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Per Curiam Affirmances Without Opinion: A Proper Basis for Conflict Jurisdiction?

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NOTE

PER CURIAM AFFIRMANCES WITHOUT OPINION: A PROPER BASIS FOR CONFLICT JURISDICTION?

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Article V, section 3(b)(3) of the Florida Constitution grants the supreme court jurisdiction to review any decision of a district court of appeal that is in direct conflict with a decision of any other district court of appeal or of the supreme court on the same question of law. This type of jurisdiction is commonly referred to as conflict jurisdiction.

For a period of time after the creation of the supreme court's conflict jurisdiction per curiam affirmances (PCA's) without opinion[1] were not considered reviewable absent exceptional circumstances as they neither announce a point of law nor have sufficient precedential value to raise the constitutionally required direct conflict.[2] In 1965, however, the issue was reconsidered in *Foley v. Weaver Drugs, Inc.*[3] The court reversed its position and held that PCA's without opinion have the same ability to raise conflict as decisions with full opinions and were thus constitutionally reviewable where an examination of the "record proper" disclosed a conflict.[4] Notwithstanding the *Foley* decision, there has been continued support for a categorical rule denying review of PCA's without opinion.[5] The proponents of such a rule, however,

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1. Because of the workload faced by Florida's appellate courts it is customary not to write opinions where to do so would only serve to satisfy the parties that justice has been done, thus adding needlessly to an already excessive volume of opinions. Accordingly, opinions are generally dispensed with in cases which turn on facts to which established rules of law are applicable or where a full or adequate opinion has been supplied by the trial judge. Foley v. Weaver Drugs, Inc., 172 So. 2d 907, 908 n.2 (Fla. 3d Dist. Ct. App. 1965), *cert. dismissed,* 177 So. 2d 221 (Fla. 1965). A perhaps invalid assumption, but one which nevertheless underlies the review of PCA's without opinion, is that the district courts use PCA's to perpetrate injustice which cannot be explained away in an opinion. Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs., 347 So. 2d 408, 409 (Fla. 1977) (England, J., concurring).

2. Lake v. Lake, 103 So. 2d 639 (Fla. 1958). "Exceptional circumstances" were found in one case. The exceptional circumstance was that the decision under review included an opinion while the decision it allegedly conflicted with was a PCA without opinion. Fidelity Constr. Co. v. Arthur J. Collins & Son, Inc., 130 So. 2d 612 (Fla. 1961).

3. 177 So. 2d 221 (Fla. 1965). The court was sharply divided. Justice Roberts wrote the opinion of the court with Justices Caldwell and Ervin concurring and Chief Justice Drew concurring specially. Justice Thornal wrote a lengthy dissent in which Justices Thomas and O'Connell concurred.

4. *Id.* at 225. For a complete discussion of the meaning of and problems created by the court's use of the term "record proper" see Note, *Conflict Certiorari Jurisdiction of the Supreme Court of Florida: The "Record Proper,"* 3 FLA. ST. U.L. REV. 409 (1975).

5. *See* Gibson v. Maloney, 231 So. 2d 823, 826 (Fla. 1970) (Thornal, J., dissenting). *See*

have not since commanded a majority of the court.[6]

This note will review the arguments supporting the continued resistance to the *Foley* decision and will analyze whether the Florida Constitution permits the supreme court to review PCA's without opinion on conflict certiorari.

The constitutional article establishing the supreme court's conflict jurisdiction and creating the district courts of appeal was originally drafted by the Judicial Council of Florida.[7] The Judicial Council was created by the legislature in 1954 to meet the increasing judicial demands of a rapidly growing state.[8] The Council was charged with the duty of studying Florida's entire judicial system and recommending improvements. Its goal was to make the administration of justice more certain, more expedient, and less costly.[9] The Council resolved to undertake a study of, among other things, the appellate courts and the procedure necessary to relieve the severe congestion in the supreme court which was one of the most pressing problems of the day.[10] At this early date the idea of courts of appeal entirely separate from the supreme court was born.

In May of 1954 the Council and the committee of the Florida bar on judicial administration met and together agreed that it would be necessary to propose a complete revision of article V of the constitution. Under the Council's plan several district courts of appeal

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also Justice O'Connell's special concurring opinion in Home Dev. Co. v. Bursani, 178 So. 2d 113, 119 (Fla. 1965) in which he stated:

> It has been and is my personal view that this Court does not have jurisdiction to review, because of conflict, a decision of a district court of appeal which affirms a judgment of a trial court per curiam without opinion. I have consistently voiced and voted this view in the cases decided by this Court, relaxing it only to the point of agreeing to request a district court to write an opinion where the circumstances warranted. Now, however, a majority of this Court in Foley v. Weaver Drugs, Inc., Fla. 1965, 168 So. 2d 749, have held that this Court does have jurisdiction to review such a per curiam decision without opinion under the conditions detailed therein. I am bound by this decision of a majority of this Court and compelled to follow it.

