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## Florida Supreme Court Jurisdiction—SUPREME COURT JURISDICTION REVISITED: A LOOK AT FIVE RECENT CASES

On March 11, 1980 Florida voters ratified a constitutional amendment limiting supreme court jurisdiction.<sup>1</sup> Ratification of this amendment created numerous questions which the court must address.<sup>2</sup> In the eighteen months since the amendment became effective<sup>3</sup> the Florida Supreme Court has already provided some insight into the extent of supreme court review available since the passage of the amendment.

The court has recently had the opportunity to address three aspects of its jurisdiction. First, the court has defined, to a limited extent, the boundaries of conflict of decision review.<sup>4</sup> The court has also addressed the review of questions certified by a district court of appeal to be of great public importance.<sup>5</sup> Finally, the court has declined the opportunity to determine the scope of discretionary review once review is granted.

This note will consider each of these areas in order to present a current view of supreme court jurisdiction.<sup>6</sup> An attempt will be

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1. The constitutional amendments were placed on the ballot of a special election that was held March 11, 1980. The official vote was 940,420 to 460,266. England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147, 160 (1980) (citing the unofficial certificate of Secretary of State) [hereinafter cited as *Jurisdiction*]. The text of the amendment provides in pertinent part:

SECTION 3. Supreme Court.—

(b) JURISDICTION.—The supreme court:

(3) May review by certiorari 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; that passes upon a question certified by a district court of appeal to be of great public interest, or that expressly and directly conflicts that is in direct conflict with a decision of another any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court, and may issue writs of certiorari to commissions established by general law having state-wide jurisdiction.

(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.

Fla. SJR 20-C (Spec. Sess. 1979).

2. See generally England & Williams, *Florida Appellate Reform One Year Later*, 9 FLA. ST. U.L. REV. 223 (1980) [hereinafter cited as *Reform*].

3. The amendments took effect April 1, 1980. 1980 Fla. SJR 20-C.

4. *Id.* at § 3(b)(3) (1980 amendment).

5. *Id.* at § 3(b)(4).

6. This topic has been analyzed extensively by Justice England in his two articles cited previously: *Jurisdiction*, *supra* note 1 and *Reform*, *supra* note 2. Therefore, this note will

made to determine whether the plain language and underlying objectives of the constitutional amendment support the court's decisions.<sup>7</sup> In addition, the impact of these decisions will be analyzed to project a pattern for the future. Whether the court will continue to judicially expand or limit the jurisdiction established by the amendment remains to be seen.

### A. Section 3(b)(3)—Conflict of Decisions

The court has given its most thorough attention to conflict of decisions review.<sup>8</sup> Decisions from different districts must "expressly and directly"<sup>9</sup> conflict for the supreme court to have jurisdiction. The avowed purpose of the "expressly" requirement was to relieve the court's overburdened docket by overruling *Foley v. Weaver Drugs, Inc.*<sup>10</sup> In *Foley*, the court allowed conflict certiorari<sup>11</sup> based on a district court's per curiam affirmance (P.C.A.).<sup>12</sup> Under section 3(b)(3) of the amendment, conflict review may no longer be predicated on a P.C.A. This is true even if the P.C.A. is accompanied by a significant dissent.<sup>13</sup>

The Florida Supreme Court has extended this restrictive view to citation P.C.A.'s<sup>14</sup> by its decision in *Dodi Publishing Co. v. Editorial America, S.A.*<sup>15</sup> In a citation P.C.A., another case is cited to explain the court's reasoning. The *Dodi* court refused to review the

not attempt to discuss the intricacies involved in the 1980 constitutional amendment. It will merely provide the reader with an analysis of supreme court decisions subsequent to those discussed in Justice England's articles.

7. See notes 44-47 *infra* and accompanying text.

8. Three of the court's five most recent decisions impacting on jurisdiction are cases defining conflict of decision review. See text accompanying notes 14-74, *infra*.

