

7-1-1974

Certiorari Review of District Court of Appeal Decisions by the Supreme Court of Florida

Judith Hayes

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Judith Hayes, *Certiorari Review of District Court of Appeal Decisions by the Supreme Court of Florida*, 28 U. Miami L. Rev. 952 (1974)
Available at: <https://repository.law.miami.edu/umlr/vol28/iss4/5>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENTS

CERTIORARI REVIEW OF DISTRICT COURT OF APPEAL DECISIONS BY THE SUPREME COURT OF FLORIDA

JUDITH HAYES*

| | |
|---|-----|
| I. INTRODUCTION | 952 |
| A. <i>Constitutional Provisions</i> | 952 |
| B. <i>Purpose</i> | 953 |
| II. DECISIONS AFFECTING A CLASS OF CONSTITUTIONAL OR STATE OFFICERS | 953 |
| III. DECISIONS PASSING UPON QUESTIONS OF GREAT PUBLIC INTEREST | 956 |
| A. <i>Jurisdiction</i> | 956 |
| B. <i>Determination</i> | 957 |
| C. <i>Motion for Certification</i> | 960 |
| D. <i>Form of Certification</i> | 960 |
| E. <i>Petition for Writ of Certiorari</i> | 962 |
| F. <i>Review of the Entire Cause</i> | 962 |
| IV. DIRECT CONFLICT ON THE SAME QUESTION OF LAW | 963 |
| A. <i>Jurisdiction</i> | 963 |
| B. <i>Conflict with District Court of Appeal or Supreme Court</i> | 964 |
| C. <i>Dictum</i> | 965 |
| D. <i>Dissenting Opinions</i> | 966 |
| E. <i>Per Curiam Decisions and Examination of the Record</i> | 967 |
| F. <i>Misapplication</i> | 969 |
| V. QUESTION OF GREAT PUBLIC INTEREST V. DIRECT CONFLICT | 971 |
| VI. CONCLUSION | 972 |

I. INTRODUCTION

A. *Constitutional Provisions*

At a general election held November 6, 1956, the voters of Florida voted overwhelmingly to revise the provisions of the Florida Constitution governing Florida's judicial system. The amendment adopted that date, which became effective July 1, 1957,¹ created the district courts of appeal and empowered the Supreme Court of Florida to review their decisions by certiorari in specified situations.²

At a special election held March 14, 1972, an extensive revision to article V of the constitution was ratified, effective January 1, 1973. The only changes relating to the supreme court's power of certiorari to review district court decisions were a renumbering of the applicable provisions, a change in wording of the provisions relating to conflict from point of law to question of law, and an additional change in the conflict provision, in that the conflict may now be with *any* district court of appeal or with the supreme court.³

* Member University of Miami Law Review, Student Instructor in Research & Writing.

1. James, *Certiorari Power of the Florida Supreme Court to Review Decisions of the District Courts of Appeal*, 15 U. MIAMI L. REV. 258 (1961).

2. FLA. CONST. art. V, § 4(2).

3. FLA. CONST. art. V, § 3(b)(3).

Prior to either of the above amendments, the supreme court had appellate jurisdiction, and the constitutional provision concerning the supreme court's certiorari jurisdiction was simply that it had the power to issue writs of certiorari.⁴ The supreme court still has the power to issue all writs necessary to the complete exercise of its jurisdiction,⁵ but these are beyond the scope of this comment.

Thus, there are now three types of decisions of the district courts of appeal which the Supreme Court of Florida has the discretionary power⁶ to review by certiorari: (1) decisions affecting a class of constitutional or state officers, (2) decisions passing upon questions certified by the district court of appeal to be of great public interest, and (3) direct conflict on the same question of law between the district court of appeal decision and a decision of another district court of appeal or of the supreme court.

B. *Purpose*

The purpose of the constitutional amendment creating the district courts of appeal as final appellate courts was to improve the administration of justice by decreasing delay due to the supreme court's burdensome workload and to providing courts of last resort throughout the state,⁷ thus reducing the difficulty and expense of effecting an appeal.⁸

In the exercise of its discretion, the supreme court was expected to limit its review by certiorari to those cases which have an effect upon the Florida public in general, and not to grant certiorari when the effect would be merely to adjudicate the rights of the particular litigants. The supreme court now has the duty to act as the supervisory body of the state's judicial system⁹ and not as a final appellate court.

II. DECISIONS AFFECTING A CLASS OF CONSTITUTIONAL OR STATE OFFICERS

The Florida Constitution gives the Supreme Court of Florida the power to review by certiorari "any decision of a district court of appeal that affects a class of constitutional or state officers."¹⁰ Of the three provisions under discussion in this article, this is the one least often utilized to obtain review by certiorari, perhaps because of its limited scope. In order for the supreme court to have jurisdiction under this provision, not only must the district court of appeal's decision affect a constitutional or state officer, but it must also affect a class consisting of those officers, and

4. FLA. CONST. art. V, § 5 (1885).

5. FLA. CONST. art. V, § 3(b)(4).

6. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

7. *See Short v. Grossman*, 245 So. 2d 217, 220 (Fla. 1971).

8. *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958); *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958).

9. *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 224 (Fla. 1965).

10. FLA. CONST. art. V, § 3(b)(3).

it must do so directly and exclusively.¹¹ Although jurisdiction attaches, issuance of the writ of certiorari is discretionary with the supreme court under the constitution.¹² However, according to the wording of the appellate rules issuance of the writ in such cases seems to be mandatory.¹³

The court has had little difficulty in determining whether the affected officer in question is a "constitutional or state officer," as the term is practically self-explanatory. Conversely, "[i]t is quite obvious that a police officer of a municipal corporation is not a 'constitutional or state officer' as contemplated by the germane constitutional provision."¹⁴ A state treasurer,¹⁵ secretary of state,¹⁶ justice of the peace,¹⁷ state prosecuting attorney,¹⁸ trial judge,¹⁹ tax assessor,²⁰ and beverage director²¹ are among those considered to be constitutional or state officers. It has also been stated in dictum that superintendents of public instruction and sheriffs are constitutional or state officers.²² However, it does not necessarily follow that a decision affecting any individual officer is one affecting a class of such officers.

Although a decision of a district court of appeal might apply directly to only one officer, it will be deemed to affect a class of such officers if, in affecting the single officer, it will ultimately similarly affect every other officer in the same category.²³ "Class," as used in the constitutional provision under discussion, has been defined as "two or more constitutional or state officers who separately and independently exercise identical powers of government."²⁴

On the basis of these principles, it has been held that a decision adjudicating the authority of a particular justice of the peace to issue a search warrant²⁵ and a decision in a taxpayer's action against a county tax assessor seeking reassessment because of the method of assessment used²⁶ are within the constitutional provision, for the decisions ultimately affect a class of constitutional or state officers.

Based upon the necessity for a class, it has been held that a decision affecting the state treasurer²⁷ or the secretary of state²⁸ does not fall within

11. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

12. *Id.*

13. FLA. APP. R. 4.5(c)(6) provides that "if the Court determines that it has jurisdiction, the said petition [for writ of certiorari] shall be granted."

14. *Hakam v. City of Miami Beach*, 108 So. 2d 608, 609 (Fla. 1959).

15. *Larson v. Harrison*, 142 So. 2d 727, 729 (Fla. 1962).

16. *Crown Cent. Petrol. Corp. v. Standard Oil Co.*, 142 So. 2d 731 (Fla. 1962).