6. *See, e.g.*, Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs., 347 So. 2d 408 (Fla. 1977); Courtelis v. Lewis, 348 So. 2d 1147 (Fla. 1976); Williams v. State, 340 So. 2d 113 (Fla. 1976); Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976); Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Commerce Nat'l Bank v. Safeco Ins. Co., 284 So. 2d 205 (Fla. 1973); Escobar v. Bill Currie Ford, Inc., 247 So. 2d 311 (Fla. 1971); Home Dev. Co. v. Bursani, 178 So. 2d 113 (Fla. 1965).

7. JUDICIAL COUNCIL OF FLA., SECOND ANNUAL REPORT 3 (1955).

8. Ch. 28062, 1953 Fla. Laws 216 (codified at FLA. STAT. § 43.15 (1977)).

9. JUDICIAL COUNCIL OF FLA., FIRST ANNUAL REPORT 2 (1954).

10. JUDICIAL COUNCIL OF FLA., SECOND ANNUAL REPORT 2 (1955). The supreme court had more than 1200 cases in 1955, almost four times the national average. See JUDICIAL COUNCIL OF FLA., THIRD ANNUAL REPORT App., at 6, 7 (1956).

The Council also resolved to study a nonpartisan plan for the selection and tenure of judges, the organization of and procedure in the trial courts, the most effective use of jurors and other laymen, and improvement of administrative procedures within the judicial system. JUDICIAL COUNCIL OF FLA., FIRST ANNUAL REPORT 11 (1954).

would hear cases at various locations in the state, thereby decreasing the supreme court's workload. Litigants would also receive the benefit of greater accessibility since appeals would be heard closer to their source. To avoid any possibility that the creation of these courts would simply afford an additional appeal, the Council thought it wise to clearly define and restrict the jurisdiction of the supreme court and for that purpose drafted an amendment to article V.[11]

A final draft of the proposed amendment to article V was prepared and sent to the legislature.[12] Although amending the Council's draft several times, the legislature retained untouched the sections creating the district courts of appeal and defining the organization and jurisdiction of the supreme court.[13] The amended proposal passed almost unanimously in both houses of the legislature.[14]

The proposed amendment was placed on the ballot of the general election held on November 6, 1956. Not only did the amendment receive the largest vote ever, but it also was adopted by the greatest percentage ever given a constitutional amendment in the state's history.[15]

Soon after the ratification of the new amendment, the supreme court rendered a series of unanimous decisions interpreting article V and defining and circumscribing the supreme court's new conflict jurisdiction.[16] In so doing, it echoed and embellished the expressed objectives of the Judicial Council. The principles established by those early decisions are central to resolving the question whether

11. JUDICIAL COUNCIL OF FLA., SECOND ANNUAL REPORT 3 (1955).

12. The final draft dealt with much more than just the creation of the district courts of appeal and the restriction of the supreme court's jurisdiction. The proposed amendment provided for (1) centralized administrative authority in the supreme court, (2) control of the practice and procedure in all courts by the supreme court, (3) regulation of admissions to the bar and discipline of attorneys by the supreme court, and (4) nonpartisan selection of supreme court justices, and district court and circuit court judges. *Id.* at 8.

13. *Compare* FLA. H.R. JOUR. 388 (Reg. Sess. 1955) *with* FLA. H.R. JOUR. 1162 (Reg. Sess. 1955) *and* FLA. H.R. JOUR. 1551 (Reg. Sess. 1955). For an excellent comparison between the Judicial Council's recommendations and the amendment as finally passed, *see* JUDICIAL COUNCIL OF FLA., SECOND ANNUAL REPORT App. 1, at 1-31.

14. The vote on the final proposed amendment was 71 in favor, 0 against in the house; 33 in favor, 2 against in the senate. FLA. H.R. JOUR. 1551 (Reg. Sess. 1955); FLA. S. JOUR. 1054 (Reg. Sess. 1955).

It was the consensus of the Judicial Council that the changes made by the legislature did not affect the council's general plan.

