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## Extraordinary Writs: A Powerful Tool for the Florida Practitioner

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# Extraordinary Writs: A Powerful Tool for the Florida Practitioner

BENNETT H. BRUMMER,\* PAUL MORRIS\*\* AND ANDREW ROSEN\*\*\*

*This article explores the distinctive nature of extraordinary writs and their availability in the Florida courts. Recent decisional and statutory law in this area is analyzed in detail. The authors' presentation affords Florida practitioners valuable guidelines for the effective invocation of extraordinary writs.*

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## I. INTRODUCTION

This article examines the nature of extraordinary writs in Florida, placing particular emphasis on recent developments.<sup>1</sup> The article also examines the jurisdiction of the courts to issue extraordinary writs and the procedures governing their use under the Florida Rules of Appellate Procedure, which took effect on March 1, 1978.

## II. MANDAMUS

### A. Nature

The writ of mandamus is issued to command performance of a preexisting, public ministerial duty.<sup>2</sup> The petitioner must demonstrate a clear legal right to commission of the particular duty in question.<sup>3</sup> An actual default must be demonstrated before the writ will issue; threats of future violation of a duty will not suffice.<sup>4</sup> Where the respondent has discretion to act, however, mandamus will lie to assure that such discretion is exercised in a sound and lawful manner.<sup>5</sup>

Mandamus is a high prerogative writ granted in the sound discretion of the court<sup>6</sup> and is available only if no other adequate legal remedy exists.<sup>7</sup> The sufficiency of alternative means of relief is determined in light of the particular facts and circumstances of each case.<sup>8</sup>

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1. Extraordinary writs are very efficacious tools for Florida practitioners. These writs, however, cannot be characterized as a group because each represents a residual remedy which does not come into play unless standard modes of relief are unavailable. This article, therefore, delineates the individual traits of extraordinary writs and discusses their respective uses in the Florida courts. See generally Adams & Miller, *Origins and Current Florida Status of the Extraordinary Writs*, 4 U. FLA. L. REV. 421 (1951).

2. A purely ministerial duty involves no element of discretion or exercise of judgment; its performance is clearly and specifically required by law. *State ex rel. Long v. Carey*, 121 Fla. 515, 530, 164 So. 199, 207 (1935).

3. *State ex rel. Evans v. Chappel*, 308 So. 2d 1 (Fla. 1975).

4. *McConihe v. State ex rel. McMurray*, 17 Fla. 238, 272 (1879).

5. *Moore v. Florida Parole & Probation Comm'n*, 289 So. 2d 719 (Fla. 1974).

6. *State ex rel. Long v. Carey*, 121 Fla. 515, 164 So. 199 (1935).

7. *Id.* at 529, 164 So. at 206.

8. *Scussel v. Kelly*, 152 So. 2d 767, 780 (Fla. 2d DCA 1963), *quashed on other grounds*

### B. Jurisdiction

Article V of the Constitution of the State of Florida authorizes the circuit courts,<sup>9</sup> the district courts of appeal<sup>10</sup> and the supreme court<sup>11</sup> to issue writs of mandamus. The writ will not lie in an appellate court, however, where factual issues exist which require the taking of testimony.<sup>12</sup> Moreover, the jurisdiction of the supreme court is expressly limited to cases in which the principal relief sought is against a state officer or agency.<sup>13</sup>

### C. Uses

Mandamus has been invoked to command performance of a variety of duties, including court compliance with proper procedures,<sup>14</sup> enforcement of constitutional rights,<sup>15</sup> determination of the constitutionality of legislation,<sup>16</sup> acceptance of complaints for filing,<sup>17</sup> disclosure of public records,<sup>18</sup> dismissal of criminal charges on the basis of immunity,<sup>19</sup> reinstatement of improperly dismissed appeals,<sup>20</sup> speedy trial of an out-of-state prisoner,<sup>21</sup> proper crediting by prison authorities of the time a defendant spent in jail,<sup>22</sup> and enforcement of judgments against municipal corporations.<sup>23</sup>

More recently, the Supreme Court of Florida held in *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*,<sup>24</sup> that a peti-

167 So. 2d 870 (Fla. 1964).

9. FLA. CONST. art. V, § 5(b).

10. *Id.* § 4(b)(3).

11. *Id.* § 3(b)(5).

12. *State ex rel. Int'l Ass'n of Firefighters v. Board of Comm'rs*, 254 So. 2d 195 (Fla. 1971). Writs which raise an issue of fact, requiring the taking of testimony, will not be heard by an appellate court because an appellate court's jurisdiction is limited to reviewing issues of law in the final decree of the trial court. *See* FLA. R. APP. P. 4.5(a)(2); FLA. CONST. art. V, § 5(b).

13. FLA. CONST. art. V, § 3(b)(5); *see, e.g., Petit v. Adams*, 211 So. 2d 565 (Fla. 1968) (no jurisdiction in supreme court because principal relief sought was against county officers).

14. *State ex rel. Dillman v. Tedder*, 123 Fla. 188, 166 So. 590 (1936); *State ex rel. Zuberi v. Brinker*, 323 So. 2d 623 (Fla. 3d DCA 1975).

15. *State ex rel. Hawkins v. Board of Control*, 83 So. 2d 20 (Fla. 1955).

16. *State ex rel. Allen v. Harlow*, 72 So. 2d 666 (Fla. 1954).

17. *McConihe v. State ex rel. McMurray*, 17 Fla. 238 (1879); *State ex rel. Kaufman v. Sutton*, 231 So. 2d 874 (Fla. 3d DCA 1970).

18. *Gannett Co. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d DCA 1974).

19. *State ex rel. Hough v. Popper*, 287 So. 2d 282 (Fla. 1973).

20. *State ex rel. Gaines Constr. Co. v. Pearson*, 154 So. 2d 833 (Fla. 1963).

21. *Dickey v. Circuit Court*, 200 So. 2d 521 (Fla. 1967).

22. *Adams v. Wainwright*, 275 So. 2d 235 (Fla. 1973).

23. *Peacock v. State ex rel. American Mortgage & Fin. Co.*, 122 Fla. 25, 164 So. 680 (1935).

24. 361 So. 2d 695 (Fla. 1978).

tioner may simultaneously seek mandamus and declaratory relief. The court reasoned that "to hold otherwise would contravene not only the plain language of the statute but the declarations of the Florida courts and of the legislature to the effect that the declaratory judgment statute should be liberally construed."<sup>25</sup>

In *State ex rel. Gerstein v. Schwartz*,<sup>26</sup> the Supreme Court of Florida issued a writ of mandamus directing the trial court to fingerprint convicted felons in accordance with statutory requirements. The court ruled that the statute did not unconstitutionally infringe upon the power of the state's judicial branch and, therefore, the trial court had a duty to comply with its provisions.

Similarly, in *D'Alessandro v. Shearer*,<sup>27</sup> the trial court had refused to comply with a statute which mandated the sentencing of defendants to fixed minimum terms upon conviction of certain offenses. Rejecting the trial court's contention that the statute was unconstitutional, the supreme court issued a writ of mandamus directing the lower court to enter new sentencing orders in compliance with the statute.

In *Mellor v. Arakgui*,<sup>28</sup> mandamus was utilized to compel the circuit court clerk to issue a certificate terminating the jurisdiction of a medical mediation panel. Because the panel had held no hearing within six months from the date on which the claim was filed, its jurisdiction had lapsed. The petitioners were entitled, therefore, to pursue the cause of action in the circuit court.<sup>29</sup>

The District Court of Appeal, Fourth District, affirmed a circuit court's issuance of the writ to compel county commissioners to approve a plat of land. The court concluded that the commissioners had acted arbitrarily because all legal prerequisites for approval had been met.<sup>30</sup>

The District Court of Appeal, Second District, upheld the use of mandamus relief to command issuance of a municipal building permit.<sup>31</sup> In so holding, the district court affirmed the circuit court judge's invalidation of a zoning ordinance which the city had contended barred issuance of the permit.