17. *State v. Robinson*, 132 So. 2d 156 (Fla. 1961).

18. *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

19. *Id.*

20. *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963).

21. *Treasure, Inc. v. State Bev. Dept.*, 238 So. 2d 580 (Fla. 1970).

22. *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958).

23. *State Bd. of Health v. Lewis*, 149 So. 2d 41 (Fla. 1963).

24. *Id.* at 43.

25. *State v. Robinson*, 132 So. 2d 156 (Fla. 1961).

26. *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963).

27. *Larson v. Harrison*, 142 So. 2d 727 (Fla. 1962).

28. *Crown Cent. Petrol. Corp. v. Standard Oil Co.*, 142 So. 2d 731 (Fla. 1962).

this constitutional provision, since there is only a single officer and no class of either state treasurers or secretaries of state in Florida.²⁹ The class cannot consist of a group of individuals acting as one entity, such as a state board or commission. According to the supreme court, however, there might be a class of governmental entities where there is more than one entity, such as all boards of county commissioners.³⁰

The possibility has been suggested that a decision might affect a class of constitutional or state officers even if no such officer were actually a party to the decision.³¹ In *Richardson v. State*³² the supreme court determined that it had jurisdiction to review by certiorari a district court of appeal's decision which held that noncompliance with the discovery requirements in a criminal case does not ipso facto constitute ground for reversal of a conviction. The court reasoned that the district court of appeal's decision affected two classes of constitutional or state officers—state prosecuting attorneys and trial judges in criminal cases. According to the supreme court the ultimate effect of the district court's decision was to interpret the duties of state prosecuting attorneys regarding their compliance with the rules of criminal procedure and the effect which trial judges in criminal cases should give to noncompliance. This extremely broad interpretation of the court's certiorari power might have frustrated the purpose of the amended court system by permitting certiorari review of most district court of appeal decisions. Quite obviously, such an assumption of certiorari jurisdiction could make every decision by a trial judge a potential one for certiorari review as one affecting a class of state or constitutional officers. In discussing whether the supreme court might assume jurisdiction to review its decision relating to the duties of witnesses to testify, the District Court of Appeal, Second District, in *Gilliam v. State*³³ agreed that, if taken literally, the *Richardson* holding would mean that "any decision of a district court of appeal would be reviewable."³⁴ The court in *Gilliam* found that the effect of its decision upon prosecutors would be only incidental and that such an effect was "if not constitutionally inadequate, so tenuous that assumption of jurisdiction on this basis is extremely unlikely."³⁵

29. See also *State Bd. of Health v. Lewis*, 149 So. 2d 41 (Fla. 1963). In *Larson v. Harrison*, 142 So. 2d 727 (Fla. 1962), two justices indicated that they would like the court to review the district court's decision even though only a single state officer was affected. Justice Drew, concurring specially, agreed that the decision was not within the constitutional provision, but stated that he would like to see an amendment giving the court certiorari power over district court of appeal decisions affecting any cabinet officer of the state. Justice Terrell dissented, stating that he believed that the constitutional provision was applicable to the case *sub judice*. He read the constitution as requiring a class of constitutional officers, but not a class of state officers.

30. *State Bd. of Health v. Lewis*, 149 So. 2d 41 (Fla. 1963).

31. *Spradley v. State*, 293 So. 2d 697 (Fla. 1974).

32. 246 So. 2d 771 (Fla. 1971).

33. 267 So. 2d 658, 660 (Fla. 2d Dist. 1972).

34. *Id.*

35. *Id.* In a pre-*Richardson* decision, the supreme court had held that a decision of a district court of appeal simply adhering to jurisdictional time limits is not one affecting a class of constitutional or state officers. *Evans v. State*, 229 So. 2d 261 (Fla. 1969).

Fortunately, the supreme court found it necessary to recede from its *Richardson* decision in *Spradley v. State*.³⁶ The court realized that under *Richardson* it had jurisdiction to review almost every district court of appeal decision, both civil and criminal, and that such a result would destroy the finality of district courts of appeal decisions as intended by the constitutional revisions of the judicial system in Florida. The principle announced in *Spradley* is that certiorari jurisdiction cannot be based simply upon the review by a district court of appeal of the actions or rulings of a trial judge. Instead, it must be based upon a decision which directly and exclusively affects a particular class of constitutional or state officers, not a decision which affects all citizens of the state and/or the parties to the litigation:

A decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. 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.³⁷

III. DECISIONS PASSING UPON QUESTIONS OF GREAT PUBLIC INTEREST

A. Jurisdiction

The Supreme Court of Florida has power to review by certiorari any decision of a district court of appeal which passes upon a question certified to be of great public interest.³⁸ Certification by the district court of appeal is a condition precedent to certiorari review under this provision.³⁹ Before the supreme court will grant certiorari, a petition for writ of certiorari must also be filed,⁴⁰ and the supreme court will then exercise its discretion in determining whether to review the decision.⁴¹ Although both the certification and petition are required, there seems to be some doubt as to whether jurisdiction vests in the supreme court upon certification⁴² or upon filing of petition for writ of certiorari.⁴³

36. 293 So. 2d 697 (Fla. 1974).

37. *Id.* at 701.

38. FLA. CONST. art. V, § 3(b)(3).

39. *Estes v. City of N. Miami Beach*, 227 So. 2d 33 (Fla. 1969); *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961); *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959).

40. See section III, E *infra*.

41. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961), recognizes the discretionary nature of the writ of certiorari.

42. *Cleveland v. City of Miami*, 263 So. 2d 573 (Fla. 1972); *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

43. *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

B. *Determination*

The determination that a decision is one which passes upon a question of great public interest can be made only by the district court of appeal which rendered the decision. This determination may not be questioned by the supreme court although the court is not required to grant certiorari. This principle was established in *Susco Car Rental System v. Leonard*⁴⁴ and has been followed without question.⁴⁵ Until such determination has been made, the implication is that the decision does not pass upon a question of great public interest.⁴⁶

Although the district courts of appeal often certify a question without specifying their reasons for doing so, those opinions in which the reasons for certification have been specified lead to the conclusion that there are three basic grounds for certifying a question: (1) the decision is one of first impression in Florida;⁴⁷ (2) there has been a change in conditions since the rule of law involved in the decision was established;⁴⁸ and (3) the decision involves a rule of law which affects a large number of Florida citizens and which will have statewide application.⁴⁹ The district courts of appeal have stated one or a combination of these grounds as reasons for certification of a particular decision.

The supreme court has acknowledged that questions of first impression are particularly susceptible to certification in that they are of great public interest.⁵⁰ Clearly, if a question of first impression is answered by the supreme court, the district courts of appeal, being bound by the decisions of the supreme court, should later answer the question, if it arises in their districts, in the same manner, thus creating harmony throughout the state and avoiding any subsequent need for the supreme court to exercise its conflict jurisdiction on the same question.

Where there has been a change in conditions since the rule of law involved in the decision was established and the district court of appeal believes that the rule should therefore be changed, it may follow the established rule and certify the question so that the supreme court may consider the effect of the changed conditions and determine whether to alter the established rule of law. In this manner, the district court of appeal avoids creating conflict with an established rule of law but gives the su-

44. 112 So. 2d 832 (Fla. 1959).

45. See, e.g., *Rupp v. Jackson*, 238 So. 2d 86 (Fla. 1970); *Duggan v. Tomlinson*, 174 So. 2d 393 (Fla. 1965); *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961); *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

46. *Whitaker v. Jacksonville Expressway Auth.*, 131 So. 2d 22 (Fla. 1st Dist. 1961).

