Florida Law Review

Volume 45 | Issue 1 Article 2

January 1993

Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System

Gerald B. Cope

DISCRETIONARY REVIEW OF THE DECISIONS OF INTERMEDIATE APPELLATE COURTS: A COMPARISON OF FLORIDA'S SYSTEM WITH THOSE OF THE OTHER STATES AND THE FEDERAL SYSTEM

*Gerald B. Cope, Jr.**

* Judge, Third District Court of Appeal of Florida; B.A. 1968, Yale University; J.D. 1977, Florida State University College of Law; LL.M. 1992, University of Virginia School of Law. An earlier version of this article was submitted as the author's thesis for the LL.M. degree.

I. INTRODUCTION

The majority of state appellate court systems consist of two tiers: a court of last resort, usually called the supreme court, and an intermediate appellate court, usually called the court of appeals.[1] Similarly, the federal court system consists of an intermediate appellate court, the United States Court of Appeals,[2] and a court of last resort, the United States Supreme Court.[3]

One of the hallmarks of a two-tier appellate court system is discretionary supreme court review.[4] In the usual two-tier system most appeals go to the intermediate appellate court for decision,[5] after which the litigant ordinarily has no automatic right to a further appeal to the supreme court.[6] Instead, the supreme court may grant review of a court of appeals decision at its discretion.[7] In practice, a relatively small percentage of requests for discretionary review are granted: an average of thirteen percent in state supreme courts[8] and approximately five percent in the United

1. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, at 47-50, 53 (1990) [hereinafter STATE COURT STATISTICS]. In New York and Maryland, the court of last resort is the court of appeals. *Id.* at 206, 218. For purposes of this article the writer will follow the majority practice of referring to the court of last resort as the supreme court. *See id.* at 47. The article also will follow majority usage in referring to the intermediate appellate court generically as the court of appeals. *Id.* In Florida, the intermediate appellate court is named the district court of appeal. FLA. CONST. art. V, § 4.

2. *See* 28 U.S.C. § 1291 (1988).

3. 28 U.S.C. § 1254 (1988). *See generally* Robert L. Stern et al., *Epitaph for Mandatory Jurisdiction*, 74 A.B.A. J. 66 (1988).

4. STANDARDS RELATING TO COURT ORG. § 1.13 (1990).

5. STATE COURT STATISTICS, *supra* note 1, at 48. In the state and federal systems, there are some cases which can be appealed directly from the trial court to the supreme court. In federal practice, that class of cases is extremely small. Stern et al., *supra* note 3, at 66. In state practice, a common example would be the right of direct appeal from the trial court to the supreme court in a case in which the death penalty has been imposed. *See, e.g.*, FLA. CONST. art. V, § 3(b)(3) (providing that "the supreme court shall hear appeals from final judgments of trial courts imposing the death penalty"). Most states allow relatively few direct appeals to the supreme court, instead channelling the majority of appeals to the intermediate appellate court. STATE COURT STATISTICS, *supra* note 1, at 48.

6. STATE COURT STATISTICS, *supra* note 1, at 48.

7. *Id.*

8. *Id.* at 57, 59. The range is from 3% to 36%. *Id.* The data include, however, all types of requests for discretionary review, including petitions for extraordinary writs. *See id.* app. C, at 298-302. Another treatise reports a representative range as being 8% to 21%. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES § 6.7(c), at 159 (2d ed. 1989).

States Supreme Court.[9]

Explicit criteria for the exercise of discretionary supreme court review have been adopted, in one form or another, in most two-tier jurisdictions. Most commonly, these take the form of nonbinding guidelines; the best known example is United States Supreme Court Rule 10, which announces the Court's *Considerations Governing Review on Writ of Certiorari*.[10] In some places, like Florida, the criteria for discretionary review are part of the supreme court's jurisdictional authorization.[11]

This article examines explicit criteria for discretionary supreme court review of intermediate appellate court decisions. The criteria of interest here are those found in rules, statutes, or constitutional provisions of the state and federal appellate systems.[12] Florida's discretionary review system is compared with those of other jurisdictions and with contemporary professional standards.

The article begins with a comparison of the sources which establish the criteria for discretionary supreme court review. The article finds that the great majority of jurisdictions establish their review criteria by rule or statute rather than by constitutional provision. Approaches which rely on rule or statute are favored because they offer advantages in terms of flexibility. Florida relies excessively on inflexible constitutional limitations.

Second, this article examines the criteria for discretionary review employed in the respective jurisdictions. One aspect of this inquiry is to identify those factors which the various states and the federal system have thought important enough to enumerate as specifically warranting (or in some cases, not warranting) review by the court of last resort. The article concludes that Florida's criteria for maintaining decisional uniformity are similar to the criteria used in the majority of jurisdictions.

The article also concludes, however, that Florida's remaining criteria for supreme court review are substantially more restrictive than those employed in the great majority of states. The Florida Supreme Court does not have jurisdiction to review a case on the basis of importance unless there has been a certification of great public importance by the district court of appeal.[13] Similarly, the Florida Supreme Court does not have the

9. *See* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 10 (1986).

10. *See infra* app. B.

11. *See* FLA CONST. art. V, § 3(b)(3).

12. Beyond the scope of this study are discretionary review criteria adopted by decisional law, including case law standards for extraordinary writs. This article undertakes a facial examination of express discretionary review criteria set forth by constitutional provision, statute, or rule.

13. *See* FLA. CONST. art. V, § 3(b).

ability to grant review for supervisory purposes,[14] and in most instances the supreme court cannot review a district court of appeal decision unless the district court of appeal has issued a written opinion.[15] Florida's criteria are also unusually restrictive because they are jurisdictional in nature; if the constitutional criteria are not satisfied, supreme court review is precluded.[16] By contrast, in other states and in the federal system the criteria for discretionary review are either promulgated as nonbinding guidelines, or are expressed in broad, elastic terms; this allows the supreme courts in those jurisdictions the latitude to make independent determinations of importance and to select cases for review accordingly.[17]

Third, this article examines Florida's requirement for a written opinion showing on its face that one of the criteria for discretionary review has been satisfied.[18] The article finds that few jurisdictions impose such a requirement.[19] To the limited extent that other states have done so, they have provided procedural alternatives where the intermediate court declines to prepare an opinion.[20] Florida affords litigants no such procedural alternative; Florida's written opinion requirement is the most restrictive system in the United States.[21]

Fourth, the article notes that a supreme court's workload capacity for discretionary review is necessarily related to the amount of judicial time occupied by the supreme court's mandatory jurisdiction.[22] In Florida, the most time-consuming mandatory item is the review of death penalty cases.[23] To the extent that a supreme court's time is consumed by matters which it is required to hear, it has correspondingly less time to dedicate to discretionary review. The article concludes that proposals to expand the Florida Supreme Court's discretionary review powers must be evaluated in light of the ability of the court to absorb any additional workload that may be entailed.[24]

This article makes several recommendations for change in Florida. First, the Florida Supreme Court should have the power to review any district court of appeal decision on the basis of the importance of the question presented. The present categorical restrictions on the Florida Su-

---

14. *See id.*
15. *See infra* parts III.B, VI.
16. *See infra* part III.
17. *See infra* part V.
18. *See infra* parts III.B, VI.
19. *See infra* text accompanying notes 327-38.
20. *See infra* text accompanying notes 329-38.
21. *See infra* part VI.
22. *See infra* part VII.
23. *See infra* notes 491-93 and accompanying text.
24. *See infra* part VII.

preme Court's discretionary jurisdiction should be modified or removed from the constitution, and the court should be authorized to promulgate its own criteria for the exercise of discretionary review. As a cautionary device, the court could require petitions for discretionary review to be accompanied by a statement of counsel certifying that the question presented is of exceptional importance, as is presently required when counsel file motions for rehearing en banc in the district courts of appeal.[25]

Second, the present requirement for a written opinion as a prerequisite for discretionary review should be eliminated. The existence or nonexistence of a written opinion is one relevant factor to be considered in deciding whether a case is important enough to warrant review, but the absence of an opinion should not automatically preclude review. The court could, as a matter of policy, decline to review no-opinion cases where review is sought on the basis of an asserted conflict of decisions. Alternatively, if the written opinion requirement is retained as a condition precedent for obtaining review in all cases, the requirement should be deemed satisfied where the litigant has requested a written opinion, and the district court of appeal has declined to write one.

Finally, this article recommends that Florida follow the majority of American jurisdictions and require that the jury be unanimous to impose the death penalty. The unanimous jury requirement is sound policy. Death is the ultimate sanction and should be imposed only where the jury, as the voice of the community, is in unanimous agreement. A rule of unanimity reduces the risk of erroneous adjudication. Where the jury is divided, the life sentence should be imposed and the case deflected to the district court of appeal. Such a change in law would likely reduce the Florida Supreme Court's death penalty workload. Alternatively, the trial court's authority to override a jury's recommendation for a life sentence should be repealed. The override cases are almost always reversed and have little actual effect on the imposition of the death penalty.

II. TWO-TIER APPELLATE COURT SYSTEMS

A. *The Development of Intermediate Appellate Courts*

When appellate workload is small enough, a state does not need an intermediate appellate court. Appeals can proceed directly from the trial court to the state supreme court. However, supreme courts cannot expand indefinitely to absorb additional appellate caseload. The prevailing view is

25. FLA. R. APP. P. 9.331.

that they should not exceed nine members.[26] The most common number of justices in the state supreme courts is seven.[27]

When appellate workload outruns the ability of the supreme court to handle it, the most common solution has been to create an intermediate appellate court.[28] This occurred in a few states in the nineteenth century,[29] and Congress created the federal courts of appeals in 1891.[30] By 1957, thirteen states had intermediate appellate courts, including Florida.[31] By 1980, the number had grown to thirty-two,[32] and at present there are thirty-nine.[33] They are found in every state with a population of over 2.6 million and some with populations even lower.[34]

B. *ABA* Standards Relating to Court Organization

The theory underlying two-tier appellate court systems is summarized in the American Bar Association's (ABA) *Standards Relating to Court Organization* (the *Court Organization Standards*).[35] The *Court Organization Standards* find that "[a]ppellate courts perform two basic functions."[36] The first is commonly referred to as the error correction function, which involves "reviewing trial court proceedings to determine whether they have been conducted according to law and applicable procedure."[37] The second is commonly referred to as the law development func-

---

26. STANDARDS RELATING TO COURT ORG. § 1.13 (1990).

27. *Id.* § 1.13 commentary at 39-40; *see* DANIEL J. MEADOR, AMERICAN COURTS 92-93 (1991).

28. STANDARDS RELATING TO COURT ORG. § 1.13 commentary at 39-40 (1990).

29. *See* STERN, *supra* note 8, § 1.3, at 6. New York, New Jersey, Ohio, Missouri, Texas, Illinois, and Louisiana had intermediate appellate courts by 1891. *Id.* In New Jersey, the intermediate appellate court was created in the eighteenth century. *Id.* at 6 n.10.

30. Rehnquist, *supra* note 9, at 6; *see also* STERN, *supra* note 8, § 1.3, at 6 (stating that when the Supreme Court of the United States fell three years behind schedule, Congress responded similarly to some states by establishing the circuit courts of appeals).

The 1891 legislation shifted appeals in diversity jurisdiction cases to the courts of appeals. In cases involving federal statutes or the federal constitution, the litigant still had a right of direct appeal to the Supreme Court, bypassing the courts of appeals. Rehnquist, *supra* note 9, at 6-7. The Judiciary Act of 1925 shifted most of the remaining mandatory appellate jurisdiction to the courts of appeals. *Id.* at 7-9.

31. NATIONAL CENTER FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING v (1990) [hereinafter IMPROVING CASE PROCESSING].

32. MARLIN O. OSTHUS, STATE INTERMEDIATE APPELLATE COURTS v (2d ed. 1980).

33. For a list of the 39 states, see *infra* app. C.

34. *See infra* app. D. The largest state without an intermediate appellate court is Mississippi, with a 1990 population of 2,573,000. *See infra* app. D. Twenty states have lower populations than Mississippi, of which nine have intermediate appellate courts. *See infra* apps. C-D.

35. *See* STANDARDS RELATING TO COURT ORG. § 1.13 & commentary (1990).

36. *Id.* § 1.13 commentary at 38.

37. *Id.* § 1.13 commentary at 38-39.

tion, which involves "developing the rules of law that are within the competence of the judicial branch to announce and interpret."[38]

Where a two-tier appellate system is created, the *Court Organization Standards* recommend that few cases should be appealable directly to the supreme court as a matter of right.[39] Appeals directly from the trial court to the supreme court should be reserved for matters of greatest importance, such as "capital cases and . . . a limited number of other matters."[40] Included in this category are highly important emergency matters where permission should be granted to appeal directly from the trial court to the supreme court, bypassing the court of appeals.[41]

Under the *Court Organization Standards*, all other appeals first proceed to the court of appeals.[42] Once the court of appeals renders a decision, any further review will be at the supreme court's discretion.[43] Except in rare cases, after the litigant has been heard in the court of appeals, the litigant is not entitled to a successive appeal to the supreme court.[44]

The general theory is that just as a litigant is entitled only to one trial, the litigant is also only entitled to one appeal as a matter of right.[45] Initial appellate review is usually triggered by the aggrieved litigant, "and is, in any event, performed chiefly for that person's benefit."[46] By contrast, any review after the initial appeal is ordinarily done for purposes of law development,[47] which "is performed for the benefit of the community at large."[48] Accordingly, review after the first appeal is primarily for benefit of the wider community and "only incidentally for the benefit of the

---

38. *Id.*

39. *Id.* § 1.13(a).

40. *Id.*

41. *Id.* § 1.13 commentary at 39. In federal practice this is certiorari before judgment. *See* 28 U.S.C. § 1254(1) (1988) (providing that cases in the courts of appeals may be reviewed by the Supreme Court before or after rendition of judgment); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 2.3 (6th ed. 1986) (analyzing certiorari jurisdiction before rendition of judgment by the court of appeals).

42. STANDARDS RELATING TO COURT ORG. § 1.13(b)(ii) (1990).

43. *Id.* § 1.13(a) & commentary at 39-40; STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5-6 (1977).

44. STANDARDS RELATING TO COURT ORG. § 1.13 commentary at 40 (1990). The Standards acknowledge that in rare cases an exception is warranted. By way of illustration, where the initial review of a death sentence is conducted by the intermediate appellate court, the Standards recommend a further appeal as a matter of right to the state supreme court. *Id.* Such a procedure is followed in Alabama. ALA. R. APP. P. 39(c). In Florida, if a district court of appeal declares a statute or provision of the Florida Constitution invalid, there is a right of appeal to the supreme court. FLA. CONST. art. V, § 3(b)(1).

45. STANDARDS RELATING TO COURT ORG. § 1.13 commentary at 40 (1990).

46. *Id.* at 39.

47. *Id.* at 41-42.

48. *Id.* at 39.

particular litigants."[49]

In the two-tier appellate system there are different roles for the court of appeals and the supreme court.[50] Where the court of appeals entertains the initial appeal, that court is responsible for the error correction function, assuring that the applicable procedures have been followed and that the correct law has been applied.[51] In addition, the court of appeals has initial responsibility for the law development function.[52] After the court of appeals has made a decision, any litigant may petition for discretionary review of any decision of a court of appeals.[53] The state supreme court grants review selectively; the court is intended to specialize in law development functions, to resolve legal issues of great importance to the jurisprudence of the state, and to assure decisional uniformity throughout the state.[54]

C. *The Workload Savings*

When a two-tier appellate system is implemented, most appeals go initially to the intermediate appellate court instead of the supreme court. Demonstrably this shifts a great deal of the review-for-correctness workload from the supreme court to the intermediate court.

Once the intermediate court decides the case, however, the losing litigant in most jurisdictions can petition the supreme court for discretionary review. Under the *Court Organization Standards*, as well as in practice in most jurisdictions, there is no categorical limitation on the right of a litigant to seek discretionary supreme court review of a court of appeals decision.[55]

At first blush it might seem that allowing every losing litigant to petition for discretionary review would erase the benefits of a two-tier system. In practice the system operates efficiently; a two-tier appellate sys-

---

49. *Id.* The word "incidentally" may overstate the case to some extent, but the Standards' essential position is that any successive review ordinarily should have significance beyond the individual case. *Id.* at 41-42.

50. *See id.* at 38-40.

51. *See id.*

52. *See id.*

53. *Id.* § 1.13(a) commentary at 39. "The highest appellate court should have authority to review all types of cases, regardless of subject matter or amount involved; important questions of substantive law and procedure can occur in cases of otherwise small significance." *Id.* § 1.13 commentary at 39.

54. *See id.* at 39-40. Of course, cases which arrive in the supreme court by direct appeal, such as death penalty cases, require the supreme court to perform error correction as well as law development functions.

55. *See supra* note 53; STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 4 (1977).

tem still results in a significant workload savings, compared with a system in which all appeals go directly to the supreme court. First, there is a significant attrition in cases after the court of appeals renders a decision. For many reasons, in numerous cases the parties do not seek further review in the supreme court.[56] Second, petitions for discretionary review can be read and decided quickly, in a fraction of the time necessary for consideration of a plenary appeal on the merits.[57] Such review focuses initially on the question of whether jurisdiction should be accepted, and in the great majority of cases results in an order denying review.[58] The task of determining whether to exercise discretionary review is an important element of the supreme court's workload,[59] but the time expended per individual case is very small.[60] Third, in practice supreme courts actually grant discretionary review in only a small percentage of the cases where it is requested. The net effect of the two-tier system is to shift the time-consuming review-for-correctness function to the court of appeals and to streamline the supreme court's workload.

D. *The Structure of Two-Tier Appellate Court Systems*

While two-tier appellate systems are now found in most American jurisdictions, the systems are not identical. The most familiar two-tier model is the federal system, in which there are separate courts of appeals, each with its own geographic jurisdiction.[61] Many states, including Flor-

56. *See infra* note 255.

57. One Florida Supreme Court Justice estimated that reading and deciding a petition for discretionary review consumed, on average, 20 minutes of his time. *See* Arthur J. England, Jr. & Michael P. McMahon, *Quantity Discounts in Appellate Justice*, 60 JUDICATURE 442, 448-49 (1977). Other time estimates have been offered for the same function in the United States Supreme Court. STERN ET AL., *supra* note 41, § 1.16, at 38-39 (noting that petitions for certiorari may be decided by Supreme Court Justices in a matter of a few minutes or longer, depending upon the importance and complexity of the issues presented).

58. *See* Rehnquist, *supra* note 9.

59. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, *in* WALTER F. MURPHY & CHARLES H. PRITCHETT, COURTS, JUDGES, AND POLITICS § 3.5, at 114-15 (4th ed. 1986).

60. *See supra* note 57 and accompanying text. Because the supreme court can accept only a small percentage of cases for review, as a practical matter, the decision of the court of appeals will be the final one in most cases. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 4-5 (1977). *See generally* John A. Stookey, *Creating an Intermediate Court of Appeals: Workload and Policymaking Consequences*, *in* PHILIP L. DUBOIS, THE ANALYSIS OF JUDICIAL REFORM 153 (1982) (discussing the effects of two-tier appellate systems).

61. STATE COURT STATISTICS, *supra* note 1, at 47-51, 185; STERN, *supra* note 8, § 6.1, at 135. The exception is the United States Court of Appeals for the Federal Circuit, which has a subject matter, rather than a geographic, jurisdiction. STERN, *supra* note 8, § 2.6(c)(2), at 55.

ida, follow this pattern.[62] Another approach is to create a single, statewide court of appeals, with or without internal subdivisions.[63]

Where a state follows the federal model and organizes its intermediate appellate court into separate courts of appeals, a major responsibility of the supreme court is to reconcile conflicts between the courts of appeals, thus assuring statewide decisional uniformity. Where a state has a single intermediate appellate court, that court can itself assure statewide decisional uniformity, thereby relieving the supreme court of that responsibility.[64] In practice, some of the statewide courts of appeals have undertaken that responsibility, while others have not,[65] and a state's practice may or may not be reflected in its supreme court's discretionary review criteria.

In most states, as in the federal model, the court of appeals and the supreme court are generalists, handling all appeals regardless of subject matter.[66] However, a few states have established courts with specialized subject matter jurisdiction. Most common is a division between criminal and civil courts,[67] but there are other types of specialized subject matter

---

62. STATE COURT STATISTICS, *supra* note 1, at 50-51 & pt. IV.

63. Such single, statewide intermediate appellate courts have as few as three or as many as 28 members. *See* MEADOR, *supra* note 27, at 94-95; STATE COURT STATISTICS, *supra* note 1, at 50 & pt. IV.

New Jersey's statewide intermediate appellate court (of 28 judges) is divided into seven, four-judge "parts," for administrative purposes. IMPROVING CASE PROCESSING, *supra* note 31, at 99; *see also* STATE COURT STATISTICS, *supra* note 1, at 216.

The Wisconsin appellate structure demonstrates another variation: "[T]he intermediate appellate court panels in Wisconsin are unified. As such, each district is bound by the published decisions of another district." Richard S. Brown, *Allocation of Cases in a Two-Tiered Appellate Structure: The Wisconsin Experience and Beyond*, 68 MARQ. L. REV. 189, 229 (1985) (footnote omitted).

64. OSTHUS, *supra* note 32, at 12-14; Ben F. Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U. L. REV. 205, 213 (1984).

65. *See* Overton, *supra* note 64, at 213 (enumerating the states without en banc procedures).

In New Jersey's statewide intermediate appellate court, consistency is maintained within, but not between, the seven administrative "parts." IMPROVING CASE PROCESSING, *supra* note 31, at 101; *see also* Overton, *supra* note 64, at 213.

Under Michigan's former practice, panels of the court of appeals were permitted to disregard decisions of other panels on the same point of law, so long as the conflict was certified to the supreme court. Edward M. Wise, *The Legal Culture of Troglodytes: Conflicts Between Panels of the Court of Appeals*, 37 WAYNE L. REV. 313, 322-23 (1991). By rule adopted in 1990, panel decisions are binding on subsequent panels and can only be overruled by a special en banc panel of the court of appeals or by the supreme court itself. Taylor Mattis, *Stare Decisis Within Michigan's Court of Appeals: Precedential Effect of Its Decisions on the Court Itself and on Michigan's Trial Courts*, 37 WAYNE L. REV. 265, 305-11 (1991). By order of the Michigan Supreme Court, the provisions of this rule have been continued in effect until December 31, 1993. Mich. Admin. Order 1993-4.

66. *See* STATE COURT STATISTICS, *supra* note 1, at 51-52.

67. In Alabama and Tennessee the intermediate appellate courts consist of a court of criminal appeals and a court of civil appeals. MEADOR, *supra* note 27, at 94-95; *see* STATE COURT STATISTICS,

jurisdiction.[68] In these specialized systems, like the generalist ones, supreme court review is usually discretionary, and the specialized subject matter does not appear to affect the criteria for discretionary review.[69]

Another organizational variation is found in the six states having so-called assignment or deflection systems.[70] In these states all appeals are filed with the supreme court.[71] The supreme court then assigns a portion of the appeals to the intermediate appellate court and retains the remainder in the supreme court for decision on the merits.[72] As in the more

---

supra note 1, at 186, 229.

In Alaska the court of appeal has criminal jurisdiction only. *See* ALASKA STAT. § 22.07.020 (1992). Civil appeals proceed directly to the supreme court. *See id.* § 22.05.010; *see also* STATE COURT STATISTICS, *supra* note 1, at 187.

In Texas there are two specialized courts of last resort: a supreme court having civil jurisdiction and a court of criminal appeals having criminal jurisdiction. TEX. CONST. art. V, §§ 3, 5; *see* MEADOR, *supra* note 27, at 93; STATE COURT STATISTICS, *supra* note 1, at 230.

In Oklahoma the supreme court and intermediate appellate court handle civil matters only. OKLA. CONST. art. VII, §§ 4, 5; *see* MEADOR, *supra* note 27, at 93; STATE COURT STATISTICS, *supra* note 1, at 222. Criminal appeals proceed directly from the trial court to the court of criminal appeals, which is the court of last resort in criminal cases. *See* OKLA. STAT. ANN. tit. 20, § 30.1 (West 1993).

68. In Pennsylvania one intermediate appellate court, the Commonwealth Court, has appellate jurisdiction in cases involving state or local governmental agencies, including administrative law matters and zoning. PA. STAT. ANN. tit. 42, § 762 (1992); OSTHUS, *supra* note 32, at 5-6, 41-42. The other intermediate appellate court, the Superior Court, has the remainder of the intermediate appellate jurisdiction, including most civil and criminal appeals. PA. STAT. ANN. tit. 42, § 742 (1992). Both courts have statewide jurisdiction. *See* STATE COURT STATISTICS, *supra* note 1, at 224.

In New York most appeals from trial courts of general jurisdiction proceed to the Appellate Division, which is the principal intermediate appellate court. *See* N.Y. CONST. art. VI, § 4. A second intermediate appellate court, the Appellate Term, has jurisdiction over appeals from certain trial courts of limited jurisdiction. *See* N.Y. CONST. art. 6, § 8; STATE COURT STATISTICS, *supra* note 1, at 218.

In Indiana there is a specialized intermediate appellate tribunal for tax matters. STATE COURT STATISTICS, *supra* note 1, at 200.

Oregon has a tax court which one authority classifies as an intermediate appellate court, MEADOR, *supra* note 27, at 95. The National Center for State Courts does not classify the Oregon tax court as an intermediate appellate court, apparently because the Oregon court has trial as well as appellate responsibilities. *See* STATE COURT STATISTICS, *supra* note 1, at 223.

69. *See* STERN, *supra* note 8, §§ 6.1-.2, at 135-38 (discussing the requirements for discretionary review in a number of states with courts of specialized jurisdiction); *infra* app. C.

70. The six states are Hawaii, Idaho, Iowa, North Dakota, South Carolina, and Oklahoma. *See* STERN, *supra* note 8, § 2.5, at 31, 32 n.34. The North Dakota court has been established on a temporary basis and is scheduled to expire on January 1, 1994. N.D. CENT. CODE § 27-01-01 note (1991). As previously mentioned, Oklahoma's court of appeals has civil jurisdiction only. OKLA. STAT. ANN. tit. 20, § 30.1 (West 1991).

71. *See* STERN, *supra* note 8, § 2.5, at 31, 32 n.34.

72. *See id.* In four of the states, the rules of court indicate that the cases are to be screened so that the supreme court retains the most important cases at the outset, while referring to the intermediate appellate court those cases which do not appear to warrant supreme court attention. *See* HAW. R. APP. P. 31; IDAHO R. APP. P. 108; IOWA R. APP. P. 401; N.D. ADMIN. R. 27, § 10. In Hawaii, for

traditional appellate systems, after the intermediate appellate court renders a decision, discretionary review is available in the state supreme court.[73] To the extent that those states have adopted discretionary review criteria, they are included in the present study.[74]

E. *Bypassing the Intermediate Appellate Court*

Although beyond the scope of this article, many jurisdictions allow an appeal to bypass the intermediate appellate court and proceed directly to the supreme court if certain conditions are met. There are two different models. Under the *Court Organization Standards* and the federal model, a bypass of the intermediate appellate court is an extraordinary step and should be employed only where the matter is both urgent and important.[75] The theory is that with rare exception the court of appeals should first address each matter within its jurisdiction. This gives the supreme court the benefit of the court of appeals' decision and analysis.[76] This approach assures that routine error correction will occur at the court of appeals level.

The other model is a variation on the assignment or deflection systems described in the preceding section. The theory is that overall appellate review time can be reduced if cases warranting supreme court review are identified at the outset and channeled to that court.[77] Under this ap-

---

example, screening is done by a single justice of the supreme court, while in Iowa it is accomplished by a panel of three justices. *See* Interview with Associate Justice Frank Padgett (Sept. 17, 1986), *in* 20 HAWAII B.J. 95, 95 (1987); STERN, *supra* note 8, § 2.5, at 31.

On the other hand, in Oklahoma all cases are routinely assigned to the court of appeals unless a party moves to retain the appeal in the supreme court. OKLA. R. APP. P. 1.16 (appeals in civil cases); William W. Means, *Reflections on Deflection: Appellate Assignment to Oklahoma's Court of Appeals*, 24 TULSA L.J. 1, 31 (1988).

In South Carolina the supreme court retains all criminal appeals and allocates the civil appeals between itself and the court of appeals by the age of the case. STERN, *supra* note 8, § 2.5, at 32 n.34.

73. *See* STERN, *supra* note 8, § 2.5, at 33.

74. This study examines only the explicit criteria for discretionary review after the court of appeals has rendered a decision. In some assignment jurisdictions, the assignment criteria bear a close resemblance to the criteria for discretionary supreme court review. *See* HAW. R. APP. P. 31(a); IDAHO R. APP. P. 108; IOWA R. APP. P. 401; N.D. ADMIN. R. 27, § 10. For purposes of consistency, this article considers only explicit criteria for discretionary review after the intermediate appellate court has rendered a decision. Pre-decision assignment criteria are omitted from consideration.

75. STANDARDS RELATING TO APPELLATE COURTS § 3.10(d) & commentary (1977); *see* 28 U.S.C. § 1254 (1988) (providing for the transfer of a case from a court of appeals to the United States Supreme Court by writ of certiorari before or after the rendition of judgment).