9. See note 1, *supra*.

10. 177 So. 2d 221 (Fla. 1965). *Foley* set out the principle that the supreme court would review no-opinion decisions by the district court. Because no district court opinion is written, consideration must be based on the written record of the proceedings in the trial court—the "record proper doctrine." *Foley* increased the court's caseload significantly as attorneys began to seek review of any district court decision. *Jurisdiction, supra* note 1, at 152. Moreover, review of the court record was a time-consuming task compounding the problem of delay resulting from the increased caseload.

11. Petition for certiorari is no longer the method to seek review. See 1980 Fla. SJR 20-C. "Certiorari is essentially a common law writ issued by a superior court to an inferior court for the purpose of bringing up the record to determine whether the inferior court exceeded its jurisdiction or failed to proceed according to the essential requirements of law." *Jurisdiction, supra* note 1, at 181 (footnote omitted).

12. 177 So. 2d at 225; *Jurisdiction, supra* note 1, at 177.

13. *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

14. A citation P.C.A. is a per curiam affirmance containing only a citation of authority. *Reform, supra* note 2, at 179.

15. 385 So. 2d 1369 (Fla. 1980).

cited case to determine whether it conflicted with a decision of another district court of appeal. The court denied jurisdiction, holding that the conflict must exist between the case for which review is sought and that of another district. No review of the cited case will be performed to determine if there is a conflict.<sup>16</sup>

*Robles Del Mar, Inc. v. Town of Indian River Shores*,<sup>17</sup> however, decided the same day, left a chink in the armor of *Dodi's* denial of conflict review for citation P.C.A.'s. The language in *Robles* implied that if the cited authority in a citation P.C.A. is not final the case may be reviewed.<sup>18</sup> In *Jollie v. State*,<sup>19</sup> the supreme court turned this implication into fact.

*Jollie* was a P.C.A., citing the Fifth District Court of Appeal's decision in *Murray v. State*.<sup>20</sup> *Murray* held that requested jury instructions were mandatory.<sup>21</sup> The trial court had not given the requested jury instruction. Nevertheless, the district court affirmed *Murray's* conviction, holding that the failure to give the requested instruction was harmless error.<sup>22</sup> Thereafter, the same district court summarily disposed of three cases<sup>23</sup> dealing with the same legal issue. *Jollie* was one of these cases. Each case cited *Murray* for authority. The holding, if not the outcome in *Murray*, however, was in conflict with a First District Court of Appeal case, *Tascano v. State*, which had held that the same jury instructions were not mandatory.<sup>24</sup> The Florida Supreme Court had already accepted certiorari in *Tascano* because the district court had certified the question as one of great public importance.<sup>25</sup>

Petitions for certiorari were subsequently filed in the supreme court for *Murray*, *Jollie*, and the other P.C.A.'s citing *Murray*. Conflict of decision was the jurisdictional peg cited in each of these

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16. *Id.*

17. 385 So. 2d 1371 (Fla. 1980).

18. "The cited *Epifano* decision . . . is a *final* decision of the district court." 385 So. 2d at 1371 (emphasis supplied). The court then dismissed the petition citing *Dodi* as authority. The only interpretation of *Robles* which will give the word "final" some meaning is one which allows review of a P.C.A. where a cited authority is not final. *See Reform, supra* note 2, at 234.

19. *Jollie v. State*, 6 F.L.W. 555 (July 30, 1981).

20. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).

21. Fla. R. Crim. P. 3.390(a) states that the judge "shall" instruct the jury on the maximum and minimum sentences which may be imposed for the crime with which the defendant is charged.

22. 378 So. 2d at 112.

23. *Jollie v. State*, 6 F.L.W. 555; *Allen v. State*, 380 So. 2d 541 (Fla. 5th Dist. Ct. App. 1980); *Knight v. State*, 379 So. 2d 10, 17 (Fla. 5th Dist. Ct. App. 1980).

24. 363 So. 2d 405 (Fla. 1st Dist. Ct. App. 1978).

