University of Miami Law Review

Volume 32 | Number 2 Article 8

3-1-1978

# Conflict Certiorari: Is The Supreme Court of Florida Following Its Constitutional Mandate?

Ellen Catsman Freidin

# CONFLICT CERTIORARI: IS THE SUPREME COURT OF FLORIDA FOLLOWING ITS CONSTITUTIONAL MANDATE?

ELLEN CATSMAN FREIDIN*

*This article considers potential changes in the Supreme Court of Florida's conflict certiorari jurisdiction. After examining the inconsistent manner in which the court has interpreted its own jurisdiction, the author discusses ameliorative alternatives.*



## I. INTRODUCTION

> [Florida must have] a plan to restrict jurisdiction of the Supreme Court in order that there might not be any possibility of merely offering two appeals, one to the district court of appeal and one to the Supreme Court, and thereby making litigation even more costly and prolonged.[1]

With this goal in mind the Judicial Council of Florida drafted the 1956 amendment to the Florida Constitution which created the district courts of appeal, streamlined the court system and delineated the new jurisdiction of the supreme court.[2] The primary impetus to the creation of Florida's new courts was threefold: (1) the supreme court, heretofore the court of primary appellate jurisdiction in the state and the court of last resort, was overburdened;[3] (2) the overburdening was causing lengthy delays;[4] and (3) the long trip

* Florida Developments Editor, *University of Miami Law Review.*

1. JUDICIAL COUNCIL OF FLORIDA, FIRST ANNUAL REPORT 14 (1954).

2. FLA. CONST., art. V (1885, amended 1956).

3. Pennekamp, *A Personal Obligation,* 30 FLA. BAR J. 136 (1956); Gardner, *Effective Court System Necessary for a Great and Growing State,* 30 FLA. BAR J. 141 (1956).

4. Gardner, *supra* note 3.

to Tallahassee (then and now the seat of the court) was proving costly and time consuming to litigants[5] and their attorneys, especially those in the southern part of the state. In fact, these problems were making the pursuit of appeals a luxury that only the wealthy could afford.[6] Furthermore, there was serious concern that overburdening and delays were causing compromise in the quality of justice the supreme court was producing.[7]

The district courts of appeal were created with the idea that in the majority of cases they would be courts of final appellate jurisdiction, that is, courts of last resort. As such, their decisions would be the laws of the state. The Supreme Court of Florida was given primary appellate jurisdiction only in a small number of narrowly defined cases and was given the power to grant various extraordinary writs, including writs of certiorari.[8] The scope of each of the constitutional grants of supreme court power is quite limited. As noted, the Judicial Council wanted to limit a litigant's opportunity for a second appellate review in the supreme court if a district court had finally determined a case. Provisions for review were included where the appellate court decision affected a class of constitutional or state officers, passed upon a question certified by that court to be of great public interest or was in direct conflict with a decision of another court of appeals or the supreme court on the same point of law.[9] The supreme court was to have a supervisory role in relation to the appellate courts. In that vein it was charged with ensuring harmony among their decisions. This power to cure conflict was the most flexible and discretionary of the court's jurisdictional grants.

Even before the constitutional amendment was passed, legal scholars and interested observers voiced fears that the provision allowing the court to solve decisional conflict would "doubtless . . . be the basis in many instances for a second review from the Courts of Appeals"[10] rather than strictly a means of producing harmony.

---

5. Pennekamp, *supra* note 3.

6. *Id.*

7. *Id.*

8. FLA. CONST. art. V, § 3(b). The following types of cases may be appealed directly from the trial court to the supreme court: those imposing the death penalty; those passing on the validity of a state statute or a federal statute or treaty or construing a provision of the state or federal constitution; and, when provided by law, those imposing life imprisonment or involving validation of bonds or certificates of indebtedness. The court may only review decisions of the district courts of appeal by certiorari in certain enumerated instances. It also may issue writs of prohibition, mandamus, quo warranto and habeas corpus and may review administrative actions as provided by law.

9. FLA. CONST. art. V, § 3(b)(3).

10. Barns, *Courts, Lawyers and Taxpayers*, 30 FLA. BAR J. 162, 165 (1956). Barns was a

One writer foresaw the possibility that wealthy litigants would use the inherent flexibility of the conflict certiorari provisions as a "delaying tactic . . . designed to enforce compromises."[11] It seemed certain that if district court decisions were to have convincing finality, "[t]he Supreme Court must establish itself, by stern conduct in receiving appeals, as the steadfast opponent of such practices."[12]

Two decades after the creation of the district courts and the redefinition of supreme court jurisdiction, the problems which led to the 1956 changes are recurrent. Most fears voiced prior to passage of the amendment have proved justified. The court is again overburdened. One justice "has nightmares about the court burden—not because he minds work, but because he thinks it is hurting the work product, justice."[13] Moreover, in two decades the court has not found it possible (or perhaps desirable) to establish clear and consistent guidelines for determining when a conflict exists. The absence of clearly defined guidelines makes application for a writ of certiorari on the ground of conflicting decisions an uncertain endeavor at best. The resulting confusion has caused Justice England to call for "the abolition of . . . conflict jurisdiction, as well as the other enumerated classes of discretionary review, in favor of the federal model which . . . gives the United States Supreme Court complete and unfettered discretion to determine when uniformity is not essential."[14]

This article will consider potential changes in the constitutional grant of jurisdiction to the Supreme Court of Florida, and in the appellate rules, in light of the current court burden and the court's twenty year failure to cope with conflict certiorari in a consistent and unified manner. Supreme court interpretations of its own jurisdictional powers will be examined. Alternatives, including those suggested by Justice England, will be discussed.

---

retired supreme court justice and a University of Miami Law Professor at the time he wrote the article.

11. Pennekamp, *supra* note 3.

12. *Id.*

13. Miami Herald, May 1, 1977, § AA at 5, col. 1. The justice referred to was Justice Arthur England. *See* England & McMahon, *Quantity Discounts in Appellate Justice,* 60 JUDICATURE 442 (1977).

14. Florida Greyhound Owners and Breeders Ass'n v. West Flagler Assoc., 347 So. 2d 408, 412 (Fla. 1977) (footnote omitted).

## II. INTERPRETATION OF THE CONFLICT CERTIORARI PROVISION OF FLORIDA CONSTITUTION ARTICLE V, SECTION 3(b)(3).

### A. *Pre*-Foley

Perhaps in answer to concerns voiced prior to the passage of the 1956 constitutional amendment, early decisions by the Supreme Court of Florida set out a strict constructionist approach toward the grant of certiorari to resolve decisional conflict. In *Ansin v. Thurston*[15] the court resolved that the constitutional "limitation of review to decisions in *'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.*"[16] Following the federal standard, the court looked forward to limiting the issuance of writs of certiorari to "cases involving principles the settlement of which is of *importance to the public, as distinguished from that of the parties,* and . . . cases where there is a *real and embarrassing conflict of opinion and authority.*"[17]

Almost immediately, while still espousing concern that it "not venture beyond the limitations of its own *powers,*"[18] the court was faced with the question of whether conflict could be found between a district court per curiam affirmance *without opinion* and a prior decision of the supreme court. Holding that the constitutional finality given to the district courts usually precluded the supreme court from delving into unstated rationale underlying district court opinions, the court stepped back from the federal standard used in *Ansin v. Thurston* and outlined an exception to this general refusal. Reiterating the necessity of sustaining the dignity of decisions of the district courts, the court held that if the refusal to consider the record in a per curiam opinion would create "*resulting injustice to the immediate litigant,*"[19] the court might look behind the opinion.