76. STERN, *supra* note 8, § 2.4, at 30.

77. *Id.* § 2.5, at 31; Brown, *supra* note 63, at 191 ("[V]ery little sustained attention has been paid . . . to . . . the concept of immediately transferring some of the more important intermediate court cases to the highest court while simultaneously reducing the amount of time that the supreme court spends on less important error correcting matters.").

proach, appeals are screened after filing, allocating to the supreme court those cases which have sufficient importance to warrant supreme court review.[78] This procedure occurs in Massachusetts and Connecticut.[79]

Under both bypass models, explicit or implicit criteria are employed in order to identify cases which should be passed directly to the supreme court. Such criteria are beyond the scope of this article. The criteria of interest here are the criteria for discretionary supreme court review after the intermediate appellate court has rendered a decision.

III. THE FLORIDA SUPREME COURT'S LIMITED JURISDICTION TO REVIEW DECISIONS OF THE DISTRICT COURTS OF APPEAL

A. *Overview of the Florida Appellate Structure*

Florida's two-tier appellate system was created by constitutional amendment in 1956.[80] At present, Florida has five district courts of appeal, each with its own separate territorial jurisdiction.[81] In Florida, few appeals can be taken to the supreme court as a matter of right.[82] Virtually all appeals from the trial court of general jurisdiction, the circuit court,[83] proceed to the district court of appeal.[84] Florida has a procedure to transfer an appeal to the supreme court, thereby bypassing the district court of appeal, when the matter is of great importance and the appeal requires immediate resolution by the supreme court.[85] Bypass is a proce-

78. STERN, *supra* note 8, § 2.5, at 31.

79. *Id.* at 32-33.

80. FLA. CONST. art. V, §§ 4, 5 (1956).

81. FLA. STAT. §§ 35.01-.043 (1991).

82. Appeals from judgments imposing the death penalty are the most time-consuming category of appeals of right. *See* FLA. CONST. art. V, § 3(b)(1); *infra* text accompanying notes 491-92. There is also an appeal as a matter of right where a district court of appeal has declared invalid a state statute or a provision of the state constitution. FLA. CONST. art. V, § 3(b)(1). Also within the supreme court's appellate jurisdiction are appeals from final judgments in bond validation proceedings and review of certain public utility regulation matters when provided by general law. *Id.* § 3(b)(2); *see* PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE §§ 2.5-.6 (1988).

83. Florida has a two-tier trial court system. *See* STATE COURT STATISTICS, *supra* note 1, at 195. The circuit court is the trial court of general jurisdiction. FLA. CONST. art. V, § 5. The county court is a trial court of limited jurisdiction. *Id.* § 6. The state is divided into 20 judicial circuits. FLA. STAT. § 26.01 (1991).

84. FLA. CONST. art. V, § 4(b)(1).

85. This "pass-through" mechanism (also referred to as "bypass") is invoked where the district court of appeal certifies that the pending appeal is "of great public importance" or will "have a great effect on the proper administration of justice throughout the state," and in either case, requires "immediate resolution by the supreme court." FLA. CONST. art. V, § 3(b)(5). The supreme court has discretion concerning whether to accept jurisdiction. *Id.* Pass-through jurisdiction may only be initiated by the district court of appeal. *Id.* There is no "reach-down" mechanism which would allow the Florida Supreme Court to initiate a transfer on its own motion or the motion of a party. *See id.*; *see*

dure which is sparingly used.[86]

The membership of Florida's smallest district court of appeal is nine judges; the largest is fifteen.[87] Appeals are ordinarily determined by panels of three judges.[88] However, each district court of appeal is authorized to sit en banc and has the responsibility to maintain decisional uniformity within the court.[89] Once the district court of appeal renders its decision, further review by the Florida Supreme Court is, with one exception, discretionary.[90]

There are two pathways for a litigant to obtain discretionary review in the Florida Supreme Court. The first is by petition for discretionary review filed directly with the supreme court.[91] The second is by permission of the district court of appeal.[92]

B. *Petitions to the Supreme Court*

A litigant may apply directly to the supreme court for discretionary review of a district court of appeal decision.[93] The supreme court may grant such review only if the district court of appeal decision fits within one of four specific categories enumerated in the Florida Constitution.[94]

When Florida's two-tier appellate system was created, the designers of the system believed that it would be necessary to create constitutional barriers to access to the supreme court.[95] They feared that there would be double appeals in every case, first to the district court of appeal and then

---

also OSTHUS, *supra* note 32, at 11-12 (discussing the use of bypass mechanisms to expedite supreme court review on important questions).

86. *See* Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147, 195 (1980) ("The most important aspect of section 3(b)(5) [the bypass mechanism] is its clearly narrow intended application.").

87. Ch. 93-63, § 3, at 407, Laws of Fla. (amending FLA. STAT. § 35.06 (1991)).

88. *See* FLA. CONST. art. V, § 4(a).

89. FLA. R. APP. P. 9.331; Ben F. Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. 80, 90 (1983). Indeed, the Florida Supreme Court's jurisdictional article does not authorize Florida Supreme Court review of conflicting decisions within a district court of appeal. *See* FLA. CONST. art. V, § 3(b)(3) (authorizing discretionary review of "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of *another* district court of appeal . . . .") (emphasis added); England et al., *supra* note 86, at 188.

90. FLA. CONST. art. V, § 3(b)(3), (4). The exception is found in § 3(b)(1), which confers a right of appeal where the decision of the district court of appeal has declared "invalid a state statute or a provision of the state constitution." *Id.* § 3(b)(1).

91. *Id.* § 3(b)(3); FLA. R. APP. P. 9.120.

92. FLA. CONST. art. V, § 3(b)(4).

93. *Id.* § 3(b)(3).

94. *Id.*

95. *See infra* part V.C.

to the supreme court.[96] Accordingly, the system was designed so that the constitution itself would spell out the categories of decisions eligible for review in the Florida Supreme Court.[97]

At present, the Florida Supreme Court has the power to grant discretionary review of a decision of a district court of appeal which:

(1) "expressly declares valid a state statute";

(2) "expressly construes a provision of the state or federal constitution";

(3) "expressly affects a class of constitutional or state officers"; or

(4) "expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law."[98]

For the supreme court to grant review, not only must a district court of appeal decision fit within one of the four constitutional categories, but that fact must appear "expressly" on the face of a written opinion issued by the district court of appeal.[99] Moreover, for these purposes the supreme court will only consider a written opinion joined by a majority of the district court of appeal panel; a concurring or dissenting opinion will not be considered.[100]

---

96. JUDICIAL COUNCIL OF FLA., FIRST ANNUAL REPORT 14 (1953/1954) [hereinafter JUDICIAL COUNCIL REPORT].

97. FLA. CONST. art. V, § 4 (1956); *see infra* app. E.

98. FLA. CONST. art. V, § 3(b)(3). During the 1980 revision of the jurisdictional article, the court and a Florida Bar committee proposed deletion of the third criterion, which permits review if the case "affects a class of constitutional or state officers." England et al., *supra* note 86, at 158. It was ultimately retained at the request of the court clerks and sheriffs associations. *Id.* The category affects a small group of cases—16 were filed in 1991. Supreme Court of Florida, Annual Statistics for the Calendar Year of 1991 (unpublished report, on file with the *Florida Law Review*) [hereinafter Supreme Court 1991 Statistics].

99. The term "expressly" is part of the constitutional language. FLA. CONST. art. V, § 3(b)(3); *see* Jenkins v. State, 385 So. 2d 1356, 1357-59 (Fla. 1980); *see also* Florida Star v. B.J.F., 530 So. 2d 286, 288 n.3 (Fla. 1988). No particular form of opinion is required, and the opinion need not expressly refer to one of the constitutional criteria. *See* Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). It is sufficient if it can be determined from the opinion that one of the constitutional criteria is satisfied. *Id.*

Under the Internal Operating Procedures of the Florida Supreme Court, "[w]hen notice of a party's seeking discretionary review is filed, the clerk's office determines whether a district court of appeal has written an opinion in the case. If there is no opinion, the case is automatically dismissed." 35 FLA. STAT. ANN., SUP. CT. MANUAL INTERNAL OPERATING P. § IIA(1)(a) (West Supp. 1993).

100. Reaves v. State, 485 So. 2d 829, 830 & n.3 (Fla. 1986). There are minor exceptions to the requirement of a written opinion. Where there is no written opinion, but only a ruling citing other case law, there will be jurisdiction if "one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or . . . the citation explicitly notes a contrary holding of another district court or of this Court." *See* Florida Star v. B.J.F., 530 So. 2d at 288 n.3 (citing Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981)).

It should also be noted that the written opinion requirement and the enumerated categorical restrictions do not apply to petitions for extraordinary writs filed in the Florida Supreme Court, such

The requirement for a written opinion was added to the Florida Constitution by amendment in 1980.[101] Florida does not require that a written opinion be prepared in each case, and affirmances without opinion are common in Florida practice. Although the absence of a written opinion will preclude Florida Supreme Court review in virtually every case, litigants are not entitled to demand written opinions which would thereby enable them to seek supreme court review.[102] There is no alternative pathway for a litigant who has requested, but failed to obtain, an opinion discussing a point on which the litigant desires supreme court review.[103]

Where there is a written majority opinion, the supreme court may entertain a petition for review based on one of its four jurisdictional categories. Of the four enumerated categories, by far the most important is the one pertaining to conflict of decisions. The other three categories are invoked infrequently.[104]

What is striking about the four jurisdictional categories is an omission: the supreme court is not empowered to grant review under this subdivision on account of the importance of the question presented. Plainly, the supreme court's four discretionary review categories do not exhaust the universe of important legal issues which the state's highest court should be empowered to resolve. For example, a question of first impression by definition does not conflict with other decisions; unless the issue happens to involve constitutionality, constitutional interpretation, or a class of constitutional or state officers, the supreme court cannot on its own grant discretionary review. Similar examples include cases of statu-

---

as mandamus or prohibition. *See infra* part VI.

101. *See* FLA. CONST. art. V, § 3(b); *see also* Jenkins v. State, 385 So. 2d 1356, 1357-59 (Fla. 1980) (holding that the 1980 constitutional amendment which added the written opinion requirement ended record proper review).

102. *See* School Bd. v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985); *see also* Williams v. State, 425 So. 2d 1163 (Fla. 5th DCA 1983); Davis v. Sun Banks, 412 So. 2d 937 (Fla. 1st DCA 1982). The written opinion requirement is discussed in more detail in part VI *infra*.

103. Although commentators have suggested that an opinion should be written in each case affording an arguable basis for supreme court review, no rules have been promulgated giving guidance in that regard. *See* John M. Scheb & John M. Scheb, II, *Making Intermediate Appellate Courts Final: Assessing Jurisdictional Changes in Florida's Appellate Courts*, 67 JUDICATURE 474, 485 (1984).

104. In 1991, 671 cases were filed which sought discretionary review on the basis of conflict of decisions, under article V, § 3(b)(3) of the Florida Constitution. By comparison there were 24 cases filed which invoked the provision relating to a declaration of validity of a state statute; 47 cases said to construe a provision of the state or federal constitution; and 16 cases affecting a class of constitutional or state officers. Supreme Court 1991 Statistics, *supra* note 98. The statistics just given pertain only to filings under article V, § 3(b)(3). There were additional filings under article V, § 3(b)(4) (certified decisions of the district courts of appeal), which included another 31 cases in which the district courts of appeal had themselves certified direct conflict. Supreme Court 1991 Statistics, *supra* note 98.

tory interpretation, decisions affecting a common law right, and cases calling for reconsideration of existing precedent. Regardless of the significance of the legal issue, the supreme court may not grant discretionary review unless the case falls into one of the four categorical pigeonholes or unless the district court of appeal has granted permission, an alternative explained in the next section.

C. *The Alternative Path: Certification of Importance or Conflict*

There is an alternative pathway to supreme court review: certification by the district court of appeal. The Florida Constitution provides that the supreme court may review a district court of appeal decision if the district court certifies that the decision "passes upon a question . . . of great public importance," or certifies that its decision is in "direct conflict with a decision of another district court of appeal."[105] The certification of direct conflict or great public importance is normally accomplished by a brief statement in the district court of appeal opinion.[106] Once the certification has been entered, a litigant must file a notice to invoke supreme court jurisdiction.[107]

---

105. FLA. CONST. art. V, § 3(b)(4).

"Direct conflict" as used in this section differs from the phrase "expressly and directly conflicts" used in article V, § 3(b)(3). If the district court of appeal certifies that there is a "direct conflict" of decision, then that is a sufficient basis for supreme court jurisdiction, regardless of whether the opinion is perfunctory or spells out the conflict in detail. *See* PADOVANO, *supra* note 82, § 2.11.

By contrast, where there has been no district court of appeal certification and discretionary review is sought in the Florida Supreme Court, the opinion of the district court of appeal must give sufficient treatment to the matter to demonstrate on the face of the opinion, expressly and directly, that there is a decisional conflict. *See* FLA. CONST. art. V, § 3(b)(3).

106. Where the district court of appeal desires to certify direct conflict, the court must use the "magic words" of the constitution. Interview with Sid White, Clerk, Florida Supreme Court. A statement in the opinion that the district court of appeal "disagrees with," "acknowledges," or "recognizes" conflict with another district court of appeal is not treated as a certification of conflict. If the decision is not certified, then the litigant proceeds by petition for discretionary review on the ground of conflict of decisions. *Id.*

107. FLA. R. APP. P. 9.120(b). If the litigants decide not to take the case to the supreme court, the district court of appeal decision becomes final.

In 1991 district courts of appeal certified 282 cases on the basis of great public importance or conflict. *See* Table of Certifications, 16 FLA. L. WEEKLY, Cumulative Index, Jan. 4-Mar. 29, 1991, at 71-72; *id.* Apr. 5-June 21, 1991, at 75; *id.* June 28-Sept. 27, 1991, at 71; *id.* Oct. 4-Dec. 20, 1991, at 62. Although the time frames do not match exactly, in 1991 the Florida Supreme Court received certifications in only 220 cases. Supreme Court 1991 Statistics, *supra* note 98. Thus, litigants in approximately 22% of the cases certified to the Florida Supreme Court did not seek review in the supreme court.

Florida's certification process has been described as "relatively successful."[108] The certification procedure is used with regularity.[109] It enlists the aid of the district courts of appeal in identifying issues of decisional conflict or importance which should be considered by the supreme court.[110] Supreme court procedure is simplified where a case has been certified because jurisdictional briefs are not required;[111] instead, only briefs on the merits are submitted.[112] The supreme court has the discretion to decline to review a decision certified by a district court of appeal,[113] but in practice it rarely does so.[114]

D. *The Systems Compared*

The two pathways for discretionary review—permission of supreme court and permission of district court of appeal—each employ different criteria. Both systems provide for supreme court review when there is a conflict of decisions. However, the systems differ sharply where a question of importance is presented.

The district court of appeal may certify any question, without limitation, as being of great public importance. Such a certification confers jurisdiction on the supreme court to entertain a petition for review.[115] Absent district court of appeal certification, the supreme court cannot consider a petition for review on the basis of the importance of the question presented.[116] In short, the Florida Supreme Court's authority to grant discretionary review is narrower than the certification authority of the district courts of appeal. Although the purpose of the supreme court is to decide the legal questions of greatest importance to the state, the court does not have the independent authority to grant a petition for review on the ground that the question is important.[117]

---

108. Overton, *supra* note 64, at 227.

109. In 1991 review was sought in 189 cases certified as being of great public importance, and in 31 cases where there was certified direct conflict. Supreme Court 1991 Statistics, *supra* note 98.

110. Overton, *supra* note 64, at 226-27.

111. FLA. R. APP. P. 9.120(d).

112. *Id.*

113. FLA. CONST. art. V, § 3(b)(4).

114. *See* Supreme Court 1991 Statistics, *supra* note 98; Supreme Court of Florida, Annual Statistics for the Calendar Year of 1990 (unpublished report on file with the *Florida Law Review*) [hereinafter Supreme Court 1990 Statistics].

115. *See* FLA. CONST. art. V, § 3(b)(4).

116. *See id.* § 3(b)(3), (4).

117. *See id.*

IV. CRITERIA FOR DISCRETIONARY REVIEW: DEFINED BY CONSTITUTIONAL PROVISION, STATUTE, OR RULE?

A. *Overview*

The form and nature of discretionary review criteria vary from jurisdiction to jurisdiction. One common pattern is exemplified by the federal system. The United States Supreme Court's jurisdiction is prescribed by statute which, insofar as pertinent here, allows the Supreme Court to review by certiorari any decision of a federal court of appeals, as well as certain final judgments of state courts.[118] The jurisdictional statutes do not announce any criteria which should be employed by the Supreme Court in the exercise of its discretionary review powers. Instead, the Court has adopted Supreme Court Rule 10, entitled *Considerations Governing Review on Writ of Certiorari.*[119] Rule 10 embodies the Supreme Court's criteria for discretionary review, and the criteria are entirely separate from the statute establishing the Supreme Court's jurisdiction.

A similar example is found in California. There, the state constitution provides that "[t]he Supreme Court may review the decision of a court of appeal in any cause."[120] The constitutional grant of jurisdiction to the California Supreme Court does not itself contain criteria suggesting or prescribing how discretionary review should be exercised.[121] Instead, California Appellate Rule 29 sets forth the guidelines which will be applied by the court when considering a petition for discretionary review.[122]

As indicated earlier, Florida takes a different approach. The Florida Constitution specifies the classifications of district court of appeal decisions which can be reviewed by the supreme court.[123] The criteria for discretionary review are jurisdictional in nature.

By far the most common approach is for discretionary review criteria to be promulgated by rule, as is true in federal practice.[124] Some states have prescribed discretionary review criteria by statute,[125] while a few,

---

118. 28 U.S.C. §§ 1254, 1257 (1988).

119. SUP. CT. R. 10; *see infra* app. B.

120. CAL. CONST. art. 6, § 12(b).

121. *See id.*

122. CAL. APP. R. 29; *see infra* app. C.

123. FLA. CONST. art. V, § 3(b)(3), (4).

124. Discretionary review criteria are promulgated by rule in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Michigan, New Jersey, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas (criminal), Utah, Washington, and Wisconsin. *See infra* app. C.

125. Discretionary review criteria are prescribed by statute in Hawaii, Kansas, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Texas, and Virginia (limited criteria only). *See infra* app. C.

including Florida, have placed discretionary review criteria in the constitution.[126] In some of the states which rely on constitution or statute, rules have been promulgated to implement or amplify the subject of discretionary review.[127] Finally, a few states have not adopted explicit, codified criteria for discretionary supreme court review.[128] The next section considers the *ABA Model Judicial Article*, which recommends that the supreme court establish the jurisdiction of the appellate courts by rule.[129]

B. *ABA* Model Judicial Article

The ABA *Model Judicial Article*[130] was promulgated to implement the ABA *Standards of Judicial Administration* (the *Judicial Administration Standards*).[131] It proposes a recommended judicial article for state constitutions.

The *Model Judicial Article* visualizes the judicial branch as a single system to be led and managed by the supreme court. To that end, the supreme court is given the power to establish its own jurisdiction, and that of the court of appeals, by rule of procedure.[132] This is accomplished by vesting all appellate jurisdiction initially in the supreme court; the supreme court then by rule allocates appellate jurisdiction between itself and the court of appeals.[133]

Consistent with the *Court Organization Standards*, the intent is that most appeals go first to the court of appeals, "with subsequent review

126. Provisions concerning discretionary review are contained in the constitutions of Florida, Georgia, Missouri, New York, and Ohio. *See infra* app. C.

127. Rules amplify constitutional or statutory provisions regarding discretionary review in Georgia, Minnesota, Missouri, New York, and Ohio. *See infra* app. C. Appendix C omits rules which merely reiterate the contents of a constitutional or statutory set of discretionary review criteria. *See infra* app. C.

128. Louisiana, Nebraska, and Oklahoma have no explicit discretionary review criteria. Virginia has no generally applicable criteria, but does have criteria applicable to limited classes of cases. *See infra* app. C.

129. *See infra* notes 132-33 and accompanying text.

130. MODEL JUDICIAL ARTICLE §§ 1-9 (1978), *reprinted in Report No. 1 of the Judicial Administration Division*, ANN. REP. OF THE ABA, 1978, at 926, 926-32. Citations will be to the *Model Judicial Article* as it appears in the ABA report. The *Model Judicial Article* was also reprinted in Douglas C. Dodge & Victoria S. Cashman, *Introduction to the ABA Model Judicial Article*, 3 STATE CT. J. 8 (1979).

131. Dodge & Cashman, *supra* note 130, at 8. An earlier version was adopted in 1962. *Id.*

132. MODEL JUDICIAL ARTICLE, *supra* note 130, § 2, at 927.

133. "The Supreme Court has initial appellate jurisdiction of all judgments and reviewable orders except to the extent such jurisdiction is vested by rules of procedure in another court." *Id.* § 2(1), at 927. This authorizes the supreme court to "allocate appellate jurisdiction between the Supreme Court and other courts." *Id.* § 2 cmt. at 927.

available before the Supreme Court on a discretionary basis."[134] Since all of the appellate jurisdiction is prescribed by rule, any explicit criteria for discretionary review would necessarily be set forth by rule.

The emphasis in the *Model Judicial Article* is on flexibility. The strong rulemaking power—including the power to allocate appellate jurisdiction by rule—allows rapid adjustments to meet the demands of judicial administration.[135] Under the *Model Judicial Article*, the rulemaking power is intended to be exercised in an appropriate process of consultation with the bar, the public, and the legislative branch of government.[136]

The idea of allocating appellate jurisdiction by rule has made some headway in the states.[137] This approach is used in Florida in a limited way: the district court of appeal jurisdiction to hear interlocutory appeals is prescribed by rule.[138]

---

134. *Id.* § 2 cmt. at 927.

135. The commentary to the current *Model Judicial Article* does not explicitly discuss the reason for prescribing appellate jurisdiction by rule. However, allocation of jurisdiction by rule was also a feature of the 1962 version of the *Model Judicial Article*. MODEL JUDICIAL ARTICLE § 2 (1962), *reprinted in Report of the Section of Judicial Administration*, ANN. REP. OF THE ABA, 1962, at 391, 393-94. In the Comment to the 1962 article, the drafters favored rule, rather than statute, because "(1) . . . such power . . . would enhance the independence of the judiciary; (2) . . . it would place the power to meet current problems in the hands of those most likely to be expert in the subject; [and] (3) . . . the rule-making power was more flexible than the legislative power in its capacity to meet the demands of judicial administration." *Id.* § 2 cmt. at 394.

136. MODEL JUDICIAL ARTICLE, *supra* note 130, § 8, at 931. Such consultation can take many forms. For example, in the federal system the Rules Enabling Act creates a public process for rule development. 28 U.S.C. §§ 2071-2074 (1988). It also provides for submission of proposed rules to Congress for a six-month waiting period. *Id.* § 2074. The system is one of "judicial rulemaking pursuant to a legislative delegation and subject to a congressional veto." 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001, at 6 (2d ed. 1987); *see also id.* § 1061, at 220 (citing the exercise of such power by Congress).

In Florida, the state supreme court has the power to promulgate procedural rules in a formal public process which is itself regulated by rule. *See* FLA. CONST. art. V, § 2(a); FLA. R. JUD. ADMIN. 2.130. Although the legislature does not have the power to promulgate a rule, it may repeal a rule "by general law enacted by two-thirds vote of the membership of each house of the legislature." FLA. CONST. art. V, § 2(a). In comparison, the *Model Judicial Article* provides no specific legislative check on the supreme court's rulemaking power. *See* MODEL JUDICIAL ARTICLE, *supra* note 130, § 8.

137. In a few states the constitution authorizes the supreme court to establish its own appellate jurisdiction in whole or in part by rule. ILL. CONST. art. 6, § 4 (partly by rule); IND. CONST. art. 7, § 4 (partly by rule); KY. CONST. §§ 110(2)(b), 116 (partly by rule); MICH. CONST. art. 6, § 4 (entirely by rule); *see also* MO. CONST. art. 5, § 10 (constitutional discretionary review criteria can be amplified by rule).

In some states the supreme court can establish the jurisdiction of the intermediate appellate court by rule. *See* ARK. CONST. amend. 58, § 1; IND. CONST. art. 7, § 6; KY. CONST. § 111 (statute and rule); OKLA. CONST. art. 7, § 5 (statute and rule); WASH. CONST. art. 4, § 30(2) (statute or rules authorized by statute).

138. FLA. CONST. art. V, § 4(b)(1); *see* FLA. R. APP. P. 9.130.

C. *The Recommendation of the Florida Supreme Court's Article V Review Commission*

The Florida Supreme Court's jurisdiction is almost entirely defined by the Florida Constitution.[139] While Florida is not alone in that approach, few states place such extensive jurisdictional detail in the constitution itself.[140] States more commonly rely on statute to provide some or all of the state supreme court's jurisdiction.[141]

In 1984, the Florida Supreme Court's Article V Review Commission recommended that the Florida Constitution be changed to allow modification of the supreme court's jurisdiction by special rulemaking procedures.[142] The Commission's approach would create a new method of amending the supreme court's jurisdictional article. Modification under the proposed new method would occur "when the proposed modification is initiated by the concurrence of not less than five justices [out of the Florida Supreme Court's membership of seven] and approved within one year by a joint resolution of a majority of the membership of each house of the legislature."[143] The Commission's proposal would leave intact the existing method of changing the jurisdictional article by constitutional amendment.[144] As a result, there would be two ways to change the supreme court's jurisdiction: special rulemaking and constitutional amendment.[145]

The Commission proposed the change because it saw a need for additional flexibility.[146] In the Commission's view, "changes in the jurisdiction of the supreme court may become necessary from time to time in order to

---

139. *See* FLA. CONST. art. V, § 2(a). A small portion of the court's jurisdiction is prescribed by statute. *See id.* § 3(b)(2) (providing that the legislature may legislate the supreme court's jurisdiction in bond-validation proceedings and review of certain utility regulation matters); *id.* § 3(b)(10) (stating that the supreme court shall, when requested by the attorney general, render an advisory opinion about the validity of initiative petitions proposing amendments to the Florida Constitution "addressing issues as provided by general law").

140. *See, e.g.*, N.Y. CONST. art. 6, § 3.

141. *See, e.g.*, PA. CONST. art. 5, § 2(c).

142. THE SUPREME COURT'S ARTICLE V REVIEW COMMISSION, FINAL REPORT 14 (1984) [hereinafter ARTICLE V REPORT].

143. *Id.* at 16.

144. *Id.*

145. The Commission proposed adding the following language to article V, § 3(b) of the Florida Constitution:

> The jurisdiction of the supreme court . . . may be changed by the action of both the supreme court and the legislature. Any proposed change must be initiated by the concurrence of not less than five justices of the supreme court and must be approved within one year by a joint resolution of a majority of the membership of each house of the legislature before it will become effective.

Id. at 15.

146. *Id.* at 16.

adjust caseloads and meet new problems."[147] The Commission advanced its proposal to "allow a degree of experimentation because a change in jurisdiction could be made with the knowledge that if it did not meet expectations, it could be altered more quickly than through the traditional method of submitting a constitutional amendment to the voters."[148]

The Commission's proposal is essentially an enhanced version of the supreme court's present rulemaking authority. The supreme court presently is authorized to adopt rules without the concurrence of the legislature, but a rule can be repealed by legislation enacted by a supermajority vote.[149] Under the Commission's proposal, the supreme court could initiate a jurisdictional change, subject to legislative concurrence. The legislative vote would serve as an alternative to the statewide referendum needed for a constitutional amendment. Under existing rulemaking procedures, there would be opportunity for input and comment prior to the finalization of a supreme court recommendation for a jurisdictional change.[150] This would be followed by a public deliberative process in the legislature.

D. *Conclusion*

Regulation of discretionary review in the Florida Constitution is cumbersome, unnecessary, and discourages innovation. Under the present system, the supreme court must have a high degree of certainty that a jurisdictional reform will work before being willing to amend the constitution to undertake it. Given the slow and arduous process of constitutional change, it is very difficult to fine tune the jurisdictional article by constitutional amendment. Both the Commission's recommendation and the *Model Judicial Article* would give greater flexibility in modifying the Florida Supreme Court's jurisdictional article than now exists. Either approach would facilitate change in the system of discretionary review. Either recommendation would accomplish a needed reform.

Should these recommendations not find favor, another alternative would be to address specifically the problem of discretionary review. That could be done by amending the constitution to allow the supreme court to review any decision of a district court of appeal.[151] Guidelines for discre-

147. *Id.*

148. *Id.*

149. FLA. CONST. art. V, § 2(a).

150. *See* FLA. R. JUD. ADMIN. 2.130.

151. *See, e.g.*, CAL. CONST. art. VI, § 12 ("The Supreme Court may review the decision of a court of appeal in any cause."); *cf.* 28 U.S.C. § 1254(1) (1988) ("Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .").

tionary review would be promulgated by rule.[152] While the latter alternative is possible, the Commission's approach, or that of the *Model Judicial Article*, would give the supreme court greater flexibility.

V. Criteria for Discretionary Supreme Court Review of Intermediate Appellate Court Decisions

A. *ABA* Standards of Judicial Administration

The ABA *Standards of Judicial Administration* (*Judicial Administration Standards*) provide that a state's highest court "should have authority to review all justiciable controversies and proceedings, regardless of subject matter or amount involved."[153] The *Judicial Administration Standards* specifically oppose placing subject matter limitations on the ability of the supreme court to review a case, and also oppose limiting supreme court jurisdiction on the basis of the amount in controversy.[154] There are essentially two reasons for the ABA position.