25. *Id.* at 407.

petitions. Unlike the other cases, however, *Jollie's* petition was filed after the effective date of the 1980 amendment.<sup>26</sup>

The supreme court granted jurisdiction in *Murray* on a direct conflict with the *Tascano* decision.<sup>27</sup> The court also granted jurisdiction to the citation P.C.A.'s filed prior to the amendment. Upon review, the court quashed *Tascano*, holding that the requested jury instruction was indeed mandatory.<sup>28</sup> Notwithstanding this holding, the court also quashed *Murray*.<sup>29</sup> It held that the district court's holding—that the failure to instruct was harmless error—was incorrect.<sup>30</sup> The court then granted relief in the two citation P.C.A.'s filed prior to the amendment.<sup>31</sup>

In resolving *Jollie*, the court made use of the "final" language in *Robles*. The language of the holding in *Robles* had left open the question whether the Florida Supreme Court can grant conflict review of a citation P.C.A. in which the cited case is pending review or has previously been reversed by the supreme court.<sup>32</sup> Determination of this question was necessary to protect *Jollie* from unjust treatment by refusing review. Although *Jollie* is indistinguishable from the other two citation P.C.A.'s in which relief was granted, the petitioner would not have received relief because his petition was filed after the effective date of the amendment.

The *Jollie* court stated: "[A] district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction."<sup>33</sup> By wording its decision in this manner the court has not created an express exception to the amendment. Nevertheless, by this redefinition of conflict the court has reopened the jurisdictional gate to review of per curiam opinions.

The court advanced two reasons for its decision to enlarge the power of review. First, the court had traditionally reviewed citation P.C.A.'s when the referenced decision had been reversed or quashed by the supreme court prior to *Foley*, and the court felt it should continue this policy. After all, the "Court must acknowl-

26. 6 F.L.W. at 555.

27. *Murray v. State*, 403 So. 2d 417 (Fla. 1981).

28. 393 So. 2d 540, 541 (Fla. 1980).

29. 403 So. 2d at 418.

30. *Id.* To hold otherwise would overrule the mandatory effect of the jury instruction rule.

31. 401 So. 2d 1333 (Fla. 1981).

32. *Reform, supra* note 2, at 234, 235.

33. 6 F.L.W. at 556.

edge its own public record actions in dispensing with cases before it."<sup>34</sup> Second, the court justified its decision because of the convenience of allowing a court to dispose of cases involving a single legal issue by authoring one opinion and referencing other cases to it. "Being time and labor saving for a court, [this] practice should not be discouraged."<sup>35</sup>

In addition to these justifications, the supreme court directed that the district courts find ways to isolate P.C.A.'s which reference a case for authority for possible review decision. P.C.A.'s which reference a lead case should be labeled differently from P.C.A.'s which cite cases merely to notify counsel of the court's reasoning.<sup>36</sup> The procedures requested by the court to isolate these cases are twofold. First, each citation P.C.A. which references a controlling contemporaneous or companion case should include a statement that an order will be withheld pending final disposition of the controlling case.<sup>37</sup> Second, the court asked that the district courts devise signals which distinguish a reference to a lead case from one intended to notify counsel.<sup>38</sup>

Thus, Mr. Jollie was protected from inequitable treatment by an expansive judicial interpretation of the amendment. But what of the integrity of the language and the purposes of the amendment? Why should Mr. Jollie be protected while others who receive citation P.C.A.'s are not? Has the court let a hard case make bad law?

Although *Jollie's* reach is limited, the decision represents a retreat from the 1980 amendment. Several judicial considerations militate against this retreat and the court's position in *Jollie*.

First, the plain language of the amendment contradicts the *Jollie* holding. Generally, where provisions of the constitution are plain and unambiguous they should be read and enforced as written.<sup>39</sup> On the other hand, a literal interpretation should not be used "if it leads to an unreasonable conclusion or a result not in-

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34. *Id.*

35. *Id.*

36. A counsel advising case is one which is included in a citation P.C.A. to explain to the attorneys involved the reasons for the court's decision. It does not serve as a discussion of the legal issues involved or as precedent. Its purpose is merely to inform counsel.

37. 6 F.L.W. at 556.

