The Operation and Jurisdiction of the Florida Supreme Court

Gerald Kogan*   Craig Waters†

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I. INTRODUCTION

The judiciary is Florida’s most poorly understood branch of government. A lack of general public knowledge about the Courts’ routine operation is nearly demanded by the institution itself. Judges and their
employees, unlike legislative or executive officials, cannot talk publicly about matters pending before them. Official silence is imposed not merely by constitutional constraints, but also by codes of ethics and the requirement that judges receive information on a case only through the closely regulated process of briefing, motions, and adversarial argument. The information going out of the courthouse is so severely restricted that most Floridians have only a dim understanding of how the judiciary works.

The same conclusion applies with greater force to the Florida Supreme Court. The seven justices and their staffs perform virtually all of their official duties away from public view, behind the security barriers on the second floor of the Supreme Court Building in Tallahassee. What is publicly known of the Court consists largely of its more ceremonial aspects: black-robed justices seated at the Court bench, listening to arguments by lawyers often talking in legal jargon unchanged since medieval times. Officially, the Court speaks only through its formal opinions and orders, all funneled through the Clerk’s Office, which appear with little warning.

Part of the purpose of this article is to dispel some of the mystery and lift some of the misconceptions about the Florida Supreme Court’s daily operations, including the exercise of its jurisdiction. Only a few prior sources illuminate the topic addressed here, and none of these have attempted a more-or-less comprehensive study. This paper is intended to fill this gap by compiling information useful both to lawyers and to laypersons interested in how the Court operates within its constitutional constraints.

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

1. See FLA. CODE JUD. CONDUCT Canon 3 (West 1993).

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

Although the internal procedures of the Court are not widely known, they follow a fairly well defined code. A few rules have been distilled into the *Supreme Court Manual of Internal Operating Procedure*[^3] and portions of the *Rules of Judicial Administration*,[^4] though these by no means contain all or even most of the principles by which the Court operates. Some of the flavor of day-to-day Court operations can also be obtained from other works detailing the Court’s history.[^5] The purpose of this section is not to belabor material that can be obtained elsewhere, but to review the more significant operations regulated by the Court’s customary, unwritten code,[^6] some aspects of which date to the Court’s first sessions in 1846.

Much of the mystery behind the Court’s daily operations arises from the fact that almost none of the internal machinery is visible to public view. Unlike the Legislature with its committee system or the Executive branch with its cabinet meetings and press liaisons, the Court’s meetings and research—apart from oral arguments—are entirely secret until the release of an opinion or order. The most important meetings of the seven justices occur during conferences that are closed even to the Court’s own staff, and the Court has never found any necessity for maintaining a permanent press liaison.[^7]

This lack of daily contact with the public is an unfortunate feature, but one born out of a necessity. The Court must retain absolute impartiality until the day a case is decided. The constitutional requirement of due process,[^8] among other reasons, gives litigants a right to have their cases reviewed in an impartial forum. Out of deference to due process, the Florida Code of Judicial Conduct requires judicial impartiality and prohibits judges and their employees from talking about pending or impending[^9]

[^4]: FLA. R. JUD. ADMIN. 2.030.
[^6]: Of course, it will be necessary to reiterate a few matters addressed in the *Supreme Court Manual of Internal Operating Procedures* in order to lay the groundwork for a discussion of the Court’s unwritten procedures. The authors also note that there are some aspects of Court operations that are confidential for a variety of reasons. These will not be discussed here.
[^7]: Most routine releases of court-related information are handled by the Clerk of the Court or the staff of the Chief Justice.
[^9]: The terms pending and impending convey an important distinction. A case is pending if it has been properly filed and is awaiting review. A case is impending if Court personnel
proceedings except through briefing, internal discussions among Court personnel, and the adversarial process. As a general rule, no such discussion outside the secrecy of the Court is permitted while a case is pending or impending unless all parties to the case are given a chance to participate and respond.

Yet, the procedures leading up to the release of a written opinion or order are by far the most important work of the Court. Binding precedent may be created in this way, affecting the lives of all Floridians. Even citizens elsewhere in the United States can be affected. Florida is a major state, and its courts' opinions are often used for guidance in other states' courts throughout the nation. It appears paradoxical that a state like Florida, which is so deeply committed to "government in the Sunshine," is required by its constitution to conduct the bulk of its judicial proceedings in secret. However, there clearly is no other way to preserve litigants' rights under the rule of due process. Unlike legislators or governors, judges and their employees cannot be required or allowed to take public stands on pending or impending matters that are yet to be resolved.

A. A Case Study: In re T.A.C.P.

In an effort to dispel some of the lack of knowledge that this mandatory secrecy has created, this article will begin by reviewing the internal process by which a recent case, In re T.A.C.P., was decided. Understanding how this case was handled may give a broader perspective on the Court's operations and exercise of its constitutional powers.

The case was chosen for several reasons. First, it presented an issue that has never been decided by any other court in the United States: Whether a terminally ill child, born without a complete brain but whose heart is still beating, can be considered "dead" for purposes of organ donation. Thus, the case has potentially set a national precedent that will be considered by the courts of other states in confronting the same issue.

Second, the decision In re T.A.C.P. has become final and thus, there is no reason to suspect that it will eventually be filed for review.

10. FLA. CODE JUD. CONDUCT Canon 3 (West 1993).
11. Id.
12. E.g., Kerans v. Porter Paint Co., 575 N.E.2d 428 (Ohio 1991) (adopting analysis developed in Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099 (Fla. 1989)).
13. 609 So. 2d 588 (Fla. 1992).
14. Id. at 589.
ethical impediment in discussing it to a limited extent. Lastly, the case received wide publicity and is, therefore, better known than most cases decided by the Court.

In March 1992, justices and employees of the Court became aware through media reports that a child, known in court records as T.A.C.P. and popularly known as "Baby Theresa," had been born in South Florida with the medical condition known as "anencephaly." Anencephalic children lack the upper portions of their brains and have only a partial skull, which leaves the remaining brain tissue open to the air. The condition is invariably fatal because the incomplete brain is unable to maintain a heartbeat for very long, partly because the exposed brain tissue is disrupted by infection or the process of childbirth.

News accounts of cases like T.A.C.P. often are the Court's first warning that a major case may be impending for review. The Florida Supreme Court library stocks current major Florida newspapers each working day, and the justices and their staffs commonly examine the papers for such information. The news accounts, however, are used primarily for the knowledge that a new case may be impending—not for the substance of the news accounts. The Court knows that news accounts sometimes contain misleading or incomplete information, though they may be informative for other purposes.

In T.A.C.P., the sole question before the Court was whether organs could be removed from a child born with so serious a birth defect that she must inevitably die in a few days' time. The parents' request in this regard was both poignant and touching. They had known of their daughter's congenital defect prior to her birth but had decided to carry her to term so her organs could be donated to help other children. The parents' hope was that their own tragedy might be redeemed by saving the lives of others who needed transplantable organs, especially other infants. As the Court itself recognized in its later opinion, there is a continuous and pressing national need for organs that can be transplanted into infants.

15. The authors will not discuss the legal significance of the opinion, only the process by which it was shepherded through the court. Nor will matters be discussed that fall within the secrecy of the court.
17. Justices and their staffs actually have a need to know this information, because the ethics codes applicable to them prohibit public comment on impending cases. The news accounts help put the court on notice that silence now is required.
18. In re T.A.C.P., 609 So. 2d at 591.
However, health care providers refused to comply with the parents’ wishes because the child had a heartbeat independent of life support. The providers feared they might run afoul of the law if they removed the child’s organs for transplant.\textsuperscript{19}

A rather speedy round of lawsuits ensued. The parents sued for a judicial determination that T.A.C.P. was dead and that her organs could be donated, notwithstanding the heartbeat. A Broward County trial judge declined their request.\textsuperscript{20} The parents then filed an emergency motion in the Fourth District Court of Appeal, in effect suing the trial judge. They asked that the district court overturn the trial judge’s determination and direct that T.A.C.P. be declared dead. The intermediate appellate court declined to do so.\textsuperscript{21}

At this point, the Florida Supreme Court’s jurisdiction was invoked by the parents. Initially, they filed a petition for a writ of mandamus, one of several legal matters over which the Court has “original” jurisdiction.\textsuperscript{22} When issued by a court, a writ of mandamus directs a public official to perform duties that he or she is obligated to undertake. Baby Theresa’s parents, in essence, were asking the Florida Supreme Court to order the trial judge in South Florida to rule that their daughter was dead. On March 30, 1992, the Florida Supreme Court denied the motion without comment.\textsuperscript{23}

At virtually the same time, however, the Fourth District Court of Appeal took the extraordinary step of certifying the case as a question of great public importance requiring immediate resolution by the Florida Supreme Court.\textsuperscript{24} This created an entirely new basis for jurisdiction apart from mandamus. Under the Florida Constitution, a district court can authorize parties to “skip” the intermediate appellate court and directly petition the Florida Supreme Court to hear a case, although the latter has discretion to accept or to deny the petition as it deems fit.\textsuperscript{25} In practice,

\textsuperscript{19} Id. at 589.
\textsuperscript{20} In re Pearson, No. 92-8255 (Fla. 17th Cir. Ct. Mar. 27, 1992).
\textsuperscript{22} See FLA. CONST. art. V, § 3(b)(8). Original jurisdiction means simply that the case can be originated in the Florida Supreme Court without need of proceeding through a trial court first. Mandamus is discussed infra notes 532-63 and accompanying text.
\textsuperscript{23} In re T.A.C.P., No. 79,581 (Fla. Mar. 30, 1992) (mem.).
\textsuperscript{24} In re Pearson, No. 92-0942 (Fla. 4th Dist. Ct. App. Mar. 30, 1992) (order); see In re T.A.C.P., 609 So. 2d at 589.
\textsuperscript{25} FLA. CONST. art. V, § 3(b)(5). This type of jurisdiction popularly is called “pass-through jurisdiction.” See Florida Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145, 1146 (Fla. 1985).
such cases are almost always accepted for review.26

Within hours, the press reported that Baby Theresa had died.27 The Florida Supreme Court, nevertheless, chose to exercise its inherent authority to review the case on the grounds that it presented an issue of great public importance "capable of repetition yet evading review." This is a long-standing traditional basis for hearing cases that have a tendency to be rendered moot by physical events before a court of final jurisdiction can decide them.28 Anencephalic children are likely to die before litigation can be completed; a decision to dismiss the case as moot thus might forever bar an appellate court from deciding the issue. The result would be the perpetual lack of a controlling court decision on a legal issue obviously capable of recurring. Accordingly, the case was scheduled for oral argument on September 2, 1992, during the first oral argument week29 after the regular summer recess had ended.30

During the summer recess, the Florida Supreme Court library staff,

26. See infra notes 498-516 and accompanying text. The Florida Constitution creates a distinction between the terms "appeal" and "review." Appeals constitute those appellate cases in which the Florida Supreme Court must hear the case. See FLA. CONST. art. V, § 3(b)(1), (2). Reviews are those appellate cases in which the Florida Supreme Court merely has discretionary jurisdiction. See FLA. CONST. art. V, § 3(b)(3)-(6). The court traditionally has observed another standard for judicial nomenclature relevant to the distinction between appeals and reviews. For appeals, the court either affirms or reverses the decision below; for reviews, the court either approves or quashes the decision below. By contrast, when the court expressly agrees or disagrees with a decision other than the one below, the court "approves" or "disapproves" the decision. On occasion, there may be lapses in the use of this nomenclature, but the convention now is well established as a matter of court custom.


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

29. By tradition, the Florida Supreme Court usually observes its regularly scheduled oral arguments during the first full business week of each month, with the exception of July and August when no oral argument usually occurs. However, the chief justice has discretion to schedule the regular oral argument calendar as may be necessary. For example, oral argument sometimes is scheduled for weeks in which the Monday or Tuesday is the last day of a month. Special oral arguments can be scheduled at other times by the chief justice, a practice that especially occurs when the court deems oral argument necessary on a pending death warrant, in some requests for advisory opinions, in cases involving pressing constitutional questions, and in other emergency matters.

30. The Florida Supreme Court traditionally observes a summer recess that usually occurs from the middle of July through the middle of August, but occasionally has been observed earlier or later. The suspension of a regular oral argument calendar in these two summer months is a traditional consequence of the summer recess.
assisted by summer law student interns, began compiling legal, medical, and ethical books and articles that had studied anencephaly. Compilation of such materials largely was complete by the end of the summer, so that the Court would have the benefit of the widest range of scholarly views on the subject. Of course, such materials in no way are used to reflect on the actual facts of the case at hand, but rather to enlighten the Court as to opinions of experts on the purely legal and medical questions at stake. In T.A.C.P., for example, the Court heavily relied on a medical definition of "anencephaly" published by the New England Journal of Medicine, which represented a consensus view among medical experts in fields such as pediatrics, neurology, and obstetrics.31

The oral argument in T.A.C.P., in early September 1992, was high-profile and well attended. Virtually the entire Tallahassee capital press corps was present, as were a large number of persons associated with children's rights groups, some of which had filed amicus briefs in the case. Immediately following oral argument, several persons from the various groups in attendance held impromptu press conferences in the rotunda of the Supreme Court Building. The scene was one of the liveliest in recent Court history.

In T.A.C.P., as with most other cases orally argued, the Court immediately held a closed-door conference the afternoon of the argument. Neither the public nor the Court's own staff are allowed to attend such conferences. At this point, the justices tentatively voted on how the case should be decided. The official Court file was then transmitted to the office of the justice assigned to the case, for a proposed majority opinion to be drafted and circulated to the Court.32

T.A.C.P. was decided quickly by the usual standards of the Court. The normal elapse of time between oral argument and the release of an opinion can be as short as a few months, although the Court attempts to render decisions within six months of oral argument or submission of the case without oral argument.33 Occasionally, the duration can be longer in especially difficult cases.34 The T.A.C.P. opinion was released quickly,
just over two months after oral argument, on November 12, 1992.\textsuperscript{35} The decision was unanimous.\textsuperscript{36} Although some of the parties and \textit{amici} criticized the decision in published press accounts, none filed a motion for clarification or rehearing. The opinion thus became final without further challenge. This is an unusual event because motions for clarification or rehearing are filed almost routinely. At this point, the Court’s work was done.

B. Internal Case Assignments & Opinion Writing

As the discussion of \textit{T.A.C.P.} indicates, the Court’s work in writing official opinions is not conducted by all seven justices simultaneously. Rather, work is delegated to individual offices. The system by which this delegation occurs is perhaps one of the least understood aspects of the Court’s routine operations. As a result, on some occasions, parties have erroneously assumed that particular justices have some unusual or unfair ability to control case assignments. The reality is very nearly the opposite.

The actual method by which cases are assigned in the Florida Supreme Court differs substantially from that used in the United States Supreme Court, in which seniority equates to power. In the latter Court, the assignment typically is made by the Senior Justice who is in the majority, with the Chief Justice always considered more senior than any other Justice. Thus, Senior Justices in the nation’s highest court do, in fact, have an unusual ability to control case assignments.

In the Florida Supreme Court, however, the bulk of cases in which opinions must be written\textsuperscript{37} are assigned at random by the Office of the

\begin{footnotesize}
\begin{enumerate}
\item[35.] \textit{In re T.A.C.P.}, 609 So. 2d at 588.
\item[36.] \textit{Id.} at 589, 595.
\item[37.] This article will not discuss the large volume of motions and petitions that are disposed without an opinion for lack of merit. For example, the Court receives numerous petitions for habeas corpus, mandamus, and similar extraordinary writs from Florida inmates. Relief is denied most of the time, but where the petition appears to have merit, the assigned justice (sometimes with the advice or consent of other justices) will order a response from the State. If the case still appears to have merit in light of the response, the Court then will
\end{enumerate}
\end{footnotesize}
Clerk, and assignments typically are made as soon as briefing is completed. There are, however, some exceptions, discussed below. In other words, case assignments in the Florida Supreme Court are generally accomplished by a kind of lottery system. This can lead to some very interesting situations when the justice assigned to write a majority opinion in a case disagrees with the majority viewpoint.

After assignment, the case file is sent to the office of the designated justice, who then usually will assign one of that office’s law clerks to begin preparing the case. The process that follows varies somewhat depending upon the type of case at issue. There are four broad categories of cases in which an opinion will be written: (1) cases scheduled for oral argument; (2) cases accepted without oral argument (“no request” cases); (3) petitions by death-row inmates (“death cases”); and (4) special cases, often requiring expedited consideration by the Court.

1. Oral Argument Cases

In all cases scheduled for oral argument, the law clerk assigned to the case is required to write an “oral argument summary” that contains a condensed, objective version of the parties’ briefs. No recommendation regarding the case’s disposition is included. In some offices, the law clerk is required to prepare a separate bench memorandum for the personal use of the justice, but this practice is not uniform throughout the Court. Bench memoranda sometimes are shared with other justices; this practice, however, is more the exception than the rule. In other offices, no memorandum is prepared, and the law clerk and justice simply sit down together and discuss the case prior to the date of oral argument.

Accept jurisdiction, and the office to which the petition was originally assigned will usually be assigned to write the opinion. The process of opinion writing in such cases is essentially the same as in any other.

38. See infra notes 70-73 and accompanying text.

39. Some district courts of appeal, on the other hand, require clerks to include a recommendation as to disposition.

40. Oral argument summaries, bench memoranda, and other documents associated with the preparation of a case are internal court documents and thus cannot be released to the public or any person not on the court’s staff. Violation of this rule is considered an ethical breach and can be punished by contempt of court. In 1974, for example, the Court ordered one of its law clerks to show cause why he should not be held in contempt for releasing copies of oral argument summaries to unauthorized persons. Based on the mitigating evidence, the Court withheld a contempt citation but publicly reprimanded the law clerk and placed him on probation for a period of two years under close supervision. In re Schwartz, 298 So. 2d 355 (Fla. 1974).
As noted earlier in the discussion of T.A.C.P., a closed-door conference of the seven justices is usually held the afternoon after oral argument, although conference may be delayed up to a few days due to conflicts in the schedules of the justices. In some district courts of appeal, law clerks are permitted to attend court conferences or are even asked to participate in the judges’ discussion of cases. However, in the Florida Supreme Court, the strict secrecy surrounding court conferences forbids the admission of any law clerk into a conference. Indeed, no one but the justices themselves are allowed into any official court conference. There is a single exception to this rule. By custom, the Clerk of the Court may be admitted, but usually is not required to be present unless requested by the justices.

If any other Court staff members need access to a justice or the Clerk of the Court during a conference, they are permitted only a single liberty that is seldom exercised: knocking on the conference room door. By custom, the Clerk, if present, answers the door. In the Clerk’s absence, the most junior justice in the room answers the door. Staff members may not enter the room while a conference is in session, but they can ask the person answering the door to deliver a message inside or to convey materials to a justice. Non-staffers are not permitted to interrupt a conference for any reason.

The secrecy surrounding conferences means that most justices, and especially the justice assigned to write the particular case, must take notes regarding the positions espoused by the other members of the Court. During the conference, all the justices are given a chance to indicate their initial and tentative preferences regarding a case’s disposition. These preferences are noted by the justice already assigned to write the opinion.

Responsibility for opinion writing varies from office to office in the Court. Some justices prefer to write their own opinions, with law clerks often being asked to check the finished product for accuracy and style. Other justices assign law clerks the responsibility of drafting most opinions, with the justice then reviewing the draft and making any changes deemed necessary. In still other offices, opinion writing is a shared responsibility of both the justice and the assigned law clerk, and may, in fact, involve every staff member in that office at some point in the process.

41. These preferences are by no means final. Justices frequently change their minds after giving a case more thought, after closer review of the record or the law, or after another justice proposes a method of analysis that seems more correct. On occasion, the Court has decided a case completely contrary to the initial conference vote, although such instances are the exception rather than the rule.
The exact way an opinion will be written may be discussed in conference, but it usually is left to the discretion of the assigned justice subject to some significant exceptions. For example, the Court has promulgated a system of legal style contained in a Rule of Appellate Procedure. For matters not covered in the Rule, style is governed by the latest edition of *The Bluebook: A Uniform System of Citation* published by The Harvard Law Review Association. If nothing in The Bluebook is on point, style is governed by the *Florida Style Manual* published by the Florida State University Law Review in Tallahassee. If none of these sources are on point, the Court generally considers that style should be governed by the closest analogous rule or example contained in the three sources listed here, in the same order of preference. As a practical matter, most authorities not covered by the rule and style manuals are Florida documents, and these typically are dealt with by reference to the closest analogous rule or example from the *Florida Style Manual*.

Another significant exception deals with gender-specific language. In the wake of a report by a Court commission investigating gender bias, the Court now has instructed its staff and the Florida Bar agencies charged with developing Rules of Court to avoid all gender-specific language wherever possible. The purpose is to avoid masculinizing language, which suggests an inferior status of women. The most common methods of complying with the rule are to use plural pronouns instead of singular, and to rewrite sentences so that gender-specific language is not needed. Strained language and newly coined words are also avoided.

The parties to a cause have their greatest opportunity to influence the Court in their briefs. Briefs are summarized and read prior to oral argument and thereby introduce the Court to the case. Therefore, a bad brief is a bad first impression, whereas a strong brief can sway the Court. Some cases may be won in oral argument, but these are a minority and usually involve close issues. Oral argument primarily allows the justices to test the strengths and weaknesses of first impressions created by reading the briefs. As a result, attorneys should scrupulously prepare their briefs to the Court.

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42. See Fla. R. App. P. 9.800.
45. In the English language, plural pronouns are inherently gender-neutral.
Style and content of briefs are governed by court rule; beyond that, counsel should avoid anything that creates confusion as to facts and issues. One practice sometimes used by respondents or appellees, for example, is to ignore the sequence of issues framed by the petitioners or appellants. This creates needless confusion and should be avoided. If the issues in the briefs do not match one another, the Court then must perform a kind of mental “cut and paste.”

The better practice is to address the issues in the same sequence, even if only to note that an issue is redundant or irrelevant, and then to list separately and to discuss any issues the opponent may have failed to raise. Another practice to avoid is incorporating by reference an argument from a brief in a different proceeding or different court, except when the Court grants leave to do so. Often the other brief may not be readily available, which renders the later brief unintelligible. It is always better to make sure a complete statement of the argument can be found within the four corners of the brief.

One peculiarity of the Court’s method of case assignment is that the assigned justice sometimes is not in the majority. Under long-standing Court custom, this fact alone does not necessarily disqualify that justice from writing the proposed majority opinion. There are several possibilities of what could happen next. Most often, the assigned justice will agree to write an unsigned “per curiam” opinion reflecting the views of the majority, with the justice also writing a separate opinion expressing any contrary views.

However, on occasions when the conference vote is close or fails to establish a tentative majority, the assigned justice may circulate a proposed majority reflecting that justice’s views, with the hope that other offices will find the analysis compelling. Less commonly, a justice may circulate two or more proposed majority opinions in the same case, thereby giving the Court options from which to choose. If an assigned justice truly feels unable to develop the majority’s proposed opinion, the case can be reassigned to another justice at conference. All reassignments lie within the discretion of the chief justice, though in practice the case is usually transferred to the justice in the majority who has most fully researched and analyzed the case.

Once a proposed majority opinion is circulated, each justice must vote on the proposal. A “vote sheet” is attached to the top of each proposed

47. Per curiam opinions are discussed infra notes 101-106 and accompanying text.
opinion and includes a listing of each kind of vote that is possible for the type of case in question.\textsuperscript{48} All voting is done manually on the vote sheets, with the justices voting by placing their initials next to the vote they prefer.\textsuperscript{49} By custom, the justices usually can cast only three types of votes that do not require them to write a separate opinion. These are "concur," "concur in result only," and "dissent."\textsuperscript{50} In addition, each justice can write a separate opinion if desired. The various kinds of separate opinions are somewhat more complicated and are discussed more fully below.\textsuperscript{51}

All separate opinions are accompanied by their own separate vote sheets, and every justice must manually vote on each one in much the same manner they vote on a proposed majority opinion. Once all vote sheets are returned to the clerk's office, one of two things will occur. If the case has generated no further controversy among the justices, it will be routed to a staff member in the chief justice's office to be checked for substantive and stylistic problems, then scheduled for release to the public.

However, if some controversy remains, the case will be scheduled for a second Court conference. Any justice can send a case to conference simply by placing a question mark on any vote sheet from the case. When the clerk's office sees the question mark, the case is routed to a staff member in the chief justice's office to be included on the next available conference agenda.\textsuperscript{52} At conference, the justices will discuss the case and

\textsuperscript{48} The possible votes vary slightly according to the kind of case.

\textsuperscript{49} If a justice is out of town and there is a pressing need for a vote on the case, the justice by telephone may authorize a staff member to indicate the proper vote on the vote sheet.

\textsuperscript{50} These votes mean precisely what they say. Concur indicates a full acceptance of the majority opinion and decision. Concur in result only indicates an acceptance only of the decision, and a refusal to join in the analysis expressed in the opinion. Dissent indicates a refusal to join in either the decision or opinion. Members of the court usually do not vote "specially concur" or "concur in part and dissent in part" unless they also write a separate opinion, although there are exceptions even here. \textit{E.g.}, Maison Grande Condominium Ass'n, Inc. v. Dorten, Inc., 600 So. 2d 463, 465 (Fla. 1992) (McDonald, J., concurring in part, dissenting in part). Moreover, in death penalty cases, each justice votes separately as to conviction and sentence. Therefore, a justice can concur as to the conviction but dissent as to the sentence without writing a separate opinion. \textit{E.g.}, Maharaj v. State, 597 So. 2d 786, 792 (Fla. 1992) (McDonald, J., concurring as to conviction, dissenting as to sentence). Though less common, justices also may vote separately as to punishment in cases of attorney discipline. \textit{E.g.}, The Florida Bar v. Morse, 587 So. 2d 1120, 1121 (Fla. 1991) (McDonald, J., concurring as to guilt, dissenting as to punishment).

\textsuperscript{51} See discussion \textit{infra} part II.C.

\textsuperscript{52} Conference agendas are produced by the office of the chief justice.
decide on any further action that may be necessary. Frequently, only minor revisions are made in opinions to satisfy the concerns of particular justices.

Occasionally it becomes apparent during a conference, or after voting, that a majority of the Court does not agree with the proposed opinion that was circulated. When this happens, the Court’s custom is that the chief justice has discretion to reassign the case to a justice in the majority. Reassignments usually occur during a Court conference upon the advice of the other justices, but sometimes are decided more informally.53 However, the original author of the “failed” majority opinion sometimes may be given an opportunity to write a new per curiam opinion that conforms to the majority’s views, perhaps accompanied by a separate opinion expressing any divergent views of the author. The latter action is more likely in complex cases already involving considerable time spent on research and writing.

Once all questions regarding a case are settled and the opinion or opinions have been proofread, the clerk’s office will set a tentative date for the opinion to be released. However, no opinion can be issued except upon the signature of the chief justice. Typically, opinions are scheduled for release no earlier than a week in advance,54 and copies of the final version of the opinion or opinions are then circulated to all justices and each member of their staffs prior to release. The purpose of this last exercise is to allow for further proofreading of opinions. Justices and their staffs sometimes find errors or inconsistencies not caught during the normal proofreading process.

By Court custom, the regular day for issuing opinions is each Thursday when the Court is in session.55 Copies of opinions are then made available to the press and the public, often no later than by 10:00 a.m. The opinions, however, are not considered final until any motion for rehearing or

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

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

55. Opinions are not issued during the court's summer recess, except for opinions already finalized that could not be released before recess began. Opinions also are not released if none are available, an event common immediately after recess ends.
clarification is disposed of, although there are some cases in which the Court notes that rehearing or clarification will not be entertained. 56

2. “No Request” Cases

A substantial percentage of the Court’s docket consists of cases in which oral argument is not granted. These can include cases in which oral argument was sought but denied, the majority of contested Bar discipline cases, and a few other categories. Once the case is submitted to the Court without argument, a more summary process is followed than otherwise would occur.

After all briefing is complete, the “no request” case is usually randomly assigned to an office where the justice then gives the case to a law clerk. Both the justice and law clerk review the file and make a determination whether the case poses a question that has an obvious answer. For example, any case that can be readily approved or quashed in light of other recent or pending cases falls into this category. Where the answer is obvious, the law clerk, or occasionally the justice, will prepare a summary opinion approving or quashing in light of the controlling precedent.

Another procedure is followed where the question posed by the “no request” case appears to be more controversial, such as where reasonable persons could differ as to the outcome. This might exist, for example, where two separate district courts of appeal have reached inconsistent but equally reasonable conclusions regarding the same issue of law. In these circumstances, the law clerk assigned to the case will prepare a memorandum that essentially is a hybrid of an oral argument summary and a bench memorandum for circulation to the entire Court. The first part of this memorandum summarizes in objective fashion all the relevant facts and

56. The Court routinely notes that it will not entertain motions for rehearing or clarification in cases requiring immediate finality, such as cases in which a death warrant is pending, or after an opinion has been revised upon the granting or denial of a motion for rehearing or clarification.