15. JUDICIAL COUNCIL OF FLA., FOURTH ANNUAL REPORT 3, and at Exhibit 3 (1957).

16. South Fla. Hosp. Corp. v. McCrea, 118 So. 2d 25 (Fla. 1960); Board of Comm'rs v. Tallahassee Bank & Trust Co., 116 So. 2d 762 (Fla. 1959); Karlin v. City of Miami Beach, 113 So. 2d 551 (Fla. 1959); Seaboard Air Line R.R. v. Branham, 104 So. 2d 356 (Fla. 1958); Lake v. Lake, 103 So. 2d 639 (Fla. 1958); Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Sinnamon v. Fowlkes, 101 So. 2d 375 (Fla. 1958); Diamond Berk Ins. Agency v. Goldstein, 100 So. 2d 420 (Fla. 1958).

per curiam affirmances without opinion are constitutionally reviewable under conflict jurisdicton and are recited below.

The supreme court was not granted its conflict jurisdiction in order to provide petitioners a second appeal on the merits; the district courts of appeal were clearly intended to have final rather than intermediate appellate jurisdiction.[17] Rather, the purpose of this grant of jurisdiction was to harmonize and stabilize the body of decisional law in Florida by providing for review of decisions forming patently irreconcilable precedents.[18]

In determining whether there exists the requisite direct conflict among the decisions on the same point of law, the supreme court should be concerned only with decisions as precedent not with the adjudication of the rights of the particular litigants.[19] It must appear that the court of appeal has made a pronouncement on a point of law which the bench and bar and future litigants may fairly regard as an authoritative precedent.[20]

The concern with precedential value follows not only from the harmonizing purpose behind the supreme court's conflict jurisdiction and the finality of the district courts' appellate jurisdiction, but also from the construction of the language of article V itself. The pertinent language, as originally adopted, read:

> The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . .[21]

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

> [T]he *powers* and *jurisdiction* of the Supreme Court were so defined and confined that there would be no danger of the district courts of appeal becoming way stations on the road to the Supreme Court.
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> *They are and were meant to be courts of final appellate jurisdiction.* . . . If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Id. at 641-42 (emphasis in original) (citations omitted).

18. *See* South Fla. Hosp. Corp. v. McCrea, 118 So. 2d 25 (Fla. 1960); N & L Auto Parts Co. v. Doman, 117 So. 2d 410 (Fla. 1960); Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959).

19. N & L Auto Parts Co. v. Doman, 117 So. 2d 410, 412 (Fla. 1960); Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). The conflict must be real and embarrassing. *Id.* at 811. It must be such that if the two decisions were rendered by the same court the latter would have the effect of overruling the former. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962).

20. South Fla. Hosp. Corp. v. McCrea, 118 So. 2d 25, 27 (Fla. 1960).

21. Fla. CS for HJR 810 (1955), adopted in 1956 as FLA. CONST. art. V, § 4(2) (current

The article embodies the idea of a supreme court which functions as a supervisory body in the judicial system of the state, exercising appellate power in certain specified areas essential to the settlement of issues of public importance.[22] Conflict jurisdiction is one of three bases of certiorari jurisdiction found in the paragraph granting the supreme court jurisdiction to review decisions of district courts of appeal. All three deal with matters of public concern beyond the interests of the immediate litigants.

A decision affecting all constitutional officers of like capacity would generally be of great concern to the public. For example, a decision relating to all superintendents of public instruction would have a significant effect on the entire school system. Similarly, a decision concerning all taxing officials would have a substantial influence upon public finances.[23] A decision certified to be of great public interest is, of course, of public concern. Thus, the interpretation that the conflict jurisdiction be concerned with decisions as precedent upon which the general public might authoritatively rely as opposed to the rights of individual litigants is consistent with the public character of the other bases of jurisdiction granted in that sentence.[24]

The constitutional grant of jurisdiction further requires that the two decisions be in direct conflict on the same point of law. In the early cases the term "decisions" was construed to mean both the judgment and the opinion of the district court.[25] This construction is necessary because the primary question in determining jurisdiction is whether the point or points of law announced by the district court's decision under review are in direct conflict with points of law announced by other district courts or by the supreme court. If there is no point of law announced, there can be no conflict. The usual method by which a district court announces a rule or point of law is not by the judgment but by the opinion that accompanies the judgment. It is in the opinion that the legal principles are expressed, defined, and discussed. And it is from the opinions that the "case law" is derived and relied upon as controlling precedent.[26] The court

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version at FLA. CONST. art. V, § 3(b)(3)).

22. Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958). The article remains substantially unchanged today. The word "any" was substituted for the word "another" in the phrase "conflict with a decision of another district court of appeal . . . ." to permit review of conflicts occurring within a single district. Also the word "question" was substituted for the word "point" in the phrase "point of law."