38. *Id.*

39. *City of St. Petersburg v. Briley*, 239 So. 2d 817 (Fla. 1970); *State v. Florida State Improvement Comm'n*, 47 So. 2d 627 (Fla. 1950); *City of St. Petersburg v. Continental Can Co.*, 151 So. 488 (Fla. 1933); *Plante v. The Florida Comm'n on Ethics*, 354 So. 2d 87 (Fla. 1st Dist. Ct. App. 1977).

tended by the lawmakers."<sup>40</sup> The language in section 3(b)(3) is clear and unambiguous and does not lead to an unreasonable conclusion.<sup>41</sup>

In addition, the term "expressly" as used in the amendment requires that there be some *verbal* representation. A decision cannot expressly conflict with that of another district unless an opinion discussing the legal issues is filed.<sup>42</sup> The holding in *Jollie* simply does not comport with this requirement. The second drawback of the *Jollie* holding is that in *Jollie* the underlying objectives of the amendment are compromised. There were several expressed purposes of the amendment. The first was to make the district courts courts of final appeal and thereby reduce the docket and workload on the overburdened Florida Supreme Court.<sup>43</sup> A second purpose was to insure that only important legal issues reach the supreme court.<sup>44</sup> A third purpose was to insure speedier, less costly, and more conclusive adjudications.<sup>45</sup> In addition, "the change was motivated in part by a desire to preserve the resources of the Court for the task of maintaining harmony and uniformity of decisions as legal precedents."<sup>46</sup>

More specifically, the purpose of adding "expressly" was to prohibit review of P.C.A.'s and citation P.C.A.'s.<sup>47</sup> Post-amendment cases had continued to narrow the review of P.C.A.'s, thereby diminishing the court's caseload. *Jollie*, however, reverses this trend.<sup>48</sup>

Despite the court's attempt to limit the review of citation P.C.A.'s, a hole has been opened in the amendment.<sup>49</sup> As noted by Justice England, "the treatment of [*Jollie*], . . . and the court's methodology for distinguishing acceptable from unacceptable citation P.C.A.'s . . . will have significant impact on the court's future

40. 239 So. 2d at 822 (citation omitted).

41. See note 1 *supra*, for text of section 3(b)(3).

42. See 6 F.L.W. at 557 (Boyd, J., dissenting). Justice Boyd uses Webster's Third New International Dictionary to define expressly.

43. *Jurisdiction*, *supra* note 1, at 153, 161, 182.

44. England, Hunter & Williams, *An Analysis of the 1980 Jurisdictional Amendment*, 24 FLA. B.J. 406 [hereinafter cited as *Analysis*]; *Reform*, *supra* note 2, at 224; Jenkins v. State, 385 So. 2d at 1358.

45. *Reform*, *supra* note 2, at 223; Jenkins v. State, 385 So. 2d at 1363.

46. *Jollie v. State*, 6 F.L.W. at 557 (Boyd, J., dissenting).

47. *Reform*, *supra* note 2, at 231; *Jurisdiction*, *supra* note 1, at 179.

48. See, e.g. *Dodi Publishing Co. v. Editorial America*, 385 So. 2d 1369 (Fla. 1981); *Robles Del Mar, Inc. v. Town of Indian River Shores*, 385 So. 2d 1371 (Fla. 1981); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

49. *Jollie v. State*, 6 F.L.W. at 557 (Boyd, J., dissenting).

caseload and thus the effectiveness of the 1980 amendment. . . ."<sup>50</sup>

As a result of *Jollie*, the court may lose many of the advantages it had hoped to gain under the amendment. It is difficult to distinguish between citation P.C.A.'s which reference a case pending review and those which merely notify counsel. Although the court does request that district courts use some type of signal to identify a case which is subject to review, each citation P.C.A. for which review is sought will have to be screened at the supreme court level. The clerk of the court will no longer be able to perform a ministerial screening as required by the supreme court operating manual<sup>51</sup> to ascertain whether petitions are supported by a written opinion.<sup>52</sup> It is not yet clear whether the procedures delineated by the court to isolate acceptable citation P.C.A.'s are sufficient. Since the procedures are neither mandatory nor particularly precise, at least some jurisdictional review will be required. The court also loses the advantage of a "better basis for making an informed decision,"<sup>53</sup> which is present when the appellate court writes an opinion as supposedly required by the amendment for jurisdiction.

