

# *Nova Law Review*

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*Volume 23, Issue 1*

1998

*Article 2*

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## Appellate Practice

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# Appellate Practice: 1998 Survey of Florida Law

Anthony C. Musto \*

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## I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida.<sup>1</sup> Although this article will focus primarily on cases decided between July 1, 1997 and June 30, 1998, it will also deal with certain cases decided shortly before and after that period which are either of particular interest to the appellate practitioner or which provide the background for, or the culmination of, issues that were addressed by cases decided throughout that period.

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore will not be discussed here. Rather, this

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1. For a discussion of developments in appellate practice for 1993, 1995, 1996, and 1997, see Anthony C. Musto, *Appellate Practice: 1997 Survey of Florida Law*, 22 NOVA L. REV. 29 (1997) [hereinafter *1997 Survey*]; Anthony C. Musto, *Appellate Practice: 1996 Survey of Florida Law*, 21 NOVA L. REV. 13 (1996) [hereinafter *1996 Survey*]; Anthony C. Musto, *Appellate Practice: 1995 Survey of Florida Law*, 20 NOVA L. REV. 1 (1995) [hereinafter *1995 Survey*]; Anthony C. Musto, *Appellate Practice: 1993 Survey of Florida Law*, 18 NOVA L. REV. 1 (1993) [hereinafter *1993 Survey*].

article will focus on matters relating to practice in the appellate courts and will examine those areas. Additionally, this article will not discuss cases relating to the preservation of particular issues, nor will it discuss the question of whether particular errors were harmless.

## II. ADMINISTRATIVE ORDERS

Chief Justice Major B. Harding of the Supreme Court of Florida issued two administrative orders of significance to appellate practitioners. One dealt with the impact of modern technology on *Florida Rule of Appellate Procedure* 9.210, which states that the text of briefs “shall be printed in type of no more than 10 characters per inch.”<sup>2</sup> The order noted that “[w]hile this requirement may have made eminent sense in the early days of computerization, it is difficult to justify, and sometimes impossible to honor, in a day when computers instantaneously perform typographic functions once available only to the most skilled manual typesetters.”<sup>3</sup> The order went on to state that “[f]oremost among these functions is the ability to adjust spacing so that individual characters take up only so much horizontal space as is necessary” and that “[w]e are nearing the day when these proportionately spaced fonts will be the only ones installed on most computers.”<sup>4</sup> The order indicated that the problems created by the new technology are twofold: 1) because the number of characters per inch will vary throughout the document, attorneys and court clerks are “left in a quandary about whether briefs actually meet the rules’ standards;” and 2) “briefs should not circumvent the page-length requirements through the simple expedient of adjusting fonts.”<sup>5</sup>

Noting that the supreme court had referred the matter to the Florida Appellate Court Rules Committee for modifications to the existing rule, the order adopted “a clear-cut interim solution to this problem.”<sup>6</sup> It did so by stating that no typed brief shall be rejected for failure to comply with the font requirements if it meets the following criteria:

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2. FLA. R. APP. P. 9.210(a)(2).

3. Order on Rule 9.210, *Florida Rules of Appellate Procedure*, Chief Justice Major B. Harding (on file with author).

4. *Id.*

5. *Id.*

6. *Id.*

- (1) It is reproduced in a font that is:
  - (a) 12 point type or larger if the font is not proportionately spaced, provided the font does not exceed ten characters per inch, or
  - (b) 14 point Times Roman (or similar) type or larger if the font is proportionately spaced; and
- (2) It includes a statement certifying the size and style of type used in the brief (e.g., 14 point proportionately spaced Times Roman; 12 point Courier New, a font that is not proportionately spaced).<sup>7</sup>

The order further notes that its criteria are modeled after the requirements of the United States Court of Appeals for the Eleventh Circuit<sup>8</sup> and may be interpreted in light of them.<sup>9</sup>

The other order established a uniform case numbering system for the Florida court system.<sup>10</sup> It directs that the appellate courts are to implement the new system by January 1, 2000, and that trial courts may implement it as early as January 1, 1999.<sup>11</sup> Furthermore, the courts must implement a uniform case numbering system before providing the public with access to court data via the Internet or by January 1, 2003, whichever occurs first.<sup>12</sup> Supreme court case numbers will begin with "SC," while district court cases will begin with the number of the district, followed by the letter "D."<sup>13</sup> The court designation will be followed by the year and then by sequential five-digit numbers that will start with "00001" each year.<sup>14</sup> For example, the first case in the First District Court of Appeal in 2000 will be numbered 1D200000001. A similar approach will be taken with regard to county and circuit court cases, with each county being identified by an assigned two-digit code at the beginning of the case number and with the addition of two-

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7. *Id.*

8. 11th Cir. FED. R. APP. P. 28-2(d) & 32-4.

9. Order on Rule 9.210, *Florida Rules of Appellate Procedure*, Chief Justice Major B. Harding (on file with author).

10. Order, Chief Justice Major B. Harding (on file with author).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

letter designations for court types.<sup>15</sup> There will also be optional branch location and party/defendant identifiers.<sup>16</sup>

The order stated:

[s]uch a system is required to ensure that, in this age of technology, case numbers include unique identifiers that easily distinguish the origin of a case, type of case, year of filing, and numerical sequence of a case when case numbers are displayed externally in an automated format for public access.<sup>17</sup>

### III. JURISDICTION OF THE SUPREME COURT OF FLORIDA

In *State v. Matute-Chirinos*,<sup>18</sup> the State sought certiorari in the third district to review a pretrial ruling in a capital murder prosecution.<sup>19</sup> Pursuant to a request by the state, the district court certified the case as one having great effect on the administration of justice throughout the state requiring immediate resolution by the supreme court.<sup>20</sup>

The supreme court noted that the provisions of Article V, section 3(b)(5) of the Florida Constitution, which allow it to review trial court decisions that are passed through district courts by certification, states that the court:

[m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.<sup>21</sup>

The court then found that “[t]his provision does not give this [c]ourt jurisdiction to accept a certification by a district court except in cases in which an appeal is pending.”<sup>22</sup> Since the case at issue had been before the district court on a petition for a writ of certiorari, the court found that the

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15. Order, Chief Justice Major B. Harding (on file with author).

16. *Id.*

17. *Id.*

18. 713 So. 2d 1006 (Fla. 1998).

19. *Id.* at 1007.

20. *Id.*

21. *Id.* at 1007 (quoting FLA. CONST. art. V, § 3(b)(5)).

22. *Id.*

constitutional provision did not provide it with jurisdiction.<sup>23</sup> The court noted that it had previously accepted jurisdiction under similar circumstances in *State v. Hootman*<sup>24</sup> and concluded that the decision to do so had been erroneous.<sup>25</sup>

#### IV. APPEALS FROM COUNTY COURTS TO DISTRICT COURTS

In *State Farm Mutual Automobile Insurance Co. v. U.S.A. Diagnostics, Inc.*,<sup>26</sup> a county court denied a motion to compel arbitration but certified to the fourth district, pursuant to *Florida Rule of Appellate Procedure* 9.030(b)(4), a question of great public importance.<sup>27</sup> The appellate court asked the parties to address the question of whether it had jurisdiction and both responded by seeking to have the court rule on the merits of the case and to answer the certified question.<sup>28</sup> “We can do so only if we have jurisdiction,” the court stated.<sup>29</sup> “We do not,” it concluded.<sup>30</sup>

The court recognized that its jurisdiction under *Florida Rule of Appellate Procedure* 9.030(b)(4) to review county court orders certified to be of great public importance is limited to final orders<sup>31</sup> and to non-final orders otherwise appealable to the circuit court under Rule 9.140(c),<sup>32</sup> which deals with appeals by the state in criminal cases.<sup>33</sup> Since the order on the motion to compel arbitration was neither final nor an order under Rule 9.140(c), the court found that it “does not have discretionary jurisdiction to review this certified question.”<sup>34</sup> Rather, the court pointed out, “appellate jurisdiction of non-final orders [entered by county courts] that determine entitlement to arbitration lies in the circuit courts.”<sup>35</sup> Accordingly, the appeal was transferred to the appropriate circuit court.<sup>36</sup>

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23. *Matute-Chirinos*, 713 So. 2d at 1007.

24. 709 So. 2d 1357 (Fla. 1998).

25. *Matute-Chirinos*, 713 So. 2d at 1007.

26. 696 So. 2d 1334 (Fla. 4th Dist. Ct. App. 1997).

27. *Id.* at 1334.

28. *Id.*

29. *Id.*

30. *Id.*

31. FLA. R. APP. P. 9.030(b)(4)(A).

32. FLA. R. APP. P. 9.030(b)(4)(B).

33. FLA. R. APP. P. 9.030(b)(4)(B).

34. *State Farm*, 696 So. 2d at 1335.

35. *Id.*

36. *Id.*

## V. APPELLATE REVIEW BY CIRCUIT COURTS

The third district held in *Metropolitan Dade County v. Hernandez*<sup>37</sup> that the circuit court lacked jurisdiction to consider an appeal from a hearing officer's order upholding a citation for a county animal control violation.<sup>38</sup> The court relied on the fact that the county code provided that a violator or the county could seek to overturn the order of the hearing officer by making application to the county court for a trial de novo on the merits.<sup>39</sup> The court found that the county was authorized by sections 162.13 and 162.21(8) of the *Florida Statutes* to adopt such a method of review.<sup>40</sup>

In quashing a circuit court decision that had reversed the hearing officer's determination, the third district stated that while it "sympathize[d] with and appreciate[d] both Mr. Hernandez's and the County's frustration with the amount of time, energy and heartache this case has caused," it "believe[d] that the proper course will at last be followed, which will clear this matter up for both parties."<sup>41</sup>

In *Oceania Joint Venture v. Ocean View of Miami, Ltd.*,<sup>42</sup> a petitioner sought certiorari review in the third district of an order from the appellate division of the Eleventh Circuit Court of Appeals denying a motion for reinstatement of an appeal.<sup>43</sup> The petitioner asserted that a prior order of dismissal based on the failure to join an indispensable party was void because it had been entered by only one circuit judge, rather than by a three-judge panel as required by a local rule.<sup>44</sup>

The petitioner did not raise the issue regarding the local rule at the time the motion to dismiss was considered, neither in a certiorari petition that sought review of the dismissal order in the third district, nor in a subsequent certiorari petition that requested the supreme court to order the district court to accept jurisdiction and reverse the circuit court's order.<sup>45</sup> The third district rejected the petitioner's contention that the local rule was jurisdictional in nature and that a claim that it was violated could therefore be raised at any time.<sup>46</sup> In denying certiorari, the court said:

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37. 708 So. 2d 1008 (Fla. 3d Dist. Ct. App. 1998).

38. *Id.* at 1009.

39. *Id.* at 1010.

40. *Id.*

41. *Hernandez*, 708 So. 2d at 1011.

42. 707 So. 2d 917 (Fla. 3d Dist. Ct. App. 1998).

43. *Id.* at 918.

44. *Id.* at 919.

45. *Id.* at 917.

46. *Id.* at 918.

[T]he three-judge panel requirement . . . is a rule of court that is procedural rather than jurisdictional in nature. Consequently, Oceania's failure to timely challenge, in its prior appeals, the order of dismissal on the grounds that it was entered by one circuit judge has resulted in a waiver of this issue.<sup>47</sup>

## VI. NONAPPEALABLE ORDERS

In *Polk County v. Sofka*,<sup>48</sup> a plaintiff obtained a verdict against the county in a suit to recover for injuries sustained in an automobile accident.<sup>49</sup> Subsequent to the county's motion for a new trial being granted, the parties executed a settlement agreement which provided for a judgment in the plaintiff's favor.<sup>50</sup> The agreement also provided that the county might seek review of two appellate issues relating to the trial court's refusal to dismiss, enter summary judgment for the county, or grant a directed verdict against the plaintiff.<sup>51</sup> The agreement further provided:

that the intermediate appellate court ha[d] jurisdiction to hear [the] [county's] appeal . . . ;” that “[t]he record on appeal [would] be the record as it exist[ed] at the time of the entry of the Stipulated Final Judgment;” and that, “if the intermediate appellate court, for any reason, determine[d] [that] there [was] no jurisdiction or standing, or if the appeal [was] not dispositive of the issue of [the county's] liability . . . , the Stipulated Final Judgment [would] be void, and the parties [would] be entitled to again proceed to trial.<sup>52</sup>

The second district affirmed the judgment and certified a question relating to the merits of the case.<sup>53</sup> The supreme court declined to answer the question, concluding that the district court had lacked jurisdiction to hear the appeal.<sup>54</sup> The court noted that neither side had requested that the order granting a new trial be set aside and that the county be permitted to withdraw its motion.<sup>55</sup> The court therefore found that the county, “having requested

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47. *Oceania Joint Venture*, 707 So. 2d at 918–19.

48. 702 So. 2d 1243 (Fla. 1997).

49. *Id.* at 1244.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Polk County v. Sofka*, 675 So. 2d 615 (Fla. 2d Dist. Ct. App. 1996).

54. *Sofka*, 702 So. 2d at 1245 (Fla. 1997).

55. *Id.* at 1244.

and received a new trial,” was “deemed to have waived its right immediately to seek appellate review of rulings made prior to, or during, the previous trial.”<sup>56</sup>

The court recognized that the parties had stipulated to the district court’s jurisdiction, but pointed out that “parties cannot stipulate to jurisdiction over the subject matter where none exists.”<sup>57</sup> The court also agreed with a statement made by the parties in a joint brief on the jurisdictional question that the court’s conclusion “will result in a waste of judicial resources.”<sup>58</sup> In light of the fact that courts are bound to take notice of the limits of their authority and to notice jurisdictional defects and enter appropriate orders,<sup>59</sup> however, the court found the waste of judicial resources to be regrettable but unavoidable.<sup>60</sup>

In *Hastings v. Demming*,<sup>61</sup> the supreme court found that “[n]onfinal orders denying summary judgment on a claim of workers’ compensation immunity are not appealable unless the trial court order specifically states that, as a matter of law, such a defense is not available to a party.”<sup>62</sup> The decision approved the district court decision under review<sup>63</sup> and disapproved the decisions in *Breakers Palm Beach, Inc. v. Gloger*<sup>64</sup> and *City of Lake Mary v. Franklin*<sup>65</sup> to the extent that they are inconsistent with the reasoning expressed in the opinion.<sup>66</sup>

Cases in which district courts held that orders were not appealable include *Health Care Associates, Inc. v. Brevard Physicians Group, P.A.*,<sup>67</sup> (confirming in part and modifying or vacating in part an arbitration award); *State Farm Mutual Automobile Insurance Co. v. Bravender*,<sup>68</sup> (assessing attorney’s fees as the result of discovery misconduct); *Rowell v. Florida Department of Law Enforcement*,<sup>69</sup> (refusing of the Florida Department of

56. *Id.*

57. *Id.* at 1245 (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

58. *Id.* at 1244.

59. *Sofka*, 702 So. 2d at 1244 (quoting *West 132 Feet v. City of Orlando*, 86 So. 197, 198–99 (Fla. 1920)).

60. *Id.*

61. 694 So. 2d 718 (Fla. 1997).

62. *Id.* at 720.

63. *Hastings v. Demming*, 682 So. 2d 1107 (Fla. 2d Dist. Ct. App. 1996).

64. 646 So. 2d 237 (Fla. 4th Dist. Ct. App. 1994).

65. 668 So. 2d 712 (Fla. 5th Dist. Ct. App. 1996).

66. *Hastings*, 694 So. 2d at 720.

67. 701 So. 2d 118 (Fla. 5th Dist. Ct. App. 1997).

68. 700 So. 2d 796 (Fla. 4th Dist. Ct. App. 1997).

69. 700 So. 2d 1242 (Fla. 2d Dist. Ct. App. 1997).

