Final Report and Recommendations

Committee on Per Curiam Affirmed Decisions

May 2000

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Copies

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Chairman's Remarks

As Chair of your Committee on Per Curiam Affirmed Decisions, I submit to you the accompanying report of the Committee's completed work that complies with the charge given the Committee. As Chair, I trust that I will be indulged in exercising the privilege of the Chair in order to present my observations in regard to the work of the Committee, the Committee Report itself, the work and assistance provided by the staff of the Office of the State Courts Administrator and the efforts of the Committee to seek input into the work of the Committee and the response to those efforts.

First, let me comment on the assistance we received from the staff of the Office of the State Courts Administrator and specifically that of Gregory Youchock and Richard Cox. This past February marked my twentieth anniversary of service as a judge on the Second District Court of Appeal. During that period of time, I served from the time of its rebirth in 1985 until 1998 on the Florida Judicial Council and its successor, the Florida Judicial Management Council. I have served as Chief Judge of the Second District Court of Appeal, as President of the Conference of District Court of Appeal Judges, and have been actively involved since 1980 in advancing to the Florida Legislature the needs of the Florida judiciary. I give you this history only to emphasize that in all of those activities, I have had the opportunity and responsibility to work closely with much of the staff of the Office of the State Courts Administrator. In doing so, I have found that office and its people to be without equal in the knowledge and dedication with which they perform their duties and with which they effectively and cooperatively serve the courts and, therefore, the people of the state of Florida. Gregory Youchock and Richard Cox are exemplars of that high standard of knowledge, dedication and cooperation, and without them, the work of your Committee would have been considerably more difficult, if not impossible. I know

that I, personally, if ever again given such a task would insist that they be at my right hand as they have unfailingly been throughout the work of the Committee.

Second, the Committee itself has gone about its work in a manner that reflects the absolute integrity and complete dedication that each and every member of the Committee brought to the work of the Committee. While there were, and are, and will continue to be, differences of opinion in regard to methods that should or should not be used to achieve the results desired, those differences were never divisive, intolerant or mean-spirited. I am personally convinced that in the work of the Committee each member sought only that which each believed would serve to not only continue, but to advance the excellence of the Florida judiciary in its service to the people of Florida.

Third, the Committee sought throughout its tenure to encourage, not only written comments on, and input into, the work of the Committee, but perhaps more importantly, personal participation by those interested in the meetings and discussions of the Committee. The historic use of PCAs has often been met, particularly by those opposed to them, with considerable zeal and emotion and therefore, as expected, we received a number of negative written commentaries which are included as an addendum to the report. Unfortunately, our open invitations to appear before and participate in discussions with the Committee were virtually ignored. The Committee held several well publicized meetings, including an open panel discussion in Miami, during regularly scheduled meetings of The Florida Bar. The attendance of those other than Committee members and staff at those meetings could be counted on one hand. One such widely publicized opportunity was the open panel discussion held in Miami at the meeting of The Florida Bar on January 20, 1999. The extraordinary panel that participated in the panel discussions brought particular and unique insight into the work of the Committee. The panel consisted of former Chief Justices of the Florida Supreme Court Alan C. Sundberg, Sr. and Stephen H. Grimes; the now retired "Dean" and longest serving judge of all District Court of Appeal Judges, former

Third District Judge, Thomas H. Barkdull, Jr.; retired Fourth District Judge William C. Owen, Sr.; and panel moderator, Thomas E. Hollenhorst, Associate Justice of the California Fourth District Court of Appeal. Adding to the expertise and historic knowledge of that panel is the fact that former Chief Justice Sundberg served as a member of the 1979 Florida Constitution Article V Review Commission; Judge Barkdull had served on every Constitution Revision Commission (1968, 1978 and 1998), and former Chief Justice Grimes served as Chair of the 1995 Article V Task Force legislatively created to provide an open forum for hearings and study of Article V issues in advance of the work of the 1998 Florida Constitution Revision Commission. While every member of the Committee and staff were present for that panel discussion, there were fewer than five other persons in attendance. In any study of a matter in controversy, it is of immeasurable benefit to an understanding of the issues involved for those interested to hear firsthand from those who have genuine expertise in the subject matter. It is an unparalleled opportunity to receive a direct or immediate response to specific questions or objections raised. It is disappointing that those who voice such strong feelings about PCAs failed to take advantage of, and thereby afford the Committee the benefit of, such a profitable exchange of ideas and information. It cannot be without considerable significance that no member of that distinguished panel recommended abolishing or significantly altering the present use of PCAs, and, to the contrary, every member favored the continued use of PCAs as a useful, effective and desirable tool to be used by Florida's appellate courts in the proper administration of justice.

As a lesser substitute for those who did not take advantage of that panel discussion in Miami, I would strongly urge a thorough study of Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), and the special concurring opinion of then Chief Justice England. (Jenkins is attached to the report as Appendix A.) No one concerned with and interested in the history and use of PCAs in the jurisprudence of Florida and in the clearly delineated respective jurisdictions of Florida's District Courts of Appeal and the Florida Supreme Court can afford not to be knowledgeable of Jenkins.

Finally, I would comment on the Report of the Committee itself and in that regard what the Committee was charged with doing and what it was not charged with doing.

The Committee was not charged with studying the desirability of, or the effect on, the jurisprudence of Florida of the "selective publication" of opinions. While many would link PCAs with the selective publication of opinions, I believe that those are two different subject matters which should have no direct linkage. There are many problems associated with selective publication which should be intensely studied before recommendations are made in regard to utilizing selective publications in Florida.

When opponents of PCAs speak, they often appear alarmed at the increased use of PCAs in Florida. I am of the opinion that it should not be surprising, or a subject for alarm, that as Florida's appellate caseload increases, as various areas of our jurisprudence become increasingly more settled and as access to our courts becomes increasingly more open, the proper use of PCAs will naturally and properly increase.

I do not think the answers to Florida's appellate caseload and workload challenges lie in increasing the number of courts and/or judges and/or the selective publication of opinions in order to curtail the use of PCAs. As new tools and methods of addressing judicial needs arise, it is not a necessary corollary to abandon those that have been useful in the past. I think it of significance that there is not a recommendation either in the report of the Committee as a whole, or in the minority reports, that the use of PCAs be abandoned or prohibited. The use of PCAs is not a new device that has been recently thrust upon our legal system. In the materials submitted with the Committee's Report is an article from the American Bar Association Journal of August 1999. (Appendix A) That article by William C. Smith, Big Objections to Brief Decisions, uses as its starting point an unpublished opinion on rehearing of an affirmance without opinion of the Eleventh U.S. Circuit Court of Appeals, in United States of America v. Vicki Lopez-Lukis, No.

98-2179. While Mr. Smith, the article's author, obviously had access to and referred to the Eleventh Circuit's unpublished opinion on rehearing in Lopez-Lukis, he does not quote from the opinion. I have, since publication of Mr. Smith's article, been furnished a copy of that opinion. Finding its opening paragraph historically instructive, I therefore quote that paragraph of that opinion as follows:

> The tenor of one of the arguments for rehearing suggests an element of illegitimacy about the practice of affirmance without opinion, such as is permitted by Eleventh Circuit Rule 36-1. More than 20 states and each of the federal circuits use summary dispositions similar to Rule 36-1. Federal Rule of Appellate Procedure 36 contemplates decisions without opinions. In addition, the appellate courts of England, as we understand their practice, still decide most of their cases without written opinions. The rationale behind these rules and practices is that in many cases no jurisprudential purpose is served by writing an opinion. See Furman v. United States, 720 F.2d 263, 266 (2d Cir. 1983) ("A great many cases do not present any new or significant issue for which there are not ample precedents already in the published reports . . . . The use of summary orders permits judges to devote more time to the remaining cases that truly merit fully developed exercises of judicial craftsmanship"). In light of this widespread practice, we are confident that we do nothing revolutionary when we decide to affirm a judgment without a written opinion.

Reflecting on the lengthy process that your Committee has engaged in, the information received, the discussions and debates that have ensued, and considering all of that in light of the

fact that on January 1, 2001, my retirement is constitutionally mandated after twenty-one years as an appellate judge, one overriding and disturbing fact will be carried with me. The Eleventh Circuit in Lopez-Lukis refers to that disturbing factor as "The tenor of . . . arguments . . .[that] suggests an element of illegitimacy about the practice of affirmance without opinion . . . ." As I have already stated, in the work of the Committee the relationship of the Committee members with each other was exemplified by the cordiality and mutual respect that our professions' search for "professionalism" seeks to attain.

In our profession, that should be so noble, it is never necessary or acceptable to be vitriolic or vituperative in support of or opposition to any position. Unfortunately, there have been some caught up in the fervor of their opposition to PCAs, who have voiced their opposition with what amounts to thinly disguised accusations of laziness at best, and malevolence and/or malfeasance at worst directed toward Florida's appellate judges. In my rather lengthy career as a practicing lawyer/judge, I have found the men and women of Florida's judiciary to be intelligent people of dedication, honor and integrity. The type of confrontation that uses a device of degradation in support of a position is in no way beneficial to increasing public confidence in the judiciary or the legal profession. There are those, Ms. Daniels included, who, not without some reason, advance the position that because of the "bad feelings" created by the debate over the use of PCAs, the very process itself (PCAs) should be altered. I do not believe that the lawyers and clients who have lost in the trial court and who have had that loss affirmed in our appellate courts are going to have their "bad feelings" assuaged by significantly altering the use of PCAs. Many of those who are unhappy with trial court decisions and who are unsuccessful in obtaining relief on appeal continue to complain about the "finality" of district court of appeal decisions, whether PCAs or otherwise. To indulge in that type of complaint or to be disturbed by it is to ignore the fact that DCA decisions were, for the most part, intended to be final.

The conclusion of the process of study by your Committee, therefore, leaves me convinced that the great majority of persons who express displeasure with PCAs are in fact dissatisfied with the present jurisdictional relationship between the Florida district courts of appeal and the Florida Supreme Court. If my analysis is correct, those dissatisfied should candidly engage in a frontal and forthright pursuit of the jurisdictional changes they desire rather than pursue a "back-door" attack on PCAs

Respectfully,

Monterey Campbell, III, Chair
Committee on Per Curiam Affirmed Decisions

Executive Summary

The Judicial Management Council's Committee on Per Curiam Affirmed Decisions (hereinafter PCA Committee) was given the task of making a thorough and comprehensive inquiry into the practice of the issuance of PCA decisions and their effect on the judicial system. In order to accomplish this task, the PCA Committee met six times (five in person and one via video conference), including one meeting which was a panel discussion at The Florida Bar's Mid-Year Meeting in January,1999, with audience participation. In addition, the PCA Committee collected specific data on PCAs from July 1998 to June 1999 from the five DCA clerks' offices and solicited input on the subject from states with appellate caseloads of comparable sizes to Florida.

In order to fully understand the historical context in which the issue must be considered, the PCA Committee engaged in a comprehensive review of relevant literature on the subject (see Section III). The subject matters considered in the review of literature included numerous subjects related at least tangentially to the matter under discussion. Among the subjects reviewed were standards for appellate courts, case processing, discretionary review of the decisions of appellate courts, selective publication, conflict review by the Supreme Court, and various views on the use of the PCA.

The PCA Committee was interested in any trends associated with PCAs in Florida. The PCA Committee hypothesized that any increase in PCAs might be associated with a concomitant increase in Anders appeals, postconviction relief cases, and other non fully-briefed appeals. In order to test this hypothesis, the PCA Committee developed a data collection instrument with three categories: Criminal, Administrative, and Civil, each with several subcategories. The instrument also contained three disposition types: written opinions, PCA, and citation PCAs. The PCA Committee solicited the help of the five district court clerks' offices in collecting the

necessary data. Data was collected on a monthly basis from July 1998 to June 1999. The PCA Committee's hypothesis was only partially supported by the data, in that Anders appeals and postconviction relief cases did receive a high percentage of PCAs; however, so did fully-briefed cases in the criminal and civil categories.

The PCA Committee solicited written input from judges, state attorneys, public defenders, and members of the bar. A significant amount of time was also dedicated to reviewing responses from judges and attorneys. Most of the judges and state attorneys who responded saw no significant problem with the present use of the PCA, while many public defenders and private bar members who responded want the district courts to either curtail or eliminate the practice.

Among the reasons given in support of the use of the PCA is that it enhances judicial efficiency, reduces non-precedential clutter in reported opinions, saves judicial time and resources, reduces delay in case disposition, disposes more promptly of frivolous appeals, increases the time available for cases in which opinions are needed, and reduces the attempts at frivolous review in the Supreme Court. Among the arguments made in opposition to the use of the PCA are that it fosters unprofessionalism by the bench and bar, diminishes the appearance of fairness and meaningful access to the courts, limits possible review by the Supreme Court, conceals inconsistent results, and allows the judiciary to avoid difficult decisions. A summary of the various responses is located in Appendices F, G, H, and I.

The PCA Committee eventually settled on five main areas of discussion, specifically: (1) motions to request an opinion; (2) suggestions for when to write an opinion and when to utilize a PCA; (3) the use of checklists; (4) the use of citation PCAs; and (5) the adoption of a system of unpublished opinions.

Recommendations

After extended discussions, the PCA Committee makes the following recommendations:

- **Reject the abolishment of PCAs.**
- **Amend rule 9.330, Florida Rules of Appellate Procedure, to allow, after a PCA, a motion to request an opinion.**
- **Develop a "suggestions for opinion writing" curriculum to be used regularly at the New Judges College and periodically at the Appellate Judges Conference as an educational tool.**
- **Reject the use of a checklist.**
- **Discourage the use of PCAs when there is a dissent in the case.**
- **Reject the requirement that PCAs be accompanied by a citation to authority**.
- **Decline to take a position on the subject of developing an alternate system of unpublished opinions as beyond its purview.**

Conclusion

The PCA Committee concludes that whereas there may be some merit to the concept of providing a written explanation of every decision, there are legal and practical reasons why such a course is not desirable or feasible. From a legal standpoint, the PCA Committee believes that writing a brief opinion, even utilizing a citation or checklist, would add nothing to the jurisprudence of the state and possibly create confusion in the law. On practical grounds, the PCA Committee is of the opinion that the present caseload facing each district court judge would make such opinion writing a significant burden, in terms of judicial time, and could subtract from time available for writing opinions in cases where such writing is more deserved. When these considerations are combined with the fact that the majority of cases receiving a per curiam affirmance are not fully-briefed and are frivolous in many cases, the PCA Committee believes the present mix of written opinions and PCAs is not inordinately skewed toward the latter.

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Appendices

I. Introduction

The Committee on Per Curiam Affirmed Decisions (hereinafter PCA Committee) was appointed by the Chair of the Judicial Management Council (JMC) in the Spring of 1998 in response to comments from a JMC Committee on Appellate Court Workload and Jurisdiction. The PCA Committee began its work in April 1998.

Over the next several months, the PCA Committee met several times focusing its attention on the following issues: (1) conducting an extensive literature review; (2) gathering PCA statistics from each of Florida's DCAs; (3) surveying the ten largest states (other than Florida) regarding their use of PCA decisions; (4) hosting a panel discussion comprised of former Supreme Court justices, former appellate judges, and a justice of California's intermediate appellate courts; (5) soliciting input from members of The Florida Bar, Florida judges, state attorneys, and public defenders; and (6) reviewing Florida's new appellate case management system.

The PCA Committee also reviewed and discussed a number of substantive issues that could impact the use of PCAs by Florida's appellate courts, including: (1) Recommendation No.15 of the 1995 Article V Task Force; (2) a proposed amendment to appellate rule 9.330, Florida Rules of Appellate Procedure; (3) suggestions for opinion writing; (4) the use of citation PCAs; (5) the adoption of a district court of appeal checklist for PCAs; and (6) the use of unpublished opinions. Each of the foregoing issues is discussed in this report.

It is important to note that the PCA Committee framed much of its debate and work within the context that Florida's appellate courts are structured to be primarily courts of last resort as provided for in the Florida Constitution. By design, the power of the Supreme Court to review decisions of the DCAs is limited. In Ansin v. Thurston, 101 So. 2d 808,810 (Fla. 1958),

the Supreme Court states that "it was never intended that the DCAs should be intermediate courts." The use therefore of the term "intermediate" in regard to Florida's district courts is a misnomer. Moreover, the PCA Committee believes that any change in discretionary review that may adversely impact the workload of the Supreme Court is antithetical to its charge.

The PCA Committee is of the opinion that Florida's judiciary is the finest in the nation. The PCA Committee further believes that Florida judges, with few exceptions, conduct themselves in a professional and ethical manner and in accord with their oath of office. The suggestions that Florida's appellate judges issue PCAs for reasons other than the fact that there has been demonstrated no harmful error in the trial court, or that panels are reluctant to write for various inappropriate reasons are unfounded and rejected by the PCA Committee. Moreover, the integrity of the appellate process should not be maligned by unfounded and unsupported accusations that amount to charges of judicial misfeasance, malfeasance, or nonfeasance. Simply put, the understandable reality is that it is difficult for many lawyers to accept the fact that their case does not deserve a written opinion.

Further, the PCA Committee also believes that many appeals that come before the DCAs are matters well established by law and that written opinions in these matters would serve not to further define but confuse the law, and further clutter an already crowded reporter system. The PCA Committee also believes that regular appellate practitioners should be able to determine the court's reasoning for issuing a PCA from the arguments in the briefs filed and questions asked and comment made, at oral argument. It is the attorney who practices appellate law infrequently who perhaps has the most difficulty in understanding why his or her case may have received a PCA.

Moreover, the PCA Committee would like to note that the threshold for trial court reversal is very high. Specifically, the threshold is whether the trial court abused or exceeded its discretion on factual issues when it issued its ruling. It is the experience of the judges on the

PCA Committee that a PCA is issued when the panel is satisfied that affirmance is correct under the applicable laws and facts. The PCA Committee also rejects the suggestions by some that the three-judge panels act in a less than professional manner and that because their work is not conducted publicly, it is somehow less than forthright or conscientious.

The PCA Committee also believes that appeals in Florida should be decided by judges, not law clerks or other legal staff, and thus rejects any system that would place more reliance on the latter when disposing of appeals. Nationally, and in Florida, the proliferation of central and personal legal staff at the appellate level has the potential of resulting in the unintended negative consequence of judges becoming managers of staff, rather than judicial decision-makers. The PCA Committee believes that such a scenario is not in the best interests of justice, nor is it the desire of Florida's citizens. Florida's appellate courts have always exercised caution and restraint in requesting additional legal staff positions. The PCA Committee endorses continuing discretion in the use of legal staff at the appellate level.

The PCA Committee also believes that any attempt to expand discretionary review by the Supreme Court would require an amendment to the Florida Constitution and thus should be considered with great care. The PCA Committee was very mindful of the potential impact on the workload of the Supreme Court when discussing each option under consideration. There was a general consensus on the PCA Committee that any recommendation directly impacting Supreme Court workload was beyond the scope and authority of the PCA Committee's charge, and was hence avoided.

Therefore, the PCA Committee has purposefully chosen to advance options that do not necessarily increase Supreme Court workload, add confusion to the law, clog the reporter system with redundant or unnecessary opinions, or allow legal staff to assume judicial functions. It is

the sincere belief of the PCA Committee that this report is thorough, fair, and in the best interests of all those who participate in Florida's appellate court system. The recommendations advanced in this report are intended to improve Florida's appellate courts where necessary, and to affirm those aspects of an appellate system that are working as provided for in the Florida Constitution.

II. Committee Charge and Membership

Charge

The Committee on Per Curiam Affirmed Decisions will make a thorough and comprehensive inquiry into the practice of issuing PCA decisions. This study should include compilation of quantitative data regarding the practice of issuing PCA opinions, as well as substantive inquiry into the effects that reliance on PCA opinions has on others within the justice system, including civil litigants, criminal defendants, trial courts, the Supreme Court, and The Florida Bar.

Membership

The Honorable Monterey Campbell, Chairman - District Court Judge, Second DCA (JMC member 1995-98)
The Honorable Peter Webster - District Court Judge, First DCA
The Honorable Gerald B. Cope, Jr. - District Court Judge, Third DCA
The Honorable Barry J. Stone - District Court Judge, Fourth DCA
The Honorable John Antoon - District Court Judge, Fifth DCA (JMC member 1995-98)
The Honorable Bernie McCabe - State Attorney, Sixth Judicial Circuit (JMC member)
The Honorable Nancy Daniels - Public Defender, Second Judicial Circuit
Mr. Brian Onek - Assistant Public Defender, Eighteenth Judicial Circuit
Mr. Thomas Elligett - Attorney, Tampa
Mr. Robert Krauss - Assistant Attorney General, Tampa

Staff to the PCA Committee was provided by the Office of the State Courts Administrator.

Mr. Gregory Youchock - Court Operations Consultant

Mr. Richard Cox - Senior Attorney

III. Literature Review

The PCA Committee conducted an extensive literature review on the use of per curiam affirmances without opinion. In addition to reviewing the American Bar Association's *Standards Relating to Appellate Courts*[1], a number of journal articles and other relevant pieces on the subject, both within Florida and nationally, were reviewed by the PCA Committee. As one might expect, the literature in this area is both critical and supportive of the use of PCA decisions. Below is a summary of the literature reviewed by the PCA Committee.

In January 1997, the Florida Bar Appellate Practice and Advocacy Section conducted a roundtable discussion at its mid-year meeting on the use of PCA decisions. The PCA Committee began its work in earnest by reviewing the roundtable discussion materials. The PCA Committee reviewed ***Standards Relating to Appellate Courts***. The standards suggest that appellate judges should confer after argument is completed and before a decision is formulated. With regard to form, the standards suggest that "... the court should give its decision and opinion in a form appropriate to the complexity and importance of the issues presented in the case and, that every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based." Directions upon remand should state clearly and specifically what course of action is to be followed in the court below.

With respect to the decision process, the standards note that "... an appellate court's decisional process should be collegial." It is not essential that every case be decided by full opinion. "The public interest is served by the court's ability to allocate its efforts according to the complexity and importance of the questions it must decide. That interest far outweighs

[1] *Standards Relating to Appellate Courts*, American Bar Association Judicial Administration Division, Standards of Judicial Administration, Vol. III, 1994, Section 3.36 Decisions and Opinions, pp. 65-69.

attempting to give every case equal literary treatment." The standards also note that "... litigants are entitled to assurance that their cases have been thoughtfully considered. The public, also, is entitled to assurance that the court is thus performing its duty. Providing that assurance requires that the decision in every case be supported at least by reference to the authorities or grounds upon which it is based."

The PCA Committee also reviewed ***Intermediate Appellate Courts: Improving Case Processing.***[2] This study reviews and discusses various disposition practices of intermediate appellate courts in Arizona, Florida, Maryland, and New Jersey and any resulting impact these procedural changes might have on quality of review. New Jersey's fast-track calendar for sentencing appeals is reviewed; appeals raising sentencing issues requiring no briefs are heard on an accelerated calendar and decided by order. The article notes that

> "... this procedure has been designed to help the court handle its high volume of these appeals. The benefits are that the court can hear these appeals more expeditiously, and the public defender can bring the appeals without having to write briefs. The justification for this procedure is that the legal issues in sentencing challenges are settled, and questions regarding the application of law to fact can be adequately presented upon review of the transcript and in argument alone."

New Jersey's use of two-judge panels is also discussed. In New Jersey, over 60 percent of civil appeals and 80 percent of criminal appeals are decided by two-judge panels. The article notes that New Jersey judges view the two-judge panel as a device that increases productivity and averts a backlog of briefed appeals. Procedurally, the appeals are designated by the research staff director after the briefs and record have been reviewed. Presiding judges and panels themselves can change the designation if they are so inclined. The quality of appellate review is maintained

[2] Joy A. Chapper and Roger A. Hanson, *Intermediate Appellate Courts: Improving Case Processing*, National Center for State Courts, 1990, pp. 20-22.

by two safeguards: (1) written decisions in every appeal explain the court's reasons for the outcome; and (2) the several layers of screening (staff and judicial) ensure that only appropriate cases are heard by two judge panels.

Maryland also has an expedited procedure. The procedure used in Maryland is voluntary and can be used in any type of appeal. According to the article "the procedure involves short briefs filed in a compressed time frame and accelerated submission to the court (with or without oral argument)." Unlike New Jersey's system, Maryland's procedure is not structured to accommodate a large portion of the caseload.

Florida's use of PCAs is also reviewed. The authors note that Florida's use of PCAs is another way for appellate courts to reduce disposition times. Eliminating the requirement for a written decision with reasons enables the court to devote more time and effort to opinion writing in the more difficult or complex appeals. The safeguard is the panel discussion of each appeal. The authors note that the use of PCAs is institutionalized in Florida and that this type of disposition is a policy option available to other appellate courts as one way for them to address increasing caseloads. Of the four states reviewed, Florida is the only state that does not require a written opinion in every case.

The PCA Committee reviewed Section E, "Opinion Writing Standards and Practices" from Judge Gerald B. Cope, Jr.'s [3]***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***.[4] In Section E, Cope reviews the ABA Standards Relating to Appellate Courts, noting that they recommend an opinion in every case. In less significant cases, the ABA standards recommend at least a statement of grounds. Cope notes that this position is also urged

[3] Judge Cope is a member of Florida's Third District Court of Appeal (Miami) and the PCA Committee.

[4] Florida Law Review, Vol. 45, 1993.

by appellate authorities and favored by practitioners. The ABA Standards recognize that full opinions are warranted in some cases but more abbreviated treatment is appropriate in others. Cope also notes that "... 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 jurisdictional prerequisites has been satisfied."

Cope notes that state courts differ in their opinion writing practices. Some use affirmances without opinion while others do not. In those states using affirmances without opinion, the practice is usually borne of necessity and is typically used as a case management technique to relieve excessive appellate workload. Such is the case in Florida. Florida's appellate workload is higher than recommended by appellate experts. Cope adds that "... although frequently criticized, affirmance without opinion has been a customary feature in Florida appellate practice."

Cope offers three observations about the use of Florida's affirmances without opinion. First, the practice is unregulated in Florida. A number of other jurisdictions have promulgated rules regulating opinion writing, but that has not occurred in Florida. Second, affirmances without opinion are used in some cases in which there is a debatable legal issue. This fact is illustrated by the regular publication of written dissents or written concurrences with affirmances without opinion. Third, there are significant variations among the five DCAs in their use of affirmances without opinion. Some attribute the variation to differences in custom and opinion writing.

Cope notes that it does not follow that a matter is unimportant merely because no opinion has been written. He believes that there are several reasons why this is so. First, the Supreme Court standard of importance may differ from that of the appellate court. Second, workload often determines whether an opinion will be written. An abbreviated opinion which omits jurisdictionally relevant words can be as preclusive as a decision without opinion. Third,

impending changes in decisional law will be known in the Supreme Court far in advance of an opinions approval and release.

Also provided in the roundtable materials was an article by Harry Lee Anstead[5] entitled ***Selective Publication: Better Than Nothing At All***, reprinted from The Florida Bar Journal, December 1984. In response to The Florida Bar's Appellate Rules Committee recommendation opposing selective publication, Justice Anstead (then a judge on the Fourth District Court of Appeal) evaluates the merits of selective publication versus per curiam affirmance. The term "selective publication" refers to the practice whereby only selected appellate opinions are published in an official reporter. Not all opinions would be published. Rather, either the panel issuing the opinion or the Supreme Court would designate which opinions would be published. Anstead traces the historical roots of selective publication back to Eugene Prince, a California lawyer who wrote a 1962 article in the ABA Journal assailing the continuing practice of publishing all appellate opinions regardless of precedential value. Since 1962, 32 states and the District of Columbia have adopted some form of selective publication.

Anstead notes that critics of selective publication argue that it undermines the legal principle of *stare decisis* (the principle of adhering to precedent) and that the practice denies publication to many opinions of precedential value, thereby reducing judicial accountability, public confidence in the courts, and the quality of judicial review. Advocates of selective publication respond by noting that the issue is whether distinctions between opinions are really important to legal development. They note that once a legal rule is well established, repeated application of that rule to similar factual settings in an appellate opinion does little to sharpen the law's image. Anstead notes that the underlying question appears to be whether all opinions are of sufficient value to justify the same publishing, indexing, distributing, storing and researching costs attendant to publication.

[5] Justice Anstead currently sits on the Supreme Court of Florida.

Anstead discusses the major criticism of selective publication, namely the no-citation rule. Critics charge that they cannot cite opinions of precedential value that are unpublished. Others charge that large law firms will be able to track unpublished opinions, thus giving them an unfair advantage into the court's reasoning on particular issues. These complaints focus chiefly on mistakes by appellate courts in selecting cases that do not merit publication.

Anstead traces the ever increasing workload of Florida's district courts of appeal and notes that the primary reason that The Florida Bar Appellate Rules Committee chose not to endorse selective publication was the disposition tool available to all DCAs, the PCA. Anstead notes that the primary criticism of the PCA is that the courts provide no explanation for their decision, thus giving the appearance of arbitrariness. Critics of the PCA also contend that their issuance undermines the integrity of the process. They argue that an opinion is an essential demonstration that the court has in fact considered the case. Anstead continues by noting that "... many regard opinion preparation as the single greatest quality control device in the appellate process. The reduction to writing of reasons for a decision is a guarantee that valid reasons exist for the decision."

Anstead concludes by noting that the PCA has been the most effective tool available to DCA judges to balance a staggering caseload. However, the practice also lacks uniform standards, discourages rather than promotes the writing of opinions, does not prevent the publication of many opinions with no precedential value, and precludes Supreme Court review. On the other hand, selective publication is an attractive alternative or supplement to the PCA. Its adoption would promote the articulation of uniform standards, enhance the quality of the decisional process and provide a more acceptable product for the parties. Ideally, Anstead argues, the two practices should be combined. This would permit Florida judges greater flexibility and opinion options. Moreover, a combined practice would allow judges to write opinions which are helpful to the parties, minimize lawbook clutter, and reduce the time required to write. Permitting unpublished opinions would reduce the number of opinions presently being

published and also reduce the research burden on the legal community. Anstead concludes by noting that judges faced with excessive caseloads would prefer a system that would permit, but not mandate, opinion writing.