57. The term “no request” refers to the fact that the Court has made no request for oral argument by the parties. In appropriate cases, it may also refer to the fact that the parties themselves have not requested oral argument. There is no absolute right to oral argument in any case, although the court’s manual of internal operating procedures requires that oral argument always be scheduled in every appeal from a judgment imposing a death sentence. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(B)(3).

58. There are exceptions to the random assignment process, most commonly, where a number of cases all pose the same issue. In such circumstances, all the cases may be assigned to the same office.
information about the case, as well as the parties' arguments. In the second
part, the memorandum discusses the options available to the Court and states
the disposition preferred by the justice to whom the case is assigned.59

The case is then scheduled for discussion at the next available court
conference. At this time, the justices state their own preferences regarding
the case and a vote is taken. The assigned justice then either drafts a
proposed majority opinion or assigns the law clerk to do so. The proposed
majority opinion is circulated to the entire Court using the same procedure
that would occur had oral argument been granted. Any differences among
the justices are resolved in the same manner as would apply in oral argu-
ment cases, including additional conference discussions as needed. Once all
the justices are satisfied that no further controversy remains about the case,
the majority opinion and any separate opinions are prepared for public
release.60

3. Death Cases

While appeals from judgments imposing the death penalty are treated
like any other oral argument case, the Court traditionally follows a
somewhat different procedure in collateral challenges by death-row inmates.
Many of these cases involve claims raised via a traditional habeas corpus
petition or through the related procedure set forth in Florida Rule of
Criminal Procedure 3.850.61 Occasionally, other means of collateral review
are sought, including the Court's "all writs" jurisdiction,62 mandamus,63
or other means. The most pressing of these cases involve claims by inmates
who have been scheduled for execution.

Except where there is an active death warrant, collateral challenges are
handled much the same as other cases. Oral argument is sometimes granted
but can be denied—unlike in appeals from judgments imposing the death
penalty where oral argument is always granted.64 Some justices require
their staffs to prepare a fact-sheet detailing the entire procedural history of

59. The use of this memorandum process in more controversial "no request" cases is a
recent innovation introduced by Justice Stephen Grimes and modeled after a similar
procedure used when he was a member of the Second District Court of Appeal.
60. "No request" cases are prepared for release in the same manner as other cases.
61. Although habeas corpus and Rule 3.850 have some differences, the Court has held
that the latter is a procedural vehicle for providing relief otherwise available through habeas
corpus. State v. Bolyea, 520 So. 2d 562, 563 (Fla. 1988); see discussion infra part VII.D.
62. See discussion infra part VII.E.
63. See discussion infra part VII.A.
64. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(B)(3).
the case, from trial to the latest collateral challenge, but this practice is not uniform throughout the Court. Opinions are usually issued for each collateral challenge filed, though the Court sometimes denies a claim in a summary order if the claim clearly is barred or meritless.

When a case involves an active death warrant, different procedures are used. Litigation often comes at unpredictable times and typically must be decided on a severe deadline. Thus, the office to which the case is assigned frequently must review the record immediately after the warrant is signed and before any pleadings have been filed in the Florida Supreme Court. Typically, the justice and law clerk assigned to the case confer as soon as possible to discuss any claims that seem likely based on the record.

As soon as pleadings are received from the inmate and the State, the justice and law clerk assigned to the case usually meet immediately. The justice then may confer informally with the other justices or request that a court conference be held, if one seems necessary. If the case seems to involve a meritorious claim, the Court may be inclined to grant an emergency oral argument, or may stay the execution until the matter can be studied further and an opinion issued.

In the absence of a viable claim, the justice or law clerk assigned to the case usually prepares an opinion (or in some cases a summary order) denying all relief. If a proposed majority opinion is prepared, a copy faced with a vote sheet will be circulated to the Court on an expedited basis and, once all votes are tabulated, will be issued to the public immediately. Summary orders may be handled in a formal or informal court conference, with the order itself later issued by the Clerk of the Court.

As the time for the inmate’s execution approaches, the justice and law clerk assigned to the case remain on call for any last minute petitions that may be filed. By custom, the chief justice or a justice designated by the chief justice will be present in the Supreme Court Building at the time of execution and is usually assisted by the Clerk of the Court and sometimes also by the law clerk assigned to the case. The Governor or a member

65. Because of the Florida Supreme Court’s mandatory role in reviewing death cases, the Governor, by long-standing tradition, does not sign death warrants to be effective during the time when the Court will be in its summer recess. See Fla. Const. art. V, § 3(b)(1), (9) (requiring the supreme court’s review of death penalty cases).

66. All records of death-row inmates remain stored in the Florida Supreme Court’s vaults or in the Florida Archives located across the street from the Supreme Court Building, and are thus readily accessible to the staff.

67. The law clerk’s presence may be especially important if there is any concern that a legal issue might be raised at the last minute.
of the Governor's staff opens a three-way telephone line connected with the death cell of the state prison and the designated justice and all three parties remain on the phone until the execution is completed and the inmate is declared dead. Under the Florida Constitution, any single justice could order the execution stayed for good reason shown, but this power has not been exercised in memory. Any problems associated with the execution generally are reported back to the full Court.

4. Other Special Cases

The Court sometimes receives other more unusual kinds of cases, often involving emergency issues that will be resolved in a written opinion. Examples include: pressing constitutional questions between the branches of state government; requests for an advisory opinion by the Governor; or a petition to invoke the Court's own emergency rule-making powers. Oral argument often is granted in cases of this type, though not always, with argument usually scheduled as soon as possible. Whether accepted for argument or not, emergency matters are normally handled like any other case, except that preparation of the opinions typically is expedited and the case is assigned to an office by the chief justice. The opinions themselves may be released outside the normal cycle if necessary to better resolve the particular emergency.

68. See Fla. Const. art. V, § 3(b)(9). Of course, the full Court could probably dissolve any stay improvidently granted. See id.
69. For example, Florida's electric chair malfunctioned during the execution of Jesse Tafero in 1990, resulting in unusual generation of heat and the need to pass electric current through Tafero's body three separate times. This malfunction was reported back to the full Court by the justice assigned to be present in the Supreme Court Building during the execution.
70. E.g., Florida House of Representatives v. Martinez, 555 So. 2d 839 (Fla. 1990); The Florida Senate v. Graham, 412 So. 2d 360 (Fla. 1982).
71. In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).
73. Emergency cases are thus an exception to the Court's random assignment system. The chief justice has broad discretion over these assignments, subject as always to the will of the full Court, but often may assign the case to an office with special expertise in the field or one that is most current in its workload.
C. Types of Separate Opinions

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

Although about seventy percent of the Court's decisions are unanimous, the press has a strong tendency to focus on disagreements embodied in separate opinions. Strongly worded dissents catch the most attention. This public focus can create a seriously exaggerated sense of division on the Court and may suggest that dissents carry a legal significance that they actually lack.

Dissenting views almost always are the least influential in the long term, due to the fact of their apparent rejection by the Court's majority. A well reasoned concurring opinion, while technically not establishing any precedent, may still be cited for persuasive authority in future cases and occasionally may become more influential than the majority opinion to which it was attached. Dissenting views sometimes prevail in the long-run, but this is a far rarer occurrence. To embrace a prior dissent, the Court usually must overrule its own precedent notwithstanding the doctrine

74. Records of the Clerk of the Court show that of the 3186 opinions filed between January 1, 1986, and September 30, 1992 seventy percent were unanimous.

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

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

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

78. E.g., Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985), receding from Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980). In Pullum, the court expressly embraced Justice McDonald's dissent in Battilla, 392 So. 2d at 874-75 (McDonald, J., dissenting).
of stare decisis, but a well reasoned concurrence can be accepted without overruling anything, on grounds that it illuminated or explained the majority opinion it accompanied.

Concurrences and dissents, however, constitute only two of six different kinds of separate opinions that are in customary usage by the Court. This variety has sometimes confused lawyers and the public alike, because the Court has never fully clarified what each of the categories implies. Confusion has been increased by the fact that the six categories are not necessarily discrete but often blur into one another. Much depends on exactly what the individual author has stated in the separate opinion, although the choice of category is often a strong indicator of the strength of the justice's feelings about the majority view.

Below, the six categories are ranked and their customary usage described. This ranking begins with the category having the strongest sense of concurrence and ends with the category having the strongest sense of dissent.

1. Concurring Opinions

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

2. Specially Concurring Opinions

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

A specially concurring opinion can clearly constitute the fourth vote needed to create a binding decision under the state constitution and can be sufficient to establish an opinion as binding precedent. However, in this last instance, the true nature of the precedent would not necessarily consist of the plurality opinion, the special concurrence, or even both taken

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80. See Fla. Const. art. V, § 3(a). There is a distinction between the terms decision and opinion. The decision is the court's judgment—i.e., the specific result reached. Whereas, the opinion is the written document explaining the reasons for the decision. Seaboard Air Line R.R. Co. v. Branham, 104 So. 2d 356 (Fla. 1958). Thus, so long as at least four members of the Florida Supreme Court agree on the decision, it is irrelevant that no similar agreement was reached regarding a written opinion. Similarly, at least four justices must concur in an opinion for it to have any precedential value beyond the case at hand. Greene v. Massey, 384 So. 2d 24 (Fla. 1980). However, the word "decision" may have a different meaning in the context of the Florida Supreme Court's jurisdiction over particular categories of "decisions." See infra note 341.

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

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


84. Fla. Const. art. V, § 3(a).
together. Rather, the Court’s opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed. In other words, it is possible for a special concurrence to deprive a plurality opinion of precedential value with respect to matters about which the concurring justice has expressed reservations.

3. Opinions Concurring in Result Only

A “concurring in result only” opinion indicates agreement only with the decision (that is, the result reached) and a refusal to join in the majority’s opinion. A separate opinion that “concurs in result only” can constitute the fourth vote necessary to establish a “decision” under the Florida Constitution, but the effect in such a case is that there is no “opinion” of the Court and thus no precedent beyond the specific facts of the controversy at hand. There may be cases in which a justice writes a “concurring in result only” opinion that also appears to agree with more than just the result. However, it seems doubtful that such an action could constitute the fourth vote needed to give the opinion validity as precedent.

4. Opinions Concurring in Part, Dissenting in Part

An opinion that “concurs in part and dissents in part” is commonly used to indicate disagreement with only one or some of the results reached by the majority opinion, but may also be used to show disagreement with part of the analysis, depending on what the separate opinion itself says. Where an opinion of this type establishes part of the Court’s majority, a

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

86. See id. A word of caution is in order here. It is easy and common, though not actually correct, for courts and lawyers to overlook the fact that a specially concurring opinion has expressed reservations about some legal point. For example, Chief Justice Ehrlich’s special concurrence in In re T.W. expressed reservations about the plurality opinion, yet few courts later analyzing T.W. seemed much concerned with that fact. Indeed, few have even noted that T.W. was merely a plurality opinion; and at least one court has ignored Chief Justice Ehrlich’s special concurrence, even where his comments actually supported the result being reached. See Jones v. State, 619 So. 2d 418 (Fla. 5th Dist. Ct. App. 1993).

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

88. See Greene, 384 So. 2d at 24.
5. Dubitante Opinions

The rarest category of separate opinions are those issued "dubitante," a notation expressing serious doubt about the case. Only one such opinion has been issued in the Court's history, although it is recent. With this sparse usage, it is not entirely clear in Florida whether a dubitante opinion should be regarded as a type of concurrence or dissent or something else, or indeed, whether a dubitante opinion can constitute the fourth vote necessary to fulfill the constitutional requirement that four justices must concur in a decision.

In the federal system, an opinion designated "dubitante" at least sometimes appears to constitute a very limited form of concurrence, and some federal judges have gone to the trouble of designating their opinions

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


91. In re Constitutionality of Senate Joint Resolution 2G, 601 So. 2d 543, 549 (Fla. 1992) (Barkett, J., dubitante). It should be noted that other separate opinions have been written that in effect constituted a species of dubitante opinion, but without using the designation "dubitante." E.g., Johnson v. Singletary, 612 So. 2d 575, 577-81 (Fla. 1993) (Kogan, J., specially concurring).

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

93. See FLA. CONST. art. V, § 3(a).

94. Indeed, some federal judges have marked their separate opinions with the heading "concurring" but have indicated in the text that the opinion is "dubitante." New York v. Halvey, 330 U.S. 610, 619 (1947) (Rutledge, J., concurring); see also Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 403 (1967) (Douglas, J., dubitante); Radio Corp. v. United States, 341 U.S. 412, 421 (1951) (Frankfurter, J., dubitante).
as "concurring dubitante."\textsuperscript{95} At least one has issued a dubitante opinion that expressly concurred in part and dissented in part, although the author seemed to indicate doubts only as to the partial concurrence.\textsuperscript{96}

In Georgia, the courts have sometimes issued "dubitante" dissents, apparently meaning dissenting views in which the author has serious doubt.\textsuperscript{97} Thus, a "dubitante dissent" would seem to constitute a species of dissenting opinion less vigorous than a full dissent. However, there also seem to be times when an opinion marked merely "dubitante" is neither a dissent nor a concurrence, but an expression of doubts so grave that the judge or justice can neither agree nor disagree with the majority.\textsuperscript{98} This probably is the best construction, for example, in those rare cases in other jurisdictions in which a judge votes "dubitante" without writing a separate opinion.\textsuperscript{99}

Because of the still uncertain nature of dubitante opinions in Florida, the better practice would be for the authors to indicate whether they intend to concur, to dissent, or neither to concur nor to dissent. Perhaps a statement to that effect could be included in the text of the opinion.

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

\textsuperscript{95} E.g., Feldman v. Allegheny Airlines, 524 F.2d 384, 392-93 (2d Cir. 1975) (Friendly, J., concurring dubitante).


\textsuperscript{98} See \textit{In re Constitutionality of Senate Joint Resolution 2G}, 601 So. 2d at 549.

\textsuperscript{99} Adams v. Williams, 838 S.W.2d 71, 73 (Mo. App. 1992) (Crandall, J., dubitante). In the absence of a written opinion, it is impossible to tell what the author's views were, other than an expression of doubt.
6. Dissents

A "dissenting" opinion should be presumed to indicate a complete refusal to join with the majority's decision and opinion. A close reading of some dissenting opinions may disclose that the author actually only disagrees with part of the majority opinion. Such a dissent could be read as though it were an opinion concurring in part and dissenting in part; but the fact that the justice has labeled the separate opinion as a full "dissent" almost certainly means the opinion could not constitute the fourth vote needed to create a binding court opinion or decision. As a result, it is doubtful that the dissenting justice should be viewed as joining the majority's views for any other purpose.

D. Per Curiam Opinions

At one time, the Florida Supreme Court followed the practice, still common in the district courts of appeal, of issuing very cursory opinions designated per curiam, with the identity of the author not disclosed. Historically, per curiam opinions came to imply short opinions devoid of a rationale. This was the general sense conveyed by the Court in 1956 when it defined the term per curiam as indicating "the opinion of the Court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by any extended discussion." Some attorneys have ruefully noted the potential for abuse inherent in the power to issue such opinions, because even a "clear" rationale helps no one if left unstated.

After the creation of the district courts of appeal and the later adoption of jurisdictional reforms, the traditional short per curiam opinion has fallen into disuse in the Florida Supreme Court. The Court now seldom issues unsigned opinions devoid of an obvious rationale. The few that might qualify typically involve questions of law now fully resolved in a recently issued opinion, to which the lower courts and parties are referred. Instead,

100. E.g., In re T.W., 551 So. 2d 1186, 1204-05 (Fla. 1989) (McDonald, J., dissenting) (dissenting opinion agreeing with part of plurality's rationale).
101. Newmons v. Lake Worth Drainage Dist., 87 So. 2d 49, 50 (Fla. 1956).
102. Toby Buel, Conflict Review in the Supreme Court of a District Court of Appeal Per Curiam Decision, 56 FLA. B.J. 849 (1982).
103. The bulk of the Florida Supreme Court's jurisdiction now is discretionary, in which case the Court has authority simply to deny jurisdiction. This is vastly different than the situation that existed when the supreme court was Florida's only appellate tribunal, with much broader mandatory jurisdiction.
Florida Supreme Court per curiam opinions now have metamorphosed into something else all together. Increasingly, they are fully analyzed majority opinions whose authors simply are not identified. The news media typically call such cases "unsigned majority opinions."

There are a variety of reasons for not identifying the true author or authors. One is because the author of the majority opinion actually disagrees with its analysis, an eventuality that can occur because of the Court's method of assigning cases. Another reason is that portions of the opinion were written by more than one justice. As a matter of courtesy, justices usually avoid claiming credit for material partially written by another office. Such a per curiam opinion might be issued, for example, when a majority of the Court has not agreed with the full analysis of a proposed majority opinion and has decided to engraft onto that opinion part of a separate analysis prepared by another justice.

In other circumstances, the decision to make an opinion per curiam is left to the discretion of the justice whose offices originated the opinion. Subject to some exceptions, most Bar discipline cases and disciplinary actions against judges are now issued per curiam. The same is true of a good number of death cases, though by no means all.

There is no way for the public to know the reasons an opinion was issued per curiam and the justices and court staff are never permitted to publicly identify the true author. In any event, the fact that an opinion is issued per curiam by the Florida Supreme Court has no significant effect other than to identify the Court itself, and not any particular justices, as the author. Per curiam opinions bear the same status as any other opinion in which the justices have voted the same way.

E. Role of the Chief Justice or Acting Chief Justice

The chief justice is Florida's highest ranking judicial officer, serving both as head of the Court and chief executive officer of the entire Florida judicial branch. The chief justice presides at all official Court functions and governs the state court system through the machinery of the Office of State Courts Administrator. One of the chief justice's most significant

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

105. See supra text accompanying note 47.

106. See Newmons, 87 So. 2d at 49.

107. FLA. CONST. art. V, § 2(b).
powers in a legal sense is the ability to dispose of motions and procedural matters connected with pending cases. This is a marked change from earlier court practice, which required a meeting of the Court to consider motions. Today, some motions may be placed on the full Court’s agenda for further guidance, particularly on controversial matters; but by far, most are handled by the chief justice alone.

Whenever the chief justice is absent or unable to act, the role of acting chief justice automatically falls upon the next most senior justice who is available. Most commonly, the Dean of the Court is the acting chief justice, but on occasion so many members of the Court are absent that the duty descends to the more junior justices. The Rules of Judicial Administration also specify that the Dean of the Court automatically becomes acting chief justice if the sitting chief leaves office for any reason; but in that event, the Court is also required to promptly elect a successor to serve the balance of the unexpired term.

Each chief justice’s term runs for a period of two years beginning and ending on July 1 of each successive even-numbered year. Prior to the end of each two-year term, the Court must elect the chief justice who will serve during the next term. For some time now, the Court has followed a custom that has largely eliminated political considerations in the election. By a custom unbroken for more than a decade, the Court elects as chief justice the next most senior justice who has not yet held the office. In the unlikely event that a time comes when all seven have served, the Court presumably would begin the rotation again, starting with the Dean of the Court.

One beneficial result of this rotation system is that it lessens the possibility that any particular justice or group of justices could gain indefinite control of the Court’s executive functions. This is vastly different from the United States Supreme Court, where the Chief Justice is nominated by the President subject to Senate confirmation and is life-tenured. The Florida Supreme Court’s customary rotation system creates a significant check and balance omitted from the constitution itself, which specifies only

109. The present Dean is Justice Ben F. Overton.
110. FLA. R. JUD. ADMIN. 2.030(2).
111. Id.
112. Id.

The custom actually predates the 1980s but was interrupted during the 1970s when some members of the Court were under investigation for alleged improprieties. The custom resumed in 1984 with the election of Justice Joseph A. Boyd, Jr.
that the Court must choose a chief justice by majority vote. By honoring the rotation system, the Court ensures that no particular ideological bent will continuously dominate the highest level of the state’s judicial branch.

F. Role of the Other Justices

The power of the chief justice, however, is not limitless. Very significant powers reside in the Court as a body, particularly through the fact that all judicial opinions and many major administrative concerns require assent by at least four justices. Moreover, the chief justice alone cannot possibly supervise all of the various committees and Bar offices under the Court’s control. The effect is that the Court in practice operates on a highly collegial basis, with all of the justices involved in some aspect of administration. Accordingly, the most effective chief justices tend to be those that build a consensus before taking actions affecting the Court and its governance.

Collegiality is expressed most noticeably in the fact that each justice is assigned a variety of supervisory duties. These include: oversight of the internal committees and offices that govern the Court; liaison responsibility with Bar organizations; and assignment to a variety of special commissions created, from time to time, to address questions of public policy involving the courts. For example, members of the Court have chaired or supervised public commissions charged with reforming guardianship laws, investigating gender bias in Florida’s judiciary, and examining ways to eliminate racial and ethnic bias from the judicial system. Each of these commissions ultimately produced extensive proposals for reform, most of which now have been implemented by the Governor, the Legislature, and the courts. To this extent, members of the Court use their offices to help effect changes in public policy beneficial to the state and consistent with the sound administration of justice.

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

Because the justices’ duties are so extensive, they could not possibly discharge their obligations without the help of a staff. Each justice accordingly is permitted to hire three staff members: a judicial assistant and two law clerks. The chief justice, with far greater responsibilities, is

113. FLA. CONST. art. V, § 2(b).
permitted to have three law clerks, one of whom is called an executive assistant. The latter's responsibilities can include both legal research and some administrative functions. In addition, the chief justice's office has a permanent staff of judicial assistants, a staff attorney, and an internal auditor, all of whom remain attached to the office through different administrations. Finally, the staffs of the justices are usually supplemented three times a year by an internship program that brings law students into the Court to act as research aides.

1. Judicial Assistants

In Florida's judiciary, secretaries of judges are called judicial assistants. Their duties vary from office to office, but almost always include supervising the flow of paperwork, keeping files, overseeing the justices' schedules, and dealing with correspondence and telephone calls. Members of the public who call individual justices almost always deal with the judicial assistant first. Judicial assistants are hired by and serve at the pleasure of their respective justices.

2. Law Clerks

As noted above, the duties of law clerks also vary among the offices, but they are usually responsible for conducting legal research for their justices. Many also have the primary responsibility of drafting opinions for their justices after receiving guidance from a court conference vote. In this situation, law clerks typically are told the result and analysis that should be used in the proposed majority opinion, but are given primary responsibility for conducting research and writing an opinion for the assigned justice to review, revise, or edit.

Opinion writing is a responsibility that can be both time-consuming and labor-intensive. Few justices would be able to manage their schedules unless at least some opinion writing was conducted by their staffs. Partly as a result, members of the Court have often chosen law clerks not merely based on academic performance in law school but also on proven writing

115. As a result, law clerks, at a minimum, must have a law degree before the date they begin work. The Court previously required admission to The Florida Bar soon after law clerks began work, but this requirement was dropped as part of the job description in the mid-1980s. Justices, however, remain free to require Bar membership if they desire, and pay scales overwhelmingly favor those who have Bar membership. As a result, only rarely are law clerks not members of The Florida Bar.
ability, often demonstrated in prior professional careers.\textsuperscript{116} The writing of legal opinions can be very exacting, if only because every majority opinion establishes legal precedent. Law clerks responsible for opinion writing, thus, must be able to master a style of English that is not merely formal, but very precise as well.

Because of this heavy responsibility, it is somewhat paradoxical that the common public image of law clerks is of young people freshly graduated from law school, with little real experience, who will leave to enter private practice after a year or two of clerking. At times the image has been borne out by reality. But the Florida Supreme Court throughout its history, and increasingly so today, has had a strong tendency to employ “permanent law clerks.”\textsuperscript{117} These most often are attorneys whose skills and temperaments especially suit the justices who employ them and who remain on staff indefinitely, at the pleasure of the justice. The vast majority of present justices have at one time or another employed such clerks.\textsuperscript{118}

A number of factors have contributed to this tendency to keep “permanent law clerks.” Perhaps the most significant is that the administrative and public responsibilities of the justices have so greatly increased in recent years that a poor choice of law clerks can be a serious liability. This has reinforced a tendency not to change staff once law clerks with demonstrable skills have been found. Another factor is that the legal job market that boomed in the 1980s has turned quite sour in the 1990s.\textsuperscript{119} As a result, the competition for clerkships has increased drastically,\textsuperscript{120} and those few hired as law clerks have a greater incentive to stay in their present jobs. Yet another factor is an increasing tendency among some young lawyers to steer away from the stress that can exist in private law firms.

\textsuperscript{116} Florida Supreme Court law clerks, for example, have included former journalists, former law professors, and former assistant prosecutors.

\textsuperscript{117} Law clerks are not permanent in the sense of having a job with civil service-style protections. Rather, these law clerks, at the request of their justices, agree to stay for some indefinite period beyond the two year minimum commitment typically required by each justice at the time the law clerk is hired.

\textsuperscript{118} Of the fifteen law clerks employed by justices in the summer of 1993, eight had been employed indefinitely. One of these eight had worked for the same justice for more than a decade, while four others had worked as law clerks in excess of five years each. Very long clerkships have not been uncommon. One former law clerk remained employed in that capacity for fourteen years before leaving to enter private practice.

\textsuperscript{119} In the mid-1980s, for example, it was common for nearly every Florida law student to have been hired for a job by the time of graduation. Now, it is common for half or more of a graduating law school class to still be looking for work after graduation.

\textsuperscript{120} Members of the court now receive applications from law students throughout the United States on a nearly continuous basis. Many are students with top credentials.
3. Interns

The Court also supplements its staff with student interns who work on an unpaid basis during each of the three semester periods common in law schools. Internships vary in length but usually commence each August, January, and May. By long-standing arrangement, the Court accepts its August and January interns only from students selected by the faculty of the Florida State University College of Law in Tallahassee and these students in turn are given academic credit for their work at the Court.

Internships starting in May are potentially available to students from any law school and may be more or less informal in nature.121 These interns serve on a purely volunteer basis and are responsible for their own expenses. Academic credit is available only if the students can make the necessary arrangements with their law schools.

Summer internships have become commonplace at the Court almost by a process of unguided evolution. They began sporadically and informally with a handful of students whose colleges would give them academic credit for summer work with government agencies. Now, summer internships have become a routine dominated by students who, despite good academic qualifications, have been squeezed out of paying summer jobs by the tight market of the 1990s.122 Many law school placement officers are encouraging students to take volunteer summer jobs to gain experience rather than do nothing. This has resulted in greater demand for volunteer summer internships by well-qualified students. In response, the Court has gradually expanded the number of interns it takes each summer.

Job responsibilities of interns vary among the offices, but usually involve assisting the law clerks. Many offices have a structured program in which student interns are given increasingly more responsibility as they demonstrate aptitude. Very promising students may even be assigned to write a simple majority opinion under the close supervision of the assigned law clerk and the justice. Much of an intern's work, however, consists of

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

122. In the mid-1980s, for example, it was very common for students to be employed as summer associates in law firms. Top students could often earn thousands of dollars in a single summer and even mediocre students could earn respectable salaries. As the market for legal services has soured, many law firms have been forced to sharply curtail or even to eliminate their summer associate programs.
more routine matters such as writing memoranda to the justice on petitions for jurisdiction, photocopying research material identified by law clerks, and writing memoranda to the law clerks on legal issues.

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

H. Ethical Constraints on the Justices & Their Staffs

The public, and even some members of the legal profession, do not fully appreciate the ethical constraints imposed upon judges and their staffs, including interns. Justices at the Court frequently receive letters from people asking that particular cases be decided certain ways or that judges should correct some perceived oversight in a case. On occasion, news reporters have even contacted judicial assistants or law clerks in an effort to learn the inside story about particular cases. Members of the public are sometimes offended when queries of this type go unanswered. However, the Court and its staff live under a very rigorous code of ethics that forbids them to comment in many instances.

1. Constraints on Justices

Perhaps the most common misunderstanding, especially among the lay public, is a widespread belief that judges or justices can be approached about their official duties in much the same way a governor, a legislator, or their respective employees can. However, the Constitution and ethics codes absolutely require that judges be and appear to be impartial. For that reason, judges and justices are not permitted to publicly discuss any aspect of pending or impending cases and there are even restrictions regarding cases that have become final.

124. FLA. CODE OF JUD. CONDUCT Canons 2, 3 (West 1993).
125. Id. at 3A.(6).
126. These include, for example, the fact that matters were discussed at Court conference, the content of unpublished draft opinions, and the Court’s initial vote or changes...
In an effort to maintain the public image of impartiality, judges and justices are also required to maintain a broad detachment from politics. In a recent case, for example, the Florida Supreme Court determined that a judge or justice may be reprimanded for writing public endorsement letters of a candidate in a nonpartisan judicial election.\textsuperscript{127} This conclusion was based on an ethics rule generally prohibiting a judge or justice from lending the prestige of the office to any political cause.\textsuperscript{128} As a result, judges and justices are required to refrain from participation in most types of political activities beyond those necessary for their own judicial elections.

