Florida Appellate Reform One Year Later


Richard C. Williams, Jr.

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FLORIDA APPELLATE REFORM ONE YEAR LATER
ARTHUR J. ENGLAND, JR.* AND RICHARD C. WILLIAMS, JR.**

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More than one year has elapsed since the effective date of the 1980 constitutional amendment which wrought the most dramatic change in the jurisdiction of the Supreme Court of Florida in twenty-four years. Although the amendment was generally portrayed as an attempt to lighten the court’s burgeoning caseload, its two principal, underlying objectives were to eliminate delay in the finality of appellate proceedings, and to permit the timely and careful resolution of important decisions emanating from the supreme court.

This article analyzes the supreme court’s first year of operation under the 1980 amendment, evaluating the performance of the amendment in light of its objectives. It focuses on statistical and decisional developments in each aspect of the court’s mandatory and discretionary jurisdiction affected by the 1980 amendment, referencing all relevant changes in the Florida Rules of Appellate Procedure. The authors have also identified some unanswered questions concerning the amendment.

It is, of course, impossible to catalogue all possible effects of the 1980 amendment or to assess completely whether it has lived up to its expectations, from the limited perspective of one year. The long-range consequences of the court’s streamlined jurisdiction will not be evident for years. The experience of the first twelve months, however, provides a glimpse of the possible effects of the 1980 amendment, and whether it might measure up to an earlier prog-

1. Fla. SJR 20-C (Spec. Sess. 1979), amended article V, section 3 of the Florida Constitution. The amendment, which was ratified by the voters on March 11, 1980, became effective on April 1, 1980. FLA. CONST. art. V, § 3(b). See appendix A for the full text of the amendment.

2. See England, Hunter & Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. FLA. L. REV. 147, 149 (1980) [hereinafter cited as Jurisdictional Reform], where the authors preliminarily analyzed the 1980 amendment. This article, in effect, updates that earlier discussion and, for readers’ convenience, follows the same format to the fullest extent possible.


On March 24, 1981, the court amended its Manual of Internal Operating Procedures to conform to practices within the court under the 1980 amendment.
nostication of "a new day in Florida appellate justice."

I. PRELIMINARY OVERVIEW

It will be recalled that the major changes instituted by the 1980 amendment were the elimination of direct appeals to the supreme court from trial courts in cases other than death penalties and bond validations, the refinement of the supreme court's discretionary jurisdiction to eliminate the review of nonprecedential district court decisions, and the elimination of almost all direct appeals to the court from administrative agencies. The intended overall effect of these amendments was to limit the supreme court to policy matters of statewide significance, leaving to the district courts of appeal the dispensation of appellate justice to individual litigants.

An immediate effect of the 1980 amendment was a dramatic drop in the number of cases filed with the supreme court. In the twelve month period preceding the 1980 amendment the court received 2,466 filings, of which 402 were direct appeals of all types, 1,222 were petitions for writs of certiorari to the district courts of appeal, and 557 were original proceedings. The table below shows filings for the twelve month period after the amendment.5

<table>
<thead>
<tr>
<th>Appeals</th>
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<tr>
<td>1. District Courts of Appeal</td>
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<td>2. Circuit Courts (transfers from district courts)</td>
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<td>4. Statutory or Constitutional Invalidity</td>
<td>6</td>
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<tr>
<td>5. Bond Validations</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>59</td>
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4. Jurisdictional Reform, supra note 2, at 149.
5. Statistics obtained from the Clerk of the Supreme Court of Florida.
The relatively low number of filings in the court during the first twelve months of the operation of the 1980 amendment provided the court with considerable "breathing room." This resulted from a lag in the time necessary to bring to the court matters filtered through the district courts of appeal which formerly came directly from trial courts, such as orders passing on the validity of statutes or construing a provision of the constitution. The time necessary to perfect appeals and obtain a decision in the district courts postponed for at least twelve months any possible review of most of those matters by the supreme court, on either a mandatory or discretionary basis.

The supreme court used its breathing room wisely, rejecting a more leisurely pace which the reduced number of new cases might
have provided and exerting great efforts to conclude deliberations on many of its pending matters. In fact, the court made giant strides toward eliminating the unmanageable backlog of cases which had built up before the amendment became effective. On March 31, 1980, the court had 1,348 cases on its docket which were unresolved. The court disposed of 2,099 cases during the next twelve months and closed the twelve month period ending March 31, 1981, with only 704 cases on its docket.6

The authors believe that the 1980 amendment has both accelerated finality in appellate proceedings generally, and promoted the supreme court’s ability to provide a careful but prompt resolution of its decisions.

II. ANALYSIS

The most significant effects of the 1980 amendment are manifest from the revisions to the supreme court’s mandatory and discretionary jurisdiction.7 The year’s developments are most conveniently examined in terms of these jurisdictional categories.

A. Mandatory Jurisdiction

1. Death Penalties—Section 3(b)(1)

The 1980 amendment made no change in the supreme court’s mandatory review of final judgments imposing a death penalty under article V, section 3(b)(1).8 The court had been receiving an average of thirty to thirty-five death penalty cases each year and, as of March 31, 1980, approximately 110 such cases were pending on its docket.9 In the twelve month period beginning April 1, 1980, another thirty-five death penalty cases were filed in the court. The court disposed of thirty-six death penalty cases during this same

6. Id. In the first six months under the 1980 amendment, the court disposed of an average 223 cases per month, leaving a pending inventory as of September 30, 1980, of 770 cases. The court’s inventory stabilized thereafter, with no major fluctuations in the number of filings or dispositions. Of the cases pending on March 31, 1981, there remained only eight worker’s compensation cases brought from the Industrial Relations Commission, six cases brought from the Public Service Commission, and 95 trial court orders brought on direct appeal in cases other than bond validations or death penalty impositions. No new cases in these categories will come to the court, except a limited number of Public Service Commission cases affecting major utilities. See Jurisdictional Reform, supra note 2, at 164-66, 172-76.

7. See Jurisdictional Reform, supra note 2, at 150-51.

8. See id. at 161.

9. Id. at 162.
period, leaving approximately 109 cases pending for review on
March 31, 1981.\(^\text{10}\)

It had been estimated that the supreme court devoted approxi-
mately twenty-five percent of its available worktime to the review
of death penalty cases.\(^\text{11}\) The authors believe that curtailment of
the court’s jurisdiction in other areas, and the court’s focused ef-
fort to reduce the backlog of cases in this category, combined to
make death penalty review a larger proportion of the court’s work
during the twelve month period. Empirical data is unavailable, but
the authors estimate that the justices were devoting closer to
thirty-five percent of their time to the review of death penalty
cases.

If the court’s workload stays at reasonable levels, the average
time from appeal to disposition in this class of cases almost surely
will be shortened. Contributing to shortened appeal times will be
new controls which relate to the length of time for processing these
cases within the court. In the past, the time from filing to decision
has been largely determined by counsel for the parties through
their control over record development and briefing. Recently, how-
ever, the court took the initiative to determine and eliminate delay
attributable to the handling of capital appeals.\(^\text{12}\)

2. Appeals from Trial Courts—Former Section 3(b)(1)

The 1980 amendment removed from the court’s jurisdiction all
direct appeals from trial courts other than in bond validation and
dead penalty cases. Appeals from challenges to a state statute and

---

10. Statistics obtained from the Clerk of the Supreme Court of Florida. These figures do
not include the court’s disposition of a petition for habeas corpus filed by 123 death row
inmates, challenging the court’s procedures on review of death penalty cases in general.

11. Jurisdictional Reform, supra note 2, at 162.

12. On April 28, 1981, the court issued directives to the public defenders of the Seventh,
Eleventh and Fifteenth Judicial Circuits, establishing deadlines for briefs to be filed in cer-
tain pending capital appeals, directing withdrawal in certain other pending capital appeals
in order to permit the appointment of private counsel, and directing them to decline future
representation in capital appeals until assurance is given that they can timely process new
matters. E.g., In re: Directive to the Public Defender of the Seventh Judicial Circuit of
Florida, No. 60,514 (Fla. Apr. 28, 1981). These directives were followed on May 6, 1981, by
an administrative order entered by the chief justice which provided new controls over the
development of the records in capital appeals, and which modified, for capital cases only,
the briefing schedules set out in the appellate rules. Administrative Order, In re: Procedures
in Briefing Schedules for Capital Cases (Fla. May 6, 1981). The administrative order noted
that an order to show cause will enter, and sanctions will be imposed, for briefs which are
delinquent.
from constructions of a constitutional provision are now routed through the five district courts of appeal. On April 1, 1981, ninety-five nonbond, nondeath penalty appeals from trial courts were still pending in the court.\(^{13}\)

This statistic, however, does not completely illustrate the very dramatic effect of this aspect of the amendment on the court's actual workload. The cases now routed through the district courts formerly required plenary review of the record and consideration of all errors presented. Moreover, many lacked a written explanation of the trial court's reasoning and involved frivolous or routine legal issues.\(^{14}\) Elimination of these cases and their attendant problems has undoubtedly made available more time than mere case counting would suggest.