This aside by the court in *Lake v. Lake,*[20] left the door open for a gradual erosion of the principles set forth in *Ansin v. Thurston* and reaffirmed in *Lake.* The court had anticipated that the new court system would be undermined and weakened without a continuing assumption that justice had been done at the district level. It had acknowledged its own responsibility to give those lower courts its

15. 101 So. 2d 808 (Fla. 1958).

16. *Id.* at 811 (emphasis added).

17. *Id.* (emphasis added, quoting Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1922)).

18. Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958).

19. *Id.* at 643 (emphasis added).

20. 103 So. 2d 639 (Fla. 1958).

fullest respect. But in the same opinion the supreme court gave itself an opportunity to realize its own misgivings and to disregard district court decisions when it suspected injustice therein.

This apparent contradiction set the stage for a philosophical conflict between those who consider the responsibility of the supreme court in its supervisory capacity to be to ensure finally that every litigant in Florida courts receives justice and those who see supreme court responsibility in a broader light. This latter group subordinates concern for individual litigants in deference to the constitutional mandate of district court finality. It sees the supreme court's responsibility as resolution of conflict only where the appellate court decision will have important impact on and cause real confusion in the decisional law of the state.

After *Lake* the supreme court made several housekeeping decisions regarding the new conflict certiorari provision. In apparent disregard of the *Lake* exception, the court defined the word *decision*[21] as including *both the judgment and the opinion.*[22] This definition would seem to require an opinion for any finding of conflict. In another case the court explained that an applicant for a writ of certiorari based on conflict must specifically cite the prior decision which conflicts with the decision challenged.[23] It is not enough to allege general "conflict with the public policy of the State of Florida."[24] In both instances the court continued to profess its interest in strict construction of the conflict certiorari provision.

The abovementioned philosophical dichotomy became apparent in *Sunad, Inc. v. City of Sarasota.*[25] A bare majority of the court granted a writ of certiorari on the ground that the district court opinion under attack (which followed a nineteen year old supreme court holding on the same subject) conflicted with a statement in a forty-three year old case which was "pure obiter dictum."[26] Three

21. The *Lake* court used the word decision in the context that an opinion must conflict with a prior court of appeal or supreme court *decision* to invoke conflict certiorari jurisdiction.

22. Seaboard Air Line R.R. v. Branham, 104 So. 2d 356 (Fla. 1958). The court recognized that to review a district court decision where there is no direct conflict amounts "in effect, to allowing the petitioners two separate successive appeals at two separate and distinct appellate levels; and this the constitution does not authorize." *Id.* at 358.

23. Karlin v. City of Miami Beach, 113 So. 2d 551 (Fla. 1959).

24. *Id.* at 552.

25. 122 So. 2d 611 (Fla. 1960). *Sunad* concerned the question of whether aesthetic considerations were a proper basis for the regulation of advertising signs where a Sarasota ordinance allowed large signs at point of sale locations but limited sign size elsewhere. The entire court agreed that a city could regulate signs on the basis of aesthetics but held the ordinance in question discriminatory because it was not based on such considerations. *See also* Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So. 2d 8 (Fla. 1967).

26. 122 So. 2d at 613.

of the seven justices argued that there was no ground for supreme court jurisdiction since the allegedly conflicting statement was obiter dictum.[27] Although not mentioned in the dissent, the fact that the district court had followed a more recent supreme court case should have been further indication that no jurisdiction existed. If the earlier case had actually been on the same point of law, as required for conflict jurisdiction to lie, it would have been overruled effectively by the later case. This case presents an example of how concern for individual litigants[28] can be an excuse for expansion of supreme court jurisdiction.

In *Rosenthal v. Scott*[29] the supreme court adopted the procedure of sending a per curiam decision without opinion back to the district court with a request to that court that it write an opinion to enable the supreme court to determine if the decision conflicted with any prior decisions.[30] Two dissenters[31] protested that the supreme court did not have authority to direct a lower court to write an opinion but agreed on the desirability of having an opinion to work with. At this stage of development, therefore, the court continued to act upon the premise that conflict was rare where there was no opinion.

In *Kyle v. Kyle*[32] the court ruled that an appellate court decision could not conflict with prior decisions where the decisional point of law had been discussed but was not controlling. "If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise."[33] This reasoning is difficult to reconcile with *Sunad* where forty-three year old dicta provided grounds for conflict. In *Sunad* the court rationalized its action by calling it an attempt to avoid confusion. Certainly a *Kyle* type of case could raise as much confusion.

In *Huguley v. Hall*[34] the court further expanded its conflict jurisdiction. There the district court had affirmed the circuit court

27. *Id.*

28. Apparently the court unanimously agreed that the district court had erred.

29. 131 So. 2d 480 (Fla. 1961).

30. This was a case of per curiam reversal without majority opinion where a concurring opinion set out the facts. The court justified its action by reasoning that reversals should always have opinions lest the court under review not understand its prescribed future course.

31. 131 So. 2d at 482-83 (O'Connell and Thornal, JJ., dissenting).

32. 139 So. 2d 885 (Fla. 1962).

33. *Id.* at 887. The point in question was whether an antenuptial agreement could be deemed valid without the signatures of two witnesses. Prior decisions had held valid, for various reasons, agreements which had been witnessed. The question of the necessity of having signatures for validity, however, was one of first impression.

34. 157 So. 2d 417 (Fla. 1963). *See also* Autrey v. Carroll, 240 So. 2d 474 (Fla. 1970).

without opinion. There was, however, an exhaustive dissenting opinion which summarized all the facts of the case. The supreme court held that it could find conflict based on this dissent, or on the *Lake* exception.