First, exclusions based on subject matter or amount in controversy do not successfully separate the important from the unimportant cases.[155] According to the ABA:

> [The matter excluded] may present questions that should be resolved as a matter of public interest or because of their importance in the administration of justice. Such questions can be of importance even though they arise in cases that are otherwise of minor consequence because the law governing such cases often affects the interests of hundreds or thousands of citizens.[156]

The appellate courts must be organized with their essential functions in mind;[157] a rule of categorical exclusion is inconsistent with the proposition that a state's highest court has the ability to select cases on the basis of importance.

Second, the imposition of categorical limitations on supreme court review does not necessarily achieve an efficient appellate system.[158] Where

---

152. As a transitional matter, the existing constitutional categories for discretionary review would become rules until changed. The constitutional sections directly affected would be Fla. Const. art. V, § 3(b)(3) and (4). Closely related is the bypass provision in Fla. Const. art. V, § 3(b)(5).

153. Standards Relating to Court Org. § 1.13(a) (1990); Standards Relating to Appellate Courts § 3.00 (1977).

154. Standards Relating to Appellate Courts § 3.00 commentary at 4 (1977).

155. *Id.*

156. *Id.*

157. Standards Relating to Court Org. § 1.13 commentary at 39 (1990).

158. Standards Relating to Appellate Courts § 3.00 commentary at 5 (1977).

states have imposed restrictions on the supreme court's ability to review intermediate appellate court decisions, the justification has been "to eliminate the expense and delay involved in such further review."[159] The ABA Commentary observes:

> Absolute prohibition of further review is unnecessary to achieve this aim, however. When the volume of appellate litigation is sufficient to justify an intermediate appellate court, the volume of cases in that court is generally very large in comparison to the capacity of the supreme court, which has the time to review only a small proportion of the cases decided by the intermediate appellate court. This practical limitation forecloses multiple appellate review except in a relatively small number of cases.[160]

In accordance with the *Judicial Administration Standards*, the *Model Judicial Article* imposes no categorical limitations on the ability of the supreme court to review decisions of the intermediate appellate courts.[161] Under the *Model Judicial Article*, criteria for discretionary review would be promulgated by the supreme court by rule.[162]

B. *The States and the Federal System*

The United States Supreme Court's Rule 10 begins by stating, "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."[163] The Rule then indicates that the Court's specific criteria of importance, "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered . . . ."[164]

The Supreme Court's formulation, which has existed in approximately the same form since 1925,[165] has been very influential in the states. Many states expressly provide, as the United States Supreme Court does, that the enumerated criteria are illustrative and do not control or fully measure the state supreme court's discretion.[166] Other states

---

159. *Id.*

160. *Id.*

161. MODEL JUDICIAL ARTICLE, *supra* note 130, § 2, at 927.

162. *See id.*; *supra* part IV.B.

163. SUP. CT. R. 10.1; *see infra* app. B.

164. SUP. CT. R. 10.1; *see infra* app. B.

165. 13 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 810.01 (2d ed. 1991) (reviewing SUP. CT. R. 10 (1990); SUP. CT. R. 17 (1980); SUP. CT. R. 19 (1970); SUP. CT. R. 38(5) (1939); SUP. CT. R. 35(5) (1925)).

166. KAN. STAT. ANN. § 20-3018 (1988); ALASKA R. APP. P. 304; COLO. APP. R. 49; CONN. R.

impart the same point in different language.[167] In some jurisdictions, the criteria for review do not expressly state that they are guidelines, but the criteria include at least one broad, nonlimiting standard which is essentially open-ended.[168] A few of the two-tier states confer a power of discretionary review on the supreme court but have adopted no explicit criteria for discretionary review.[169] Apart from Florida, in the small number of states in which criteria for discretionary review are found in the constitution, the constitutional criteria confer broad discretionary authority on the supreme court.[170] Some states do, however, make certain categories of

---

APP. P. 4127; IDAHO APP. R. 118; ILL. S. CT. R. 315; MINN. R. CIV. APP. P. 117 cmt.; N.D. S. CT. ADMIN. R. 27, § 13(c); OR. R. APP. P. 9.05(4); PA. R. APP. P. 1114 note; S.C. APP. CT. R. 226(b); TENN. R. APP. P. 11(a); TEX. R. APP. P. 200(c) (criminal cases); UTAH R. APP. P. 46; WIS. R. APP. P. 809.62(1).

167. ARIZ. R. CIV. APP. P. 23(c)(4) ("reasons why the petition should be granted . . . may include, *among others* . . . [listing criteria]) (emphasis added); ARIZ. R. CRIM. P. 31.19.c.4 (same); N.Y. CT. APP. R. 500.11(d)(1)(v) ("argument showing why the questions presented merit review by this court, *such as* . . . [listing criteria]") (emphasis added); OHIO S. CT. PRAC. R. II, § 4(A)(2) (motion for leave to appeal to supreme court shall address specified criteria *or* state "why leave to appeal should be granted") (emphasis added).

168. *E.g.*, MO. CONST. art. V, § 10 ("general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law"); N.Y. CONST. art. 6, § 3(a)(5), (6) ("in [the supreme court's] opinion, a question of law is involved which ought to be reviewed"); HAW. REV. STAT. ANN. § 602-59(b) (Michie 1988) ("grave errors of law or of fact"); MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1988) ("desirable and in the public interest"); MASS. GEN. LAWS ANN. ch. 211A, § 11 (West 1992) ("substantial reasons affecting the public interest or the interests of justice"); N.M. STAT. ANN. § 34-5-14B(4) (Michie 1990) ("issue of substantial public interest"); N.C. GEN STAT. § 7A-31(b)(1) (1992) ("significant public interest"); TEX. GOV'T CODE ANN. § 22.001(a)(6) (West 1993) ("error of law . . . of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction"); ARK. R. S. CT. & CT. APP. 1-2(d), (f) ("issue of significant public interest or a legal principle of major importance"); CAL. APP. R. 29(a)(1) ("settlement of important questions of law"); GA. S. CT. R. 29 ("cases of great concern, gravity, and importance to the public"); ILL. S. CT. R. 315(a) ("general importance of the question presented"); IOWA R. APP. P. 402(c) ("Court of Appeals . . . has erred . . . or . . . has decided a case which should have been retained by the Supreme Court."); KY. R. CIV. P. 76.20(1) ("A motion for discretionary review . . . is a matter of judicial discretion and will be granted only where there are special reasons for it."); MICH. CT. R. 7.302(B)(5) ("clearly erroneous and will cause material injustice"); N.J. R. APP. PRAC. 2:12-4 ("if the interest of justice requires"); *see also* ALA. R. APP. P. 39(c)(3)-(5), (k) (criteria include question of first impression, request for change in existing supreme court precedent, and conflict of decisions; scope of review includes application of law to stated facts).

169. *See supra* note 128.

170. Missouri, New York, Ohio, and Georgia are examples. In Missouri, supreme court review may be had "because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule." MO. CONST. art. V, § 10. A Missouri Supreme Court rule allows for review when "the opinion filed [by the Court of Appeals] is contrary to a previous decision of an appellate court of this state." MO. S. CT. R. 83.03.

In New York the court of last resort may grant discretionary review in a civil case "upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it . . . ." N.Y. CONST. art. VI, § 3(b)(5), (6). Under one of New York's constitutional provisions, the appeal "shall

cases, typically involving smaller matters, unreviewable by the supreme court.[171]

In sum, the experience in most jurisdictions has been that explicit review criteria are best employed as general guidelines for the exercise of discretionary review. A majority of states, as well as the federal system, explicitly state that their review criteria do not limit the power of the supreme court to grant discretionary review. Even where that is not so, the states' discretionary review criteria ordinarily have at least one standard of considerable breadth which would allow the court wide latitude to accept cases on the basis of importance or the imperatives of the administration of justice. Florida's system runs counter to prevailing practice, in that the supreme court's constitutional categories are not guidelines, but are jurisdictional limitations. There is no open-ended, importance-based standard.[172]

Although most states use criteria as general guidelines, the substance

---

be allowed when required in the interest of substantial justice." *Id.* § 3(b)(6). The constitutional provisions have been amplified by rule. N.Y. CT. APP. R. § 500.11(d)(1)(v) ("[Q]uestions [which] merit review by this court [include those which] are novel or of public importance, or involve a conflict with prior decisions of this court, or . . . a conflict among the Appellate Divisions."). Discretionary review in criminal cases is statutory. Stuart M. Cohen, *Criminal Leave Applications to the Court of Appeals*, N.Y. ST. B.J., Jan. 1990, at 28, 28-29. There are no explicit review criteria for criminal cases. *Id.* at 29.

In Ohio, the supreme court may review a court of appeals decision "[i]n cases of public or great general interest . . . ." OHIO CONST. art. IV, § 2(B)(2)(d). The constitutional provisions have been amplified by rule, which require the petitioner to address specified criteria or to state "why leave to appeal should be granted." OHIO S. CT. PRAC. R. II, § 4(A)(2).

In Georgia, "[t]he Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance." GA. CONST. art. VI, § 6, ¶ 5.

171. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 12-202 (1989 & Supp. 1992) (stating that the decision of the intermediate appellate court is final where it has granted or denied leave to appeal in: post-conviction proceedings; certain matters pertaining to the right or amount of bail; inmate grievance commission proceedings; judgments entered following a plea of guilty; and orders revoking probation).

Another variation is a limited preclusion of review based on subject matter, jurisdictional amount, or court of origin, but permitting supreme court review if specified criteria are met. *See* ARIZ. CONST. art. VI, § 5(3) (stating that the supreme court does not have jurisdiction of "civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impost, assessment, toll, statute, or municipal ordinance"); WASH. CONST. art. IV, § 4 (stating that the supreme court does not have jurisdiction of civil actions for $200 or less, "unless the action involves the legality of a tax, impost, assessment, [toll], municipal fine, or the validity of a statute"); VA. CODE ANN. § 17-116.07 (Michie 1988) (stating that certain traffic, misdemeanor, administrative, matrimonial, criminal, and inmate cases are unreviewable in the supreme court, unless the case "involves a substantial constitutional question as a determinative issue or matters of significant precedential value"); *see also* TEX. GOV'T CODE ANN. § 22.225 (West 1992) (providing that certain unreviewable civil cases have right of appeal if specified criteria are met).

172. A "great public importance" criterion is available to the district courts of appeal, FLA. CONST. art. V, § 3(b)(4), but is not available to the Florida Supreme Court. *Id.* § 3(b)(3).

of the criteria varies. The criteria found in the United States Supreme Court's *Considerations Governing Review on Writ of Certiorari* have been adopted intact in some states and have served as a foundation in others.[173] The Supreme Court's guidelines provide for discretionary review in three different instances. First, review should be granted when the court below "has decided an important question of federal law which has not been, but should be, settled by this Court . . . ."[174] Second, review is appropriate where there is a conflict of decisions between the appellate tribunals below, or a conflict between the decision below and an applicable decision of the Supreme Court.[175] Third, review should be granted if the appellate court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."[176] Though the meaning may be broader, this last category includes review to prevent a miscarriage of justice.[177]

The *Judicial Administration Standards* have also recommended criteria for discretionary review.[178] These are "that the matter involves a question that is novel or difficult, is the subject of conflicting authorities applicable within the jurisdiction, or is of importance in the general public interest or in the administration of justice."[179] While both sets of criteria are used in the states, the federal standards are used with greater frequency.[180] Accordingly, the basic federal criteria—importance, conflict of decisions, and supervisory function—are discussed first, followed by criteria not falling into any of these categories.

1. Important Question of Law Which Should Be Settled by the Supreme Court

A number of states have adopted more or less intact the following United States Supreme Court standard: review may be granted when an important question of law is presented which has not been, but should be, settled by the Supreme Court.[181] In some states the phraseology resembles

---

173. For the text of Supreme Court Rule 10, see *infra* app. B.

174. SUP. CT. R. 10.1(c).

175. *Id.* R. 10.1(a)-(c). For purposes of federal questions, the applicable conflicts are those between United States Courts of Appeals, state courts of last resort, or both, or between any of them and the United States Supreme Court. *Id.*

176. *Id.* R. 10.1(a). The power of supervision is asserted with respect to the United States Courts of Appeals, but not the state courts. *Id.*

177. *See* STERN ET AL., *supra* note 41, at 222.

178. STANDARDS RELATING TO APPELLATE COURTS § 3.10(c) (1977).

179. *Id.*

180. *See infra* app. C.

181. SUP. CT. R. 10.1(c).

that of the United States Supreme Court,[182] while in other states the standard refers to a case of first impression,[183] a novel question,[184] or an undecided point of law.[185] Another formulation adopted by some states is, simply, that the legal question is an important one.[186] Still other states' guidelines call for review when the matter is of great public importance or affects the public interest.[187]

---

182. N.Y. CONST. art. 6, § 3(b)(5), (6) ("a question of law is involved which ought to be reviewed by the court of appeals"); MINN. STAT. ANN. § 480A.10(1) (West 1990) ("whether the question presented is an important one upon which the court has not, but should rule"); ALASKA R. APP. P. 304(c) ("significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the supreme court of the state of Alaska"); COLO. APP. R. 49(a)(1) ("question of substance not heretofore determined by this court"); CONN. R. S. CT. § 4127(1) ("question of law not theretofore determined by the Supreme Court"); IDAHO APP. R. 118(b)(1) (similar); IND. R. APP. P. 11(B)(2)(b) ("decision of the Court of Appeals erroneously decides a new question of law"); N.J. R. APP. PRAC. 2:12-4 ("question of general public importance which has not been but should be settled by the Supreme Court"); N.D. S CT. ADMIN. R. 27, § 13(c)(1) ("question of substance not previously determined by the Supreme Court"); PA. APP. P. R. 1114 note ("[w]here the appellate court below has decided a question of substance not theretofore determined by the Supreme Court"); TEX. R. APP. P. 200(c)(2) (criminal cases) ("important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals"); UTAH R. APP. P. tit. VII, 46(d) ("Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court").

183. ALA. R. APP. P. 39(c)(3) ("a material question requiring decision is one of first impression in Alabama").

184. N.Y. CT. APP. R. 500.11(d)(1)(v); S.C. APP. CT. R. 226(b)(1); *see* STANDARDS RELATING TO APPELLATE COURTS § 3.10(c) (1977).

185. ARIZ. R. CRIM. P. 31.19(c)(4) ("no Arizona decision controls the point of law in question"); ARIZ. R. CIV. APP. P. 23(c)(4) ("a decision of the [state] Supreme Court should be overruled or qualified"); OR. R. APP. P. 9.05(3)(e) ("the issues presented have importance beyond the particular case and require decision by the Supreme Court").

186. MO. CONST. art. 5, § 10 ("importance of question involved"); KAN. STAT. ANN. § 20-3018(b)(1) (1992) ("general importance of the question presented"); N.C. GEN. STAT. § 7A-31(c)(2) (1992) ("[l]egal principles of major significance"); VA. CODE ANN. § 17-116.07(B) (Michie 1992) ("matter of significant precedential value"); ARK. R. S. CT. & CT. APP. 1-2(d), (f) ("legal principle of major importance"); CAL. APP. R. 29(a) (review "appears necessary to secure . . . the settlement of important questions of law"); ILL. S. CT. R. 315(a) ("general importance of the question presented"); MICH. CT. R. 7.302(B)(3) ("issue involves legal principles of major significance to the state's jurisprudence"); TENN. R. APP. P. 11(a)(2) ("the need to secure settlement of important questions of law").

187. *See* GA. CONST. art. 6, § 6, ¶ 5 ("gravity or great public importance"); MASS. ANN. LAWS ch. 211A, § 11 (Law. Co-op 1986) ("substantial reasons affecting the public interest or the interests of justice"); N.M. STAT. ANN. § 34-5-14(B)(4) (Michie 1990) (decision "involves an issue of substantial public interest that should be determined by the supreme court"); N.C. GEN. STAT. § 7A-31(c) (1989) ("[t]he subject matter of the appeal has significant public interest"); ARK. R. S. CT. & CT. APP. 1-2(d), (f) ("issue of significant public interest"); CONN. R. S. CT. § 4127(4) ("question of great public importance"); GA. S. CT. R. 29 ("cases of great concern, gravity, and importance to the public"); N.Y. CT. APP. R. § 500.11(d)(1)(v) ("public importance"); OHIO S. CT. PRAC. R. II, § 4(A)(2) ("case . . . of public . . . interest"); PA. R. APP. P. 111 note ("issue of immediate public

In another variation, discretionary review is available "for the purpose of reexamining the existing law. . . ."[188] In two states, review is available if a decision of the highest court will help develop, clarify, or harmonize the law, when "the case calls for the application of a new principle or policy," there is possible statewide impact, or the question is likely to be a recurrent one unless resolved by the supreme court.[189] One state extends this criterion to include the establishment or change of a policy within the supreme court's own authority.[190]

Several states have singled out for separate treatment the situation presented when the court of appeals follows existing supreme court precedent, but the supreme court precedent should be changed.[191] Recognizing this category of cases explicitly may be desirable to provide flexibility or to plug gaps left by other criteria.[192]

Some states' criteria have identified particular subject matter as presumptively warranting consideration for discretionary review. Included in this category are questions of interpretation of the state or federal constitution[193] and questions as to the validity of a statute.[194] Some states' crite-

---

importance"); TENN. R. APP. P. 11(a)(3) ("the need to secure settlement of questions of public interest"); WASH. R. APP. P. 13.4(4) ("issue of substantial public interest that should be determined by the Supreme Court"); *see also* STANDARDS RELATING TO APPELLATE COURTS § 3.10(c) (1977).

188. MO. CONST. art. V, § 10.

189. MINN. R. CRIM. P. 29.04, subd. 4(5); MINN. R. CIV. APP. P. 117, subd. 2(d) (same); *see* WIS. R. APP. P. 809.62(1)(c) (similar).

190. WIS. R. APP. P. 809.62(1)(b).

191. ALA. R. APP. P. 39(c)(5) ("[w]here petitioner seeks to have controlling Supreme Court cases overruled which were followed in the decision of the court of appeals"); ARIZ. R. CRIM. P. 31.19.c.4 ("a decision of the Supreme Court should be overruled or qualified"); ARIZ. R. CIV. APP. P. 23(c)(4) ("a decision of the Supreme Court should be overruled or qualified"); IND. R. APP. P. 11(B)(2)(d) ("Court of Appeals correctly followed ruling precedent of the Supreme Court, but . . . such ruling precedent is erroneous or is in need of clarification or modification"); WIS. R. APP. P. 809.62(1)(e) ("court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination").

192. Where the court of appeals follows existing supreme court precedent, there is no conflict of decisions. Similarly, if the supreme court has previously ruled on the point, the case is not included in the federal formulation: "important question of . . . law *which has not been, but should be*, settled by this Court. . . ." SUP. CT. R. 10.1(c) (emphasis added). So long as the discretionary review criteria are nonbinding guidelines, there is sufficient flexibility to accommodate a request to revisit existing precedent. Such flexibility is missing in Florida. *See supra* part III.

193. FLA. CONST. art. V, § 3(b)(3) ("construes a provision of the state or federal constitution"); N.M. STAT. ANN. § 34-5-14(B)(3) (Michie 1990) ("significant question of law under the constitution of New Mexico or the United States"); VA. CODE ANN. § 17-116.07(B) (Michie 1988) ("substantial constitutional question as a determinative issue"); ALA. R. APP. P. 39(c)(1) ("initially construing a controlling provision of the Alabama or Federal Constitution"); ALASKA R. APP. P. 304(b) ("a significant question concerning the interpretation of the constitution of the United States or the supreme court of the state of Alaska"); OHIO S. CT. PRAC. R. II, § 4(A) ("substantial consti-

ria give weight to the fact that the litigation involves the state, affects a class of constitutional or state officers,[195] or involves the legality of governmental action.[196]

More elusive is the question whether a lower tribunal's error is itself a factor to be weighed in granting review. Under traditional doctrine, the function of the supreme court is not primarily to correct error. The asserted erroneousness of the decision below is not expressly mentioned in the United States Supreme Court's *Considerations Governing Review on Writ of Certiorari*,[197] nor in the criteria adopted in most states.[198] It is instead thought to be a matter considered sub silentio in the review of petitions for certiorari.[199] A few states' criteria provide that error is a factor that will be considered, at least where the issue is an important one.[200] Others assert that error, without more, is not enough.[201]

---

tutional question"); WASH. R. APP. P. 13.4(3) ("significant question of law under the Constitution of the State of Washington or of the United States"); WIS. R APP. P. 809.62(1)(a) ("[a] real and significant question of federal or state constitutional law").

194. FLA. CONST. art. V, § 3(b)(3) ("decision of a district court of appeal that expressly declares valid a state statute"); MINN. STAT. ANN. § 480A.10 (West 1992) ("held a statute to be unconstitutional"); ALA. R. APP. P. 39(c)(1) ("decisions initially holding valid or invalid a city ordinance, a state statute, or a federal statute or treaty"); MICH. CT. R. 7.302(B)(1) ("substantial question as to the validity of a legislative act"); MINN. R. CRIM. P. 29.04(4) ("ruled on the constitutionality of a statute"); MINN. R CIV. APP. P. 117(2)(b) (same); OR. R. APP. P. 9.05(4)(b) ("constitutionality of a statute"); TEX. R. APP. P. 200(c)(4) (criminal cases) ("court of appeals has declared unconstitutional . . . a statute, rule, regulation, or ordinance").

In some jurisdictions a trial court's decision invalidating a statute may be appealed directly to the supreme court as a matter of right, rather than discretion. *See, e.g.*, COLO. REV. STAT. ANN. § 13-4-102(1)(b) (West 1989 & Supp. 1992); ILL. S. CT. R. 302(a)(1); *cf.* FLA. CONST. art. V, § 3(b)(1) (right of appeal from district court of appeal decision invalidating a state statute or a provision of the state constitution).

195. FLA. CONST. art. V, § 3(b)(3) ("affects a class of constitutional or state officers"); ALA R. APP. P. 39(c)(2) ("decisions that affect a class of constitutional, state, or county officers"); MICH. CT. R. 7.302(B)(2) ("issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity").

One study suggests that courts are more likely to grant review where the state is a party. Victor E. Flango, *Court Control of Access: Which Appeals Are Heard?*, 8 STATE CT. J., Fall 1984, at 26, 27.

196. OR. R. APP P. 9.05(4)(b) ("the legality of an important governmental action which will have irreversible consequences").

197. *See* SUP. CT R. 10.1.

198. *See infra* app. C.

199. *See* STERN ET AL., *supra* note 41, § 4.17, at 222 n.65 (" 'Nonetheless, the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court.'") (quoting William H. Rehnquist, *Oral Advocacy: A Disappearing Act*, 35 MERCER L. REV. 1015, 1027 (1984)); *see also* Flango, *supra* note 195, at 27 ("All justices in the sample were more likely to reverse than affirm petitions they voted to grant.").

200. HAW. REV. STAT. § 602-59(b)(1) (1985) ("grave errors of law or of fact"); TEX. GOV'T

In sum, the first major criterion, whether the case presents an important question of law which should be settled by the supreme court, is embraced by the great majority of states in one form or another. It reflects one major aspect of the law-development function of a court of last resort. Many states have found it desirable to be more specific with respect to the issues which warrant review and the considerations of importance which will be applied.

Unlike most states, Florida has no general criterion of importance which can be invoked at the supreme court level.[202] Unless there is also a conflict of decisions, a constitutional issue, or a matter affecting a class of constitutional or state officers, jurisdiction may not be invoked on petition to the supreme court.[203] The Florida system allows importance-based discretionary review only when a district court of appeal grants permission through its certification of a question of great public importance.[204]

2. Conflict of Decisions

Securing uniformity of decision is one of the most commonly employed criteria for granting supreme court review.[205] This reflects the expectation that decisional law, like statutory law, should be consistently applied to all persons within the court's jurisdiction.[206] The federal system

---

CODE ANN. § 22.001(a)(6) (Vernon 1988) (civil cases) ("error of law . . . of such importance to the jurisprudence of the state that . . . it requires correction"); ARIZ. R. CRIM. P. 31.19(c)(4) ("important issues of law have been incorrectly decided"); ARIZ. R. CIV. APP. P. 23(c)(4) (same); IND. R. APP. P. 11(B)(2)(b) ("decision of Court of Appeals erroneously decides a new question of law"); IOWA R. APP. P. 402(c) ("Court of Appeals . . . [h]as erred"); MICH. CT. R. 7.302(B)(5) ("decision is clearly erroneous and will cause material injustice").

201. OR. R. APP. P. 9.05(4) (stating that "[a]n assertion of the grounds on which the decision . . . is claimed to be wrong, without more, does not" show that the issues have importance beyond this case and therefore does not require decision by the Supreme Court); *see also* FLA. R. APP. P. 9.120 committee notes (suggesting that in a jurisdictional brief "[i]t is not appropriate to argue the merits of the substantive issues"); PADOVANO, *supra* note 82, § 12.13, at 204 ("the question whether reversible error exists under the particular circumstances of the case is secondary at this point").

202. *See* FLA. CONST. art. V, § 3(b)(3).

203. *See id.*

204. *Id.* § 3(b)(4).

205. *See infra* notes 207, 210-15.

206. *See* J. Timothy Eaton et al., *Resolving Conflicts in the Illinois Appellate Court*, 78 ILL. B.J. 182 (1990). As applied to decisional conflicts among intermediate appellate courts, conflict of decisions could be seen as merely a special case within a larger category, that of important questions of law which should be settled by the supreme court. A conflict of decisions among lower tribunals is possible only when the court of last resort has not decided the legal question at issue. The same is not true where the intermediate appellate court has come into decisional conflict with the supreme court itself. There the conflict criterion consists of an exercise of supervision, or law clarification, by the supreme court. In any event, settlement of decisional conflict is a criterion employed with great frequency in the states. *See infra* notes 210-16 and accompanying text. This reflects the value attached

and the states have differing approaches to resolve intermediate decisional conflicts.

The approach taken by the United States Supreme Court is to identify the courts whose conflicting decisions the Supreme Court will resolve: federal courts of appeals and (ordinarily) state courts of last resort.[207] Excluded are conflicting decisions of lower tribunals.[208] Also excluded are conflicts within a single court of appeals as a matter warranting supreme court review, as internal consistency is the responsibility of the court of appeals itself.[209]

The states have arrived at a variety of definitions of reviewable decisional conflict. The simplest is that review will be granted "where it appears necessary to secure uniformity of decision. . . ."[210] More commonly, state criteria identify the courts whose conflicts will be considered. Under one common formulation, the state supreme court will review a court of appeals decision in conflict with the decision of another court of appeals or the state supreme court.[211] Other states include the above, but

---

to decisional consistency and establishes the category as one which carries priority.

207. SUP. CT. R. 10.1(a)-(c). Rule 10.1(c) refers to "state court" rather than, as in Rule 10.1(b), "state court of last resort." *Id.* R. 10.1(b)-(c). Under the Supreme Court's jurisdictional statute, certiorari may be granted to review final judgments of "the highest court of a State in which a decision could be had . . . ." 28 U.S.C. § 1257(a) (1992). This is usually, but not always, the state supreme court. *See* STERN ET AL., *supra* note 41, § 3.14-.17, at 139-43.

The Supreme Court seeks to assure a uniform body of federal law by reviewing decisional conflicts between United States courts of appeals, state courts of last resort, and/or the United States Supreme Court on matters of federal law. Because of its broader responsibilities for oversight of the federal judiciary, the Supreme Court will also entertain conflicts of decision between the United States courts of appeals on matters other than federal law. SUP. CT. R. 10.1(a).

208. *See* SUP. CT. R. 10.1(a)-(c).

209. STERN ET AL., *supra* note 41, § 4.6, at 204-05. "As Justice Harlan once wrote, 'decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.'" *Id.* at 205 (footnote omitted). The commentators suggest, however, that an intra-circuit conflict of decisions may be taken into account if other reasons for granting review are present. *Id.* If an exceptional case were to arise, the Supreme Court's criteria are nonexclusive and broad enough to allow review either on the basis of importance or under the Court's supervisory power. *See* SUP. CT. R. 10.1(a), (c).

210. CAL. APP. R. 29(a)(1); TENN. R. APP. P. 11(a)(1) ("the need to secure uniformity of decision").

211. FLA. CONST. art. V, § 3(b)(3) ("supreme court . . . [m]ay review any decision of a district court of appeal . . . 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"); KAN. STAT. ANN. § 20-3018(b)(2) (1988) ("conflict between the decision sought to be reviewed and a prior decision of the supreme court, or of another panel of the court of appeals"); MINN. STAT. ANN. § 480A.10, subd. 1 (West 1990) (enumerating only "direct conflict with an applicable precedent of the supreme court"); N.M. STAT. ANN. § 34-5-14(B)(1) (Michie 1990) ("conflict with a decision of the supreme court"); *id.* § 34-5-14(B)(2) ("conflict with a decision of the court of appeals"); COLO. APP. R. 49(a)(2) ("[w]here the Court of Appeals . . . has decided a question of substance in a way probably not in

also include conflicts with the decisions of the United States Supreme Court[212] or conflicts with other federal decisions.[213] In one jurisdiction the

---

accord with applicable decisions of the Supreme Court"); *id.* 49(a)(3) ("[w]here a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of said court"); CONN. R. APP. P. § 4127(1) (same); *id.* § 4127(2) ("[w]here the decision under review is in conflict with other decisions of the appellate court"); ILL. S. CT. R. 315(a) ("the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court"); IND. R. APP. P. 11(B)(2)(a) ("decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court"); *id.* R. 11(B)(2)(c) ("conflict between the . . . decision and a prior opinion of the Court of Appeals"); IOWA R. APP. P. 402(c)(2) ("decision . . . is in conflict with a prior holding of a published Court of Appeals decision or published Supreme Court decision"); MICH. CT. R. 7.302(B)(5) ("decision conflicts with a Supreme Court decision or another decision of the Court of Appeals"); MO. S. CT. R. 83.03 ("opinion . . . contrary to a previous decision of an appellate court of this state"); N.Y. CT. APP. R. 500.11(d)(1)(v) ("conflict with prior decisions of this court [court of appeal—New York's court of last resort], or there is a conflict among the Appellate Divisions"); OR. R. APP. P. 9.05(4)(e) ("departure by the Court of Appeals from a prior decision of the Supreme Court or of the Court of Appeals"); UTAH R. APP. P. 46(a) ("panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law"); *id.* R. 46(b) ("panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court"); WASH. R. APP. P. 13.4(b)(1) ("decision of the Court of Appeals is in conflict with a decision of the Supreme Court"); *id.* R. 13.4(b)(2) ("decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals"); *see* MINN. R. CRIM. P. 29.04, subd. 4(3) ("the Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court"). *But cf.* MINN. R. CIV. APP. P. 117, subd. 2 (not enumerating conflict).