Even the personal finances of judges and justices are closely regulated. For example, they are not permitted to be involved in any business transactions that might reflect poorly on their impartiality or job performance.\textsuperscript{129} They are required to divest themselves of investments that result in their frequent recusal in cases before the Court, such as where a judge or justice owns stock in a corporation that is a frequent litigant.\textsuperscript{130} Gifts, loans, and favors are closely regulated\textsuperscript{131} and some restrictions even apply to the finances of a judge or justice’s family and household members.\textsuperscript{132} Judges and justices must also file disclosures of their income, assets, and business interests.\textsuperscript{133}

A battery of other ethical constraints imposed upon judges and justices are set out in considerable detail in the Code of Judicial Conduct. Moreover, the level of detail may be expanded by a revision of the Code still pending review at the time this article was being written. The revision focuses on restrictions on the political activities in which judges may participate.

Enforcing ethical constraints on justices of the Florida Supreme Court poses a unique problem because, in theory, the Court is the final arbiter of what is ethical and what is not.\textsuperscript{134} As a result, the Florida Constitution has created special mechanisms to deal with alleged impropriety by a jus-

\begin{itemize}
  \item \textsuperscript{127} See \textit{In re Inquiry Concerning a Judge}, Hugh S. Glickstein, 620 So. 2d 1000 (Fla. 1993); see also \textit{In re Code of Judicial Conduct} (Canons 1, 2, and 7A(1)(b)), 603 So. 2d 494 (Fla. 1992).
  \item \textsuperscript{128} FLA. CODE OF JUD. CONDUCT Canon 7 (West 1993).
  \item \textsuperscript{129} ld. at 5C(1).
  \item \textsuperscript{130} ld. at 5C(3).
  \item \textsuperscript{131} ld. at 5C(4).
  \item \textsuperscript{132} ld. at 5C(5).
  \item \textsuperscript{133} FLA. CODE OF JUD. CONDUCT Canon 6B(1) (West 1993).
  \item \textsuperscript{134} The court itself promulgates the ethics rules. See FLA. CONST. art. V, § 2(a).
\end{itemize}
tice. First, members of the Court are subject to inquiry by the Judicial Qualifications Commission ("JQC"), as are all Florida judges. The JQC recommends proposed discipline for breaches of judicial ethics, subject to review by the Florida Supreme Court. However, when a justice of that court is being investigated, all sitting members of the Florida Supreme Court are automatically recused. Thereafter, the seven most senior chief judges of Florida’s twenty judicial circuits automatically sit as temporary associate justices to review the case and to impose discipline if appropriate. Discipline can include reprimand, suspension, or removal from office.

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

The Florida Constitution specifies that the chief justice of the Florida Supreme Court must preside or choose another justice to preside over the Senate at all trials after impeachment. Where the chief justice is under investigation, the Governor presides. This mandatory language could lead to the problematic situation of a chief justice presiding over the trial of another justice. While the constitution is not entirely clear, it may be possible for the chief justice to appoint an impartial judge of a lower court as an associate justice solely for purposes of presiding over the Senate trial. Such an appointment would better ensure the impartiality of the presiding officer. In any event, a future revision of the Florida Constitution may be in order to address this problem.

135. See Fla. Const. art. V.
136. Id. § 12.
137. The significance of the term associate justice is discussed infra note 165 and accompanying text.
139. Id. art. III, § 17(a); see also Forbes v. Earle, 298 So. 2d 1 (Fla. 1974).
140. Fla. Const. art. III, § 17(b).
141. Id. § 17(c).
143. Fla. Const. art. III, § 17(c).
144. Id.
2. Constraints on Justices’ Staffs

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

Prior to 1992, many persons assumed that judicial staff members were subject to all of the constraints imposed upon the justices, even for matters conducted on personal time. In May 1992, the Florida Committee on Standards of Conduct Governing Judges reinforced this interpretation in an advisory opinion concluding that judicial assistants were prohibited from engaging in partisan political activities, just as judges and justices are. The Committee’s conclusions obviously implied that all judicial staff members were subject to the canons of judicial ethics as though they themselves were judges.

This view, however, was rejected by the Florida Supreme Court in a court conference in the fall of 1992. At that time, the Court took the unusual step of overruling the advisory opinion and issuing its own statement on the question. This occurred after some of the judiciary’s employees voiced objections to the Committee’s reasoning.

145. FLA. CODE OF JUD. CONDUCT Canon 3B.(2) (West 1993).
148. The Court has traditionally used a somewhat unusual method of overruling advisory opinions of the Committee on Standards of Conduct Governing Judges. This is something that, in any event, is rarely done. If any member of the Court disagrees with the advisory opinion, the matter is discussed in a Court conference and a vote may be taken. If a majority of the Court agrees, a statement is prepared overruling the advisory opinion and that statement is then placed in the official minutes of the Court. At this time, the Clerk of the Court notifies the Committee chair of the Court’s action and transmits a copy of the relevant portion of the minutes to The Florida Bar News for publication. The act of overruling the advisory opinion in this manner obviously does not constitute a decision of the Court and, for that reason, is not absolutely binding. But the Court’s statement is highly persuasive and one from which the Court is unlikely to depart if discipline were attempted for some alleged ethical breach.
In its statement, the Court found that judicial staff members have a First Amendment right to engage in political activities provided this is done outside of Court, on personal time, and without reference to the judge or the judge's office. In support of this conclusion, the Court said that members of a judge's staff are analogous to the spouses of judges, who have a right to engage in political activities using their personal time and resources. This reasoning implies that staff members may be treated the same as a judge's spouse in other contexts involving the use of free time, though the analogy obviously is not a perfect one and could be less forceful outside the context of exercising free-speech rights.

A special variety of ethical problems commonly arises with respect to law clerks. Some law clerks decide to enter private practice after completing two or more years of work at the Court, and some firms have voiced confusion over the ethical standards that govern the process of hiring a law clerk. Obviously, a problem could develop if the hiring firm has any case pending before the Court. Thus, law clerks should generally disclose any possible conflict of interest to their justices.

To assist in proper disclosure to the justice, at first contact or soon thereafter, the firm should probably disclose to the law clerk all of its cases pending for review in the Court or that are likely to be pending, before employment negotiations are concluded. At that time, the law clerk should discuss the matter with the justice, who should then segregate the law clerk from the disclosed cases if there is any possibility or appearance of a conflict of interest. At a minimum, the law clerk may not personally or substantially work on any of the disclosed cases during the pendency of negotiations for employment with the firm. Furthermore, the law clerk may be segregated even after negotiations end or fail if the justice deems it necessary.

Upon leaving the Court, former law clerks must be segregated from working on any case involving matters in which the law clerk participated personally and substantially, except upon consent by all parties after

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149. Florida Supreme Court Conference, Minutes of Meeting (Sept. 8, 1992) (on file with Court).
150. Id.
151. It is unlikely, for example, that the financial activities of a judge or justice's judicial assistant would create a substantial conflict of interest. The financial activities of the judge or justice's spouse could.
152. This should include any case in which the firm has an interest in its own right or as counsel to a party.
153. RULES REGULATING THE FLA. BAR 4-1.12(b).
disclosure. A problem of this type might occur, for example, where the firm, after hiring the law clerk, acquires a client who had a case pending in the Court. Moreover, law clerks seldom can ethically reveal information learned at the Court, including the nature of their work assignments. Therefore, it would be wise for all involved parties to assume that the disqualification rule should apply to each of the firm’s cases that were pending in the Court on the date of the law clerk’s last employment there. In any event, if the former law clerk states that the disqualification rule applies in a particular case, the parties probably should not inquire as to the reasons why and former law clerks should not answer if asked.

Similar restrictions apply as to judicial assistants and interns, though problems are less frequent in this regard. Judicial assistants are fewer in number and do not change employment with the frequency more common for law clerks. Interns, meanwhile, are present at the Court for a few months at most and seldom are exposed to any but the most routine matters. However, both judicial assistants and interns should adhere to the rules applicable to law clerks if there is any possibility of a conflict of interest.

Interns, in particular, are routinely warned about conflicts that may be created by employment or negotiations for employment. For example, during their time at the Court, interns are not permitted to engage in part-time or volunteer work assisting anyone engaged in the practice of law. This is because all Court staff are prohibited from engaging in or providing support services for the practice of law, except in representing their own personal interests. Likewise, interns should disclose the fact that they are interviewing for jobs during their time at the Court and should not work on any matter in which their job prospects have an interest. Usually, the supervising law clerks regulate the interns’ compliance with these ethical duties.

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

154. Id. at 4-1.12(a).
155. See supra note 40.
Florida Board of Bar Examiners, possibly resulting in a denial of licensure.\(^{156}\)

I. Court Protocol

In its day-to-day operations, the Florida Supreme Court has followed a simple protocol that sometimes borders on the informal. The unifying factor of the protocol, and perhaps its most formal aspect, is a seniority system in which more senior justices outrank their colleagues, with the sitting chief justice always deemed most senior.\(^{157}\) If more than one justice is appointed to the Court simultaneously, seniority is determined by reference to the appointee's prior career using a standard adopted in 1968.\(^{158}\) Virtually every other aspect of business in the Supreme Court

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\(^{156}\) The Florida Board of Bar Examiners routinely sends detailed questionnaires regarding former interns to the justices and their staffs. The questions probe such matters as the intern's thoroughness, promptness, work ethic, background, and personal problems. If the answer to any question raises a concern about fitness to practice law, the Bar Examiners will investigate further.

\(^{157}\) Except for the chief justice, seniority is determined according to the order of appointment to the court. Upon ceasing to be chief justice, members of the court revert to the seniority they otherwise would have had.

\(^{158}\) See The Fla. Supreme Court, minutes of meeting (Jan. 12, 1987) (on file with the Court). On October 14, 1968, the Florida Supreme Court adopted the following resolution:

\[\text{BE IT RESOLVED:}\]

\begin{quote}
Seniority on this Court shall be determined by length of continuous service on this Court:

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

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

This Resolution shall become effective immediately.
\end{quote}

This policy was reaffirmed on January 12, 1987, when two justices assumed office simultaneously. Because one of these justices had served on a district court, he was accorded a higher seniority than the other, who had served on a circuit court.
Building is governed by this seniority ranking. Justices are listed according to seniority in court stationery, choose their office suites in the same order, and appear formally in public ranked from most senior to most junior. When the Court is in session the justices are seated with the chief justice presiding in the center, the next most senior justice placed to the immediate right, the next most senior justice placed to the immediate left, and so on until all are seated. Even the separate opinions attached to a majority opinion are ranked by reference to seniority.

The seniority system also expresses itself in other ways. For example, a listing of justices in a publication should adhere to the system. However, formal public introductions reverse the seniority ranking on the premise that the most senior justices should be introduced last, giving them the “last word.”

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

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

159. As a general rule, separate opinions are divided into the six separate categories and, within each category, are then ranked according to the author’s seniority.
160. ALLEN MORRIS, PRACTICAL PROTOCOL FOR FLORIDIANS (Revised) 77 (1988).
163. Id.
164. See FLA. CONST. art. V.
temporary service on the Florida Supreme Court. Thus, the title should not be used in any context except when a judge is temporarily assigned to the Florida Supreme Court.

In less formal situations, or when addressing a justice verbally, the members of the Court usually are called simply "Justice (name)." For example, this has become the standard method of addressing a member of the Court during oral argument. In the late 1980s, the Court completely abandoned the use of the gender-specific titles "Madam Justice (name)" or "Mister Justice (name)" though a few attorneys still use these without incident. The staff of the Florida Supreme Court commonly address a justice verbally with the single word "Judge," though this is an informal and familiar usage.

Justices who have retired from the Court commonly are addressed by the courtesy title "Justice," though this is not required and is subject to some ethical constraints. The courtesy title should not be used during the practice of law in which a former justice may be engaged except for purely biographical purposes. Nor should the title be used in any other context in which the title may create a false impression. The title "Chief Justice" can be used only with respect to a sitting chief justice of the Florida Supreme Court and is never used as a courtesy title. Likewise, "Associate Justice" is never used as a courtesy title by lower court judges who previously have been temporarily assigned to sit on the Florida Supreme Court.

A few other matters of court protocol have been distilled into written form by Allen Morris, including details of the investiture ceremony for new justices and protocol for funeral ceremonies of justices. The Court generally has adhered to these two protocols. By tradition, the Court also

165. FLA. R. JUD. ADMIN. 2.030(g). Temporary assignments are made, for example, when a quorum of the court is not available. Id.

166. This change dates from the appointment of the first woman justice, Rosemary Barkett. Shortly after her appointment in 1985, Justice Barkett indicated she would not use the title "Madam Justice Barkett" but simply "Justice Barkett." Later, the other members of the Court dropped the "Mister" from their titles, and this change was formalized by altering all name plates on the justices' suites in the Supreme Court Building. The use of the unadorned title "Justice" is consistent with the court's recently adopted policy of avoiding gender-specific language wherever possible. See Ricki Lewis Tannen, Report of the Florida Supreme Court Gender Bias Study Commission, 42 FLA. L. REV. 803 (1990).


169. Id. at 113-14.
generally has adhered to these two protocols. By tradition, the Court also lowers its flags to half—staff upon the death of any present or former justice.

J. The Clerk's Office

The vast majority of the Florida Supreme Court's contact with lawyers and the public occurs through the Office of the Clerk of the Court. Briefs are filed through the Clerk, and virtually all routine communications with lawyers are handled by this office. Yet, the Clerk's staff does far more than just deal with the public. The Clerk, who serves at the pleasure of the Court, is charged with the responsibility of maintaining all papers, records, files, and the official seal of the Court.

Moreover, the Clerk's staff maintains the Court's docket, oversees the rigorous procedural requirements imposed on death penalty cases, arranges the exact timing of oral argument, and prepares finalized opinions for release to the public. Orchestrating routine functions such as these requires considerable coordination among the lawyers, the parties, and the Court. All such matters are handled by the Clerk's Office, and the workload is substantial. In 1992, the Clerk's Office filed dispositions in 1890 cases and opened files in 1844 new cases, in addition to handling 314 motions for rehearing.

K. The Florida Supreme Court Library

For its entire history, the Court has maintained its own law library, which consequently is the oldest state supported library in continuous operation in Florida. An 1845 catalog in the library's possession still lists the 260 volumes that comprised the Court's first collection in the year Florida was granted statehood. Today, the library maintains around 100,000 volumes.

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170. The present Clerk is Sid White, and the Chief Deputy Clerk is Debbie Casseaux.
171. FLA. CONST. art. V, § 3(c).
172. Most docketing matters currently are controlled by Kathy Belton and Barbara Maxwell.
173. Most aspects of death penalty cases presently are supervised by Tanya Carroll.
174. The scheduling of oral argument is supervised by the Calendar Clerk, who presently is Sara Gainey.
175. The release of opinions is controlled by the Opinion Clerk, who presently is Janie Bentley.
176. Other members of the Clerk's staff who assist in these functions are Betsy Hill, who circulates court files, and Sonny McAllister, who moves materials between the Clerk's office and the justices.
volumes along with some 10,000 monograph titles, 1400 serial titles, and 700 linear feet of archival and manuscript material.\footnote{177}

But the library has not lost touch with its considerable history. A number of rare Florida legal books are in the Court’s collection, including Spanish texts that were of great importance in the years after the Spanish Crown ceded Florida to the United States.\footnote{178} The library also still retains and uses a large number of antique glass-fronted “barrister” book cases that have belonged to the Court since they were first purchased in 1913. These Globe-Wernicke sectional bookcases filled five railroad cars when originally delivered, prompting a proud headline in the October 3, 1913, edition of a Tallahassee newspaper, the \textit{Weekly True Democrat}.\footnote{179}

The office of the Supreme Court librarian\footnote{180} has existed only since 1957, and the occupant serves at the pleasure of the Court. Beginning in 1862, the Clerk also wore the hat of “head” librarian, though from 1899 until 1957 a full-time assistant librarian was employed. The library is open to the public, but it does not circulate books. Its hours of operation are 8:00 a.m. to 5:00 p.m., Monday through Friday, although the stacks are available to Florida Supreme Court justices and staff at any time.

\textbf{L. The Office of State Courts Administrator}

One of the newest internal components of the Court is the Office of State Courts Administrator, which was created on July 1, 1972. Its initial purpose was to assist the Court in the technical and fiscal problems associated with preparing the operating budget of the judicial branch, as well as compiling statistics on the need for new judges and specialized court divisions throughout Florida. Today, the State Courts Administrator\footnote{181} also serves as the Court’s liaison to a number of other agencies, including the Legislature, the Governor, auxiliary court agencies, and national judicial agencies. The Office oversees a variety of legal programs and continuing

\footnote{177. Some of the information used here was compiled by former Supreme Court Librarian Brian Polley.}
\footnote{178. The treaty ceding Florida bound both the United States and the future state government to honor matters already finalized under Spanish law. Thus, a large number of early court cases actually rested on an interpretation of Spanish law. Apalachicola Land \& Dev. Co. v. McRae, 98 So. 505, 524-25 (Fla. 1923).}
\footnote{179. See Five Carloads of Book Cases for Tallahassee, \textit{Weekly True Democrat}, October 3, 1913.}
\footnote{180. The present librarian is Joan Cannon. Her staff are Jo Dowling, Joyce Elder, Jo Smyly, and Linda Cole.}
\footnote{181. The present State Courts Administrator is Ken Palmer.}
education for judges,\textsuperscript{182} information systems used by the courts,\textsuperscript{183} and the judicial branch’s accounting and fiscal activities.

M. The Marshal

The Court also appoints a Marshal\textsuperscript{184} to be the custodian of the Supreme Court Building and grounds and to be the conservator of the peace in the building or any place where the Court is sitting. The Marshal is also authorized to execute the process of the Court throughout Florida. To this end, the Marshal is vested with constitutional authority to deputize the sheriff or a deputy sheriff in any Florida county.\textsuperscript{185} The Marshal also is responsible for performing some court budgeting, purchasing and contracting, security, and property accountability and maintenance.

III. An Overview of Jurisdiction

Another major aspect of the Court’s day-to-day operations is the exercise of its jurisdiction.\textsuperscript{186} It is through the exercise of jurisdiction that the Court chooses the cases that it will hear and thus, the kinds of issues that will be decided. Florida’s society is shaped by these decisions because the opinions that result from the exercise of jurisdiction create the precedent that will control future cases. Moreover, the bulk of the Florida Supreme Court’s jurisdiction is discretionary, meaning that the Court may decline to hear cases falling into particular categories even if it has jurisdiction over them.\textsuperscript{187} Accordingly, the Court has significant power to choose the issues it deems most important.

The membership of the Court has been diverse enough that no particular ideology is discernible in the way jurisdiction has been exercised. Jurisdiction in discretionary cases, for example, usually is put to a vote by

\begin{itemize}
  \item \textsuperscript{182} The present Deputy Administrator for Legal Affairs and Education is Dee Beranek.
  \item \textsuperscript{183} The present Deputy Administrator for Information Systems and Program Support is Peggy Horvath.
  \item \textsuperscript{184} The present Marshal is Wilson Barnes.
  \item \textsuperscript{185} See FLA. CONST. art. V, § 3(c).
  \item \textsuperscript{187} See FLA. CONST. art. V, § 3(b)(3)-(6).
\end{itemize}
a panel of five justices, with four votes being necessary to grant review.\textsuperscript{188} No single justice can dominate the choice of cases because of this procedure. Moreover, in some discretionary categories such as certified questions of great public importance,\textsuperscript{189} the Court routinely grants jurisdiction in nearly every case brought for review by the parties.\textsuperscript{190} This practice further mutes any ideological bias that might seek to influence the choice of cases.

A. The Nature of Jurisdiction

Jurisdiction always involves a deceptively simple question: Does the Court have the power to hear and to determine the case?\textsuperscript{191} In discretionary cases, a second question must also be addressed: Why should the case be heard?\textsuperscript{192} Most of the time the answers are obvious. But there are a significant number of cases that fall somewhere near the outer limits of the Court’s jurisdiction. These can be exceedingly complicated, and opinions addressing them often take on the quality of theological abstraction. Yet such cases are highly important in the law because they draw the line between what the Court will and will not hear. Much of the discussion below necessarily involves such cases; for that reason, the remainder of this article is of primary interest to lawyers and persons who may ask the Florida Supreme Court to hear their cases.

To further complicate the issue, the Court’s jurisdiction is not really a single unified concept. Rather, jurisdiction falls into five distinct categories, each of which involves somewhat different problems. These categories are: advisory opinions, mandatory appellate jurisdiction, discretionary review jurisdiction, discretionary original jurisdiction, and exclusive jurisdic-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{188} SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES \textsection 2(A)(1)(a). If review is granted, but four members do not agree on the need for oral argument, the chief justice decides the issue or places the matter on the court conference agenda for resolution. \textit{Id.} If the jurisdictional vote is close and the case is significant, the chief justice also may send the petition to the remaining two justices for a jurisdictional vote by the entire court in lieu of placing the matter on the conference agenda.
\item \textsuperscript{189} See infra notes 462-85.
\item \textsuperscript{190} Occasionally parties choose not to bring such a case even though the district court has certified a question. The fact that a question is certified does not bind the parties to seek review in the Florida Supreme Court.
\item \textsuperscript{191} See \textit{State ex rel. Campbell v. Chapman}, 1 So. 2d 278 (Fla. 1941).
\item \textsuperscript{192} See generally \textit{The Florida Star v. B.J.F.}, 530 So. 2d 286 (Fla. 1988) (holding that Florida Supreme Court has subject matter jurisdiction over appeal of decision of intermediate appellate court expressly citing a statute).
\end{enumerate}
\end{footnotesize}
tion. Each of these categories are addressed in detail below in separate sections of this article.

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

1. Presumptions

The presumptions circumscribing jurisdiction depend on a key question: Is the Court’s jurisdiction limited or plenary? In a broad but imperfect sense, the Florida Supreme Court is a tribunal of limited jurisdiction. This means that the Court is forbidden to exercise any form of jurisdiction not expressly granted to it. Unlike the circuit courts, the Florida Supreme Court does not have a general grant of plenary jurisdiction, which would give the Court authority over any matter not expressly excluded from its jurisdiction.

This is an important distinction. It also is the reason why every well written opinion issued by the Florida Supreme Court begins with a statement establishing the basis of jurisdiction. The Florida Supreme Court cannot act until it finds, in the Florida Constitution, an express provision granting jurisdiction. The circuit court, to the contrary, is presumed to have jurisdiction unless the constitution or statutes say otherwise. Put another way, the jurisdiction of the Florida Supreme Court, being limited, tends to be strictly construed. Unlike the supreme court, the jurisdiction of the circuit courts, being plenary, tends to be liberally construed.

Thus, in close cases, the presumptions would disfavor jurisdiction in a court of limited jurisdiction while favoring jurisdiction in a court of plenary jurisdiction. This has an important consequence. When parties invoke the jurisdiction of the Florida Supreme Court, they usually are fighting against a presumption that the Court cannot hear the case. For example, every petition seeking to establish jurisdiction based on an

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193. See Fla. Const. art. V, § 3(b).
194. See Mystan Marine, Inc. v. Harrington, 339 So. 2d 200 (Fla. 1976); Lake v. Lake, 103 So. 2d 639 (Fla. 1958).
195. See generally Mystan Marine, Inc., 339 So. 2d at 201.
196. Compare Fla. Const. art. V, § 3(b) with Fla. Const. art. V, § 5(b).
197. See Fla. Const. art. V, § 5(b).
"express and direct conflict of decisions" labor under this presumption, and it is one reason the bulk of these petitions are summarily denied.

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

2. Precedential Value

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

3. Discretion

Two categories of discretionary jurisdiction, discretionary review jurisdiction and discretionary original jurisdiction, involve a separate problem: the concept of “discretion.” Should the Court hear the case?

198. See discussion infra part VI.D.
199. FLA. CONST. art. V, § 3(b)(1).
201. See discussion infra part VII.E.
203. Discretion can be involved to a lesser extent in other categories of jurisdiction, but the restriction usually is so obvious as to merit little discussion. For example, the court has no discretion to refuse to hear a proper appeal pursuant to its mandatory jurisdiction. See FLA. CONST. art. V, § 3(b)(1), (2).
Discretion loosely implies the authority to make a decision as one sees fit, but the term has a somewhat different meaning in the present context. In *The Florida Star v. B.J.F.*, the Court noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless. Discretion itself can be limited by the applicable law, forbidding the Court to act even though jurisdiction might exist over the case.

Restrictions on discretion are most obvious when the Court’s discretionary original jurisdiction is invoked to issue one of the so-called “extraordinary writs.” The fact that a petitioner merely asks for mandamus, for example, vests the Court with jurisdiction. However, that is not the end of the matter. Well established law severely restricts the Court’s discretion to issue writs of mandamus, as is true of most of the extraordinary writs. Similar restrictions on discretion apply when a petitioner asks the Court to review a case decided by a district court of appeal that allegedly conflicts with an opinion of another Florida appellate court. However, the Court’s discretion is generally much broader over the other subcategories of discretionary review jurisdiction.

As a practical matter, lack of jurisdiction and lack of discretion equate to the same thing: The case will not be heard by the Court. This explains the tendency of lawyers and judges to blur the two concepts together, because the distinction usually does not matter. However, there is one very important consequence that justifies the distinction. In some cases, the deadline by which appeals must be taken to the United States Supreme Court hinges on whether the Florida Supreme Court actually had *jurisdiction* of a case in which it has denied review.

If the Court had jurisdiction but did not exercise discretion, for whatever reason, then the time to take the further appeal is judged from the date the petition was dismissed by the Florida Supreme Court. But if the Court lacked jurisdiction entirely, then the time to take the further appeal is judged from the date the lower court’s opinion became final.

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204. 530 So. 2d 286 (Fla. 1988).
205. *Id.*
206. See discussion *infra* part VII.A.
207. See discussion *infra* part V.D.
208. *The Florida Star,* 530 So. 2d at 286.
209. *Id.* This problem sometimes has been addressed by saying that a court has “jurisdiction to determine jurisdiction.” However, the Florida Supreme Court has avoided this type of analysis, which does not really solve the problem. If a court has jurisdiction to determine jurisdiction, then the decision not to hear a case could be construed as retroactively depriving the court of actual jurisdiction over the controversy.
is a crucial point for litigants seeking a further appeal to the United States Supreme Court. Thus, lawyers and litigants who hope to preserve all avenues of appeal must be mindful of the distinction between jurisdiction and discretion.

Finally, even when discretion is not limited by the law, the Court still can refuse to hear any case falling within a discretionary category. Typically this occurs because the Court does not believe the case presents an important enough issue or the result was essentially just. For this reason, jurisdictional briefs should almost always argue why the case is significant enough to be heard. It is not enough merely to establish that jurisdiction exists and that discretion is unrestricted for present purposes, except perhaps where the importance of the case is obvious.

B. Invoking the Court's Jurisdiction

The jurisdiction of the Florida Supreme Court usually must be invoked by an affirmative act of one of the parties to the cause. This can occur in several ways. Jurisdiction to issue an advisory opinion is invoked by the Governor or Attorney General by the mere filing of a letter with the Court outlining the issues. In the mandatory appellate jurisdiction category, the Court's jurisdiction is automatic in death appeals, and is invoked by notice of appeal and petition in the other subcategories. Discretionary review jurisdiction is invoked by filing a petition seeking review. However, in some types of cases, briefing on jurisdiction is not allowed. Finally, the Court's exclusive original jurisdiction can be invoked by petition, and in the case of the decennial review of legislative apportionment, the Attorney General must file the petition.

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

210. See Fla. Const. art. V, § 3(b)(3)-(6).
211. See Fla. Const. art. V, § 3(b)(10), art. IV, §10.
212. Fla. Const. art. V, § 3(b)(1).
213. See infra text accompanying notes 493-94.
214. The court also may exercise its exclusive original jurisdiction over rule-making and regulation of The Florida Bar on its own motion, but this is rarely done.
216. See discussion infra part VI.D.
IV. ADVISORY OPINIONS

Any discussion of advisory opinions must begin with the well established rule that they are disfavored. This rule hinges on the nature of advisory opinions. As a broad rule, an advisory opinion is any conclusion of law stated by a court in the absence of a real controversy as to that particular issue. The reasons for this rule are obvious: Courts exist to resolve disputes, not to address questions in the abstract. Thus, the rule against advisory opinions prohibits parties from bringing a spurious lawsuit in order to create precedent. The rule equally forbids judges to invent new law irrelevant to the matters at hand. In this sense, the rule is probably derived, in part, from the doctrine of separation of powers, because the most extreme advisory opinions come close to being acts of judicial legislation.

However, the rule is subject to broad and sometimes poorly defined exceptions, partly because real world controversies often do not fall into the neat categories the rule might suggest. The true extent of controversies may be blurry. Moreover, judicial opinions must be conveyed through the inherently inexact medium of human language, and sometimes it is useful for judges to forecast directions the law is likely to take. Forecasting can give people throughout the state some degree of guidance on unresolved questions of law.