In his 1994 article, ***Do the DCA's Hide Behind Their PCA's*** [sic]**,**[6] Steve Mason discusses the 1980 amendment to Article V of the Florida Constitution, which provides that a decision by a DCA precludes review by the Supreme Court unless the decision is in direct conflict with another district on the same question of law. The author also reviews statistical data to support his claim that DCAs are forestalling appellate review.

Mason traces the opposition to PCAs from Jenkins v. State[7] to interviews with former Justices James Adkins and Arthur England, who both wrote opinions in Jenkins. Jenkins is important because it upheld the 1980 constitutional amendment to Article V limiting Supreme Court review. England believes that DCAs are courts of finality, in most instances. Regarding PCAs, England notes that a PCA should only be issued in those situations where "... the application of established law to a case with the same existing facts will result in the same outcome or decision." Adkins' position on PCAs is that an onerous workload does not justify the abuse of the PCA. He believes that district court judges should write a short opinion in every case explaining and justifying their actions.

Mason reviews appellate statistics from all DCAs from 1988 through 1992. He concludes that the vast majority of cases filed with the DCAs are disposed of in a fashion to prevent further appellate review by the Supreme Court. Mason states that it is difficult to believe that such an overwhelming number of PCA cases were fairly and correctly decided by the DCAs.

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[6] Steve Mason, "Do the DCA's Hide Behind Their PCA's" [sic], *Florida Defender*, Vol. 6 No. 1, Spring 1994.

[7] Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Notwithstanding his claims that there are many more, Mason cites three cases as examples of PCA abuse: Hall v. State; Washington v. State; and Gould v. State.[8]

Mason offers the following alternatives and remedies to the use of PCAs: (1) the chief justice should conduct an inquiry into the use of PCAs; (2) a referendum revisiting the constitutional amendment to Article V, Section 3(b)(3) should occur; (3) Jenkins v. State should be overruled by the Supreme Court; (4) the Supreme Court should amend the Florida Rules of Appellate Procedure to mandate that the district courts write at least a short opinion in each case explaining their reasoning in affirming a case; and (5) the Supreme Court should invoke its discretionary power and begin to review PCA cases.

Tony Buel in his 1982 article ***Conflict review in the Supreme Court of a DCA per curiam decision***[9] [sic] summarizes the history preceding the 1980 constitutional amendment regarding conflict certiorari jurisdiction, and the court's action under it, and then identifies options available to counsel during the appellate process. Buel notes that prior to 1957, appeals of all circuit court decisions could be filed directly with the Supreme Court of Florida. In 1957 the DCAs were created in order to reduce the caseload of the Supreme Court. They were intended to be the final appellate court for the majority of legal questions. The Supreme Court's review authority of DCA decisions was only to be exercised in selected cases to harmonize jurisprudence on a statewide basis.

Buel tracks the pre- and post-period of Foley v. Weaver Drugs[10] and how it increased Supreme Court jurisdiction. The pre-Foley period, 1965, treated PCAs as *de minimis* (i.e., no

[8] Hall v. State, 614 So. 2d 473 (Fla. 1993); Washington v. State, 620 So. 2d.777 (Fla. 5th DCA 1993); and Gould v. State, 596 So. 2d. 1075 (Fla. 5th DCA 1992).

[9] Tony Buel, "Conflict review in the Supreme Court of a DCA per curiam decision" [sic], *The Florida Bar Journal*, December 1982, pp. 849-851.

[10] Foley v. Weaver Drugs, 177 So. 2d 221 (Fla. 1965).

basis for conflict and hence Supreme Court jurisdiction). Post-Foley witnessed the Supreme Court's ability to review the "record proper" of lower court rulings. The result being a significant increase in Supreme Court workload. In 1980, Article V, Section (3) (b) (3) was amended to require a "direct and express" conflict between districts or with a Supreme Court decision.

Buel states that "with the adoption of the 1980 constitutional amendment . . . the jurisdiction of the Florida Supreme Court has been limited in conflict review petitions to those where the conflict is directly and expressly apparent. The high court has remained consistent to the intent of the amendment in practice. It has not required opinions where the conflict was apparent from a review of its public records actions. The court has refused apparently to examine an opinion that doesn't have conflict integrated in the body of the lower court's decision. This will invite PCA decisions and ominous possible consequences."

Wisconsin Chief Justice John Winslow, in his 1915 article ***The Courts and The Papermills,***[11] laments the ever increasing number of opinions and volumes of case law being produced. Winslow notes that briefs are becoming "steadily more bulky and untrue to their name and function." Instead of being compact discussions of legal principles applicable to case law they are becoming volumes where endless pages are devoted to precedent. To address this increase in needless opinions, Winslow offers the following legislative changes: (1) whenever there exists a law requiring the filing of an opinion in every case, it should be replaced by an act putting the whole matter within the discretion of the Supreme Court; (2) all demurrers except the general demurrer should be abolished and there should be no pleading over. The order sustaining or overruling a demurrer should automatically be followed by judgment on the merits; (3) appeals should only be allowed from final judgments; from orders granting, denying, or modifying a provisional remedy; and from orders preventing a judgment or substantially

[11] John Winslow, "The Courts and The Papermills," 10 *U. of Ill. L. Rev*. 157 (1915).

involving the merits and not remediable upon appeal from the judgment. If appeals are allowed from any other orders they should not be allowed as matter of right but only in the discretion of the court upon showing that a question of importance either to the parties or to the public at large is involved.

Winslow also offers a number of suggestions that courts themselves can take to address this issue: (1) no opinion should ever be written upon an affirmance where only questions of fact are involved. In such cases, an affirmance means that the findings of fact are sustained by the evidence and an opinion really says nothing more; (2) no opinion should be written upon an affirmance where the case is determined by following a legal principle or principles well established by previous decisions in the same court; (3) no opinion should be written upon affirmance upon a mere question of practice or procedure unless, in the judgment of the court, the question is one of such importance in the administration of the law that it should be settled by an authoritative pronouncement from the court of last resort; and (4) in cases of affirmance generally no opinion should be written unless in the judgment of the court the question is of such exceptional importance as to demand treatment in an opinion.

Winslow concludes by noting that in his judgment "the great mass of opinions are too long" and that judges write too much. He further opines that in many cases the syllabus would constitute a better opinion than the opinion itself. He suggests that judges should confine themselves to the actual questions presented and treat them as briefly as possible with clarity and certainty. He argues that while it is more difficult to write such opinions the result amply justifies the extra labor.

In his article ***DCAs, PCAs, and Government in the Darkness***,[12] Stephen Krosschell notes that even though the DCAs praise Florida's government in the sunshine, "the DCAs themselves are among the least open governmental entities in Florida and operate largely in the darkness." Krosschell observes that most work done by DCA judges is not public record or not available for public inspection. Krosschell states that "for most appeals, nothing is known about the decisional process except what the courts themselves choose to reveal in their written opinions." According to Krosschell, this is especially troublesome because approximately 63 percent of all DCA dispositions were per curiam affirmances in 1996.

Krosschell states that PCAs are inconsistent with Florida's government in the sunshine statutes and the Open Government Amendment. Both are designed to create open government institutions whose decision making is available for public scrutiny and review. Krosschell observes that the intent of both was to apply to all branches of government, including the judicial; however, he alleged that the intent was circumvented by a Supreme Court rule exempting the DCAs. Krosschell further observes that scholars, appellate commissions, institutes, and others have all condemned the use of the PCA by appellate courts as being anathema to the appellate process by not stating reasons for their decisions. Krosschell adds that PCAs give the appearance of arbitrariness, citing a finding of the Commission on the Revision of the Federal Court Appellate System that noted that "more than three-fourths of the attorneys questioned agreed that it is important for the courts to at least issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case."

[12] Stephen Krosschell, "DCAs, PCAs, and Government in the Darkness," 1 *Fla. Coast. L.J.* 13 (1999).

Krosschell offers another shortcoming of PCAs, which is, that an unexplained PCA rejecting an argument necessarily appears arbitrary when another court or panel considers the identical argument and reverses. He cites several cases: Palmore v. Sidoti; Freund v. Butterworth; Wright v. State; Benedit v. State; Moreland v. State; and Hall v. State.[13] Krosschell notes that these examples are rare primarily because objective evidence of PCA misuse is difficult to obtain "precisely because PCAs are unexplained and unreviewable."

Krosschell further postulates that the use of PCAs is inconsistent with the fundamental system of American government, namely, its checks and balances. He states that "Florida's system of intermediate appellate justice is therefore structurally defective, because the routine issuance of PCAs violates the checks-and-balances doctrine." This system precludes Supreme Court, legislative and gubernatorial review. This system also precludes review by the Judicial Qualifications Commission. Krosschell further argues that because of the extensive use of PCAs by DCA judges, Florida's merit-retention system is undermined, in that citizens cannot reasonably evaluate their judges when most of their work is unreviewable.

Krosschell addresses the argument of excessive caseload as one defense for the use of PCAs. Krosschell notes that other large states like California, Texas, and Ohio issue written opinions in every appeal despite their large caseloads. Krosschell argues that Florida's DCAs could provide brief explanations to the parties as to the reasons for their decisions or, alternatively, they could cite the appropriate pages of the appellee's brief as to the dispositive reasons for their decision. Krosschell notes that another option would be to tape record the

[13] Palmore v. Sidoti, 426 So. 2d 34 (Fla 2d DCA 1982), rev'd 466 U.S. 429 (1984); Freund v. Butterworth, 117 F.3d 1543 (11th Cir. 1997); Wright v. State, 604 So. 2d 1248 (Fla. 4th DCA 1992); Benedit v. State, 610 So. 2d 699 (Fla. 3d DCA 1992); Moreland v. State, 582 So. 2d 618 (Fla. 1991); and Hall v. State, 614 So. 2d 475 (Fla. 1993).

panel's discussion, have it transcribed, and then have it either issued on the Internet or directly transmitted to the parties. Krosschell maintains that all of the options available are of minimal burden to appellate judges.

Krosschell also challenges those who argue that the DCAs should not issue opinions in areas of the law that are well settled. Krosschell maintains that the losing parties, not the attorneys, are the appellants and they would indeed benefit from a reasoned opinion by the court. Krosschell notes that a PCA causes parties and their lawyers to speculate as to the court's reasoning. Krosschell notes that "written appellate opinions can have important pedagogical functions for the judges and parties involved, even when the relevant points of law are well settled."

Krosschell also addresses the concern regarding the proliferation of appellate opinions. He argues that this concern is best handled through a selective publication rule and notes that all of the federal circuits and two-thirds of the states, including the ten most populous states with intermediate appellate courts, have adopted a selective publication rule. Under the selective publication rules in these jurisdictions, not all opinions are published. Krosschell states that "a selective publication rule would largely resolve the concern that a written opinion rule would unduly multiply the number of opinions which counsel must review as part of their research."

Krosschell concludes by noting that "increasing the number of written appellate opinions in Florida would increase the confidence that Florida citizens have in their appellate system and would avoid the appearance of arbitrariness that is an inevitable byproduct of routine use of PCAs. A written explanation rule would advance the cause of appellate justice in this state."

IV. State Surveys

As part of its effort, the PCA Committee surveyed intermediate appellate courts in the ten largest states excluding Florida.[14] State size was determined by population and case filings. A copy of the survey instrument can be found in Appendix B. The PCA Committee received responses from nine states. Generally, the survey was designed to elicit information that would provide an overview of the structure, workload, support staff, resources, and appellate rules relating to opinion writing of intermediate appellate courts in the respective states.

The survey results indicate that most intermediate appellate courts are broken into geographic districts. Many are also divided by subject matter. Divisions are employed for either geographic, subject matter, or administrative reasons. The number of intermediate appellate judges by state ranges from 25 in Pennsylvania to 93 in California (as compared to 61 in Florida).

All states do not require that all appellate opinions be published, with the exception of Illinois and New York. The percentage of appellate opinions published ranges from 7 percent in California to 28 percent in the Commonwealth Court in Pennsylvania. Most states responding averaged 10 percent. The only state with a page limitation on opinions is Illinois with a 20-page limit. Nearly every state employs a central legal staff and individual law clerks for their intermediate appellate judges. Two states allow law clerks to prepare opinion drafts (Pennsylvania and Texas), New Jersey forbids it, and one-half the states leave it to the discretion of the judge. Approximately one-half of the states surveyed use affirmances without opinion. Of those that do, the percentage of cases in that category range from 1 percent in Michigan to 89 percent in Illinois.

[14] California, Georgia, Illinois, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Texas.

With regard to the question of whether a rule or statute permits appellate disposition of certain cases without briefs being filed, one-half of the states permit it. The percentage of cases fully briefed runs from a low of 65 percent in Illinois to 100 percent in Michigan, Ohio, and Texas; New York and Pennsylvania are at 98 percent. California, Georgia, Illinois, New Jersey and Ohio each have a statute, rule, or constitutional provision determining when a judgment may be affirmed without opinion and/or when an opinion must be written, the others do not.

Nearly every state has an automatic right of first appeal. In Michigan, the right exists in criminal and civil cases and in some administrative cases. The states are split on whether the appellate court may issue an affirmance without opinion in an Anders[15] case. With respect to summary denials of postconviction relief, Illinois and Michigan permit affirmances without opinion, while California, Ohio, and Pennsylvania do not. In New York these are not appeals as a matter of right, and in Georgia the Supreme Court has jurisdiction. In appeals without oral argument, panel members routinely meet to discuss the case in New Jersey, New York, and Ohio, and sometimes meet in California, Georgia, Michigan, and Texas. In Pennsylvania and Illinois they never meet.

[15] In Anders v. California 386 U.S. 738, 87 S.Ct. 1396, 18 L.ed.2d493(1967), the United States Supreme Court established the procedure for what has become known as an "Anders brief." The Court held that appointed counsel may be permitted to withdraw from a case where the appeal is "wholly frivolous" and without merit. Id. at 744, 87 S.Ct. at 1400. However, in order to protect an appellant's constitutional rights, counsel who find an appeal to be frivolous must file a brief "referring to anything in the record that might arguably support the appeal." Id. The Supreme Court then conducts its own examination of the record to determine if the appeal is indeed wholly frivolous. If so, the appellant proceeds without the assistance of counsel.

V. PCA Data

Trends

Florida's population has grown tremendously, adding more than four million residents in the past 15 years. As shown on the following table, the number of PCAs has nearly doubled in the same period. Unlike population, the increase in the number of PCAs has not been a steady one from year to year, rather it has occurred as large growth spurts every few years. These growth spurts seem to correspond with the increase in the number of appellate filings, especially post-conviction relief motions, facing the appellate courts in Florida. This relationship is substantiated by the 95 percent correlation[16] between the number of PCAs and the number of post-conviction relief motions filed with the DCAs.

[16] Pearson's Correlation Coefficient = 0.9535, n=16, $p<0.0001$

Table I

Annual Statewide Population and District Courts of Appeal Data

Year	PCAs	All Opinions	Post Conviction Relief Motions	Total DCA Filings	State Population	DCA Judges
1983	4,252	8,999	578	13,579	10,719,848	46
1984	3,936	8,572	565	13,438	11,014,259	46
1985	4,156	8,729	747	13,941	11,317,751	46
1986	4,268	8,761	952	15,367	11,613,905	46
1987	4,852	9,478	1,012	15,796	11,927,329	46
1988	4,732	9,211	667	16,003	12,233,695	46
1989	4,852	9,731	650	15,934	12,547,116	53
1990	5,092	10,307	837	16,649	12,937,926	57
1991	6,301	11,870	1,208	17,999	13,195,982	57
1992	6,337	11,353	1,625	18,895	13,424,406	57
1993	6,603	11,305	1,640	18,474	13,608,622	57
1994	7,403	12,008	1,965	18,740	13,878,916	61
1995	7,847	12,662	2,606	21,429	14,155,585	61
1996	8,239	13,075	3,295	21,850	14,411,532	61
1997	8,435	13,331	3,474	22,225	14,712,922	61
1998	8,193	13,542	3,144	21,334	15,000,475	61
Percent Increase For Five-Year Intervals						
1983 to	11.3	2.4	15.4	17.8	14.1	0.0
1988 to	39.5	22.7	145.9	15.4	11.2	23.9
1993 to	24.1	19.8	91.7	15.5	10.2	7.0
Percent Increase From 1983 to 1998						
1983 to	92.7	50.5	443.9	57.1	39.9	32.6

Source: Population - Executive Office of the Governor, Revenue and Economic Analysis, July 1999
Other Data - Office of the State Courts Administrator, Run Date: 28 Sept 99

One-Year Data Collection Effort

Diverse hypotheses for the increase in the number of PCAs abound and are not easily substantiated with the Summary Reporting System data available from the Office of the State Courts Administrator (OSCA). The missing piece of information was the composition of PCAs by type of case. Hence, the PCA Committee devised a data collection form to be submitted monthly to the OSCA by each of the five DCAs clerks for a 12-month period from July 1998 through June 1999. The data collection form provided for all dispositions (Opinions, PCAs, and Citation PCAs) by type and category of case in the following manner:

Table II

Categorization of Cases Used for Data Collection Form

Type	**Category**
Criminal	*Anders* Appeals 9.140 (i) or Post Conviction Relief Non-final All Other
Administrative	Unemployment Compensation Workers Compensation All Other
Civil	Non-final All Other

The results of this limited data collection effort are summarized in Table III.

Table III

Per Curiam Affirmed Decisions as a Percent of all Opinions

Statewide, July 1998 through June 1999

Case Type and Category	# of PCAs	Total # of Opinions	% PCA
Criminal			
Anders	1,059	1,174	90.2
9.140(i)	2,449	2,985	82.0
Non-final	22	38	57.9
All Other	2,504	4,523	55.4
Criminal Total	6,034	8,720	69.2
Administrative			
Unemployment	211	311	67.8
Workers Compensation	240	361	66.5
All Other	166	267	62.2
Administrative Total	617	939	65.7
Civil			
Non-final	201	487	41.3
All Other	1,468	3,166	46.4
Civil Total	1,669	3,653	45.7
All Case Types and Categories	**8,320**	**13,312**	**62.5**

Source: Data submitted monthly to the Office of the State Courts Administrator by the DCA clerks of court for a 12-month special project of the PCA Committee.

Hypotheses

A central hypothesis of the PCA Committee is that increases in PCAs are due primarily to increases in Anders cases and post-conviction relief cases, where generally a PCA is the appropriate disposition. The PCA Committee believes that the percentage of PCAs in "fully-

briefed" appeals has been and will continue to be relatively constant and should contribute only marginally to the future growth in PCAs.

Recognizing the limitation of only having one full year of disposition data broken down by type and category of cases, the PCA Committee's hypotheses can be substantiated in part. As shown in Table III, the likelihood that a case will be disposed through a PCA does indeed depend upon the type of case. Overall, about 62.5 percent of all opinions are PCAs, but for civil case types the percentage is 45.7 percent and for criminal cases it is 69.2 percent.

More interesting is the diversity in the rate of PCAs among the different categories of criminal cases. Ninety percent of opinions written for Anders Appeals cases are PCAs and 82 percent of opinions written for 9.140(i) cases (appeals from a summary denial of a motion for post-conviction relief) are PCAs compared with only 57.9 percent and 55.4 percent of non-final and all other criminal cases respectively.

The results of the 12-month study show that the case types that receive a disproportionate number of PCAs are Anders Appeals and 9.140(i) cases combined with the trends presented in Table I present strong evidence that the growth in PCAs can be attributed in large part to the growth in the number of these types of appeals, which the PCA Committee felt are properly being disposed of by PCA.

Individual DCA Findings

Detailed tables for each of the five DCAs and statewide totals can be found in Appendix C. Table IV shows, by DCA, the percent of PCAs for criminal, administrative and civil cases.

Table IV

Per Curiam Affirmed Decisions as a Percent of All Opinions by DCA and Case Type

July 1998 through June 1999

DCA	Criminal	Administrative	Civil	Total
First	71.0	70.5	60.4	68.7
Second	76.1	74.1	64.0	73.2
Third	67.3	45.5	27.6	51.9
Fourth	62.4	73.0	42.7	55.8
Fifth	66.4	39.1	37.3	58.4
Statewide	69.2	65.7	45.7	62.5

Source: Data submitted monthly to the Office of the State Courts Administrator by the DCA clerks of court for a 12-month special project of the PCA Committee

Care must be taken to interpret the data, keeping in mind the difference in the mix of cases for each of the districts. For example, the Second District Court of Appeal has the highest percentage of criminal appeals in the state, which may contribute to the higher rate of PCAs for that district.

DCA Case Management System

The data collected for this 12-month study was accomplished manually by each DCA clerk's office. The PCA Committee is appreciative of their effort. Fortunately for Florida, it is now possible to collect this data via the new Appellate Case Management System. Unlike any other appellate case management system in the United States, Florida's new case management system, effective January 2000, is able to collect all forms of appellate data, including PCAs, in much greater detail.

This system, designed by the OSCA with enormous input from DCA clerks and appellate judges, has been implemented and is operational in the five DCAs and the Supreme Court. Heretofore, data captured across DCAs may have varied due to the unit of count or other definitional semantics related to cases, making any comparisons suspect. With the new appellate case management system, data will be uniformly collected, thus making comparisons and interpretations across DCAs both easier and more accurate.

VI. Issues and Recommendations

A. Abolishment of the PCA

Issue: Whether the PCA should be abolished.

Recommendation: The PCA Committee rejects the abolishment of the PCA.

Discussion: The PCA Committee believes that the PCA performs a useful function when utilized properly. Such utilization is appropriate in various situations, including, but not limited to, when a case has not been fully-briefed and therefore does not present issues necessitating a discussion, when the law is so well settled on the issues presented that no further explication is required, and when the principle of law upon which the decision rests is so generic (e.g., the trial court decision is supported by competent substantial evidence) that even reference to a citation would add nothing to the jurisprudence.

The PCA Committee believes that the use of the PCA is a matter best left within the discretion of the individual panel, which can be expected to act in a manner consistent with general standards of judicial review. The PCA Committee does not believe, as some have charged without documented justification, that the PCA is used as a method to avoid either controversy or judicial labor.

In addition, the PCA Committee believes that each of its other recommendations, while explicitly dealing with methods to limit PCAs, constitute an implicit

endorsement of their use under various circumstances. The PCA Committee concludes that the judicious use of the PCA will have a beneficial effect on the jurisprudence of the state by eliminating the potential clutter its abolishment would heap upon an already voluminous reporter system.

B. 1995 Article V Task Force, Recommendation 15

Issue: Whether the PCA Committee should recommend the adoption of Recommendation No. 15 of the Article V Task Force, which reads as follows:

> The Task Force recommends that the Supreme Court adopt a rule that would allow an appellant or appellee the opportunity to petition the appellate court for a written opinion. The petitioning party would be required to establish that a written opinion would serve as a basis for further review. The decision to grant a petition should be left within the discretion of the DCA.

The specific language of such proposed rule, as recommended by the Article V Task Force, was as follows:

> After issuing a decision PCA without opinion, and upon timely motion and certification by a party that a written opinion would provide a basis for further appellate review, an appellate court may issue a short plain statement explaining the factual and/or legal basis for its decision.

Recommendation: The PCA Committee recommends that rule 9.330 be amended in the following manner:

Rule 9.330. Rehearing; Clarification; Certification

(a) Time for Filing; Contents; Reply. A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing or clarification shall state with particularly the points of law or fact that the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion. When the order is a per curiam affirmance without opinion, and a party believes that a written opinion would provide a legitimate basis for Supreme Court review, the party may request that the court issue a written opinion. Such a request shall include the following statement:

> I express a belief, based on a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because (state with specificity the reasons why the Supreme Court would be likely to grant review if an opinion were written).
>
> /s/ _____
> Attorney for (name of party)
> (address and telephone number)
> Florida Bar No. _____

(b) Limitation. A party shall not file more than 1 motion for rehearing or for clarification of decision and 1 motion for certification with respect to a particular decision.

(c) Exception; Bond Validation Proceedings. A motion for rehearing or for clarification of a decision in proceedings for the validation of bonds or certificates of indebtedness as provided by rule 9.030(a)(1)(B)(ii) may be filed within 10 days of an order or within such other time set by the court. A reply may be served within 5 days of service of the motion. The mandate shall issue forthwith if a timely motion has not been filed. A timely motion shall receive immediate consideration by the court and, if denied, the mandate shall issue forthwith.

(d) Exception; Review under Rule 9.120. No motion for rehearing or for clarification may be filed in the Supreme Court addressed to the grant or denial of a request for the court to exercise its discretion to review a decision described in rule 9.120.

Committee Note: (PCA Committee)

The PCA Committee would stress that the addition of the language at the end of subdivision (a) allowing a party to request that the court issue a written opinion after receiving a PCA is not intended to restrict the ability to seek rehearing or clarification from a PCA on other grounds.

Discussion: The PCA Committee believes that adoption of this language is advisable since a per curiam affirmance without either an opinion or citation precludes review by the Supreme Court. The proposal would permit a party to request the district court to reconsider a case in which such a per curiam affirmance has been entered and to write an opinion, when the party believes an opinion would provide a legitimate basis for such review.

The PCA Committee is of the opinion that the proposal would allow parties to present their argument to the panel as to why an opinion would allow them to pursue their case to the Supreme Court. One reason could be to provide a basis for review when the instant decision seemingly conflicts with the decision of another district court or the Supreme Court. The PCA Committee does not believe that this process would be abused if attorneys are required to sign the statement appended to the motion expressing their belief that such an opinion would provide a basis for further review. Obviously, the court retains the authority to deny the motion if inappropriately filed.

The PCA Committee emphasizes that the new procedure created in subdivision (a) in no way operates to restrict any existing right to a rehearing contained in the present rule.

C. Suggestions for Opinion Writing

Issue: Whether written suggestions for opinion writing should be developed and published in relation to the use of per curiam affirmances.

Recommendation: The PCA Committee recommends the adoption of "Suggestions for Opinion Writing" (see Appendix E) to be disseminated to appellate judges and to be incorporated, as relevant, into judicial education programs.

Discussion: The PCA Committee believes that unless it commits itself to developing suggestions for opinion writing any "good intentions" regarding PCAs will disappear. The PCA Committee points to the statistics it gathered, the ABA Standards on Opinion Writing, as well as its survey of other states to support its argument.

The PCA Committee discussed the appropriate way to advance said suggestions and concludes that, in light of the fact that jurists and others have addressed this subject over the years, often reaching different conclusions, any "suggestions" should encompass as many divergent views on the subject as possible. It was agreed by the PCA Committee that the most appropriate way to advance such suggestions is to develop a course curriculum to be used regularly at the New Judges College and periodically at the Appellate Judges' Conference.

The PCA Committee would stress that these are suggestions, rather than guidelines. The PCA Committee believes that the designation as guidelines would give any such document more of a mandatory connotation than is intended. The belief of the PCA Committee is that DCA judges, upon being regularly reminded of the various factors which may be appropriately considered in determining whether and what to write, will often choose the option of writing an opinion in those cases meriting a written opinion.

D. Citation PCAs

Issue: Whether any or all cases that are decided by a PCA without a written opinion should be required to have at least a citation to the authority relied upon in reaching the decision.

Recommendation: The PCA Committee rejects the concept of mandating that citation PCAs replace PCA without opinion decisions.

Discussion: The PCA Committee believes the use of citation PCAs should be left to the discretion of the panel in any given case. It bases this conclusion on various factors, including the fact that all members of a panel may not agree on a particular citation, that such cites may be ambiguous, and that such an approach would be less preferable than even a checklist.

The PCA Committee also believes that the use of citation PCAs would, in any case, be of limited use since the holding of any cited opinion may have only limited application to the instant case, which would usually involve issues not dealt with in the cited case. On the other hand, if the court wants to cite a case for a broad concept, for example, the decision of the trial court is supported by competent, substantial evidence, such proposition may be better spelled out in full rather than merely referenced in a citation.

E. Checklists

Issue: Whether PCAs without opinion should be replaced by a mandatory checklist of reasons for the decision.

Recommendation: The PCA Committee rejects the concept of recommending the use of such a checklist.

Discussion: The PCA Committee, as part of its deliberations, reviewed a rule with some of the attributes of a checklist. Rule 36-1 of the United States Eleventh Circuit Court of Appeals lists five situations in which an affirmance without opinion would be appropriate, if any are found in conjunction with the fact that an opinion would have no precedential value. The PCA Committee concludes that the use of such a checklist would demean the appellate function, create confusion if judges differ on the rationale for the decision, and provide little, if any, benefit to attorneys and litigants.

The PCA Committee during its deliberations did consider a number of checklists, including the aforementioned federal example. However, no matter how comprehensive the list, and even if the exact parameters thereon could have been agreed upon, the PCA Committee believes such a system has two major flaws. First, there was a general consensus that its use would be demeaning to the court, whose function is to write and explain, rather than check boxes. Second, the PCA Committee envisioned practical problems which could reduce the effectiveness of such a system (e.g., two or three judges checking different boxes as to the reason for a decision).

F. PCAs with Dissent

Issue: Whether the use of PCAs should be curtailed in cases with a dissent.

Recommendation: The PCA Committee discourages the use of PCAs when there is a dissent in the case.

Discussion: While the PCA Committee does not believe PCAs should be prohibited in a case with a dissent, it strongly discourages their use for a number of reasons. First, the PCA Committee believes it tends to show disrespect for the dissenting judge who has taken the time to memorialize the reason or reasons for disagreement with the court's decision. The PCA Committee believes that the writing judge should, as a rule, make an effort to establish the grounds upon which the decision rests, whether or not in direct rebuttal of the dissent.

Second, the PCA Committee believes that PCAs with dissent present a less than desirable picture to the parties and the public, who may assume that the majority has somehow been intimidated into not writing an opinion for fear of presenting an untenable position. While the PCA Committee certainly is not of the opinion that this is the case, it does believe that a legal explanation of the majority decision will at least identify the positions of the opposing sides.

Finally, the PCA Committee believes that the writing of the majority opinion will clearly frame the dispositive issue or issues of the case. If such issue or issues are not the focus of the dissent, the losing litigant will at least have a better understanding of why the case was lost and not necessarily assume that the dissent's unrefuted arguments should have been dispositive of the case.