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25. *Id.* at 699 (footnotes omitted).

26. 357 So. 2d 167 (Fla. 1978).

27. 360 So. 2d 774 (Fla. 1978).

28. 359 So. 2d 36 (Fla. 4th DCA 1978).

29. *Cf. Stanton v. Community Hosp.*, 359 So. 2d 37 (Fla. 4th DCA 1978) (same issue presented in a petition for writ of prohibition which successfully sought to prevent a medical mediation panel from hearing a claim after the six-month period had elapsed).

30. *Broward County v. Narco Realty, Inc.*, 359 So. 2d 509 (Fla. 4th DCA 1978).

31. *City of St. Petersburg v. Austin*, 355 So. 2d 486 (Fla. 2d DCA 1978).

A grant of mandamus relief to compel a city utility commission to release records and documents in its possession to a utility company pursuant to the Public Records Act<sup>32</sup> was affirmed by the District Court of Appeal, First District.<sup>33</sup> Although the pertinent provisions of the Act were deemed mandatory and nondiscretionary, the court asserted that mandamus would not lie to compel disclosure of documents because fundamental privacy interests outweighed the right to disclosure.<sup>34</sup>

### III. PROHIBITION

#### A. Nature

The writ of prohibition is narrow in scope.<sup>35</sup> It may be issued by a superior court solely to prevent a lower court or tribunal from exercising jurisdiction with which it has not been vested by law.<sup>36</sup> Proceedings in a lower tribunal which do not involve jurisdictional questions, therefore, are not proper objects of a prohibition action even though they may constitute reversible error.<sup>37</sup> The writ may not be invoked to preclude a lower court from erroneously exercising its legally conferred jurisdiction;<sup>38</sup> nor will it lie to challenge an order previously entered.<sup>39</sup> Ordinarily, however, it is available to prevent the commission of a future act.<sup>40</sup>

Prohibition is a high prerogative writ granted in the sound discretion of the court. It may be invoked only where the petitioner lacks other adequate means to redress or to prevent wrongful actions by the lower tribunal.<sup>41</sup> If alternative but inadequate remedies exist, prohibition will lie.<sup>42</sup> The writ is unavailable, however, at the appellate level because resolution of factual issues requiring the taking of testimony is sought.

Generally, an objection or ruling in the lower tribunal is not a

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32. FLA. STAT. § 119.01 -.12 (1975).

33. *Wait v. Florida Power & Light Co.*, 353 So. 2d 1265 (Fla. 1st DCA 1978).

34. *Byron, Harless, Schaffer, Reid & Assocs. v. State ex rel. Schellenberg*, 360 So. 2d 83 (Fla. 1st DCA 1978).

35. The writ will issue only to prevent judicial or quasijudicial action, as distinguished from legislative, executive or ministerial action. See *State ex rel. Swearingen v. Railroad Comm'rs*, 79 Fla. 526, 84 So. 444 (1920).

36. *English v. McCrary*, 348 So. 2d 293 (Fla. 1977).

37. *White v. State ex rel. Johnson*, 160 Fla. 965, 37 So. 2d 580 (1948).

38. *Burkhart v. Circuit Court*, 146 Fla. 457, 1 So. 2d 872 (1941).

39. *State ex rel. R.C. Motor Lines, Inc. v. Boyd*, 114 So. 2d 169 (Fla. 1959).

40. *Id.*

41. *Burkhart v. Circuit Court*, 146 Fla. 457, 1 So. 2d 872 (1941).

42. *Scussel v. Kelly*, 152 So. 2d 767 (Fla. 2d DCA 1963), *quashed on other grounds*, 167 So. 2d 870 (Fla. 1964).

prerequisite to prohibition relief since jurisdictional defects relating to subject matter are not waivable.<sup>43</sup> Nevertheless, in view of the discretionary nature of the writ, it is advisable to present the jurisdictional issue to the lower tribunal whenever feasible.

### B. Jurisdiction

Article V of the Constitution of the State of Florida authorizes the circuit courts,<sup>44</sup> the district courts of appeal<sup>45</sup> and the supreme court<sup>46</sup> to issue writs of prohibition. The jurisdiction of the supreme court, however, is expressly limited to "causes within the jurisdiction of the supreme court to review."<sup>47</sup> Neither the circuit nor district courts are subject to such a jurisdictional restriction.

Recently, in *State ex rel. Sarasota County v. Boyer*,<sup>48</sup> the Supreme Court of Florida defined the parameters of its power to grant prohibition relief directed to the district courts of appeal. Article V limits the authority of the supreme court to grant such relief to only those causes within its jurisdiction to review. Decisions of the district courts so included are those "initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution."<sup>49</sup> The court rejected the contention that the requirement, as construed, was overly restrictive of its prohibition jurisdiction vis-a-vis the district courts of appeal. Denying a request to interpret narrowly the power, the court declared: "It cannot be known whether a district court decision will pass on a statute's validity or construe the Constitution so as to give jurisdiction to review, until the decision has been rendered."<sup>50</sup> The court cited three cases in which it had entertained requests for prohibition relief directed to district courts of appeal.<sup>51</sup> It found that adoption of the restrictive constitutional in-

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43. *State ex rel. Garrett v. Whitehurst*, 122 Fla. 484, 490, 165 So. 691, 693 (1936).

44. FLA. CONST. art. V, § 5(b).

45. *Id.* § 4(b)(3).

46. *Id.* § 3(b)(4).

47. *Id.*

48. 360 So. 2d 388 (Fla. 1978).

49. FLA. CONST. art. V, § 3(b)(1).

50. 360 So. 2d at 392. Prohibition is a preventive writ, which will not lie to attack or to revoke an order once entered. Therefore, after decision is rendered so as to create jurisdiction in the supreme court for its review, issuance of the writ is precluded.

51. *State ex rel. Florida Dep't of Natural Resources v. District Court of Appeal*, 355 So. 2d 772 (Fla. 1978) (holding that prohibition power was validly invoked to prevent district court of appeal from hearing petition for review of agency action where filing of petition was untimely); *State ex rel. Shevin v. Rawls*, 326 So. 2d 173 (Fla. 1976) (finding that prohibition relief was extended properly to consider dismissal of an appeal where notice was prematurely filed); *State ex rel. Shevin v. Rawls*, 290 So. 2d 477 (Fla. 1974) (ruling prohibition was used

terpretation would have rendered the court powerless to issue such writs in these and other cases. The court further noted that such interpretation "would open to challenge suggestions for prohibition in an equally significant group of cases in trial courts."<sup>52</sup>

### C. *Relation Between Mandamus and Prohibition*

The similarities between prohibition and mandamus have generated much discussion. The Supreme Court of Florida has stated that the writs "in many instances have been used interchangeably."<sup>53</sup> This is true, however, only in cases which present jurisdictional issues. In such instances, mandamus may lie to compel dismissal by the lower tribunal of an action over which it lacks jurisdiction, while prohibition may issue to prevent the exercise of unlawful jurisdiction.<sup>54</sup> Apart from this context, the two remedies possess distinct prerequisites and objectives. Mandamus may be invoked against an individual to command performance of a preexisting, ministerial public duty; prohibition may lie against a tribunal to prevent usurpation or exercise of jurisdiction with which it is not vested by law.

