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THE SCOPE OF THE ALL WRITS POWER

ROBERT T. MANN*

I. INTRODUCTION

Four decades of dicta narrowing the power of a Florida court to issue all "writs necessary to the complete exercise of its jurisdiction"¹ came to an end—or so we may hope—in 1982 with *The Florida Senate v. Graham*.² This article addresses the concern that practitioners will continue to misconceive the nature of this extraordinary but useful judicial tool. Indeed, although once put to rest by the supreme court in 1968, the court itself, eight years later, renewed mistaken notions about limitations on the all writs power through the unfortunate citation to an overruled case in *Shevin ex rel. State v. Public Service Commission*.³

The court now has come full circle and sought to correct the damage done since 1976 by *Shevin*. In *The Florida Senate v. Graham*,⁴ decided in April, 1982, the supreme court entertained a petition from the Florida Senate designed to test whether the Governor could call the legislature into session for a period shorter than thirty days for the purpose of reapportioning itself, when the Constitution of Florida provides that the Governor "shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted."⁵ The Governor's call for a

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The author wishes to express his appreciation to Joseph Brock, Nancy Malley, and Carrie Stradley for their assistance in the preparation of this article.

1. FLA. CONST. art. V, §§ 3(b)(7); 4(b)(3). The language of the circuit courts' all writs power is "necessary or proper to the complete exercise of their jurisdiction." FLA. CONST. art. V, § 5(b).

2. 412 So. 2d 360 (Fla. 1982).

3. 333 So. 2d 9 (Fla. 1976).

4. 412 So. 2d 360.

5. FLA. CONST. art. III, § 16(a).

shorter time prompted the senate to seek mandamus or an appropriate writ under the all writs section to clarify the matter. All Justices agreed that the issuance of the decision under the all writs provision was within the court's constitutional power,⁶ although there was no matter pending before the court to which the writ petitioned for would be ancillary. Justice Boyd would have issued mandamus, but did not question the scope of the all writs power.⁷

The court's decision rests upon the continued validity of *Couse v. Canal Authority*.⁸ But the importance of the jurisdictional point seems to warrant discussion of the scope of the all writs power both because of the misunderstanding which has flowed from the cases discussed herein and because it is exemplary of a larger jurisprudential question which the author undertakes to sketch, if not to answer satisfactorily.

The specific point is a minor one, but it illustrates a generic point of major significance. Specifically, the all writs power of the Supreme Court of Florida,⁹ the district courts of appeal¹⁰ and the circuit courts¹¹ also extends to cases within the ultimate, as distinguished from the already acquired, jurisdiction of the court. The larger problem, which occurred in *Shevin*,¹² is a persistent one in jurisprudence: the casual citation of authority which supports the immediate point, but which leaves in current use inconsistent lines of authority. If certainty remains a desideratum in any legal system, then that larger point should eventually be addressed. This writer, unprepared for that task, leaves the broader inquiry to simmer in the reader's mind.

First, an overview of the problem: the starting point is *State ex rel. Watson v. Lee*,¹³ a 1942 case decided by the Supreme Court of Florida prior to the adoption of the present appellate rules¹⁴ and constitutional requirement that the rule contain a provision that

6. 412 So. 2d at 361; 412 So. 2d at 364 (Ehrlich, J., concurring).

7. *Id.* at 365 (Boyd, J., dissenting).

8. 209 So. 2d 865 (Fla. 1968).

9. FLA. CONST. art. V, § 3(b)(7) provides: "May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction."

10. FLA. CONST. art. V, § 4(b)(3) provides: "A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction."

11. FLA. CONST. art. V, § 5(b) provides: "They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction."

12. 333 So. 2d at 12.

13. 8 So. 2d 19 (Fla. 1942), *overruled*, *Couse v. Canal Auth.*, 209 So. 2d 865 (Fla. 1968).

14. FLA. R. APP. P. 9.100.

no cause shall be dismissed because an improper remedy has been sought.¹⁵ The court refused to grant any relief to Attorney General J. Tom Watson, who protested the action of Comptroller J.M. Lee in engaging private counsel to assist in the collection of taxes which should have been, but were not, assessed. The petition prayed "that the Court will issue such rules, orders or decrees as to it may seem meet and proper."¹⁶ A separate motion asked the court to bring the allegedly errant comptroller before it to show by what authority he had dared contract with private counsel.¹⁷ There is an undertone of impatience in Justice Whitfield's opinion for a unanimous court. First, he acknowledged the access-to-courts provision of the constitution,¹⁸ but then disclaimed original jurisdiction in the supreme court except "to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its jurisdiction."¹⁹ In addition, the court stated:

The express power granted to this court to issue "all writs necessary or proper to the complete exercise of its jurisdiction" has reference only to ancillary writs to aid in the complete exercise of the original or the appellate jurisdiction of the Supreme Court, and does not confer added original or appellate jurisdiction in any case.²⁰

Couple the oft-cited opinion of *Watson v. Lee* with the common usage of the all writs provision to stay proceedings in one court pending review in another court and it is understandable that the

15. FLA. CONST. art. V, § 2(a) was adopted by a special election on March 14, 1972. It provides that the "supreme court shall adopt rules for the practice and procedure in all courts including . . . a requirement that no cause shall be dismissed because an improper remedy has been sought."