For the record, the PCA Committee would not extend this recommendation to concurrences, which the PCA Committee believes do not invoke any of the same considerations applicable to a dissent, or if so, at least to the same degree.

G. Unpublished Opinions

Issue: Whether the present system of publishing all opinions in Florida should be modified to include the adoption of a system of unpublished opinions.

Recommendation: This matter is beyond the purview of the PCA Committee and therefore it makes no recommendation.

Discussion: The PCA Committee considered the subject of unpublished opinions as a device by which the court could essentially issue private explanations of its decisions which would not become part of Florida caselaw. While the PCA Committee reviewed various of the arguments for and against such a bifurcated system, it decided that the matter was not within its charge, which is limited to the use of the per curiam affirmances without written opinion.

The PCA Committee believes that its charge is limited to making "a thorough and comprehensive inquiry into the practice of issuing PCA decisions" and examining "the effects that reliance on PCA opinions has on others within the justice system." While the adoption of a system of unpublished opinions could possibly reduce the number of PCAs, the PCA Committee believes that it would be in the same category as various other factors that could also have an indirect

effect on the use of PCAs, such as an increase in the number of appellate judges, the assignment of additional research assistants to each judge, or an increase in the number of appellate districts. The PCA Committee chooses rather to focus on existing alternatives that may have a direct effect on the use of PCAs.

VII. Minority Reports and Member Comments

Minority Report of Judge Gerald B. Cope, Jr.

I am in agreement with much of what the Committee has recommended. Although the Committee members have widely divergent, sincerely-held views about the use of Per Curiam Affirmances ("PCAs"), the Committee has worked very hard to arrive at suggestions for improving the system.

I respectfully disagree with the Committee majority on the central issue of when an opinion should be written.

We should recommend that bare PCAs not be used for fully-briefed appeals, that is, appeals from final judgments and authorized non-final appeals.[17]

If an affirmance in such a case rests on routine application of well-settled law, then there should at least be a citation to the authorities on which the affirmance is based. If a citation to the applicable authorities does not suffice, then there should at least be a brief statement of reasons for the affirmance.[18]

[17] By authorized non-final appeals, I mean those identified in Florida Rules of Appellate Procedure 9.130, 9.140(c), and 9.145(c).

[18] I exclude from these comments appeals that are not fully briefed, the most common examples of which are "no merit" criminal appeals which proceed under Anders v. California, 386 U.S. 738 (1967), and appeals from summary denials of postconviction relief which proceed under Florida Rule of Appellate Procedure 9.140(i), as well as petitions for extraordinary writs. In a "no merit" Anders appeal, an opinion by definition is unnecessary. In petitions for extraordinary writs and postconviction appeals, affirmance has customarily been without opinion unless a substantial issue is presented.

I.

The Committee report sets out the prevailing Florida view that even in fully-briefed appeals, an opinion should not be written unless it contributes to the law. What constitutes a contribution to the law is, of course, in the eye of the beholder. The statistics assembled by the Committee show that while large numbers of PCAs are accounted for by non-fully-briefed appeals (no merit criminal appeals and summary denials of postconviction relief), large numbers of PCAs are also issued in final and non-final appeals that have been fully briefed.

I think the better view is that in fully-briefed appeals, the lawyers and litigants are entitled either to a statement of reasons for the decision or, at a minimum, to a citation of the authorities on which the appellate decision rests. If the appellee has defended by marshaling alternative arguments, as commonly happens in criminal cases, then the court should identify which of the alternative arguments was accepted.[19]

If the reason for the decision can appropriately be explained by citation to authority, then something as minimal as a citation PCA or an "affirmed on authority of" will do. That does not seem to me to be too much to ask. If the matter cannot appropriately be disposed of in such a minimal fashion then there should at least be a brief explanation of the reasons for the decision.

[19] In appeals by the defendant in a criminal case, the State commonly defends by arguing that the point was not preserved for appellate review; if preserved, it is without merit; if it is meritorious, the error was harmless. If an otherwise meritorious point was not preserved for appellate review, then the defendant may have a viable claim for postconviction relief. If the issue is without merit, or the error was harmless, then there is no basis for postconviction relief on that issue.

II.

The general approach outlined above is well-expressed in the American Bar Association's Standards Relating to Appellate Courts (1994), which represent, as I see it, the prevailing American view on the subject. The Standards provide:

> The court should give its decision and opinion in a form appropriate to the complexity and importance of the issues presented in the case. A full written opinion reciting the facts, the questions presented, and analysis of pertinent authorities and principles, should be rendered in cases involving new or unsettled questions of general importance. Cases not involving such questions should be decided by memorandum opinion. **Every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based.** When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing court should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion.

Id. § 3.36(b) (emphasis added).

The accompanying comment states, in part:

> It is not essential that every case be decided by full opinion. Constitutional and statutory provisions making that a requirement, or construed as doing so, misdirect an appellate court's energies. The public interest is served by the court's ability to allocate its efforts according to the complexity and importance of the questions it must decide. That interest far outweighs attempting to give every case equal literary treatment. Cases of substantial difficulty, however, should be decided through opinions that deal with them adequately and candidly; memorandum opinions should not be used to avoid responsibility for reasoned, legally supported resolution of difficult cases. Litigants are entitled to assurance that their cases have been thoughtfully considered. The public, also, is

> entitled to assurance that the court is thus performing its duty. Providing that assurance requires that the decision of every case be supported at least by reference to the authorities or grounds upon which it is based.

Id. § 3.36 commentary at 67.

Stated differently, appellate courts should "provide in case dispositions (except in those appeals the court determines to be wholly without merit) at a minimum, reasoned explanations for their decisions."[20]

III.

Workload considerations must, of course, be considered. The Committee received the following letter from Judge Williams C. Owen, Jr., which is helpful. It states in part:

> 2. Litigants (and their counsel) have a legitimate need for some insight into the court's reasoning why appellant's arguments were rejected. Judges should be encouraged, without being mandated, to strive to meet that need.
>
> 3. Meeting that need must be accomplished in a way that neither creates nor imposes an undue additional burden on the judges nor tends to reduce the quality of their published opinions.
>
> 4. There must be one or more viable solutions that would incorporate the foregoing criteria. Here is one suggestion that was discussed and which I feel most judges could adapt to with little or no additional effort (possibly a task for their research aide):
>
> > A very brief opinion (in cases that otherwise would have been a PCA), omitting facts, case history, and similar matter, and stating only one or more authorities upon which the court found each issue to be without merit.

[20] American Bar Association House of Delegates Resolution 8B, adopted Feb. 14, 2000.

> Example: "The judgment and sentence are severally affirmed. Denial of the pre-trial motion to suppress was proper; the search was incident to a lawful arrest. (cite). Granting the state's challenge for cause as to juror McMillan was not an abuse of discretion. (cite). Overruling appellant's objection to the state's closing argument was proper; it was a fair comment on the evidence. (cite). Appellant's sentence is within the guidelines." If that's too verbose, then: "Affirmed. The arrest (and thus the search incident thereto) was lawful. (cite). The challenge of a juror for cause was within the court's discretion. (cite). The prosecutor's closing argument was a fair comment on the evidence. (cite). The sentence was not illegal."[21]

IV.

The Committee report intimates that we should preserve the status quo in order to protect the Florida Supreme Court from additional petitions for discretionary review. I do not think that position will withstand analysis.

If identically situated litigants are being treated differently in different districts, that is a reason to write opinions, not to issue PCAs. I am very skeptical that issuing statements of reasons in cases now receiving PCAs would actually have any material impact on the Florida Supreme Court's workload. But if similarly situated litigants are, in fact, being treated differently in different districts, then if those litigants choose to pursue the matter (many do not),[22] they are entitled to ask the Supreme Court in its discretion to address the matter.

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[21] The letter goes on to suggest that such opinions generally not be published.

[22] See Gerald B. Cope, Jr., "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," 45 *Fla. L. Rev*. 21, 38 n. 107, 63 & n. 255 (1993).

V.

In a common-law system, cases are decided on a reasoned basis, consistent with applicable law and precedent. In such a system, an appropriate statement of reasons for appellate decisions should be given.

I hope that in time the foregoing views will be seen as the better approach to the problem now before us.

In the meantime, I think that the Committee's more modest recommendations for change make sense and that the Committee report will be useful to anyone having an interest in this subject.

Minority Report of Nancy Daniels

The Committee's report, in my opinion, seriously underestimates the gravity of the per curiam affirmed (PCA) problem in Florida. Its recommendations, while ameliorative, do not adequately respond to a widespread, increasing practice which undermines the quality of appellate justice in our state.

The correspondence received by the Committee revealed a high-level of frustration with PCAs. Comments by Bar members included: "the current system is structurally flawed;" "the power to PCA has been abused with no avenue of redress for litigants;" "a PCA is never appropriate in absence of an oral argument;" "even reasons given in a single sentence without citation to authority would be preferable to a PCA decision;" "the judiciary should abandon the practice of allowing appellate courts to stop cases dead in their tracks without giving any reasons for doing so;" "lawyers and their clients (especially some very poor ones) deserve to be heard, understood, and responded to;" "even two or three lines or one paragraph is fairer and creates a better perception of fairness for the court's constituency, the public at large;" "my firm is vehemently opposed to PCAs; the present situation is deplorable and a miscarriage of justice;" "it is my very strong belief that the habitual use of PCAs by Florida DCAs has been a disastrous practice that has fostered wide-spread disrespect and frustration with the law;" "PCA opinions undermine confidence in the integrity of the judicial system;" "the process of regularly applying PCAs . . . is destructive and breeds suspicion of the system;" and "PCAs leave the nearly unavoidable impression that the majority has acted in an arbitrary fashion."

Likewise, letters to the editor in recent issues of the Bar Journal and Bar News include comments such as: "Perhaps no other result on appeal can be more frustrating than a loss by per curiam affirmance without written opinion;" and "I have talked to many other attorneys who

agree the failure of the Supreme Court to give a positive instruction to the DCAs to write an opinion on each area complained of is one of the greatest denials of due process in the State of Florida."

This criticism, mostly from civil appellate attorneys, was accompanied by well-reasoned position papers from the Florida Association of Criminal Defense Lawyers, the Florida Public Defender Association, and the Florida Bar Appellate Practice Committee, Criminal Law Section which pointed out numerous problems with the courts' current practices regarding PCAs. The FACDL memo, starting from the premise that PCAs are only appropriate "when the facts and law are so well established that discussion of them would serve no useful purpose," Williams v. State, 425 So. 2d 1163 (Fla. 5th DCA 1983), stated that many of its members have experienced PCAs involving cases of first impression and "literally, thousands of litigants receive no explanation on the merits of an appeal." FACDL pointed out too that PCAs ultimately create more work for the judicial system and often cause doctrinal and precedential confusion between cases involving similar facts. Another problem noted by FACDL was the "significant variance between the District Courts of Appeal concerning the percentage of written opinions and PCAs."

Similarly, the comments of the Florida Public Defender Association analyzed how PCAs not only perpetuate trial error, but diminish the appearance of fairness and meaningful access to court by litigants. The FPDA memo annotates the Florida cases accepted (and reversed) by the United States Supreme Court after PCAs had been issued in the state courts. The FPDA's discussion also details a number of Florida cases in which inconsistent dispositions, both intradistrict and interdistrict, were concealed by PCA opinions.[23]

[23]See also Krosschell, DCAs, PCAs, and Government in the Sunshine, Florida Coastal Law Journal, Spring/Summer 1999, Vol. I 1:13; and Dixon v. State, 730 So. 2d 265 (Fla. 1999), footnote 4 at p. 268.

The comments of the Criminal Law Section of the Appellate Practice Committee of The Florida Bar described a "visceral" reaction to PCAs and stated that of the twelve responses received by the Executive Council of the Criminal Law Section, most respondents "expressed concern that PCAs failed to provide any guidance to the parties or to the trial court as to the issues raised and the reasons for the district court's affirmance, i.e., whether affirmance was based on lack of demonstrable error, lack of preservation, or lack of prejudice. The Bar's Committee offered several suggestions: a requirement that citations be included in per curiam opinions; a ban on PCAs except in Anders cases; consideration of unpublished opinions; development of a checklist; and more funding for appellate courts.

The PCA Committee's collection of recent data established without any doubt that the use of PCAs has grown enormously in recent years. Furthermore, it is not only the "no merit" criminal appeals and post-conviction appeals that are being affirmed by this method. Statewide, from July, 1998 to June, 1999, 62.5% of all appeals were PCA'd. In the First District Court of Appeal, 68.7% of all appeals were PCA'd; in the Second District, 73.2% of the cases were PCA'd. In the Third District, the percentage of PCAs was substantially lower--51.9%, whereas the Fourth District's overall percentage was 55.8% and the Fifth District's 58.4%. Of the civil appeals, 45.7% were PCA'd; the First District's average was 60.4%, the Second District's 64%; the Third 27.6%; the Fourth 42.7%; and Fifth 37.3%. Administrative appeals were PCA'd statewide at a rate of 65.7%, with fairly large divergences among the DCAs: the First--70.5%; the Second--74.1%; the Third--45.5%; the Fourth--73%; and the Fifth--39.1%. Of the fully-briefed criminal appeals, 55.4% were PCA'd statewide, while the First District's PCA rate was 64.7%; the Second District's 68.8%; the Third District's again much lower--36.9%; the Fourth District's 54.4% and the Fifth District's also much lower than the statewide average--39.6%. And as noted in the Committee report, the overall number of PCAs has grown steadily in the last 15 years--from 4,252 in 1983, to a high of 8,435 in 1997, and 8,193 in 1998.

The out-of-state study and literature review revealed that there are seven states which prohibit per curiam affirmed opinions by constitution, rule, or statute. In addition, Florida was clearly in a minority with regard to publication of opinions; California publishes just seven percent of its opinions, Michigan ten percent, Ohio ten percent, Texas twenty three percent, and New Jersey ten percent. Florida is apparently unique in both allowing PCAs and flatly prohibiting further appellate review in cases which have been affirmed without opinion.

Viewing the Committee's study as a whole, I concluded that immediate, strong change was necessary in Florida. There were several arguments against change, however. One prominent area of discussion was appellate workload and the fear that additional opinion-writing requirements would cause delays and over-reliance on law clerks. These are certainly valid concerns. But the answer to workload is not to increase the use of PCAs. Florida already has a large caseload per judge, and we clearly need more judges and more appellate courts.

Another issue mentioned in our discussions was "junk opinions," or too many insubstantial opinions cluttering up the reporters. This is already a problem. Review of any recent volume of *Southern Second Reporter* reveals numerous opinions of nonprecedential value. The answer to this problem is to do what every other large state has done: adopt a system of unpublished opinions.

The arguments against use of a checklist were interesting. Some argued that it is beneath the dignity of a court to check boxes on a checklist or cite a rule number in every affirmance. Others said it would be unworkable in cases where the judges disagreed on the reasons for an affirmance, and in multi-issue cases. We learned, though, that the 11th Federal Circuit uses a checklist successfully. On balance, I was persuaded that the use of a checklist would be an improvement over the current practice affording no explanation of any kind to litigants. This is

particularly true in criminal cases, where it is important for purposes of post conviction relief to know whether the basis of the affirmance was a finding of no error, no preservation, or harmless error.

Some members of the committee expressed the view that lawyers should be able to tell why they lost by referring to the briefs or remembering the questions and discussion at oral argument. This argument, however, fails to consider that many cases are not orally argued. And appellees' briefs frequently contain alternative arguments for affirmance, making it impossible to know which argument prevailed.

The possibility of increasing the Supreme Court's workload was another area of concern. The worry here was that if the DCAs began to write more opinions, more inter-district conflicts would occur and litigants would have more opportunities to seek Supreme Court jurisdiction. A large portion of the forum held in Miami to discuss PCAs concerned the fact that Florida's District Courts are by design, courts of final jurisdiction. That issue, which includes the great debate over whether the Supreme Court's jurisdiction should be expanded, is, in my opinion, a separate question. For now, if issues which fit into the Supreme Court's current jurisdictional boundaries are not surfacing because of the use of per curiam affirmances, that is not a reason to continue the increasing use of PCAs.

In summary, although I admit that I joined the Committee with a preexisting belief that there is a problem with too many PCAs in Florida, the statistics, correspondence, literature, and out-of-state materials I reviewed during the committee's work convinced me even further that Florida's current PCA practices are seriously flawed. To me, there is no question that the current state of affairs engenders inconsistent dispositions, bad feeling, and frustration by lawyers and litigants, and undermines the public trust and confidence in the courts.

Accordingly, while I do not think we should prohibit PCAs altogether, I believe that Florida needs a rule of procedure that requires a written explanation of any decision which:

(a) Establishes a new rule of law;

(b) Treats an issue of first impression;

(c) Criticizes, clarifies, or modifies an existing rule of law;

(d) Applies an existing rule of law to facts significantly different from those to which that rule has previously been applied;

(e) Creates, resolves or continues actual or apparent conflict with past holdings of that court or other courts;

(f) Resolves a legal issue of substantial public interest;

(g) Sets forth a new interpretation of a decision of the United States Supreme Court or the Supreme Court of Florida, or of a rule or statute;

(h) Treats a new constitutional or statutory issue;

(i) Applies a previously overlooked rule of law;

(j) Has been remanded by a federal court or a higher state court for an action other than ministerial obedience to directions of the court;

(k) Contains a separate opinion from a member of the panel; or

(l) Treats an issue for which there is an arguable basis for review in the Supreme Court of Florida.

In addition, I believe Florida should adopt a system of using unpublished opinions in nonprecedential cases. These changes, I believe, would alleviate the current mood of frustration and bring Florida into line with other large states that suffer as we do from excessive appellate workload.

I enjoyed the opportunity to participate in the Committee's study, and the chairman and Committee members were cordial, fairminded, and thorough. I believe, however, that the ultimate conclusions of the majority report do little of significance to address the PCA issue.

Comments by Raymond T. (Tom) Elligett, Jr.

I write as the only lawyer in private practice on the Committee, and the only lawyer who works primarily (over the years almost exclusively) in civil practice. Much of the criticism of PCAs appears to come from lawyers who do few appeals. In the majority of cases, an experienced appellate litigator should be able to discern the likely reason or reasons an appellate court decided the case with a PCA, especially if counsel argued the case orally.

However, several lawyers point to cases that should not have been per curiam affirmed. The cited examples generally arise in the criminal context, where one of two defendants received a different appellate result on the same issue in a separate appeal. Such cases present the concerns some have voiced on accountability of cases decided by a PCA. There may also be concerns for those few cases that are affirmed by a PCA where it appears the panel was not able to articulate a reason for affirming.

After being involved in well over 300 hundred appeals during the last twenty years, with most in Florida's district courts of appeal, I can readily think of four PCA cases that I felt clearly warranted an opinion (and no, they were not all cases I lost). There was no controlling precedent and they presented substantial substantive issues that had been preserved. When an appellant receives a PCA in such a case, it is a frustrating experience for the client and lawyer.

Perhaps the guidelines and rule clarification that lawyers can move for rehearings on PCAs will help. I am not optimistic, as increases in such filings will probably diminish the chances those few with merit will "rise to the top."

As to the alternative of requiring a written opinion in every case, selective publication should be able to address the concerns expressed over flooding casebooks with useless non-precedential opinions. But there is a more significant problem.

The number of appeals decided on the merits, compared to the present number of intermediate appellate judges, dictates the state would have to commit to a substantial increase in the number of judges. Otherwise the quality of precedential written opinions would suffer. The district courts of appeal would become administrative processors. Those appellants who complain now would not likely like the future in a mandatory opinion judiciary, absent a dramatic increase in judges.

Would litigants or their counsel really benefit by a written opinion that says that the court considered the appellant's points and finds no merit in them? Mandatory opinions might actually increase the percentage of cases affirmed, if judges had less time to write on the merits of cases that deserved it, because they were busy processing those cases that did not.

The key to fewer decisions that are true PCAs or the functional equivalent, with or without a mandatory opinion rule, is a dramatically increased commitment from the state for more appellate judges. This seems unrealistic today. Perhaps those who decry the large numbers of PCAs can work toward an enlarged appellate bench that would have the capacity to generate more written opinions.

APPENDIX A

Materials Referenced in Chairman's Remarks

Philip H. JENKINS, Petitioner,
v.
STATE of Florida, Respondent.

No. 59087.

Supreme Court of Florida.

June 26, 1980.

Defendant was convicted, on plea of nolo contendere, before the Circuit Court, Palm Beach County, Marvin U. Mounts, Jr., J., and defendant appealed. The District Court of Appeal, 382 So.2d 83, affirmed. On application for review, the Supreme Court, Sundberg, J., held that Court lacked jurisdiction to review District Court of Appeal's decision, which read in its entirety "Per Curiam Affirmed," though the decision was accompanied by dissenting opinion.

Application for review dismissed.

England, C. J., concurred specially and filed opinion.

Adkins, J., dissented and filed opinion.

[1] CONSTITUTIONAL LAW k16
92k16
State constitutional amendment must be viewed in light of historical development of the decisional law extant at time of amendment's adoption and the intent of framers and adopters.

[2] COURTS k216
106k216
Supreme Court lacked jurisdiction to review District Court of Appeal's decision, which read in its entirety "Per Curiam Affirmed," though the decision was accompanied by dissenting opinion. West's F.S.A.Const. Art. 5, §§ 3, 3(b)(3).

[3] COURTS k216
106k216
Regardless of whether District Courts of Appeal's per curiam decisions, which are rendered without opinion, are accompanied by a dissenting or concurring opinion, Supreme Court lacks jurisdiction to review such a decision for alleged conflict with a decision of another District Court of Appeal or Supreme Court. West's F.S.A.Const. Art. 5, §§ 3, 3(b)(3).

***1357** Edward A. Garrison of Kohl, Springer, Springer & Garrison, Palm Springs, for petitioner.

Jim Smith, Atty. Gen., and John D. Cecilian, Asst. Atty. Gen., West Palm Beach, for respondent.

SUNDBERG, Justice.

We here address the question whether this Court currently has jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. We answer the question in the negative.

Review of the decision of the District Court of Appeal, Fourth District, was sought in this cause by notice to invoke the certiorari jurisdiction of this Court filed April 11, 1980. By his application petitioner asserts that the decision of the district court is in conflict with decisions of other districts or with Supreme Court decisions upon the issue of whether uncorroborated hearsay information from a confidential informant, who had not divulged the source of his information, was sufficient to establish probable cause for a warrantless search of a vehicle. Prior to trial, petitioner moved to suppress evidence seized in a search of his vehicle. The trial court denied the motion to suppress. Petitioner subsequently entered a plea of nolo contendere preserving his right to appeal the trial court ruling. On review the district court affirmed the ruling of the trial court without opinion. One member of the three-judge panel dissented to the decision of the majority in a comprehensive opinion which recited the facts extensively and concluded that under prevailing law the search violated petitioner's fourth amendment rights.

> *Jenkins v. State*, 382 So.2d 83 (Fla. 4th DCA 1980).

After ratification by the people of this state at an election held on March 11, 1980, article V, section 3 of the Florida Constitution pertaining to the jurisdiction of the Supreme Court was substantially revised. In particular, section 3(b)(3) underwent a dramatic change. Prior to April 1, 1980 (the effective date of the amendment), the provisions of section 3(b)(3) relating to review of conflicting decisions read as follows:

> May 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. . . .

Post April 1, 1980, that section reads with respect to review of conflicting decisions:

> May 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. . . .
> (Emphasis supplied.)

[1] The constitutional amendment must be viewed in light of the historical development of the decisional law extant at the time of its adoption and the intent of the framers and adopters. Our inquiry must begin with the amendment to article V of the Florida Constitution occurring in 1956, whereby the district courts of appeal were created. In grappling with the significance of the revised jurisdiction of this Court, a tone was set early on. In *Ansin v. Thurston*, 101 So.2d 808, 810 (Fla.1958), speaking through Justice Drew, the Court said:

> We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. *Diamond Berk Insurance Agency, Inc. v. Goldstein*, Fla., 100 So.2d 420; *Sinnamon v. Fowlkes*, Fla., 101 So.2d 375. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate

> level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions ***1358** as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.
>
> To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

[2] This was followed by *Lake v. Lake*, 103 So.2d 639 (Fla.1958), where Justice Thomas again reviewed the history of and purposes for the 1956 amendment to article V and held that in order to fulfill those purposes, a "per curiam" decision without opinion of a district court of appeal would not be reviewed by this Court upon petition for certiorari based on "direct conflict" jurisdiction except in those rare cases where the "restricted examination required in proceedings in certiorari (revealed) that a conflict had arisen with resulting injustice to the immediate litigant." Id. at 643. Some seven years later, however, in an opinion which observed that the rule of *Lake v. Lake* had been eroded *de facto* if not *de jure* by subsequent actions of the Court, a majority of the Court determined that there was jurisdictional power under section 3(b)(3) to review district court decisions rendered "per curiam" without opinion if from the "record proper" conflict with another decision could be discerned. *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla.1965).

In the interim the Court had already concluded that conflict certiorari jurisdiction could be founded on a dissenting opinion to a per curiam majority decision rendered without opinion. *Huguley v. Hall*, 157 So.2d 417 (Fla.1963). This position was adopted by a majority of the Court without discussion or rationale and has been subsequently followed without amplification of reasoning. E. g., *Autrey v. Carroll*, 240 So.2d 474 (Fla.1970); *Commerce Nat'l Bank in Lake Worth v. Safeco Ins. Co.*, 284 So.2d 205 (Fla.1973). In the *Commerce National Bank* decision, however, the impediments to relying on the factual statement contained in a dissenting opinion to establish conflict jurisdiction were observed:

> When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based. However, a dissent does not rise to a similar level of dignity and is not considered as precedent; note, for example, that West Publishing Company does not offer headnotes for dissents, regardless of their legal scholarship. By definition, a dissent contains information, interpretations or legal analysis which has been rejected in whole or part, by the majority. It is also possible that the majority accepts matters set forth in the dissent, but for other reasons declines to follow its line of thought. The majority is

> under no compulsion to respond to a dissent or to set out the measure of their reluctance to agree. The issuance of a per curiam opinion without comment or citation of authority remains the prerogative of the majority.

Id. at 207.

More recently, the wisdom of the jurisdictional policies expressed in *Foley* and *Huguley* have been brought into question by several members of this Court. See *Florida Greyhound Owners & Breeders Ass'n, Inc. v. West Flagler Associates, Ltd.*, 347 So.2d 408, 408 (Fla.1977) (England, J., concurring; Overton, C. J., concurring specially); *Golden Loaf Bakery, Inc. v. Charles W. Rex Constr. Co.*, 334 So.2d 585, 586 (Fla.1976) (England, J. and Overton, C. J., concurring); *AB CTC v. Morejon*, 324 So.2d 625, 628 (Fla.1975) (England and Overton, JJ., dissenting).

It was against this jurisprudential backdrop and in the face of a staggering case load that in November, 1979, this Court urged the legislature, meeting in special session, to enact a proposed amendment to ***1359** section 3 of article V of the Florida Constitution to limit the jurisdiction of the Supreme Court. Times were not unlike the year 1956 when the challenge confronting the drafters of that amendment to the judicial article was described thus:

> The means and procedure required to accomplish the improvement were difficult, complicated, tedious and onerous.
>
> Yet the determination was not lacking for congestion in the court of last resort had become almost intolerable. The time had come when the court, working at top speed, with cases, except extremely emergent ones, set in the order of their maturity, was hearing arguments as late as fourteen months after the cases were ready for oral presentation.
>
> For about eighteen months after its creation the (Judicial) Council, in periodic meetings, debated and deliberated the method which might most effectively modernize a system that by overloading had ceased to function as it should to assure litigants justice without undue, or even ruinous, delay. The words of Gladstone were often heard: "Justice delayed is justice denied."

Lake v. Lake, 103 So.2d 639, 640-41. The legislature responded through enactment of Senate Joint Resolution No. 20-C, which forms the language of the current section 3 of article V.

At hearings before the legislature and in countless meetings with representatives of The Florida Bar, The Conference of Circuit Judges of Florida, the Appellate Judges' Conference, The League of Women Voters as well as other interested organizations too numerous to recount, members of this Court represented that one of the intents and effects of the revision of section 3(b)(3) was to eliminate the jurisdiction of the Supreme Court to review for conflict purposes per curiam decisions of the district courts of appeal rendered without opinion, regardless of the existence of a concurring or dissenting opinion. These same representations were made consistently to the public at large preceding the ballot on the proposed

amendment. There can be little doubt that the electorate was informed as to this matter, because opponents of the amendment broadcast from one end of this state to the other that access to the Supreme Court was being "cut off," and that the district courts of appeal would be the only and final courts of appeal in this state. With regard to review by conflict certiorari of per curiam decisions rendered without opinion, they were absolutely correct.

The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabr.). The single word "affirmed" comports with none of these definitions. Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal. As stated by Justice Adkins in *Gibson v. Maloney*, 231 So.2d 823, 824 (Fla.1970), "(i)t is conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." (Emphasis in original.)

[3] Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court. The application for review in the instant case having been filed subsequent to March 31, 1980, it is therefore dismissed.

ENGLAND, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

***1360** ENGLAND, C. J., concurs specially with an opinion.

ADKINS, J., dissents with an opinion.

ENGLAND, Chief Justice, concurring specially.

A detailed recitation of the relevant history of the 1980 jurisdictional amendment is relevant to an understanding of the majority's conclusions as to its applicability in this case.[FN1]

> FN1. This recitation is extracted from an article to be published later this year in 32 U.Fla.L.Rev., Vol. 2 (Winter 1980), entitled "Constitutional Jurisdiction of the Florida Supreme Court: 1980 Reform." Detailed, supporting footnotes have been omitted here. For an abridged version of this article, see England, Hunter & Williams, *An Analysis of the 1980 Jurisdictional Amendment*, 54 Fla.B.J. 406 (1980).