212. ALA. R. APP. P. 39(c)(4) ("decisions in conflict with prior decisions of the United States Supreme Court, the Alabama Supreme Court, or the Alabama courts of appeals"); ALASKA R. APP. P. 304(a) ("decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the supreme court of the state of Alaska, or with another decision of the court of appeals"); IDAHO APP. R. 118(b)(2) ("Court of Appeals has decided a question of substance probably not in accord with applicable decisions of the Idaho Supreme Court or of the United States Supreme Court"); *id.* R. 118(b)(3) ("Court of Appeals has rendered a decision in conflict with a previous decision of the Court of Appeals"); N.J. R. APP. PRAC. 2:12-4 ("decision under review is in conflict with any other decision of the same or a higher court"); N.D. S. CT. ADMIN. R. 27, § 13(c)(2) ("Court of Appeals has decided a question of substance probably not in accord with applicable decisions of the North Dakota Supreme Court or of the United States Supreme Court"); *id.* § 13(c)(3) ("Court of Appeals has rendered a decision in conflict with a published decision of the Court of Appeals"); PA. R. APP. P. 1114 note ("(1) Where the appellate court below has decided a question of substance not theretofore determined by the Supreme Court, or has decided it in a way probably not in accord with applicable decisions of the Supreme Court of Pennsylvania or the Supreme Court of the United States. (2) Where an appellate court has rendered a decision in conflict with the decision of the other appellate court below on the same question . . . ."); TEX. R. APP. P. 200(c)(1) (criminal cases) ("court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter"); *id.* R. 200(c)(3) ("[w]here a court of appeals has decided an important question of state or federal law in conflict with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States"); WIS. R. APP. P. 809.62(1)(d) ("[t]he court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions").

213. HAW. REV. STAT. ANN. § 602-59(b)(2) (1985) ("obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision,

criteria for discretionary review mention only conflicts at the court of appeals level, apparently on the assumption that the court of appeals decisions will not conflict with those of the state supreme court.[214] Another variation is to enumerate conflict between the court of appeals and the state supreme court as a basis for discretionary review, but not conflict within the court of appeals; the premise evidently is that the court of appeals is responsible for maintaining its own internal decisional consistency.[215] Finally, some states do not enumerate conflict as a criterion for discretionary review, but have other criteria broad enough to include decisional conflict.[216]

As suggested by some of the preceding examples, state practice is not

---

and the magnitude of such errors or inconsistencies dictating the need for further appeal").

214. ARIZ. R. CIV. APP. P. 23(c)(4) ("conflicting decisions have been rendered by the Court of Appeals"); ARIZ. R. CRIM. P. 31.19(c)(4) (same). However, Arizona's list of criteria is nonexclusive, so that the state supreme court has the ability to take jurisdiction should such a supreme court-court of appeals conflict arise. *Id.*

215. N.C. GEN. STAT. § 7A-31(c)(3) (1989) ("decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court"). North Carolina's other criteria for review, "significant public interest" and "legal principles of major significance to the jurisprudence of the State," *id.* § 7A-31(c)(1)-(2), are broad enough to allow supreme court review of an intra-court of appeals conflict.

In Minnesota the statutory ground for conflict review is "whether the court of appeals has decided a question in direct conflict with an applicable precedent of the supreme court . . . ." MINN. STAT. ANN. § 480A.10, subd. 1 (West 1990). The Minnesota Rules of Civil Appellate Procedure contain no additional ground for conflict review. The rules of criminal procedure, by contrast, include the criterion that "the Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court." MINN. R. CRIM. P. 29.04, subd. 4(3). However, the omission of court of appeals conflict as a ground for review would not preclude consideration of that factor in a civil case, because the supreme court's statutory and civil appellate rules' criteria are nonexclusive. MINN. STAT. ANN. § 480A.10, subd. 1 (West 1990); MINN. R. CIV. APP. P. 117 subd. 2. The Minnesota Supreme Court's just-cited statutory provision and civil appellate rule also include the exercise of the supreme court's supervisory powers as a ground for review.

216. *E.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1989) ("desirable and in the public interest"); MASS. GEN. LAWS ANN. ch. 211A, § 11 (West 1986) ("substantial reasons affecting the public interest or the interests of justice"); ARK. R. S. CT. & CT. APP. 1-2(d), (f) ("issue of significant public interest or a legal principle of major importance"); GA. R. S. CT. 29 ("cases of great concern, gravity, and importance to the public").

In Ohio, "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." OHIO CONST. art. 4, § 3(B)(4). The supreme court is required to review any case so certified. *Id.* § 2(B)(2)(e). Should there be conflict which has not been certified, the supreme court has broad power to review courts of appeals' cases "of public or great general interest . . . ." *Id.* § 2(B)(2)(d).

Virginia's criteria are of very limited application, but where applicable, include any "substantial constitutional question as a determinative issue or matters of significant precedential value . . . ." VA. CODE ANN. § 17-116.07(B) (Michie 1988).

uniform on the question of whether to include, as a ground for discretionary review, a conflict between panels within a single court of appeals. In the federal system, such conflicts are left to each court of appeals to sort out through its own en banc procedure, and will not serve as a basis for United States Supreme Court review.[217] So long as it is feasible to adopt an en banc procedure, this system is preferred because it is efficient. Like the federal system, internal conflict within an intermediate appellate court does not warrant supreme court review in Florida.[218]

Some jurisdictions have not adopted en banc procedures for the court of appeals,[219] and in one state en banc proceedings by the intermediate appellate court are affirmatively prohibited.[220] In such states it is left to the supreme court to resolve conflicts between panels of a court of appeals. Somewhat surprisingly, in a number of states that have an en banc procedure, the criteria for discretionary supreme court review nonetheless include that of conflict within the intermediate appellate court.[221] The explanation for this appears to be that it is the court of appeals' responsibil-

---

217. *See* sources cited *supra* note 209.

218. FLA. CONST. art. V, § 3(b)(3); FLA. R. APP. P. 9.331; *see* England et al., *supra* note 86, at 188. This was a change from the prior 1972 constitutional provision, which provided that the supreme court "[m]ay review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of *any* district court of appeal or of the supreme court on the same question of law . . . ." FLA. CONST. art. V, § 3(b)(3) (1972) (emphasis added).

219. *See* Overton, *supra* note 64, at 213.

220. UTAH CODE ANN. § 78-2a-2(2) (1991) ("The Court of Appeals may not sit en banc.").

221. CONN. R. S. CT. 4127 ("decision under review is in conflict with other decisions of the appellate court"). Connecticut has a single appellate court with an en banc procedure. CONN. APP. CT. R. 2013.

IOWA R. APP. P. 402(c)(2) (supreme court may grant review where Court of Appeals "has rendered a decision which is in conflict with a prior holding of a published Court of Appeals decision"). The court of appeals has an en banc procedure. IOWA CODE ANN. § 602.5102(4) (West 1992).

MICH. CT. R. 7.302(B)(5) (grounds for review include a Court of Appeals' "decision [which] conflicts with . . . another decision of the Court of Appeals"). Michigan has an interim en banc rule. Mich. Admin. Order 1990-6; *see id.* 1993-4 (extending the effect of Mich. Admin. Order 1990-6 through December 31, 1993).

MINN. R. CRIM. P. 29.04, subd. 4(3) ("the Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court"). Minnesota has an en banc procedure. STATE COURT STATISTICS, *supra* note 1, at 195.

OR. R. APP. P. 9.05(4)(e) ("departure by the Court of Appeals from a prior decision of . . . the Court of Appeals"). Oregon has an en banc procedure. OR. REV. STAT. § 2.570 (1991).

In several states the court of appeals has only three members and invariably sits en banc, thus in theory insuring decisional consistency. Even so, the criteria for discretionary review cite conflicts within the intermediate appellate court as a criterion for supreme court review in the following states: HAW. REV. STAT. § 602-59(b)(2) (1985); ALASKA R. APP. P. 304(a); IDAHO APP. R. 118(b)(3); N.D. S. CT. ADMIN. R. § 13(c)(3). A similar situation exists in Alabama. ALA. R. APP. P. 39(c)(4). The Alabama Court of Civil Appeals has 3 members, and the Court of Criminal Appeals has 5 members; both sit en banc. STATE COURT STATISTICS, *supra* note 1, at 172.

ity to be decisionally consistent; but if the court of appeals fails to do so, then that fact alone will merit review.

While this approach is understandable, it is also undesirable. Where the discretionary review criteria indicate that the supreme court will review intra-court of appeals conflict, they invite petitions to the state supreme court predicated on that ground. The proper forum, however, is the court of appeals.[222] In the unlikely event that the court of appeals allows an intolerable internal conflict to exist, it can in most states be reviewed by the supreme court on other grounds.[223] Therefore, the federal model is preferable.

3. Supervisory Powers

The United States Supreme Court's third consideration in its *Considerations Governing Review on Writ of Certiorari* is that the "court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."[224] This standard is followed in many states; some use language substantially identical to that of the United States Supreme Court,[225] and others use a modified or abbreviated form.[226] In federal practice this standard includes intervention to prevent a gross miscarriage of justice.[227] In some jurisdictions such

---

222. Where the intermediate appellate court has the responsibility of maintaining internal decisional consistency, that responsibility generally will be carried out. For practical reasons the court of appeals will find it unacceptable to allow conflicting lines of authority on a substantial matter to exist within the court for an extended period of time.

223. The supreme court will have the ability to review an intra-court of appeals conflict if the state has a nonexclusive list of discretionary review criteria, a general supervisory standard, or a general standard of importance.

224. SUP. CT. R. 10.1(a).

225. COLO. APP. R. 49(a)(4); CONN. R. S. CT. 4127(3); IDAHO APP. R. 118(b)(4); N.D. S. CT. ADMIN. R. 27, § 13(c)(4); PA. R. APP. P. 1114 note; TEX. R. APP. P. 200(c)(6); UTAH R. APP. P. 46(c).

226. KAN. STAT. ANN. § 20-3018(b)(3) (1988) ("the need for exercising the supreme court's supervisory authority"); MINN. STAT. ANN. § 480A.10, subd. 1 (West 1990) ("whether the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the court's supervisory powers"); ALASKA R. APP. P. 304(d) ("[u]nder the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the present case, and appears reasonably necessary to further the administration of justice"); ILL. S. CT. R. 315(a) ("the need for the exercise of the Supreme Court's supervisory authority"); MINN. R. CIV. APP. P. 117(2)(c) (same as MINN. STAT. ANN. § 480A.10, subd. 1); MINN. R. CRIM. P. 29.04, subd. 4(4) (same); N.J. R. APP. PRAC. 2:12-4 ("decision under review . . . calls for an exercise of the Supreme Court's supervision"); TENN. R. APP. P. 11(a)(4) ("the need for the exercise of the Supreme Court's supervisory authority").

227. STERN ET AL., *supra* note 41, § 4.17, at 222-23.

considerations come under the heading of "interests of justice"[228] or under criteria recognizing an error correction function.[229] For jurisdictions having nonexclusive lists of discretionary review criteria, the supervisory function need not be spelled out, although many jurisdictions have found it important to do so.[230] Florida's discretionary review criteria do not include a supervisory function.[231]

4. Dissent

Some states' discretionary review criteria include factors relating to the proceedings in the intermediate appellate court. While the existence of a divided vote in the court of appeals is said to be a factor considered sub silentio by the United States Supreme Court,[232] in some states the existence of a divided panel or a panel unable to agree on a common rationale is expressly mentioned in the state's discretionary review criteria.[233] In a few other jurisdictions the existence of a dissent in the intermediate court triggers an unqualified right to appeal to the supreme court.[234]

---

228. N.Y. CONST. art. 6, § 3(b)(6) ("Question of law is involved which ought to be reviewed by the court of appeals. . . . Such an appeal shall be allowed when required in the interest of substantial justice."); MASS. GEN. LAWS ANN. ch. 211A, § 11 (West 1986) (authorizing review in "the interests of justice"); MICH. CT. R. 7.302(B)(5) ("decision is clearly erroneous and will cause material injustice"); N.J. R. APP. PRAC. 2:12-4 ("interest of justice requires").

229. *See supra* note 200.

230. *See supra* notes 225-26.

231. *See* FLA. CONST. art. V, § 3(b).

232. STERN ET AL., *supra* note 41, § 4.6, at 205-06 (suggesting weight may be given to a closely divided court of appeals en banc vote, or to intracircuit conflict which "relates to a recurring and important issue or is accompanied by a 'widespread conflict among the circuits'") (citations omitted).

233. ARK. R. S. CT. & CT. APP. 1-2(f) ("case . . . was decided in the Court of Appeals by a tie vote"); CONN. R. APP. P. 4127(5) ("where the judges of the appellate panel are divided in their decision or, though concurring in the result, are unable to agree upon a common ground of decision"); N.D. S. CT. ADMIN. R. 27, § 13(c)(6) ("whether there is a dissenting opinion in the Court of Appeals"); S.C. APP. CT. R. 226(b)(2) ("[w]here there is a dissent in the decision of the Court of Appeals"); TEX. R. APP. P. 200(c)(5) (criminal cases) ("justices of the court of appeals have disagreed upon a material question of law necessary to its decision"); *cf.* GA. CONST. art. VI, § 5, ¶ 5 (where court of appeals equally divided, "the case shall be immediately transmitted to the Supreme Court"); *see infra* note 246.

234. MO. CONST. art. V, § 10 ("Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals."); N.J. CONST. art. V, § 5, ¶ 1(b) ("[a]ppeals may be taken to the Supreme Court . . . where there is a dissent in the Appellate Division of the Superior Court"); N.C. GEN. STAT. § 7A-30(2) (1989) ("Except as provided in G.S. 7A-28 [making certain decisions of court of appeals unreviewable in supreme court], an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dis-

5. Certification by Intermediate Appellate Court

In several jurisdictions, including Florida, discretionary review is available where there is a certification by the intermediate appellate court. These include certification that there is a substantial question of law which should be reviewed by the supreme court,[235] that the intermediate appellate court has passed on a question of great public importance, that the intermediate appellate court's decision is in direct conflict with a decision of another intermediate appellate court,[236] or that the public interest or interests of justice make further review desirable.[237] Another variation is to require a certification of importance by at least one judge,[238] or by a dissenting judge.[239] In these jurisdictions the intermediate appellate court certification is a ground for discretionary, not mandatory, review. This approach is in accord with the *Judicial Administration Standards*.[240]

There are also jurisdictions in which the intermediate appellate court's certification creates an appeal as a matter of right.[241] Such mecha-

---

sent."); TEX. GOV'T CODE ANN. § 22.001 (civil cases) ("justices of a court of appeals disagree on a question of law material to the decision"); N.Y. CIV. PRAC. LAW & R. 5601(a) ("dissent by at least two justices on a question of law in favor of the party taking such appeal").

235. CONN. R. APP. P. § 4135. (Two or more judges of the panel must concur in certification, and the opinion must make "a finding that there is a substantial question of law which should be reviewed by the supreme court.").

236. FLA. CONST art. V, § 3(b)(4) ("supreme court . . . 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").

237. IDAHO APP. R. 118(b)(5) ("A majority of the judges of the Court of Appeals, after decision, certifies that the public interest or the interests of justice make desirable a further appellate review."); N.D. S. CT. ADMIN. R. 27, § 13(c)(5) (similar).

238. ILL S CT. R. 315(a) ("no petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Industrial Commission orders shall be filed, unless at least one judge of that panel files a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court").

239. MO. CONST. art. 5, § 10 ("Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals.").

240. *See* STANDARDS RELATING TO APPELLATE COURTS § 3.10(c), at 14 (1977) ("Rules of procedure may provide that a party may seek certification by the lower appellate court that the matter warrants further review but such a certification should not require the higher court to grant review nor should its denial preclude review.").

241. *E.g.*, ILL. CONST. art. VI, § 4(c) ("Appeals from the Appellate Court to the Supreme Court are a matter of right . . . if a division of the Appellate Court certifies that a case decided by it involves a question of such importance that the case should be decided by the Supreme Court."); N.Y. CONST. art. VI, § 3(b)(6) (appeal "where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal,

nisms are disfavored, since they involve a loss of control by the supreme court over its own docket.[242]

6. Other Criteria

Several other items appear in some of the states' discretionary review criteria. In one jurisdiction the failure of the court of appeals to write an opinion on each material point is itself grounds for discretionary review, as is an inaccurate opinion.[243] In another state the absence of jurisdiction in the court of appeals or a lack of concurrence of the required majority of qualified judges constitutes grounds for review.[244] Some states expressly

---

to the court of appeals, or (b) directly to the court of appeals"); *see also infra* note 242; *cf.* 28 U.S.C. § 1254(2) (1988) ("Cases in the courts of appeals may be reviewed by the Supreme Court by . . . certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."); 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 4038, at 102 (1988) ("In form and history, this certified question jurisdiction [of 28 U.S.C. § 1254(2)] is mandatory. In fact, the Supreme Court has surrounded it with so many barriers that in recent years only three cases have been decided on certified questions.") (citations omitted).

242. *See* STANDARDS RELATING TO APPELLATE COURTS § 3.10(c) (1977), *quoted in supra* note 240.

As to the Illinois procedure, "[t]he supreme court, perhaps concerned that the appellate court would require it to hear too many cases it did not regard as important, has let it be known that it disapproves of this procedure, with the result that the appellate court seldom certifies anything." Eaton et al., *supra* note 206, at 186 (footnote omitted).

As to the New York procedure, "[w]hile the motion in the Appellate Division is permissible, there appears to be a tendency among Appellate Division justices to deny such motions as a matter of course, so as to let the Court of Appeals prescribe its own calendar." Thomas F. Gleason & Salvatore D. Ferlazzo, *The Court of Appeals Moves Towards "Certiorari" Status*, N.Y. ST. B.J., May 1986, at 8, 11. Under New York practice, leave to appeal a final order may be obtained either in the Appellate Division or in the Court of Appeals; where finality as defined in New York practice is not present, leave must be obtained from the Appellate Division. *Id.* at 10-11.

243. IND. R. APP. P. 11(B)(2)(e) ("decision of the Court of Appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties"); *id.* R. 11(B)(2)(f) ("the . . . decision of the Court of Appeals erroneously and materially misstates the record").

244. CAL. APP. R. 29(a)(2) ("Court of Appeal was without jurisdiction of the cause"); *id.* R. 29(a)(3) ("where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges"); OR. R. APP. P. 9.05(4)(d) (issue regarding "jurisdiction of the Court of Appeals over the case").

Two jurisdictions consider whether the case should originally have come to, or remained in, the supreme court instead of going to the court of appeals. ARK. R. S. CT. & CT. APP. 1-2(f) ("the case . . . should have come to the Supreme Court originally under Section (a) of this Rule [direct appeal to Supreme Court] . . . or should have been certified to the Supreme Court under Section (d)(2) of this Rule [issue of significant public interest or a legal principle of major importance]"); IOWA R. APP. P. 402(c) ("Court of Appeals . . . has decided a case which should have been retained by the Supreme Court").

consider the interlocutory or final character of the decision sought to be reviewed as a factor to be weighed in deciding whether to grant review.[245] On occasion a state will use its discretionary review criteria to describe what will not be reviewed.[246]

C. *The Florida System*

With the foregoing in mind, the Florida system may be analyzed. The Florida system differs from other jurisdictions' systems in its use of discretionary review criteria as a constitutional limitation on the ability of the Florida Supreme Court to grant discretionary review.[247] To begin the analysis, it is necessary to describe how and why Florida's system was created.

1. The Original Misunderstanding

Florida's two-tier appellate system grew out of a 1954 study by the Florida Judicial Council.[248] At that time there were relatively few two-tier systems in existence.[249] By 1957 only thirteen states had them, including Florida.[250] In its initial deliberations on the subject, the Council concluded that it would be necessary "to study a plan to restrict jurisdiction of the Supreme Court in order that there might not be any possibility of merely offering two appeals, one to the district court of appeal and one

245. *E.g.*, KAN. STAT. ANN. § 20-3018(b)(4) (1988) ("the final or interlocutory character of the judgment, order or ruling sought to be reviewed"); N.C. GEN. STAT. § 7A-31(c) (1989) ("Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm."); ILL. S. CT. R. 315(a) ("the final or interlocutory character of the judgment sought to be reviewed"). *See generally* England et al., *supra* note 86, at 191 (stating that in Florida, review of trial court interlocutory orders proceeds in the first instance to the district court of appeal even if on final judgment a direct appeal would lie in the Florida Supreme Court).

246. CAL. APP. R. 29(b) (providing that the supreme court ordinarily will not consider an issue which was not raised in the court of appeal, or matters omitted or misstated in the court of appeal's opinion, unless it was called to the attention of the court of appeal by petition for rehearing); GA. R. S. CT. 30 (supreme court ordinarily will not review: (1) sufficiency of the evidence; (2) court of appeals' affirmance of denial of certain motions; or (3) workers' compensation cases; unless three judges dissented in the court of appeals or the cases conflict on a question of law).

247. *See* FLA. CONST. art. V, § 3(b); *supra* part III.

248. *See* JUDICIAL COUNCIL REPORT, *supra* note 96, at 10.

249. IMPROVING CASE PROCESSING, *supra* note 31, at v.

250. *Id.* The ABA *Appellate Court Standards* did not come into existence until much later, STANDARDS RELATING TO APPELLATE COURTS vii (1977), and the literature pertaining to intermediate appellate courts was at that time comparatively sparse. *See* Arthur J. Simpson, Jr., *The Drive to Sculpture the Ideal Court System*, JUDGES J., Summer 1981, at 10, 14-15.

to the Supreme Court, and thereby making litigation even more costly and prolonged."[251]

The Council's concern—avoiding double appeals—was entirely understandable and laudable. Avoiding double appeals is an objective routinely sought in all two-tier appellate systems.[252] However, as stated earlier, the ABA has concluded that it is unnecessary to limit the jurisdiction of a state supreme court to avoid the problem of double appeals.[253] That is so because the supreme court "has the time to review only a small proportion of the cases decided by the intermediate appellate court. This practical limitation forecloses multiple appellate review except in a relatively small number of cases."[254]

There is empirical support for the ABA conclusion. Most litigants in cases decided by the intermediate appellate courts do not seek further appellate review.[255] Of the petitions for discretionary review which are filed, only a small percentage are granted. State supreme courts review an average of thirteen percent of the petitions filed.[256] Thus, the selection process itself eliminates double review in all but a very small number of cases.[257] This phenomenon is well understood in the federal system, where the odds of having the United States Supreme Court grant a petition for discretionary review are less than five percent.[258] As a practical matter, regardless of the system used, the decisions of the intermediate appellate courts are final in the great majority of cases. It has not been necessary to impose categorical restrictions to achieve that result, and most jurisdictions have not done so.

It appears that what is now conventional wisdom was not understood

---

251. JUDICIAL COUNCIL REPORT, *supra* note 96, at 14.

252. *See, e.g.*, STANDARDS RELATING TO APPELLATE COURTS § 3.10 & commentary (1977); OSTHUS, *supra* note 32, at 2-3; Brown, *supra* note 63, at 202.

253. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5 (1977); *see supra* text accompanying note 160.

254. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5 (1977).

255. In Florida in 1990, petitions for discretionary review were filed in 910 cases, including certified decisions, out of a total of 5150 dispositions by written opinion in the district courts of appeal, or 17.7%. *See* Supreme Court 1990 Statistics, *supra* note 114; *see also* 1992 Certification Package, District Courts of Appeal 16 (unpublished report, on file with the *Florida Law Review*) [hereinafter 1992 Certification Package].

Similar attrition is found in other states. *See* Overton, *supra* note 64, at 208 (stating that in 1984 petitions for discretionary review were filed in approximately 25% of the cases decided by California courts of appeal); *id.* apps. A-C, at 234-37 (the petitions to invoke discretionary jurisdiction in the 10 largest states [app. A] were a fraction of the intermediate appellate court filings [app. B]); *see* STATE COURT STATISTICS, *supra* note 1, at 52 (filings in intermediate appellate courts substantially exceeded petitions for discretionary review in state supreme courts).

256. *See supra* note 8 and accompanying text.

257. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5 (1977).

258. Rehnquist, *supra* note 9, at 10.

when the Council created the model for a two-tier appellate court system in Florida. The Council mistakenly thought that formal limitations on the Florida Supreme Court's discretionary jurisdiction would have to be employed in order to head off the anticipated problem of double appeals. For that reason, restrictive categories for discretionary review were written into the 1956 constitutional amendment creating the two-tier appellate system.[259] The principal basis for supreme court discretionary review was decisional conflict between district courts of appeal, or conflict with the supreme court itself, on a point of law.[260]

2. Expansion of Florida Supreme Court Jurisdiction by Judicial Interpretation

The Commentary to the ABA *Standards Relating to Appellate Courts* (the *Appellate Court Standards*) predicts that where an attempt is made to preclude supreme court review "categorically, by making an intermediate appellate court's decisions unreviewable in specified circumstances," the result will be "forced or hypertechnical reasoning in the application of the criteria that determine whether further review may be had."[261] That is exactly what happened in Florida. In the first few years of operation under the 1956 amendment, the Florida Supreme Court described its jurisdiction in a restrictive manner.[262] Soon, however, the court began to take a more expansive view.[263]

---

259. Under the 1956 constitutional amendment, the Florida Supreme Court was authorized to "review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . ." FLA. CONST. art. V, § 4(2) (1956); *see infra* app. E. A litigant could appeal from the district court of appeal to the Florida Supreme Court, as a matter of right, any decision "initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution." FLA. CONST. art. V, § 4(2) (1956).

260. *See supra* note 259.

261. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5 (1977).

262. *See, e.g.*, Karlin v. City of Miami Beach, 113 So. 2d 551, 552-53 (Fla. 1959); Lake v. Lake, 103 So. 2d 639, 640-43 (Fla. 1958); Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958).

Even at this early date, the court was careful to say that it had the latitude to take action in exceptional cases to review affirmances without opinion, but that it would not ordinarily do so. *Lake*, 103 So. 2d at 643.

263. *See, e.g.*, Huguley v. Hall, 157 So. 2d 417, 417-18 (Fla. 1963) (finding that a jurisdictional prerequisite may be satisfied where a basis for jurisdiction appears in a dissenting opinion, even though there was no written majority opinion); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth., 111 So. 2d 439, 441-42 (Fla. 1959) (holding that the supreme court had jurisdiction to review a district court of appeal decision which inherently passed on the validity of a statute, even though the district court of appeal did not expressly discuss the point).

In 1965 in *Foley v. Weaver Drugs, Inc.*,[264] the supreme court held that it could exercise its conflict jurisdiction to review a district court of appeal decision in which no opinion had been written.[265] The court announced that it would henceforth exercise its conflict jurisdiction where it could be determined from the "record proper" that the ruling in the pending case was in conflict with a precedent of another district court of appeal or the supreme court itself, even though in the pending case the district court of appeal had affirmed without opinion.[266] A vocal minority argued that an affirmance without opinion did not create a reviewable decisional conflict within the meaning of the constitution.[267]

The curious thing about *Foley* is the way that the decision came about. The district court of appeal had issued an affirmance without opinion.[268] Foley petitioned the Florida Supreme Court for certiorari, asserting that the decision was in conflict with a precedent of another district court of appeal.[269] The supreme court requested the district court of appeal to reconsider the matter and write an opinion.[270] It relinquished jurisdiction to the district court of appeal for that purpose.[271]

The district court of appeal wrote an opinion objecting to the request.[272] Understandably, it objected to a request to reconsider a matter which it had already decided.[273] The district court of appeal also objected to the request to prepare an opinion,[274] arguing that affirmances without opinion were necessary to control excessive workload and that preparation of an opinion should not be required where the court had previously made a decision not to do so.[275]

Most significantly, the district court of appeal urged that a written opinion was not necessary for the Florida Supreme Court to exercise its conflict certiorari.[276] It reasoned that the Florida constitution referred to "conflict of *decisions*, not conflict of *opinions* or *reasons* . . . ."[277] The court pointed out that its decision could be gleaned by reviewing the "rec-

264. 177 So. 2d 221 (Fla. 1965).
265. *Id.* at 222-26, 229-31 (majority opinion and Drew, C.J., concurring specially).
266. *Id.*
267. *Id.* at 231 (Thornal, J., dissenting).
268. Foley v. Weaver Drugs, Inc., 146 So. 2d 631 (3d DCA 1962), *cert. discharged*, 177 So. 2d 221 (Fla. 1965).
269. Foley v. Weaver Drugs, Inc., 168 So. 2d 749, 749 (Fla. 1964).
270. *Id.* at 750.
271. *Id.*
272. Foley v. Weaver Drugs, Inc., 172 So. 2d 907 (Fla. 3d DCA 1965).
273. *Id.* at 908.
274. *Id.*
275. *Id.* at 908 n.2.
276. *Id.* at 908 n.1.
277. *Id.*

ord proper" when no opinion had been prepared.[278] Since the absence of an opinion would not, in the district court of appeal's view, preclude review in the Florida Supreme Court, the district court of appeal should not be required to prepare an opinion.[279] The court acknowledged, however, a duty to respond to the supreme court's request.[280] The court did so, but in a form so abbreviated that the Florida Supreme Court later characterized this as a refusal to respond to the supreme court's request.[281]

When the matter returned to the supreme court, the court adopted the district court of appeal's constitutional analysis and authorized record proper review as the district court of appeal had suggested.[282] In view of the fact that the district court of appeal had advocated that approach, it is ironic that later commentary characterized *Foley* as infringing on the prerogatives of the district courts of appeal.[283]

Through *Foley* and other means, the supreme court by judicial decision took an increasingly expansive view of its own jurisdiction.[284] This was the supreme court's response to the overly narrow jurisdictional limitations.[285]

---

278. *Id.* at 909.