47. The questions certified were stated to be of first impression in *McCullough v. Jacksonville Terminal Co.*, 176 So. 2d 345 (Fla. 1st Dist. 1965); *In re Estate of Wartman*, 128 So. 2d 600 (Fla. 1961); *First Nat'l Bank v. Edgerly*, 121 So. 2d 417 (Fla. 1960); and *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959).

48. See note 52 *infra* and accompanying text.

49. See, e.g., *Stiles v. Brown*, 177 So. 2d 672 (Fla. 1st Dist. 1965).

50. *Duggan v. Tomlinson*, 174 So. 2d 393 (Fla. 1965).

preme court the opportunity to review and change the rule.⁵¹ For example, in *Hall v. King*⁵² the District Court of Appeal, First District, followed a prior supreme court decision holding a statute constitutional which automatically revoked the registration of a real estate broker if the broker became a nonresident of Florida, and certified the question. The district court's reasoning in certifying the question was that the supreme court might reconsider its prior decision⁵³ because considerable time had passed since the supreme court decision, circumstances surrounding the real estate profession had changed, and modern long-arm statutes had provided local redress against nonresidents conducting business in Florida, with the result that the continuous residency requirement of the statute might now be unreasonable and unconstitutional.

But the district courts of appeal do not always follow the above procedure when recognizing a change in conditions and certifying a question. Occasionally, a court will, because of a change in conditions, render a decision contrary to a rule of law established by the supreme court, thus creating a conflict, and then certify the question.⁵⁴

A decision involving a rule of law which affects a large number of Florida citizens has, by its nature, the potential of being deemed a decision passing upon a question of great public interest. The broad effect on citizens of such a decision is probably not, by itself, enough to create a certifiable question if the rule of law involved is an established one and conditions do not warrant a change. However, when such a decision also involves another of the grounds for certification, *i.e.*, a question of first impression or a change in conditions since the establishment of the rule of law, there is a clear opportunity for certification of the question. When a rule of law will affect citizens throughout the state, it is desirable that there be harmony throughout the courts of the state in their treatment of the question. Certiorari review by the supreme court of a question of first impression should serve to avoid later conflicting decisions by the lower courts. Re-examination of an established rule of law by the supreme court will avoid the conflict which would be created if only the district court of appeal considering the question at the time were to change the established rule.

The following statement by the District Court of Appeal, First District, in *Stiles v. Brown*,⁵⁵ which involved the right of a taxpayer to challenge the assessment of his land, illustrates the reasoning upon which the district courts certify questions having state-wide application:

51. See section V *infra* for a comparison of this procedure to the creation of conflict by the district court of appeal.

52. 254 So. 2d 223 (Fla. 1st Dist. 1971).

53. See *Carraway v. Revell*, 112 So. 2d 71 (Fla. 1st Dist. 1959) (certification of character of proof required to sustain recovery under guest passenger statute); *Walker v. United States Fidelity & Guaranty Co.*, 101 So. 2d 437 (Fla. 1st Dist. 1958) (certification of whether bond surety was liable for illegal acts of deputy sheriff done under color of law).

54. See section V *infra*.

55. 177 So. 2d 672 (Fla. 1st Dist. 1965).

Obviously, the import of this decision is of great public interest in that it could affect the revenues of each of the sixty-seven counties of this state. In order to assure that a uniform and harmonious decision applicable throughout the state is operative, we determine and certify that the decision rendered herein is one which passes upon a question of great public interest.⁵⁶

Questions involving the courts themselves have also been certified as being of great public interest. Although not apparent from the limited reasoning stated in the opinions, these questions may fall within the classification of decisions affecting citizens throughout the state. In *Bernard v. State*,⁵⁷ the supreme court accepted jurisdiction of a question certified by the District Court of Appeal, Third District, "in that it concerns an important question of practice as to the time a trial actually begins." The certified question considered by the supreme court in *In re Estate of Wartman*⁵⁸ was the length of period of appeal, which the District Court of Appeal, Third District, certified because it involved "an important new point of law relating to jurisdiction of the District Courts of Appeal."

After the constitutional provision regarding certified questions of great public interest had been in effect for approximately four years, the supreme court stated that there was no discernible pattern as to the type of decisions certified to it by the district courts of appeal.⁵⁹ Thirteen years later, there is still no discernible pattern, other than the broad classifications discussed above, which can be seen in either the questions certified or in the questions which, once certified, the supreme court in its discretion decides to review by certiorari.⁶⁰

56. *Id.* at 677-78. Similar reasoning was set forth in the following cases: *McCullough v. Jacksonville Terminal Co.*, 176 So. 2d 345 (Fla. 1st Dist. 1965), which certified a question of first impression regarding the liability of a terminal company under the Federal Safety Appliance Act for injury to its employees; *Boulevard Nat'l Bank v. Air Metal Indus. Inc.*, 176 So. 2d 94 (Fla. 1965), where the supreme court set forth the reason for the district court of appeal's certification of the question of priority between assignees of successive assignments of a chose in action; *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959), where the supreme court set forth the district court of appeal's reason for certifying the question of liability of a car rental company for damages resulting from the unauthorized operation of a vehicle by someone other than the person to whom it was rented; *Carraway v. Revell*, 112 So. 2d 71 (Fla. 1959), which certified the question of the character of negligence necessary for recovery under the guest passenger statute; and *Walker v. United States Fidelity & Guaranty Co.*, 101 So. 2d 437 (Fla. 1st Dist. 1958), which certified the question of liability of the surety on an official bond furnished by a deputy sheriff for unlawful acts of the deputy sheriff.

57. 261 So. 2d 133 (Fla. 1972).

58. 128 So. 2d 600 (Fla. 1961).

59. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (Fla. 1961).

60. Some examples of certified questions serve to illustrate the broad range of topics covered: *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974) (the impact rule); *Mount Sinai Hosp. v. Jordan*, 290 So. 2d 484 (Fla. 1974) (enforceability of charitable pledge); *State v. Bryan*, 287 So. 2d 73 (Fla. 1973) (standard jury instructions relating to manslaughter); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (comparative negligence); *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973) (admissibility of wiretap evidence in domestic relations case); *Allstate Ins. Co. v. Dairyland Ins. Co.*, 271 So. 2d 457 (Fla. 1972) (proration among multiple insurers providing uninsured motorist coverage); *Wolfe v. State*, 271 So. 2d

C. *Motion for Certification*

Certification may be made by the district court of appeal sua sponte, upon motion of a party to the litigation, or upon motion of an interested nonparty prior to expiration of the time for filing a petition for rehearing. A motion to the district court of appeal to certify the question is technically not a motion, but a suggestion. The movant has no right to have the court dispose of his motion, and there is no right to review of a district court of appeal's failure to certify the question.⁶¹ For these reasons, the filing of a motion to certify is not one which will delay rendition of judgment and therefore has no effect upon the time in which a party may seek review by certiorari.⁶²

D. *Form of Certification*

There is no specific form which the certification by the district court of appeal must take. Although the constitution, if read literally, requires