In his 1978 Report to the Legislature, then Chief Justice Ben Overton recommended the creation of a commission, having broad based participation, to determine the need for an additional district court and to consider district court rather than Supreme Court review of workmen's compensation cases. In the summer of 1978, newly-elected Chief Justice Arthur England implemented Justice Overton's recommendation by appointing an Appellate Structure Commission chaired by Justice Overton and composed of district, circuit and county court judges, legislators, laymen and members of the bar. Chief Justice England expanded the scope of the commission's inquiry, however, to include a review of the entire appellate system in light of the 1956 goal "to ensure that the district courts of appeal are courts of final appellate review as contemplated by Article V of the Constitution."

In response to its expanded duty, the commission analyzed each category of the Supreme Court's jurisdiction to determine if cases in those categories were significant or important enough to justify the attention of a then overloaded state high court. Tentative votes, taken at the October 12, 1978 meeting, indicated the commissioners' view that, ideally, mandatory jurisdiction should be restricted to death penalty cases, decisions invalidating statutes or construing the constitution, and bond validation proceedings. Nonetheless, after six months of work, the commission rejected constitutional change to achieve this goal and recommended only that the Supreme Court's jurisdiction be modified by statute and by rule.

After weeks of intense discussion within the Court and numerous internal drafts of proposed changes, the chief justice, on behalf of a unanimous court, presented virtually every aspect of the commission's recommendations for appellate court reforms to the 1979 legislature. The most notable exception was the Court's rejection of the commission's proposal to alter the jurisdiction of the Supreme Court solely by rule and by statute. The Court viewed the commission's data as conclusive of the need for a constitutional adjustment, and it refused to deny the voters of Florida the right to refine the jurisdictional role which the constitution had created in 1956.

Statistics developed by the commission had demonstrated, for the first time, that the Court's growing problems were not (as generally believed) attributable to the Court's liberality in accepting cases for review, but rather to the effects of its constitutionally assigned mandatory jurisdiction and the numbers of cases being brought as a result (among others) of *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla.1965). The commission found that "the Court has in reality exercised great restraint in accepting for review the cases over which it has any freedom of choice" and has "granted (discretionary petitions) in less than 5 percent of the cases. . . ."

The Court proposed a constitutional amendment in April 1979, which was filed by Senator Mattox Hair, chairman of the Senate Judiciary-Civil Committee, as Senate Joint Resolution 714, for consideration at the 1979 regular session of the Florida Legislature. The Court's discretionary jurisdiction under SJR

714 was predicated on district court certifications of decisions in conflict or of questions of great public importance, plus a "safeguard" provision authorizing ***1361** the Supreme Court, on its own initiative, to reach down and obtain for review trial court orders and district court decisions which had substantial importance and required immediate statewide resolution.

The Judicial Council endorsed and supported SJR 714. Under pressure to accept or reject the Court's proposal on very short notice, however, the Board of Governors of The Florida Bar, by a vote of 18 for and 12 against, failed to endorse SJR 714 by the two-thirds vote required by the Board's bylaws. The members of the Board principally objected to SJR 714 because attorney-filed petitions for conflict certiorari review were eliminated, and because the initiative, or so-called "reach down" provision, did not appear to allow attorney-filed suggestions to the Court.

Two Senate Judiciary-Civil Committee hearings were held. Despite the Court's expression of intent to limit severely the exercise of the safeguard or "reach down" provision, that provision was ridiculed by opponents of SJR 714 as "pluck up" power which would destroy the finality of all cases throughout the judicial system. Opposition to SJR 714 also developed from attorneys who expressed a lack of trust in district court judges, or at least in their ability or willingness to recognize, concede, and certify conflicting decisions. At the suggestion of the bill's sponsor, SJR 714 was withdrawn from further consideration during the 1979 regular session, in order to give the Court an opportunity to discuss alternatives with opponents and critics and to seek a consensus substitute by the time of an announced special legislative session in the fall of 1979.

Notwithstanding the fate of SJR 714, the Court gained support for its position that structural change was essential to avoid a potential decline in the quality of its work and its increasing backlogs and delays. Justice Sundberg scheduled a series of meetings with a committee appointed by the president of The Florida Bar, in an effort to review the controversial aspects of the Court's original proposal. A statement of agreed principles was eventually drafted by the bar committee and Justice Sundberg, to advise the bar's Board of Governors and the Court of a consensus that could be reached. This included a proposal to retain discretionary review of written opinions of district courts invoked by attorney-filed petitions asserting decisional conflict. The bar committee made clear the intent to overrule the Foley decision regarding conflict, however, by declaring that only an opinion which "articulates a rule of law . . ." should qualify for discretionary review.

At the urging of attorney Tobias Simon and others who feared too severe a narrowing of the Court's review authority, the bar committee presented, as an acceptable alternative plan, discretionary review of "decisions of a district court of appeal which substantially affect the general public interest or the proper administration of justice throughout the state" -- a standard based on the American Bar Association model for constitutionally unlimited discretionary review.

After the bar's deliberations, Justice Overton reconvened the Appellate Structure Commission to review the bar committee's statement of principles. At their meeting on September 5, 1979, the commission disagreed with the bar committee's preferential guidelines for discretionary review. At the urging of commission member Tobias Simon the commission opted instead for the alternative constitutionally unlimited discretionary review to be restricted by the
Court's adoption of rules setting guidelines for its own exercise of discretion.

On September 15, 1979, the bar committee's principles were presented formally to the Board of Governors by the committee's chairman, attorney Benjamin Redding of Panama City. Tobias Simon argued for the alternative, commission-approved approach of constitutionally unlimited discretionary review. The members of the Board of Governors, at the request of Justice Sundberg, agreed to support a Court proposal for constitutional change based either on the committee's principles or the alternative.

***1362** As the Court prepared to submit to the November special legislative session a proposed substitute for SJR 714, the chairman of the American Bar Association's Committee to Implement Standards of Judicial Administration expressed an interest in Florida's court reform effort and chose Tallahassee as the site for the next scheduled ABA Committee meeting. The Committee's national expertise with appellate courts focused, in accordance with the ABA standards, on constitutionally unlimited discretionary review for the Supreme Court. In discussions with legislative committee members, the Court, and the bar immediately preceding the legislative session, however, the ABA committee members recognized unusual features in the Florida system of which they had not previously been aware. Principal among these was the incredibly large number of appeals (35 per year) filed in death penalty cases, each requiring full record and sentence review. This compared, they noted, with only eight death cases a year in the state with the next highest volume. They also noted the special concern for constitutional conflict resolution jurisdiction, due to the diversity in geographical regions of the state. These and other unique factors, the Committee concluded, adequately explained Florida's proposed deviation from the ABA's model standard of constitutionally unlimited discretionary review.

When the combined Senate-House Judiciary Committees met to consider the Court's new constitutional amendment on the opening day of the three-day November 1979 special session, only two issues in the proposal were very controversial, and these quickly became the focus of attention. The first was the Court's suggestion to remove the constitutional restriction on the selection of Supreme Court justices, which required appellate district representation on the Court. The other publicly controversial issue concerned review of public utility decisions, most of which were proposed to be transferred from the Supreme Court for review in the district courts of appeal. The Court's proposal SJR 20-C emerged from committees of both chambers of the legislature in essentially the form suggested by the Court, as derived from the bar committee's statement of principles.

SJR 20-C, as amended, was adopted by the Senate by a vote of 38 to 2 on November 28, together with a companion bill (SB 21-C) to accelerate submission to the voters by allowing the proposed amendment to be considered at the special presidential primary election scheduled for March 11, 1980. Immediately following the vote in the Senate, both measures were certified to the House, substituted for comparable House legislation, and adopted without further amendment by a vote of 110 to 2.

During the period between November 28, 1979, and March 11, 1980, active public support for SJR 20-C was undertaken by six of the seven justices of the Supreme Court,[FN2] the governor, the attorney general of Florida, and the organized bar. Endorsements for the proposal were sought and received from the conferences of district court, circuit court, and county court judges, the League of Women Voters, the prosecuting attorneys' association, the sheriffs' association, and numerous newspaper and television editorial boards.

FN2. Justice Adkins publicly opposed the amendment.

The Florida Bar and the Young Lawyers Section of The Florida Bar developed and disseminated promotional literature, and provided speakers both for civic clubs and for media discussions and debates. Promotional literature was distributed widely throughout the state, including targeted explanations of the amendment to employees of the state's electric and telephone companies, and to residents of condominium associations.

Articles supporting passage of the amendment, most authored by justices of the Court supporting the amendment, were published in trade publications such as the journals or monthly newsletters of the Florida Bankers Association, the cattlemen's association, the county commissioners' association, the League of Municipalities, and the ***1363** like. Television appearances and radio spots were scheduled whenever possible for the justices supporting the amendment, and for others offering public support for its adoption.

Two dominant themes of persuasion were argued by the proponents. First, the amendment would eliminate delay in the Supreme Court, both by removing from the Court's docket those district court decisions which had no written opinion, and by eliminating all direct appeals to the Supreme Court from trial courts (except in bond validation cases and cases in which a death penalty had been imposed). Second, the amendment would reduce the cost of litigation by reducing the number of multiple appeals and by making the district courts truly final in the bulk of matters brought to Florida's appellate courts.

Opposition to the amendment developed from a small group of Florida attorneys organized by Tobias Simon as "Floridians against Limited Access," from one current and one former member of the Supreme Court,[FN3] and from the public defenders' association. The main efforts of the opponents were to develop newspaper and television editorial support against the amendment, to develop opposition in local bar associations, and to urge public rejection of the amendment

through media appearances. Five dominant themes were espoused.

FN3. Former Justice B. K. Roberts publicly opposed the amendment.

First, it was suggested to the media that the amendment would limit or cut off entirely their access to the Supreme Court for the resolution of first amendment cases. Second, local bar associations and the public were told that general access to the Court would be curtailed. Third, it was suggested that district court judges would be given the power to prevent review of their decisions by the Supreme Court. Fourth, it was urged that the Florida Supreme Court should be like the United States Supreme Court and the ABA's model high tribunal, having constitutionally unlimited discretionary review of district court decisions. Lastly, the opponents inferred that the amendment was unnecessary because the Court's caseload was in fact diminishing and the justices traveled too much.

Immediately before the March 11 vote, the 1980 amendment was endorsed editorially by almost every major, daily newspaper in the state. The official vote for passage on March 11 was 940,420 to 460,266 a 67 percent ratio of voter approval.

The significance of the public discussion concerning the amendment is that it provides a frame of reference by which to ascertain the intent of the voters in adopting the amendment.[FN4] In this case, the public debate and informational literature make abundantly clear that the voters were asked to approve an appellate court structure having these features:

FN4. *Myers v. Hawkins*, 362 So.2d 926 (Fla.1978).

1. a Supreme Court having constitutionally limited, as opposed to unlimited, discretionary review of intermediate appellate court decisions; and

2. finality of decisions in the district courts of appeal, with further review by the Supreme Court to be accepted, within the confines of its structural review, based on the statewide importance of legal issues and the relative availability of the Court's time to resolve cases promptly.

ADKINS, Justice, dissenting.

I dissent.

We are embarking on a course which limits our jurisdiction to matters concerning deep questions of law, while the great bulk of litigants are allowed to founder on rocks of uncertainty and trial judges steer their course over a chaotic reef as they attempt to apply "Per Curiam Affirmed" decisions. When the constitutional amendment is considered in light of historical development of the decisional law (as suggested by the majority), we find regression instead of progression. The majority admits that many will not obtain justice for our jurisdiction will be limited to resolving questions of importance to the public as distinguished ***1364** from that of the parties. In *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla.1958), cited by the majority, the Court said:

[T]here should be developed consistent rules for limiting issuance of the writ of certiorari

> to "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between decisions.

The opinion in *Ansin v. Thurston*, *supra* was authored by Justice Drew. This interpretation lasted for seven years and then a progressive Court adopted *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla.1965). The rule in *Ansin* had created problems which were resolved in *Foley*. In a special concurring opinion in *Foley*, Justice Drew said:

> Many problems have arisen in the interpretation of amended Article V. But there has been no dispute that under the constitutional plan for the administration of justice at the appellate level in this State the responsibility was placed in this Court to keep the law harmonious and uniform. . . . We must assume, in the absence of something in the record to indicate a contrary view, that an affirmance of a *decision* of a trial court by a decision of the District Court of Appeal makes the trial court decision the decision of the District Court. So far as the trial judge is concerned and so far as the Bench and Bar who are familiar with the decision of the trial judge are concerned, such judgment is the law of that jurisdiction. I think it would result in utter chaos in the judicial system of this State with three separate District Courts, and the possibility of a fourth in the near future, if it were impossible for this Court to maintain consistency and uniformity of the law in such cases. A different rule of law could prevail in every appellate district without the possibility of correction. The history of similar courts in this country leads to the conclusion *that some of such courts have proven unsatisfactory simply because of the impossibility of maintaining uniformity in the decisional law of such state*.

177 So.2d at 230.

In *Seaboard Air Lines Railroad Company v. Williams*, 199 So.2d 469, 472 (Fla.1967), Justice Drew reiterated his views, saying:

> In my concurring opinion in *Foley v. Weaver Drugs*, Fla.1965, 177 So.2d 221, I observed: "I think it would result in utter chaos in the judicial system of this State with three separate District Courts, and the possibility of a fourth in the near future, if it were impossible for this Court to maintain consistency and uniformity of the law in [decisions of such district courts merely affirming without opinion] * * *." What has occurred in this case fulfills that prophecy. I, therefore, concur in the foregoing majority opinion.

Under the construction proposed by the majority we will have well-written uniform *opinions*, but the *decisions* of the five district courts of appeal will be in hopeless conflict.

The majority says there was little doubt "that the electorate was informed" and proceeds to construe a purported constitutional amendment, the terms of which were not placed on the ballot nor were they explained to the public. While discussions with some segments of the public on background and debates concerning the proposed amendment

were instructive, nevertheless, what was submitted to the people for adoption was a statement on the ballot which read: "[p]roposing an amendment to the State Constitution to modify the jurisdiction of the Supreme Court." In discussing the proposed amendment, one news analyst contended:

> The ballot says simply that the proposal would "modify the jurisdiction of the Supreme Court," giving the public little insight into the changes it would make in court appeals procedures.

Given the complex nature of those procedures, few voters understand the issue. Van Gieson, *Reform Sought to Ease Court's Load*, Tallahassee Democrat, March 9, 1980 at 5b, col. 1.

***1365** A pamphlet entitled "Constitutional Amendments on Florida Supreme Court Jurisdiction . . . to be Considered at March 11, 1980, Election" prepared by Manning J. Dauer and Fred Goddard discussed the content of the change in the constitution as follows:

> The proposed change to Article 5 does not modify the organization of the State Supreme Court. There was a proposal from the Supreme Court to permit all justices of the State Supreme Court to be from the state at large. The legislature, however, retained subsection A of Section 3 which requires at least one of the justices to be from each of the districts in which the state is divided for district courts of appeal. In sub-section B there are a number of modifications as to the jurisdiction of the Supreme Court. The attempt has been made to retain appellate jurisdiction for the most important cases involving new point of law, the death penalty, constitutional questions, affecting the state constitution or that of the U.S., affecting the construction of new statutes passed by the legislature, *affecting disagreements among two or more district courts of appeal*, affecting bond validation, and affecting certain cases certified for review by the district courts of appeal. Also, the jurisdiction of the Supreme Court has been changed in one case category, that is, cases from administrative agencies of the state affecting rates charged to consumers or service provided by the electric utilities and gas and phone companies.
>
> On the other hand, many other types of cases will be cut off with the appeal being exhausted at the level of the district courts of appeal. For example, cases involving life imprisonment will now be constitutionally limited to the level of the appellate district court unless the case involves a constitution question, a new statute, or a disagreement in construction among district courts. Writs of certiorari (requests for appeal) would be much more limited. Appeals from state administrative agencies' decisions would ordinarily stop at the district courts of appeal. The Supreme Court would retain, of course, the right to issue writs of certiorari, writs of habeas corpus, writs of prohibition, writs of injunction, and writs of mandamus when it entertained jurisdiction.
>
> The aim of these and other changes is to reduce the caseload on the Supreme Court. The estimate given by the Court is that instead of handling 3000 cases per year, the changes will permit the reduction of the caseload from 3000 to 2000 or less. At the

> same time, the citizen will be guaranteed justice by having cases heard more quickly and by appeals being adequately considered at the district court level. Finally, in the categories of new issues, *or in case of disagreement by lower courts,* review is still available at the level of the State Supreme Court.

DAUER, Amendment to Limit Appellate Jurisdiction of the Florida State Supreme Court, 62 Pub.Ad. Clearing Service, Univ. of Fla. Civic Information Ser. 2, 4- 5, (1980). (Emphasis supplied.)

The proposed amendment was conceived and composed by the justices of this Court. After the proposal was approved by the legislature, it was decided to place the proposed amendment on the ballot at a special election. *See* article XI, section 5(a), Florida Constitution. Hopefully, this special election would create interest in the voting populace because it was a special presidential primary election in which a popular homestead amendment giving tax relief would also be considered. The substance of the amendment to be placed on the ballot (section 101.151, Florida Statutes), was as follows: "An amendment to the State Constitution to modify the jurisdiction of the Supreme Court." Justices of the Court and others attempted to explain the contents of the proposed amendment to the public, and there were many discussions.

While the discussions relating to the intent of the framers, referred to by the majority, were instructive as to background, nevertheless, there was only one provision submitted to the voters for adoption: "an amendment to the state constitution to modify the jurisdiction of the ***1366** Supreme Court." Any discussions or debate which may have taken place does not change the provision on the ballot that was approved by the voters. *See In Re Advisory Opinion*, 223 So.2d 35, 40 (Fla.1969). Construing this provision (as placed upon the ballot) under the ordinary rules of construction, the voters gave us absolute discretion in determining whether we had jurisdiction of a particular case.

Also, I disagree with the judgment of the majority that language and expressions found in a dissenting or concurring opinion cannot support jurisdiction. The effect of the 1980 amendment is to give us jurisdiction for review of a decision that expressly and directly conflicts with a decision of another district court of appeal. A "Per Curiam Affirmed" is a decision, but no decision can be rendered unless three judges of the district court of appeal participate. Art. V, s 4(a), Fla.Const. (1972). A concurring or dissenting opinion is used by trial judges throughout the state in determining the effect of a "Per Curiam Affirmed" decision. We should glance through the window of our ivory tower and attempt to adjust any confusion in the law which may arise by virtue of statements made in a concurring or dissenting opinion, as it is an integral part of the decision of the district courts of appeal.

There will be occasions when a "Per Curiam Affirmed" decision will cite another case. In some instances the cited case had admittedly been in conflict with other decisions, but, because of the failure of the parties to seek our jurisdiction, the law remained unsettled. Under the construction of the present

constitutional amendment, the law will remain unsettled. A heavy case load does not justify our spawning confusion in the judicial system.

The decision of the district court of appeal conflicts with other decisions and creates instability in the law. I would accept jurisdiction.

Trends in the Law (Cite as American Bar Association Journal of August 1999)

Big Objections to Brief Decisions
Critics contend one-word appellate rulings give short shrift to justice

BY WILLIAM C. SMITH

Facing a prison sentence of 27 months for mail fraud, Vicki Lopez-Lukis appealed to the 11th U.S. Circuit Court of Appeals. A former Lee County, Fla., commissioner, she had been convicted of taking bribes to favor the clients of a lobbyist who also was her lover.

Her appeal asserted error in the jury instructions and sentencing. But the Atlanta-based court disposed of her appeal last January with a single word: "Affirmed."

Perhaps stung by publicity surrounding the case, the panel issued a nine-page opinion on May 5 defending its prior one-word ruling. The court insisted it did not give short shrift to Lopez-Lukis' appeal, as some had claimed. *United States v. Lopez-Lukis*, No. 98-2179.

Guessing Game

The case exemplifies the growing use of no-comment decisions by circuit courts. Some judges and observers defend the practice as an appropriate, and perhaps inevitable, means for swamped circuit judges to dispose of meritless appeals. However, critics charge that the quality of appellate justice suffers, and further appeals are next to impossible, when the courts affirm without explanation.

Responding to a motion for reconsideration, the 11th Circuit panel said summary affirmances "must be read in the context of the case presented, [the arguments] in the briefs, and the give and take among lawyers and judges at oral argument." If a decision might be based on alternative theories, the court concluded, the outcome "must be understood to rest not on the new-law ground, but on the settled ground."

In Lopez-Lukis' case, the court said its rationale would be clear to "reasonable lawyers who know the case and who think hard about our decision."

Given the summary appellate procedures in the federal system, 20 states and England, the court said, "[W]e are confident that we do nothing revolutionary when we decide to affirm a judgment without a written opinion."

Quoting a 1983 decision by the 2nd U.S. Circuit Court of Appeals, *Furman v. United States*, the court noted that a "great many cases do not present any new or significant issue. ... The use of summary orders permits judges to devote more time to the remaining cases that truly merit fully developed exercises of judicial craftsmanship."

As permitted by Rule 36 of the Federal Rules of Appellate Procedure, the 11th Circuit allows one-word affirmances when it finds the District Court was right on the law and the facts, and when a written opinion "would have no precedential value."

Douglas Molloy, the assistant U.S. attorney in *Lopez-Lukis*, says appeals with no merit can appropriately be resolved without opinion. Circuit judges and court staff are extremely conscientious, and give each case the attention it deserves, Molloy says. A summary disposition "is just the court's way of saying, 'Look, there's nothing there.' "

Busy Docket Breeds Brevity

The 11th Circuit, covering Florida, Georgia and Alabama, is one of the busiest federal appeals courts in the nation, resolving about 3,000 appeals on the merits annually. It also leads the circuit courts in issuing decisions that have not included written opinions, with 502 such rulings last year.
Not far behind are the 3rd Circuit based in Philadelphia (404 no-comment decisions) and the 8th Circuit based in St. Louis (384 such decisions). Recently, though, the 3rd Circuit has decided to try to curb the number of rulings without rationales.

"We realized that this was a mistake, that we owed the bar more," says Chief Judge Edward Becker of the 3rd Circuit. This year, he says, his colleagues have committed to "virtually eliminate" judgment orders as a case management tool.

That move would likely be applauded by critics such as Paul Petterson, a staff attorney with the National Association of Criminal Defense Lawyers.

He notes that while court-appointed appellate counsel must search the record for reversible error, "There is no comparable rule for the courts. If a panel decides at 4 o'clock on a Friday afternoon to [summarily affirm] the last 10 cases on its docket, there's no check or balance, no oversight."

The NACDL filed an amicus brief urging reconsideration in *Lopez-Lukis*, criticizing the appeals court for giving little consideration to a substantive sentencing issue.

Disillusionment

In a similar brief filed in a 9th Circuit case, *United States v. Brian*, No. 97-50285, the NACDL said that summary and unexplained dispositions "are not just disappointing, they are disillusioning and lessen respect for the process."

A written opinion, the brief continued, "permits litigants and the public alike to review, and appreciate, the accuracy of the logic employed and propriety of the legal rules invoked."

Law professor William Richman of the University of Toledo observes that circuit courts are more likely to give full-scale review, including oral argument and a detailed decision, in cases deemed important, such as securities litigation.

Richman, a well-published expert on unpublished opinions, says more routine cases are often shunted off to staff attorneys for review, and an unelaborated or cursory affirmance is issued.

In testimony last year before the Commission on Structural Alternatives for the Federal Courts of Appeals, Richman said this practice falls disproportionately on the "poorest and least powerful federal litigants since theirs are the 'trivial' cases: Social Security litigation, civil rights cases, pro se appeals and prisoner petitions."

The commission, chaired by former Supreme Court Justice Byron White, noted in its December 1998 report that summary dispositions may have made circuit courts more efficient, "but at some cost to the appearance of legitimacy of the appellate process."

The report noted that federal litigants' statutory right to circuit court review imposes a corresponding "obligation on the court to consider a properly presented appeal and decide it on its merits." However, the growing use of unelaborated opinions has "blurred the distinction between obligatory and discretionary review."

The commission rejected a proposal that appellate jurisdiction be made discretionary across the board, but suggested that circuit courts might be allowed to deny review in certain categories of cases that are "generally fact intensive and controlled by existing precedent."

Some appeals courts endeavor to keep one-word affirmances to a minimum. The D.C. Circuit, for example, issued just one such opinion last year, and the 7th Circuit based in Chicago issued only 37. Judge Richard Posner of the 7th Circuit says his court usually tries to articulate grounds for a decision. The practice may reveal some areas of disagreement with the lower court's ruling, he says. However, the former law professor--who is among the federal bench's most prolific authors of

judicial opinions and scholarly texts--does not believe every appeal warrants judicial wordiness. The District Court may be affirmed in a single sentence or citation "if there's only one issue and it's frivolous," he says.

Judge Patricia Wald of the D.C. Circuit believes appeals that involve no new area of the law can often be resolved in unpublished memorandum opinions, without all the "pomp and circumstance" required for the Federal Reporter. However, she is "very skeptical and suspicious" of one-word rulings that give no clue about the circuit court's rationale. She says her court avoids such judgment orders, although it occasionally affirms "for the reasons stated in the District Court's opinion."

Nosedive in Judgment Orders

The 3rd Circuit's new stand against summary dispositions has produced dramatic results so far, according to the circuit clerk's office. The court has issued only 15 judgment orders in the first four months of 1999, down 95 percent from the 280 in the same period in 1998.

The court made up most of the difference with a fivefold increase in unpublished per curiam and memorandum opinions, which briefly explain the court's rationale.

According to Judge Becker, the court has so far managed to keep current on its work, defying fears that decreasing judgment orders would necessarily increase the circuit's backlog.

Although the new policy may involve more work for his already busy colleagues, Becker thinks the change is worthwhile. "It was the right thing to do, so we just did it," he says.

S. ANSIN, Petitioner,
v.
Ralph L. THURSTON, Respondent.
S. ANSIN, Petitioner,
v.
Ralph L. THURSTON, as Administrator of the Estate of Ralph L. Thurston, Jr., deceased minor, Respondent.

Supreme Court of Florida.

March 26, 1958.

Rehearing Denied April 12, 1958.

Action for death by drowning. The Circuit Court, Dade County, Harold R. Vann, J., rendered judgments for the plaintiff and defendant appealed. The District Court of Appeal, Pearson, J., 98 So.2d 87 affirmed the judgments and the defendant sought review by certiorari. The Supreme Court, Drew, J., held, inter alia, that fact that defendant found it necessary to review with particularity evidence in various cases and to refer to authorities elsewhere to bolster his position indicated that argument was primarily upon the merits of decision attacked as opposed to any contention that it brought into existence a conflict of authority, and hence writ would be denied for failure to show a direct conflict between decision involved and a previous ruling on the same point of law.

Writ denied.

***809[1] NEGLIGENCE k1177**
272k1177
Formerly 272k39
The maintenance of an artificial body of water where there exists some unusual element of danger not present in ponds or natural bodies of water generally may constitute actionable negligence supporting recovery for injury or death by drowning of a minor child under attractive nuisance doctrine.

[2] COURTS k216
106k216
That petitioner seeking review by certiorari of decision of District Court of Appeal which had affirmed judgments in tort actions for negligence found it necessary to review with particularity evidence in various cases and to refer to authorities elsewhere to bolster his position indicated that argument was primarily upon the merits of decision attacked as opposed to any contention that it brought into existence a conflict of authority, and hence writ would be denied for failure to show a direct conflict between decision involved and a previous ruling on the same point of law. F.S.A.Const. art. 5, § 4(2) as amended in 1956; Florida Appellate Rules, rule 2.1, subd. a(5) (b).

[3] COURTS k216
106k216
Under constitutional provision authorizing review by Supreme Court by certiorari, the powers of the Supreme Court to review decisions of District Courts of Appeal are limited and strictly prescribed since it was never intended that District Courts of Appeal

should be intermediate courts. F.S.A.Const. art. 5, § 4(2) as amended in 1956; Florida Appellate Rules, rule 2.1, subd. a(5) (b).

[4] COURTS k216
106k216
The revision and modernization of the Florida judicial system at appellate level was prompted by the great volume of cases reaching the Supreme Court and consequent delay in administration of justice, and new constitutional provision embodies idea of a Supreme Court which functions as a supervisory body in judicial system for the state, exercising appellate power in certain specified areas essential to settlement of issues of public importance and preservation of uniformity of principle and practice, with review by district courts of appeal in most instances being final and absolute. F.S.A.Const. art. 5, § 4(2) as amended in 1956; Florida Appellate Rules, rule 2.1, subd. a(5) (b).

[5] COURTS k216
106k216
The constitutional provision limiting review by Supreme Court of decisions of District Courts of Appeal to decisions in "direct conflict" evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants. F.S.A.Const. art. 5, § 4(2) as amended in 1956.

Blackwell, Walker & Gray, Miami, for petitioner.

Nichols, Gaither, Green, Frates & Beckham and Sam Daniels, Miami, for respondent.

DREW, Justice.

The petitioner, defendant in the trial court, seeks review by certiorari of a decision of the District Court of Appeal, Third District, by which certain judgments against him in tort actions for negligence were affirmed.

The only point presented in the appeal below was the alleged error of the trial court in denying defendant's motion for directed verdict on the issue of liability. The actions against him, both arising out of the same circumstances, were by the respondent individually and as administrator of the estate of his minor son, who died by drowning in a 'rockpit' on land owned by defendant. In each case the cause of action was dependent upon proof of facts sufficient to come within the doctrine of tort ***810** liability usually referred to as attractive nuisance.

[1] It was the opinion of the district court that the facts alleged and proved, details of which appear fully in the published report of the case in that court, were sufficient to present a jury question under the rule enunciated in the case of *Allen v. William P. McDonald Corporation*, Fla., 42 So.2d 706, to the effect that the maintenance of an artificial body of water where there exists some unusual element of danger not present in ponds or natural bodies of water generally may constitute actionable negligence supporting recovery for injury or death by drowning of a minor child upon the theory noted above.

The petition herein is necessarily prosecuted under that portion of amended Article V, Section 4(b), (4(2), F.S.1957) of the Florida Constitution, F.S.A., authorizing review by certiorari in this Court of 'any decision of a district court of appeal * * * 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 the corresponding provision of Rule 2.1, subd. a(5)(b) of the Florida Appellate Rules.