### D. *Uses*

Florida courts have granted prohibition relief to prevent a trial on the following grounds: double jeopardy,<sup>55</sup> collateral estoppel,<sup>56</sup>

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correctly to determine whether right to appeal was lost where timely filing of notice of appeal was made in wrong district court of appeal).

52. *State ex rel. Sarasota County v. Boyer*, 360 So. 2d 388, 391 (Fla. 1978); *see, e.g., Reino v. State*, 352 So. 2d 853 (Fla. 1977). In *Reino*, the court granted prohibition directed to the trial court where defendant had been charged with commission of a capital crime. The jurisdiction of the supreme court to issue prohibition relief was predicated on FLA. CONST. art. V, § 3(b)(1), which authorizes the court to "hear appeals from final judgments of trial courts imposing the death penalty." Prohibition was deemed to lie even though no final judgment or sentence of the lower tribunal evidencing appellate jurisdiction in the supreme court had yet been entered. Furthermore, petitioner's claim that the lower tribunal lacked authority to impose the death penalty did not bar the court's exercise of jurisdiction because the crucial issue involved the trial court's conclusion that the applicable statute of limitations permitted prosecution for a capital offense any time. Note, however, that the court found the jurisdictional argument to have been "novel and not without doubt." 352 So. 2d at 855; *cf. Tsavaris v. Scruggs*, 360 So. 2d 745, 747 n.2 (Fla. 1977) (expressly declining to decide whether district court of appeal might also be an appropriate forum in such a case).

53. *Wincor v. Turner*, 215 So. 2d 3, 5 (Fla. 1968). The supreme court determined that petitioner was able to invoke mandamus even though he could have elected to use prohibition. Thus, a petitioner who has been denied prohibition relief cannot seek mandamus relief on the same grounds. *State ex rel. Kovnot v. Ferguson*, 313 So. 2d 710 (Fla. 1975).

54. *Wincor v. Turner*, 215 So. 2d 3 (Fla. 1968).

55. *State ex rel. Williams v. Grayson*, 90 So. 2d 710 (Fla. 1956).

56. *McCray v. State*, 350 So. 2d 1126 (Fla. 2d DCA 1977).



violation of defendant's immunity from prosecution<sup>57</sup> or right to a speedy trial,<sup>58</sup> bias of the presiding judge,<sup>59</sup> improper contempt citation by the judge,<sup>60</sup> and expiration of the presiding judge's temporary appointment to the bench.<sup>61</sup>

More recently, the District Court of Appeal, Third District, held that prohibition may be invoked to challenge the lack of jurisdiction in a medical mediation panel because the aggrieved party has no other adequate remedy to cure such fundamental error.<sup>62</sup>

In *State ex rel. Wilhoit v. Wells*,<sup>63</sup> prohibition relief was granted to a defendant in a criminal proceeding in which the trial court had set aside a nolo contendere plea after having formally accepted it. Because such repudiation would have placed the defendant twice in jeopardy, the district court found no jurisdiction in the trial court to reject the plea after its approval.

In *State v. Reasbeck*,<sup>64</sup> the state successfully petitioned for prohibition relief to prevent acceptance by the trial judge of a plea agreement which the state had withdrawn prior to formal court approval. The trial court had erroneously viewed the state as bound by its plea.

#### IV. QUO WARRANTO

##### A. Nature

The writ of quo warranto is issued "to test the right of a person to hold an office or franchise or exercise some right or privilege, the peculiar powers of which are derived from the State."<sup>65</sup>

The Attorney General of the State of Florida may institute quo warranto proceedings on behalf of the state. In the event that the attorney general refuses either to commence such action in the name of the state upon the claimant's relation, or refuses to designate the claimant as the person rightfully entitled to the position, anyone claiming title to an office held by another may file petition for the writ.<sup>66</sup> If the attorney general initiates quo warranto proceedings

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57. *Tsavaris v. Scruggs*, 360 So. 2d 745 (Fla. 1977).

58. *Sibert v. Hare*, 276 So. 2d 523 (Fla. 4th DCA 1973).

59. *State ex rel. Aguiar v. Chappell*, 344 So. 2d 925 (Fla. 3d DCA 1977).

60. *State ex rel. Gillham v. Phillips*, 193 So. 2d 26 (Fla. 2d DCA 1966).

61. *State ex rel. Wesley Constr. Co. v. O'Connell*, 347 So. 2d 442 (Fla. 3d DCA 1977).

62. *Hubacher v. Landry*, 360 So. 2d 42 (Fla. 3d DCA 1978). See also *Stanton v. Community Hosp.*, 359 So. 2d 37 (Fla. 4th DCA 1978).

63. 356 So. 2d 817 (Fla. 1st DCA 1978).

64. 359 So. 2d 564 (Fla. 4th DCA 1978).

65. *Winter v. Mack*, 142 Fla. 1, 8, 194 So. 225, 228 (1940).

66. FLA. STAT. § 80.01 (Supp. 1978); see *Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla. 1975).

naming the individual entitled to the office or if proceedings are commenced upon the relation of a party claiming title, the action may not be dismissed without the claimant's consent.<sup>67</sup>

A judgment obtained in a quo warranto proceeding instituted without the consent of the attorney general is conclusive as between all parties to the action except the state.<sup>68</sup> Thus, it does not bar the subsequent initiation of such proceedings by the state.<sup>69</sup> Judgment rendered in a quo warranto action brought by the attorney general does not preclude filing of claims by nonparties.<sup>70</sup>

Quo warranto is a remedial as well as a prerogative writ<sup>71</sup> which, on a proper showing, may issue for purposes beyond those for which it was originally conceived.<sup>72</sup> Quo warranto relief will not be granted, however, where an otherwise worthy claimant is guilty of laches or where the public would suffer injury or confusion thereby.<sup>73</sup>

The exclusiveness of quo warranto distinguishes it from nearly all other extraordinary writs. In a case where quo warranto is available, it is, absent a statute to the contrary, the only proper remedy.<sup>74</sup>

### B. Jurisdiction

The Constitution of the State of Florida authorizes the circuit courts,<sup>75</sup> district courts of appeal<sup>76</sup> and the supreme court<sup>77</sup> to issue writs of quo warranto. As in mandamus, the supreme court is only empowered to issue the writ of quo warranto to state officers and agencies.<sup>78</sup>

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67. FLA. STAT. § 80.02 (Supp. 1978).

68. *Id.* § 80.04.

69. *Id.*

70. *Id.*

71. A prerogative writ is one which is issued in the discretion of the court on behalf of the state. A remedial writ is a civil action or proceeding brought to enforce a legal right issued in the name or on behalf of the state at the instigation of an individual who has an interest in the matter. See generally W. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES §§ 315, 355 (1913).

72. State *ex rel.* Pooser v. Wester, 126 Fla. 49, 170 So. 736 (1936).

73. *Id.*

74. State *ex rel.* Ellis v. Tampa Waterworks Co., 57 Fla. 533, 48 So. 639 (1908); *cf.* Bloomfield v. City of St. Petersburg Beach, 82 So. 2d 364 (Fla. 1955) (holding that declaratory relief was properly sought to resolve contest for political control of city). Quo warranto was not the exclusive remedy because the issues were not limited to trying title to an office. The declaratory judgment proceeding also sought to "bring an expeditious termination to the public confusion." *Id.* at 369.

75. FLA. CONST. art. V, § 5(b).

76. *Id.* § 4(b)(3).

77. *Id.* § 3(b)(5).