## B. Foley

In 1965, some seven troubled years after the *Lake* decision, the supreme court reexamined the question of whether a district court decision without opinion is reviewable by conflict certiorari. The case was *Foley v. Weaver Drugs, Inc.*[35] and the result was a modification of the *Lake* policy.[36] The district court had refused to respond to a request to explain its per curiam affirmance. The supreme court found no practical difference between determining if conflict exists in per curiam decisions or opinion decisions[37] and no difference in the legal effect of the two. The majority held that the supreme court "may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal."[38] The "record proper" was defined as "the written record of the proceedings in the court under review except the report of the testimony."[39]

In his dissent,[40] Justice Thornal expressed concern that the majority's holding would produce a flood of petitions for certiorari.[41] This would again overburden the court and would provide a means for every litigant to attempt to secure a second hearing for his cause, thus undermining the finality of the district courts.[42] Justice Thornal emphasized that if there is no opinion, there is no way to tell on what issues the court based its ruling. In this situation the supreme court potentially could find conflict in points of law never considered by the appellate court.[43]

Generally the *Foley* court perceived only two alternatives to the problems created by *Lake:* (1) a hard and fast rule against reviewing per curiam decisions, and (2) the ruling it chose.[44] The court did not

35. 177 So. 2d 221 (Fla. 1965).
36. *Id.* at 225.
37. The court reasoned that eventually it would have to look at the record in any case.
38. 177 So. 2d at 225.
39. *Id.*
40. *Id.* at 231.
41. *Id.* at 234.
42. *Id.*
43. *Id.* at 233-34.
44. *See id.* at 229-31 (Drew, J., concurring).

seem to consider the *practical* precedential effect of per curiam affirmances.[45] A ruling by the supreme court that these decisions could not be reviewed for conflict would effect primarily the individual litigants but probably would not create confusion in the law of the state. In this case, therefore, the court effectively rejected the *Ansin v. Thurston* goal[46] of limiting the grant of certiorari to cases which would affect "decisions as precedents as opposed to adjudications of the rights of particular litigants."[47] The three *Foley* dissenters[48] recognized a lack of necessity for the majority's holding and anticipated problems it would create.

One of the first results of *Foley* was district court refusal to comply further with supreme court requests to explain any per curiam decisions rendered to enable the high court to determine the existence of conflict. In one instance an appellate court reasoned: "to comply with the request would be to make an advocate of this court if it should attempt to set forth the basis of its reasoning after its jurisdiction has expired."[49] This court recognized the need of the supreme court to have such explanations; however, it felt relieved from its responsibility of providing such information because after *Foley* the supreme court could delve into the record for its own information.[50]

In *Sinclair Refining Co. v. Butler*[51] the supreme court took *Foley* one step further. Notwithstanding that the district court had issued a full opinion with its decision, the court saw fit to inspect the record to determine whether a conflict existed. The district court opinion did not speak to the point of law allegedly in conflict with another district court ruling. Dissenting Chief Justice Thornal, with whom Justice Thomas concurred, accused the majority of constructing "another vehicle to enable [them] to follow one of two rules of law"[52] on which they wish to express an opinion. The dissenters maintained that the holding allows the supreme court to "sua sponte dig back through the trial record in an effort to pick up something which . . . the District Court has allegedly overlooked."[53]

Two years after *Foley* the Supreme Court granted conflict

45. *See* text accompanying notes 117-120 *infra.*
46. *See* notes 15-17 *supra,* and accompanying text.
47. 101 So. 2d 808, 811 (Fla. 1958).
48. Justices Thornal, Thomas and O'Connell.
49. Hoisington v. Kulchin, 178 So. 2d 349, 351 (Fla. 3d Dist. 1965).
50. *Id.*
51. 190 So. 2d 313 (Fla. 1966).
52. *Id.* at 320.
53. *Id.*

certiorari in a case which demonstrated "the necessity for and wisdom of the rule in *Foley*."[54] *Seaboard Air Line Railroad Co. v. Williams* was tried under a contributory negligence statute held unconstitutional by the high court in the interim between the trial and appeal. The district court denied appellant's motions to amend its assignment of errors to include the unconstitutionality of the statute and to remand the case for new trial based on the decision of unconstitutionality. It then affirmed the trial court result per curiam and without opinion.[55] The supreme court had held recently "that an appellate court is required to apply the law as it existed at the time of the appeal."[56] Therefore, if the affirmance were permitted to stand, it would be in direct conflict with the holding of unconstitutionality and in direct contravention of the aforementioned recent holding. Furthermore, a situation would be created whereby some litigants would have the benefit of a recent supreme court declaration of unconstitutionality and others would not. Even Justice O'Connell, a *Foley* dissenter, concurred, opining that this was an instance where the court should be able to look behind an opinionless decision to resolve serious conflict.

Also in 1967 a unanimous court reaffirmed *Sunad*[57] in holding that conflict can be found in obiter dicta.[58] In this instance the dicta was located in the opinion under review. The court recognized that the conflicting statements were dicta, granted certiorari, and proceeded to affirm the district court holding on grounds having nothing to do with the conflict. In its own dicta the supreme court resolved the conflicting statements of law.[59] Since the affirmance was based on a point other than the conflicting one and the conflicting point was unnecessary to the resolution of the case, one might question the precedential value of the supreme court opinion and ask if the substance of that opinion was not dicta itself.

Controversy over the interpretation of the conflict provision of

54. Seaboard Air Line R.R. v. Williams, 199 So. 2d 469, 471 (Fla. 1967), *cert. denied*, 390 U.S. 920 (1968).

55. 189 So. 2d 417 (Fla. 4th Dist. 1966).

56. 199 So. 2d at 471 (citing Florida East Coast Ry. v. Rouse, 194 So. 2d 260 (Fla. 1967); Atlantic Coast Line Ry. v. Braz, 196 So. 2d 109 (Fla. 1967)).

57. *See* notes 25-28 *supra*, and accompanying text.

58. Hawkins v. Williams, 200 So. 2d 800 (Fla. 1967).

59. In this case the appellate court held that no contributory negligence could be found on the face of the complaint and reversed the circuit court order dismissing the complaint for failure to state a cause of action. In pure dicta the appellate court went on to hold that even if such contributory negligence was apparent in the allegations of the complaint, it must be raised as a defense rather than as grounds for dismissal. This conflicted with several prior district and supreme court holdings. Upon grant of certiorari, the supreme court agreed that no contributory negligence could be found in the complaint. Therefore, it approved the district court holding but resolved the conflict in dicta in favor of the prior cases.

the Florida Constitution[60] came to a head in *Gibson v. Maloney.*[61] There the two dissenters maintained that the majority had based its finding of conflict on a United States Supreme Court decision rather than any Florida district or Supreme Court decision as constitutionally required.[62] They further maintained that the Florida decisions cited for conflict were irrelevant to the questions at hand, easily distinguished on their facts and, in fact, presented no conflict at all. Furthermore, the majority relied on jury instructions as part of the record proper. Dissenting, Justice Thornal complained that the definition of record proper was highly uncertain and that he had not before considered it to include jury instructions.[63] He lamented that by expanding the definition of record proper the supreme "[c]ourt is able to completely circumvent any jurisdictional issue and go right to the merits of each case."[64] He voiced a concern that if the court, by means of this expanded definition, continued to permit an erosion of its limitations on conflict certiorari, Florida would rapidly approach "the much decried allowance of 'two appeals', which concerned the framers of our amended juridical article when it was drafted in 1956."[65]

The *Gibson v. Maloney* dissents were the first of many. Retired Justice Drew, in *Fountainbleau Hotel Corp. v. Walters,*[66] criticized the majority for finding conflict and opined that "the Constitution enables this Court to harmonize the decisions of this and the District Courts of Appeal, not to correct erroneous decisions of the latter."[67] Dissenting in *Buck v. Lopez*[68] Justice Adkins, joined by Justice Ervin in citing *Ansin v. Thurston,* reminded the majority that its "concern should be with the decision of the District Court of Appeal as precedent as opposed to an adjudication of the rights of the particular litigants."[69] These dissents indicated the continued existence and vitality of the philosophical dichotomy in the Su-

60. FLA. CONST. art V, § 4(2) (1885, amended 1956) (current version at FLA. CONST. art V, § 3(b)(3)).

61. 231 So. 2d 823 (Fla. 1970).

