

CONFRONTING A PCA: FINDING A PATH AROUND A BRICK WALL

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An appellant dreads nothing more than the receipt of a thin envelope from the district court of appeal containing an adverse per curiam affirmance (not so affectionately known to appellate lawyers as a “PCA”). After months, and perhaps years, of effort in the trial and appellate courts, the appellant is rewarded with the equivalent of “you lose” without a word of explanation. Worse yet, in most circumstances, a PCA is the end of the line for an appeal.¹ In Florida, with one possible exception, a PCA cannot be reviewed by the Florida Supreme Court.²

But is this unfair? As appellate judges (and appellees) will hasten to point out, most cases receiving a PCA deserve such treatment.³ The issues were likely routine and well-settled, and the appeal was probably doomed from the start.⁴

Not every PCA is deserved, however. Consider, for example, the case of Clarence Earl Gideon.⁵ Mr. Gideon filed a petition for writ of habeas corpus that was denied by the Florida Supreme

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1. *Infra* nn. 65–74.

2. *Infra* nn. 129–140.

3. *E.g. Whipple v. State*, 431 S.2d 1011, 1012 (Fla. Dist. App. 2d 1983) (explaining that the court issued a PCA because a written opinion would merely refute the appellant’s arguments, would not show any conflict in law, and would not have been of any significant assistance to the bench or bar).

4. *Id.*

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Court without an opinion.⁶ Instead of giving up, Gideon filed a petition for writ of certiorari in the United States Supreme Court.⁷ His perseverance was rewarded with the landmark decision of *Gideon v. Wainwright*,⁸ the famous case granting criminal defendants the right to counsel.⁹ Mr. Gideon's receipt of the denial without opinion was not deserved, but fortunately, it did not spell ultimate defeat in his case.

What should counsel do if he or she believes that the client's case presents a special situation in which an adverse PCA should not end the case? How does one find a path around the brick wall that is the PCA? This Article addresses this problem and provides several suggestions for achieving further appellate review in those cases in which the PCA issued by the district court of appeal is wrong or in which resolution by a per curiam affirmance was inappropriate. These options include (1) filing a motion for rehearing coupled with a motion for rehearing en banc, (2) filing a motion for clarification or a motion to write an opinion, (3) asking the court to certify an issue or a conflict to the Florida Supreme Court, (4) appealing directly to the United States Supreme Court, and (5) perhaps, in extremely rare circumstances, appealing to the Florida Supreme Court.

THE PCA IN FLORIDA COURTS

PCAs are commonplace in the Florida District Courts of Appeal (DCAs).¹⁰ In 1998, for example, 8,193 of 13,542 DCA rulings were PCAs.¹¹ Because of its commonality, the most maddening aspect of a PCA is its effect on the reviewability of the appeal: with one possible exception, a PCA issued by a DCA cannot be reviewed by the Florida Supreme Court.¹² According to the Florida Constitution, the Florida Supreme Court has discretionary review

6. *Gideon v. Cochran*, 135 S.2d 746 (Fla. 1961), *rev'd, sub nom. Gideon v. Wainwright*, 372 U.S. 335 (1963).

7. *See Gideon*, 372 U.S. at 338 (citing *Gideon v. Cochran*, 370 U.S. 908, 908 (1962)) (noting that the U.S. Supreme Court granted certiorari to review the issue of a defendant's right to counsel).

8. 372 U.S. 335.

9. *Id.*

10. Comm. on Per Curiam Affirmed Dec., *Final Report and Recommendations* <<http://www.flcourts.org/sct/sctdocs/library.html#reports>> (May 2000).

11. *Id.* Between July 1998 and July 1999, 45.7% of civil appeals were PCAs, 69.2% of criminal appeals were PCAs, and 65.7% of administrative appeals were PCAs. *Id.*

12. *Infra* nn. 129–135.

over appeals from DCA decisions only if they “*expressly* and directly” conflict with other DCA or Florida Supreme Court decisions, *expressly* declare a statute valid, *expressly* construe the constitution, or *expressly* affect a class of state officers.¹³ Because a PCA does not “express” anything, the Florida Supreme Court has no jurisdiction to consider a petition for discretionary review from a PCA.¹⁴

A court will issue a PCA if the points of law are so established that a written opinion would serve no purpose.¹⁵ Though frustrating to appellate attorneys, some argue that PCAs are necessary to relieve pressure on an already overburdened judicial system.¹⁶ Others point out that PCAs prevent the proliferation of unnecessary case law on settled propositions, and as a result avoid duplicative opinions and simplify legal research.¹⁷

Nevertheless, complaints about PCAs far surpass their praises.¹⁸ First, PCAs often are used in cases in which there are unresolved debatable legal issues, as evidenced by written dissenting opinions from PCAs issued by the majority.¹⁹ Second,

13. Fla. Const. art. V, § 3(b)(3) (emphasis added). Article V, section 3 allows the Florida Supreme Court discretionary review of 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.

Id.

14. *Jenkins v. State*, 385 S.2d 1356, 1359 (Fla. 1980).

15. See e.g. *Elliot v. Elliot*, 648 S.2d 137, 138 (Fla. Dist. App. 4th 1994) (stating that it is black-letter law that PCAs without opinion are given when the points of law are well settled).

16. See Jack W. Shaw, Jr., “*Per Curiam Affirmed*”: *Some Historical Perspectives*, 1 Fla. Coastal L.J. 1, 6 (1999) (citing *Patton v. State Dept. of Health & Rehabilitative Servs.*, 597 S.2d 302, 303 (Fla. Dist. App. 2d 1991), in which the Second DCA observed that “[l]awyers may have a good faith belief that a written opinion is appropriate when this court has come to an opposite conclusion. Each judge on this court must now review and decide more than 1000 cases each year. This caseload sometimes requires that we affirm a case without written opinion when we would prefer to write.”)

17. E.g. *Jones v. State*, 468 S.2d 253, 254 (Fla. Dist. App. 2d 1985) (citing *Whipple*, 431 S.2d at 1012–1014).

18. See Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida’s System with Those of the Federal System*, 45 Fla. L. Rev. 21 (1993) (arguing that the issuance of PCAs is unregulated in Florida).

19. *Id.* at 79 (citing Harry L. Anstead, *Selective Publication: An Alternative to the PCA?* 34 Fla. L. Rev. 189, 203 (1982)). Neither a PCA followed by a dissenting or concurring opinion, nor a PCA followed by a case citation has any effect on the reviewability of the PCA at the Florida Supreme Court level. *Jenkins*, 385 S.2d at 1358–1359.

PCAs often are used as a compromise when the judicial panel agrees on the result but cannot agree on the underlying reasoning.²⁰ Last, PCAs are erratically issued by the district courts of appeal as a natural result of the courts' different customs and opinion-writing philosophies.²¹ One judge worried that, without written standards, "there will be a greater 'margin of error and variance of view between districts in determining precedential value.'"²²

Because of the frustration surrounding PCAs, the Florida Judicial Management Council appointed a Committee on Per Curiam Affirmed Decisions (PCA Committee), which issued a useful report in May 2000.²³ In this report, the PCA Committee gathered statistics and met with attorneys, judges, and The Florida Bar in an attempt to obtain various perspectives on PCAs.²⁴ Through several conferences, the PCA Committee developed a list of recommendations to promote the proper use of PCAs, including suggestions for opinion writing, and suggestions for when a PCA is inappropriate.²⁵ This report is a useful tool for appellants when attempting to determine whether it may be appropriate to seek further review from an adverse PCA.

