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# Appellate Practice

Anthony C. Musto*

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# Appellate Practice: 1996 Survey of Florida Law

**Anthony C. Musto***

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* B.G.S., University of Miami, 1972; J.D., Catholic University of America, 1975. Mr. Musto is board certified in appellate practice and is the Chief Appellate Counsel for the County Attorney's Office of Broward County, Florida. He is the chair of The Florida Bar Criminal Law Section and the immediate past-chair of The Florida Bar Appellate Practice and Advocacy Section. He is also a past-chair of the Florida Rules of Judicial Administration Committee and the Florida Criminal Procedure Rules Committee.

## I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida. Although this article will focus primarily on cases decided between July 1, 1995, and June 30, 1996, 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 during 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 article will focus on matters relating to practice in the appellate courts and will deal with substantive areas only with regard to appellate considerations unique to those areas. Additionally, this article will not discuss cases relating to the preservation of issues, nor the question of whether particular errors were harmless.

## II. AMENDMENTS TO FLORIDA'S RULES OF PROCEDURE

The Supreme Court of Florida adopted several amendments to the various sets of Florida procedural rules that will impact the field of appellate practice.

### A. *Florida Rules of Appellate Procedure*

Rule 9.130(a)(5) of the *Florida Rules of Appellate Procedure* was amended[1] to allow for appellate review of orders entered on motions filed under Rule 12.540 of the *Florida Family Law Rules of Procedure* requesting

1. Amendment to Florida Rule of Appellate Procedure 9.130, 663 So. 2d 1314 (Fla. 1995).

relief from judgment, decrees or orders. This amendment was necessitated by creation of the *Florida Family Law Rules of Procedure*[2] and is intended only to continue allowing appeals from orders in family law cases that were previously entered pursuant to Rule 1.540 of the *Florida Rules of Civil Procedure*.

Responding to concerns expressed by the fourth district in *McFadden v. West Palm Beach Police Officer*[3] regarding the need for an amendment to the rules that would allow determinations of indigency for appellate purposes to be made at the appellate level,[4] the supreme court, in *McFadden v. Fourth District Court of Appeal*,[5] adopted an amendment accomplishing that purpose for incarcerated parties. The amendment adds to the existing language of Rule 9.430 of the *Florida Rules of Appellate Procedure*, which deals with the process for obtaining an indigency determination in the lower tribunal, the following paragraph:

> In lieu of the above procedure, an indigent incarcerated party may file in the appellate court a motion for an order of indigency, along with an affidavit showing the party's inability either to pay fees and costs or to give security therefor. The affidavit shall be sufficient without more for the court to rule on the appellant's indigency unless an objection is filed. If an objection is filed the appellate court may determine the issue or remand it to the lower tribunal for determination.[6]

Although the amended rule was made "effective immediately,"[7] the court allowed any interested person to file comments regarding the matter.[8] As a result of that process, seven days later, the court entered an order staying until further order of the court implementation of the amendment nunc pro tunc to the date of the court's decision. Subsequently, an alternative proposal was submitted by the Appellate Court Rules Committee and it is presently pending before the court.

The supreme court created an interesting situation when it amended both the criminal and appellate rules in an effort to ensure that criminal

2. *In re* Family Law Rules of Procedure, 663 So. 2d 1049 (Fla. 1995).
3. 658 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1995).
4. *Id.* at 1048.
5. 21 Fla. L. Weekly S183 (Apr. 25, 1996).
6. *Id.* at S184.
7. *Id.*
8. *Id.*

defendants will have the opportunity to raise sentencing errors on appeal. In *Amendments to Florida Rules of Appellate Procedure 9.020(g) and Florida Rules of Criminal Procedure 3.800*,[9] the court created a new Rule 3.800(b) of the *Florida Rules of Criminal Procedure*, which provides: "(b) Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within ten days after rendition of the sentence."[10] At the same time, the court amended Rule 9.020(g) of the *Florida Rules of Appellate Procedure* to provide that a timely filed motion to correct a sentence or an order of probation delays rendition of the sentence or order until the motion is ruled upon.[11]

Taken together, these two amendments appear to create an anomaly. The criminal rule indicates that a motion to correct a sentencing error is timely if filed within ten days after rendition, but the appellate rule states the timely filing of such a motion acts to delay rendition until its disposition. The net effect is that the time period within which the motion must be filed does not start to run until the motion has been disposed of.

At the time it adopted these amendments, the court also amended Rule 9.020(g)(3) of the *Florida Rules of Appellate Procedure* to state that "a pending motion to correct a sentence or order of probation shall not be affected by the filing of a notice of appeal from a judgment of guilt."[12]

## B. *Florida Rules of Judicial Administration*

Rule 2.050(h) of the *Florida Rules of Judicial Administration* was amended[13] to provide that in any case in which a defendant has been sentenced to death, the circuit judge assigned to the case "shall take such action as may be necessary to assure that a complete record on appeal has been properly prepared"[14] and that "the judge shall convene a status conference with all counsel of record as soon as possible after the record has been prepared . . . to ensure that the record is complete."[15]

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9. 675 So. 2d 1374 (Fla. 1996).

10. FLA. R. CRIM. P. 3.800(b). This rule is entitled "Motion to Correct Sentencing Error."

11. *Amendment to Florida Rules of Appellate Procedure 9.020(g) and Florida Rules of Criminal Procedure 3.800*, 675 So. 2d at 1375.

12. *Id.* at 1375–76.

13. *In re* Amendments to Florida Rules of Judicial Administration Regarding Death Cases, 672 So. 2d 523 (Fla. 1996).

14. *Id.* at 524.

15. *Id.*

## C. *Florida Rules of Workers' Compensation Procedure*

The supreme court adopted extensive revisions to the portion of the *Florida Rules of Workers' Compensation Procedure* that deals with appellate proceedings.[16] In light of the large number of changes to the rules, no effort will be made here to detail every amendment that was approved. However, some of the more significant revisions will be discussed.

An effort was made to streamline the rules by deleting rules that were unnecessary or duplicative of the appellate rules and by creating a new rule, rule 4.156, which provides that "[a]ppellate review proceedings in workers' compensation cases shall be governed by the *Florida Rules of Appellate Procedure* (civil) except as otherwise provided by these rules."[17] The rules deleted in their entirety and their appellate rule counterparts [in brackets] are rules 4.180(e) [9.200(f)(2)]; 4.225 [9.210(g)]; 4.240 [9.320]; 4.250 [9.330]; 4.255 [9.331]; 4.260 [9.340].[18]

Rule 4.160 was amended in response to the first district's invitation in *Hines Electric v. McClure*[19] to the Workers' Compensation Rules Committee to address certain problems that arose from the fact that the rule made review of certain non-final orders discretionary with the court.[20] The amended rule requires the court to consider appeals of some of the orders in question and divests it of the jurisdiction to consider appeals from certain other orders.[21] A new provision was added indicating that nothing in the rule should be interpreted as precluding other original proceedings in the district court as provided in the appellate rules.[22] Presumably, this provision was intended to clarify that when the appropriate requirements are met, orders that formerly fell within the court's discretionary appellate jurisdiction can still be considered by certiorari.

Rule 4.161(b) was amended to reflect that the district court upon motion shall decide disputes as to whether challenges to certain benefits have been abandoned.[23]

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16. *In re* Amendments to the Florida Rules of Workers' Compensation Procedure, 664 So. 2d 945 (Fla. 1995).

17. *Id.* at 945.

18. 1995 Committee Note to Florida Rule of Workers' Compensation Procedure 4.156. *In re Workers' Compensation Procedure*, 664 So. 2d at 946.

19. 616 So. 2d 132 (Fla. 1st Dist. Ct. App. 1993).

20. For a discussion of the problems identified in *Hines Electric*, *see* Anthony C. Musto, *Appellate Practice: 1993 Survey of Florida Law*, 18 NOVA L. REV. 1, 28–30 (1993).

21. *Workers' Compensation Procedure*, 664 So. 2d at 946.

22. *Id.* at 947.

23. *Id.* at 948–49.

Rule 4.165 was amended to require that a conformed copy of the order or orders designated in a notice of appeal be attached to the notice[24] and to provide that notices of cross-appeal are no longer to be filed with the judge, but are to be filed directly with the district court.[25]

Deleted from rule 4.180(a)(1) was a provision which allowed the district court to consider matters not introduced into evidence if necessary for the determination of the issues on appeal.[26]

Rule 4.180 (g)(1) was renumbered as (f)(1) and was revised to make the procedures for relief from the filing fee and from the costs of the record on appeal consistent with changes to section 57.081(1) of the *Florida Statutes*, as amended by Chapter 94-318 section 18 of the *Laws of Florida*, and with the dictates of caselaw,[27] specifically *Schwab v. Brevard County School Board*[28] and *Miller v. Hospitality Care Center.*[29]

## III. COURT DIVISIONS

In an unpublished order captioned *Local Rule Concerning Divisions in First District Court of Appeal*, the supreme court approved as a local rule an administrative order[30] adopted by the First District Court of Appeal that created a criminal division of that court. The administrative order provides that the new division will consider "[a]ll criminal cases and all cases that originate from prisoners involving their conviction or sentence, juvenile delinquency cases, and criminal derivative actions such as gain time or parole decision challenges, original writ proceedings, including but not limited to habeas corpus."[31]

The approval of this rule gives the first district, which had previously created a General and an Administrative Division,[32] three subject matter divisions. It remains the only Florida appellate court to sit in divisions.

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24. *Id.* at 950.
25. *Id.* at 951.
26. *Workers' Compensation Procedure*, 664 So. 2d at 951.
27. *See* 1995 Committee Note to Florida Rule of Workers' Compensation Procedure 4.180. *Workers Compensaton Procedure*, 664 So. 2d at 955–56.
28. 650 So. 2d 1099 (Fla. 5th Dist. Ct. App. 1995). For a discussion of the decision in *Schwab*, see Anthony C. Musto, *Appellate Practice: 1995 Survey of Florida Law*, 20 NOVA L. REV. 1, 23–25 (1995).
29. 431 So. 2d 254 (Fla. 1st Dist. Ct. App. 1983).
30. Fla. First District Court of Appeal Admin. Order No. 95-2.
31. *Id.* at 1.
32. *See In re* Court Divisions, 648 So. 2d 761 (Fla. 1st Dist. Ct. App. 1994).

## IV. SUPREME COURT JURISDICTION

In *St. Paul Fire & Marine Insurance Co. v. Indemnity Insurance Co. of North America*,[33] the supreme court dealt with a case in which the fourth district had upheld a judgment against two defendants.[34] One of the defendants timely filed a motion for rehearing, which was denied some three months later.[35] Within thirty days of the denial, but 114 days after the opinion, the other defendant filed a notice invoking the supreme court's discretionary jurisdiction.[36]

The plaintiff moved to strike the notice as untimely and to dismiss for lack of jurisdiction, claiming that the notice was not filed within thirty days of rendition, as required by Rule 9.120(b) of the *Florida Rules of Appellate Procedure*.[37] The plaintiff relied on rule 9.120(g), which provides that rendition is delayed by the pendency of motions for rehearing, but which also states that when such a motion is pending, "the final order shall not be deemed rendered with respect to any claim between the movant and any party against whom relief is sought by the motion."[38]

The court found this rule to be inapplicable, however, concluding that it applied only to orders entered by trial courts.[39] The court buttressed its finding by noting that when the rule was amended to include the relevant portion, both the court's opinion[40] and the Report of The Florida Bar Appellate Court Rules Committee explained that the amendment was to clarify that in a multi-party situation, a single order can be rendered at different times depending on when the trial court resolved authorized post-trial motions.[41]

"In contrast,"[42] the court continued, "the motions permitted in an appellate proceeding follow the procedure set forth in" Rule 9.300 of the *Florida Rules of Appellate Procedure*.[43] That rule states that "service of a

33. 675 So. 2d 590 (Fla. 1996).

34. *See* Florida Medical Malpractice Underwriting Ass'n v. Indemnity Ins. Co. of North America, 652 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1995).

35. *St. Paul Fire*, 675 So. 2d at 591.

36. *Id.*

37. *Id.*

38. FLA. R. APP. P. 9.120(g)(1).

39. *St. Paul Fire*, 675 So. 2d at 591.

40. *In re* Amendments to the Florida Rules of Appellate Procedure, 609 So. 2d 516, 517 (Fla. 1992).

41. *St. Paul Fire*, 675 So. 2d at 591–92.

42. *Id.* at 592.