62. 231 So. 2d 823, 830, 840 (Thornal, J. and Ervin, C.J., dissenting).

63. *Id.* at 832. For a comprehensive discussion of the controversy over the definition of record proper see Comment, *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); Note, *Conflict Certiorari Jurisdiction of the Supreme Court of Florida: The "Record Proper,"* 3 FLA. ST. U. L. REV. 409 (1975).

64. 231 So. 2d at 833.

65. *Id.*

66. 246 So. 2d 563 (Fla. 1971).

67. *Id.* at 566.

68. 250 So. 2d 6 (Fla. 1971).

69. *Id.* at 9.

preme Court of Florida.

In 1973 the court took an "opportunity to comment on the rationale of considering dissents when no other portion of the record proper is presented for consideration other than the majority and dissenting opinions."[70] The court noted that when facts are set forth in a majority opinion, precedentially they are considered to be the accepted facts of the case. Facts set forth in a dissent are not given such dignity. There is a presumption, however, that an appellate judge who dissents would not intentionally try to mislead by using inaccurate facts in his opinion. Consequently, the court held that an attorney may file a petition for conflict certiorari based on facts gleaned from the dissent even when there is a majority opinion.[71] If the party opposing certiorari uses facts from the majority opinion to argue that there is no conflict, however, the validity of facts stated by the majority would prima facie supersede those stated in the dissent. The court warned that a petitioner for certiorari relying on facts as set out in a dissent for conflict should buttress his position with the use of other parts of the record proper and should anticipate the effective use of a majority opinion, if any, against him.[72]

The limits of conflict certiorari jurisdiction were expanded quietly in two subsequent cases. In *Keller v. Keller*[73] the court found conflict between a third district case and several prior district and supreme court cases. The finding was noteworthy in that the subject of the cases was the award of alimony, an area left principally to the discretion of the trial court. Petitioner alleged that the award had been inadequate and cited for conflict other factually similar cases where awards had been greater.[74] The supreme court compared the award in the case under review with the other cases and apparently failed to consider that potential abuse of discretion by the trial court had already been considered at the district level. In cases where awards are highly discretionary it is difficult to see how an award in a single case can be found to conflict with another in the constitutional sense or to have any disharmonious effect on the laws of the State.

In *Baycol, Inc. v. Downtown Development Authority*,[75] the su-

70. Commerce Nat'l Bank v. Safeco Ins. Co. of America, 284 So. 2d 205, 207 (Fla. 1973) (footnote omitted).

71. *Id.* at 207.

72. *Id.* at 208.

73. 308 So. 2d 106 (Fla. 1974).

74. *Id.* at 107-08.

75. 315 So. 2d 451 (Fla. 1975).

preme court, without acknowledging that it was doing so, expanded its definition of record proper to include evidentiary exhibits which were not part of the initial pleadings, orders or opinion of the case. The court cited *Foley*[76] for authority to consider the exhibits but apparently failed to consider the *Foley* definition of what could be examined to ascertain if conflict existed.[77] This inconsistency was identified by Justice Overton in his dissenting opinion where he argued: "[c]learly, exhibits and depositions are not 'record proper.' "[78]

Focusing in on the controversy, Justice England's dissent in *State v. Embry*[79] accused the majority of "glossing over the jurisdictional issue to reach the merits."[80] Conflict had been held to exist between the case under review and two prior supreme court cases.[81] In fact there were important factual differences between the *Embry* case and those with which it allegedly conflicted. The district court, however, had applied the rules of law set out in the conflicting cases to the facts at bar.[82] The grounds for conflict were quite unclear.[83]

Justices England and Overton again protested the majority's jurisdictional determination in *AB CTC v. Morejon.*[84] There a finding of conflict was based on parts of the record of a *prior* action

76. 177 So. 2d 221 (Fla. 1965).

77. *See* text accompanying note 39 *supra.*

78. 315 So. 2d at 459.

79. 322 So. 2d 515 (Fla. 1976).

80. *Id.* at 519.

81. All three cases concerned Florida's speedy trial rule. The circuit court had denied Embry's motion to dismiss for failure to afford him a speedy trial on the grounds that subsequent to requesting the speedy trial Embry had filed a motion to suppress. This, reasoned the court, showed that Embry was not prepared to go to trial as required by the allegedly conflicting cases. The district court reversed, holding that the mere filing of a motion to suppress does not indicate a defendant's unreadiness or unwillingness to go to trial. The allegedly conflicting cases required a bona fide desire to go to trial and adequate preparation as prerequisites to demand a dismissal after speedy trial had been demanded. In both cases the defendants had engaged in dilatory motions and discovery procedures subsequent to requesting speedy trials.

82. *See* Nielson v. City of Sarasota, 117 So. 2d 731 (Fla. 1960). In that case the court held:

> the principal situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflict are, (1) the announcement of a *rule of law* which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this court.

*Id.* at 734.

83. 322 So. 2d at 518. Justice Overton in a partial dissent expressed belief that no conflict existed.

84. 324 So. 2d 625 (Fla. 1975). For an excellent discussion of this case see 6 STETSON INTRAMURAL L. REV. 15 (1976).

which had been appended to petitioner's brief in the case at bar. The dissenters emphasized that this could not have been foreseen in the constitutional requirement of "direct" conflict or in the *Foley* definition of record proper.[85] Justice England called for a re-evaluation of *Foley*.[86]

The question of whether conflict could be found in a dissenting opinion was raised again by Justice England in his concurring opinion in *Golden Loaf Bakery, Inc. v. Charles W. Rex Construction Co.*[87] The majority had ruled simply that it had no conflict jurisdiction in the case. Since the district court affirmance was without opinion but contained one judge's dissenting opinion, Justice England took the opportunity to state clearly his objection to the use of "dissent conflict" as a means for the supreme court to acquire jurisdiction. Unwilling "to ascribe to the dissenter the power to speak for the unspoken majority,"[88] but noting that in the instant case the dissent presented the only reviewable record proper,[89] Justice England inferred that to grant conflict certiorari based on matters set forth in a dissent is unnecessary because of lack of precedential effect and a dangerous erosion of the "last resort" character of the district courts.[90] It must be noted, however, that although four justices concurred in discharging the writ of certiorari, only Justice Overton joined Justice England in his disapproval of "dissent conflict."