78. *Id.*

### C. Uses

Quo warranto has often been invoked to challenge the title to authority of elected<sup>79</sup> and appointed<sup>80</sup> officials, and to seek relief where a municipality has improperly exercised jurisdiction or control over land.<sup>81</sup> Quo warranto is also available to ascertain which powers of an office derive from the state. In a recent quo warranto proceeding entertained by the District Court of Appeal, Third District, the court determined that a state attorney lacks authority to represent the State of Florida in an interpleader action brought in federal court.<sup>82</sup> In so holding, the court made it clear that the attorney general is the sole official empowered to represent the State of Florida in an action in federal court.

## V. CORAM NOBIS

### A. Nature

The writ of coram nobis may issue only in a criminal case.<sup>83</sup> It serves the purpose of correcting a judgment based upon an error of fact unknown to the court, counsel or parties at the time and which, if known, would have prevented the conviction.<sup>84</sup> The party seeking the writ, however, must have no alternative remedy.<sup>85</sup>

The recent interpretation of rule 3.850 of the Florida Rules of Criminal Procedure to permit challenges to judgments on the basis of newly discovered evidence, has caused conflict regarding the availability of coram nobis. In *State v. Gomez*,<sup>86</sup> the District Court of Appeal, Third District, held that collateral attack of a conviction on grounds of newly discovered evidence is available through a rule

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79. See, e.g., *Treiman v. Malmquist*, 342 So. 2d 972 (Fla. 1977); *State ex rel. Askew v. Thomas*, 293 So. 2d 40 (Fla. 1974); *State ex rel. Judicial Qualification Comm'n v. Rose*, 286 So. 2d 562 (Fla. 1973).

80. E.g., *Austin v. State ex rel. Christian*, 310 So. 2d 289 (Fla. 1975); *Carey v. State*, 349 So. 2d 820 (Fla. 3d DCA 1977).

81. E.g., *Orange County v. City of Orlando*, 327 So. 2d 7 (Fla. 1976); *City of South Miami v. State ex rel. Landis*, 140 Fla. 740, 192 So. 624 (1939).

82. *State ex rel. Shevin v. Weinstein*, 353 So. 2d 1251 (Fla. 3d DCA 1978).

83. The writ was abolished in civil actions by FLA. R. Civ. P. 1.540; see *Ohio Cas. Group v. Parrish*, 350 So. 2d 466 (Fla. 1977).

84. *Russ v. State*, 95 So. 2d 594 (Fla. 1957) (juror misconduct discovered after the trial); *Nickels v. State*, 86 Fla. 208, 98 So. 502 (1923) (accused forced to plead guilty out of well-grounded fear of mob violence).

The writ cannot reach error in matters of law. The party seeking relief must apply to the same court in which judgment was entered. Petitioner must show that if the matters presented had been before the trial court at the time of judgment, the conviction would have been precluded and that the party seeking the writ would have had no other remedy.

85. *Russ v. State*, 95 So. 2d 594 (Fla. 1957).

86. 363 So. 2d 624 (Fla. 3d DCA 1978).

3.850 motion or through a petition for writ of coram nobis. In so ruling, the court expressly rejected District Court of Appeal, Second District decisions which had specified coram nobis as the only means of effectuating such an attack.<sup>87</sup> The *Gomez* holding, however, comports with dicta in decisions of both the Supreme Court of Florida<sup>88</sup> and the District Court of Appeal, Fourth District.<sup>89</sup>

An application for coram nobis should be made on sworn petition.<sup>90</sup> Moreover, the petitioner carries the burden of demonstrating existence of the facts in question by "strong and convincing proof."<sup>91</sup>

### B. Jurisdiction

Permission to seek a writ of coram nobis in the trial court must be sought and granted by the appellate court which previously had entertained the appeal from final judgment.<sup>92</sup> In cases in which no appeal was taken, application should be filed in the trial court.<sup>93</sup>

The authority of the courts to entertain requests for coram nobis relief derives from section 2.01 of the Florida Statutes which provides:

The common and statute laws of England which are of a general and not a local nature . . . are declared to be of force in this state; provided, the said statutes and common law be not inconsistent

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87. *Hallman v. State*, 343 So. 2d 912 (Fla. 2d DCA 1977); *Hamilton v. State*, 237 So. 2d 255 (Fla. 2d DCA 1970). *Hallman* was approved by the Supreme Court of Florida in *Hallman v. State*, 1979 FLA. L. WEEKLY 121 (Fla. Mar. 15) (No. 51,633). The supreme court held that the decision of the Second District was not in conflict with *Fast v. State*, 221 So. 2d 203 (Fla. 3d DCA 1969), and thus declined to review the decision via conflict certiorari. The court treated *Hallman's* request for certiorari review as a petition for a writ of error coram nobis. In denying the writ, the court noted that the alleged facts were not of such a vital nature that had the trial court known them, they "conclusively" would have prevented the entry of judgment.

88. *State v. Matera*, 266 So. 2d 661, 667 (Fla. 1972) (indicating that newly discovered evidence, e.g., perjury, could constitute valid ground for post-conviction relief under FLA. R. CRIM. P. 3.850).

89. *Tolar v. State*, 196 So. 2d 1 (Fla. 4th DCA 1967), wherein the court stated: "Post-conviction motions for relief collaterally attacking judgments and sentences under Criminal Procedure Rule No. 1 [the predecessor to rule 3.850] are basically in the nature of writs of error coram nobis." *Id.* at 3.

90. *Russ v. State*, 95 So. 2d 594 (Fla. 1957). The application may be accompanied by a supporting affidavit delineating the facts "which would vitiate the verdict and . . . show the evidence upon which the required facts can be proved and the source thereof." *Id.* at 598.

91. *Id.*

92. *Id.*; *Hallman v. State*, 343 So. 2d 912 (Fla. 2d DCA 1977). In such cases, the appellate court determines the legal effect of the allegations. If the allegations are deemed sufficient, the petitioner is granted leave to apply to the court for the writ. The trial court then determines the truth of the allegations.

93. *Durley v. Mayo*, 160 Fla. 922, 37 So. 2d 320 (1948).

with the constitution and laws of the United States and the acts of the legislature of this state.<sup>94</sup>

## VI. HABEAS CORPUS

### A. *Nature*

Habeas corpus is a high prerogative writ, which is granted to determine whether the detention of an individual is legal.<sup>95</sup> Habeas is designed to provide a speedy<sup>96</sup> remedy without cost<sup>97</sup> for those persons illegally held.<sup>98</sup> Mere irregularities or errors of procedure, however, are not grounds for discharge.<sup>99</sup> Where a motion pursuant to rule 3.850 of the Florida Rules of Criminal Procedure or any other proceeding affords the petitioner an adequate alternative remedy, habeas is not available.<sup>100</sup>

When properly issued, habeas supersedes all other writs.<sup>101</sup> A judgment in habeas corpus becomes absolute unless reviewed by the appropriate appellate court and, if not reversed, the judgment is res judicata as to the lawfulness of custody.<sup>102</sup>

### B. *Jurisdiction*

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit court judge.<sup>103</sup> A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the district court, or before

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94. FLA. STAT. § 2.01 (1975), quoted in *Farrell v. Amica Mut. Ins. Co.*, 361 So. 2d 408, 410 (Fla. 1978).

95. *Sneed v. Mayo*, 69 So. 2d 653 (Fla. 1954).