THE HISTORY OF PCAs

The increased use of PCAs is a direct effect of the rising number of appellate cases in the Florida DCAs.²⁶ Overburdened courts and cluttered dockets have plagued the judicial system for decades.²⁷ Before 1956, there were no DCAs, and the Florida Supreme Court handled all appeals.²⁸ When the Florida Legislature

20. *Id.* (citing *Anstead*, *supra* n. 19, at 203).

21. *Id.* (citing *Anstead*, *supra* n. 19, at 203, 207, 216).

22. *Id.* (quoting *Anstead*, *supra* n. 19, at 207).

23. Comm. on Per Curiam Affirmed Dec., *supra* n. 10.

24. *Id.*

25. *Id.* The PCA Committee included the following among its recommendations: (1) reject the proposed abolishment of PCAs, (2) amend the Florida Rules of Appellate Procedure to allow parties to request a written opinion, (3) develop a curriculum to suggest opinion writing techniques when teaching judges, and (4) discourage PCA use whenever there is a dissent. *Id.*

26. *Id.* (finding that an increase in PCAs corresponded to an increase in appellate filings).

27. See *Jenkins*, 385 S.2d at 1357 (noting that Florida DCAs were created in 1956 because the Supreme Court was inundated with a heavy caseload and consequently, justice was delayed).

28. *Id.* at 1357-1358.

created the district courts of appeal in 1956 to decrease the Florida Supreme Court's workload, it intended that the district courts of appeal would serve as courts of appellate review in most cases, thus removing a large portion of the workload from the Florida Supreme Court.²⁹ In *Jenkins v. State*,³⁰ the Court explained,

It was never intended that the district courts of appeal should be intermediate courts To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.³¹

Despite the admonishment that the DCAs not be treated as intermediate courts, in the period before 1980 the Florida Supreme Court found itself increasingly burdened by petitions for certiorari from DCA decisions.³² At that time, the Florida Constitution allowed the Florida Supreme Court to hear any case decided by the DCAs when there was a direct conflict with another DCA or the Florida Supreme Court.³³ Thus, the Florida Supreme Court had jurisdiction to hear *all* cases decided by the DCAs, including per curiam affirmances.³⁴ The justices could simply examine the underlying record of a particular case to determine whether the decision was in direct conflict with Florida Supreme Court precedent or case law in other districts, or determine some other jurisdictional basis to accept the case.³⁵

29. See *Ansin v. Thurston*, 101 S.2d 808, 810 (Fla. 1958) (stating that district courts were intended to be the final court of review); *Lake v. Lake*, 103 S.2d 639, 640 (Fla. 1958) (discussing the motivations for creating district courts); *Whipple*, 431 S.2d at 1013–1014 (clarifying that Florida litigants do not have a right to review in the Florida Supreme Court, but rather have a general right to review).

30. 385 S.2d 1356.

31. *Id.* at 1357–1358.

32. Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 Fla. L. Rev. 147, 152–153 (1980). Before 1980, discretionary review to the Florida Supreme Court was invoked by a petition for certiorari. In 1980, the certiorari petition was replaced by a notice to invoke the discretionary review of the Florida Supreme Court. Fla. R. App. P. 9.120 (2002); Phillip J. Padovano, *Florida Appellate Practice* § 27.3 (2001–2002 ed., West 2001).

33. Fla. Const. art. V, § 4 (1956) (repealed 1980 by Fla. Const. art. V, § 3).

34. See England et al., *supra* n. 32, at 152 (stating that *Foley v. Weaver Drug, Incorporated*, 177 S.2d 221 (Fla. 1965), demonstrated the Florida Supreme Court's willingness to review cases unaccompanied by a written opinion).

35. See *supra* n. 32 (explaining the basis for Florida Supreme Court jurisdiction).

But faced with an ever-increasing number of cases seeking review of DCA decisions, the Florida Supreme Court decided in *Lake v. Lake*³⁶ that it would no longer examine the underlying record to determine whether a decision that had been per curiam affirmed by the DCA conflicted with other Florida Supreme Court or DCA cases.³⁷ The Florida Supreme Court stated,

We assume that an appeal to a district court of appeal will receive earnest, intelligent, fearless consideration and decision. When it does . . . the litigant gets a decision by a final appellate court. Thus justice is assured to all, injustice to any is prevented.³⁸

Despite the Florida Supreme Court's self-restrictions, it had difficulty abiding by the *Lake* ruling and continued to examine the underlying record when considering petitions for review.³⁹ For example, in *Foley v. Wearer Drugs, Incorporated*,⁴⁰ the Court reviewed the record proper of a PCA decision that conflicted with a later decision of another appellate court to "make uniform and harmonious the law on the particular point involved in the two decisions."⁴¹ In *Foley*, the Court realized that it was regularly reviewing the underlying record to find a conflict. Thus, the Florida Supreme Court officially changed its procedure and held that it would review the record proper to determine whether a decision that had been per curiam affirmed by the DCA conflicted with other supreme court or DCA cases.⁴²

Again, the burden of examining the underlying record combined with an increasing caseload became overwhelming.⁴³ The Court requested that the Legislature remedy this problem, and in 1980, the Florida Legislature amended Article V of the Florida Constitution to state that the Florida Supreme Court's conflict jurisdiction was restricted to situations in which a district court's

36. 103 S.2d 639.

37. *Id.* at 643.

38. *Id.*

39. *Foley*, 177 S.2d at 223.

40. 177 S.2d 221.

41. *Id.* at 223.

42. *Id.* at 225 (holding that the Florida Supreme Court "may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal").

43. England et al., *supra* n. 32, at 152.

decision “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.”⁴⁴

This amendment finally rid the Florida Supreme Court of discretionary review over PCAs. The Court could no longer hear a case that had been per curiam affirmed by a DCA because a PCA created no “express or direct” conflict with other case law.⁴⁵ According to the Florida Supreme Court, the mere use of the word “affirmed” did not meet dictionary definitions of the word “express,” which definitions include “to represent in words” and “to give expression to.”⁴⁶ Therefore, any DCA opinion with only the words “affirmed” or “affirmed per curiam” does not “express” anything and cannot be appealed to the Florida Supreme Court.⁴⁷

Consequently, an express or direct conflict is created only when the DCA contemplates a legal question “within the four corners of the opinion itself.”⁴⁸ Therefore, the opinion must state the point of law that forms the basis of the decision.⁴⁹ Although it is not necessary that the DCA explicitly cite conflicting case law in its opinion,⁵⁰ there must be at least some language from the court indicating its reasoning for ruling a particular way.⁵¹

Interestingly, because a dissent or concurrence is not part of the DCA’s official “opinion,” a PCA is not reviewable even when there is a dissenting or concurring opinion attached to an affirmance or denial without opinion.⁵² This is true even if the dissent or concurrence points out a direct conflict or other jurisdictional basis supporting further review.⁵³ Receipt of this sort of mixed

44. Fla. Const. art. V, § 3(b)(3). The other provisions of Article V, section 3(b) were similarly amended to require an “express” jurisdictional prerequisite. *Id.* The decision had to *expressly* declare a state statute valid, or *expressly* construe the constitution, or *expressly* affect a class of constitutional officers. *Id.*

45. *Jenkins*, 385 S.2d at 1359.