It is impossible to predict exactly how many trial court rulings involving constitutional constructions or questions of statutory validity will ultimately come to the court for review following action by the district courts. It had been estimated that a large number of these cases would never come to the supreme court, because the district courts would resolve the cases on nonconstitutional or nonstatutory grounds.\(^{15}\) Whether that estimate will come true cannot be determined on the basis of the present low number of filings in the supreme court, since most of the appeals lodged in district courts on and after April 1, 1980, would not have been resolved within one year from filing.\(^{16}\)

3. **Invalidity of State Statute or Constitutional Provision—Section 3(b)(1)**

New language in article V, section 3(b)(1) of the constitution brought to the court mandatory jurisdiction to review district court decisions which declared invalid either a state statute or a provision of the state constitution. It was estimated that the court would receive approximately twenty-five cases of this type each year.\(^{17}\) In fact, the court received only six such cases during the

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13. Statistics obtained from the Clerk of the Supreme Court of Florida. A relatively large number of these appeals were the result of stays entered in 40 cases pending the resolution of State v. Benitez, 395 So. 2d 514 (Fla. 1981) (upholding the constitutionality of Florida's drug trafficking statute, FLA. STAT. § 893.135 (1979)).

14. For a detailed explanation of these problems in the court's preamendment jurisdiction, see *Jurisdictional Reform*, supra note 2, at 164-65.

15. *See generally id.* at 161.

16. Briefing schedules and other appellate time requirements would have taken a sizeable portion of the twelve month period. *See FLA. R. APP. P. 9.700.*

twelve month period ending March 31, 1981, attributable to the fact that potential invalidation cases still were wending their way through the district courts of appeal.

The supreme court has yet to decide whether a declaration of invalidity "as applied" will be eligible for supreme court review. The other issue identified as an open question under the 1980 amendment, whether a declaration of invalidity can be "inherent" in a district court's decision, seems to have been resolved in Southern Gold Citrus v. Dunnigan. There the district court had affirmed without opinion an order of a deputy commissioner which allegedly failed to apply a limiting workers' compensation statute. The appeal papers suggested that the district court inherently invalidated the statute. The supreme court summarily dismissed the appeal for lack of jurisdiction, on the ground that the district court did not declare a state statute invalid. A petition to reinstate the appeal was denied.

4. **Bond Validations—Section 3(b)(2)**

The 1980 amendment did not change the supreme court's jurisdiction to review final trial court judgments in proceedings for the validation of bonds or certificates of indebtedness. The court received three new bond cases during the twelve months after the adoption of the amendment, roughly consistent with the level of activity in this category in prior years.

5. **Review of Administrative Action—Section 3(b)(2)**

As amended in 1980, section 3(b)(2) of article V limited the su-
The Supreme Court's jurisdiction over administrative matters to the review of Public Service Commission action with respect to electric, gas and telephone utilities. It was predicted that the Supreme Court would receive approximately five to ten cases from the Commission each year. The Court in fact received three cases during the amendment's first year of operation. The original estimate, of course, was intended as an average over several years, inasmuch as variations in economic conditions typically produce pressures for rate increases among major utilities in three or four year cycles. Accordingly, the Court's review of Commission matters tends to be bunched together in one year out of every three or four.

By statute, the review of Commission decisions in all other areas of its jurisdiction was assigned to the First District Court of Appeal. Concern as to the constitutionality of this assignment of exclusive jurisdiction to one district court of appeal may have been abated by Rollins v. Southern Bell Telephone & Telegraph Co., holding that the legislature had the authority to assign review of all workers' compensation cases to the First District Court of Appeal because the agency had its headquarters in Tallahassee. The authors know of no pending constitutional challenge to the exclusive assignment of Commission jurisdiction.

The effect of assigning Commission matters to only one district court appears to have created no major problem for that court. Motor carrier transportation appeals, a formerly significant source of activity from the Commission, were eliminated through deregulation of that industry in 1980. Consequently, the First District Court of Appeal received only six cases from the Commission during the twelve month period ending March 31, 1981.

26. The relevant sections for administrative review prior to the amendment were Fla. Const. §§ 3(b)(2), (7).
27. Jurisdictional Reform, supra note 2, at 175.
28. Statistics obtained from the Clerk of the Supreme Court of Florida.
30. 384 So. 2d 650, 652 (Fla. 1980).
32. Statistics obtained from the Clerk of the First District Court of Appeal.
B. Discretionary Jurisdiction

1. Inserting “expressly” in Section 3(b)(3)

"[T]he purpose for including the term ‘expressly’ in section 3(b)(3) was to overrule Foley [v. Weaver Drugs, Inc.], and thereby eliminate supreme court review of [no-opinion district court decisions known as] PCA’s. A written opinion of the district court on the point of law sought to be reviewed is now an essential predicate for supreme court review." Initial decisions construing section 3(b)(3) indicate that the court remains firmly committed to that purpose. The court, in effect, has relied upon the “expressly” requirement to reject supreme court jurisdiction over several types of district court decisions which formerly qualified for review under the Foley doctrine.

a. Decisions without opinion

Jenkins v. State, was the court’s first decision applying the 1980 amendment. There petitioner sought review, under the court’s conflict jurisdiction, of a district court decision which read merely “PER CURIAM. AFFIRMED.” The district court’s decision was accompanied by an extensive dissent, reciting facts and analyzing applicable law.

On review, the supreme court analyzed the history and language of amended section 3(b)(3) and concluded:

33. 177 So. 2d 221 (Fla. 1965).
34. Jurisdictional Reform, supra note 2, at 179-80 (footnotes omitted). PCA refers to “Per Curiam Affirmed,” a district court form of summary disposition without opinion.
35. 385 So. 2d 1356 (Fla. 1980). A challenge to the 1980 constitutional amendment, and to the supreme court’s Jenkins decision implementing the limitations of the 1980 amendment, was taken to the United States Supreme Court in Lampkin-Asam v. Florida, No. (jurisdictional statement on file at the Florida Supreme Court Library). The jurisdictional statement of petitioners in that case suggested that the amendment of article V, section 3(b)(3) in 1980 infringed upon federal constitutional due process and equal protection rights by denying petitioners access to the highest court of the state. The jurisdictional statement, though prepared, was never filed and, thus, the case was never docketed.
36. Jenkins v. State, 382 So. 2d 83 (Fla. 4th DCA 1980), dismissed, 385 So. 2d 1356 (Fla. 1980).
37. See id.
38. The majority’s analysis was supplemented by a detailed recitation of the relevant history of the amendment in then Chief Justice England’s specially concurring opinion. 385 So. 2d at 1360-63.
39. The court noted that the single word “affirmed” did not comport with the dictionary definitions of “express”—which means “to represent in words” or “to give expression to”—or “expressly”—which means “in an expressed manner.” Id. at 1359.
The Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court.40

Jenkins not only eliminated the supreme court's conflict review of PCA's without opinion, it further abolished the concepts of "dissent conflict" and "concurrence conflict" which had been developed by the court in earlier years.41 Although Jenkins involved only PCA's arising under the court's conflict jurisdiction, it is probable that PCA's arising under any of the other jurisdictional categories of section 3(b)(3) will be similarly treated, since each is prefaced with the term "expressly."

In St. Paul Title Insurance Corp. v. Davis,42 petitioner sought review of a district court PCA without opinion under the constitution's "all writs" provision.43 The court dismissed the petition on the authority of Jenkins, noting also that the all writs provision could not be used to establish an independent basis for appellate jurisdiction.44 Similarly, when review of a PCA without opinion was sought by a petition for writ of prohibition or, alternatively, mandamus, the petition was denied.45

40. Id. Justice Adkins, who had opposed the 1980 amendment, Jurisdictional Reform, supra note 2, at 159 & n.58, argued in a dissent that decisions without opinions still provided a sufficient basis for conflict jurisdiction. Jenkins v. State, 385 So. 2d at 1363-66. He premised his argument on the rationale previously enunciated in Foley that a district court's per curiam affirmance creates a precedent sufficient for conflict purposes in the trial court being affirmed—at least so far as the trial judge and other familiar members of the bench and bar are concerned. Supreme court review of these decisions was necessary to maintain uniformity in the law, he concluded, and the amendment gave the court "absolute discretion in determining whether [it] had jurisdiction of a particular case" since the provision on the ballot approved by the voters merely stated "an amendment to the state constitution to modify the jurisdiction of the supreme court." Id. at 1365-66.

41. 385 So. 2d at 1358-59. See Jurisdictional Reform, supra note 2, at 189, 216. In State v. Gross, No. 60,207 (Fla. Apr. 30, 1981), petitioner argued that facts set out in a dissenting opinion were available for consideration despite Jenkins since they were consistent with the majority's "facts" but simply more complete. The court by a vote of 4-3 denied review. Chief Justice Sundberg and Justices Adkins, Overton, and McDonald voted to deny the petition. Justices Boyd, England, and Alderman dissented.