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

24. *Id.*

25. South Fla. Hosp. Corp. v. McCrea, 118 So. 2d 25 (Fla. 1960); N & L Auto Parts Co. v. Doman, 117 So. 2d 410 (Fla. 1960); Seaboard Air Line R.R. v. Branham, 104 So. 2d 356, 358 (Fla. 1958).

26. South Fla. Hosp. Corp. v. McCrea, 118 So. 2d 25, 27 (Fla. 1960).

delineated the following procedure to determine whether the requisite conflict exists: the court will examine the opinion upon which the district court's decision is based, and if the opinion on its face shows the probable existence of a direct conflict between the two decisions on the same point of law, the writ of certiorari may issue.[27]

The court in *Lake v. Lake,* applying these principles, held that review of PCA's without opinion was constitutionally prohibited absent exceptional circumstances.[28] The *Lake* court reasoned that the words "per curiam affirmed," without further elucidation or elaboration, constituted a decision without an opinion that did not announce to the public any principle of law.[29] Since these words are not a decision in the constitutional sense, and do not announce a principle of law, they cannot be regarded as authoritative precedent upon which future litigants may fairly rely. Neither can they provide the real and embarrassing conflict or confusion and disharmony in the decisional law of the state necessary to invoke the supreme court's jurisdiction.

The legal significance which attaches to the phrase "per curiam affirmed" is merely the adjudication of the rights of particular litigants in a particular case. As announced many times by the court, the district courts of appeal are courts of final appellate jurisdiction, especially in determining the rights of particular litigants. Unfortunately, by suggesting that there might be exceptional cases where a decision without opinion might be reviewed, the court in *Lake* left the door open to the subsequent enlargement of its jurisdiction.[30]

The first case to come through the door was *Rosenthal v. Scott.*[31] In *Scott,* a majority of the district court had reversed a circuit court in a per curiam decision without opinion.[32] However, a concurring opinion was found to contain adequate factual background for the supreme court to entertain the petition for certiorari.[33] In order to resolve the jurisdictional issue, the court remanded the case to the district court requesting that it adopt an opinion setting forth the theory and reasoning in support of its reversal.[34] This practice of reviewing decisions without opinions by returning them to the dis-

27. Seaboard Air Line R.R. v. Branham, 104 So. 2d 356, 358 (Fla. 1958).

28. 103 So. 2d 639 (Fla. 1958).

29. *Id.* at 643.

30. Note, *The Erosion of Final Jurisdiction in Florida's District Courts of Appeal,* 21 U. FLA. L. REV. 375, 385 (1969).

31. 131 So. 2d 480 (Fla. 1961).

32. Scott v. Rosenthal, 118 So. 2d 555 (Fla. 3d Dist. Ct. App. 1960).

For purposes of conflict jurisdiction there was no opinion of the court. While it appears that Judge Barns is writing for the court, a careful examination shows that neither of the other judges agreed with his opinion but rather concurred in the judgment only. 131 So. 2d 481.

33. 131 So. 2d 481.

34. *Id.* at 482.

trict courts to issue opinions continued until the decision in *Foley*.

Rose Foley and her husband brought an action against the manufacturer and retail seller of a bottle of reducing pills when the bottle broke and lacerated Mrs. Foley's wrist. The action was founded on negligence and breach of implied warranty. Defendant Weaver Drugs successfully moved to strike the allegations relating to breach of implied warranty and similarly obtained a summary judgment in its favor on the negligence issue. The Third District Court of Appeal affirmed without opinion.[35] Certiorari was sought by the plaintiffs solely on the implied warranty issue, and probable jurisdiction was noted by the supreme court.

Because the Third District Court of Appeal had affirmed without opinion, the supreme court temporarily relinquished jurisdiction to the district court requesting that it prepare an opinion setting forth the theory and reasoning behind the decision.[36] Justices Thomas and Thornal dissented on the basis that the district court had not yet written anything and hence had not yet expressed any view that could conflict with another view of the law.[37] The district court refused to write an opinion,[38] and the supreme court, holding PCA's without opinion reviewable where examination of the record proper discloses a conflict, proceeded to review without the benefit of a written opinion from either the trial court or the appellate court.[39] Ultimately, the supreme court affirmed the decision.[40]