46. *Id.* (quoting *Webster’s Third New International Dictionary* 803 (Ency. Britannica, Inc. 1961)).

47. *Id.*

48. *Fla. Star v. B.J.F.*, 530 S.2d 286, 288 (Fla. 1988), *rev’d on other grounds*, 491 U.S. 524 (1989).

49. *Id.*

50. *Ford Motor Co. v. Kikis*, 401 S.2d 1341, 1342 (Fla. 1981).

51. *See id.* (stating that a discussion of applicable legal principles was sufficient to form the basis of a conflict-review petition).

52. *Jenkins*, 385 S.2d at 1359.

53. *Reaves v. State*, 485 S.2d 829, 830 (Fla. 1986) (holding that there was no direct or express conflict when the basis of the conflict was recited only in the dissent).

opinion is particularly frustrating to litigants, considering that a dissenting opinion clearly indicates some dissension among the judges and is strong evidence that the case did not merit a PCA.⁵⁴

Opinions followed by citations (often called "citation PCAs") also do not create an express conflict allowing for Florida Supreme Court review, even if the cited precedent conflicts with another DCA or Florida Supreme Court opinion.⁵⁵ The Florida Supreme Court can review citation PCAs only if the controlling precedent has been reversed,⁵⁶ or if the controlling precedent is pending review by the Florida Supreme Court.⁵⁷ In other words, all PCAs with dissenting or concurring opinions and most PCAs followed by citations are not reviewable by the Florida Supreme Court.

Last, an appellant cannot circumvent the "express or direct conflict" language by filing an extraordinary writ to obtain review of a PCA.⁵⁸ In *St. Paul Title Insurance Corporation v. Davis*,⁵⁹ the Florida Supreme Court stated,

We will not allow the [extraordinary writ] to be used to circumvent the clear language of section 3(b)(3) and [the court's] holding in *Jenkins v. State* that [it] lack[s] jurisdiction to review per curiam decisions . . . rendered without opinion when the basis for such review is an alleged conflict of that decision with another.⁶⁰

CONFRONTING A PCA

The Legislature's 1980 revision of the Florida Constitution has caused a great deal of frustration among litigants who are faced with a PCA.⁶¹ One author commented that, "[d]espite the

54. Cope, *supra* n. 18, at 79 (stating that dissenting opinions in PCAs are evidence that PCAs are issued despite a debatable legal issue); *see id.* at 59 (noting that some states, such as Arkansas, Connecticut, North Dakota, South Carolina, Texas, and Georgia, grant discretionary review based on the existence of a divided panel).

55. *Dodi Publ. Co. v. Editorial Am.*, 385 S.2d 1369, 1369 (Fla. 1980).

56. *Jollie v. State*, 405 S.2d 418, 421 (Fla. 1981).

57. *Jollie*, 405 S.2d at 421; *e.g. Taylor v. State*, 601 S.2d 540, 541 (Fla. 1992); *State v. Lofton*, 534 S.2d 1148, 1149 (Fla. 1988).

58. *Grate v. State*, 750 S.2d 625, 626 (Fla. 1999); *St. Paul Title Ins. Corp. v. Davis*, 392 S.2d 1304, 1304, 1305 (Fla. 1980).

59. 392 S.2d 1304.

60. *Id.* at 1304-1305.

61. *See Cope, supra* n. 18, at 25 (noting that, unlike other states, Florida does not provide procedural alternatives to litigants when a court issues a PCA); Shaw, *supra* n. 16,

usefulness of a PCA in saving scarce judicial resources, appellants who receive a PCA sometimes feel shortchanged or have a legitimate reason to ask the court to issue a written opinion.⁶² Because PCA decisions are commonplace today,⁶³ appellate counsel will inevitably, though rarely, confront cases in which a PCA is obviously inappropriate. Perhaps the case presented important issues of first impression that were thoroughly briefed by the parties. Perhaps a conflict in the cases was apparent in a concurring or dissenting opinion. Perhaps the issues presented were important beyond the parties to the litigation. Perhaps the court made an obvious mistake. In such cases, the litigant, and indeed the justice system, has been shortchanged.

Fortunately, a PCA is not always the end of the litigation process.⁶⁴ Sometimes, in appropriate situations, there are paths that a litigant may take around the brick wall formed by the PCA. While rarely appropriate (and rarely successful), these alternatives can be effective, if used wisely and sparingly. The remainder of this article discusses those possible paths, which include (1) filing a motion for rehearing coupled with a motion for rehearing en banc, (2) filing a motion for clarification or a motion to write an opinion, (3) asking the court to certify an issue or a conflict to the Florida Supreme Court, (4) appealing directly to the United States Supreme Court, and (5) convincing the Florida Supreme Court that the PCA had the effect of declaring a statute or constitutional provision invalid.

A. Filing a Motion for Rehearing Coupled with a Motion for Rehearing En Banc

Filing only a motion for rehearing in response to a PCA is usually ineffective.⁶⁵ A party may file for rehearing “where careful analysis indicates a point of law or a fact which the court has overlooked or misapprehended, or where clarification of a written opinion is essential.”⁶⁶ This presents an unfortunate problem for

at 1 (stating that PCAs have been “the subject of considerable, and often heated, debate in the legal community”).

62. Shaw, *supra* n. 16, at 9.

63. See Comm. on Per Curiam Affirmed Dec., *supra* n. 10 (noting that from July 1998 through June 1999, 62.5% of all DCA opinions were PCAs).

64. *Infra* nn. 76, 106–111, 129–140, 154, 170–196.

65. *Infra* nn. 67–74.

66. Whipple, 431 S.2d at 1013.

an attorney faced with a PCA: How can counsel persuasively argue that the court has overlooked or misapprehended something?

Inevitably, courts will interpret an appellant's motion for rehearing as an attempt to reargue the case, and generally frown upon such motions as a waste of time.⁶⁷ For example, as early as 1958, in *State v. Green*,⁶⁸ one judge complained,

Certainly, it is not the function of a petition for rehearing to furnish a medium through which the counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.⁶⁹

Moreover, in *Lawyers Title Insurance Corporation v. Reitzes*,⁷⁰ in disgust, the court denied the appellant's motion for rehearing, noting that "[w]e find nothing in the instant motion for rehearing that appellant did not argue in his briefs or in oral argument."⁷¹ Also, in *Elliot v. Elliot*,⁷² the court summarily denied the appellant's motion for rehearing after the appellant's lawyer remarked in his motion that the court's opinion "was a simple per curiam affirmance of the trial court's Final Judgment, and the undersigned attorney found it impossible to discern the Court's reasoning."⁷³ The lawyer went on to state that he "was extremely surprised at this Court's per curiam affirmance and presumed that his argument had been overlooked by this Court."⁷⁴

Thus, in most cases, the PCA is the end of the line.⁷⁵ If the attorney has adequately presented the issues in the briefs and can

67. *See id.* (noting that motions for rehearing or clarification may be misused to reargue the case or express dissatisfaction with the court's ruling).

