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Establishing New Criteria for Conflict Certiorari in Per Curiam District Court Decisions: A First Step Toward a Definition of Power

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standard, the real need is for direct means of minority advancement. If Congress fails to repeal any section 1981 effect on affirmative action, the Court should acknowledge the logical difficulties with its interpretation of the statute and resolve not to extend what is essentially the Court's own creation to invalidate society's attempts to correct its past errors.

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ESTABLISHING NEW CRITERIA FOR CONFLICT CERTIORARI IN PER CURIAM DISTRICT COURT DECISIONS: A FIRST STEP TOWARD A DEFINITION OF POWER

Article V of the Florida Constitution gives the supreme court power to grant a writ of certiorari when "a decision by a district court is in direct conflict with a decision of any district court of appeals or of the supreme court on the same point of law."[1] For almost two decades the Supreme Court of Florida has struggled to delimit its conflict jurisdiction. The limits are especially unclear when the alleged conflict is based upon per curiam decisions[2] rendered by the district courts of appeal. The present procedure for dealing with per curiam district court decisions is to examine the "record proper"[3] of lower court proceedings to determine if conflict jurisdiction

1. FLA. CONST. art. V, §3(b)(3). In Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960), the supreme court held that the conflict comprehended by art. V, §3(b)(3) can be found (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves substantially the same controlling facts as a prior case. For a recent application of this formulation see the City of Jacksonville v. First Nat'l. Bank of Jacksonville, 339 So. 2d 632, 633 (Fla. 1976) (England, J., concurring).

2. "By the Court. A phrase used to distinguish an opinion of the whole court from an opinion of one judge." BLACK'S LAW DICTIONARY 1293 (4th ed. 1951). Though per curiam is the traditional phraseology, Justice England, in recent cases has referred to per curiam decisions as decisions "by the court." *See* State v. Johnson, 336 So. 2d 1131 (Fla. 1976); State v. Adams, 335 So. 2d 801 (Fla. 1976). The First District Court of Appeal has adopted Justice England's "by the Court" terminology. Dixon v. State, 334 So. 2d 822 (1st D.C.A. Fla. 1976); Tuten v. State, 334 So. 2d 822 (1st D.C.A. Fla. 1976); Watson v. State, 334 So. 2d 281 (1st D.C.A. Fla. 1976); Rutledge v. State, 334 So. 2d 821 (1st D.C.A. Fla. 1976). The other District Courts of Appeal, however, are clinging to the traditional per curiam designation. *See* Copeland v. State, 336 So. 2d 653 (2d D.C.A. Fla. 1976); Santos v. Bosh, 334 So. 2d 833 (3d D.C.A. Fla. 1976), Simpson v. Montgomery Ward & Co., 334 So. 2d 826 (4th D.C.A. Fla. 1976).

3. The term "record proper" first appeared in Florida in Foley v. Weaver Drugs, 177 So. 2d 221, 225 (Fla. 1965). Indigenous to Florida law in this context, the term was specifically established to provide the court with a portion of the record below for determining whether a conflict existed in the absence of a district court opinion. For an examination of the traditional use of record proper in other court systems, see Justice Overton's dissent in Baycol v. Downtown Dev. Auth., 315 So. 2d 451, 459 (Fla. 1975). For further historical background and analysis of the term record proper see Note, *Conflict Certiorari Jurisdiction of the Supreme Court of Florida: The Record Proper*, 3 FLA. ST. U.L. REV. 409 (1975).

exists. Several constitutional and practical questions have arisen from this procedure.

It is unsettled whether the Article V provision for harmonizing conflicts in the laws of the state includes the power to review district court decisions without opinion through examination of the record proper. Even if such a power exists, it is questionable whether state law can be effectively harmonized by this type of review, which requires the supreme court to second guess the rationale for lower court decisions. Also unsettled is what comprises the record proper for purposes of conflict jurisdiction. Because the present procedure regarding per curiam district court decisions appears to violate Article V, it not only presents the possibility of eroding the finality of the district courts' appellate jurisdiction,[4] but also threatens the ability of the supreme court effectively to fulfill its role as a court of limited supervisory jurisdiction concerned with only the most critical areas of constitutional and appellate review.[5]

There is a great need for the supreme court to develop a consistent policy of reviewing district court decisions without opinions. In this policy the court must continually balance its jurisdiction in order to maintain uniformity in law with final appellate jurisdiction delegated to the district courts of appeal. This commentary examines the balancing process by tracing the background of the supreme court's power to dispose of per curiam district court decisions and by describing the two positions held by the Florida supreme court since the creation of conflict jurisdiction. The constitutional and practical problems in the present system are pointed out, and a solution with a potential for striking the necessary balance is offered.

BACKGROUND

Prior to the 1957 amendment of Article V of the Florida Constitution,[6] the supreme court could exercise its final appellate jurisdiction by issuing a common law writ of certiorari.[7] The common law writ, which was purely discretionary,[8] was issued to any inferior court "where necessary for the attainment of Justice."[9] In 1957, the electorate adopted a constitutional amendment to Article V that was designed to improve a congested court system by reallocating judicial powers.[10] The amendment transferred final

4. FLA. CONST. art. V, §4(b). For an analysis of the impact of the Supreme Court of Florida's extensions of jurisdiction immediately after *Foley v. Weaver Drugs* see Note, *Erosion of the Final Jurisdiction of Florida's District Courts of Appeal*, 21 U. FLA. L. REV. 375 (1969).

5. Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958).

6. FLA. CONST. art. V, §4(2) was adopted on November 6, 1956, and went into effect on July 1, 1957. This section became §3(b)(3) in 1972. Fla. Laws 1972, S.J. Res. 52-D, §3, at 99.

7. Atlantic Coast Line R.R. v. Mack, 64 So. 2d 304 (Fla. 1952); Brinson v. Tharin, 99 Fla. 696, 127 So. 313 (1930); Seaboard Air Line R.R. v. Ray, 52 Fla. 634, 42 So. 714 (1906).

8. Lorenzo v. Murphy, 159 Fla. 639, 645, 32 So. 2d 421, 424 (1947).

9. Halliday v. Jacksonville and Alligator Plank Rd. Co., 6 Fla. 304, 305 (1855).

10. Lake v. Lake, 108 So. 2d 639, 642 (Fla. 1958).

appellate jurisdiction in most cases to district courts of appeal.[11] To complete the streamlining of the judiciary, the supreme court was given a supervisory role.[12] The supreme court is now empowered to entertain only a limited class of cases on appeal[13] and to grant certiorari only if a case affects a class of constitutional or state officers, passes upon a question certified by the district court to be of great public interest, or conflicts directly with a decision of any district court of appeal or of the supreme court on the same point of law.[14] This commentary focuses on the use of the third category, commonly referred to as conflict certiorari, in cases where the district court has rendered a decision without opinion.[15]

The primary purposes of the new Article V's conflict certiorari provision were to allow the supreme court to maintain harmony among the newly created district courts of appeal and to promote uniformity in the laws of the state.[16] The conflict certiorari provision was a legislative recognition that the need for final appellate jurisdiction to be vested in several diverse district courts must be balanced by a final authority with limited jurisdiction to resolve inter-district conflicts.[17] In defining the limits of this conflict jurisdiction the 1958 supreme court was quickly confronted with a jurisdictional Pandora's box. Still unanswered questions included whether the new Article V contemplated the supreme court's extending conflict jurisdiction to district court decisions without opinion and whether such a per curiam disposition could provide the supreme court with a basis for harmonizing the laws of the state.

