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Conflict Certiorari Jurisdiction of the Supreme Court of Florida: The "Record Proper"

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CONFLICT CERTIORARI JURISDICTION OF THE SUPREME COURT OF FLORIDA: THE "RECORD PROPER"

> Just once, it would be helpful if my colleagues who follow the *Foley*[1] majority would actually define what is meant by "record proper" and "transcript of testimony." There is no clear-cut definition in the books and I think our cases on the subject are extremely confusing.[2]
>
> —Justice Thornal

I. INTRODUCTION

Florida's district courts of appeal are intended in most cases to be final courts of appeal.[3] In certain cases appeal is permitted from a decision of a district court of appeal;[4] in others direct appeal from the circuit court to the supreme court is allowed.[5] The Florida Constitution gives the Supreme Court of Florida jurisdiction to review by certiorari "any decision of a district court of appeal . . . that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law . . . ."[6]

In *Lake v. Lake*,[7] decided shortly after the creation of the district courts of appeal, the supreme court held that it would not "dig into a record to determine whether or not a per curiam affirmance by a district court of appeal conflicts" with a prior decision and thereby gives jurisdiction to the supreme court.[8] The court, however, left an escape route for itself: "There may be exceptions to the rule that this court will not go behind a judgment per curiam, consisting only of the word 'affirmed' which does not reflect a decision that would interfere with settled principles of law, rendered by a district court of appeal . . . ."[9]

Seven years later the supreme court reconsidered its position and allowed the exception to swallow the general rule. In *Foley v. Weaver*

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1. Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1965).
2. Gibson v. Maloney, 231 So. 2d 823, 832 (Fla.) (Thornal, J., dissenting), *cert. denied*, 398 U.S. 951 (1970).
3. *See, e.g.*, Keegan v. State, 293 So. 2d 351 (Fla. 1974); Johns v. Wainwright, 253 So. 2d 873 (Fla. 1971); Taylor v. Knight, 234 So. 2d 156 (Fla. 1st Dist. Ct. App. 1970).
4. FLA. CONST. art. V, § 3(b)(1). *See* Comment, *Certiorari Review of District Court of Appeal Decisions by the Supreme Court of Florida*, 28 U. MIAMI L. REV. 952 (1974).
5. FLA. CONST. art. V, §§ 3(b)(1)-(2).
6. FLA. CONST. art. V, § 3(b)(3).
7. 103 So. 2d 639 (Fla. 1958).
8. *Id.* at 643.
9. *Id.*

Drugs, Inc.,[10] the supreme court announced that where a district court of appeal affirmed without opinion a trial court, the supreme court could and would review the "record proper" to determine whether it had conflict certiorari jurisdiction.[11] The *Foley* court defined "record proper" only in the broadest terms: "the written record of the proceedings in the court under review except the report of the testimony."[12] One would suppose that this simple definition could be easily implemented, but this has not been true. Since *Foley*, the term "record proper" has caused much confusion.[13]

The court's reliance in *Foley* on the record proper appears to have been an arbitrary compromise[14] between the court's *Lake* position, with its concomitant respect for the finality of district court decisions, and a position that would allow the supreme court absolute power to examine for conflict district court per curiam decisions without opinion. Using the record proper as a basis for conflict certiorari, however, has created considerable problems. Given the present definition of the term, it is extremely difficult to determine what portion of the record will be considered part of the record proper. Definitional ambiguity encourages frivolous applications for conflict certiorari and undercuts the finality of district court decisions.

This note does not offer a clear-cut definition of the record proper; one does not exist. Thus it is unable to satisfy Justice Thornal's request. It does, however, attempt to identify a theoretical framework that may be applied to the record below in determining what is part of the record proper. In the course of that effort, it is assumed that the supreme court will continue to use the term "record proper" to designate those items it will consider when reviewing per curiam decisions without opinion. It is also assumed that defining that term with some degree of precision is more important than the content of the definition chosen.

This note traces the growth of the technical record, or record proper, from its common law origins to its modern definitions in Florida and other jurisdictions. The discussion of Florida cases is

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10. 177 So. 2d 221 (Fla. 1965).

11. *Id.* at 223.

12. *Id.*

13. *See* note 2 and accompanying text *supra;* notes 96-114 and accompanying text *infra. See also* Comment, *supra* note 4, at 968-69.

14. *Cf.* Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 233-34 (Fla. 1965) (Thornal, J., dissenting). Justice Thornal disagreed not only with the court's decision to review the record proper, but with its application of that term. In his view, the term "record proper" encompassed "only the actual pleadings and orders of the case." Gibson v. Maloney, 231 So. 2d 823, 832 (Fla.) (Thornal, J., dissenting), *cert. denied,* 398 U.S. 951 (1970).

divided into pre-*Foley* and post-*Foley* analyses. The post-*Foley* cases indicate the confusion and lack of predictability created by the current definition of record proper. The pre-*Foley* cases, by contrast, demonstrate that the record proper was once fairly well defined. The analysis of pre-*Foley* cases focuses on two particularly troublesome areas—motions and affidavits—and the test once used by Florida courts to determine when those areas fell within the record proper. The thesis of this note is that if Florida courts apply the theoretical framework embodied in that test—which distinguished matters of fact from matters of record—a higher level of predictability can be achieved.