279. *See id.*

280. *Id.* at 910.

281. *Foley*, 177 So. 2d at 226. That characterization was probably occasioned by the fact that the district court of appeal merely quoted the supreme court's own words back to it. In its decision, the district court of appeal stated:

> In this instance the Supreme Court has discerned our decision from the record, and has stated it to be "that neither of the plaintiffs had a cause of action against the defendant retailer for breach of implied warranty of fitness and merchantability," [adding that we also held the plaintiffs were not entitled to damages on the theory of negligence, but noting the latter holding was not challenged on certiorari]. We adopt that statement by the Supreme Court as constituting our decision on the appeal.

172 So. 2d at 910 (bracketed text in original).

282. *Foley*, 177 So. 2d at 224-25. The supreme court affirmed the district court of appeal decision on the merits, but overruled a conflicting precedent of another district court of appeal. *Id.* at 229.

283. *E.g.*, William D. Rives, III, Note, *The Erosion of Final Jurisdiction in Florida's District Courts of Appeal*, 21 U FLA. L. REV. 375 (1969).

284. *See, e.g.*, England et al., *supra* note 86, at 165 (stating that "the jurisprudence had developed that the supreme court would consider the entire case once any appealable issue had arisen") (footnote omitted). Counsel could bring a case within the court's jurisdictional categories by "raising a constitutional issue by simple motion, perhaps as one ground of many, before a county or circuit court, with no intention to develop or argue the constitutional claim." *Id.* (footnote omitted).

285. *See* Ben F. Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA L. REV. 80, 88-89 (1983) (describing as "subterfuge" the practice of "finding conflict to address a truly important legal issue when no real conflict existed . . . ."); *see also Report of the Supreme Court Commission on the Florida Appellate Structure*, 53 FLA. B.J. 274, 286 (1979) [hereinafter *Report on Appellate Structure*] (adding an importance standard would mean that "no longer

3. 1980 Amendment

In 1980 Florida amended its constitution in an effort to reduce the Florida Supreme Court's excessive workload.[286] The amendment reduced the supreme court's mandatory appellate jurisdiction[287] and made most discretionary review depend on the existence of a written opinion.[288] The written opinion requirement is considered in part VI.

Of interest for present purposes are two features of the 1980 amendment. First, the 1980 amendment retained the 1956 approach of placing categorical limitations on the supreme court's jurisdiction in the constitution.[289] Second, the 1980 amendment modified the system for a district court of appeal to certify a decision to the Florida Supreme Court for discretionary review. Prior to 1980, the supreme court could grant discretionary review if the district court of appeal certified that its decision was one of "great public interest."[290] In 1980 the system was changed so that a district court of appeal could certify either that it had passed on a question of "great public importance" or that its decision was "in direct conflict with a decision of another district court of appeal."[291]

The 1980 amendment took an important step by making importance an explicit basis for discretionary review.[292] The 1980 certification system enlisted the district courts of appeal in identifying issues of importance, as well as decisional conflicts, which should be resolved by the supreme court.

However, the 1980 amendment did not go far enough. Although it gave a general importance-based standard to the district courts of appeal, it did not add that same standard to the supreme court's own independent

---

[would] the court be forced to stretch its other jurisdictional powers to fulfill its role as overseer of Florida jurisprudence").

286. FLA. CONST. art. V, § 3(b)(3); *see Report on Appellate Structure*, *supra* note 285, at 274-76.

287. England et al., *supra* note 86, at 161-76. *Compare* FLA. CONST. art. V, § 4(2) (1956) *with* FLA. CONST. art. V, § 3(b)(1)-(3) (1980).

288. *See* Jenkins v. State, 385 So. 2d 1356, 1357-59 (Fla. 1980) (stating that the imposition of the written opinion requirement ended record proper review and in that respect overruled *Foley v. Weaver Drugs, Inc.*).

289. FLA. CONST. art. V, § 3(b)(3) (1980). The categories were modified to some extent, but the changes are not significant for purposes of the present analysis.

290. FLA. CONST. art. V, § 4(2) (1956).

291. FLA. CONST. art. V, § 3(b)(4) (1980).

292. *See* Overton, *supra* note 285, at 86. "The Appellate Structure Commission suggested replacing the word 'interest' with 'importance' because most district court judges were under the impression that the phrase 'great public interest' required that the public actually know of and be interested in the legal issue to be certified. This construction was never judicially tested." *Id.* (footnote omitted).

criteria for discretionary review.[293] The end result is that a denial of certification by the district court of appeal will preclude supreme court review, unless one of the supreme court's short list of constitutional criteria are satisfied.[294] The *Appellate Court Standards* take the position that a denial of certification should not preclude supreme court review.[295] This is sound policy, for a state's highest court should have the ability to set its own docket.

The near universal practice, whether measured by professional standards or practice in two-tier jurisdictions, is to confer on the supreme court the ability to select cases on the basis of the importance of the question presented.[296] A system for certification of decisions by the district courts of appeal can play an important role in identifying cases for supreme court review. Measured by utilization, the system is popular and makes a substantial contribution in the selection of cases for supreme court consideration.[297] The question, however, is not whether a certification system should exist—clearly it should—but whether the district courts of appeal should provide the sole mechanism for identifying cases for supreme court review on the basis of great public importance. For several reasons, this article suggests that it should not.

It is self-evident that the standards of importance employed by a district court of appeal panel do not necessarily coincide with the standards of importance of the supreme court. Therefore, the ABA advocates leaving the final choice of case selection to the supreme court.[298] The supreme court evaluates cases in comparison with others which might be reviewed.[299] Just as the Florida Supreme Court is granted the discretion not to hear a case certified by the district court of appeal,[300] the supreme court might also find an uncertified case to be important.[301] The certification system is also peculiarly vulnerable to error when existing law appears to be well settled, but the supreme court is actively considering, or prepared to consider, changing the law.[302] In summary, it is unwise to place exclusive reliance on Florida's present system of certification.

---

293. *See* FLA CONST. art. V, § 3(b)(3)-(4).
294. *See id.* § 3(b)(1)-(3).
295. STANDARDS RELATING TO APPELLATE COURTS § 3.10(c) (1977).
296. *See supra* part V.B.
297. *See supra* part III.C.
298. STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary at 13 (1977).
299. *Id.* § 3.10 commentary at 14.
300. FLA. CONST. art. V, § 3(b)(4).
301. *See infra* part VI.F, G.
302. *See infra* part VI.G (discussing Moreland v. State, 582 So. 2d 618 (Fla. 1991)).

D. *Conclusion*

Florida's system of categorical constitutional limitations on supreme court jurisdiction is overly restrictive. It was installed with laudable objectives, but was based on a faulty premise. It was wrongly assumed that formal barriers would be necessary to avoid having the supreme court grant rights of successive appeal in every case, or in a large number of cases. That assumption was incorrect; the system should be revised.

A major part of a supreme court's mission is to resolve the legal issues of greatest importance. It is essential that the court have powers which are coextensive with its responsibilities. That includes the power to select a case—any case—for discretionary review on the basis of importance. The power to select cases for the docket is at least as important as the power to decide the cases chosen.[303] Thus, the Florida Supreme Court should have the discretionary power to review any decision of a district court of appeal. The special considerations relating to the requirement of a written opinion are considered in Part VI.

Florida should follow the majority of jurisdictions and create guidelines that expressly state that they are illustrative in nature and do not limit the supreme court's power of review. Many other states have adopted the United States Supreme Court's language, that the criteria, "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered . . . ."[304] This language is both concise and familiar to practitioners.

An explicit criterion based on importance should be added for the exercise of discretionary review. Any number of models can be drawn upon from the state and federal systems.[305] However, the supreme court's

---

303. Brennan, *supra* note 59, at 112, 114 ("The screening process . . . is . . . inextricably linked to the fulfillment of the Court's essential duties and is vital to the effective performance of the Court's unique mission . . . .").

A comment should be made about one dogma which has grown up as an adjunct to the 1956 system of jurisdictional categories. Some of the writings about the Florida system have taken the view that specific categorical limitations on supreme court jurisdiction are necessary in order to enhance the power and status of the district courts of appeal. *E.g.*, Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958). The suggestion is that the stature of the district courts of appeal will be greater if the constitution contains a provision expressly precluding review in some cases. *Id.*

As explained earlier, when a district court of appeal renders a decision in Florida, or an intermediate appellate court does so in another state or the federal system, that decision is final in the vast majority of cases. *See supra* notes 255-58 and accompanying text. The notion that limits are needed on Florida Supreme Court jurisdiction in order to enhance the role of the district courts of appeal should be quietly interred, along with the present system of categorical limitations on supreme court discretionary jurisdiction.

304. SUP. CT. R. 10.1.

305. *See Report on Appellate Structure*, *supra* note 285, at 283-86.

importance-based standard should dovetail with the standard used by the district courts of appeal.[306] Since the district court of appeal standard is "great public importance,"[307] a simple solution would be to add the same standard to the supreme court's criteria for review.[308] Another possibility would be a standard providing for review when the district court of appeal has decided an important question of law which should be settled by the supreme court.[309]

One objection to this proposal may be that there will be a great increase in petitions filed on the basis of importance. A means to address that concern is found in the system used in Florida's en banc rule.[310] When that rule was amended in 1984 to authorize litigants to request en banc review on the basis of "exceptional importance," the rule imposed a corollary requirement that a certificate of counsel be included with any motion for rehearing en banc.[311] The certificate of counsel states, in relevant part: "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance."[312]

Experience with the en banc rule has shown that the cautionary provisions have had the desired effect. Although counsel could characterize every case as being of "exceptional importance," the "exceptional importance" ground has actually been invoked far less frequently than its companion standard, which authorizes review when "necessary to maintain uniformity in the court's decisions."[313] Moreover, where a litigant asserts

---

306. *See, e.g.*, N.Y. CONST. art. 6, § 3(b)(6) (substantially identical standard used by supreme court and intermediate appellate court); MASS. GEN. LAWS ANN. ch. 211A, § 11 (West 1986) (same).

307. FLA. CONST. art. V, § 3(b)(4).

308. It has been suggested that the existing "great public importance" standard "be changed to emphasize that the district courts may certify any issue deemed by them to be important enough to merit supreme court review." Overton, *supra* note 285, at 94.

309. SUP. CT. R. 10.1(c). The suggested phraseology has been patterned on United States Supreme Court Rule 10.1(c). The federal formulation is that a state court or United States court of appeals "has decided an important question of federal law which has not been, but should be, settled by this Court . . . ." *Id.* As phrased, the standard identifies questions that are of first impression in the Supreme Court, but does not explicitly address, as the standards of some states do, the need for modification or overruling of existing precedent. However, so long as the standards are promulgated as nonexclusive guidelines, the court can in any event entertain a petition which proposes a change in existing precedent.

310. FLA. R. APP. P. 9.331.

311. *Id.* R. 9.331(c)(1).

312. *Id.* R. 9.331(c)(2). The rule also cautions: "A rehearing en banc is an extraordinary proceeding. In every case the duty of counsel is discharged without filing a motion for rehearing en banc unless one of the grounds set forth in (1) is clearly met." *Id.* Under subsection (1), "a party may move for an en banc rehearing solely [when] the case is of exceptional importance or . . . such consideration is necessary to maintain uniformity in the court's decisions." *Id.* R. 9.331(c)(1).

313. *Id.* R. 9.331(c)(2). The court system does not collect statistics enumerating how many

that the matter is of exceptional importance, it is usually evident on the most cursory reading whether or not the case actually is exceptionally important.

By contrast, determining whether there is decisional conflict can be a difficult and time-consuming proposition. As one authority suggests:

> "[T]he judgment as to whether a conflict exists or not is often quite a difficult one. The literature abounds with adjectives for describing conflicts: true conflicts, general conflicts, head-on conflicts, sideswipes, and the like. The easiest case is that in which there are clearly stated rules of law that conflict as to the exact same subject matter * * *. Most conflicts are not so clean, however. Many involve rule applications to divergent fact situations. For these cases, the issue is necessarily one involving judgment [as to which] opinions often differ."[314]

Based on the experience with the en banc rule, a comparable cautionary system can keep filings within manageable bounds. Review of petitions submitted on grounds of importance should require considerably less effort than review of petitions based on conflict of decisions.

The other categories for discretionary review presently in the constitution can be retained intact as guidelines.[315] The existing criterion regarding decisional conflict properly places the responsibility on the district courts of appeal to maintain internal decisional consistency.[316] That standard should be retained.

One criterion employed in the federal system and many states is review for supervisory reasons.[317] The federal standard allows review where the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."[318] A number of state jurisdictions have adopted a similar supervisory standard.[319]

---

motions for rehearing en banc were predicated on (a) decisional conflict, (b) exceptional importance, or (c) both. It is the author's observation that motions for rehearing en banc are more frequently predicated on intradistrict decisional conflict than on exceptional importance.

314. STERN, *supra* note 8, § 2.6b, at 43 (quoting COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE app. II at 97, 67 F.R.D. 306 (1975)).

315. For a listing of states which have promulgated discretionary review criteria by rule, see *supra* note 124.

316. *See* FLA. CONST. art. V, § 3(b)(3); *supra* text accompanying notes 89, 221-23.

317. *See supra* part V.B.3.

318. SUP. CT. R. 10.1(a).

319. *See supra* part V.B.3.

Florida has no supervisory standard.[320] Whether Florida should adopt a supervisory standard is a difficult question. While a case can be made for the adoption of an explicit supervisory standard, it is not essential so long as the guidelines for discretionary review are nonexclusive and include criteria authorizing review based on the importance of the issue presented. Since there is an understandable desire to keep the supreme court's workload manageable, it would be best to add a single, simple importance-based standard which would be accompanied by a certificate of counsel.

VI. THE REQUIREMENT FOR A WRITTEN OPINION

Under Florida's jurisdictional system, the supreme court may not conduct discretionary review of a district court of appeal decision unless there is a written opinion which shows on its face that one of the jurisdictional prerequisites is satisfied.[321] These jurisdictional prerequisites include decisional conflict, construction of the state or federal constitution, declaration of validity of a state statute, or a decision affecting a class of constitutional or state officers.[322] If there is no opinion at all, or if the written opinion fails to show that one of the categories is satisfied, then the Florida Supreme Court has no jurisdiction.[323]

A. *ABA* Standards Relating to Appellate Courts

The *Appellate Court Standards* impose no requirement that there be a written opinion as a condition for supreme court review. To the contrary, the *Appellate Court Standards* provide that "[t]he supreme court should have authority to review all justiciable controversies and proceedings, regardless of subject matter or amount involved."[324] As summarized previously, the *Appellate Court Standards* oppose the imposition of categorical limitations on supreme court review.[325] The written opinion re-

320. *See* FLA. CONST. art. V, § 3.

321. *Id.* art. V, § 3(b)(3). The constitution requires that the district court of appeal decision "expressly" satisfy one of the enumerated criteria, which is construed to require a written opinion. *Id.*; *see* Jenkins v. State, 385 So. 2d 1356, 1357-59 (Fla. 1980).

322. FLA. CONST. art. V, § 3(b)(3).

323. *Id.*; *see Jenkins*, 385 So. 2d at 1357-59; STANDARDS RELATING TO APPELLATE COURTS § 3.00(a)(1) (1977).

324. STANDARDS RELATING TO APPELLATE COURTS § 3.00(a)(1) (1977); *accord* STANDARDS RELATING TO COURT ORG. § 1.13(a) (1990). This includes "authority to review any case already determined by an intermediate appellate court, even if the decision in the latter court is unanimous and purports to accord with the law as previously announced by the supreme court." STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 4 (1977).

325. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 5 (1977).

quirement is just the type of categorical limitation opposed by the *Appellate Court Standards*.[326]

B. *United States Supreme Court Practice*

The United States Supreme Court's *Considerations Governing Review on Writ of Certiorari* do not require that there be a written opinion as a precondition for United States Supreme Court review.[327] The Supreme Court can, and does, grant review where there is no opinion.[328]

C. *Practice in the States*

In virtually no jurisdiction is the absence of a written opinion, or the absence of an opinion discussing the point at issue, given preclusive effect.[329] Exceptions are found in California and Alabama, but those states provide the litigant with an alternative avenue to obtain supreme court review.

In California, the appellate rules provide:

> As a matter of policy, on petition for review the Supreme Court normally will not consider . . . any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, *unless* the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.[330]

In California practice, therefore, a litigant must call an omission or misstatement to the attention of the court of appeal, which may elect to amend or amplify its opinion.[331] However, if the court of appeal chooses not to do so, the litigant is free to petition for review in the supreme court.[332] Alabama has a similar rule,[333] and in both jurisdictions the rele-

---

326. *See id.* Closely related is the *Appellate Court Standards*' position that an intermediate appellate court's denial of a request for certification should not preclude the supreme court's ability to review a case. *Id.* § 3.10(c). The same logic applies to a district court of appeal's decision not to write an opinion; a ruling without opinion should not automatically preclude supreme court review.

327. SUP. CT. R. 10.1.

328. *See infra* part VI.F.

329. *See infra* sources quoted in app. C.

330. CAL. APP. R. 29(b)(2) (emphasis added).

331. *Id.*

332. *Id.*

333. Alabama Rule of Appellate Procedure 39(k) provides:

> The review . . . will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he

vant provision is a matter of procedural rule, not constitutional mandate.[334]

Pennsylvania takes a different approach, placing the burden on the intermediate appellate court, not the litigant. There, upon the filing of the petition for review, "the appellate court below which entered the order sought to be reviewed, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order."[335] In another jurisdiction the absence of an opinion, or alleged deficiencies in an opinion, are themselves grounds for discretionary supreme court review.[336] In a few jurisdictions the wording of the appellate rules effectively acknowledges that petitions for review may be filed where there is no written opinion. However, those states attach no further significance to the absence of an opinion.[337]

In short, most states do not condition access to the state supreme court on the existence or contents of a written opinion. In the two jurisdictions in which such a requirement is imposed, the requirement may be satisfied if the litigant has by motion for rehearing requested the preparation of an appropriate opinion. The intermediate appellate court is not required to write, but its failure to do so will not preclude the litigant's

---

> may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

ALA. R APP. R. 39(k).

334. *See id.* R. 39(k); CAL. APP. R. 29(b)(2).

335. PA. R. APP. P. 1925(c). The Florida Supreme Court has held that it lacks the authority to order a district court of appeal to write an opinion. School Bd. v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).

336. IND. R. APP. P. 11(B)(2)(e) ("The opinion or memorandum decision of the Court of Appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties."); *id.* R. 11(B)(2)(f) ("the opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record, concisely setting out the misstatement . . ., the materiality of the misstatement, and specifically stating the resulting prejudice to the petitioner").

337. MD. R. APP. P. 8-303(b)(3) ("If an opinion of that Court [the Court of Special Appeals] has been filed, it shall be attached."); N. MEX. R. APP. P. 12-502(C)(4)(a), (b) (stating that where a litigant seeks review on basis of decisional conflict, the litigant shall include "a quotation from that part of the Court of Appeals opinion [the opinion under review], *if any*," as well as a quotation from the part of the supreme court or court of appeals opinion which will demonstrate the conflict) (emphasis added); *see also* ARIZ. R. CIV. APP. P. 23(c)(2) ("The petitioner shall also list, separately and without argument, those additional issues which were presented to, but not decided by, the Court of Appeals and which may need to be decided if review is granted."); ARIZ. R. CRIM. P. 31.19.C.2 (same).

access to the state supreme court. Pennsylvania places the onus entirely on the intermediate appellate court, and the other jurisdictions do not require a written opinion at all.[338]

D. *Effect of Absence of Opinion on Granting of Review*

Another question to be examined is whether the absence of a written opinion is a factor which may be considered by a supreme court in determining whether to grant discretionary review. It is certainly true that a substantial question of law does not become insubstantial merely because the intermediate appellate court elected not to write an opinion. On the other hand, the existence of a written and published opinion plainly has precedential impact, while an affirmance without opinion does not. Thus, the existence or absence of a written opinion is a factor which can be considered, but it should not be given dispositive weight.[339]

Where a state limits affirmances without opinion to those cases in which there is no substantial question of law, one would expect supreme court review to be granted at a lower rate than when the intermediate appellate court has rendered a written opinion. That conclusion is supported by a study conducted in Massachusetts.[340] This ten-year study[341] showed that the supreme court granted 13.3% of the petitions for discretionary review overall.[342] However, the study also showed that where litigants sought review of decisions rendered without written opinion, the supreme court granted review in only 3.8% of the cases.[343]

This study indicates that no-opinion cases are accepted for review less frequently than decisions with opinion. While the study does not draw a conclusion about cause and effect, there appear to be two reasonable

338. It should be noted that most American jurisdictions now have a selective publication rule, pursuant to which written opinions of the intermediate appellate court will not be published unless specified criteria are met. In general the opinions are selected for publication which are deemed to have some precedential effect. *See* Harry L. Anstead, *Selective Publication: An Alternative to the PCA?*, 34 U. FLA. L. REV. 189 (1982). *See generally* Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21 (1991). Even though an unpublished intermediate appellate court opinion is by definition deemed to lack precedential value or effect, the various states have not used the "no-publish" designation to preclude supreme court review.

339. *See Report on Appellate Structure*, *supra* note 285, at 284.

340. *See* Byrgen P. Finkelman, *Further Appellate Review in Civil Cases: How the Court Decides What Cases to Take*, 69 MASS. L. REV. 116 (1984). The study concluded, among other things, that the Massachusetts Supreme Judicial Court "is primarily interested in maintaining a uniform body of law in the Commonwealth. Thus the [Supreme Judicial Court] regularly granted review in cases which raised issues of first impression or novel questions of law." *Id.* at 117 (footnote omitted).

341. The study included civil cases filed between January 31, 1973 and December 30, 1982. *Id.* at 116.

342. *Id.* at 117.

343. *Id.*

inferences. First, where the standard is "no substantial question of law" and the standard is properly administered, the no-opinion cases are less likely to present a substantial issue. Second, the absence of an opinion itself may be factored into the supreme court's decision on whether to accept jurisdiction in the pending case or deny review and allow the issue to percolate further.

On the other hand, a striking result of the Massachusetts study is that despite a "no substantial question of law" standard, and despite the absence of a written opinion, the supreme court still accepted jurisdiction in almost four percent of the cases. Given the relatively low rate at which petitions for discretionary review are accepted overall,[344] that is a significant percentage. The data help explain why every jurisdiction (except Florida) has declined to preclude review on the basis of absence of a written opinion: a case may present an important question of law which should be reviewed by the supreme court even though there is no written opinion.

E. *Opinion Writing Standards and Practices*

1. ABA *Standards Relating to Appellate Courts*

The *Appellate Court Standards* recommend an opinion in every case. In less significant cases, the *Appellate Court Standards* recommend at least a statement of grounds.[345] That view also is urged by appellate authorities[346] and favored by practitioners.[347] It should be noted that even under the *Appellate Court Standards*, the preparation of a reasoned opinion in every case would not necessarily result in an opinion showing an arguable basis for supreme court jurisdiction under the Florida Supreme Court's four restrictive categories.[348] The *Appellate Court Standards* recognize that full opinions will be called for in some cases, but more abbreviated treatment will be appropriate in others.[349] Under Florida's system, the existence of an opinion does not automatically make the decision reviewable; the opinion still must show on its face that one of the four juris-

344. In this study the acceptance rate was 13.3%. *Id. See generally* STERN, *supra* note 8, § 6.7(c), at 159.

345. STANDARDS RELATING TO APPELLATE COURTS § 3.36(b) (1977).

346. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 31-35 (1976); STERN, *supra* note 8, § 17.5, at 477-79.

347. Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405, 409 (1981). A Federal Judicial Center survey found 79% of attorneys believe "[i]t is important that the courts issue written explanations"; 63% of federal district judges agreed; 49% of federal court of appeals judges agreed. *Id.*

348. FLA. CONST. art. V, § 3(b)(3).

349. STANDARDS RELATING TO APPELLATE COURTS § 3.36(b) (1977).

dictional prerequisites has been satisfied.[350]

2. State Practices

The states are divided in their opinion writing practices. Some states utilize affirmances without opinion while others do not.[351] In jurisdictions where an opinion is prepared for the decision of each appeal, the requirement is sometimes prescribed by rule and in other instances is a matter of custom.[352] In the remaining jurisdictions, affirmance without opinion is permitted.[353] These states have typically permitted affirmance without opinion as a caseload management technique to relieve excessive appellate workload.[354]

3. Florida Practice

The use of affirmances without opinion is described as a practice born of necessity in Florida, where the workload for appellate judges is higher than that recommended by appellate experts.[355] Moreover, Florida

---

350. FLA. CONST. art. V, § 3(b)(3).

351. *See* Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 287-88 (1989). The article reports opinion writing practices through 1984. *Id.* The data indicate that 22 of 45 states decided some appeals without opinion, including intermediate appellate courts in ten states. *Id.* & tbl. 5. The study counted the District of Columbia as a state. *Id. See generally* Williams, *supra* note 338, at 21-49 (surveying state court opinion writing and publication practices).

352. *E.g.*, IND. R. APP. P. 15(A)(1) (opinion required); TEX. R. APP. P. 90(a) (same). *See* Charles G. Douglas, III, *Innovative Appellate Court Processing: New Hampshire's Experience with Summary Affirmance*, 69 JUDICATURE 147, 149-50 (1985) (stating that the practice of writing an opinion in each case continued after the explicit requirement was abolished, but the practice ended after adoption of a summary affirmance rule); *see also* IMPROVING CASE PROCESSING, *supra* note 31, at 74 (stating that the Arizona Court of Appeals, Division One (Phoenix) "writes a reasoned decision in every appeal"); *id.* at 93 (stating that the Maryland Court of Special Appeals wrote a "reasoned opinion . . . in every appeal"); *id.* at 101 (stating that the New Jersey Superior Court, Appellate Division—a statewide intermediate appellate court—requires a written decision in every case). *See generally* Williams, *supra* note 338, at 21.

353. Marvell, *supra* note 351.

354. *Id.* The practice is regulated by rule in a number of jurisdictions. *E.g.*, 11TH CIR. R. 36-1; GA. CT. APP. R. 36. *See generally* Williams, *supra* note 338, at 22-49.

355. *See, e.g.*, Whipple v. State, 431 So. 2d 1011, 1015 (Fla. 2d DCA 1983) (stating that an excessive workload restricts the number of opinions which an appellate judge can write); *see also* School Bd. v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985) ("the reason and necessity for district courts [of appeal] to render summary decisions are explained in *Whipple v. State*"); ARTICLE V REPORT, *supra* note 142, at 18 (stating that Florida's intermediate appellate judges have the third highest caseload in the nation).

Florida Rule of Judicial Administration 2.035(b)(2) contemplates that there be one appellate judge per 250 annual filings. FLA. R. JUD. ADMIN. 2.035(b)(2). This would be the number of cases for which any single judge would have primary responsibility. *See id.* Since the district courts of appeal operate in panels of 3, *id.* R. 2.040(a)(1), each judge would participate in three times the guideline

tends not to add appellate judges until the workload exceeds, sometimes by substantial amounts, the state's workload standard.[356] Since an opinion is invariably needed in cases of reversal,[357] affirmance without opinion is widely, though not universally,[358] used to relieve excessive workload.[359] Although frequently criticized,[360] affirmance without opinion has been a customary feature in Florida appellate practice.[361]

Several observations may be made about Florida's use of affirmances without opinion. First, the practice is unregulated.[362] A number of other jurisdictions have promulgated rules regulating opinion-writing,[363] but that has not been done in Florida.[364] While it has been said that an opinion should be written in any case in which there is any arguable basis for

---

figure. *See id.* R. 2.035(b)(2).

It is to be expected, of course, that there will be attrition of cases through settlement or involuntary dismissal. Even after making such allowances, the workload exceeds that recommended by professionals in the field. *See* ROBERT A. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 9 (1976) (recommending in substance that an individual judge would participate with colleagues in no more than 300 substantial cases per year); Harry L. Anstead, *The Shape and Size of Florida's Judiciary: Report of the Courts' Restructure Commission*, FLA. B.J., July-Aug. 1986, at 21, 25 n.2 ("The [1979 Supreme Court Commission on the Florida Appellate Court Structure] set the 250 figure as a realistic goal with the hope of further reductions in the future.").