There is established precedent, for example, for judges to write what often are called “scholarly” opinions creating an entire analytic framework to resolve particular issues. Opinions of this type almost always go beyond the bare questions presented by the case and rest on thorough research and reasoning contained in the text. As recent cases from the United States Supreme Court have demonstrated, they often are admired, honored, and come in all ideological bents. Thus, the rule against advisory opinions does not apply to scholarly opinions, though such opinions sometimes are criticized for violating the rule.

Florida law also has a long-standing tradition of obiter dicta, usually shortened to “dicta,” which by definition are statements in a court’s opinion

217. See, e.g., Interlachen Lakes Estates, Inc. v. Brooks, 341 So. 2d 993 (Fla. 1976); Department of Admin. v. Home, 325 So. 2d 405 (Fla. 1976).
218. See Interlachen Lakes Estates, Inc., 341 So. 2d at 993.
219. See id.
220. See Fla. Const. art. II, § 3.
that are extraneous or unnecessary to the resolution of the issues.\textsuperscript{222} Scholarly opinions, almost by definition, are built on dicta. Moreover, dicta are so common in opinions that a well established body of cases govern their interpretation, and obviously, tolerate their continued use. Thus, dicta are extraneous statements of law that are permissible, though not always taken seriously. Here again, the rule against advisory opinions does not reach so far as to out-and-out prohibit the use of dicta.

In any event, dicta are subject to strong limitations. Courts sometimes say that dicta bind no one, not even the one who wrote them,\textsuperscript{223} though this assertion may suggest too much. In actual practice, dicta can have persuasive force in much the same way that a concurring opinion can, at least when they are well reasoned.\textsuperscript{224} This is most apparent in scholarly opinions. In other words, dicta should be considered if relevant, can be ignored if poorly reasoned or distinguishable, and gain greater force with repetition. One district court of appeal has even suggested that a dictum stated by the Florida Supreme Court “is not without value as precedent,”\textsuperscript{225} but this may use the word “precedent” too loosely.

Whatever border separates dicta from advisory opinions has never been finely drawn, and there probably can be no bright line rule. Clearly, dicta can verge into an advisory opinion and thus, may be abused. In broad terms however, statements that illuminate or place in context any relevant issue probably should continue to be tolerated as a useful feature of opinion writing, especially in forecasting the law’s evolution. The rule against advisory opinions would be most applicable to attempts to address wholly irrelevant issues, especially where the effect is legislation.

Even then, other long standing exceptions to the rule against advisory opinions exist. In a few instances, even moot or completely abstract questions can be answered by the Court. For example, the mootness doctrine generally requires dismissal of a cause in which the issues have become so fully resolved that any decision will have no actual effect.\textsuperscript{226} There is, however, an important exception for moot cases that present important questions capable of repetition yet likely to evade review because they are inherently fleeting in nature. This occurred in the case of \textit{T.A.C.P.}

\begin{itemize}
\item \textsuperscript{222} See Therrell v. Reilly, 151 So. 305 (Fla. 1932).
\item \textsuperscript{223} E.g., Hart v. Stribling, 6 So. 455 (Fla. 1889).
\item \textsuperscript{224} See Milligan v. State, 177 So. 2d 75 (Fla. 2d Dist. Ct. App. 1965); but see Continental Assurance Co. v. Carroll, 485 So. 2d 406, 408 (Fla. 1986) (dicta never regarded as “ground-breaking precedent”).
\item \textsuperscript{225} Hart v. Stribling, 6 So. 455 (Fla. 1889).
\item \textsuperscript{226} Hollywood, Inc. v. Clark, 15 So. 2d 175 (Fla. 1943).
\end{itemize}
discussed above. 227 If the Court finds this situation to exist, jurisdiction may be determined as though the controversy had never become moot. 228

Likewise, the Florida Constitution itself expressly authorizes the Court to consider abstract questions of law and issue advisory opinions to the Governor and Attorney General in two narrow circumstances. 229 Like all advisory opinions, these opinions do not constitute binding precedent, though they can be persuasive. 230 They are authorized by the constitution to deal with situations in which the Court’s opinion on an abstract question can advance public interests, discussed below.

A. Advisory Opinions Requested by the Governor

The Florida Supreme Court may issue advisory opinions to the Governor on any question affecting the latter’s constitutional powers and duties. 231 By tradition, the question or questions are posed in a simple letter to the Court on the Governor’s stationery. 232 Often, the letter is quite detailed and usually contains an in—depth briefing on the relevant law, including reasons why the Governor believes the questions should be answered in a particular way.

Jurisdiction is mandatory; the Court must hear the case and issue an opinion. 233 Upon receipt, the letter is immediately routed to the chief justice, who will call a court conference to determine if the question can be answered and if oral argument is desired. 234 If the case is accepted, the chief justice then will assign it to an office. 235 In practice, oral argument is usually granted, 236 except where at least four justices determine that the question is unanswerable for reasons discussed below. 237 Any person whose substantial interest may be affected by the advisory opinion may be

227. See supra text accompanying note 28.
228. In re T.A.C.P., 609 So. 2d 588, 589 n.2 (Fla. 1992) (citing Holly v. Auld, 450 So. 2d 217 (Fla. 1984)).
229. FLA. CONST. art. IV, §§ 1(c), 10.
230. See Florida League of Cities, 607 So. 2d at 399.
231. See FLA. CONST. art. IV, § 1(c).
232. This is consistent with the applicable Rule of Court, which only requires that the Governor’s request be in writing. See FLA. R. APP. P. 9.500(a).
233. Id.
235. Id. Advisory opinions almost always fall into the “special” category of case assignments. See supra text accompanying note 73.
236. See supra text accompanying notes 70-73.
permitted to make argument, to file a brief, or both. Time limitations and scheduling of argument lie within the Court’s discretion.

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

Under the constitution’s requirements, in the strictest sense, the Court’s discretion to answer a request for an advisory opinion is confined solely to questions of the Governor’s constitutional powers. Accordingly, the first issue that must be addressed in each instance is whether the Governor’s questions can be answered as framed. If the questions stray beyond constitutional concerns, then the Court lacks discretion and must refuse to answer. There is precedent that an advisory opinion cannot address issues of the Governor’s purely statutory powers.

Over the years, however, the distinction between constitutional and statutory concerns has become fuzzy. In a number of cases the Court’s majority has answered questions about statutory matters if there was some significant and identifiable nexus with the Governor’s constitutional powers or duties. For example, the Court has held that the Governor’s constitutional powers are implicated by questions posed to the Court about new statutory tax schemes. This was done on grounds that the fiscal stability of the state was at stake, which implicated the Governor’s fiscal duties under the Florida Constitution.

240. Fla. Const. art. IV, § 1(c).
241. Id.
242. See In re Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969).
243. See In re Advisory Opinion to the Governor, 509 So. 2d 292, 301 (Fla. 1987) (citing In re Advisory Opinion to the Governor, 243 So. 2d 573, 576 (Fla. 1971)).
A similar result was reached in a case involving a statute modifying Florida’s appellate districts and creating judicial vacancies.\textsuperscript{244} There, the Court found discretion to hear the case because “irreparable harm” otherwise might result, and the constitutional nexus cited was the Governor’s duty to fill judicial vacancies.\textsuperscript{245} Thus, in actual practice, the Court sometimes may find it has discretion to answer questions about statutes significantly related to any one of the Governor’s express constitutional powers or duties.

“Statutory” advisory opinions of this type, even if proper, are not without problems. There are important limitations to advisory opinions to the Governor beyond the fact that they are not technically binding precedent. The Court has held that advisory opinions cannot address federal issues. The Court has also held that they can address Florida constitutional issues only for prima facie validity.\textsuperscript{246} As a result, all federal questions remain unresolved along with any challenge to the statute’s constitutionality as applied to specific individuals.\textsuperscript{247} A dissenting justice in one of the tax cases suggested that an advisory opinion of this type can win the Governor, at best, a fragment of a victory.\textsuperscript{248}

Advisory opinions to the Governor, in other words, are most useful when they are confined to the stricter parameters suggested by the Florida Constitution itself: the Governor’s constitutional powers and duties. The Florida Supreme Court is the final authority on the meaning of the state constitution, subject to the people’s power of amendment.\textsuperscript{249} Advisory opinions confined to a question of pure Florida constitutional law are thus far more persuasive than ones that delve into the validity of statutes or into matters regulated by federal law. A “constitutional” advisory opinion genuinely may be able to resolve a future controversy before it can occur, but a “statutory” advisory opinion may only mark the first of many rounds of litigation.

\textsuperscript{244} In re Advisory Opinion to the Governor Request of June 29, 1979, 374 So. 2d 959 (Fla. 1979).

\textsuperscript{245} Id. at 962.

\textsuperscript{246} In re Advisory Opinion to the Governor, 509 So. 2d at 301-02.

\textsuperscript{247} This restriction is self-evident. Advisory opinions deal with abstract questions of law, not the concerns of single individuals not present in the court. “As applied” challenges, by their very nature, require a controversy raised by individuals. See id.

\textsuperscript{248} Id. at 319-20 (Barkett, J., declining to answer questions).

\textsuperscript{249} See The Florida Star, 530 So. 2d at 288; see also Fla. Const. art. XI, § 3.
B. *Advisory Opinions Requested by the Attorney General*

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

Such a ruling is important because citizen petition drives are subject to two requirements imposed by state law. The proposed amendment must contain only a single subject and must include a fair and accurate ballot summary of no more than seventy-five words. The Florida Supreme Court has determined that it cannot consider any issue beyond these two, including whether the amendment, if enacted, would violate the United States Constitution. Nor can the Court rewrite an unfair or inaccurate ballot summary. However, these are restrictions imposed not by the constitution, but by the enabling legislation, which could be amended to lift the restrictions. A bill to accomplish just that was approved by the 1993 Florida Legislature but vetoed by the Governor.

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

The Court has determined that advisory opinions of this type are handled the same as those requested by the Governor. By analogy to gubernatorial advisory opinions, the Attorney General has adopted the practice of submitting the case to the Court by means of a letter on official stationery addressed to the justices. The two relevant questions must be posed and answered, because neither the Attorney General nor the Court has any discretion to expand or to restrict the issues, as matters presently stand.

Beyond that, the Attorney General is not required to brief the issue nor to take any particular side in the case. However, the Attorney General's letter usually includes a statement outlining the facts, issues, and relevant law in an objective manner, without advocating any particular result. Any interested party may also brief the case, which usually is scheduled for oral argument. There has been no need to expedite such cases, because the enabling legislation ensures that they come well in advance of any election.

Although jurisdiction over cases of this type is recent, the Court nevertheless decides these cases by drawing on precedent. Previously, challenges to proposed constitutional amendments could be brought by means of a mandamus action filed at any time prior to the date of the election. The Court has concluded that its new advisory jurisdiction is meant to address the same issues previously considered by way of mandamus, subject to the inherent limitations of advisory opinions.

257. FLA. CONST. art. IV, § 10.
258. FLA. STAT. § 15.21 (1991). The number required is determined by a formula contained in this statute. Id.
259. Id.
261. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(2).
262. See In re Advisory Opinion to the Attorney General English—the Official Language of Florida, 520 So. 2d 11, 12 (Fla. 1988) (noting case was submitted by letter).
263. See Florida League of Cities, 607 So. 2d at 397.
264. Id. at 399.
Thus, earlier cases brought as mandamus actions are relevant in determining the applicable law. However, the fact that this new form of jurisdiction is only advisory means that any opinion issued by the Court is highly persuasive but not binding. The Court still can entertain a later petition for mandamus provided that it does not attempt to relitigate issues already addressed in the advisory opinion.265

The standard for addressing the "single-subject" requirement wavered during the early 1980's but has become more stable recently. All that is required is that the proposed amendment have a logical and natural oneness of purpose, which occurs if all parts of the amendment may be viewed as having a natural relation and connection as components or aspects of a single dominant plan or scheme.266 The Court also has held that it is not necessarily relevant that the proposed amendment affects more than one provision of the Florida Constitution or more than one branch of government provided it meets the "oneness" standard.267 This test has been criticized for its subjectivity but remains the applicable standard of review.268

The standard for addressing the ballot summary issue has a more stable history. The Court has consistently held that the summary must state in clear and unambiguous language the chief purpose of the measure, but need not explain every detail or ramification.269 The chief evil addressed by this standard of review is to prevent the voters from being misled and to allow votes to be cast intelligently.270 For example, the Court has held ballot summaries defective for suggesting that new rights were to be given to the people, when in fact rights were being taken away.271 Moreover, the failure to include an adequate ballot summary cannot be cured by the fact that public information about the amendment was widely available.272

For reasons not entirely clear, the Court has not adopted the practice of answering the Attorney General's questions in the form of a letter signed by the concurring justices, as happens with gubernatorial advisory opinions.

265. Id. at 398-99.
266. Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991) (quoting Fine v. Firestone, 448 So. 2d 984, 990 (Fla. 1984)).
267. Id. (citing Weber v. Smathers, 338 So. 2d 819 (Fla. 1976)).
268. Id. at 231 (Kogan, J., concurring in part, dissenting in part).
269. Id. at 228 (quoting Carroll v. Firestone, 497 So. 2d 1204, 1204-1206 (Fla. 1986)).
270. Id.
271. Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984); accord People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1376 (Fla. 1991).
272. Wadhams v. Board of County Comm'rs, 567 So. 2d 414, 416-17 (Fla. 1990).
Instead, the Court has issued its conclusions in the form of an opinion, possibly because this always was done in the earlier mandamus actions. However, the letter format has the grace of emphasizing the advisory nature of the opinion and the fact that the opinion comes from the justices as individuals and not from the Court as a tribunal. The Court, at some point, might wish to return to the letter format. In any event, this is a matter of sheer form and does not alter the purely advisory nature of the opinion.  

V. MANDATORY APPELLATE JURISDICTION

The Florida Supreme Court is vested with mandatory appellate jurisdiction over four narrow categories of cases. These are: (1) death appeals; (2) appeals involving the validity of public-revenue bonds; (3) appeals from the Florida Public Service Commission; and (4) appeals from opinions of a district court declaring a state statute or provision of the Florida Constitution invalid. All cases brought under the Court’s mandatory jurisdiction are called "appeals," as distinguished from "reviews." The reasons for vesting the Court with some limited forms of mandatory, exclusive appellate jurisdiction are evident. In death appeals, for example, the Court has noted that its mandatory appellate jurisdiction rests in part on the need to ensure uniformity of the applicable law throughout Florida. A lack of uniformity might occur if the various district courts of appeal had jurisdiction subject only to discretionary review in the Florida Supreme Court. Uniformity is essential in death cases because of a variety of federal constitutional restrictions.

273. See Smith, 607 So. 2d at 399.
274. FLA. CONST. art. V, § 3(b)(1).
275. Id., § 3(b)(2).
276. Id.
277. Id. § 3(b).
278. Id.
279. See FLA. CONST. art. V, § 3(b)(1) (using terms “appeal” and “review” in contradistinction). The distinction apparently has a long history in Florida, where Courts sometimes have said that the word “appeal” denotes an appellate proceeding that may be had as a matter of right. See Zirin v. Charles Pfizer & Co., 128 So. 2d 594, 597 (Fla. 1961).
281. Id.
The same reasoning applies to bond validations and appeals to the Public Service Commission. Enormous amounts of public money and great potential liability often are at stake in these cases. A determination by the state’s highest court is necessary to dispel questions as to whether publicly issued bonds are valid and whether utility regulations and rates are lawful. Without such finality, bonds might be considered a poor risk by investors who might suddenly be cast in doubt by new Court decisions; and, utility services might be impeded by protracted appellate litigation or unresolved doubts in the law. Thus, the framers of the constitution vested the Florida Supreme Court with mandatory appellate jurisdiction to resolve these matters. 282

A. Death Appeals

The Court’s authority over death appeals is one of the most straightforward. Very simply, the Court has exclusive, mandatory jurisdiction over any final judgment imposing a sentence of death 283 and all other matters arising from the same trial and sentencing. 284 Moreover, jurisdiction is automatic, meaning the Court must hear the case even if the inmate sentenced to death does not wish to appeal. 285 This is the only type of supreme court jurisdiction that is automatic. In all others, failure to bring an appeal or seek review deprives the Court of jurisdiction. 286 A murder conviction resulting in any penalty less than death is appealed to the appropriate district court, with possible discretionary review later in the Florida Supreme Court.

The rare disputes over this form of jurisdiction often relate to the collateral proceedings that almost always follow the conclusion of the appeal. Nevertheless, the Court commonly cites its constitutional jurisdiction over death appeals as a basis for hearing collateral challenges, 287 even though the latter technically do not constitute “appeals” at all. This suggests the plenary nature of the jurisdiction granted once the Court finds there is

282. See FLA. CONST. art. V, § 3(b)(1), (2).
283. Id., § 3(b)(1).
284. See Savio v. State, 422 So. 2d 308 (Fla. 1982).
286. There are limited but rare exceptions when the Court exercises its administrative jurisdiction sua sponte to make rules and regulate the Florida Bar. Moreover, administrative acts of the court are not judicial acts, properly speaking.
a final judgment of death in the case, a conclusion reinforced by the Court's habeas corpus\textsuperscript{288} and "all writs" jurisdiction.\textsuperscript{289}

Interlocutory appeals in ongoing trials that might result in a death penalty are more problematic, and the law in this area remains unsettled. The argument against the Court hearing these cases rests chiefly on the fact that the constitution grants jurisdiction only where there is a final judgment imposing the death penalty.\textsuperscript{290} Moreover, in 1979, the Court stated that there is no reason interlocutory appeals in death cases should not go to a district court of appeal when they involve matters routinely reviewed there, as most do.\textsuperscript{291} The Court's 1979 analysis of this issue came prior to the jurisdictional reforms of 1980 and can be questioned on that basis, but the rationale remains sound.

Nevertheless, the argument against interlocutory jurisdiction cannot be called compelling as matters now stand. In 1988, the Court appeared to hold that interlocutory appeals to a district court in a death case become "law of the case" perhaps even when no further appeal to the Florida Supreme Court was possible at the time.\textsuperscript{292} This suggestion contradicted, and thus may have overruled, a 1984 holding saying the opposite.\textsuperscript{293} The possible result is that the Florida Supreme Court could be deprived of its ability to consider an interlocutory issue that very well might reflect on the validity of a later death sentence; a result obviously contrary to the principle of automatic and full review in death cases.\textsuperscript{294} Defense counsel also might deprive the client of a full appeal in the Florida Supreme Court simply by exercising the right to an interlocutory appeal to the district court.

The only reasonable solutions to this problem are to recognize some form of obligatory supreme court jurisdiction in interlocutory appeals or to hold, once again, that the law of the case doctrine does not apply in this context. Obligatory jurisdiction could be premised on the Court's jurisdiction over judgments of death or its all writs power.\textsuperscript{295} However, either of these approaches strains the constitution's language and risks burdening the Florida Supreme Court's docket with interlocutory appeals from cases that

\begin{itemize}
\item \textsuperscript{288} See discussion infra part VII.D.
\item \textsuperscript{289} See discussion infra part VII.E.
\item \textsuperscript{290} See Fla. Const. art. V, § 3(b)(1).
\item \textsuperscript{291} State v. Preston, 376 So. 2d 3, 4 (Fla. 1979).
\item \textsuperscript{293} Preston, 444 So. 2d at 942.
\item \textsuperscript{294} See id.
\item \textsuperscript{295} See discussion infra part VII.E.
\end{itemize}
may or may not result in a death penalty. Limiting the law of the case doctrine seems more consistent both with the pre-1988 case law and the language of the constitution itself. Supreme Court jurisdiction requires a final judgment of death, not mere speculation that such a judgment will be entered. Moreover, interlocutory appeals in death cases rarely involve matters the district courts do not routinely consider.

There is a separate method by which non-final orders of trial courts sometimes are directly reviewed by the Florida Supreme Court. On rare occasions the Court has agreed to review such matters by way of writ of prohibition. However, these cases involve the trial court’s effort to restrict prosecutorial discretion to seek the death penalty. It is highly unlikely that prohibition would be allowed over more routine issues.

B. Bond Validation

The second form of mandatory, exclusive appellate jurisdiction deals with the validation of bond issues made for some public purposes. Typically, the bonds are issued by governmental units to build infrastructure, to finance public projects, or to advance the public welfare. This is a type of jurisdiction authorized by the constitution but requiring enabling legislation that has now been enacted.

The jurisdictional grant is narrow. The Court has said that its sole function in such cases is to determine whether the governmental agency issuing the bonds had the power to act as it did, and whether the agency exercised its power in accordance with the law. Some procedural time limits are abbreviated in bond cases to allow expedited review.

The determination of legality can include questions that might impugn the bond issue, such as the propriety of an election in which voters approved a funding source securing the issue. Moreover, many types of bonds

296. See supra note 293.
297. See Fla. Const. art. V, § 3(b)(1).
298. E.g., State v. Donner, 500 So. 2d 532 (Fla. 1987); State v. Bloom, 497 So. 2d 2 (Fla. 1986). The writ of prohibition is discussed infra part VII.C.
299. See Fla. Const. art. V, § 3(b)(2).
301. State v. Leon County, 400 So. 2d 949, 950 (Fla. 1981).
are proper only if issued for public, municipal, or other specific purposes. But these restrictions are sometimes broadly construed. "Public purpose," for instance, has been found to include even some projects of primary benefit to relatively small segments of the public or even private enterprise. The most famous of these cases involved the validation of bonds for reclamation and water control in the vicinity of Walt Disney World.

C. Public Service Commission Appeals

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

The enabling legislation adds only a few insights into the Court’s jurisdiction. For instance, it specifies that appeal is obtained “upon petition.” Additionally, one statute equates the term “telephone service” with “telecommunications company,” thus defining the Florida Supreme Court’s jurisdiction to reach most forms of two-way communication for hire within the state. There appear to be no cases addressing

304. E.g., State v. City of Orlando, 576 So. 2d 1315, 1316-18 (Fla. 1991), receding from State v. City of Panama City Beach, 529 So. 2d 250 (Fla. 1988); see Fla. Const. art. VII, §§ 2, 10-17; Fla. Stat. § 75.01-75.17 (1991).
305. Northern Palm Beach County Water Control District v. State, 604 So. 2d 440 (Fla. 1992).
306. E.g., Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97 (Fla. 1983); State v. Osceola County Indus. Dev. Auth., 424 So. 2d 739 (Fla. 1982).
307. State v. Reedy Creek Improvement Dist., 216 So. 2d 202 (Fla. 1968) (case arose prior to adoption of the 1968 Constitution).
308. See Fla. Const. art. V, § 3(b)(2).
310. See id. § 364.381.
313. See Fla. Const. art. V, § 3(b)(2).
315. See id. § 364.02(7).
whether this statutory definition comports with the strict language of the constitution, which only uses the word “telephone.”

D. Statutory/Constitutional Invalidity

The final form of mandatory jurisdiction differs from the other three because it is not exclusive. By definition, cases involving statutory or constitutional invalidity are appealed from a district court decision that has stricken a provision of the Florida Statutes or state constitution.317 The plain language of the constitution requires that this decision must actually and expressly hold the statutory or constitutional provision invalid.318 Apparently, it is not enough that the opinion can merely be construed to have reached the same result tacitly.319 However, commentators have suggested that the Florida Supreme Court might properly exercise this type of jurisdiction in the rare event that a district court has summarily affirmed a lower court’s ruling expressly invalidating a statute.320 One possible basis for doing so could be the Court’s all writs jurisdiction, discussed below.

There was some concern at one point that this form of jurisdiction might only apply when a statutory or constitutional provision is declared facially invalid and not where invalidity was “as applied.”322 However, the Court has not recognized this distinction. “As applied” invalidity has

316. See Fla. Const. art. V, § 3(b)(2).
317. See id. § 3(b)(1).
318. Id. Any direct statement by a district court that a statute or constitutional provision is invalid almost certainly would be construed as a holding and thus part of the decision, even if unnecessary to the case. Review then could be had on that basis. However, the Florida Supreme Court did decline review in one case with peculiar facts. In Hanft v. Phelan, 488 So. 2d 531 (Fla. 1986), the court dismissed jurisdiction where invalidity was only one of several alternative holdings and the district court had remanded for an evidentiary hearing to determine which of the holdings was proper in the specific case. Id. at 532. Absent the remand for an evidentiary hearing, it seems unlikely that Hanft would have been dismissed merely because there were alternative holdings. Id.
319. For a discussion of this “inherent invalidity” argument, see Arthur J. England, Jr., et al., Florida Appellate Reform One Year Later, 9 Fla. St. U. L. Rev. 221, 229 (1981). As this article notes, the first “inherent invalidity” case in which jurisdiction was denied apparently was Southern Gold Citrus v. Dunnigan, 399 So. 2d 1145 (Fla. 1981). For a discussion of the now-abolished inherency doctrine see infra notes 342-43 and accompanying text.
321. See discussion infra part VII.E.
322. See Jurisdiction, supra note 320, at 170.
been used as the basis for jurisdiction, though the Court apparently has done so without comment by extension from earlier case law.\textsuperscript{323} Before the 1980 reforms, "as applied" jurisdiction had proven controversial, being disallowed in 1961,\textsuperscript{324} but then authorized again in 1963 by a divided court.\textsuperscript{325} The practice was reaffirmed in 1979 shortly before the most recent jurisdictional reforms, again by a fragmented court.\textsuperscript{326}

Earlier criticisms may still have some merit in that an "as applied" decision invalidates a statute or constitutional provision only in cases with similar facts. Thus, there is a less pressing reason for mandatory review, because the decision under appeal essentially leaves the statute or provision in effect but subject to a fact-specific exception. However, much of the earlier criticism arose from the fact that trial court orders declaring a statute invalid were directly appealable to the Florida Supreme Court.\textsuperscript{327} This is no longer the case. In any event, "as applied" cases have been relatively few and probably serve a useful function in settling partial doubts about a statute's enforcement.

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

Such problems cannot be completely eliminated, however. Any state court opinion striking a provision of the Florida Constitution could do so only on grounds that the provision violated the United States Constitution, a federal statute, or a treaty binding upon the state through the Supremacy Clause.\textsuperscript{328} That necessarily means that the Florida Supreme Court's resolution of the issue would rest entirely on federal questions that would be reviewable by the United States Supreme Court and could be decided

\begin{itemize}
\item \textsuperscript{323} See Psychiatric Assoc. v. Siegel, 610 So. 2d 419, 421-22 (Fla. 1992) (accepting jurisdiction for "as applied" invalidity).
\item \textsuperscript{324} Stein v. Darby, 134 So. 2d 232 (Fla. 1961).
\item \textsuperscript{325} Snedeker v. Vernmar, Ltd., 151 So. 2d 439 (Fla. 1963).
\item \textsuperscript{326} Cross v. State, 374 So. 2d 519 (Fla. 1979).
\item \textsuperscript{327} See Jurisdiction, supra note 320, at 166.
\item \textsuperscript{328} U.S. Const. art. VI, cl. 2.
\end{itemize}
differently by some federal courts. Thus the Florida Supreme Court’s determination of the case would not necessarily be the final word.

VI. DISCRETIONARY REVIEW JURISDICTION

The Florida Supreme Court’s discretionary review jurisdiction accounts for the largest share of the petitions that it receives. This type of jurisdiction is “discretionary” because the Court, in every instance, can decline to hear a case without reason, and in some instances must decline because the law restricts discretion. All cases brought under this type of jurisdiction technically are called “reviews,” as distinguished from “appeals,” though lawyers and justices alike sometimes use the terms interchangeably. The distinction between the terms is found in the constitution itself. In a more colloquial sense, “reviews” in this category do, in fact, constitute a type of “appellate” jurisdiction because the Court is reviewing actions taken by lower courts.

Jurisdiction over discretionary review cases is invoked when a party files two copies of a notice that review is being sought, which must be done within thirty days of rendition of the order in the case. The notice must be filed with the clerk of the district court, must be accompanied by the proper fee, and must be in the form prescribed by rule. Briefing on jurisdiction is allowed in all cases except where the district court has certified a question of great public importance, or has certified that the case is in direct conflict with the decision of another district court.

A. Declaration of Statutory Validity

The first type of discretionary review jurisdiction governs district court decisions expressly declaring a state statute valid. For jurisdiction to

329. For a discussion of “discretion” see supra part III.A.3.
330. For a discussion distinguishing reviews from appeals see supra text accompanying note 279.
331. See Fla. Const. art. V, § 3(b).
332. Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to some exceptions. See Fla. R. App. P. 9.020(g).
333. Id. at 9.120(b).
334. See id. at 9.200(b-c), 9.900.
335. Id. at 9.120(d). “Certified question” is discussed infra part VI.E. “Certified conflict” is discussed infra part VI.F.
exist, the decision under review must contain some statement to the effect that a specified statute is valid or enforceable.\textsuperscript{337} The constitution does not directly say whether the statement must be necessary to the result reached. In a highly analogous context, however, the Court has expressly premised its jurisdiction on statements that were dicta.\textsuperscript{338}

This conclusion is justifiable in the sense that dicta have persuasive force. At first blush, however, it does seem somewhat at odds with the constitution's requirement that jurisdiction be based on a "decision."\textsuperscript{339} At least in other contexts, the decision is the result reached and is not gratuitous dicta in the opinion.\textsuperscript{340} However, the Florida Supreme Court has indicated that the term "decision," as used in the constitution's jurisdictional sections, encompasses not merely the result but also the entire opinion.\textsuperscript{341} In any event, the fact that a statute is declared valid in dicta may lessen the desire of the Court to exercise its discretion over the case, unless perhaps some injustice may result if the dicta are given effect by other courts.