The traditional definition of record proper did not evolve in the context of conflict certiorari. It therefore does not reflect the central consideration in conflict certiorari questions—the appropriate division of judicial labor and power between the supreme court and the district courts of appeal. Nonetheless, this note hopefully demonstrates that the traditional definition offers a sound basis on which to build.

II. History of the Record

The first "record" in England was the Domesday Book.[15] It consisted of two volumes, written in the last years of the reign of William the Conqueror,[16] that contained the fiscal records of the realm.[17] In them were listed the owners and subtenants of land, livestock, and other assets that could be taxed by the Crown.[18] The strict insistence of Exchequer officials upon the correctness of the Domesday Book may have led to the notion of a "record" as a technical object.[19] If so, records must be regarded as financial in origin; only later did they become judicial.[20]

The writ of certiorari emerged as a judicial tool used by the King to check the justice handed out to his subjects by his barons.[21] The writ was a means of controlling summary criminal convictions by

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15. The two volumes were usually called the Great Domesday and Little Domesday, although they had many other names. P. Winfield, The Chief Sources of English Legal History 110-11 (1925).

16. The books were begun in the seventeenth year of William the Conqueror's reign and finished in 1086, the twentieth year of his reign. M. Hale, The History of the Common Law of England 70 (C. Gray ed. 1971).

17. P. Winfield, *supra* note 15, at 111.

18. T. Plucknett, A Concise History of the Common Law 12 (5th ed. 1956).

19. *Id.*

20. *Id.*

21. Plucknett suggests that the writs originally were "mere administrative orders from superior officials to their subordinates telling them to do something, to give some information, or the like." T. Plucknett, *supra* note 18, at 173. *See generally* de Smith, *The Prerogative Writs,* XI Cambridge L.J. 40, 45-48 (1951).

English county courts.[22] In the beginning, county courts were not courts of record.[23] What, then, was delivered to the appellate court when a writ was issued calling for the record of the case? When the writ was received by the county court, four knights or freemen were dispatched to Westminster to recount what had happened in the case.[24] They provided a narrative of the complaint and a summary of the evidence produced in the baron's court.[25] If the defendant challenged this "record," a duel was waged to delete any errors.[26]

The advent of rolls of court—written records—can be traced to the late twelfth century.[27] At that time, the term "courts of record" signified a special class of courts. "Courts of record were originally those of the King's courts whose records enjoyed the privilege at common law of being treated as infallible . . . ."[28] Those records could not

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22. 4 W. BLACKSTONE, COMMENTARIES *315-16; 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 244-46 (1938). *See* Abel, *Materials Proper for Consideration in Certiorari to Tribunals: I,* 15 U. TORONTO L.J. 102, 103 (1963).

The King used the writ of certiorari to satisfy his duty to his subjects to see that justice was dispensed. M. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND FROM THE NORMAN CONQUEST 152 (1880). *See also* de Smith, *supra* note 21, at 48. The writ was also used as a means of changing the venue of a case. E. JENKS, THE BOOK OF ENGLISH LAW 66-67 (1929).

23. T. PLUCKNETT, *supra* note 18, at 93; Thorne, *Notes on Courts of Record in England,* 40 W. VA. L.Q. 347, 355 (1934). Appellate proceedings from these county courts were called "false judgment" but were analogous to certiorari proceedings. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 61 (1971).

24. T. PLUCKNETT, *supra* note 18, at 93-94.

25. For an example of what was recounted, see *id.* at 121-23.

26. *Id.* at 94.

> We before said, that courts were not bound to defend their records by duel; but they were obliged to defend their *judgments* in that manner: as if any one should declare against a court for passing *a false judgment* against him, and should state it to be *therefore* false, because when one party said thus, and the other answered thus, the court gave a false judgment thereon in such and such words, and passed that judgment by the mouth of N. and should conclude, that if it was denied, he was ready to prove it by a lawful witness there ready to deraign it; in this case, the question might be decided by the duel. But there were some doubts whether the court was to defend its judgment by one of his own members, or by some stranger. Glanville seems to have been of the former opinion; for, he says, the defence was to be by the person who passed the judgment.

1 J. REEVES, HISTORY OF THE ENGLISH LAW 153-54 (Dublin ed. 1787).

27. P. WINFIELD, *supra* note 15, at 128-33.

> Pleas heard in the King's court *(curia regis)* seem to have been enrolled in the last years of Henry II.'s reign, but the earliest surviving rolls are of the year 1194. (6 Rich. I.)
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> From the time of Edward I. onward we have distinct series of records for the King's bench *(coram rege* rolls), common pleas *(de banco* rolls), eyre, gaol-delivery, etc.

F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 2 n.1 (J. Colby ed. 1915), *citing* C. GROSS, SOURBES AND LITERATURE OF ENGLISH HISTORY 352 (1900).