FLA. R. APP. P. 9.040(c) provides: "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy."

16. 8 So. 2d at 20.

17. *Id.*

18. FLA. CONST. OF 1885, Declaration of Rights, § 4 provided: "All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

The present version is in FLA. CONST. art. I, § 21 which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

19. 8 So. 2d at 21.

20. *Id.*

provision has often been narrowly referred to as providing for a "constitutional stay writ." The all writs power, however, is by no means confined to stay of lower court proceedings.

II. CONSTITUTIONAL STAY WRITS AND THE IMPROPERLY NARROW INTERPRETATION OF THE ALL WRITS PROVISION

The most common occasion for the invocation of the power to issue "all writs" in Florida is the perceived necessity to preserve the status quo pending the review of some issue by the court from which the writ is sought. This is normally incidental to review of a lower court proceeding, but the writ is not always so limited. For example, in *Petit v. Adams*,²¹ the supreme court was asked to prevent the destruction of records of an election. The court, doubting its original jurisdiction in such a matter, nevertheless issued a stay writ despite the absence of an appeal pending before it on the matter.²²

The phrase "constitutional stay writ" is commonplace in the literature of Florida law. A symposium on extraordinary writs published in the University of Florida Law Review in 1951 contained a section in which the "constitutional writ of injunction" was discussed, and the author stated that it was founded on the all writs power.²³ Justice Adams and Professor Miller wrote an overview on extraordinary writs in the same symposium and discussed the then existing version of the Rules of Practice of the Supreme Court of Florida.²⁴ These rules were the only nonconstitutional authority cited in *Watson v. Lee* to support the court's interpretation of the all writs provision. Rule 33(a) then provided that:

AFTER APPEAL AND NOTICE. Application for constitutional or other writs necessary to complete exercise of the jurisdiction of this court will be entertained only after the required notice herein to the adverse party, unless such requirement be modified. No such petition will be entertained *unless an appeal has been perfected* in this court and then it must clearly appear that superse-

21. 211 So. 2d 565 (Fla. 1968).

22. *Id.* at 566. The supreme court later held that mandamus was only proper as to state officials. Since the case involved county officials the court determined that it had no power to issue mandamus and vacated its stay. *Id.* at 567-68.

23. Fabisinski & Cowart, *Injunctive Relief in Florida*, 4 U. FLA. L. REV. 571, 578-79 (1951).

24. Adams & Miller, *Origins and Current Florida Status of the Extraordinary Writs*, 4 U. FLA. L. REV. 421, 467 n. 158 (1951).

deas will not completely preserve the court's jurisdiction.²⁵

Adams and Miller also referred to the all writs provision as the "constitutional writ of injunction" and stated that "if jurisdiction does not already exist, this writ is unavailable."²⁶ Citing *Watson v. Lee*, they asserted that "[t]he position that the 'other writs' mentioned in the Constitution are ancillary writs is the obvious interpretation."²⁷

It is this characterization of the writs issued under the blanket authority of the all writs clause as "constitutional stay writs" or "constitutional writs of injunction" which shaped the thinking of the bar too narrowly. Indeed, the phrase "constitutional stay writ" has no meaning in the federal practitioner's vocabulary.²⁸ In Florida, however, the concept of the all writs power as the power to issue something colloquially referred to as a "constitutional stay writ" has persisted. Some commentators have recognized that the all writs provision is appropriate if some portion of the case is already before the court, or if the case is within the ultimate jurisdiction of the issuing court. Updating the 1951 symposium, Jacqueline R. Griffin wrote an article in 1977 entitled "The Constitutional Stay Writ"²⁹ in which she described the writ as ancillary in character, but acknowledged the rule of *Couse*³⁰ which authorized the writ if the court can ultimately acquire jurisdiction.³¹

Others, however, have limited the all writs provision specifically to pending proceedings. One example is in the Continuing Legal Education manual for Florida Civil Practice After Trial.³² That

25. Sup. Ct. R. 33(a), FLA. STAT. (1951) (emphasis added).

26. Adams & Miller, *supra* note 24, at 467-68.

27. *Id.* at 462.

28. Those writs which are delineated in the Florida Constitution are not specified in the federal writs statute. The power there expressed to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (1976), is all that Congress wrote.

29. Griffin, *The Constitutional Stay Writ*, 29 U. FLA. L. REV. 229 (1977).

30. 209 So. 2d 865.

31. Griffin, *supra* note 29, at 238.

32. [§21.70] NECESSITY THAT COURT ALREADY HAVE JURISDICTION OF CAUSE

Since the constitutional stay writ must be complementary to jurisdiction existing in the appellate court at the time of applying for the writ and cannot be used as an independent proceeding to bring this jurisdiction into being, the petitioner must have already placed his cause within the jurisdiction of this same appellate court by some other proceeding. The heading here used reflects this essential step, and paragraph 8 brings this step specifically to the attention of the appellate court. That court, of course, knows nothing of the cause and nothing of

manual, written in 1966, described the "constitutional stay writ" as if it were another named writ which could be invoked only if an appeal were pending before the issuing court.