356. *See* Anstead, *supra* note 355, at 22. In 1990, for example, there were 292 filings per judge in the district courts of appeal, with filings forecasted to rise to 308 per judge through 1992. 1992 Certification Package, *supra* note 255, at 2.

357. *Whipple*, 431 So. 2d at 1015.

358. Davis v. Sun Banks, 412 So. 2d 937, 937 (Fla. 1st DCA 1982) (Mills, J.). The *Davis* court stated:

> I shall write a short opinion in each case assigned to me and shall tersely give the reason for affirming each issue raised by the appellant or cross-appellant. I hope that this action by me will answer the frequent complaints about per curiam affirmed decisions. . . . The possible remedies from adverse decisions will be preserved for consideration by the Supreme Court.

Id.

359. *Whipple*, 431 So. 2d at 1015-16; Scheb & Scheb, *supra* note 103, at 481; *see also* Williams v. State, 425 So. 2d 1163, 1164 (Fla. 5th DCA 1983) (Orfinger, C.J., concurring specially) (stating that the growing caseload makes it impracticable to write opinions in every case).

Some also argue that an opinion of affirmance should not be written unless it will make some contribution to jurisprudence or disclose a jurisdictional basis for the Florida Supreme Court. *Whipple*, 431 So. 2d at 1015-16. *See generally* Anstead, *supra* note 338, at 201-07 (reviewing the history and practice of per curiam affirmance without opinion). Workload considerations are, however, cited more frequently.

360. *E.g.*, CARRINGTON ET AL., *supra* note 346, at 31-32; *see Davis*, 412 So. 2d at 937; Anstead, *supra* note 338, at 203-07.

361. *See, e.g.*, *Whipple*, 431 So. 2d at 1015-16; *Williams*, 425 So. 2d at 1164 (Orfinger, C.J., concurring specially) (quoting Foley v. Weaver Drugs, 172 So. 2d 907, 908 n.2 (Fla. 3d DCA 1965)).

362. *See* Anstead, *supra* note 338, at 207; Williams, *supra* note 338, at 27.

363. *See* Williams, *supra* note 338, at 22-49.

364. Anstead, *supra* note 338, at 207.

supreme court jurisdiction,[365] no rule has been adopted containing such a standard or guideline.[366]

Second, affirmances without opinion are used in some cases in which there is a debatable legal issue.[367] This is demonstrated by the fact that affirmances without a written opinion which are accompanied by a written dissenting opinion or a written concurrence are published with some regularity.[368] Affirmance without opinion is also used on occasion where the panel agrees on the result but cannot agree on a common rationale.

Third, there are significant variations among the five district courts of appeal in their use of affirmances without opinion.[369] While this may stem in part from workload variations between districts,[370] it has been suggested that the variations also relate in part to differences in custom and opinion-writing philosophy.[371] As one judge suggests, because of the absence of written standards, there will be a greater "margin of error and variance of view between districts in determining precedential value. . . ."[372]

The above observations suggest some of the reasons why the written opinion requirement is not a desirable screening device. Where a written opinion has been rendered, it undoubtedly will be helpful to the supreme court in determining whether to grant discretionary review. It does not follow, however, that a matter is unimportant merely because no opinion has been written.

There are several reasons why this is so. First, the standard of importance applied by a district court of appeal will not always coincide with the standard of importance applied by the supreme court.[373] Second,

---

365. *Whipple*, 431 So. 2d at 1015; Scheb & Scheb, *supra* note 103, at 485.

366. Anstead, *supra* note 338, at 207.

367. *Id.* at 203.

368. *Id.* ("Although most PCAs [affirmances without opinion] are issued with the concurrence of all three panel members, numerous two-judge majorities publish PCAs with an accompanying special concurrence or dissent.").

369. *Id.* at 203, 207, 216.

370. In 1990 the filings per judge varied from 265 per judge in the Third District Court of Appeal to 310 per judge in the Second District. 1992 Certification Package, *supra* note 255, at 2. For 1992 the range was predicted to be from a low of 269 to a high of 345 per judge. *Id.* All figures exceed, of course, the guideline of 250 filings per judge. *See* FLA. R. JUD. ADMIN. 2.035(b)(2).

371. *See* Anstead, *supra* note 338, at 203, 207, 216.

372. *Id.* at 207.

373. Florida formally accepts that logic, at least in part. Where a district court of appeal certifies that a decision is of great public importance or that there is a decisional conflict, supreme court review is discretionary, not mandatory. Scheb & Scheb, *supra* note 103, at 482. The theory is that the supreme court must have the opportunity to make the final determination on the question of importance by applying its own standard, notwithstanding that the district court of appeal has already certified great public importance. *See* STANDARDS RELATING TO APPELLATE COURTS 3.10(c) & commentary at 17 (1977).

workload considerations play a significant part in determining whether the district court of appeal will write an opinion and in determining how much will be written. An abbreviated opinion which omits jurisdictionally relevant words can be as preclusive as a decision without opinion.[374] Third, impending changes in decisional law will be known in the supreme court for considerable periods of time before an opinion is approved and released. That pre-announcement information will be known and applied by the justices in making decisions to accept or reject petitions for discretionary review in cases presenting the same or related issues. It will not be known in advance to the district courts of appeal and, therefore, cannot be taken into account in deciding whether to write an opinion or certify a decision.

F. *Review by the United States Supreme Court*

From the standpoint of judicial administration, it is unsound to allow a district court of appeal decision to be reviewed by the United States Supreme Court, while depriving the Florida Supreme Court jurisdiction to review the same matter. That is, however, the effect of Florida's system of categorical limitation, including the written opinion requirement.

The United States Supreme Court does not impose any written opinion requirement.[375] It can, and does, review decisions from Florida and other states which have been rendered without written opinion. Although not in the class of cases with which we are now concerned, a useful illustration is *Gideon v. Wainwright*.[376] In *Gideon*, a petition for habeas corpus was filed directly with the Florida Supreme Court and after consideration on the merits, was denied without opinion.[377] The United States Supreme Court granted review,[378] resulting in the landmark decision on the right to counsel in a criminal case.[379] *Gideon* is a reminder that importance is not necessarily measured by the existence of a written opinion and that denial of relief summarily on the basis of existing law does not preclude a higher tribunal from taking a different view.

In addition, the United States Supreme Court has on a number of occasions reviewed decisions of Florida district courts of appeal, even though there was no written opinion. Such cases simply bypassed the

374. *See infra* notes 387-401 and accompanying text.

375. *See* SUP. CT. R. 10.1.

376. 372 U.S. 335 (1963), *rev'g* Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961) (habeas corpus denied without opinion).

377. *Id.* at 337.

378. Gideon v. Cochran, 370 U.S. 908 (1962).

379. *Gideon*, 372 U.S. at 338-45.

Florida Supreme Court.[380] Examples include a case in which a child custody issue was decided on the basis of racial considerations;[381] a case that involved "a misapprehension of the controlling principles of law governing airport stops";[382] a case that involved the denial of a speedy trial under the Sixth Amendment;[383] a case that involved the involuntariness of a confession;[384] a case in which unemployment insurance payments had been denied to persons who filed unfair labor practice charges against their former employer;[385] and a summary reversal in a racial discrimination case.[386]

The United States Supreme Court has also reviewed cases in which the district court of appeal issued a written opinion, but the opinion failed to reveal a basis for Florida Supreme Court jurisdiction. An example of this is found in *Florida Star v. B.J.F.*[387] In that case, a newspaper defended an invasion of privacy suit on First Amendment grounds, including a constitutional challenge to a Florida statute involved in the case.[388] A judgment against the newspaper was affirmed in a brief per curiam opin-

380. On matters of federal law, the United States Supreme Court may review final judgments "rendered by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257(a) (1988). Where the state supreme court is without jurisdiction to review an intermediate appellate court decision, the intermediate appellate court is the highest court in which a decision can be had. Williams v. Florida, 399 U.S. 78, 80 n.5 (1970); STERN ET AL., *supra* note 41, § 3.16; *see also* Palmore v. Sidoti, 466 U.S. 429, 431 (1984); Nash v. Florida Indus. Comm'n, 389 U.S. 235, 237 n.1 (1967); Callendar v. State, 181 So. 2d 529, 531-33 (Fla. 1966).

381. *Palmore*, 466 U.S. at 430-31.

382. Florida v. Rodriguez, 469 U.S. 1, 5 (1984); *see also* Florida v. Rodriguez, 461 U.S. 940 (1983) (vacating earlier decision without opinion in same case).

383. Dickey v. Florida, 398 U.S. 30, 31 (1970).

384. Brooks v. Florida, 389 U.S. 413, 415 (1967) (describing record in the case as documenting "a shocking display of barbarism which should not escape the remedial action of this Court").

385. *Nash*, 389 U.S. at 236.

386. Callender v. Florida, 380 U.S. 519 (1965) (reversing an unlawful assembly conviction on authority of Boynton v. Virginia, 364 U.S. 454 (1960)). The United States Supreme Court spelled the petitioner's name Callender, but the Florida courts spelled it Callendar. *See* Callendar v. State, 181 So. 2d 529, 531 (Fla. 1966). The facts of *Callendar* are unreported. *Boynton* reversed a conviction for trespass into the "whites only" section of a restaurant in an interstate bus terminal. *Boynton*, 364 U.S. at 455, 464.

In *Callendar*, the Florida district court of appeal denied review of a criminal conviction without opinion. *Callendar*, 181 So. 2d at 531. The Florida Supreme Court denied review because it lacked jurisdiction. *Id.* The United States Supreme Court granted certiorari review of the district court of appeal's no-opinion affirmance. *Id.* On summarily reversing, the Court addressed its mandate to the Florida Supreme Court. *Id.* The Florida Supreme Court objected that it had no jurisdiction and returned the mandate to the United States Supreme Court. *Id.* at 533. In response, the United States Supreme Court vacated its prior ruling and addressed its mandate to the Florida District Court of Appeal. Callender v. Florida, 383 U.S. 270, 270 (1966); *see also* Florida v. Rodriguez, 461 U.S. 940 (1983).

387. 491 U.S. 524 (1989).

388. *Id.* at 526-30.

ion.[389] Although making reference to the statute and affirming the judgment, the district court of appeal's decision "did not discuss [the statute] except to quote it verbatim, nor did it expressly uphold the statute against appellant's constitutional challenge."[390] The Florida Supreme Court denied review.[391] Although the supreme court gave no reason for its denial of review, it is reasonably clear that the district court of appeal had not written enough to satisfy one of the four constitutional categories, even though the First Amendment issues had been squarely presented and ruled on in substance.[392]

The United States Supreme Court granted review,[393] noting "[t]he somewhat uncharted state of the law in this area,"[394] and reversed on First Amendment grounds. The case illustrates the fact that under the Florida constitutional provision, not only will the absence of an opinion preclude review, but the writing of an opinion that does not use jurisdictionally relevant words will also preclude review.[395]

---

389. Florida Star v. B.J.F., 499 So. 2d 883, 884 (1st DCA 1986), *rev. denied*, 509 So. 2d 1117 (Fla.), *question certified*, 484 U.S. 984 (1987), *certified question answered*, 530 So. 2d 286 (Fla. 1988), *rev'd*, 491 U.S. 524 (1989).

390. *Florida Star*, 530 So. 2d at 287.

391. *Florida Star*, 509 So. 2d at 1117.

392. In later answering a jurisdictional question certified by the United States Supreme Court, *see infra* note 395, the court ultimately took the view that its discretionary jurisdiction under the Florida Constitution, article V, § 3(b)(3), has two separate, but related, elements. *Florida Star*, 530 So. 2d at 288. "The first is a general grant of discretionary subject-matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised. In effect, the second is a limiting principle dictated to this Court by the people of Florida." *Id.*

In order to invoke the court's jurisdiction on the basis of conflict of decisions, "it is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or criterion in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." *Id.* Therefore the court has jurisdiction where there is an opinion containing "a statement or citation effectively establishing a point of law upon which the decision rests." *Id.*

The court concluded that when *The Florida Star* petitioned for discretionary Florida Supreme Court review, the court had subject matter jurisdiction in the broad sense and answered the United States Supreme Court's certified question accordingly. *Id.* at 288-89. The court declined to offer any view on whether the district court of appeal decision had satisfied any of the four jurisdictional pigeonholes. *Id.* at 288. The writer was counsel for amici curiae in this phase of the proceedings. *Id.* at 287.

393. The Court granted review under the Court's appellate jurisdiction. *Florida Star*, 491 U.S. at 529.

394. *Id.* at 530 n.5.

395. The *Florida Star* litigation eliminated a potentially serious "Catch 22" for litigants, but in doing so created another procedural anomaly. The *Florida Star* litigation confronted the Florida Supreme Court with a difficult issue regarding the relationship between its own jurisdiction and that of the United States Supreme Court. *Florida Star*, 530 So. 2d at 287. Because of the United States Supreme Court's exhaustion requirements, a litigant must seek review in the highest state court in which a decision could be had before petitioning for United States Supreme Court review. *See* 28

A useful comparison is found in *Williams v. Florida*.[396] In *Williams*, the district court of appeal wrote a brief opinion disposing of the federal constitutional claims with an abbreviated discussion.[397] Under the then existing jurisdictional system, the opinion did not satisfy the criteria for discretionary Florida Supreme Court review.[398] The United States Supreme Court granted certiorari, thus bypassing the Florida Supreme Court.[399] The United States Supreme Court upheld Florida's notice of alibi rule, and upheld the use of a six-member jury over Williams' contention that it violated his rights under the Sixth and Fourteenth Amendments.[400]

As the examples suggest,[401] a substantial matter does not become insubstantial merely because there is no written opinion. These examples also illustrate a material weakness in Florida's judicial process. Matters of

---

U.S.C. § 1257. B.J.F. contended that *The Florida Star* had petitioned the Florida Supreme Court for review when, in fact, the district court of appeal opinion disclosed no basis for Florida Supreme Court jurisdiction. *Florida Star*, 530 So. 2d at 287. B.J.F. moved to dismiss in the United States Supreme Court, arguing that in the absence of jurisdiction in the Florida Supreme Court, the time for seeking United States Supreme Court review had run from the date of the district court of appeal decision, not from the date of the Florida Supreme Court's denial of discretionary review. *Id.* at 287-88. *The Florida Star*'s appeal to the United States Supreme Court was timely when measured from the denial of discretionary review by the Florida Supreme Court, but untimely when measured from the date of the decision of the district court of appeal. *See id.* at 289.

The Florida Supreme Court resolved the problem by construing its jurisdictional article to contain a broad grant of discretionary jurisdiction, limited by the four constitutional categories. *Id.* at 288-89. The court concluded that so long as there was a written opinion on a point of law, the court had jurisdiction over the case. *Id.*

The opinion creates an orderly pathway for appellate review, by requiring in most instances that a litigant wishing to reach the United States Supreme Court must first petition for review in the Florida Supreme Court. In so doing, the litigant will invoke Florida Supreme Court jurisdiction in the broad sense.

The irony, however, is that in a number of cases the district court of appeal opinion will not satisfy the four narrow criteria for review and the Florida Supreme Court will be unable to take the case on the merits.

396. 399 U.S. 78, 80 n.5 (1970).

397. Williams v. State, 224 So. 2d 406, 407 (Fla. 3d DCA 1969), *aff'd*, 399 U.S. 78 (1970).

398. Williams had initially appealed directly from the trial court to the Florida Supreme Court, under the 1956 Florida constitutional provision which allowed an appeal where a trial court had construed "a controlling provision of the Florida or federal constitution . . . ." FLA. CONST. art. V, § 4(2) (1956). The Florida Supreme Court held that it did not have jurisdiction. *See Williams*, 399 U.S. at 80 n.5. The appeal was therefore heard by the district court of appeal. *Williams*, 224 So. 2d at 406. The written opinion provided no criterion which would have allowed a petition for discretionary review to the Florida Supreme Court. *See id.* Review was therefore taken directly to the United States Supreme Court. *Williams*, 399 U.S. at 80.

399. *Williams*, 399 U.S. at 80 n.5.

400. *Id.* at 86, 103.

401. The writer has not undertaken to identify all such cases heard by the United States Supreme Court.

importance can and do bypass the Florida Supreme Court because the district court of appeal decided not to file a written opinion.

G. *No-Opinion Cases and the Florida Supreme Court*

Some Florida decisions also reveal that the written opinion requirement is an undesirable screening device. For example, in *Moreland v. State*,[402] Moreland argued in the trial court that Palm Beach County's system of selecting jurors for the petit jury pool resulted in a systematic exclusion of blacks. A criminal defendant in another case, *Spencer v. State*, made the same argument.[403]

Spencer was convicted of first degree murder and was sentenced to death.[404] As a result, he had a right of direct appeal to the Florida Supreme Court.[405] In his appeal he raised the issue of unconstitutional selection of the jury pool.[406]

Meanwhile, Moreland was convicted of first degree murder and sentenced to life imprisonment.[407] He appealed to the district court of appeal and raised the same constitutional challenge to the jury selection process.[408] While *Spencer* was pending in the Florida Supreme Court, the district court of appeal affirmed Moreland's conviction without opinion.[409] Because there was no opinion, Moreland could not petition the Florida Supreme Court for discretionary review.

Subsequently, the Florida Supreme Court reversed Spencer's conviction, holding that the jury selection system was unconstitutional.[410] Moreland then petitioned the trial court for post conviction relief.[411] The trial court granted relief, holding that *Spencer* should be applied retroactively.[412] On appeal, the district court of appeal reversed, holding that the *Spencer* decision did not meet the recognized tests for retroactivity.[413] This time there was a written opinion which satisfied one of the jurisdictional criteria, so the Florida Supreme Court granted discretionary review.[414] The supreme court ruled that the existing tests for retroactivity

402. 582 So. 2d 618 (Fla. 1991).
403. Spencer v. State, 545 So. 2d 1352, 1353-54 (Fla. 1989).
404. *Id.* at 1353.
405. FLA. CONST. art. V, § 3(b)(1); *see Spencer*, 545 So. 2d at 1353.
406. *Spencer*, 545 So. 2d at 1354.
407. *Moreland*, 582 So. 2d at 619.
408. *Id.*
409. *Id.*
410. *Spencer*, 545 So. 2d at 1355; *see Moreland*, 582 So. 2d at 619.
411. *Moreland*, 582 So. 2d at 619.
412. *Id.*
413. *Id.*
414. *Id.*; *see* FLA. CONST. art. V, § 3(b)(3).

were not satisfied and that the district court of appeal had been correct on that point.[415] The supreme court concluded, however, that "fundamental fairness" required that Moreland be given the benefit of the *Spencer* decision.[416]

The fundamental fairness issue arose because the absence of a written opinion, along with the fact that Moreland was not sentenced to death, had prevented Moreland from obtaining discretionary supreme court review even though the same issue was then pending before the supreme court in *Spencer*.[417] If, of course, Spencer's case had never existed at all, Moreland's case presented a substantial and meritorious issue which could not reach the supreme court for want of a written opinion.

The *Moreland* decision reveals a flaw in Florida's system. The system precludes a litigant from reaching the Florida Supreme Court on a properly preserved legal issue which is already pending in the supreme court in another case. Second, it illustrates that a district court of appeal's standard of importance will at times diverge from the standard of importance applied by the supreme court itself. This is not to criticize the district court of appeal; rather plainly, the district court of appeal believed that the applicable law was both clear and well settled, while the supreme court had taken a different view.

This is not the first time the Florida Supreme Court has addressed this issue. In *Jollie v. State*,[418] the supreme court noted the problem created by the written opinion requirement where a district court of appeal had disposed of a related group of cases which presented the identical legal issue.[419] The court noted that one commonly used practice was for the district court of appeal to write a reasoned opinion in the first case to be decided, and then affirm the related cases on the strength of the lead case.[420] That had occurred in *Jollie*; Jollie's appeal had been resolved in the district court of appeal by the single word "affirmed," followed by a citation to the district court's earlier case, *Murray v. State*.[421] The supreme court had in the meantime granted review in the district court of appeal's lead case, *Murray v. State*, and had disapproved that decision.[422]

The question for the supreme court in *Jollie* was whether it could

415. *Moreland*, 582 So. 2d at 619.
416. *Id.* at 619-20.
417. *See id.*
418. 405 So. 2d 418 (Fla. 1981).
419. *Id.* at 419-21.
420. *Id.*
421. Jollie v. State, 381 So. 2d 351 (5th DCA 1980) (citing Murray v. State, 378 So. 2d 111 (Fla. 5th DCA 1980)), *quashed*, 405 So. 2d 418 (Fla. 1981).
422. *See Jollie*, 405 So. 2d at 418; Murray v. State, 403 So. 2d 417 (Fla. 1981).

grant jurisdiction and afford Jollie consistent treatment, or whether the absence of a written opinion (other than a citation of authority) precluded jurisdiction.[423] Since the decision in *Jollie* had expressly cited *Murray*, the supreme court decided that there was a sufficient basis on which to conclude that there was an express conflict of decisions.[424] Thus, the supreme court had jurisdiction to grant review and reversed, just as it had in *Murray*.[425]

Although the court obviously reached the correct result, the discussion in *Jollie* is unsettling. The court noted that its ability to review a companion case like *Jollie* was entirely dependent on the particular citation of authority utilized by the district court of appeal.[426] The court explained that so long as the companion case expressly cited the lead case, then the companion case could be considered for review along with the lead case.[427] If, however, the district court of appeal did not cite the lead case but instead cited other "counsel-advising" case authority, then the supreme court would not have jurisdiction.[428] The court suggested that each district court of appeal establish a procedure to expressly "pair" the first-decided case with subsequent cases presenting the same issue.[429] The court also suggested that mandates be withheld in the related cases "pending final decision of the petition for review, if any, filed in the controlling decision."[430] Furthermore, the court suggested that procedures be adopted so that the later-decided cases, even those without written opinion, would contain a statement expressly stating that the later cases presented the same legal issue as the earlier case.[431]

The *Jollie* decision illustrates the weakness in screening on the basis of written opinions. Where the supreme court has already granted discretionary review in a case, the court should be able to grant review in all other cases which present the identical issue. This should occur regardless of whether the district court of appeal wrote an opinion in the related case and regardless of whether the district court of appeal chose the proper citation. It should not be necessary to create elaborate case-tracking and pairing mechanisms in the district courts of appeal to satisfy the written

423. *Jollie*, 405 So. 2d at 419.
424. *Id.* at 419-21.
425. *Id.* There were two dissents. *Id.* at 421. *See generally* Lisa Pratt, Case Note, *Florida Supreme Court Jurisdiction—Supreme Court Jurisdiction Revisited: A Look at Five Recent Cases*, 9 FLA. ST. U L. REV. 693 (1981).
426. *Jollie*, 405 So. 2d at 420.
427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.* at 421.

opinion requirement and thereby confer jurisdiction on the supreme court.

It is worth noting that where the supreme court itself has had a choice, it has not applied the written opinion litmus test to other areas of its own jurisdiction. For example, the requirement for a written opinion does not apply to petitions for extraordinary writs. The supreme court has regularly granted petitions for mandamus and prohibition directed to the district courts of appeal where there was no written majority opinion.[432] The absence of a written opinion in those cases has not been found to be an impediment to review, and the supreme court has not imposed a written opinion requirement as a matter of practice.

In summary, the written opinion requirement is an unwieldy and unreliable device for screening cases for supreme court review. The ultimate inquiry in discretionary review should be whether the legal question presented is important enough to be resolved by the supreme court. In some cases the presence or absence of an opinion will be a strong consideration in granting or denying review, while in others it will not. Where the legal question presented is a highly important one, the court should not be impeded from accepting jurisdiction.

The succeeding sections will suggest alternatives to the written opinion requirement. However, to fashion an alternative, it is necessary first to explain why the written opinion requirement was adopted.

H. *Pre-1980 Practice and the 1979 Report of the Commission on the Florida Appellate Court Structure*

Florida's written opinion requirement was adopted in 1980 as a device to limit the supreme court's workload.[433] When Florida's 1956 constitutional amendment created the two-tier appellate system, the amendment did not require a written opinion as a condition of Florida Supreme Court review.[434] The Florida Supreme Court's discretionary jurisdiction was based then, as it is today, almost entirely on conflict of decisions. For

---

432. *See* Cantera v. District Court of Appeal, 555 So. 2d 360 (Fla. 1990) (prohibition); Fox v. District Court of Appeal, 553 So. 2d 161 (Fla. 1989) (prohibition); Sky Lake Gardens Recreation, Inc. v. District Court of Appeal, 511 So. 2d 293 (Fla. 1987) (mandamus); Davidson v. District Court of Appeal, 501 So. 2d 603 (Fla. 1987) (mandamus); Jellen v. District Court of Appeal, 488 So. 2d 825 (Fla. 1986) (mandamus); *see also In re* Estate of Laflin, 569 So. 2d 1273, 1274 (Fla. 1990) (mandamus) (district court of appeal denied relief by order which cited case authority).

The Florida Supreme Court does not have common law certiorari jurisdiction. FLA. CONST. art. V, § 3; Vetrick v. Hollander, 464 So. 2d 552, 553 (Fla. 1985). A petition for discretionary review is the procedure for invoking the discretionary jurisdiction of the court. *Vetrick*, 464 So. 2d at 553. Review prior to 1980 was by certiorari. FLA. CONST. art. V, § 3(b)(3) (amended 1972); FLA. CONST. art. V, § 4 (1956).

433. England et al., *supra* note 86, at 159.

434. FLA. CONST. art. V, §§ 4, 5 (1956).

the first few years the Florida Supreme Court took the position that it would not ordinarily review district court of appeal decisions which had been decided without opinion.[435] The court was careful to note that such decisions were not entirely insulated from review, but would be examined only in exceptional cases.[436]

As explained earlier, the court soon began taking an increasingly expansive view of its own jurisdiction.[437] This was reflected in the court's 1965 decision in *Foley v. Weaver Drugs, Inc.*[438] In *Foley*, the Florida Supreme Court adopted "record proper" review for cases in which the district court of appeal had not written an opinion.[439] In the period between 1965 and 1980, the supreme court's discretionary review practice evolved in an unexpected way. According to one study: "The court's current practice of accepting jurisdiction over any case in which a conflict is found has all but written the word 'may' out of Article V, § 3(b)(3), Florida Constitution."[440] If conflict could be shown on the basis of an individual issue, including a subsidiary one, the court would grant review and consider the entire case.[441] The reason for the court's practice was suggested in a 1977 concurring opinion: "A majority of this Court may hold the view that district court decisions without opinions are precedents, and that the Constitution imposes on us an obligation, as opposed to a right, to harmonize all conflicts which are detectable among the four judicial districts of the state."[442]

In the mid-1970s two of the newer justices on the court urged that the court begin exercising discretion in connection with conflict certiorari; thus, only the most important matters would be selected for review.[443]

---

435. Lake v. Lake, 103 So. 2d 639, 643 (Fla. 1958).

436. *Id.*

437. *See supra* text accompanying notes 261-85.

438. 177 So. 2d 221 (Fla. 1965).

439. *Id.*; *see* Foley v. Weaver Drugs, Inc., 172 So. 2d 907, 908-09 (3d DCA 1962), *cert. discharged*, 177 So. 2d 221 (Fla. 1965).

440. *Report on Appellate Structure*, *supra* note 285, at 285.

441. England et al., *supra* note 86, at 165.

442. Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs., 347 So. 2d 408, 412 (Fla. 1977) (England, J., concurring). *Foley* itself had held that "an affirmance without opinion of a trial court by a district court is generally deemed to be an approval of the judgment of the trial court, and becomes a precedent, certainly, in the trial court rendering the judgment." *Foley*, 177 So. 2d at 225-26.

The quoted passage from *Florida Greyhound Owners* refers to four district courts of appeal, which was the number then existing. 347 So. 2d at 412. Today there are five. FLA. STAT. § 35.01 (1991).

443. *Florida Greyhound Owners*, 347 So. 2d at 412 (Overton, C.J., concurring specially; England, J., concurring); Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co., 334 So. 2d 585, 586 (Fla. 1976) (Overton, C.J. & England, J., concurring); *see* AB CTC v. Morejon, 324 So. 2d 625, 628-30 (Fla. 1975) (England & Overton, JJ., dissenting).

Record proper review was criticized because it required a higher than usual investment of time in order to evaluate jurisdictional briefs.[444] The two justices contended, among other things, that cases were not being selected on the basis of importance.[445] Their view did not, however, persuade the court to change its practice.[446]

By 1978 the supreme court was suffering from persistent excessive workload.[447] The court created the Commission on the Florida Appellate Court Structure to recommend solutions.[448] A portion of the study focused on the supreme court's practices relating to discretionary review.[449]

The Commission recommended that the court assume control over its own docket by exercising its discretion and ceasing what the Commission described as "the practice of granting 'second appeals' . . . ."[450] The Commission urged, "in the strongest possible terms, that the court reconsider its role within Florida's appellate system. To serve the state as its highest judicial tribunal, the Supreme Court must consider only cases which substantially affect the law of the state."[451]

To that end, the Commission recommended that the court engage in rulemaking to spell out "the discretionary nature of the writ [of certiorari] and listing several factors which the court will consider in screening petitions for writs of certiorari . . . ."[452] The Commission proposed a set of criteria to embody in a rule.[453] The Commission also considered recom-

---

444. *Florida Greyhound Owners*, 347 So. 2d at 411-12 (Overton, C.J., concurring specially; England, J., concurring).

445. *See* cases cited *supra* note 443.

446. *See Report on Appellate Structure*, *supra* note 285, at 283.

447. *Id.*

448. *Id.* at 274.

449. *Id.* at 283-87.

450. *Id.* at 283.