43. *Id.*

motion shall toll the time schedule of any proceeding in the court until disposition of the motion."[44] This provision, the court found, "is clear on its face that it suspends the time schedule of any and all proceedings irrespective of the movant."[45] The court therefore denied the plaintiff's motion, concluding "that appellate motions are governed by rule 9.300(b), and a district court's order is not 'rendered' until there has been a disposition of all motions relative to that order."[46]

## V. VENUE

### A. *When Changes of Venue Are Deemed Effective*

In *Cottingham v. State*,[47] the supreme court clarified an aspect of its decision in *Vasilinda v. Lozano*,[48] which established the standards for determining in which court appellate jurisdiction lies when the trial court has granted a change of venue to a circuit court located within another district. In *Vasilinda*, the court found that if a change of venue has not yet become effective when appellate jurisdiction is invoked, the appellate proceeding goes to the district court to which appeals are taken from the transferor court.[49] Conversely, the court found, when the change of venue has become effective, the appellate proceeding goes to the district court to which appeals are taken from the transferee court.[50]

The decision in *Cottingham* focused on the issue of when changes of venue are deemed effective in civil cases. The court in *Vasilinda* had discussed that question, concluding that changes of venue in civil cases become effective when the court file has been received in the transferee court and costs and service charges required by the applicable statutes and rules of procedure are paid.[51]

In the decision under review in *Cottingham*, the first district had certified as being of great public importance the question of whether the date

44. FLA. R. APP. P. 9.300(b).
45. *St. Paul Fire*, 675 So. 2d at 592.
46. *Id.*
47. 672 So. 2d 28 (Fla. 1996).
48. 631 So. 2d 1082 (Fla. 1994).
49. *Id.* at 1087.
50. *Id.*
51. *Id.*

of payment of the costs and charges is the date they are mailed by the party responsible for payment or the date of receipt by the transferee court.[52]

The supreme court found that the date of receipt by the transferee court is deemed to be the date of payment, and thus the date on which the change of venue is effective.[53]

## B. *Venue in Appeals from Orders of the Unemployment Appeals Commission*

In *Mendelman v. Dade County Public Schools*,[54] the third district had for review a decision of the Unemployment Appeals Commission. The unemployment appeal hearing had been conducted by telephone, with the claimant participating from Key Largo, the employer from Miami, and the appeals referee from Tallahassee.[55]

The Commission moved to transfer the case to the first district, relying on section 443.151(4)(e), of the *Florida Statutes*, which states that appeals of commission orders are to go to the district court "in the appellate district in which the issues involved were decided by an appeals referee . . . ."[56] The Commission reasoned that since the written ruling was issued by its Tallahassee office, the appeal could only go the first district.[57]

The third district disagreed, noting that the proceeding at which the referee reaches a decision is the final hearing and concluding that when the participants are located in two appellate districts, "the fairest interpretation of the statute is that the appeal will lie in either appellate district."[58]

The court indicated that a factor demonstrating that its interpretation of the statute is workable is the "many years' experience under the Florida Administrative Procedure Act, which provides for judicial review either in 'the district court of appeal in the appellate district where the agency

52. *Cottingham*, 672 So. 2d at 28. For a recitation of the complicated factual circumstances that led to the certified question, as well as a more complete statement of the standards established by *Vasilinda*, see Musto, *supra* note 28, at 18–20.

53. *Cottingham*, 672 So. 2d at 29–30.

54. 674 So. 2d 195 (Fla. 3d Dist. Ct. App. 1996).

55. Key Largo is located in Monroe County, which constitutes the sixteenth circuit, a part of the third district. Miami is located in Dade County, which constitutes the eleventh circuit, a part of the third district. Tallahassee is located in Leon County, which is one of the counties in the second circuit, a part of the first district.

56. FLA. STAT. § 443.151(4)(e) (1995).

57. *Mendelman*, 674 So. 2d at 196.

58. *Id.*

maintains its headquarters or where a party resides.'"[59] The court also stated that in taking its view, it was "influenced by practical considerations,"[60] specifically the fact that it generally grants requests for oral argument in unemployment compensation appeals and the court's belief that its interpretation would therefore "provide more convenient access to the appellate courts."[61]

The decision in *Mendelman* raises a number of questions about the rule of law applicable to other factual situations. For instance, if a claimant and an employer participate from locations in two different districts, while the appeals referee is in a third, is a party taking an appeal able to select venue from among three district courts? Does the rule of law set forth in *Mendelman* apply if a party who lives in one district travels to another district and participates in a hearing for the sole purpose of being able to subsequently appeal to the court of appeal for that district? Can parties and their attorneys expand the number of possible venues by participating from different locations? If a party participates on a cellular phone while driving through several districts, can an appeal go to any of those districts? To the extent that the practical consideration of providing convenient access for oral argument underlies the rule of law adopted in *Mendelman*, would a different conclusion be reached when the oral argument in the more distant court would be heard by video teleconference?[62]

These questions and others will likely have to be dealt with at some point. If they prove too troublesome, consideration of whether the third district's approach should be abandoned in favor of the position advocated by the commission in *Mendelman* might also become a question that will need to be addressed.

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59. *Id.* at 196 (footnote) (citing FLA. STAT. § 120.68(2) (1995)).

60. *Id.* at 196.

61. *Id.*

62. In *In re* Oral Argument By Video Teleconference Network, 648 So. 2d 763 (Fla. 1st Dist. Ct. App. 1994), the first district established remote facilities for arguments by video teleconference. That court is presently conducting such arguments only when all attorneys expected to present argument are located near a single remote facility. Since the attorney representing the commission in *Mendleman* was from Tallahassee, and since it appears that the appellant, who represented himself on appeal, was from south Florida, this factor apparently had no applicability in that case. It may well play a role in striking the proper balance in future cases, however. For instance, if the parties are both from Ft. Myers, one of the locations at which the first district has established a remote facility, it would clearly be more convenient for the parties to present oral argument to the first district by video teleconference than it would be to travel to either Tampa or Lakeland, the locations at which the second district, which includes Ft. Myers, generally hears oral arguments.

## VI. ORDERS REVIEWABLE

The courts decided a large number of cases dealing with the issue of whether certain orders were reviewable, either by appeal or by certiorari. The sheer volume of such cases precludes discussion of the reasoning of each case. This article will therefore focus on some of the more significant cases in this regard and set forth a sampling of other decisions, noting the type of order involved, and the conclusion reached by the court as to whether it was reviewable.

### A. *Orders Denying Motions to Dismiss Based on Claims of Untimely Service*

Concluding that an order denying a motion to dismiss based on the failure to effect service within 120 days, as required by Rule 1.070(i) of the *Florida Rules of Civil Procedure*, is not appealable, the second district dismissed the appeal in *Nowry v. Collyar*.[63] The court recognized, however, that its decision was in conflict with decisions of other districts[64] and it certified the following question to the supreme court:

> DOES AN ORDER DENYING A MOTION TO DISMISS A COMPLAINT CLAIMING UNTIMELY SERVICE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.070(i) FAIL TO CONSTITUTE AN ORDER DETERMINING THE JURISDICTION OVER THE PERSON,[65] THUS MAKING IT A NONAPPEALABLE, NON-FINAL ORDER?[66]

The first district addressed the same issue in *Novella Land, Inc. v. Panama City Beach Office Park, Ltd.*,[67] noting the conflict recognized in *Nowry* and agreeing with the second district that such orders are not appeal-

63. 666 So. 2d 555 (Fla. 2d Dist. Ct. App. 1995).

64. *See* Comisky v. Rosen Management Servs., Inc., 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc); Mid-Florida Assocs., Ltd. v. Taylor, 641 So. 2d 182 (Fla. 5th Dist. Ct. App. 1994).

65. Orders determining the jurisdiction of the person are appealable pursuant to Rule 9.130(a)(3)(C)(I) of the *Florida Rules of Appellate Procedure*.

66. *Nowry*, 666 So. 2d at 556.

67. 662 So. 2d 743 (Fla. 1st Dist. Ct. App. 1995).

able.[68] The first district also pointed out that the third district in *RD & G Leasing, Inc. v. Stebnicki*[69] had reached a similar conclusion.[70]

## B. *Declaratory Judgments*

In *Canal Insurance Co. v. Reed*,[71] the supreme court determined that when an insurance coverage issue has been decided in a third party declaratory judgment action between an insurer and its insured prior to a final determination of liability in the underlying action, and, as a result, the insurer must provide liability coverage for the insured in the underlying action, the order entered in the declaratory judgment action is a final order subject to appellate review.[72] Pointing out that under section 86.011 of the *Florida Statutes*, "a declaratory judgment has 'the force and effect of a final judgment,'"[73] the court found itself "compelled to find that a declaratory judgment is appealable as a final order regardless of whether the judgment is rendered in a separate declaratory judgment action or as part of a third-party action such as that at issue here."[74]

Although finding the declaratory judgment regarding a determination of insurance coverage to be reviewable as a final order, the court stated that it "must also stress that such a judgment will not *automatically* result in a stay in the independent underlying cause of action."[75] The court explained that "[t]his is because the underlying personal injury action is separate and distinct from the insurance coverage dispute"[76] and that "[t]he trial judge has the discretion to stay the underlying action between the parties pending resolution of the appeal or to permit it to continue concurrently with the appeal process."[77]

The court acknowledged that "it would be in the best interests of all the parties for coverage issues to be resolved as soon as possible."[78] The court therefore "suggest[ed] that the district courts expedite review of appeals

68. *Id.* at 794.
69. 626 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1993).
70. *Novella Land*, 662 So. 2d at 743.
71. 666 So. 2d 888 (Fla. 1996).
72. *Id.* at 889–90.
73. *Id.* at 891 (quoting FLA. STAT. § 86.011 (1995)).
74. *Canal Ins. Co.*, 666 So. 2d at 891.
75. *Id.* at 892.
76. *Id.*
77. *Id.*
78. *Id.*

involving the sole issue of coverage"[79] and "that the Appellate Court Rules Committee consider an appropriate method for providing expedited review of these cases to avoid unnecessary delays in the final resolution of the underlying actions."[80]

### C. *Orders Denying Motions for Summary Judgment Based on Claims of Sovereign Immunity*

In *Department of Education v. Roe*,[81] the supreme court rejected an effort to extend to claims of sovereign immunity the rationale of *Tucker v. Resha*,[82] which held that with regard to federal civil rights claims brought in state courts, public officials are entitled to interlocutory review of orders denying motions for summary judgment based on the defense of qualified immunity.[83] The decision in *Tucker* was based on the fact "that qualified immunity of a public official best achieves its purpose as an immunity from suit rather than a mere defense to liability"[84] and the fact that such immunity "is effectively lost if a case is erroneously permitted to go to trial."[85]

The court relied on a number of factors in declining to extend the *Tucker* rationale beyond the facts of that case. These factors included: 1) the fact that permitting interlocutory appeals when claims of sovereign immunity are rejected would "add substantially to the caseloads of the district courts of appeal;"[86] 2) the fact that since "the applicability of the sovereign immunity waiver is [often] inextricably tied to the underlying facts, [thus] requiring a trial on the merits . . . , many interlocutory decisions would be inconclusive and . . . a waste of judicial resources;"[87] 3) the fact that "qualified immunity is rooted in the need to protect public officials from undue interference, whereas sovereign immunity is not;"[88] and 4) the fact that in *Tucker*, the court "had an interest in affording federal causes of action brought in state court the same treatment they would receive if brought in

79. *Canal Ins. Co.*, 666 So. 2d at 892.
80. *Id.*
81. 21 Fla. L. Weekly S311 (July 18, 1996).
82. 648 So. 2d 1187 (Fla. 1994).
83. *Id.* at 1190.
84. *Roe*, 21 Fla. L. Weekly at S311.
85. *Tucker*, 648 So. 2d at 1189 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).
86. *Roe*, 21 Fla. L. Weekly at S312.
87. *Id.*
88. *Id.*

federal court,"[89] while sovereign immunity cases deal "with a state law defense to an ordinary state law cause of action."[90]

## D. *Nonappealable Orders*

Orders deemed to be nonappealable included: An order denying a motion to amend a complaint to add a punitive damage claim;[91] a partial summary judgment on liability as to four counts of a six-count complaint, when those counts, although based on different legal theories, were interrelated with and interdependent on the two remaining counts;[92] a non-final order striking a pleading as a discovery violation sanction;[93] a final order of the Board of Clinical Laboratory Personnel granting a petition for a clinical laboratory supervisor license;[94] an order setting aside a clerk's default;[95] an order denying a motion to dissolve an agreement to engage in alternative dispute resolution when the parties had already entered into the resolution process;[96] and a non-final order striking a defendant's compulsory counterclaim.[97]

## E. *Orders Reviewable by Certiorari*

Orders found to be reviewable by certiorari included: An order transferring a case from circuit court to county court;[98] an order granting a motion to conduct a postverdict jury interview;[99] and an order requiring production of records and documents asserted to be confidential as work product and by operation of the attorney-client privilege, or, in the alternative, the construction of a log which indicated the date of each document, its type, and its general contents.[100]

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89. *Id.*

90. *Id.*

91. King v. Odle, 665 So. 2d 378 (Fla. 4th Dist. Ct. App. 1996).

92. El Segundo Original Rey De La Pizza Cubana, Inc. v. Rey Pizza Corp., 676 So. 2d 1031 (Fla. 3d Dist. Ct. App. 1996).

93. Hi-Tech Mktg. Group, Inc. v. Thiem, 659 So. 2d 479 (Fla. 4th Dist. Ct. App. 1995).

94. Agency For Health Care Admin. v. Board of Clinical Lab. Personnel, 673 So. 2d 531 (Fla. 1st Dist. Ct. App. 1966).

95. Collins v. Penske Truck Leasing, 668 So. 2d 343 (Fla. 5th Dist. Ct. App. 1996).

96. Department of Health and Rehabilitative Servs. v. Electronic Data Sys. Corp., 664 So. 2d 332 (Fla. 1st Dist. Ct. App. 1995).