In practice, stay of lower court proceedings is the most common occasion for invoking the all writs power. It is obvious, but seldom reflected in the literature, that one who petitions for a common law writ, injunctive in nature, to preserve the status quo pending review must also seek that review. In the absence of the appeal or other relief sought, one seeks something the court should not grant: interference in a lower court's judgment without a view toward affirmance or reversal of it as legally erroneous. Too, the constitutional language requires that any writ issued under this residual power be in aid of the issuing court's "exercise of its jurisdiction," so the word "ancillary" is not inaccurate if used with respect to the totality of the issuing court's jurisdiction. It is only when we begin to think of the writ as simply ancillary to a pending proceeding that we lose sight of the teaching of *Couse*,³³ as reasserted in *The Florida Senate v. Graham*.³⁴

III. CASE LAW DEVELOPMENT

In *Watson v. Lee*, the supreme court held that the all writs power depends upon the pendency of some proceeding in aid of which the writ is issued.³⁵ The present constitutional language gives the supreme court,³⁶ as well as the district courts of appeal³⁷ and the circuit courts,³⁸ the power to issue all writs necessary to the complete exercise of its jurisdiction. In *Couse*, the court ex-

the appeal, notice of which has just been filed with the circuit court clerk. The petition, therefore, must summarize the situation for the higher court.

The constitutional stay writ, in the few instances of its use, is ancillary to an appeal normally pertaining to a decree or judgment of a circuit court; and the notice of appeal, or of interlocutory appeal, is prepared and filed in the usual manner. Conceivably, however, a constitutional stay writ could arise in connection with some other type of proceeding. In that event that portion of the heading for this writ above the words "Petition for Constitutional Stay Writ" would be the heading used for the other proceeding employed to bring into existence the jurisdiction of the court to which petitioner is applying for the stay writ.

Miller, *Extraordinary Writs in Appellate Courts*, 6 FLORIDA CIVIL PRACTICE AFTER TRIAL § 21.70 (1966). See also, Caruso, *Jurisdiction*, FLORIDA APPELLATE PRACTICE § 3.26 (Supp. 1981).

33. 209 So. 2d 865.

34. 412 So. 2d 360.

35. 8 So. 2d at 21.

36. FLA. CONST. art. V, § 3(b)(7).

37. FLA. CONST. art. V, § 4(b)(3).

38. FLA. CONST. art. V, § 5(b) (provides for "all writs necessary or proper").

pressly overruled so much of *Watson v. Lee* as denied the existence of the power with respect to the court's ultimate, but not yet invoked, jurisdiction.³⁹

Consider the facts of *Couse*: A landowner protested the quick taking of his land for a construction project, asserting the unconstitutionality of the statute which permitted the accelerated process.⁴⁰ His motion to dismiss the proceeding was denied, and he sought a writ of common law certiorari in the supreme court. The order was not appealable as an interlocutory order.⁴¹ Common law certiorari thus seemed appropriate under the circumstances, since the land could be a canal before an appeal from final judgment might be perfected. The supreme court noted that article V did not authorize the supreme court to issue common law certiorari.⁴² On its own motion, the supreme court transferred the case to the district court of appeal. That court perceived the question as one within the constitutional scheme in which the supreme court decided appeals from all courts in which the validity of a statute was called in question.⁴³ It certified the question involved, without deciding the case, as one of great public interest and sent the matter back to the supreme court.⁴⁴ On its second coming, the case appeared more perplexing than ever. While "certiorari" (so referred to in the constitution, but obviously not the same as common law certiorari) might issue to review a *decision* certified by the district court of appeal to be of great public interest, there was no *decision*.⁴⁵ Realizing at last that this matter was one in which the clear intent of the constitution contemplated supreme court resolution of constitutional validity, the supreme court said that it had improvidently transferred the case to the district court of appeal, that that court had wisely refrained from deciding it and that the power to issue certiorari—or any writ, for that matter—in an ap-

39. 209 So. 2d at 867.

40. *Id.* at 866.

41. *Id.*

42. *Id.*

43. *Couse v. Canal Auth.*, 197 So. 2d 841, 842 (Fla. 1st Dist. Ct. App. 1967) (referring to FLA. CONST. OF 1885, art. V, §§ 4(2) & 5(3) (1956)).

44. *Id.* FLA. CONST. OF 1885, art. V, § 4(2) (1956) provided that the "supreme court may review by certiorari any *decision* of a district court of appeal that . . . passes upon a question certified by the district court of appeal to be of great public interest." (Emphasis added).

45. Thus, jurisdiction could not be obtained under FLA. CONST. OF 1885 art. V, § 4(2) (1956) which provided: "[a]ppeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from *decisions* initially passing upon the validity of a state statute." (Emphasis added).

propriate case was vested in the supreme court under the all writs provision.⁴⁶ The rule adopted in pursuance of the theretofore narrowly conceived power presented an obstacle.⁴⁷ The court said:

The writ, in sum, is essential, even indispensable, to the complete and effective exercise of the prescribed jurisdiction of this Court to decide all appeals from final judgments passing on the validity of a statute.