130 (Fla. 1972) (accused's right to speedy trial delayed by actions of prosecuting officials); Seaboard Coast Line R.R. v. McKelvey, 270 So. 2d 705 (Fla. 1972) (discretion of jury in awarding damages for future humiliation, pain and suffering); State v. Retherford, 270 So. 2d 363 (Fla. 1972) (admissibility of conflicting statements made before Miranda warnings were given, for impeachment purposes); Seaboard Coast Line R.R. v. Hill, 270 So. 2d 359 (Fla. 1972) (admissibility of plaintiff's remarriage in action for wrongful death of spouse); Wilensky v. Fields, 267 So. 2d 1 (Fla. 1972) (enforceability of usury statutes); Aron v. Huttoe, 265 So. 2d 699 (Fla. 1972) (contempt for failure to appear at trial in response to subpoena); Korash v. Mills, 263 So. 2d 579 (Fla. 1972) (back tax assessment on previously unassessed property); Renard v. Dade County, 261 So. 2d 832 (Fla. 1972) (standing to attack or enforce a zoning ordinance); First Nat'l Bank v. Hector Supply Co., 254 So. 2d 777 (Fla. 1971) (garnishment of a joint checking account); Post v. Lunney, 261 So. 2d 146 (Fla. 1972) (test to determine whether plaintiff is invitee or licensee); Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970) (performance of autopsy by medical examiner as basis for tort action); Street v. Sugerman, 202 So. 2d 749 (Fla. 1967) (exemption of stock in a professional service corporation from levy and sale); State v. Pierce, 201 So. 2d 886 (Fla. 1967) (beginning time for statute of limitations for larceny); Palmieri v. State, 198 So. 2d 633 (Fla. 1967) (denial of preliminary hearing as prejudicing defendant); State v. Hines, 195 So. 2d 551 (Fla. 1967) (effect of comment on failure of accused to testify in preliminary hearing); Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967) (liability of city for negligent performance of inspection of construction in progress by its employee); Giblin v. City of Coral Gables, 149 So. 2d 561 (Fla. 1963) (necessity of articulating purpose in order to effectuate arrest); State v. Leveson, 147 So. 2d 524 (Fla. 1962) (standing to challenge validity of search and seizure); Scherer & Sons, Inc. v. International Ladies' Garment Workers' Union, 142 So. 2d 290 (Fla. 1962) (preemptive effect of Labor Management Relations Act); Chase Fed. Sav. & Loan Ass'n v. Sullivan, 127 So. 2d 112 (Fla. 1960) (joint bank account with right of survivorship as gift inter vivos or attempted testamentary transfer); Sturgis v. Canal Ins. Co., 122 So. 2d 313 (Fla. 1960) (direct suit by creditor against insurer for recovery of judgment in excess of policy limits); First Nat'l Bank v. Edgerly, 121 So. 2d 417 (Fla. 1960); (time at which cause of action accrues to depositor for bank's wrongful payment of a check).

61. Whitaker v. Jacksonville Expressway Auth., 131 So. 2d 22 (Fla. 1st Dist. 1961).

62. Lipsius v. Bristol-Myers Co., 269 So. 2d 680 (Fla. 1972). FLA. APP. R. 1.3 provides for the delay of rendition of judgment when a "timely and proper" motion has been filed, until such motion has been disposed of. A motion to certify the question is not a "proper motion" within the meaning of FLA. APP. R. 1.3.

certification of a *question* to vest certiorari jurisdiction, certification of an *opinion* is sufficient to satisfy the constitutional mandate.⁶³ The rationale behind the principle equating an opinion with a decision is twofold: (1) because the Supreme Court of Florida must accept the district court of appeal's determination that its decision passes upon a question of great public interest, it must also conclude from the certification of the decision per se that the district court of appeal is satisfied that such a question is contained within its decision;⁶⁴ (2) the supreme court may review the entire decision and thus have before it the entire decision and the question contained therein, regardless of which is certified.⁶⁵

Nevertheless, the supreme court would prefer that certification be of a question, rather than of an opinion or a decision, and that the question be articulated.⁶⁶ If a specific question is articulated in the certification, the supreme court will know what the question is that the district court of appeal deems to be one of great public interest and thus, if it grants certiorari, will be certain to answer that question. Furthermore, there is a greater likelihood that the supreme court will grant certiorari if the question is specifically presented to it. In several decisions over many years, the supreme court has indicated its wish that the district courts of appeal articulate the specific question certified,⁶⁷ has struggled to determine what question is being certified,⁶⁸ and has even refused to grant certiorari where it seems that the court might have granted it had the question been articulated.⁶⁹ To assist both the supreme court in determining what question is to be answered and the district courts of appeal in obtaining answers to their questions, it would seem that it is time to adopt a rule which requires articulation of any question certified.⁷⁰

63. *Rupp v. Jackson*, 238 So. 2d 86 (Fla. 1970). Thus a certification by the district court which reads as follows is constitutionally sufficient: "ORDERED that the opinion of this court filed (date) is hereby certified to be one which passes upon a question of great public interest." Cf. *Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958), holding that although "decision" generally means judgment, not the opinion and reasoning, "decision" does encompass judgment and opinion with reasoning for the purpose of conflict certiorari. *Contra*, *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970), *cert. denied*, 398 U.S. 951 (1970), stating: "It is a conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari."

64. See section III, B *supra*.

65. See section III, F *infra*.

66. *E.g.*, *Rupp v. Jackson*, 238 So. 2d 86 (Fla. 1970); *State v. Cruz*, 189 So. 2d 882 (Fla. 1966); *Duggan v. Tomlinson*, 174 So. 2d 393 (Fla. 1965); *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961).

67. See cases cited note 66 *supra*.

68. *State v. Cruz*, 189 So. 2d 882 (Fla. 1966); *Duggan v. Tomlinson*, 174 So. 2d 393 (Fla. 1965).

69. *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961).

70. FLA. APP. R. 4.6 sets forth with particularity the form and content required for certification of questions of first impression by lower courts. This rule might serve as a model for a rule for certification of questions of great public interest.

E. *Petition for Writ of Certiorari*

In questions of great public interest, a petition for writ of certiorari must be filed with the supreme court,⁷¹ although a preliminary jurisdictional brief is not necessary.⁷² Once certification and filing of the petition have been accomplished, there is no question of jurisdiction.⁷³ Even though it may have jurisdiction, the supreme court will exercise its discretion in granting certiorari. Although the supreme court may not question the district court's determination that the decision passes upon a question of great public interest,⁷⁴ the supreme court may effectively disagree by refusing to grant certiorari. The supreme court itself once stated:

For the purpose of emphasis we repeat that the proposition of whether a decision of a district court decides a question of great public importance is one solely for the district court to determine only insofar as vesting complete jurisdiction in this Court to entertain the cause is concerned. After jurisdiction attaches, the Constitution then brings into play the power of this Court to exercise its discretion and then to determine whether in that case an opinion is justified or required.⁷⁵

If the supreme court decides to review the cause, an order granting certiorari will be entered and the matter will proceed.⁷⁶

F. *Review of the Entire Cause*

Once the supreme court has granted certiorari to review a decision passing upon a question of great public interest, it will review not only the question certified, but also the entire decision, opinion, judgment, and record of the cause.⁷⁷ The supreme court reasons that the constitution permits such a broad review of the cause by empowering the court

71. In *In re Estate of Wartman*, 121 So. 2d 660 (Fla. 1960), the court granted petitioner's motion to treat his timely notice of appeal as a petition for certiorari, where the district court of appeal had certified the question.