97. Cole v. Bayley Prods., Inc., 661 So. 2d 1299 (Fla. 4th Dist. Ct. App. 1995).

98. David v. Prime Hospitality Corp., 676 So. 2d 1049 (Fla. 3d Dist. Ct. App. 1996).

99. Pesci v. Maistrellis, 672 So.2d 583 (Fla. 2d Dist. Ct. App. 1996).

100. Calzon v. Capital Bank, 20 Fla. L. Weekly D2603 (3d Dist. Ct. App. Nov. 29, 1995).

### F. *Orders Not Reviewable by Certiorari*

Orders held not to be reviewable by certiorari included: An order denying a motion to consolidate two separate lawsuits when the case does did fall within the catagory of cases in which the possibility of repugnant and inconsistent verdicts would result in a manifest injustice and a material injury to the petitioners;[101] an order denying a motion to strike a demand for a jury trial;[102] an order denying a motion in limine to exclude expert scientific testimony;[103] an order determining that a prior judgment of dissolution of marriage was not res judicata on the issue of paternity;[104] an order on a motion in limine precluding the introduction of evidence regarding insurance coverage;[105] and an order prohibiting a plaintiff from engaging in ex parte communications with any of the defendant's employees.[106]

## VII. RENDITION

### A. *Delay in Rendition Due to Pendency of Motion for Rehearing*

In *Pennington v. Waldheim*,[107] the trial court entered a series of final summary judgments in favor of the defendants.[108] Within the time period contemplated by the *Florida Rules of Civil Procedure* for service of motions for new trial or rehearing, the plaintiff filed, but did not serve, a motion for rehearing.[109] Several weeks later, the defendants learned of the motion and moved to strike it.[110] The plaintiff asserted that the failure to serve the defendants was due to clerical error and contended that the defendants had

101. Friedman v. Desoto Park N. Condominium Ass'n, 678 So. 2d 391 (Fla. 4th Dist. Ct. App. 1996).

102. Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646 (Fla. 2d Dist. Ct. App. 1995).

103. Florida Power & Light Co. v. Glazer, 671 So. 2d 211 (Fla. 3d Dist. Ct. App. 1996).

104. Elder v. Department of Revenue, 670 So. 2d 1032 (Fla. 2d Dist. Ct. App. 1996).

105. Riano v. Heritage Corp. of S. Fla., 665 So. 2d 1142 (Fla. 3d Dist. Ct. App. 1996).

106. Boyd v. Pheo, Inc., 664 So. 2d 294 (Fla. 1st Dist. Ct. App. 1995).

107. 669 So. 2d 1158 (Fla. 5th Dist. Ct. App. 1996).

108. *Id.* at 1159.

109. Rule 1.530(b) of the *Florida Rule of Civil Procedure* provides that such motions shall be served not later than 10 days after the judgment. In *Pennington*, the 10th day was a Sunday, so the time period for seeking rehearing was extended by the dictates of rule 1.090(a) until the following day. The motion in the case was filed on that following day and was therefore timely.

110. *Pennington*, 669 So. 2d at 1159.

not been prejudiced.[111] The plaintiff also filed a pleading entitled "'Motion for Relief in Accordance with Florida Rules of Civil Procedure 1.540,'"[112] requesting "'relief' from 'damage resulting from clerical error in failing to properly serve defendants on a timely basis.'"[113] The trial court granted the defendants' motions and denied the motion filed by the plaintiff.[114] On the thirtieth day after the trial court's ruling, the plaintiff filed a notice of appeal from the orders granting final summary judgment.[115]

The defendants moved to dismiss, asserting that the appeal was untimely. The fifth district, "writ[ing] to warn counsel of the danger posed by the failure to comply with *Florida Rule of Civil Procedure* 1.530(b),"[116] agreed. The court noted that under Rule 9.110(b) of the *Florida Rules of Appellate Procedure*, notices of appeal must be filed within thirty days of rendition of the order to be reviewed[117] and that under rule 9.020(g), rendition is suspended by a motion for rehearing only when the motion is "authorized and timely."[118] The court concluded that rendition was not suspended in *Pennington* because, under the civil rules, the motion had to be served within ten days in order to be timely.[119] Since the motion was untimely, so was the notice of appeal and dismissal was therefore mandated.[120] "Although it may be counter-intuitive for civil lawyers to view *service* as an event of jurisdictional dimension,"[121] the court wrote, "in the case of this particular rule, timely *filing* is of no moment, timely *service* is everything."[122]

The question of whether a motion had to be served or filed within the appropriate time period was also at issue in *Department of Revenue v. Loveday*.[123] There, the appellee moved to dismiss as untimely an appeal from a child support judgment, asserting that the pendency of a motion to vacate under former Rule 1.491(f) of the *Florida Rules of Civil Procedure*,

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Pennington*, 669 So. 2d at 1159.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Pennington*, 669 So. 2d at 1160.
121. *Id.*
122. *Id.*
123. 659 So. 2d 1239 (Fla. 2d Dist. Ct. App. 1995).

served on the tenth day after the judgment was entered, did not delay rendition of the judgment.[124]

The court pointed out that "[u]nlike most of the rules of civil procedure"[125] this rule, which allowed parties to "move to vacate the order within 10 days from the date of entry"[126] did not state whether the motion had to be served or whether it had to be filed within the ten days.[127] "Because this motion is similar to a motion for rehearing, which must be served within 10 days,"[128] the court stated, "and because most other time requirements in the rules are governed by service, we interpret the rule as requiring a party to serve a motion to vacate within ten days of the entry of the order."[129]

This determination did not end the court's inquiry, however. The court noted that only "authorized and timely" motions under Rule 9.020(g) of the *Florida Rules of Appellate Procedure* delay rendition of an order and that the list of such motions in that rule does not include motions to vacate under former rule 1.491.[130] Drawing the same analogy it drew in deciding the issue of whether the motion had to be served or filed within ten days in order to be timely, the court found that the motion "functions as a motion to rehear, alter, or amend a judgment."[131] Since such motions are listed in rule 9.020(g) as being among those that suspend rendition, the court found that the motion to vacate had that effect as well.

Given these two conclusions,[132] the court found that the thirty-day period within which a notice of appeal must be filed[133] did not start to run until the trial court's disposition of the motion to vacate, and that the notice

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124. *Id.* at 1240.

125. *Id.* at 1241.

126. *Id.*

127. *Id.*

128. *Loveday*, 659 So. 2d at 1241.

129. *Id.* It is not likely that the court's conclusion in this regard will have a significant precedential impact. The rule that the court interpreted has been deleted from the civil rules and incorporated into the new family rules as Rule 12.491(f) of the *Florida Family Law Rules of Procedure*. The new family law rule states that a party "may move to vacate the order by filing a motion to vacate within ten days form the date of entry." FLA. FAM. LAW R. P. 12.491(f).

130. *Loveday*, 659 So. 2d at 1241.

131. *Id.*

132. The court also rejected a claim that the motion did not delay rendition because it was not heard within 10 days. *Id.* at 1242.

133. FLA. R. APP. P. 9.110(b).

in *Loveday*, filed within that period, was therefore timely.[134] The motion to dismiss was therefore denied.[135]

## B. *Orders Denying Motions*

In *Turner v. State*,[136] the second district found no appealable order to exist when the record disclosed a handwritten margin note on the face of a motion for post-conviction relief that read "Denied 11/2/95"[137] and that was followed by some symbol that appeared to be initials.[138] Noting that in *Gibson v. State*,[139] it had disapproved of the use of a rubber stamped denial signed by a trial judge and entered on the face of a motion for postconviction relief, the court stated: "Here we have even less."[140] The appeal was therefore dismissed with directions to the trial court to reconsider the motion and to "render an appropriate order susceptible of this court's review."[141]

## C. *Relinquishment of Jurisdiction*

In *State v. Siegel*,[142] the state attempted to appeal an order granting a motion to suppress evidence.[143] When it was learned that no signed, written order was ever entered,[144] the state moved to temporarily relinquish jurisdiction for the entry of an order.[145] The fifth district denied the motion and dismissed the appeal.[146] The court recognized that Rule 9.110(m) of the *Florida Rules of Appellate Procedure* "permits an appeal to proceed where an appealable order is rendered prior to dismissal of a premature appeal,"[147] but pointed out that this provision is applicable only to final orders.[148]

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134. *Loveday*, 659 So. 2d at 1242.
135. *Id.*
136. 667 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996).
137. *Id.* at 882.
138. *Id.*
139. 642 So. 2d 43 (Fla. 2d Dist. Ct. App. 1994).
140. *Turner*, 667 So. 2d at 882.
141. *Id.*
142. 662 So. 2d 1013 (Fla. 5th Dist. Ct. App. 1995).
143. *Id.* at 1014.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Siegel*, 662 So. 2d at 1014.
148. *Id.*

## VIII. NOTICE OF APPEAL

In *Westfield Insurance Co. v. Sloan*,[149] the fifth district considered a motion to dismiss that was based on the fact that, after the time for filing a notice of appeal had run, an amended notice was filed adding an appellant to the single appellant that had been named on the original, timely-filed notice.[150]

The court noted that Rule 9.110(d) of the *Florida Rules of Appellate Procedure* requires that the notice contain the name and designation of at least one party on each side[151] and that the 1977 Committee Note to the rule states that the advisory committee did not intend for defects on a notice of appeal to be "jurisdictional or grounds for disposition unless the complaining party was substantially prejudiced."[152] The court also pointed to rule 9.040(d), which provides:

> At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.[153]

Finding no substantial prejudice to have been alleged or to be apparent, the court denied the motion to dismiss.[154]

The fifth district's approach in this case appears to conflict with the conclusion reached by the third district in *Ashraf v. Smith*,[155] a case in which a motion to amend a notice of appeal to include the appellant's insurer was denied.[156] Although the court found the amendment "entirely unnecessary"[157] under the facts of the case, the denial of the motion was based on the court's determination that it "lack[ed] the jurisdiction to permit such an amendment."[158]

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149. 671 So. 2d 881 (Fla. 5th Dist. Ct. App. 996).
150. *Id.* at 882.
151. *Id.*
152. *Id.*
153. FLA. R. APP. P. 9.040(d)
154. *Westfield*, 671 So. 2d at 883.
155. 647 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 989 (Fla. 1995).
156. *Id.* at 893.
157. *Id.*
158. *Id.*

Despite the decision in *Ashraf*, the third district, in *Eisman v. Ross*,[159] applying an analysis virtually identical to that of the fifth district in *Westfield*, granted a motion to amend mandate to include as a party appellant the name of an individual who was not named on the notice of appeal but who was listed as a party litigant on the supersedes bond posted for the appeal.[160]

## IX. BOND

The appellee moved to dismiss the appeal in *School Board of Hillsborough County v. Lara*,[161] because the appellant, a public body, failed to post the bond required by section 440.25(5)(c) of the *Florida Statutes*, for appeals from orders of judges of compensation claims.[162] The first district concluded that the application of this statutory bond requirement to the appellant would conflict with the dictates of Rule 9.310(b)(2) of the *Florida Rules of Appellate Procedure*, which provides that the filing of a notice of appeal by a public body operates as an automatic stay pending review[163] and which, as is made clear by the Committee Note to the rule,[164] contemplates that the automatic stay is to be without bond.[165] The court stated that to the extent that the statute and the rule conflict, the rule must control.[166] In light of this determination, the court denied the motion to dismiss.[167]

## X. BRIEFS

### A. *Form*

In *Kennedy v. Guarantee Management Services, Inc.*,[168] the third district found that the circuit court, acting in its appellate capacity, had erred in dismissing an appeal because the appellant submitted his brief in handwritten form, rather than having it typed.[169] The district court concluded that

159. 664 So. 2d 1128 (Fla. 3d Dist. Ct. App. 1995).
160. *Id.* at 1129.
161. 667 So. 2d 368 (Fla. 1st Dist. Ct. App. 1995).
162. *Id.* at 368.
163. *Id.*
164. 1977 Committee Note to *Florida Rule of Appellate Procedure* 9.310.
165. *Lara*, 667 So. 2d at 368–69.
166. *Id.* at 369.
167. *Id.*
168. 667 So. 2d 1013 (Fla. 3d Dist. Ct. App. 1996).
169. *Id.* at 1014.

the circuit court's action had deprived the appellant of his right of access to the courts.[170]

### B. *Supplemental Briefs*

In *Dagostino v. State*,[171] a case in which the appellant was represented by the Public Defender's office, the fourth district dealt with a request by the appellant's attorney to accept the appellant's pro se brief as a supplemental brief.