[2] Petitioner contends that the decision below is not in accord with the rule of the case relied upon by the district court, and that it conflicts with two subsequent decisions where this Court affirmed judgments for defendant in such actions, but did not purport to overrule the earlier case. *Newby v. West Palm Beach Water Co.*, Fla., 47 So.2d 527; *Lomas v. West Palm Beach Water Co.*, Fla., 57 So.2d 881. In the brief much attention is devoted to the character of the banks surrounding the body of water involved, and argument is addressed primarily to the point that the present case is distinguishable upon the facts from *Allen v. McDonald Corp., supra*. The very fact that petitioner finds it necessary in a proceeding of this nature to review with such particularity the evidence in the various cases, and to refer to authorities elsewhere to bolster his position, would indicate that the argument is primarily upon the merits of the decision attacked as opposed to any contention that it brings into existence a conflict of authority in this jurisdiction. These considerations, among others, impel our conclusion that the writ should be denied for failure to show direct conflict between the decision in question and a previous ruling 'on the same point of law.' Rule 2.1, subd. a(5) (6) supra.

[3][4] We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. *Diamond Berk Insurance Agency, Inc., v. Goldstein*, Fla., 100 So.2d 420; Sinnamon v. Fowlkes, Fla., 101 So.2d 375. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

[5] The suggestion is inevitable that the detailed consideration given the issues here presented and the exposition of reasons by written opinion, contrary to the customary ***811** appellate practice in denying certiorari, involves the expenditure of quite enough judicial labor to have enabled the Court to dispose of this controversy on its merits, and so far as the particular litigation is concerned our efforts might more logically be so directed. But it is of obvious importance that there should be developed consistent rules for limiting issuance of the writ of certiorari to

'cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority' between decisions. See *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 43 S.Ct. 422, 423, 67 L.Ed. 712. While the court in the latter case dealt with rules couched in varying language, the conclusion is inescapable that our own constitutional provision has the same general objectives. A limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.

Similar provisions in the court systems of other states have been so construed: 'A conflict of decisions * * * must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions.' 21 C.J.S. Courts s 462.

The general import of these pronouncements should be of benefit in charting a course of practice under amended Article V, and considered in relation to the instant case they serve to sustain and explain our conclusion herein.

Writ denied.

TERRELL, C. J., THORNAL and O'CONNELL, J., and WIGGINTON, District Judge, concur.

APPENDIX B
STATE SURVEY INSTRUMENT AND SUMMARY

State Survey Instrument

State_____

Name of Person Completing Form_____

Telephone Number of Person Completing Form_____

(1) Is your intermediate appellate court:

(a) statewide?

(b) divided into geographic districts? If so, how many?

(c) divided by subject matter? If so, how many?

(2) Are divisions employed in any of your appellate courts? If so, circle all that apply:

(a) geographic

(b) subject matter

(c) administrative (for division of workload)

(d) other

(3) What is the total number of filings and dispositions in intermediate appellate courts for calendar years 1996 and 1997?

	Filings	Dispositions
1996		
1997		

(4) How many intermediate appellate judges does your state have?

(5) Are all appellate opinions published?

If not, approximately what percentage are published?

Is there any page limitation on the length of published opinions?

(6) Do your state's intermediate appellate courts have:

(a) central legal staff?

(b) law clerks assigned to the judges?

(7) Do law clerks prepare opinion drafts?

(a) yes

(b) no

(c) depends on the judge

(8) Do your intermediate appellate courts use affirmances without opinion?

If so, what percentage of opinions fall into this category?

(9) Does your state have a rule or statute which permits appellate disposition of certain cases without briefs being filed? [Note: For example, when counsel moves to withdraw from a no-merit criminal appeal under Anders v. California, 386 U.S. 738 (1967), and the motion is well taken, the appeal is not fully briefed. Similarly, where there has been a summary denial of a motion for postconviction relief, Florida provides for an appeal on an abbreviated record in which there will not be full briefing unless ordered by the court.]

What percentage of cases are fully briefed?

(10) Does your state have any statutes, rules, or constitutional provisions on the issue of:

(a) when a judgment may be affirmed without opinion, and/or

(b) when an opinion must be written.

If so, please provide.

(11) Does your state grant an automatic right of first appeal?

If not an across-the-board right, does it cover criminal, civil, and administrative appeals? (please circle applicable categories.)

(12) In a no-merit criminal appeal where appointed counsel moves to withdraw under Anders v. California, 386 U.S. 738 (1967), and the motion to withdraw is well taken, does the intermediate appellate court affirm without opinion?

If not, how is the court's ruling issued?

(13) When the intermediate appellate court affirms a summary denial of a motion for postconviction relief (where the trial court has denied the motion for postconviction relief without an evidentiary hearing), does the intermediate appellate court issue an affirmance without opinion?

If not, how does the intermediate appellate court issue its ruling?

(14) In appeals without oral argument, do the assigned panel members meet to discuss the case?

Please return to:

Committee on Per Curiam Affirmed Decisions
c/o Greg Youchock
Office of the State Courts Administrator
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399
FAX: (850) 414-1342

State Survey Summary

(1) Is your intermediate appellate court:

(a) statewide?

California:	No
Georgia:	Yes
Illinois:	n/a
Michigan:	Yes
New Jersey:	Yes
New York:	Yes
Ohio:	Yes
Pennsylvania:	Yes
Virginia:	Did not respond.
Texas:	No

(b) divided into geographic districts? If so, how many?

California:	Yes, six districts, nine court sites.
Georgia:	n/a
Illinois:	Five districts.
Michigan:	n/a
New Jersey:	No
New York:	Yes, four departments.
Ohio:	Twelve
Pennsylvania:	n/a
Virginia:	Did not respond.
Texas:	Yes, fourteen.

(c) divided by subject matter? If so, how many?

California:	No
Georgia:	n/a
Illinois:	n/a
Michigan:	n/a
New Jersey:	No
New York:	Not really, although the Third Department handles.
Ohio:	No
Pennsylvania:	Yes, two. Commonwealth and Superior Court.
Virginia:	Did not respond.
Texas:	No

(2) Are divisions employed in any of your appellate courts? If so, circle all that apply:

(a) geographic

California:	Yes. Second District has one geographically separate division (Ventura) Fourth District has three (San Diego, Santa Ana, San Bernadino).
Georgia:	n/a
Illinois:	n/a
Michigan:	For election purposes.
New Jersey:	n/a
New York:	Yes
Ohio:	Yes
Pennsylvania:	Yes. Eastern, Western, and Middle Districts. (Same group of judges sit at all three districts, varies by where the court is convening).
Virginia:	Did not respond.
Texas:	n/a

(b) subject matter

California:	No
Georgia:	n/a
Illinois:	n/a
Michigan:	n/a
New Jersey:	n/a
New York:	n/a
Ohio:	n/a
Pennsylvania:	Commonwealth and Superior Court.
Virginia:	Did not respond.
Texas:	No

(c) administrative (for division of workload)

California:	Yes. First (5 divisions in San Francisco) Second (6 Divisions in Los Angeles).
Georgia:	Yes
Illinois:	Only in First District Appellate Court (Cook County).
Michigan:	n/a
New Jersey:	n/a
New York:	Each department is a wholly separate court.
Ohio:	n/a
Pennsylvania:	n/a

Virginia: Did not respond.
Texas: No

(d) other

California: n/a
Georgia: n/a
Illinois: n/a
Michigan: n/a
New Jersey: n/a
New York: n/a
Ohio: n/a
Pennsylvania: The geographic split is based on location of counties.
Virginia: Did not respond.
Texas: No

(3) What is the total number of filings and dispositions in intermediate appellate courts for calendar years 1996 and 1997?

	1996		1997	
State	**Filings**	**Dispositions**	**Filings**	**Dispositions**
California	23,710	25,584	25,760	28,087
Georgia	3,450	3,411	Did not provide	Did not provide
Illinois	8,982	9,397	9,307	9,578
Michigan	9,108	10,842	8,866	10,242
New Jersey	7,911	7,350	7,509	7,842
New York	11,450	19,200	11,676	18,874
Ohio	12,751	12,507	11,849	11,565
Pennsylvania	13,569	12,961	unavailable	unavailable
Virginia	Did not provide	Did not provide	Did not provide	Did not provide
Texas	10,742	10,164	10,754	11,249

(4) How many intermediate appellate judges does your state have?

California: 93
Georgia: 10
Illinois: 48
Michigan: 28
New Jersey: 32
New York: 55
Ohio: 66
Pennsylvania: 16 Superior Court judges and 9 Commonwealth judges.
Virginia: Did not respond.
Texas: 80

(5) Are all appellate opinions published?

California: No
Georgia: No. See rule 33(b) and Case Workload Summary 1991-1997.
Illinois: Yes
Michigan: No
New Jersey: No
New York: Yes, and memoranda too.
Ohio: No
Pennsylvania: Superior Court-no; Commonwealth Court-no.
Virginia: Did not respond.
Texas: No

If not, approximately what percentage are published?

California: 7%
Georgia: n/a
Illinois: n/a
Michigan: 10%
New Jersey: 10%
New York: n/a
Ohio: 10%; Most unreported opinions appear on Lexis and/or Westlaw.
Pennsylvania: Superior Court-15%; Commonwealth Court-28%.
Virginia: Did not respond.
Texas: 23%

Is there any page limitation on the length of published opinions?

California: No
Georgia: No
Illinois: Yes, 20 pages.
Michigan: No
New Jersey: No
New York: No
Ohio: No
Pennsylvania: Superior Court-no; Commonwealth Court-no.
Virginia: Did not respond.
Texas: No, but Rule 47 of the Texas Rules of Appellate Procedure provides that: "The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it."

(6) Do your state's intermediate appellate courts have:

(a) central legal staff?

California: Yes
Georgia: Yes
Illinois: Yes
Michigan: Yes
New Jersey: Yes
New York: Yes
Ohio: n/a
Pennsylvania: Superior Court has central legal staff; Commonwealth Court does not.
Virginia: Did not respond.
Texas: Yes

(b) law clerks assigned to the judges?

California: Yes, two per justice.
Georgia: Yes
Illinois: Yes
Michigan: Yes
New Jersey: Yes
New York: Permanent law secretaries.

Ohio: Most
Pennsylvania: Both Superior and Commonwealth Court assign law clerks to judges.
Virginia: Did not respond.
Texas: Yes

(7) Do law clerks prepare opinion drafts?

(a) yes

California: n/a
Georgia: n/a
Illinois: n/a
Michigan: n/a
New Jersey: n/a
New York: n/a
Ohio: n/a
Pennsylvania: Yes
Virginia: Did not respond.
Texas: Yes

(b) no

California: n/a
Georgia: n/a
Illinois: n/a
Michigan: n/a
New Jersey: No
New York: n/a
Ohio: n/a
Pennsylvania: n/a
Virginia: Did not respond.
Texas: n/a

(c) depends on the judge

California: Yes
Georgia: Yes
Illinois: Yes
Michigan: Yes
New Jersey: n/a
New York: Yes

Ohio: Most do.
Pennsylvania: n/a
Virginia: Did not respond.
Texas: n/a

(8) Do your intermediate appellate courts use affirmances without opinion?

California: No
Georgia: Yes, see Rule 36.
Illinois: Yes, by Rule 23 and Summary Orders.
Michigan: Yes
New Jersey: Yes. Affirmance orders are used in the court's Sentencing program which deals with criminal appeals that relate only to sentencing issues. Because of the narrow issues being addressed, appeals considered in this program are argued without briefing.
New York: No, did until 1989.
Ohio: Some
Pennsylvania: Commonwealth Court does not use affirmances without opinion. Superior Court does use affirmances without opinion occasionally.
Virginia: Did not respond.
Texas: No

If so, what percentage of opinions fall into this category?

California: n/a
Georgia: 1995 approximately 8%; 1996 approximately 3.5%; 1997 approximately 2%.
Illinois: 1996=89% (A total of 571 cases were approved by opinion, and a total of 4,163 were approved by Rule 23 or summary orders).

1997=89% (A total of 529 cases were approved by opinion, and a total of 4,309 were approved by Rule 23 or Summary Orders).
Michigan: 1%
New Jersey: 15%
New York: n/a
Ohio: Unknown
Pennsylvania: No percentage available for Superior Court.
Virginia: Did not respond.
Texas: n/a

(9) Does your state have a rule or statute which permits appellate disposition of certain cases without briefs being filed? [Note: For example, when counsel moves to withdraw from a no-merit criminal appeal under Anders v. California, 386 U.S. 738 (1967), and the motion is well taken, the appeal is not fully briefed. Similarly, where there has been a summary denial of a motion for postconviction relief, Florida provides for an appeal on an abbreviated record in which there will not be full briefing unless ordered by the court.]

California:	No
Georgia:	No
Illinois:	Supreme Court Rules 23, 306, and 311.
Michigan:	100%
New Jersey:	Yes. See R. 2:8-3(b) and 2:9-11 and comments thereto.
New York:	Yes
Ohio:	No
Pennsylvania:	No in Superior Court. Yes in Commonwealth Court.
Virginia:	Did not respond.
Texas:	Rule 28 of the Texas Rules of Appellate Procedure allows an accelerated appeal in civil cases from interlocutory orders of the court. The appellate court may allow those cases to be submitted without briefs.

What percentage of cases are fully briefed?

California:	n/a
Georgia:	Briefs are required in all cases. Briefs may not be filed if a case is dismissed before briefs are due.
Illinois:	Approximately 65%.
Michigan:	100%
New Jersey:	78%
New York:	98%
Ohio:	Briefs are filed in every case.
Pennsylvania:	In Commonwealth Court of cases decided on the merits, 98% are fully-briefed. In Superior Court approximately one third of cases are quashed, so they are not briefed.
Virginia:	Did not respond.
Texas:	Virtually 100%.

(10) Does your state have any statutes, rules, or constitutional provisions on the issue of:

(a) when a judgment may be affirmed without opinion, and/or

California: n/a
Georgia: See Rule 36.
Illinois: Yes
Michigan: No
New Jersey: See R. 2:11-3 and comments thereto.
New York: n/a
Ohio: n/a
Pennsylvania: This practice is permissible, but there is no explicit rule or statute.
Virginia: Did not respond.
Texas: No

(b) when an opinion must be written.

California: Yes
Georgia: n/a
Illinois: Supreme Court Rule 23.
Michigan: No
New Jersey: No
New York: No
Ohio: A court of appeals must rule on each assignment of error and give written reasons for the decision (with some narrow exceptions). See App.R.12 (A).
Pennsylvania: There is no explicit rule or statute, but in Superior Court, there is an internal rule requiring that all en banc decisions be published.
Virginia: Did not respond.
Texas: No

If so, please provide.

(11) Does your state grant an automatic right of first appeal?

California: Yes
Georgia: See Official Code of Georgia Annotated 5-6-34 and 5-6-35.
Illinois: Yes, across the board.
Michigan: Yes, except for guilty matters where underlying offenses committed after effective date of constitutional amendment.
New Jersey: Yes

New York: Yes
Ohio: Yes
Pennsylvania: Yes, see 42 Pa.C.S.A. sec. 5105 (Right of appeal from final order).
Virginia: Did not respond.
Texas: Yes

If not an across-the-board right, does it cover criminal, civil, and administrative appeals? (please circle applicable categories).

California: n/a
Georgia: See above.
Illinois: n/a
Michigan: Criminal-yes; civil-yes; administrative-some.
New Jersey: n/a
New York: n/a
Ohio: n/a
Pennsylvania: n/a
Virginia: Did not respond.
Texas: n/a

(12) In a no-merit criminal appeal where appointed counsel moves to withdraw under Anders v. California, 386 U.S. 738 (1967), and the motion to withdraw is well taken, does the intermediate appellate court affirm without opinion?

California: No, see People v. Wende (1979) 25 Cal3d 436.
Georgia: The court does not affirm without opinion in criminal cases. There are no "merit" appeals in criminal cases.
Illinois: Yes
Michigan: Yes
New Jersey: The vast majority of criminal appeals in New Jersey to the intermediate appellate court are handled by the Office of the Public Defender. That office has a policy of not moving to withdraw under *Anders*.
New York: Sometimes, after the issuance of a very brief memorandum.
Ohio: Unknown
Pennsylvania: Superior Court no. Commonwealth Court only hears criminal regulatory actions, not PCRA and similar criminal actions.
Virginia: Did not respond.
Texas: No, the court issues a short standard opinion.

If not, how is the court's ruling issued?

California: Written opinion.
Georgia: n/a
Illinois: Summary order.
Michigan: n/a
New Jersey: n/a
New York: n/a
Ohio: n/a
Pennsylvania: Superior Court by normal process (i.e., panel will file a decision, memorandum, or order).
Virginia: Did not respond.
Texas: n/a

(13) When the intermediate appellate court affirms a summary denial of a motion for postconviction relief (where the trial court has denied the motion for postconviction relief without an evidentiary hearing), does the intermediate appellate court issue an affirmance without opinion?

California: No. such a matter would come to the court of appeal as a new habeas corpus petition (which could be denied without opinion).
Georgia: The Supreme Court has jurisdiction over habeas cases in Georgia. Other postconviction relief matters, which are not criminal may be addressed by Rule 36 for affirmance without opinion.
Illinois: Yes
Michigan: Yes
New Jersey: n/a
New York: Denials of applications for post conviction relief in criminal cases are not appealable as a matter of right.
Ohio: No
Pennsylvania: No
Virginia: Did not respond.
Texas: No, the intermediate court does not hear these cases. The appellant has a right to direct appeal to the Court of Criminal Appeals (the court with final appellate jurisdiction in criminal cases).

If not, how does the intermediate appellate court issue its ruling?

California: n/a
Georgia: n/a
Illinois: Summary Order
Michigan: n/a
New Jersey: Sometimes under R. 2-11-3(e) (2), either by formal opinion or, if the only issue involves the sentence, by an order on sentencing calendar.
New York: If the denial is affirmed, it is usually issued in a brief memorandum.
Ohio: n/a
Pennsylvania: By normal process (i.e., memorandum, judgment, or order will be filed).
Virginia: Did not respond.
Texas: n/a

(14) In appeals without oral argument, do the assigned panel members meet to discuss the case?

California: Varies by division, most do, some do not.
Georgia: Depends upon the division of Court and the case under consideration.
Illinois: No
Michigan: Sometimes
New Jersey: Yes
New York: Yes
Ohio: Yes
Pennsylvania: No
Virginia: Did not respond.
Texas: Not always. Rule 41.1 of the Rules of Appellate Procedure requires that if the case is decided without argument, 3 justices must participate in the decision. However, there is no requirement that the justices meet to discuss the case. A decision may be reached upon the circulation of the opinion.

APPENDIX C
PCA DATA REPORTING FORM

PCA Data Reporting Form

Committee on Per Curiam Affirmed Decisions
Reporting Form

District Court of Appeal_____ Month_____ Year_____

Categories	**DISPOSITION TYPE**		
CRIMINAL	Opinion	Per Curiam Affirmed (PCA)	Citation PCA
Anders Appeals			
9.140(i)			
Non-final			
All Other			
ADMINISTRATIVE	Opinion	Per Curiam Affirmed (PCA)	Citation PCA
Unemployment Compensation			
Workers Compensation			
All Other			
CIVIL	Opinion	Per Curiam Affirmed (PCA)	Citation PCA
Non-final			
All Other			

Instructions:

1. Exclude all petitions for extraordinary writs.
2. Exclude non-dispositive opinions, e.g., opinions on rehearing or motions not disposing a case.
3. Calculate so that statistics are consistent with the SRS Report. Thus, if three appeals are consolidated, it is counted as *three opinions*. The total number of opinions, PCAs and citation PCAs should equal Section II,1. a. of the SRS Report.
4. Submit the report no later than the 15th day of the month following the reporting period to:
   Committee on Per Curiam Affirmed Decisions
   c/o Gregory Youchock, Office of the State Courts Administrator
   Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399. Fax (850) 414-1342
5. Contact Gregory Youchock for questions. (850) 922-5108 or Suncom 292-5108.

APPENDIX D
PCA STATISTICS

OPINIONS BY CATEGORY AND DISPOSITION TYPE
First District Court of Appeal, July 1998 - June 1999

	Disposition Type				% of Category		
Category	Opinion	PCA	Citation PCA	Total Opinions	Opinion	PCA	Citation PCA
CRIMINAL							
Anders Appeals	37	118	29	184	20.1	64.1	15.8
9.140(i)	119	550	16	685	17.4	80.3	2.3
Non-Final	4	1	0	5	80.0	20.0	0.0
All Other	248	501	25	774	32.0	64.7	3.2
TOTAL	408	1,170	70	1,648	24.8	71.0	4.2
ADMINISTRATIVE							
Unemployment	4	32	0	36	11.1	88.9	0.0
Workers Compensation	116	240	5	361	32.1	66.5	1.4
All Other	27	94	1	122	22.1	77.0	0.8
TOTAL	147	366	6	519	28.3	70.5	1.2
CIVIL							
Non-Final	22	29	0	51	43.1	56.9	0.0
All Other	193	311	8	512	37.7	60.7	1.6
TOTAL	215	340	8	563	38.2	60.4	1.4
GRAND TOTAL	770	1,876	84	2,730	28.2	68.7	3.1

OPINIONS BY CATEGORY AND DISPOSITION TYPE
Second District Court of Appeal, July 1998 - June 1999

	Disposition Type				% of Category		
Category	Opinion	PCA	Citation PCA	Total Opinions	Opinion	PCA	Citation PCA
CRIMINAL							
Anders Appeals	22	287	4	313	7.0	91.7	1.3
9.140(i)	102	579	19	700	14.6	82.7	2.7
Non-Final	0	0	0	0	----	----	----
All Other	382	890	22	1,294	29.5	68.8	1.7
TOTAL	506	1,756	45	2,307	21.9	76.1	2.0
ADMINISTRATIVE							
Unemployment	12	78	2	92	13.0	84.8	2.2
Workers Compensation	0	0	0	0	----	----	----
All Other	22	25	0	47	46.8	53.2	0.0
TOTAL	34	103	2	139	24.5	74.1	1.4
CIVIL							
Non-Final	36	51	0	87	41.4	58.6	0.0
All Other	229	428	4	661	34.6	64.8	0.6
TOTAL	265	479	4	748	35.4	64.0	0.5
GRAND TOTAL	805	2,338	51	3,194	25.2	73.2	1.6

OPINIONS BY CATEGORY AND DISPOSITION TYPE
Third District Court of Appeal, July 1998 - June 1999

	Disposition Type				% of Category		
Category	Opinion	PCA	Citation PCA	Total Opinions	Opinion	PCA	Citation PCA
CRIMINAL							
Anders Appeals	2	139	2	143	1.4	97.2	1.4
9.140(i)	82	529	15	626	13.1	84.5	2.4
Non-Final	4	1	2	7	57.1	14.3	28.6
All Other	201	178	104	483	41.6	36.9	21.5
TOTAL	289	847	123	1,259	23.0	67.3	9.8
ADMINISTRATIVE							
Unemployment	31	44	15	90	34.4	48.9	16.7
Workers Compensation	0	0	0	0	----	----	----
All Other	15	12	6	33	45.5	36.4	18.2
TOTAL	46	56	21	123	37.4	45.5	17.1
CIVIL							
Non-Final	61	19	14	94	64.9	20.2	14.9
All Other	370	191	106	667	55.5	28.6	15.9
TOTAL	431	210	120	761	56.6	27.6	15.8
GRAND TOTAL	766	1,113	264	2,143	35.7	51.9	12.3

OPINIONS BY CATEGORY AND DISPOSITION TYPE
Fourth District Court of Appeal, July 1998 - June 1999

	Disposition Type				% of Category		
Category	Opinion	PCA	Citation PCA	Total Opinions	Opinion	PCA	Citation PCA
CRIMINAL							
Anders Appeals	12	61	1	74	16.2	82.4	1.4
9.140(i)	75	352	7	434	17.3	81.1	1.6
Non-Final	6	20	0	26	23.1	76.9	0.0
All Other	403	596	117	1,116	36.1	53.4	10.5
TOTAL	496	1,029	125	1,650	30.1	62.4	7.6
ADMINISTRATIVE							
Unemployment	8	44	5	57	14.0	77.2	8.8
Workers Compensation	0	0	0	0	----	----	----
All Other	10	21	1	32	31.3	65.6	3.1
TOTAL	18	65	6	89	20.2	73.0	6.7
CIVIL							
Non-Final	82	72	7	161	50.9	44.7	4.3
All Other	422	329	28	779	54.2	42.2	3.6
TOTAL	504	401	35	940	53.6	42.7	3.7
GRAND TOTAL	1,018	1,495	166	2,679	38.0	55.8	6.2

OPINIONS BY CATEGORY AND DISPOSITION TYPE
Fifth District Court of Appeal, July 1998 - June 1999

	Disposition Type				% of Category		
Category	Opinion	PCA	Citation PCA	Total Opinions	Opinion	PCA	Citation PCA
CRIMINAL							
Anders Appeals	3	454	3	460	0.7	98.7	0.7
9.140(i)	44	439	57	540	8.1	81.3	10.6
Non-Final	0	0	0	0	----	----	----
All Other	341	339	176	856	39.8	39.6	20.6
TOTAL	388	1,232	236	1,856	20.9	66.4	12.7
ADMINISTRATIVE							
Unemployment	14	13	9	36	38.9	36.1	25.0
Workers Compensation	0	0	0	0	----	----	----
All Other	16	14	3	33	48.5	42.4	9.1
TOTAL	30	27	12	69	43.5	39.1	17.4
CIVIL							
Non-Final	51	30	13	94	54.3	31.9	13.8
All Other	281	209	57	547	51.4	38.2	10.4
TOTAL	332	239	70	641	51.8	37.3	10.9
GRAND TOTAL	750	1,498	318	2,566	29.2	58.4	12.4

OPINIONS BY CATEGORY AND DISPOSITION TYPE
District Courts of Appeal, State of Florida, July 1998 - June 1999

	Disposition Type				% of Category		
Category	Opinion	PCA	Citation PCA	Total Opinions	Opinion	PCA	Citation PCA
CRIMINAL							
Anders Appeals	76	1,059	39	1,174	6.5	90.2	3.3
9.140(i)	422	2,449	114	2,985	14.1	82.0	3.8
Non-Final	14	22	2	38	36.8	57.9	5.3
All Other	1,575	2,504	444	4,523	34.8	55.4	9.8
TOTAL	2,087	6,034	599	8,720	23.9	69.2	6.9
ADMINISTRATIVE							
Unemployment	69	211	31	311	22.2	67.8	10.0
Workers Compensation	116	240	5	361	32.1	66.5	1.4
All Other	90	166	11	267	33.7	62.2	4.1
TOTAL	275	617	47	939	29.3	65.7	5.0
CIVIL							
Non-Final	252	201	34	487	51.7	41.3	7.0
All Other	1,495	1,468	203	3,166	47.2	46.4	6.4
TOTAL	1,747	1,669	237	3,653	47.8	45.7	6.5
GRAND TOTAL	4,109	8,320	883	13,312	30.9	62.5	6.6

APPENDIX E
SUGGESTIONS FOR OPINION WRITING

SUGGESTIONS FOR OPINION WRITING[24]

The following suggestions are offered in the hope that they may be helpful to the appellate bench.

A judge should consider writing an opinion when:

(1) The decision is in conflict with that of another district.

(2) The decision appears to be in conflict with that of another district, but the latter can be harmonized or distinguished.

(3) There is an arguable basis for Supreme Court jurisdiction.

(4) The decision establishes a new rule of law.

(5) The decision modifies an existing rule of law.

(6) The decision applies an existing rule of law to facts significantly different from those to which the rule had been previously applied.

(7) The decision applies an existing rule of law that appears to have been generally overlooked.

(8) The issue decided is also present in other cases pending before the court.

(9) The issue decided can be expected to arise in future cases.

(10) The decision rules on a constitutional or statutory issue for the first time.

(11) Previous precedent has been overruled by statute, rule or an intervening decision of a higher court.

(12) A dissent has been written, especially when the dissent addresses an issue that presents an arguable basis for Supreme Court jurisdiction.

[24] Prepared by the Committee on Per Curiam Affirmances, a committee of the Florida Judicial Management Council.

(13) The court concludes that an error was harmless, but that it can reasonably be expected that the trial court or counsel will repeat the error if it is not addressed.

(14) The court concludes, in a criminal case, that an unpreserved error is material.

APPENDIX F
SUMMARY OF JUDICIAL COMMENTS

Judicial Comments

The PCA Committee received nine responses from judges, one from a circuit judge and eight from district court judges, some of whom had previously served as county and circuit judges. A summary of their responses is listed below.

Practitioner Perspective

- One judge noted that as a practitioner, he did not like PCAs. However, as a judge, he believes that they are necessary for the system to function effectively.

- The legitimacy of our system of advocacy would not be improved by increasing the number of written opinions reflecting that the lawyers in either the trial court or the appellate court failed to perform at an optimum level.

Trial Judge Perspective

- A PCA from the appellate court is viewed as an acknowledgment that the trial court's decision is absolutely and unequivocally clear, the decision is correct, and that the appellate body could add nothing to the existing body of law by writing an opinion.

Appellate Judge Perspective

- The judicial role is to interpret the laws of Florida in accordance with other statutes and Constitution of the State of Florida and the Constitution of the United States. Written opinions that help develop the law are absolutely necessary as an important function of the district court appellate process.

District Court of Appeal Jurisdiction

- In Florida, the DCAs are not intended to be mere intermediate appellate courts. Constitutionally, they are primarily designed and intended to be the courts of last resort to correct error for litigants. In Florida, when a DCA issues a written opinion, as compared to a PCA, the opinion serves as a final precedent, binding on all trial courts throughout the state in the absence of inter-district conflict.