72. FLA. APP. R. 4.5(c)(6); see *Gilliam v. Stewart*, 291 So. 2d 593 (1974).

73. See section III, A *supra*.

74. See note 44 *supra* and accompanying text.

75. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961). *Accord*, *Cleveland v. City of Miami*, 263 So. 2d 573, 576 (Fla. 1972); *Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970); *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961) (concerning granting of certiorari as being solely within the discretion of the supreme court); and FLA. APP. R. 4.5(c)(6).

76. FLA. APP. R. 4.5(c)(6).

77. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961) (supreme court should review the entire decision); *Scherer & Sons, Inc. v. International Ladies' Garment Workers' Union*, 142 So. 2d 290 (Fla. 1962) (supreme court may explore the entire record); *Pan American Bank v. Alliegro*, 149 So. 2d 45 (Fla. 1963) (all questions considered by the district court should be considered by the supreme court although only one was certified); *Giblin v. City of Coral Gables*, 149 So. 2d 561 (Fla. 1963) (certification of decision extends scope of supreme court's review to the opinion, judgment, and record, including testimony therein); *Rupp v. Jackson*, 238 So. 2d 86 (Fla. 1970) (supreme court is privileged to review the entire decision and record); *Cleveland v. City of Miami*, 263 So. 2d 573 (Fla. 1972) (supreme court is permitted to read the entire record).

to review the "decision" of the district court of appeal when a question of public interest is certified;⁷⁸ since a "decision" encompasses both opinion and judgment, the entire opinion and judgment are to be reviewed. Further justification for broad review is found in the avoidance of both needless steps in litigation and of piecemeal review.⁷⁹

As a result of its policy of reviewing the entire cause, the supreme court even found it possible, in *Cleveland v. City of Miami*,⁸⁰ to assume jurisdiction based upon a certified question, consider the entire cause, quash the district court of appeal's decision, but refrain from answering the specific question certified because the supreme court in its review determined the question inapplicable to the cause. Although broad review of the entire cause to avoid needless steps in litigation may be permissible and even desirable, it is submitted that the court went too far in *Cleveland*. The court assumed jurisdiction on the basis that a question was of great public interest, and then reviewed the entire cause upon that basis. By its failure to answer the very question upon which jurisdiction was based, finding that question to be inapplicable to the cause, the supreme court seems to have exceeded the previously apparent limits of constitutional review of certified questions.

IV. DIRECT CONFLICT ON THE SAME QUESTION OF LAW

A. *Jurisdiction*

The Supreme Court of Florida has power to review by certiorari any decision of a district court of appeal which is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law.⁸¹ To obtain review under this provision, there must be a petition for writ of certiorari filed with the supreme court. After considering jurisdictional briefs, the record or portions thereof, and oral argument if such has been directed, the supreme court will determine whether to grant certiorari.⁸² Although the wording of the constitution indicates that issuance of the writ of certiorari is discretionary even if such a conflict vests the court with jurisdiction,⁸³ the wording of the appellate rules seems to make issuance of the writ mandatory if the court determines that there is such conflict.⁸⁴ If the writ is issued, after study

78. FLA. CONST. art. V, § 3(b)(3).

79. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

80. 263 So. 2d 573 (Fla. 1972).

81. FLA. CONST. art. V, § 3(b)(3).

82. FLA. APP. R. 4.5(c)(6).

83. FLA. CONST. art. V, § 3(b)(3) provides that the supreme court "[m]ay review by certiorari" the conflicting decision (emphasis added). The discretionary nature of the writs of certiorari of the three types under discussion in this article was recognized in *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

84. FLA. APP. R. 4.5(c)(6) provides that "if the Court determines that it has jurisdiction, the said petition [for writ of certiorari] shall be granted." (emphasis added). But see *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

of the cause it may be discharged or the decision of the district court of appeal quashed or modified in order to end any conflict.⁸⁵

The supreme court may treat a different petition as one for conflict certiorari. For example, in *Johns v. Wainwright*,⁸⁶ petitioner filed a petition for habeas corpus, but the court recognized the petition as one for certiorari which had been given a different name by petitioner to circumvent the thirty-day filing requirement and denied the petition. And in *Kozerowitz v. Florida Real Estate Commission*,⁸⁷ while an appeal was pending the supreme court decided another case which conflicted directly with the case sought to be reviewed. The supreme court therefore treated the appeal as a petition for writ of certiorari.

B. Conflict with District Court of Appeal or Supreme Court

The constitutional provision granting conflict jurisdiction, by its wording, does not grant jurisdiction to review by conflict certiorari the decision of a district court of appeal which conflicts with a decision of a court other than a district court of appeal or of the Supreme Court of Florida, such as a Civil Court of Record.⁸⁸ Nor does it grant jurisdiction to review the decision of a district court of appeal which conflicts with a decision of the United States Supreme Court, unless the decision of the United States Supreme Court has been specifically adopted in another decision by a district court of appeal or by the Supreme Court of Florida.⁸⁹ If the conflicting decision had been thus adopted, there would be a conflict between the district court of appeal's decision sought to be reviewed and the adopting decision, of the type contemplated by the constitution.⁹⁰

From the time that the district courts of appeal were established until the 1972 amendment to article V of the constitution, jurisdiction was based upon conflict between a district court of appeal and *another* district court of appeal or the supreme court.⁹¹ Effective since the 1972 amendment, jurisdiction is based upon conflict between a district court of appeal and *any* district court of appeal or the supreme court.⁹² Thus,

85. *Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356 (Fla. 1958); *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958). See also *Fusco v. Heymann*, 139 So. 2d 689 (Fla. 1962).

86. 253 So. 2d 873 (Fla. 1971). See *State ex rel. Scaldeferri v. Sandstrom*, 285 So. 2d 409 (Fla. 1973).

87. 289 So. 2d 391 (Fla. 1974).

88. *Kendel v. Pontious*, 261 So. 2d 167 (Fla. 1972).

89. *State ex rel. Hawkins v. Board of Control*, 83 So. 2d 20 (Fla. 1955); *Gibson v. Maloney*, 231 So. 2d 823 (Fla. 1970) (dissenting opinions), *cert. denied*, 398 U.S. 951 (1970).

90. Similarly, neither the reasoning nor the statements of the trial judge in the cause sought to be reviewed may be the basis of conflict jurisdiction under this provision, even if the district court has affirmed the trial court, unless specifically relied upon by the district court of appeal. This is so because, lacking such reliance, the trial court's reasoning and statements may be considered "mere surplusage." *State ex rel. Ranalli v. Johnson*, 277 So. 2d 24 (Fla. 1973).

91. FLA. CONST. art. V, § 4(2); *Gilliam v. State*, 267 So. 2d 658 (Fla. 2d Dist. 1972); *Little v. State*, 206 So. 2d 9 (Fla. 1968).

92. FLA. CONST. art. V, § 3(b)(3).

jurisdiction may now rest upon conflict within the same district.⁹³ Theoretically, there should be no conflict between decisions of the same district court of appeal because the later decision would in effect overrule the earlier decision and become the law in that district.⁹⁴ Nevertheless, under the supreme court's expanded view of conflict,⁹⁵ the possibility of conflict within one district is not unlikely.