This conclusion dictates (and we prescribe herewith) amendment of Florida Appellate Rule 4.5 g(1), previously framed in primary reference to stay orders, to read as follows:

"(1) *In aid of prescribed jurisdiction.* Application for constitutional or other writs necessary to the complete exercise of the jurisdiction of the Court will be entertained only after reasonable notice to the adverse party. No such petition will be entertained unless the case is one in which the Court may properly acquire jurisdiction and then only when it is made clearly to appear that the writ is in fact necessary in aid of an ultimate power of review and that a supersedeas order entered by the lower court will not completely preserve the Court's jurisdiction, or that the lower court has erroneously refused to enter such an order."

The writ remains ancillary in nature, as often stated in previous application of the constitutional writs provision, but our decision here represents a departure from, and effectively overrules, such pronouncements as in *State ex rel. Watson v. Lee* that the "all writs" provision may not be invoked "until jurisdiction is acquired" over the cause by means of independent appellate proceedings. Certainly the writs provision in the context of amended Article V contains no such qualification.⁴⁸

46. 209 So. 2d at 866-67.

47. FLA. R. APP. P. 4.5(9)(1) (1962).

In her article, Griffin, *supra* note 29, at 232 traces the history of the Appellate Rule to reflect the supreme court's decision in *Couse*. A significant amendment to the rule was made in 1968. The then existing heading of Rule 4.5(g)(1) (1962) was changed from "After Appeal and Notice" to "In Aid of Prescribed Jurisdiction." FLA. R. APP. P. 4.5(g)(1)(1968). This change was announced in *Couse*, and promulgated in *In re Florida Appellate Rules*, 211 So. 2d 198 (1968). The present rule, FLA. R. APP. P. 9.100(b) provides: "COMMENCEMENT. The original jurisdiction of the court shall be invoked by filing a petition, accompanied by a filing fee if prescribed by law, with the clerk of the court deemed to have jurisdiction." The all writs provision of the Florida Supreme Court is located at FLA. R. APP. P. 9.030(a)(3), that of the district courts of appeal at FLA. R. APP. P. 9.030(b)(3), and that of the circuit courts at FLA. R. APP. P. 9.030(c)(3).

48. 209 So. 2d at 867 (footnote omitted).

Later, in *Monroe Education Association v. Clerk, District Court of Appeal, Third District*,⁴⁹ the district court's clerk returned unfiled an "Application for Constitutional Writ," explaining that it was not "ancillary to any matter pending in this court and therefore cannot be filed here."⁵⁰ Citing *Couse* and other cases, the supreme court mentioned the all writs power as precluding such an abrupt denial of access to the court as the clerk presumed to take upon himself.⁵¹ The supreme court required the lower court to entertain, but not necessarily to grant, the petition, stating:

We think it would greatly emasculate and render sterile an appellate court's ability to make necessary and expeditious adjudications in extraordinary or emergency situations if at threshold applications for original constitutional writs were rejected on the blanket basis they were "not ancillary to any matter pending in this court and therefore cannot be filed here."⁵²

The cause of the recent confusion, at least until *The Florida Senate v. Graham*⁵³ clarified the point, was *Shevin ex rel. State v. Public Service Commission*.⁵⁴ In *Shevin*, the attorney general had filed with the Florida Public Service Commission a motion to delineate procedure, and specifically to permit the participation of the attorney general before the commission at its agenda conferences in a pending rate proceeding. The public counsel also made such a request. Both requests were denied without written order.⁵⁵ The petition to the supreme court for certiorari was untimely.⁵⁶ The public counsel's petition for mandamus, subject to "no inflexi-

49. 299 So. 2d 1 (Fla. 1974). Mandamus was sought in the supreme court to compel the clerk of the district court to receive and file an application for a constitutional writ. *Id.* at 2.

50. *Id.* at 2. In summarily refusing to docket the petition for constitutional writ in the third district, the clerk overlooked a case decided in that court, *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, 109 So. 2d 599, 601 (Fla. 3d Dist. Ct. App. 1959), in which that court acknowledged:

[T]he numerous instances in the federal courts in which it has been held, as to the power of appellate courts to issue necessary writs in aid of appellate jurisdiction . . . that power to issue such writs or orders exists, not only after appeals have been filed, but prior to the filing of such appeals in aid of appellate jurisdiction which is only potential and incipient.

51. *Id.* at 2-3.

52. *Id.* at 3 (emphasis in original).

53. 412 So. 2d 360.

54. 333 So. 2d 9 (Fla. 1976).

55. The supreme court stated that it assumed that lack of a written order was no impediment to its review. *Id.* at 10-11.