Law Enforcement to certify an individual's eligibility to have her criminal record sealed); *Park Imaging, Inc. v. Steadfast Insurance Co.*,<sup>70</sup> (granting partial summary final judgment providing that the amount of money an insured's insurance company had to spend on costs and expenses in defending the insured, including attorney's fees, would reduce the insurance company's monetary limit of liability insurance by the amount of those costs and expenses); *Gomez v. Gomez*,<sup>71</sup> (non-final order granting wife's motion to join her brother-in-law as a defendant in her dissolution action); *Kalantari v. Kalantari*,<sup>72</sup> (granting interlocutory order denying a motion to set aside an antenuptial agreement); *Estate of Nolan v. Swindle*,<sup>73</sup> (authorizing previously appointed administrator ad litem to file an action seeking to set aside will and revocable living trust on the ground that beneficiaries had exercised undue influence); *Lynbrook Court Condominium Ass'n. v. Arana*,<sup>74</sup> (determining that a case had not been dismissed, entered subsequent to an order stating that the case shall stand dismissed thirty days from the date of the order unless it appeared that the matter was diligently being prosecuted within that thirty day period); *Caribbean Transportation, Inc. v. Acevedo*,<sup>75</sup> (order staying action and retaining jurisdiction pending arbitration); *Salzverg v. Salzverg*,<sup>76</sup> (bifurcating order which simply dissolved the parties' marriage); and, *Thomas v. Silvers*,<sup>77</sup> (denying motion to dismiss for failure to serve complaint within 120 days as required by *Florida Rule of Civil Procedure* 1.070(i)).<sup>78</sup>

## VII. FINAL ORDERS

In *Hills v. State*,<sup>79</sup> the first district rejected a claim that an order approving mental treatment pursuant to section 916.107(3) of the *Florida Statutes* was non-final because it was only effective for a period of ninety days, and the appellee could once again petition to continue treatment once this period had expired.<sup>80</sup> The court determined "that this potentiality does

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70. 700 So. 2d 185 (Fla. 4th Dist. Ct. App. 1997).

71. 702 So. 2d 255 (Fla. 3d Dist. Ct. App. 1997).

72. 711 So. 2d 1368 (Fla. 3d Dist. Ct. App. 1998).

73. 712 So. 2d 421 (Fla. 2d Dist. Ct. App. 1998).

74. 711 So. 2d 249 (Fla. 3d Dist. Ct. App. 1998).

75. 698 So. 2d 604 (Fla. 3d Dist. Ct. App. 1997).

76. 696 So. 2d 1278 (Fla. 3d Dist. Ct. App. 1997).

77. 701 So. 2d 389 (Fla. 3d Dist. Ct. App. 1997).

78. The court certified conflict with *Mid-Florida Assoc., Ltd. v. Taylor*, 641 So. 2d 182 (Fla. 5th Dist. Ct. App. 1994) and *Comisky v. Rosen Management Serv., Inc.*, 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc).

79. 699 So. 2d 735 (Fla. 1st Dist. Ct. App. 1997).

80. *Id.* at 736.

not render the order at issue nonfinal, since it clearly marked an end to judicial labor as to the matters then pending before the trial court.”<sup>81</sup>

The fourth district, in *Roshkind v. Roshkind*,<sup>82</sup> addressed the issue of whether a post-dissolution final order in a modification proceeding “is a final judgment, to be appealed by plenary appeal, or an order entered after final judgment, reviewable as a non-final appeal under *Florida Rule of Appellate Procedure* 9.130(a)(4).”<sup>83</sup>

The court noted that although case law “would support an argument that petitions for modification are not independent actions, the orders entered in modification proceedings have all the aspects of final judgments.”<sup>84</sup> The court therefore concluded that such orders are final judgments, subject to motions for rehearing under the *Florida Rule of Civil Procedure* 1.530(a), and appealable as plenary appeals.<sup>85</sup>

The fourth district also examined the question of finality in the context of appeals taken by persons who were not parties to the proceedings in the lower tribunal. In *Shook v. Alter*,<sup>86</sup> a lawyer representing a party in the trial court sought certiorari review of an order holding him in indirect civil contempt.<sup>87</sup> The district court entered an order redesignating the petition for writ of certiorari as a final appeal.<sup>88</sup> The court noted that the distinction was important because a petitioner seeking certiorari carries “a heavier burden than an appellant must carry on appeal.”<sup>89</sup> The court indicated that it was publishing its order “so that the Bar will know that, where a final order is entered against a non-party such as, for example, a lawyer or a witness, the appropriate method for review of that order is by final appeal.”<sup>90</sup>

The petitioners in *Borja v. Nationsbank of Florida*<sup>91</sup> sought mandamus to compel the trial court to amend a final judgment that inadvertently omitted the names of some of the parties to the action.<sup>92</sup> Due to the omission, the petitioners claimed that a final judgment was never entered

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81. *Id.*

82. 717 So. 2d 544 (Fla. 4th Dist. Ct. App. 1997).

83. *Id.* at 544.

84. *Id.*

85. *Id.*

86. 715 So. 2d 1082 (Fla. 4th Dist. Ct. App. 1998).

87. *Id.* at 1082–83.

88. *Id.* at 1083.

89. *Id.*

90. *Id.*

91. 698 So. 2d 280 (Fla. 3d Dist. Ct. App. 1997).

92. *Id.* at 280.

against the omitted parties.<sup>93</sup> The respondents maintained that the omissions were merely technical errors that did not affect the finality of the judgment.<sup>94</sup> The third district found the omissions to be “a mere clerical error” that would not affect the judgment’s finality.<sup>95</sup> Accordingly, the court directed the trial court to amend the judgment to include the names of the omitted parties *nunc pro tunc* on the date of the original final judgment.<sup>96</sup>

#### VIII. NOTICE OF APPEAL

In *Raysor v. Raysor*,<sup>97</sup> the first district encountered a situation in which a notice of appeal was mailed to the post office box maintained by the clerk of the lower tribunal five days prior to the expiration of the thirty-day period established by *Florida Rule of Appellate Procedure* 9.130(b) for the filing of such notices.<sup>98</sup> The notice was not filed with the clerk, however, until the morning after the thirty day period expired.<sup>99</sup>

The court rejected the appellant’s argument that the facts established that the notice of appeal was delivered to the clerk’s post office box on the final day of the thirty day period.<sup>100</sup> The court went on to indicate that even if it was assumed that the notice did reach the post office box on the thirtieth day, “we would conclude that [the appellant] nonetheless failed to timely ‘file’ the notice of appeal with the clerk of the trial court.”<sup>101</sup> The court further noted that “[g]enerally, a paper is deemed to be ‘filed’ when it is delivered to the proper official and received by that official to be kept on file,” and concluded that “merely mailing the notice or having the notice placed in a post office box within the required time period is not sufficient.”<sup>102</sup>

The court then went on to state:

By publishing this opinion, our intent is not to single out counsel for appellant, who by all appearances mailed the notice of appeal in

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Borja*, 698 So. 2d at 281.

97. 706 So. 2d 400 (Fla. 1st Dist. Ct. App. 1998).

98. *Id.* at 400.

99. *Id.*

100. *Id.* at 401.

101. *Id.*

102. *Raysor*, 706 So. 2d at 401 (citing *Blake v. R.M.S. Holding Corp.*, 341 So. 2d 795 (Fla. 3d Dist. Ct. App. 1977)).

a manner that under ordinary circumstances would have resulted in timely receipt by the clerk. On the contrary, given the relative frequency with which situations such as this occur, our purpose is to reiterate the point that one who foregoes the opportunity to personally deliver time critical documents to the clerk, and instead elects to entrust those documents to postal authorities or some other delivery mechanism, does so at his or her own peril.<sup>103</sup>

The fourth district in *Bove v. Ocwen Financial Corp.*,<sup>104</sup> denied a motion to amend a notice of appeal that timely sought review of a final judgment.<sup>105</sup> Some two months after the filing of the notice, the trial court entered a judgment taxing costs.<sup>106</sup> After the time for appealing the cost judgment had expired, the appellants moved to amend the notice of appeal so as to allow them to appeal the cost judgment.<sup>107</sup> In the motion, the appellants stated that they were not seeking reversal of the cost judgment except in the event the final judgment was to be reversed.<sup>108</sup>

The court found that it “must deny the motion to amend the notice of appeal on jurisdictional grounds because no notice of appeal was filed within [the time for appealing] the cost judgment.”<sup>109</sup> The court went on to suggest an alternative method of dealing with similar situations:

Having to file a separate notice of appeal from a judgment for costs or attorney’s fees, entered after a notice of appeal has already been filed from the main judgment, requires, of course, the payment of an additional filing fee. Where, as here, the only reason for appealing the second judgment is in the event the main judgment is reversed, parties should consider stipulating that the second judgment would be vacated if the main judgment were reversed. Such a stipulation would not only save the appellant the additional filing fee, but would also save both parties attorneys’ fees and would not expose the appellee to having to bear the cost of that filing fee in the event the cost judgment is reversed.<sup>110</sup>

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103. *Id.*

104. 23 Fla. L. Weekly D564 (4th Dist. Ct. App. Feb. 25, 1998).

105. *Id.* at D564.

106. *Id.*

107. *Id.*

108. *Id.* at D564–65.

109. *Bove*, 23 Fla. L. Weekly at D565.

110. *Id.* (footnote omitted).

In *Turner v. City of Daytona Beach Shores*,<sup>111</sup> the fifth district dismissed an appeal in which the notice of appeal was untimely, rejecting the appellant's claim that he had filed an earlier, premature, notice of appeal.<sup>112</sup> The document referred to by the appellant was a pleading entitled "Motion to Strike the Sham Pleadings by Defendants Objection to Plaintiffs Notice of Hearing and Defendant's Entry of a Order for Final Summary Judgment In the Alternative, A Notice of Appeal," the last paragraph of which stated, "The Plaintiff herein is providing a Notice of Appeal, if the Court issues an Order in favor of the contemptuous Attorney and the Defendants."<sup>113</sup>

The court found, the purported notice "does not even come close to complying with the requirements of *Florida Rules of Appellate Procedure* 9.110(d) and 9.900(a), and glaringly omits 'the name of the court to which the appeal is taken.'"<sup>114</sup> The court recognized that *Florida Rule of Appellate Procedure* 9.110(m) "allows for some leeway for premature appeals," but interpreted the rule to require "some previous action by the trial court about which an appellant wishes to complain."<sup>115</sup> The purported notice having been filed "before any appealable decisions were rendered by the trial court and five months before any of the defendants filed a motion leading to the final judgment from which the appellant tardily filed an appeal," the appeal was dismissed.<sup>116</sup>

Several cases dealt with the question of whether the filing of particular motions in the trial court delayed the rendition of an order, so as to make timely a notice of appeal filed within thirty days of the order denying the motion, but more than thirty days after the order appealed from.

Some examples include: 1) motion for clarification directed to final order of dismissal did not delay rendition;<sup>117</sup> 2) motion to set aside final judgment was intended to operate as a motion for rehearing and suspended rendition;<sup>118</sup> 3) pending motion to amend complaint, filed prior to entry of summary final judgment, did not stay rendition of the judgment, despite the fact that the trial court had reserved ruling on the motion;<sup>119</sup> 4) motion for rehearing directed to a circuit court order granting a stay of a driver's license

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111. 702 So. 2d 632 (Fla. 5th Dist. Ct. App. 1997).

112. *Id.* at 632-33.

113. *Id.* at 633.

114. *Id.*

115. *Id.*

116. *Turner*, 702 So. 2d at 633.

117. *Tyler v. State*, 718 So. 2d 811 (Fla. 2d Dist. Ct. App. 1997).

118. *Olson v. Olson*, 704 So. 2d 208 (Fla. 5th Dist. Ct. App. 1998).

119. *DiPaolo v. Rollins Leasing Corp.*, 700 So. 2d 31 (Fla. 5th Dist. Ct. App. 1997).

suspension did not delay rendition because motions for rehearing are not authorized with regard to non-final orders;<sup>120</sup> 5) motion for reconsideration after a final summary judgment, although mislabeled, was in substance a proper motion for rehearing and thus suspended rendition;<sup>121</sup> 6) motion for rehearing was unauthorized, and rendition was not delayed by its filing because order denying arbitration was non-final;<sup>122</sup> and 7) post-judgment contempt order in a dissolution proceeding, although reviewable as an appeal from a non-final order under *Florida Rule of Appellate Procedure* 9.140(a)(4) is actually a final order and motion for rehearing therefore delays its rendition.<sup>123</sup>

## IX. STAYS

In *St. Mary's Hospital, Inc. v. Phillipe*,<sup>124</sup> the fourth district found to be constitutional section 766.212 of the *Florida Statutes* which allows a district court, in order to prevent manifest injustice, to stay an arbitration award entered pursuant to section 766.207 of the *Florida Statutes*.<sup>125</sup> The defendants in the case claimed that the statute infringed on the supreme court's exclusive authority to prescribe rules of procedure, in that it abrogates the automatic stay provision of *Florida Rule of Appellate Procedure* 9.310.<sup>126</sup> The court disagreed, finding that in enacting the statute, the legislature "created a modified right to judicial review of arbitration awards,"<sup>127</sup> review that "includes an equally substantive right to payment of the award during review unless the court finds that a stay is necessary to prevent manifest injustice."<sup>128</sup>

In light of its interpretation of the statute, the court stated, "[w]e cannot say that such substantive legislation infringes on the supreme court's power to regulate procedures in appellate proceedings."<sup>129</sup> The court went on to

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120. Department of Highway Safety & Motor Vehicles v. Bond, 696 So. 2d 949 (Fla. 5th Dist. Ct. App. 1997).

121. Magnum Towing, Inc. v. Sunbeam Television Corp., 23 Fla. L. Weekly D850 (Fla. 3d Dist. Ct. App. Apr. 1, 1998).

122. Josephthal Lyon & Ross, Inc. v. C & A Fin. Programs, Inc., 709 So. 2d 1384 (Fla. 4th Dist. Ct. App. 1998).

123. Remington v. Remington, 705 So. 2d 920 (Fla. 4th Dist. Ct. App. 1997).

124. 699 So. 2d 1017 (Fla. 4th Dist. Ct. App. 1997).

125. *Id.* at 1019.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Phillipe*, 699 So. 2d at 1020.

certify “the question of constitutionality to the supreme court for its definitive resolution.”<sup>130</sup>

The fifth district, in *Department of Safety v. Stockman*,<sup>131</sup> dealt with the issue of whether a circuit court has the authority to stay the administrative suspension of a driver’s license pending certiorari review by the circuit court.<sup>132</sup>

The court found that “the circuit court, as the direct reviewing court, has the inherent power and discretion to suspend the administrative order, pending certiorari review.”<sup>133</sup> Not according the circuit court this discretionary power, the court recognized, would likely render review of such orders “meaningless.”<sup>134</sup> To illustrate its point, the court noted that the license suspension in the case under review was for six months.<sup>135</sup> “If this order could not be stayed pending review,”<sup>136</sup> the court said, “the suspension time, or a great deal of it, would likely run before the circuit court ruled on the petition for certiorari review.”<sup>137</sup>

The court rejected arguments based on sections 322.2615(13), 322.272, and 322.28(6) of the *Florida Statutes*, interpreting those provisions as simply providing no automatic stay pending review of a license suspension.<sup>138</sup>

In *State Department of Environmental Protection v. Pringle*,<sup>139</sup> the first district granted a motion to reinstate an automatic stay imposed by *Florida Rule of Appellate Procedure* 9.310(b)(2)<sup>140</sup> and vacated by the trial court.<sup>141</sup>

The case involved an order enjoining state agencies from arresting commercial fishermen for possessing and/or using certain fishing nets.<sup>142</sup> The appellees’ motion to vacate the automatic stay was based on a sheriff’s affidavit which stated that he and other sheriffs were concerned about “rising

130. *Id.* (footnote omitted).

131. 709 So. 2d 179 (Fla. 5th Dist. Ct. App. 1998).

132. *Id.* at 180.

133. *Id.* (footnote omitted).

134. *Id.*

135. *Id.*

136. *Stockman*, 709 So. 2d at 180.

137. *Id.* at 180–81.

138. *Id.* at 180.

139. 707 So. 2d 387 (Fla. 1st Dist. Ct. App. 1998).

140. The rule provides that the timely filing of a notice of appeal automatically operates “as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review.” FLA. R. APP. P. 9.310(b)(2).

141. *Pringle*, 707 So. 2d at 389.

142. *Id.* at 388.

tensions”<sup>143</sup> regarding the issue and setting forth what the appellate court termed “clear implication of possible violence” between fishermen and law enforcement officers.<sup>144</sup>

The court noted that the fourth district, in *St. Lucie County v. North Palm Beach Development Corp.*,<sup>145</sup> had explained that the automatic stay is based on a policy rationale and that automatic stays “should be vacated only under the most compelling circumstances.”<sup>146</sup>

After considering the evidence, the court found “no compelling reason to vacate the . . . stay.”<sup>147</sup> Indeed, the court indicated that granting a stay for the reasons asserted “would impermissibly reward those citizens who would use threats (implicit or otherwise) of violence in response to an unpopular law, at the expense of those who would follow or attempt to lawfully challenge or change the law within this state’s democratic institutions.”<sup>148</sup>

#### X. INDIGENCY

In *Quigley v. Butterworth*,<sup>149</sup> a prisoner serving a life sentence appealed a circuit court’s dismissal of his declaratory judgment action.<sup>150</sup> He moved the district court of appeal to allow him to proceed in forma pauperis, and the court transferred the motion to the circuit court for a determination of the prisoner’s indigency status.<sup>151</sup> The circuit court denied the motion because the prisoner failed to meet the requirements of section 57.085 of the *Florida Statutes*, which calls for prisoners seeking waiver of prepayment of court costs and fees due to indigency to file an affidavit of indigency with the court.<sup>152</sup> As a result of this ruling, the district court ordered the prisoner to pay the appellate filing fee of \$250.<sup>153</sup>

The prisoner then filed a second motion with the district court, entitled “Appellant’s Second Motion for Leave to Proceed on Appeal without

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143. *Id.* at 389.