68. 105 S.2d 817 (Fla. Dist. App. 1st 1958).

69. *Id.* at 818-819.

70. 631 S.2d 1100 (Fla. Dist. App. 4th 1994).

71. *Id.* at 1100.

72. 648 S.2d 137 (Fla. Dist. App. 4th 1994).

73. *Id.* at 138 (emphasis removed). The attorney's explanation was a response to the court's order to show cause why he should not be sanctioned for a "flagrant violation" of appellate rules regarding a motion for rehearing. *Id.*

74. *Id.* (emphasis removed).

75. *Supra* nn. 66-74.

do nothing more than reargue, counsel generally should respect the court's not-so-subtle signal about the strength of the case.

If the issue presented is of exceptional importance, however, or if counsel is convinced that the panel decision necessarily conflicts with other precedent within the same DCA, a petition for rehearing en banc, coupled with a motion for rehearing, has at least some small chance of success.⁷⁶ At a minimum, and assuming the case is appropriate, a rehearing en banc allows the appellant to file a motion firmly within the confines of the appellate rules.⁷⁷

There are several advantages to this procedure. First, as noted above, the request fits within the rules so long as counsel can make the required certification discussed below.⁷⁸ Second, the case stays alive. Third, the appellant has the opportunity to present its arguments to "fresh" judges.⁷⁹ Perhaps one of those judges will be struck by the importance of the issue and become convinced that an injustice has been done or that an error has been committed.

Obviously, this procedure is appropriate only for the exceptional case, and the rules make clear that such motions should not be routine.⁸⁰ A party may file for rehearing en banc only if counsel can certify that the case is of "exceptional importance" or that such consideration is "necessary to maintain uniformity" in the court's decisions.⁸¹

Unfortunately, there is not much guidance on what exactly is a case of exceptional importance. This is particularly true when the court decides to grant en banc review after the panel has is-

76. En banc review will be ordered only if the case is exceptionally important or if the review is necessary to maintain uniform decisions in the court. Fla. R. App. P. 9.331(a).

77. Pursuant to Florida Rules of Appellate Procedure 9.331(d)(1), an appellant must file for en banc consideration in conjunction with a motion for rehearing, or the motion will be denied. *E.g. La Grande v. B & L Servs., Inc.*, 436 S.2d 337, 337 (Fla. Dist. App. 1st 1983) (dismissing the appellant's motion for en banc review because it was not filed with a motion for rehearing). An en banc hearing is considered by a majority of active judges participating with the case and not just the original panel of three. Fla. R. App. P. 9.331(a). The judges will vote whether to hear the case en banc, and if there is a tie, the original panel decision will stand. *Id.*

78. *Infra* n. 81.

79. See Fla. R. App. P. 9.331(a) (noting that the en banc decision will be made by a majority of active judges actually voting on the case).

80. *Id.*

81. *Id.* 9.331(d)(2).

sued a PCA.⁸² Only rarely do courts explain why they have changed their minds.⁸³ Indeed, at least one judge has pointed out the due-process concerns that arise from the appellate courts' failure to better articulate the standard for selecting certain cases for en banc review.⁸⁴ In a dissenting opinion, Judge Joseph A. Cowart, Jr. admonished the Fifth District Court of Appeal:

The vague standard for selection of cases for en banc consideration coupled with no appellate review of the selection decision can combine to deny the litigant equal protection of the law and deprive him of his constitutional right to have his case on appeal heard and decided by the three judge panel to which it was duly, and constitutionally, assigned for decision The lack of a ready remedy for improper en banc consideration is a real problem. Separate (special concurring and dissenting) opinions have discussed the problem but majority en banc opinions need not address the issue, and seldom do, so there is no building body of law construing the term "exceptional importance" and no opportunity for a majority en banc opinion to certify direct conflict and no incentive to certify the en banc question to be of great public importance.⁸⁵

Judge Cowart was certainly correct that the lack of explanations creates an aura of arbitrariness and uncertainty. However, the root of the problem often is not the decision for en banc review, but the initial decision to decide an important case by a PCA. If the case has attracted the attention of the court en banc, the earlier PCA almost certainly was inappropriate.

Unlike Florida courts, federal courts have articulated two types of cases of exceptional importance appropriate for en banc review: "(1) cases that may affect large numbers of persons and (2) cases that interpret fundamental legal or constitutional rights."⁸⁶ While Florida courts have not explicitly defined "excep-

82. *E.g. Hoechst Celanese Corp. v. Fry*, 753 S.2d 626, 627 (Fla. Dist. App. 5th 2000) *mandamus denied*, 773 S.2d 55 (Fla. 2000) (explaining only that the per curiam affirmance was "improvident in light of established case authority and the facts of this case").

83. *E.g. id.*; *State v. Georgoudiou*, 560 S.2d 1241, 1247-1248 (Fla. Dist. App. 5th 1990) (Cowart, J., dissenting).

84. *Id.* at 1248.

85. *Id.* at 1248 n. 9.

86. *In re D.J.S. v. State Dept. of Health & Rehabilitative Servs.*, 563 S.2d 655, 657 n. 2 (Fla. Dist. App. 1st 1990) (citing Neil D. McFeeley, *En Banc Proceedings in the United States Courts of Appeal*, 24 Idaho L. Rev. 255, 265 (1987-1988)).

tional importance,”⁸⁷ they seem to follow the federal approach. For example, in *Kinder v. State*,⁸⁸ the court recognized the importance of discerning fundamental legal rights when acknowledging that “the question of whether a person awaiting an involuntary civil commitment proceeding pursuant to the [Commitment of Sexually Violent Predators] Act may be released pending trial” is an issue of exceptional importance.⁸⁹ However, in *Gainesville Coca-Cola v. Young*,⁹⁰ the court found that the case did not concern matters of exceptional importance.⁹¹ The case did not affect large numbers of people; rather, the court complained that appellant’s motion for rehearing en banc was inappropriate because the motion did not suggest that the court’s decision had any impact upon the workers’-compensation jurisprudence of the State, and in fact, only affected the individual plaintiffs.⁹²

Counsel’s other predicate for seeking en banc review from a PCA is a bit more problematic. Nothing about the PCA inherently prevents counsel from arguing that the case is of exceptional importance.⁹³ However, it is more difficult to suggest that a PCA affirmance, which lacks prejudicial value, conflicts with anything.⁹⁴ Still, the en banc rule does not require an express or direct conflict but only a representation that the decision is contrary to other decisions by the same court.⁹⁵ As demonstrated by the Florida Supreme Court’s pre-1980 practice of delving into the record to find a conflict, nothing in the en banc rule prevents counsel from arguing that the PCA is contrary to other decisions.⁹⁶

87. See *State v. Diamond*, 1989 Fla. App. LEXIS 7460 at *25 (Fla. Dist. App. 1st Dec. 28, 1989) (Nimmons, J., concurring) (stating that “there has to date been no analytical development by the district courts concerning why a particular case merits en banc consideration on the ground of exceptional importance. None of the courts’ opinions which have decided to review the cases on that ground have attempted any detailed explanation for their decisions, and a reader is required to make an examination of the facts and issues in each case to determine how the court arrived at its conclusion.”).

88. 779 S.2d 512 (Fla. Dist. App. 2d 2000).

89. *Id.* at 515.