56. It was filed 32 days after the Commission's action. *Id.* at 11.

ble time requirement,"⁵⁷ was rejected because "[m]andamus will not issue to relieve litigants of the consequences of failing to file in time for other appropriate relief."⁵⁸ The court added:

Public counsel has also invoked the all writs clause as a basis for this Court's jurisdiction. That provision confers jurisdiction on the Court to issue "all writs necessary to the complete exercise of its jurisdiction." Fla.Const. Art. V, § 3(b)(4). This language contemplates a situation where the Court has already acquired jurisdiction of a cause on some independent basis, and the complete exercise of that jurisdiction might be defeated if the Court did not issue an appropriate writ or other process, e.g., a stay of related proceedings in another court or their transfer here for consolidation. *Wilson v. Sandstrom*, 317 So.2d 732 (Fla. 1975); *State v. Lee*, 8 So.2d 19 (Fla. 1942) (the all writs provision "has reference only to ancillary writs . . . and does not confer added original or appellate jurisdiction in any case." At 21). In the present case, we do not have jurisdiction on any independent basis, so there is no occasion for any ancillary writ."⁵⁹

In one sense the citation of *Wilson v. Sandstrom* is appropriate, but the reader who pursues it at the volume and page cited will read only that the matter of jurisdiction had been determined in an order filed four days prior to the published opinion.⁶⁰ *Wilson v. Sandstrom* was habeas corpus, brought as an original proceeding in the supreme court.⁶¹ A matter involving the same question of law was simultaneously pending in the district court of appeal.⁶² Using the all writs power and on authority of *Mize v. Seminole County*,⁶³ the supreme court ordered the district court of appeal to send the case before it to the supreme court for consolidated treatment.⁶⁴ Thus, *Wilson v. Sandstrom* is an even more expansive use of the all writs power, since the supreme court might just as readily have sent the habeas matter to the the district court of appeal, which had concurrent jurisdiction.

The citation of *State ex rel. Watson v. Lee* also requires a bit of research to understand. That case, although expressly overruled,

57. *Id.* at 12.

58. *Id.*

59. *Id.*

60. 317 So. 2d 732, 734 (Fla. 1975), *cert. denied*, 423 U.S. 1053 (1976).

61. *Wilson v. Sandstrom*, No. 47,674, slip op. (Fla. July 17, 1975).

62. *Id.*, slip op. at 2.

63. 229 So. 2d 841 (Fla. 1969).

64. *Wilson v. Sandstrom*, No. 47,674, slip. op. at 2-4.

was cited to the court in the brief of respondent Central Telephone Company of Florida.⁶⁵ That does not explain all: surely Shepard's Citations is available to the court as well as counsel. It does serve to dissipate the notion that the court wanted to overrule *Couse* in *Shevin*.

Some legal scholars have been perplexed by the reversion to the older doctrine of *Watson v. Lee*, and have, in writing about the scope of the all writs power, recognized that the court has confused the issue. Professor Onoprienko, for example, in his comprehensive manual published shortly before the opinion came down in *The Florida Senate v. Graham*, referred to *Shevin* as "a case which seems to reinstate cases prior to *Couse*."⁶⁶ Other commentators have assumed that it has been overruled *sub silentio*.⁶⁷ Now, however, taken together with *The Florida Senate v. Graham*⁶⁸ there can be no doubt that *Couse* suggests that the broad scope of the constitutional power has relevance to particular cases in which no

65. Brief for Respondent at 8 & 15, *Shevin ex rel. State v. Public Serv. Comm'n*, 333 So. 2d 9.

66. G. ONOPRIENKO, *CASES AND MATERIALS ON FLORIDA APPELLATE PRACTICE AND PROCEDURE*, 806-08 (1982).

67. The confusion engendered by this unfortunate citation was reflected in the legal literature that followed *Shevin*. Edward M. Waller, Jr., wrote in the overview chapter to the Continuing Legal Education manual on Extraordinary Writs in Florida:

Former *Fla.App.R.* 4.5(g)(1) indicated that no petition for a constitutional stay writ would be entertained unless the case was one in which the court might otherwise properly acquire jurisdiction. That limitation does not appear in the new rule. See *Fla.R.App.P.* 9.100(a). Nevertheless, it is clear that no constitutional stay writ should issue unless it is "necessary to the complete exercise" of the court's jurisdiction. There is no reason to believe that the streamlining of the language in the applicable procedural rule evidences any change in the law concerning the power of the courts to issue constitutional stay writs.

The Supreme Court has held that a constitutional writ cannot be used as an independent basis for jurisdiction. *Besoner v. Crawford*, 357 So.2d 414 (Fla. 1978). Although that case was decided under the former rule, the jurisdictional principle applied by the Supreme Court undoubtedly survives the language change in the appellate rules. See also *Shevin ex rel. State v. Public Service Commission*, 333 So.2d 9 (Fla. 1976) and *McCain v. Select Committee on Impeachment, Florida House of Representatives*, 313 So.2d 722 (Fla. 1975); but see *Monroe Education Association v. Clerk, District Court of Appeal, Third District*, 299 So.2d 1 (Fla. 1974) and *Couse v. Canal Authority*, 209 So.2d 865 (Fla. 1968).

As a result of the ancillary nature of constitutional stay writs, a notice of appeal or appropriate petition will precede or be filed concurrently with the petition for that writ. The writ also may be useful to an appellee under certain circumstances.