144. *Id.* at 390.

145. 444 So. 2d 1133 (Fla. 4th Dist. Ct. App. 1984).

146. *Pringle*, 707 So. 2d at 390 (quoting *St. Lucie County v. North Palm Beach Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th Dist. Ct. App. 1984)).

147. *Id.*

148. *Id.*

149. 708 So. 2d 270 (Fla. 1998).

150. *Id.* at 270.

151. *Id.*

152. *Id.* at 270–71.

153. *Id.* at 271.

Payment of Costs.”<sup>154</sup> The court again transferred the request to the circuit court, which again denied the motion.<sup>155</sup> Subsequently, the district court dismissed the appeal for failure to pay the filing fee.<sup>156</sup>

The prisoner petitioned the Supreme court of Florida for mandamus to compel the district court to reinstate his appeal and permit him to proceed in forma pauperis.<sup>157</sup> The supreme court agreed with the prisoner that his second motion should have been treated as a motion for review of the circuit court’s initial denial under *Florida Rule of Appellate Procedure* 9.430.<sup>158</sup> Relying on Rule 9.040(c),<sup>159</sup> which provides that “[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought,” the court transferred the cause to the district court “for consideration of the denial of indigency status.”<sup>160</sup>

In *Willis v. State*,<sup>161</sup> a criminal defendant who was represented by the Public Defender at trial, was convicted of possession of cocaine with intent to sell and filed a notice of appeal.<sup>162</sup> Ruling on the defendant’s motion for an order of insolvency applicable to the appeal, the trial court appointed the Public Defender but required the defendant to pay the appellate filing fee and the cost of the trial transcripts.<sup>163</sup> Nothing in the record reflected that the defendant had the ability to pay those costs.<sup>164</sup>

After the first district dismissed the appeal for failure to pay the filing fee, the defendant filed a financial affidavit showing that he had only twenty-five dollars and sixty-three cents in his prison account and twice petitioned the court to reinstate the appeal.<sup>165</sup> The district court directed the trial court to reconsider the defendant’s indigency status.<sup>166</sup> That court reiterated its prior order, stating that the defendant’s affidavit was invalid because, although it was sworn to and subscribed before a notary public, it was not sworn to under penalty of perjury;<sup>167</sup> that the defendant was unresponsive in

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154. *Quigley*, 708 So. 2d at 271.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. FLA. R. APP. P. 9.040(c).

160. *Quigley*, 708 So. 2d at 271 (quoting FLA. R. APP. P. 9.040(c)).

161. 708 So. 2d 939 (Fla. 1998).

162. *Id.* at 940.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Willis*, 708 So. 2d at 940.

167. *Id.*

answering the questions on the affidavit;<sup>168</sup> and that because the defendant ““was not homeless, destitute or totally without assets’ before his arrest and because he was a known and convicted drug dealer, he must produce ‘credible evidence to support the proposition that he was then or now totally insolvent.’”<sup>169</sup> Pursuant to the trial court’s order, the district court again required the defendant to pay the filing fee to maintain his appeal.<sup>170</sup>

The defendant then petitioned the Supreme court of Florida for a writ of habeas corpus to enable him to pursue his appeal.<sup>171</sup> The court granted the petition, stating:

[W]e find it difficult, if not illogical, to conclude that the trial court could find the financial affidavit in this case to be valid and sufficient to prove that Willis was insolvent for the purpose of hiring appellate counsel but find the affidavit to be invalid and insufficient to prove that he was insolvent for the purpose of paying the filing fee and the transcript costs. If a financial affidavit was properly executed for the purpose of granting the defendant public assistance of counsel, it necessarily follows that the affidavit was properly executed for all purposes. While a defendant may be found indigent for the purpose of receiving public assistance of counsel, yet solvent to pay other costs and fees, the record must justify the order of partial indigency. Merely noting that a defendant is a convicted drug dealer and not homeless is not, in our view, a sufficient justification for declaring that person to be solvent to pay filing fees and other costs.<sup>172</sup>

In *Ferenc v. State*,<sup>173</sup> a criminal defendant’s motion to proceed in forma pauperis in his appeal from the denial of a motion for post-conviction relief was denied based on the trial court’s finding that the appeal was frivolous.<sup>174</sup> On appeal, the fifth district found this denial, apparently based on section 57.085(8) of the *Florida Statutes* (1995),<sup>175</sup> which authorizes trial courts to dismiss frivolous proceedings instituted by indigent prisoners under certain

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168. *Id.* at 940–41.

169. *Id.* at 941.

170. *Id.*

171. *Willis*, 708 So. 2d at 941.

172. *Id.*

173. 697 So. 2d 1262 (Fla. 5th Dist. Ct. App. 1997).

174. *Id.* at 1263.

175. *Id.*

circumstances, to be improper because the statute does not apply to criminal proceedings or collateral criminal proceedings.<sup>176</sup>

A criminal defendant in *Martin v. State*<sup>177</sup> argued that he should be considered indigent for purposes of appeal based on his testimony that he had a Chapter 7 personal bankruptcy case pending and that certain property he owned was the subject of an action to foreclose a mortgage.<sup>178</sup> The fourth district disagreed.

As to the bankruptcy claim, the court stated:

The mere fact that one has filed for relief under chapter 7 of the Bankruptcy Code does not by itself establish indigency for purposes of an appeal under section 27.52 [of the *Florida Statutes*]. For one thing, income earned by a debtor after filing for relief under the bankruptcy law is not part of the bankruptcy estate. For another Martin's unadorned claim of bankruptcy fails to address exempt property under bankruptcy law.

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Moreover, bankruptcy connotes insolvency. Under the Bankruptcy Code, insolvency means that one's debts exceed the value of one's property. In contrast, indigency under section 27.52 is related to income or, alternatively, the ability of a defendant to pay for an attorney without substantial hardship to the defendant's family. Thus, without more, mere insolvency under bankruptcy law cannot be equated with indigency under section 27.52.<sup>179</sup>

The court also addressed the foreclosure claim.

So too with the foreclosure. Knowing that a foreclosure proceeding is pending with regard to real property owned by a defendant in a criminal case hardly establishes the section 27.52(2)(b) standard for indigency. The record in this case does not tell us, for example, the amount of the claimed debt in the foreclosure proceeding; nor does it tell us the value of the property to be foreclosed. For all we know, the value greatly exceeds the debt, and [the] defendant has equity which he could use to pay for an attorney. And even that, of course, fails to consider whether it is

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176. *Id.*

177. 711 So. 2d 117 (Fla. 4th Dist. Ct. App. 1998).

178. *Id.* at 119.

179. *Id.* at 120 (footnotes omitted).

apparent that the mortgagee will ultimately prevail in the foreclosure action.<sup>180</sup>

The court also discussed “the question of transfers of property and income by Martin to family members, including his mother.”<sup>181</sup> The court stated:

We do not believe that section 27.52 allows transfers of property and money by a defendant to family members in order to create the insolvency required for court-appointed counsel. To do so would require the public to pay for lawyers for defendants whose appearance of need was specifically created for that purpose. That amounts to a fraud on the courts as well as the taxpayers. Voluntary transfers of property to family members to create indigency for the appointment of counsel are just as much fraudulent conveyances as are such transfers by debtors to avoid payment to their creditors.<sup>182</sup>

In light of the above factors, and the existence of evidence that the defendant’s real property had been used for income producing purposes, the fourth district upheld a circuit court determination that the defendant was not indigent.<sup>183</sup>

## XI. FILING FEES

In *Milligan v. Palm Beach County Board of County Commissioners*,<sup>184</sup> the Supreme court of Florida upheld a circuit court’s conclusion<sup>185</sup> that Florida’s counties do not have to pay appellate filing fees on behalf of indigent criminal defendants.<sup>186</sup>

The court pointed out that “Article VIII, section 1(b) of the Florida Constitution provides that disbursement of county funds must be by general law.”<sup>187</sup> The court found “no provision in . . . any . . . statute which mandates that counties disburse funds to pay appellate filing fees on behalf

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180. *Id.*

181. *Id.*

182. *Martin*, 711 So. 2d at 120–21.

183. *Id.* at 121.

184. 704 So. 2d 1050 (Fla. 1998).

185. The fourth district had certified that the circuit court order passed on an issue of great public importance requiring immediate resolution by the supreme court. *Id.* at 1051.

186. *Id.*

187. *Id.*

of indigent criminal defendants.”<sup>188</sup> Rejecting the comptroller’s argument that such disbursement was required upon an *in pari materia* reading of certain statutes, the court found “that when the legislature has intended counties to pay certain costs, it has expressly provided for such disbursements.”<sup>189</sup>

The court found that its decision would only have prospective application, “meaning that refunds of filing fees which counties have paid before issuance of this opinion are not required.”<sup>190</sup> The court also, by separate administrative order, “directed the clerks of the appellate courts to stop collecting filing fees for cases filed on behalf of indigents beginning on the date this opinion is issued [January 8, 1998].”<sup>191</sup>

The fourth district, in *In re Payment of Filing Fees*,<sup>192</sup> discussed the situation that exists when a notice of appeal is filed without the payment of the appellate filing fee.<sup>193</sup> The court recognized that “[b]ecause there is a strict time deadline for filing a notice of appeal, . . . lawyers for parties taking an appeal may be forced to act quickly to preserve the right but without prepayment of these costs to the attorney by the client.”<sup>194</sup> The court indicated that as a result, it often receives notices of appeal unaccompanied by the fee,<sup>195</sup> and that, in such cases, it routinely enters “an order directing the attorney who filed the appeal to pay the filing fee or file a determination of indigency.”<sup>196</sup> In an increasing number of cases, the court indicated, attorneys have been failing to respond to these orders,<sup>197</sup> and the court wrote on the subject “to make a point in the hope that the practice will cease.”<sup>198</sup>

The court stated that “[t]he mere fact that the client is obligated to reimburse the attorney for the costs advanced does not relieve the attorney of the duty to tender the filing fees to this court when the appeal is initiated.”<sup>199</sup>

The court continued, “consequently, we rightfully look to the attorney initiating the appellate process to pay the filing fees due this court.”<sup>200</sup>

188. *Id.*

189. *Milligan*, 704 So. 2d at 1052 (footnote omitted).

190. *Id.*

191. *Id.*

192. 22 Fla. L. Weekly D2341 (4th Dist Ct. App. Oct. 8, 1997).

193. *Id.* at D2341.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Payment of Filing Fees*, 22 Fla. L. Weekly at D2341.

198. *Id.*

199. *Id.* at D2342.

200. *Id.*

The court went on to dispel the “mistaken assumption that a later decision by the client not to pursue the appeal, and the filing of a voluntary dismissal, will relieve the attorney of responding to our order for payment.”<sup>201</sup> The court noted “[t]he filing fee is an entry fee to the appellate process, not a fee for prosecuting the appeal to a final result,”<sup>202</sup> and stated that “[w]hen the appeal is later abandoned, that is the decision of the litigant and does not affect the liability for the fees due to commence the process.”<sup>203</sup>

The court also said:

We wish to make clear that we do not “bill” anyone, most especially not clients, for payment of our filing fees. We instead enter an order to the person filing the notice of appeal to *pay* the filing fee (or produce an order of indigency) within 10 days or sanctions will be imposed. The continued failure to pay is then a failure to comply with an order of the court, not a mere failure to respond to a bill from a creditor.<sup>204</sup>

## XII. COUNSEL

In *Davis v. Meeks*,<sup>205</sup> the first district dealt with a situation in which two attorneys jointly instituted an appeal on behalf of a client.<sup>206</sup> Subsequently, a third attorney, who represented the client in related litigation, filed a notice of appearance and a notice voluntarily dismissing the appeal.<sup>207</sup> The two attorneys who instituted the appeal moved to strike the notice of voluntarily dismissal and to disqualify the third attorney, asserting that due to factors pertaining to the related litigation, the attorney stood to gain if the judgment against the client was upheld and that he therefore had a conflict of interest.<sup>208</sup> The third attorney responded that he had discussed with the client the benefits and detriments of proceeding with the appeal and that they had jointly determined that the client’s best interests were served by dismissal of the case.<sup>209</sup> This response was accompanied by a sworn

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201. *Id.*

202. *Payment of Filing Fees*, 22 Fla. L. Weekly at D2342.

203. *Id.*

204. *Id.*

205. 709 So. 2d 184 (Fla. 1st Dist. Ct. App. 1988).

206. *Id.* at 185.

207. *Id.*

208. *Id.*

209. *Id.*

affidavit of the client, in which the client stated that she approved of the filing of the notice of dismissal as it was her wish to have the appeal dismissed.<sup>210</sup>

The court found that although it was undisputed that the two attorneys were at one time authorized to pursue the case, it was clear that any such authorization had been revoked.<sup>211</sup> The court concluded that “[u]nder these circumstances, determining who best represents her interests in this case is not the province of this court, but rather of [the client] herself.”<sup>212</sup> “The wisdom of her choice is not for us to decide,” the court continued, “and the consequences of that choice present issues for resolution in another forum on another day.”<sup>213</sup>

### XIII. RECORD ON APPEAL

In *Fleming v. State*,<sup>214</sup> a criminal defendant moved for rehearing of the second district’s summary affirmance of his appeal, brought pursuant to *Florida Rule of Appellate Procedure* 9.140(i),<sup>215</sup> claiming that he was denied an opportunity to file a brief.<sup>216</sup> The defendant cited *Summers v. State*,<sup>217</sup> in which the court ruled that summary records contemplated by the rule must be paginated and indexed by the circuit court clerks according to the requirements of Rule 9.200(d),<sup>218</sup> and asserted that his case was decided while he was awaiting the index from the clerk to use in providing proper record citations in his brief.<sup>219</sup>

The court noted that, subsequent to *Summers*, the rule at issue was amended to require that briefs be filed within fifteen days of the filing of the notice of appeal.<sup>220</sup> The court then stated:

We decline to apply the requirements of *Summers* under this amended version of the rule because to do so would require that the

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210. *Davis*, 709 So. 2d at 185.

211. *Id.*

212. *Id.*

213. *Id.*

214. 709 So. 2d 135 (Fla. 2d Dist. Ct. App. 1998).

215. The rule sets forth the procedures to be used in appeals from summary denials of motions for post-conviction relief.

216. *Fleming*, 709 So. 2d at 135.

217. 570 So. 2d 990 (Fla. 1st Dist. Ct. App. 1990).

218. *See Fleming*, 709 So. 2d at 135.

219. *Id.*

220. *Id.*

clerk index and paginate the record and send it to appellant, who would then be required to file a brief, all within fifteen days of the filing of the notice of appeal. No clerk in the district regularly prepares summary records in this fashion and we do not believe the rules intend that summary records be paginated and indexed.<sup>221</sup>

Noting that the defendant had conceded that the fifteen day requirement postdated *Summers* and the defendant neither sought an extension of time for his brief nor filed a motion asking the court how to reconcile the fifteen day requirement with *Summers*, the court determined that the defendant had waived his right to file a brief and denied rehearing.<sup>222</sup>

#### XIV. TRANSCRIPTS

In *Guardianship of Halpert v. Rosenbloom, P.A.*<sup>223</sup> the fourth district “reluctantly”<sup>224</sup> reversed an award of attorney’s fees because it failed to “set forth findings as to the time reasonably expended, the hourly rate, or other factors, if any, considered.”<sup>225</sup> The court’s reluctance stemmed from the fact that the trial court proceedings were not transcribed,<sup>226</sup> meaning that a new hearing would be required.<sup>227</sup> The lack of a transcript did not preclude appellate review, the court found, because the reversible error appeared on the face of the order.<sup>228</sup>

Although considering itself compelled by precedent to reverse, the court stated that “[w]ere we writing on a clean slate, we might consider this error harmless” or “[a]t a minimum, . . . impose a waiver by the offended party’s failure to draw the error to the attention of the trial court.”<sup>229</sup>

In *Estopinan v. State*,<sup>230</sup> there was a transcript of the trial proceedings, albeit one that the second district termed as being “full of errors and inaccuracies due to the poor performance of the court reporter.”<sup>231</sup> Because

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221. *Id.* at 135–36.