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11. *Id.* at 642. *See generally* Short v. Grossman, 245 So. 2d 217, 219-20 (Fla. 1971); Zinn v. Pfizer & Co., 128 So. 2d 594, 597 (Fla. 1961).

12. Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1968).

13. FLA. CONST. art. V, §3(b)(1), (2).

14. FLA. CONST. art. V, §3(b)(3). There are also specific provisions for interlocutory orders passing on a matter which upon judgment would be directly appealable. FLA. CONST. art. V, §3(b)(1), (2). In addition, there has traditionally been a certiorari vehicle for reviewing orders of state administrative boards and commissions. F.A.R. 4.1. *But see* FLA. STAT. §120.68 (1975). For an explanation that might resolve the apparent contradiction between the rule and the statute see Haddad, *The Common Law Writ of Certiorari in Florida,* 29 U. FLA. L. REV. 207, 222 (1977).

15. For a good general evaluation of the Florida supreme court's use of the writ of certiorari see Hayes, *Certiorari Review of District Court of Appeal Decisions by the Supreme Court,* 28 U. MIAMI L. REV. 952 (1974). For thorough evaluation of the extraordinary writ of common law certiorari see Haddad, *supra* note 14.

16. AB CTC v. Morejon, 324 So. 2d 625 (Fla. 1975); Foley v. Weaver Drugs, 177 So. 2d 221, 224 (Fla. 1965); N&L Auto Parts Co. v. Danan, 117 So. 2d 410, 412 (Fla. 1960); Lake v. Lake, 103 So. 2d 639, 642-43 (Fla. 1958); Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958).

17. Justice Thomas, who was instrumental in the creation of the district courts of appeal, reiterated in several speeches favoring ratification of this constitutional amendment that conflict certiorari would be granted only in extreme cases where irreconcilable conflicts between state courts existed. Thomas stressed that in most cases the district courts of appeal would be courts of final appellate jurisdiction on the merits; litigants would not be faced with the long trek to Tallahassee for final disposition of their cases. Interview with Chief Justice Ben Overton, Supreme Court of Florida, in Tallahassee, Fla. (October 13, 1975).

Lake v. Lake

The supreme court attempted to resolve some of the uncertainty surrounding conflict certiorari in *Lake v. Lake*,[18] in which the petitioner urged the court to grant review of per curiam decisions of the district courts of appeal. The application for certiorari was based on petitioner's claim that the Second District Court of Appeal's per curiam decision[19] affirming the circuit court's findings was factually similar to a case in which the supreme court had reached an opposite result.[20] Rejecting petitioner's contention, Justice Thomas, writing for the majority, pointed to the difficulty of harmonizing contrary district court decisions without an opinion to serve as a rational basis for reconciling the conflict.[21] The court's position was strongly influenced by the legislative intent behind the amendment of Article V.[22] The primary purpose of the amendment was to relieve a congested court system by establishing the district courts and at the same time to retain statewide uniformity of judicial decisions.[23] Within these constitutional bounds the court impliedly defined Article V's use of the word "decision" as a basis for conflict to include both the judgment and the opinion.[24]

The *Lake* court outlined the requirements for a successful application for conflict certiorari.

> If in a particular case an opinion is rendered by a district court of appeal that prima facie conflicts with a decision of another district court of appeal or Supreme Court on some point of law, the writ of certiorari may issue and, after study, may be discharged, or the decision of the district court of appeal may be quashed or modified to the end that any conflict may be reconciled.[25]

The alternative procedure would compel the supreme court to "dig through the record of the case to determine if the conflict alleged by the petitioner's interpretation of former decisions existed."[26] Rejecting this alternative, Justice Thomas foresaw two dangers in extending supreme court review to include conflicts based on per curiam decisions. First, finding conflict by review of the record without opinion could not adequately satisfy the constitutional

18. 103 So. 2d 639 (Fla. 1958).

19. 98 So. 2d 761 (2d D.C.A. Fla. 1957).

20. Dye v. Dulbeck, 114 Fla. 866, 154 So. 847 (1934).

21. 103 So. 2d at 643. *See also*, Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970); Foley v. Weaver Drugs, 177 So. 2d 221, 223 (Fla. 1965).

22. 103 So. 2d at 640-41.

23. *Id.*

24. *Id.* at 643. A short time after the court's decision in *Lake*, in their only decision speaking directly on this point, the supreme court explained the need for a unique definition of "decision" in Florida. Because of the unusual structure of the Florida courts and the limited powers of review of the Florida supreme court under the revised Florida Constitution, the court held that the constitutional definition of decision "comprehends both the opinion and the judgment." Seaboard Air Line R.R. Co. v. Brahman, 104 So. 2d 356, 358 (Fla. 1958).

25. 103 So. 2d at 643.

26. *Id.* at 641.

goal of harmonizing the laws of the state.[27] The philosophy of conflict certiorari was not to provide an individual with a second appeal due to some harmless or miniscule conflict; only if the conflict threatened to overturn an established body of law could the court exercise jurisdiction.[28] The *Lake* court determined that such a clear conflict could only be revealed in a decision accompanied by the compelling reasoning of a district court formulated in an opinion.[29] Second, this extension of review to determine whether the court has jurisdiction would certainly destroy the final appellate nature of the district courts' appellate jurisdiction. Giving the court authority to dig through the record would permit an unlimited review process that would ultimately make the district courts of appeal little more than "waystations to the Supreme Court,"[30] a position contrary to their constitutional role. Nevertheless, although generally closing the door on an extension of supreme court conflict jurisdiction to review district court decisions without opinion, Justice Thomas conceded the need for exceptions to the *Lake* rule.

> There may be exceptions to the rule that this court will not go behind a judgment per curiam, consisting only of the word "affirmed" which does not reflect a decision that would interfere with settled principles of law, rendered by a district court of appeal, ... Conceivably it could appear from the restricted examination required in proceedings in certiorari that a conflict had arisen with resulting injustice to the immediate litigant. In that event the exception, not the rule, would apply. But if the Supreme Court undertakes to go behind a judgment on the tenuous theory that it must see that justice is done instead of giving to the judgment the verity it deserves and assuming that justice *has been done* the system that has been overwhelmingly approved by the people will be undermined and weakened.[31]

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27. *Id.* at 643.

28. Justice Thomas did not want to see the supreme court become a vehicle for a second appeal on the merits. He felt the supreme court should not intervene on the basis of mistake or error, but was empowered to intervene only if the conflict presented a serious threat to the uniformity of state laws. Further, Justice Thomas believed it unnecessary for the court to spend its time remedying every conflict. Article V, §3(b)(3) of the Florida Constitution provides that the court "may" grant a writ of certiorari. A writ of conflict certiorari is therefore a writ of grace to be exercised sparingly within constitutional demands. For a reappearance of Justice Thomas' view in recent supreme court opinions (most of them dissenting opinions of Justice England or Justice Overton) see Carter v. State, 331 So. 2d 293 (Fla. 1976); Cummings v. Cummings, 330 So. 2d 134, 137 (Fla. 1976); Hunt v. Seaboard Coast Line R.R., 327 So. 2d 193, 196 (Fla. 1976); Hollywood Beach Co. v. City of Hollywood, 321 So. 2d 65 (Fla. 1976).