- The DCAs provide jurisdiction to the Supreme Court to review issues, rather than being subject to a Supreme Court that reaches down to remove cases from their jurisdiction. While unique to Florida, this system has proven to be very workable for a state our size. This constitutional structure, however, mandates that DCAs exercise caution when deciding to issue a written affirmance. Unless the law needs development and the specific case is a proper tool to aid in that development, there is no justification to write precedent merely because a party wants a personal letter from the court. This unique system also makes it difficult to rely upon ABA standards or to employ comparisons to other states.

Appropriateness of Issuing a PCA

- With no screening mechanism at the inception of the appellate process, the PCA serves as a timely method to announce a correct result in a case where the appellant has not established that a harmful, preserved, or fundamental error warrants correction and the case does not have public value as precedent.

- Affirmances are written to provide useful precedent for judges and other litigants in future cases. They are not written for the present litigants, who can review the briefs to discover the arguments that persuaded the court in their case.

- Much thought and effort goes into all cases, including those that are ultimately per curiam affirmed.

- Cases that warrant little or no discussion and do nothing to add to our existing body of law deserve no more than a PCA. Being required to write opinions in such cases would serve no more than to bewilder and confuse our legal profession with unnecessary redundancies.

- There are enough instances of reversal to satisfy the message role assumed by Florida's intermediate appellate courts.

- The correctness of a ruling should always be paramount to the format of the ruling.

- There is a time and place for PCAs. For example, there may be a lack of consensus on the panel as to why a case is being affirmed. The case may be poorly presented or the record so confused that the appellate court has no other choice.

- The judges are aware of no case that has been affirmed via a PCA when the panel actually concluded it should be reversed as a matter of law.

- An appellate court should not issue a PCA with a dissenting opinion. It is discourteous to the dissenting judge, a brief opinion from the majority should be prepared. Some appellate judges believe that they should not write an opinion because the Supreme Court might agree with the dissent and they do not want them to take jurisdiction.

Precedent

- It is the function of the neutral court, not of the interested advocates, to decide which cases are likely to serve as useful precedent.

- PCAs in favor of the appellee will not transform into written reversals for the appellant if district courts are forced to write unneeded precedent.

- District courts will have less time to write quality precedent if they are forced to write letters of explanation merely for the benefit of the litigants.

- If appellants are challenging the more questionable trial court decisions, then the decisions that are affirmed are often unlikely to serve as good precedent.

Oral Argument

- In cases that are orally argued but are affirmed without opinion, those present at the argument generally know, from the court's questions, the reason for affirmance.

***Anders* Appeals and Post-conviction Relief Motions (3.800 and 3.850)**

- Few *Anders* appeals and post-conviction relief motions justify a written opinion. The PCA should not be justified as a timesaving procedure. It takes little additional time to write an opinion once the case is prepared. Whether to write an opinion or issue a PCA should be based on whether the particular case merited an opinion.

Mandatory Written Opinions

- Oppose mandatory written opinions because such a requirement would have an adverse impact on an already beleaguered Supreme Court. Increasing the number of opinions in the appellate courts would increase the number of filings in the Supreme Court.

- Parties to litigation deserve and anticipate timely decisions to their cases. To mandate written opinions in all cases would delay the decision making process.

- To write opinions in the vast majority of cases that are otherwise PCAed would add nothing to the law and, in essence, would fill the *Southern Reporter* with a "firm grasp of the obvious." Moreover, if opinions were mandated in every case, it would be easy to envision "form" opinions which would be used by simply changing the name of the parties.

- States that require opinions in all cases diminish the quality of opinions in cases which deserve opinions. Brief written opinions say little more than a PCA.

Unpublished Opinions

- Litigants should have some knowledge as to why an appeal is lost, assuming the appeal has some substantial merit and not merely unhappiness with a jury verdict or trial court's order. Consideration should be given to private rulings which will serve no precedential value with an admonishment that citations and references to private rulings will not be considered and those relying or utilizing such private rulings may be subject to ethical violations.

- Litigants (and their counsel) have a legitimate need for some insight into the court's reasoning why appellant's arguments were rejected. Judges should be encouraged, without being mandated, to strive to meet that need. Meeting that need must be accomplished in a way that neither creates nor imposes an undue additional burden on the judges nor tends to reduce the quality of their published opinions. One way to achieve this goal is for the appellate court to issue a very brief opinion (in cases that otherwise would have been a PCA), omitting facts, case history, and similar matter, and stating only one or more authorities upon which the court found each issue to be without merit. Such abbreviated opinions generally would be non-published and not cited as precedent. An exception would be made in possibly two instances: (1) in a criminal appeal by defendant where the appellate issue is not considered because it is not properly preserved by trial counsel; and (2) in any case where the authority cited is a case that conflicts with a decision of another district court.

Impact on Supreme Court

- The Supreme Court relies on district court of appeal opinions when they resolve conflicts or certified questions. It is helpful to their review when they receive scholarly opinions going both ways on an issue from the DCAs. These can be in the form of conflicting opinions from different courts, or dissents or specially concurring opinions from the same court. If DCA judges have to write opinions in every case, it gives them less time to perform that important function.

Suggestions

- Collect case disposition data with specific category types that accurately reflects the types of cases heard and disposed by DCA. It is suggested that a six to twelve month period be used and that all DCAs participate in the data collection.

- Replace the current term PCA with a statement that reads: "The court has carefully considered the arguments of the appellant but concludes that no preserved or fundamental harmful error justifies reversal on the record presented to this court."

- Categorize affirmances by type. Examples might include:

  - Affirmance of non-precedential postconviction motion.
  - Affirmance of Anders appeals.
  - Affirmance based on lack of preservation.
  - Affirmance based on inadequate record for review.
  - Affirmance of criminal case without precedential value.
  - Affirmance of civil case without precedential value.
  - Affirmance of dissolution proceeding involving discretionary issues or without precedential value.
  - Affirmance of unemployment compensation appeal.
  - Affirmance of pro se appeal.
  - Affirmance of non-final order appeal without precedential value.

  Note: An appeal could be affirmed with a notation of one or more classifications. A similar classification system could be used for denials and dismissals of petitions for certiorari and other extraordinary writs.

APPENDIX G
STATE ATTORNEY COMMENTS

State Attorney Comments

The PCA Committee received two responses from state attorneys, one each from the Eleventh and Twentieth Judicial Circuits. A summary of their main points are listed below.

PCA Appropriateness

- Per curiam affirmed decisions are often appropriate and should not be prohibited.
- Appellate courts issue opinions when they are needed to explain their decisions, and have not avoided their responsibility to do so by issuing inappropriate PCA decisions.

Frivolous Appeals

- Too often defendants file frivolous appeals that clearly do not warrant an opinion. Per curiam affirmed decisions are the right way of resolving these appeals, and they assure that a frivolous petition for jurisdiction will not be filed in the Supreme Court.

Balance

- The Second District Court of Appeal has met the fine balance between per curiam affirming those cases that really do not warrant a written decision, and the additional work and effort of writing a decision when necessary.

APPENDIX H
PUBLIC DEFENDERS' COMMENTS

Public Defender Comments

The Florida Public Defender Association, Inc., responded to the PCA Committee's request for input by submitting a position paper as their comment on the use of PCA decisions by Florida's intermediate appellate courts. The main points of their position paper are summarized below.

Scope and Prevalence of PCAs

- In 1997, according to statistics from the Office of the State Courts Administrator, the five DCAs disposed of almost two-thirds of their decisions by pure PCA (i.e., a decision that affirms without opinion).

Problems with PCA Practice

- A major problem with current PCA practice is that it fosters unprofessionalism by the bench and bar. When an appellate court affirms a case on the basis that the error was harmless or unpreserved, unless the court expressly articulates the basis for its affirmance, the message conveyed (whether intended or not) is that no error occurred. This practice insulates attorney and judge errors which should be noted as error even if they do not result in reversible error.

- PCAs diminish the appearance of fairness and meaningful access to courts. For most cases, the district court of appeal is our court of last resort. The PCA practice detracts from the public's confidence in the court's accessibility and fairness. The ABA Standards Relating to Appellate Courts emphasize that litigants are entitled to assurance that their cases have been thoughtfully considered and that providing that assurance requires that the decision of every case be supported at least by reference to the authorities or grounds upon which it is based.

- PCAs obstruct review of important issues. Citing Judge Cope's article, "a substantial question of law does not become insubstantial merely because the intermediate appellate court elected not to write an opinion." This is a material weakness in Florida's judicial process. Matters of importance can and do bypass the Supreme Court because the district court of appeal decided not to file a written opinion.

United States Supreme Court Rejections of Florida Per Curiam Affirmances

- The issuance of a PCA by a district court sets up an ironic dichotomy. On the one hand, the PCA precludes the Supreme Court from reviewing the case because no conflict or question of great public importance appears on the face of the opinion. However, the Supreme Court of the United States recognizes no such limitation on its ability to review PCAs from Florida courts and has acted to do so on several occasions, each time reversing the PCA and perceiving significant constitutional issues worthy of comment, occasionally in a scathing opinion. Several cases are cited as examples: Florida v. Rodriguez; Ibanez v. Florida Department of Business and Professional Regulation Board of Accountancy; Hobbie v. Unemployment Appeals Commission of Florida; Brooks v. Florida; Callender v. Florida; Lawrence v. State; Rodriguez v. State; and Moore v. State.[25]

PCAs Reduce Reliability and Conceal Inconsistent Results

- The failure to set forth reasons for a disposition diminishes the reliability of a decision and increases the likelihood that arguable issues will be overlooked. The practice also sometimes conceals inconsistent dispositions both intra-district and inter-district. See Zipperer v. State; State v. Holz; State v. Johnson; Sam v. State; Berkebile v. State; Bourgault v. State; Heddleson v. State; Ruffin v. State and Hall v. State.[26]

[25] Florida v. Rodriguez, 469 U.S. 1 (1984); Ibanez v. Florida Department of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136 (1994); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987); Brooks v. Florida, 389 U.S. 413, 415 (1967); Callender v. Florida, 380 U.S. 519 (Fla. 1965); Lawrence v. State, 701 So. 2d 874 (Fla. 2d DCA 1997); Rodriguez v. State, 511 So. 2d 1021 (Fla. 2d DCA 1987); and Moore v. State, 706 So. 2d 291 (Fla. 1st DCA 1995).

[26] Zipperer v. State, 481 So. 2d 991 (Fla. 5th DCA 1986); State v. Holz, 679 So. 2d 782 (Fla. 2d DCA 1996); State v. Johnson, 691 So. 2d 483 (Fla. 2d DCA 1996); Sam v. State, 681 So. 2d 1148 (Fla. 2d DCA 1996); Berkebile v. State, 592 So. 2d 768 (Fla. 2d DCA 1992); Bourgault v. State, 491 So. 2d 623 (Fla. 4th DCA 1986); Heddleson v. State, 512 So. 2d 957 (Fla. 4th DCA 1987); Ruffin v. State, 390 So. 2d 841 (Fla. 5th DCA 1980); and Hall v. Florida, 510 U.S. 834 (1993).

Suggested Possible Remedies

Require a Terse Statement of Reasons in Almost Every Criminal Appeal

— At a minimum, a terse statement of reasons for affirmance should be required in almost every appeal. This approach is consistent with the position advocated by the ABA Standards Relating to Appellate Courts which notes that while every case need not be given "equal literary treatment," there should be an opinion in every case, and in the less significant cases, at least a statement of grounds or references to authorities. The PCA should be reserved for *Anders* cases where appellant's counsel concedes no reversible error and appellant has not filed a pro se brief.

Amend Appellate Rules to Allow Party to Request a Written Opinion

— The Supreme Court should consider adopting a rule to make clear that parties have the authority to petition the appellate court on rehearing for a written opinion, perhaps putting a burden on the moving party to certify that a written opinion would further the interests of justice.

Consider Selective Publication

— Selective publication might be an improvement over the use of PCAs. Although this procedure denies publication to many opinions that may be of precedential value, at least the reasoning of the DCA is exposed to the litigants. Selective publication affords greater clarity than the PCA. This would promote decisional reliability, facilitate error correction, and ensure that litigants and attorneys are confident that the court has acted with a reasoned process. Because many unpublished opinions will not need a full recitation of facts, the opinions can be shorter and therefore would not substantially increase DCA workload. Moreover, the *Southern Reporters* will not be filled with non-precedential opinions.

— If selective publication is adopted, the Supreme Court should approve rules implementing the system and establishing criteria for when an opinion should be published. There should be a presumption in favor of a published opinion. A published opinion should be required if there is a dissent, and unpublished opinions should only be permitted by a unanimous vote not to publish. Parties should be allowed to file motions requesting that an unpublished opinion be re-issued as a published opinion.

— Below is a suggested list of criteria for mandatory publication.[27]

(1) The case is a test case.
(2) An issue of first impression is treated.
(3) A new rule of law is established.
(4) An existing rule of law is criticized, clarified, altered, or modified.
(5) An existing rule of law is applied to facts significantly different from those to which that rule has been previously applied.
(6) An actual or apparent conflict in or with past holdings of this or other courts is created, resolved, or continued.
(7) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
(8) A significantly new factual situation, of interest to a wide spectrum of persons, other than the parties to a case, is set forth.
(9) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
(10) A new constitutional or statutory issue is treated.
(11) A previously overlooked rule of law is treated.
(12) Procedural errors or judicial process errors are corrected, whether by remand with instructions or otherwise.
(13) The case has been returned by the U.S. Supreme Court or the Florida Supreme Court for disposition by action other than ministerial obedience to directions of the court.
(14) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

Acquire More Specific and Uniform Data Regarding Use of PCAs

— The Office of the State Courts Administrator should be requested to acquire more specific statistics on the use of per curiam affirmances. The statistics should differentiate between criminal versus non-criminal appeals; clarify whether post-conviction appeals and writs are included as criminal; and create a separate counting category for the functional PCA and citation PCA. The statistical categories must be uniform for all five DCAs.

[27] List taken from Standard Operating Procedure of United States Court of Appeals for the Federal Circuit. See Honorable Phillip Nichols, Jr., *Introduction Selective Publication of Opinions: One Judge's View*, 35 Am.U.L.Rev. 909, 922-23 (1986).

APPENDIX I
FLORIDA BAR MEMBER COMMENTS

Florida Bar Member Comments

The PCA Committee received **34** responses from Florida Bar members throughout the state. The responses are grouped by issue type and are summarized and edited to minimize redundancy.

Jurisdiction

- One problem perceived by some is the limited nature of Supreme Court jurisdiction and its inability to review PCAs, a circumstance which effectively gives the district courts absolute power to control the extent of their supervision by that court. Since potential for abuse exists the current system is structurally flawed.

- The present situation in regards to PCA decisions is deplorable and a miscarriage of justice. It effectively allows the DCAs to preclude and prevent further review by the Supreme Court. This allows them to exert extra-judicial control over cases and effectively determine important public issues that should be reviewed by the Supreme Court. This occurs in cases of first impression and in other cases where there is a conflict decision of another appellate court with which the court disagrees or chooses simply to ignore.

- A PCA decision prevents any further review by the issuing court by Motion for Rehearing or Clarification. Often there are substituted opinions following rehearing and clarification requests of full opinions because the court may have overlooked or misapprehended an issue of law or fact. A PCA decision tells the litigant that the appellate court believes that it is perfect, should not be reviewed, and could not possibly have erred. Such is not the case in all instances.

Role of the District Courts of Appeal

- The role of the appellate courts in Florida, as courts of last resort, should be to provide to litigants and the public a fair, well-reasoned decision which applies existing precedent or interprets the law. Courts have an obligation to identify and refine issues which require review by the Supreme Court. All appellate court decisions should be clear, with written opinions addressing the dispositive issues of the case.

Precedent

- Courts are reluctant to upset the applecart of precedent largely for the following reason. Faced with the choice of jettisoning important precedent (or carving out major exceptions) on the one hand and applying the law and letting the chips fall where they may on the other hand, more courts would just bite the bullet and follow the law. PCAs allow a convenient evasion of that choice. With a PCA, the precedent remains intact for the next exponent of wealth and power who appears before the court, but the court still escapes the fallout that would attend equal justice under law for the powerless against the powerful. The net result is that PCA opinions undermine confidence in the integrity of the judicial system. The point is not that the public perceives PCA opinions as a way to hide injustice. The point is that they are right in thinking so. The remedy is to change the practice, not the perception.

- Problems arise when the only law on the subject from one DCA is not followed by a sister court when the identical issue is presented. The court has an obligation to either follow the law or explain why they may have reached a different conclusion. It is improper for a court to hide behind a PCA to avoid following the law and avoid taking a stand if it disagrees. The results of such actions are compounding and confounding. The lawyer benefitting from the PCA uses it as the "law" in the district, and the PCA is used as having given credence and validity to the trial court's order, which is in fact, contrary to the only law on the subject. The lawyer then obtains other judgments based upon the appellate court's refusal to follow the law and the non-existent authority of the PCA. Those judgments are also appealed and decided by another PCA.

- PCAs should be used to avoid restating precedent, not avoid making it. To allow PCAs to be used otherwise undermines the predictable and precedential value of cases, which is a detriment to everyone. Courts cannot, and should not, be required to issue lengthy and clearly articulated opinions in all cases. This is not practical, necessary, or valuable. They should, however, be required to provide minimal justification or explanation for the affirmance. This could be through a mere citation to existing authority, or simply by espousing a new rule where such is appropriate. Difficult, close, threshold issues deserve opinions even if they cloud the law. Only then can better law have an opportunity to emerge, and the law ultimately become more predictable and uniform.

— Florida's appellate courts have long used PCAs to avoid writing on important issues that have not been decided under Florida law. There exists a dearth of Florida case law on important issues, which often requires lawyers and litigants to roam far afield for well-reasoned authority. Important issues of Florida law would be much easier for lawyers and litigants to predict if the words "Affirmed Per Curiam" did not form the substance of two-thirds of all DCA opinions.

Education

— Attorneys should always be learning by reading the law and decisions. When they lose at trial, appeal, and receive a PCA (i.e., no explanation) how can they learn?

PCA Appropriateness

— As stated in *3 Fla. Jur.2d, Appellate Review 416*, a PCA decision is appropriate (only) in the following instances: (1) where points of law raised are so well settled that a further writing would serve no useful purpose; (2) where an opinion will not add to the law of the subject or otherwise serve some useful purpose; and (3) where the matter is totally without merit. The main problem with PCA decisions is that many are entered without falling within the ambit of the above.

— PCA decisions must be considered in the context of the multiple functions served by the DCAs. On the one hand, the DCAs serve to review trial court errors and abuses. Most criminal appeals fall into this category, as do many civil appeals, presenting questions of the correctness of a procedural or substantive ruling by the court. In these types of cases, PCA decisions are an appropriate and necessary vehicle in order for the courts to adjudicate the vast number of appeals they are faced with and to prevent the *Southern Reporter* from becoming cluttered with redundant statements of well-established principles of law.

PCA Inappropriateness

— The DCAs serve an important function as courts of policy and interpretation. The DCAs are frequently called upon to resolve questions of statutory interpretation and to develop common law questions regarding various rights and remedies. This function is especially important in light of the limited jurisdiction of the Supreme Court and its death penalty caseload. In such cases as this, the use of a PCA is particularly inappropriate, as it frustrates the parties and leaves important questions of law unresolved and, therefore, unclear.

- Overuse of the PCA practice masks laziness by appellate court judges, uncritical judicial analysis, and questionable justice in the administration of the court system. PCAs are antithetical to developing a body of case law, thereby undermining the concept of *stare decisis*. Moreover, when litigants commit themselves to the time and expense to take an appeal, win or lose, they expect greater consideration by the appellate courts than a one sentence decision or a citation to one or two cases that often appear inapplicable or distinguishable. Usually the losing party in the appeal feels cheated, not only by the loss but also by how the appellate court treated the appeal in a dismissive, perfunctory way. That undermines the justice system or at least the perception of the justice system.

- Inherent in the PCA process is the opportunity for PCA decisions to be a tool for district courts to avoid difficult issues in "gray," changing, or unsettled areas of the law where affirmance is likely proper but difficult to articulate or justify without creating jurisprudential conflict and uncertainty.

- A PCA should include, at a minimum, sufficient citations to indicate the basis for affirmance. If appellate courts are not sufficiently staffed, service should be curtailed until the legislature meets this responsibility.

- PCAs lead to more work and uncertainty in the criminal field, especially in more serious cases. A PCA compounds questions about issues in post-conviction proceedings. PCAs often cause doctrinal and precedential confusion between cases involving similar facts. A simple citation in an opinion (citing controlling precedent) is better than a PCA opinion.

- PCAs result in many motions for rehearing. Litigants want to know why the court reached a certain decision or if the court understood the issues or the facts of a case. PCAs on pretrial writs (like a petition for a writ of certiorari on a discovery or jurisdictional issue) cause much confusion and often unnecessary litigation by the parties. Courts must remember that appellate decisions instruct the parties and the courts on how to act in a particular case and do not just advance the "law" or legal precedent.

PCA Checklist

- A sensible compromise between the needs of the litigants to be informed of the ground or grounds for decision and the efficiency needs of the court can be effectuated by the use of a form attached to a PCA that lists and checks off the applicable basis for decision. The content of such a form is suggested by the Eleventh Circuit Court of Appeals Rule 36-1. The form, though imperfect, would represent a substantial improvement over the present thunderous silence embodied by a PCA.

Public Trust

- Nothing undermines public trust or professionalism more than the inability of the attorney for the appellant to explain to his or her client a PCA opinion.

- PCAs contribute to a lack of respect for, and acceptance of, appellate decisions. PCAs seem arbitrary and contain an element of decisions made behind closed doors. Part of the effectiveness of any court, including an appellate court, is the perception and reality of fairness. A court should explain its decision even if the explanation will not necessarily advance legal precedent.

- The hollowness of PCA decisions undermines the integrity of our judicial system. In addition to fostering litigation and alienating litigants and practitioners, PCA decisions also create the impression that the DCAs are intentionally avoiding review by the Supreme Court. PCA decisions should be the extremely rare exception, rather than the common tool they have become. The judicial system in Florida would be far better served by the appellate courts issuing actual decisions rather than cursory stamps of approval without explanation.

- The use of PCAs has become a case management tool, with courts opting to overcome caseload backlog by declining to write opinions, even memorandum ones, whenever possible. This is unacceptable and breeds public mistrust about the role, responsibility, and operation of the appellate justice system. When coupled with the increasing tendency of appellate courts to decline to grant oral arguments, the public perception is that access to courts is limited. Couple this fact with the belief that litigants with money or influence are able to obtain justice in our courts, and without such resources a litigant will obtain only superficial attention. The scenario is ripe for legislative intervention into the judicial process.

- Respect for the rule of law in general, and the appellate courts of this state in particular, is diminished through the use of PCAs. No matter what rationalization is offered based on efficiency, perceived lack of precedential value, and docket management, a PCA can leave the obvious impression that the appeal was viewed by the district court as unworthy of serious attention. That logically engenders doubt on the part of the litigants and their counsel regarding the quality of the process by which an affirmance was determined to be the most appropriate outcome. A PCA thus corrodes the perception that the underlying appellate decision was reached through the type of impartiality, consideration, and reasoning that is able to withstand outside scrutiny. This problem is particularly disturbing in the case of appeals which are provided to the people of this state as a matter of right and not discretion. There is little practical difference to the layperson between denial of discretionary review and an unexplained affirmance in a plenary appeal.

- The use of PCAs in approximately 65 percent of DCA decisions harms the public's faith in the fairness of the legal system that it helps to fund through payment of taxes. Litigants who have endured the struggle inherent in asserting their legal rights and have paid for attorney's fees at both the trial and appellate level, and lost at both levels, have a right to be told by the appellate court why they lost. To write a short opinion with one or two sentences and one or two citations to cases, statutes or rules, would not unduly burden an appellate court appreciably more than does a PCA. Deciding cases is what courts are for and what judges are paid to do. The professed justification for the use of PCAs does not outweigh the public's right to written opinions in appeals.

- Florida has been a leader in promoting Government in the Sunshine which helps to promote the public's confidence in the integrity of our state government. The courts are a part of that government, and stopping the practice of PCAs by appellate courts will greatly add to the public's trust of our legal system.

Citation PCAs

- If courts wish to PCA a case because the law is well-settled against reversal, a simple "PCA" with a case cite would suffice, as it would adequately explain the basis for the court's decision. If there are multiple points on appeal, one simple case cite for each would suffice. Since the court has the cases before it when considering an appeal, no extra effort would be required beyond typing a few lines of text. In giving such summary explanation, the losing appellant is afforded the possibility of further review, and citizens of the state, the lawyers, and the courts have some firm basis to point to so as to justify the holding, thereby furthering continuity and predictability in the law.

Written Opinions

- PCAs are frustrating to trial and appellate attorneys because they offer no explanation as to the court's reasoning. A one or two paragraph explanation of the basis for the court's ruling and any particular case law upon which the appellate court relied would be helpful. Short opinions are recommended with each PCA ruling.

- The use of PCAs is one of the greatest travesties of justice in Florida. Anyone spending thousands of dollars on litigation in Florida's courts deserves the comfort of closure that comes from knowing the basis for an appellate court's ruling in his/her case. This is especially true of unsuccessful litigants. Even reasons given in a single sentence without citation to authority would be preferable to a PCA decision. Any concern that such abbreviated opinions would generate more appeals to the Supreme Court could be addressed by conferring upon that body whatever additional legal authority is necessary to exercise complete discretion in accepting or rejecting such appeals. The judiciary

could seek enactment of a "cert pool" system similar to that used by the United States Supreme Court.

- After spending hours reviewing a case, the idea is ludicrous that, between three judges and their numerous clerks, they cannot take 30 seconds or two to five minutes to even bother to write, type, or dictate either: (a) a one sentence opinion; (b) a brief opinion adopting the holding of the court below; or (c) an opinion merely containing a citation or two.

- In many instances, an opinion of two or three sentences with a couple of citations would inform the parties as to why their appeal was disposed of in the manner it was. A written opinion enables the practitioner to decide for him or herself whether a motion for rehearing, certification, or petition for certiorari might be justified and well-advised, but it may have consequences for the litigation in the trial court. If it is emphatically the province and the duty of the judiciary to say what the law is, then it should do so.

- PCA decisions deny clients their constitutional right to a direct appeal, in that PCA decisions do not provide meaningful appellate review. Clients and their attorneys are left to ponder the appellate issues left unanswered by PCA decisions for the rest of their lives. Written appellate opinions would answer many, if not all, of these unanswered issues. A prohibition on the use of PCA decisions would mean that the appellate courts of Florida would provide meaningful review through written opinions. A rule prohibiting PCA decisions would not increase the number of appeals accepted for discretionary review by the Supreme Court. Conflict would still have to exist between two DCAs, or between a DCA and the Supreme Court for the latter to accept jurisdiction.

- Courts can take more time to issue more opinions. It is better to exchange time and the expediting of the process for more written opinions. A little delay in a written opinion is far better than a PCA issued within an earlier time period.

- Every contested appeal should be entitled to at least a brief opinion that cites the primary arguments and the legal authority that resolves those points. If there is truly time enough to review the record and the briefs, then there is time to write a paragraph or two that resolves the case. Most cases on appeal involve issues complex enough to be of interest to the parties and instructive to the trial court. For the appellate court to issue no guidance in those matters is, in my opinion, a dereliction of duty. The habitual use of the PCA by Florida's DCAs has been a disastrous practice that has fostered wide-spread disrespect and frustration with the law.

- Written opinions accomplish two goals: (1) the parties and their counsel understand that the judges have read their arguments; and (2) it gives the losing counsel something to explain to their clients as to the reasoning of the court on why they were unsuccessful. PCAs threaten to destroy the integrity of the appellate process and are indicative of nothing more than laziness on the court's part. They should not be utilized. There is no excuse for the court not penning a few words on why they are affirming.

- If an appellant's brief is so meritless that no preliminary basis for reversal has been demonstrated, Florida has a procedural rule that permits summary affirmance. See rule 9.315(a), Florida Rules of Appellate Procedure. The use of this rule is to avoid patently frivolous appeals. It has the salutary effect of saving the appellee the cost of having to pay an attorney to write the answer brief and prepare for and attend oral argument and saving the court from having to prepare for oral argument as well. But, if an appellate court chooses not to invoke the rule, thereby requiring expenditures of additional resources by both parties and the court through the oral argument stage, then the court should write at least a short opinion which explains the basis of the decision.

PCA with Dissent

- In cases sufficiently close to warrant a dissent by a member of the panel, the mere exercise of articulating the basis for decision and refuting the dissent arguments will, in a significant number of cases, cause the majority to sufficiently re-examine the underlying premises of their decision so that a different result might obtain. A written decision by the majority also may provide at least the possibility of further review in the Supreme Court, a possibility which should not be unnecessarily foreclosed in a close call. The Supreme Court should adopt a rule of judicial administration which requires the district courts to write an opinion explaining the rationale for the decision in any case where a member of the panel has dissented.

Selective Publication

- Many United States circuit courts of appeals have adopted a practice of either recommending only certain opinions be published and relied on as precedent, or entering written opinions expressly stating that they are not for publication and therefore do not constitute binding precedent. Many states have adopted this position as well. The rationale is clear and simple; it gives the litigants assurances that the merits were reviewed and denied or granted, without having any further precedential effects on others.

Appellate Secrecy

- It is important for everyone to remind themselves that the system functions fairly when it does not operate under a shroud of secrecy. Moreover, when decisions are handed down, there is no mystery as to why the panel reached its conclusion. Being open is equated with being fair. Shrouding the process and results in Masonic-like mystery can only breed suspicion. If a panel has decided a case and entered a PCA, it will have already reviewed the merits of the case, and therefore concluded with a reason to rule the way it has. Accordingly, inserting a paragraph or two explaining the reasons why review is granted or denied is not harmful, but in fact helpful in assuring the litigants that the merits were reviewed and either granted or denied without extensive opinion. Those opinions could be denoted as not for publication, and that would simply resolve the matter on its own.

Abuse of Power

- There have been many instances where the power of the DCAs to PCA decisions has been abused with no avenue of redress available to the litigant who receives the unfavorable PCA decision. In several instances, the PCA decision was contrary to existing law. DCA judges should be required to cite the appropriate authority when issuing a PCA.