28. G. RADCLIFFE & G. CROSS, THE ENGLISH LEGAL SYSTEM 247 n.1 (1946).

be and were not disputed.[29] They consisted of acts and judicial proceedings of the court enrolled in parchment.[30]

Several types of rolls evolved: (1) process rolls, (2) recognizance rolls, (3) imparlance rolls, (4) plea rolls, (5) issue rolls, (6) judgment rolls, (7) scire facias rolls, (8) rolls of proceedings on writs of error and false judgment, and (9) rolls of deeds and awards. The latter two rolls were not important in determining appellate certiorari jurisdiction. When a writ of certiorari was issued, the rolls pertaining to a case were sent to Westminster by the court receiving the writ.[31] The appellate court would restrict itself to these rolls when hearing an appeal.[32]

To understand what the technical record, or "record proper," was, it is necessary to know what was written on these rolls. The following is a summary of the types of entries found on the rolls used in determining certiorari jurisdiction.

1. Process roll.—The warrant was recorded on this roll.[33] In the King's Bench the warrant was copied onto the roll; in the Common Pleas the gist of the warrant was entered. Also noted on this roll were the sheriff's return, any continuances, and the plaintiff's appearance.[34]

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29. The records were "of such high and supereminent authority, that their truth is not to be called in question." 3 W. BLACKSTONE, COMMENTARIES *24. *See also* J. BAKER, *supra* note 23, at 61.

30. "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony . . . ." 3 W. BLACKSTONE, COMMENTARIES *24.

31.

> The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him in an inferior Court; whereupon the Sovereign, saying that he wishes to be informed—*certiorari*—of the matter, orders that the record, etc., be transmitted into a Court where he is sitting.

Rex v. Titchmarsh, 22 D.L.R. 272, 277-78 (Sup. Ct. Ont., App. Div. 1915).

32. S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 47-48 (1969). In those days the record might prove incomplete. Therefore, the bill of exceptions evolved to allow the defendant to "make his own private supplement to the record." *Id.* at 48. *See* notes 47-49 and accompanying text *infra*.

33. Until the time of Wright, C. J., if an action were commenced by warrants of attorneys, these warrants were recorded on this separate roll. Wright caused these warrants to be entered on the top of the issue roll. 1 W. TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH, AND COMMON PLEAS, IN PERSONAL ACTIONS, AND EJECTMENT 95 (4th Am. ed. 1856).

Robert Wright had been chief justice of the Common Pleas for five days—April 16-21, 1687—when James II appointed him chief justice of the King's Bench. His predecessor had been dismissed for refusing to grant an order for hanging a deserter. Wright's first act was to grant that order. 7 E. FOSS, JUDGES OF ENGLAND 282 (1864).

34.

> And where a writ is sued out to avoid the statute of limitations, it should regularly be *entered* on a roll, and docketed, with the sheriff's *return* thereto, and *continuances* to the time of declaring. The writ should be entered on a roll of

2. Recognizance roll.—A recognizance was an obligation to do some particular act that a man entered into before a court of record or duly authorized magistrate.[35] When an obligation was entered on the roll, it became an obligation of record. A judge could then order execution on the obligation.[36] Issuance of bail was also recorded on the recognizance roll.[37]

3. Imparlance roll.—An imparlance was leave granted by the court to answer the complaint at a specified time.[38] Other continuances were not recorded on this roll.[39]

4. Plea roll.—At first all entries on the plea rolls were made by the

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that term wherein it was returnable; and, in the King's Bench, it is entered in *haec verba:* after which the roll proceeds with an entry of the plaintiff's appearance, the sheriff's return of *non est inventus,* and continuances of the process from term to term, by *vicecomes non misit breve,* to the term of the declaration. In the Common Pleas, the roll merely contains a recital of the writ, with an entry of the plaintiff's appearance, and sheriff's return, &c.

1 W. TIDD, *supra* note 33, at 161-62 (footnote omitted).

35. 2 W. TIDD, *supra* note 33, at 1083. *See also* C. KEIGWIN, CASES IN COMMON LAW PLEADING WITH SUMMARIES OF DOCTRINE UPON SEVERAL HEADS OF THAT SUBJECT 45-46 (2d ed. 1934). A recognizance was also used as a means of probation.

A recognizance is a contract executed or acknowledged before a court of record (or an officer authorized to take it) by a person, who thereby admits his indebtedness to the Crown in a specified sum, such indebtedness to cease upon the fulfilment of the condition enjoined by the Court, *e.g.,* that the offender be of good behaviour for six months . . . .

1 W. ODGERS & W. ODGERS, THE COMMON LAW OF ENGLAND 179 (1911).

36. This procedure provided a method of confessing judgment. Many times a merchant would insist on entering a recognizance before selling goods on credit. 2 W. TIDD, *supra* note 33, at 1084-87. *See generally* A. HOGUE, ORIGINS OF THE COMMON LAW 205-13 (1966). This "cognovit" was "a written confession of an action, supposed to be given by the defendant in court, which authorizes the plaintiff, under circumstances specified, to enter up judgment and issue execution thereon against the defendant." H. BROOM, COMMENTARIES ON THE COMMON LAW DESIGNED AS INTRODUCTORY TO ITS STUDY 262 n.(*l*) (4th London ed. 1873).

37. E. JENKS, *supra* note 22, at 241. An issuance of bail was to be recorded on the recognizance roll prior to the pleadings in the case. 1 W. TIDD, *supra* note 33, at 277.