96. The writ of habeas corpus "shall be returnable without delay." FLA. CONST. art. I, § 13.

97. *Id.*

98. *State ex rel. Gerstein v. Schulz*, 180 So. 2d 367 (Fla. 3d DCA 1965). A defendant in a criminal case, however, is entitled to habeas relief despite the fact that he may not be released if the conviction is successfully attacked and that outstanding concurrent sentences are unchallenged. *Frizzell v. State*, 238 So. 2d 67 (Fla. 1970).

99. *State ex rel. Giblin v. Sullivan*, 157 Fla. 496, 26 So. 2d 509 (1946). Discharge is proper, however, if the judgment or process under which the petitioner is held is void. *Id.*

100. *State ex rel. Wilkins v. Sinclair*, 162 So. 2d 661 (Fla. 1964); *Boyd v. Cochran*, 118 So. 2d 627 (Fla 1960); *Hollingshead v. Mayo*, 79 So. 2d 774 (Fla. 1955).

101. *State ex rel. Stringer v. Quigg*, 91 Fla. 197, 107 So. 409 (1926). Habeas corpus proceedings were brought to test the legality of the detention of a fugitive under an executive warrant of extradition. The court stated that, upon service of the writ, "the executive warrant of extradition under which the prisoner was originally held is suspended," and that until disposition of the writ, the prisoner is detained solely by the authority of the writ of habeas corpus. *Id.* at 211, 107 So. at 414.

102. *Taylor v. Wainwright*, 178 So. 2d 105 (Fla. 1965).

103. FLA. CONST. art. V, § 3(b)(6).

any circuit court judge within the territorial jurisdiction of the court.<sup>104</sup> The circuit courts are also empowered to issue writs of habeas corpus.<sup>105</sup>

The relative ease with which the circuit court can resolve factual issues should be considered; nevertheless, appellate courts are authorized to appoint commissioners to make factual findings.<sup>106</sup> Additionally, a circuit court may not review by habeas corpus an order of a court over which it has no appellate jurisdiction, unless the decree is illegal or void.<sup>107</sup>

### C. Uses

Legislative enactments authorize the use of habeas corpus in regard to detention of juveniles,<sup>108</sup> patients in mental hospitals,<sup>109</sup> patients in mental retardation facilities,<sup>110</sup> patients in drug treatment centers<sup>111</sup> and patients in alcoholic treatment facilities.<sup>112</sup>

These provisions, however, do not affect the availability of the writ<sup>113</sup> in other proceedings.<sup>114</sup> Habeas has been used: to challenge an out of state detainer,<sup>115</sup> to recover a child withheld from a person entitled to custody,<sup>116</sup> to attack extradition,<sup>117</sup> and to vindicate certain deprivations of the right to appeal.<sup>118</sup>

Recently, the Supreme Court of Florida afforded habeas relief to a defendant who, after conviction, was discovered to have been a mentally disordered sex offender.<sup>119</sup> The trial court transferred the defendant to a state hospital, pronouncing a sentence which he would be required to serve after treatment. The supreme court de-

104. *Id.* § 4(b)(3).

105. *Id.* § 5(b).

106. *State v. Wooden*, 246 So. 2d 755 (Fla. 1971).

107. *State ex rel. Scaldefferri v. Sandstrom*, 285 So. 2d 409 (Fla. 1973); *Lederer ex rel. Gravina v. Stack*, 294 So. 2d 107 (Fla. 4th DCA 1974).

108. FLA. STAT. § 39.03(7)(a) (Supp. 1978).

109. *Id.* § 394.459(10).

110. *Id.* § 393.11(4).

111. *Id.* § 397.052(7).

112. *Id.* § 396.102(10).

113. The writ of habeas corpus "shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." FLA. CONST. art. I, § 13.

114. *See Sullivan v. State ex rel. Cootner*, 44 So. 2d 96 (Fla. 1950) (holding that legislature cannot alter the scope of habeas corpus and that a statute providing for habeas corpus relief does not narrow or expand availability of the writ).

115. *Grayson v. Wainwright*, 330 So. 2d 461 (Fla. 1976).

116. *Coker v. Montgomery*, 238 So. 2d 490 (Fla. 1st DCA 1970) (inquiry limited to review of governor's determination that jurisdictional prerequisites to issuance of writ exist).

117. *State v. Cox*, 306 So. 2d 156 (Fla. 2d DCA 1974).

118. *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1969).

119. *Gammill v. Wainwright*, 357 So. 2d 714 (Fla. 1978).

terminated that the applicable sex offender statute mandated deferring imposition of sentence until the completion of treatment. In so doing, the court reaffirmed the rule that a defendant may, at any time, contest by habeas corpus the pronouncement of a future sentence.

## VII. ALL WRITS

### A. Nature and Jurisdiction

Invocation of the "all writs" provision is generally limited to the prevention of irreparable harm in emergency situations.<sup>120</sup> Cases involving "great public interest where emergencies and seasonable considerations are involved that require expedition" may qualify for relief.<sup>121</sup>

The supreme court is authorized to issue "all writs necessary to the complete exercise of its jurisdiction."<sup>122</sup> The circuit courts and district courts of appeal are similarly empowered.<sup>123</sup> In *State ex rel. Watson v. Lee*,<sup>124</sup> the supreme court construed the above quoted statutory language as referring "only to ancillary writs" which could not be issued "until jurisdiction is acquired."<sup>125</sup> Although this restrictive holding, which limited the availability of all writs relief to causes in which jurisdiction had been acquired, was eventually overruled in *Couse v. Canal Authority*,<sup>126</sup> the court has since noted that the writ "remains ancillary in nature."<sup>127</sup>

Jurisdiction to issue all writs relief was seemingly expanded in *Monroe Education Association v. Clerk, District Court of Appeal, Third District*.<sup>128</sup> The Clerk of the Third District had refused to accept a filing fee and application for all writs relief on the ground that the application was not ancillary to any matter pending in the court. The supreme court ruled that all writs relief was not so limited and that "the application for a constitutional writ should be

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120. *Wingate v. Mach*, 114 Fla. 380, 154 So. 192 (1934).

121. *Monroe Educ. Ass'n v. Clerk, Dist. Court of Appeal, Third Dist.*, 299 So. 2d 1, 3 (Fla. 1974).

122. Fla. Const. art. V, § 3(b)(4).

123. A district court "may issue writs of mandamus, certiorari, prohibition, quo warranto and other writs necessary to the complete exercise of its jurisdiction." *Id.* § 4(b)(3). The circuit courts may issue "all writs necessary or proper to the complete exercise of their jurisdiction." *Id.* § 5(b).

124. 150 Fla. 496, 8 So. 2d 19 (1942).

125. *Id.* at 500-01, 8 So. 2d at 21.

126. 209 So. 2d 865 (Fla. 1968).

127. *Monroe Educ. Ass'n v. Clerk, Dist. Court of Appeal, Third Dist.*, 299 So. 2d 1 (Fla. 1974).

128. *Id.*

accepted for filing and duly considered under the discretionary jurisdiction that appertains in such situations."<sup>129</sup> Among the numerous cases cited by the court in support of its holding was *State ex rel. Turner v. Earle*,<sup>130</sup> wherein all writs relief was granted in a cause over which the court had no jurisdiction save by the "all writs" provision.

Continuing its reliance upon the overruled language of *State ex rel. Watson v. Lee*,<sup>131</sup> the Supreme Court of Florida denied relief in *Shevin ex rel. State v. Public Service Commission*.<sup>132</sup> There, the court reasoned that the all writs provision "contemplates a situation where the Court has already acquired jurisdiction."<sup>133</sup>

### B. Uses

In *Booth v. Wainwright*,<sup>134</sup> the supreme court issued an extraordinary stay order based upon emergency security difficulties encountered by correctional authorities. The writ was granted in conjunction with pending certiorari proceedings.