90. 632 S.2d 83 (Fla. Dist. App. 1st 1994).

91. *Id.*

92. *Id.*

93. *Supra* nn. 80–82.

94. *Contra Hoechst*, 753 S.2d at 626–627, 628 (finding that the court’s prior per curiam affirmance granting class certification conflicted with Florida Supreme Court precedent that fraud claims are not suitable for a class action).

95. Fla. R. App. P. 9.331(d)(2).

96. See *Foley*, 177 S.2d at 225 (holding that the Florida Supreme Court may review PCAs when the PCA was in conflict with the Florida Supreme Court or another DCA).

When relying on a conflict, the en banc motion must demonstrate that the panel could have decided the opinion only by ignoring established case law.⁹⁷ For example, in *Hoechst Celanese Corp. v. Fry*,⁹⁸ after receiving a PCA certifying a class, the defendant's counsel filed a motion for rehearing en banc.⁹⁹ The Fifth District Court of Appeal granted the defendant's motion and reversed its decision granting class status to the plaintiffs.¹⁰⁰ The court stated that its prior affirmance was "improvident in light of established case authority."¹⁰¹ A 3–0 PCA turned into an 8–0 en banc reversal!¹⁰²

When attempting to convince a court that there is contradictory case law, the appellant must show that conflicting decisions are "so inconsistent and disharmonious that they would not have been rendered by the same panel of the court."¹⁰³ In *Schreiber v. Chase Federal Savings and Loan Association*,¹⁰⁴ the court emphasized the need for consistent case law, explaining that the main purpose of en banc review is to harmonize decisions of the districts to minimize the disparity in decisions caused by the "luck of the draw."¹⁰⁵

While rare, lightning does strike. In addition to the *Hoechst Celanese* case described above,¹⁰⁶ there are other reported Florida decisions in which PCAs have been attacked successfully by a motion for rehearing en banc.¹⁰⁷ For example, in *State v. Navarro*,¹⁰⁸ the court granted the appellant's motion for rehearing en banc, and in reversing, adopted the dissenting opinion of the original

97. *E.g. Russo v. State*, 814 S.2d 463, 464 (Fla. Dist. App. 4th 2001) (denying en banc review when there were factual dissimilarities preventing *Russo* from conflicting with a recent court opinion); *Lett v. State*, 805 S.2d 950, 951 (Fla. Dist. App. 2d 2001) (granting review based on conflict with another case).

98. 753 S.2d 626.

99. *Id.* at 626.

100. *Id.* at 628.

101. *Id.* at 627.

102. *Id.* at 626–628.

103. *Schreiber v. Chase Fed. Sav. & Loan Assn.*, 422 S.2d 911, 912 n. 1 (Fla. Dist. App. 3d 1982).

104. 442 S.2d 911.

105. *Id.* at 912 n. 1 (quoting *McAllister v. McAllister*, 345 S.2d 352, 354 (Fla. Dist. App. 4th 1977)).

106. *Supra* nn. 98–102.

107. *Infra* nn. 108–111.

108. 464 S.2d 137 (Fla. Dist. App. 3d 1984).

panel decision.¹⁰⁹ Additionally, in *Teca, Incorporated v. WM-Tab, Incorporated*,¹¹⁰ although the appellant moved only for rehearing, the court decided sua sponte to hear the case en banc after the court noticed a discrepancy in its own case law.¹¹¹

Despite these successful examples, in the vast majority of cases, requesting an en banc hearing is inappropriate and a waste of both the court's time and the client's money.¹¹² Consequently, an application for en banc review should be used in limited circumstances.¹¹³ Improper motions for review test the courts' patience and unnecessarily increase the courts' work load.¹¹⁴ Appellants must not reargue issues in a last-ditch effort to convince the court that their position is correct,¹¹⁵ and should file such motions only when they believe in good faith that their case is contrary to other precedent within the same DCA or that their case presents an issue of exceptional importance.

Such motions should be clear and, above all, concise. Counsel should assume that other members of the court will be reading the motion in the middle of a large stack of outside reading. Counsel's case must be presented compellingly and must catch the attention of the court almost immediately. If the argument cannot be made compellingly while still being simple and concise, it probably is not appropriate for en banc review.

B. Asking the District Court of Appeal for Clarification or to Write an Opinion

Sometimes an appellant can simply petition the court to clarify its reasoning or to write an opinion in a case in which it has previously issued a per curiam affirmance.¹¹⁶ This is also a remedy the court might invoke to avoid a potential rehearing en banc.¹¹⁷

109. *Id.* at 140.

110. 726 S.2d 828 (Fla. Dist. App. 4th 1999).

111. *Id.* at 831 (Klein, J., concurring specially).

112. See *Lawyers Title Ins. Corp.*, 631 S.2d at 1101 (noting that misusing motions for rehearing wastes "the time and effort of three judges").

113. Fla. R. App. P. 9.331(a).

114. See *Lawyers Title Ins. Corp.*, 631 S.2d at 1101 (noting that misusing motions wastes the "time, energy and effort of the clerk's office and the other persons who function in the court's processes").

115. See *id.* (stating that motions for rehearing should not be used to try "to persuade [the] court to change its mind").

116. Padovano, *supra* n. 32, at § 19.3.

117. See *Higgins v. State*, 553 S.2d 177 (Fla. Dist. App. 1st 1989) (choosing to grant a

Before January 1, 2003, no specific rule governed a request for an opinion,¹¹⁸ and most counsel included such requests within a motion for clarification.¹¹⁹ Thus, counsel's task was daunting. To file a motion for clarification pursuant to Florida Rule of Appellate Procedure 9.330, the movant was required to "state with particularity the points of law or fact in the court's decision that in the opinion of the movant are in need of clarification."¹²⁰ How does one ask for clarification when the court has said nothing?

Courts have held that such motions should be used sparingly, and only when it is clear that the court has erroneously decided the case via a PCA.¹²¹ Judge Phillip J. Padovano explained the view from the bench:

While the rules do not prohibit the filing of a motion for clarification when the appellate court has issued a per curiam affirmed decision without an opinion, this practice should be discouraged. The need for clarification implies that there is something about an opinion that requires further explanation. Asking the court to clarify a per curiam decision summarily affirming a case is tantamount to asking the court to write an opinion in the case.¹²²

Counsel's task became easier on January 1, 2003, with the adoption of an amendment to Rule 9.330(a) that specifically permits counsel to request an opinion.¹²³ According to the rule, "[w]hen a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion."¹²⁴

The grounds provided by the rule are narrow. If counsel believes that a written opinion could legitimately provide grounds

motion for rehearing as opposed to the motion for rehearing en banc to clarify the basis of the PCA).

118. See Fla. R. App. P. 9.330 (providing guidance regarding motions for rehearing, clarification, and certification).

119. See e.g. *Devlin v. State*, 766 S.2d 490, 490 (Fla. Dist. App. 5th 2000) (finding that counsel made a "good argument" for a written opinion and granting the appellant's motions for rehearing and clarification of the PCA).

120. Fla. R. App. P. 9.330(a).

121. *Lawyers Title Ins. Corp.*, 631 S.2d at 1101.

122. Padovano, *supra* n. 32, at § 19.3.

123. *Amend. to Fla. App. P.*, 2002 Fla. LEXIS 1810 at *10, **99-100 (Aug. 29, 2002).