The supreme court's exercise of jurisdiction in *Foley* was based on the premise that except for the slight difference in the review procedure, a per curiam affirmance without opinion is both legally and practically indistinguishable from a decision supported by an opinion. The court, apparently confusing the verity of a PCA with the precedential value accorded a PCA, impliedly reasoned that since a decision without opinion should not be given any less verity than a decision with an opinion, PCA's without opinion must have the same precedential effect, and thus the same power to create confusion and instability in the decisional law of the state, as decisions supported by full opinions.[41]

The initial flaw in this argument is that the verity of a decision is not the same as the precedential value of that decision. Verity is the quality of being true,[42] whereas precedent is an authoritative

35. Foley v. Weaver Drugs, Inc., 146 So. 2d 631 (Fla. 3d Dist. Ct. App. 1962).
36. Foley v. Weaver Drugs, Inc., 168 So. 2d 749 (Fla. 1964).
37. *Id.* at 751.
38. Foley v. Weaver Drugs, Inc., 172 So. 2d 907 (Fla. 3d Dist. Ct. App. 1965).
39. Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1965).
40. *Id.* at 229.
41. *Id.* at 224.
42. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2543 (16th ed. 1971).

legal principle to be followed by future litigants.[43] While a PCA is neither any less correct nor any less truthful because it is rendered without an opinion, it, nevertheless, announces no legal principle to future litigants. Thus it has no precedential value and no ability to cause the confusion and instability among the body of decisional law necessary to invoke the supreme court's jurisdiction.

The court further attempted to support its position by stating that in actual practice it had not been relieved of any substantial portion of its workload by the policy of denying review of per curiam decisions announced in *Lake*.[44] The failure to achieve this objective can be attributed to the *Lake* court's leaving open the possibility for review in exceptional circumstances. In effect every unsuccessful litigant in the district courts was invited to shout "exceptional circumstances"; which, of course, they did.[45] The bar's practice of petitioning for review of PCA's without opinion was further invited by the supreme court's procedure of noting probable jurisdiction in PCA's without opinion and then temporarily relinquishing jurisdiction to the district courts with a request that an opinion be written explaining the theories and reasoning behind the decision.[46]

The answer to the problem of a burdensome workload is not for the court to increase the scope of its jurisdiction. Rather, the obvious answer, as suggested by Justice Drew in his special concurring opinion, is for the court to adopt a rule or position that *no* PCA without opinion would be subject to review on the theory of conflict jurisdiction.[47] This would prevent litigants from incurring the expense of petitioning for certiorari in such cases and would relieve the court of the burden of reviewing those petitions. This position would be entirely consistent with the finality of the district courts' jurisdiction and the construction of the term "decision" as a judgment and opinion.

If the supreme court in *Foley* were to actually ascribe to PCA's without opinion the verity it suggests they deserve, the court would presume the correctness of those decisions and refrain from assuming jurisdiction where it is not constitutionally warranted. Instead,

43. BLACK'S LAW DICTIONARY 1968 (4th ed. 1951).

44. 177 So. 2d at 223.

45. *See* Justice England's concurring opinion in Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs., 347 So. 2d 408 (Fla. 1977).

46. Young Spring & Wire Corp. v. Smith, 168 So. 2d 540 (Fla. 1964); Fontainebleau Hotel Corp. v. Forty-five Twenty-five, Inc., 168 So. 2d 317 (Fla. 1964); Home Dev. Co. v. Bursani, 168 So. 2d 131 (Fla. 1964); *accord*, State v. Leveson, 147 So. 2d 524 (Fla. 1962); Rosenthal v. Scott, 131 So. 2d 480 (Fla. 1961) (per curiam *reversals* without opinion sent back to district courts); *cf.* Solomon v. Sanitarians' Registration Bd., 147 So. 2d 132 (Fla. 1962) (decision with opinion remanded for clarification because no opinion concurred in by a majority of the court).

47. 177 So. 2d at 229.

fearing that a district court of appeal will perpetuate a facially undiscoverable injustice, the court arrogates to itself the power to prevent any possibility of this unlikely occurrence.[48]

In his special concurring opinion Justice Drew viewed the central question to be whether a PCA without opinion constitutes a decision in the constitutional sense. He stated that in the absence of something in the record indicating a contrary view one must assume that an affirmance of a decision of a trial court by a decision of the district court of appeal transforms the trial court's decision into the decision of the district court of appeal. Therefore, as far as the bench and bar who are familiar with the trial judge's decision are concerned, such decision is the law of that jurisdiction.[49]

Presumably inherent in this logic is the further idea that a PCA without opinion is a decision in the constitutional sense and is therefore reviewable. While Justice Drew failed to define what he meant by the phrase "decision in the constitutional sense," he was apparently attempting to show that a per curiam decision without opinion stood for a principle of law, no matter how invisible or undiscernible to the public, which could be relied upon as authoritative in that jurisdiction, at least by the few who were exposed to its application and aware of its existence. However, one can easily rebut this theory by simply pointing out that decisions without opinion, even those with some admitted precedential value, merely adjudicate the rights of particular litigants and do not affect a significant enough number of people to create a real and embarrassing conflict in the body of decisional law of the state.