In *State ex rel. Turner v. Earle*,<sup>135</sup> the court was asked to issue a writ of prohibition to prevent the Judicial Qualifications Committee from proceeding against the relator. Finding no jurisdictional issue to authorize prohibition relief, the court determined the matter pursuant to its all writs power.

All writs relief was also granted in *State ex rel. Pettigrew v. Kirk*.<sup>136</sup> The relator there petitioned for a writ of quo warranto to prevent a threatened exercise of power by the executive branch in the appointment of additional circuit judges and in the issuance of certain licenses. The court held quo warranto to be unavailable, treating the petition instead as a request for all writs relief, "since all the parties have appeared before the Court and argued the questions involved."<sup>137</sup>

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129. *Id.* at 3.

130. 295 So. 2d 609 (Fla. 1974).

131. 150 Fla. 496, 8 So. 2d 19 (1942).

132. 333 So. 2d 9 (Fla. 1976).

133. *Id.* at 12.

134. 300 Sc. 2d 257 (Fla. 1974).

135. 295 So. 2d 609 (Fla. 1974).

136. 243 So. 2d 147 (Fla. 1970).

137. *Id.* at 149. Various other cases involving the exercise of all writs jurisdiction are not detailed in this article. See e.g., *Mize v. County of Seminole*, 229 So. 2d 841 (Fla. 1969); *Georgia S. & Fla. Ry. v. Duval Connecting R.R.*, 193 So. 2d 19 (Fla. 1st DCA 1966).



## VIII. CERTIORARI

### A. Common Law Writ of Certiorari

#### 1. NATURE

The common law writ of certiorari may be issued where a lower tribunal acts without or in excess of jurisdiction, or enters a ruling which, by its failure to conform to essential legal requirements, is reasonably likely to cause material injury.<sup>138</sup> The writ will lie to review interlocutory orders only where appeal is an inadequate remedy.<sup>139</sup> The common law writ of certiorari may be granted only by those courts which are vested with appellate jurisdiction over the tribunal whose order is challenged.<sup>140</sup>

#### 2. JURISDICTION

The district courts of appeal<sup>141</sup> and the circuit courts<sup>142</sup> are empowered to issue common law certiorari relief; the supreme court lacks such authority.<sup>143</sup> As a jurisdictional prerequisite, a petition for a writ of common law certiorari must be filed within thirty days of rendition of the order to be reviewed.<sup>144</sup>

Prior to implementation of the new Florida Rules of Appellate Procedure on March 1, 1978, common law certiorari relief was often sought in the district courts to review circuit court interlocutory decrees.<sup>145</sup> The present rules provide for appellate review of specifically listed nonfinal orders;<sup>146</sup> those decrees not named remain re-

138. *Blacharski v. Watts*, 268 So. 2d 465 (Fla. 4th DCA 1972); *Dairyland Ins. Co. v. McKenzie*, 251 So. 2d 887 (Fla. 1st DCA 1971); *Gulf Cities Gas Corp. v. Cihak*, 201 So. 2d 250 (Fla. 2d DCA 1967).

139. *Dairyland Ins. Co. v. McKenzie*, 251 So. 2d 887 (Fla. 1st DCA 1971).

140. *Nellen v. State*, 226 So. 2d 354 (Fla. 1st DCA 1969).

141. FLA. CONST. art. V, § 4(b)(3); *see, e.g., Robinson v. State*, 132 So. 2d 3 (Fla. 1961).

142. FLA. CONST. art. V, § 5(b).

143. *Dresner v. City of Tallahassee*, 164 So. 2d 208 (Fla. 1964). The supreme court had been authorized to grant common law certiorari relief prior to the establishment of the district courts of appeal, effective July 1, 1957. *Id.* at 210. The supreme court, however, continues to apply the standard for common law certiorari relief in causes wherein the court "may issue writs of certiorari to commissioners established by general law having statewide jurisdiction." FLA. CONST. art. V, § 3(b)(3); *see, e.g., Chicken 'N' Things v. Murray*, 329 So. 2d 302 (Fla. 1976); *Scholastic Sys. v. LeLoup*, 307 So. 2d 166 (Fla. 1974).

144. FLA. R. APP. P. 9.100(c). *But see Lampkin-Asam v. District Court of Appeal, Third Dist.*, 364 So. 2d 469 (1978), which held that the reviewing court is without appellate jurisdiction if the notice of appeal is filed in the wrong court even though the notice is filed within the 30-day limit.

145. *See Haddad, The Common Law Writ of Certiorari in Florida*, 29 U. FLA. L. REV. 207, 215 (1977).

146. FLA. R. APP. P. 9.130 & .140. The Committee Notes to rule 9.130 provide: "It is

viewable by common law certiorari.<sup>147</sup> Additionally, the district courts have retained their authority to review by common law certiorari orders entered by the circuit courts in their appellate capacities.<sup>148</sup>

### 3. USES

In the recent case of *Simmons v. Faust*,<sup>149</sup> the supreme court resolved a conflict in the law by holding that orders issued by the judicial referee of a medical mediation panel are reviewable by common law certiorari in the district courts of appeal.

In *Goodyear Tire & Rubber Co. v. Cooley*,<sup>150</sup> interlocutory orders rendered in connection with discovery proceedings were held reviewable by common law certiorari. The court reasoned that appeal is an inadequate remedy for a party wrongfully ordered to disclose information because the resultant damage from disclosure is irreparable.

A different balance may be struck, however, between a privilege of nondisclosure and an accused's right to identification evidence in a criminal case. In *State v. Moore*,<sup>151</sup> the state petitioned for common law certiorari review of a discovery order directing it to disclose the location of a secondary vehicle identification number. Although the court upheld the defendant's right to verify the number, it did so in a manner which recognized the demands of public policy to maintain confidentiality of the location. Thus, the court modified the trial court's order to require disclosure to an official court reporter who would verify its accuracy by way of a sealed transcript.

#### B. *Certiorari in the Supreme Court of Florida*

##### 1. REVIEW OF DECISIONS IN THE DISTRICT COURTS OF APPEAL

The Supreme Court of Florida has the discretionary power to review by certiorari any decision of a district court of appeal which affects a class of constitutional or state officers, which passes upon a question certified by a district court of appeal to be of great public

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anticipated that since the most urgent interlocutory orders are appealable under this rule, there will be very few cases where common law certiorari will provide relief."

147. See *id.* 9.130(a)(1).

148. See, e.g., *Adlington v. State*, 350 So. 2d 1148 (Fla. 3d DCA 1977); *Blacharski v. Watts*, 268 So. 2d 465 (Fla. 4th DCA 1972).

149. 358 So. 2d 1358 (Fla. 1978).

150. 359 So. 2d 1200 (Fla. 1st DCA 1978).