The appellate rules provide only for conflict between different districts or with the supreme court⁹⁶ as they did before the 1972 constitutional amendment; however, the courts follow the current constitutional provision and acknowledge a basis for jurisdiction where there is conflict within the same district.⁹⁷ Even before the 1972 amendment, there was a basis for conflict jurisdiction if a district court of appeal decision conflicted with both a decision of the same district and that of another district.⁹⁸

C. *Dictum*

In *Sunad, Inc. v. City of Sarasota*,⁹⁹ the court established the principle that conflict jurisdiction may be based upon dictum in the district court of appeal's decision although the essential portions of the decision do not conflict with another decision. This result is reached by "[l]ifting this statement out of context, taking it for face value and disregarding its gratuitous character."¹⁰⁰ Although it might be said that there exists some type of conflict when dictum is inconsistent with another decision, it is submitted that such conflict is not the type upon which direct conflict jurisdiction can constitutionally be based. The constitution requires a conflict between "decisions," and even if "decision" is interpreted to include opinions and reasoning, dictum, by its very nature and definition,¹⁰¹ cannot be part of the opinions and reasoning upon which a decision is based. Nor can it be considered to be a "decision" by virtue of creating precedent, because dictum is without force as precedent.¹⁰² Only dictum from the supreme court, if there is no contrary supreme court decision, should be given persuasive weight by lower courts.¹⁰³ Clearly, therefore,

93. *Wale v. Barnes*, 278 So. 2d 601 (Fla. 1973).

94. *Little v. State*, 206 So. 2d 9 (Fla. 1968).

95. See section IV, F *infra*.

96. FLA. APP. R. 4.5(c)(6).

97. *E.g.*, *Wale v. Barnes*, 278 So. 2d 601 (Fla. 1973).

98. *See, e.g.*, *State v. Coffey*, 212 So. 2d 632 (Fla. 1968), where a decision of the District Court of Appeal, First District, conflicted with another decision of the very same appellate court and also with a decision of the District Court of Appeal, Third District.

99. 122 So. 2d 611 (Fla. 1960).

100. *Id.* at 613. Cases following this principle in reliance upon the *Sunad* decision include *State v. Jackson*, 281 So. 2d 353 (Fla. 1973) and *Southern Realty & Util. Corp. v. Belmont Mortgage Corp.*, 186 So. 2d 24 (Fla. 1966).

101. Dictum is a statement not essential to the decision of a case. *See State v. State Improvement Comm'n*, 60 So. 2d 747, 750 (Fla. 1952); *Pell v. State*, 97 Fla. 650, 122 So. 110 (1929).

102. *State v. Board of Business Reg.*, 276 So. 2d 823 (Fla. 1973); *State v. State Improvement Comm'n*, 60 So. 2d 747 (Fla. 1952); *Pell v. State*, 97 Fla. 650, 122 So. 110 (1929).

103. *Weisenberg v. Carlton*, 233 So. 2d 659 (Fla. 2d Dist. 1970); *O'Sullivan v. City of*

dictum from a district court of appeal, particularly when contrary to an earlier supreme court decision, is without value as precedent and is not a "decision."

It would seem, then, that the supreme court's view of dictum as a basis for direct conflict jurisdiction is one example of the court's inclination to retain its role as an appellate court by extending its certiorari jurisdiction beyond the limited scope which was intended by the constitution.¹⁰⁴

D. *Dissenting Opinions*

As determined in *Huguley v. Hall*,¹⁰⁵ a dissenting opinion in the district court of appeal decision sought to be reviewed may be resorted to in determining whether the required conflict exists. In explaining such a rule the supreme court stated in *Commerce National Bank v. Safeco Insurance Co.*¹⁰⁶ that although a dissenting opinion achieves a lower "level of dignity" than the majority opinion, there is a presumption that the dissenting appellate judge would not intentionally attempt to mislead when stating facts and testimony. Thus the facts and testimony presented by the dissent may be presumed true for the purpose of determining jurisdictional conflict. However, if the facts stated by the majority are contrary to those stated by the dissent, the majority's factual presentation will prevail.

Reliance on the dissent as a basis for issuing the writ of certiorari is tempered by the fact that the court will review the record after the writ is issued and may discharge the writ as improvidently issued if it determines from the record that conflict does not exist.¹⁰⁷

The above rule and its rationale were the basis for the holding in *Commerce National Bank* that the requirement that the brief of petitioner for certiorari "set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for issuance of the writ"¹⁰⁸ was satisfied by a brief relying solely upon the facts stated in the dissenting opinion and including a conformed copy of the opinion.

It should be noted that reliance on the dissenting opinion should be limited to facts, not conclusions, contained therein, because the conclusions of the majority, and not of the dissent, constitute the decision of the court.¹⁰⁹

Deerfield Beach, 232 So. 2d 33 (Fla. 4th Dist. 1970); *Weber v. Zoning Bd. of Appeals*, 206 So. 2d 258 (Fla. 4th Dist. 1968); *Milligan v. State*, 177 So. 2d 75 (Fla. 2d Dist. 1965).

104. The dissenting opinion in *State v. Jackson*, 281 So. 2d 353 (Fla. 1973) expressed strong discontent with the court's view of dictum.

105. 157 So. 2d 417 (Fla. 1963), followed in *Autrey v. Carroll*, 240 So. 2d 474 (Fla. 1970) and *Commerce Nat'l Bank v. Safeco Ins. Co.*, 284 So. 2d 205 (Fla. 1973).

106. 284 So. 2d 205 (Fla. 1973).

107. Although occurring at a later stage, this procedure of reviewing the record to ultimately determine jurisdiction bears a similarity to examination of the record to initially determine jurisdiction to review a per curiam affirmance, discussed in section IV, *E infra*.

108. FLA. APP. R. 4.5(c)(6).

109. See *Commerce Nat'l Bank v. Safeco Ins. Co.*, 284 So. 2d 205, 207 (Fla. 1973).

E. *Per Curiam* Decisions and Examination of the Record

The supreme court has dealt with the question of whether a per curiam decision by a district court of appeal without opinion is reviewable by conflict certiorari. Shortly after the creation of the district courts of appeal, it was held in *Lake v. Lake*¹¹⁰ that such a decision was not reviewable by conflict certiorari unless the "restricted examination required in proceedings in certiorari [revealed that] a conflict had arisen with resulting injustice to the immediate litigant."¹¹¹ In order to determine whether a conflict existed between a district court of appeal's per curiam decision without opinion and another decision it would have been necessary for the supreme court to delve into the record. But the court in *Lake* reasoned that to do this would weaken the finality which the revised court system intended to give to the district courts of appeal. Such an outcome would permit the supreme court, on review, to determine whether it agreed with the appellate court's decision.

Lake, however, was decided in 1958, when the supreme court was inclined toward a narrow construction of the constitutional amendment which gives the district courts of appeal final appellate jurisdiction and provides review in the supreme court by certiorari only in limited situations. Within a few years, however, it became apparent that the supreme court was becoming reluctant to give up its power of appellate review, in spite of the constitutional mandate. In the area here under consideration, the supreme court has experienced difficulty in following the rule set forth in *Lake*, with the result that the court, in a large number of cases, has examined the record or some portion thereof when petitioned for certiorari review of a per curiam decision without opinion. In this atmosphere, *Foley v. Weaver Drugs, Inc.*,¹¹² was decided. *Foley* modified *Lake*, holding that when the district court of appeal's decision is a per curiam affirmance without opinion, the supreme court may examine the "record proper" to determine whether the legal effect of the decision is to create conflict. The court reasoned that per curiam decisions should be given the same verity as decisions with opinions and that they should also be subjected to the "same scrutiny."¹¹³ It is interesting to note, however, that the "same scrutiny" to which the supreme court refers is of the record proper for per curiam decisions and of the opinion for decisions with opinions. There has been strong disagreement within the supreme court with the view taken by the *Foley* majority,¹¹⁴ but its principle remains law.¹¹⁵

110. 103 So. 2d 639 (Fla. 1958).