The court denied the motion,[172] pointing out that when defendants are represented by counsel on appeal, they do not have an absolute right to participate and represent themselves.[173]

The court "caution[ed] that the filing of pro se briefs after the public defender has briefed the case does not aid in"[174] resolving appeals "in some orderly process."[175]

Noting the high regard it has for the Public Defender's office, the court indicated that its action in denying the motion was "to reinforce that confidence, not to undermine it"[176] and that accepting supplemental briefs in such situations "would weaken the constitutional right to counsel afforded to all indigent criminal appellants."[177]

## XI. CERTIORARI

### A. *Procedure*

Two opinions provided insight into the manner in which district courts analyze petitions for certiorari. Reviewing a petition that sought review of the denial of a motion to strike a demand for jury trial in *Parkway Bank v. Fort Myers Armature Works, Inc.*,[178] the second district discussed the "confusing distinction between a dismissal of a certiorari petition for lack of

170. *Id.*
171. 675 So. 2d 194 (Fla. 4th Dist. Ct. App. 1996).
172. *Id.* at 195.
173. *Id.*
174. *Id.* at 196.
175. *Id.*
176. *Dagostino*, 675 So. 2d at 196.
177. *Id.*
178. 658 So. 2d 646 (Fla. 2d Dist. Ct. App. 1995).

jurisdiction and a denial of a petition after a review of the nonfinal order on its merits."[179]

The court noted that "case law usually explains that a certiorari petition must pass a three-prong test before an appellate court can grant relief from an erroneous interlocutory order."[180] Under this test, the court explained, "[a] petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal."[181] The court stated that "[w]hile this traditional test is correct, the grammar of the test places the description of the appellate court's standard of review on the merits before the two threshold tests used to determine jurisdiction."[182]

This characterization of the test was based on the court's determination that the second and third prongs deal with the court's jurisdiction to consider a petition for certiorari and that the first prong establishes the standard to be applied on the merits if jurisdiction is found to exist. As stated by the court, "a petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before this court has power to determine whether the order departs from the essential requirements of the law."[183] After drawing the distinction between the jurisdictional prongs of the test and the one relating to the merits of the case, the court proceeded to address the proper manner for disposing of petitions. "If the jurisdictional prongs of the standard three-part test are not fulfilled,"[184] the court said, "then the petition should be dismissed rather than denied."[185]

In *Bared & Co., Inc. v. McGuire*,[186] the fourth district, with the exception of one "small quibble,"[187] expressed its "complete agreement" with *Parkway Bank*.[188] Concluding that "harm is not irreparable if it can be corrected on final appeal,"[189] the court decided to "merge the second and third prongs into a single one."[190]

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179. *Id.* at 648.
180. *Id.*
181. *Id.* (citations omitted).
182. *Id.*
183. *Parkway Bank*, 658 So. 2d at 649.
184. *Id.*
185. *Id.*
186. 670 So. 2d 153 (Fla. 4th Dist. Ct. App. 1996) (en banc).
187. *Id.* at 156 n.3.
188. *Id.*
189. *Id.* (emphasis omitted).
190. *Id.*

Noting, in the same manner as did the second district in *Parkway Bank*,[191] that "in the past we have not been careful to make our jurisdictional decisions in these cases manifest,"[192] and that "[m]ore often than not, we have denied such petitions when we were really deciding that we lacked jurisdiction,"[193] the court "seized on the present occasion to clarify our dispositions and manner of proceeding."[194]

The court stated that when it receives a certiorari petition that seeks review of a nonfinal order, it will "initially study it only to determine if petitioner has made a prima facie showing of the element of irreparable harm."[195]

If the petitioner has failed to make such a showing, the court will dismiss the petition.[196] On the other hand, if the petitioner meets this burden, the court will then "study the petition to determine whether it makes a prima facie showing that the order to be reviewed departs from the essential requirements of law."[197]

If the petition fails to make a prima facie demonstration of a departure, the petition will be denied.[198] If it does make such a showing, an order to show cause why the petition should not be granted will be entered.[199] After considering the response, if the court determines that there has been an insufficient showing of irreparable harm or injury, it will dismiss the petition.[200] If it determines that the order under review does not depart from the essential requirements of law, or if it decides that it will not exercise its discretion to grant the writ, the court will deny the petition.[201]

The court went on to discuss the effects of the two manners of rejecting petitions for certiorari. "[A] dismissal of a petition seeking common law certiorari represents only a determination that we lack jurisdiction and nothing more,"[202] the court said. "[A] bare denial by simple order of a petition for common law certiorari review of a pretrial order will not

191. *Parkway Bank*, 658 So. 2d at 649 n.1.
192. *Bared*, 670 So. 2d at 157.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Bared*, 670 So. 2d at 157.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Bared*, 670 So. 2d at 157.

represent a determination on the merits of the order to be reviewed,"[203] the court continued, "unless an opinion denying the petition indicates that preclusive effect is intended."[204]

The court noted its agreement with the second district's decision in *Don Mott Agency, Inc. v. Harrison*,[205] which found that a denial without opinion of a petition for a writ of certiorari is not an affirmance, does not establish the law of the case, cannot be construed as passing upon any of the issues in the litigation, and would not be *res judicata* as to the issues raised in the petition.[206]

## B. *Record*

In *DSA Marine Sales & Service, Inc. v. County of Manatee*,[207] the petitioners sought certiorari review in the circuit court of the disapproval by a board of county commissioners of a construction proposal.[208] The petition was accompanied with a motion to supplement the record as more documents became available.[209] Shortly thereafter, the petitioner filed an amended petition with a more thorough, but not yet completed, appendix.[210] The circuit court never ruled on the motion to supplement and denied the amended petition without ordering a response on the merits, finding that the petitioners failed to make a prima facie showing for relief.[211] The petitioners moved for rehearing, seeking, among other things, guidance detailing the insufficiency of the petition and an opportunity to amend once again.[212]

Reviewing the order of denial, the second district recognized that "[b]ecause certiorari petitions must be filed within thirty days from the date of rendition of the subject order, it is sometimes impossible to compile and contemporaneously file the entire record as an appendix to the petition."[213] The court also stated that although "[s]everal elements are embraced in the notion of procedural due process, none [are] more important than the right to

203. *Id.* at 158 (footnote omitted).
204. *Id.*
205. 362 So. 2d 56 (Fla. 2d Dist. Ct. App. 1978).
206. *Bared*, 670 So. 2d at 158.
207. 661 So. 2d 907 (Fla. 2d Dist. Ct. App. 1995).
208. *Id.* at 908.
209. *Id.*
210. *Id.*
211. *Id.*
212. *DSA*, 661 So. 2d at 908.
213. *Id.* at 909.

be heard."[214] Under the circumstances of this case, the court found that the summary denial of the petition deprived the petitioner of procedural due process.[215]

### C. *Order to Show Cause*

In *City of Kissimmee v. Grice*,[216] a police officer whose employment was terminated filed a petition for certiorari in the circuit court, which ordered the City to show cause why relief should not be granted.[217] The City moved to dismiss, asserting that the circuit court lacked subject matter jurisdiction.[218] Although the motion was denied,[219] the City failed to file a response to the order to show cause.[220] The circuit court granted the writ,[221] but "merely stated conclusions of law without indicating how the city departed from the essential requirements of law"[222] in terminating the officer.

On appeal, the fifth district found that the lack of response to an order to show cause "is not tantamount to a default which automatically entitles the petitioner to his requested relief."[223] The court indicated that although the failure to respond "does limit the court's consideration to the information contained in the record and the allegations contained in the petition[,] ... [s]till the court must determine if the petition is meritorious and whether the requested relief should be granted."[224]

The district court quashed the circuit court's order, characterizing it as "in essence, a 'Per Curiam Reversal,'"[225] and stated, "[a]lthough a decision under review may be affirmed without opinion, indicating that the presumption of correctness accorded the lower tribunal had not been rebutted, an appellate court has the responsibility to write opinions in all reversals."[226]

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214. *Id.*
215. *Id.*
216. 669 So. 2d 307 (Fla. 5th Dist. Ct. App. 1996).
217. *Id.* at 308.
218. *Id.* at 309.
219. *Id.*
220. *Id.* at 308.
221. *Grice*, 669 So. 2d at 309.
222. *Id.* at 309 n.1.
223. *Id.* at 308.
224. *Id.* (citation omitted).
225. *Id.* at 309 (footnote omitted).
226. *Grice*, 669 So. 2d at 309.

## XII. AMICUS CURIAE

In *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*,[227] the fourth district offered guidance as to the role an amicus curiae should play in an appeal. The court noted that a brief from an amicus curiae is "generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues."[228] The court also stated that "[a]lthough 'by the nature of things an amicus is not normally impartial,' amicus briefs should not argue the facts in issue."[229]

Applying these principles, the court denied one of two requests for leave to file an amicus brief, because the brief appeared "to be nothing more than an attempt to present a fact specific argument"[230] of the same type as was contained in the appellants' fifty page brief, a brief of the maximum allowable length under the appellate rules.[231] The court pointed out that "[s]ince the parties are limited as to the number and length of briefs, amicus briefs should not be used to simply give one side more exposure than the rules contemplate."[232]

The court expressed some further thoughts on the subject, indicating that "it would be helpful to the court if [multiple] amicus would attempt to join together in one brief and cooperate with the parties so as not to be repetitious of the parties' briefs."[233] Further, the court said that "[i]n the interest of brevity, amicus briefs should not contain a statement of the case or facts, but rather should get right to the *additional* information which the amicus believes will assist the court."[234] The court concluded its discussion by noting that "although Florida Rule of Appellate Procedure 9.370 does not require a motion for leave to file an amicus brief to state whether the parties have consented, it would be appropriate for the motion to contain that information."[235]

227. 21 Fla. L. Weekly D1562 (4th Dist. Ct. App. July 3, 1996).
228. *Id.* at D1562 (citing Alexander v. Hall, 64 F.R.D. 152 (D.C.S.C. 1974)).
229. *Id.* (citing Strasser v. Doorley, 432 F.2d 567 (1st Cir. 1970)).
230. *Id.*
231. FLA. R. APP. P. 9.210(a)(5).
232. *Ciba-Geigy*, 21 Fla. L. Weekly at D1562.
233. *Id.*
234. *Id.*
235. *Id.* (citation omitted).

## XIII. PROHIBITION

In *Brooks v. Lockett*,[236] plaintiffs and prospective plaintiffs in a putative class action suit in Orange County sought a writ of prohibition against a circuit judge in Lake County, where a similar class action against the same defendant was pending, who had entered an order abating the Orange County proceeding,[237] as well as other cases against the defendant.[238] The fifth district found that the Lake County judge "was not empowered to issue an order staying a pending action in another jurisdiction."[239] It recognized that "prohibition generally is not available to revoke an order already entered,"[240] but granted the writ nonetheless,[241] because "the order in the instant case attempts to exert an ongoing effect on pending class-action litigation involving [the defendant] throughout the State of Florida."[242]

## XIV. THE EFFECT ON APPEALS OF PRIOR DENIALS OF PROHIBITION

In *Barwick v. State*,[243] the defendant raised on appeal to the supreme court from his convictions and sentences a claim that the trial court erred in denying his motion for disqualification. This same issue had been the basis for a pretrial petition for a writ of prohibition that the supreme court had denied[244] in an order which did not indicate the grounds for denial.[245]

The State argued that the denial of prohibition should be deemed a ruling on the merits of the issue.[246] In support of this position, the State relied on the third district's opinion in *Obanion v. State*,[247] which was advocated by (then Judge and present Supreme Court of Florida) Justice Anstead's specially concurring opinion in the fourth district's decision in

236. 658 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1995).
237. Lake County is located in the fifth circuit, while Orange County is located in the ninth circuit. *Id.* at 1207.
238. *Brooks*, 658 So. 2d at 1206.
239. *Id.* at 1207.
240. *Id.*
241. *Id.* at 1208.
242. *Id.* at 1207–08.
243. 660 So. 2d 685 (Fla. 1995).
244. *Id.* at 690.
245. *Id.* at 691.
246. *Id.* at 690–91.
247. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986), *review denied*, 504 So. 2d 768 (Fla. 1987).

*DeGennaro v. Janie Dean Chevrolet, Inc.*,[248] cases that the supreme court categorized as "recogniz[ing] that a denial of a petition for writ of prohibition in those districts should henceforth constitute a ruling on the merits unless otherwise indicated."[249]

The supreme court "approve[d] of the procedure adopted by the Third District in *Obanion* and advocated by Justice Anstead's concurring opinion in *DeGennaro* as to the effect of the denial of a petition for writ of prohibition in those district courts,"[250] but did not agree that its denial of the petition in *Barwick* was a decision on the merits.[251] Noting that its order did not indicate the grounds for the denial[252] and the fact that the court had not "clearly expressed an intention to have a denial of a petition for writ of prohibition, without more, serve as a ruling on the merits,"[253] the court "recognize[d] a need to clarify the effect of this Court's denial of a prohibition petition."[254]

Satisfying the need that it had identified, the court stated:

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248. 600 So. 2d 44 (Fla. 4th Dist. Ct. App. 1992) (Anstead, J., concurring specially).