151. 356 So. 2d 838 (Fla. 1st DCA 1978).

interest, or which directly conflicts with a supreme court or district court of appeal decision on the same question of law.<sup>152</sup>

a. *Decisions Affecting a Class of Constitutional or State Officers*

The supreme court may review by certiorari "any decision of a district court of appeal that affects a class of constitutional or state officers."<sup>153</sup> *Spradley v. State*<sup>154</sup> interpreted this provision as requiring the decision of the district court to affect directly and exclusively a particular class of constitutional officers.<sup>155</sup>

*Spradley* limited the holding of *Richardson v. State*,<sup>156</sup> in which the supreme court had reviewed a district court decision regarding discovery requirements in criminal cases. In *Richardson*, the district court decision was held to have affected two classes of constitutional officers, state prosecutors and trial judges. *Spradley* receded from *Richardson* to the extent that it authorized certiorari review of a district court decision which affected, in any way, any segment of a class of constitutional or state officers.<sup>157</sup>

The continuing vitality of *Spradley* was demonstrated in *Shevin v. Cenville Communities, Inc.*<sup>158</sup> The court there discharged certiorari, reasoning that the decision of the district court affected only one agency of the state government—the Department of Legal Affairs—and not a class of constitutional officers.<sup>159</sup>

Despite the *Spradley* holding, *Richardson* has been cited by the supreme court as authority for granting certiorari. In *State v. Laiser*,<sup>160</sup> the court held that its certiorari jurisdiction had been properly invoked to rule on the validity of a search warrant because "the district court's opinion affects all sheriffs of the state in the performance of their duties. *Richardson v. State.*"<sup>161</sup>

In *Shuman v. State*,<sup>162</sup> the supreme court granted a petition for

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152. FLA. CONST. art. V, § 3(b)(3). For an extensive discussion of this area of certiorari review, see Comment, *Certiorari Review of District Court of Appeal Decisions by the Supreme Court of Florida*, 28 U. MIAMI L. REV. 952 (1974).

153. FLA. CONST. art. V, § 3(b)(3).

154. 293 So. 2d 697 (Fla. 1974).

155. *Id.* at 701. The court stated: "To vest this Court with certiorari jurisdiction, a decision 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." *Id.*; see Comment, *supra* note 152, at 956.

156. 246 So. 2d 771 (Fla. 1971).

157. 293 So. 2d at 701.

158. 338 So. 2d 1281 (Fla. 1976).

159. *Id.* at 1282 (England, J., concurring).

160. 322 So. 2d 490 (Fla. 1975).

161. *Id.* at 491.

162. 358 So. 2d 1333 (Fla. 1978).

a writ of certiorari to review a district court decision. The issue presented was whether costs for preparation of a transcript necessary for an indigent's appeal from an order of involuntary hospitalization should be taxed against the county in which the hearing was held or against the office of the public defender appointed to represent the indigent. The court granted certiorari on the ground that the decision of the district court, a per curiam affirmance without opinion,<sup>163</sup> "affects a class of constitutional or state officers."<sup>164</sup>

In *Taylor v. Tampa Electric Co.*<sup>165</sup> and in *Heath v. Beckett*,<sup>166</sup> the supreme court granted certiorari, finding that the district court decisions had affected a class of constitutional officers, clerks of the circuit courts.<sup>167</sup>

Certiorari was granted in *Murphy v. Mack*,<sup>168</sup> where the supreme court determined that a county sheriff is a public employee within the meaning of certain statutory provisions. The court's exercise of jurisdiction was supported by the Florida local government constitutional provision designating sheriffs as "county officers."<sup>169</sup>

#### b. *Decisions Passing Upon Questions of Great Public Interest*

The only recent development in this area has been the elimination of briefs on jurisdiction.<sup>170</sup> Under the former appellate rules a brief on jurisdiction was permitted to support a petition for writ of certiorari seeking review of a district court decision which had passed on a question certified by the district court as being of great public interest.<sup>171</sup> Under the present rules, however, no such brief is permitted;<sup>172</sup> the petitioner need only file the requisite notices.<sup>173</sup>

In *Revitz v. Baya*,<sup>174</sup> the supreme court was asked to review a decision of the District Court of Appeal, Third District, in which the

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163. *Shuman v. State*, 339 So. 2d 1176 (Fla. 1st DCA 1976) (per curiam).

164. 358 So. 2d at 1334. The district court had affirmed a trial court order directing taxation of costs against the public defender. Apparently, the constitutional or state officers involved were public defenders, whose duties are prescribed by FLA. CONST. art. V, § 18 and FLA. STAT. § 27.51 (1975).

165. 356 So. 2d 260 (Fla. 1978).

166. 327 So. 2d 3 (Fla. 1976).

167. FLA. CONST. art. V, § 16 supports the conclusion that clerks are constitutional officers.

168. 341 So. 2d 1008 (Fla. 1977).

169. FLA. CONST. art. VIII, § 1(d).

170. For earlier cases on questions of great public interest, see Comment, *supra* note 152, at 956-63.

171. Fla. R. App. P. 4.5(c)(6) (1962).

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

173. *Id.* 9.120(b).

174. 355 So. 2d 1170 (Fla. 1977).

district court had certified a question.<sup>175</sup> The supreme court ruled that it lacked jurisdiction to review the Third District decision, since the district court had specifically found it unnecessary to pass upon the certified question.<sup>176</sup>

### c. *Decisions Conflicting on the Same Question of Law*

The power of the Supreme Court of Florida to review by certiorari per curiam decisions without opinions has been strongly debated.<sup>177</sup> In *AB CTC v. Morejon*,<sup>178</sup> two justices<sup>179</sup> of the supreme court voted to overrule *Foley v. Weaver Drugs, Inc.*,<sup>180</sup> which had authorized the court to review district court affirmances rendered without opinion. One of the two justices recently conceded that his view was a minority one, concluding that "a majority of the Court seem inclined to continue 'finding' conflict in those district court decisions they do not like."<sup>181</sup>

In *Mystan Marine, Inc. v. Harrington*,<sup>182</sup> however, a majority of the supreme court did agree to narrow its jurisdiction. The court held that denial of certiorari without opinion by a district court lacks precedential value and is thus beyond the constitutional scope of the certiorari review authority of the court.

## 2. INTERLOCUTORY CERTIORARI

The supreme court may review by certiorari "any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court."<sup>183</sup>

In *Burnsed v. Seaboard Coastline Railroad Co.*,<sup>184</sup> the court

175. *Baya v. Revitz*, 345 So. 2d 340 (Fla. 3d DCA 1977).

176. 355 So. 2d at 1171-72. The district court had stated: "'We, therefore, do not reach the question of whether it is an abuse of process to appeal any consent judgment, nor do we discuss the damage issue.'" *Id.* at 1171, quoting *Baya v. Revitz*, 345 So. 2d at 341 (emphasis added by supreme court).

177. See, e.g., Comment, *supra* note 152, at 967-69; Commentary, *Establishing New Criteria for Conflict Certiorari in Per Curiam District Court Decisions: A First Step Toward a Definition of Power*, 29 U. FLA. L. REV. 335 (1977).

178. 324 So. 2d 625 (1975).

179. Justices England and Overton.

180. 177 So. 2d 221 (Fla. 1965).

181. *National Airlines, Inc. v. Edwards*, 336 So. 2d 545, 548 (Fla. 1976) (England, J., dissenting). Justice England, continuing his opposition to many grants of conflict certiorari, dissented in a later case in which there was an opinion below, and said that the majority, in finding conflict where he thought none existed, "obliterates any vestige of finality in the district courts" and "pervert[s] Article V of the Constitution." *Lubell v. Roman Spa, Inc.*, 362 So. 2d 922, 923-24 (Fla. 1978) (England, J., dissenting).

182. 339 So. 2d 200 (Fla. 1976).