Historically, the 1980 jurisdictional amendments overruled the so-called "inherency doctrine"\textsuperscript{342} by which review might be had if the Court found that an opinion tacitly found a statute valid.\textsuperscript{343} This might occur, for example, where the opinion applied the statute as though it were valid but did not directly make a finding of validity. Following the 1980 amendments, the inherency doctrine has not been mentioned or used, and obviously is no longer viable.

B. Construction of State or Federal Constitutions

The second form of discretionary jurisdiction arises when the decision of the district court below expressly construes a provision of the state or federal constitutions.\textsuperscript{344} The operative phrase "construes a provision" was

\textsuperscript{337} See Cantor v. Davis, 489 So. 2d 18 (Fla. 1986).
\textsuperscript{338} Watson Realty Corp. v. Quinn, 452 So. 2d 568, 569 (Fla. 1984) (involving express and direct conflict of decisions).
\textsuperscript{339} See Fla. Const. art. V, § 3(b)(3).
\textsuperscript{340} The Court has recognized the importance of the distinction in analogous contexts. See Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980) (jurisdiction based on express and direct conflict of decisions of different courts of appeal or the supreme court).
\textsuperscript{341} Seaboard Air Line R.R. v. Branham, 104 So. 2d 356, 358 (Fla. 1958).
\textsuperscript{342} See Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959).
\textsuperscript{343} See Jurisdiction, supra note 320, at 183.
\textsuperscript{344} Fla. Const. art. V, § 3(b)(3).
imported into the 1980 jurisdictional reforms essentially unchanged from what had existed previously, with the word "expressly" being an addition.\textsuperscript{345} Commentators in 1980 stated their view that the new requirement of "expressness" merely codified prior case law,\textsuperscript{346} a view the Court apparently has neither accepted nor rejected. However, it does seem likely that pre-1980 case law on this type of jurisdiction remains persuasive at least to some extent.

Prior to the 1980 reforms, the Court held that the inherency doctrine does not apply to this type of jurisdiction.\textsuperscript{347} Rather, the decision under review had to "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision."\textsuperscript{348} The key word was "doubts": The opinion under review had to contain a statement recognizing or purporting to resolve some doubt about a constitutional provision. Moreover, this statement had to be a "ruling" that was more than a mere application of a settled constitutional principle.\textsuperscript{350} Absent the obligatory act of construction, it was not enough that a petitioner simply alleged an unconstitutional result.\textsuperscript{351} Commentators called this the "explain or amplify" requirement.\textsuperscript{352}

On policy grounds, this entire analysis still makes good sense. The Florida Supreme Court is the one state court that can resolve legal doubts on a statewide basis. Resolving constitutional doubts is a highly important function because it results in more predictable organic law. No similar purpose is served by the Court hearing a case that has merely reiterated settled principles. The Court's function, in other words, is to say whether an evolution in constitutional law developed by the lower appellate courts is proper,\textsuperscript{353} or to resolve a doubt those courts have expressly noted.\textsuperscript{354}

\begin{itemize}
  \item \textsuperscript{345} See Jurisdiction, supra note 320, at 184-85.
  \item \textsuperscript{346} Id. at 184.
  \item \textsuperscript{347} Ogle v. Pepin, 273 So. 2d 391, 392 (Fla. 1973).
  \item \textsuperscript{348} Id. (quoting Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958)).
  \item \textsuperscript{349} Dykman v. State, 294 So. 2d 633, 635 (Fla. 1973), cert. denied, 419 U.S. 1105 (1975).
  \item \textsuperscript{350} Rojas v. State, 288 So. 2d 234, 236 (Fla. 1973), cert. denied, 419 U.S. 851 (1974).
  \item \textsuperscript{351} Carmazi v. Board of County Com'mrs, 104 So. 2d 727, 728-29 (Fla. 1958).
  \item \textsuperscript{353} Any evolution in law by a lower court inherently creates a "doubt": Is the new principle or the new application correct?
  \item \textsuperscript{354} A district court sometimes may outline its doubts about what appears to be a settled constitutional principle it is applying. The statement of doubt creates an issue that sometimes may deserve resolution by the Florida Supreme Court.
\end{itemize}
The Court's recent cases on this form of jurisdiction seem to be in accord with the pre-1980 analysis outlined above. 355

There are a few problems, however. For one thing, the line that separates "explain or amplify" from "mere application" has sometimes been hard to see. In the 1975 case Potvin v. Keller, 356 for example, the Court's majority reviewed a district court opinion that merely mentioned the appellants' Fourteenth Amendment argument, and then affirmed the trial court's order without stating whether the Fourteenth Amendment had any bearing on the decision. 357 The Florida Supreme Court's majority in Potvin buttressed its jurisdiction with the following explanation: The district court had "ruled" that "no constitutional infirmity" existed based on the specific facts at hand. 358

Later in the opinion's analysis, the majority also noted that the district court's opinion "may" have overstated federal case law when talking about constitutional and statutory rights that were not further identified. 359 Thus, the district court arguably had tried to eliminate a doubt about the Fourteenth Amendment. A misapplication of settled law obviously can be viewed as an evolutionary development deserving correction; but on Potvin's peculiar facts, some straining was needed to reach so far, especially because the lower court's result was affirmed.

The strain is especially evident when a second question is posed: How specifically must the district court identify a constitutional provision it is construing? The district court in Potvin did not premise its actual holding on any specific provision, though the court probably misconstrued a federal case dealing with the Fourteenth Amendment. In other words, a reader could not finally determine that the Fourteenth Amendment was being construed in Potvin without reading, or having prior knowledge of, the federal case cited therein. 360

This analysis risks creating a kind of "cross-reference" jurisdiction any time an opinion cites to materials analyzing a constitutional provision. Such a possibility is very difficult to square with the requirement that construction must be "express." Potvin probably is best understood as a dated and

355. E.g., Foster v. State, 613 So. 2d 454 (Fla. 1993); City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992); City Nat'l Bank v. Tescher, 578 So. 2d 701 (Fla. 1991).
356. 313 So. 2d 703 (Fla. 1975), affg 299 So. 2d 149 (Fla. 3d Dist. Ct. App. 1974).
357. Id. at 704 & n.1.
358. Id. at n.1.
359. Id. at 705 & n.4.
marginal case in which the Florida Supreme Court stretched the envelope of its jurisdiction to correct a deficient lower court analysis that, nevertheless, had reached a correct result. Moreover, the 1980 jurisdiction amendments could be viewed as superseding Potvin by adding the requirement that constitutional construction be "express." 361

The better approach is the one suggested in the Court's earlier cases. For jurisdiction to exist, the district court's opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point. 362 Misapplication of earlier law could rise to this level to the extent that it can be considered an evolutionary development; but even then, the decision under review should at least be grounded in the discussion of a specific constitutional provision. Obviously, it would be needlessly bureaucratic to require a formal method of citation. Any reference sufficient to identify some constitutional provision ought to qualify, even a clipped reference like "full faith and credit." 363

It remains to be seen whether dicta can be a sufficient basis for jurisdiction in cases of this type. The court has expressly used dicta to establish jurisdiction in analogous contexts, 364 and thus, probably could do so here as well. Dicta establishing some new principle of constitutional law would have persuasive value, though perhaps not quite amounting to "rulings." 365 Review might be justified on that basis, especially where the dicta could be disruptive. But in any event, jurisdiction remains discretionary and could be declined if the dicta seem harmless.

C. Opinions Affecting Constitutional or State Officers

The third basis of discretionary review jurisdiction exists when a decision of a district court expressly affects a class of constitutional or state officers. 366 Again, the operative language here was imported nearly unchanged from the pre-1980 constitution, but with the word "expressly" added. Commentators in 1980 noted that the "expressness" requirement had the principle purpose of foreclosing any review of a district court decision

361. FLA. CONST. art. V, § 3(b)(3).
362. Ogle, 273 So. 2d at 391; Dykman, 294 So. 2d at 633.
363. See Holbein v. Rigot, 245 So. 2d 57, 59 (Fla. 1971).
364. Watson Realty Corp. v. Quinn, 452 So. 2d 568, 569 (Fla. 1984).
365. See Dykman, 294 So. 2d at 635. But cf. Seaboard Air Line R.R., 104 So. 2d at 358 (term "decision" as used in the constitution's jurisdictional provisions includes the entire written opinion).
366. FLA. CONST. art. V, § 3(b)(3).
issued without opinion.\textsuperscript{367} The Court has adopted this view.\textsuperscript{368} Other than that, the pre-1980 case law was largely unaffected and probably remains persuasive.

In 1974, the Court held that a decision does not fall within this type of jurisdiction unless it meets a very restrictive test; it must "directly and, in some way, exclusively affect the duties, powers, validity, formation, termination, or regulation of a particular class of constitutional or state officers."\textsuperscript{369} Thus, the decision must do more than simply modify, construe, or add to the general body of Florida law. If other criteria are met, it is not necessarily dispositive that members of a valid class were or were not litigants in the district court.\textsuperscript{370} The Court has also said that jurisdiction could exist even where no class members were parties to the action, provided the decision affects the entire class in some way "unrelated to the specific facts of that case."\textsuperscript{371}

Most of the cases seem to assume that the parties to the proceedings below are the ones allowed to seek review in the Florida Supreme Court, even though they may not be members of the "affected class." However, this has not always been true. One case, \textit{In re Order on Prosecution of Criminal Appeals},\textsuperscript{372} allowed jurisdiction even though review was sought by governmental agencies not actually a party in the proceedings below.\textsuperscript{373} In any event, the case had very unusual facts, and may have been erroneously assigned to this particular subcategory of jurisdiction.

The case arose in 1990 when a district court entered a \textit{sua sponte} order prohibiting a public defender from bringing appeals arising outside his own circuit. The incidental effect was to require public defenders in other circuits to handle their own appeals; and because the other circuits lacked adequate resources, county governments would be forced to pay for court-appointed private lawyers. After the order was entered, several county governments then filed a "motion for rehearing," which was summarily denied. The county governments next obtained review in the Florida Supreme Court, based not on their own constitutional status, but on the fact

\textsuperscript{367} See Jurisdiction, \textit{supra} note 320, at 187.
\textsuperscript{368} See School Bd. of Pinellas County v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).
\textsuperscript{369} Spradley \textit{v.} State, 293 So. 2d 697, 701 (Fla. 1974).
\textsuperscript{370} \textit{Id}.
\textsuperscript{371} \textit{Id}.
\textsuperscript{372} 561 So. 2d 1130 (Fla. 1990).
\textsuperscript{373} \textit{Id}.
that the district court’s order incidentally affected the duties of public
defenders. 74

Presumably the act of filing the "motion for rehearing" somehow made
the county governments a "party," but this is not at all clear. The summary
order of dismissal is equally consistent with the view that the district court
refused to recognize the county governments as a party. Moreover, it
appears that no one raised or argued any objections to jurisdiction when the
matter was brought to the Florida Supreme Court. It thus seems highly
unlikely that the Court was creating any form of "third-party standing."

Whatever the case, In re Order on Prosecution of Criminal Appeals
probably is better characterized as an exercise of the Court’s "all writs"
jurisdiction, which is discussed in greater detail below. 375 "All writs"
review previously has been allowed to bring serious governmental crises for
expedited review where some factual or procedural quirk threatens to
deprive the Court of its "ultimate jurisdiction." 376 That situation almost
certainly existed here, where a technical lack of standing might have
frustrated the Florida Supreme Court's ultimate ability to review the
case. 377 On the whole, In re Order on Prosecution of Criminal Appeals
probably is better characterized as an all-writs case in which the wrong basis
of jurisdiction was cited.

Another problem in this form of jurisdiction is the definition of the
phrase "class of constitutional or state officers." The Court has held that the
word "class" at the very least means there must be more than one officer of
the type in question. 378 As a result, a decision affecting only the State
Treasurer or only the Secretary of State does not establish jurisdiction.
Likewise, there is no jurisdiction over a decision affecting only a single
board with multiple members where the sole powers affected are those of
the board as a single entity. 379 In such a situation, the entity constitutes
only one "officer." 380

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74. Id. at 1131-33; see Brief on Jurisdiction of Collier County, In re Order on
Prosecution of Criminal Appeals, 561 So. 2d 1130 (Fla. 1990) (No. 74,574).
375. See discussion infra part VII.E.
376. E.g., Florida Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982).
377. See discussion supra part III.A.3 for a discussion of the reasons why the lack of
standing might have frustrated the court’s ultimate ability to review the case.
378. Florida State Bd. of Health v. Lewis, 149 So. 2d 41, 43 (Fla. 1963).
379. Id.
380. Id.
The fact that an office or board is unique, thus, almost always means there is no jurisdiction. But jurisdiction would exist, for example, where a decision affects every board of county commissioners in the state in some way peculiar to them as a class. At a minimum, there must be two or more officers or entities who separately and independently exercise identical powers of government that are peculiarly affected by the district court's decision.

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

381. The opinion in State v. Bowman, 437 So. 2d 1095 (Fla. 1983), at first blush, seems to reach a contrary result: The district court's opinion primarily affected the Attorney General, a unique office. Moreover, the Attorney General was the one who brought the case to the Florida Supreme Court. However, Bowman involved a question of whether a particular duty fell to the Attorney General or to the various State Attorneys throughout Florida. Thus, there was a "class" of constitutional officers whose duties were at stake. Bowman may be significant in that sense because the district court's opinion had determined that the duty in question fell to the Attorney General, not to the State Attorneys. Thus, Bowman tacitly recognizes jurisdiction where the district court's decision holds that the "class" of officers has no duty to act in a particular situation. Bowman is also significant in that it tacitly recognizes jurisdiction even where the petition for review is not brought by a member of the affected class—a conclusion supported by other cases. See In re Order on Prosecution of Criminal Appeals, 561 So. 2d at 1130.

382. Lewis, 149 So. 2d at 43.

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

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

385. For example, the Florida Constitution mentions "municipal legislative bodies." FLA. CONST. art. VIII, § (2)(b). Yet, the case law indicates that a city official is not a constitutional or state officer. Estes v. City of N. Miami Beach, 227 So. 2d 33, 34 (Fla. 1969).
The term "state officer" remains somewhat more vague. It apparently does not include purely local entities not created by the constitution itself. Beyond that, the Court has said little. There has been no definitive statement that all local officials and entities are excluded if they fail to qualify as constitutional officers. A good argument can be made that a "class of state officers" should include offices of trust created by statute and authorized to independently exercise identical powers of government as part of some larger statewide scheme. Examples might include the governing boards of Florida's water management districts. However, this is an issue that remains undecided.

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

D. Express and Direct Conflict

By far the largest and most disputatious subcategory is jurisdiction premised on express and direct conflict, usually called simple "conflict

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

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


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

Jurisdiction. Jurisdiction of this type exists where the decision of the district court expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law. This relatively straightforward statement has taken on great complexity in practice. Conflict jurisdiction also is the subcategory most affected by the somewhat arcane distinction between "jurisdiction" and "discretion."

Historically, the 1980 jurisdictional reforms had one of the greatest effects on this type of jurisdiction. Prior to the amendments, a much broader form of conflict jurisdiction existed. It had come into existence in 1965 when a divided Florida Supreme Court held that conflict jurisdiction could exist over decisions affirming the trial court without opinion, in which the entire opinion usually said nothing but "PER CURIAM. AFFIRMED." (These opinions often are identified by the acronym "PCA.") Obviously, the determination of "conflict" in such cases only could be made by looking at the record, not from a review of the opinion under review.

By definition, a PCA establishes no precedent beyond the specific case, and Florida Supreme Court review thus, was of questionable utility. Through the years, the ability to review PCAs grew increasingly onerous and was sternly criticized, even by members of the Court. The criticisms, along with the Court's overburdened docket, led directly to the 1980 constitutional reforms.

1. The Elements of Obtaining Conflict Review

As a result of the 1980 reforms and the cases construing them, the Court potentially has conflict jurisdiction only over a district court decision

391. The term "conflict jurisdiction" is almost never used to refer to "certified conflict," which is a separate subcategory. See discussion infra part VI.F.

392. The term "decision" has been held to include both the judgment and opinion for purposes of the Florida Supreme Court's jurisdiction over "decisions." Seaboard Air Line R.R., 104 So. 2d at 358.

393. Fla. Const. art. V, § 3(b)(3).

394. See supra part III.A.

395. Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1965), overruling Lake v. Lake, 103 So. 2d 639 (Fla. 1958).

396. PCAs should be distinguished from "per curiam" opinions issued by the Florida Supreme Court, which are very different in nature. See discussion supra part II.D.

containing at least a statement by a majority (however short) or a
majority citation to authority. If there is any question, petitions seeking
jurisdiction are brought to the justices and their staffs. At this point, there
must be some further examination to determine if several threshold
requirements have been met.

This examination is constrained by the "four-corners" rule: Conflict
must "appear within the four corners of the majority decision" brought for
review. There can be no examination of the record, no second-guessing
of the facts stated in the majority decision, and no use of extrinsic materials
to clarify what the majority decision means. In the vast majority of cases,
the Court strictly honors the four-corners rule, though there are rare cases
difficult to square with it.

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

a. Does Jurisdiction Exist?

The most obvious effect of the 1980 reforms was to eliminate
completely the Court's jurisdiction over a large number of PCAs—those
issued without statement or citation. If a PCA includes no statement by a
majority (however short) and no majority citation to authority, then the
Court completely lacks jurisdiction to review the case. Statements in
a separate opinion, whether dissenting or concurring, are not sufficient if
there is no majority statement or citation.

It deserves to be stressed that jurisdiction is completely absent in these
cases; it is not that the Court simply lacks discretion to hear the cause.

398. The court has held that discussion of the "legal principles which the court applied
supplies a sufficient basis for a petition for conflict review." Ford Motor Co. v. Kikis, 401
So. 2d 1341, 1342 (Fla. 1981). There is no requirement that the district court opinion must
explicitly identify conflicting decisions. Id.
400. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Here, the court clearly is using
the term "decision" to encompass both the result and the entire opinion; accord Seaboard
Air Line R.R., 104 So. 2d at 358.
402. Id.
403. The Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988). In other words,
any further appeal from a PCA issued without a majority statement or citation can be had
As a result, the Clerk of the Court routinely issues a form summary denial in most cases brought for review to the Court based on a PCA that lacks a majority statement or citation to authority. The justices and their staffs usually do not review these petitions, and filing them thus is a complete waste of time, resources, and money.

The case law has established only one other category of district court opinions over which the Court may completely lack conflict jurisdiction. These are PCAs that contain nothing but a citation to authority (called "citation PCAs"). In 1988, the Court distilled much of its earlier law on this question into a single formula. In *The Florida Star v. B.J.F.*, the Court said that there is no jurisdiction over a citation PCA unless "one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court."

As noted earlier, the failure to meet any of these requirements strips the Court of all jurisdiction, which can have significant consequences when further appeal may be sought in the United States Supreme Court.

As is apparent from the language quoted here, the citation to authority must be to a case issued by a Florida district court of appeal or by the Florida Supreme Court. A citation to a statute, administrative or court rule, federal case, or case from another jurisdiction is insufficient in itself to establish discretion for a review.

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

only in the United States Supreme Court, in its discretion. Appearing to bring the case for review in the Florida Supreme Court may have the effect of barring an appeal to the United States Supreme Court, because the time to file the appeal most likely will be consumed. *Id.*

Theoretically there could be another: PCAs that contain only a statement insufficient to establish a point of law, without citation. The Court apparently has never addressed this question.

404. *530 So. 2d* at 286.
405. *Id.* at 288 n.3 (citing *Jollie v. State*, *405 So. 2d* 418, 420 (Fla. 1981)).
406. *See supra* text accompanying note 206-09.
407. *The Florida Star*, *530 So. 2d* at 288 n.3 (citing *Jollie*, *405 So. 2d* at 420).
408. *FLA. CONST.* art. V, § 3(b)(3).
409. *Jollie*, *405 So. 2d* at 420.
supreme court jurisdiction. The latest inconsistent opinion is deemed to overrule the earlier.411

On the other hand, jurisdiction exists if there is any notation in a citation PCA (or any other type of opinion, for that matter) of contrary case law issued by another district court of appeal or the Florida Supreme Court.412 This may be as simple as a citation beginning with the signals “contra” or “but see,”413 because they indicate contradiction. A citation beginning with “but cf.” may be insufficient414 because the signal indicates contradiction only by analogy,415 which may not meet the constitutional requirement of “direct” conflict.416

Often, a citation PCA may include a parenthetical statement that conflict exists. The statement can establish jurisdiction only if it is accurate417 and identifies a specific opinion of another district court or the Florida Supreme Court as the basis for conflict. But when this happens, it is possible that jurisdiction may exist on a completely independent basis—the Court’s “certified conflict” jurisdiction, discussed below.418 The possibility always should be considered, because “certified conflict” is a less restrictive form of jurisdiction.419

412. See Stevens v. Jefferson, 436 So. 2d 33, 34 & n.* (Fla. 1983), affg 408 So. 2d 634 (Fla. 5th Dist. Ct. App. 1981). A district court may seem foolish recognizing contrary authority from the Florida Supreme Court, but this sometimes happens with good reason. In Watson Realty Corp. v. Quinn, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983), the First District Court of Appeal noted that it was departing from dicta issued by the Florida Supreme Court in Canal Authority v. Ocala Manufacturing, Ice & Packing Co., 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983) (citing Canal Auth. v. Ocala Mfg., Ice & Packing Co., 332 So. 2d 321 (Fla. 1976)). The district court believed the dicta to be incorrect, and the Florida Supreme Court later agreed. Watson Realty Corp. v. Quinn, 452 So. 2d 568 (Fla. 1984).
413. See Frederick v. State, 472 So. 2d 463 (Fla. 1985), affg 472 So. 2d 463 (1985).
414. Such citations are rare. See, e.g., Cherry v. State, 618 So. 2d 255 (Fla. 1st Dist. Ct. App. 1993); Phelps v. State, 368 So. 2d 950 (Fla. 2d Dist. Ct. App. 1979). No further review was taken in either of these cases.
416. FLA. CONST. art. V, § 3(b)(3).
417. The accuracy requirement arises from the plain language of the constitution that there must be express and direct conflict appearing on the face of the decision below. FLA. CONST. art. V, § 3(b)(3). The fact that the parties assert conflict in their jurisdictional briefs will not supply this requirement, even if both parties erroneously conclude that conflict exists.
418. See discussion infra section VI.F.
419. See infra text accompanying notes 493-95.
b. Does Discretion Exist?

Except for PCAs that fail to meet the criteria outlined above, the Florida Supreme Court technically has jurisdiction over all other district court opinions. However, that is not the end of the matter. The Court may still lack discretion to hear the particular case. As noted earlier, the distinction between “jurisdiction” and “discretion” is somewhat arcane and really is relevant only in determining the time to bring appeals to the United States Supreme Court. So, in common usage, lawyers and justices often tend to speak of both under the rubric “jurisdiction.”

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

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

In The Florida Star, the Court said that jurisdiction exists if a district court decision contains any statement or citation that “hypothetically could create conflict if there were another opinion reaching a contrary result.” However, discretion is still limited by the conflict requirement; a petitioner, therefore, also must establish that discretion to hear the case

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420. The Florida Star, 530 So. 2d at 288-89.
421. Id.
422. Id.
423. Id.
425. The Florida Star, 530 So. 2d at 288.
426. Id.
genuinely exists. Any petition arguing "hypothetical conflict" alone would fail to address the discretion problem, and could be denied on that basis.

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

(i) "Holding" Conflict

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

For example, a district court in 1992 issued an opinion expressly applying the doctrine of interspousal immunity in a particular case. While review was pending, the Florida Supreme Court issued an opinion in another case holding that the doctrine of interspousal immunity no longer existed in Florida. These two opinions are in actual and irreconcilable conflict with one another, because the holding of one cannot stand if the other is true. Conflict jurisdiction therefore exists.

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

427. *E.g.*, Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985); see Fla. Const. art. V, § 3(b)(3).
429. Waite v. Waite, 618 So. 2d 1360 (Fla. 1993).
(ii) Misapplication Conflict

A separate kind of conflict occurs when the decision of the district court misapplies controlling precedent.430 “Misapplication conflict” thus is not precisely the same as “holding conflict,” because the cases involved are distinguishable. The conflict arises because the district court has failed to distinguish the cases properly. In other words, no conflict would have existed had controlling precedent been read and applied properly. Misapplication conflict comes in three varieties: “erroneous reading” of precedent, “erroneous extension” of precedent, and “erroneous use” of facts.

“Erroneous reading” cases are the most clearly justifiable of the three because they involve a purely legal problem: Was the law properly stated? Thus, they sometimes verge on being “holding conflict” cases. For example, in 1982, the Court confronted a case in which the district court first had misinterpreted controlling precedent on awards of punitive damages and then had applied the misinterpretation to the case. The Florida Supreme Court accepted jurisdiction expressly because of misapplication conflict.431 This was not precisely a “holding conflict” case, however. Two dissenting justices argued that the district court actually had read the precedent correctly.432 In other words, misapplication was not necessarily clear until the Court’s majority decided the matter.

“Erroneous extension” cases are those in which the district court correctly states a rule of law but then proceeds to apply the rule to a set of facts for which it was not intended. In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two. This type of conflict is easily masked as some other type of conflict, and for that reason is seldom expressly discussed in majority opinions. The fact of the erroneous extension is occasionally noted in opinions dissenting as to a denial of jurisdiction.433 Prior to 1980, the Court expressly had recognized “erroneous extension” as a valid basis of conflict jurisdiction.434

“Erroneous use” cases are those in which the district court misapplies a rule of law based on its own misperception of the facts.435 This is the most troublesome form of misapplication conflict, because it often tests the

430. E.g., Acensio v. State, 497 So. 2d 640, 641 (Fla. 1986).
431. Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1041 (Fla. 1982).
432. Id. at 1043 (Sundberg, C.J., dissenting, joined by Adkins, J.).
434. Sacks v. Sacks, 267 So. 2d 73, 75 (Fla. 1972).
435. E.g., Acensio, 497 So. 2d at 640.
strength of the four-corners rule. Sometimes the factual error may be
evident on the face of the opinion, but often it is not. For example, in
1985, the Court accepted jurisdiction in a case where the district court had
"overlooked" a relevant factual finding of the trial court. Although
controlling law was stated properly, the district court's opinion improperly
applied the law because of the overlooked finding.436

The discretion to review such cases really is only justifiable where the
factual error is apparent within the four corners of the opinion being
reviewed.437 The justification becomes tenuous otherwise. In State v.
Stacey,438 for example, the district court opinion did in fact "overlook" the
relevant finding. At best, the possibility of the error could be inferred from
the district court opinion, but the facts stated therein were not complete
enough to show that error was clear. "Inferential" factual error is a very
slim reed to support a finding of express and direct conflict.439 Obviously,
the justification for a review becomes even less justifiable if the existence
of the error cannot even be inferred from material contained within the four
corners of the district court opinion. Thus, to some extent the Florida
Supreme Court violated the four-corners rule in accepting jurisdiction; and
that case is probably best understood as marginal and anomalous.

Finally, there is a possibility that a case may involve an alleged
misapplication of dicta. In 1984, the Court accepted a case based on
conflict with dicta in a prior Florida Supreme Court opinion, although the
Florida Supreme Court overruled the dicta rather than the district court.440
If "dicta conflict" existed in that context, it probably also could exist as a
form of misapplication conflict. Dicta conflict can be justified in light of
the fact that the Florida Supreme Court elsewhere has suggested that its
jurisdiction over "decisions" can rest on anything in a written opinion, not
merely a judgment or result.441

For example, a scholarly opinion may make broad statements of law
that are actually dicta, yet these statements express an opinion about some
legal point. Later a district court conceivably could find the dicta persuasive

436. State v. Stacey, 482 So. 2d 1350, 1351 (Fla. 1985).
437. The court elsewhere has said that in determining conflict there can be no
consideration of facts outside the four corners of the opinion. Hardec v. State, 534 So. 2d
706, 708 (Fla. 1988).
438. 482 So. 2d 1350 (Fla. 1985).
439. See Department of Health & Rehab. Servs. v. National Adoption Counseling Serv.,
Inc., 498 So. 2d 888, 889 (Fla. 1986) (conflict cannot be inferred or implied).
440. Watson Realty Corp., 452 So. 2d at 568.
and then misapply them. In such a situation, all the reasons justifying review of misapplication conflict also would apply: Review would be warranted to the extent the misapplication may create confusion in the law or reach an incorrect or unfair result.