42. 392 So. 2d 1304 (Fla. 1980).

43. Fla. Const. art. V, § 3(b)(7), enables the court to issue "all writs necessary to the complete exercise of its jurisdiction."

44. This doctrine was well established under the court's preamendment case law. See Besoner v. Crawford, 357 So. 2d 414 (Fla. 1978); Shevin ex rel. State v. Public Serv. Comm'n, 333 So. 2d 9 (Fla. 1976).

45. State ex rel. Dep't of Health & Rehab. Servs. v. Pack, No. 60,041 (Fla. Mar. 18,
A petition for writ of habeas corpus was filed in *Wolfe v. State*, following the entry of a district court per curiam affirmance without opinion of a criminal contempt conviction. Although the petitioner recognized *Jenkins* and *St. Paul* as restricting the court's jurisdiction, he suggested, nonetheless, that "the jurisdictional question posed by this habeas request is substantially different because it is confined to a deprivation of liberty in the narrow circumstance of a facially invalid direct criminal contempt proceeding ... which has been summarily affirmed in direct conflict with applicable law." The petition for writ of habeas corpus was denied.

b. Citation PCA's

*Dodi Publishing Co. v. Editorial America, S.A.*, involved a request to review a district court decision which read in its entirety:

PER CURIAM.

Affirmed. See *Consolidated Electric Supply, Inc. v. Consolidated Electrical Distributors Southeast, Inc.*, 355 So. 2d 853 (Fla. 3d DCA 1978).

Petitioner argued that the cited case, *Consolidated Electric*, was in conflict with another district court decision. The court refused to reexamine the authority cited for conflict, reasoning that "[t]he issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority." The petition...
for review was dismissed.\textsuperscript{51}

The \textit{Dodi} decision was followed in \textit{Robles Del Mar, Inc. v. Town of Indian River Shores.}\textsuperscript{53} The district court decision in \textit{Robles} was a PCA merely citing another case filed by the same court on the same day.\textsuperscript{55} The supreme court dismissed the petition on the basis of \textit{Dodi}, noting that the cited case was a "final" decision of the district court.\textsuperscript{54} The finality of the cited case was evident from the record, which showed that rehearing had been denied by the district court and that no timely review petition had been filed to invoke the supreme court's jurisdiction.

The court's treatment of citation PCA's in \textit{Dodi} and \textit{Robles} appears to accept the notion that decisions of that type "stand on no better precedential footing than pure PCA's,"\textsuperscript{55} and that the citation of authority in each is principally for the benefit of the parties rather than the public.\textsuperscript{56}

This is not to say that the court will not accept review of a PCA which cites a district court decision which is not final. In fact, it appears the court will accept review when the cited case is pending or has been accepted for review in the supreme court. For example, review was accepted in \textit{Shelby Mutual Insurance Co. v. Johnson},\textsuperscript{57} bringing to the court a district court decision\textsuperscript{58} which read in its entirety:

\begin{quote}
The summary final judgment entered herein is reversed and the cause is remanded for further proceedings, on the authority of \textbf{State Farm Insurance Company v. Bergman, No. 79-1702/T4-694}, (Fla. 5th DCA, August 27, 1980).
\end{quote}

\textbf{REVERSED AND REMANDED.}

The cited decision, \textit{State Farm Insurance Company v. Bergman}, had been certified to the court and accepted for review\textsuperscript{58} when re-

\begin{itemize}
\item \textsuperscript{51} Justice Adkins dissented for reasons expressed in \textit{Jenkins}.
\item \textsuperscript{52} 385 So. 2d 1371 (Fla. 1980).
\item \textsuperscript{53} Robles Del Mar, Inc. v. Town of Indian River Shores, 379 So. 2d 967 (Fla. 4th DCA 1979) (citing Epifano v. Town of Indian River Shores, 379 So. 2d 966 (Fla. 4th DCA 1979)).
\item \textsuperscript{54} Robles Del Mar, Inc. v. Town of Indian River Shores, 385 So. 2d at 1371.
\item \textsuperscript{55} Jurisdictional Reform, supra note 2, at 179 (footnote omitted).
\item \textsuperscript{56} Id. at n.187.
\item \textsuperscript{57} No. 59,949 (Fla., review granted May 11, 1981). Chief Justice Sundberg and Justices Adkins, Overton, England, Alderman and McDonald voted to grant review. Justice Boyd dissented.
\item \textsuperscript{58} Johnson v. Shelby Mut. Ins. Co., No. 79-290 (Fla. 5th DCA Oct. 22, 1980).
\end{itemize}
view was granted in Shelby.

*State Farm Mutual Automobile Insurance Co. v. Walter,*\(^6\) *State Farm Mutual Automobile Insurance Co. v. Smith,*\(^6\) and *State Farm Mutual Automobile Insurance Co. v. White,*\(^8\) all are citation PCA's in which the case cited for authority is pending before the court for review.\(^6\) Review determinations in these cases are pending at the time of this writing. Also pending at the time of this writing are *Jollie v. State,*\(^6\) *Allen v. State,*\(^6\) and *Knight v. State,*\(^6\) citing to and raising the same issue as the pending case of *Murray v. State.*\(^7\) The treatment of these several cases, and the court's methodology for distinguishing acceptable from unacceptable citation PCA's (such as on the basis of the "finality" touchstone identified in *Robles*) will have significant impact on the court's future caseload and thus the effectiveness of the 1980 amendment, the authors believe.\(^8\)

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60. No. 59,908 (Fla., petition filed Nov. 10, 1980).
61. No. 60,235 (Fla., petition filed Feb. 9, 1981).
62. No. 60,236 (Fla., petition filed Feb. 9, 1981).
64. No. 59,158 (Fla., petition filed May 1, 1980).
65. No. 58,964 (Fla., notice of cert. filed Mar. 31, 1980).
66. No. 58,873 (Fla., notice of cert. filed Mar. 18, 1980).
67. No. 58,608 (Fla., notice of cert. filed Feb. 5, 1980).
68. Another interesting jurisdictional determination involving a citation PCA is pending before the supreme court in *State Farm Mut. Auto. Ins. Co. v. Lawrence,* No. 60,167 (Fla., petition filed Jan. 21, 1981). There the district court's opinion reads as follows:


State Farm Mut. Auto. Ins. Co. v. Lawrence, No. 80-636 (Fla. 5th DCA Dec. 24, 1980). The petition for review alleges a direct conflict between the court's decision and *McLellan.* The case, in effect, presents the question of whether a "contra" signal is sufficient to establish a jurisdictional basis for review on the ground of an "express" conflict. *Cf. Parker v. State,* No. 59,674 (Fla., review granted Jan. 8, 1981), where the district court certified, and the supreme court accepted, the following decision for review under section 3(b)(4) (certified conflict):

**PER CURIAM.**


*Parker,* No. 79-486 (Fla. 5th DCA Aug. 13, 1980).
c. Citation orders

In *Pena v. Tampa Federal Savings & Loan Association*, peti-
tioner sought review of the following order entered by the district
court of appeal:

The attorneys for appellee having filed a motion to dismiss the
above-styled interlocutory appeal, upon consideration, it is
ORDERED that said motion is granted and the above-styled
interlocutory appeal is hereby dismissed. See *Southeastern Asso-
ciates, Inc. v. First Georgia Bank*, 362 So.2d 967 (1st DCA
1978).

Citing *Dodi* and *Jenkins*, the court found no express and direct
conflict in the order and dismissed the petition.

d. Other considerations

The above precedents provide virtually no guidance as to how
much discussion of the legal issue being brought for review is
needed in a district court opinion to satisfy the “expressly” re-
quirement. The question remains largely open for future interpre-
tation. Based on the historical development of section 3(b)(3), we
suggested that “a general statement of the legal issue” in the dis-

trick court opinion would be adequate to permit a petition for con-

lict review. The authors’ review of the direct conflict cases ac-
cepted by the court during the first year of the amendment tends
to support this suggestion. Instances were found where a minimal
amount of discussion in a district court opinion—even a sentence
or two—sufficed to obtain conflict review in the supreme court.
Nonetheless, most of the district court opinions in fact contained
fairly extensive discussions of the issue alleged for conflict, and in
many instances the district court actually recognized the existence

69. 385 So. 2d 1370 (Fla. 1980).

70. The district court's order was reproduced in the supreme court's opinion. *Id.*

71. This question arises most often with regard to conflict petitions, since a framework
for the meaning of “expressly” in the other jurisdictional categories had been developed
under former section 3(b)(3). See *Jurisdictional Reform, supra* note 2, at 183 (statutory
validity); *id.* at 184 (constitutional constructions); *id.* at 186-87 (class of constitutional or
state officers).

72. *Id.* at 188-89.