Finally, since the court is trying to maintain harmony and uniformity of decisions as legal precedents as well as ensure that the court will review only important legal issues,<sup>54</sup> these cases do not warrant review. By resolving the cited authority, the court will provide a uniform legal precedent and thereby perform its policymaking function. If the cited case is reviewed, the question at issue will have a definitive answer. Supreme court review of citation P.C.A.'s will add nothing to the precedent developed. Moreover, citation P.C.A.'s do not stand as precedent.<sup>55</sup> If the supreme court does not review them, they will neither prejudice future litigants nor upset the precedent created by the court's review of the cited authority. Review also imposes high costs in court time and effort. Thus, the

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50. *Reform, supra* note 2, at 235.

51. *Reform, supra* note 2, at 237 (citing Sup. Ct. Manual of Inter. Oper. Proc. art. II, A(1)(a) (as amended March 24, 1981)).

52. *Jurisdiction, supra* note 1, at 181. The authors state: "The clerk's office will be able to screen petitions to ascertain if they are supported by a written opinion of a district court, and those without such support will simply be returned to the filing attorney." *Id.*

53. *Jurisdiction, supra* note 1, at 181. "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." *Id.* at 179 (footnote omitted).

54. See note 48 *supra* and accompanying text. See also, *Jenkins v. State*, 385 So. 2d at 1363 (Adkins, J., dissenting).

55. *Jurisdiction, supra* note 1, at 179, n.187. (citing P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL*, 33, 39-40 (1976)).



court should not have created the *Jollie* loophole.

Another interesting jurisdictional determination involving citation P.C.A.'s and conflict of decision review was presented indirectly in *State Farm Mutual Automobile Insurance Co. v. Lawrence*.<sup>56</sup> In a P.C.A. the district court cited a case for authority and then added a second citation sentence: "*Contra, McLellan v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 811 (Fla. 4th D.C.A. 1979)."<sup>57</sup> The jurisdictional question was "whether a 'contra' signal is sufficient to establish a jurisdictional basis for review on the ground of an 'express' conflict."<sup>58</sup>

The supreme court in *Lawrence* did not, in fact, review the district court decision since the conflict had already been resolved.<sup>59</sup> Implicit in the majority's statement that the conflict had been resolved is the conclusion that the court did have jurisdiction. Otherwise the court would have denied review for lack of an express conflict without concluding that the legal issue was already decided. This represents a further retreat from the purposes of the amendment. Justice Boyd, in dissent, stated: "The statement that the conflict has been resolved in a recent or simultaneously issued decision of this court presupposes that there was conflict adequate to support the exercise of jurisdiction."<sup>60</sup> In addition, Justice Alderman stated simply that he would dismiss for lack of jurisdiction.<sup>61</sup> Thus, once again the court has opened the gate to review of no-opinion decisions, in contravention of the language and objectives of the amendment.

Both *Jollie* and *Lawrence* represent small cracks in the floodgate of the 1980 amendment and the subsequent cases which narrowly construed the amendment. As with most small cracks, they may begin to expand and eventually tear down the floodgate. Unfortunately, these decisions have seriously undermined the effectiveness of the amendment. However, not all of the recent decisions regarding conflict review have been expansive in effect. In a third case dealing with conflict review, *Ford Motor Co. v. Kikis*,<sup>62</sup> the court attempted to clarify the "expressly" requirement in section

56. 401 So. 2d 1326 (Fla. 1981).

57. *Id.* at 1327.

58. *Reform*, *supra* note 2, at 235, n.68.

59. 401 So. 2d at 1326. The court stated, in response to the application for review: "Denied, conflict resolved in South Carolina Ins. Co. v. Kokay, 398 So. 2d 1355 (Fla. 1981)." *Id.*

60. *Id.* at 1327 (Boyd, J., dissenting).

61. *Id.* at 1326 (Alderman, J.)

62. 401 So. 2d 1341 (Fla. 1981).