38. "*Imparlance* is said to be, when the court gives a party leave to answer at another time, without the assent of the other party; and in this sense, it signifies time to reply, rejoin, surrejoin, &c. But the more common signification of imparlance is time to plead: and it is either *general* [or special.]" 1 W. TIDD, *supra* note 33, at 462 (footnotes omitted).

39.

Historically, the most interesting of these continuances [imparlance, *curia advisari vult, vicecomes non misit breve,* and *jurata ponitur in respectu*] was that by imparlance. It was a survival of the days of oral pleading in court, when each pleader was expected to answer his adversary's pleading at once, unless the court would grant him an imparlance, that is a delay to talk the matter over. In spite of the rise of written pleadings, the law as to imparlances was in full vigour when Stephen wrote the first edition of his book [*Pleading*] in 1824, and, as might be expected, had given rise to a maze of minute rules.

9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 260 (3d ed. 1944) (footnotes omitted).

clerks of the various courts.[40] At that time lawyers had no control over what was recorded in the plea roll.[41] Since judgments were based on the roll and not on the oral pleadings, the art of oral pleading was to get a written reaction from the clerk.[42] Later, attorneys were allowed to enter the pleadings themselves.[43]

5. Issue roll.—The entries on this roll were summations of the legal issues of the case.[44] These entries were made by the lawyers in the case, many times in the comfort of their offices.[45] The judgment in a case was also entered on this roll. From then on the roll was called the *judgment roll.*

6. Scire facias roll.— All judgments on writs of scire facias were entered on these rolls. A scire facias was a writ founded on some matter of record, typically a recognizance or a judgment as recorded on its respective roll.[46] A writ of execution is the modern functional equivalent of a writ of scire facias.

The above rolls comprised the technical record of a case, or what has now become known as the record proper. If a modern court were to follow a strict interpretation of record proper, the following would be included: (1) the warrant, (2) the amount of bail, (3) any leave for extension of time to answer, and the order concerning that motion, (4) the pleadings, (5) the legal issues, (6) the judgment, and (7) any order of execution issued upon that judgment.

III. The Definition of Record Proper in American Jurisdictions Other than Florida

At ancient common law the writ of error was the only means to challenge a lower court decision. That writ, however, could only be used to challenge errors that appeared on the record. There was no means to challenge matters not included in the record, such as evidence rulings and jury instructions.[47]

40.

> The entries on the rolls were formerly made, in the King's Bench, by the clerks of the chief clerk; as, in the Common Pleas, they were made by the clerks of the prothonotaries, who were called *entering* clerks: but they are now made in both courts by the attorneys . . . .

2 W. Tidd, *supra* note 33, at 729 (footnote omitted).

41. T. Plucknett, A Concise History of the Common Law 358 (2d ed. 1936).

42. *Id.* at 358-59.

43. *See* note 40 *supra.*

44. 2 W. Tidd, *supra* note 33, at 734.

45. *Id.* at 724-26.

46. *Id.* at 1090.

47. 1 W. Holdsworth, *supra* note 22, at 214-16.

> To relieve this, the Statute of Westminster 2, 13 Edw. I, ch. 31 (1 Eng. Stat. at L. 99; Bac. Abr., title "Bill of Exceptions"), was enacted more than six hundred years ago, providing that one who alleged an exception should write it out and require the justices to put their seals to it, and that if upon review "the exception be not found in the roll, and the plaintiff show the exception written, with the seal of the justice put to, the justice shall be commanded that he appear, etc., and if he cannot deny his seal they shall proceed to judgment according to the exception," etc.[48]

The bill of exceptions was thus a statutory means of bringing "into the record the facts and the decision of the court, where it would not otherwise appear therein."[49]

Appellate courts would not consider matters that were misclassified. "Where matter which should be contained in the record proper is set out only in the bill of exceptions, error assigned thereon will not be considered. Matters not a part of the record proper must be evidenced by the bill of exceptions."[50] It was thus crucial to distinguish matters that were part of the record proper from those matters that became part of the record only through the bill of exceptions.

Legislatures eventually adopted statutes that required courts to consider misclassified matter.[51] There are, therefore, few recent cases discussing the record proper. Older cases, however, contain extensive discussion of the term.

A. Federal Decisions

In *Clune v. United States*,[52] the Supreme Court recognized that "[f]rom time immemorial . . . [the record] has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."[53] The Court did not limit itself to the actual rolls of the English courts; it added: "There are, for instance, in some States statutes directing that all instructions must be reduced to writing, marked by the judge 'refused' or 'given,' and attested by his signature, and that when so attested and filed in the clerk's office they become a part of the record."[54] Clearly these instructions would not have been

48. Nalle v. Oyster, 230 U.S. 165, 176 (1913).
49. Barnes v. Scott, 11 So. 48, 49 (Fla. 1892).
50. 1 C. CRANDELL, PRACTICE IN ACTIONS AT LAW § 495, at 748 (1928).
51. *See, e.g.*, Fla. Laws 1927, ch. 12019, § 3 (repealed 1971).
52. 159 U.S. 590 (1895).
53. *Id.* at 593.
54. *Id.* at 593-94.

part of the records of English courts. The Supreme Court's use of jury instructions as an example implies that the Court was willing to expand its definition of the record proper.