29. The precedential value of per curiam district court decision is minimal. They cannot usually be found by "shepardizing." Even if found, without the reasoning of the court to apply to the facts at hand, per curiam decisions add little strength to an argument. See text accompanying notes 44-49 *infra*.

30. 103 So. 2d at 641. Justice Thomas was very concerned with a loss of faith in the finality of appellate decisions made by the district courts of appeal. He felt the entire rationale for establishing district courts would be defeated if litigants began to feel their final right to appeal rested in the supreme court. *See also* Note, *supra* note 4.

31. 103 So. 2d at 643.

It was this exception to the *Lake* rule that became its death knell in *Foley v. Weaver Drugs*.[32]

Foley v. Weaver Drugs

The supreme court experienced difficulty in following the *Lake* rule for disposing of per curiam judgments in the conflict certiorari area. Increasingly, advocates applying for a writ of certiorari sought to classify their clients within the *Lake* exception by urging review of the record to "prevent injustice to the immediate litigant."[33] As a result, the court was continually faced with the task of examining the record to determine if a conflict existed within the exception.[34]

The court at times attempted to maintain consistency with *Lake* by remanding the case to the district court with instructions to write an opinion clarifying the conflict.[35] But in 1965, the Third District Court of Appeal in *Foley v. Weaver Drugs* refused the supreme court's request for an opinion.[36] The *Lake* rule placed the court in a dilemma: it could either abolish the *Lake* exception and refuse certiorari if the district court disposed of a case per curiam or transform the exception into the rule by extending supreme court review of the record to all per curiam district court decisions to determine whether a conflict existed.

Writing for the majority in *Foley*, Justice Roberts first pointed to the shortcomings of the *Lake* exception for resolving the question of whether the court should entertain per curiam decisions.[37] Next, Justice Roberts emphasized that a decision without opinion fulfills the constitutional definition of "decision":

> Nor is there any *legal* distinction between the effect of a per curiam decision without opinion, and one that is supported by an opinion, so that one is not entitled to and should not be given more "verity" than the other. It is the judgment that constitutes the decision.[38]

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32. 177 So. 2d at 221.

33. *E.g.*, South Fla. Hosp. Co. v. McCrea, 118 So. 2d 25 (Fla. 1960); Dean v. Deas, 116 So. 2d 23 (Fla. 1959).

34. Foley v. Weaver Drugs, 177 So. 2d 221, 223 (Fla. 1965).

35. *E.g.*, Svedeker v. Vernman, Ltd., 139 So. 2d 682 (Fla. 1962); Rosenthal v. Scott, 131 So. 2d 480 (Fla. 1961); State v. Bruno, 104 So. 2d 588 (Fla. 1958).

36. 177 So. 2d at 221. Later in the opinion, the court stated that it could exercise its rule-making authority to require district courts to write an opinion. *Id.* at 226. It is unclear, however, especially in light of the workload at the district court level, whether such a rule could force the district courts to write opinions that would aid the supreme court in determining whether to exercise its conflict jurisdiction.

37. *Id.* at 223.

38. *Id.* at 224. Justice Roberts referred to the court's analysis of per curiam decisions in Newman v. Lake Worth Drainage, 87 So. 2d 49 (Fla. 1956). This case contained an analysis of the impact of per curiam decisions by the Florida supreme court prior to the 1957 amendment restricting the supreme court's jurisdiction. See text accompanying note 6 *supra*. It is questionable whether this definition is automatically applicable to per curiam decisions of the district courts. Although they were allocated a portion of the supreme court's authority under the old constitutional provision, the practical considerations of

Finally, Justice Roberts relied on two United States Supreme Court decisions that expressed the need for clarifying ambiguities and obscurities in state law for the proper exercise of the Supreme Court's appellate jurisdiction.[39] These considerations led the Florida supreme court to overrule *Lake* and to adopt a compromise position[40] providing for review of per curiam decisions via the record proper to determine whether a conflict existed.[41]

Justice Thornal, joined by two other members of the court, filed a forceful dissent echoing Justice Thomas' warnings in *Lake* of the consequences of expanded supreme court review. The dissenters recognized a two-fold threat stemming from the adoption of the *Foley* doctrine. First, the uniformity of the laws of the state would be adversely affected by a failure of the supreme court adequately to harmonize the decisions of state courts on the basis of the word "affirmed" and the record proper.[42] Second, final appellate jurisdiction of the district courts of appeal would be eroded by the power of the

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the new constitution's conflict certiorari provision meant that the supreme court would have to review constantly alleged conflicts in district court opinions. Justice Roberts' analogy falls short because a per curiam decision of a district court may be utilized by the supreme court in harmonizing the laws of the state, a function that per curiam decisions of the supreme court prior to 1957 were never designed to perform. In further explaining the verity to be given a per curiam decision of a district court, Justice Roberts also relied on Justice Hobson's dissenting opinion in Donohue v. Beeler, 149 So. 2d 534, 536 (Fla. 1963). But neither Justice Roberts nor Justice Hobson explained how a per curiam decision can provide the court with the reasoning and jurisprudence of various conflicting courts' views needed to harmonize effectively the laws of the state. At best, rummaging through the lower court record and reading the briefs might allow the court to reconstruct some of the proceedings below. Finally, Justice Roberts did not respond to the court's holding in Seaboard Air Line R.R. v. Brahman, 104 So. 2d 356, 358 (Fla. 1958), in which the court said that article V's definition of "decision" comprehends both the judgment and the opinion. See note 25 *supra*.

39. Justice Roberts implied a belief that the United States Supreme Court was speaking directly to the Florida supreme court in Minnesota v. National Tea Co., 309 U.S. 551 (1939). It was his view that the Supreme Court of Florida should clear up any ambiguities in the state's law. This view disregarded the limited appellate jurisdiction vested in the Supreme Court of Florida in the post-1957 version of article V of the Florida Constitution. *National Tea Co.* and *Blackburn v. Alabama*, 354 U.S. 393 (1956), the cases relied upon by Justice Roberts, can be viewed in another way. The United States Supreme Court might have meant that it cannot properly exercise appellate jurisdiction unless an unambiguous issue is presented for decision and that any appellate court in a similar position should wait for further clarity before performing its appellate function. This view is born out by the language in the cases and the results. In both cases the Supreme Court denied certiorari, remanding for clarification before exercising appellate jurisdiction. By analogy, perhaps, the Florida supreme court should not grant a writ of conflict certiorari without having a clear and unambiguous issue in conflict. This view would make it extremely difficult for per curiam district court decisions to serve as a basis for conflict certiorari except in cases of the most blatant conflicts.