Seemingly Justice Drew's greatest concern was that chaos would result within the state judicial sytem if PCA's without opinion were not reviewable. He feared that inconsistency and disharmony of the law among the districts might prevail.[50] One must again ask, however, whether PCA's are really a large enough factor in the decisional law of the state to have a disruptive effect. Could the supreme court ever really lose control over the uniformity of the decisional law of the state by restricting the scope of its conflict jurisdiction to decisions with opinions? The possibility seems quite remote and the resultant harm from such a possibility, as evidenced by the functioning of the federal court system, appears to be minimal.

48. Justice Roberts points out that an affirmance without opinion is generally deemed to be an approval of the judgment of the trial court and becomes a precedent in the trial court rendering the judgment. 177 So. 2d at 225-26. Nevertheless, this could hardly create the real and embarrassing conflict in the jurisprudence of the state necessary to constitutionally warrant the supreme court's attention. *See* Justice England's concurring opinion in Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs., 347 So. 2d 408 (Fla. 1977).

49. 177 So. 2d at 230.

50. *Id.*

Even if the possibility were substantial, the proper question is not to what extent the supreme court should restrict its own jurisdiction, but to what extent the constitution does restrict the supreme court's jurisdiction.

Agreeing completely that the district courts of appeal were intended to and must be courts of final appellate jurisdiction, Justice Drew attempted to show that the appellate jurisdiction of those courts has in fact been final.[51] He noted that through 1964 almost ninety-nine out of one hundred cases filed in the district courts of appeal had not been disturbed by the supreme court; consequently, he argued the jurisdiction of the district courts of appeal obviously must be final.[52]

Justice Drew's argument again misses the mark. The purpose of the constitutional amendment was not that the decisions of the district courts of appeal remain undisturbed, but that the jurisdiction of the district courts of appeal be final so as to eliminate the additional cost of a second appeal. These two purposes are not the same. While the *decison* was *disturbed* in slightly more than one out of one hundred of the cases filed in the district courts of appeal through 1964, the jurisdiction was not *final* in more than one out of twenty-five of those cases.[53]

Furthermore, from the viewpoint of the litigants' pocketbook, jurisdiction was not final in almost one out of seven cases filed in the district courts.[54] In those cases the litigants went to the additional expense of filing petitions for certiorari which at that time required preparing argument on the merits. In terms of the litigants' expense in time and money, in those one out of seven cases filed, final appellate jurisdiction effectively vested in the supreme court rather than in the district courts of appeal.

One must also remember that the statistics presented in Justice Drew's concurring opinion covered a period when PCA's without opinion were generally considered not reviewable. The impact of the *Foley* decision could only increase the number of petitions for certiorari review of PCA's without opinion.[55]

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51. *Id.* at 230-31.

52. *Id.* at 231.

53. Through 1964, 14,444 cases were filed in the three district courts of appeal and 2,005 petitions for certiorari were filed in the supreme court to review those decisions. Only 180 were changed or altered. *Id.* at 230. Thirty percent of the 2,005 petitions were granted, resulting in the review of approximately 600 of the 14,444 district court cases—or 1 out of 25. 30% x $\frac{2,005}{14,444} = 4.16\% = \frac{1.04}{25}$; this figure takes into account the loss of final appellate jurisdiction by the district courts only as a result of *certiorari jurisdiction* in the supreme court. It does not account for appeals from the district courts as a matter of right.

54. Two thousand five certiorari petitions out of 14,444 district court cases—or one out of seven. $\frac{2,005}{14,444} \cong \frac{1}{7}$.