In *National Airlines, Inc. v. Edwards*,[91] Justice England, again joined in dissent by Justice Overton, accused the majority of seeming "inclined to continue 'finding' conflict in those district court decisions they do not like."[92] In *Edwards* a passenger on a commercial air liner hijacked to Cuba became ill and suffered permanent injury as a result of ingestion of Cuban food and water. She sued the airline company alleging negligence in failure to detect the hijacker and failure to prevent the incident. The central issue in the

85. 324 So. 2d at 629.

86. *Id.* It is interesting to note that at about this time Justice England was speaking out in favor of curtailing other forms of certiorari jurisdiction. In Lake Region Packing Ass'n v. Furze, 327 So. 2d 212 (Fla. 1976), where a district court had certified that its decision was of great public interest but had failed to frame the question it wanted the supreme court to decide, Justice England felt the high court was without power to frame the question itself and had no jurisdiction absent the certification of an express question. 327 So. 2d at 217. The majority disagreed.

87. 334 So. 2d 585 (Fla. 1976) (England and Overton, JJ. concurring).

88. *Id.* at 587.

89. *Id.* at 586.

90. *Id.* at 586-87.

91. 336 So. 2d 545 (Fla. 1976).

92. *Id.* at 548.

case was whether the airline's negligence was the proximate and foreseeable cause of the passenger's injuries. The trial court dismissed the complaint. Upon appeal, the district court reversed, holding that the claim for damages was not so remote as to demand dismissal. The cause was then appealed to the Supreme Court of Florida, which granted certiorari on the grounds of conflict with two previous district court opinions. In the *Edwards* case the district court, in reversing, set forth the general rule governing remoteness — the same rule which was followed in both of the cases allegedly in conflict. In the prior cases the supreme court, in applying the rule, found the claimed damages to be too remote and unforeseeable. Similarly, in *Edwards*, the supreme court quashed the order the district court and reinstated the dismissal of the case. Agreeing with the result of the majority opinion, the dissenters protested that the supreme court had no authority to intervene simply to express an opinion on the application of accepted legal tests to a particular set of facts. Neither the dissenters nor the majority pointed out that the court's action in *Edwards* failed to fit into one of the two situations set out in *Nielson v. City of Sarasota.*[93]

Finally, in *Mystan Marine, Inc. v. Harrington*[94] a majority of the court, led by Justice England, reaffirmed *Ansin v. Thurston*[95] and manifested a "concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."[96] Notwithstanding recognition that the petitioner in the instant action had been denied a "benefit . . . which a defendant in the identical legal position [had been] able to obtain"[97] the court held that the district court's denial without opinion of a writ of common law certiorari in the case had no precedential effect. Discussing possible alternative reasons for the denial of certiorari, the court acknowledged "there is no means by which we, or anyone else, can determine exactly what action the district court took."[98] Since the decision had no precedential effect, it could not create disharmony in the decisional law of the state. Although the end result conflicted with a prior decision, the court found that "the constitutional scope of [its] jurisdiction prohibit[ed] [its] review."[99]

In *City of Jacksonville v. Florida First National Bank*[100] a writ

93. 117 So. 2d 731 (Fla. 1960). For a discussion of this case *see* note 82 *supra.*
94. 339 So. 2d 200 (Fla. 1976).
95. 101 So. 2d 808 (Fla. 1958). *See* text accompanying notes 15-17 *supra.*
96. 339 So. 2d at 201 (*quoting* Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958)).
97. 339 So. 2d at 201.
98. *Id.*
99. *Id.* at 202.
100. 339 So. 2d 632 (Fla. 1976).

for certiorari was discharged with the concurrence of five justices. Two justices[101] joined Justice England in rejecting the writ based on the rationale of *Nielson v. City of Sarasota.*[102] They agreed that the supreme court had no jurisdiction to review a district court's application of a settled rule of law unless that application conflicted with a prior application of the same rule to a case with substantially similar facts. There had been no prior case with similar facts. It is noteworthy that in his solitary dissent, Justice Boyd apparently ignored the jurisdictional problem in the case and spoke only to the merits.[103] It is also interesting to ponder whether the denial of certiorari—at least by the two justices who did not join in Justice England's opinion—could be attributed to the fact that fairness and compassion seemed to be served by that denial.[104]

Joined by Justices Hatchett and Overton, Justice England again registered his disapproval of the majority's method of granting conflict certiorari in *Williams v. State.*[105] The district court had affirmed the trial court without opinion, but a dissenting opinion had been filed. Justice England reiterated his objection to "dissent conflict."[106] Furthermore, he opined that there was no effective conflict of decisions. Most importantly, he pointed out that the statute involved in the case producing the legal question which allegedly required clarification had been repealed. For that reason alone Justice England thought certiorari should be denied. The only consequence of resolving the conflict—if one existed—would be to the immediate litigants. The "individual litigants versus the precedential effect" question continued to pose a difficult situation.

A unified court ordered dismissal of the petition for writ of certiorari in *Florida Greyhound Owners & Breeders Association v. West Flagler Associates.*[107] The court, however, was not unified in the reasons for dismissal: Justice England and Chief Justice Overton wrote concurring opinions. The two agreed that "the time [had] indeed come to recede from *Foley* and its ill-conceived attempt to retain the last word on every matter brought to the Florida

101. Chief Justice Overton and Justice Sundberg.

102. 117 So. 2d 731 (Fla. 1960).

103. 339 So. 2d at 634-36.

104. The action was one against a municipality to remunerate two abused children for their injuries caused by the alleged negligence of the municipality. The trial court had dismissed the complaint and the district court had reinstated it. Therefore, a denial of certiorari was effectively a decision favoring the children.

105. 340 So. 2d 113 (Fla. 1976).

106. *See* Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976). *See also* text accompanying notes 87-91 *supra.*

107. 347 So. 2d 408 (Fla. 1977).

appellate courts."[108] Justice England reasoned that *Foley* was based on the assumption that a per curiam affirmance is a tacit adoption of the trial court's reasoning on a point of law. He continued, "[b]oth the Second and Third District Courts of Appeal have expressly stated that trial judges can make no assumptions as to the basis on which a per curiam affirmance without opinion is rendered,"[109] and the supreme court has agreed with such statements.[110] "To my mind, there is no possible way that a district court's affirmance without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention."[111] Justice England stated that the only reason for the supreme court to review per curiam affirmances is to provide justice to the individual litigants. The constitution assigns that responsibility to the district courts. Decisions without opinion have no lasting effect on the state's law. Hence, along with increasing the burden on the supreme court, the *Foley* decision has seriously undermined the district courts' finality. In a final note, Justice England, apparently frustrated by his brothers' refusal to recede from *Foley,* addressed himself to the 1977 Constitutional Revision Commission and asked it to abandon the present grants of supreme court jurisdiction in favor of the system of granting certiorari used in the United States Supreme Court.[112] The implication is that as long as the court is granting certiorari in a highly discretionary fashion, its constitutional grant of power should specifically give it such discretion.