40. Justice Roberts called the court's 4-3 decision in *Foley* a compromise, a temporary settlement of the per curiam district court decision problem. Interview with Justice B. K. Roberts, Supreme Court of Florida, in Tallahassee, Fla. (Oct. 13, 1975). Perhaps after a decade this compromise has now outlived its usefulness. See AB CTC v. Morejon, 324 So. 2d 625, 630 (Fla. 1975) (England, J., dissenting).

41. 177 So. 2d at 225.

42. *Id.* at 231.

supreme court to grant a second appeal in any case through conflict jurisdiction based on examination of the record proper.[43]

THE *Foley* AFTERMATH: UNSETTLED CONSTITUTIONAL AND PRACTICAL QUESTIONS

Several constitutional considerations support the view that the supreme court cannot harmonize directly conflicting decisions on the same point of law without an adequate consideration of both the legal reasoning and case law authority relied on by the district court. The basic philosophy of review by conflict certiorari is to resolve irreconcilable district court decisions in extreme cases.[44] This limited remedy is to be applied only when conflict threatens the uniformity of state law.[45] In these important cases, effective communication between the district courts in dispute and the supreme court is criticial in formulating the law of the state. Effective communication excludes communication solely by counsel's implication of what the district court meant in a brief for jurisdiction or communication based on the inferences drawn by the justices as to the meaning of the district court's decision.[46] More importantly, it is unclear whether the Constitution authorizes the court to search through the record proper to determine if conflict exists. As noted in *Foley*, "it is utterly impossible to locate anything in the Constitution that conveys to the Supreme Court the privilege of exploring trial records in order to produce conflict of decision."[47] Finally, it is doubtful that the word "affirmed" can meaningfully establish direct conflict in decisions on a point of law.[48] The only case directly confronting the definition of the word "decision" casts doubt on the value of per curiam decisions in establishing a clear conflict by defining the term to comprehend both judgment and opinion.[49] Furthermore, even the *Foley* majority conceded that an opinion once written becomes a part of the decision.[50] There can thus be little doubt of the value of written opinions in resolving or explaining a point of law.

Beyond these unsettled constitutional challenges, the court's standard of review as adopted in *Foley*, "examination of record proper of the courts

43. *Id.* at 234. For a discussion of the erosion of district court authority prior to and immediately after *Foley*, see Note, *supra* note 4.

44. See note 16 *supra*.

45. *Id.*

46. Under the present system, the Supreme Court of Florida does not communicate with the district courts in conflict except occasionally to ask for conformed transcripts and the record used by the district courts in announcing their opinions. The entire responsibility for establishing and arguing conflict is on petitioner's counsel; the court relies heavily on counsel because it has little knowledge of the proceedings below. Interview with Chief Justice Ben Overton, Supreme Court of Florida, in Tallahassee, Fla. (November 3, 1975).

47. 177 So. 2d at 234.

48. *Id.* at 231. In the words of Justice Thornal, "How can one word 'affirmed' be a 'decision on the same point of law? If it can be, what 'point of law' does the word 'affirmed' decide?" *Id.* For a contemporary application of Justice Thornal's analysis see Golden Loaf Baking Co. v. Charles W. Rex Constr. Co., 334 So. 2d 585, 586-87 (Fla. 1976).

49. See text accompanying note 24 *supra*.

50. Zinn v. Pfizer, 128 So. 2d 594, 596 (Fla. 1961).

below,"[51] has proved unworkable. Three major problems have resulted from the application of the *Foley* standard. First, the district courts are often circumvented in determining a basis for harmonizing the laws of the state. In addition, applicants for writs of certiorari are overloading the court with increasing numbers of petitions accompanied by voluminous pages of record proper alleged to be necessary to establish conflict. Finally, the supreme court's expansion of its conflict jurisdiction through examination of the record proper has diminished the final appellate authority vested in the district courts by the Constitution.

As noted above, the present conflict certiorari procedure has no significant provision for communication between the supreme court and a district court proffering its decision without opinion on the point of law alleged to be in conflict.[52] When the supreme court examines the record proper, it can only speculate as to the legal issues and theories supporting a per curiam district court decision.[53] The court has nothing on which to base its decision beyond that which the litigants allege to be the reasoning of the district court. Often, the district courts are totally unaware that their decisions without opinion conflict with a body of law within the state.[54] Traditionally, per curiam decisions indicated that the judges were of one mind and were usually reserved for expeditiously dealing with well-settled points of law.[55] When a district court is unaware that its decision conflicts with prior case law, the supreme court's second guessing of that decision by probing the record can only lead to a relitigation of the question, entailing supreme court reclarification when the district court again faces similar facts and issues and formulates an opinion.[56] Regrettably, *Foley*-type harmonization provides no chance for the district courts upon whose decisions review is based to respond to the alleged existence of a conflicting point of law. There should at the very least be a provision in the certiorari process allowing the district courts to certify relevant facts to the supreme court for examination in determining whether a conflict exists and as an aid in resolving that conflict.[57]

Present trends[58] in conflict certiorari demonstrate that examination of the record proper is absorbing increasingly greater amounts of the supreme court's time.[59] Out of 138 writs of certiorari granted in 1974, 128 were for

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51. 177 So. 2d at 225.

52. See note 46 *supra.*

53. See note 39 *supra.*

54. Under the present procedure the alleged conflict need not have been presented to the district court in any form; the cases relied on for conflict can first be presented at the supreme court level. Interview with Justice A. England, Supreme Court of Florida, in Tallahassee, Fla. (October 13, 1975).

55. *Id. See also,* BLACK'S LAW DICTIONARY 1293 (rev. 4th ed. 1968).

56. AB CTC v. Morejon, 324 So. 2d 625, 630 (Fla. 1975).

57. See text accompanying notes 115-118 *infra.*

58. The author has analyzed in detail Florida supreme court review by certiorari. This study entailed a file by file examination of the 138 cases in which certiorari was granted by the Florida supreme court in 1974-1975. Much thanks and appreciation is due the Clerk of the supreme Court Sid White and very helpful staff. Thanks also goes out to Colonel Core of the Judicial Advisory Committee.

59. In 1970-1971 the supreme court heard 589 petitions for certiorari; in 1973-1974

conflict certiorari. A little over one third of the petitions granted were based on per curiam dispositions at the district court level.[60] The number of judicial hours needed to process petitions for conflict certiorari is exacerbated by the substantial contents of the petitions and the briefs for jurisdiction.[61] The contents of the record and the time needed for examination are inevitably greater in cases of per curiam disposition by the district courts than in cases with opinions because the record becomes the basis for determining if a conflict exists.[62] Petitions and briefs for jurisdiction have included voluminous documentation often presented in a massive appendix, or in conformed transcripts, with a general index.[63] The litigant's philosophy seems to be that if the court is provided with an ample record it will engage in a fishing expedition to determine if a conflict exists.[64] Such a philosophy is inconsistent

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the court heard 857 petitions. In 1975, the court heard 986 petitions. From 1970-1975, therefore, there has been an increase by almost 50% in the number of petitions heard. See Justice Thornal's analysis and prediction of this trend in Gibson v. Maloney, 231 So. 2d 823, 824 (Fla. 1970).