(iii) Apparent Conflict

Another category is "apparent conflict," which arises when a district court opinion only seems to be in conflict, though there may be some reasonable way to reconcile it with the case law. A cramped reading of the constitution might suggest that discretion should not be allowed here. However, such an approach ignores the real problem. Until the Florida Supreme Court harmonizes cases that seem to be in conflict, for all intents and purposes, there is an actual conflict. The mere fact that conflict can be eliminated on review does not resolve the conflict retroactively.

Moreover, it would be bad practice to deprive the Court of discretion merely because there is some way to harmonize cases without overruling any of them. This amounts to saying that the Court, in conflict cases, can review only if it negates, which will not always be desirable policy. The Florida Supreme Court should not be forced either to decline jurisdiction or overrule essentially sound decisional law whose relation to other cases is simply uncertain.

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

Apparent conflict sometimes may arise from a prior district-court opinion that simply is not very precise. In 1988, for example, the Court accepted a case based on apparent conflict with another district court

442. See Fla. Const. art. V, § 3(b)(3).
443. "Recede" is the term of art used when the court overrules its own decisions in whole or in part.
444. Public Health Trust of Dade County v. Menendez, 584 So. 2d 567 (Fla. 1991).
445. Id. at 569-70.
opinion that had not stated sufficient facts for anyone to determine whether the ruling was correct.\textsuperscript{446} In that sense, the earlier case could be considered overbroad, but was not necessarily so. The Florida Supreme Court resolved the apparent conflict by disapproving the earlier case “only to the extent that it may be inconsistent” with a correct and complete statement of the relevant law.\textsuperscript{447} In a similar case, the Court said that conflict exists if a rule of law is stated vaguely or imprecisely enough to create a “fair implication” of conflict.\textsuperscript{448}

Of course, the Court need not overrule anything. In a sizable number of apparent conflict cases, the Court harmonizes all the “conflicting” cases, thus completely eliminating any possible conflict.\textsuperscript{449} In 1990, for example, the Court accepted review in a case “because of apparent conflict with the decisions of several district courts of appeal.”\textsuperscript{450} The Court then engaged in an extensive examination of these cases, harmonized them, and made a holding without overruling anything.

In a sense, dicta conflict can be viewed as a type of apparent conflict because dicta are not binding precedent; and thus, there cannot be an actual conflict of holdings. As noted above, however, the Court has accepted review based on dicta conflict, although these cases seem more the exception than the rule.\textsuperscript{451} Dicta conflict also may blur into the category of misapplication conflict.\textsuperscript{452}

(iv) “Piggyback” Conflict

The final category of conflict is “piggyback” conflict. Discretion over these cases arises because: (a) they cite as controlling precedent a decision of a district court that is pending for review in, or has been overruled by, the Florida Supreme Court; or (b) they cite as controlling precedent a

\textsuperscript{446} D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988).
\textsuperscript{447} Id. at 1348.
\textsuperscript{448} Hardee, 534 So. 2d at 708. These examples also demonstrate applications of the four-corners rule: The court should confine its determination to the four corners of the conflicting district court opinions, making no attempt to review the record in the earlier district court. The decision whether discretion exists must be made based on the facts as stated in the four corners of the “conflicting” opinions. Id.
\textsuperscript{449} E.g., Fitzgerald v. Cestari, 569 So. 2d 1258 (Fla. 1990); Cross v. State, 560 So. 2d 228 (Fla. 1990); Balthazar v. State, 549 So. 2d 661 (Fla. 1989); Conway Land, Inc. v. Terry, 542 So. 2d 362 (Fla. 1989).
\textsuperscript{450} Fitzgerald, 569 So. 2d at 1258.
\textsuperscript{451} Watson Realty Corp., 452 So. 2d at 568.
\textsuperscript{452} See discussion supra part VI.D.1.b.ii.
decision of the Florida Supreme Court from which the Court now has receded.\(^{453}\) A considerable number of cases falling within this category are citation PCAs, but not all are. The district courts sometimes issue lengthy opinions resting on precedent that is pending review in the Florida Supreme Court or precedent that is later overruled.

There are good reasons for allowing this type of discretion. For example, the lower appellate courts often have a large number of cases before them dealing with the same legal issue. To save both time and resources, one case is selected as the "lead case" to be decided with a full opinion, while the others are resolved in short opinions that often do little more than cite to the lead case. It is illogical and unfair to say the Florida Supreme Court has discretion to take the lead case but not the "companion" cases. For this reason, the Court accepts the bulk of "piggyback" cases for review, though these often are handled as no request cases.\(^{454}\)

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

This leads to another problem: "Piggyback" conflict sometimes may be only an inchoate, unrealized possibility at the time when review must be sought. For example, the Florida Supreme Court may be uncertain for a time whether it will accept a lead case for review. Perhaps the justices are divided on the correctness of the lead case or they are uncertain as to whether they have discretion to hear it. During the interim, jurisdiction remains inchoate.

In such instances, the Court typically follows a practice of postponing its decision on jurisdiction and sometimes permits parties to brief the substantive issues in the interim.\(^{455}\) Once the lead case is accepted for review, the companion cases may be accepted, except on some occasions when "piggyback" cases actually reached the correct result. A denial of jurisdiction in the lead case eliminates "piggyback" jurisdiction, meaning that review will be declined in the companion cases unless some other basis for jurisdiction exists.

\(^{453}\) The Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988) (citing Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981)).

\(^{454}\) See discussion supra Section II.B.2.

\(^{455}\) FLA. R. APP. P. 9.120(e).
c. "Is the Case Significant Enough?"

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

It is worth noting that the act of accepting review based on conflict vests the Court with power to hear every issue in the case, not merely the conflict issues. As a result, these "nonconflict" issues sometimes may weigh with the Court in deciding whether to accept review. However, the fact that these issues may seem important will not cure a lack of conflict. Finally, the Court also has inherent authority not to address nonconflict issues if it chooses. Doing so establishes no supreme court precedent as to these issues.

2. Briefing on Conflict Jurisdiction

For parties to invoke the Court's conflict jurisdiction, they must file jurisdictional briefs with the Court. The Rules of Court limit these briefs to ten pages. However, the best briefs on conflict jurisdiction are shorter and make their points with direct, plain language. If conflict truly exists, all the brief need do is quote something from the district court opinion, show how it conflicts with a statement in another proper case, and then explain the importance of the case. For "piggyback" jurisdiction, it is sufficient (and imperative) to note the fact that a case cited in the district court opinion is pending review or has been disapproved or receded from.

456. See Wainwright v. Taylor, 476 So. 2d 669, 670-71 (Fla. 1985) (petition dismissed in interests of judicial economy where outcome would not be different and where erroneous statement of law had been corrected by other means).
457. Bankers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530, 531 (Fla. 1985); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982).
458. See, e.g., Thom v. McAdam, 626 So. 2d 184 (Fla. 1993).
In many cases, the actual point of the jurisdictional brief usually can be established in two pages or less per conflict issue⁴⁶⁰ (not including appendices) if conflict genuinely is clear. Of course, the existence of conflict often is not so certain, meaning that a brief must engage in a lengthier and more convoluted argument to establish the Court’s discretion over the case. Within the ten-page limit, the Court will not reject a petition simply because it is longer or wordy. However, the justices almost always view lengthier petitions as a kind of tacit concession that the alleged conflict is not clear. Attorneys who could make their points with less verbiage should consider whether they want to handicap their case with a longer brief.

Appendices should consist only of a copy of the decision below and a copy of the alleged conflict cases. Anything else is irrelevant and will be ignored, especially copies of material from the record. Under the four—corners rule, the record cannot be used to establish conflict, and attorneys who ignore this fact do themselves and their clients a disservice. The Court sometimes receives voluminous appendices that obviously cost a good deal to compile, reproduce, and bind. This is a pity, because such material has no purpose other than adding to the Court’s drive to collect recyclable paper.⁴⁶¹

Except for some PCAs in which jurisdiction is clearly lacking, nearly all jurisdictional briefs are handled and decided by the justices. Some justices routinely have their law clerks and interns prepare a brief memorandum summarizing relevant facts and holdings and making a recommendation. Other justices handle all “determinations of jurisdiction” (“DOJs”) by themselves, on the theory that a law clerk memorandum simply duplicates effort. However, new law clerks and new interns are almost always assigned a stack of DOJs as their first task, on the theory that jurisdiction is the first thing a new law clerk or intern must learn. In a few offices, all DOJs are reviewed by the law clerks and interns before going to the justices.

When the justices’ staff prepares memoranda on DOJs, these necessarily must focus on the three questions relevant to conflict cases: (a) does jurisdiction exist?; (b) does the Court have discretion to hear the case?; and (c) why should the discretion be exercised? As noted earlier, a case can be accepted for review only upon the affirmative vote of at least four justices, though the decision whether to grant oral argument sometimes can be determined by fewer votes or by the chief justice.

⁴⁶⁰. Sometimes multiple conflict exists.
⁴⁶¹. The court has instituted a very successful paper recycling program in recent years.
3. Opinion-Writing in Conflict Cases

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

E. Certified Questions of Great Public Importance

The next subcategory of discretionary review jurisdiction exists when a decision of a district court passes upon a question certified by it to be of great public importance. Commentators have noted that the operative language essentially was unchanged by the 1980 reforms, although the pre-1980 constitution specified that the question be one of great public "interest." This last change, however, may only have been semantic. Even prior to 1980, certified questions routinely involved important issues in which the general public had little "interest," generally speaking.

Justices of the Court sometimes have argued that certified questions should not be reviewed unless the case involves some minimum level of immediacy. That view was silently rejected when first made after the 1980 reforms, and has never gained acceptance since. In practice, the Court reviews the majority of certified questions properly brought for review by the parties, even some of relatively minor importance. A large number, however, often are summarily disposed of, and the Court has shown no unwillingness to brand a certified question "irrelevant." The decision to certify falls within the absolute discretion of the district court, and thus cannot be required or undone by the Florida Supreme Court.

462. See FLA. CONST. art. V, § 3(b)(4).
463. See Jurisdiction, supra note 320, at 191-92.
466. Id. (majority opinion).
Court. Jurisdiction over cases in this subcategory is absolutely dependent on the act of certification by a district court, which operates as a condition precedent. Once the case is certified, the condition precedent has been fully met, and no review or redetermination of the point is necessary or proper.469

As a corollary, the failure to certify a question creates a binding presumption that the case does not pass upon a matter amenable to this type of review. Thus, once a district court opinion becomes final and is not subject to rehearing or to clarification, the time has passed for a question to be certified.470 Any purported certification occurring thereafter presumably would be treated as a nullity. However, the Florida Supreme Court has indicated that “any interested person” can ask for a certification by the district court at any time before the opinion becomes final.471

Nevertheless, certification does not create mandatory jurisdiction. The Florida Supreme Court has discretion to decline review, such as where the question is irrelevant, or where answering it would serve no purpose.472 On occasion, the Court also seems to have declined to answer questions it regarded as too insignificant.473 However, the Court has announced that jurisdiction is “particularly applicable” to cases of first impression,474 perhaps implying a greater presumption that review should be granted.

Under the pre-1980 constitution, the common practice for many years was for the district courts simply to certify the case without actually framing a question. Later, the Florida Supreme Court urged the district courts to state the question being posed,475 though there has never been an absolute requirement to this effect.476 Framing the question now has become the most common practice,477 though the district courts sometime still resort to the earlier habit of leaving the question unstated. When questions actually are framed, the Court sometimes rephrases them in a manner that better suits the purposes of review.478

471. Id.
474. Duggan v. Tomlinson, 174 So. 2d 393, 393 (Fla. 1965).
475. Id. at 394.
476. E.g., Rupp, 238 So. 2d at 89.
477. See, e.g., Reed v. State, 470 So. 2d 1382, 1383 (Fla. 1985) (quoting question as framed); Holly v. Auld, 450 So. 2d 217, 218 (Fla. 1984) (quoting question as framed).
478. E.g., Waite v. Waite, 618 So. 2d 1360 (Fla. 1993).
When the question is left unframed, the Florida Supreme Court sometimes proceeds to discuss the issue without actually framing it.\textsuperscript{479} At other times, the Court will frame the question at the start of an opinion, though occasionally it may not be entirely clear what the question is.\textsuperscript{480} One case was accepted for review even though the district court had issued its opinion as a summary PCA and then certified the "question."\textsuperscript{481} This prompted an exasperated dissent from one justice who argued that the Court should decline to review PCAs, even if certified, because the unstated "question" simply was not clear.\textsuperscript{482}

There is a special problem that sometimes arises in cases involving certified questions: The losing party fails to seek Florida Supreme Court review. When this happens, the Court has ruled that the party who prevailed on the issue embodied in a certified question cannot seek review solely on that basis. In other words, the Court lacks jurisdiction of the case if the losing party on the certified question does not petition for review, unless some other basis of jurisdiction exists.\textsuperscript{483}

Jurisdiction may also be lost over an otherwise valid certified question in another way. When a certified question is properly brought by the parties, they sometimes ask the Florida Supreme Court to relinquish jurisdiction to the district court for some reason.\textsuperscript{484} In one such case, upon relinquishment, the district court granted rehearing and issued a new opinion that failed to include a certified question. The Florida Supreme Court dismissed the case when it came back for review, apparently for want of jurisdiction.\textsuperscript{485}

F. Certified Conflict

Discretionary review jurisdiction also exists when the district court certifies that its decision is in direct conflict with a decision of another district court of appeal.\textsuperscript{486} This form of jurisdiction was created by the

\textsuperscript{479} E.g., Trushin v. State, 425 So. 2d 1126, 1127-28 (Fla. 1982).
\textsuperscript{480} See, e.g., Radiation Technology, Inc. v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983).
\textsuperscript{481} Id. at 329.
\textsuperscript{482} Id. at 332-33 (Alderman, C.J., dissenting).
\textsuperscript{483} See Petrik v. New Hampshire Ins. Co., 400 So. 2d 8, 9-10 (Fla. 1981); Taggart Corp. v. Benzing, 434 So. 2d 964, 966 (Fla. 4th Dist. Ct. App. 1983).
\textsuperscript{484} Relinquishment is governed by rule. See FLA. R. APP. P. 9.110, 9.600.
\textsuperscript{485} State v. Smulowitz, 486 So. 2d 587, 588 (Fla. 1986).
\textsuperscript{486} FLA. CONST. art. V, § 3(b)(4).
1980 constitutional reforms and had no earlier analogue.\textsuperscript{487} Case law on certified conflict has done little to illuminate its scope, though (with some early exceptions) the district court opinions accepted in this way almost uniformly meet two requirements: (1) they use the word “certify” or some variation of the root word “certif-”\textsuperscript{488} in connection with the word “conflict;” and (2) they indicate a decision from another district court upon which the conflict is based. The Court sometimes has accepted jurisdiction even if some study of the district court opinion is needed to find the exact conflict case.\textsuperscript{489}

The required use of the root word “certif-” has not arisen from decisional law but from the custom of the supreme court clerk’s office,\textsuperscript{490} which determines the category of jurisdiction before sending the case to the justices. Thus, strictly speaking, this form of jurisdiction effectively does not exist if conflict is merely “acknowledged,” “recognized,” “noted,” or some other variation on the theme. With few exceptions,\textsuperscript{491} all of these “acknowledged conflict” cases are treated as petitions for “express and direct” conflict, though many are accepted for review on that basis. The distinction between “acknowledged conflict” and “express conflict” can have an important consequence, however, because express and direct conflict is subject to more rigorous requirements.

In other words, to certify conflict properly, the district court must use the root word “certif-.” This requirement may seem needlessly bureaucratic, but it serves a useful function. Any other rule would allow the categories of certified conflict and “express and direct” conflict to blur together. Thus, some “acknowledged” conflict cases might be accepted on one basis of jurisdiction while a similar case might not. The Clerk’s bright-line rule avoids such arbitrariness.

Certified conflict cases differ in two important ways from the “express and direct” conflict subcategory, discussed above.\textsuperscript{492} First, no briefing on

\textsuperscript{487} See Jurisdiction, supra note 320, at 193.
\textsuperscript{488} One district court used the words “certificate of direct conflict.” State v. Dodd, 396 So. 2d 1205, 1208 n.7 (Fla. 3d Dist. Ct. App. 1981), approved, 419 So. 2d 333, 336 (Fla. 1982).
\textsuperscript{489} E.g., Hannewacker v. City of Jacksonville Beach, 402 So. 2d 1294, 1296 (Fla. 1st Dist. Ct. App. 1981), approved as modified, 419 So. 2d 308, 312 (Fla. 1982).
\textsuperscript{490} The custom has not always been strictly followed. In one early case, the court accepted “certified conflict” solely because a citation PCA contained a “Contra” cite. See Parker v. State, 406 So. 2d 1089, 1090 (Fla. 1981), rev’g 386 So. 2d 1297, 1298 (Fla. 5th Dist. Ct. App. 1980). This practice has not been observed in recent years.
\textsuperscript{491} Some cases may slip through the initial review process.
\textsuperscript{492} See discussion infra part VI.D.
jurisdiction is permitted because the cases are accepted routinely. Second, the Court has found discretion to hear them even if there is actually no conflict, something that cannot be done for express and direct conflict. In one 1993 case, for example, the Florida Supreme Court reviewed a certified conflict but then harmonized the cases. The policy for accepting such cases, of course, is that the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court. In sum, review is easier to obtain for certified conflict than for "express and direct" conflict.

Finally, there is one important procedural fact that could deprive the Florida Supreme Court of jurisdiction even where conflict is properly certified. As with certified questions, the party who prevailed on the "certified conflict" issue cannot seek review based on this form of jurisdiction. In other words, the Court lacks jurisdiction of the case if the losing party does not petition for review, except where some independent basis for jurisdiction exists. This situation most often will arise when the party who prevailed on the conflict issue disagrees with some other aspect of the district court opinion.

G. "Pass-Through" Jurisdiction

The next subcategory of discretionary review jurisdiction has been identified by the informal name "pass-through jurisdiction." It essentially is a variation of a certified question for very important and pressing cases. The principle feature is that the case "passes through" the district court without being heard and is sent directly to the Florida Supreme Court for immediate resolution. This substantially speeds the appellate process.

The Florida Supreme Court can hear such cases only if: (1) an appeal is pending in the district court brought from a trial court’s order or judgment; (2) the district court certifies that the case is of great public

494. Actual conflict must exist in "express and direct" cases for the Court to have discretion to hear the case. See discussion supra part VI.D.1.
495. Harmon v. Williams, 615 So. 2d 681, 683 (Fla. 1993).
496. See supra text accompanying note 482.
497. See Davis v. Mandau, 410 So. 2d 915, 915 (Fla. 1981).
498. For an opinion using the informal name, see Florida Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145, 1146 (Fla. 1985).
499. For a considerable history underlying the development of this form of jurisdiction, see Jurisdiction, supra note 320, at 193-96.
importance or may have great effect on the proper administration of justice throughout the state; and, (3) the district court certifies that immediate resolution by the Florida Supreme Court is required. Certification can occur on the district court’s own motion, or at the suggestion of a party if done within ten days of appealing to the district court.

While the three elements above appear mandatory from the constitutional language, the Florida Supreme Court has been lenient in accepting district court certifications fairly susceptible of meeting the requirements. The root word “certif-” probably should be used by the district court, but it is doubtful that a case of obvious importance would be refused for failure to do so. The policy reasons for requiring a term of art in certified conflict cases do not exist here. Typically, the district courts scrupulously meet the certification requirement.

The Florida Supreme Court’s jurisdiction over pass-through cases attaches immediately on rendition of the district court order certifying the case. Thus, the district court loses jurisdiction at that point unless the Florida Supreme Court relinquishes its jurisdiction. In theory, a defective certification would not actually divest the district court of jurisdiction nor vest the supreme court with jurisdiction. For that reason, the parties and the district court should pay some attention to insure that certification is done properly.

500. FLA. CONST. art. V, § 3(b)(5).
502. See supra text accompanying notes 436-40 for policy reasons which require a term of art in certified conflict cases. “Acknowledged” conflict cases can be “mopped up” by the “express and direct” category. There is no other category to “mop up” pass-through cases in which the district court failed to use the root word “certif-.”
503. In the “Baby Theresa” case, for example, the Fourth District Court of Appeal issued the following certificate:

We hereby certify to the Florida Supreme Court that the order of the trial court of March 27, 1992, requires immediate resolution by the Supreme Court, because it rules on an issue of great public importance and because the relief sought in the trial court may be mooted by the natural death of the infant child of appellants.

In re Pearson, Case No. 92-0942 (Fla. 4th Dist. Cl. App., March 30, 1992) (unpublished order).
504. Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to a few exceptions usually not applicable in these cases. See FLA. R. APP. P. 9.020(g).
505. FLA. R. APP. P. 9.125(g).
There is no requirement that the district court frame a question, although a minority of the courts do so.\textsuperscript{507} Framing a question may be useful, but these cases almost always involve questions that are apparent to everyone. Where a question is framed, the Florida Supreme Court usually quotes it.\textsuperscript{508} If no question is framed, the Court sometimes states the issue to be reviewed\textsuperscript{509} and sometimes does not.\textsuperscript{510} In any event, the presence or absence of a framed question makes no difference, though it can serve a useful purpose when the parties disagree on the exact nature of the question being decided.\textsuperscript{511}

Pass-through cases fall within the Court's discretionary jurisdiction and theoretically could be refused. In practice, the cases are always heard, frequently (but not always), on an expedited basis. The Court once admonished the district courts not to use pass-through jurisdiction "as a device for avoiding difficult issues by passing them through to this Court."\textsuperscript{512} This hints that jurisdiction might be declined if pass-through was abused, but on the whole, the cases certified in this manner genuinely are pressing. These cases most commonly involve urgent questions of governmental authority,\textsuperscript{513} constitutional rights that could be undermined if the case is not expedited,\textsuperscript{514} or personal liberties that could be jeopardized.
ized by a lengthy appeal. With rare exceptions, all these cases involve a significant level of immediacy.

H. Questions Certified by Federal Appellate Courts

The final subcategory of discretionary review jurisdiction is cases involving a question of law certified by the federal appellate courts. Jurisdiction is allowed here only if: (1) the United States Supreme Court or a federal court of appeals certifies a question; (2) the question is determinative of "the cause;" and, (3) there is no controlling precedent of the Florida Supreme Court. This language is mandatory, and therefore, all three elements must be present. By rule, the federal court is required to issue a "certificate" containing the style of the case, a statement of the facts showing the nature of the cause and the circumstances from which the questions of law arose, and the questions to be answered. The certificate must be certified to the Florida Supreme Court by the federal court clerk.

The jurisdiction granted here was not a part of the pre-1980 constitution. However, much the same process had arisen earlier by court rule and from decisional law. Thus, the 1980 reforms largely codified these procedures within the constitution.

Perhaps the most significant requirement, other than the detailed formal certificate, is that there must be a "cause" from which the certified questions arise. This means that the Florida Supreme Court cannot accept questions in the abstract, but only if they are "determinative" of a particular case. In practice, this means that there must be an actual suit pending review in the federal appellate courts. Thus, certified questions do not actually ask the Florida Supreme Court to issue an advisory opinion. The federal courts are bound to honor and to apply the response given by the Florida Supreme Court. All such cases involve an actual application of Florida law, often in cases premised on federal diversity jurisdiction.

515. In re T.A.C.P., 609 So. 2d at 588 (right to donate organs of child soon to die, where death would make organs undonatable).
516. See, e.g., Carawan, 515 So. 2d at 161.
517. FLA. CONST. art. V, § 3(b)(6).
518. FLA. R. APP. P. 9.150(b).
519. E.g., Gaston v. Pittman, 224 So. 2d 326 (Fla. 1969).
520. See Jurisdiction, supra note 320, at 196.
Certified questions accepted from federal courts are answered by way of a formal opinion, a requirement that stems in part from state statute. The holdings of that opinion can become precedent for future cases, on the theory that the Florida Supreme Court’s opinion actually resolves controlling questions. In answering the questions, however, the Court does not “remand” the cause to a federal court as it would to an inferior court. Some Florida Supreme Court opinions misuse the word “remand” in this way, but the better practice is for the Court to “transmit” or “return” the cause to the federal court for further proceedings.

The Court has obvious discretion to decline to answer a federal certified question. However, in practice, the federal appellate courts have been conscientious in confining certification to cases that genuinely meet the rather strict constitutional requirements. Review might be declined, for example, where a federal appellate court was unaware that there is controlling precedent previously made by the Florida Supreme Court. In that situation, the most constructive response would be for the Court to cite the controlling precedent in the order declining review.

VII. DISCRETIONARY ORIGINAL JURISDICTION

The Florida Supreme Court’s discretionary original jurisdiction involves a class of legal “writs” that, with some exceptions, originated centuries ago in the English common law. Most Floridians know little about these writs, with the possible exception of habeas corpus, and even some lawyers tend to lose sight of the creative ways the writs can be used. In truly exceptional circumstances, one of these so-called “extraordinary writs” may provide jurisdiction when nothing else can.

524. Fla. Stat. § 25.031 (1991). There is no requirement to accept the case, only to issue an opinion once the case is accepted. Id.

525. The term “remand” implies mandate and therefore suggests a direction to an inferior court. See Black’s Law Dictionary 1293 (6th ed. 1991). The federal appellate courts are not inferior to the Florida Supreme Court.

526. E.g., Dorse v. Armstrong World Indus., Inc., 513 So. 2d 1265, 1270 (Fla. 1987); Bates v. Cook, Inc., 509 So. 2d 1112, 1115 (Fla. 1987).

527. The court probably would lack jurisdiction, not merely discretion, in this situation. The constitution’s strict language suggests that it is not enough for the federal appellate court to certify the case; there also must be an actual lack of controlling precedent of the Florida Supreme Court. Fla. Const. art. V, § 3(b)(6). In any event, whether the case was dismissed for lack of jurisdiction or lack of discretion would make no difference here.
Because most of the writs are ancient, there is a highly detailed body of case law governing their use. The constitution itself does little more than identify the writs and assign the court jurisdiction over them, so the Florida Supreme Court almost always gauges these cases based on long-standing judicial precedent. As a result, these cases tend to be analyzed under a kind of "common law" approach, although, strictly speaking, the jurisdiction arises from the constitution itself. There are some limitations imposed by the constitution that did not arise from the common law, but these usually involve the specific class of persons to whom a writ may be issued by the Court.

Technically speaking, the Florida Supreme Court has jurisdiction over any petition that merely requests some form of relief available under this category. The Court's discretion, however, is severely limited in some cases by the body of case law and common law principles defining the scope of permissible judicial action. The "jurisdiction/discretion" distinction is usually of little real consequence here. If the Court lacks discretion to issue a writ, it cannot grant relief as surely as if it lacked jurisdiction.

Nevertheless, there are aspects of the controlling case law that can be explained only by the distinction. For example, the Court's discretion to issue any of the extraordinary writs is defined by the applicable standard of review, which differs with each writ. It is common (though not precise) to use the word "jurisdiction" in its loose sense to include limitations on discretion, in which case the Court's "jurisdiction" over the extraordinary writs also would be determined by the standard of review.

However, there are cases where the Court expressly accepts jurisdiction, hears the case, and issues a full opinion determining that the standard of review has not been met and a writ cannot be issued. If the Court lacked jurisdiction of such cases, then it could not even hear them, much less accept jurisdiction and issue a full opinion.

There is another aspect of "discretion" that deserves some mention. The fact that the Court's discretion to issue the writs is limited by judicially created case law leaves open the possibility of the Florida Supreme Court refining or modifying the standards of review. Such modifications are

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528. In many instances, however, jurisdiction is not exclusive. The lower courts would also have jurisdiction to consider issuing one of the writs, except that petitioners usually are forbidden to seek the same remedy from another court simply because they did not like the last court's decision.

unusual, but they do happen. It would be hard to say in these cases that
the Court somehow has modified its own “jurisdiction,” because this would
imply some inherent power to depart from the constitution. On the whole,
the infrequent modifications made to standards of review are best understood
as changes in discretion, not changes in jurisdiction.

A. Mandamus

The first extraordinary writ is “mandamus,” whose name in Latin
means “We command.” As the name suggests, mandamus is a writ of
commandment, a fact underscored by its history. In ancient times, the writ
issued as a command from the Sovereigns of England when they sat
personally as judges; but, it later came to be a prerogative of judges of the
Court of King’s Bench. Because of the writ’s coercive nature, its use
is subject to severe restrictions developed in Florida and earlier English case
law. In broad terms, the Florida Supreme Court today may issue mandamus
only to compel state officers and state agencies to perform a purely minis-
terial action where the petitioner otherwise would suffer an injury and has
a clear and certain right to have the action done. There are a number of
concerns here.