222. *Id.* at 136.

223. 698 So. 2d 938 (Fla. 4th Dist. Ct. App. 1997).

224. *Id.* at 939.

225. *Id.*

226. *Id.*

227. *Id.* at 940.

228. *Halpert*, 689 So. 2d at 939.

229. *Id.* at 940.

230. 710 So. 2d 994 (Fla. 2d Dist. Ct. App. 1998).

231. *Id.* at 995.

the appellant was “precluded from meaningful appellate review” due to the “abysmal” transcript, the case was reversed and remanded for a new trial.<sup>232</sup>

#### XV. EXTENSIONS OF TIME

In *Publix Supermarkets, Inc., v. Arnold*,<sup>233</sup> an attorney filed a motion for an extension of time, stating in the motion that he had contacted the opposing counsel and that no objection to the request had been made.<sup>234</sup> After the opposing counsel did file an objection which indicated that she had not been contacted, the court ordered the attorney who filed the motion to respond.<sup>235</sup> The attorney indicated that when he signed his motion, he believed that his assistant had contacted the opposing counsel and had received no objection.<sup>236</sup>

The court first pointed out that *Florida Rule of Appellate Procedure* 9.300(a) “contemplates that counsel, not a secretary or an assistant, shall contact opposing counsel regarding an extension of time.”<sup>237</sup> The court found that “[t]he problem here is that appellant’s counsel delegated this important function to his assistant and then misrepresented to this court that it was he who had made the contact.”<sup>238</sup>

Because of counsel’s failure to comply with the appellate rule and his erroneous representations, the court, by separate order, directed counsel to pay \$250 to the clerk of the court.<sup>239</sup> “In closing,” the court stated, “we note that, if a lawyer is too busy to personally contact opposing counsel to determine whether there is an objection to a motion for an extension of time for filing a brief, perhaps that lawyer is overextended.”<sup>240</sup>

The first district, in *Stoutamire v. State*,<sup>241</sup> granted a motion for extension of time to file an appellant’s initial brief in an appeal from an order summarily denying a motion for post-conviction relief.<sup>242</sup> The court

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232. *Id.* at 996.

233. 707 So. 2d 1161 (Fla. 5th Dist. Ct. App. 1998).

234. *Id.* at 1161.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Publix*, 707 So. 2d at 1161.

239. *Id.*

240. *Id.* at 1161–62.

241. 703 So. 2d 1065 (Fla. 1st Dist. Ct. App. 1997).

242. *Id.* at 1066.

wrote “only to explain a change in the Rules of Appellate Procedure concerning briefs in such cases.”<sup>243</sup>

The court noted that effective January 1, 1997, *Florida Rule of Appellate Procedure* 9.140(g), which governed such appeals, was redesignated as Rule 9.140(i) and amended to provide in pertinent part that “no briefs . . . shall be required, but any appellant’s brief shall be filed within 15 days of the filing of the notice of appeal.”<sup>244</sup>

The court then stated that although it was granting the motion for extension of time despite the fact that it had been filed well after the fifteen day period contemplated by the rule,<sup>245</sup> “we remind litigants that normally motions for extensions of time to file a brief filed after the time for filing the brief has expired, will not be granted.”<sup>246</sup> Although most appeals governed by the rule involved in the case “are handled by litigants pro se,”<sup>247</sup> the court stated that it “will not hesitate”<sup>248</sup> to apply its normal approach in such proceedings.<sup>249</sup> “The fact that [litigants] are not represented by a lawyer does not excuse them from complying with the procedural rules,”<sup>250</sup> and, the court continued, “[l]itigants should be on notice that in appeals pursuant to Rule 9.140(i), the initial brief is due within 15 days from the filing of the notice of appeal.”<sup>251</sup>

## XVI. DISQUALIFICATION OF APPELLATE JUDGES

In *5-H Corp. v. Padovano*,<sup>252</sup> the Supreme Court of Florida considered a petition for a writ of prohibition that sought to prevent all of the judges of the first district from presiding over the petitioner’s appeal that was pending in that court.<sup>253</sup> The petitioners’ attorney had handled a prior, related appeal in the first district, in which a panel of the court ruled against the attorney’s clients.<sup>254</sup> The attorney filed a motion for rehearing in which he “suggested that the panel not only disfavored one of his clients, but also favored

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243. *Id.*

244. *Id.*

245. *Id.*

246. *Stoutamire*, 703 So. 2d at 1066.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Stoutamire*, 703 So. 2d at 1066.

252. 708 So. 2d 244 (Fla. 1997).

253. *Id.* at 244.

254. *Id.*

opposing counsel.”<sup>255</sup> In addition, in referring to opposing counsel’s argument, the attorney argued that “what is *truly* appalling is that . . . the panel in the instant appeal would buy such nonsense and give credence to such “total b[---]s[---].”<sup>256</sup> Moreover, in a footnote, the attorney stated that “the use of the term “total b[---]s[---]” without the inclusion of at least 2 or 3 intervening expletives is very kind and generous under the circumstances.”<sup>257</sup>

The court denied the rehearing motion,<sup>258</sup> and then had its clerk forward a copy of the motion to The Florida Bar to review the appropriateness of its comments and language and to determine whether disciplinary proceedings should be instituted against the attorney.<sup>259</sup> Subsequently, The Florida Bar filed a formal complaint against the attorney, who in turn reported the matter to the Judicial Qualifications Commission (JQC).<sup>260</sup> The complaint against the attorney was dismissed upon a finding of no probable cause, while the petition before the supreme court was silent as to what action, if any, was taken on the report to the JQC.<sup>261</sup>

In the appeal giving rise to the prohibition proceeding, the attorney, on behalf of his clients, moved to disqualify the judges of the first district from presiding over the case.<sup>262</sup> The motion asserted that such disqualification was mandated in light of the circumstances of the prior appeal.<sup>263</sup>

Each judge on the court not otherwise disqualified considered the motion in accordance with *In re Estate of Carlton*,<sup>264</sup> which calls for appellate judges to determine for themselves “both the legal sufficiency of a request seeking [their] disqualification and the propriety of withdrawing in any particular circumstances.”<sup>265</sup> Some of the judges voluntarily recused themselves, but four of the remaining judges denied the disqualification motion as legally insufficient.<sup>266</sup>

The supreme court denied the petition for prohibition, holding “that a Florida judge’s report of perceived attorney unprofessionalism to The

255. *Id.*

256. *Id.* at 245 (citations omitted).

257. *5-H Corp.*, 708 So. 2d at 245 (citations omitted).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *5-H Corp.*, 708 So. 2d at 245.

263. *Id.*

264. 378 So. 2d 1212 (Fla. 1979).

265. *Id.* at 1216.

266. *5-H Corp.*, 708 So. 2d at 24546.

Florida Bar (or, conversely, an attorney's report of perceived judicial unprofessionalism to the JQC) is, in and of itself, legally insufficient to support that judge's disqualification."<sup>267</sup>

The court pointed out that under the applicable ethical rules and canons, "Florida judges, just like every other Florida attorney, have an obligation to maintain the integrity of the legal profession and report to the Florida Bar any professional misconduct of a fellow attorney."<sup>268</sup> It stated that the petitioner's argument that the court should disqualify the district court judges was "untenable,"<sup>269</sup> because "such a holding would not only contradict both the letter and spirit of the canons and rules discussed above, but also discourage Florida judges from reporting questionable attorney behavior to the Florida Bar for fear of the possible repercussions (such as those sought in the present case)."<sup>270</sup> The court continued, "Encouraging such reporting also eliminates any incentive for an attorney to seek a Florida judge's disqualification by intentionally provoking that judge into filing a report with the Florida Bar. Simply stated, encouraging such reporting discourages underhanded 'judge shopping' and 'forum shopping.'"<sup>271</sup>

In concluding that disqualification would not be compelled in the context of an attorney filing a report with the JQC, the court relied on the specific wording of *Florida Code of Judicial Conduct*, Canon 3E.(1) cmt.,<sup>272</sup> as well as district court decisions holding that neither a party's expressed intent to file a JQC complaint,<sup>273</sup> nor the institution of a civil suit against a judge,<sup>274</sup> constitutes a legally sufficient ground for recusal. The court explicitly disapproved of other district court decisions that were inconsistent with the court's opinion.<sup>275</sup>

"Of course," the court added, "regardless of whether such reports to The Florida Bar or the JQC have been filed, disqualification remains available where it can be shown that 'the judge has a *personal* bias or prejudice concerning a party or a party's lawyer.'"<sup>276</sup>

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267. *Id.* at 246.

268. *Id.*

269. *Id.* at 247.

270. *Id.*

271. *5-H Corp.*, 708 So. 2d at 247 (footnote and citations omitted).

272. *Id.* at 248.

273. *Cherradi v. Andrews*, 669 So. 2d 326 (Fla. 4th Dist. Ct. App. 1996).

274. *Dowda v. Salfi*, 455 So. 2d 604 (Fla. 5th Dist. Ct. App. 1984).

275. *5-H Corp.*, 708 So. 2d at 248.

276. *Id.* (citing Fla. Code Jud. Conduct Canon 3E(1)(a) (emphasis added by the court)).

## XVII. MOOTNESS

In *Kay v. Erskine*,<sup>277</sup> an appeal was taken from a circuit court order vacating a county judge's blanket order of recusal in all cases in which certain attorneys appeared as counsel.<sup>278</sup> The fourth district reversed, finding that the judge's resignation from the bench prior to the circuit court's entry of the order had rendered moot the relief sought.<sup>279</sup>

In *Bostic v. State*,<sup>280</sup> the first district dismissed a criminal appeal as moot due to the death of the appellant.<sup>281</sup> The appellant's estate argued that the appeal was not moot because the trial court had imposed a fine on the appellant that the State could attempt to collect from the estate.<sup>282</sup> In light of the State's representation that it would not attempt to collect the fine, however, the court concluded that the appellant had not shown good cause why the appeal should not be dismissed.<sup>283</sup>

The first district also found the death of a litigant to render an appeal moot in *Lund v. Department of Health*.<sup>284</sup> There, a doctor who was appealing the suspension of his medical license died while the appeal was pending.<sup>285</sup> His personal representative urged the court to decide the case for the sole purpose of determining the appellant's right to prevailing party attorney's fees under section 120.595(5) of the *Florida Statutes* (Supp. 1996).<sup>286</sup>

The court noted that "[a] generally recognized exception precluding dismissal of an otherwise moot case occurs in situations wherein collateral legal consequences affecting the rights of a party may flow from the issues to be decided."<sup>287</sup> This exception, the court continued, "applies to cases in which the consequences consist of property, advantages or rights that the appellant would lose as a collateral result of the lower court's decision if the appellate court were to dismiss the appeal and allow the lower court's decision to stand."<sup>288</sup> By contrast, the court found, the appellant hoped "to

277. 710 So. 2d 751 (Fla. 4th Dist. Ct. App. 1998).

278. *Id.* at 752.

279. *Id.* at 753.

280. 708 So. 2d 695 (Fla. 1st Dist. Ct. App. 1998).

281. *Id.* at 696.

282. *Id.*

283. *Id.*

284. 708 So. 2d 645 (Fla. 1st Dist. Ct. App. 1998).

285. *Id.* at 646.

286. *Id.*

287. *Id.* (citing *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)).

288. *Id.*

obtain a ‘collateral legal benefit’ that would arise . . . if the appeal were to be decided in appellant’s favor.”<sup>289</sup>

Concluding that the appeal was not moot simply to determine whether the appellant was entitled to attorney’s fees after prevailing on appeal “would be a broad expansion of the concept of ‘collateral legal consequences,’” the court stated.<sup>290</sup> Declining to so expand the concept, the court concluded “that the possibility of an attorney’s fee award under section 120.595(5) is not a collateral legal consequence which would preclude dismissal when the death of a party renders the appeal moot.”<sup>291</sup>

Another first district decision involving mootness was *Physicians Health Care Plans, Inc. v. State of Florida, Agency for Health Care Administration*.<sup>292</sup> There, an appeal was taken from a final administrative order denying a petition to initiate rulemaking.<sup>293</sup> Approximately one week before oral argument, the agency that had denied the petition instituted a proceeding to develop a proposed rule on the subject of the petition.<sup>294</sup> The agency candidly acknowledged that it was “not a coincidence that the proposed rule development was initiated shortly prior to the date of oral argument.”<sup>295</sup>

The court recognized that the agency’s institution of the rulemaking process came well after it was required by law.<sup>296</sup> Because the appellant’s proposed rule could be considered by the agency in the newly instituted rule development proceeding, however, the court found that the agency’s belated initiation of rulemaking granted the appellant all the relief that would have been available on appeal.<sup>297</sup> Accordingly, the case was dismissed as moot.<sup>298</sup>

A mootness claim was rejected by the fourth district in *Taxpayers Ass’n. of Indian River County, Inc. v. Indian River County*.<sup>299</sup> In that case, a circuit court dismissed petitions for certiorari that sought review of action of a county commission regarding the purchase of a number of residential lots.<sup>300</sup> The circuit court’s decision was based on the fact that the county had

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289. *Lund*, 708 So. 2d at 647.

290. *Id.*

291. *Id.*

292. 706 So. 2d 113 (Fla. 1st Dist. Ct. App. 1998).

293. *Id.* at 113.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Physicians Health Care Plans, Inc.*, 706 So. 2d at 113–14.

298. *Id.* at 114.

299. 701 So. 2d 897 (Fla. 4th Dist. Ct. App. 1997).

300. *Id.* at 898.

already closed on the lots.<sup>301</sup> The fourth district agreed with the petitioners' claim that the issue was capable of repetition because the county might purchase additional lots, a contention which the county did not deny.<sup>302</sup> Accordingly, the court found that "the dismissals for mootness were improper."<sup>303</sup>

In *Khazaal v. Browning*,<sup>304</sup> a default final judgment of foreclosure was entered but shortly thereafter was redeemed.<sup>305</sup> On appeal, the appellees contended that the case was moot because the payment resulting in redemption was voluntary due to the fact that the appellant could have moved for a stay pending review or posted a supersedeas bond.<sup>306</sup> The fifth district, after first reiterating the concept it expressed in *Great American Insurance Co. v. Stolte*<sup>307</sup> that "there does not appear to be a rationale underlying the rule that voluntary payment of the judgment renders the case moot, precluding appeal while involuntary payment does not," disagreed.<sup>308</sup> The court stated, "payment by appellant in this case was involuntary in that no stay was issued and payment was not made as part of a compromise, but rather to preclude a foreclosure sale."<sup>309</sup>

#### XVIII. STANDING

In *Save Anna Maria, Inc. v. Department of Transportation*,<sup>310</sup> the second district concluded that an environmental group had standing to appeal from a Department of Environmental Protection ("DEP") denial of a request by the Department of Transportation ("DOT") for a dredge and fill permit.<sup>311</sup> Although the order under review actually granted the group's motion to dismiss, DEP rejected a hearing officer's finding with respect to the public interest, concluding instead that DOT did provide reasonable assurance that the proposed project was clearly in the public interest.<sup>312</sup> The

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301. *Id.*

302. *Id.*

303. *Id.*

304. 707 So. 2d 399 (Fla. 5th Dist. Ct. App. 1998).

305. *Id.* at 400.

306. *Id.*

307. 491 So. 2d 352 (Fla. 4th Dist. Ct. App. 1986).

308. *Khazaal*, 707 So. 2d at 400.

309. *Id.*

310. 700 So. 2d 113 (Fla. 2d Dist. Ct. App. 1997).

311. *Id.* at 16.

312. *Id.* at 115.

environmental group argued that, left unchallenged, the decision would become *res judicata* when the issue is revisited in court.<sup>313</sup>

Recognizing the general rule that parties cannot file proceedings to review an order of judgment in their favor, the court indicated that the question of whether the environmental group's appeal should be permitted was "not an easy question to answer."<sup>314</sup> The environmental group urged the view expressed in *State Road Department of Florida v. Zetrouer*<sup>315</sup> that "[t]he mere fact that a litigant secures a judgment in his favor does not necessarily mean that there may not be some aspect of said judgment at which he would be aggrieved and which would present grounds for review by an appellate court."<sup>316</sup> Noting that *res judicata* and collateral estoppel concerns had been addressed in the context of a similar issue in *General Development Utilities, Inc. v. Florida Public Service Commission*,<sup>317</sup> the court found that "[o]n balance, these authorities compel the conclusion that [the environmental group] should be permitted to prosecute this appeal."<sup>318</sup>

In *Barnett v. Barnett*,<sup>319</sup> the fourth district dismissed an appeal arising from a dissolution action.<sup>320</sup> A bank had moved, in the trial court, to establish the priority of its lien over that of the parties' attorneys with respect to the proceeds of the sale of a sculpture.<sup>321</sup> It did not, however, move to intervene or to consolidate its pending foreclosure case with the dissolution action.<sup>322</sup> The bank assigned to the wife any rights it might have to appeal the order denying it priority, and the wife filed an appeal in her capacity as assignee.<sup>323</sup>

The court found that since the bank was not a party to the trial court proceeding, it had no standing to appeal the adverse order.<sup>324</sup> The court noted that *Florida Rule of Appellate Procedure* 9.020(f)(1) defines "[a]ppellant" as a "party who seeks to invoke the appeal jurisdiction of a

313. *Id.* at 114.