Federal circuit courts have not adopted a consistently broad or narrow approach to the record proper. In *Lewis v. United States*,[55] the Tenth Circuit Court of Appeals held that "[t]he record proper in a criminal case consists of the pleadings, process, verdict and judgment. It does not embrace interlocutory motions and rulings thereon, especially where the motion is supported by affidavits or evidence."[56] At common law it was clear that evidence and rulings on evidence were not reviewable by a writ of certiorari.[57] The *Lewis* court extended the scope of this exclusion from motions based on evidence or affidavits to *all* interlocutory motions and rulings thereon. The court was following its previous ruling in *Addis v. United States*,[58] in which it had stated: "A statement in the transcript of the record that certain instructions were given, or requested and refused, or that a motion for a directed verdict was made and denied, over the certificate of the clerk, avails nothing."[59] But the *Addis* court had relied on the fact that the part of the record at issue was certified by the clerk of the court and not by the judge. The *Lewis* court swept aside this distinction and limited the record proper to "the pleadings, process, verdict and judgment."[60]

In *Montgomery v. Erie R.R.*,[61] the Third Circuit realized that this definition was too restrictive. While it recognized the general definition of record proper, it added that "[t]he strict record or record proper in the case at bar must be deemed to include the warrant for satisfaction of the judgment."[62] This is in keeping with the contents of the English rolls of court. Such warrants would have been entered on a scire facias roll and hence would have been considered part of the technical record.[63]

B. State Decisions

State courts have generally taken a narrow view of what constitutes the record proper. For example, although an Oklahoma statute pro-

55. 92 F.2d 952 (10th Cir. 1937).
56. *Id.* at 953.
57. *See* notes 77-79 *infra*.
58. 62 F.2d 329 (10th Cir. 1932).
59. *Id.* at 330.
60. 92 F.2d at 953.
61. 97 F.2d 289 (3d Cir. 1938).
62. *Id.* at 290.
63. *See* note 46 and accompanying text *supra*.

vided that "[t]he record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court . . . ,"[64] the Supreme Court of Oklahoma in *Tribal Development Co. v. White Brothers*[65] held that motions and orders thereon were not part of the record proper.[66]

Fifty-four years later, however, the Oklahoma court in *Short v. Hale*[67] abandoned the distinction, implicit in *White Brothers,* between the record proper and the statutorily defined "record." The *Hale* court stated that the record proper "comprises all instruments and pleadings which by force of 12 O.S. 1961, § 704, form a part of the record proper."[68] Since this statute is substantially the same as the statute construed by the *White Brothers* court, the court impliedly overruled *White Brothers* and adopted a broad interpretation of record proper.

At the same time, the *Short* court stated: "The term 'record' or 'record proper,' as used in reference to a transcript of the record, is synonymous with the term 'judgment roll' at common law."[69] This is clearly erroneous. Only the legal issues and the judgment were entered on the judgment roll.[70] No court has limited the record proper to these two items, and the Supreme Court of Oklahoma presumably did not wish to do so. The court's confusion illustrates the uncertainty that has surrounded the term "record proper."

Absent a statute some state courts have limited the concept of the record proper. In *State v. Copeland,*[71] the Supreme Court of North Carolina held that "the record proper in criminal cases consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment."[72] Other courts have limited the record proper to these five items.[73]

More important are cases which explain what is *not* part of the record proper. In *DeLisle v. Spitler,*[74] the Supreme Court of Missouri held that " '[a]n abandoned petition is not part of the record prop-

64. Compiled Laws of Okla. 1909, § 5939.
65. 114 P. 736 (Okla. 1911).
66. *Id., citing* Menten v. Shuttee, 67 P. 478 (Okla. 1902). *See* cases cited 114 P. at 737.
67. 400 P.2d 816 (Okla. 1965).
68. *Id.* at 819.
69. *Id.*
70. *See* notes 44, 46 and accompanying text *supra.*
71. 199 S.E.2d 448 (N.C. 1973).
72. *Id.* at 450.
73. *See, e.g., In re* Arnold's Estate, 176 S.W.2d 837 (Mo. Ct. App. 1944).
74. 162 S.W.2d 854 (Mo. 1942).

er . . . .' "[75] The court had previously stated that "orders and decisions of the court in the progress of the trial" were not part of the record proper.[76] These two decisions are in keeping with the history of the English rolls of court.[77]

In *Haun v. State*,[78] an Alabama court of appeals held that " '[a]n appeal bond is no part of the record proper . . . . ' "[79] The court relied on a narrow definition of record proper and did not take notice of what would have been recorded in the English court rolls. At common law, a bond would have been recorded on the recognizance roll and hence would have been part of the technical record.[80]

IV. The Record Proper in Florida

In *Foley v. Weaver Drugs, Inc.*,[81] the supreme court modified the *Lake* rule that a per curiam decision by a district court of appeal could not be reviewed by conflict certiorari. The *Foley* court held that "this court may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal."[82] The court defined record proper without citing precedent as "the written record of the proceedings in the court under review except the report of the testimony."[83] This broad definition has proved unworkable because it is unclear what the supreme court will consider part of "the written record of the proceedings in the court under review." In cases since *Foley* the court has created confusion by its ad hoc determination of what constitutes the record proper.[84] The term was not new in the jurisprudence of Florida, and the court could have stated more precisely what is included in the record proper.