73. *See, e.g.*, *Smith v. City of Clearwater*, No. 78-1501 (Fla. 2d DCA Apr. 16, 1980),
review granted, No. 59,382 (Fla. Feb. 24, 1981); *Life Ins. Co. of N. America v. Del Aguila,*
No. 79-1328/T4-601 (Fla. 5th DCA Oct. 16, 1980), review granted, No. 59,933 (Fla. Jan. 30,
of a conflict in its decision. Seemingly, a recognition of conflict by the district court enhances the possibility that the supreme court will accept review.

The addition of the "expressly" requirement in section 3(b)(3) prompted two important procedural changes with respect to Florida appellate practice. First, the supreme court's Manual of Internal Operating Procedures has been amended to indicate that the clerk's office will automatically dismiss requests for discretionary review where the district court has not written an opinion in the case. Second, the Florida Rules of Appellate Procedure were amended to limit jurisdictional briefs to ten pages and to prohibit reply briefs on jurisdiction.

The new page limitation and the abolition of reply briefs are possible in light of the sharpened focus which the "expressly" requirement brings to bear on petitions for review. Since issues brought to the court have already been framed in an appended district court opinion, the parties can more easily identify the direct conflicts and then concentrate their arguments on the desirability of supreme court review. The elimination of jurisdictional reply briefs, moreover, speeds jurisdictional rulings by the court, since briefs are distributed to a five-justice panel promptly after the respondent's brief is filed.

2. Deleting "by certiorari" from Section 3(b)(3)

It is still too early to determine what impact the deletion of "by certiorari" from section 3(b)(3) will have on supreme court practice. Our earlier article suggested that this constitutional change would limit to some extent the scope of supreme court review. In this regard, four possible alternatives are available.

The court could, upon acceptance of jurisdiction: (1) review the "peg issue" only—that is, the issue which provides a basis for supreme court jurisdiction; (2) review the peg issue and all other issues which are discussed in the district court decision; (3) review the peg issue and all others presented to the district court regard-

75. See The Fla. Bar. In re Florida Rules of Appellate Procedure, 391 So. 2d 203 (Fla. 1980); FlA. R. App. P. 9.210(a)(5) & 9.120(d). Both of these changes were anticipated in our prior article. See Jurisdictional Reform, supra note 2, at 181.
76. See generally 1977 Committee Notes to FlA. R. App. P. 9.120.
77. The time saved is at least 10 days. FlA. R. App. P. 9.120(d) (1977). In this regard, see text accompanying notes 193-94 infra.
78. See Jurisdictional Reform, supra note 2, at 181-83.
less of whether they are discussed in the opinion, or; (4) review the
peg issue and all others presented to the supreme court, regardless
of whether the district court ever had the opportunity to rule on
them.

The court is presented with its first opportunity to construe this
change in *Trushin v. State.* There the court is squarely presented
with the question of whether the deletion of "by certiorari" limits
supreme court discretionary review to those issues which provide
the initial basis for jurisdiction. The district court in *Trushin*
certified its decision to the supreme court under section 3(b)(4) as
passing "upon questions of great public importance concerning the
validity and interpretation of Section 104.061(2), Florida Stat-
utes." Respondent argued to the court that the deletion of "by
certiorari" limited supreme court review to the question of whether
the challenged statute is valid, thereby preventing the court from
addressing any other issues. The case was argued to the court on
February 9, 1981. Obviously, the authors take no position on the
issues presented.

On the practical side, the authors have noted that numerous re-
quests for discretionary review filed after the effective date of the
1980 amendment still use the term "certiorari." The misuse of
this terminology is frequently accompanied by a misunderstanding
of the jurisdictional bases for obtaining supreme court review.
Practitioners would be well advised to delete the term "certiorari"
from their vocabulary when seeking review in the supreme court, if
for no other reason than to indicate their understanding of the
concepts which brought about the 1980 changes.

3. Validity of State Statutes—Section 3(b)(3)

The 1980 amendment assigned review of district court decisions
in which a state statute is declared valid to the supreme court's
discretionary jurisdiction. The clerk of the court estimated that
approximately 150 review requests would be filed from validity de-

80. The district court certification procedure for questions of great public importance
appeared in Fla. Const. art. V, § 3(b)(3), before the 1980 amendment, where it was pref-
aced by the phrase "by certiorari." The current version appears in Fla. Const. art. V, §
3(b)(4).
82. This terminology has been removed from the appellate rules as of January 1, 1981.
See The Fla. Bar. In re Florida Rules of Appellate Procedure, 391 So. 2d 203 (Fla. 1980);
The Fla. Bar. In re Florida Rules of Appellate Procedure, 387 So. 2d 920 (Fla. 1980); In re
Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370 (Fla. 1980).
cisions. In fact, only three requests were filed during the first twelve months under the amendment. This low number should not be considered representative, however, since decisions involving the validity of state statutes would, during that twelve month period, be proceeding through the district courts of appeal and, in most cases, not have ripened into a final decision as of March 31, 1981.

It is arguable that the court has a broader range of discretion in deciding which cases to review under this category of jurisdiction than any other under the 1980 amendment. When they occur, declarations of statutory validity are rarely certified to the court and, in most instances, do not cause any disharmony in the law. Some, moreover, do not involve issues of statewide importance. In reviewing requests directed at district court declarations of statutory validity, the court has a unique opportunity to emphasize the discretionary nature of its jurisdiction and to resurrect the "may" in section 3(b)(3).

At the present time, there is too little evidence to indicate the court's philosophy. We do know, however, that the court declined jurisdiction in the three concluded cases in which a district court

83. Jurisdictional Reform, supra note 2, at 184.
84. Statistics obtained from the Clerk of the Supreme Court of Florida.
85. The time lag inherent in these cases reaching the supreme court from the district courts is illustrated in R.P. v. State, No. 59,978 (Fla.), where the validity of a statute and a construction of the constitution predicated a request to review the decision of the First District Court of Appeal reported as R.P. v. State, 389 So. 2d 658 (Fla. 1st DCA 1980). The district court's decision was rendered on September 30, 1980, and rehearing was denied on October 31, 1980. A petition for review was filed on December 2, 1980. The time necessary to process the case for review in the supreme court resulted in the last brief on jurisdiction being filed in the court on December 31, 1980. Panel consideration of the jurisdictional issues began promptly after the first of the year.
86. Of course, a district court's declaration of statutory validity might create conflict with another district court decision which had declared the same statute invalid. For a discussion of this problem, see Jurisdictional Reform, supra note 2, at 184.
87. See id. at 183. See also Police Pension Bd. v. Gaines, 389 So. 2d 677 (Fla. 4th DCA 1980), review of which was denied in the supreme court. See notes 122-24 and accompanying text infra.
88. The 1978 Appellate Structure Commission had criticized the court's practice of routinely granting jurisdiction whenever a basis for discretionary review was identified, concluding that the court had all but written the word "may" out of section 3(b)(3). Appellate Structure Commission Report, 53 Fla. B.J. 274, 285 (1979). The court has obviously been concerned with the constitutional imperative in this regard. For example, review was denied from Wood v. State, Dep't of Environmental Regulation, 390 So. 2d 786 (Fla. 1st DCA 1980), in which the district court rejected a constitutional challenge to the statute prescribing administrative review of departmental orders. Id. No. 60,056 (Fla. Apr. 20, 1981). Justices Overton, England, Alderman and McDonald voted to deny review. Justice Adkins dissented.
had passed on and approved the validity of a state statute. 89

No cases to date indicate whether the court will accept for review a declaration of statutory validity "as applied." It has been suggested that the court could. 90

4. Construction of the Constitution—Section 3(b)(3)

It has been estimated that the court would receive approximately eighty requests each year to review district court decisions which construe the state or federal constitution. 91 The court in fact received fourteen such requests during the twelve month period ending March 31, 1981. 92 Again, this limited number of filings may reflect only a lag in the disposition of direct appeals involving constitutional questions in the district courts. 93

The 1980 amendment did not change the judicially-developed meaning of a "constitutional construction," although the wording of the provision was slightly altered. 94 The court is still able to review only those district court decisions which expressly explain or amplify a provision of the state or federal constitution, as contrasted with those which simply "apply" a constitutional provision to the facts of a particular case. 95 Two cases filed during the amendment's first year, however, indicate that the supreme court has broad discretion in determining whether a district court's construction sufficiently explains or amplifies a constitutional provision so as to provide a viable basis for jurisdiction. In In re Estate of Finch, 96 the district court rendered an eight-line interpretation of an exception in the homestead provision of the Florida Constitution. 97 Contrariwise, the district court in Sentinel Star Co. v. Edwards, 98 engaged in an extensive analysis of an unresolved constitutional issue which it recognized was "one of first impression." 99 Both cases were accepted for review. 100

89. Statistics obtained from the Clerk of the Supreme Court of Florida.
90. Jurisdictional Reform, supra note 2, at 184.
91. Id. at 186.
92. Statistics obtained from the Clerk of the Supreme Court of Florida.
93. See note 85 supra.
94. For an extensive analysis of the limited impact of this change, see Jurisdictional Reform, supra note 2, at 184-86.
95. See, e.g., Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973); Armstrong v. City of Tampa, 106 So. 2d 407 (Fla. 1958).
96. 383 So. 2d 755 (Fla. 4th DCA 1980).
98. 387 So. 2d 367 (Fla. 5th DCA 1980).
99. Id. at 370.
The mere application of a constitutional provision may be illustrated by the petition filed in Richards v. State,\(^{101}\) where petitioner argued that the district court had expressly construed a provision of the federal constitution when it framed the issue in this way: "The question presented for review is whether the stop and search by the Coast Guard violated the fourth amendment."\(^{102}\) Despite this statement of the issue and a fairly extensive analysis of the relevant facts and case law, the supreme court denied petitioner's request to review the decision.\(^{103}\)

5. Class of Constitutional or State Officers—Section 3(b)(3)

The clerk of the supreme court estimated that the court would receive approximately ten requests each year to review decisions of district courts which allegedly affect a class of constitutional or state officers.\(^{104}\) In fact, the court received eleven such requests during the twelve month period ending March 31, 1981.\(^{105}\) None of these requests had been accepted at the time of this writing, eight having been denied with three still pending. It appears that the nature and extent of this review, formerly considered quite narrow,\(^{106}\) remain very limited.