City of Miami v. Cuban Vill-Age Co., 143 So.2d 69 (Fla. 3d DCA 1962).

Waller, *Overview*, *EXTRAORDINARY WRITS IN FLORIDA*, § 1.10 (1979).

A. ENGLAND & T. SIMON, *FLORIDA APPELLATE PRACTICE MANUAL*, § 2.135 (1979 & Supp. 1980).

68. 412 So. 2d 360.

other remedy seems fit and in which the correctness of the result cannot be disputed. Indeed, an analysis of case law would indicate that any limitation of *Couse* was improper.

IV. THE PROPER INTERPRETATION OF THE ALL WRITS PROVISION

In *Wingate v. Mach*,⁶⁹ a case decided prior to *Watson v. Lee*, the court denied an application for a constitutional writ ancillary to a pending appeal, but took pains to point out that it had "jurisdiction to issue all writs 'necessary' and all writs 'proper' to the 'complete exercise' of its jurisdiction."⁷⁰ Further, the court stated:

As will be noted from the language of the Constitution itself,⁷¹ the jurisdiction of the Supreme Court to issue constitutional writs is not limited to those writs merely which are *necessary* to protect its jurisdiction, but may extend to the issuance of such writs as may be *proper* "to the complete exercise" of its jurisdiction. It is therefore within the province of this court to grant a writ of the character prayed for by appellants if it be found by this court that the granting of such a writ is either "necessary" or is "proper" to the complete exercise of its jurisdiction to decide the matter brought here on appeal. . . .⁷²

This is interesting language now that *Couse* has demonstrated that stay of lower court proceedings is not the only occasion for invocation of the power, because it asserts broad power and then presupposes the typically sought stay order as the only context of its invocation.

Was *Couse* a case in which the grant of common law certiorari, omitted from the court's express powers, was "proper"? Plainly the denial of the writ would have posed more troublesome problems.⁷³

69. 154 So. 192 (Fla. 1934). This case involved a lower court denial of a motion by creditors of an estate to appoint a receiver for the business during the litigation over an estate.

70. *Id.* at 193. The court stated that there was no evidence of extreme urgency nor a potential for irreparable injury during the interim between the entry of the appeal and the final decision of the appellate court. *Id.* at 193.

71. FLA. CONST. OF 1885, art. V, § 4(2) (1902) (supreme court). In 1972 the language of the all writs power of the supreme court and district courts of appeal, FLA. CONST. art. V, §§ 4(2) & 5(3) (1968) was changed from "necessary or proper" to "necessary" and the sections were redesignated as §§ 3(b)(4) & 4(b)(3), respectively. The present version is in FLA. CONST. art. V §§ 3(b)(7) & 4(b)(3).

72. 154 So. at 193 (emphasis and footnote added).

73. The *Couse* court observed:

It is also clear that issues determined on interlocutory review are not, in our appellate process, subject to question anew on appeal from the final judgment. The review of such orders by writ of certiorari from the district courts of appeal would

Indeed, it seemed perfectly "proper" for the supreme court to retain the case on the explanation it gave: that *Watson v. Lee* was wrong in the dictum disclaiming the power to use the all writs provision except as ancillary to an already pending matter.⁷⁴

In another case in which all writs seemed the only appropriate solution, *Mize v. County of Seminole*,⁷⁵ there was in issue the question whether Sanford was the county seat of Seminole County. That question had arisen in two separate proceedings: one in which bonds for the purpose of building a courthouse had been validated which was directly reviewable by the supreme court,⁷⁶ and a declaratory judgment proceeding in which the route of appellate review lay through the district court of appeal. The circuit court in the bond validation proceeding determined that Sanford had validly been designated the county seat and validated the bonds.⁷⁷ The appeal from that decision went directly to the supreme court. Meanwhile, back at the district court of appeal, the same result in the declaratory judgment proceeding had been reversed.⁷⁸ The supreme court, acknowledging the undoubted jurisdiction in the bond validation appeal, said:

A more serious question arises in connection with the jurisdiction of this Court in No. 38,040, the declaratory judgment action. Jurisdiction is alleged to be vested in this Court in the Petition for Certiorari for the reason that said decision "affects a class of constitutional officers, to-wit, county commissioners, as demonstrated by the decision which enjoins petitioners from financing the construction of a courthouse in the City of Sanford under the provisions of Chapter 135, Florida Statutes, 1967 [F.S.A.]." We accept jurisdiction in this proceeding not because of the reasons assigned above in the Petition for Certiorari, but by virtue of the provisions of the constitution authorizing this Court to issue all writs necessary or proper to the complete exercise of its jurisdiction.

This Court, being vested with exclusive jurisdiction in all proceedings for the validation of bonds and certificates of indebtedness, would be completely frustrated in the necessary and proper

therefore effectively extinguish or prevent the exercise by this Court of a part of its prescribed jurisdiction on appeal from final judgment in the cause.

Couse, 209 So. 2d at 866-67.

74. *Id.* at 867.

75. 229 So. 2d 841 (Fla. 1969).

