ Moreover, if the Lieutenant Governor cannot succeed to the office in any situation, the succession is established by state law.⁹¹¹

The constitutional language is not as clear in describing what happens if a Governor is allegedly unable to perform the duties of office due to incapacity. The relevant language states that the Lieutenant Governor will become acting Governor during the period of incapacity.⁹¹² However, the constitutional provision then falls into ambiguity by not stating exactly how incapacity will be determined. There are two separate methods of officially establishing incapacity.⁹¹³ The first is that the Florida Supreme Court “may” determine the issue upon due notice after the filing of a written suggestion of incapacity by the full cabinet⁹¹⁴—the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture.⁹¹⁵ The second is that the Governor “may” establish the fact by filing a certificate of incapacity with the custodian of state records.⁹¹⁶

The obvious ambiguity rests on this question: Does the word “may” in these two provisions mean that one or the other method must be used, or does it mean that neither is absolutely necessary? In other words, could the Lieutenant Governor simply assume the role of acting Governor without either of these two processes occurring? Common sense dictates that there must be some formal process for determining incapacity, if only to establish that the person acting as Governor has lawfully assumed the executive powers. If these powers were not lawfully vested, every action by the Lieutenant Governor would be subject to legal challenge. This in turn suggests that the two methods of certifying gubernatorial incapacity are alternatives, at least one of which must occur.

Moreover, this same conclusion is reinforced by the fact that a Lieutenant Governor assuming the role of acting Governor without any such certification would be subject to a petition for writ of quo warranto, which under

909. FLA. CONST. art. IV, § 3(a).

910. FLA. CONST. art. IV, § 3(b).

911. FLA. CONST. art. IV, § 3(a); *see also* FLA. STAT. §§ 14.055, .056 (2002).

912. FLA. CONST. art. IV, § 3(b).

913. *Id.*

914. *Id.*

915. *Compare id. with* FLA. CONST. art. IV, § 4(a).

916. *Id.* The Governor might file such a certificate, for example, before undergoing serious surgery. This would permit the Lieutenant Governor to serve as acting Governor until such time as the Governor files another certificate indicating that the incapacity no longer exists. *Id.*

established case law could be filed by any state citizen.⁹¹⁷ By this means the issue could be brought before the Court if neither of the two requirements were met. Quo warranto—perhaps in connection with the Court’s all-writs authority⁹¹⁸—thus also would exist as a potential means of addressing the legal issues that would arise if a governor was unable to declare incapacity and one or more members of the cabinet refused to join in the suggestion of incapacity filed with the Court.⁹¹⁹ All-writs jurisdiction might properly exist if the refusal of the parties in question would frustrate the Court’s jurisdiction to determine incapacity of the Governor, even if the Court ultimately found the allegations unfounded.⁹²⁰ This would be so because the constitutional language leaves open the possibility that a Governor could be truly incapacitated and the Lieutenant Governor could be unable to act as Governor if the cabinet was unable to agree on the issue. In that unlikely situation, the state could be left without an acting executive.

Once the suggestion is filed by the cabinet, the Court resolves the issue as both fact-finder and final adjudicator of the question. The constitution is silent as to what standard must be used, and the Court has never had an occasion to interpret this provision of the constitution since it was added in 1968. However, there is at least one actual case from another state. In 2003, the Governor of Indiana suffered a stroke that rendered him unconscious for a period of time before he died.⁹²¹ The analogous provision of the Indiana Constitution required that a petition be filed with the Indiana Supreme Court by the speaker of the house and president of the senate.⁹²² A few days later these two officers filed their petition, but included with it a statement by the attending physician verifying the Governor’s incapacity and a letter from the Governor’s general counsel stating that the Governor’s family approved of the transfer of power.⁹²³ The Indiana Supreme Court approved the request

917. State *ex rel.* Watkins v. Fernandez, 143 So. 638, 640 (Fla. 1932); Martinez v. Martinez, 545 So. 2d 1338, 1339 (Fla. 1989) (citing State *ex rel.* Pooser v. Wester, 170 So. 736, 737 (Fla. 1936)).

918. FLA. CONST. art. V, § 3(b)(7).

919. There is an enhanced possibility in Florida that political motivations could come into play in some future dispute over alleged incapacity because the three cabinet members are elected independently of the Governor and Lieutenant Governor. See FLA. CONST. art. IV, §§ 1, 4.