6. Conflict of Decisions—Section 3(b)(3)

Before the effective date of the 1980 amendment, it was estimated that conflict petitions under section 3(b)(3) of article V would continue to provide the bulk of the court's discretionary caseload, and that filings would approximate 1,200 cases per year.\(^{107}\) In the twelve month period ending March 31, 1981, only 499 petitions for conflict review were filed in the supreme court.\(^{108}\)

There are at least two ready explanations for the reduced num-

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103. Justices Adkins, Boyd, Overton, England, and Alderman voted to deny review. Interestingly, the petitioner also argued that the decision could be accepted under the court's conflict jurisdiction. It had been suggested that a conflict of decisions might be asserted as an additional, independent basis for jurisdiction in some constitutional construction cases. See Jurisdictional Reform, supra note 2, at 185-86 n.226.
104. Id. at 187.
105. Statistics obtained from the Clerk of the Supreme Court of Florida.
106. See Jurisdictional Reform, supra note 2, at 186-87.
107. Id. at 191.
108. Statistics obtained from the Clerk of the Supreme Court of Florida.
umber of conflict petitions. First, the court’s early interpretation of the “expressly” requirement to eliminate review of PCA’s undoubtedly curtailed the filing of petitions. Second, district court judges have to some extent identified their conflicting decisions and used the new certification procedure of section 3(b)(4) to afford the opportunity for supreme court review.

The 1980 amendment continued the concept of “direct conflict” in section 3(b)(3) with several minor but important changes—namely, the elimination of intra-district conflict and the inclusion of the “expressly” requirement. Both of these changes, along with other observations on prior doctrines and practices, warrant analysis here.

(a) The supreme court prepared for the elimination of intra-district conflict by establishing an en banc review process for the district courts of appeal. During the first fifteen months of this available procedure, three district courts rendered en banc decisions resolving existing or outstanding conflicts within their district.

An interesting use of the new en banc procedure occurred in Rogers v. State Farm Mutual Automobile Insurance Co. In that case the en banc court denied a motion for rehearing as being untimely but then, on its own motion, reversed a decision which had been rendered some six months earlier as being in direct conflict with one of the court’s later decisions. The en banc decision was brought to the supreme court in a petition for common law certiorari, challenging the ability of the district court to exercise jurisdiction over a decision for which no timely petition for rehearing had been filed and in which the time for review to the supreme court had expired. The court entered an order treating the petition as

109. See notes 33-68 and accompanying text supra.
110. Jurisdictional Reform, supra note 2, at 187-89.
111. In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, 377 So. 2d 700 (Fla. 1979). See Jurisdictional Reform, supra note 2, at 188.
113. 390 So. 2d 138 (Fla. 5th DCA 1980).
114. The court noted that its earlier per curiam affirmation, reported in 383 So. 2d 1221 (Fla. 5th DCA 1980), was in direct conflict with State Farm Mut. Auto. Ins. Co. v. Bergman, 387 So. 2d 494 (Fla. 5th DCA 1980). Rogers v. State Farm Mut. Auto. Ins. Co., 390 So. 2d at 139.
an application for a writ of mandamus and directed the district
court to show cause why its en banc decision should not be
vacated.\textsuperscript{116}

Another interesting development under the court's en banc rule
occurred in \textit{Royer v. State}.\textsuperscript{117} Originally, this case was decided by a
panel consisting of a permanent judge on the court and two judges
assigned to the court for temporary duty. A majority of the divided
court, consisting of the assigned judges, ruled with the state, fol-
lowing which Royer asked for a rehearing en banc on the basis of
views expressed in the dissenting opinion of the permanent judge.
Rehearing en banc was granted and, after briefs and oral argu-
ment, a new decision taking Royer's view of the case was entered
by the en banc court. The en banc decision was authored by the
judge who had dissented from the panel determination. The other
two original panelists could not participate, as they were ineligible
under the supreme court's rule governing en banc proceedings.\textsuperscript{118}

The state petitioned the supreme court for review, suggesting
that the en banc court simply reweighed the facts in a manner con-
trary to the panel decision, and that this action was contrary to the
specific requirement of the appellate rules that en banc proceed-
ings be held solely to resolve intra-district conflicts. The state also
suggested that new members of the court had imposed their views
on a former majority of judges in that district, thereby upsetting
precedent created by earlier panel decisions. The supreme court
denied to review the en banc decision.\textsuperscript{119}

As might be expected, not all practitioners paid attention to the
elimination of intra-district conflict by the 1980 amendment. In
one clear case, for example, petitioner sought review of an alleged
intra-district conflict which respondent simply noted was inappro-
priate after April 1, 1980. The supreme court denied review.\textsuperscript{120}

(b) As noted earlier, a direct conflict of decisions need not be

\begin{itemize}
  \item \textsuperscript{116} State Farm Mut. Auto. Ins. Co. v. Judges of the District Court of Appeal, Fifth
       District, No. 60,035 (Fla., order issued Feb. 20, 1981). The court acted under the provi-
       sions of FLA. R. APP. P. 9.100(f). \textit{See also} the court’s \textit{Gans} decision, \textit{supra} note 45.
  \item \textsuperscript{117} 389 So. 2d 1007 (Fla. 3d DCA 1980).
  \item \textsuperscript{118} The rule provides that the en banc court “shall consist of the judges in regular
       active service on the court,” thus prohibiting retired judges assigned by the chief justice
       from participating in en banc proceedings. \textit{See} FLA. R. APP. P. 9.331(a).
  \item \textsuperscript{119} State v. Royer, No. 59,953 (Fla. Mar. 18, 1981). Chief Justice Sundberg and Justices
       Boyd, Overton, England, and McDonald voted to deny review. Justices Adkins and Alder-
       man dissented.
  \item \textsuperscript{120} Kersey v. Atlantic Truck Lines, Inc., No. 59,773 (Fla. Mar. 4, 1981). Justices Boyd,
\end{itemize}
identified and discussed in the district court's opinion to satisfy the "expressly" requirement. Rather, a general statement of the legal issue probably can premise a petition for review if counsel believes that a direct conflict of decisions exists.121

While either a discussion of legal issues or an identification of conflicting precedents in a district court opinion may allow counsel to file for supreme court review, neither will assure that a case will be accepted for review. The point is illustrated by Police Pension Board v. Gaines,122 a case brought to the court for review on the basis of a direct conflict of decisions. The district court's opinion acknowledged "a degree of conflict" between two precedents,123 yet the supreme court denied review.124

(c) The status of "dicta conflict," which had formerly predicated review in some cases,125 remains undetermined. The court has yet to accept for review, or explicitly decline to review, a decision identified as creating mere dicta conflict.

(d) A district court decision can become in direct conflict with a supreme court decision rendered after a district court had ruled.126 This situation occurred in Murray v. State,127 presently pending in the court. Conflict arose with a supreme court decision rendered on June 5, 1980, in Tascano v. State.128

(e) Early thought on the limited change in section 3(b)(3) suggested that many of the doctrines developed under prior case law, such as the two types of direct conflict articulated in Nielsen v. City of Sarasota,129 would continue under the 1980 amendment.130 An argument can be made, however, that the types of cases in which an "express" and "direct" conflict can arise is more narrow than originally perceived.