249. *Barwick*, 660 So. 2d at 691. While *Obanion* certainly established this principle in the third district, the impact of *DeGennaro* in the fourth district is less clear. Justice Anstead's sentiments in that decision cannot be reconciled with those expressed by Judge Farmer in his dissenting opinion in *Thomason v. State*, 594 So. 2d 310 (Fla. 4th Dist. Ct. App. 1992) (Farmer, J., dissenting), *quashed on other grounds*, 620 So. 2d 1234 (Fla. 1993). In *Thomason*, the defendant, who was appealing from an order withholding adjudication and placing him on probation, raised a double jeopardy claim that he had previously asserted in a petition for prohibition that had been denied without opinion. The court affirmed without opinion, but Judge Farmer, who wrote primarily to dissent on the merits, discussed the question of whether consideration of the double jeopardy claim was proper in light of the prior petition. He noted that such consideration was appropriate because "prohibition is an extraordinarily *prerogative* writ . . . that is sometimes denied for good reasons having nothing to do with the underlying merits of a petitioner's position." *Id.* at 312 n.2. He recognized that his view was contrary to *Obanion*, but stated that the fourth district had never adopted the *Obanion* approach and that he hoped it never would, "at least as long as prohibition is deemed a matter of mere grace." *Id.* Although disagreeing with Judge Farmer on the merits of the case, it appears that the other members of the panel agreed with him on the jurisdictional issue because the case was affirmed, rather than dismissed, because Judge Stone wrote a specially concurring opinion that set forth the reasons why he felt the case should be affirmed on the merits, and because the court, on rehearing, certified a question that dealt only with the merits of the case. *Id.* at 318.

250. *Barwick*, 660 So. 2d at 691.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

> We hold that from this time forward, if an order from this Court denying a petition for a writ of prohibition based upon an unsuccessful motion for disqualification is to constitute a decision on the merits and, thereby, foreclose further review of the disqualification issue on direct appeal, the order will state that it is "with prejudice."[255]

The court's decision to use qualifying language that refers only to a petition "based upon an unsuccessful motion for disqualification"[256] leaves open the question of whether the court means to apply this same rationale when a petition is based on some other ground, such as the double jeopardy issue in *Thomason* or the speedy trial claim in *Obanion*.

The court's specific approval of the *Obanion* procedure for the third district and the procedure advocated by Justice Anstead in *DeGennaro* for the fourth district,[257] while it adopted a different procedure for itself, at least with regard to petitions raising disqualification issues, seems to indicate that each district court will be allowed to adopt the approach it deems best.

## XV. MOOTNESS

In *J. M. v. State*,[258] the third district reversed an adjudication of delinquency based on its conclusion that the trial court's stated reasons for its departure from the recommendation made by the Department of Health and Rehabilitative Services ("HRS") as to the appropriate level of restrictiveness were not supported by the record.[259] The district court remanded for a new disposition hearing, finding that the issue was not moot even though the juvenile had served his residential sentence and had been released by HRS.[260] The court stated:

> Depending upon the evidence, if any, presented at the new disposition hearing on remand, the trial court, in its finding of delinquency, may conceivably decide to withhold adjudication, impose a less restrictive sentence and give the juvenile credit for the origi-

255. *Barwick*, 660 So. 2d at 691.

256. *Id.*

257. *See supra* note 249. This footnote addresses the reasons why the court's approval of this procedure for the fourth district may not mean a great deal, since the fourth district itself may prefer a different approach.

258. 677 So. 2d 890 (Fla. 3d Dist. Ct. App. 1996).

259. *Id.* at 892.

260. *Id.* at 893.

> nal sentence served or suspend entry of sentence altogether. As stated by this court in *R.A.B. v. State*, 399 So.2d 16, (Fla 3d DCA 1981): "The very fact of adjudication, apart from disposition, has potential collateral effects which are not harmless." *Id.* at 18. Indeed, a withhold of adjudication as opposed to an adjudication for this offense would certainly be relevant to future dispositions if this juvenile is ever rearrested or if he decided to enter a profession which required him to disclose any juvenile record. *See* § 39.045, Fla. Stat. (1993).[261]

## XVI. HARMLESS ERROR

In *Heuss v. State*,[262] the fourth district found that the trial court erred by failing to make findings sufficient to support the admission of certain statements.[263] The court concluded that the error was harmless,[264] however, and affirmed the convictions and sentences under review.[265] In a motion for rehearing, the defendant pointed out that the state had not made a harmless error argument and contended that the court lacked authority to sua sponte apply the harmless error doctrine.[266]

Noting that section 59.041 of the *Florida Statutes* requires the court to consider whether any error is harmless,[267] the court rejected the defendant's contention. The court stated that it could "discern no public policy supporting a conclusion that a review court must reverse an otherwise valid conviction for an error that is deemed harmless simply because harmless error was not argued in the state's brief."[268]

## XVII. SANCTIONS

In several cases, orders were entered imposing sanctions on pro se litigants. One particularly active litigant received sanctions from three

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261. *Id.* (footnote omitted). *See also* FLA. STAT. § 39.045 (1993).
262. 660 So. 2d 1052 (Fla. 4th Dist. Ct. App. 1995).
263. *Id.* at 1057.
264. *Id.*
265. *Id.* at 1058.
266. *Id.*
267. A similar requirement is set forth in section 924.33 of the *Florida Statutes.*
268. *Heuss*, 660 So. 2d at 1059.

district courts. In *Attwood v. Eighth Circuit Court*,[269] *Attwood v. Singletary*,[270] and *Attwood v. State ex rel. Florida Department of Corrections*,[271] the first, second, and fourth districts, respectively, decided to take action against an individual who had instituted an extraordinary number of cases, virtually all of which challenged prison conditions.[272]

Attwood had filed seventeen appeals or petitions in the first district in the period of just over ten months preceding the court's order,[273] seventeen cases in the second district in the six-month period ending June 1, 1995,[274] and thirty-one appeals or petitions in the fourth district in the first half of 1995.[275] The fourth district also noted that Attwood had eighteen cases, one of which had 200 defendants, pending in the circuit court for Martin County,[276] and that as of the date of a hearing held in October, 1993, in the United States District Court for the Northern District of Florida, Attwood had filed more than forty cases in that court.[277] The fourth district additionally pointed out that at the federal hearing, Attwood admitted that he had also filed "several thousand"[278] internal grievances in the Florida system.[279]

The first district indicated that its clerk's office received mail from Attwood "on almost a daily basis."[280] The fourth district noted that at the federal hearing, Attwood "admitted mailing 'pounds of mail a week' to the courts."[281]

In addition to commenting on the quantity of Attwood's efforts, the district courts made it clear that they were unimpressed with the quality of those efforts. The fourth district referred to Attwood's "frivolous claims,"[282] the second district to his "baseless appeals, petitions, and related unauthorized motions,"[283] and the first district to his "simply incomprehensible"[284]

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269. 667 So. 2d 356 (Fla. 1st Dist. Ct. App. 1995).
270. 659 So. 2d 1127 (Fla. 2d Dist. Ct. App. 1995).
271. 660 So. 2d 358 (Fla. 4th Dist. Ct. App. 1995).
272. *See Attwood*, 667 So. 2d at 357 n.4; *Singletary*, 659 So. 2d at 1128; *Department of Corrections*, 660 So. 2d at 358.
273. *Attwood*, 667 So. 2d at 356.
274. *Singletary*, 659 So. 2d at 1128.
275. *Department of Corrections*, 660 So. 2d at 358.
276. *Id.*
277. *Id.*
278. *Id.* at 359.
279. *Id.*
280. *Attwood*, 667 So. 2d at 357.
281. *Department of Corrections*, 660 So. 2d at 359.
282. *Id.* at 360.
283. *Singletary*, 659 So. 2d at 1128.

pleadings. Attwood's pleadings were also apparently quite repetitive. The first district indicated that he filed "numerous copies of the same pleading in different cases."[285] The fourth added that he often "makes copies of what he has already filed, signs the copied version, and handwrites an additional allegation, which must be treated as a new petition or appeal."[286]

The fourth district also expressed concern over the fact that Attwood, claiming indigency, had paid no filing fees in any of his cases[287] despite evidence adduced at the federal hearing to the effect that he was the sole owner of a rental income-generating apartment building with an estimated value of $57,000 to $69,000[288] and that he had a bank account about which he refused to testify.[289]

The first district prohibited Attwood from filing any document on his own behalf in the case under review or in any other case, as either appellant or petitioner,[290] directed its clerk to "refuse any document filed by Attwood unless signed by a member of The Florida Bar"[291] and, in Attwood's pending cases that were not yet mature, afforded Attwood thirty days within which to file and serve a notice of appearance of counsel,[292] noting that it would dismiss any case in which such a notice is not timely filed.[293]

The second district directed its clerk to reject the filing of all future notices of appeal and petitions for extraordinary relief in civil matters sent by or on behalf of Attwood unless submitted and signed by a member of The Florida Bar.[294] The court stated that any papers filed in violation of its order would be "automatically placed in an inactive file,"[295] and that any notices of appeal received from circuit courts would be "summarily stricken."[296] The court noted that its order would not apply to any criminal appeal filed by Attwood which directly concerns a judgment and sentence.[297]

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284. *Attwood*, 667 So. 2d at 356.
285. *Id.* at 357.
286. *Department of Corrections*, 660 So. 2d at 360.
287. *Id.* at 358.
288. *Id.* at 359.
289. *Id.*
290. *Attwood*, 667 So. 2d at 357.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Singletary*, 659 So. 2d at 1128.
295. *Id.*
296. *Id.*
297. *Id.*

The fourth district ordered that Attwood "be denied indigent status for the filing of appeals or petitions for extraordinary relief"[298] and directed its clerk "to refuse any such notice of appeal or petition for filing unless accompanied by the proper filing fee or submitted and assigned by a member of the Florida Bar."[299] Like the second district, the court indicated that its order would not apply to "any criminal appeal filed by Robert Attwood which directly concerns a judgment and sentence."[300]

The fifth district, apparently unaffected by Attwood's output, determined that sanctions were appropriate for another litigant. In *Holmes v. State*,[301] the court entertained a defendant's fifth petition for writ of habeas corpus and his eleventh post-conviction proceeding,[302] all unsuccessful challenges to a 1989 conviction and sentence.[303]

Finding the defendant "has disrupted the fair allocation of judicial resources of this court,"[304] and "this activity now rises to the level of being an abuse of process,"[305] the court prohibited the defendant from filing "any further *pro se* pleadings regarding his 1989 conviction and sentence."[306]

## XVIII. REHEARING

In *Thompson v. Singletary*,[307] the fourth district entered an initial opinion ordering a new trial for a criminal defendant.[308] No motion for rehearing was filed within the fifteen days allowed by Rule 9.330(a) of the *Florida Rules of Appellate Procedure*,[309] and mandate therefore issued.[310]

The state subsequently filed an untimely motion for rehearing, a motion to accept the motion for rehearing as timely filed and a motion to recall the mandate.[311] Attached to the motion for rehearing were portions of the trial transcript not previously furnished to the court that demonstrated that the

298. *Department of Corrections*, 660 So. 2d at 360.
299. *Id.*
300. *Id.*
301. 669 So. 2d 360 (Fla. 5th Dist. Ct. App. 1996).
302. *Id.* at 360.
303. *Id.* at 360 n.1.
304. *Id.* at 361.
305. *Id.*
306. *Holmes*, 669 So. 2d at 361.
307. 659 So. 2d 435 (Fla. 4th Dist. Ct. App. 1995).
308. *Id.* at 435–36.
309. *Id.* at 436.
310. *Id.*
311. *Id.*

defendant was not in fact entitled to a new trial.[312] Eleven days after the state's motions were filed, and before the court ruled on them, the term of court ended.[313]

The court found that the untimeliness of the motion for rehearing presented no impediment to its consideration, because the fifteen-day time limit of the rule is not jurisdictional[314] and the motion was filed in the same term of court.[315] The fact that the term of court ended after the issuance of the mandate, however, was a matter of greater concern.

The court began its analysis by focusing on the Supreme Court of Florida's decision in *State Farm Mutual Automobile Insurance Co. v. Judges of District Court of Appeal, Fifth District.*[316] There, the district court affirmed a case without opinion.[317] When the appellant filed a motion for rehearing four months later during the next term of court, the district court denied the motion as untimely, but sua sponte decided to reconsider the case en banc because it conflicted with an opinion in another case that was written in the interim.[318] The party opposing the rehearing then obtained a writ of mandamus from the supreme court, which held that an appellate court is without jurisdiction to recall its mandate beyond the term of court during which the mandate was issued.[319]

After its discussion of *State Farm*, the fourth district pointed out that if the state had called its attention to the impending expiration of the court's term of court by designating its motion to recall mandate as an emergency motion, the court would have recalled mandate before the end of the term.[320] The court noted that in the absence of such a designation, it had followed its normal procedure with motions for rehearing, which is to hold them in the clerk's office until a response is filed or the time for a response expires.[321] By the time that process was completed, so was the term of the court.[322]

312. *Thompson*, 659 So. 2d at 436.
313. *Id.*
314. *Id.*
315. *Id.* at 437.
316. 405 So. 2d 980 (Fla. 1981).
317. *Thompson*, 659 So. 2d at 436.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Thompson*, 659 So. 2d at 436.