- Some cases receive PCAs because the three-judge panel determines that they are "too tough to tackle." These cases are usually long in trial, complex in character, difficult in analysis, and frequently multi-faceted. These are the appellate headaches, usually with jury verdict complications and respected trial judges. Lawyers and their clients deserve to be heard, understood, and responded to. Without that, a decision of law is a farce.

Other Suggestions

- Often practitioners' unhappiness with a PCA decision stems from an inability to properly characterize the nature of the issue in a given appeal. One way to resolve this problem might be to label appeals as involving questions of 'error' or questions of 'law.' This could be done through a question on a docketing statement regarding the nature of the issues involved.

- There is some justification for per curiam opinions but they should be few and far between and should follow criteria promulgated by the courts. Each judge should be mandated to assert separately, and independently, his or her reasons for expressing no opinion.

- There should be some type of opinion in every case (even if only in case citation or memorandum form) if this is possible. The Eleventh Circuit Court of Appeals often issues unpublished memorandum opinions. It is better to have opinions for the parties only, without precedential value, than more PCAs. Such opinions would at least give guidance to the litigants. It is time to worry less about caseloads and expediting decisions, and worry more about the quality of justice dispensed.

- Create secondary review panels as a system of checks and balances.

APPENDIX J
CASE LAW CITATIONS

Case Law Citations

The following is a list of all cases cited either in the body of the report or appendices.

Anders v. California, 386 U.S. 738 (1967)

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

Benedit v. State, 610 So. 2d 699 (Fla. 3d DCA 1992)

Berkebile v. State, 592 So. 2d 768 (Fla. 2d DCA 1992)

Bourgault v. State, 491 So. 2d 623 (Fla. 4th DCA 1986)

Brooks v. Florida, 389 U.S. 413 (1967)

Callender v. Florida, 380 U.S. 519 (Fla. 1965)

Florida v. Rodriguez, 469 U.S. 1 (1984)

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

Freund v. Butterworth, 117 F. 3d 1543 (11th Cir. 1997)

Furman v. United States, 720 F. 2d 263, 266 (2d Cir. 1983)

Gould v. State, 596 So. 2d. 1075 (Fla. 5th DCA 1992)

Hall v. Florida, 510 U.S. 834 (1993)

Hall v. State, 614 So. 2d 473 (Fla. 1993)

Heddleson v. State, 512 So. 2d 957 (Fla. 4th DCA 1987)

Hobbie v. Unemployment Appeals Com'n of Florida, 480 U.S. 136 (1987)

Ibanez v. Florida Department of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136 (1994)

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

Lawrence v. State, 701 So. 2d 874 (Fla. 2d DCA 1997)

Moore v. State, 706 So. 2d 291 (Fla. 1st DCA 1995)

Moreland v. State, 582 So. 2d 618 (Fla. 1991)

Palmore v. Sidoti, 426 So. 2d 34 (Fla. 2d DCA 1982), rev'd 466 U.S. 429 (1984)

Rodriguez v. State, 511 So. 2d 1021 (Fla. 2d DCA 1987)

Ruffin v. State, 390 So. 2d 841 (Fla. 5th DCA 1980)

Sam v. State, 681 So. 2d 1148 (Fla. 2d DCA 1996)

State v. Holz, 679 So. 2d 782 (Fla. 2d DCA 1996)

State v. Johnson, 691 So. 2d 483 (Fla. 2d DCA 1996)

United States of America v. Vicki Lopez-Lukis, No. 98-2179

Washington v. State, 620 So. 2d 777 (Fla. 5th DCA 1993)

Wright v. State, 604 So. 2d 1248 (Fla. 4th DCA 1992)

Zipperer v. State, 481 So. 2d 991 (Fla. 5th DCA 1986)

Appendix K

American Bar Association Resolution

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 14, 2000

RESOLVED, That the American Bar Association urges the courts of appeals, federal, state and territorial, to provide in case dispositions (except in those appeals the court determines to be wholly without merit), at a minimum, reasoned explanations for their decisions.

FURTHER RESOLVED, That the American Bar Association urges the Congress and state and territorial legislatures to provide the courts of appeals with resources that are sufficient to enable them to meet this responsibility.

REPORT

The demand on appellate courts throughout the nation because of growing caseloads has been widely discussed. Courts have undertaken a variety of measures to handle this demand and process cases efficiently. Some of these measures have, however, given rise to a countervailing concern that they have hampered the quality of review and decision making and have restricted public information regarding the reasons for decisions.

As a result, attorneys, their clients, legal scholars and others may believe that cases have not received full consideration and that the opinions, judgments and orders are inadequate and even unjust. Of particular concern are orders that simply affirm the judgment without any explanation of the reason for the decision. According to a recent article in the ABA Journal, there were 1,524 such decisions by federal courts of appeals in 1998, constituting 6.1% of total case dispositions. See William C. Smith, "Big Objections to Brief Decisions," ABA Journal, August 1999, at p.34.

The ABA Journal article dealt with a one-word affirmance of a criminal conviction carrying a prison sentence. The public, as well as attorneys, find it difficult to maintain confidence in a system in which the final resolution may be a simple word or even a generic sentence. The Federal Third Circuit recently decided to curb the number of rulings without rationales. "We realized that this was a mistake, that we owed the bar more," stated Chief Judge Edward R. Becker. See ABA Journal article.

The issues presented by the level of caseloads in the circuits were addressed by the Commission on Structural Alternatives for the Federal Courts of Appeals, which was chaired by Justice Byron R. White. The Final Report of the commission, issued on December 18, 1998, stated at p. 22:

> "As the volume and nature of the appellate caseloads changed, so did the likelihood that an appellate court would publish an opinion explaining its decision to the point where today, most courts issue published opinions in only a small percentage of the appeals they decide on the merits..." *****

***** Unpublished opinions raise issues of broader scope than unexplained decisions, but are related in that they may be less likely than published opinions to provide a full explanation of the factual basis and legal rationale for the decision.

Section 3.36 (concerning decisions and opinions) of the ABA Standards Relating to Appellate Courts, approved by the House of Delegates in 1977, provides as follows:

"3.36 Decision and Opinions.

"...

"(b) Form. The court should give its decision and opinion in a form appropriate to the complexity and importance of the issues presented in the case. A full written opinion reciting the facts, the questions presented, and analysis of pertinent authorities and principles, should be rendered in cases involving new or unsettled questions of general importance. Cases not involving such questions should be decided by memorandum opinion. Every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing court should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion."

The ABA Standards do not require a full written opinion in every case. They recognize that many cases are not of sufficient importance to require that amount of discussion and analysis. But they do say that every case should be decided by at least a "memorandum opinion" that includes, at a minimum, a citation of the authority or statement of grounds on which it is based. The instant proposed resolution makes that more explicit and perhaps somewhat broader in that it requires a statement of the "operative facts of the case, the issues presented, and the legal basis for the ruling."

At least that much explanation is necessary to provide assurance to litigants and their counsel that their case has received full consideration, to allow higher courts to make an adequate review, whether mandatory or discretionary, and to allow legal scholars and others to comment on the accuracy and adequacy of the court's analysis. This is essential to judicial accountability in a nation whose people are supposed to be governed by law and not by governmental fiat.

The proposed resolution recognizes that in some appeals, which are so unfocused or unsupported by legal authority that they might well be characterized as "frivolous," even a memorandum explanation of reasons for the decision would be difficult to write. But even in those cases the resolution requires, as the basis for dispensing with a statement of the operative facts and legal rationale, a judicial determination that the case is "wholly without merit." Such a determination would itself be subject to review and comment by those tracking judicial performance. While the determination would best be included in the order of disposition, it might also be made an express prerequisite for any unexplained disposition by court rule.

The importance of judicial opinions has been described at length by legal scholars. See, e.g., Paul D. Carrington, et al., Justice on Appeal (1976); Martha J. Dragich, Will the Federal Courts of Appeals Perish If they Publish? 44 American University Law Review 757 (1995). Dean Carrington emphasized that the judges' statement of reasons for their decisions assures a considered decision and facilitates public understanding and acceptance of the decision. Carrington at pp.9-10.

Professor Dragich characterized opinions as prerequisites to the legitimacy of the judicial process and essential tools in research and analysis. In making this point, she referred to the separate statement of Judge Patricia M. Wald of the District of Columbia Circuit in National Classification Committee v. United States 765 F.2d 164, 172-75 (D.C. Cir. 1985), in which Judge Wald expressed concern about overuse of the practice of disposing of cases by order or brief unpublished memorandum opinion.

The strong conclusion of Professor Dragich is noteworthy:

> "The courts of appeals' admittedly legitimate concerns with increasing caseloads do not warrant practices that threaten the development of a coherent body of law and fundamentally alter our appellate traditions. Rather than adopting practices that strike at the very core of their function in our legal system, the courts of appeals should pursue structural or other reforms to address the caseload crisis. Appellate court practices that create a "secret" body of law of questionable precedential value, and that provide wholly inadequate guidance to district court judges, lawyers, and citizens, are misguided and destructive." Dragich at 802.

Several highly-respected federal judges were quoted in a recent New York Times article on managing the courts' caseload. William Glaberson, Caseload Forcing Two-Level System for U.S. Appeals, The New York Times, March 14, 1999, at section 1, page 1. Chief Judge Richard A. Posner of the Seventh Circuit, quoted in that article, has characterized decisions with one word affirmances and no opinions as "a formula for irresponsibility." Letter dated March 15, 1999, from Chief Judge Posner to William Glaberson.

In March 1999, Judge Richard S. Arnold of the Federal Eight Circuit was asked, while speaking at Drake University Law School, about the New York Times story concerning perfunctory on-word rulings. An editorial in The Des Moines Register recounted Judge Arnold's comments. It said he characterized the practice of one-word rulings as an "abomination." Judge Arnold stated he had recently participated in a court session in which more than fifty cases had been decided in two hours. "We heard many, many cases with no opinions or unpublished opinions." "I felt dirty. It was a ...betrayal of the judicial ethos. It makes me feel terrible." See "Perfunctory Justice; Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings," The Des Moines Register, March 26, 1999, at 12.

Chief Judge Becker and Judge Arnold were contacted in the preparation of this report. Chief Judge Becker responded by letter dated November 1, 1999, saying he "strongly endorsed" the recommendation that appellate courts state in case dispositions the operative facts of the case, the issues presented, and the legal basis for the ruling. Judge Arnold responded by letter dated October 25, 1999. He said the volume of cases forces his court into a practice of sometimes rendering opinions that are "cursory at best." But the practice "is not a good one. I struggle every day to resist it. The parties, especially the losing party, deserve an intelligible explanation."

A member in Oregon responded to the August ABA Journal article with a Letter to the Editor about affirmances without opinion, known there as "AWOP."

> "AWOP makes cursory consideration of appeals a judicial convenience. Novel issues get AWOPed. Judges should write decisions, however brief, because when they have to write they have to think." See David B. Lowry, in "Opinions on No Opinions," ABA Journal, October 1999, at p.16.

An analogy may be found in the rule of administrative law that a federal court of appeals must reverse administrative agency action if unable to satisfy itself that the agency has given reasoned consideration to all the material facts and issues. This calls for "insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." Greater Boston TV Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923. The rule has variously been grounded in the requirement of the Administrative Procedure Act that agency action not be "arbitrary" or "capricious," Motor Vehicle Manufacturers v. State Farm, 463 U.S. 29, 56 (1983), and in the due process requirement of the Fifth Amendment. Aberdeen & Rockfish RR Co. v. United States, 565 F.2d 327, 334 (5th Cir. 1977). What the proposed resolution would urge is that the courts of appeals adhere in their own case dispositions to the same standard.

Writing focuses thinking and sharpens analysis. Every lawyer has had the experience of modifying a position in a brief or memorandum because "it just won't write."

The growing caseload of appellate courts requires a renewed effort toward quality as well as quantity of decisions. The system of justice at the appellate level should not have efficiency as its primary measure of achievement.

CONCLUSION

The courts of appeals, both federal and state, should ensure that there be reasoned consideration of the material facts and issues in all cases and, except for appeals the court affirmatively determines on the basis of such consideration to be wholly without merit, that each case receives a decision which at a minimum sets out the operative facts of the case, the issues presented, and the legal basis for the ruling.

Respectfully submitted,

Jack H. Olender
President, Bar Association of the
District of Columbia

February 2000

GENERAL INFORMATION FORM

Submitting Entity: Bar Association of the District of Columbia

Submitted by: Jack H. Olender, President of the Bar Association of the District of Columbia

III. Summary of Recommendation:

The Recommendation states that the courts of appeals should require that case dispositions (with the exception of wholly frivolous appeals) set out the operative facts of the case, the issues presented, and the legal basis for the ruling.

IV. Approval by Submitting Entity.

The Recommendation was approved by the Board of Directors of the Bar Association of the District of Columbia at its meeting on November 17, 1999, in Washington, D.C.

V. Has this or a similar recommendation been submitted to the House or Board previously?

This Recommendation has not previously been submitted to the House or Board.

VI. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Section 3.36 of the ABA Standards Relating to Appellate Courts, adopted in 1977, is relevant to this Recommendation. The present Recommendation emphasizes the concern about the growing caseload of the appellate courts and the resulting diminution in stated reasoned analysis in case dispositions.

VII. What urgency exists which requires action at this meeting of the House?

Action is required at this meeting of the House because of the widespread public concern about fair consideration of cases on appeal. See William C. Smith, "Big Objections to Brief Decisions," ABA Journal, August 1999, at 34.

VIII. Status of Legislation. (if applicable.)

There is no pertinent legislation.

IX. Cost to the Association. (Both direct and indirect costs.)

None

X. Disclosure of Interest. (If applicable.)

None

XI. Referrals.

Several ABA entities and interested persons have been or will be contacted. These include the Section of Litigation and the Appellate Judges Conference of the Judicial Division. It is anticipated that the Appellate Judges Conference will include this matter on its agenda at the Midyear Meeting.

APPENDIX L
MEETING MINUTES

Per Curiam Affirmed Committee Meeting One
Florida Bar Meeting Room C
Tampa Airport Marriott
April 14, 1998

MINUTES

Members Present:

Judge John Antoon, II
Judge Gerald B. Cope, Jr.
Judge Peter Webster
Judge Barry J. Stone
Mr. Bernie McCabe
Mr. Brian Onek
Mr. Tom Elligett
Mr. Robert Krauss

Members Absent:

Judge Monterey Campbell, III, Chair

Staff Present:

Mr. Gregory Youchock
Mr. Richard Cox

Judge Antoon chaired the meeting in Judge Campbell's absence and convened the meeting at 10:00 a.m. by reviewing the committee's charge from the Judicial Management Council (JMC). Judge Antoon noted that the committee's genesis emanates from the work of the JMC's Appellate Workload Committee which issued its report to the JMC in late 1997. Two members of the Appellate Workload Committee raised the issue of "quality," referring to the use of per curiam affirmed decisions as a means of disposition for appellate courts. Thus, the Per Curiam

Affirmed (PCA) Committee was formed and charged with studying the issue in depth, making any necessary recommendations to the JMC.

Judge Cope reviewed both his letter to Chief Justice Kogan (November 5, 1997), which identified several categories of case types worth collecting and the statistical table included in the meeting materials that illustrates the number and percent of PCAs by district court of appeal (DCA) from 1983-1997. Judge Cope noted that in his district, the third DCA, there has been a significant growth in criminal filings over the last 10 years from approximately 32% to 45% of total filings. Judge Cope observed that the increase in the use of PCAs could possibly be a growth in the criminal percentage of total caseload, particularly in the area of post-conviction relief and in Anders brief filings.

Judge Cope stated that there is a sense among the judges in the 3rd DCA that there are more appeals from summary denials of 3.850 motions and 3.800 motions. Judge Cope opined that these are non-fully briefed appeals and, as such, it is appropriate to use PCAs. Judge Cope stated that it might be helpful to the committee if PCAs were captured according to the categories listed in his letter to Chief Justice Kogan: 9.140(I); Anders; Unemployment Compensation; Worker's Compensation; Criminal (fully briefed); Civil (fully briefed); APA (chapter 120); Other; and Citation PCAs. Judge Cope indicated that the DCAs collect data differently and it may be difficult to capture his suggested categories. Moreover, he noted that the big divide is between fully briefed versus non-fully briefed appeals; the primary criticism of PCAs being their use in fully briefed appeals.

The committee discussed the need for greater specificity in capturing case types to better analyze the use of PCAs. Mr. McCabe suggested that it might be helpful for the DCA to standardize how they collect data. Mr. Onek asked whether it was an anomaly that a DCA would PCA a capital murder conviction that was later reduced to second degree murder by the Supreme Court. Judge Webster reviewed Chet Kaufman's letter/position on PCAs for the committee and suggested that Mr. Kaufman would contend that three judge panels are using PCAs because they (cases) won't write as an affirmance.

Judge Webster observed that he and Mr. Elligett, both of whom serve on the Executive Council of the Appellate Practice Section of The Florida Bar, have heard increasing complaints from members of the private bar that cases are being PCAed that should not be. Mr. Elligett shared the view that there are increasing complaints, but they come from those who do not specialize in appellate practice. Mr. Elligett stated that it was his observation that regular appellate practitioners understand the reasons why some cases received PCAs. Mr. Elligett stated that the number of cases filed are voluminous and unless the size of the judiciary is increased significantly, appellate judges cannot write opinions in all cases; hence the need for PCAs. Mr. Elligett then reviewed the use of citation PCAs for the committee and discussed its viability as a tool for use in obtaining Supreme Court review of a case.

Judge Antoon refocused the discussion to the gathering of statistics or case types to assist the committee in their review of PCAs. Judge Stone indicated that gathering statistics in the 4th DCA might be difficult. Judge Stone stated that he does not believe that the clerk's office has the automated capability to capture these statistics and that they might have to be collected manually, which could ultimately be a manpower problem. Judge Stone opined that complaints about the use of PCAs might be a case of the "tail wagging the dog." More specifically, it could be that a vocal minority is asserting that a problem exists with the balance believing that there is no inherent problem. In essence, the issue is not as serious as purported by some.

Judge Antoon agreed with Judge Stone that a vocal minority exists and its mainly comprised of public defenders who do not agree with the use of PCAs. They feel that the use of PCAs is a way of avoiding further review. Another criticism of PCAs from assistant public defenders and those who do not specialize in appellate practice is that litigants deserve a reasoned response to their appeal. Judge Antoon observed that the current case type categories do not lend themselves to a rigorous examination of the use of PCAs. For example, current data categories preclude a detailed analysis as to whether there is a disproportionate use of PCAs, especially in the areas of criminal collateral appeals, Anders, and unemployment compensation appeals.

Judge Stone raised the issue of one or two sentence citation PCAs and how they affect the overall numbers. Single sentence citations may be used more frequently on some courts than others. It may be a matter of judicial preference, rather than a court-wide preference. The reason may be that it is impossible to write on every case. Judge Webster noted that although he did not feel PCAs are a big problem, he's received comments that it is perceived to be a problem among members of the private bar. Judge Webster indicated that an educational process explaining to the bar, in general, why DCA judges use this tool and the standards that are employed when doing so. Judge Webster advised that an educational process would help diffuse this issue, otherwise unhappiness with PCAs could become a real problem.

The discussion then shifted to the use of PCAs by the federal appellate courts. Judge Webster stated that the federal courts have been deciding cases without opinion for a long time. Judge Webster estimated that federal appellate courts dispose of 70% of their cases without opinion. Judge Webster speculated that there are few complaints by practitioners at the federal level because they are typically more experienced than those practicing appellate law at the state level. Another reason there are few complaints is because federal courts have internal rules stating when they will affirm without opinion. This gives the lawyers a written explanation as to why the case is being disposed without opinion.

Mr. Krauss echoed Judge Webster's comments and cited rule 36-1 in the Eleventh Circuit which lists five reasons why a case is being disposed without opinion. Mr. Krauss suggested that it may be advisable to develop a similar appellate rule at the DCA level. In essence, the rule would contain a check-off menu available to judges as to why a case is being PCAed. Mr.

Krauss advised that this proposal/solution may prove to be satisfactory to members of the bar who object to the use of PCAs.

Judge Antoon reiterated his commitment to capture the necessary statistics to aid the committee in its study. Judge Antoon asked the committee if there was any objection to collecting statistics at either the Office of the State Courts Administrator (OSCA) level or by individual courts; there was none. Mr. McCabe supported Judge Antoon's idea and restated his belief that there needs to be standardization of data collection by the clerks at the five DCAs. Mr. McCabe stated that it would probably be beneficial to the DCA judges to know how many different types of cases they dispose of each year.

Judge Stone advised that the numbers exist, it's just that they may have to be collected manually. Judge Stone indicated that it might be easier to go back and collect data because it's already in the system. Judge Webster advised the committee that within the next year the DCA will have a case management system that is capable of collecting this data.

Judge Cope suggested that staff contact the five DCA clerks and ask them: (1) which internal statistics are kept; and (2) the feasibility of conducting a 6 month test capturing the categories outlined in his letter to Chief Justice Kogan from July 1-December 31, 1998. Judge Antoon suggested that staff should then develop a proposal for committee approval for capturing and comparing the necessary data. Judge Stone suggested that another factor that may be impacting accurate statistics and the increase in PCAs is the number of pro se filings especially in the family area. Judge Cope noted that he would like to see statistics that demonstrate the distinction between fully briefed and non-fully briefed appeals.

Judge Cope made a motion that staff be requested to develop a proposal for collecting statistics during a study period from July 1-December 31, 1998, using the categories outlined in his November 5, 1997, letter to Chief Justice Kogan after consultation with the DCA clerks. Staff should place particular emphasis on the use of PCAs in fully briefed versus non-fully briefed appeals. The committee approved the motion.

Judge Cope proposed a second motion whereby staff and the individual DCAs would review historical data that is currently available and make a report back to the committee. The time period under review shall parallel the table in the meeting materials from 1983-1997. The committee approved the motion.

The committee then turned its attention to a substantive inquiry into the effects of reliance on PCAs by the DCAs on others. Judge Cope noted that Florida is very much at odds with the American Bar Association (ABA) standards for the use of PCAs. The ABA position is that there should be a statement of reason in every fully briefed appeal. Judge Cope observed that such is not the case in Florida. Judge Cope suggested that the committee consider establishing an open

forum or hearing at the Bar's next meeting in conjunction with the Appellate Section to listen to concerns, ideas, or complaints from anyone who might be affected by the use of PCAs.

Judge Cope suggested that the committee review the experience of PCAs in other states. Judge Cope recommended the committee invite Professor Dan Medder from the University of Virginia Law School to discuss the proper use of summary affirmances in fully briefed appeals. Sylvia Walbolt from the American Academy of Trial Lawyers would be another good invitee.

Judge Cope suggested that the committee also look at jurisdictions that have developed some guidance as to when it is appropriate to use summary affirmances and when it is not, or, more specifically, when opinions should be written and when they should not. Particular emphasis should be placed on jurisdictions that have heavy caseloads (e.g., New York, Texas, California, Pennsylvania, and Michigan).

Judge Cope observed that coincidentally, in November, the Council of Chief Judges of the Intermediate Appellate Courts will be meeting in Key West. Judge Cope opined that it might be good to meet with them to identify opinion writing practices in other states. Judge Cope observed that two issues surround the use of PCAs: (1) the ABA standard (i.e., what should occur regarding a statement of reason in each fully briefed appeal and when a summary affirmance without opinion appropriate) and should the committee adopt an explicit standard regarding the use of PCAs or should the status quo be maintained?; and (2) access to the Supreme Court, the use of PCAs forecloses access to the Supreme Court as does an opinion that does not use jurisdictionally relevant words.

To Judge Cope's knowledge, two states have adopted rules that say, in essence, if one wants to raise an issue before the Supreme Court and it has not been included in an opinion, then by motion for rehearing, you ask the intermediate appellate court to address the issue. The intermediate appellate court does not have to address the issue, but, if it does, then one is allowed to proceed with a petition to the Supreme Court. Judge Cope expressed concern that in some districts rules exist that preclude attorneys and litigants from filing a motion for rehearing after a PCA is issued and that prevents attorneys from asking for an opinion even though there may be a good faith basis for requesting that a question be certified or that conflict exists.

Judge Stone suggested that the committee should also consider the practical consequences to individual courts of adopting a more stringent rule on PCAs. Unless there is a dramatic increase in the number of courts or judges, and unless the percent increase is in the post conviction relief motions, there could be a resulting backlog created in the workload of individual judges who have other office opinions to write. Consequently, these cases will find their way into the stack of opinions to be written. The end result will be a greater delay in opinions and affirmances being released.

Judge Antoon agreed with Judge Stone's observation and suggested that critics of the current practice either do not understand the consequences of drastically changing the way the DCAs handle their workload or they do not care. Judge Antoon continued by indicating that any change would require more resources to write opinions in all cases. Judge Antoon agreed with Judge Cope's comment that it is important to look at other states to see how they process their workload. Florida's efficiency usually compares favorably with other states.

Judge Cope suggested that the committee schedule a session at The Florida Bar's annual meeting in June to hear comments from members of the Bar and others as to their opinions about the use of PCAs. Judge Webster agreed with Judge Cope and noted that the Appellate Practice Section hosted a similar meeting in 1997 and on the whole it was well received by those in attendance. Mr. Elligett volunteered to research the availability of meeting room space and agenda time with staff at The Florida Bar for their annual meeting in June. If space is unavailable in June, the committee might consider September (bar committee meetings) as a second option to host a forum. The committee also discussed placing an announcement in the Florida Bar News soliciting written correspondence from members of the bar. It was suggested that the public meeting, coupled with the correspondence, will give the committee a 'rough gauge' as to the magnitude of concern held by private bar practitioners.

Judge Stone expressed the view that these efforts may result in an imbalance of information on one side of the ledger (i.e., criticism of PCAs) while neglecting information on the other side (i.e., proper and justifiable use of PCAs by DCA judges). Judge Stone continued by noting that in the meeting materials there appeared to be an underlying assumption that PCAs are being used as a workload tool. Judge Stone indicated that at his court (4th DCA) he's never heard any of the judges state that they are going to use PCAs to manage their caseload. While their use may have that effect, that is not the judicial intent behind their use. To address this possible deficiency in information, Judge Antoon suggested that the committee may wish to solicit input from the DCA judges.

Mr. Elligett suggested that any request for comment should require the writer to advance concrete ideas or solutions to judicial workload if the use of PCAs is restricted. Judge Webster reminded the committee that its not beyond the realm of possibility that the Legislature could require DCA judges to write an opinion in every case and not appropriate any additional funding for more staff or additional judgeships. Judge Webster noted that California, by statute, requires that the appellate court write something on every issue that's addressed in an appeal.

The committee then made a series of assignments and recommendations to staff based on the previous discussion, including:

— Staff is to prepare a draft announcement to be placed in the Florida Bar News soliciting written input from members of the bar. The announcement shall ask bar members to identify their volume of appellate work and their overall experience with the DCAs. Responses should also contain constructive suggestions for addressing the issue of PCAs while simultaneously being mindful of judicial workload. The announcement shall be approved by Judge Campbell prior to being published. Once published, bar members shall have thirty days to respond from the initial date of publication.

— Staff is directed to draft a letter for Judge Campbell's signature to all appellate judges soliciting their input regarding the use of PCAs. Included with the letter shall be a copy of the announcement placed in the Bar News. The committee charge and membership shall also be attached to the letter.

— Staff is directed to draft a letter for Judge Campbell's signature to all circuit chief judges asking them to distribute the letter to their judges as they deem appropriate and for their input on the use of PCAs. Included with the letter shall be a copy of the announcement placed in the Bar News. The committee charge and membership shall also be attached to the letter. The letter shall ask the chief judges to respond, in writing, to the letter.

— Staff is directed to draft a letter for Judge Campbell's signature to all public defenders, state attorneys, and the Office of the Attorney General asking for their input on the use of PCAs. Included with the letter shall be a copy of the announcement placed in the Bar News. The committee charge and membership shall also be attached to the letter.

— Staff shall advance a copy of the announcement placed in the Bar News to Ms. Jackie Werndli, Bar Liaison of The Florida Bar and ask her to place a copy of same in the meeting materials for the next meeting of the Executive Council of the Appellate Practice Section of The Florida Bar.

— The committee directed staff to contact Ms. Jackie Werndli of The Florida Bar within the next two weeks advancing her a copy of the announcement and asking her to place same in *The Record* which is the Bar's appellate newsletter. This will meet the May deadline and thus occur prior to the Bar's convention in June.

— The committee directed staff to schedule a 2-hour public forum in conjunction with the Bar's Appellate Section's September committee meeting in Tampa. The committee will host the forum and solicit input from the members of the appellate bar.

— The committee directed staff to arrange a meeting room at the Bar's convention in June so that the committee could invite a panel of three appellate experts to make a presentation before the committee with an overview and history of the use of PCAs. The experts are: (1) Professor Emeritus Dan Medder, University of Virginia Law School; (2) Stephen Grimes, retired Florida Supreme Court Justice; and (3) Ms. Sylvia Walbolt, outgoing Chair, American Academy of Appellate Lawyers.

  Once a room and date is secured by staff (Wednesday afternoon 17th or Friday afternoon 19th), Judge Webster agreed to call Ms. Walbolt and Professor Medder. It was suggested by the committee that Judge Campbell call Justice Grimes because they've known each other for many years. The committee also instructed staff to determine what expenses the committee is willing to pay for Professor Medder's expenses. Because Professor Medder is blind, he may wish to have his wife's expenses paid so that she may accompany him.

  The committee discussed obtaining and comparing data from other states with large populations, specifically, how do they handle appellate workload with regards to opinion writing. Judge Antoon reviewed the requirements of appellate judges in California. Judges in California are required to write on every case and every issue and have many more judges per capita. Nebraska and New Jersey were also cited as states with unusual appellate systems.

— The committee directed staff to contact the National Center for State Courts (NCSC) requesting comparative figures on the use of PCAs for the ten largest states in the country and the Federal Courts of Appeal. At a minimum, the committee would like the following information:

  ~ Are they using affirmances without opinion? If so, what are the numbers and percentages?

  ~ Numbers or statistics of fully briefed versus non-fully briefed appeals.