For example, conflict petitions which challenge the district court's attempt to reweigh evidence may no longer be acceptable for review in the supreme court under either of the tests an-

121. Jurisdictional Reform, supra note 2, at 188-89.
122. 389 So. 2d 677 (Fla. 4th DCA 1980).
123. Id. at 678.
125. Jurisdictional Reform, supra note 2, at 189.
126. Id. at 190.
127. No. 58,608 (Fla., petition filed Feb. 5, 1980).
128. 393 So. 2d 540 (Fla. 1980).
129. 117 So. 2d 731 (Fla. 1960).
130. Jurisdictional Reform, supra note 2, at 189.
nounced in *Nielsen*. First, a district court decision which in fact reweighs evidence, albeit improperly, usually does not discuss or identify a legal issue which is in conflict with other appellate decisions. District courts never declare that they are reweighing the evidence. Supreme court review requires an extrinsic look at what the district court did, not what it said, to determine whether its action, rather than its decision, is in direct conflict with principles of law established in other appellate cases. Second, the notion of finality in the district courts which underlies the 1980 amendment contemplates that district courts, knowing the correct rules to apply, can be wrong or misapply those rules without subjecting their decisions to supreme court review.

The authors hypothesize, therefore, that decisions such as *Westerman v. Shell's City, Inc.*,131 and *Shaw v. Shaw*,132 in which the court reemphasized the responsibility of the district courts to accept evidentiary findings of the trial courts and not reweigh the evidence themselves, may no longer provide a viable predicate for establishing a direct conflict of decisions, unless to express a periodic restatement of this review principle.133 A few recent court decisions suggest this result.

In *Sheradsky v. Moore*,134 the petition for review argued only that the district court had reweighed the evidence and substituted its judgment for that of the trier of fact, citing conflict with *Westerman* and related cases. The court denied review.135 In *Berlin v. Berlin*,136 the result was the same.137 Contrariwise, in *Chirogianis v. Anderson*,138 the court by a vote of 4-3 accepted for review a district court decision brought for review solely on the basis of an alleged *Westerman*-type conflict.139

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131. 265 So. 2d 43 (Fla. 1972).
132. 334 So. 2d 13 (Fla. 1976).
134. No. 60,070 (Fla. Apr. 16, 1981).
135. Justices Adkins, Boyd, Overton, Alderman and McDonald voted to deny review.
138. No. 59,534 (Fla., review granted Dec. 11, 1980).
139. Chief Justice Sundberg and Justices Adkins, Overton, and McDonald voted to grant review. Justices Boyd, England, and Alderman dissented. See also *Jerry's, Inc. v. Marriott Corp.*, No. 59,379 (Fla., review granted Dec. 8, 1980), for which argument was held on April 8, 1981, reviewing a district court decision reported at 383 So. 2d 662 (Fla. 3d DCA 1980). In that case three alternative bases for seeking review were presented, one of which was that
(f) With respect to jurisdictional briefs and appendices, the authors note that many practitioners still attach trial transcripts to their briefs as a part of the appendix. This is a complete waste of time, effort and a client's money, since there is no longer any justification for referring to the trial transcript in a case brought to the court on the basis of a direct conflict of Florida appellate court decisions.

Another wasteful procedure is the filing by respondents of a second copy of the district court's decision. The rules provide that the decision must be part of the petitioner's appendix, or jurisdiction will not lie in the first instance. 140 The filing of a second copy, obviously, is unnecessary. 141

(g) Infrequently, but in more than isolated instances, counsel for losing litigants in the district courts will bring to the supreme court allegedly conflicting matters which are in reality requests for a second plenary appeal. In one case, for example, counsel argued in support of direct conflict jurisdiction that the "actual facts" developed in the trial court were inconsistent with those in the district court's decision. The court denied review. 142 In another case, facts allegedly developed in the trial court predicated counsel's disagreement with the district court's decision, although no principle of law in the opinion was faulted. Extensive excerpts from the trial transcript were appended to petitioner's brief. Review was also denied in that case. 143 Plainly, petitioners' counsel in these cases either did not understand or did not want to accept the judgment of Florida's voters that the supreme court was not available for second, plenary appeals.

A costly byproduct of spurious attempts to obtain further review, at least for the clients, is that wasteful motions frequently attend the petition. In the second case above, for example, respondent's counsel filed a motion to strike petitioner's brief and appendix on the ground that they failed to make a preliminary showing

the district court reweighed the evidence presented at a nonjury trial, causing its decision to conflict with Shaw and Westerman.

140. FLA. R. APP. P. 9.120 & 9.220. See also 1980 Committee Notes to FLA. R. APP. P. 9.120.

141. Admittedly, the rules might be read to suggest the need for a second filing, see FLA. R. APP. P. 9.210(c), but common sense would dictate that respondents need not include that which has already been filed by the petitioner.


of direct conflict under the amended jurisdiction. In accordance with the court's usual practice of avoiding dual, preliminary circulation of the case within the court, counsel was advised that the motion would be considered when the court decided the jurisdictional issue. A brief and appendix were then filed, in which counsel for respondent argued facts from the trial record which did not appear in the district court's written decision. When review was eventually denied, the motion to strike—which had by then engendered a response from petitioner and a separate motion to strike respondent's brief and appendix for exceeding page limits—was moot.

(h) Shorter jurisdictional briefs are possible under the court's present jurisdiction than was the case before, since all petitions must be accompanied by a district court opinion expressly discussing or mentioning the issue or issues brought for review. The appellate rules were amended to limit jurisdictional briefs to ten pages, but the authors have noted that even that length is frequently unnecessary.

(i) One of the main objectives of the 1980 amendment was to restore the supreme court's discretion to deny review of district court decisions which, although ostensibly in direct conflict with other Florida appellate decisions, lack importance to the jurisprudence of the state. Even where a direct conflict of decisions is acknowledged in a respondent's brief, the court may nonetheless decline review. Thus, in drafting a jurisdictional brief, petitioner's counsel should always explain why the case warrants consideration by the state's highest tribunal.

(j) Practitioners should be careful in using the Florida Rules of Appellate Procedure to distinguish the 1977 Committee Notes from those applicable under the 1980 amendment. For the most part, the appellate rules committee and the supreme court identified in the 1980 Committee Notes all changes which made the 1977 commentary inapplicable. An exception, however, appears in the commentary which accompanies Rule 9.120. The last sentence of the fifth full paragraph of the 1977 Committee Note suggests that an appendix to a jurisdictional brief should contain a copy of the

144. Id.
145. See Jurisdictional Reform, supra note 2, at 199; Fla. R. App. P. 9.120(d).
146. For example, the petitioner in Lewis v. Green, No. 59,917 (Fla., review denied Mar. 4, 1981), filed a two-page jurisdictional brief. Justices Adkins, Overton, Alderman and McDonald voted to deny the petition for review. Justice England dissented.
147. See generally Jurisdictional Reform, supra note 2, at 176-81, 200.
trial court order if the district court's decision was without opinion. Since that situation can no longer exist, the sentence should be disregarded. The 1980 Committee Note fails to mention this point.

(k) As regards the number of conflict cases accepted for review, the authors note that approximately thirteen percent of those filed and disposed of during the twelve month period were accepted for review. The 1980 amendment has apparently provided a basis for less self-restraint in the minds of the justices than was formerly exercised. With fewer requests filed, a greater percentage of cases can be accepted without creating unreasonable delays.

It remains to be seen what types of cases the court accepts for review, however. It is probable that, under the pre-amendment jurisdiction, the court took far too many cases which it imagined to be in direct conflict with precedent, seeking in fact to substitute the court's collective judgment for that of the district courts. The round robin consequence of this open-door policy, fully explained in our earlier article, created a climate in which attorneys brought cases for review which in fact involved marginal conflict or disagreeable results—rather than a direct conflict of decisions. The authors believe that former rulings of the supreme court operated not only to invite review requests but create more disharmony in the law by random intrusion into the appellate decisions of district courts than would have occurred if those decisions had been given presumptive finality. That is, fewer decisions from the high court might have generated fewer interpretive decisions below, and probably would have provided greater stability in the law over the years.

7. Certified Questions of Great Public Importance—Section 3(b)(4)

The 1980 amendment made no significant change in the supreme court's authority to review on a discretionary basis those decisions which the district courts certify as passing upon questions of great public importance. The clerk had estimated that approximately thirty-five decisions would be certified each year. In fact, thirty-

148. The court granted review in less than 5% of its discretionary cases before the 1980 amendment. Id. at 155.
149. See id. at 152-53, 177-78.
150. Id. at 191-92.
151. Id. at 192.
two certified decisions were filed during the amendment's first year of operation.152

Interestingly, the court accepted for review all of the certified decisions as to which jurisdictional determinations had been made at the time of this writing. It appears, then, that the justices generally respect the judgment of district court judges as to whether a matter is sufficiently important to warrant review by the state's highest tribunal.153 This deference will pose no problems for the court, provided district court judges continue to certify only those decisions which in fact involve questions of statewide importance.

Of the seventeen certified decisions which were filed and accepted for review, fourteen were set for consideration with oral argument; in the remaining three, the parties did not request argument.154 This suggests not only that any certified decision which is accepted by the court will warrant oral argument on the ground of its importance, but that the justices have adopted that view of certified matters in allocating their limited bench time.