60. This observation is based on the author's examination of the 138 files as described in note 59 *supra*.

61. Out of 138 files of cases in which certiorari was granted, two thirds of the petitions for certiorari and briefs for jurisdiction contained excessive amounts of supplementary material in the form of an appendix or record for certiorari. Only in rare cases did petitioner specifically designate portions of the record that were especially relevant for the court to consider. It is possible that this problem might be partially alleviated by the proposed F.A.R. 9.280(d), which merges the petition for certiorari and the brief for jurisdiction. *Draft, Proposed Florida Appellate Rules* (Florida Rules Revision Committee, Jan. 1976).

62. The author also determined from an examination of the files that per curiam cases offered as a basis for appeal in 1974-1975 usually contained more unrelated information in the record. Note 63 *infra* reflects information derived from the files of the cases rather than from the report of the cases.

63. Documentation has included complete transcripts of the trial at the circuit court, Mancini v. State, 312 So. 2d 732 (Fla. 1975); transcripts of special hearings, Parkway Towers Condominium v. Metro Dade Co., 295 So. 2d 295 (Fla. 1974); pages of city ordinances, Albury v. City of Jacksonville Beach, 295 So. 2d 297 (Fla. 1974); copies of all 28 exhibits and depositions used at trial, School Board v. Hauser, 293 So. 2d 681 (Fla. 1974); transcripts of entire secret proceedings before a psychologist, Keller v. Keller, 308 So. 2d 625 (Fla. 1975); five district court opinions in their entirety, Densmore v. Martin Blumenthal Ass'n., 314 So. 2d 756 (1975); a resolution of a city commission, Brigham v. Dade County, 305 So. 2d 756 (Fla. 1974); discussion of jury instructions in judge's chambers, Perrett v. Seaboard Coast Line R.R. Co., 299 So. 2d 590 (Fla. 1974); and briefs of petitioner at district court level, 305 So. 2d 756; McGough v. State, 302 So. 2d 75 (Fla. 1974); State v. Gaugus, Supreme Court Case 45,171 (Fla. 1974) (this case does not appear in reports because it was withdrawn before final disposition).

64. Though all the material contained in the record and briefs in the cases described in note 64-73 *supra* was not irrelevant for determining conflict, in most cases it was presented in an excessive and poorly organized format. This is part of a fishing expedition philosophy. The inclusion of a massive amount of material in an appellate record or appendix has two reasons: 1) to force the court to read hundreds of pages in the hope that after the court has invested a great deal of time it will decide to hear oral arguments or write an opinion; 2) by providing excess material for the court to peruse, some point, perhaps a point not even based in the conflict, might catch the eye of four justices who will issue the writ because they disagree with the decision of the district court, or want a chance to speak on this matter regardless of the limited jurisdiction

with the provision of the appellate rules that specifies "only that portion of the record necessary to establish jurisdiction will be submitted."[65]

In addition to circumventing the jurisdiction of the district courts and increasing the supreme court's workload, the concept of record proper originating in *Foley* has given rise to an extension of supreme court jurisdiction beyond the intended grant of power from Article V of the Constitution. The new Article V created district courts of appeal vested with final appellate jurisdiction in most cases.[66] The debilitating effect of the *Foley* doctrine on the district courts' final appellate jurisdiction has resulted from the burgeoning definition of record proper since *Foley*.

In *Foley*, Justice Roberts defined record proper for the purpose of reviewing per curiam decisions of the district courts to determine whether a conflict existed: "In each of such cases, some members of the court have examined the 'record proper' — meaning the written record of the proceedings in the Court under review except the testimony."[67] Record proper has proven to be an elastic concept capable of expanding to include forms and incidents of litigation far beyond the restrictive definition placed on it by the *Foley* court.

The supreme court's new definition of record proper includes all motions at trial, whether or not offered in argument at the district court.[68] It encompasses motions dismissed[69] or withdrawn[70] and the facts surrounding those motions. Contrary to the express language in *Foley*, the new definition also includes the testimony of witnesses at trial,[71] jury instructions,[72] depositions,[73] and expert testimony not used at trial.[74] The court has in addition examined the record proper of the case and found conflict based on dictum in earlier decisions.[75] Also included in the definition of record proper are the litigant's often ample appendices attached to briefs for jurisdiction. The court has examined these appendices and used "testimony and evidence in prior lawsuits as the source documents upon which to find direct conflict."[76] The record proper giving rise to conflicts may also include the facts of a case

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vested in the supreme court by article V of the Florida Constitution. *See* National Airlines v. Edwards, 336 So. 2d 545, 547 (Fla. 1976) (England, J. dissenting); AB CTC v. Morejon, 324 So. 2d 625, 630 (Fla. 1975) (England, J. dissenting).

65. F.A.R. §4.5(C)(6) (1977).

66. Lake v. Lake, 103 So. 2d at 642.

67. 177 So. 2d at 223.

68. Godstall v. Unigard, 225 So. 2d 680 (Fla. 1971).

69. D'Agostiro v. State, 310 So. 2d 12, 13 (Fla. 1975).

70. Lopez v. State, 300 So. 2d 902 (Fla. 1974).

71. Commerce Nat'l Bank v. Safeco Ins. Co., 284 So. 2d 205, 207 (Fla. 1973).

72. Gibson v. Maloney, 231 So. 2d 823, 830-32 (Fla. 1970). The dissent, noting that the use of the jury instruction relied on by the majority constituted harmless error, accused the court of using this unimportant technicality of procedure as a pretense to obtain conflict jurisdiction to address other issues on the merits.

73. Baycol Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 459 (Fla. 1975).

74. Noa v. United Gas Pipeline, 305 So. 2d 182 (Fla. 1974).

75. Saf-T-Clean, Inc. v. Marietta, 197 So. 2d 8, 9 (Fla. 1967). *See also* Sunad Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960).

76. AB CTC v. Morejon, 324 So. 2d 625, 629-30 (Fla. 1975).

plus a dissenting opinion,[77] although the court admits that by definition the dissent is rebutted by the majority's judgment even when the majority does not write an opinion.[78] Perhaps the clearest infringement by the supreme court on the district courts' final appellate jurisdiction by use of the record proper has come in a series of cases in which the court has examined the record to find a conflict based on misapplication or error assigned to the district courts.[79]

Perhaps only an elastic definition of record proper can give the court the perspective to determine whether or not a conflict exists. Perhaps also, the court has found it necessary to the exercise of its conflict jurisdiction to expand the definition of record proper to the above proportions better to determine the relevant facts and issues in the absence of a district court opinion.[80] But an unbroken line of dissenters has suggested that the expanding record proper also provides a channel for a supreme court of limited power to recoup some of its withdrawn jurisdiction.