*A. Pre-*Foley *Record Proper*

Prior to *Foley*, Florida cases drew a sharp distinction between matters of record and matters *in pais*. Matters of record were included

75. *Id.* at 885, *quoting* Reinker v. Wesche, 117 S.W.2d 334, 335 (Mo. 1938).
76. Spotts v. Spotts, 55 S.W.2d 977, 980 (Mo. 1932).
77. *See* notes 33-46 and accompanying text *supra*.
78. 217 So. 2d 249 (Ala. Ct. App. 1968).
79. *Id.* at 251, *citing* Burton v. State, 109 So. 2d 311 (Ala. Ct. App. 1959).
80. *See* notes 35-37 and accompanying text *supra*.
81. 177 So. 2d 221 (Fla. 1965).
82. *Id.* at 225.
83. *Id.* at 223.
84. *See* note 2 and accompanying text *supra;* notes 96-114 and accompanying text *infra*.

by definition in the record proper, while matters *in pais* were not. A matter *in pais* is a "[m]atter of fact that is not in writing; thus distinguished from matter in deed and matter of record; matter that must be proved by parol evidence."[85]

The matter of record—matter of fact dichotomy makes it possible to determine what should be included in the term "record proper"; those portions of the record that are not matters of fact are part of the record proper. While some might consider this a backdoor approach to defining a term, it is at least workable and reasonably precise when applied in the context of existing case law. This section briefly examines case law in troublesome areas—affidavits, motions, and orders thereon—to illustrate the approach Florida courts have traditionally taken in defining the record proper.

Prior to the enactment of curative statutes, it was necessary for courts to determine whether matters were properly includable in the record proper or in the bill of exceptions.[86] To make those determinations, courts divided motions into those based on law and those based on facts. For instance:

> The motion in arrest of judgment [used to contest legal insufficiencies apparent on the face of the judgments or pleadings[87]] is a matter of record. The motion for a new trial [used to seek reexamination of a factual issue following the verdict or decision[88]] is a matter in pais. One should be evidenced by the record proper and the other by the bill of exceptions.[89]

Similarly, motions for a change of venue were considered to be matters *in pais* when based on factual allegations concerning the state of mind of the community from which the jury would be drawn. Even after curative statutes granted appellate courts power to consider factual matters not included in a bill of exceptions, the courts continue to characterize change of venue motions as matters *in pais.*

> It is contended that the motion for change of venue, *being matter in pais,* was not a part of the record proper and and cannot be considered unless embraced in a properly authenticated bill of exceptions.

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85. BLACK'S LAW DICTIONARY 1130 (4th ed. 1968).

86. *See* notes 47-50 and accompanying text *supra.*

87. *See* Peavy-Wilson Lumber Co. v. Baker, 4 So. 2d 333, 334, 336 (Fla. 1941).

88. *See* Seaboard Air Line Ry. v. Anderson, 73 So. 837, 837-38 (Fla. 1917).

89. Holstun v. Embry, 169 So. 400, 404 (Fla. 1936). Similarly, an amendment to a motion for a new trial is not part of the record proper. Peavy-Wilson Lumber Co. v. Baker, 4 So. 2d 333, 334 (Fla. 1941).

> Such was the common-law rule and still appears to be the rule in some jurisdictions. . . . If this rule of the common law was ever in force in this state, it was modified by [Fla. Laws 1927, ch. 12019, § 3] . . . .[90]

This distinction between matters of record and matters of fact was also drawn when considering affidavits. If an affidavit took the place of a pleading, it was considered part of the record proper.

> The proceeding by attachment is a summary one, strictly statutory, and was a stranger to the common-law method of practice and procedure. The statutory affidavit and bond upon which the writ issues, and, when contested by the defendant, the latter's affidavit traversing the initiatory affidavit of the plaintiff, are jurisdictional, and constitute the statutory pleadings in the cause. The issue of fact thus raised as to whether the writ is to be sustained or dissolved is formed, tried, and determined exclusively upon them. When filed, they become matters of record, and stand as and for the pleadings in the cause, and, when brought into question in an appellate court, constitute the record proper of the case, and have no place in a bill of exception, whose sole office is to evidence to an appellate court matters purely in pais.[91]

On the other hand, evidentiary affidavits were not considered part of the record proper. In an appeal of a condemnation award setting just compensation, the defendant attempted to show by affidavit that the jury was not impartial. The supreme court disallowed this attempt, saying:

> The second of the reasons urged here for reversal of the judgment, viz. that it was shown by the defendant below on his motion for vacation of the award of the viewers, by uncontradicted affidavits, that the viewers were not fair and impartial, we cannot consider, even if it were not already effectually disposed of in what has been already said. If there were any such affidavits presented in support of such motion, the only way that they could be so evidenced to this court as that we could recognize or consider them was to have preserved them in a bill of exceptions duly authenticated by the

90. McMichael v. Harris, 174 So. 323, 324 (Fla. 1937) (citations omitted; emphasis added).

91. Merchants' Nat'l Bank v. Grunthal, 20 So. 809, 811 (Fla. 1896).

The writ of attachment is also a part of the record. Motions addressed to an attachment affidavit and to a writ of attachment which are a part of the pleadings should, with the orders thereon, be evidenced to the appellate court by the record proper and not by bill of exceptions.