111. *Id.* at 643.

112. 177 So. 2d 221 (Fla. 1965).

113. *Id.*

114. See, e.g., Justice Thornal's dissent in *Foley* and in *Gibson v. Maloney*, 231 So. 2d 823 (Fla. 1970), cert. denied, 398 U.S. 951 (1970), and the dissents of Justices Thornal and O'Connell in *Home Dev. Co. v. Bursani*, 178 So. 2d 113 (Fla. 1965), stating that the view taken is too broad. Compare Justice Ervin's dissent in *Delano v. Dade County*, 287 So. 2d 288 (Fla. 1973), stating that the view is not broad enough.

115. See *Adams v. Whitfield*, 290 So. 2d 49 (Fla. 1974).

Quite obviously, the effect is to make district court of appeal per curiam decisions less final than they were prior to *Foley* and, possibly, less final than they were intended by the constitutional amendment and vote of the people.¹¹⁶ The supreme court has gone beyond the conflict of decisions which the constitution requires for conflict jurisdiction to exist, by allowing itself to find conflict elsewhere, *i.e.*, in the "record proper."

As the court may now examine the "record proper" of a per curiam decision to find conflict, it is appropriate to consider what constitutes the "record proper." According to *Foley*, the record proper consists of the "written record of the proceedings in the court under review except the report of the testimony."¹¹⁷ However, testimony is part of the record proper if set forth, for example, within pleadings or orders, which themselves are part of the record.¹¹⁸ The court has, however, examined such items as the transcript of testimony and jury instructions, with no indication that they were part of the record proper in that particular case.¹¹⁹ A motion filed in the circuit court is part of the record proper of the district court of appeal's decision.¹²⁰ The record to be examined is that of the case for which certiorari review is sought, and not the record of the case with which it is claimed to conflict.¹²¹

If the district court of appeal's decision is a short-form order without any comment on the applicable principles of law, it is treated like a per curiam decision in that examination of the record is permitted to determine whether jurisdictional conflict exists.¹²² But where there is a per curiam affirmance and a dissenting opinion setting forth all essential facts, the decision differs from the ordinary per curiam affirmance without opinion, and conflict may be found by examination of the dissenting opinion without the necessity of examining the record proper.¹²³ Although the record proper may be examined, no finding of conflict is proper concerning a question which was neither presented nor considered.¹²⁴

However, it was held in *Sinclair Refining Co. v. Butler*¹²⁵ that the court may examine the record to find conflict on a particular point of law if the district court of appeal's opinion is stated in general terms and does not cover that point specifically. The effect of the *Sinclair Refining* holding is to permit examination of the record proper even when there

116. "It was the intention of the framers of the constitutional amendment which created the District Courts that the decision of these courts would, in most cases, be final and absolute." *Johns v. Wainwright*, 253 So. 2d 873, 874 (Fla. 1971).

117. *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 223 (Fla. 1965).

118. *Commerce Nat'l Bank v. Safeco Ins. Co.*, 284 So. 2d 205, 207 n.2 (Fla. 1973).

119. *See, e.g.*, *Wale v. Barnes*, 278 So. 2d 601 (Fla. 1973); *Gibson v. Maloney*, 231 So. 2d 823 (Fla. 1970), *cert. denied*, 398 U.S. 951 (1970).

120. *Godshall v. Unigard Ins. Co.*, 255 So. 2d 680 (Fla. 1971).

121. *Short v. Grossman*, 245 So. 2d 217 (Fla. 1971).

122. *De Loache v. De Loache*, 274 So. 2d 883 (Fla. 1973).

123. *Huguley v. Hall*, 157 So. 2d 417 (Fla. 1963).

124. *Winn-Dixie Stores, Inc. v. Goodman*, 276 So. 2d 465 (Fla. 1973).

125. 190 So. 2d 313 (Fla. 1965).

is an opinion of the district court of appeal. This seems to be an undue extension of *Foley*, which permits examination of the record proper when the district court of appeal's decision is per curiam. It also seems to contradict the reasoning of *Foley*, which sought to give per curiam decisions and decisions with opinions the same verity by scrutinizing the record proper in the former and the opinion in the latter. Under the holding of *Sinclair Refining*, a decision with opinion is subject to scrutiny of both the opinion and the record. As will be seen in the following section, the record, as well as testimony, has been examined regardless of the extent of the district court of appeal's opinion, and in spite of the seemingly limited application of the *Foley* rule to per curiam decisions without opinion.

F. *Misapplication*

The supreme court has interpreted its direct conflict jurisdiction to include certiorari review of decisions recognizing the correct rule of law but improperly applying it. This misapplication is found and the alleged conflict resolved by an examination of the facts, testimony and evidence in the case *sub judice*. It is submitted that conflict jurisdiction was never intended to encompass this court-developed misapplication jurisdiction, which has lost sight of the constitution's requirement of direct conflict on the same question of law. The result is contrary to the intent of the electors who approved the constitutional amendment seeking to make the district courts of appeal final appellate courts because when the court examines the facts to find a misapplication of the correct rule, it is reviewing the decision on its merits.

The misapplication doctrine had its inception in *Pinkerton-Hays Lumber Co. v. Pope*.¹²⁶ In this case, where the question was one of proximate cause, the district court of appeal relied upon another case's definition of natural and probable consequences as those which happen frequently. The district court of appeal treated the frequent happening test as a subjective one, but the supreme court held that the test was an objective one. Here the district court misapplied the rule of the case upon which it relied by applying the objective test subjectively, but it did so because it misconstrued the rule as stating a subjective test. There is some validity to finding direct conflict in such a situation because the court has attributed to the case upon which it relied an erroneous principle of law and, in effect, created conflict with that case. It would seem to be the misconstruction of a rule, resulting in the pronouncement of an erroneous and conflicting rule, rather than the misapplication of a correct rule, which was the basis for conflict jurisdiction in *Pinkerton-Hays*. As will be seen, however, the misconstruction which was present in *Pinkerton-Hays* has been greatly disregarded, and that case has been relied upon to find conflict based merely upon misapplication of the correct rule.

126. 127 So. 2d 441 (Fla. 1961).

Another case often cited for the misapplication doctrine is *McBurnette v. Playground Equipment Corp.*¹²⁷ Here the district court of appeal relied upon a case which had established the rule that one who is not in privity with a retailer has no action against him for breach of implied warranty. The district court affirmed the dismissal of an action by a father and his minor child for breach of implied warranty against the retailer from whom the father had purchased playground equipment for the minor child. Again, the district court had attributed an expanded erroneous rule of law to the case upon which it relied by giving the rule a broader effect than was intended, and the supreme court held that it had conflict jurisdiction. It is more difficult to justify the finding of direct conflict in *McBurnette*, where the correct rule was merely given a broader application than intended, than to justify such a finding in *Pinkerton-Hays*, where the district court's subjective test conflicted with the objective test of the case relied upon. It is submitted that the supreme court should not find jurisdiction based upon direct conflict unless the two points of law involved are incompatible in that they consist of opposing rules, since otherwise, they are not in direct conflict.