Justice Thornal's dissent in *Foley* frowned on the majority's view that the supreme court has "the power to examine the trial records *to create* a conflict of decisions when a district court affirms without opinion."[81] He asked the court to "exercise extreme caution against reaching out beyond the confines of the Constitution to endow the court with jurisdiction they do not have."[82] Justice Thornal found the harm of exercising this extra-constitutional jurisdiction to lie in a stripping of the district courts of their final appellate jurisdiction.[83] The ultimate result of this lack of faith[84] in

77. Keller v. Keller, 308 So. 2d 106 (Fla. 1975); Commerce Nat'l Bank v. Safeco Ins. Co., 284 So. 2d 205 (Fla. 1973); Smothers v. Smothers, 281 So. 2d 359 (Fla. 1973); Autrey v. Carroll, 240 So. 2d 474 (Fla. 1970); Huguley v. Hall, 157 So. 2d 417 (Fla. 1963). *Contra*, Golden Loaf Bakery v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976). In *Golden Loaf*, although the majority seemed to adopt a case by case approach, Justice England in his concurring opinion stated: "My principal objection to 'dissent conflict' stems from my unwillingness to ascribe to the dissenter the power to speak for the unspoken majority. In this case, for example, respondents vigorously contest the dissenter's characterization of the majority's affirmance. . . . I would expressly overrule all cases which hold than conflict jurisdiction may be premised on a dissenting opinion." *Id.* at 587. *But see* Williams v. State, 340 So. 2d 113, 116 (Fla. 1976) (England, J., dissenting).

78. Commerce Nat'l Bank v. Safeco Ins. Co., 284 So. 2d at 207.

79. Killaren Apts. v. Estate of Thompson, 283 So. 2d 102 (Fla. 1973); Fountainbleau, Inc. v. Walters, 246 So. 2d 563, 566 (Fla. 1971). In *Fountainbleau* the dissent points to a lengthy chain cite of cases that relied upon the post-1957 Constitution to characterize the Supreme Court of Florida as a court of limited supervisory jurisdiction, not a court for final review of trial error.

80. Interview with Justice James C. Adkins, Supreme Court of Florida, in Tallahassee, Fla. (October 13, 1975). *But see* Buck v. Lopez, 250 So. 2d 6, 9 (Fla. 1971) (Adkins, J. dissenting).

81. Foley v. Weaver Drugs, 177 So. 2d 221, 234 (Fla. 1965).

82. *Id.* at 235.

83. *Id.* at 234.

84. Justice Thornal noted that "[i]f I were a practicing lawyer in Florida, I would never again accept with finality a decision of a district court. Under the majority decision today, there is always that potential opportunity to obtain another examination of the record by the supreme court with the hope that it will in some way differ with the district court." *Id.*

the district courts would be an increase in the number of cases urged upon the supreme court,[85] thereby returning its dockets to the state of chaos that the 1957 amendment to Article V was designed to eliminate.[86] Adding to the fear of divesting the district courts of their final appellate authority was the fulfillment of Justice Thornal's prediction that soon the concept of record proper would be used to "go behind district court decisions rendered with opinion."[87] In *Sinclair v. Butler*[88] the supreme court reversed a district court's decision rendered with opinion by reviewing the record proper and determining that the district court had overlooked a critical issue.[89] In *Sinclair*, Justices Thornal and Thomas called on their judicial brethren to define the limits of both record proper and the court's conflict jurisdiction; however, no definition was forthcoming. In 1970, the court fulfilled another of Justice Thornal's *Sinclair* predictions[90] when it extended the definition of record proper to include review of the trial transcript in *Gibson v. Maloney*.[91] In his dissent, Justice Ervin called for "some kind of forthright articulation of the majority's reasoning for this further extension of *Foley*."[92] Justice Ervin characterized the majority's conflict as a bootstrapping process[93] in which the court used the alleged conflict not to harmonize the laws to the state but rather to resolve a potential conflict of Florida law with prevailing legal philosophies.[94] Justice Thornal's dissent in *Gibson* began by classifying the court's basis for conflict as harmless error.[95] He characterized the use of such a conflict as a pretext for jurisdiction over the merits of the case.

> It appears common law certiorari has returned. By allowing ourselves to examine the "record proper," including the "transcript of testimony," this Court is able to completely circumvent any jurisdictional issue and go right to the merits of each case. If we think the District Court of Appeal reached the wrong conclusion, the majority mysteriously finds some conflict. I think it is plain to see why we are receiving more and more petitions asking us to grant "conflict certiorari." If an attorney will scream the merits of his case long and

85. See note 59 *supra*.

86. 177 So. 2d at 234-35. *See* Gibson v. Maloney, 231 So. 2d 823, 833 (Fla. 1970).

87. *Id.* at 234.

88. 190 So. 2d 313, 320 (Fla. 1966).

89. *But cf.* Register v. Gladding, 322 So. 2d 911 (Fla. 1976). While review of district court decisions rendered with opinions has been limited by *Register*, the full impact of the opinion is still unclear. Justice England's language and the posture of the case allow two possible interpretations. First, in the strictest sense, *Register* merely demands adherence to the *Foley* rule that examination of lower court decisions by use of the record proper does not allow review of the transcript of testimony in the trial court. This rule has not been consistently followed. See notes 91-96 *infra*. Read more broadly, *Register* signals an intention to overrule the procedure of using the record proper to go behind decisions of the district courts rendered with an opinion.

90. *See* 190 So. 2d at 320.

91. 231 So. 2d 823 (Fla. 1970). *But see* Register v. Gladding, 322 So. 2d 911 (Fla. 1976). This holding seems to place a limit on the "reanalyzing of testimonial evidence to establish constitutional 'conflict.'" *Id.* at 912.

92. 231 So. 2d at 834.

93. *Id.*

94. *Id.*

95. *Id.* at 830-31.

> loud enough, he might always find a conflict somewhere in the "record proper."[96]

Justice Thornal cited the increase in petitions and number of cases reviewed on certiorari since *Foley*[97] as proof that the *Foley* dissent's prediction that the record proper concept would cause a flooding of the supreme court. Justice Thornal's most forceful statement returned to the increasing effect on the district courts of the court's pretextual use of record proper.

> I predict that if the Court keeps finding "direct conflict" at the rate we are moving, that in a relatively short time the District Court of Appeal will cease to be courts of final jurisdiction as intended by our Constitution. . . . We are rapidly approaching the much decried allowance of "two appeals," which concerned the framers of our amended juridical article when it was drafted in 1956.
>
> It will not be long before the entire purpose behind Fla. Const. art. V, §4(2), [98] as it was amended in 1956, will be defeated.[99]

Justice Thornal's fears in *Gibson* were echoed by Justice Drew in *Fountainbleu Hotel v. Walters.*[100] In *Walters,* Justice Drew objected to the issuance of a writ of conflict certiorari to review an alleged misapplication of law based on a district court decision rendered without opinion. The majority was reminded that the court is one of limited jurisdiction empowered to "harmonize, not correct erroneous decisions of the [district courts]."[101]

Although the expanded definition[102] of record proper is still the measure of the court's conflict jurisdiction, recent decisions have manifested a resurgence of opposition to the *Foley* rule. In *Baycol v. Downtown Development Authority,*[103] Justice Overton dissented from the majority's use of a portion of deposition testimony to create conflict. In calling for a new definition of record proper, Justice Overton relied on *Neilsen v. City of Sarasota*[104] to reiterate that the supreme court is not a court of selected errors that can whimsically choose cases of importance for review.[105] Justice

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96. *Id.* at 832-33.

97. *Id.* at 833.