314. *Id.* at 115 (citing *Employers Fire Ins. Co. v. Blanchard*, 234 So. 2d 381 (Fla. 2d Dist. Ct. App. 1970)).

315. 142 So. 217 (Fla. 1932).

316. *Save Anna Maria, Inc.*, 700 So. 2d at 115 (quoting *State Road Dep't v. Zetrouer*, 142 So. 217, 218 (Fla. 1932)).

317. 385 So. 2d 1050 (Fla. 1st Dist. Ct. App. 1980).

318. *Save Anna Maria, Inc.*, 700 So. 2d at 116.

319. 705 So. 2d 63 (Fla. 4th Dist. Ct. App. 1997).

320. *Id.* at 64.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Barnett*, 705 So. 2d at 64.

court,”<sup>325</sup> and that “[t]he general rule is that a non-party is a ‘stranger to the record’ who cannot ‘transfer jurisdiction to the appellate court.’”<sup>326</sup> The court distinguished the case from *In re Receiverships of Guarantee Security Life Insurance Co.*<sup>327</sup> based on the fact that in that case, “even though the litigants were not parties to the statutory receivership proceeding, they had standing on appeal to challenge the order that directly impacted the development of the case in which they were named defendants.”<sup>328</sup>

The fifth district dismissed an appeal in *Cocoa Academy for Aerospace Technology v. School Board of Brevard County*<sup>329</sup> when the appellant was not a legal entity, but simply the name of a program at a high school.<sup>330</sup> The court found that “[i]t is a basic premise that unless an *in rem* proceeding is before the court, a cause of action must be conducted by or opposed by a ‘person’ recognized under the laws of this state.”<sup>331</sup> Dismissing the appeal, the court found that “[i]n the instant matter, only one party, the appellee, School Board, is visible to this court, and Cocoa Academy of Aerospace Technology, although designated as the appellant, is not.”<sup>332</sup>

#### XIX. PRESERVATION OF ERROR

The fourth district, in *Murphy v. International Robotics Systems, Inc.*,<sup>333</sup> discussed at length the subject of improper closing arguments that were not objected to during trial, “in the hopes that a litigant considering an appeal to this court, whose best hope for reversal is unobjected-to argument of counsel, will carefully consider whether it is worth the cost.”<sup>334</sup> The opinion noted that “[i]n the thirty-three years since this court was created, it has never granted a new trial in a civil case grounded solely on improper argument when there was no objection during trial.”<sup>335</sup> It also pointed out that “[a]lthough the Florida Supreme court has reversed for a new trial based

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325. *Id.* (quoting FLA. R. APP. P. 9.020(f)(1)) (emphasis added by the court).

326. *Id.* (quoting *Forcum v. Symmes*, 133 So. 88, 89 (1931)).

327. 678 So. 2d 828 (Fla. 1st Dist. Ct. App. 1996).

328. *Barnett*, 705 So. 2d at 64.

329. 706 So. 2d 397 (Fla. 5th Dist. Ct. App. 1998).

330. *Id.* at 398.

331. *Id.*

332. *Id.*

333. 710 So. 2d 587 (Fla. 4th Dist. Ct. App. 1998).

334. *Id.* at 588.

335. *Id.* at 587.

on unobjected-to closing argument, the last time it did so in a civil case was in 1956.”<sup>336</sup>

The court provided an extensive overview of Florida case law relating to the issue. It stated that “we do not think improper, but unobjected-to, closing argument in a civil case is something so fundamental that there should be an exception to the rule requiring an objection.”<sup>337</sup> The court further stated that “we do not think we are being inconsistent with our supreme court when we all but close the door on allowing this issue to be raised for the first time on appeal.”<sup>338</sup>

## XX. ORAL ARGUMENT

In *Whitehead v. Dreyer*,<sup>339</sup> counsel for one of the appellees was denied the opportunity to present oral argument on behalf of his client.<sup>340</sup> Prior to a decision by the court, that attorney filed a motion for rehearing, contending that he was entitled to participate in oral argument because he filed a brief as an appellee.<sup>341</sup>

The fifth district recognized that “[a]lthough *Florida Rule of Appellate Procedure* 9.020 defines an appellee as every party other than the appellant, the committee notes to that rule observe the term appellee ‘has been defined to include the parties against whom relief is sought and all others necessary to the cause.’”<sup>342</sup> Pointing out that relief was not being sought against the appellee represented by the attorney who moved for rehearing and that the appellee was not a necessary party to the appealed judgment, the court denied the motion.<sup>343</sup>

## XXI. SANCTIONS

In *Mercade v. State*,<sup>344</sup> the second district concluded that a *pro se*, incarcerated appellant had brought a frivolous appeal from a trial court order denying a motion to correct an illegal sentence.<sup>345</sup> The court consequently

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336. *Id.* at 589 (citing *Seaboard Air Line R.R. v. Strickland*, 88 So. 2d 519 (Fla. 1956)).

337. *Id.*

338. *Murphy*, 710 So. 2d at 590.

339. 698 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1997).

340. *Id.* at 1280.

341. *Id.*

342. *Id.* (citing 1973 Amendments to Committee Notes, FLA. R. APP. P. 9.020(g)).

343. *Id.*

344. 698 So. 2d 1313 (Fla. 2d Dist. Ct. App. 1997).

345. *Id.* at 1313.

recommended that the Department of Corrections exercise its discretion to subject the appellant to the forfeiture of gain time in accord with section 944.28 of the *Florida Statutes* (Supp. 1996).<sup>346</sup>

The court stated:

We use this case . . . to send a message to prisoners collaterally attacking sentences imposed by the trial courts of this district that we fully intend to invoke the applicable provisions of section 944.28, Florida Statutes (Supp. 1996), governing the forfeiture of gain time and the right to earn gain time in the future, when we are confronted with a frivolous appeal, such as this one, from the denial of a motion for postconviction relief.<sup>347</sup>

The court went on to discuss the statute to which it had referred. It noted that effective July 1, 1996, section 944.28(2)(a) was amended in part to provide that “[a]ll or any part of the gain time earned by a prisoner according to the provisions of law *is* subject to forfeiture if such prisoner . . . is found by a court to have brought a frivolous suit, action, claim, proceeding or appeal in any court.”<sup>348</sup> It also pointed out that the legislature in section 944.28 (2)(c) “vested sole discretion in the Department of Corrections to declare a forfeiture of a prisoner’s gain time for any violation of section 944.28(2)(a), including the bringing of a frivolous appeal.”<sup>349</sup>

The court went on to state:

It is manifestly clear to us that by amending section 944.28(2)(a), the Florida Legislature sent a definite message to prisoners such as the appellant that the initiation of frivolous legal proceedings before the courts of this state, including the bringing of frivolous appeals, will no longer be tolerated as a matter of public policy and that the consequence of bringing such proceedings may result in the Department of Corrections imposing the harshest of sanctions available to punish a prisoner—a longer period of incarceration through the forfeiture of gain time. We fully intend to implement this legislative policy expression.<sup>350</sup>

The court also noted that it was not the first appellate court “to rely on the provisions of section 944.28(2)(a) in an attempt to stem the flow of

346. *Id.*

347. *Id.* at 1314.

348. FLA. STAT. § 944.28(2)(a) (Supp. 1996).

349. *Mercade*, 698 So. 2d at 1315.

350. *Id.*

frivolous post-conviction appeals,”<sup>351</sup> citing to three fifth district cases, two of which provided a warning to defendants that further pursuit of frivolous appeals would subject them to sanctions as provided in 944.28(2)(a),<sup>352</sup> and one of which<sup>353</sup> “direct[ed] the Department of Corrections to forfeit the applicable gain time” of one of the individuals who had been previously warned.<sup>354</sup>

The *Mercade* court stated that “[a]lthough we share the same frustrations over frivolous post-conviction appeals as do our colleagues on the Fifth District, we conclude that we do not have the authority to simply direct the Department of Corrections to forfeit a prisoner’s gain time after finding that the prisoner’s appeal is frivolous.”<sup>355</sup> The court therefore declined to follow the “‘direct’ approach” taken by the fifth district.<sup>356</sup> The court then stated:

We express our confidence, however, that if we consistently implement the legislative policy expressed in section 944.28(2)(a) in the manner we have done in this case, and if the Department of Corrections consistently invokes the procedures of section 944.28(2)(c) when notified that a particular prisoner has brought a frivolous appeal before us, then prisoners will be dissuaded from bringing frivolous postconviction appeals because of the looming specter of the loss of a prisoner’s most precious commodity—gain time.<sup>357</sup>

## XXII. EXTRAORDINARY WRITS

### A. *Certiorari*

In *North Beach Association of St. Lucie County, Inc. v. St. Lucie County*,<sup>358</sup> a landowner filed a petition for a writ of certiorari in the circuit court to challenge a rezoning order.<sup>359</sup> After the landowner amended the

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351. *Id.* at 1316.

352. *Ferenc v. State*, 697 So. 2d 1262 (Fla. 5th Dist. Ct. App. 1997); *Hall v. State*, 690 So. 2d 754 (Fla. 5th Dist. Ct. App. 1997).

353. *Hall v. State*, 698 So. 2d 576 (Fla. 5th Dist. Ct. App. 1997).

354. *Id.*

355. *Mercade*, 698 So. 2d at 1316.

356. *Id.*

357. *Id.*

358. 706 So. 2d 62 (Fla. 4th Dist. Ct. App. 1998).

359. *Id.* at 63.

petition to allege additional grounds, the circuit court dismissed the petition, concluding that it lacked jurisdiction to consider the substantive arguments in the amended petition.<sup>360</sup>

Reviewing the dismissal, the fourth district granted certiorari, stating that “[a] petition for certiorari may be amended to include additional substantive arguments when the interests of justice are served thereby.”<sup>361</sup> The court noted that it is “not entirely uncommon” for appellants to move to file amended briefs to raise additional issues and that the court grants such motions when appellants gave satisfactory explanations as to why they did not raise the issues in their initial briefs and when there is no prejudice to opposing parties.<sup>362</sup> “We see no reason not to extend the same reasoning to the amendment of petitions for extraordinary relief,” the court stated.<sup>363</sup>

District court decisions involving requests for certiorari included *Patton v. State*,<sup>364</sup> (certiorari proper method of seeking review of order committing criminal defendant to custody of Department of Health and Rehabilitative Services after a determination that he was incompetent to proceed); *Taxpayers Ass’n. of Indian River County, Inc. v. Indian River County*,<sup>365</sup> (certiorari granted by district court when circuit court improperly concluded that petition for certiorari filed in circuit court to review action of county commission was moot); *Larkin v. Pirthauer*,<sup>366</sup> (order disqualifying attorney from representing personal representative of an estate reviewable by certiorari); *Billings, Cunningham, Morgan & Boatwright, P.A. v. Isom*,<sup>367</sup> (certiorari proper to review law firm’s motion to withdraw as counsel); *Board of County Commissioners v. Brabham*,<sup>368</sup> (certiorari is appropriate method of reviewing order which awards counsel fees to court-appointed attorneys in criminal cases); *Lerner v. Lerner*,<sup>369</sup> (certiorari granted to quash order granting a motion to compel the listing of a marital home for immediate sale); *Rutherford, Mulhall & Wargo, P.A. v. Antidormi*,<sup>370</sup> (certiorari granted to quash order requiring law firm, that had imposed a restraining lien on its office file for a former client who disputed the fee charged, to turn the file over to the client before the fee was paid); *Okaloosa*

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360. *Id.*

361. *Id.*

362. *Id.*

363. *North Beach Ass’n of St. Lucie County*, 706 So. 2d at 63.

364. 712 So. 2d 1206 (Fla. 1st Dist. Ct. App. 1998).

365. 701 So. 2d 897 (Fla. 4th Dist. Ct. App. 1997).

366. 700 So. 2d 182 (Fla. 4th Dist. Ct. App. 1997).

367. 701 So. 2d 1271 (Fla. 5th Dist. Ct. App. 1997).

368. 710 So. 2d 230 (Fla. 4th Dist. Ct. App. 1998).

369. 708 So. 2d 1029 (Fla. 2d Dist. Ct. App. 1998).

370. 695 So. 2d 1300 (Fla. 4th Dist. Ct. App. 1997).

*County v. Custer*,<sup>371</sup> (certiorari appropriate to review denial of motion to dismiss complaint for failure to comply with medical malpractice presuit requirements); *Gunning v. Brophy*,<sup>372</sup> (certiorari granted to vacate an order compelling a petitioner to respond to interrogatories that was entered after a notice was filed removing the case to federal court); *Code Enforcement Board v. Bustamont*,<sup>373</sup> (appellate decision of circuit court quashed on petition for writ of certiorari when circuit court had reversed a decision on an appeal which was untimely and as to which the appellant had waived not only the grounds of but the right to appeal in the first place); *Leveritt & Associates, P.A. v. Williamson*,<sup>374</sup> (certiorari granted to quash circuit court's affirmance of trial court's final judgment when circuit court refused to review issue of whether the trial court erred in denying motion to disqualify trial court); and, *WFTV, Inc. v. Hinn*,<sup>375</sup> (certiorari granted to quash order denying motion to strike a punitive damages claim).

## B. Prohibition

In *Valltos v. State*,<sup>376</sup> a criminal defendant sought prohibition after a trial judge denied a motion for disqualification based on the fact that the judge, in acceding to a request to order a presentence report on the propriety of youthful offender sanctions, announced that doing so would be a “waste of the Court's time.”<sup>377</sup> A response to the petition, filed by the Attorney General on behalf of the trial judge, stated that the “trial court merely indicated she did not think it would be appropriate to sentence petitioner as a youthful offender, but she nonetheless would consider sentencing petitioner as such.”<sup>378</sup> The response concluded that there “has been no showing that petitioner would not receive a fair hearing and sentence before this judge.”<sup>379</sup>

The second district noted that in reviewing motions for disqualification, trial judges may look only at the facial sufficiency of the motions and that attempts to refute charges of partiality exceed the scope of the inquiry and establish grounds for disqualification.<sup>380</sup> The court further stated that “[t]his

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371. 697 So. 2d 1297 (Fla. 1st Dist. Ct. App. 1997).

372. 22 Fla. L. Weekly D2167 (Fla. 2d Dist. Ct. App. 1997).

373. 706 So. 2d 1383 (Fla. 3d Dist. Ct. App. 1998).

374. 698 So. 2d 1316 (Fla. 2d Dist. Ct. App. 1997).

375. 705 So. 2d 1010 (Fla. 5th Dist. Ct. App. 1998).

376. 707 So. 2d 343 (Fla. 2d Dist. Ct. App. 1997).

377. *Id.* at 344.

378. *Id.*

379. *Id.*

380. *Id.*

principle applies with equal force to a response filed in a prohibition proceeding in the appellate court by the trial judge whose partiality is questioned, and the response refutes factual allegations or conclusions.”<sup>381</sup> Based on these principles, the court found that “[t]he response filed on behalf of the trial judge in this proceeding creat[ed] ‘an intolerable adversary atmosphere between the trial judge and the litigant’” and consequently granted prohibition.<sup>382</sup>

### C. *Effects on Appeals of Prior Denials of Petitions for Writs of Prohibition*

In *Sumner v. Sumner*,<sup>383</sup> the second district declined to follow the lead of the third and fourth districts, holding that denials of petitions for writs of prohibition will not bar subsequent, post-trial review unless the order of denial states that it is with prejudice or otherwise evinces an unequivocal determination by the court that the merits were considered.<sup>384</sup> The court’s conclusion was consistent with its historical approach to the issue, an approach that was rejected by the third district in *Obanion v. State*.<sup>385</sup> In *Obanion*, the court determined that petitions which are denied without comment will be deemed to constitute determinations on the merits, barring the issues raised from being litigated on subsequent appeals.<sup>386</sup> The fourth district adopted the *Obanion* approach in *Hobbs v. State*.<sup>387</sup> In *Barwick v. State*,<sup>388</sup> the supreme court approved of the use by the third and fourth districts of the *Obanion* approach, but declined to adopt it for itself, concluding instead that petitions filed in the supreme court would preclude subsequent review only when the order denying the petition specifically stated that the denial was with prejudice.<sup>389</sup>

### D. *Mandamus*

In *Sheley v. Florida Parole Commission*,<sup>390</sup> an inmate appealed from a circuit court order denying his petition for a writ of mandamus to review an

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381. *Valltos*, 707 So. 2d at 344.