C.A. Williams Co. v. Roberts & Geiger, 86 So. 433 (Fla. 1920).

> judge below. There is no bill of exceptions in the record here, and, though the alleged affidavits are recited and copied into the record by the clerk below, they form no part of the record proper in the cause; and the ipse dixit of the clerk below in reference thereto is no evidence to an appellate court of their existence or use in the court below.[92]

Affidavits as to matters occurring or introduced at trial were also excluded from the record proper. In *Maddox v. Barr*,[93] a civil habeas corpus proceeding, a certified copy of the decree of divorce bore an "indorsement of the circuit judge that no such decree was submitted to him on the hearing, and that the attorney for petitioner stated he did not have the decree . . . ."[94] The supreme court held that it could not consider affidavits of the petitioner's attorney or the clerk of the court below that had been copied into the record, which affidavits were presumably in conflict with the trial judge's indorsement, because they were not part of the record proper and there was no bill of exceptions.[95]

Prior to *Foley* the supreme court drew a sharp distinction between motions and affidavits based on questions of fact and those based on questions of law. This distinction might have helped the *Foley* court formulate a definition of the record proper. The *Foley* court, however, ignored the old cases and adopted a definition that has produced considerable uncertainty.

*B. Post-*Foley *Record Proper*

The post-*Foley* cases adopt an extremely broad definition of the record proper. The supreme court has recognized the traditional elements of the record proper, but it has not distinguished between matters of record and matters of fact. In *White v. Pinellas County*,[96] allegations in the complaint were held to be part of the record proper.[97] Certain types of motions also have been considered part of the record proper: motions to sever,[98] motions to dismiss,[99] and motions

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92. Heermans v. Jacksonville, St. A. & I.R. Ry., 23 So. 587, 589 (Fla. 1898).
93. 38 So. 766 (Fla. 1905).
94. *Id.* at 767.
95. *Id.*
96. 185 So. 2d 468 (Fla. 1966).
97. *Id.* at 471. *See also* Commerce Nat'l Bank v. Safeco Ins. Co., 284 So. 2d 205 (Fla. 1973); Balbontin v. Porias, 215 So. 2d 732 (Fla. 1968); Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So. 2d 8 (Fla. 1967).
98. Godshall v. Unigard Ins. Co., 255 So. 2d 680 (Fla. 1971).
99. Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So. 2d 8, 10 (Fla. 1967).

to transfer for improper venue.[100] In *Andersen v. State*,[101] a law enforcement agent's affidavit that provided the basis for a search warrant was considered part of the record proper.[102] Jury instructions also have been examined by the court to vest conflict certiorari jurisdiction in itself.[103]

The definition in *Foley* of the record proper expressly excluded "the report of the testimony."[104] Nonetheless, where testimony "appears in excerpted form within the complaint, orders of the court, the appellate decisions, [and other parts of the record proper],"[105] it will be considered part of the record proper. The supreme court, however, was not content with these self-imposed restrictions concerning what testimony it could consider. In *Pauline v. Borer*,[106] "findings by the examiner, final order of the Real Estate Commission, *evidentiary documents* and the opinion of the District Court of Appeal"[107] were held to be part of the record proper. In *Baycol, Inc. v. Downtown Development Authority*,[108] the supreme court used "a portion of the deposition testimony of the executive director of respondent" to establish conflict.[109] Clearly this violates even the *Foley* definition of the record proper.[110]

In *AB CTC v. Morejon*,[111] "the majority . . . expanded the definition of 'record proper' to include affidavits appended to trial motions and trial transcripts from a different proceeding which are exhibits in briefs."[112] "The trial court [had] permitted respondent to incorporate into [the] record [of *AB CTC*] the record of a prior law suit including

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100. *Id.*

101. 274 So. 2d 228 (Fla. 1973).

102. *Id.* at 229.

103. Short v. Grossman, 245 So. 2d 217 (Fla. 1971); Gibson v. Maloney, 231 So. 2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970); Sinclair Refining Co. v. Butler, 190 So. 2d 313 (Fla. 1966).

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

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

106. 274 So. 2d 1 (Fla. 1973).

107. *Id.* at 2 (emphasis added).

In Sinclair Refining Co. v. Butler, 190 So. 2d 313 (Fla. 1966), the supreme court held that it could examine the record proper to ascertain conflict even when the district court of appeal wrote a decision. The district court there "did not discuss the point of law involved and simply held, in general terms, that the trial court did not commit 'harmful error' in its ruling on the matter in question." *Id.* at 315. Since the jury charge in question was assigned as error and the district court affirmed without discussion of this point, the supreme court looked at the record proper to ascertain whether conflict existed.

108. 315 So. 2d 451 (Fla. 1975).

109. *Id.* at 459 (Overton, J., dissenting).

110. *See id;* note 114 *infra.*

111. No. 45,903 (Fla. July 24, 1975).

112. *Id.* at 9 n.7 (England, J., dissenting).

affidavits, depositions, and trial testimony."[113] The supreme court looked to these items in determining whether it had conflict certiorari jurisdiction. It is unclear why the mere fact that the trial court allowed plantiff to incorporate into the record portions of a previous trial's transcript and evidence should make these matters part of the record proper. It would seem that the supreme court was not distinguishing the record from the record proper.