124. *Id.* at **99-100.

for supreme court review, counsel must certify that the belief was “based upon a reasoned and studied professional judgment [] that a written opinion will provide a legitimate basis for supreme court review.”¹²⁵ Then, counsel must state specific reasons why the supreme court would likely grant review.¹²⁶

In drafting a motion for clarification or to write an opinion, counsel should consult the PCA Committee report. In that report, the Judicial Management Council suggested the types of cases that may warrant a written opinion.¹²⁷ These include cases in which

- the decision conflicts with another district;
- an apparent conflict with another district may be harmonized or distinguished;
- there may be a basis for Supreme Court review;
- the case presents a new legal rule;
- existing law is modified by the decision;
- the decision applies novel or significantly different facts to an existing rule of law;
- the decision uses a generally overlooked legal rule;
- the issue is pending before the court in other cases;
- the issue decided may arise in future cases;
- the constitutional or statutory issue is one of first impression;
- previous case law was “overruled by statute, rule or an intervening decision of a higher court”;
- there is a written dissent identifying an issue that may be a basis for Florida Supreme Court review.¹²⁸

Appellants should consider all of these factors when filing a motion for clarification or a motion to write an opinion. Certainly, the more factors on which an appellant convincingly can rely, the more likely a court will be to grant a motion for clarification or to

125. *Id.* at *100.

126. *Id.*

127. Comm. on Per Curiam Affirmed Dec., *supra* n. 10. The Commission hoped that by presenting factors to consider, judges would choose to write opinions in cases warranting a written opinion, rather than issuing a PCA. *Id.*

128. *Id.* Because the DCA could use any of the listed factors to certify a conflict or a question of great public importance, arguably, all of the grounds could serve as a basis for supreme court review.

write an opinion in the appellant's case. Because appellate courts likely will respect the time and effort that went into compiling the facts and opinions contained within the PCA Committee report, counsel should refer to the report when making such a motion for clarification or a motion for a written opinion.

Although the recent amendment to Rule 9.330(a) is yet untested, before its adoption, motions for clarification have been occasionally successful in prodding appellate courts to issue an opinion in cases that originally were decided by PCAs.¹²⁹ For example, in *Hampton v. Duda and Sons*,¹³⁰ the appellant brought a motion for clarification following the appellate court's per curiam affirmance.¹³¹ Although the appellate court adhered to its initial affirmance of the trial court's grant of summary judgment, it corrected a misapplication of law, vacated its prior PCA, and reissued the opinion affirming the trial court.¹³² While the DCA did not ultimately change the result it had originally reached, the written opinion enabled the appellant to petition the Florida Supreme Court to review the case.

Similarly, in *McCord v. State*,¹³³ the court granted the appellant's motion for clarification, withdrew its previous PCA, and substituted an opinion for the PCA.¹³⁴ Again, the court did not reverse itself, but did address the four issues the appellant raised in its claim, thereby allowing review at the Florida Supreme Court level.¹³⁵

Similar motions also were successful in *Denson v. State*,¹³⁶ in which the court granted a motion for clarification of a PCA pursuant to the appellant's request,¹³⁷ and *King v. State*,¹³⁸ in which the court clarified the basis for the defendant's conviction.¹³⁹ Both of these cases illustrate the simplicity with which the court need address such requests for clarification — both courts responded to

129. *Infra* nn. 127–132.

130. 511 S.2d 1104 (Fla. Dist. App. 5th 1987).

131. *Id.* at 1104.

132. *Id.* at 1104, 1105.

133. 795 S.2d 101 (Fla. Dist. App. 5th 2001), *cert. denied*, 122 S. Ct. 1612 (2002).

134. *Id.* at 102.

135. *Id.* at 102–103.

136. 1993 Fla. App. LEXIS 4537 (Fla. Dist. App. 5th Apr. 21, 1993).

137. *Id.* at *1.

138. 706 S.2d 880 (Fla. Dist. App. 5th 1998).

139. *Id.* at 880.

the appellants' motions with a mere half page of text, sufficient to allow review by the Florida Supreme Court.¹⁴⁰

Like a motion for rehearing en banc, a motion for clarification or a motion for a written opinion should be utilized only in rare situations in which it is apparent that the court has erroneously utilized a PCA to decide a case.¹⁴¹ For example, the Fourth DCA criticized an unsuccessful motion for clarification because the appellant had done nothing more than reargue the case.¹⁴² In *Moore v. Hayward*,¹⁴³ the appellant filed a motion for clarification, written opinion, or rehearing.¹⁴⁴ The appellee countered that the appellant did not give sufficient reasons justifying the motion as there were neither issues of great public importance, nor any legal basis for certifying conflict with other DCA opinions.¹⁴⁵ Accordingly, the Fourth DCA summarily denied the motion.¹⁴⁶

Using the PCA Committee checklist should help avoid such an admonishment. If counsel cannot demonstrate that the case is appropriate for an opinion using the factors listed by the committee, counsel should give up the fight.

C. Asking the Court of Appeal to Certify an Issue to the Florida Supreme Court

Rule 9.330 of the Florida Rules of Appellate Procedure allows an appellant to move for certification to the Florida Supreme Court.¹⁴⁷ Appellants may request certification when there are issues "of great public importance requiring immediate resolution by the [Florida] [S]upreme [C]ourt,"¹⁴⁸ or where the court's decision conflicts with opinions of other DCAs or the Florida Supreme Court.¹⁴⁹

140. *King*, 706 S.2d at 880; *Denson*, 1993 Fla. App. LEXIS 4537 at *1.

141. *Moore v. Hayward*, 1992 Fla. App. LEXIS 14102 at **1, 2, 3 (Fla. Dist. App. 4th Aug. 26, 1992), *motion denied*, 530 S.2d 611 (Fla. Dist. App. 4th 1992).

142. *Id.* at *1.

143. 1992 Fla. App. LEXIS 14102.

144. *Id.* at *1.

145. *Id.* at *3.

146. *Moore*, 530 S.2d at 611.

147. Fla. R. App. P. 9.330(a).

148. *E.g. Fladell v. Labarga*, 775 S.2d 987, 987 (Fla. Dist. App. 4th 2000).

149. *See Clark v. State*, 783 S.2d 967, 967 (Fla. 2001) (reviewing a case that was certified based on conflict with another district court opinion); *Edwards v. State*, 679 S.2d 772, 772 (Fla. 1996) (accepting jurisdiction because of the district court's certification of conflict with a decision from another district); *Jenkins*, 385 S.2d at 1360 (noting that the court's

Counsel should approach the motion for certification much like the motion for rehearing en banc discussed above.¹⁵⁰ In moving for certification of an issue of great importance, counsel should be prepared to argue that the case affects large numbers of people or presents an issue of exceptional importance.¹⁵¹ In fact, any motion for rehearing en banc that is based on an issue of exceptional importance is also a case that is appropriate for a motion to certify.¹⁵² Thus, counsel often will include an alternative request for certification in the en banc motion.¹⁵³

Occasionally, such motions are successful.¹⁵⁴ For example, in *Higgins v. State*,¹⁵⁵ a defendant filed a motion for rehearing en banc coupled with a motion for certification after the DCA issued a per curiam affirmance of his conviction.¹⁵⁶ The panel court found that second-degree arson was not a lesser-included offense of first-degree arson, despite the defendant's contrary arguments.¹⁵⁷ After rehearing the case, the DCA found that dates surrounding the revised arson laws made it confusing to determine which version of the law to apply to the defendant's case.¹⁵⁸ As a result, the court certified the legal question to the Florida Supreme Court.¹⁵⁹

While examples of such successful motions rarely arise in the PCA context, other cases are illustrative of when motions to certify are appropriate. For instance, in *Beverly Enterprises-Florida, Incorporated v. Knowles*,¹⁶⁰ the Fourth DCA granted the appellant's motion for certification, noting that the case raised an issue of great public importance in that it would affect many elderly

jurisdiction was based on the district court's certification of decisions in conflict or of great public importance).