### C. *The Present*

The Supreme Court of Florida has developed a system of granting writs of certiorari that is confused and controversial. The basic question that must be asked is whether the function of the state's highest court is to ensure that individual litigants obtain justice, to pass judgment on all matters that it deems important or to adhere strictly to its constitutional function of acting only when there is serious decisional disharmony in the state. Justices England and Overton obviously favor a restriction of grants of conflict certiorari to cases where the decisional conflict would have great and lasting impact. Justices Adkins and Boyd apparently favor liberal grants

108. *Id.* at 409.

109. *Id.* at 410-11 & n. 9 (citing Acme Specialty Corp. v. City of Miami, 292 So. 2d 379, 380 (Fla. 3d Dist. 1974) and Schooley v. Judd, 149 So. 2d 587, 590 (Fla. 2d Dist.), *rev'd on other grounds,* 158 So. 2d 514 (Fla. 1963)).

110. *Id.* (citing State *ex rel.* Ranalli v. Johnson, 277 So. 2d 24, 25 (Fla. 1973)).

111. *Id.*

112. *Id.*

of writs for conflict certiorari based on conflict found in dissenting opinions and obiter dicta,[113] misapplication of law to facts[114] and expansive definitions of the record proper.[115] The general positions of the other justices are uncertain. There is some indication, however, that Justices England and Overton are beginning to influence the others.[115.1] There also seems to be a reduction in the number of certiorari petitions granted.[116]

The only thing about conflict certiorari that is certain is that a petitioner for a writ cannot know in advance what his chances of success will be. Jurisdictional determinations seem to be very subjective. In fact the supreme court uses a great deal of discretion, and very few opinions set guidelines in the process of granting certiorari.

## III. Remaining Questions

Solutions to this general uncertainty can be made in decisional pronouncements or in changes in the Florida Appellate Rules. A revision of the constitutional provision which grants jurisdiction to the supreme court also might be appropriate. General questions which remain troublesome are: (1) whether a decision without opinion is precedential and should be a basis for a grant of conflict certiorari; (2) how to define the "record proper" which may be consulted in ascertaining whether conflict exists; (3) whether the conflict necessary to invoke jurisdiction must in be controlling points of law in both cases, that is, necessary to the result and not merely dicta or part of a dissenting opinion; (4) whether conflict certiorari should be granted when the ultimate question is moot and not likely to produce further litigation or when the statute which is central to the case has been repealed; and (5) whether diverse applications of the same rule of law to different sets of facts can be grounds for granting a writ of certiorari based on decisional conflict.

Hereafter some alternative ways of handling these problems will be discussed and suggestions will be made.

---

113. *See* Williams v. State, 340 So. 2d 113 (Fla. 1976); Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976) (dissent conflict); Ciongoli v. State, 337 So. 2d 780 (1976) (obiter dicta).

114. *See* National Airlines v. Edwards, 336 So. 2d 545 (Fla. 1976); State v. Embry, 322 So. 2d 515 (Fla. 1975).

115. *See* AB CTC v. Morejon, 324 So. 2d 625 (Fla. 1975); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975) (per curiam); Gibson v. Maloney, 231 So. 2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970).

115.1. *See* Justice Hatchett's discharge of a writ of certiorari where conflict was based on dicta in Ciongoli v. State, 337 So. 2d 780 (1976).

116. Comment, *supra* note 63, at 351 n. 124.

### A. *Is a Decision Without Opinion Precedential?*

Professor Karl N. Llewellyn noted that legal "precedent consists in [a court] doing over again under similar circumstances substantially what has been done by [it] or [its] predecessor before,"[117] and "the foundation . . . of precedent is the official analogue."[118] Llewellyn emphasized the importance of maintaining records of prior cases where the solution of a problem takes a great deal of time and effort. The product of that time and effort, if preserved in records, can be applied to similar problems in the future without further expenditure of effort and time. The lawyer can search "the records for convenient cases to support his point, [press] upon the court what it has already done before, [and capitalize] the human drive toward repetition by finding, by making explicit, by urging, the prior cases."[119]

However, if an opinion consists of three words, "Per Curiam. Affirmed.", it is difficult for a lawyer to use it in the manner anticipated. A use of the decision as precedent would require a detailed examination of the record of the case. Even then only sheer guess work could establish the exact reasoning behind the result. For this purpose it is difficult to see how such a decision could have any effect on the jurisprudence of the state. A researcher could never understand a particular case absent coincidental familiarity with it. Yet a majority of the Supreme Court of Florida declines to overrule the case which allows it to find conflict in per curiam affirmances without opinion. The effect of this is two-fold: individual litigants receive a second appellate hearing of their cases, and the supreme court caseload expands. These are two results sought to be avoided through the development of our modern court system.

As to whether a decision without opinion should invoke conflict jurisdiction, three justices of the Supreme Court of Missouri opined wisely: "The Court of Appeals does not *go* contrary to the previous rulings of this court unless it *states* a proposition of law contrary to what this court has held."[120] This rule could be adopted by the Supreme Court of Florida.

### B. *How Should the Record Proper Be Defined?*

Since it appears that the supreme court will not halt its practice

117. K. LLEWELLYN, BRAMBLE BUSH 64 (1930).

118. *Id.*

119. *Id.* at 65.

120. State *ex rel.* Union Biscuit Co. v. Becker, 316 Mo. 865, 875, 293 S.W. 783, 787 (1927) (White, J. dissenting) (emphasis added).

of finding conflict where there is no written opinion, the court at least should clarify once and for all the definition and limitation of what it will consider in ascertaining if conflict exists. Once thought to include only the opinions, orders and pleadings filed in a case, the record proper has been extended recently to include evidentiary exhibits and documents filed in a prior lawsuit.[121]

In Missouri, where the grant of jurisdiction to the supreme court to resolve conflicts resembles that of Florida,[122] the supreme court will not find conflict unless it appears on the face of the allegedly conflicting opinions or documents referred to therein.[123] Since Florida's appellate courts do not always write opinions and the supreme court has neither seen fit nor had the authority to require them to do so, the high court might consider a rule requiring the district court to furnish it, on request, with a list of documents pertinent to its decision. This would not put the appellate court in the position of having to defend a decision it had already rendered and should not be unduly burdensome. On the other hand this rule might minimize the blind groping the supeme court presently must do in order to determine if a case without opinion presents a conflict.