3(b)(3).<sup>63</sup>

The trial court, upon Ford's motion, vacated a jury verdict entered for Kikis and directed a verdict for Ford. The district court reversed and instructed the trial court to reinstate the jury verdict.<sup>64</sup> Ford asserted an express and direct conflict and requested supreme court review. The district court, however, had not identified a conflict in its opinion. This omission raised the question of whether the district court itself must expressly identify a conflicting decision.<sup>65</sup>

The court concluded that "[i]t is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under § 3(b)(3)."<sup>66</sup> The intermediate court's discussion of the legal principles provided a sufficient basis for conflict review.

The *Kikis* decision is clearly justifiable. Neither the framers of the amendment nor the voters intended to require identification of conflicting decisions by the district courts. If that were the intent, then sections 3(b)(3) and 3(b)(4)<sup>67</sup> would have the same meaning. The district court already must expressly identify conflicting decisions to predicate review under certified conflict in section 3(b)(4). It would be redundant to require this identification for section 3(b)(3) as well. Common sense and canons of constitutional construction will not allow this strained interpretation. Constitutional provisions should be considered in *pari materia* and each provision construed so that it has an effect.<sup>68</sup> Thus the only plausible construction of sections 3(b)(3) and 3(b)(4) mandates the holding in *Kikis*.<sup>69</sup>

In addition, there is an important advantage in the *Kikis* holding; the court eliminates an element of the district court's discretion in determining which cases may seek supreme court review. Prior to this decision, a district court could, arguably, avoid review

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63. *Id.* at 1342.

64. *Id.*

65. *Id.*

66. *Id.*

67. FLA. CONST. art. V, § 3(b)(4). *See* note 2 *supra*.

68. *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13 (Fla. 1974) (construing provisions of FLA. CONST. art. V, § 3(b)(1) and (b)(3)). "It is a fundamental rule of construction of our constitution that a construction of the constitution which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts." *Id.* at 16. (citations omitted). *See also*, *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979); *Askew v. Game & Fresh Water Fish Comm'n*, 336 So. 2d 556, 560 (Fla. 1976); *In re Advisory Opinion to the Governor*, 96 So. 2d 904, 905-06 (Fla. 1957).

69. *See Jurisdiction*, *supra* note 1, at 179-80, 189.

by not identifying an express and direct conflict. This can no longer be done. Although the district courts may still avoid review by issuing P.C.A.'s and citation P.C.A.'s to the extent allowed under *Jollie*, the opportunity to avoid review by not identifying a conflict has been firmly closed.<sup>70</sup>

*B. Certified Question of Great Public Importance—Section 3(b)(4)*

The second road to review recently considered by the court is that of certified questions of great public importance.<sup>71</sup> In *Petrik v. New Hampshire Insurance Co.*<sup>72</sup> the court addressed the question of supreme court jurisdiction of a certified public question when none of the parties sought review on that ground.<sup>73</sup>

The petitioners in *Petrik* were passengers in their son's car when it collided with a dairy truck. A policy provision in the son's insurance contract excluded coverage for bodily injury to the named insured or relatives, thus precluding payment to the petitioners. Nevertheless, the trial court granted summary judgment against the son's insurance company, which was a third party defendant, in the suit between the petitioners and the dairy's insurer.<sup>74</sup> The district court affirmed<sup>75</sup> and certified the following question as one of great public importance: "Does a family exclusion clause in an automobile insurance policy control over the Uniform Contribution Among Joint Tortfeasors Act to prevent one tortfeasor from seeking contribution from another tortfeasor?"<sup>76</sup> The parties, however, petitioned for review solely on the basis of section 3(b)(3), alleging express and direct conflict. None of the parties petitioned for review on the certified question of great public importance. Review was denied because the supreme court found no conflict, despite the district court's certification.<sup>77</sup>

The *Petrik* decision creates an obstacle to supreme court review

70. *Id.* at 180.

71. FLA. CONST. art. V, § 3(b)(4). Jurisdiction of a certified public question is available whenever a district certifies a question to the Florida Supreme Court as one involving issues of great public importance.

72. 400 So. 2d 8 (Fla. 1981).