183. FLA. CONST. art. V, § 3(b)(3).

184. 290 So. 2d 13 (Fla. 1974).

distinguished this provision from that of article V, section 3(b)(1), of the Constitution of the State of Florida, which states that the court shall hear appeals from orders of trial courts initially and directly passing on the validity of a state statute. In order to effectuate the interlocutory certiorari provision, the court held that article V, section 3(b)(1) must be read to allow appeal as a matter of right only from final orders of trial courts initially and directly passing on the validity of a state statute.<sup>185</sup>

### 3. CERTIORARI REVIEW OF DECISIONS OF COMMISSIONS

The supreme court may review by certiorari decisions of commissions established by general law which have statewide jurisdiction.<sup>186</sup> Only final decisions of these commissions are reviewable<sup>187</sup> and such review is in all instances discretionary.<sup>188</sup> In these proceedings, the court applies the identical test utilized by lower courts in common law certiorari cases: the court looks to whether the decision under review departs from the essential requirements of the law.<sup>189</sup> The court will not reverse a commission finding unless there is no competent evidence to support the determination below<sup>190</sup> or existing evidence is so insubstantial as to make the finding "arbitrary and capricious."<sup>191</sup>

## IX. PROCEDURE

Florida Rule of Appellate Procedure 9.100 applies to proceedings which invoke the jurisdiction of the supreme court, district courts of appeal and circuit courts for the issuance of writs of mandamus, prohibition, quo warranto, habeas corpus and "all writs

185. *Id.* at 16-17.

186. FLA. CONST. art. V, § 3(b)(3).

187. *See, e.g.*, *Central Truck Lines, Inc. v. Mason*, 186 So. 2d 498 (Fla. 1966) (per curiam).

188. In *Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974), the supreme court concluded that there was no constitutional requirement for mandatory review of administrative agency action when the commission procedure itself provided for an appeal as of right. The court stated: "This court has from time to time reconsidered the manner in which it can best utilize its judicial resources within the framework of its extensive constitutional jurisdiction; otherwise, it would become physically impossible to give proper consideration to all cases which equally demand our careful review." *Id.* at 168.

The court noted that the constitution gives it "the power of direct review of administrative action." FLA. CONST. art. V., § 3(b)(7), but decided that the grant of power did not mandate its use. 307 So. 2d at 168-69.

189. 307 So. 2d at 168. *See also*, *Chicken 'N' Things v. Murray*, 329 So. 2d 302 (Fla. 1976).

190. *Chicken 'N' Things v. Murray*, 329 So. 2d 302, 305 (Fla. 1976).

191. *Id.*

necessary to the complete exercise of the courts' jurisdiction."<sup>192</sup> The rule also applies to the certiorari jurisdiction of the district courts of appeal and circuit courts, and to the interlocutory certiorari jurisdiction of the supreme court.<sup>193</sup> Certiorari proceedings to review orders of the district courts of appeal by the supreme court are governed by rule 9.120.

#### A. Rule 9.100

Original jurisdiction of the court is invoked under this rule by filing with the clerk of the court a petition accompanied by the appropriate fee.<sup>194</sup> A petition for a writ of common law certiorari must be filed within thirty days after rendition of the order to be reviewed.<sup>195</sup> Apart from common law certiorari, no express time limit governs the filing.<sup>196</sup> When the relief sought is directed to a lower tribunal, the petition must be accompanied by an appendix.<sup>197</sup>

Each petition must reflect the basis for invoking jurisdiction,<sup>198</sup> the relevant facts,<sup>199</sup> and the nature of the relief sought.<sup>200</sup> Although briefs are not authorized, supporting argument, with appropriate citation of authority, must be offered.<sup>201</sup> Additional procedural requirements may be applicable.<sup>202</sup>

If the pleadings demonstrate a preliminary basis for relief, the court may issue an order to show cause.<sup>203</sup> In prohibition proceed-

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192. FLA. R. APP. P. 9.100(a).

193. *Id.*

194. *Id.* 9.100(b).

195. *Id.* 9.100(c). "Rendition" is defined in rule 9.020(g) as "the filing of a signed, written order with the clerk of the lower tribunal," absent pending posttrial motions. Rule 9.100(c) also provides that a copy of the petition shall be furnished to the person issuing the order in question. *But see*, *Lampkin-Asam v. District Court of Appeal, Third Dist.*, 364 So. 2d 469 (Fla. 1978).

196. The doctrine of laches, however, may apply. *Cf. State ex rel. Perkins v. Lee*, 142 Fla. 154, 159, 194 So. 315, 317 (1940) (*per curiam*) (mandamus generally regarded as not within statutes of limitation applicable to ordinary actions, but it is subject to the equitable doctrine of laches).

197. FLA. R. APP. P. 9.100(e). Rule 9.220 prescribes the format of the appendix.

198. *Id.* 9.100(e)(1).

199. *Id.* 9.100(e)(2).

200. *Id.* 9.100(e)(3).

201. *Id.* 9.100(e)(4).

202. *See* FLA. STAT. § 79.01 (1977), which provides that a petition for writ of habeas corpus must demonstrate illegal detention by affidavit or evidence. Section 81.011 requires that a petition for writ of prohibition be verified by affidavit of the petitioner or his attorney when the facts alleged are not matters of record. When the matters appear on the face of the proceedings in the body presuming to exercise jurisdiction, a certified transcript of the record of all the proceedings must accompany the petition. *See also* FLA. R. CIV. P. 1.640, 1.660, 1.680.

203. FLA. R. APP. P. 9.100(f).

ings, issuance of the order stays further proceedings in the lower tribunal.<sup>204</sup> Within the time set by the court, the respondent may file and serve an appropriate response which may include argument, citation of authority and a supplemental appendix.<sup>205</sup> The petitioner may file a reply and supplemental appendix within twenty days of the service of the response.<sup>206</sup> Final disposition by the court entails either issuance of the final order<sup>207</sup> or discharge of the rule to show cause.

### B. Rule 9.120

Certiorari jurisdiction of the supreme court to review decisions of the district courts of appeal is invoked by filing two copies of a notice of certiorari, accompanied by the appropriate fee, with the clerk of the district court within thirty days after rendition of the order to be reviewed.<sup>208</sup>

Petitioner's brief, restricted to the question of jurisdiction, must be served within ten days of filing the notice.<sup>209</sup> When jurisdiction is predicated upon a district court decision passing on a question certified to be of great public interest, no brief on jurisdiction regarding that issue may be filed.<sup>210</sup> Respondent's brief on jurisdiction must be served within twenty days of service of petitioner's brief; a reply brief may be served ten days thereafter.<sup>211</sup>

In the event the supreme court denies the petition for certiorari, the cause is concluded; no motion for rehearing is permitted.<sup>212</sup> If the court accepts jurisdiction or postpones decision, the petitioner shall serve a brief on the merits within twenty days after rendition of the order accepting or postponing.<sup>213</sup> Additional briefs are to be served as prescribed by rule 9.210. If the supreme court enters an order

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204. *Id.*

205. *Id.* 9.100(h).

206. *Id.* 9.100(i).

207. In mandamus and prohibition, the final order is also known as the preemptory writ or writ absolute; it is referred to as the judgment of ouster in quo warranto. The final decree in habeas corpus is labeled a "final judgment in habeas," and may compel various forms of relief, including discharge of the petitioner, admission of the petitioner to bail, or other relief appropriate under the facts of the case.

208. FLA. R. APP. P. 9.120(b). To avoid dismissal of the petition, the notice should be substantially in the form prescribed by rule 9.900. *But see* Lampkin-Asam v. District Court of Appeal, Third Dist., 364 So. 2d 469 (Fla. 1978).

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

210. *Id.*

211. *Id.*

212. *Id.* 9.330(d).

213. *Id.* 9.120(f).



accepting jurisdiction, the parties and the district court shall be notified and, within sixty days after rendition of the decree, the clerk of the district court shall transmit the record.<sup>214</sup>

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214. *Id.* 9.120(e).