382. *Id.* at 345.

383. 707 So. 2d 934 (Fla. 2d Dist. Ct. App. 1998).

384. *Id.* at 934.

385. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986).

386. *Id.* at 980.

387. 689 So. 2d 1249 (Fla. 4th Dist. Ct. App. 1997).

388. 660 So. 2d 685 (Fla. 1995).

389. *Id.* at 691.

390. 703 So. 2d 1202 (Fla. 1st Dist. Ct. App. 1997) (criminal division en banc).

order suspending his presumptive parole release date.<sup>391</sup> The first district acknowledged that “final judgment on a complaint for writ of mandamus is reviewable by appeal,” but concluded that this principle did not apply to the case under review because the circuit court petition was filed “as an appellate remedy to review quasi-judicial action of a lower tribunal.”<sup>392</sup> Under such circumstances, the court concluded, circuit court orders denying mandamus are “reviewable in the district court by certiorari under rule 9.030(b)(2)(B), and not by a subsequent plenary appeal on the merits of the case.”<sup>393</sup>

In *Orange County v. Love*,<sup>394</sup> a criminal defendant was acquitted of the charges brought against her in county court.<sup>395</sup> Subsequently, that court certified some, but not all, of the defendant’s claimed costs.<sup>396</sup> She then filed a petition for mandamus in the circuit court to compel certification of all claimed costs.<sup>397</sup> At the hearing on the petition, the county, which was responsible for reimbursing the costs allowed, appeared and objected to a majority of the costs.<sup>398</sup> The circuit court granted the petition, finding that the county court should certify all costs incurred by the defendant, except those which she conceded were not reimbursable, and the county appealed.<sup>399</sup> The fifth district noted that the county was never a proper party to either the criminal case or the mandamus and that there was no order requiring the county to pay the costs.<sup>400</sup> Accordingly, the court found that the county lacked standing to bring the appeal.<sup>401</sup>

### E. *Habeas Corpus*

In *McCray v. State*,<sup>402</sup> a criminal defendant, who had received a death penalty that was reduced on appeal to life imprisonment without parole for twenty-five years, filed a petition for a writ of habeas corpus, challenging the

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391. *Id.* at 1204.

392. *Id.* at 1204–05.

393. *Id.* at 1205.

394. 703 So. 2d 1138 (Fla. 5th Dist. Ct. App. 1997).

395. *Id.* at 1139.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Love*, 703 So. 2d at 1139.

400. *Id.*

401. *Id.*

402. 699 So. 2d 1366 (Fla. 1997).

effectiveness of his appellate counsel.<sup>403</sup> The petition was filed fifteen years after the original appeal.<sup>404</sup>

The court found the petition to be barred by laches.<sup>405</sup> Noting that “[t]he unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process,”<sup>406</sup> the court stated:

To remedy this abuse, we conclude, as a matter of law, that any petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel is presumed to be the result of an unreasonable delay and to prejudice the state if the petition has been filed more than five years from the date the petitioner’s conviction became final. We further conclude that this initial presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis, that the petitioner was affirmatively misled about the results of the appeal by counsel.<sup>407</sup>

In *Lewis v. Florida Parole Commission*,<sup>408</sup> the appellant filed a petition for a writ of habeas corpus in the tenth circuit in Polk County, where he was incarcerated, claiming that there was insufficient evidence to support the revocation of his parole.<sup>409</sup> On motion of the parole commission, the court transferred the case to the second circuit on the theory that the commission is located in Leon County, within that circuit.<sup>410</sup> That court dismissed the petition as an abuse of the writ based on the conclusion that the appellant had filed a petition for a *writ of mandamus* in the second circuit challenging his presumptive parole release date and could and should have raised the issues from the *habeas corpus* petition in the mandamus action.<sup>411</sup>

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403. *Id.* at 1366.

404. *Id.* at 1367. The petition was not barred by the two-year limitation period under *Florida Rule of Appellate Procedure* 9.140(j)(3)(B) for petitions alleging ineffective assistance of appellate counsel because Rule 9.140(j)(3)(C) provides that the two-year period “shall not begin to run prior to the effective date of this rule” and the petition at issue was filed within two years of the effective date.

405. *Id.* at 1386.

406. *Id.*

407. *McCray*, 699 So. 2d at 1368 (Fla. 1997).

408. 697 So. 2d 965 (Fla. 1st Dist. Ct. App. 1997).

409. *Id.* at 965.

410. *Id.*

411. *Id.* at 965–66.

On appeal, the first district reversed,<sup>412</sup> holding that the second circuit “did not have territorial jurisdiction to rule on such petitioning”<sup>413</sup> because “a habeas petition challenging a parole revocation must be filed in the county where the prisoner is incarcerated.”<sup>414</sup> The court went on to state that “[o]n the other hand, the proper method of challenging a presumptive parole release date is by a petition for writ of mandamus, filed in the Circuit Court of Leon County.”<sup>415</sup> Simply put, the court found that the appellant had instituted each of his two proceedings in the proper court.

The court rejected the Parole Commission’s argument that the issue of venue was moot because the appellant did not appeal the change of venue to the second district, where Polk County is located.<sup>416</sup> The court found that even if it were to accept that argument, the order under review would still have to be reversed because the circuit court in Leon County lacked “territorial jurisdiction”<sup>417</sup> over the action. The court also declined the Parole Commission’s request to “engage in a harmless-error analysis”<sup>418</sup> because “[a]s this is a matter for the courts of another district, we believe it would be improper for this court to in any way comment on the meritoriousness of appellant’s claim.”<sup>419</sup> Finally, the court also rejected the Parole Commission’s “fallback position” that the matter be remanded with instructions to dismiss the petition without prejudice to refile in the appropriate court.<sup>420</sup> The court felt that such a result would be “unjust and inappropriate” since the appellant had “already filed the matter in the proper court, and the Parole Commission improperly moved to change venue.”<sup>421</sup> The court therefore remanded with instructions to transfer the petition back to the tenth circuit.<sup>422</sup>

Venue was also at issue in *Calloway v. State*.<sup>423</sup> There, a defendant appealed from the denial of his petition for habeas corpus that had been filed

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412. *Id.* at 965.

413. *Lewis*, 697 So. 2d at 965.

414. *Id.* at 966.

415. *Id.* (citing *Porter v. Florida Parole and Probation Comm’n*, 603 So. 2d 31 (Fla. 1st Dist. Ct. App. 1992)).

416. *Id.*

417. *Id.*

418. *Lewis*, 697 So. 2d at 966.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. 699 So. 2d 849 (Fla. 3d Dist. Ct. App. 1977).

in Dade County, which constitutes the eleventh circuit.<sup>424</sup> The defendant had been convicted in the seventeenth circuit and could no longer file a timely motion for post conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850 in that circuit.<sup>425</sup> He admitted that he filed his petition in Dade County in an attempt to avoid the limitations period of rule 3.850.<sup>426</sup>

The third district dismissed the appeal on two grounds. First, the court stated that “[a] petition for habeas corpus cannot be used to circumvent the two-year period for filing motions for post-conviction relief.”<sup>427</sup> The court then went on to say, “[a] more significant reason for our dismissal of this appeal, however, is that the trial court in Dade County was without jurisdiction to entertain defendant’s petition. ‘[A] circuit court has no jurisdiction to review the legality of a conviction in another circuit . . .’”<sup>428</sup>

The fifth district relied on *Calloway* in dismissing an appeal from the denial of a habeas corpus petition in *McLeroy v. State*.<sup>429</sup> In that case, the petitioner, who had been convicted in the eleventh circuit, filed his petition in the fifth circuit, where he was incarcerated.<sup>430</sup> The fifth district pointed out that “[g]enerally, a petition for writ of habeas corpus should be filed in the jurisdiction where the petitioner is incarcerated.”<sup>431</sup> The court went on to state, however, that “petitions for writ[s] of habeas corpus which allege ineffective assistance of counsel are properly filed in the court where the original sentence was imposed.”<sup>432</sup>

#### F. *Coram Nobis*

In *Peart v. State*,<sup>433</sup> the third district receded from *Beckles v. State*,<sup>434</sup> and held that coram nobis is not an available remedy to defendants who were not advised of the deportation consequences of their pleas in criminal

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424. *Id.* at 849.

425. *Id.*

426. *Id.*

427. *Id.* (citing *Scott v. Dugger*, 604 So. 2d 465, 470 (Fla. 1992); *Leichtman v. Singletary*, 674 So. 2d 889, 891–92 (Fla. 4th Dist. Ct. App. (1996)).

428. *Calloway*, 699 So. 2d at 849–50 (quoting *State v. Broom*, 523 So. 2d 639, 641 (Fla. 2d Dist. Ct. App. 1988)).

429. 704 So. 2d 151 (Fla. 5th Dist. Ct. App. 1997).

430. *Id.* at 152.

431. *Id.*

432. *Id.*

433. 705 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1998) (en banc).

434. 679 So. 2d 892 (Fla. 3d Dist. Ct. App. 1996).

cases.<sup>435</sup> The court pointed out that the function of a writ of coram nobis is to correct errors of fact, and that the failure to advise of deportation consequences is an error of law.<sup>436</sup> The court therefore concluded that the proper remedy for defendants to pursue is post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850.<sup>437</sup>

The court recognized that because defendants who are not in custody cannot seek post conviction relief under the rule, such relief is “never available” to defendants who are released on “time served,” without any period of probation or community control.<sup>438</sup> The court recognized that “this may be a *harsh and unfair result*” as to such defendants.<sup>439</sup> “However,” the court continued, “there is no present mechanism that provides relief under these circumstances, and it is beyond this Court’s authority to alter the procedural rules to provide this relief.”<sup>440</sup> The court went to suggest that the supreme court “consider whether a rule should be adopted to address the issue.”<sup>441</sup> The court also certified that its decision conflicted with the decisions in *Marriott v. State*<sup>442</sup> and *Wood v. State*.<sup>443</sup>

### XXIII. APPEALS IN CRIMINAL CASES

#### A. *Trial Court Jurisdiction During Pendency of Appeal*

In *Daniels v. State*,<sup>444</sup> a defendant who had a pending appeal from an order revoking community control filed a motion for post conviction relief in the trial court.<sup>445</sup> The motion was denied and the first district affirmed, despite finding that the trial court lacked jurisdiction to consider the post conviction motion during the pendency of the appeal.<sup>446</sup> The Supreme Court of Florida quashed the district court’s decision and remanded with directions that the trial court’s order on the motion be vacated.<sup>447</sup> The court stated:

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435. *Peart*, 705 So. 2d at 1062.

436. *Id.*

437. *Id.*

438. *Id.* at 1063.

439. *Id.*

440. *Id.*

441. *Peart*, 705 So. 2d at 1063.

442. 605 So. 2d 985 (Fla. 4th Dist. Ct. App. 1992).

443. 698 So. 2d 293 (Fla. 1st Dist. Ct. App. 1997).

444. 712 So. 2d 765 (Fla. 1998).

445. *Id.* at 765.

446. *Id.*

447. *Id.*

[D]uring the pendency of a defendant's direct appeal, the trial court is without jurisdiction to rule on a motion for postconviction relief.

Consistent with *Meneses* and *Hall*, we hold that a ruling on the merits of the postconviction motion rendered by the trial court is a nullity, and, consequently, a decision by the appellate court that affirms or reverses the trial court's ruling is also a nullity.<sup>448</sup>

The fourth district, in *Griner v. State*,<sup>449</sup> also addressed the impact of a pending appeal on the trial court's jurisdiction to consider a motion for post conviction relief.<sup>450</sup> There, a defendant sought such relief with regard to convictions for certain charges while an appeal was pending from convictions on other charges that had been included in the same information, but had been severed for trial.<sup>451</sup> Noting that the State cited no authority in support of its argument that the trial court lacked jurisdiction, the appellate court found that the defendant had "clear legal right to a ruling on his motion for post conviction relief."<sup>452</sup>

## B. *Flight*

The State moved to dismiss a defendant's appeal in *Griffis v. State*<sup>453</sup> on the ground that the defendant had absconded after jury selection, was tried and convicted *in absentia* and was not returned to custody for six years, at which time he was adjudicated and sentenced.<sup>454</sup> Relying on *State v. Gurican*,<sup>455</sup> the State asserted that the defendant's flight constituted a waiver of the right to appellate review.<sup>456</sup> Finding the case to be "materially indistinguishable" from *Gurican*, the first district granted the State's motion.<sup>457</sup> The court noted, however, the defendant's argument that many of the policy considerations underlying the decision in *Gurican* were subsequently rejected by the United States Supreme Court in *Ortega-Rodriguez v. United States*.<sup>458</sup> The court recognized that the decision in

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448. *Daniels*, 712 So. 2d at 765 (citing *State v. Meneses*, 392 So. 2d 905 (Fla. 1981); *Hall v. State*, 697 So. 2d 237 (Fla. 5th Dist. Ct. App. (1997))).

449. 705 So. 2d 650 (Fla. 4th Dist. Ct. App. 1998).

450. *Id.* at 650.

451. *Id.*

452. *Id.* (citing *Moore v. Kaplan*, 640 So. 2d 199 (Fla. 4th Dist. Ct. App. 1994)).

453. 703 So. 2d 522 (Fla. 1st Dist. Ct. App. 1997).

454. *Id.* at 523.

455. 576 So. 2d 709 (Fla. 1991).

456. *Griffis*, 703 So. 2d at 523.

457. *Id.*

458. 507 U.S. 234 (1993).

*Ortega-Rodriguez* was based on the Supreme Court's exercise of its supervisory powers over the federal courts as opposed to any federal constitutional principle, and that the Supreme Court of Missouri in *State v. Troupe*,<sup>459</sup> had declined to follow *Ortega-Rodriguez*, adhering instead to an approach consistent with *Gurican*.<sup>460</sup> Nonetheless, the court certified to the Supreme Court of Florida the question of whether *Gurican* should be re-evaluated in light of *Ortega-Rodriguez*.<sup>461</sup>

### C. Appeals After Pleas of Guilty or *Nolo Contendere*

The defendant in *Harriel v. State*<sup>462</sup> pled guilty and was sentenced pursuant to a negotiated plea.<sup>463</sup> After his appointed counsel filed a notice of appeal, a State motion to dismiss the appeal was denied without prejudice.<sup>464</sup> The Public Defender handling the appeal then filed a brief pursuant to the dictates of *Anders v. California*,<sup>465</sup> which allows court appointed counsel to satisfy their ethical obligations when they can identify no meritorious issues to raise on appeal.<sup>466</sup> In reconsidering and granting the State's motion to dismiss, the court wrote an opinion "to establish a procedure for reviewing motions to dismiss appeals from convictions and sentences based on voluntary pleas of guilty or *nolo contendere* without reservation" of the right to appeal a dispositive issue.<sup>467</sup>

The court pointed out that under *Florida Rule of Appellate Procedure*, 9.140(b)(2)(B) which incorporates the dictates of *Robinson v. State*,<sup>468</sup> defendants who plead guilty or *nolo contendere* without reservation may appeal only:

- (i) the lower tribunal's lack of subject matter jurisdiction;
- (ii) a violation of the plea agreement, *if preserved by a motion to withdraw plea*;

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459. 891 S.W.2d 808 (Mo. 1995).

460. *Griffis*, 703 So. 2d at 523 n.1.

461. *Id.* at 523.

462. 710 So. 2d 102 (Fla. 4th Dist. Ct. App. 1998) (en banc).

463. *Id.* at 102-03.

464. *Id.* at 103.

465. 386 U.S. 738 (1967).

466. *Harriel*, 710 So. 2d at 103.

467. *Id.*

468. 373 So. 2d 898 (Fla. 1979).