98. FLA. CONST. art. V, §3(b)(3).

99. 231 So. 2d at 833.

100. 246 So. 2d 563 (Fla. 1971).

101. *Id.* at 566. Ironically, the majority of the court seems to parrot Justice Drew's statement when it does not want to review a district court decision. Financial Fed. Savings v. Burleigh House, 336 So. 2d 1145, 1146 (Fla. 1976). This opinion has an unusual twist; Justice England dissents claiming the supreme court should grant certiorari to resolve "a potentially embarrassing conflict." *Id.* at 1147. For a further demonstration of the courts move toward a narrower certiorari jurisdiction in a similar situation see Mystan Marine, Inc. v. Harrington, 339 So. 2d 201 (Fla. 1976) (when the district court denies certiorari without an opinion the supreme court has no jurisdiction to determine if a conflict exists, or whether certiorari was improperly denied).

102. *But cf.* Register v. Gladding, 322 So. 2d 911 (Fla. 1976) (the real impact of this decision, however, is not yet certain). *See* note 89 *supra.*

103. 315 So. 2d 451 (Fla. 1975).

104. 117 So. 2d 731 (Fla. 1960).

105. *Id.* at 734.

Overton, emphasizing the limited role of the Florida supreme court's conflict jurisdiction, stated that conflict jurisdiction should be exercised only "to stabilize the law by a review of decisions which form patently irreconciliable precedents."[106] Justice Overton was not alone in advocating this philosophy.[107] In two recent dissenting opinions, Justice England voiced the need for a re-evaluation of the court's use of record proper. In *AB CTC v. Morejon*,[108] Justice England challenged the existence of a conflict based on evidence and testimony from a different and prior lawsuit[109] because the court's exercise of conflict jurisdiction did not in the case result in a harmonization of state law.[110] In *State v. Embry*,[111] Justice England, pointing to the majority's "glossing over of the jurisdictional question to get to the merits,"[112] urged the court to deny certiorari when there was no jurisdiction to consider the merits: "A responsible exercise of our limited constitutional role requires that we refrain from a review of district court decisions which, on their face, either harmonize or apply existing precedents."[113]

Lack of predictability resulting from the unclear definition of record proper combined with the unfavorable impact on the district courts of this standard of review substantiate past and present fears about the workability and constitutionality of using the record proper as the method for examining district court decisions without opinion to determine whether the requirements for conflict certiorari have been met.

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106. 315 So. 2d 451 (Fla. 1975).

107. Justice England and Chief Justice Overton favor a limited supreme court review by conflict certiorari with limited examinations of the record proper. Justices Boyd, Adkins, and Roberts consistently vote for an expanded supreme court review by conflict certiorari. While neither of the two newer Justices, Sundberg and Hatchett, has specifically addressed this conflict, Justice Sunberg seems to be leaning toward the England-Overton view. *See* Florida Publish. Co. v. Fletcher, 340 So. 2d 914, 920 (Fla. 1976). Justice Hatchett's tendency to swing depending on the facts suggests that he employs a type of sliding scale approach to conflict certiorari jurisdiction. If Justice Sunberg and Hatchett continue to lean toward restricted jurisdiction, *Foley* may be overruled at any time. For an example of the new majority in action see Golden Loaf Bakery v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976).

108. 324 So. 2d 625 (Fla. 1975).

109. *Id.* at 629.

110. *Id.* at 629-30.

111. 322 So. 2d 515 (Fla. 1975).

112. *Id.* at 519.

113. *Id.* There have been some moves toward constricting the supreme court's conflict jurisdiction. Golden Loaf Bakery v. Charles W. Rex Constr. Co., 334 So. 2d 585, 586-87 (Fla. 1976) (dissenting opinions purporting to state the majority position as grounds for conflict); Register v. Gladding, 322 So. 2d 911 (Fla. 1976) (using record proper to go behind decisions of the district courts rendered with an opinion). See also note 124 *infra*. Nevertheless, as of May 12, 1976, the court still seems to take cases beyond their jurisdiction. In a case decided on this date, National Airlines v. Edwards, 336 So. 2d 545, 548 (Fla. 1976), Justice England stated in dissent: "I can only reiterate the warnings of my predecessors that to so [take cases where no real conflict exists] is at odds with a constitutional scheme which never contemplated that our district courts would be treated as 'way stations' in a multiple appellate process. This case demonstrates the majority's propensity to do just that."

CONCLUSION: CLEARER LINES FOR A DEFINITION OF POWER

Any approach to solving the problems created by the *Foley* rule must carefully balance the need for uniformity in the laws of the state, the possibility of injustice to litigants arising from per curiam decisions,[114] and the adverse impact of extended supreme court jurisdiction on the finality of district court decisions.

The problem of circumventing or second guessing the district courts could most easily be solved, short of a constitutional amendment, by requiring a district court to write an opinion in every case or face remand for failure to do so if the decision gives rise to a conflict. The problems with this procedure, however, include delay of final adjudication and the possibility of placing the supreme court in the position of dealing with a district court that refuses to write an opinion.[115] A procedure occasionally utilized is to request the district court to send to the supreme court a copy of the district court proceedings.[116] Presently, however, different courts send different information and often the supreme court must make repeated requests for the information desired.[117] The district courts could be more directly involved by establishing a uniform procedure for the inclusion of the district court's view in conflict certiorari proceedings.[118]

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114. There is a potential violation of equal protection at the district court level if failure to write an opinion can be shown to prejudice or aid appellants in obtaining review. Under *Lake,* for example, failure to write an opinion could have deprived a litigant of even a possibility of review except in circumstances of extreme injustice. Interview with Justice B. K. Roberts, Supreme Court of Florida, in Tallahassee, Fla., (Oct. 13, 1975). Under *Foley,* an absence of opinion may prejudicially aid in obtaining review by the supreme court.

115. The procedure of requiring the district courts to write an opinion was occasionally used after *Lake,* see notes 35, 36 *supra,* but ultimately that produced the result in *Foley*; that is, refusal by the district court to write an opinion. As noted by Justice England, "Unlike our court, the district courts are required to accept appeals from all litigated matters. In the nature of things they will receive a large number of cases which routinely apply existing law to a variety of different facts. It seems to me obvious that there are many cases which warrant no opinion decisions simply because they are routine. This category of district court cases can never provide conflict jurisdiction for us, and to the extent that we tighten our notions of conflict, the district courts will be encouraged to use no opinion decisions to handle this large and routine portion of their workload." Letter from Justice A. England to Domenic L. Massari III, (Dec. 8, 1975), on file at the University of Florida Law Review. The only possible danger in Justice England's approach is the potential district court decision without opinion disobeying the express authority of the supreme court. This type of decision would then be unreviewable even though it flies in the face of precedent.