73. *Id.*

74. *Id.* at 9.

75. *Petrik v. New Hampshire Ins. Co.*, 379 So. 2d 1287, 1290, *on rehearing*, 379 So. 2d 1290 (Fla. 1st Dist. Ct. App. 1979).

76. *Id.* 401 So. 2d at 9.

77. *Id.* at 10.

of certified public questions.<sup>78</sup> *Petrik* requires that a party must seek review of the certified question. The court will not review a decision on the district court's motion.<sup>79</sup>

The *Petrik* decision, however, may not be completely consistent with at least one case decided prior to the jurisdictional changes—*McLeod v. W. S. Merrell Co.*<sup>80</sup> Although *McLeod* was decided prior to the constitutional amendment, it most likely remains applicable. The sole change incorporated by the amendment is that "importance" has replaced the term "interest," perhaps resulting in a slight broadening of the issues accepted for review.<sup>81</sup>

In *McLeod* the court felt that consideration of jurisdictional problems inherent in the petition for certiorari<sup>82</sup> was unnecessary because the petition was "buttressed" by a certified question.<sup>83</sup> The court, therefore, granted review. The language used by the court suggests that the petitioner requested certiorari on grounds other than certified public question.<sup>84</sup> Thus, even though no party actually sought review on the certified question, the court apparently granted review solely on the basis of the certified question.<sup>85</sup>

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78. A second obstacle is that review of certified public questions, as well as conflict decisions, is at the discretion of the supreme court. See FLA. CONST. art. V, § 3(b)(3) and (4). Use of the word "[m]ay" means that review under these sections is discretionary. See also *Jurisdiction*, *supra* note 1, at 177, 191; *Analysis*, *supra* note 44, at 410.

79. Note, however, that once the supreme court granted jurisdiction on the basis of a certified public question, under prior case law they could review the entire record. *Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970). This may no longer be true under the 1980 amendment. *Jurisdiction*, *supra* note 1, at 182. "Opinions should embrace only the legal issue which was important enough to persuade the justices to accept the case for review." *Id.* The 1980 constitutional amendment deleted certiorari review. The court in *Trushin v. State*, 6 F.L.W. 546 (Fla. July 30, 1981) had the opportunity to decide that review is available only on the issue which served as the jurisdictional peg. The *Trushin* decision, however, was ultimately decided on other grounds.

80. 174 So. 2d 736 (Fla. 1965).

81. *Jurisdiction*, *supra* note 1, at 192. Thus, the *McLeod* decision would not be affected by that broadening.

82. Review based on a petition for certiorari is no longer available. Fla. SJR 20-C.

83. 174 So. 2d at 736.

84. "Since the petition for certiorari is buttressed by the certificate of the Court of Appeal, we proceed directly to the merits without a preliminary consideration of jurisdictional problems." *Id.* This language appears to distinguish between *McLeod's* petition for certiorari and the grounds stated therein and the court's certification. If the petition had included the certified question as one of its grounds for review, it is unlikely that the court would have spoken of the petition being "buttressed" as it did.

85. Supreme court jurisdiction must be founded on one accepted method of obtaining review. FLA. CONST. art. V, § 3(b). The language of the amendment requires only one jurisdictional peg. Two methods of review which are only partially satisfied do not add up to the required peg. Thus, if the court found it unnecessary to review the jurisdictional problems in the petition for certiorari because of the certified question, the certified question must have been sufficient alone to grant jurisdiction.

This review without assertion by a party appears inconsistent with *Petrik's* conclusion that a party must actually seek review of the certified public question. *Petrik*, however, reflects the court's current intent to require parties to *request* review of a certified question before the court will grant review.

### C. Scope of Discretionary Review—Deletion of “by certiorari”

The supreme court was recently presented with the opportunity to construe the scope of review since the deletion of “by certiorari” by the 1980 amendment.<sup>86</sup> Former section 3(b)(3), certiorari review, was based on the common law definition of certiorari.<sup>87</sup> Upon issuance of a common law writ of certiorari from a superior to an inferior court, the record was brought to the superior court for a determination of whether the lower court exceeded its jurisdiction or neglected to comply with essential requirements of law.<sup>88</sup> The impact of bringing up the entire record under common law principles of certiorari was that the court could review all meritorious issues presented in reviewing the full record.