920. FLA. CONST. art. V, § 3(b)(7).

921. Mary Beth Schneider, *O’Bannon Dies; Frank O’Bannon: January 30, 1930-September 13, 2003; Plane Returns Body to Indiana*, INDIANAPOLIS STAR, Sept. 14, 2003, at A1 [hereinafter *O’Bannon Dies*].

922. Mary Beth Schneider et al., *Power Transferred to Kernan*, INDIANAPOLIS STAR, Sept. 11, 2003, at A1.

923. *Id.*; *O’Bannon Dies*, *supra* note 910.

and expressly ratified all actions of the acting Governor from the time the Governor became incapacitated.⁹²⁴

The Indiana example shows an obvious attempt to establish complete certainty about the Governor's condition and the transfer of authority. In its order, the Indiana court expressly found that there was “no basis for doubt or dispute” about the Governor's incapacity. The situation obviously would be different if a doubt or dispute did exist, especially if the dispute was raised by the Governor in question. While not offering much guidance on this latter hypothetical issue, the actual events in Indiana suggest a central point—a great unwillingness on the part of all concerned, including the Indiana court, to seek and certify incapacity if it was in any sense a political act. “Doubt or dispute” thus could be seen as the line dividing obvious cases of incapacity from those requiring a far more stringent standard of review.

Under Florida's constitutional scheme, a similar procedure appears to be contemplated. The Florida Constitution expressly provides for impeachment in the House followed by trial in the Senate of any Governor “for misdemeanor in office.”⁹²⁵ While one case suggests that this phrase must be defined by the legislature itself,⁹²⁶ another says that the term is broader than the criminal concept of “misdemeanor” and includes any “willful malfeasance, misfeasance, or nonfeasance in office.”⁹²⁷ Further, the term may not even require actual corruption or criminal intent.⁹²⁸ The very fact that this impeachment process exists—and is exclusively placed in the hands of the inherently political legislative branch of government—means it would be illogical to seek a certification of incapacity in the Supreme Court of Florida for any situation that merely involves impeachable activity.

The impeachment process likewise requires supermajorities in both houses and other extraordinary safeguards that do not exist in certifying incapacity.⁹²⁹ A fair conclusion, supported by the Indiana example, is that certification of incapacity exists only to address a truly catastrophic failure in the Governor's physical or mental health, whether short- or long-lived. It does not exist to serve as a faster means of impeachment, nor is it a proper remedy where the motivations are political. In sum, where there is “doubt or dispute” about incapacity, the Court would show great reluctance to certify

924. *In re* Temporary Inability of Governor Frank L. O'Bannon to Discharge the Duties of Office, 798 N.E.2d 838, 838–39 (Ind. 2003).

925. FLA. CONST., art. III, § 17(a), (c).

926. *Forbes v. Earle*, 298 So. 2d 1, 5 (Fla. 1974).

927. *In re* Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Fla., 93 So. 2d 601, 605–06 (Fla. 1957).

928. *Id.* at 606.

929. FLA. CONST. art. III, § 17(a), (c).

incapacity. If the allegations fairly constitute impeachable activities, incapacity would not be warranted and the matter would be left to the legislature to resolve.

After the Florida Supreme Court certifies the incapacity of a Governor, it also has exclusive jurisdiction to determine that the incapacity no longer exists, thereby transferring the executive powers back to the Governor.⁹³⁰ This jurisdiction is invoked in the same way described above—by the filing of a written suggestion with the Court. However, the suggestion in this instance can be filed by the unanimous cabinet, by the Governor individually, or by “the legislature.”⁹³¹ While it might be cumbersome for the legislature to convene and vote on the issue, it appears unlikely that the need would arise except in some extraordinary situation. The most likely person to file the suggestion is the Governor seeking restoration of the executive powers.

IX. CONCLUSION

The Supreme Court of Florida was created in 1845 and held its first sessions the following year. Since that time, a considerable body of custom and precedent has come into existence regarding the Court’s operation and jurisdiction. This body is not widely known outside the Court, nor has there been much previous effort to compile information about routine operations in a comprehensive collection. The present article is an effort to fill this gap, to update the previous 1993 article because of major changes that have occurred in the intervening years, and to provide information to lawyers and laypersons about their state’s highest court.

930. FLA. CONST. art. IV, § 3(b).

931. *Id.*