451. *Id.*

452. *Id.* at 282. The court had not adopted explicit criteria to guide discretion in the review of petitions for certiorari. *Id.*

Under the constitutional provision existing prior to 1980, discretionary review was procured by petition for writ of certiorari. FLA. CONST. art. V, § 3(b)(3) (amended 1972); FLA. CONST. art. V, § 4(2) (1956). The reference to certiorari has since been eliminated. FLA. CONST. art. V, § 3(b)(3).

453. *Report on Appellate Structure*, *supra* note 285, at 284-85. The language proposed by the Commission was:

> Review by writ of certiorari is not a matter of right. The supreme court will determine as a matter of sound judicial discretion whether to exercise its constitutional certiorari jurisdiction to review a decision of a district court of appeal. While the considerations mentioned in this rule are neither controlling nor exclusive, the court will, in determining whether a decision is sufficiently important to warrant review by certiorari, consider:
>
> (1) whether or not the decision has been embodied in a written opinion;
>
> (2) the extent to which the rule of law announced in the decision will defeat or

mending an entirely discretionary system of supreme court review (except for death penalty appeals) as a mechanism for reducing supreme court workload.[454] It concluded, however, that such a step was unnecessary for that purpose and that the desired workload reduction could be achieved by the supreme court itself, operating within the existing framework.[455] The Commission also recommended that the court be permitted to review by certiorari cases of great public importance.[456] The Commission recommended that this be accomplished by constitutional amendment if it could not be accomplished within the court's existing certiorari powers.[457]

Two points should be made about the Commission's report. First, the Commission did not recommend that a written opinion be required as a condition precedent for supreme court review.[458] The Commission concluded that the existence of a written opinion was only one factor to be considered in deciding whether a matter had sufficient importance to warrant supreme court review.[459] It was not, however, a factor to be given conclusive weight.[460]

---

render doubtful rights acquired in reliance on previously rendered decisions;

(3) the extent to which the decision will create uncertainty with respect to the applicable rule of law and the extent to which the uncertainty will impair the ability of persons to plan future courses of action, to enter into contractual and other relationships, to settle disputes or to conduct judicial proceedings;

(4) the extent to which the decision will create uncertainty with respect to obligations of public officials;

(5) the number of persons affected by the decision or likely to be affected in the future by the rule of law announced in the decision;

(6) the frequency with which events raising the question of law answered in the decision are likely to occur;

(7) the degree to which the decision is incorrect or inconsistent with established principles of law.

In any event, where a petition for certiorari is predicated upon a conflict of decisions, the supreme court will not exercise its constitutional certiorari jurisdiction to review a decision of a district court of appeal:

(1) in which the alleged conflict exists only because of statements expressed in dicta, dissent, or other parts of the opinion which are not controlling; or

(2) in which a settled rule of law has been applied to facts which are not substantially the same as those in a prior decision; or

(3) in which the alleged conflict of decisions is based upon the comparison of the weight of the evidence and the credibility of the witnesses.

Id.

454. *Id.* at 283-84.

455. *Id.*

456. *Id.* at 286.

457. *Id.*

458. *See id.* at 284.

459. *Id.*

460. *See id.*

Second, although much of the Commission's report was implemented,[461] the recommendations on discretionary jurisdiction were not.[462] Although at any time the court could have receded from the *Foley* decision or adopted rules as recommended by the Commission, neither came about. *Foley* was never rescinded, but instead was overruled by constitutional amendment.[463] The revision of the supreme court's jurisdictional article in 1980 transferred away much of the court's mandatory appellate jurisdiction and created the current system for certification of decisions by district courts of appeal.[464]

The written opinion requirement was imposed primarily to curtail the invocation of the court's conflict jurisdiction where the district court of appeal had not written an opinion.[465] The method chosen was a categorical preclusion of review where no opinion has been written. This was said to be desirable on policy grounds and because it would reduce the time required to review jurisdictional petitions.[466]

This article has suggested that the written opinion requirement is an unwise limitation on the supreme court's ability to review cases on the basis of importance. In view of the reasons for the limitation, the question is what adjustments could be adopted in order to improve the system.

I. *The Need to Readjust the 1980 Amendment*

Under the present Florida system, a litigant must have a written opinion in order to petition for review in the supreme court,[467] but the litigant has been given neither an entitlement to an opinion nor an alternative if his or her request for an opinion is refused.[468]

In the two jurisdictions which have something approaching a written opinion requirement, the states have created an alternative pathway for the litigant.[469] Under the California approach, the litigant must request an opinion on the points sought to be reviewed; if that request is refused, the litigant may request discretionary review in the supreme court.[470] At a bare minimum, Florida should adopt the California system.[471]

---

461. *See* Arthur J. England, Jr., *1979 Report on the Florida Judiciary*, 53 FLA. B.J. 296 (1979).

462. *See id.* at 298-99.

463. England et al., *supra* note 86, at 179.

464. *Id.* at 161-76, 194.

465. *See* England, *supra* note 461, at 299.

466. *Id.*

467. *See* FLA. CONST. art. V, § 3(b).

468. *See* sources cited *supra* note 102.

469. *See supra* part VI.C.

470. *See supra* part VI.C.

471. It is to be anticipated that such requests will be made in a relatively small percentage of

The better alternative would be to abolish the written opinion requirement entirely. It is virtually unheard of in other American jurisdictions.[472] It may have been the only feasible alternative in 1980 as a transition away from *Foley*'s record proper review.[473] The written opinion requirement should not, however, remain a fixture in the Florida Constitution.

Some may object that the elimination of the written opinion requirement could resuscitate record proper review—the exact phenomenon the written opinion requirement was intended to abolish.[474] That need not be so. Whether record proper review returns hinges entirely on the discretionary review criteria which the court adopts. One solution to this problem would be to provide by rule that review of no-opinion decisions would be evaluated purely on the basis of the importance of the question presented, and would require an appropriate certificate of counsel.[475] The court's rules could provide that the conflict criterion would not be applied where there is no written opinion. In sum, a no-opinion decision could be reviewed on the basis of exceptional importance, but not on the basis of conflict.[476]

Such an approach appears to be the reality in federal practice. Although the United States Supreme Court's rules do not require written opinions,[477] it has long been known that the Court has followed a practice in many cases of allowing an issue to "percolate" before it will grant discretionary review.[478] As one commentary explains, "Justice Brennan has revealed that 'there is already in place, and has been ever since I joined the Court [in 1956], a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question.'"[479] While there are signs that the percolation doctrine may be on its way

---

cases. Many litigants do not petition for further review, *see supra* note 255 and accompanying text, and in many instances an opinion will already have been issued. In addition, the nature of the California rule allows the district court of appeal discretion about whether to write and how much to write. *See supra* part VI.C.

472. *See supra* part VI.C.; *infra* app. C.

473. *See* England, *supra* note 461, at 299.

474. *See id.*

475. *See supra* text accompanying notes 310-14.

476. A variation on this theme would be to adopt the approach recommended by the 1979 *Report of the Supreme Court Commission on the Florida Appellate Structure*. Under that approach, the existence or nonexistence of a written opinion was a factor which would be explicitly considered in deciding whether to exercise discretionary review, including where review is sought on the basis of conflict of decisions. *Report on Appellate Structure*, *supra* note 285, at 284.

477. *See* SUP. CT. R. 10.1(a).

478. *See* STERN ET AL., *supra* note 41, § 4.4, at 200.

479. *Id.* (footnote omitted).

out,[480] it is reasonably clear that the United States Supreme Court's practice has been to resolve conflicts between United States courts of appeals on the basis of written opinions, not on the basis of decisions without opinion. On the other hand, as the examples earlier in this section indicate, the Supreme Court does not hesitate to review a decision without opinion if the issue presented is sufficiently important.[481]

Some may also object that either proposal—the California alternative or the complete elimination of the written opinion requirement—could cause the supreme court's workload to increase. There are several responses to that contention. First, if the criterion for review requires great public importance and a certificate of counsel, the experience with the en banc rule suggests that there will not be a voluminous increase in filings.[482] Second, as the experience under the en banc rule also indicates, petitions asserting that the matter is one of exceptional importance are ordinarily easy to evaluate. By contrast, petitions asserting conflict are not.[483] Third, it is proposed that the entire system be under the control of the supreme court and be regulated by rule. Adjustments can be made, if need be, to fine tune the system.[484]

Finally, some may object to the elimination of the written opinion requirement because it would increase the reliance on staff for the screening of petitions. If the system is implemented as suggested above, the workload should remain within reasonable boundaries. However, even if it were necessary to rely on staff to examine petitions for review in no-opinion cases, that would be an improvement over the present situation in which such decisions are excluded from review entirely.

J. *Conclusion*

Florida's written opinion requirement was imposed in a time of crisis and should be revisited. The categorical restriction is the most severe limitation on access to the state supreme court in any American jurisdiction.[485] It runs counter to ABA Standards, the experience of other states, and the recommendation contained in the *Report of the Supreme Court*

480. Rehnquist, *supra* note 9, at 11 (commenting that the percolation theory is a "strange" and inappropriate form of decisionmaking).

481. A court of appeals decision without opinion which is very materially in conflict with settled principles might also call for the exercise of the Court's supervisory jurisdiction. *See* SUP. CT. R. 10.1(a).

482. *See supra* part V.D.

483. *See supra* note 314 and accompanying text.

484. *See supra* part IV.D.

485. *See supra* part VI.C.

Commission on the Florida Appellate Structure.[486] The preferred alternative would be to delete the requirement. Decisions without opinion would be reviewed on the basis of importance, but not conflict. A certificate of counsel patterned on the en banc rule would be required.

Alternatively, if the written opinion requirement is retained, then the California system should be adopted whereby an opinion may be requested by motion for rehearing.[487] If the request is denied, the litigant may nonetheless petition for discretionary review.[488] Either of these reforms would provide greater access to the supreme court and provide a more flexible system of discretionary review.

VII. A COMMENT ON THE FLORIDA SUPREME COURT'S MANDATORY WORKLOAD

The Florida Supreme Court's discretionary jurisdiction forms only part of the court's workload. The court spends much of its time reviewing cases that fall within its mandatory jurisdiction.[489] In addition, the court has responsibility for the administration and management of the judicial branch, has broad rulemaking authority, and oversees the Bar.[490]

Any proposal to expand the court's discretionary jurisdiction cannot be divorced from consideration of the remainder of the court's workload. The court's capacity to allocate time to discretionary review, whether it be on the merits or on consideration of petitions for review, is directly impacted by the court's other tasks, particularly by its mandatory jurisdiction.

By far the largest single item of the court's workload is its mandatory review of death penalty cases.[491] A recent court estimate states, "While capital cases comprise only 6% of [the Court's] caseload, they take approximately 30 to 40% of the Court's time."[492] This work-

---

486. *See supra* parts VI.A; C.-F.

487. *See supra* notes 330-32 and accompanying text.

488. *See supra* notes 330-32 and accompanying text.

489. *See* FLA. CONST. art. V, § 3(b).

490. *See id.* §§ 2, 3, 4(b)(1), 9, 15.

491. *See* Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 54 (1985).

492. Memorandum from Sid J. White, Clerk of the Florida Supreme Court, to Chief Justice Shaw (Nov. 19, 1991) (on file with the *Florida Law Review*); *accord* Mello & Robson, *supra* note 491.

> One former Justice of the Florida Supreme Court estimated that the court spent from thirty-five to forty percent of its time on death penalty cases, and two former research aides to Florida Supreme Court Justice Ben Overton have written that "[u]nquestionably, the most difficult and time-consuming class of cases which the court reviews is the direct appeal from a circuit court order imposing the death penalty."

load figure is unexpectedly large.[493] Plainly, it has an impact on the court's ability to handle other work. From the standpoint of judicial administration, the workload presents two issues, which will be discussed below.

A. *Jury Unanimity and the Death Penalty*

In a significant majority of the jurisdictions having capital punishment, the jury decides the sentence and must unanimously vote for the death penalty in order for it to be imposed.[494] The "requirement of unanimity reflects the judgment that sentence of death is a sanction so enormous and exceptional that it should not be imposed unless the case is

---

Id. (citation omitted). Among the factors influencing the percentage of workload is not only the number of death penalty appeals filed, but the governor's practice in signing warrants for execution. *See Justice Raymond Ehrlich, First FSU Jurist-in-Residence, Heads Back to Private Practice*, ALUMNEWS, FLA. ST. U. C. L., Winter 1992, at 5. The number and timing of warrants influence requests for emergency relief, which must be given priority. *Id.*

It is conceivable that the workload will move upward, at least in the near term. The Supreme Court Committee on Postconviction Relief in Capital Cases recommended time standards for the processing of petitions for postconviction relief, including a shortening of the period of time within which a petition for postconviction relief may be filed. Report of the Supreme Court Committee on Postconviction Relief in Capital Cases, at 4 (May 31, 1991) (unpublished report, on file with the Clerk of the Florida Supreme Court). The time-shortening recommendation for filing a postconviction petition has been adopted as Florida Rule of Criminal Procedure 3.851, effective for convictions becoming final after January 1, 1994. *In re*: Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence Has Been Imposed) and Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence), 18 Fla. L. Weekly S553 (Fla. Oct. 21, 1993).

493. One Justice has estimated that in Illinois the death penalty workload consumes 18% of the court's time. Keith H. Beyler, *Illinois Appellate Courts: Meeting the Challenge of Heavier Caseloads*, 78 ILL. B.J. 440, 443 (1990). A California justice put the figure at 20% for that court. Marcus M. Kaufman, *Crisis in the Courts*, CAL. LAW., Aug. 1990, at 28, 30.

494. Thirty-six states, plus the United States Government and United States military, have capital punishment statutes. NAACP LEGAL DEFENSE & EDUCATION FUND, DEATH ROW U.S.A. REPORTER, CURRENT SERVICE, Summer 1993, at 477. Fourteen states and the District of Columbia do not. *Id.*

"At least 26 jurisdictions with presumptively valid capital statutes allow a death sentence only if the jury votes for death, unless the defendant has requested sentencing by the court." Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 924 n.2 (1991) (citations omitted). Mello's tabulation includes Delaware, which has subsequently become an advisory jury state, DEL. CODE ANN. tit. 11, § 4209 (1987 & Supp. 1992), but omits Mississippi, Missouri, and Oregon, all of which require a unanimous jury in order to impose the death penalty. *See* MISS. CODE ANN. § 99-19-103 (1991); MO. ANN. STAT. § 565.030 (Vernon 1993); OR. REV. STAT. § 163.150 (1991). "A 1980 survey found that 23 states explicitly required jury unanimity to impose death, and most of the remaining capital punishment states did so by implication." Mello, *supra*, at 926 n.3 (citation omitted); *see* Raymond J. Pascucci, Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1240-41 (1984).

clear enough to convince all the jurors."[495] It is in accord with "the tradition of jury unanimity in criminal matters."[496] Under the most common practice, if the jury is not unanimous, then the sentence is for life.

Florida's system is different. In Florida and three other states, the jury has an advisory role. In Florida, a vote by seven or more of the twelve jurors for the death sentence is deemed to be a recommendation for death; a tie vote or a majority vote for a life sentence constitutes a recommendation for life. The judge is not bound by the recommendation; in particular, the judge may override a jury recommendation for life and impose the death sentence.[497] Commentators describe Florida's advisory jury system as having been chosen primarily in the belief that it was required by *Furman v. Georgia*.[498] It was also suggested by some that a judge would be less likely to impose the death penalty than would a jury,[499] a prediction that has not been borne out in practice.[500] To the extent that Florida's advisory jury system rested on a perception that *Furman* required it, that perception has been dispelled.[501] Later United States Supreme Court decisions have made clear that jury sentencing is permissible,[502] an approach now followed in the majority of states which impose the death penalty and in the federal system.[503]

On principle, the majority American view, which requires a unanimous jury vote in order to impose the death penalty, is by far the more

---

495. MODEL PENAL CODE § 210.6 commentary at 150 (footnote omitted).

496. *Id.* (footnote omitted).

497. FLA. STAT. § 921.141 (1991). The other states using an advisory jury are Alabama and Indiana, Mello, *supra* note 494, at 925 n.2, and recently, Delaware. DEL CODE ANN. tit. 11, § 4209 (1987 & Supp. 1992).

In four other states—Arizona, Idaho, Montana, and Nebraska—the judge serves as the sentencer without a jury of any kind. Mello, *supra* note 494, at 925 n.2.

498. 408 U.S. 238 (1972).

As the Model Penal Code Comment states:

> The decisions in *Furman* left retentionist jurisdictions [states retaining the death penalty] in a quandary. The Court had made it clear, albeit by the slightest of majorities, that a system of wholly unguided jury discretion in imposing the death penalty would not be permitted. On the other hand, one could only speculate as to whether some other basis for capital punishment might survive constitutional scrutiny.

MODEL PENAL CODE § 210.6 cmt. 12(a) at 155; *see also* Mello, *supra* note 494, at 928.

499. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

500. It has been suggested that this phenomenon was entirely foreseeable. "In the most extensive empirical study yet conducted on jury behavior in America, Kalven and Zeisel collected data indicating that jurors were less likely than judges to impose a death sentence." Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1413 (1985) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 434-39 (1966)).

501. Gregg v. Georgia, 428 U.S. 153 (1976).

502. *E.g., id.*

503. Mello, *supra* note 494, at 369 n.2.

desirable one. The death penalty is the most extreme sanction and is irreversible. Imposition of the death penalty should be reserved for cases in which the jury, as the voice of the community, is unanimously in agreement. The requirement of unanimity reduces the risk of erroneous adjudication, and would likely simplify the supreme court's review of the penalty phase. If the jury is less than unanimous, then the sentence should be for life. Where the sentence is life, the appeal lies in the district court of appeal instead of the supreme court.[504]

The foregoing considerations are, of course, substantive ones and do not relate primarily to judicial administration. Legislation has been introduced in Florida which would require that the jury either be unanimous or have a vote of 11-1 to impose the death penalty.[505] Although that measure was not adopted, the question to address is the possible impact on judicial administration if Florida were to follow the great majority of states by requiring jury unanimity.

Based on the supreme court's 1991 dispositions, there were unanimous recommendations for death in only eleven percent of capital cases.[506] The Assistant Attorney General in charge of death penalty appeals has been quoted as saying, "In all murder cases, I would say 10 percent would be the top number of cases that end up with a 12-0 vote recommending death."[507] The legislation introduced most recently in Florida did not propose a rule of unanimity, but instead required a vote of 11-1 or 12-0 in order to impose the death penalty.[508] Based on 1991 dispositions, juries voted 11-1 or 12-0 to impose the death penalty in twenty-three percent of the cases.[509]

---

504. *See* FLA. CONST. art. V, § 3(b)(1).

505. Fla. H.B. 911 (1992); Fla. S.B. 1150 (1992).

506. *See* Death Penalty Cases—Jury Votes, Cases Disposed of from 1/1/91—12/3/91 (unpublished report, on file with the Clerk of the Florida Supreme Court) [hereinafter Death Penalty Cases]. In 1991 there were 63 dispositions in capital cases, of which two were transferred to district courts of appeal because the death penalty had not been imposed or had been reduced to a life sentence. Of the remaining 61 cases, there was a unanimous verdict for the death penalty in 7 cases, representing 11% of the total of 61. *Id.*

In one of the cases, there were three counts. On one count the jury made a unanimous 12-0 death recommendation; on another, 11-1; on another, 10-2. For this calculation the case has been counted once, as a 12-0 recommendation for death.

507. Patrick May, *Order Damsel of Death Executed, Jury Advises Judge*, MIAMI HERALD, Jan. 31, 1992, at 4B.

508. Fla. H.B. 911 (1992); Fla. S.B. 1150 (1992).

509. After reduction for the two transferred cases, *see supra* note 506, there were seven unanimous recommendations for death, *id.*, and another seven with a vote of 11-1. In the multiple count case described *supra* note 506, the defendant had a vote of 12-0 on one count and 11-1 on another count; for this computation the case has been counted once. The 14 cases represent 23% of the total of 61. *See supra* note 506.

Naturally, if the statute were changed in order to require jury unanimity to impose the death penalty, the dynamics within the jury would change. At present the jury is instructed that its vote is advisory and that a simple majority vote is sufficient to recommend the death penalty. If the system were changed and the jury were advised that a unanimous verdict is necessary to impose the death penalty, it is reasonable to expect greater pressure for unanimity where a majority, especially a large majority, favors the death sentence for that case.

It is difficult to predict the quantitative impact of such a change in law. It seems reasonable to assume that juries presently voting in favor of a life sentence would continue to do so. It also appears reasonable to expect that where the jury's tentative vote discloses a strong majority in favor of the death sentence, there will be a tendency for many of those cases to become unanimous. Based on 1991 dispositions, approximately fifty-four percent of the supreme court's death penalty cases had jury recommendations of 9-3, 10-2, 11-1, or 12-0. Farther along the spectrum are the cases having 8-4 or 7-5 votes for death; they comprised about twenty-seven percent of the 1991 dispositions.[510] The remaining death penalty workload is comprised of "override" cases. As explained in the next section, the so-called "override" cases, in which the trial court overrides a jury's life recommendation and imposes the death sentence, comprise an average of twenty-one percent of the supreme court's death penalty workload, and were approximately nineteen percent in 1991. Based on those rough assumptions, a change in law would reduce the supreme court's death penalty workload by (a) eliminating the override cases discussed in the next section, and (b) shifting other nonunanimous cases (which would receive life sentences) to the district courts of appeal. It is impossible to predict with any certainty exactly what the resulting workload savings would be.

It will be recalled that death penalty workload consumes thirty to forty percent of the supreme court's time.[511] Hypothetically, if that workload were reduced by one-third, then there would be a net savings of ten to thirteen percent of the supreme court's entire working time. Any work-

510. *See* Death Penalty Cases, *supra* note 506. There were 10 dispositions having a 10-2 vote, amounting to 16%, and 9 dispositions having a 9-3 vote, amounting to 15%. *Id.* When added to the 23% having a vote of 11-1 or 12-0, the total is 54%. *See id.* The multiple count case described *supra* note 506 has been counted once for this computation.

Twelve cases had jury recommendations of 8-4, representing 20% of the total. For these purposes two 2-count cases have been excluded, each of which also had one count with a 9-3 vote. In addition, four cases had votes of 7-5, representing 7% of the total. *See* Death Penalty Cases, *supra* note 506.

511. *See supra* note 492 and accompanying text.

load reduction in this general range would be significant from the standpoint of judicial administration.

B. *The Trial Judge Override of Jury Recommendations for Life Sentences*

Adoption of a unanimous jury requirement as described above would automatically eliminate the so-called "override" cases—cases in which the trial judge overrides a jury recommendation for a life sentence and imposes the death penalty. As an alternative to the foregoing recommendation for jury unanimity to impose the death penalty, Florida should prohibit judicial override outright.

Prior to 1972, Florida's death penalty statute provided that if the jury in a capital case recommended mercy by a majority vote, the court was required to follow the jury's recommendation and sentence the defendant to life imprisonment.[512] The judge could not override the jury's decision regarding a life sentence.[513]

After the invalidation of the state death penalty statutes in 1972,[514] Florida revised its death penalty law in order to meet what were perceived to be constitutional objections.[515] In doing so, Florida became one of a very few states to make the jury completely advisory.[516] Under Florida's revised statute, the trial judge may override a jury recommendation for life and impose the death penalty.[517] Sentencing judges have done this with some regularity. In the period through March 1988, twenty-one percent of the defendants sentenced to death had received a jury recommendation for a life sentence.[518]

---

512. FLA. STAT. § 921.141 (1971). This had been Florida law since 1872. MODEL PENAL CODE § 210.6 cmt. 4(c) at 129 n.67 (1980). This followed the general pattern of nineteenth-century American reform in which the automatic death penalty for all murder, or first degree murder, was replaced by "discretionary imposition of capital punishment for the highest category of murder." *Id.* at 129 (footnote omitted).

513. Mello, *supra* note 494, at 969 (citing Newton v. State, 21 Fla. 53, 101 (1884)).

514. Furman v. Georgia, 408 U.S. 238 (1972). *See generally* Mello & Robson, *supra* note 491, at 35 n.19.

515. *See supra* note 498 and accompanying text.

516. Mello, *supra* note 494, at 925 n.2; *see* FLA. STAT. § 921.141(2)-(3) (1991).

517. FLA. STAT. § 921.141(3) (1991). The legal standard for overriding the jury recommendation is set forth in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

518. Mello, *supra* note 494, at 926. Mello reported that between December 1972 and March 1988, there were 526 death sentences under the new statute, of which 113 had received jury recommendations for life. *Id.* Thus, the life recommendations were 21% of the total.

More recent statistics are not significantly different. Sixty-three death penalty cases were disposed of in 1991. Death Penalty Cases, *supra* note 506. Excluding one case transferred (death penalty not imposed), the remainder is 62. Of those, 12 were cases in which the trial judge had imposed the death sentence despite a jury recommendation for a life sentence. *See id.* That constitutes 19% of the

The simple fact about the override cases is that the override is almost always reversed.[519] In 1989 the supreme court put the reversal rate at approximately eighty percent.[520] The reversal rate was ninety-one percent in 1991.[521] Thus, in approximately eighty to ninety percent of the override cases, the death penalty is vacated and the jury recommendation for life is reinstated. Given the high reversal rate and the applicable substantive law,[522] it might have been thought that override cases would largely disappear. Surprisingly, override cases continue to comprise a significant percentage of the supreme court's workload.

From the standpoint of judicial administration, it makes no sense to continue to allow the judge to override a jury's recommendation for a life sentence when such cases result in reversal eighty to ninety percent of the time. In reality the override cases have little actual effect on the ultimate imposition of the death penalty, because the cases are so frequently reversed. As a practical matter, most such defendants wind up with a life sentence.

Life sentence cases are reviewed in the district courts of appeal, not the supreme court. A prohibition against imposing the death penalty where the jury recommended life would cause the override cases to be deflected to the district courts of appeal. The workload savings to the su-

---

62 total. *See id.* One of the 12 was reduced to life by the trial court pursuant to a relinquishment of jurisdiction, but is counted as an override because that was the status of the case when appealed. *Id.*

519. For present purposes, an "override case" is one in which the judge overrides a jury recommendation for life and instead imposes the death sentence.

520. Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). The court referred to the time period since 1985. *Id.*

521. In 1991 the court disposed of 12 cases in which a judge overrode a life recommendation by the jury and imposed the death penalty. *See* Death Penalty Cases, *supra* note 506. For purposes of computing the reversal rate, one case must be eliminated because the circuit court reduced the death sentence to a life penalty during a relinquishment of jurisdiction. *See id.* That case was transferred to a district court of appeal. *Id.*

Of the remaining 11 cases, the Florida Supreme Court reduced 9 to a life sentence as the jury had recommended. *See id.*

One additional case was reversed for a new trial. *See* Wright v. State, 586 So. 2d 1024, 1025 (Fla. 1991). However, the court also reversed the imposition of the death penalty. *Id.* The court concluded that the trial court's reasons for overriding the jury recommendation were insufficient, and under double jeopardy principles the death penalty could not be sought in the new trial. *Id.* at 1031-32.

In one case, the override was affirmed. Death Penalty Cases, *supra* note 506.

In sum: of the 11 override cases adjudicated in 1991, 10 overrides were reversed; 1 was affirmed. *Id.*; *see also* Mello, *supra* note 494, at 936-38 (discussing jury override statistics from 1974-1990); Mello & Robson, *supra* note 491, at 53-54 (discussing 1984 jury override statistics).

522. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) ("In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.").

preme court would be significant. Override cases constitute an average of twenty-one percent of the supreme court's death penalty caseload.[523] Since death penalty cases consume thirty to forty percent of the supreme court's time,[524] elimination of the override category would reduce the supreme court's overall workload by six to eight percent. Accordingly, the statute should be amended to eliminate the trial judge's authority to override a jury's life sentence recommendation. This recommendation is, of course, an alternative to the previous section's recommendation of a rule of jury unanimity for imposition of the death penalty. Adoption of a unanimous jury requirement would automatically eliminate the override cases.

C. *Conclusion*

Florida's death penalty workload is high, consuming thirty to forty percent of the court's time. Unlike most states, Florida does not require a unanimous jury vote in order to impose the death penalty. This appears to influence the rate at which Florida courts impose the death penalty, and has a corresponding impact on the supreme court workload. While a requirement of jury unanimity is desirable as a matter of policy, it would also result in a reduction in the supreme court's workload.

If the first measure is not adopted and the advisory system is retained, the statute should be amended to eliminate the trial judge's ability to override a jury recommendation of life. Trial judges override jury recommendations of life imprisonment in twenty-one percent of the cases, despite the fact that such death sentences are rarely upheld. Elimination of the override cases would thus reduce the death penalty workload by twenty-one percent, resulting in an overall workload savings of six to eight percent. At the same time, the elimination of judicial overrides would have little effect on the number of defendants given the death penalty, because few of the override sentences survive judicial review.[525]

VIII. Conclusion and Summary of Recommendations

The responsibility of a supreme court is to resolve the questions of greatest importance for the public interest and the administration of justice. At the heart of the discretionary review function is the ability of the

523. *See supra* note 518 and accompanying text.

524. *See supra* note 492 and accompanying text.

525. In some jurisdictions debate is ongoing about other possible alternatives for management of death penalty review. *See generally* Beyler, *supra* note 493, at 445; Kaufman, *supra* note 493, at 32; Robert Weisberg, *Essay—Redistributing Wealth of Capital Cases: Changing Death Penalty Appeals in California*, 28 Santa Clara L. Rev. 243, 256-66 (1988).

court to select cases on the basis of the importance of the question presented and to decline those cases which do not require the supreme court's attention. The supreme court's jurisdictional arrangements and discretionary review criteria should facilitate, rather than impede, the attainment of those objectives.