In *Trushin v. State*,<sup>89</sup> the defendant promised to prepare a free will for each person pledging to support certain judges in a runoff election. This promise led to his conviction for vote buying.<sup>90</sup> The defendant challenged his conviction on four grounds, none of which were raised at trial. The district court decided three of the issues which were presented and certified the case to the supreme court as one “involving issues of great public importance concerning the validity and interpretation of section 104.061(2).”<sup>91</sup>

The supreme court accepted review using the certified question as the jurisdictional peg.<sup>92</sup> The respondent argued that the court could consider only the peg issue because of the deletion of “by certiorari” in the 1980 amendment. Review of the other issues incidentally presented by the petitioner was therefore argued to be impermissible.<sup>93</sup> The court was thus presented with the question of to what extent, if any, deletion of “by certiorari” limited supreme

86. *Trushin v. State*, 6 F.L.W. 546 (Fla. July 30, 1981). See *Reform*, *supra* note 2, at 237-38; *Jurisdiction*, *supra* note 1, at 182.

87. *Jurisdiction*, *supra* note 1, at 181.

88. *Id.*

89. 6 F.L.W. 546.

90. *Trushin v. State*, 384 So. 2d 668, 679 (Fla. 3d Dist. Ct. App. 1980).

91. *Id.* at 679 n.28.

92. 6 F.L.W. 546.

93. *Reform*, *supra* note 2, at 238.

court review.

Justice England submitted four potential answers, or levels, to this question:

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 regardless 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.<sup>94</sup>

The petitioner advocated acceptance of the fourth position since he was submitting entirely new questions to the supreme court. The state advocated the first position—the most restrictive view. The court chose instead to deny review altogether.<sup>95</sup>

The court felt it would be improper to review three of the issues presented by the petitioner because they were improperly raised for the first time on appeal.<sup>96</sup> The court found it more troublesome to justify its refusal of the certified question. Nevertheless, the court declined to review the issues encompassed by the certification because they were not properly presented to the district court. The court felt that recognition of the certified questions in this circumstance "would defeat the purpose of the rule requiring proper preservation of issues and would empower the district courts to fashion issues which are hypothetical or are otherwise not ripe for decision."<sup>97</sup> The court noted that "[t]he certification of a question by the district court cannot resurrect an issue which died because a party failed to properly preserve it."<sup>98</sup>

Thus, the *Trushin* court neatly sidestepped the entire issue of scope of review. In order to determine the issue of the scope of review, the court first would have had to accept review on at least one of the certified questions. Then, by deciding which, if any, of the *other* questions raised would receive review, the court would have indirectly determined whether mere acceptance of jurisdiction permits review of the entire case. The decision rendered by

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94. *Id.* at 237-38.

95. 6 F.L.W. at 547.

96. *Id.* at 546.

97. *Id.*

98. *Id.* at 547.

the court is proper since it comports with the general rule that courts should be wary of deciding constitutional questions unless absolutely necessary.<sup>99</sup> Moreover, the supreme court maintains its role as a court of review, rather than one of first impression.

In conclusion, the court is taking a divided highway in determining its jurisdiction. In *Jollie, Lawrence* and *Kikis*, the court expands its power to accept jurisdiction under the conflict of decisions rule. The court may now review *some* citation P.C.A.'s and the districts are not required to identify specific conflicts on which supreme court review may be predicated. In *Petrik* and *Trushin*, on the other hand, the court has read the amendments more restrictively and, thus, the review available is more narrow. It is unclear which policy will prevail at the end of the road. What is clear, however, is that the highway will be long and winding.

LISA PRATT

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99. *Mayo v. Market Fruit Co.*, 40 So. 2d 555 (Fla. 1949). Scope of discretionary review is a constitutional issue. The court, however, was able to decide *Trushin* on non-constitutional grounds and, therefore, followed the general constitutional rule requiring that decisions be made on non-constitutional grounds whenever possible.