116. Interview with Chief Justice Ben Overton, Supreme Court of Florida in Tallahassee, Fla. (Oct. 3, 1975).

117. *Id.*

118. *See* Appendix, especially provisions II(b) and III(a)(4)(b)(i) & (ii). It is clear that the establishment of a uniform procedure would involve the expenditure of more time at the district court level, but the district court system and the number of judges can be expanded to solve the problem. Assuming good faith on the part of judges, the most logical place to determine what factors are relevant to conflict is at the district court level. The district court judges have read the briefs and heard the oral arguments. They

The problem of an ever increasing number of detailed and lengthy petitions for certiorari[119] is in need of immediate solution as consideration of such petitions is absorbing an inordinately large percentage of the supreme court's time. In contrast to the procedure for determining conflict between regular court opinions, significantly greater numbers of hours are needed to analyze petitions based on per curiam district court decisions because only the record proper provides a basis for determining if a conflict exists.[120] The court, by denying certiorari if a petitioner does not carefully isolate support for the conflict, could halt the fishing expedition approach[121] employed by many appellate practitioners. An effective solution would be a supreme court opinion on record proper delimiting not only the proper contents of a brief for certiorari but also the degree of specificity to be demonstrated before the court will accept supportive information as "necessary to establish conflict."[122] An improved definition of "necessary to establish jurisdiction" might reduce the volume of marginally relevant data urged on the court as the basis for a conflict. In addition, this definition should be codified in an amendment to the appellate rules that enunciates with specificity the appropriate requirements of a brief on jurisdiction.[123] Such an explicit definition of record proper would allow presentation of a finalized and clear picture of conflict appropriate for supreme court consideration on the issue of jurisdiction.

The final problem created by *Foley*, expansion of supreme court jurisdiction to the extent that it interferes with the final appellate jurisdiction of the district courts, is one that can be solved only by the court's careful reexamination of its constitutional role.[124] Only Florida's supreme court possesses

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can select what is appropriate and what is not for the supreme court to consider as "that part of the record necessary to establish [conflict] jurisdiction." F.A.R. §4.5(c)(6) (1977).

119. See notes 54-62 *supra*.

120. See notes 58-65 *supra* and accompanying text.

121. See note 64 *supra*.

122. F.A.R. §4.5(c)(6). *See also*, proposed F.A.R. §9.28; note 61 *supra*. "This approach would also be considerably less costly to the litigants, and we should ever be mindful of the costs of operating our system for those who use it." Letter from Justice A. England to Domenic L. Massari III (Dec. 8, 1975) on file at the University of Florida Law Review.

123. The proposed amendments to the FLORIDA APPELLATE RULES ON CONSTITUTIONAL CERTIORARI are silent on most of these points. The proposed amendments consolidate the petition for certiorari with the brief for jurisdiction, prevent application for a writ to act as a stay in any proceedings, and finally expedite the time pending for a writ of certiorari to be acted on. Though helpful, these changes neither address the core of the record proper problem nor provide guidelines for conflict jurisdiction. Most important, the amendments provide no criteria for treatment of district court decisions rendered without opinion. Proposed F.A.R. §9.280 note 61 *supra*.

124. Recent opinions indicate that the court is narrowing its conflict jurisdiction. Golden Loaf Bakery v. Charles W. Rex Constr. Co., 334 So. 2d 585 (Fla. 1976); Wilson v. Southern Bell Tel. Co., 327 So. 2d 220 (Fla. 1976); Southeast Title Co. v. Caldwell, 326 So. 2d 12 (Fla. 1976); Register v. Gladding, 322 So. 2d 911 (Fla. 1976); Mahler v. Lauderdale Lakes Nat'l Bank, 322 So. 2d 507 (Fla. 1976). *Cf.* National Airlines v. Edwards, 336 So. 2d 545, 547-48 (Fla. 1976). Also, the author's tabulations for January through March, 1976, show a decrease in the number of conflict certiorari cases heard by the court. Out of 55 reported cases of certiorari heard from January to March, the court has entertained only 34 cases on the basis of conflict. Of these, eight have been dismissed as not containing conflict after the filing of briefs and/or oral arguments, eight have been dismissed pursuant

the ability to define the limits of its own power.[125] A rejection of all cases in which a district court does not write an opinion cannot adequately protect the constitutional goal of harmonizing the laws of the state, but the need for harmonization should not open the doors to unqualified review of any case the supreme court finds to be of great interest from a review of the record proper. The standard of review selected by the court should protect against review of the merits before determination of jurisdictional competence. At present, the only effective protection that the court can employ against a petitioner's premature exhibition of the merits is a strict enforcement of the phrase "only that part necessary to establish [conflict]" as set out in the present Florida rules of appellate practice.[126] A more workable alternative would be the careful limitation of the record of conflict presentable to the court.[127] A precise definition of record proper would enhance the supreme court's performance of its supervisory function of harmonizing the laws of the state without adversely affecting the final appellate jurisdiction of the district courts of appeal.

Solutions to these problems are urgently needed. In dealing with per curiam determinations in the future and ultimately disposing of *Foley*, the Supreme Court of Florida must give due consideration to both constitutional and practical questions. The most desirable resolution encompasses cooperation among state courts, not isolationism. Only such cooperation can meet the ultimate goal of any legal system: a swift, consistent, and workable dispensing of justice.

DOMENIC L. MASSARI, III

APPENDIX

PROPOSED AMENDMENT TO §4.5 RULES OF APPELLATE PRACTICE*

I. GROUNDS FOR CONFLICT CERTIORARI
Supreme court review by conflict certiorari may be based only on the following grounds:
A. Showing conflict is of the nature that failure to harmonize conflict will result in inconsistent and confused decisions on this point of law, or
B. Showing an adverse factual impact on the immediate litigant is directly caused by the conflict alleged.

II. REQUIREMENTS FOR CONFLICT
All petitions for conflict certiorari must demonstrate that the decision of the district

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to a recent supreme court decision, and only 18 have actually been heard and decided on the merits of conflict. Compare the 1976 figures with 128 cases heard and decided on the basis of conflict in 1975.

125. *Contra*, Esteva v. Adkins, No. 75-215 (N.D. Fla., filed Dec. 1976). This suit alleges an abuse of the Florida supreme court's conflict jurisdiction and asks the federal court to determine the limits of the supreme court's conflict power.

126. F.A.R. §4.5(c)(6) (1977).

127. See Appendix *infra*.

court of appeal creates a conflict with the decision of another district court of appeal or the supreme court on a point of law by showing:

A. A conflict on the face of the district court opinion, or

B. If the district court decision is made without opinion, by disposition of a petition for rehearing, filed with the district court, based on grounds of conflict petitioner offers as grounds for certiorari.

III. BRIEFS

A. A petitioner's brief offered in support of the court's conflict jurisdiction will contain only:

1. Grounds of conflict alleged.
2. Citation of authority giving rise to conflict.
3. Discussion of existence and impact of alleged conflict.
4. An attached copy of the "record proper" concerning the subject matter of the conflict from:
   a. Opinion of the district court.
   b. If no opinion, then:
      i. District court evaluation of the conflict from opinion on petition for rehearing.
      ii. If no rehearing granted or opinion filed on grounds of conflict in disposition of rehearing, a certified copy of the "record proper," on point of law in conflict, from the district court.

B. A reply brief on jurisdiction will be limited to the same matters appropriate for petitioners brief as described in (A.) of this section.

*This proposal could also replace (c)(2) of proposed F.A.R. §9.280 (Sept. 1976 draft), or could be formulated into a constitutional amendment to article V, §3(b)(3).