The post-*Foley* cases lead to one conclusion: where the supreme court is interested in the merits of the controversy before it, it will examine the *entire* record, not merely the record proper, in determining whether it has conflict certiorari jurisdiction. A change in this practice, however, may be forthcoming.[114]

V. CONCLUSION

From a historical viewpoint, it is clear that the supreme court has strayed far afield when reviewing the record proper. One approach to resolving the resulting confusion is to cease using the term "record proper" to indicate the boundaries of the court's power to review for conflict district court decisions without opinion. The court might, for instance, declare that it stands ready to consider the entire record below in determining whether it has conflict jurisdiction. This position, however, is inimical to the notion that district courts are generally final courts of appeal.

Alternatively, the court could replace the troublesome term with a comprehensive list of specific matters to be considered in reviewing the record below. If the court abandoned its de facto practice of looking

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113. *Id.* at 2.

114. Justice Overton's dissenting opinion in *Baycol* noted:

> The term "record proper" has a restrictive meaning. . . . Generally, exhibits have never been considered as part of the record proper except those exhibits that are part of the initial pleading in the cause. . . .
>
> . . . Clearly, exhibits and depositions are not "record proper."
>
> . . . This Court previously stated that we are not merely a "'court of selected errors' whereby the Justices of this Court could whimsically select cases for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of this Court." . . . The decisions of the District Courts are final except under situations where review by the Supreme Court is clearly authorized by the Constitution.

315 So. 2d at 459-60 (citations omitted). Justice Overton suggested that he is disposed to reconsider *Foley* if that case allows the supreme court "to take jurisdiction in [a] cause [such as *Baycol*]." *Id.* at 16.

In *AB CTC*, Justice England in dissent was more forceful: "[T]he time for re-evaluation of *Foley* is at hand. I am ready to do that now." No. 45, 903 at 9. Justice Overton concurred in Justice England's dissent.

at the entire record whenever it so desires, it would be better able to manage its docket. Moreover, practitioners would know precisely what the court would consider when reviewing a petition for conflict certiorari where the district court's decision is without opinion. Unfortunately, this approach lacks the flexibility necessary to insure that future cases in conflict with prior district or supreme court decisions would be reviewable by the supreme court.

A third means of escaping the difficulties created by the term "record proper" is to readopt the position taken in *Lake v. Lake*.[115] That position, however, would effectively eliminate certiorari review of district court per curiam decisions without opinion. It would thus keep the court from fulfilling its

> duty, as the "supervisory body in the judicial system" of this state, Ansin v. Thurston, Fla. 1958, 101 So. 2d 808, 810, . . . to maintain uniformity and harmony in the decisions of our appellate courts, and to resolve the conflict created by a decision which is, "out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents." Kyle v. Kyle, Fla. 1962, 139 So. 2d 885, 887.[116]

The above approaches are unsatisfactory. Each fails to strike an adequate balance between competing policy considerations: the fact that district courts of appeal were created as final courts of appeal, and the need for uniformity and harmony in the law of this state. That balance cannot be achieved unless the court retreats from its present practice.

The basic *Foley* approach—considering only the record proper in determining whether district court decisions without opinion conflict with other decisions—might produce an acceptable balance. The difficulty with *Foley* is not its reliance on the record proper, but its expansive definition of the term—"the written record of the proceedings in the court under review except the report of the testimony."[117] The court should replace that definition with one that reduces the number of matters subject to review while increasing predictability and retaining a measure of flexibility.

Historically, a sharp line has been drawn between matters of record and matters *in pais* when determining the content of the record proper. The court should readopt this theoretical framework to help

115. *See* notes 7-9 and accompanying text *supra*.
116. Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 224 (Fla. 1965).
117. *Id.* at 223.

it decide what is in the record proper. All matters of law and no matters of evidence should be considered part of the record proper.

This is not to suggest that the court should blindly follow old case law in classifying portions of the total record. The old Florida cases were not decided in the context of conflict certiorari, and today's court might well reach different conclusions as to what items should be regarded as matters of law and what items should be treated as matters of evidence. Nonetheless, existing case law could be expected to provide persuasive guidance to courts and attorneys, and thereby foster predictability.

This approach offers several advantages other than increased predictability. First, it allows the supreme court to exercise a measure of supervision over the way Florida law is applied in summary decisions of district courts. Some control of those decisions is needed to maintain uniformity and harmony in Florida law. Secondly, this approach restricts the current de facto jurisdiction of the supreme court, and thereby emphasizes that district courts are final courts of appeal in most situations. Finally, if the court reasserts the distinction between matters of record and matters *in pais,* a distinction well grounded in this state's jurisprudence, it would retain a measure of flexibility. Although the supreme court would deny itself the power to review matters *in pais,* it would ultimately define the modern content of that term. It might do so with an eye to expanding or restricting its conflict certiorari jurisdiction. Hopefully it would approach this secondary definitional problem by asking whether particular types of motions, affidavits, orders, or other documents traditionally regarded as matters *in pais* are so likely to raise serious *legal* issues as to require the court to reclassify them as matters of record, and thereby subject them to supreme court examination.

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