- (iii) an involuntary plea, *if preserved by a motion to withdraw plea*;
- (iv) a sentencing error, *if preserved*; or
- (v) as otherwise provided by law.<sup>469</sup>

Given this fact, the court stated:

[W]e hold that the state may move to dismiss an appeal from a plea of guilty or nolo contendere without reservation, on the basis that the issues identified in *Robinson* are not implicated, with sufficient references to the record to support its position, and the appellant may file a response. We can then review the record to determine whether the appellant made a motion to withdraw the plea to preserve the issues of voluntariness of the plea and violation of the plea agreement or filed a motion to correct a sentencing error. If no motions have been filed, we will determine whether the other *Robinson* issues of subject matter jurisdiction or illegality of sentence exist. If they do not, we will dismiss the appeal as frivolous. If they do, we will deny the motion to dismiss, and the appellant can file a brief, *Anders* or otherwise.<sup>470</sup>

The court added that if the state does not move to dismiss appeals from guilty or nolo contendere pleas, it will still examine the record and brief to determine whether a properly preserved *Robinson* issue exists.<sup>471</sup> If no such issue exists, the court will summarily affirm.<sup>472</sup> If one does, it will “treat the issue as in any other comparable appeal.”<sup>473</sup>

In *Vaughn v. State*,<sup>474</sup> the defendant pled nolo contendere and reserved the right to appeal the denial of his motion to suppress, which the trial court had found to be dispositive.<sup>475</sup> The trial court’s determination as to dispositiveness was based on its belief that the state would not have been able to convince the jury of the defendant’s guilt without the evidence that was the subject of the suppression motion.<sup>476</sup>

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469. *Harriel*, 710 So. 2d at 104 (citing FLA. R. APP. P. 9.140(b)(2)(B)).

470. *Id.* at 106.

471. *Id.*

472. *Id.*

473. *Id.*

474. 711 So. 2d 64 (Fla. 1st Dist. Ct. App. 1998).

475. *Id.* at 64.

476. *Id.* at 65.

The first district court noted that it had previously held on several occasions that issues are dispositive only if there will be no trial of the case regardless of the result of the appeal.<sup>477</sup> The court therefore concluded that the trial court had applied an incorrect legal rule in finding the issue to be dispositive.<sup>478</sup> Since, under the facts of the case, there existed ample evidence, independent of that to which the motion was directed, for the State to proceed to trial, the court found that the issue was not dispositive and dismissed the appeal.<sup>479</sup>

#### D. *Appellate Review of the Sufficiency of the Evidence*

In *Barton v. State*,<sup>480</sup> the first district agreed with a defendant that certain evidence was improperly admitted at trial.<sup>481</sup> The court went on to review the defendant's sufficiency of the evidence claim and, in doing so, faced the question of whether it could consider the improperly admitted evidence in deciding the sufficiency issue.<sup>482</sup> "It does not follow," the court found, "that the defendant is entitled to a judgment of acquittal merely because evidence that is critical to the court's finding of sufficiency was improperly admitted."<sup>483</sup> Relying on the decision in *Lockhart v. Nelson*,<sup>484</sup> the court pointed out that some procedural errors might be corrected on remand, thereby allowing the evidence to be used again.<sup>485</sup> "Consequently," the court concluded, "the appellate courts must consider the sufficiency of the evidence and alleged trial errors separately."<sup>486</sup>

#### E. *Reviewable Orders*

Numerous cases passed on the question of whether particular orders in criminal cases were reviewable by appellate courts. These cases included: *State v. Allen*,<sup>487</sup> (state may appeal from order partially denying claim for

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477. *Id.*

478. *Id.* at 66.

479. *Vaughn*, 711 So. 2d at 66.

480. 704 So. 2d 569 (Fla. 1st Dist. Ct. App. 1997).

481. *Id.* at 573.

482. *Id.*

483. *Id.*

484. 488 U.S. 33 (1988).

485. *Barton*, 704 So. 2d at 573 (citing *Lockhart v. Nelson*, 488 U.S. 33 (1988)).

486. *Id.*

487. 22 Fla. L. Weekly D2155 (Fla. 1st Dist. Ct. App. Sept. 12, 1997).

restitution); *Downs v. State*,<sup>488</sup> (defendant may appeal from order designating him a sexual predator); *Thomas v. State*,<sup>489</sup> (same); *Torres v. State*,<sup>490</sup> (defendant cannot appeal from order denying motion for violation of probation hearing, proper procedure is to seek a habeas corpus in the circuit of incarceration); *Oser v. State*,<sup>491</sup> (defendant cannot appeal from order denying motion to mitigate); *Brown v. State*,<sup>492</sup> (defendant cannot appeal from order denying motion to mitigate, but when circuit court's denial was based on an erroneous determination that the defendant's motion was untimely, court treated appeal as a petition for writ of certiorari, granted petition, and remanded for proper consideration of the motion).

#### F. *Belated Appeals*

In *Trowell v. State*,<sup>493</sup> the first district examined the trial court's denial of a defendant's motion for a belated appeal,<sup>494</sup> citing *Thomas v. State*<sup>495</sup> and concluding that the defendant was not entitled to an appeal because he had entered a negotiated plea of guilty and waived his right to appeal matters relating to the judgment.<sup>496</sup>

The appellate court noted that *Thomas* was inconsistent with a substantial body of case law from the first district as well as other district courts.<sup>497</sup> Thus, the court receded from *Thomas* to the extent that the decision in that case required defendants seeking belated appeals to state what issues they would have raised on appeal, whether or how those issues would have been dispositive, or how they were otherwise prejudiced.<sup>498</sup> The court went on to state:

[T]here should be no difference between a defendant's right to a belated appeal, if the evidence discloses that the delay was not attributable to his or her own neglect, and the right to a timely appeal, insofar as any requirement that the defendant make a preliminary showing of merit. In both cases, a statement of

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488. 700 So. 2d 789 (Fla. 2d Dist. Ct. App. 1997).

489. 22 Fla. L. Weekly D2541 (4th Dist. Ct. App. Nov. 5, 1997).

490. 700 So. 2d 1247 (Fla. 5th Dist. Ct. App. 1997).

491. 699 So. 2d 844 (Fla. 4th Dist. Ct. App. 1977).

492. 707 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1998).

493. 706 So. 2d 332 (Fla. 1st Dist. Ct. App. 1998) (en banc).

494. *Id.* at 333.

495. 626 So. 2d 1093 (Fla. 1st Dist. Ct. App. 1993).

496. *Trowell*, 706 So. 2d at 333.

497. *Id.* (citations omitted).

498. *Id.*

meritorious issues is irrelevant to one's entitlement to appeal. Similarly, there should be no difference between a defendant's right to a belated appeal from a conviction following trial or after a plea, because, in either instance, if the appeal had been timely filed, an initial statement of arguable points would be irrelevant to the right to appeal.<sup>499</sup>

Thus, the court said:

[W]e are of the firm belief that the only relevant inquiry, once a request for a belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person. If the appeal proceeds from the entry of an unconditional guilty or nolo contendere plea, it may, due to appellant's failure to submit any issue cognizable under *Robinson* [v. State],<sup>500</sup> eventually result in dismissal by an *appellate* court, but issues of merit are not required as a precondition to the appeal.<sup>501</sup>

Recognizing that subsequent to the trial court's ruling, *Florida Rule of Appellate Procedure* 9.140(j)(1) was amended to provide that petitions seeking belated appeals are to be filed in the appellate courts, the court construed the motion in the case as a properly filed petition and granted it.<sup>502</sup> The court noted that its decision conflicted with several decisions from other district courts<sup>503</sup> and certified the conflict.<sup>504</sup>

In *Denson v. State*,<sup>505</sup> the fifth district discussed how to deal with factual questions relating to requests for belated appeals.<sup>506</sup> The petitioner there sought a belated appeal and the State, despite not specifically disputing the petitioner's allegations, argued that in the absence of a sworn affidavit from trial counsel or supporting documentation, neither of which had been

499. *Id.* at 334–35.

500. 373 So. 2d 898 (Fla. 1979). For a discussion of the issues that can be raised under *Robinson* after a plea of guilty or nolo contendere, see Section XXIII (C) of this article.

501. *Trowell*, 706 So. 2d at 337 (citing *Baggett v. Wainwright* 229 So. 2d 239 (Fla. 1969); *Amendments to the Florida Rule of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996)).

502. *Trowell*, 706 So.2d at 338.

503. *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d Dist. Ct. App. 1997); *Loadholt v. State*, 683 So. 2d 596 (Fla. 3d Dist. Ct. App. 1996); *Zduniak v. State*, 620 So. 2d 1083 (Fla. 2d Dist. Ct. App. 1993); *Bridges v. Dugger*, 518 So. 2d 298 (Fla. 2d Dist. Ct. App. 1987).

504. *Trowell*, 706 So. 2d at 338.

505. 710 So. 2d 144 (Fla. 5th Dist. Ct. App. 1998).

506. *Id.*

provided, an evidentiary hearing should be required.<sup>507</sup> The court disagreed, noting that *Florida Rule of Appellate Procedure* 9.140(j), which governs belated appeals, does not require a petitioner to provide an affidavit from trial counsel and stated that, “[i]nstead, the state must dispute the petitioner’s sworn claim, if not by affidavit, at least by specific allegations.”<sup>508</sup> Where there is an absence of disputed fact, the court stated, “the petition will be granted without an evidentiary hearing.”<sup>509</sup>

### G. Appeals By the State

In *State v. Rincon*,<sup>510</sup> as authorized by section 924.07(1)(j) of the *Florida Statutes*,<sup>511</sup> the State appealed from a judgment of acquittal entered after the jury had returned a guilty verdict.<sup>512</sup> The defendant asserted that notwithstanding the statutory authority, the appeal ran afoul of double jeopardy.<sup>513</sup> The court rejected the defendant’s argument, concluding that “double jeopardy is a consideration only when a *retrial* of the defendant would be necessitated by a reversal of the trial court’s ruling.”<sup>514</sup> Since reversal in the case under review would result not in a retrial, but in the reinstatement of the jury verdict, the court considered the merits of the case.<sup>515</sup>

### H. Cross-Appeals

In *Hudson v. State*,<sup>516</sup> a defendant appealed from convictions for trafficking in and conspiracy to traffic in 200 or more, but less than 400, grams of cocaine.<sup>517</sup> The State, on cross-appeal, asserted that the trial court erred in granting a motion for judgment of acquittal as to charges that the defendant was guilty of offenses involving 400 or more grams of cocaine.<sup>518</sup>

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507. *Id.*

508. *Id.* at 145.

509. *Id.*

510. 700 So. 2d 412 (Fla. 3d Dist. Ct. App. 1997).

511. *Id.*

512. *Id.* at 412.

513. *Id.* at 414.

514. *Id.* (quoting *Ramos v. State*, 457 So. 2d 492, 494 (Fla. 3d Dist. Ct. App. 1984) (emphasis added by the court)).

515. *Rincon*, 700 So. 2d at 413.

516. 711 So. 2d 244 (Fla. 1st Dist. Ct. App. 1998).

517. *Id.* at 245.

518. *Id.*

The first district examined section 924.07 of the *Florida Statutes*, which confers on the state the right to appeal certain orders in criminal cases.<sup>519</sup> First, the court looked to section 924.07(1)(j),<sup>520</sup> which allows the state to appeal from a “ruling granting a motion for judgment of acquittal after a jury verdict.”<sup>521</sup> Reading this provision in the context of the double jeopardy clauses of the federal and state constitutions, the court found that “this statutory provision plainly contemplates appeal from a judgment of acquittal only if the judgment of acquittal follows a guilty verdict.”<sup>522</sup>

The court went on to consider section 924.07(1)(d), which authorizes state appeals from rulings on questions of law when defendants are convicted and appeal from the judgment.<sup>523</sup> The court determined that “[i]n keeping with precedent” and with the rule of statutory construction that specific statutes control over general ones on the same subject,<sup>524</sup> it would “decline to construe the general language of subsection (1)(d) as overriding the specific provision in subsection (1)(j).”<sup>525</sup> The state’s cross-appeal was therefore dismissed.<sup>526</sup>

In *State v. Fedor*,<sup>527</sup> the State appealed from an order excluding certain evidence and the defendant filed a cross-appeal directed to another portion of the order appealed from.<sup>528</sup> Subsequently, the State voluntarily dismissed its appeal and the fifth district faced the issue of whether it had jurisdiction to hear the cross-appeal.<sup>529</sup>

The court noted that a cross-appeal can continue after a main appeal is dismissed “if the cross-appeal could have been appealed on its own merits, independent of the [sic] main appeal.”<sup>530</sup> Since a criminal defendant has no independent right to appeal a pretrial order, but can do so only by cross-appeal to review a related issue which was resolved in the same order that the state is appealing, the court concluded that it lacked jurisdiction and dismissed the case.<sup>531</sup>

519. *Id.* at 246; see FLA. STAT. § 924.07 (1995).

520. *Id.*

521. *Hudson*, 711 So. 2d at 246 (quoting FLA. STAT. § 924.07(1)(j) (1995)).

522. *Id.*

523. *Id.* at 247.

524. *Id.*

525. *Id.*

526. *Hudson*, 711 So. 2d at 247.

527. 714 So. 2d 526 (Fla. 5th Dist. Ct. App. 1998).

528. *Id.* at 526.

529. *Id.*

530. *Id.*

531. *Id.* at 526–27.

## I. *Public Defenders*

The Supreme Court of Florida, in *In re Public Defender's Certification of Conflict*,<sup>532</sup> approved an order of the second district which addressed the large number of criminal appeals involving indigent defendants represented by the Public Defender's Office for the tenth circuit who were "not receiving timely appellate review."<sup>533</sup> The second district's order had been precipitated by a motion from the Public Defender to withdraw in 248 cases "due to what the Public Defender deemed to be 'an excessive caseload.'"<sup>534</sup> The order indicated that the second district was reviewing cases in which the defendants had served their prison sentences or had completed their probation before the Public Defender filed its briefs with the court.<sup>535</sup> At oral argument, the supreme court was advised that the number of cases then delinquent exceeded 640.<sup>536</sup> The order required the Public Defender to accept no appellate cases until further order and mandated that the chief judges of the circuits within the district "appoint qualified attorneys to represent indigents in appeals arising in their respective circuits."<sup>537</sup>

The order acknowledged that it was placing an enormous financial burden on the counties, but explained that without such a drastic step, the court would be unable to fulfill its "constitutional duty to provide meaningful review to indigent criminal defendants."<sup>538</sup> In approving the order, the supreme court stated:

The facts in this record establish a significant problem of constitutional magnitude that must immediately be addressed. We do not want to face a situation where a significant number of defendants convicted of felony offenses must be released on bond because their appeals of right are not being timely addressed due to the lack of counsel required to be provided under the United States Constitution. We must provide an immediate short-term solution to this crisis.<sup>539</sup>

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532. 709 So. 2d 101 (Fla. 1998).

533. *Id.* at 102.

534. *Id.*

535. *Id.*

536. *Id.*

537. *Public Defender's Certification of Conflict*, 709 So. 2d at 102.

538. *Id.* at 103.

539. *Id.*

The supreme court additionally required the chief judge of the second district, the Public Defender, and the Attorney General to provide status reports on September 1, 1998, (about five months after the date of the opinion) “as to whether the order should be continued, modified, or terminated,” and requested that the legislature consider providing an emergency fund to help the affected counties.<sup>540</sup> In concluding, the court said:

We strongly believe that there needs to be a long-term as well as a short-term solution, and, in this regard, we would encourage the creation of a special committee or commission by the legislature to examine the structure and funding of indigent representation in criminal cases. We firmly believe that this type of delay in the criminal justice process, as illustrated in this case, can be eliminated by a joint effort of all interested parties. This Court is very willing to participate and provide necessary resource assistance to develop a viable solution to this ongoing problem.<sup>541</sup>

In a specially concurring opinion that was joined in by Justice Wells, Justice Overton suggested “that the time has come to reevaluate the structure of how we provide Public Defender representation.”<sup>542</sup> He set forth some proposed structural changes: the elimination of the five district appellate offices and the representation by each Public Defender’s office of the defendants from its jurisdiction, the creation within each Public Defender’s office of a separate section for conflict cases for both trial and appeal, and that these conflict sections be funded to handle the capital collateral representation of defendants sentenced to death in other circuits.<sup>543</sup> Justice Overton ended his opinion by stating:

In conclusion, these structural changes should provide better representation for indigent defendants, assist in alleviating problems counties are facing in paying for the cost of conflict counsel, provide a unified administrative structure for funding, and provide more effective administration of collateral representation in capital cases. With the implementation of such changes, the legislature should be better able to focus on other problems

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540. *Id.* at 104.

541. *Id.*

542. *Public Defender’s Certification of Conflict*, 709 So. 2d at 104 (Overton, J., concurring specially).