150. *Supra* nn. 145–147 and accompanying text.

151. *Supra* n. 86 and accompanying text.

152. *E.g. State v. GTech Corp.*, 816 S.2d 648, 655–656 (Fla. Dist. App. 1st 2001) (certifying questions as involving issues of great public importance following motions for rehearing en banc and certification of questions).

153. *E.g. id.*

154. *See Higgins v. State*, 553 S.2d at 178, 179 (certifying a question to the Florida Supreme Court following a PCA); *Howard v. State*, 571 S.2d 507, 507 (Fla. Dist. App. 5th 1990) (granting a motion for certification following a PCA).

155. 553 S.2d 177.

156. *Id.* at 178.

157. *Id.*

158. *Id.* at 179.

159. *Id.*

160. 763 S.2d 1285 (Fla. Dist. App. 4th 2000).

people in Florida.¹⁶¹ Despite the DCA's initial decision affirming the lower court's judgment, counsel's motion convinced the court that the case was important enough to be certified.¹⁶²

Counsel also may be able to convince the Court that its decision conflicts with other district courts of appeal or Florida Supreme Court case law. For example, in *Padgett v. State*,¹⁶³ despite the DCA's belief that it had made the correct decision in affirming the trial court, it certified a conflict to the Florida Supreme Court on the basis that two apparently conflicting decisions may have been confusing.¹⁶⁴ Similarly, in *Watson v. State*,¹⁶⁵ the DCA recognized the existence of conflicting case law regarding standing and certified the issue to the Florida Supreme Court.¹⁶⁶

D. Appealing a PCA Directly to the United States Supreme Court

Despite the fact that review of a PCA by the Florida Supreme Court is unavailable, an appellant can bypass the Florida Supreme Court and seek review of a PCA directly in the United States Supreme Court.¹⁶⁷ Reviewing decisions without opinions is not new territory for the U.S. Supreme Court.¹⁶⁸ Unlike the Florida Supreme Court, the U.S. Supreme Court can and does grant review even when there is no opinion below.¹⁶⁹ A famous example is *Gideon v. Wainwright*, in which the U.S. Supreme Court granted review following the Florida Supreme Court's denial without opinion of Gideon's petition for habeas corpus.¹⁷⁰ The resulting landmark decision granted criminal defendants the right to counsel.¹⁷¹

Counsel need not file a futile attempt at review in the Florida Supreme Court to preserve the right to go to the United States

161. *Id.* at 1285.

162. *Id.*

163. 551 S.2d 1259 (Fla. Dist. App. 5th 1989).

164. *Id.* at 1262.

165. 763 S.2d 1143 (Fla. Dist. App. 4th 2000).

166. *Id.* at 1143.

167. *Fla. Star*, 530 S.2d at 288 n. 3.

168. *See e.g. Gideon*, 372 U.S. 335 (reviewing case after habeas corpus was denied without an opinion by the Florida Supreme Court).

169. *Id.*; *Fla. Star*, 530 S.2d at 288 n. 3.

170. *Gideon*, 372 U.S. at 338.

171. *Id.* at 339.

Supreme Court.¹⁷² In *The Florida Star v. B.J.F.*,¹⁷³ the Florida Supreme Court specifically noted that an appellant may bypass the Florida Supreme Court and appeal directly to the U.S. Supreme Court when seeking review of a PCA.¹⁷⁴ In *Florida Star*, the appellant challenged the constitutionality of a statute prohibiting it from printing information regarding the identities of victims of sexual crimes.¹⁷⁵ After losing at trial, Florida Star appealed to the First District Court of Appeal, which affirmed without discussion the trial court's validation of the statute.¹⁷⁶ Florida Star appealed the DCA decision to the U.S. Supreme Court after Florida Supreme Court review was summarily denied.¹⁷⁷

The U.S. Supreme Court did not render a decision because it was unclear whether Florida Star was required to first appeal to the Florida Supreme Court.¹⁷⁸ The U.S. Supreme Court remanded the case to the Florida Supreme Court to decide whether the Florida Constitution conferred Florida Supreme Court jurisdiction to hear the appellant's appeal.¹⁷⁹

Upon remand, the Florida Supreme Court interpreted Article V, Section 3(b)(3) of the Florida Constitution to allow review only of district court of appeal cases that contained a "statement or citation in the opinion that hypothetically could create conflict" with other DCA or Florida Supreme Court opinions.¹⁸⁰ The Court noted that a "district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the case."¹⁸¹ Therefore, because the appellants must exhaust review within a state system before proceeding to the U.S. Supreme Court, the *Florida Star* Court officially verified that appellants who receive PCAs from the district court of appeal may proceed directly to the U.S. Supreme Court.¹⁸²

172. *Fla. Star*, 530 S.2d at 288 n. 3.

173. 530 S.2d 286.

174. *Id.* at 288 n. 3.

175. *Id.* at 287.

176. *Id.*

177. *See Fla. Star v. B.J.F.*, 509 S.2d 1117, 1117 (Fla. 1987) (declining to accept jurisdiction in the Florida Supreme Court).

178. *See Fla. Star v. B.J.F.*, 484 U.S. 984, 984 (1987) (certifying the question of whether the Florida Supreme Court had jurisdiction).

179. *Id.*

180. *Fla. Star*, 530 S.2d at 288.

181. *Id.* at 288 n. 3.

182. *Id.* Before this case, there was a fear among appellants that by moving directly to

While appealing a PCA decision to the U.S. Supreme Court may seem daunting, this procedure has been successful.¹⁸³ For example, in *Hobbie v. Unemployment Appeals Commission of Florida*,¹⁸⁴ the U.S. Supreme Court reversed a per curiam decision.¹⁸⁵ In *Hobbie*, the employer fired Hobbie when she refused to work certain hours due to religious convictions developed after she began her employment.¹⁸⁶ When the employer contested Hobbie's unemployment-compensation claim, she sued.¹⁸⁷ Following an unsuccessful appeal to the Fifth DCA, Hobbie appealed directly to the U.S. Supreme Court, which reversed the per curiam affirmance and noted that the denial of benefits to the appellant violated the Free Exercise Clause of the First Amendment.¹⁸⁸

Similarly, in *Palmore v. Sidoti*,¹⁸⁹ a mother was denied custody of her child solely because she lived with and then remarried an African-American man.¹⁹⁰ The trial court verified that there was no question about the parental abilities of the mother, and instead stated that its decision was based on the mother's choice of a lifestyle that placed her own gratification ahead of her child's welfare.¹⁹¹ The Second DCA affirmed in a per curiam decision.¹⁹² The U.S. Supreme Court reversed, noting that the trial court's reasoning did not satisfy the Fourteenth Amendment prohibition against discrimination.¹⁹³

Additionally, in *Brooks v. State*,¹⁹⁴ the U.S. Supreme Court reversed the district court of appeal's PCA because the trial court had allowed an involuntary confession to be admitted into evi-

the U.S. Supreme Court they risked the objection that state-court remedies were not exhausted. *Id.* at 289. However, if they filed only in the Florida Supreme Court and were denied review, appellants risked the objection that the subsequent appeal to the U.S. Supreme Court was untimely as not occurring within ninety days of the lower court's opinion. *Id.* at 288, 289. This case alleviated those fears.