It is interesting to note that the Supreme Court of Texas flatly refuses to look behind an opinion in a case to see if conflict exists.[124] Texas has a means for resolving conflict similar to that of Florida and Missouri.[125] Its appellate courts do not always write opinions after examining lower court decisions for error. Nonetheless, absent the decisional mischief of the *Lake* exception and *Foley,* Texas does not have the problem of handling alleged conflicts created where no opinion is written. It simply does not recognize the possibility.

---

121. *See* note 115 *supra.*

122. MO. CONST. art. V, § 10 (1945, amended 1970) provides for resolution of decisional conflict among the courts of Missouri by the supreme court. The case under review must be certified to the supreme court by an appellate court unless it involves a question of general interest or importance.

123. Knorp v. Thompson, 175 S.W.2d 889 (Mo. 1943); Kansas City Gas Co. v. Shain, 132 S.W.2d 1015 (Mo. 1939); Kroger Grocery & Baking Co. v. Haid, 18 S.W.2d 478 (Mo. 1929); State *ex rel.* Union Biscuit Co. v. Becker, 316 Mo. 865, 293 S.W. 783 (1927); State *ex rel.* Vulgamott v. Trimble, 300 Mo. 92, 253 S.W. 1014 (1923).

124. Boxwell v. Ladehoff, 400 S.W.2d 303 (Tex. 1966); Torrez v. Maryland Cas. Co., 363 S.W.2d 235 (Tex. 1962); Dockum v. Mercury Ins. Co., 135 S.W.2d 700 (Tex. Comm'n App. 1940); *see* Sales & Cliff, *Jurisdiction in the Texas Supreme Court and Courts of Civil Appeals,* 26 BAYLOR L. REV. 501 (1974).

125. TEX. CONST. art. V, § 3; TEX. REV. CIV. STAT. ANN., art. 1728 (Vernon). Texas law provides the supreme court with appellate jurisdiction of all cases "in which one of the courts of appeal holds differently from a prior decision of another court of appeal or of the Supreme Court upon any question of law *material to a decision of the case.*" *Id.* (emphasis added). *See also* State *ex rel.* Miles v. Ellison, 296 Mo. 151, 190 S.W. 274 (1916).

### C. *Can There Be Conflict in Dicta, Dissents or Other Parts of the Opinion which Are Not Controlling?*

> If this court should establish the policy of requiring every observation made by the Court of Civil Appeals in the course of an opinion to be certified [to the supreme court] if there seemed to be a conflict with observations made by Courts of Civil Appeals in other cases, notwithstanding they do not affect the [result] of the case, then we apprehend its docket would be cluttered with a great deal of unnecessary litigation.[126]

With this ruling the Supreme Court of Texas took a hard and fast position against finding conflict in any parts of opinions except those which are legally controlling and necessary to the result.[127] A statement which is immaterial to the decision in a case cannot create conflict even if it is directly contrary to statements made in a prior decision.[128]

The United States Supreme Court employs a similar standard: "[T]here must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized."[129]

In *Sunad*,[130] a case which has not been overruled,[130.1] the Supreme Court of Florida reaffirmed its policy of taking jurisdiction of a case in order to correct conflicting dicta. In a similar vein, the court has not been adverse to finding conflict on the basis of a dissenting opinion.[131] This again raises the questions: What possible precedential value could such statements have, and how could they cause "real and embarrassing conflict"? If the court saw its function solely as that of a conflict resolver it could not take jurisdiction in such instances. Surely the fact that it acquires jurisdiction based on dicta and/or dissents might be considered an indication that the supreme court sees itself as the true court of last resort of the state.

As previously suggested, the court should adopt a policy or appellate rule to the effect that conflict, to invoke the court's jurisdiction, must appear on the face of the majority opinion, must be necessary to the result of the case and must be in a controlling point

---

126. Benson v. Jones, 296 S.W. 865, 867 (Tex. Comm'n App. 1927).

127. *See* Ziegelmeyer v. Pelphrey, 125 S.W.2d 1038 (Tex. 1939); Sales & Cliff, note 105 *supra*.

128. Nesbett v. Nesbett, 428 S.W.2d 663 (Tex. 1968); Williams v. Williams, 325 S.W.2d 682 (Tex. 1959).

129. STERN & GRESSMAN, SUPREME COURT PRACTICE, § 4.3 at 154 (4th ed. 1969).

130. 122 So. 2d 611, 613 (Fla. 1960). *See also* notes 25-28 & 57 *supra*, and accompanying text.

130.1. *See* Ciongoli v. State, 337 So. 2d 780 (1976).

131. Williams v. State, 340 So. 2d 113 (Fla. 1976).

of law. In this way, much of the court's overburdening would be alleviated and the probabilities of obtaining a writ for conflict certiorari clarified.

There are those who would argue that such a ruling would be unjust for certain individual litigants, but it must be pointed out that no court is infallible. Even the supreme court occassionally errs. There are ample provisions in the appellate courts for rehearings and other means of ensuring that justice is done. Hence, allowing the supreme court to grant a second appellate hearing by finding conflict in statements with no precedential value is not necessarily a guarantee that "better" justice will be achieved. Furthermore, the district courts of appeal were constitutionally designed to be Florida's courts of last resort.

### D. *Should Conflict Certiorari Be Granted to Resolve Moot Problems?*

There are those who would argue that the conflict is not worthy of resolution where the question presented will not arise again. This occurs in a situation where a case is decided, the decision legitimately conflicts with another decision, but the central and conflicting question is moot or about to become moot at the time of petition for certiorari. This could be true in a case based on a statute that has been repealed or where a decision affects a class of litigants all of whose rights have been adjudicated already. Again the court is faced with the possibility that an individual litigant will be treated unfairly. This must be weighed against the costs and benefits to society of a second appellate review by the supreme court. Obviously, society's benefits from the review would be limited to benefits received by the protesting litigant. Since the question will not arise again, disharmony in the decisional law should not be a concern.[132]

Recently in *Williams v. State*[133] the Supreme Court of Florida found conflict in a case based on a statute which had been repealed subsequent to the trial of the case. The conflicting question in the case would not arise again, but the court apparently did not see this as a reason to deny the writ.

This must be contrasted with the policy of the Supreme Court of the United States. There the conflicting issue must be vital before certiorari will be granted.[134] R. L. Stern, a devoted scholar of the

132. It is important to confine this rationale to cases where the moot question is very narrow and probably would not be applied to analogous situations.

133. 340 So. 2d 113 (Fla. 1976).

134. Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465 (1953).

Supreme Court, has concluded that if a statute had expired the Court very probably would not hear a case based on it, notwithstanding that there were a substantial number of cases pending on that very issue.[135] Of course if the case had some independent importance the Court would hear it.[136] Furthermore, the United States Supreme Court usually will not base certiorari on conflict if the case under review allegedly conflicts with a case that is very old.[137]

These standards used by the high court of our nation appear to be sound ones. The highly discretionary nature of its grant of jurisdictional power[138] requires that it exercise restraint in accepting cases for hearing and hear only the most important, a model the Florida Supreme Court might well follow.