The 1980 amendment substituted the terms "great public importance" for "great public interest." Based on the historical development of the provisions, the authors had suggested that the phrases were synonymous.155 Other commentators, however, expressed the view that "great public importance" was broader than "great public interest" in that some issues may have importance "but may not be sufficiently known by the public to have 'great public interest.' "156 The certified cases initially accepted for review indicate that the change in terminology has indeed broadened the provision to some extent. In a number of instances, the court has accepted certifications involving technical legal issues which are undoubtedly of great importance but which are palpably not of widespread public concern.157

152. Statistics obtained from the Clerk of the Supreme Court of Florida.
153. Under Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961), the court could decline for any reason to review a certified question brought from a district court.
154. Statistics obtained from the Clerk of the Supreme Court of Florida.
155. See Jurisdictional Reform, supra note 2, at 192.
157. See, e.g., Motchkavitz v. L. C. Boggs Indus., Inc., No. 78-1945 (Fla. 4th DCA June 4, 1980), review granted, No. 59,421 (Fla. July 7, 1980) (interpretation of workmen's compensation statutes); Casto v. Casto, No. 79-2008 (Fla. 4th DCA May 14, 1980), review granted, No. 59,255 (Fla. Oct. 2, 1980) (interpretation of term "entry of judgment" in Fla. R. Civ. P. 1.530(b)). At least one case certified during the amendment's first year would probably satisfy the former "great public interest" test. Board of County Comm'rs v. Wilson, 382 So. 2d 431 (Fla. 3d DCA 1980), quashed, 386 So. 2d 556 (Fla. 1980).
8. Certified Conflict—Section 3(b)(4)

The framers of the 1980 amendment believed that the district courts should have authority to certify to the supreme court those decisions which they thought to be in direct conflict with decisions of other district courts. This authority was embodied in section 3(b)(4), and it was estimated that the district courts would certify approximately twenty decisions each year. In fact, six decisions were certified as being in direct conflict during the applicable twelve month period. The supreme court accepted all but one of these cases for discretionary review, and it granted oral argument in all cases where the parties requested it.

There are at least two alternatives by which the court may treat a certified case when the direct conflict has already been resolved consistent with the district court's decision by a supreme court opinion entered after the date of certification. The court could simply deny review, possibly citing to that later decision in its order, or the court could accept the case and affirm in a summary order citing the subsequent decision. The latter action would, of course, constitute precedent, to the same extent as the court's decision which had resolved the conflict. A mere denial of review would not have precedential effect. The difference in treatment would be inconsequential, however, since precedent is supplied by the decision which had resolved the conflict and upon which the application for review was denied.

9. Certified Trial Court Orders—Section 3(b)(5)

One important caseload estimate which has held true during the twelve month period was the prediction that not more than two or three trial court orders would be certified by district courts as requiring immediate supreme court resolution under newly-created section 3(b)(5). In fact, only two cases in this category were certified to the court during the amendment's first year of operation, State, Department of Insurance v. Liberty Mutual Fire Insurance

158. Jurisdictional Reform, supra note 2, at 193.
159. Statistics obtained from the Clerk of the Supreme Court of Florida.
162. Jurisdictional Reform, supra note 2, at 195.
Co.,¹⁶³ and State, Department of Insurance v. Government Employees Insurance Co.¹⁶⁴ The district court's treatment of these cases provides a view of its understanding of the immediacy requirement under this provision.

Both trial court orders, which were certified by the First District Court of Appeal,¹⁶⁵ declared unconstitutional and enjoined the enforcement of a statute enacted in 1977 to require automobile insurance companies to rebate to policyholders their so-called "excess profits."¹¹⁶⁶ The orders found that the legislation constituted an unlawful delegation of legislative authority and violated the equal protection rights of the insurance companies.

Counsel in each case submitted suggestions for certification to the district court,¹⁶⁷ arguing that the validity of the excess profits rebate law was of great public importance and required immediate resolution by the supreme court. The principal bases for the suggestions of immediacy and importance were: (1) that the insurance companies would be required to maintain reserves or contingent liabilities so long as the lawsuits were unresolved, thereby causing adverse effects on company dividends and earnings estimates; (2) that policyholders would be delayed in receiving excess profit rebates if the statute were ultimately found to be valid; (3) that other auto insurers were affected by the uncertain status of the statute; (4) that the 1980 legislature was considering a bill to reenact the excess profits statute; and (5) that the appeals would affect all people in Florida who pay auto insurance premiums.¹⁶⁸ The district court granted the suggestion in each case in a short form order.

Shortly after the district court’s certifications arrived at the supreme court, the 1980 legislature amended the contested provisions of the statute.¹⁶⁹ Each party entered a notice of voluntary dismissal, and the certified cases were dismissed.¹⁷⁰ The court never ruled whether the cases would be accepted for review based on the tests

¹⁶³. No. 59,352 (Fla. Aug. 27, 1980).
¹⁶⁴. No. 59,353 (Fla. Aug. 27, 1980).
¹⁶⁵. Memorandum to Counsel, State, Dep’t of Ins. v. Liberty Mut. Fire Ins. Co., No. VV-353 (Fla. 1st DCA June 9, 1980); Memorandum to Counsel, State, Dep’t of Ins. v. Government Employees Ins. Co., No. VV-354 (Fla. 1st DCA June 9, 1980).
¹⁶⁸. Appellees’ Suggestions for Certification of Appeal at 1-3.
set out in section 3(b)(5).

McPherson v. Flynn,\textsuperscript{171} a case filed with the court on April 1, 1981 (technically during the second year of the 1980 amendment), illustrates both the intended operation of section 3(b)(5) and the significance of the difference between the two alternative bases for the certification of a trial court order which requires immediate resolution by the supreme court—"great public importance" and "great effect on the proper administration of justice throughout the state." The case involved the power of the judiciary to adjudicate the validity of a legislator's election.

The McPherson case came to the court on April 1. The Florida Legislature was scheduled to convene for its regular 1981 session on April 7. In light of the challenge to McPherson's position as a member of the Florida House of Representatives and the district court's certification, the court accepted the case for review\textsuperscript{172} and expedited its consideration of the case by setting it for oral argument on April 9. A decision and opinion were rendered on April 14.

The McPherson case was brought to the court as a matter of great public importance. Its resolution is unrelated to the proper administration of justice throughout the state. This latter category of case would more typically affect the operation of the court system in some way, as was discussed by way of examples in our earlier article.\textsuperscript{173} Quite clearly now, it can be seen that although issues affecting the administration of justice may have prompted the creation of the certification procedure found in section 3(b)(5),\textsuperscript{174} the "great public importance" alternative is a concept distinct from the "administration of justice" alternative.

Interestingly, the McPherson case also illustrates that section 3(b)(5) is a procedural vehicle, shifting only the locale for review from one court level to another, and as such can conceivably bring to the supreme court any type of appeal or review that may be entertained by the district courts in the first instance. McPherson was taken to the Third District Court of Appeal by petition for a writ of certiorari. The case proceeded in that posture after the supreme court exercised its jurisdiction under section 3(b)(5) to accept the certification, and resulted in a mandate issued directly to

\textsuperscript{171} No. 60,435 (Fla. Apr. 14, 1981).
\textsuperscript{172} The immediacy requirement of section 3(b)(5) was undoubtedly met by the imminence of the 1981 legislative session, in which the challenged member of the Florida House of Representatives was to participate.
\textsuperscript{173} Jurisdictional Reform, supra note 2, at 193-94.
\textsuperscript{174} Id. at 194-95.
the trial court. The court’s opinion accepted “the petition for writ of certiorari filed with the Third District Court of Appeal and transferred to this Court under article V, section 3(b)(5),” and then reversed the trial court’s order of dismissal.176

Temporary appellate rules which had been adopted with respect to the certification of trial court orders became a permanent part of the Florida Rules of Appellate Procedure as of January 1, 1981.176 Rule 9.125 establishes several special features of appellate practice applicable to these proceedings. The process is self-executing in nature, in that the jurisdiction of the supreme court is declared invoked, although on a discretionary basis, upon rendition of the certificate.177 The district court can certify a case on its own motion or upon a party’s suggestion (the form of which is specified in the rule).178 The district court’s action on the certification, moreover, does not affect the applicable time limits or place of filing.179 Jurisdictional briefs are not required, and the supreme court’s decision to accept or reject a case essentially affects the parties only to the extent that all papers will be filed in the supreme court, rather than the district court, if the case is accepted.180

10. Questions Certified from Federal Courts—Section 3(b)(6)

The 1980 amendment in no way affected the previous practice by which federal appellate courts certified to the supreme court questions of state law which were dispositive of causes pending in the federal judicial system. The clerk’s estimate of a nominal five cases per year181 was slightly high, in that federal appellate courts certified only one case to the supreme court during the amendment’s first twelve months of operation.182

11. Writs of Prohibition to Courts—Section 3(b)(7)

The 1980 amendment made no change in the court’s authority to issue writs of prohibition to courts, and during the twelve month period ending March 31, 1981, sixteen petitions for writs of prohi-

176. See note 3 supra.
177. FLA. R. APP. P. 9.125(b).
178. Id. at (a), (e).
179. Id. at (f).
180. Id. at (g).
181. Jurisdictional Reform, supra note 2, at 197.
182. Statistics obtained from the Clerk of the Supreme Court of Florida.
Petitions filed with the court indicate some confusion as to whether a writ of prohibition may issue to courts which take action in causes not now within the supreme court's review jurisdiction, such as trial court orders which neither impose a death sentence nor validate bonds. This problem stems from the 1980 amendment's deletion of the phrase "in causes within the jurisdiction of the supreme court to review." The confusion has not been addressed or resolved by the court.