183. *E.g. Fla. v. Rodriguez*, 469 U.S. 1, 2, 5 (1984) (reversing a PCA in light of U.S. Supreme Court precedent); *infra* nn. 184–196.

184. 480 U.S. 136 (1987).

185. *Id.* at 139, 139 n. 4.

186. *Id.* at 138.

187. *Id.* at 138–139.

188. *Id.* at 139, 146.

189. 466 U.S. 429 (1984).

190. *Id.* at 430–431.

191. *Id.* at 431. The court was thus concerned that because of the mother's chosen lifestyle, the child would be subject to "social stigmatization." *Id.*

192. *Id.*

193. *Id.* at 432, 434.

194. 389 U.S. 413 (1967).

dence at trial.¹⁹⁵ The U.S. Supreme Court examined the circumstances surrounding the defendant's confession and found that a confession exacted after fifteen days in solitary confinement with no bed, meager meals, and no human contact except with an investigating officer was not "voluntary."¹⁹⁶

However, the U.S. Supreme Court will not reverse a case that presents issues only of Florida law.¹⁹⁷ Counsel must be prepared to prove that the case involves an important issue of federal or constitutional law worthy of review by the U.S. Supreme Court.¹⁹⁸ Such attempts are an obvious long shot because the U.S. Supreme Court accepts only a small fraction of the certiorari petitions filed every year.¹⁹⁹

E. Filing an Appeal with the Florida Supreme Court

There may be an exception to the general rule that the Florida Supreme Court may not review a PCA. Article V, Section 3(b)(1) of the Florida Constitution states that the Florida Supreme Court "[s]hall hear appeals . . . from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution."²⁰⁰ If a DCA issues a per curiam affirmance that necessarily declares a state statute invalid, is the Florida Supreme Court required to hear such an appeal?

Of course, this begs the question of whether a PCA can "declare" a statute invalid. Logically, one might argue that a PCA does not declare anything (just as it does not "express" anything).²⁰¹ However, the Florida Supreme Court has long exercised the power to review the record proper to determine whether it has conflict jurisdiction.²⁰² It lost this power when a 1980 constitutional amendment added the requirement that the conflict be "ex-

195. *Id.* at 414, 415.

196. *Id.* at 413–415.

197. *Mich. v. Long*, 463 U.S. 1032, 1040–1041 (1983).

198. For an excellent discussion of when an issue is "certworthy," see Robert L. Stein, et al., *Supreme Court Practice* 162–167 (8th ed., BNA 2002).

199. *Id.* at 164.

200. Fla. Const. art. V, § 3(b)(3). The Florida Constitution states that the Florida Supreme Court "[s]hall 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." Fla. Const. art. V, § 3(b)(1).

201. *Supra* nn. 45–47.

202. *Supra* nn. 35–38.

press and direct.”²⁰³ But when this “express and direct conflict” language was added in 1980 to section 3(b)(3), it was not simultaneously added to section (3)(b)(1).²⁰⁴ According to section (3)(b)(1), for the Florida Supreme Court to grant review, the DCA must declare the statute invalid, but there is no requirement of an express declaration, unlike the requirements existent in the remainder of section (3)(b).²⁰⁵ Because the Legislature purposely omitted the “express” language from section 3(b)(1), arguably the Florida Supreme Court has jurisdiction when a PCA results from a decision that implicitly declares a statute invalid.²⁰⁶

Judge Padovano seems to agree that the Florida Supreme Court has appellate jurisdiction under Article V, section (3)(b)(1) when an appellate court issues a PCA affirming an order of a trial court that declares a state statute invalid.²⁰⁷ As long as the Court has the power to review the record proper, counsel should be able to attempt to convince the Court that the only way the district court of appeal could reach its decision was to declare a statute invalid.²⁰⁸ This untested theory still awaits its first reported decision.

Such an appeal poses a practical problem. The typical notice of appeal from a PCA is dismissed by the Florida Supreme Court long before there is any briefing on the merits. Thus, counsel should bring the basis for the Court’s jurisdiction to its attention as soon as possible. For example, counsel could file a “speaking” notice of appeal that explicitly raises the question and discusses the Court’s jurisdiction.²⁰⁹

203. Fla. Const. art. V, § 3(b)(3).

204. Padovano, *supra* n. 32, at § 3.4.

205. *Id.*

206. *See id.* (stating that the Florida Supreme Court would likely hold that it has jurisdiction to review decisions inherently declaring invalid state statutes or constitutional provisions).

207. *Id.* (citing *State v. Cohen*, 568 S.2d 49 (Fla. 1990); *State v. Jenkins*, 469 S.2d 733 (Fla. 1985); *Gardner v. Johnson*, 451 S.2d 477 (Fla. 1984)).

208. *Id.*

209. In practice, a speaking notice of appeal is one that goes beyond the required formal language and presents an explanation and argument about the jurisdictional basis for the notice.

CONCLUSION

A PCA should be the end of the line for most Florida appellants.²¹⁰ In most cases, the PCA is a clear expression to the appellant that the appeal is not meritorious and presents no issue worthy of further review.²¹¹ As one court warned, “[C]ounsel should carefully and seriously consider the necessity or desirability of asking the court to rehear a case.”²¹² Burdening a court with frivolous motions for rehearing or clarification only creates more work for the court, a problem that the PCA is meant to remedy.²¹³ Moreover, appealing a PCA to the U.S. Supreme Court will be useless if the case does not present an important issue of federal law or U.S. constitutional law.²¹⁴ But as *Gideon v. Wainwright* illustrated, there are rare cases in which the appellants should not give up.²¹⁵ Although a PCA may be a brick wall in the vast majority of cases, in the appropriate case there are paths around that brick wall waiting for use by creative counsel. The next time that thin envelope arrives bearing bad news, do not automatically assume that the case is dead. Instead, stop and consider whether your client’s case may be that rare one deserving of further review.

210. *Supra* nn. 65–74.

211. *See supra* nn. 3–4, 15 (noting that most cases receiving a PCA do not need a written opinion).

212. *Whipple*, 431 S.2d at 1013.

213. *Lawyer’s Title Ins. Corp.*, 631 S.2d at 1101.

214. *Long*, 463 U.S. at 1040 (citing *Minn. v. Natl. Tea Co.*, 309 U.S. 551, 556 (1940)).

215. *Supra* nn. 5–9; *see supra* nn. 76, 106–111, 129–140, 151, 170–196 (noting cases in which there have been successful paths around PCAs).