In dissent, Justice Thornal reminded the reader that the power to review PCA's without opinion must be found within the constitution, and argued that the one word "affirmed" cannot provide the constitutionally required direct conflict among decisions. He pointed out that by allowing the court to explore the trial record in order to find conflict, the majority holds that the court has the power to *create* conflict where it previously did not exist.[56]

Justice Thornal further argued that the majority's decision meant that district court decisions are no longer final under any circumstances, and that the majority had invited every unsuccessful litigant in the district court to come up to the supreme court and be granted a second appeal. He noted that this was the very thing which we assured the people of this state would *not* happen when the judiciary article was amended in 1956. . . . If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a District Court."[57]

Since the *Foley* decision, there has been continued resistance to the review of PCA's without opinion and to the expansion of the supreme court's jurisdiction through its practice of looking into the "record proper" to determine conflict jurisdiction.[58] Notwithstanding this resistance, the supreme court has continued to expand its jurisdiction to the point of severely distorting the finality of the district courts' appellate jurisdiction.[59] As a justification for the expansion of its jurisdiction, the court has often pointed to the necessity of maintaining uniformity in the law while overlooking the constitutional mandate that the jurisdiction of the district courts is final.[60]

In the past several years, this resistance to the review of PCA's without opinion and to the erosion of the finality of the district courts' jurisdiction has suddenly become highly visible. Since his election to the court, Chief Justice England has written a number of opinions recognizing the jurisdictional principles early established by the court, pointing out the court's deviation from these established constitutional principles and vociferously calling for the

55. While this information is not available, we do know that in 1978 there were 1,366 petitions for certiorari filed in the supreme court from the district courts alone and that more than 30% of the 9,692 district court decisions were rendered without opinion. OFFICE OF THE STATE COURTS ADMINISTRATOR, FLA. JUDICIAL SYSTEM STATISTICAL REPORT 34, 39 (1978).

56. 177 So. 2d at 234.

57. *Id.* (emphasis in original).

58. *See* Justice Thornal's vigorous dissent in Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970) and the dissents of Justices Thornal and O'Connell in Home Dev. Co. v. Bursani, 178 So. 2d 113 (Fla. 1965).

59. *See, e.g.*, Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So. 2d 8 (Fla. 1967).

60. *See The Erosion of Final Jurisdiction in Florida's District Courts of Appeal, supra* note 30, at 388.

dethronement of the *Foley* decision. While most of the other members of the court have concurred in England's opinions at one time or another, in no decision has a majority of the court concurred in any opinion explicitly calling for the overruling of *Foley*.[61]

In *Williams v. State*,[62] the court was again faced with review of a PCA without opinion. Justice England, joined by Justices Hatchett and Overton, recognized the finality of the district court's appellate jurisdiction and the limited precedential value of per curiam decisions without opinion. Voting to deny review, they wrote: "One appeal to review the fairness of a trial is all that is appropriate in a state with intermediate appellate courts. Where our court has no law-harmonizing or precedent-developing function, our intercession for a second full plenary review merely erodes the constitutional finality of our district courts."[63]

The question whether a PCA without opinion has sufficient precedential value to cause the constitutionally required direct conflict, the issue upon which the *Foley* decision turned, was most vigorously addressed in *Florida Greyhound Owners & Breeders Association v. West Flagler Associates*.[64] There, a petition for writ of certiorari to review a PCA without opinion was unanimously and summarily dismissed. Justice England wrote a concurring opinion in which he analyzed in depth the supreme court's review of per curiam decisions without opinions and the pivotal question of whether these decisions can ever create the degree of decisional conflict required by the constitution.

> In my view, the premise articulated by the *Foley* majority is in all events manifestly unsound. . . . The high cost of *Foley* in dollars and time to litigants and to the judiciary of Florida now demands that the majority decision there be reconsidered. . . . To my mind, *there is no possible way that a district court's affirmance without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention.*[65]

The majority opinion in *Mystan Marine, Inc. v. Harrington*,[66] although not explicitly calling for the abandonment of *Foley*, would appear to require that *Foley* be overruled. At a pretrial hearing, the circuit court in a written opinion denied Mystan Marine's motion to tax costs. Mystan Marine petitioned for common law certiorari

61. *See, e.g.*, cases cited note 6 *supra*.
62. 340 So. 2d 113 (Fla. 1976).
63. *Id.* at 116 (dissenting opinion).
64. 347 So. 2d 408 (Fla. 1977).
65. *Id.* at 410-11 (emphasis added).
66. 339 So. 2d 200 (Fla. 1976).

to the Fourth District Court of Appeal, but its petition was summarily denied. The district court's entire opinion consisted of the two words "certiorari denied."[67]

In a unanimous decision authored by Justice England, the supreme court denied review, recognizing that the district courts of appeal have final appellate jurisdiction to review the rights of particular litigants, that the supreme court has a narrow and exceptional conflict jurisdiction to review only decisions having precedential value, and that decisions without accompanying statements of reason have insufficient precedential value to constitutionally warrant a second review. The opinion of the court, joined in by Chief Justice Overton and Justices Adkins, Boyd and Sundberg, stated:

> It is clear, then, that Mystan Marine was denied a financial benefit by the circuit court which a defendant in the identical legal position in *Royal Globe* [the decision that *Mystan Marine* allegedly conflicted with] was able to obtain. That does not alone show, however, that the decisions of the two district courts are in direct conflict for purposes of our jurisdiction.
>
> . . . Article V uses the words "direct conflict" to manifest a "concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."
>
> In this perspective, it is seen that the decision of the district court we are now asked to review *does not constitute precedent in any form.* Its entire opinion consists of the words "certiorari denied," and there is no means by which we, or anyone else, can determine exactly what action the district court took.
>
> . . . .
>
> Obviously the denial of certiorari by a district court without a statement of reasons does not create discord in the decisional law of this state. *Since its decision lacks precedential value, the constitutional scope of our jurisdiction prohibits our review.*[68]

The *Mystan Marine* court, on materially stronger facts, reached a conclusion opposite to that reached by the *Foley* court. In both *Foley* and *Mystan Marine* a pretrial motion was ruled on at a hearing.[69] The lower court in *Foley,* however, ruled orally on the motion and did not write an opinion, making it almost impossible for anyone to positively ascertain the basis upon which the judge ruled.[70] The respective district courts, *without opinion or explanation,* refused to upset the trial judges' rulings. The supreme court in *Foley*

67. *Id.* at 201.

68. 339 So. 2d at 201-02 (emphasis added) (quoting Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958)).

69. *Id.* at 201; Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1965).

70. 177 So. 2d at 221.

held that PCA's without opinion are reviewable as a general rule while in *Mystan Marine*, without mentioning *Foley*, it held that certiorari denials without opinions, the functional equivalent of PCA's for purposes of conflict jurisdiction, are not reviewable as a general rule.

Some contend that PCA's and certiorari denials without opinion are distinguishable because in a certiorari denial it cannot be determined whether review was denied on the basis of the merits or on the court's exercise of its plenary discretion to deny review. The asserted distinction is not material. The *Mystan Marine* court states that because the entire district court opinion consists of the two words "certiorari denied" there is no means by which the basis of the district court's action can be exactly determined. Assuming this is true, it is equally true that the three words "per curiam affirmed" cannot provide the exact basis of a district court's action. The three words remove only one of a large number of possible bases upon which a district court might rule; the procedural exercise of the court's plenary discretion to deny review. The three words, however, still do not tell us upon which of the remaining possible procedural and substantive bases the court's decision was based. Thus, PCA's without opinion should be no more reviewable than certiorari denials without opinion.

The provisions of article V establishing the supreme court's conflict jurisdiction and creating the district courts of appeal were primarily a response to the overwhelming caseload in the supreme court. The obvious purpose of this article was effected by creating the district courts of appeal and transferring to them a substantial portion of the supreme court's former responsibilities. This transfer of responsibilities included a transfer of final appellate jurisdiction, leaving the supreme court mainly supervisory duties.

As a response to the need to fine tune the newly created appellate system, rather than as a response to any major judicial problem, the supreme court was given a very limited and restricted jurisdiction by which it might maintain within certain bounds the general stability and uniformity in the law of the state as announced by the district courts. Thus, the purpose of the supreme court's conflict jurisdiction—to prevent disharmony and instability among precedents—should be viewed as secondary to the primary objective of reducing the caseload of the supreme court.

In an attempt to prevent any possibility of a perpetration of a facially undiscoverable injustice by the district courts of appeal, the court in *Foley* subordinated the finality of the district courts' appellate jurisdiction to the supreme court's conflict jurisdiction. While this was an indisputably well-intended action, it was nevertheless

a very apparent and unconstitutional usurpation of the district courts' appellate jurisdiction, resulting ultimately in more injustice than justice.

In 1955 the supreme court handled more than 1,200 cases. The resultant overload necessitated a severe restriction of the court's jurisdiction through the adoption of article V. Initially under this scheme PCA's without opinion were considered unreviewable. The court has since reversed its position on PCA's and has increased its review powers to the point that in 1978 the court handled more than 2,700 cases resulting in a backlog of more than 1,300 cases.[71] A constitutional amendment redefining and limiting the court's jurisdiction has again been recommended.[72] Can it ever become more apparent that the time to overrule *Foley* has arrived?

71. OFFICE OF THE STATE COURTS ADMINISTRATOR, FLA. JUDICIAL SYSTEM STATISTICAL REPORT 34 (1978).

72. Fla. Bar News, Apr. 15, 1979, at 1, col. 3.