The court next turned its attention to *Washington v. State*,[323] a case in which the supreme court stated that "[t]he prevailing rule is that an appellate court is without power to recall a mandate regularly issued without inadvertence and resume jurisdiction of the cause after the expiration of the term at which its judgment was rendered and the mandate issued."[324] The supreme court in *Washington* also recognized "the power . . . to recall a mandate sent down by inadvertence."[325]

Seizing on the references in *Washington* to "inadvertence," the fourth district concluded that its failure to grant the State's motion to recall the mandate during the eleven day period between its filing and the expiration of the term of court was "inadvertent under *Washington.*"[326] Repeating its previous pronouncement that it would have recalled mandate prior to the end of the term had the State called its attention to the need to do so,[327] the court concluded that "[u]nder these facts, which we believe make this case distinguishable from *State Farm*, . . . we have not lost jurisdiction."[328] The court therefore granted the State's motions, withdrew its original opinion,[329] and denied relief on the merits.[330]

## XIX. APPELLATE ATTORNEYS' FEES

### A. *Offer of Judgment on Appeal*

In *Deleuw, Cather & Co. v. Grogis*,[331] when the fourth district upheld a trial court's judgment taxing costs, the appellee moved for appellate attorney's fees and costs on the basis of an offer of judgment served during the pendency of the appeal.[332] The court struck the motion and the offer of judgment based on its conclusion that section 768.79 of the *Florida Statutes* under which the offer was made, "does not contain any language which would indicate that the legislature contemplated its use during appeals."[333]

323. 110 So. 259 (Fla. 1926).
324. *Id.* at 260–61 (citations omitted).
325. *Id.* at 261.
326. *Thompson*, 659 So. 2d at 437.
327. *Id.*
328. *Id.*
329. The original opinion was published in the advance sheets at 655 So. 2d 1282. It was not included in the bound volume, however, in light of the fact that it was withdrawn.
330. *Thompson*, 659 So. 2d at 437.
331. 664 So. 2d 989 (Fla. 4th Dist. Ct. App. 1995).
332. *Id.* at 989.
333. *Id.*

Additionally, the court found the statute inapplicable to the case under review because the statute applies only to damages[334] and the proceeding dealt only with the correctness of the amount of costs,[335] which are not considered a part of a claim which forms the basis of a suit.[336]

### B. *Violations of the Government in the Sunshine Law*

In *School Board of Alachua County v. Rhea*,[337] the first district rejected a claim that because section 286.011(4) of the *Florida Statutes* provides that "the court shall assess a reasonable attorney's fee" against agencies determined to have violated the Government in the Sunshine Law, there is no requirement for a party seeking appellate attorney's fees in such a case to file a motion in the appellate court.[338] The court found that the statute's mandatory language "does not supersede the requirements of Florida Rule of Appellate Procedure 9.400(b),"[339] which dictates that such motions must be filed in the appellate court, "nor does it authorize the trial court to make an initial award of appellate attorney's fees."[340]

## XX. MANDATE

The supreme court, in *State v. Roberts*,[341] clarified the procedure for obtaining a stay or recall of a district court's mandate when discretionary review is sought. The issue came before the court after the first district's denial of a motion to recall mandate.[342] The motion had been filed four days after the party seeking the recall had filed a notice invoking the supreme court's discretionary jurisdiction. In its denial, the district court relied on the supreme court's opinion in *State v. McKinnon*[343] for the proposition that a party desiring a stay of mandate during the pendency of a petition for review must apply to the supreme court for the stay.[344]

334. *Id.*
335. *Id.*
336. *Deleuw*, 664 So. 2d at 989.
337. 661 So. 2d 331 (Fla. 1st Dist. Ct. App. 1995).
338. *Id.* at 332.
339. *Id.*
340. *Id.*
341. 661 So. 2d 821 (Fla. 1995).
342. *Id.* at 821.
343. 540 So. 2d 111 (Fla. 1989).
344. *Roberts*, 661 So. 2d at 821.

The supreme court recognized that *McKinnon* "contained language"[345] supporting such a conclusion, but pointed out that "the issue in that case was not where the motion for stay should be filed."[346] Rather, the court stated, the holding of *McKinnon* was that the pendency of a petition for review "did not deprive the trial court of jurisdiction to resentence a defendant pursuant to the district court's mandate which had reversed and remanded the case for resentencing."[347] Ending any confusion as to the effect of *McKinnon*, the court stated that "[w]hile a motion for stay and to recall a mandate may be filed in this Court, it may also be filed in the district court of appeal."[348] Relying on Rule 9.130(a) of the *Florida Rules of Appellate Procedure*, which indicates that lower tribunals "have continuing jurisdiction"[349] to consider motions for stay pending review, the court said, "[t]he fact that a notice to invoke the discretionary jurisdiction of this court has already been filed does not deprive the district court of appeal of jurisdiction to rule upon the motion."[350] In fact, the court went on to indicate that "[g]enerally speaking, the Court prefers that motion for stay be filed in the district court of appeal because at that stage of the case the district court ordinarily will be better informed concerning the case and thereby better able to predict the likelihood of this Court's accepting jurisdiction."[351] The court therefore receded from *McKinnon* "to the extent that it suggests that the filing of a notice to invoke discretionary jurisdiction precludes the district court of appeal from entertaining a motion to stay or withdraw its mandate."[352]

## XXI. APPEALS IN CRIMINAL CASES

### A. *Death of Defendant*

In *State v. Clements*,[353] the supreme court dealt with the effect of defendants' deaths during the pendency of direct appeals from judgments and sentences. Despite the fact that each of the district courts of appeal had

345. *Id.*
346. *Id.*
347. *Id.* at 821–22.
348. *Id.* at 822.
349. *Roberts*, 661 So. 2d at 822.
350. *Id.*
351. *Id.*
352. *Id.*
353. 668 So. 2d 980 (Fla. 1996).

found abatement ab initio to be proper under such circumstances,[354] the supreme court concluded that "the appeal of a conviction may be dismissed but is not to be abated ab initio."[355] The court pointed out that the theory upon which abatement ab initio had been applied was the fact that it left in effect upon a defendant's death the legal presumption of innocence.[356] The court found such reasoning inapplicable in light of the fact that "the presumption of innocence ceases 'upon the adjudication of guilt and the entry of sentence,'"[357] and the fact that "a judgment of conviction comes for review with a presumption in favor of its regularity or correctness."[358]

The court went on to indicate, however, that even dismissal is not mandated. Finding that "monetary fines or penalties continue to be enforceable against assets which comprise a defendant's estate,"[359] the court stated that in such situations, "the estate maintains the same right to appeal that the defendant would have had if living"[360] and that the state may also "have an interest in seeing the appeal completed."[361] Thus, the court concluded that "when a defendant dies after judgment but during an appeal, the appellate court may, upon a showing of good cause by the State or a representative of the defendant, determine that the appeal should proceed."[362]

## B. *Belated Appeals*

The fourth district grudgingly reversed a defendant's sentence in *Gilbert v. State*[363] by applying, to a belated appeal, the general rule that appellate courts decide cases in accordance with the law in effect at the time of the appellate decision.[364] The court felt that it was bound by supreme court precedent[365] to apply this general rule despite "question[ing] its

354. *See, e.g.*, Williams v. State, 648 So. 2d 313 (Fla. 1st Dist. Ct. App. 1995); Carstens v. State, 638 So. 2d 630 (Fla. 4th Dist. Ct. App. 1994); Jackson v. State, 559 So. 2d 320 (Fla. 3d Dist. Ct. App. 1990); Kearns v. State, 536 So. 2d 1187 (Fla. 5th Dist. Ct. App. 1989); Cruz v. State, 137 So. 2d 254 (Fla. 2d Dist. Ct. App. 1962).

355. *Clements*, 668 So. 2d at 981.

356. *Id.*

357. *Id.* (quoting Vaccaro v. State, 11 So. 2d 186, 187 (Fla. 1942)).

358. *Clements*, 668 So. 2d at 981 (citing *Vaccaro*, 11 So. 2d at 188; Hitchcock v. State, 413 So. 2d 741 (Fla. 1982)), *cert. denied*, 459 U.S. 960 (1982).

359. *Clements*, 668 So. 2d at 982.

360. *Id.*

361. *Id.*

362. *Id.*

363. 667 So. 2d 969 (Fla. 4th Dist. Ct. App. 1996).

364. *Id.* at 971.

365. Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985).

propriety in cases of a belated appeal, especially one [such as the case under review] which is not brought until after the favorable case law change has been announced."[366]

The court expressed its belief that "a defendant should not be allowed to sit back and await a favorable change in the law before claiming a right to appeal, as the appellant did here."[367] Indicating that it did not believe it should "take two years to discover and bring to the court's attention"[368] a trial counsel's dereliction of the duty to file a notice of appeal when requested to do so, the court suggested "that the time for bringing a claim for ineffectiveness based on trial counsel's failure to appeal should be even more limited than a routine motion for ineffectiveness pursuant to *Florida Rule of Criminal Procedure* 3.850,"[369] a rule which presently requires such motions to be filed within two years of conviction,[370] one year in capital cases.[371]

Judge Glickstein wrote a specially concurring opinion in which he agreed with the majority on the merits of the case, but "abstain[ed] from their expressed concerns as to the policy matters beyond the issues."[372]

## C. *Appeals by the State*

### 1. Appeals Taken After the Jury is Sworn

In *State v. Livingston*,[373] a motion to suppress, filed prior to jury selection, was heard after the jury was sworn but before opening statements.[374] The trial court granted the motion and subsequently granted a mistrial.[375]

The State appealed from the order granting the motion to suppress and the defendant contended that the order was not appealable because the jury had been sworn prior to the suppression hearing.[376] The second district

366. *Gilbert*, 667 So. 2d at 971.
367. *Id.*
368. *Id.*
369. *Id.*
370. FLA. R. CRIM. P. 3.850(b).
371. *Id.*
372. *Gilbert*, 667 So. 2d at 971 (Glickstein, J., concurring specially).
373. 21 Fla. L. Weekly D1237 (2d Dist. Ct. App. May 22, 1996).
374. *Id.* at D1237–38.
375. *Id.* It is not clear from the opinion which party requested the mistrial, whether the mistrial had any relation to the motion to suppress or whether the mistrial was granted before opening statements or at some point thereafter.
376. *Livingston*, 21 Fla. L. Weekly at D1238.

disagreed, concluding that "the granting of a motion to suppress followed by a mistrial results in an order appealable under *Florida Rule of Appellate Procedure* 9.140(c)(1)(B)."[377]

### 2. Effect of Nolle Prosse

The State sought certiorari review of two pretrial evidentiary rulings in *State v. Spence*.[378] After the trial court entered the orders in question, the State nolle prossed the case.[379] Some three weeks later, the State refiled an information alleging the same crime.[380] The State then filed its timely petitions for certiorari.[381]

Relying on the supreme court's decision in *State v. Vazquez*,[382] the court found that the evidentiary rulings had "no carryover effect upon the new information."[383] Given this fact, the court called the attempt to obtain review of the rulings a "request for a futile act"[384] and denied the State's petitions.[385] "Even though the new case may constitute an identical allegation,"[386] the court stated, "it nonetheless constitutes a separate case and we cannot reach back and rule and determine the validity of orders entered in a previous case that is no longer in existence."[387]

The court warned that the filing of a nolle prosse "may have awesome consequences which should be contemplated before such action is taken,"[388] and indicated that it "prepared this opinion to point out the pitfall in the course of action taken by the state in the instant case."[389]

### 3. Pretrial Orders Declaring a Sentencing Statute Unconstitutional

In *State v. Peloquin*,[390] the second district dealt with consolidated appeals by the State from orders declaring the DUI vehicle impoundment

377. *Id.*
378. 658 So. 2d 660 (Fla. 3d Dist. Ct. App. 1995).
379. *Id.* at 661.
380. *Id.*
381. *Id.*
382. 450 So. 2d 203 (Fla. 1984).
383. *Spence*, 658 So. 2d at 661.
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Spence*, 658 So. 2d at 661.
389. *Id.*
390. 20 Fla. L. Weekly D2744 (2d Dist. Ct. App. Dec. 15, 1995).

law[391] unconstitutional.[392] The court noted that the defendants in the cases under review had not yet gone to trial or pleaded to the charges[393] and that the issue of vehicle impoundment does not arise until after conviction.[394] Under these circumstances, the court dismissed the appeals,[395] stating that "[a] pretrial order declaring a statute or ordinance unconstitutional, and doing nothing more regarding the underlying case, is not appealable,"[396] and that since "these orders relate to sentencing, and do not impact the trial of the cases, they do not meet the standard for review by certiorari."[397]

## D. *Motions for Post Conviction Relief*

### 1. Summary Denial

In *Davis v. State*,[398] the fourth district discussed the procedure it follows in reviewing summary denials of motions for postconviction relief.[399] The court noted that appeals in such cases are governed by Rule 9.140(g) of the *Florida Rules of Appellate Procedure*,[400] which requires the court to review "the arguments made therein together with the order of denial and the attachments thereto,"[401] and which states, "[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing."[402] The court went on to note that if its review "shows a preliminary basis for reversing the trial court's order,"[403] the court will order a response from the state and will then "allow the appellant to reply."[404] If the record does not show such a basis, the court continued, "neither the appellant nor the state are required to file briefs."[405]

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391. FLA. STAT. § 316.193(6)(d) (1993).
392. *Peloquin*, 20 Fla. L. Weekly at D2744.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.* (citation omitted).
397. *Peloquin*, 20 Fla. L. Weekly at D2744.
398. 660 So. 2d 1161 (Fla. 4th Dist. Ct. App. 1995).
399. *Id.* at 1162.
400. *Id*
401. *Id.*
402. FLA. R. APP. P. 9.140(g).
403. *Davis*, 660 So. 2d at 1162.
404. *Id.*
405. *Id.*

The court took the opportunity to explain its process because "we have noted of late many pro se appellants filing briefs on orders denying postconviction relief without a hearing."[406] Stating that it "would have already disposed of this case as an affirmance but for the fact"[407] that the appellant filed a brief,[408] the court opined that such briefs "may in fact slow the process of our review"[409] and "[g]enerally ... are not considered, because either the arguments were made in the postconviction relief motion, or they improperly raise additional issues not contained in"[410] the motion.