In the Florida Supreme Court, unlike other state courts, mandamus may
issue only to state officers and state agencies. This limitation arises
from the constitution itself, and is the only restriction on mandamus
expressly imposed there. The Court has never fully defined what the
terms “state officers” and “state agencies” mean. The cases appear to
assume that these terms include agencies and public office holders within
the three branches of state government, but nothing establishes this with any
finality. Arguably, state officers could include persons holding an office

530. E.g., Jones v. State, 591 So. 2d 911, 913 (Fla. 1991) (modifying error coram
nobis); Richardson v. State, 546 So. 2d 1037, 1039 (Fla. 1989) (modifying error coram
nobis).

531. In theory, modifications to “discretion” could be so drastic as to essentially
constitute a change in jurisdiction. In practice, it is unlikely the court would take any such
drastic step, which probably would invite efforts to curb the court’s actions by way of statute
or constitutional amendment.


533. See State ex rel. State Live Stock Sanitary Bd. v. Graddick, 89 So. 361, 362 (Fla.
1921).

534. Thus, the Florida Supreme Court presently cannot issue a writ of mandamus to
private individuals or businesses, as it sometimes could in the past. See, e.g., State ex rel.
Ranger Realty Co. v. Lummus, 149 So. 650 (Fla. 1933).

535. FLA. CONST. art. V, § 3(b)(8).
created by the Florida Constitution, but the Court has never clearly said so. Moreover, the constitution itself seems to contrast “state officers” with “constitutional officers” elsewhere, implying they are not the same thing.

Someone seeking mandamus also must establish that the action being sought is “ministerial.” An action is ministerial only to the extent that the respondent has no discretion over the matter. There are self-evident reasons for this requirement. No court can compel that lawful discretion be exercised to achieve a particular result, however fair it may seem to do so. Any other rule would permit judges to exercise dictatorial powers through the simple expedient of mandamus. Thus, a respondent’s lack of discretion is an absolute prerequisite to mandamus.

However, the lack of discretion can be partial because it is possible for an action to be partly ministerial and partly discretionary. This most commonly arises where the law grants discretion to take some action but specifies a particular kind of review process and factors that must be considered when and if discretion is exercised. Sometimes a respondent may depart from the required process. When so, mandamus can issue only to require a proper review, not to mandate that any particular discretionary outcome must be reached.

Thus, the Court has held that mandamus cannot compel the discretionary act of granting parole to an inmate; yet, mandamus potentially could be used to compel the Florida Parole and Probation Commission to conform its parole review process to the clear requirements of the constitution. Likewise, mandamus cannot be used to compel the Florida Department of Corrections to perform the discretionary act of awarding “early release” credits to inmates; yet mandamus can be used to require the Department to employ a constitutionally required process in review of such cases.

The person seeking mandamus also must show the likelihood that some injury will occur if the writ is not issued. If there is no possibility of injury, then mandamus is an inappropriate remedy. Thus, mandamus

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536. Examples include sheriffs, clerks of the circuit court, and property appraisers. See Fla. Const. art. VIII, § 1(d).
537. See Fla. Const. art. V, § 3(b)(3).
539. Id. at 719-20.
542. Id.
will not be issued if doing so would constitute a useless act or would result in no remedial good. This situation might exist, for example, where the action that would be compelled already has been done.

For example, the Court has found the writ inappropriate where a license was taken away improperly but had been obtained in the first instance through fraud or deceit. In other words, a valid reason existed to revoke the license, and, therefore, it would be a useless act to issue mandamus merely because an improper reason had been given for revocation. Moreover, injury does not exist if petitioners are able to perform the ministerial acts in question for themselves. However, injury can include some generalized harm, such as a disruption of governmental functions or the holding of an illegal election.

Petitioners seeking mandamus also must establish that they have a "clear and certain" right imposing a corresponding duty on the respondents to take the actions sought. A right is clear and certain only if it is already plainly established in preexisting law or precedent. Thus, the opinion in which mandamus will be issued cannot be used as the vehicle for creating a right previously uncertain or not yet extended to the situation at hand. The right already must have come into existence through some other legal authority. Moreover, the right must be "complete" and unconditional at the time the petition is brought. The existence of any unfulfilled condition precedent renders mandamus improper. Likewise, mandamus cannot be used to achieve an illegal or otherwise improper purpose, because there is no right to break the law or violate public policy.

On occasion, Florida courts imposed another element which a petitioner had to show the existence of no other adequate remedy. This was

543. E.g., Bishoff v. State ex rel. Tampa Waterworks Co., 30 So. 808, 812 (Fla. 1901).
544. E.g., McAlpin v. State ex rel. Avriett, 19 So. 2d 420, 421 (Fla. 1944).
545. E.g., State ex rel. Fidelity & Casualty Co. v. Atkinson, 149 So. 29, 30 (Fla. 1933).
547. E.g., Gallie v. Wainwright, 362 So. 2d 936 (Fla. 1978).
548. E.g., Dickinson v. Stone, 251 So. 2d 268 (Fla. 1971).
549. See supra note 529.
552. Id.
553. State ex rel. Bergin, 71 So. 2d at 749.
554. See, e.g., State ex rel. Edwards v. County Comm'rs of Sumter County, 22 Fla. 1, 7 (1886).
555. E.g., Shevin ex rel. State v. Public Serv. Comm'n, 333 So. 2d 9, 12 (Fla. 1976); State ex rel. Long v. Carey, 164 So. 199, 205 (Fla. 1935).
justified on the grounds that mandamus exists to correct defects in justice, not to supersede other adequate legal remedies. The extraordinary nature of the writ supports this rationale. However, in 1985, the Florida Supreme Court seemed to indicate that the “no adequate remedy” requirement no longer exists, at least in cases involving “strictly legal constitutional” questions.\(^{556}\)

The reasons for this conclusion are not clear, nor is the validity of the result certain. The opinion making these statements obviously misread the precedent on which it relied\(^ {557}\) and could be criticized or overruled on that basis. The “no adequate remedy” serves a useful purpose in that it requires petitioners to exhaust other sufficient means before burdening the Florida Supreme Court’s docket. Possibly the Court may see fit to reinstate the requirement at some point. In any event, the writ of mandamus remains discretionary and can be refused without reason if the Court believes a petitioner has another good remedy.

The terms “state officers and state agencies” as used in the constitution include judges and courts,\(^ {558}\) though the Florida Supreme Court generally seems to confine its “judicial” mandamus cases to petitions directed at the district courts of appeal. In these cases, one specialized use of the writ is to require the respondent-judges to exercise jurisdiction that has been wrongly denied in the lower court. At earlier common law, this device was known as the writ of \textit{procedendo},\(^ {559}\) though today the same concept has been subsumed under mandamus.\(^ {560}\) However, mandamus would be inappropriate unless the law clearly required the lower court to exercise its jurisdiction and it failed to do so.\(^ {561}\)


\(^{557}\) The court cited \textit{Fine v. Firestone}, 448 So. 2d 984 (Fla. 1984), which involved an alleged defect in a constitutional amendment that would be put to voters. \textit{Fine} did not mention the “no adequate remedy” requirement. However, it was clear that no other adequate remedy existed there: The right to a fair election was at stake, and a fair election would not be possible if a defective constitutional amendment was allowed to remain on the ballot. \textit{Id.} at 985. Moreover, there was precedent that the defects in the proposed amendment would be “cured” by the act of being approved in the election, unfair though it may be.

\(^{558}\) \textit{See} FLA. CONST. art. V, § 3.

\(^{559}\) \textit{See} Linning v. Duncan, 169 So. 2d 862, 866 (Fla. 1964) (citing Newport v. Culbreath, 162 So. 340 (Fla. 1935)).

\(^{560}\) \textit{E.g.}, Pino v. District Court of Appeal, 604 So. 2d 1232 (Fla. 1992).

\(^{561}\) \textit{Id.}
Finally, the Florida Supreme Court has a long-standing custom—but one not uniformly followed—regarding the actual issuance of mandamus. As a matter of courtesy, the Court sometimes says it will withhold issuing the writ because the justices are confident a respondent will conform to the majority opinion. The practice is a sound one, if only because it may blunt some of the sting the losing party may feel. In any event, if a respondent later refused to conform, the Court could still issue a previously "withheld" writ on a proper motion to enforce the mandate. The fact that a writ is actually issued, however, never indicates any special onus.

B. Quo Warranto

The second extraordinary writ is *quo warranto*, whose name in Latin poses the question, "By what right?" As the name suggests, *quo warranto* is a writ of inquiry. Historically, the Crown of England developed the writ as a means of calling upon subjects to explain some alleged abuse of an office, franchise, or liberty within the Crown's purview. Today, *quo warranto* continues in Florida as the means by which an interested party can test whether any individual improperly claims or has usurped some power or right derived from the State of Florida.

Standing to seek *quo warranto* can be inclusive. The Florida Supreme Court has held that any citizen may bring suit for *quo warranto* if the case involves "enforcement of a public right." In practice, *quo warranto* proceedings almost always involve a public right because the Florida Supreme Court can issue the writ only to "state officers or state agencies." (This limitation is the only express restriction imposed by the constitution, all others being derived from case law.) Thus, the cases taken to the Court usually are limited to those involving some allegedly improper use of state powers or violation of rights by these officers or agencies.

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562. E.g., Caldwell v. Estate of McDowell, 507 So. 2d 607, 608 (Fla. 1987).
564. Id.; Martinez v. Martinez, 545 So. 2d 1338, 1339 (Fla. 1989).
565. Martinez, 545 So. 2d at 1339 (citing State ex rel. Pooser v. Wester, 170 So. 736, 737 (Fla. 1936)).
566. FLA. CONST. art. V, § 3(b)(8). For a discussion of this limitation and its likely meaning, see supra text accompanying notes 534-37. Under earlier law, *quo warranto* sometimes could be used to test the validity of actions done pursuant to a franchise granted by the state, including the right to incorporate. Thus, the writ sometimes could issue against a private concern. E.g., Davidson v. State, 20 Fla. 784 (1884). The Florida Supreme Court no longer has such authority. See FLA. CONST. art. V, § 3(b)(8).
One use of *quo warranto* is to test the outcome of a disputed election, such as where one person has claimed the powers of the elective office but another contends this was unlawful.⁵⁶⁷ Actions of this variety are governed in part by Florida Statutes specifying that the petition be brought by the Attorney General or, if the latter refuses, by the person claiming title to the office.⁵⁶⁸ If the Court grants the petition, it can issue a judgment of ouster⁵⁶⁹ which has the effect of vesting the claimant with title to the office. However, if the Attorney General did not consent to the suit, the judgment remains subject to challenge by the state.⁵⁷⁰

There are other uses of *quo warranto*. For example, *quo warranto* has been used by a legislator who argued that the Governor exceeded his constitutional authority in calling a special session of the Legislature.⁵⁷¹ In that instance, the petition for *quo warranto* was filed by the legislator as an original proceeding in the Court.⁵⁷² The writ has also been used to decide whether a state public defender’s office exceeded its statutory authority by representing indigent clients in federal court proceedings.⁵⁷³ As in the case of mandamus, the Florida Supreme Court sometimes has “withheld” issuance of a writ of *quo warranto* as a matter of courtesy where it appears the Court’s decision will be honored.⁵⁷⁴ This custom has not been followed uniformly, however, and the failure to withhold issuance has no real significance. In any event, *quo warranto* is a somewhat exotic legal device that is used only occasionally by the Court.

C. **Writs of Prohibition**

The third extraordinary writ is that of prohibition. Like the two writs discussed above, the writ of prohibition has an ancient origin in English law. It arose out of the early struggle between the royal courts controlled by the Crown and the ecclesiastical courts controlled by the Church. Its primary purpose was to prevent an ecclesiastical court from encroaching upon the

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⁵⁶⁷. State *ex rel.* Gibbs v. Bloodworth, 184 So. 1 (Fla. 1938).
⁵⁶⁸. FLA. STAT. § 80.01 (1991).
⁵⁶⁹. *Id.* § 80.032.
⁵⁷⁰. *Id.* § 80.04.
⁵⁷¹. *Martinez*, 545 So. 2d at 1338.
⁵⁷². *Id.*
⁵⁷⁴. *E.g.*, *id.* at 950; Greenbaum v. Firestone, 455 So. 2d 368, 370 (Fla. 1984).
prerogatives of the Sovereign.\textsuperscript{575} Thus, the writ of prohibition came into being as a preventive writ and retains that quality to this day.

In Florida, prohibition is now the process by which a higher court prevents an inferior tribunal from exceeding its jurisdiction.\textsuperscript{576} The writ may be obtained only by a petitioner who can demonstrate that a lower court is without jurisdiction or is attempting to act in excess of jurisdiction regarding a future matter, and the petitioner has no other adequate legal remedy to prevent an injury that is likely to result.\textsuperscript{577} There are a number of concerns here.

The writ may only be directed to a lower court and not to state agencies, state officers, or state commissions. This restriction is imposed by the constitution\textsuperscript{578} as a result of the 1980 jurisdictional reforms, which deleted the Florida Supreme Court's authority to issue writs of prohibition to some quasi-judicial commissions.\textsuperscript{579} In effect, this ended the Court's earlier jurisdiction over state administrative agencies when they acted in their quasi-judicial capacities.\textsuperscript{580} Under long-standing precedent, writs of prohibition clearly cannot reach an action that is purely legislative or executive in nature.\textsuperscript{581}

However, the Florida Supreme Court's power to issue writs of prohibition to courts is now the same for both the district courts\textsuperscript{582} and the circuit courts.\textsuperscript{583} Prior to the 1980 reforms, the authority over trial courts had been limited to "causes within the jurisdiction of the supreme court to review."\textsuperscript{584} The restriction was deleted in 1980, effectively vesting the Florida Supreme Court with potential prohibition jurisdiction over any cause arising in a trial court.\textsuperscript{585} Presumably, this includes the county courts, though in practice such cases will seldom involve matters of such gravity for the Court to exercise its discretion.

\textsuperscript{575} English v. McCrary, 348 So. 2d 293, 296 (Fla. 1977).
\textsuperscript{576} Id.
\textsuperscript{577} Id. at 296-97; accord Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986).
\textsuperscript{578} FLA. CONST. art. V, § 3(b)(7).
\textsuperscript{579} Moffit v. Willis, 459 So. 2d 1018, 1020 (Fla. 1984).
\textsuperscript{580} For an example of this superseded form of jurisdiction, see State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487 (Fla. 1973) (prohibition issued against quasi-judicial proceedings of Florida Real Estate Commission).
\textsuperscript{581} State ex rel. Swearingen v. Railroad Comm'rs, 84 So. 444 (1920).
\textsuperscript{582} See, e.g., Peltz v. District Court of Appeal, 605 So. 2d 865 (Fla. 1992).
\textsuperscript{583} See, e.g., Department of Agric. v. Bonanno, 568 So. 2d 24 (Fla. 1990).
\textsuperscript{584} ARTHUR J. ENGLAND, JR., ET AL., FLORIDA APPELLATE PRACTICE MANUAL § 2.23(a), at 57 (D & S/Butterworths 1992 Supp.).
\textsuperscript{585} Id.
Petitioners must also show that the lower court is without jurisdiction or is attempting to act in excess of jurisdiction. For example, prohibition is proper to restrain a lower court that clearly lacks jurisdiction over the subject matter.\footnote{Crill v. State Rd. Dep't, 117 So. 795 (Fla. 1928).} The Florida Supreme Court often has contrasted "lack of jurisdiction" with those situations in which a court merely exercises jurisdiction erroneously. In theory, a writ of prohibition is not proper for the latter.\footnote{English, 348 So. 2d at 297.} In practice, however, there is no realistic way to draw a clear distinction between the lack of jurisdiction and the erroneous exercise of jurisdiction as the two often blur together.

Perhaps as a result, the case law often reaches results that seem hard to reconcile with a strict "lack of jurisdiction" element. In several cases, for example, the Florida Supreme Court has used prohibition to prevent a lower court from imposing restraints on a prosecutor's discretion to seek the death penalty in a criminal trial. This has occurred even though the lower court plainly had jurisdiction over the issues but had merely engaged in conduct best characterized as a clear error.\footnote{E.g., State v. Donner, 500 So. 2d 532 (Fla. 1987); State v. Bloom, 497 So. 2d 2 (Fla. 1986). But see Peacock v. Miller, 166 So. 212 (Fla. 1936) (prohibition not proper where inferior court has jurisdiction but commits error). The use of prohibition in the prosecutorial discretion cases following the 1980 jurisdiction reforms apparently began with Bloom, which cited as authority Cleveland v. State, 417 So. 2d 653 (Fla. 1982). However, this is an obvious overextension of Cleveland, which was an "express and direct conflict" case holding only that a court could not interfere with a prosecutor's discretion to refuse to allow a defendant to be placed in a pretrial intervention program. Id. Cleveland had nothing to do with prohibition. Nevertheless, the "abuse of discretion" cases do gain some support by analogy to the well established precedent that prohibition sometimes may be used as a means of disqualifying biased judges even though they clearly have jurisdiction. E.g., Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978); State ex rel. Bank of Am. v. Rowe, 118 So. 5 (Fla. 1928). Judicial disqualification comes much closer to being a question of abuse of discretion than abuse of jurisdiction.}{586}

On policy grounds, such a use of prohibition has some merit. It could promote judicial economy by allowing the Florida Supreme Court to prevent a clear error from infecting the entire proceeding. This would forestall the likelihood of a useless trial that must inevitably be reversed on appeal. Nevertheless, such a rule comes close to vesting the Court with a kind of interlocutory appellate jurisdiction, which could become onerous if not used with restraint. As a practical matter, it seems unlikely the Court will extend this particular use of prohibition much beyond the unusual factual pattern from which it arose.
The next element a petitioner must show in order to obtain a prohibition writ is that the alleged improper actions of the lower court will occur in the future.\textsuperscript{589} The Florida Supreme Court often has noted that prohibition is a preventive writ, not a “corrective” one.\textsuperscript{590} Thus, prohibition can be directed only to future acts, not past ones. The cases suggest that the future act must to some degree be “impending.”\textsuperscript{591} “Past acts” can include an order already entered or proceedings already completed.\textsuperscript{592} Additionally, prohibition has been allowed for orders previously entered if the primary effect is on a proceeding that has not yet occurred.\textsuperscript{593} This use is justifiable in that such orders are directed to the future, but the result is a blurring of the distinction. The best interpretation probably is that a “past act” is one involving a significant degree of finality, whereas a “future act” does not.

To obtain prohibition, a petitioner must also show that no other adequate remedy exists.\textsuperscript{594} The key word is “adequate.” Other remedies may exist that are inadequate, incomplete, or unavailable to the petitioner; if so, then prohibition is not foreclosed.\textsuperscript{595} As a general rule, the fact that an appeal will give the petitioner an adequate and complete remedy renders prohibition unavailable.\textsuperscript{596} If another extraordinary writ provides an adequate and complete remedy, then prohibition also should be denied.\textsuperscript{597} However, the Court still might review the case by treating the petition as though it had requested the proper remedy.\textsuperscript{598}

The final element is that prohibition can be issued only to prevent some likely and impending injury.\textsuperscript{599} Prohibition is not available if the issues have become moot by the passage of time,\textsuperscript{600} nor can it be used to issue a purely advisory opinion establishing principles for future cases.\textsuperscript{601} Opinions discussing the writ often describe it as being appropriate only in

\begin{enumerate}
\item[589.] English, 348 So. 2d at 296.
\item[590.] E.g., Sparkman, 498 So. 2d at 895.
\item[591.] E.g., Joughin v. Parks, 143 So. 145 (Fla. 1932).
\item[592.] Id.
\item[593.] E.g., Donner, 500 So. 2d at 532; Bloom, 497 So. 2d at 2.
\item[594.] English, 348 So. 2d at 297.
\item[595.] E.g., Sparkman, 498 So. 2d at 892; Curtis v. Albritton, 132 So. 677 (Fla. 1931).
\item[596.] Sparkman, 498 So. 2d at 892.
\item[597.] E.g., State ex rel. Placeres v. Parks, 163 So. 89 (Fla. 1935) (if mandamus is available, prohibition should be denied); State ex rel. Booth v. Byington, 168 So. 2d 164 (Fla. 1st Dist. Ct. App. 1964) (if quo warranto is available, prohibition should be denied).
\item[598.] See, e.g., Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990).
\item[599.] English, 348 So. 2d at 297.
\item[600.] Wetherell v. Thursby, 129 So. 345 (Fla. 1930).
\item[601.] English, 348 So. 2d at 293.
\end{enumerate}
“emergencies,” implying that the likelihood of some injury must be real and immediate.

As with many of the other extraordinary writs, the Florida Supreme Court sometimes withholds formal issuance even when prohibition is granted. This is a custom not uniformly followed in the cases, and is usually done as a matter of courtesy or when the Court is confident a respondent will adhere to the decision. Failure to withhold a writ in particular cases thus has no real significance, because the result is the same.

D. Habeas Corpus

The best known of the extraordinary writs is habeas corpus, whose name in Latin means “You should have the body.” The name arises from the fact that the writ always began with these words, which were directed to one who was detaining another person. The writ typically required the respondent to bring the body of the detained person into court so that the validity of the detention might be examined. Habeas corpus thus arose as a writ of inquiry used to determine whether the detention is proper or, put more accurately, whether the restraint on liberty is lawful. Potentially, any deprivation of personal liberty can be tested by habeas corpus, and for that reason it is often called the Great Writ.

The obvious relationship to the constitutional right of liberty explains why habeas corpus is the only writ specifically guaranteed by the Florida Constitution’s Declaration of Rights, which forbids suspension of habeas corpus except in cases of rebellion or invasion. Habeas corpus is also the most frequently used and most generously available of the extraordinary writs. For that reason, the case law is exceedingly complex. Entire treatises have been written addressing the writ’s many nuances. A

602. Id. at 296.
603. E.g., Bloom, 497 So. 2d at 3.
604. AMERICAN HERITAGE DICTIONARY 586 (2d ed. 1985).
605. There no longer is any absolute requirement that the detained person be brought to court, and this earlier practice rarely occurs in the Florida Supreme Court today.
607. Sylvester v. Tindall, 18 So. 2d 892 (Fla. 1944).
608. See State ex rel. Deeb v. Fabisinski, 152 So. 207 (Fla. 1933). In ancient times, the writ of habeas corpus was divided into many subcategories, most of which now are irrelevant or have been superseded by other devices such as the capias or bench warrant. Id.
full discussion of habeas corpus thus is not possible within the limited space of this article.

The standard of reviewing habeas claims can also be complex. In very broad and general terms, the Court has said that habeas cannot be issued except where the petitioner shows reasonable grounds to believe that a present, actual, and involuntary restraint on liberty is being imposed without authority of law and that no other remedy exists. Habeas is improper if the restraint has ended, if there is no actual restriction on liberty, or if restrictions on liberty are mere future possibilities or have not been coercively imposed. Even limited restraints on liberty can be sufficiently coercive to justify habeas relief, including an unlawfully imposed parole.

Habeas is also proper only if the restraint is without legal justification and no other remedy exists to correct the problem. It is often said that habeas cannot substitute for remedies available by appeal, by motion to dismiss, or by proper use of procedural devices that were available prior to the time the restraints on liberty were imposed. Thus, strictly speaking, habeas would not be a proper remedy where counsel failed to make a timely motion that could have prevented the restraint on liberty, though the matter potentially might be reviewable as a claim for ineffective assistance of counsel.

Likewise, habeas is improper to the extent that the restraint on liberty itself is not the true issue. This often hinges on fine distinctions. For example, inmates alleging that "early release" credits were computed in an unconstitutional manner would not be entitled to habeas. In that instance, the real issue was not the self-evident restraint on liberty, but the improper performance of a ministerial act (computing "early release" credits) that may or may not reflect on the lawfulness of the detention; and habeas thus, was not the proper remedy.

In sum, habeas is not a proper remedy if some unfulfilled condition precedent still must occur to render any further restraint on liberty unlawful.

611. Rice v. Wainwright, 154 So. 2d 693 ( Fla. 1963).
612. Sellers v. Bridges, 15 So. 2d 293 ( Fla. 1943).
616. State ex rel. Davis v. Hardie, 146 So. 97 ( Fla. 1933).
617. Brown v. Watson, 156 So. 327 ( Fla. 1934).
619. Waldrup, 562 So. 2d at 687.
even if the writ were issued. But habeas would be one possible remedy at a later date if "early release" credits were properly computed, the inmate clearly was entitled to release, and prison officials failed to honor the law. It is worth noting, however, that an allegedly invalid death penalty itself constitutes a restraint on liberty even where there is no question that the defendant will remain in prison even if the penalty is vacated.620 But the habeas petitioner's claim must genuinely be directed at the validity of the penalty itself, not at some other matter.621

There are three special aspects of habeas corpus that deserve a passing mention. The most common and obvious use of habeas corpus is by inmates who wish to challenge the lawfulness of their present imprisonment. Dozens of petitions to this effect come to the Florida Supreme Court every week.622 However, habeas corpus is not strictly confined to a penal or even a criminal-law setting. "Civil detention" of a person can potentially be tested by the writ of habeas corpus, including matters beyond the obvious example of involuntary commitments for psychiatric treatment.623 Even detention imposed on someone by a private individual potentially can be tested by habeas corpus. The most common use is where one parent alleges that the other parent has taken custody of a child wrongfully.624

The second point deserving mention is that the remedy available by habeas corpus has been supplemented and modified somewhat since the 1960s by innovations in the Florida Rules of Court. Some types of habeas claims by inmates now must be brought under Rule of Criminal Procedure 3.850625 in the trial court where the matter in question originated. Rule

620. Compare Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986) (death penalty vacated on habeas petition, and case remanded for new proceedings), with Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (death penalty ultimately reduced to life imprisonment for same defendant).

621. The court itself sometimes overlooks the fine distinctions that can be involved in determining whether a petition genuinely is challenging a restraint on liberty, not some other matter. See discussion of the case of Michael Durocher infra text accompanying notes 660-63.

622. These petitions often are in the form of handwritten notes that do not meet the court's usual filing requirements. However, the court accepts all such "pro se" petitions if they fairly appear to be seeking some form of relief, sometimes even assigning volunteer counsel to assist in exceptional cases. The court has held that even informal communications can be sufficient to petition for habeas corpus. Crane v. Hayes, 253 So. 2d 435, 442 (Fla. 1971).

623. E.g., In re Hansen, 162 So. 715 (Fla. 1935).

624. E.g., Crane v. Hayes, 253 So. 2d 435 (Fla. 1971); Porter v. Porter, 53 So. 546 (Fla. 1910).

625. FLA. R. CRIM. P. 3.850.
3.850 was originally created by the Florida Supreme Court as an emergency means of dealing with the substantial turmoil created by the decision of the United States Supreme Court in *Gideon v. Wainwright*. At the time, the Rule’s immediate purpose was to prevent the Florida Supreme Court from being overwhelmed by habeas petitions prompted by *Gideon*’s holding that Florida had violated the rights of hundreds of indigent felony offenders convicted without benefit of counsel.

Over the years, Rule 3.850 has retained its original purpose of creating a procedural “channel” through which a large class of “habeas” claims must flow. There is already a detailed body of case law interpreting the Rule, so bulky that an adequate outline cannot be given in an article of this size. However, the Court has not lost sight of Rule 3.850’s origin as a refinement of habeas corpus.

In a 1988 case, for example, the Court described Rule 3.850 as “a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus,” one that creates a fact-finding function in the trial courts and a uniform method of appellate review. In 1992, the Court further suggested that Rule 3.850 must be construed in a manner consistent with the Florida Constitution’s stricture that habeas corpus shall be “grantable of right, freely and without cost.”

These refinements to habeas corpus again show how even the extraordinary writs evolve over time. Obviously, further evolution will occur in years ahead as new problems arise that are unanticipated in the thousand years of Anglo-American precedent upon which Florida’s legal system draws. Such changes are not necessarily bad, nor do they necessarily require amendment of the constitution. The upheaval caused by *Gideon*, for example, was met and overcome through the Court’s rule-making powers, described more fully below. The Court “channelized” habeas corpus into an orderly procedural process that not only was consistent with the constitution but helped ensure that fundamental rights would be honored without delay.

The final point to note is that the Florida Constitution does something very unusual with the habeas power it grants: The power is conferred upon

626. 372 U.S. 335 (1962). The problems *Gideon* caused, as well as the Florida Supreme Court’s response, are recounted in *Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963).
627. *Roy*, 151 So. 2d at 827.
630. See discussion infra part VIII.C.
each justice of the Florida Supreme Court individually. In other words, the constitution permits each justice to issue the writ as an individual without the necessity of obtaining assent from a majority of the Court. The justices' individual power of granting habeas corpus underscores that ready access to the writ was intended as part of the constitution's protection of liberty.

E. "All Writs"

The state constitution also grants the Florida Supreme Court authority to issue "all writs necessary to the complete exercise of its jurisdiction." The operative constitutional language here has remained essentially unchanged for many decades now, although the construction placed on that language has fluctuated almost erratically at times. As a result, the Court's "all writs" authority remains one of the most confusing and unsettled areas of jurisdiction, a problem worsened by the infrequency of all writs cases. The all writs clause cannot be understood apart from its history.