### E. *Can There Be Conflict in Cases Which Do Not Have Substantially Similar Facts?*

When a case is factually one of first impression it is the function of the trial and district courts to see that the law of the state is properly applied to the unique facts at bar. There is no constitutional provision in Florida for the review of a district court opinion based on unique facts. In a recent decision, however, the supreme court saw fit to review an application of settled law to a unique set of facts[139] on the ground that the application conflicted with that in a prior case. In fact there had never been a case that even remotely resembled the case at bar factually. Additionally, the rule of law dealt with remoteness of damages — traditionally a highly discretionary area.

It is clearly understood that each time a rule of law is applied to a new set of facts it creates a slightly different precedent.[140] It is somewhat difficult to understand how the application of a rule to an entirely diverse and new set of facts can create conflict, for there is no precedent with which the application can conflict.

The Supreme Court of Texas has held that for conflict to arise "[t]he rulings must be so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the

135. *Id. But cf.* Tinder v. United States, 193 F.2d 720 (4th Cir. 1951), *rev'd on other grounds*, 345 U.S. 565 (1953).

136. *See* Watson v. Commissioner, 197 F.2d 56 (9th Cir. 1952), *aff'd*, 345 U.S. 544 (1953) (although statute was no longer in force and could create no further litigation, there were fifty-five cases pending on the same point of law involving millions of dollars).

137. STERN & GRESSMAN, *supra* note 129, at 157.

138. *See* U.S. SUP. CT. R. 19.

139. National Airlines v. Edwards, 336 So. 2d 545 (Fla. 1976).

140. LLEWELLYN, *supra* note 117, at 61-64.

other."[141] That court has ruled that two decisions based on slightly different facts cannot be in conflict so long as the same rule of law has been applied.[142] The Supreme Court of the United States also denies certiorari on the basis of conflict when the asserted conflict arises from "differences in states of fact, and not in the application of a principle of law."[143]

Florida, in *Nielson v. City of Sarasota,*[144] has recognized that if the application of a settled rule of law to a set of facts is to create conflict, the facts must be *substantially the same* as those in the prior case.[145] Of course *substantially the same* is a term of art and it is in its interpretation that the controversy lies.

## IV. CONCLUSION

Potential changes as just discussed would require only the agreement and inclination of the supreme court for their execution. Indeed they reflect necessary changes in attitude that a majority of the court is apparently not prepared to make—either because it sees no need for them or because it does not agree with their thrust.

There are two other alternatives that must be discussed. They both would involve substantial changes in the constitutional grant of jurisdiction to the supreme court. The first retains the restrictive nature of the jurisdictional grant and the second replaces it with total discretion.

The first would involve a scheme whereby conflict certiorari could not issue unless at least one judge on an appellate court panel would certify that conflict *may* exist between its present holding and a prior holding of a district court or the supeme court. If no judge would so certify and the supreme court found the case to be of great importance, it could take the case only for the purpose of resolving the conflict (i.e., either affirming the district court decision or quashing it with instructions to modify the district court decision). In this latter instance the supreme court could consider only the conflicting point and not the entire case while in the former the court would furnish a complete review.

In effect, such a system would resolve much of the uncertainty in our present system. The Ohio and Missouri systems are similar

141. International Harvester Co. v. Stedman, 324 S.W.2d 543, 546 (Tex. 1959) (quoting Garritty v. Rainey, 112 Tex. 369, 247 S.W. 825, 827 (Tex. 1923)); West Disinfecting Co. v. Trustees of Crosby Indep. School Dist., 143 S.W.2d 749 (Tex. 1940).

142. Boxwell v. Ladehoff, 400 S.W.2d 303 (Tex. 1966).

143. Wisconsin Elec. Co. v. Dumore Co., 282 U.S. 813 (1931).

144. 117 So. 2d 731, 734 (Fla. 1960).

145. *See* Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959).

to that suggested.[146] The court of appeals is in an excellent position to recognize conflict as the court most familiar with the record of the case before it. Petitioners could allege conflict on petition for rehearing and/or certification. Since certification by only one judge of the three that sit on appeals would be required and since the constitution would require certification if there *might* be a conflict, the chances are excellent that a very high percentage of true conflicts would reach the supreme court. The problems created by *Foley* might be avoided through such a plan. Furthermore, the supreme court would maintain a degree of flexibility through the latter part of its jurisdictional grant. Certainly the court would not have the burden of screening as many petitions for conflict certiorari. That would be handled at the district level, where the task would not be so burdensome.

The other alternative is for Florida to adopt the federal plan for grants of certiorari jurisdiction. Supreme Court Rule 19, "Considerations governing review on certiorari," states simply: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."[147] The rule goes on to list potential but not controlling considerations for determining whether a case is of such character that certiorari should be granted. In short, the United States Supreme Court has

> jurisdiction to review, at some time and in some manner, all cases in lower federal courts . . . in which the determination of a question as to the meaning or effect of a federal statute . . . constitutional provision, right, or immunity is essential to the decision and in which such a question is properly raised.[148]

The rule imposes no limits as to parties, subject matter, etc. There are no requirements of certification by the appellate court and the Court is not obliged to take any case on certiorari. There are no true guidelines,[149] but the Court has held that its certiorari powers were "not conferred . . . merely to give the defeated party in the Circuit Court of Appeals another hearing."[150]

Such wide discretion would appear, at first, to be unduly burdensome. Certainly, more petitions for certiorari would be filed under such a plan. As a practical consequence, however, the Florida

146. MO. CONST. art. V, § 10 (1945, amended 1970); OHIO CONST. art. IV, § 3(B)(4).
147. U.S. SUP. CT. R. 19.
148. STERN & GRESSMAN, *supra* note 110, at 23-24.
149. *Id.* at 153.
150. *Id.* at 149 (quoting Magnum Co. v. Coty, 262 U.S. 159, 163 (1923)).

justices would have to be more selective in the cases they took. There would be more screening of cases to be done. Yet according to Justice Brennan the effectiveness of a court is enhanced by such a screening process.[151] It is by exposure to a wide variety of cases that a judge can keep his fingers on the pulse of societal change.

Justice England has indicated support for such a change.[152] Yet Justice Overton, who concurred with Justice England in calling for a change, later stated he thought no change in Florida's judicial article was necessary.[153]

Perhaps Justice Overton's avowed desire to keep the same judicial article is an indication that he sees change coming from within the court. If this is true the litigants of Florida would applaud it. For after two decades of wandering through jurisdictional mazes it is only fair that the path to conflict certiorari be cleared and marked once and for all.

---

151. *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835, 836 (1973).

152. Florida Greyhound Owners & Breeders Ass'n. v. West Flagler Assoc., 347 So. 2d 408, 412 (Fla. 1977).

153. Miami Herald, July 10, 1977, § E, at 8, Col. 1.