76. FLA. CONST. art. V, § 4(2) (1968).

77. 229 So. 2d at 843.

78. *Id.* at 842-43.

exercise of that jurisdiction in the validation proceedings unless it could bring before it for review the decision of the District Court which enjoined the issuance of said bonds. Ultimate disposition of this case, therefore, is not only necessary and proper but essential to the complete exercise of our jurisdiction.⁷⁹

Later, in *Dickinson v. Stone*,⁸⁰ mandamus issued to test the propriety of the legislature's use of the general appropriations bill to amend the law respecting responsibility for data processing, a general statute having assigned the function at least in part to the comptroller.⁸¹ Citing *Couse* and *Mize*, the supreme court attributed its jurisdiction over the petition, which sought to transfer to the comptroller the funds improperly appropriated to the Department of General Services.⁸² The reference to the all writs power was superfluous, the constitutionality of the appropriation having been properly raised by mandamus, but it can hardly be deemed an incorrect result.

In *State ex rel. Pettigrew v. Kirk*,⁸³ the original jurisdiction of the supreme court to enjoin the appointment of circuit judges and the award of beverage licenses as a consequence of the 1970 census was undoubted.⁸⁴ The lack of a pending appeal did not seem to trouble the court, which used the all writs power after mentioning that quo warranto, the writ sought, was not the proper remedy.

Thus, it is clear there was substantial case law to support the application of the all writs provision to cases within the ultimate as well as merely the pending jurisdiction of the court.

Indeed, federal case law would also support this proposition. Use of the phrase "constitutional stay writ" may well describe the typical utility of the all writs provision to the Florida practitioner, but to one who practices or judges in a federal court the phrase is incongruous for two reasons. The power of federal courts to issue writs is statutory, not constitutional, and provides that: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."⁸⁵

No mention is made in the federal statute of mandamus, injunc-

79. *Id.* at 843 (footnote omitted).

80. 251 So. 2d 268 (Fla. 1971).

81. *Id.* at 270-71.

82. *Id.* at 273 (citing *Couse*, 209 So. 2d 865 and *Mize*, 229 So. 2d 841).

83. 243 So. 2d 147 (Fla. 1970).

84. *Id.* at 149.

85. 28 U.S.C. § 1651(a) (1976).

tion, quo warranto, certiorari, prohibition or habeas corpus, which are specifically mentioned in the Florida Constitution.⁸⁶ A phrase like "constitutional stay writ" is thus of local usage, and suggests a narrower power than exists.

Two federal cases were cited in *Couse* to support application of the all writs provision to a cause not pending before the issuing court.⁸⁷ In *United States v. United States District Court for the Southern District of New York*,⁸⁸ involving the all writs provision of the federal statutes,⁸⁹ an appeal brought directly to the Supreme Court could not be heard for want of a qualified quorum, four of the Justices being disqualified, and was transferred to the circuit court of appeals.⁹⁰ That court subsequently denied mandamus sought to compel compliance with its mandate to hear the case, on the reasoning that its jurisdiction existed only as an incident to its jurisdiction to entertain an appeal.⁹¹ On review, the Supreme Court said:

Section 262 of the Judicial Code, 28 U.S.C. § 377, provides that the federal courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." It was early recognized that the power to issue a mandamus extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. See *Marbury v. Madison*, 1 Cranch 137, 175; *Ex parte Crane*, 5 Pet. 190. That power protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be immediately and directly involved.⁹²

Thus, the federal case law supports an interpretation of its all writs provision which includes both pending cases and those cases which may ultimately be within the court's jurisdiction. The fed-

86. FLA. CONST. art. V, §§ 3(b)(7); 3(b)(8); 3(b)(9); 4(b)(3); 5(b).

87. 209 So. 2d at 868 nn. 7 & 8.

88. 334 U.S. 258 (1948).

89. *Id.* at 263 (citing 28 U.S.C. § 377 (1940)).

90. *Id.* at 259-61. The circuit court of appeals found there had been an antitrust violation and only remanded the case to the district court for application of the appropriate remedies. *Id.* at 261. No dissolution action was taken for five years because of the war. The alleged violator then requested a finding that there was no longer an antitrust violation. *Id.* at 262. The district court set the case for trial on that issue. The government objected and filed a writ of mandamus in the circuit court. *Id.*

91. *Id.* at 262.

92. *Id.* at 263.

eral case law, however, does recognize that the positive appellate rules must be followed.

In *Roche v. Evaporated Milk Association*,⁹³ mandamus had been sought under the federal all writs provision to compel the trial judge to consider certain pleas in abatement.⁹⁴ The use of mandamus in this way, to deal with a matter properly reviewable only on appeal, was disapproved,⁹⁵ but the Supreme Court said:

As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction. Its authority is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.⁹⁶

Therefore, *Roche* was a case in which the issuance of the writ was inappropriate, but the Court expressly reaffirmed the power to issue writs when appropriate. If, in *Shevin*⁹⁷ the Florida Supreme Court had done likewise, there would not have been such confusion over the scope of the all writs power.