Since *Pinkerton-Hays* and *McBurnette* were decided, the misapplication of law upon which conflict jurisdiction has been based has been of two types: (1) misconstruction of the rule of law of a controlling case,¹²⁸ and (2) misapplication of a properly stated rule to the particular facts.¹²⁹

An example of the extent to which the supreme court goes in examining the facts may be seen in *Wale v. Barnes*.¹³⁰ The action was for medical malpractice in a forceps delivery. A directed verdict for defendant was affirmed by the district court of appeal, based upon two earlier decisions wherein it was held that in order to make a prima facie case on the question of proximate causation, the plaintiff must negate possible non-negligent causes of injury. The supreme court distinguished the facts of the decisions relied upon by the district court in that in those cases there had been no direct proof that injury resulted from a specific negligent act, whereas in the case *sub judice* there was testimony that the injury might have been caused by the forceps delivery. Thus, the supreme court held that it had conflict certiorari jurisdiction since the district court had misapplied a correct rule of law to a particular factual situation.

In *Spivey v. Battaglia*,¹³¹ often cited for the misapplication doctrine, plaintiff, an extremely shy person, brought an action for assault against a fellow employee who had teased her by giving her an unsolicited hug, as a result of which the plaintiff suffered sharp pains and became para-

127. 137 So. 2d 563 (Fla. 1962).

128. See, e.g., *Coward v. City of W. Palm Beach*, 255 So. 2d 673 (Fla. 1971).

129. See *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960).

130. 278 So. 2d 601 (Fla. 1973).

131. 258 So. 2d 815 (Fla. 1972).

lyzed on one side of her face and mouth. The trial court applied the rule that the intent necessary for an assault exists if a reasonable man would believe that the result was substantially certain to follow his acts, and found that those results were substantially certain; the district court of appeal affirmed. The supreme court held that the correct rule had been misapplied—a reasonable man could not believe that such bizarre results were substantially certain to follow an unsolicited hug.

In a less subtle manner, the supreme court expanded its conflict certiorari jurisdiction to include review of decisions which admittedly do not conflict but which merely create confusion, stating:

If there are those who do not think we have jurisdiction on this theory (misapplication), certainly we have it on the theory that the decision of the district court of appeal herein has generated confusion and instability among the precedents rendering the law "unclear, if not in conflict."¹³²

These illustrations demonstrate that the supreme court has not strictly limited the exercise of its conflict certiorari jurisdiction to merely resolving direct conflict as stated in the constitution, but has reviewed the merits of district court of appeal decisions and adjudicated the rights of particular litigants.¹³³

V. QUESTION OF GREAT PUBLIC INTEREST V. DIRECT CONFLICT

When a district court of appeal believes that a change in circumstances warrants a change to an existing point of law involved in a case before it, it is faced with the question of whether to follow established law and certify the question to the supreme court as one of great public interest; to decide the case contrary to established law, thus creating conflict which may later be resolved if a petition for conflict certiorari is filed and certiorari granted; or to decide the case contrary to established law, creating conflict, and also to certify the question to the supreme court as one of great public interest. Where a decision contrary to established law would create conflict with another district court of appeal, the question is not a serious one. Although to create conflict in such a situation would cause disharmony among the districts, no district court of appeal is bound to follow the decisions of other district courts of appeal as controlling, and the conflict may be resolved by the supreme court at some later time.

However, where a decision contrary to established law would create conflict with the supreme court, the district court of appeal must analyze its role with respect to the supreme court. Decisions of the supreme court are controlling as precedent to be followed by all district courts of appeal of the state. Most of the district courts of appeal have recognized their

132. *Benefield v. State*, 160 So. 2d 706, 707 (Fla. 1964).

133. See section I, B *supra*.

duty to follow the controlling precedent of the supreme court,¹³⁴ although their decisions at times do conflict with supreme court decisions. If the district court does make a decision in conflict with one of the supreme court, the trial courts of that district may be uncertain whether they should follow their district court of appeal or the supreme court. The supreme court addressed this problem in *Hoffman v. Jones*,¹³⁵ directing that in the event of a conflict between the decision of a district court of appeal and of the supreme court, the supreme court decision shall control unless or until the supreme court changes its position on the question.

The supreme court has reprimanded the district courts of appeal for creating conflict with supreme court decisions and then certifying the question as one of great public interest, because the district courts of appeal lack the power to overrule the supreme court and because of the chaos which may result from the creation of such conflict. The supreme court seems to look most disfavorably upon those situations where conflict with a well-established rule of law was created intentionally.

When a district court is of the opinion that a change in the law established by the supreme court is needed, the proper procedure is to follow the established law and then certify the question to the supreme court, indicating, if the court wishes, its reasons for advocating change. The supreme court may then accept jurisdiction and determine whether a change is necessary. In this way, the district courts of appeal may seek change without causing conflict and disharmony throughout the state.¹³⁶

In spite of the reasons for the view that the district courts of appeal should not create conflict with supreme court decisions, it is arguable that since there is a constitutional provision for certiorari review of such a conflict, there is an implied right of the district courts of appeal to create that conflict.¹³⁷ It will be less difficult than it previously was to justify such a position if the trial courts are able to follow the rule of *Hoffman v. Jones*¹³⁸ and thus eliminate much of the chaos which such conflict could create.

VI. CONCLUSION

It appears that the supreme court has been reluctant to turn over its final appellate review to the district courts of appeal. The court seems to have expanded its certiorari review beyond those limited situations in

134. See, e.g., *Goode v. State*, 279 So. 2d 352 (Fla. 1st Dist. 1973); *Roberts v. State*, 199 So. 2d 340 (Fla. 2d Dist. 1967); *United States v. State*, 179 So. 2d 890 (Fla. 3d Dist. 1965).

135. 280 So. 2d 431 (Fla. 1973).

136. See, e.g., *Gilliam v. Stewart*, 291 So. 2d 593 (1974) (impact rule) and *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (comparative negligence), reprimanding the District Court of Appeal, Fourth District, for its holding contrary to the position announced by the supreme court, and discussing the proper procedure to be followed.

137. *Walker v. United States Fidelity & Guaranty Co.*, 101 So. 2d 437 (Fla. 1st Dist. 1958).

138. See note 135 *supra* and accompanying text.

which the constitution empowers it to grant certiorari, by giving an overly broad interpretation to the constitutional provisions, particularly in the area of conflict jurisdiction. The supreme court finds certiorari jurisdiction on the basis of dictum, dissenting opinions, and per curiam decisions without opinion. It examines the record and transcripts of testimony to find conflict. It interprets the misapplication of the correct rule of law to be a ground for direct conflict jurisdiction. And it has even found direct conflict jurisdiction where there is no conflict but merely confusion. Perhaps it is time to return to the reasoning of those decisions made shortly after the district courts of appeal were created, when the supreme court considered itself bound to act in accordance with the purpose of the constitutional amendment.

*[The district courts of appeal] are and were meant to be courts of final, appellate jurisdiction. . . . If they are not considered and maintained as such the system will fail. Sustaining the dignity of the decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.*¹³⁹

If the Supreme Court of Florida does not limit its certiorari review to those situations in which the constitution empowers it to act, the district courts of appeal will become "mere stepping stones" along an "arduous and expensive pathway in the appellate process."¹⁴⁰ "[T]he tremendous effort that was expended in the revision of our appellate judicial system will have come to naught and the effective and efficient administration of justice in this state will have suffered a severe blow."¹⁴¹

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

140. *Lawyers Title Ins. Co. v. Little River Bank & Trust Co.*, 243 So. 2d 417, 418 (Fla. 1970).

141. *Id.* at 418.