Florida's discretionary review system should be modified by granting the supreme court explicit authority to review any case on the basis of importance. Experience with the district court of appeal en banc rule[526] suggests that where exceptional importance is the standard to be applied, screening of petitions for review will be relatively straightforward. Ordinarily, in such cases it is facially obvious whether the question presented is important or not. By contrast, screening petitions on the basis of conflict is often an arduous task because significant analysis is required to determine whether the asserted conflict is real or illusory.[527]

In accordance with the practice in other jurisdictions, the Florida Supreme Court should have plenary authority to promulgate rules and guidelines for the exercise of its discretionary review powers. Rules should be adopted for the guidance of the Bar and the court, indicating the reasons which call for the exercise of the court's discretion to grant review. Through the rulemaking power or otherwise,[528] the court should be given ample latitude to fine-tune the discretionary review process.

In an importance-based system of review, the requirement of a written opinion with jurisdictionally relevant words is neither reliable nor desirable. That is especially true where considerations of workload require district courts of appeal to affirm without opinion or in abbreviated opinions. To be sure, the existence or nonexistence of a written opinion is a relevant factor in deciding whether to grant review. As a matter of policy, the court could decline to consider petitions for review in no-opinion cases where review is sought because of an asserted conflict of decisions. However, the written opinion requirement should be eliminated as a general precondition for review, or if retained, should be deemed satisfied where the litigant has sought, but failed to obtain, a written opinion.

The Florida Supreme Court's time and opportunity for discretionary

526. FLA. R. APP. P. 9.331.

527. It seems probable that a shift to an importance-based standard at the supreme court level would also result in the district courts of appeal being more sparing in the certification of questions of great public importance. Because of the supreme court's present jurisdictional limitations, there seems to be a tendency toward liberal certification of questions, thereby preserving the possibility of supreme court review. Were there to be an importance-based standard at the supreme court level and explicit importance-based guidelines for review, the district courts of appeal would probably certify fewer questions.

528. The 1984 Article V Review Commission recommended the creation of a special court-legislative procedure for amending the supreme court's jurisdictional article. *See supra* part IV.C.

review is affected by the size of its other workload. The court's largest single commitment is the review of death penalty cases, absorbing thirty to forty percent of the court's time. In the majority of states, the death penalty can be imposed only by the vote of a unanimous jury, in contrast with Florida's advisory jury system. As a matter of policy, the ultimate penalty should not be imposed by less than a unanimous vote. Accordingly, Florida should switch to the system used in most states by requiring jury unanimity. Such a change would also reduce the supreme court's death penalty workload by shifting to the district courts of appeal any cases which remain non-unanimous. Related are the so-called override cases, in which the trial court overrides a jury recommendation for life and instead imposes the death penalty. These cases are reversed eighty to ninety percent of the time, and constitute about twenty-one percent of the death penalty workload. A prohibition of override would likewise result in a supreme court workload reduction.

In short, Florida should take the following steps:

(1) The criteria for discretionary review should not be expressed as constitutional limitations, but instead should be nonlimiting guidelines promulgated by rule. The preferred approach would be to confer special rulemaking power on the supreme court as contemplated by the 1984 Article V Review Commission and the *Model Judicial Article*, so that the court could by rule modify the relevant portions of its judicial article. Enhanced rulemaking power would give the supreme court needed flexibility. An alternative approach would be to follow the federal model and authorize the supreme court to review any decision of a district court of appeal; California's constitutional language is apt.

(2) The criteria for discretionary review by petition to the supreme court should include an explicit standard authorizing review because of the importance of the question presented. This standard should at least be equivalent to the district court of appeal's power to certify a decision on the basis of great public importance. A petition for discretionary review on this ground would be accompanied by a certificate of counsel patterned on the en banc rule.[529]

(3) The requirement for a written opinion as a condition of discretionary review should be changed. The preferred alternative is to abolish the written opinion requirement in favor of the procedure just outlined. Discretionary review of a decision without opinion would be permitted on the basis of the importance of the question presented, but not on the basis of decisional conflict. Alternatively, if the written opinion requirement is retained, then the California system should be adopted. Under this sys-

529. FLA. R. APP. P. 9.331.

tem, the litigant may seek supreme court review if the litigant has requested a written opinion on the point in question, but the court of appeals has declined to write such an opinion.

(4) Florida should follow the great majority of states by adopting legislation requiring jury unanimity in order to impose the death penalty. While desirable on substantive grounds, such a modification would also reduce the supreme court's death penalty caseload. Alternatively, legislation should be adopted which would prohibit a trial judge from overriding a jury recommendation of a life sentence and imposing the death penalty. Such death sentences are almost invariably reversed, and they amount to twenty-one percent of the death penalty workload.

APPENDICES

APPENDIX A

CONSTITUTION OF THE STATE OF FLORIDA,

ARTICLE V, SECTIONS 3(b), 4(b) (CURRENT VERSION)

FLA. CONST. art. V, § 3(b):

SECTION 3. Supreme court.—

(b) JURISDICTION.—The supreme court:

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

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

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

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

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

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

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

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

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

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

FLA. CONST. art. V, § 4(b):

SECTION 4. District courts of appeal.—

(b) JURISDICTION.—

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

APPENDIX B

UNITED STATES SUPREME COURT RULE 10

SUP. CT. R. 10. Considerations Governing Review on Writ of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

APPENDIX C*

CRITERIA FOR DISCRETIONARY SUPREME COURT REVIEW OF INTERMEDIATE APPELLATE COURT DECISIONS IN THE STATES

ALABAMA

ALA. R. APP. P. 39(c):

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

(2) From decisions that affect a class of constitutional, state or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the United States Supreme Court, the Alabama Supreme Court, or the Alabama courts of appeals; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision with which the conflict is alleged; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling Supreme Court cases overruled which were followed in the decision of the court of appeals.

ALA. R. APP. P. 39(k) (excerpt):

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with

* This appendix omits rules which merely reiterate the contents of a constitutional or statutory set of discretionary review criteria.

that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

ALASKA

ALASKA R. APP. P. 303(b)(5):

(5) A statement of concrete reasons, apart from those asserted for reversal, explaining why the issues presented have importance beyond the particular case and require decision by the court of discretionary review, and referring to specific paragraphs of Rule 304;

ALASKA R. APP. P. 304:

Rule 304. Grounds for Granting Petition for Hearing

The granting of a petition for hearing is not a matter of right, but is within the discretion of the court of discretionary review. The following, while neither controlling nor fully measuring that court's discretion, indicates the character of reasons which will be considered:

(a) The decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the supreme court of the state of Alaska, or with another decision of the court of appeals.

(b) The intermediate appellate court has decided a significant question concerning the interpretation of the Constitution of the United States or the Constitution of Alaska, which question has not previously been decided by the supreme court of the United States or the supreme court of the state of Alaska.

(c) The intermediate appellate court has decided a significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the supreme court of the state of Alaska.

(d) Under the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the present case, and appears reasonably necessary to further the administration of justice.

ARIZONA

ARIZ. CONST. art. 6, § 5.3:

The Supreme Court shall have . . . [a]ppellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impost, assessment, toll, statute, or municipal ordinance.

ARIZ. R. CRIM. P. 31.19.c.4 (excerpt):

4. The reasons why the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

ARIZ. R. CIV. APP. P. 23(c)(4) (excerpt) (identical to above excerpt from Arizona Rules of Criminal Procedure).

ARKANSAS

ARK. R. S. CT. & CT. APP. 1-2(d), (f):

(d) CERTIFICATION FROM COURT OF APPEALS TO SUPREME COURT. A case which has been appealed to the Court of Appeals may be certified to the Supreme Court by the Court of Appeals if the Court of Appeals finds that the case: (1) is excepted from its jurisdiction by section (a) hereof [listing cases appealable directly to Arkansas Supreme Court]; or (2) involves an issue of significant public interest or a legal principal of major importance. The Supreme Court may accept for its docket cases so certified or may remand any of them to the Court of Appeals for decision.

. . . .

(f) PETITION FOR REVIEW. No appeal as of right shall lie from the Court of Appeals to the Supreme Court. A petition for review may be granted by the Supreme Court for review of decisions of the Court of Appeals only if the Supreme Court determines that the case (1) should have come to the Supreme Court originally under Section (a) of this Rule, (2) should have been certified to the Supreme Court under Section (d)(2) of this Rule, or (3) was decided in the Court of Appeals by a tie vote.

ARK. R. S. CT. & CT. APP. 2-4(c):

(c) REQUIREMENT FOR ASSERTING RULE 1-2(d)(2). To invoke the Supreme Court's jurisdiction asserting that the case involves an issue of significant public interest or a legal principle of major importance as set forth in Rule 1-2(d)(2), the petitioner must have filed a motion in the

Court of Appeals requesting certification to the Supreme Court before the case was submitted to the Court of Appeals. The motion must contain a certificate of counsel stating that it is filed in good faith belief that the case should be certified to the Supreme Court.

CALIFORNIA

CAL. APP. R. 29:

RULE 29. GROUNDS FOR REVIEW IN SUPREME COURT

(a)[Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

COLORADO

COLO. APP. R. 49:

Rule 49. Considerations Governing Review on Certiorari

(a) Addressed to Judicial Discretion. A review in the Supreme Court on writ of certiorari as provided in section 13-4-108, C.R.S., and section 13-6-310, C.R.S., is a matter of sound judicial discretion and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the district or superior court on appeal from the county court has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals, or district or superior court on appeal from the county court, has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court;

(3) Where a division of the Court of Appeals has rendered a decision

in conflict with the decision of another division of said court; the same ground applies to judgments and decrees of district courts on appeal from the county court when a decision is in conflict with another district court on the same matters;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a lower court as to call for the exercise of the Supreme Court's power of supervision.

CONNECTICUT

CONN. R. S. CT. 4127:

4127. Certification by Supreme Court—Basis for Certification

Certification by the supreme court on petition by a party or request by the appellate panel is not a matter of right but of sound judicial discretion and will be allowed only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons which will be considered:

(1) Where the appellate court has decided a question of substance not theretofore determined by the supreme court or has decided it in a way probably not in accord with applicable decisions of the supreme court.

(2) Where the decision under review is in conflict with other decisions of the appellate court.

(3) Where the appellate court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by any other court, as to call for an exercise of the supreme court's supervision.

(4) Where a question of great public importance is involved.

(5) With respect only to appeals from the appellate court, where the judges of the appellate panel are divided in their decision or, though concurring in the result, are unable to agree upon a common ground of decision.

FLORIDA

FLA. CONST. art. V, § 3(b)(3), (4):

(b) JURISDICTION.—The supreme court:

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

the same question of law.

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

GEORGIA

GA. CONST. art. 6, § 6, ¶ 5:

The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.

GA. S. CT. R. 29, 30:

Rule 29

A review on certiorari is not a right. A petition for the writ will be granted only in cases of great concern, gravity, and importance to the public.

Rule 30

Subject to Rule 29 certiorari will not be granted:

(1) To review the sufficiency of evidence;

(2) Where the Court of Appeals has affirmed the denial of a motion to dismiss, denial of a motion for judgment on the pleadings, or a denial of a motion for summary judgment;

(3) In workers' compensation cases unless three judges of the Court of Appeals have dissented or the cases conflict on a question of law.

HAWAII

HAW. REV. STAT. ANN. § 602-59(b) (1985):

(b) The application for writ of certiorari shall tersely state its grounds which must include (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

[NOTE: For criteria governing initial assignment of cases, see HAW. R. APP. P. 31(a).]

IDAHO

IDAHO APP. R. 118(b):

(b) Criteria for Granting Petitions for Review by the Supreme Court. Granting a petition for review from a final decision of the Court of Appeals is discretionary on the part of the Supreme Court, and will be granted only when there are special and important reasons and a majority

of the Justices direct that the petition be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, are factors that will be considered in the exercise of the Court's discretion:

(1) Whether the Court of Appeals has decided a question of substance not heretofore determined by the Supreme Court;

(2) Whether the Court of Appeals has decided a question of substance probably not in accord with applicable decisions of the Idaho Supreme Court or of the United States Supreme Court;

(3) Whether the Court of Appeals has rendered a decision in conflict with a previous decision of the Court of Appeals;

(4) Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of the Supreme Court's power of supervision;

(5) Whether a majority of the judges of the Court of Appeals, after decision, certifies that the public interest or the interests of justice make desirable a further appellate review.

[NOTE: For criteria governing initial assignment of cases, see *id.* R. 108.]

ILLINOIS

ILL. S. CT. R. 315(a):

(a) Petition for Leave to Appeal; Grounds. Except as provided below for appeals from the Industrial Commission division of the Appellate Court, a petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed. However, no petition for leave to appeal from a judgment of the five-judge panel of the Appellate Court designated to hear and decide cases involving review of Industrial Commission orders shall be filed, unless at least one judge of that panel files a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court. A motion asking that such a statement be filed may be filed as a prayer for alterna-

tive relief in a petition for rehearing, but must, in any event, be filed within the time allowed for filing a petition for rehearing.

INDIANA

IND. R. APP. P. 11(B)(2):

(2) Errors upon which a petition to transfer shall be based may include:

(a) That the opinion or memorandum decision of the Court of Appeals contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent, or

(b) That the opinion or memorandum decision of the Court of Appeals erroneously decides a new question of law, concisely stating the same, or

(c) That there is a conflict between the opinion or memorandum decision and a prior opinion of the Court of Appeals stating concisely the conflict and opinion in which it occurs, or

(d) That the opinion or memorandum decision of the Court of Appeals correctly followed ruling precedent of the Supreme Court, but that such ruling precedent is erroneous or is in need of clarification or modification, or

(e) The opinion or memorandum decision of the Court of Appeals fails to give a statement in writing of each substantial question arising on the record and argued by the parties. If this error is relied upon, the petition shall set forth such portions of the record so as to affirmatively disclose such failure, and establish that petitioner was prejudiced thereby [, or]

(f) That the opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record, concisely setting out the misstatement (with reference to the record where appropriate), the materiality of the misstatement and specifically stating the resulting prejudice to the petitioner.

IOWA

IOWA R. APP. P. 402(c):

(c) Grounds. An application to the Supreme Court for further review shall allege precisely and in what manner the Court of Appeals: (1) Has erred; (2) has rendered a decision which is in conflict with a prior holding of a published Court of Appeals decision or published Supreme Court decision; (3) has not considered a potentially controlling constitutional provision in rendering its opinion; or (4) has decided a case which should have been retained by the Supreme Court.

[NOTE: For criteria governing initial assignment of cases, see *id.* R. 401.]

KANSAS

KAN. STAT. ANN. § 20-3018(b) (1988):

(b) Any party aggrieved by a decision of the court of appeals may file a motion with such court for a rehearing, in accordance with rules of the supreme court, but such motion shall not be a condition precedent to a review of such decision by the supreme court, and any such party may petition the supreme court for review within thirty (30) days after the date of such decision. The procedures governing petitions for review shall be prescribed by rules of the supreme court, and the review of any such decision shall be at the discretion of the supreme court. While neither controlling nor fully measuring the court's discretion, the following shall be considered in determining whether review will be granted: (1) The general importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and a prior decision of the supreme court, or of another panel of the court of appeals; (3) the need for exercising the supreme court's supervisory authority; and (4) the final or interlocutory character of the judgment, order or ruling sought to be reviewed.

KENTUCKY

KY. R. CIV. P. 76.20(1):

(1) General

A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, and a motion for such review by the Court of Appeals of a judgment of the circuit court in a case appealed to it from the district court, shall be prosecuted as provided by this Rule 76.20 and in accordance with the Rules generally applicable to other motions. Such review is a matter of judicial discretion and will be granted only when there are special reasons for it.

LOUISIANA

[NOTE: Louisiana has no explicit criteria.]

MARYLAND

MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1989):

If the Court of Appeals finds that review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that the case be certified to it for review

and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 211A, § 11:

§ 11. Further appellate review of certain cases by supreme judicial court

There shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by that court, except:—(a) where a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interests of justice make desirable a further appellate review, or (b) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice. Upon the written order of a majority of the justices of the appeals court, the decision of a panel of the appeals court may be reviewed and revised by a majority of the justices of the appeals court. Such a review shall not be a condition precedent to obtaining further appellate review by the supreme judicial court.

MICHIGAN

MICH. CT. R. 7.302(B):

Rule 7.302 APPLICATION FOR LEAVE TO APPEAL

(B) Grounds. The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence;

(4) in an appeal before decision by the Court of Appeals, delay in final adjudication is likely to cause substantial harm;

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice.

MINNESOTA

MINN. STAT. ANN. § 480A.10 (West 1990):

480A.10. Further review in supreme court

Subdivision 1. After decision in court of appeals. The supreme court may grant further review of any decision of the court of appeals upon the petition of any party. In determining whether to grant such a petition, the supreme court should take into consideration whether the question presented is an important one upon which the court has not, but should rule, whether the court of appeals has held a statute to be unconstitutional, whether the court of appeals has decided a question in direct conflict with an applicable precedent of the supreme court, or whether the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the court's supervisory powers. The supreme court shall issue its decision whether to grant a petition for review within 60 days of the date the petition is filed.

MINN. R. CRIM. P. 29.04, subd. 4:

Subd. 4. Discretionary Review. Review of any decision of the Court of Appeals is discretionary with the Supreme Court. The following criteria may be considered:

(1) the question presented is an important one upon which the Supreme Court should rule;

(2) the Court of Appeals has ruled on the constitutionality of a statute;

(3) the Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court;

(4) the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; or

(5) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and

1. the case calls for the application of a new principle or policy;

2. the resolution of the question presented has possible statewide impact; or

3. the question is likely to recur unless resolved by the Supreme Court.

[NOTE: Minnesota Rule of Civil Appellate Procedure 117, subd. 2, is identical to Rule of Criminal Procedure 29.04, subd. 4, above, except that it contains no counterpart to the "direct conflict" criterion of Rule

29.04 subd. 4(3) *supra*.]

MISSOURI

MO. CONST. art. 5, § 10:

Section 10. Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

MO. S. CT. R. 83.03:

RULE 83.03 Transfer by Supreme Court After Opinion by Court of Appeals

In any case in which a motion for rehearing has been overruled and an application for transfer under rule 83.02 has been denied, the case may be transferred by order of this court on application of a party for any of the reasons specified in rule 83.02 [because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law], or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state. Application for such transfer shall be filed in this court within 15 days of the date on which transfer was denied by the court of appeals. Motions for reconsideration of the court's action in refusing an application for transfer shall not be accepted or filed.

NEBRASKA

[NOTE: Nebraska has no explicit criteria for discretionary review of a decision of its intermediate appellate court.]

NEW JERSEY

N.J. R. APP. PRAC. 2:12-4:

2:12-4. Grounds for Certification

Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to

the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

NEW MEXICO

N.M. STAT. ANN. § 34-5-14 B (Michie 1990):

34-5-14. Supreme court; appellate jurisdiction; review by certiorari to court of appeals; certification of cases to supreme court.

. . . .

B. In addition to its original appellate jurisdiction, the supreme court has jurisdiction to review by writ of certiorari to the court of appeals any civil or criminal matter in which the decision of the court of appeals:

(1) is in conflict with a decision of the supreme court;

(2) is in conflict with a decision of the court of appeals;

(3) involves a significant question of law under the constitution of New Mexico or the United States; or

(4) involves an issue of substantial public interest that should be determined by the supreme court.

Application to the supreme court for writ of certiorari to the court of appeals shall be filed with the clerk of the supreme court within twenty days after final action by the court of appeals. A copy of the application shall be filed by the clerk of the supreme court with the clerk of the court of appeals and the clerk of the court of appeals shall forthwith transmit the record in the case to the clerk of the supreme court. Upon filing of the application, the judgment and mandate of the court of appeals shall be stayed pending final action of the supreme court. No further briefs or oral argument in support of an application for writ of certiorari shall be filed or had in the supreme court unless so directed by the supreme court. If an application has not been acted upon within thirty days, it shall be deemed denied.

NEW YORK

N.Y. CONST. art. 6, § 3(b)(5), (6):

3. [Jurisdiction of court of appeals]

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

. . . .

In civil cases and proceedings as follows:

. . . .

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

N.Y. CT. APP. R. 500.11(d)(1)(v):

500.11 Motions

. . . .

(d) Permission to Appeal in Civil Cases.

. . . .

(1) The moving papers . . . shall contain . . .:

(v) A direct and concise argument showing why the questions presented merit review by this court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is a conflict among the Appellate Divisions. The particular portions of the record where the questions sought to be reviewed are raised and preserved shall be identified.

[NOTE: New York has no explicit criteria for discretionary review of a decision of its intermediate appellate court in criminal cases.]

NORTH CAROLINA

N.C. GEN. STAT. § 7A-31(c) (1989):

§ 7A-31. Discretionary review by the Supreme Court.

. . . .

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

NORTH DAKOTA

N.D. S. CT. ADMIN. R. 27, § 13(c):

Section 13. Review by the Supreme Court.

. . . .

(c) The Supreme Court may grant a petition for review from a judgment or order of the Court of Appeals when there are special and important reasons and a majority of the justices of the Supreme Court direct that the petition be granted. The following criteria, while neither controlling nor fully measuring the Supreme Court's discretion, will be considered in the exercise of the court's discretion:

(1) whether the Court of Appeals has decided a question of substance not previously determined by the Supreme Court;

(2) whether the Court of Appeals has decided a question of substance probably not in accord with applicable decisions of the North Dakota Supreme Court or of the United States Supreme Court;

(3) whether the Court of Appeals has rendered a decision in conflict with a published decision of the Court of Appeals;

(4) whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of the supervisory jurisdiction of the Supreme Court;

(5) whether a majority of the judges of the Court of Appeals, after decision, certify that the public interest or the interests of justice make desirable review by the Supreme Court; and

(6) whether there is a dissenting opinion in the Court of Appeals.

[NOTE: For criteria governing initial assignment of cases, see *id.* 27, § 10.]

OHIO

OHIO CONST. art. IV, § 2(B)(2)(d):

2(B)(2) The supreme court shall have appellate jurisdiction as follows:

. . . .

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals[.]

OHIO S. CT. PRAC. R. II, 4(A)(2):

(A) A motion to certify, a motion for leave to appeal or a claimed appeal as of right shall be supported by a memorandum which shall contain:

. . . .

(2) Only to the extent not indicated by such propositions of law and such argument, a concise statement of why the case is of public or great general interest, why a substantial constitutional question is involved or why leave to appeal should be granted, such statement to follow the argument.

OKLAHOMA

[NOTE: Oklahoma has no explicit criteria for discretionary review of a decision of its intermediate appellate court. For criteria governing retention of cases in the supreme court, rather than assignment to court of appeals, see OKLA. R. CIV. APP. P. 1.16(F).]

OREGON

OR. R. APP. P. 9.05(3)(e), (4):

RULE 9.05 PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

. . . .

(3) The petition shall contain in order:

. . . .

(e) A statement of specific reasons why the issues presented have importance beyond the particular case and require decision by the Supreme Court.

. . . .

(4) An assertion of the grounds on which the decision of the Court of Appeals is claimed to be wrong, without more, does not constitute compliance with subsection 3(e) of this rule. A petitioner may claim that one or

more of the following factors gives the issue presented importance beyond the particular case: [FN2. This list of factors is a guide to parties preparing petitions for review, not a limitation on the authority of the Supreme Court to grant petitions for review; the list is not exhaustive, but illustrative only.]

(a) the interpretation of a statute not previously construed by the Supreme Court and which affects large numbers of persons or governs transactions of public importance;

(b) the constitutionality of a statute or the legality of an important governmental action which will have irreversible consequences;

(c) the use and effect of a rule of trial court procedure;

(d) the jurisdiction of the Court of Appeals over the case; or

(e) a departure by the Court of Appeals from a prior decision of the Supreme Court or of the Court of Appeals.

PENNSYLVANIA

PA. R. APP. P. 1114 & note:

RULE 1114. CONSIDERATIONS GOVERNING ALLOWANCE OF APPEAL

Except as prescribed in Rule 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.

Note

Based on [former] U.S. Supreme Court Rule 19 . . . . The following, while neither controlling nor fully measuring the discretion of the Supreme Court, indicate the character of the reasons which will be considered:

(1) Where the appellate court below has decided a question of substance not theretofore determined by the Supreme Court, or has decided it in a way probably not in accord with applicable decisions of the Supreme Court of Pennsylvania or the Supreme Court of the United States.

(2) Where an appellate court has rendered a decision in conflict with the decision of the other appellate court below on the same question, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an administrative agency or lower court, as to call for an exercise of the power of supervision of the Supreme Court.

(3) Where the question involves an issue of immediate public importance such as would justify assumption of plenary jurisdiction under 42 Pa. C.S. 726 (extraordinary jurisdiction).

SOUTH CAROLINA

S.C. APP. CT. R. 226(b):

RULE 226. CERTIORARI TO THE COURT OF APPEALS

. . . .

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

TENNESSEE

TENN. R. APP. P. 11(a):

Rule 11. APPEAL BY PERMISSION FROM APPELLATE COURT TO SUPREME COURT.

(a) Application for Permission to Appeal; Grounds. An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

TEXAS

TEX. GOV'T CODE ANN. § 22.001(a)(6) (West 1988) (civil cases):

22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial

courts:

. . . .

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEX. R. APP. P. 200(b), (c) (criminal cases):

RULE 200. DISCRETIONARY REVIEW IN GENERAL

. . . .

(b) Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion.

(c) In determining whether to grant or deny discretionary review, the following, while neither controlling nor fully measuring the Court of Criminal Appeals' discretion, indicates the character of reasons that will be considered:

(1) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;

(2) Where a court of appeals has decided an important question of state or federal law which has not been, but should be, settled by the Court of Criminal Appeals;

(3) Where a court of appeals has decided an important question of state or federal law in conflict with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States;

(4) Where a court of appeals has declared unconstitutional, or appears to have misconstrued, a statute, rule, regulation, or ordinance;

(5) Where the justices of the court of appeals have disagreed upon a material question of law necessary to its decision; and

(6) Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

UTAH

UTAH R. APP. P. 46:

RULE 46. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

VIRGINIA

[NOTE: Virginia has no generally applicable criteria for discretionary review.]

VA. CODE ANN. § 17-116.07 (Michie 1988):

[Virginia Code § 17-116.07.A states that certain traffic infraction, misdemeanor, administrative, matrimonial, criminal, and inmate cases cannot be appealed to the Supreme Court. However, § 17-116.07.B provides:]

B. Notwithstanding the provisions of subsection A, in any case other than an appeal pursuant to § 19.2-398 [appeal by Commonwealth in felony action], in which the Supreme Court determines on a petition for review that the decision of the Court of Appeals involves a substantial constitutional question as a determinative issue or matters of significant precedential value, review may be had in the Supreme Court in accordance with the provisions of § 17-116.08.

[NOTE: VA. CODE ANN. § 17-116.08 provides generally for discretionary review in the Virginia Supreme Court.]

WASHINGTON

WASH. CONST. art. 4, § 4:

The supreme court jurisdiction . . . shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, [toll], municipal fine, or the validity of a statute.

WASH. R. APP. P. 13.4(b), 13.5(b):

RULE 13.4 DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

. . . .

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or

(3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RULE 13.5 DISCRETIONARY REVIEW OF INTERLOCUTORY DECISION

. . . .

(b) Considerations Governing Acceptance of Review. Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

(1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or

(2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or

(3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

WISCONSIN

WIS. R. APP. P. 809.62(1):

(1) A party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10 within 30 days of the date of the decision of the court of appeals. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme

court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

APPENDIX D

STATE POPULATIONS, 1990

Rank	*States*	*Pop.* (000's)
1	California	29,760
2	New York	17,990
3	Texas	16,987
4	Florida	12,938
5	Pennsylvania	11,882
6	Illinois	11,431
7	Ohio	10,847
8	Michigan	9,295
9	New Jersey	7,730
10	North Carolina	6,629
11	Georgia	6,478
12	Virginia	6,187
13	Massachusetts	6,016
14	Indiana	5,544
15	Missouri	5,117
16	Wisconsin	4,892
17	Tennessee	4,877
18	Washington	4,867
19	Maryland	4,781
20	Minnesota	4,375
21	Louisiana	4,220
22	Alabama	4,041
23	Kentucky	3,685
24	Arizona	3,665
25	South Carolina	3,487
26	Colorado	3,294
27	Connecticut	3,287
28	Oklahoma	3,146
29	Oregon	2,842
30	Iowa	2,777
31	Mississippi	2,573
32	Kansas	2,478
33	Arkansas	2,351
34	West Virginia	1,793
35	Utah	1,723
36	Nebraska	1,578
37	New Mexico	1,515
38	Maine	1,228

39	Nevada	1,202
40	New Hampshire	1,109
41	Hawaii	1,108
42	Idaho	1,007
43	Rhode Island	1,003
44	Montana	799
45	South Dakota	696
46	Delaware	666
47	North Dakota	639
48	Vermont	563
49	Alaska	550
50	Wyoming	454

Source: U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 6 (111th ed. 1991)

APPENDIX E

CONSTITUTION OF THE STATE OF FLORIDA, ARTICLE V, SECTION 4(2) (AS ADOPTED IN 1956)

FLA. CONST. art. V, § 4(2) (1956):

SECTION 4. Supreme Court.—

. . . .

(2) JURISDICTION. Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

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

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.