### 2. Orders Granting in Part and Denying in Part

In *Cooper v. State*,[411] the second district found to be appealable an order granting in part and denying in part a motion for postconviction relief filed under Rule 3.850 of the *Florida Rules of Criminal Procedure*.[412] Such an order, the court concluded, "marks the end of the judicial labor which is to be expended on the motion, and the order is final for appellate purposes."[413] The court drew a distinction between such an order and one that denies a claim in a postconviction motion but grants an evidentiary hearing on a different claim in the same motion.[414] In such circumstances, the court stated, the order is "not appealable until all issues raised have been ruled upon by the court,"[415] because "[j]udicial economy ... forbids piecemeal appeals until all pending matters raised in a single motion have been resolved and ... can then be efficiently reviewed in one appellate proceeding."[416]

## E. *Cross-Appeals*

In *Page v. State*,[417] a criminal defendant appealed from a conviction and the state cross-appealed, asserting that the trial court erroneously suppressed

406. *Id.*
407. *Id.*
408. *Davis*, 660 So. 2d at 1162.
409. *Id.*
410. *Id.*
411. 667 So. 2d 932 (Fla. 2d Dist. Ct. App. 1996).
412. *Id.* at 933.
413. *Id.*
414. *Id.*
415. *Id.*
416. *Cooper*, 667 So. 2d at 933.
417. 677 So. 2d 55 (Fla. 1st Dist. Ct. App. 1996).

a statement.[418] The first district affirmed the conviction and, in light of that resolution, declined to address the issue raised on cross-appeal.[419]

The court recognized section 924.07(1)(d) of the *Florida Statutes*, which states, in pertinent part: "Once the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal."[420] Concluding, however, that compliance with that provision in a case such as the one under review would "be rendering what amounted to nothing more than an advisory opinion,"[421] the court found that "to the extent the statute purports to dictate to the courts what issues must be addressed, regardless of necessity, it constitutes a violation of the separation of powers."[422] The court certified the following question to the supreme court as one of great public importance:

> IS SECTION 924.07(1)(d), FLORIDA STATUTES (1995), AN UNCONSTITUTIONAL VIOLATION OF THE PRINCIPAL [SIC] OF SEPARATION OF POWERS TO THE EXTENT THAT IT PURPORTS TO MANDATE THAT AN APPELLATE COURT MUST RULE UPON ISSUES RAISED BY THE STATE IN A CROSS-APPEAL, REGARDLESS OF THE DISPOSITION OF THE DEFENDANT'S APPEAL?[423]

## F. *Disqualification of Counsel*

In *Colton v. State*,[424] a criminal defendant appealing his conviction, who was represented by the Public Defender's Office, moved to disqualify counsel for the State.[425] The motion was based on the fact that at the time of the filing of the notice of appeal, counsel for the state had been employed as a trial attorney by the Public Defender's Office representing the defendant.[426]

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418. *Id.* at 55.
419. *Id.* at 56.
420. FLA. STAT. 924.07(1)(d) (1995).
421. *Id.*
422. *Page*, 677 So. 2d at 56.
423. *Id.*
424. 667 So. 2d 341 (Fla. 1st Dist. Ct. App. 1995).
425. *Id.* at 342.
426. *Id.*

Resolving all factual disputes in favor of the defendant,[427] the first district denied the motion. The court found a number of facts to be of significance, including the fact that: 1) the attorney did not represent the defendant at trial or on any previous matter;[428] 2) the defendant did not assert that the attorney had received any confidential information, but only that it was possible that he could have been exposed to such information;[429] and 3) the attorney filed an affidavit in which he stated that he was not privy or exposed to any information regarding appellate cases, including the defendant's appeal.[430]

The court noted that there is no rule of Professional Conduct that specifically addresses successive government to government employment when those interests are adverse[431] and rejected the defendant's effort to extend to the facts of the case the dictates of Rule 2.060(c) of the *Florida Rules of Judicial Administration*, which "prohibits former judicial research aides from participating in any manner in any proceeding that was docketed in the court during the term of service or prior thereto."[432]

The court therefore addressed the issue in terms of whether the representation resulted in an appearance of impropriety, noting first that such an evaluation must be done on a case-by-case basis.[433] In finding no appearance of impropriety to exist, the court pointed out that "arguments made at trial and on appeal are distinct and involve differing strategies,"[434] that appellate courts are "bound by the record and arguments made at the trial court level,"[435] matters with which the attorney in the case under review was not involved,[436] and that any "anonymous information"[437] the attorney might have overheard while with the Public Defender's Office would be viewed by the court as "of little value in the appellate process."[438]

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427. The court noted that if the case had turned on the factual disputes, it would have appointed a special master to make factual findings. *Id.*

428. *Id.* at 343.

429. *Colton*, 667 So. 2d at 343.

430. *Id.* at 342.

431. *Id.* at 342–43.

432. *Id.* at 343.

433. *Id.*

434. *Colton*, 667 So. 2d at 343.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

### G. *Out-of-Time Rehearing*

In *Spaziano v. State*,[439] a criminal defendant with a pending death warrant filed two out-of-time motions for rehearing. One motion was directed to the affirmance, thirteen years earlier on direct appeal, of the judgment and sentence of death and the other was directed to the affirmance, nine years earlier, of the denial of a motion for post-conviction relief.[440]

The court noted that the motions were "clearly not authorized."[441] It went on, however, consistent with its "constitutional responsibility to refrain from dismissing a cause solely because an improper remedy has been sought,"[442] to consider the contents of the motions and a supporting affidavit "to determine whether they have any basis for relief under our jurisdiction."[443] Such consideration led to the conclusion that one issue raised by the defendant, relating to newly discovered evidence of the recantation of the testimony of a significant witness, was a proper subject for a successive motion for post-conviction relief under Rules 3.850 and 3.851 of the *Florida Rules of Criminal Procedure*.[444] The supreme court therefore remanded the matter to the trial court for consideration of that issue.[445]

## XXII. APPEALS IN TERMINATION OF PARENTAL RIGHTS CASES

### A. *Final Orders*

The question of what constitutes a final order for purposes of appeal, when parental rights are terminated was dealt with by the fifth district in *Moore v. Department of Health and Rehabilitative Services*.[446] Uncertainty existed on this point because the statutory scheme applicable to such cases contemplates the entry of two written orders.[447] The first order, pursuant to section 39.467 of the *Florida Statutes*, is to be entered after the adjudicatory hearing and is to set forth "the findings of fact and conclusions of law."[448] The second, pursuant to section 39.469(3), is a subsequent order of disposi-

439. 660 So. 2d 1363 (Fla. 1995).
440. *Id.* at 1364.
441. *Id.* at 1365.
442. *Id.*
443. *Id.*
444. *Spaziano*, 660 So. 2d at 1365–66.
445. *Id.* at 1366.
446. 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995).
447. *Id.* at 1139.
448. FLA. STAT. § 39.467(5) (1995).

tion "briefly stating the facts upon which [the court's] decision to terminate the parental rights is made."[449]

The district court held that "it is the second or dispositional order which is the final order for purposes of appeal."[450] Although the notice of appeal in the case under review was directed to the initial adjudicatory order, the court reached the merits of the appellant's claims, concluding that "a notice of appeal directed to an adjudicatory order should simply be treated as a premature notice which is held in abeyance until entry of the dispositional order."[451]

## B. *Lack of Issue of Arguable Merit*

In *Ostrum v. Department of Health and Rehabilitative Services*,[452] an appeal was taken from a final order terminating parental rights. The appellant's court-appointed counsel moved to withdraw and filed a brief pursuant to the dictates of *Anders v. California*.[453]

In *Anders*, the United States Supreme Court established the procedure to be employed by court-appointed counsel in criminal appeals when they find no issues of arguable merit. As capsulized in *Ostrum*, such attorneys are to file a brief "detailing the proceedings below with a discussion of where error might be suggested and why none actually appears."[454]

The fourth district granted the motion to withdraw, but also took the opportunity to establish the proper procedure to be employed when court-appointed counsel finds no issues of arguable merit in appeals from orders terminating parental rights.[455]

The court concluded that "the full panoply of *Anders* procedures"[456] do not apply in such situations. The court relied in part on the fact that the Sixth Amendment right to counsel does not apply to termination of parental rights cases because they are purely civil in nature,[457] and the conclusion that

449. *Id.* § 39.469(3) (1995).
450. *Moore*, 664 So. 2d at 1139.
451. *Id.*
452. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).
453. 386 U.S. 738 (1967).
454. *Ostrum*, 663 So. 2d at 1361.
455. *Id.*
456. *Id.*
457. The court recognized that the right to counsel in termination of parental rights cases is compelled by both the *Florida Constitution* and the *United States Constitution*, albeit on a due process theory. *See In re* D.B., 385 So. 2d 83, 90–91 (Fla. 1980).

"the interest of the children in quitting the uncertainties surrounding their future should be put to rest as soon as it can fairly be done."[458]

"More importantly, however,"[459] the court stated, "*Anders* represents a radical departure from the traditional role of appellate judges as neutral decision makers without bias or prejudice for or against any party,"[460] turning the judges instead "into advocates for the party whose counsel seeks to withdraw."[461]

"Whatever may be the rationale for requiring that departure from neutrality in criminal cases,"[462] the court continued, "we are quite unwilling to allow it in purely civil matters. To do so is to favor one class of litigants over the other. That circumstance will understandably be seen by other parties as a classic denial of equal protection of the law."[463]

Accordingly, the court concluded that in cases of this nature, counsel should simply move to withdraw.[464] The court then set forth the procedure that it will follow with such motions. As in other civil appeals, the court will give the party a period of time within which to argue the case without an attorney.[465] If the party fails to file a brief, the court will dismiss the appeal for failure to prosecute.[466] If the party does file a brief and it fails to present a preliminary basis for reversal, the court will summarily affirm under Rule 9.315 of the *Florida Rules of Appellate Procedure*.[467] If the brief does present a preliminary basis for reversal, the case will proceed as an ordinary appeal.[468]

In *Jiminez v. Department of Health and Rehabilitative Services*,[469] the third district applied the *Ostrum* reasoning to similar facts, noting additionally one point not specifically addressed by, but presumably implicit in, *Ostrum*. The *Jiminez* court stated that in cases in which a party's brief does show a preliminary basis for reversal, the "court will retain discretion to

458. *Ostrum*, 663 So. 2d at 1361.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Ostrum*, 663 So. 2d at 1361.
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Ostrum*, 663 So. 2d at 1361.
469. 669 So. 2d 340 (Fla. 3d Dist. Ct. App. 1996).

deny the motion to withdraw and direct that appointed counsel proceed with the appeal."[470]

## XXIII. APPEALS IN WORKERS' COMPENSATION CASES

In *Millinger v. Broward County Mental Health Division*,[471] the appellant's notice of appeal from an order denying a claim for compensation was mailed to the district court two days before the expiration of the thirty-day period for filing such notices,[472] but was not received until after that period had expired.[473]

The appellant filed a "Motion for Extension or in the Alternative Motion for Remand,"[474] requesting that the appeal be accepted as timely or that the case be remanded to the judge of compensation claims ("JJC") to determine whether excusable neglect existed so as to allow the JJC to vacate and reenter the already final order.[475] The motion was accompanied by an affidavit of appellant's counsel's secretary stating that she had called the clerk's office of the district court and was given erroneous information that the notice of appeal would be timely if it was postmarked within the thirty-day period.[476] The district court denied the motion and dismissed the appeal.[477]