III. Concluding Observations

Certain general observations can be drawn from the first year of experience under the 1980 amendment.

1. A major concern of some members of the organized bar regarding the adoption of the 1980 amendment was the risk of entrusting the finality of their cases to district court judges. Although no conclusive data can be developed to establish that decisions of three-judge district court panels are as reliable and just as decisions of a seven-justice supreme court were thought to be, at least one indicator suggests that the organized bar's concern was unwarranted.

Since the adoption of the 1980 amendment there has been a merit retention election of twenty district court judges throughout the state. Pre-retention polls taken by the organized bar with respect to these judges showed a 76 to 93 percent range of acceptability among lawyers. In fact, all but two district court judges were considered qualified by more than 80 percent of Florida's lawyers. These ratings by the bar were confirmed by the voters during the merit retention elections, when all twenty district court judges were retained in office. The percentages of approval ranged from 66 percent to 76 percent.

2. Although it is too early to make predictions with any degree of precision, the composition of the supreme court's workload may be shifting subtly. Review of death penalty cases consumed a larger

183. Id.
184. See Jurisdictional Reform, supra note 2, at 197.
185. See generally id. at 160.
186. The retention election was a part of the November 4, 1980, general election.
188. Certificate of Secretary of State.
proportion of the court’s current work time, and bar matters,\textsuperscript{189} frequently overlooked, increased as a proportion of the court’s workload.

A 1977 analysis of the court’s workload indicated that approximately nine percent of the court’s filings were bar-related matters.\textsuperscript{190} Bar-related matters recently assumed more prominence, representing twenty-one percent of the court’s total filings. Two changes in bar processes may have contributed to this phenomenon, in effect “bunching” bar matters during the twelve months here analyzed. The first results from the fact that matters formerly processed through a grievance process which relied upon attorney referees are now processed through more expeditious judicial referees.\textsuperscript{191} The accelerated new and remaining old disciplinary matters which came to the supreme court during the amendment’s first year added more bar matters to its docket than usual. Second, the organized bar has now developed a more extensive prosecution staff for disciplinary matters, with the consequence that more grievance matters seem to be brought before referees and, eventually, the court.\textsuperscript{192}

In the long view of constitutional reform, the question will have to be asked whether death penalty cases and bar matters will or should occupy such a prominent proportion of the court’s work.

3. A main objective of the voters in adopting the 1980 amendment was to reduce delay in appellate courts. Implementation of the amendment has enabled the supreme court to reduce significantly the amount of time necessary to dispose of petitions for discretionary review—a major portion of its workload. As of April 1, 1980, the approximate time for the disposition of certiorari petitions was five to six months.\textsuperscript{193} One year later, the approximate average time for disposition of review petitions was six to eight weeks.\textsuperscript{194} This time saving, moreover, does not reflect the impact of either the reduced page limitation for jurisdictional briefs or the elimination of jurisdictional reply briefs. It unquestionably stems

\textsuperscript{189} These matters include disciplinary actions, rules petitions, and bar admission review applications. The court is assigned jurisdiction over the admission and discipline of attorneys by Fla. Const. art. V, § 15.


\textsuperscript{191} Petition of Supreme Court Special Comm. for Lawyer Disciplinary Procedures to Amend Integration Rule, Article II and Article XI, 373 So. 2d 1 (Fla. 1979).


\textsuperscript{193} Estimate of the Clerk of the Supreme Court of Florida.

\textsuperscript{194} \textit{Id.}
in large part from the court's having fewer petitions to review, shortened appendices, and more focused arguments of counsel with respect to the issue or issues presented.

4. Any analysis of the supreme court's workload and the effectiveness of the 1980 amendment must take into account the workload of the district courts. Filings and dispositions in those courts in calendar years 1978, 1979, and 1980 provide relevant data:

<table>
<thead>
<tr>
<th>Filings</th>
<th>Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978: 9,566</td>
<td>9,691</td>
</tr>
<tr>
<td>1979: 12,474</td>
<td>10,875</td>
</tr>
<tr>
<td>1980: 11,814</td>
<td>11,780</td>
</tr>
</tbody>
</table>

In that there has been no diminution in the work of the district courts, it appears that the 1980 amendment was indeed necessary to save the supreme court from inundation under its former jurisdictional framework.

5. The types of district court decisions are also relevant in considering the effectiveness of the 1980 amendment. Information developed by the 1978 Appellate Structure Commission indicated that the district courts entered PCA's without opinion in a range of fifteen to forty-seven percent of the cases which they disposed of during calendar years 1978 and 1979. The district courts apparently did not seize upon the amendment to expand the percentage of their dispositions without opinions during calendar 1980. Reports from the clerks of the district courts indicate that the average rates of disposition without opinion during the amendment's first year were as follows:

- First DCA - 32%
- Second DCA - 49%
- Third DCA - 10%
- Fourth DCA - 27%
- Fifth DCA - 32%

6. It has been suggested that the philosophy of the supreme court's seven justices, and their adherence to the voters' will with respect to the court's jurisdiction, will in large part determine the ultimate success of the 1980 amendment. The voting patterns of
the current justices may be a preliminary indicator of their acceptance of the supreme court's new role. Bearing in mind that the court in recent years had granted review in less than five percent of its discretionary cases, it is interesting to see the justice's votes on direct conflict petitions under revised section 3(b)(3) in the cases which were disposed of by a panel or the court during the first year since the 1980 amendment became effective.

**TABLE 2**

<table>
<thead>
<tr>
<th>Justice</th>
<th>Number of cases considered</th>
<th>Review accepted</th>
<th>Review denied</th>
<th>Percent of cases accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adkins</td>
<td>278</td>
<td>126</td>
<td>152</td>
<td>45.32</td>
</tr>
<tr>
<td>Boyd</td>
<td>279</td>
<td>56</td>
<td>223</td>
<td>20.07</td>
</tr>
<tr>
<td>Overton</td>
<td>292</td>
<td>49</td>
<td>243</td>
<td>16.78</td>
</tr>
<tr>
<td>England</td>
<td>249</td>
<td>35</td>
<td>214</td>
<td>14.06</td>
</tr>
<tr>
<td>Sundberg</td>
<td>74</td>
<td>28</td>
<td>46</td>
<td>37.84</td>
</tr>
<tr>
<td>Alderman</td>
<td>287</td>
<td>30</td>
<td>257</td>
<td>10.45</td>
</tr>
<tr>
<td>McDonald</td>
<td>281</td>
<td>52</td>
<td>229</td>
<td>18.51</td>
</tr>
</tbody>
</table>

It may be fairly inferred that the voting variations illustrated in this table reflect diverse attitudes both as to the relative importance of select issues brought to the court and as to the supreme court's generic role in Florida's judicial hierarchy. There is nothing insidious or dangerous in those diversities. Indeed, they exist in all high courts, and their periodic explication, such as through the

198. See id. at 155.

199. Justice Sundberg served as chief justice during the last nine months of the twelve month period. In that capacity he received only one-third the number of review petitions assigned to other justices. Fla. Sup. Ct. Man. Int. Oper. Proc. § II A. 1(a). More cases would have been brought to him than to the other justices, however, when a vote was needed to resolve disagreement because a five-justice panel did not record a four-vote consensus. Id. Statistics for his votes thus reflect a possible "deference factor" in the exercise of the chief justice's discretion, since in many of the cases on which he must vote at least two or three other justices have already expressed a desire to accept the case for review.

200. In Watt v. Alaska, No. 79-1890 (U.S. Apr. 21, 1981), Justice Stevens concurred specially to vocalize his dissatisfaction with the court's "misuse [of] its scarce resources . . . by granting certiorari without adequate justification." His complaint was precisely that which in large part led to constitutional change in Florida—finality in the intermediate appellate courts. He suggested that "the public interest would have been better served by allowing this litigation to terminate in [those courts]," that despite occasional errors in those tribunals "this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals," and that "if we accorded those dedicated appellate judges the deference that their work merits, we would be better able to resist the temptation to grant certiorari for no reason other than a tentative prediction that our review of a case may produce an answer different from theirs." Id., slip op. at 1-3.
debates on the 1980 constitutional amendment, is a source of strength within the court and a resource of understanding to the public generally.
APPENDIX A

FLA. CONST. art. V, § 3(b)

(b) JURISDICTION.—The supreme court:

1. Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

2. When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.

3. May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

4. May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

5. May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

6. May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

7. May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

8. May issue writs of mandamus and quo warranto to state officers and state agencies.

9. May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.