Shevin is rightly decided but wrongly explained. Appellate courts ought to make short work of the attempted abuse of their power by litigants seeking absolution from the normal rules of procedure. The purpose of the all writs provision is not to render nugatory all of the positive rules laid down by law. In that case the all writs power was invoked improvidently.⁹⁸ To grant a writ after the expiration of the normal appeal time would be to make a mockery of the rules. The all writs power could not be so intended. There was plainly no need, however, to deny its existence for later use in a proper case after the court had so clearly affirmed the power in *Couse*.

While we may prefer hearing, "We can't do what you ask" from the department store clerk or government functionary rather than "You don't deserve our help," when a court muddies the law in the consequence of being polite one begins to think that a more accu-

93. 319 U.S. 21 (1943).

94. *Id.* at 24.

95. *Id.* at 25.

96. *Id.*

97. 333 So. 2d 9.

98. The appeal was filed 32 days after the Commission's order. *Id.* at 11.

rate explanation is desirable. In *Shevin*⁹⁹ the use of the all writs power to grant the relief sought would have been destructive of orderly judicial procedure. This policy consideration was also apparent in *St. Paul Title Insurance Corp. v. Davis*, in which the court refused to grant review under the all writs provision.¹⁰⁰ In both of those cases there was some positive requirement which was absent. In *Shevin* it was timeliness; in *St. Paul Insurance*, it was the express and direct conflict between decisions required by the 1980 amendment to Article V for Supreme Court review which was missing.¹⁰¹ The petitioner in *St. Paul* invoked the all writs power as if it completely nullified the recent constitutional amendment. If all writs is a way around the rules, what is the point of the rules? In the author's view, the practitioner who seeks a writ to accomplish a positively forbidden result misuses the all writs provision. In such a case the writ clearly is not necessary to the full exercise of the court's jurisdiction.

Indeed, the 1980 amendment to Article V was adopted to narrow the supreme court's power of review.¹⁰² To do as petitioner in *St. Paul* asked, and grant review under the all writs power would be to negate the expressed limitations on the court's power. These cases point up the wisdom of reading the word "jurisdiction" as the operative limitation on the all writs power. If the constitutional provision setting forth the court's power to review decisions in the district courts of appeal means anything at all, it must mean that an expansive reading of the court's residual writs power cannot effect an amendment to the Florida Constitution.

V. CONCLUSION

What is the scope of the power to issue "all writs necessary to the complete exercise" of a court's jurisdiction? There was no dissent from the proposition announced in *Couse* that the power extended to cases within the ultimate power of the supreme court to

99. 333 So. 2d 9.

100. 392 So. 2d 1304 (Fla. 1980). The Supreme Court stated:

We will not allow the "all writs necessary" provision of section 3(b)(7) to be used to circumvent the clear language of section 3(b)(3) and our holding in *Jenkins v. State* that we lack jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion when the basis for such review is an alleged conflict of that decision with another.

Id. at 1304-05.

101. FLA. CONST. art. V § 3(b)(3).

102. FLA. CONST. art. V. See England & Williams, *Florida Appellate Reform One Year Later*, 9 FLA. ST. U.L. REV. 223, 223 (1981).

review.¹⁰³ There was no dissent from the holding in *Monroe Education Association*.¹⁰⁴ And Justice Boyd, the lone dissenter in *The Florida Senate v. Graham* did not object to the assertion of power to issue a writ under the all writs power, but merely thought it unnecessary since, in his view, mandamus was an appropriate remedy.¹⁰⁵

In those cases, then, in which the remedy sought is undeniably appropriate and no specific writ suffices, the power of the supreme court seems clear. Why then did the court harken back to the words of *Watson v. Lee* in deciding *Shevin*? Of the two hypotheses plausible before *Graham*, we must now discount the theory that the court wanted to back away from *Couse*. That leaves one to believe only that the court cited the overruled 1942 case hastily because the public interest in a prompt decision seemed pressing at the time. In retrospect, a little more careful reliance upon Shepard's Citations, even if it became necessary to revise the opinion before publication, would have avoided the bar's misunderstanding.

The constitutional limitation on the all writs power is simply this: that the writ be necessary to the complete exercise of the court's jurisdiction. It is conceivable that one could think of the power as ancillary to pending litigation, as Justice Whitfield did in *Watson v. Lee*,¹⁰⁶ but when the necessity is manifest, as in *Couse*,¹⁰⁷ *Mize*¹⁰⁸ and *The Florida Senate v. Graham*,¹⁰⁹ then it is clear the court has, and ought to exercise, the power to issue an appropriate writ. What is now needed is a new perspective on the extraordinary writs. Given the proper perspective, good lawyers will not seek a writ to accomplish a plainly forbidden purpose; the all writs power is not complete license. But when the circumstances are truly extraordinary and demand an extraordinary remedy, the power is there to be invoked by counsel and used by the court.

103. 209 So. 2d 865.

104. 299 So. 2d 1.

105. 412 So. 2d at 365 (Boyd, J., dissenting).

106. 8 So. 2d 19.

107. 209 So. 2d 865.

108. 229 So. 2d 841.

109. 412 So. 2d 360.