The appellant then filed with the JJC a motion for rehearing and motion to vacate based on the same grounds as the motion in the district court.[478] At the hearing on the motion, appellant's counsel testified that he was aware of the fact that the notice had to actually be filed within thirty days,[479] that he had instructed his staff on the point,[480] and that his secretary had acted on her own in contacting the clerk's office.[481] The JJC vacated the original order and reentered an identical order to allow the appellant an opportunity to appeal.[482]

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470. *Id.* at 342 (footnote omitted).
471. 672 So. 2d 24 (Fla. 1996).
472. FLA. R. WORK. COMP. P. 4.165(a).
473. *Millinger*, 672 So. 2d at 25.
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Millinger*, 672 So. 2d at 25.
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*

The appellant instituted a timely appeal from the second order and the appellee cross-appealed, challenging the vacation of the original order.[483] The district court agreed with the appellee, holding that the JJC was without jurisdiction to vacate and reenter the judgment.[484]

The supreme court approved the district court's decision[485] and found it to be inapplicable to the case relied upon by the appellant, *New Washington Heights Community Development Conference v. Department of Community Affairs*.[486]

In *New Washington Heights*, the appellant's counsel's secretary telephoned the clerk of an administrative agency and was erroneously told that the agency would consider an appeal from one of its orders to be filed as of the postmark date, if sent by certified mail.[487] The third district dismissed the appeal, but did so "without prejudice to the appellant to apply to the Department to vacate and re-enter the operative order."[488] The court stated that "[i]f the Department acts favorably upon such application, the appellant may timely appeal the re-entered order and thereby challenge the merits of the original adverse agency action."[489] The court's decision was based on the principle that "where state action deprives a party of the ability to file a timely notice of appeal, the appellate court, although deprived of jurisdiction over the appeal, will provide the thus-rejected appellant with an alternative avenue of review."[490]

The supreme court found that the reasoning of *New Washington Heights* was "not dispositive"[491] in *Millinger* "for at least two reasons."[492] First, the court stated, the untimely notice in *Millinger* "was not the *direct* result of misrepresentations of a state official."[493] Second, the court continued, not only was it "both inappropriate and unnecessary for counsel's secretary to call the court clerk for legal advice"[494] in *Millinger* because "[i]t is a settled rule of law that mailing, as opposed to filing, a notice within the thirty-day

483. *Millinger*, 672 So. 2d at 25.
484. Millinger v. Broward County Mental Health Div., 655 So. 2d 104 (Fla. 1st Dist. Ct. App. 1994).
485. *Millinger*, 672 So. 2d at 25.
486. 515 So. 2d 328 (Fla. 3d Dist. Ct. App. 1987).
487. *Id.* at 329.
488. *Id.* at 330.
489. *Id.*
490. *Id.* at 329–30.
491. *Millinger*, 672 So. 2d at 26.
492. *Id.*
493. *Id.*
494. *Id.*

filing period is insufficient to preserve appellate rights,"[495] but the appellant's "counsel admitted that he knew the notice had to be filed in the district court within the thirty-day filing period."[496] Under these facts, the court found that "[i]t was counsel's responsibility to adequately supervise and instruct his staff to ensure" [497] that the notice was timely filed. The court also "disapprove[d] *New Washington Heights* to the extent that it is inconsistent with our holding here."[498]

The supreme court additionally rejected a claim that because a JJC "may . . . do all things comformable to law which may be necessary to enable him effectively to discharge the duties of his office,"[499] the JJC had the "inherent authority to vacate and reenter his final order."[500] The appellant's argument in this regard was based on the decision in *Morgan Yacht Corp. v. Edwards*,[501] which interpreted section 440.331(1) "as giving a JJC the authority to rescind his approval of a settlement upon discovering that the settlement was based on the claimant's 'flagrant fraud and misrepresentations.'"[502]

The supreme court distinguished *Morgan Yacht* on the basis that counsel in *Millinger* did not miss the deadline "due to fraud or deliberate deception,"[503] but because he "failed to manage his office professionally."[504]

## XXIV. APPEALS IN JUVENILE CASES

### A. *Final Orders*

In *A.N. v. State*,[505] an appeal was taken by a juvenile from an adjudication of delinquency.[506] The State moved to dismiss, asserting that the order of adjudication was a nonappealable, nonfinal order.[507]

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495. *Id.* (citations omitted).
496. *Millinger*, 672 So. 2d at 26.
497. *Id.*
498. *Id.* at 27.
499. FLA. STAT. § 440.33(1) (1993).
500. *Millinger*, 672 So. 2d at 27.
501. 386 So. 2d 883 (Fla. 1st Dist. Ct. App. 1980).
502. *Millinger*, 672 So. 2d at 27 (quoting *Morgan Yacht*, 386 So. 2d at 884).
503. *Id.*
504. *Id.* (footnote omitted).
505. 666 So. 2d 928 (Fla. 3d Dist. Ct. App. 1995).
506. *Id.* at 929.
507. *Id.*

The third district pointed out that under the *Florida Constitution*, the right to appeal interlocutory orders exists only "to the extent provided by rules adopted by the supreme court" [508] and that the supreme court has not adopted a rule that permits interlocutory appeals in juvenile delinquency cases.[509] The court recognized the fact that the legislature "created the right to appeal a final order in a delinquency case by enacting paragraph 39.069(1)(a), Florida Statutes (1993)."[510] The court noted, however, that the statute "does not itself define what is a final order in a juvenile delinquency proceeding."[511]

Agreeing with the first district's decisions in *C.L.S. v. State*[512] and *T.L.W. v. Soud*,[513] which found that the final order in a delinquency case is the order of disposition because that order marks the end of the judicial labor in the case,[514] the third district concluded that since no disposition order had been entered,[515] there existed no appealable order[516] and dismissal was appropriate.[517]

## B. *Evidence Sufficient to Prove Only Lesser Included Offense*

In *I.T. v. State*,[518] the second district found the evidence insufficient to support adjudications of delinquency based on the offense of grand theft auto.[519] The court concluded, however, that the evidence did support a finding of trespass in a conveyance.[520]

Citing to the supreme court's decision in *Gould v. State*,[521] the second district recognized that when an appellate court finds the evidence insufficient in a criminal case to support the offense for which a defendant was convicted, but sufficient to prove a lesser included offense, the appellate

508. FLA. CONST., art. V, § 4(b)(1).
509. *A.N.*, 666 So. 2d at 930.
510. *Id.*
511. *Id.*
512. 586 So. 2d 1173 (Fla. 1st Dist. Ct. App. 1991).
513. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994), *review dismissed*, 650 So. 2d 992 (Fla. 1995).
514. *A.N.*, 666 So. 2d at 930.
515. *Id.*
516. *Id.*
517. *Id.*
518. 657 So. 2d 1241 (Fla. 2d Dist. Ct. App. 1995).
519. FLA. STAT. § 812.014(2)(c) (1993).
520. *Id.* § 810.08(1) (1993).
521. 577 So. 2d 1302 (Fla. 1991).

court can order the trial court to enter a conviction for the lesser crime only when that crime is a necessarily lesser included offense.[522]

The court pointed out, however, that in *G.C. v. State*,[523] the third district concluded that "an appellate court may affirm a juvenile adjudication on an alternative ground that is not a necessary lesser included offense,"[524] and that the supreme court, in its review of the third district's decision,[525] "approved this procedure."[526]

The court acknowledged that in *N.C. v. State*,[527] the fourth district followed a different procedure, reversing an adjudication for grand theft auto and discharging the juvenile defendant based on *Gould*.[528] Concluding, however, that *Gould* is limited to adult criminal cases,[529] and that the supreme court did not intend in *Gould* to overrule *G.C.*,[530] the court affirmed the adjudications in *I.T.* with directions to modify them to reflect trespass in a conveyance as their basis.[531] The court also certified conflict with *N.C.*[532]

### C. *Sentencing*

In *J.M. v. State*,[533] the third district concluded that a trial court's departure from the recommendations set forth by HRS in a delinquency disposition proceeding is appealable.[534] The court relied on section 39.052(3)(e)3 of the *Florida Statutes*, which states: "The court shall commit the child to the department at the restrictiveness level identified [by HRS] or may order placement at a different restrictiveness level. . . . Any party may appeal the court's findings resulting in a modified level of restrictiveness pursuant to this subparagraph."[535]

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522. *I.T.*, 657 So. 2d at 1242.
523. 560 So. 2d 1186 (Fla. 3d Dist. Ct. App. 1990).
524. *I.T.*, 657 So. 2d at 1242.
525. State v. G.C., 572 So. 2d 1380 (Fla. 1991).
526. *I.T.*, 657 So. 2d at 1242.
527. 581 So. 2d 647 (Fla. 4th Dist. Ct. App. 1991).
528. *I.T.*, 657 So. 2d at 1242.
529. *Id.*
530. *Id.*
531. *Id.*
532. *Id.*
533. 677 So. 2d 890 (Fla. 3d Dist. Ct. App. 1996).
534. *Id.* at 891.
535. FLA. STAT. § 39.052(3)(e)3 (1993).

Judge Cope dissented, believing that the court is not permitted to review a trial court's discretionary sentencing decision[536] because of section 39.052(3)(k) of the *Florida Statutes*.[537] That provision states:

> It is the intent of the Legislature that the criteria set forth in paragraph (d) are general guidelines to be followed at the discretion of the court and not mandatory requirements of procedure. It is not the intent of the Legislature to provide for the appeal of the disposition made pursuant to this subsection.[538]

The majority, however, interpreted the second sentence of section 39.052(3)(k) to refer to the first sentence of the provision.[539] "That is to say,"[540] the court indicated, "we believe the legislature did not intend to create an appealable issue out of the fact that the trial court considered only certain of the criteria listed in paragraph (d) and not other listed criteria."[541]

The majority also found what it considered to be "a second, more fundamental reason for why this statutory provision cannot be construed to preclude appellate review."[542] Noting that "[t]he commitment of a child to HRS is a deprivation of liberty which triggers significant due process protection,"[543] the court stated that it "simply cannot agree with an interpretation of any statutory language which permits such a fundamental liberty interest to rest solely on the unbridled discretion of the trial judge."[544]

The court went on to note that in *A.S. v. State*,[545] it had found that the trial court violated a juvenile's constitutional rights by imposing a harsher sentence than that recommended by HRS because the juvenile had exercised his constitutional right to assert his innocence, even after adjudication as a delinquent.[546] The court stated that if there was no right for juveniles to appeal their dispositions, the juvenile in *A.S.* would have had to "serve a

536. Judge Cope indicated that the question was not whether there existed an appealable order, but whether the trial court's departure from the recommendation made by HRS was an appealable issue. *Id.* at 894–95 (Cope J., dissenting).
537. *Id.* at 896 (Cope, J., dissenting).
538. FLA. STAT. § 39.052(3)(k) (1993).
539. *J. M.*, 677 So. 2d at 891–92.
540. *Id.* at 892.
541. *Id.*
542. *Id.*
543. *Id.*
544. *J.M.*, 677 So. 2d at 892.
545. 667 So. 2d 994 (Fla. 3d Dist. Ct. App. 1996).
546. *J. M.*, 677 So. 2d at 892.

significantly enhanced sentence as a result of his exercise of a fundamental constitutional right."[547] The court indicated that in its view, such a result was "unfathomable."[548]

### D. *Juvenile Restitution*

In *State v. C.W.*,[549] the fourth district dismissed an appeal by the state from a final order denying restitution in a juvenile proceeding.[550] The court recognized that such orders can be appealed in criminal cases under section 924.07(1)(k) of the *Florida Statutes*,[551] but pointed out that there is no comparable provision in sections 39.069(1)(b) and 39.0711,[552] which list the types of orders from which the state may appeal in juvenile proceedings.

## XXV. APPEALS IN BOND VALIDATION CASES

In *Rowe v. St. Johns County*,[553] an appeal from a decision declaring a proposed bond issue valid,[554] the named appellant filed a notice of appeal, but did not submit the initial brief.[555] Rather, the appellants were "three citizens who did not intervene in the bond validation proceeding below."[556] The supreme court found that "as citizens and taxpayers"[557] of the county that authorized the issuance of the bonds, the three appellants "were proper parties to that proceeding and thus may properly appear for the first time on appeal."[558]

## XXVI. A LOOK TO THE FUTURE

In the upcoming year, the supreme court, pursuant to Rule 2.130 of the *Florida Rules of Judicial Administration*, will adopt its four-year cycle amendments to the *Florida Rules of Appellate Procedure*. It is likely that

547. *Id.*
548. *Id.*
549. 662 So. 2d 768 (Fla. 4th Dist. Ct. App. 1995).
550. *Id.* at 769.
551. *Id.*
552. *Id.*
553. 668 So. 2d 196 (Fla. 1996).
554. *Id.* at 197.
555. *Id.*
556. *Id.*
557. *Id.* at 197–98.
558. *Rowe*, 668 So. 2d at 198.

these amendments will significantly impact the appellate process in Florida. Of course, the supreme court and the courts of appeal will also provide answers to many of the questions raised by the cases discussed in this article. The answers, as they usually do, will likely generate new questions. Those questions, and others, will continue to provide the large number of court decisions that shape the field of appellate practice.