Prior to 1968, the cases dealing with the all writs clause plainly stood for two things. First, the all writs power could not be invoked unless a cause was already pending before the Court on some independent basis of jurisdiction. Second, the Court's authority in this regard could only be directed at purely ancillary matters. In sum, "all writs" meant ancillary writs in pending proceedings.

Then, in the 1968 case of Couse v. Canal Authority, the Court suddenly and dramatically overruled its earlier standard of review. "All writs" authority would now exist over any matter falling within the Court's "ultimate power of review" even if no case on the matter was pending in the Florida Supreme Court at the time. The 1968 Court, then sua sponte, amended the Rules of Appellate Procedure to set forth its new standard: All writs jurisdiction exists "only when it is made clearly to appear that the writ is in fact necessary in aid of an ultimate power of review." In sum, the

631. FLA. CONST. art. V, § 3(b)(9).
633. Compare FLA. CONST. art. V, § 3(b)(7) with Couse v. Canal Authority, 209 So. 2d 865, 867 (Fla. 1968) (quoting FLA. CONST. of 1885, art. V (1957)).
634. E.g., State ex rel. Watson v. Lee, 8 So. 2d 19, 21 (Fla. 1942).
635. 209 So. 2d 865 (Fla. 1968).
636. Couse, 209 So. 2d at 867 (quoting FLA. R. APP. 4.5(g)(1) (as amended)). Apparently, the new standard merely expanded jurisdiction. The Court still continued to
standard of review was changed from “ancillary writs” to “aiding ultimate jurisdiction,” though it was not altogether clear in Couse what this change meant.

Two years later, the Court mentioned its all writs powers in a way that apparently expanded them even further. In a rancorous dispute between the Governor and the Legislature, the 1970 Court seemed to suggest that it was exercising some form of original all writs jurisdiction because the case “vitally affect[ed] the public interest of the State.” 637 However, the case is vague and actually may have involved the issuance of a writ of prohibition, with the Court imprecisely referring to “the all writ section” as the basis for jurisdiction, 638 a misreference that has also happened elsewhere. 639

Later cases, unfortunately, have read this same vague language quite expansively. In 1974, the Court confronted a case involving the all writs authority of the district courts of appeal. While deciding the case, the Court detoured into dicta reiterating the 1968 standard of review and adding to it: The Florida Supreme Court’s original all writs jurisdiction now would extend to “certain cases [that] present extraordinary circumstances involving public interest where emergencies and seasonable consideration are involved that require expedition.” 640 It was unclear whether this dictum was a revision of the Couse standard or merely added an additional requirement that must be met before all writs jurisdiction could be invoked. If the former, “all writs” could have been converted into a form a “reach-down” jurisdiction by which any sufficiently important case could originate in the Florida Supreme Court, with all trial and appellate issues potentially being resolved in one sitting.

For the next two years, the Court made little effort to explain whether its all writs power would operate so sweepingly. 641 Then in 1976 another

issue ancillary writs in pending proceedings under its all writs power. See Booth v. Wainwright, 300 So. 2d 257, 258 (Fla. 1974).


638. See id. The headnote says that prohibition was issued, though the text of the opinion is vague on this point. Id.

639. E.g., City of Tallahassee v. Mann, 411 So. 2d 162, 163 (Fla. 1981) (all writs clause cited as basis of jurisdiction in granting prohibition). The misreference also was tempted by another fact: Both prohibition and “all writs” are authorized by the same sentence in the constitution, though the two actually are distinct and subject to radically different standards of review. See Fla. Const. art. V, § 3(b)(7).


641. E.g., McCain v. Select Committee on Impeachment, 313 So. 2d 722, 722 (Fla. 1975). The McCain case involved an effort by a sitting justice of the Florida Supreme Court
dramatic reversal occurred: The Court suddenly reverted to its pre-1968 standard of review. No real reason for doing so was given,\textsuperscript{642} and the Court did not mention or overrule the relevant cases it had issued since the late 1960s. Nor did the Court even note that the relevant Rule of Appellate Procedure still contained the language added \textit{sua sponte} to enforce \textit{Couse}.\textsuperscript{643} The Court’s decision was criticized as being “rightly decided but wrongly explained.”\textsuperscript{644}

The older ancillary writs standard does seem dated in light of modern procedural innovations. Common-law “ancillary writs” such as \textit{audita querela} have vanished from the law, replaced by procedural rules no longer even identified by the somewhat quaint term “writ.” In the Florida Supreme Court, modern-day descendents of the old ancillary writs are sometimes still seen, such as the writ of injunction and the related concept of a judicial “stay.” However, the Court in recent years has never attempted to use the all writs clause as the basis of jurisdiction over such matters. Rather, the Court routinely finds some other basis of jurisdiction.\textsuperscript{645} In this light, an ancillary writs standard risks converting “all writs” into something essentially meaningless, contrary to the settled rule that all constitutional language should be construed to have an effect if at all possible.\textsuperscript{646}

Nevertheless, by the late 1970s, the Court seemed to be applying the restrictive ancillary writs standard, though it typically did so with a minimum of explanation.\textsuperscript{647} Then, in 1982, everything changed again:

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\textsuperscript{642} The Court only cited one case that had nothing to do with the all-writs clause and a 1942 case that clearly had been overruled in 1968. \textit{Shevin ex rel. State}, 333 So. 2d 9, 12 (Fla. 1976) (citing Wilson v. Sandstrom, 317 So. 2d 732 (Fla. 1975)); \textit{State v. Lee}, 8 So. 2d 19 (Fla. 1942).

\textsuperscript{643} FLA. R. App. P. 4.5(g)(1). The Rule’s language was even quoted two years later in an opinion apparently applying the pre-1968 standard of review. \textit{Besoner v. Crawford}, 357 So. 2d 414, 415 (Fla. 1978).


\textsuperscript{645} E.g., \textit{Jones v. State}, 591 So. 2d 911, 912, 916 (Fla. 1991) (stay of pending execution based on Court’s jurisdiction over judgments imposing sentence of death); \textit{The Florida Bar v. Dobbs}, 508 So. 2d 326, 327 (Fla. 1987) (writ of injunction against unlicensed practice of law based on Court’s jurisdiction to regulate practice of law).

\textsuperscript{646} \textit{Burnsed v. Seaboard Coastline R.R.}, 290 So. 2d 13, 16 (Fla. 1974).

\textsuperscript{647} \textit{Id.}; \textit{St. Paul Title Ins. Corp. v. Davis}, 392 So. 2d 1304, 1304-05 (Fla. 1980) (all writs clause cannot confer jurisdiction over district court PCA).
Another dispute between the Legislature and the Governor came to the Court that was hard to pigeonhole into any particular basis of jurisdiction. To hear the case, the Court abruptly returned to the less restrictive *Couse* standard it had adopted in 1968 and apparently abandoned in 1976. Once again, no effort was made to overrule or reconcile the inconsistent cases.648

Significantly, the 1982 Court made no mention of its earlier dicta suggesting that all-writs jurisdiction would exist if the issue was merely important enough. Rather, the Court applied the earlier “aiding ultimate jurisdiction” standard that had been developed in 1968 by *Couse*. The Court found that it had all-writs jurisdiction in this particular case because the Governor had taken actions that might restrict the Legislature’s ability to reapportion the state’s legislative and congressional districts. Florida’s Constitution requires the Court to review all apportionment plans for constitutionality,649 so the Governor’s actions could have limited the Court’s ultimate exercise of that jurisdiction.

Very little has happened in more recent years to illuminate the all writs power. In 1984, the Court cited the all writs clause as the basis for hearing a death-row inmate’s request for a judicial order requiring a competency hearing, though no relief was granted.650 Exercising jurisdiction in this manner was consistent with the “aiding ultimate jurisdiction” standard. The state constitution assigns the Florida Supreme Court exclusive and mandatory appellate jurisdiction over cases involving death sentences.651 Thus, the Court has the ultimate jurisdiction to ensure that executions are conducted lawfully. The all writs clause could be invoked, in other words, to review any matter or to issue any order necessary to ensure the propriety of a death sentence. An example would be ordering a judicial determination of competency where there was a serious enough question.

Nevertheless, the only rule that can be distilled from this confusing body of law is that the “aiding ultimate jurisdiction” standard apparently prevails at the moment. Its true scope remains somewhat unclear, especially since the earlier dicta about “sufficiently important” cases has never actually been overruled.

The better view probably is that the Court rejected these dicta by ignoring them in its more recent opinions, or else regards them as an additional requirement above and beyond “aiding ultimate jurisdiction.”

648. Florida Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982).
649. Fla. Const. art. III, § 16(c).
651. Fla. Const. art. V, § 3(b)(1).
There are sound reasons for this conclusion. A "sufficient importance" standard could convert "all writs" into a broad form of reach-down jurisdiction, even though the 1980 jurisdictional reformers considered and rejected much the same thing. Moreover, sufficient importance is an inherently subjective concept that would be hard to define in practice.

The Couse standard is probably best seen as very limited and cases qualifying under it would be rare. The policy of "aiding ultimate jurisdiction" makes most sense when confined to a class of cases over which the Court normally would have some form of original or appellate jurisdiction, but where the full and complete exercise of that jurisdiction seems likely to be curtailed or defeated before the Court could otherwise hear the case. That would mean there are two elements: the existence of "ultimate jurisdiction" found in the text of the constitution, and some unusual and impending factor likely to limit or frustrate the complete exercise of that jurisdiction. This is consistent with the constitution, which itself says that the purpose of "all writs" is to allow a "complete exercise" of jurisdiction.

The "ultimate jurisdiction" requirement would also mean that properly written court opinions should identify at least two constitutional provisions establishing jurisdiction. One would be the provision creating the ultimate basis of jurisdiction, and the other would be the all writs clause. In other words, "all writs" as conceived in Couse has a "dual jurisdiction" requirement.

The few cases already decided in this subcategory suggest another significant conclusion: The Court’s all writs power is on its firmest footing in death cases, especially those involving pending executions, and in pressing governmental crises. In that vein, it is worth noting that the case In re Order on Prosecution in Criminal Appeals, is probably best understood as an all writs case mistakenly assigned to the wrong category of jurisdiction. The case obviously involved a pressing governmental crisis,

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652. See Jurisdiction supra note 320, at 193-96.
653. Obviously, this could include such traditional ancillary concerns as issuance of a temporary injunction or the stay of lower court proceedings. See Mann, supra note 644 at 200-02.
654. FLA. CONST. art. V, § 3(b)(7).
655. Accord Florida Senate, 412 So. 2d at 361 (citing both all writs clause and ultimate basis of jurisdiction).
656. E.g., Alvord, 459 So. 2d at 316.
657. Florida Senate, 412 So. 2d at 360; accord Mize v. County of Seminole, 229 So. 2d 841 (Fla. 1969).
658. In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130 (Fla. 1990).
as the Court expressly noted. A strong argument existed there that the county governments affected by the district court’s "sua sponte" order should have been joined as parties below under the rule of due process. Moreover, the Florida Supreme Court had "ultimate jurisdiction" over the kind of case involved, and the district court's failure to join the counties threatened to deprive the Florida Supreme Court of the full exercise of its ultimate jurisdiction because of a technical lack of standing. This would justify "all writs" review under the Coose standard.

Another recent death case illustrates much the same situation. In 1993, death-row inmate Michael Durocher, the subject of an active death warrant, mailed a letter to the Florida Supreme Court seeking to dismiss his attorney and announcing that he would not oppose his own pending execution. His attorney, meanwhile, argued that Durocher was mentally incompetent and could not make an intelligent decision. The Court accepted the case and ordered the trial judge to hold a hearing to determine whether Durocher was making an intelligent waiver of his right to counsel.

As a basis of jurisdiction, the Court cited only its habeas powers. However, the Court elsewhere has noted that the writ of habeas corpus is inappropriate if the actual dispute is not the lawfulness of a restraint on liberty. That certainly was the case with Durocher because the only issue was whether his attempt to dismiss counsel was effective. The restraint on liberty was not in question. On the whole, Durocher's case is probably best understood as an all writs case mistakenly assigned to the wrong category of jurisdiction. All writs authority clearly was appropriate because of the unusual facts and the Court's ultimate jurisdiction to ensure the lawfulness of state executions.

A few other aspects of all writs jurisdiction deserve comment. As noted above, the Court occasionally has cited the all writs clause as a basis for jurisdiction over writs such as prohibition, which are actually authorized by separate clauses or provisions of the constitution. This is a practice that promotes confusion and should be avoided. The Court's all writs

659. Id. at 1131.
660. "Ultimate jurisdiction" potentially existed here on a number of bases, including the Florida Supreme Court authority to review cases affecting a class of state or constitutional officers, the basis actually cited for jurisdiction in the case. See Fla. Const. art. V, § 3(b)(3).
662. Id. at 1.
663. Waldrup. 562 So. 2d at 687.
665. See supra notes 638, 639 and accompanying text.
authority now has evolved into a distinct concept, so it muddies the waters to use the phrase “all writs” as a generalized reference to any or all of the extraordinary writs. The 1970 case of Pettigrew\(^6\) apparently made this mistake and was later cited as authority in a questionable effort to expand the all-writs power. The better practice is to confine all writs jurisdiction to those cases applying the Couse standard, at least to the extent this is possible.

In this vein, it should be noted that there is at least one extraordinary writ, error coram nobis, for which the Court has tended to cite the all writs clause as a basis for jurisdiction.\(^6\) However, that is an unusual case and in any event, error coram nobis now has been rendered largely obsolete. Previously the writ of error coram nobis\(^6\) was the method by which a prior conviction could be challenged on the basis of newly discovered evidence.\(^6\) In 1989, the Florida Supreme Court essentially abolished the writ as it applies to persons still incarcerated. Challenges by such persons now must be presented to the trial court pursuant to Florida Rule of Criminal Procedure 3.850.\(^6\)

Error coram nobis appears to remain available only for persons not presently in custody.\(^5\) Even this limited remnant is hard to justify. The only evident reason for retaining it is that Rule 3.850 technically is available only to prisoners in custody.\(^6\) Yet this fact alone hardly seems to justify retaining the far more restrictive coram nobis standard\(^6\) only for persons already released from custody. The better practice would be to allow all persons the same remedy when newly discovered evidence is presented to challenge a prior conviction. This would require a change in the Rules of Criminal Procedure,\(^6\) but one that would seem worthwhile and fairer.

\(^6\) Supra note 637.

\(^6\) E.g., Richardson v. State, 546 So. 2d 1037, 1037 (Fla. 1989). Coram nobis is not mentioned in the constitution’s grant of jurisdiction. See FLA. CONST. art. V, § 3(b).

\(^6\) The name is a peculiar blending of English and Latin. “Coram nobis” means “before us.” The writ exists to bring an error “before us” for review, i.e. before the court. BLACK’S LAW DICTIONARY 543 (6th ed. 1991).

\(^6\) Richardson, 546 So. 2d at 1037.

\(^6\) For a discussion of Rule 3.850, see infra note 674.

\(^6\) Jones, 591 So. 2d at 915.

\(^6\) FLA. R. CRIM. P. 3.850(a).

\(^6\) See Jones, 591 So. 2d at 915.

\(^6\) This could be done simply by stating that persons not in custody who are challenging a prior conviction based on newly discovered evidence may proceed under Rule 3.850 the same as a person in custody. There will be a need for some procedure of this type, because persons released from custody sometimes do find new evidence that could exonerate them and clear their records. It hardly seems fair to apply the liberalized Rule 3.850 remedy
Attempts have sometimes been made to use the all writs clause as a means of resurrecting a variety of writs that existed in earlier common law. An example is the common-law writ of certiorari. This is an extraordinary "writ of review" that should be distinguished from the separate "appellate certiorari" jurisdiction previously granted to the Court by provisions of the Florida Constitution deleted in 1980. Common-law certiorari exists to review and correct actions by a lower tribunal that violate the essential requirements of the law where no other adequate remedy exists. However, it is now clear that the Florida Supreme Court cannot issue the writ. The Court's authority in this regard was abolished in the 1957 jurisdictional reforms that created the district courts of appeal and was not revived by the 1980 reforms.

English common law at one time had developed many other legal devices labeled "writs." In theory, any of these could be "revived" by interpreting the Florida Constitution's all writs clause as a generalized reference. In practice, however, such a thing is unlikely to be necessary or wise. Most of the common-law writs dealt with problems fully covered by a variety of modern legal practices and procedures, most of which are no longer even considered to be "writs." On the whole, it appears likely that the Florida Constitution's reference to "all writs" should be understood as creating a single highly specialized writ available in the extraordinary circumstances contemplated by Couse, with the possible exception of the highly limited (and questionable) form of error coram nobis that seems to remain today.

VIII. EXCLUSIVE JURISDICTION

The constitution assigns the Florida Supreme Court exclusive original jurisdiction in five categories, most of which deal with regulation of Florida's Bench and Bar. The only exception is in the case of legislative apportionment, which is a unique concern. Jurisdiction is both exclu-

\[\text{to those in custody, while restricting all others to the hidebound and quirky standards that made error coram nobis virtually impossible to obtain. } \text{See id.}\]

675. E.g., Kilgore v. Bird, 6 So. 2d 541 (Fla. 1942).
677. Allen v. McClamma, 500 So. 2d 146, 147 (Fla. 1987).
678. For example, the writ of audita querela now has been supplanted by the motion for relief from judgment authorized in the Rules of Civil Procedure. BLACK'S LAW DICTIONARY 131 (6th ed. 1991).
679. See discussion infra part VIII.E.
sive and original because most of the topics embraced within this category involve the Court's administrative powers over the state's judiciary and lawyers. In the case of apportionment, jurisdiction is premised on the necessity of a final and swift legal determination that Florida's electoral districts are constitutionally valid each time they are altered.

A. Regulation of The Florida Bar

The state constitution assigns the Florida Supreme Court exclusive jurisdiction over the discipline of persons admitted to practice law. As a result, attorneys are the only profession that cannot be regulated through agencies created by the Legislature. They fall within the exclusive purview of the Court. Moreover, on June 7, 1949, the Florida Supreme Court "integrated" The Florida Bar; that is, it designated it as an arm of the Court for purposes of regulating the practice of law. The Bar maintains that function to this day. Integration effectively means that no one can practice law in Florida without first becoming a member of The Florida Bar.

Regulation of attorneys operates on a number of levels. For one thing, the Court controls admissions to the Bar and promulgates rules that regulate the profession's governance and the procedures used in court. The Court's most significant power is its ability to discipline lawyers for improprieties based on a detailed set of ethical rules governing attorney conduct, with The Florida Bar serving as primary enforcer.

Allegations of unethical conduct are investigated and, if meritorious, may be reviewed by Bar counsel or Bar grievance committees. The matter then may be examined by the Board of Governors of The Florida Bar. Subject to the Board of Governor's control, Bar counsel then may file a complaint with the Florida Supreme Court, which initiates formal charges against the lawyer in question. At this point, the chief justice usually appoints a "referee" to resolve factual issues and make recommendations regarding discipline. Referees ordinarily are sitting county or circuit judges, however, retired judges also can be appointed.

Procedures before the referee are highly regulated by court rules and are conducted as adversary proceedings, like a trial. After hearing the

680. FLA. CONST. art. V, § 15.
681. In re Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).
682. FLA. R. REGULATING THE FLA. BAR 3-3.1.
683. See discussion infra part VIII.C.
684. See generally FLA. R. REGULATING THE FLA. BAR.
685. Id. 3-7.5.
evidence, the referee will issue a report setting down factual findings and recommended discipline, if any. The report is then forwarded to the Court. At this point, many attorneys decline to challenge the referee’s findings and recommendations, which the Court then summarily affirms. If attorneys dispute the reports, their cases usually are accepted for review as a “no request” (without oral argument), although in rare cases oral argument is granted. The Bar also can challenge a referee’s report.

Factual findings contained in the referee’s report are presumptively correct and are accepted as true by the Court unless such findings lack support in the evidence, or, stated another way, unless clearly erroneous. Proceedings before the Florida Supreme Court are not trials de novo in which all matters might be revisited. However, the referee’s purely legal conclusions (including disciplinary recommendations) are subject to broader review, though they come to the Court with a presumption of correctness. In practice, the Court will depart from recommended discipline deemed too harsh or too lenient. However, the Court almost never exceeds the discipline actually requested by Bar counsel.

Discipline can range from a reprimand to disbarment. Nearly all forms of discipline result in a public record of the attorney’s misconduct. Disbarred attorneys typically cannot be readmitted to practice law unless at least five years have passed and they prove they have been rehabilitated—a difficult thing to do in many cases. Occasionally, the Court disbars without leave to reapply, in which case readmission is possible only by petitioning the Court for permission.

B. Admission to The Florida Bar

The constitution also grants the Florida Supreme Court exclusive jurisdiction over admitting persons to practice law. To oversee Bar admissions, the Court has created the Florida Board of Bar Examiners. This agency reviews all applications for admission using detailed standards included in the Rules of Court. Every Bar applicant must undergo a

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689. The Florida Bar v. Langston, 540 So. 2d 118 (Fla. 1989).
691. The Florida Bar re Lawrence H. Hipsh, Sr., 586 So. 2d 311 (Fla. 1991).
692. Id.
693. FLA. CONST. art. V, § 15.
694. See FLA. SUP. CT. BAR ADMISS. RULE.
rigorous background investigation conducted by the Bar Examiners, must successfully complete a two-day examination on legal knowledge, and must pass a separate examination on legal ethics.

If the background investigation reveals anything reflecting poorly on an applicant’s character or fitness, the Bar Examiners are also authorized to conduct a series of hearings to resolve the matter. Any decision coming out of this process can be taken to the Court by petition for further review. The Court can then accept, reject, or modify the recommendations of the Bar Examiners. Bar admission cases are usually confidential, though a few are occasionally made public and published in Southern Second, often with the applicant identified only by initials. 695

C. Rules of Court

The development and issuance of all rules governing practice and procedure before Florida Courts lies within the exclusive jurisdiction of the Florida Supreme Court. 696 Development of rules has been delegated to various committees of The Florida Bar, except local rules, which are developed by the state’s lower courts, reviewed by the Local Rules Committee, and submitted to the Florida Supreme Court for approval.

Every four years these committees submit proposals for revisions, which the Court then accepts, rejects, or modifies. This “quadrennial” revision process is often supplemented in off-years by special proposals by the committees, petitions for revisions filed by Bar members, and the much rarer sua sponte revisions issued by the Court to meet some special need. Though it seldom happens, court rules can be repealed by a two-thirds vote in each house of the Legislature. 697 The lower courts cannot ignore or amend controlling rules. 698

The Court’s rule-making authority extends only to procedural law, not substantive law. Though the boundary separating the two is not entirely precise, the Court has said that “procedural law” deals with the course, form, manner, means, method, mode, order, process, or steps by which substantive rights are enforced. 699 “Substantive law” creates, defines, and

695. E.g., Florida Bd. of Bar Examiners, Re: S.M.D., 619 So. 2d 297 (Fla. 1993).
698. State v. McCall, 301 So. 2d 774 (Fla. 1974).
regulates rights. In other words, "procedure" is the machinery of the judicial process while "substance" is the product reached.\textsuperscript{700}

These distinctions are important because they separate the rule-making authority of the Court from the lawmaking authority of the Legislature. Thus, it is possible for the Legislature to enact a "procedural" statute that can be superseded by court rule\textsuperscript{701} just as it is possible for the Court to enact a rule so substantive in nature that it violates the Legislature's prerogative.\textsuperscript{702} Tussles between the two branches of government have erupted in the past, most noticeably in the development of the Florida Evidence Code. On occasion, the Court has even called for a "cooperative" effort with the Legislature in eliminating problems between conflicting statutes and rules.\textsuperscript{703} The Court has also announced that it will make every effort to harmonize rules with relevant statutes, on the theory that legislative enactments embody the popular will. However, the Court lacks any authority to issue rules governing administrative proceedings, which fall within the legislature's authority.\textsuperscript{704}

It is worth noting that by promulgating a rule, the Court does not vouch for its constitutionality. A court rule could thus be challenged in a future proceeding on any valid constitutional ground. This is because rules are issued as an administrative function of the Court, not as an adjudicatory function. For much the same reason, the act of promulgating a rule does not foreclose challenges that it contains "substantive" aspects and to that extent is invalid. Questions such as these can only be decided when affected parties bring an actual controversy for resolution.

D. Judicial Qualifications

The next form of exclusive jurisdiction governs "judicial qualifications," which exists solely for the purpose of disciplining the state's judges and justices for improprieties. It is analogous to Bar discipline, though accomplished through a different administrative agency. Jurisdiction here rests on a constitutional provision that specifies in considerable detail how such cases are reviewed.\textsuperscript{705} As noted earlier, cases of this type are commenced at the instance of the JQC, which is authorized to investigate

\textsuperscript{700} Id.
\textsuperscript{701} Id.
\textsuperscript{702} E.g., State v. Furen, 118 So. 2d 6 (Fla. 1960).
\textsuperscript{703} Leapai v. Milton, 595 So. 2d 12, 14 (Fla. 1992).
\textsuperscript{704} E.g., State v. Furen, 118 So. 2d 6 (Fla. 1960).
\textsuperscript{705} FLA. CONST. art. V, § 12.
alleged impropriety by any judge or justice. Upon recommendation of two-thirds of the JQC’s members, the Florida Supreme Court is then vested with jurisdiction to consider the case.

Jurisdiction here is exclusive, however, because the findings and proposals of the JQC are considered to be only recommendations. The JQC operates as an “arm of the court” much in the nature of a fact-finding referee in a Bar discipline proceeding. The JQC’s recommendations are persuasive but not conclusive, and the Florida Supreme Court has sometimes departed from recommended discipline. Moreover, the JQC does not constitute a “court” in itself and thus, is not subject to the writ of prohibition. Discipline recommended by the JQC will be imposed only when supported by clear and convincing proof of the impropriety in question.

The Court has held that judicial qualification proceedings are not in the nature of a criminal prosecution and thus are not subject to the constitutional restraints peculiar to criminal law. The doctrines of res judicata and double jeopardy do not apply and the JQC can, therefore, inquire into matters previously investigated in other contexts. As noted earlier, the constitution automatically disqualifies the sitting justices of the Florida Supreme Court to hear a proceeding brought against one of their own number. Instead, a panel of specially appointed “Associate Justices” will hear the case.

E. Review of Legislative Apportionment

In every year ending in the numeral “2,” the Florida Legislature is required to reapportion the state’s legislative and congressional districts to reflect the latest United States Census. Reapportionment must be finalized before the fall’s elections that same year, which might not be possible if lawsuits on the question began in some lower court and wended through the appellate system. Accordingly, the state constitution has given the Florida

706. See discussion supra part II.H.1.
708. Id.
710. State ex rel. Turner, 295 So. 2d at 611.
711. In re LaMotte, 341 So. 2d 513, 516 (Fla. 1977).
713. Id. at 570.
714. See supra text accompanying notes 137-38.
Supreme Court exclusive, original, and mandatory jurisdiction to review each decennial reapportionment plan approved by the Legislature.\footnote{715}{FLA. CONST. art. III, § 16(c).}

The Court's authority in this regard is extraordinary. All questions regarding validity of the reapportionment plan can be litigated to finality in a single forum, for both trial and appellate purposes. Moreover, if the Legislature is unable to reapportion within certain time constraints, the Court itself has authority to impose a reapportionment plan by order.\footnote{716}{Id.} Judicial apportionment, for example, was necessary in 1992 with respect to some of the state's districts.\footnote{717}{In re Constitutionality of Senate Joint Resolution 2G, 601 So. 2d 543 (Fla. 1992).} Thus, federal issues are an important concern here. It should be noted, however, that the Florida Supreme Court's determination of validity does not necessarily bind the federal courts.

**IX. CONCLUSIONS**

The Florida Supreme Court was created in 1845 and held its first sessions the following year. Since that time, a considerable body of custom and precedent has come into existence regarding the Court's operation and jurisdiction. This body is not widely known outside the Court, nor has there been much previous effort to compile information about routine operations in one more or less comprehensive collection. The present article is an effort to fill this gap, providing information to lawyers and laypersons about their state's highest court.

On the whole, the review of custom and precedent shows a Court that is operating smoothly and fairly efficiently following the jurisdictional reforms of 1980. There have been occasional cases that may be difficult to square with the Court's limited jurisdiction, but these have been rare and are largely confined to categories seldom entertained. The Court's docket is manageable, and the present staff structure enables the justices to fulfill their various duties efficiently, while also disposing of their case assignments. Today, the Florida Supreme Court is one of the success stories in the state's more recent efforts to modernize its constitution.

\footnote{715}{FLA. CONST. art. III, § 16(c).}
\footnote{716}{Id.}
\footnote{717}{In re Constitutionality of Senate Joint Resolution 2G, 601 So. 2d 543 (Fla. 1992).}
\footnote{718}{Id. at 546-47.}