543. *Id.* at 105.

confronting the effective administration of our criminal justice system.<sup>544</sup>

#### XXIV. APPEALS IN JUVENILE CASE

In *State v. T.M.B.*,<sup>545</sup> the Supreme Court of Florida reviewed several cases in which the respondents pled either guilty or nolo contendere in juvenile delinquency proceedings and attempted to appeal the final orders of delinquency.<sup>546</sup> The State had opposed the appeals, arguing that the respondents were required by sections 924.051(3) and (4) of the *Florida Statutes*, to preserve their claims for review.<sup>547</sup> The first district rejected the state's argument, concluding that section 924.051 applies only to criminal cases, not juvenile matters,<sup>548</sup> but certified the issue to the supreme court.<sup>549</sup> In approving the district court's conclusion, the supreme court found that because "the terms and conditions of juvenile appeals are addressed exhaustively in chapter 39 [of the *Florida Statutes*] . . . [i]t is . . . clear that the legislature intended chapter 39 to govern juvenile appeals . . . [and] that section 924.051 is inapplicable to juvenile proceedings."<sup>550</sup>

In *A.G. v. Department of Children and Family Services*,<sup>551</sup> the fourth district examined the issue of whether an order adjudicating a child dependent is a final appealable order or whether it is a non-final order that can be reviewed in a subsequent appeal from a later disposition order.<sup>552</sup> The court concluded that such orders are final and certified conflict with the fifth district's decision in *Moore v. Department of Health and Rehabilitative Services*.<sup>553</sup>

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544. *Id.*

545. 716 So. 2d 269 (Fla. 1998).

546. *Id.* at 269.

547. *Id.*

548. *Id.* at 270.

549. *Id.* at 269.

550. *T.M.B.*, 716 So. 2d at 271.

551. 707 So. 2d 972 (Fla. 4th Dist. Ct. App. 1998).

552. *Id.* at 972.

553. 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995). The court noted that both *Moore* and *G.L.S. v. Department of Children and Families*, 700 So. 2d 96 (Fla. 1st Dist. Ct. App. 1997), which the first district certified as conflicting with *Moore*, dealt with termination of parental rights. "[W]e view the issue of appealability, vel non, of an adjudicatory order to be the same in dependency proceedings," the court said. *A.G.*, 707 So. 2d at 972. For a discussion of the decision in *G.L.S.*, see *supra* Part XXV. at 96.

In *Department of Juvenile Justice v. J.R.*,<sup>554</sup> the Department of Juvenile Justice (“DJJ”) appealed from an order adjudicating “a juvenile as a delinquent and committing him to a specific treatment program.”<sup>555</sup> The juvenile moved to strike DJJ’s notice of appeal and brief, which argued that the trial court exceeded its authority by specifying the detention program placement.<sup>556</sup> The juvenile pointed to the fact that section 985.234(1)(b) of the *Florida Statutes* (1997), provides that in appeals by the state, the State Attorney is to file the notice of appeal and the fact that other provisions of chapter 985 call for the State Attorney to represent the state in the trial court and for the Attorney General to do so on appeal.<sup>557</sup> The Attorney General also appeared and took the position that the juvenile’s motions should be granted.<sup>558</sup>

The first district disagreed, noting that “[s]ection 985.23(1)(d) provides that parties to the case shall include representatives of DJJ” and found that DJJ was “not the prosecuting authority (*i.e.*, ‘the state’), but rather appear[ed] in its capacity as the legal custodian of the child committed to its care.”<sup>559</sup> The court determined that “the right DJJ seeks to vindicate on appeal is unique to its role as the custodian charged with the care of a delinquent child,” and denied the juvenile’s motions.<sup>560</sup>

In *E.P.H. v. Wright*,<sup>561</sup> the fourth district found that habeas corpus is the proper method for reviewing orders of secure detention.<sup>562</sup> The court recognized that section 985.215(5)(a) of the *Florida Statutes*, states that such orders shall be deemed final orders reviewable by appeal, but agreed with the first district in *T.L.W. v. Soud*<sup>563</sup> that “this statute is unconstitutional as a legislative attempt to provide for appeal of non-final orders.”<sup>564</sup> Judge Farmer dissented, expressing the belief that the legislature’s power to establish substantive rights includes “the power to say when a right is so important that the judicial determination of it is final for purposes of

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554. 710 So. 2d 211 (Fla. 1st Dist. Ct. App. 1998).

555. *Id.* at 212.

556. *Id.*

557. *Id.*

558. *Id.* at 213.

559. *Department of Juvenile Justice*, 710 So. 2d at 213.

560. *Id.* at 214.

561. 708 So. 2d 673 (Fla. 4th Dist. Ct. App. 1998).

562. *Id.* at 674.

563. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994).

564. *E.P.A.*, 708 So. 2d at 674 (citing *T.L.W. v. Soud*, 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994)).

appellate review” and indicating that he “would certify conflict with *T.L.W.*”<sup>565</sup>

## XXV. APPEALS FROM ORDERS TERMINATING PARENTAL RIGHTS

In *G.L.S. v. Department of Children and Families*,<sup>566</sup> a father appealed from two orders, an order terminating his parental rights, and a disposition order committing the minor children to the legal care, custody, and control of the Department of Health and Rehabilitative Services.<sup>567</sup> The order terminating parental rights was entered eighteen days before the disposition order, and the notice of appeal was filed twenty-four days after the disposition order.<sup>568</sup> Thus, although the notice was timely as to the disposition order,<sup>569</sup> the first district was faced with the issue of whether the notice was timely with regard to the termination order.

The father argued only the disposition order was a final order and that had he filed a notice of appeal from the termination order, it would have been premature and thus “held in abeyance until the entry of the final disposition order.”<sup>570</sup> The court disagreed, holding that “an adjudication order in which parental rights are actually terminated is a final, appealable order, subject to immediate review.”<sup>571</sup> Because the notice of appeal was not timely as regards to the termination order, the appeal was dismissed.<sup>572</sup> The court noted that its dismissal was without prejudice to the father’s right to seek a belated appeal<sup>573</sup> and certified that the decision was in conflict<sup>574</sup> with two fifth district cases.<sup>575</sup>

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565. 708 So. 2d at 674.

566. 700 So. 2d 96 (Fla. 1st Dist. Ct. App. 1997).

567. *Id.* at 97.

568. *Id.*

569. Under *Florida Rule of Appellate Procedure* 9.110(b), a notice of appeal must be filed within 30 days of rendition of the order from which review is sought. FLA. R. APP. P. 9.110(b).

570. *G.L.S.*, 700 So. 2d at 98.

571. *Id.*

572. *Id.* at 99.

573. *Id.*

574. *Id.*

575. *Lewis v. Department of Health and Rehabilitative Services*, 670 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1996); *Moore v. Department of Health and Rehabilitative Services*, 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995).

## XXVI. ATTORNEYS' FEES

In *Berry v. Scotty's, Inc.*,<sup>576</sup> an appellant requested attorney's fees after prevailing in an appeal from an order of the Unemployment Appeals Commission.<sup>577</sup> The second district noted that when statutes provide for awards of appellate attorneys' fees, and the lower tribunals are circuit or county courts, the court grants entitlement to an award of fees and remands for the trial court to determine the amount of the award.<sup>578</sup> The court noted, however, that the statute at issue in the case, section 443.041(2)(b) of the *Florida Statutes*, was "unusual," in that it directs the appellate court to "fix" the award.<sup>579</sup>

The court recognized that the third district had observed in *Cheung v. Executive China Doral, Inc.*,<sup>580</sup> that since the statute offers no criteria for determining the amount of an award, the common law principles in *Florida Patient's Compensation Fund v. Rowe*,<sup>581</sup> were applicable.<sup>582</sup> The second district agreed with the analysis of *Cheung*, but decided that rather than appoint a judge as a commissioner to determine the fee, as the third district had in *Cheung*, it preferred "to relinquish jurisdiction to the appeals referee to conduct further proceedings on the matter."<sup>583</sup>

## XXVII. COSTS

In *Porter v. State*,<sup>584</sup> a criminal defendant under a sentence of death, who was represented by the Capital Collateral Representative ("CCR") appealed from the denial of a motion for post-conviction relief.<sup>585</sup> Incident to that appeal, the defendant filed a motion that sought to have the county pay the cost of transcribing the various hearings in the trial court.<sup>586</sup> In denying the motion, the supreme court noted that in *Hoffman v. Haddock*,<sup>587</sup> it had held that CCR is statutorily required "to provide for the collateral

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576. 23 Fla. L. Weekly D930 (2d Dist. Ct. App. Apr. 8, 1998).

577. *Id.* at D930.

578. *Id.*

579. *Id.*

580. 638 So. 2d 82 (Fla. 3d Dist. Ct. App. 1994).

581. 472 So. 2d 1145 (Fla. 1989).

582. *Berry*, 23 Fla. L. Weekly at D930.

583. *Id.*

584. 700 So. 2d 647 (Fla. 1997).

585. *Id.* at 648.

586. *Id.*

587. 695 So. 2d 682 (Fla. 1997).

representation of any person convicted and sentenced to death in this state and is to be responsible *for the payment of all necessary costs and expenses.*"<sup>588</sup> The court went on to "clarify that [its *Hoffman*] decision includes court reporter fees for transcription of the proceedings to be included in the record on appeal."<sup>589</sup> The court further stated:

We rule on this motion by this opinion to express our conclusion that payment of all postconviction costs out of CCR's budget is not only statutorily required but is necessary to carry out the legislative intent expressed in section 27.7001, Florida Statutes (Supp. 1996). Moreover, we believe it will further the goal of accounting for and controlling costs in postconviction proceedings and further the efficient processing of postconviction capital cases.<sup>590</sup>

Because postconviction costs were historically paid by the counties, the court urged CCR and the Commission on Administration of Justice in Capital Cases "to immediately assess the impact of these costs on CCR's budgets in each of the CCR offices and at an early time do what is necessary to make the legislature aware of the need to appropriate the funds to cover these costs."<sup>591</sup>

The fifth district, in *Rehman v. ECC International Corp.*,<sup>592</sup> rejected a claim that lost interest on a cash bond posted on appeal was a recoverable cost. The court noted *Florida Rule of Appellate Procedure* 9.400(a) which indicates that "taxable costs" shall include certain things, including the catch-all phrase "other costs permitted by law," but does not specifically refer to lost interest.<sup>593</sup> The court subsequently stated:

Courts do not allow as taxable costs interest which theoretically accrued on other kinds of costs expended by a party to an appeal, such as the payments for transcripts, depositions, exhibits and the like. Without an express authorization in the rules to treat theoretical lost interest on a cash bond posted by an appellant, we agree it should not be a taxable cost.<sup>594</sup>

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588. *Porter*, 700 So. 2d at 648 (Fla. 1997) (quoting *Hoffman v. Haddock*, 695 So. 2d 682, 684 (Fla. 1997)).

589. *Id.* at 648.

590. *Id.*

591. *Id.* at 648-49.

592. 707 So. 2d 752 (Fla. 5th Dist. Ct. App. 1998).

593. *Id.* at 752-53.

594. *Id.* at 753.

In *Okeelanta Corp. v. Bygrave*,<sup>595</sup> the plaintiffs brought a class action and obtained a final summary judgment in their favor.<sup>596</sup> The defendants appealed and the judgment was reversed for further proceedings.<sup>597</sup> On remand, four defendants moved for, and received an order taxing appellate costs, while a fifth agreed to defer hearings on its motion for a cost judgment until there was an ultimate prevailing party in the underlying case.<sup>598</sup>

On appeal from the order taxing costs, the fourth district agreed that “at this point in the proceedings, absent members of the class may not be liable for costs.”<sup>599</sup> The court noted that “[a] judgment cannot be entered without knowing against whom it may operate” and that “[a]t the present time, an impediment to entering a cost judgment is the inability to identify who, besides the class representatives, may be judgment debtors.”<sup>600</sup> The court therefore concluded that “because it has not been established which members of the class might ultimately be liable for these costs, we reverse the order and direct that it be deferred until the conclusion of the case.”<sup>601</sup>

In *Fleitman v. McPherson*,<sup>602</sup> a petitioner sought certiorari to quash a trial court order denying a motion to disqualify the respondents’ attorney and that attorney’s law firm from representing the defendant.<sup>603</sup> After the order was quashed with respect to the disqualification of the attorney at trial, but upheld with respect to the disqualification of the law firm, the petitioner moved to tax costs.<sup>604</sup> The trial court determined that since the appellate court’s “ruling affirmed in part and reversed in part, it could not be determined which side prevailed.”<sup>605</sup> It “further found it must consider the results of the entire litigation, not merely an interlocutory certiorari review, and that it would be inappropriate to tax costs at this time.”<sup>606</sup>

The petitioner sought review of the trial court’s order, asserting that he had prevailed in the certiorari proceeding, that he had timely moved to tax appellate costs, that the trial court did not need to take any additional action on the issues involved in the certiorari action, and that the applicable rules

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595. 22 Fla. L. Weekly D1769 (4th Dist. Ct. App. June 16, 1997).

596. *Id.* at D1769.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Okeelanta*, 22 Fla. L. Weekly at D1770.

601. *Id.*

602. 704 So. 2d 587 (Fla. 1st Dist. Ct. App. 1997).

603. *Id.* at 588.

604. *Id.*

605. *Id.*

606. *Id.*

and case law precluded the trial court from deferring its ruling.<sup>607</sup> The respondent replied that since there had been no ruling by the trial court, there was nothing for the appellate court to review, other than the question of whether the trial court abused its discretion in taking the motion under advisement.<sup>608</sup>

The first district found that in the certiorari proceeding, the “petitioner prevailed on the question of disqualification of the attorney, while respondents prevailed on the question of disqualification of the law firm.”<sup>609</sup> The court went on to state that

[s]ince no further action need be taken by the trial court with respect to the attorney disqualification issue, it appears the trial court failed to apply the correct law, and abused its discretion, in declining to make a determination as to the prevailing party for purposes of an award of appellate costs with respect to the petition for certiorari.<sup>610</sup>

Further, the court found that the “trial court also erred in delaying a decision as to costs pertaining to an interlocutory appeal, based on a determination that the court must consider the results of the entire litigation.”<sup>611</sup> The court noted that while “[a]n attorney’s fee award cannot be made until the prevailing party in the underlying litigation is determined[,] . . . the prevailing party under rule 9.400(a) is the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs.”<sup>612</sup> Therefore, the court reversed the order deferring ruling and remanded “with directions to make a determination as to the party who prevailed on the *significant* issue in the petition for certiorari review, and for an award of costs.”<sup>613</sup>

## XXVIII. BOARD CERTIFIED APPELLATE LAWYERS

In *The Florida Bar re Ash*,<sup>614</sup> the Supreme Court of Florida upheld the denial of an attorney’s application for certification as a Board Certified

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607. *Fleitman*, 704 So. 2d at 588–89.

608. *Id.* at 589.

609. *Id.*

610. *Id.*

611. *Id.*

612. *Fleitman*, 704 So. 2d at 590.

613. *Id.*

614. 701 So. 2d 552 (Fla. 1997).

Appellate Lawyer. The denial had been based on the applicant's failure to disclose the fact that an appellate court had ordered her to show cause why sanctions should not be imposed on her for the manner in which she handled a particular case.<sup>615</sup> On her certification application, the applicant had stated "N/A" in response to two questions that asked her to list and explain "all cases in which your competence or conduct was raised as a basis for [ ] relief . . . by the court" and "all cases in which your conduct was adversely commented upon in writing by a judge."<sup>616</sup>

In upholding the denial of the application, the court found that the show cause order was a document that the applicant "was unequivocally required to disclose on her application."<sup>617</sup> The court went on to state, "Indeed, it is difficult to conceive of a clearer violation of the oath of truthfulness at the conclusion of the application."<sup>618</sup> The court also submitted the matter to The Florida Bar to determine whether any disciplinary rules were violated.<sup>619</sup>

#### XXIX. A LOOK INTO THE FUTURE

The Supreme Court of Florida Judicial Management Council has established a committee to study issues relating to *per curiam* affirmances without opinions. The committee will make recommendations as to whether written opinions should be required in all cases, whether a system should be adopted under which some opinions are not published, and other concerns.

The Florida Appellate Court Rules Committee has recommended to the supreme court that *per curiam* affirmances that do no more than provide citations to authorities be published only in table form. The committee has also recommended adopting a rule that would provide that the denial of an extraordinary writ would not constitute a determination on the merits unless the court order specifically indicates otherwise or evinces an unequivocal determination by the court that the merits were considered. As discussed in Part XXII.C of this article, such a rule would incorporate the conclusion reached by the supreme court and the second district and would require the third and fourth districts to change their approach regarding such matters. Both the committee and the Florida Courts Technology Commission continue to study the concept of adopting a vendor-neutral citation system.

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615. *Id.* at 553.

616. *Id.*

617. *Ash*, 701 So. 2d at 554.

618. *Id.*

619. *Id.*

Of course, the courts over the coming year will provide answers to many of the questions raised by the cases discussed in this article. These answers, as they frequently do, will likely generate new questions. These questions, and others, will continue to provide the large number of court decisions that shape the field of appellate practice.