  ~ State or federal rules on when it is appropriate to issue an affirmance without opinion. (example, Eleventh Circuit's Rule 36-1).

  ~ Jurisdiction; is there an automatic right of first appeal? Does the court cover criminal, civil, and administrative appeals?

  ~ Is there any limitation on the number of pages permitted to be published?

  ~ Whether or not opinions are published?

- ˜ Total number of filings and dispositions by year.
- ˜ Total number of judges.
- ˜ The use of central and personal legal staff in writing opinions.

— The committee directed staff to draft a letter to the Administrative Office of the Courts for the 10 largest states asking for the following information regarding their intermediate appellate courts:

- ˜ How are Anders' proceedings processed?
- ˜ How are affirmances without opinion in post conviction cases handled?
- ˜ Is the PCA based on the authority of a rule or statute?
- ˜ To what extent, in cases where opinions are written, is there a requirement that a 3-judge panel meet to discuss the case?

Staff was also directed to circulate said letter to the committee prior to its issuance for their input. The committee then discussed the use of unpublished opinions. Judge Webster indicated that an unpublished opinion provides some explanation to the litigants and avoids having the reporter system clogged up with opinions. However, it does not address the issue of appellate judges managing their workload. Judge Webster indicated that mandating the use of unpublished opinions would require the doubling of the appellate judiciary in Florida.

Judge Cope reviewed the problems associated with adopting an unpublished opinion policy for appellate courts. The primary problem is that unpublished opinions find their way onto the Internet or in Westlaw and may end up being cited even if a no citation rule is in effect. A hybrid system of citations occurs which is antithetical to the reasoning behind unpublished opinions.

Judge Webster indicated that this idea has never really caught on in Florida. In practice, what occurs is the emergence of a 'black market' of unpublished opinions for large law firms who create their own base which gives them an advantage on the court's reasoning that smaller firms or sole practitioners might not enjoy. An ancillary jurisdictional issue is access to the Supreme Court if one arrives there via an unpublished opinion. Judge Antoon indicated that this issue is of such magnitude that JMC approval should be sought by the committee if it wishes to further explore the matter.

The next meeting of the committee will be either Wednesday, June 17, or Friday, June 19, in conjunction with The Florida Bar's Convention in Orlando. Staff will check on room availability and advise Judge Campbell who will then set the meeting. The meeting shall include the panel presentation and regular business of the committee. A four hour block of time will be set aside for the committee.

Judge Antoon adjourned the meeting at 12:40 p.m.

Per Curiam Affirmed Committee Meeting Two
Buena Vista Palace Resort and Spa
Windsor Room
Orlando, Florida
June 17, 1998

MINUTES

Members Present:

Judge Monterey Campbell, III, Chair
Judge John Antoon, II
Judge Gerald B. Cope, Jr.
Judge Peter Webster
Judge Barry J. Stone
Ms. Nancy Daniels
Mr. Brian Onek
Mr. Tom Elligett
Mr. Robert Krauss

Members Absent:

Mr. Bernie McCabe

Staff Present:

Mr. Gregory Youchock
Mr. Richard Cox

Judge Campbell began the meeting at 1:00 p.m. and welcomed Ms. Nancy Daniels, Public Defender, Second Judicial Circuit to the committee. The committee reviewed and approved the minutes from the previous meeting. Judge Campbell reviewed the supplemental meeting materials packet for the committee. He noted that one item in the packet was a summary of votes

taken at the Judicial Management Council's (JMC) April 1998 meeting in Orlando. One item in particular dealt with the use of per curiam affirmed decisions by Florida's DCAs. Judge Campbell reviewed the vote for the committee, noting that there was overwhelming support for the position to not change the use of per curiam affirmed decisions.

Judge Campbell also reviewed the process whereby the PCA Committee has its origins. He observed that the PCA Committee was formed as a result of a minority report of the Appellate Workload Committee chaired submitted to the JMC in October 1997. As a result of the minority report, Chief Justice Kogan appointed this committee to study the use of Per Curiam Affirmed (PCA) decisions.

Judge Cope then reviewed a vote taken by the Florida Bar Board of Governors concerning the use of PCAs. The vote taken by the Board of Governors was in response to Recommendation 15 of the 1995 Article V Task Force. The Task Force recommended that the Supreme Court adopt a rule that would allow an appellant or appellee the opportunity to petition the appellate court for a written opinion. The petitioning party would be required to establish that a written opinion would serve as a basis for further review. The decision to grant a petition would be within the discretion of the district court of appeal. The recommendation was adopted by the Article V Task Force. The Board of Governors voted negatively on that recommendation.

Judge Cope suggested that perhaps in the future the committee could hear from either former Chief Justice Grimes, who chaired the Article V Task Force, or other members to acquire a deeper understanding of their reasons for Recommendation 15. Judge Cope further suggested that it might also be helpful to hear from a member(s) of the Board of Governors to receive an explanation as to their vote on Recommendation 15. Ms. Daniels who served on the Task Force indicated that Recommendation 15 was a suggestion from State Representative Carlos Lacossa, an appellate practitioner who had received several PCAs from the DCAs. Ms. Daniels indicated that there was not extensive discussion on the use of PCAs by the Task Force. Judge Stone and Judge Cope briefly discussed the process of motions for rehearing after the issuance of a PCA.

The committee then reviewed the judicial comments section of the meeting materials. Mr. Onek observed that there appear to be inconsistencies in the judicial comments section regarding how much time it may take to write a written opinion once a case has been decided. The committee discussed the reasons for the possible inconsistencies. The committee also discussed the impact of additional written opinions from the DCA on Supreme Court workload. A potential impact on Supreme Court workload might be that it will have to review more petitions for certiorari. However, more written opinions should not impact the number of 'merit' cases that come before the Supreme Court. Judge Campbell suggested that a 'judicial impact statement,' much like a 'fiscal impact statement,' be used by the legislature for proposed legislation.

An additional consequence of more written opinions will be cases filed with the Supreme Court that should not be. The committee briefly discussed the impact of PCAs on trial judges. Judge Campbell expressed his concern for the sharp philosophical dividing line between those who have won or lost via a PCA.

Ms. Daniels reviewed the concern of public defenders when receiving a PCA, specifically, that they do not know what to tell their clients as to why they lost. Ms. Daniels referred the committee to the Public Defender Association Position Paper distributed to the committee prior to the meeting. Ms. Daniels noted that criminal appeals have become very complicated, especially on sentencing issues, with the body of law focused on procedural issues. Ms. Daniels reviewed the Criminal Appeals Reform Act which states that issues cannot be presented on appeal unless they are preserved by proper objection during the trial.

Ms. Daniels stated that the average criminal appeal has errors alleged by the appellant (if the defendant is the appellant). A typical state reply includes: (1) the trial court ruling is not in error; (2) the issue is not preserved properly; and (3) if the issue is not reversible error, then it's harmless error. The public defenders find themselves in the position of writing appeals and receiving PCAs and not knowing which of the three points raised by the state was the basis of the affirmance. This is important to criminal appellate practitioners because of collateral consequences. For example, if it is a preservation error, then one could argue ineffective assistance of trial counsel for not having made the proper objection or not filing a motion to correct during the trial. Thus, public defenders are 'in the dark' when they receive a PCA. The repetitive nature and volume of appeals filed by public defender offices makes this an important issue.

Judge Webster noted that he shares Ms. Daniels' concerns but observed that the flip side to her argument is that unless the judicial branch receives additional judgeships from the legislature, the inevitable result is going to be that cases that need written opinions are going to take longer to write. To balance this internal conflict, Judge Webster notes that he writes in cases where there is a legitimate issue that has either not been written on before or which creates a conflict. Judge Webster suggested that if DCA judges wrote a paragraph in each case, they would not be able to process one-half of their current caseload. He added that until the judicial branch receives more judgeships, the use of PCAs may be an unfortunate compromise. Judge Webster opined that litigants and lawyers have a right to know how and why their case was decided. Yet, for DCA judges to issue a written opinion in every case a significant number of additional appellate judges will be required.

The committee then reviewed letters from members of the private bar. Mr. Elligett commented on the Murphy letter noting that Murphy suggests that it would be helpful to have some guidance from the DCA judges. Mr. Elligett talked about the use of a motion for rehearing for clarification purposes. Mr. Onek observed that Murphy is suggesting that if the court has

reached the 'merits' of a case, then the parties don't need to spend any more money further litigating the matter.

Judge Campbell then asked Ms. Daniels for her comments regarding whether the court should state that its PCA is 'without prejudice' to the appellant. Judge Campbell noted that there are concerns on both sides of this argument. The first is that the DCAs are not in the business of practicing law and should not direct the parties as to how they should proceed; the other side is that the court should give the parties some direction. Ms. Daniels stated that the court should indicate that the PCA is without prejudice, noting that this is especially so because the Criminal Appeals Reform Act has had a big impact on public defender appellate practice. For example, defendants are by statute, not entitled to the assistance of counsel for collateral motions. Ms. Daniels added that because there is a prohibition on helping defendants with collateral issues, it is in the interests of justice to give the attorneys some guidance with regards to a 3.850 appeal. Judge Campbell asked if the DCA gave such guidance, are they then encouraging that person to believe that they have a valid claim for a 3.850 appeal.

The committee then had a discussion about preserving issues at the trial court. One concern about issuing opinions that indicate that issues were not preserved at the trial court is that it could create a groundswell of further appellate activity in the realm of post-conviction relief motions. Ms. Daniels and Mr. Onek opined that such a motion was proper because it provides the defendant another hearing. Judge Campbell indicated that while he understood that position, he cautioned that in several years it may be difficult to resolve these types of issues.

Ms. Daniels suggested that there are a number of procedural steps that appellate courts could implement via their opinions to diminish the number of collateral claims that are non-meritorious. For example, Ms. Daniels suggested that an appellate court could write an opinion citing the need for an on-record colloquy at the trial court for defendants who are filing appeals alleging that their trial court counsel told them that they could not testify. Judge Campbell expressed concern about DCA judges possibly usurping Supreme Court authority by essentially engaging in rule-making opinions.

Judge Campbell also expressed his concern that the more opinions that the DCA issue, the greater chance there is for frivolous appeals and possible abuse of the system by unscrupulous attorneys. This will increase the costs to their clients, particularly in civil cases. Unfortunately, Florida has its share of lawyers who will abuse the system, if permitted to do so. Judge Antoon wondered what impact issuing written opinions in many criminal cases would have given that the current trend seems to favor the defendant by reversing the trial court. Judge Antoon wondered if the DCA wrote in every case, would this trend reverse itself. Since most PCA cases affirm the trial court, logic holds that there would be a greater body of case law in favor of the state if the DCA were to write in every case.

Ms. Daniels cited the Peters' letter in which he stated that even an opinion without citation authority would be preferable to a PCA decision. Ms. Daniels stated that she felt that is a view shared by many public defenders, the reason being that at least the case that is cited as authority is still the law and one can still get in the 'pipeline' of review with a citation PCA.

Ms. Daniels mentioned that there is a feeling among public defenders that there is a disproportionate number of PCAs in first-degree murder cases where there is a life sentence. Ms. Daniels noted that these cases have a lot of issues associated with them similar to death-sentence appeals. Judge Campbell observed that he used to have a rule that he would not PCA first-degree murder cases. However, over the years, he has changed his position because in many instances the evidence is overwhelming against the appellant and there was nothing done by the trial court that would change the outcome of the case. Ms. Daniels suggested that there should be some correlation between the length of sentence and the type of review (i.e., a first-degree murder case merits more attention or even a written opinion, whereas a probation case would likely warrant less review).

The committee then had a brief discussion on court costs. Mr. Onek observed that he would forego forty opinions on court costs and take more on the issues. The committee agreed with him. Judge Webster observed that the Simplification Act (see Chapter 938, Florida Statutes) has created numerous procedural problems for the DCAs. Judge Webster stated that the First DCA has written many more opinions on court costs since the passage of the Simplification Act then it would ever want to. Judge Webster indicated that the issue of court costs has boiled down to a question of whether the DCAs should guess about the Supreme Court's intention with regards to its rule on court costs or, should the DCAs wait for the Supreme Court to overrule the Wood Case, which held that imposing costs and attorneys fees without notice and a hearing is fundamental error.

The committee then reviewed the articles/papers section of the meeting materials. Mr. Elligett began a discussion on party notification when receiving a PCA and the preclusion of Supreme Court review of same by noting that perhaps a form could be devised which identifies why a case received a PCA. For example, the form might contain a check-off box which indicates that this case was affirmed because: error was not preserved; there was no reversible error; there was no abuse of discretion; evidence exists which supports the verdict; etc. This form would not be published and would go only to the litigants and lawyers who received the PCA. The receipt of said form would not be grounds for Supreme Court review.

Judge Webster indicated that he did not think that it would be too much more work for DCA judges if the appropriate body (e.g., the Rules of Judicial Administration Committee) were to adopt a rule that says whenever a DCA affirms without opinion they will identify from the list below, by number, the basis for the decision. For example, it might read Affirmed, Rule XX, (xxxx). Judge Webster cautioned that although this might not take too much judicial time, he

does not believe that it will satisfy litigants. Judge Campbell observed that there might be some problem getting a panel of three judges to agree on the reasons for the affirmance.

Judge Cope indicated that Judge Webster's suggestion is closely aligned with Mr. Krauss' proposal from the first meeting where he reviewed the 11th Circuit Court of Appeals check-off form. The State of Georgia has a similar rule. Judge Webster opined if a panel cannot agree on one reason, then they can simply list all that apply. Ms. Daniels indicated that it would be a great improvement from the public defender's perspective. Ms. Daniels asked that even though this form would be unpublished and therefore not have precedential value, would it be admissible for collateral appeal purposes? Judge Cope and Judge Webster stated that they thought that it would be. Judge Webster thought that even though it might be admissible, does not mean that it would prevail.

Judge Antoon suggested that one effect of this proposal might be attorney exposure to claims of malpractice. Judge Antoon commented that the current system protects attorneys from such claims even though many appeals that are filed are without merit or frivolous. Mr. Elligett related his experience at The Florida Bar's 1997 mid-year meeting in Miami regarding the round table discussion on PCAs in which the lawyers present were of the view that it is not the DCA judge's job to protect malpracticing lawyers. Judge Webster indicated that it might be helpful for the committee to devote some time to list the permissible reasons why a case might receive a PCA and provide for same either on the PCA itself or in a separate document. Judge Webster stated that he does not believe that the appellate judiciary will be upset about such a proposal. Mr. Elligett suggested that in addition to using this new check-off PCA form, the committee should recommend to the JMC that the Supreme Court ask the legislature for additional judgeships.

The committee then had a discussion about the need for additional DCAs and the current workload per judge as those issues relate to the certification of new appellate judgeships to the Florida Legislature. The committee also discussed the potential impact that their recommendations might have on the work and recommendations of the JMC's Committee on Appellate Workload. Judge Webster briefed the PCA Committee on the work of the Appellate Workload Committee because he is a member of that committee.

Judge Cope and Judge Webster had a brief discussion as to which body, either the Appellate Rules Committee or the Rules of Judicial Administration Committee, should review any recommendations advanced by the PCA Committee. The discussion focused on procedure versus judicial administration issues. Judge Webster noted that one talks about the administration of how the court does its work rather than the procedure used by litigants and lawyers in presenting issues to the court. Judge Campbell discussed the implications of the Krosschell article and suggested that his proposal would affect the deliberative process and would thus be a Rule of Judicial Administration issue. Judge Antoon related his experience in

Brevard County representing the Personnel Council of Brevard County and the possible impact and consequences that open deliberations have on the decision making process.

The committee then reviewed state responses to the committee's questionnaire. The committee noted that California has 50% more appellate judges and only 10% more appellate filings. The committee observed that one explanation for the difference is that California now has private judges and that the appellate courts may not receive Workers' Compensation or Administrative Appeals. Ms. Daniels observed that all states responding have unpublished opinions. The committee also reviewed the numbers for Texas and New Jersey. The committee also discussed the possible creation of a statewide court of governmental appeals. Judge Campbell commented on the relationship between additional judges, PCAs, and frivolous lawsuits and noted that the use of PCAs would probably continue (unless mandated otherwise) as long as frivolous lawsuits continue to be filed.

Judge Stone noted that he is not if favor of using a PCA checklist as discussed earlier by the committee. Specifically, Judge Stone stated that he does not believe that a checklist solves anything. For example, if each judge on a 3-judge panel has a different reason why a case should receive a PCA then you may have multiple checks. Judge Stone suggested that this does not offer any more than a PCA because in a PCA one can rely on the briefs that have been filed. Mr. Elligett responded by noting that regular appellate practitioner can probably figure out why the received a PCA. He added that the checklist is for the infrequent and inexperienced appellate lawyer who needs to provide their client with some explanation as to why they lost. Judge Stone suggested that he would rather write an opinion than use a checklist that does not represent the views of the majority of the panel. Judge Cope suggested that 2 of the 3 judges would have to agree to any check-off.

Judge Antoon urged the committee to be cautious in their approach to using a checklist and for them to make sure that they explore all their options in this regard. Judge Antoon suggested that one unintended workload consequence of the PCA checklist might be access to the Supreme Court via another appeal. Mr. Elligett noted that another possible downside to the checklist is that it may generate more petitions for rehearing. Judge Antoon urged the committee to be cautious when comparing Florida's system of appellate practice to other states and added that any comparison must be made by reviewing Florida's system in its totality versus reviewing the appellate system of any other state in its totality.

Ms. Daniels noted that Florida's appellate court system is unique in that it both allows PCAs and has an absolute prohibition on Supreme Court jurisdiction if there is no opinion. Judge Campbell noted that the 'flip side' to that point is that Florida permits an appeal in every case whereas some states do not (e.g., Virginia). Judge Webster indicated that what the public defenders want is some explanation as to why they lost, adding that public defenders are looking for some sense that their case has been carefully considered.

Judge Campbell emphasized that he did not believe that the 'integrity of the process' is at issue because appellate judges are carefully chosen and are committed to their work. Judge Campbell stated that the true reason for challenging PCAs is due to something else. Ms. Daniels indicated that public defenders view PCAs as a workload issue and an administration of justice issue. Judge Campbell added that it is his hope that through its process the committee does not damage the integrity of the system. Judge Cope suggested that with regards to the checklist, the committee put something down on paper before it makes any recommendation.

The committee then discussed the possibility of having a PCA forum at a later date perhaps at The Florida Bar's mid-year meeting, in Miami, in January 1999. Ms. Daniels indicated that she thought a forum would be helpful to many members of the bar and would give the committee the opportunity to gauge the depth of feeling held by many lawyers in Florida regarding the use of PCAs. Judge Campbell stated that he would like to combine a public forum with a panel of appellate experts to discuss the history and use of PCAs. Judge Webster observed that a similar approach used several years earlier on merit selection and retention was well received. The committee instructed staff to arrange a meeting for January 1999, in Miami.

The committee instructed staff to contact Professor Meador and former Chief Justice Grimes about their availability to participate as panel members. Judge Webster suggested that the committee also identify a national expert who has written specifically on PCAs or affirmances without opinion as a possible panelist. Judge Campbell suggested Karl West Anderson in that regard. Judge Campbell asked the committee to advance the names of any possible panelists to staff.

A brief discussion on PCA data collection occurred. Staff was directed to advise the DCA clerks regarding PCA data collection. The meeting was adjourned at 4:00 p.m.

Per Curiam Affirmed Committee Meeting Three
Panel Discussion
Whitehall Room, Wyndham Hotel
Miami, Florida
January 20, 1999

Minutes

Members Present:

Judge Monterey Campbell, III, Chair
Judge Gerald B. Cope, Jr.
Judge Peter Webster
Judge John Antoon, II
Judge Barry Stone
Mr. Bernie McCabe
Ms. Nancy Daniels
Mr. Brian Onek
Mr. Raymond Thomas Elligett
Mr. Robert Krauss

Panel Members:

Former Chief Justice Stephen H. Grimes, Supreme Court of Florida, Retired
Former Chief Justice Alan C. Sundberg, Sr., Supreme Court of Florida, Retired
Judge Thomas H. Barkdull, Jr., Third District Court of Appeal, Retired
Judge William C. Owen, Jr., Fourth District Court of Appeal, Retired
Justice Thomas E. Hollenhorst, State Court of Appeal, Riverside, California, Panel Moderator

Staff Present:

Mr. Gregory Youchock
Mr. Richard Cox

Judge Campbell opened the meeting at 2:00 PM with an overview of the committee's charge and an introduction of committee members. Judge Campbell reviewed the committee's work and outlined the reasons for having a panel comprised of senior appellate judges who could offer their insight into the use of Per Curiam Affirmed (PCA) decisions in Florida's intermediate appellate courts. Judge Campbell then introduced each panel member.

Justice Sundberg began the discussion by asking what is the purpose of a judicial opinion. Justice Sundberg indicated that judges issue written opinions to explicate their reasons for arriving at a decision. Another reason is to advance jurisprudence. Further, the District Courts of Appeal (DCA) are limited in their ability to explicate their decisions in areas of law where the Supreme Court has ruled. Thus, one must decide where PCA decisions enter into this process. If the decision is based on a mechanical application of law, there is no reason to explicate. One criteria for writing an opinion is to advance a body of law. Justice Sundberg indicated that the use of PCAs is a quality of work, rather than a workload, issue. If their mission is to advance jurisprudence, then it is unreasonable to expect DCA judges to write opinions in every case.

Judge Barkdull echoed Justice Sundberg's remarks, stating that he believed when recommending a PCA or written opinion to a three judge panel, his guiding principle was whether the decision would impact the law in Florida. Judge Barkdull commented that he saw no necessity to issue a written opinion to reiterate established law. Approximately seven years ago, Judge Barkdull noted that he became concerned about the increased percentage of cases receiving PCAs, particularly in the criminal area. Many of these criminal PCAs came from collateral issues and sentencing guidelines. At the same time, filings had leveled off at the Third DCA. Judge Barkdull stated that if a written opinion was not going to change current law, then there was no point in writing an opinion which would merely restate the law.

Justice Grimes opined that whether to write an opinion in a given case should not be dictated by workload. However, if the rules are changed to require an opinion in every case, then workload will be an issue. Justice Grimes reviewed DCA statistics for the committee from 1983 to 1997 tracing the increase in appellate filings and PCAs for the period. He observed that at present, DCA judges are writing 80 opinions per judge, per year, a significant number. As a practical matter, requiring judges to write opinions in every case may cause the number of appellate judges to triple, or alternatively, could reduce the quality of work and collegiality of the court.

Judge Owen noted that hardly anyone cares whether or not a PCA is issued, unless it is their case. With respect to writing opinions, Judge Owen observed that when he was on the appellate bench, the practice was that unless there was something new in the law, or there was an intervening constitutional or statutory change justifying a new approach, a written opinion should not be required. This is especially true for fully-briefed cases. Judge Owen stated that he knows of no instance where an opinion should have been written where a PCA was issued.

Judge Campbell summarized some of the major themes in the correspondence received thus far by the committee. Judge Campbell noted that most of the correspondence is negative on the use of PCAs. Three themes emerged from the correspondence. First, a written opinion will ensure further review. Second, opinions should be written to increase public trust and confidence in the appellate system. Third, written opinions will avoid arbitrary decisions. Judge Campbell cited one letter that said "PCAs threaten to destroy the integrity of the appellate process and are indicative of nothing more than laziness on the court's part." Judge Campbell then turned the meeting over to Justice Hollenhorst who acted as panel moderator.

Justice Hollenhorst began his remarks by talking about the legitimacy of the process. Heavy volume for intermediate appellate courts is nothing new to Florida or other intermediate appellate courts around the country. Nationally, typical responses are to add judges, add staff, curtail oral argument, and issue short written opinions; the PCA being the shortest of all.

Justice Hollenhorst noted that there are problems associated with each approach. The biggest problem with adding judges is the differing view on the law that each brings to the bench. This is especially so where written opinions are required in each case (e.g., California). This type of scenario can actually spawn more appeals. The problem with adding staff is that judges become mentors of assembly line justice. In California, judges spend as much time editing work from staff as they do writing opinions. Some states are now curtailing oral argument as one way to address their workload. Lastly, limiting opinion length is also an option. Justice Hollenhorst noted that federal courts have used limited opinions for years. Alternatively, in states like California that require written opinions, they average approximately 12 pages. There is an expectation of the legal culture that perpetuates this cycle. Another factor complicating matters for intermediate appellate courts is the efficiency of trial courts. Trial courts can process cases efficiently and in great numbers. This is not necessarily true for the intermediate appellate courts.

Justice Hollenhorst then asked panel members for their views on whether PCAs are a legitimate way to dispose of cases with little merit. Justice Sundberg stated that he believes that PCAs are a legitimate way to dispose of cases with little or no merit. Justice Sundberg responded by noting that under Florida's constitution the Supreme Court is a court of limited appellate jurisdiction, unlike the California Supreme Court, which has certiorari review. Justice Sundberg does not accept the argument that written opinions are needed in order to ensure further review. Moreover, the further review provision is not recognized under Florida's constitutional framework.

Justice Sundberg noted that he served on the 1979 Article V Review Commission which looked at Supreme Court jurisdiction. The commission expressly stated that for discretionary review, there must be a written decision. He observed that at the time, Supreme Court workload was getting out of control. The premise behind the reasoning was that the DCAs would exercise

the screening process to cull out only those cases deserving Supreme Court review. Justice Sundberg disagreed with the assertion by some attorneys who contend that DCA judges will PCA cases that they believe should not receive further review, noting that DCA judges and Supreme Court justices take an oath to uphold the constitution and it is their job to judge cases on the merits. He believes that a PCA is absolutely a legitimate basis for the disposition of a case on appeal.

Justice Grimes noted that parties are only entitled to one appeal and the Supreme Court is only right because it is last. Florida's DCA judges are extremely competent. Justice Grimes disagrees with the assertion that DCA judges will PCA a case because they do not want it to receive further review. Moreover, Justice Grimes noted that it is his view that the DCA judges are certifying more cases to the Supreme Court than they should. Many of these cases are "run of the mill" and should probably be disposed of at the DCA. Justice Grimes agrees with Justice Sundberg by noting that he does not subscribe to the ensuring further review argument. He also believes that PCAs are a legitimate way to dispose of a case.

Justice Hollenhorst noted that it is said that the appearance of justice is as important as justice being done. Justice Hollenhorst asked the panel if the use of PCAs gives the image to the public that justice is not being done? Judge Barkdull provided the panel with a historical perspective on the use of PCAs by discussing the 1956 constitutional amendment creating the DCAs. Essentially, the debate turned on whether the DCAs would be "way stops" on the way to the Supreme Court or would be courts of finality. It was agreed that the DCAs would be courts of finality and would certify issues to the Supreme Court. It was only after this agreement that the Judicial Council and Legislature agreed to place the issue on the ballot.

Judge Barkdull stated that it was never the intention that there would be a "two stop" appeal process in Florida. The trial courts established the facts, the DCAs corrected harmful judicial error, and the Supreme Court tried to keep decisions consistent. Judge Barkdull noted that the biggest disservice that the DCAs can do to the public is to delay the ultimate decision in their case. Judge Barkdull opined that as a private practice attorney, he was opposed to the creation of the DCAs because he was concerned that they would create further delay in the appeal process. He observed that it was ironic that he ended up serving as a DCA judge. He noted that he understands how people feel when the lose. However, there also many lawyers who are very pleased with the use of PCAs. Judge Barkdull observed that the Supreme Court stated several years ago that the purpose of a DCA was to answer the question presented with an opinion only if the decision advances the law in Florida. That is the course of action that Judge Barkdull always tried to follow. Judge Barkdull opined that the philosophy behind the creation of the DCAs in Florida is that they are designed to be courts of finality and to dispose of 98% of appellate cases filed. The purpose of the system was never to have two appeals as a matter of right in Florida. He further noted that PCAs are not a management tool and that DCA judges should only write opinions to advance the jurisprudence of the state.

Judge Owen discussed the impression that many lawyers may have regarding the appearance of justice when receiving a PCA. Many lawyers want an explanation and are frustrated when they do not receive one. One alternative to PCAs can also be problematic, namely, unpublished opinions. Unpublished opinions might help individual litigants know whether or not justice was done, if one keeps in mind that justice is like beauty, that is, in the eye of the beholder. In any case, some litigants may feel better about the process if they are told why they lost.

Justice Sundberg indicated that a similar debate took place in 1979 during meetings of the Article V Commission. In essence, in 1979 there was a proposal before the commission that would enable the Supreme Court to reach down and identify cases at the DCA level and select cases that they wished to hear. At the conclusion of extensive debate, the proposal was soundly defeated.

Justice Hollenhorst then raised the issue of collateral review in criminal cases. He asked if PCAs could be modified to note the reasons for the PCA, thus giving counsel an opportunity for collateral review. Judge Owen suggested that in a sense it should be done. For example, if the reason a case is receiving a PCA is because an issue was not properly preserved at trial, there is a valid basis to affirm. But it does not mean that an appellant should have the opportunity for collateral review before the Supreme Court on the basis of ineffective assistance of counsel.

Justice Hollenhorst observed that the use of PCAs apparently differs from DCA to DCA in Florida. He asked the panel whether there should be uniform guidelines or rules with regards to their use that will apply uniformly across districts. Justice Grimes remarked that he did not believe there should be specific rules as such. He indicated that it was possible for the DCAs to get together and create a set of guidelines in which certain types of cases would be the ones most likely to receive a PCA. Even then, there will always be exceptions. He concluded that there really is no way to bind each DCA into this type of practice.

Justice Grimes also mentioned the many variables that would impact this type of practice including caseload and judicial preference. For instance, Justice Grimes noted that he served on the Second DCA, which had more PCAs than any other district. He believes that such high use of PCAs was primarily attributable to the fact that the Second DCA also had a larger criminal caseload than any other district. Criminal cases are more likely to receive a PCA. While indicating that it may be useful to promote some form of guidelines for the use of PCAs in particular types of cases, he expressed the view that it should not be done categorically.

Justice Sundberg stated that he subscribes to the belief that judging is an art rather than a science. That is why human beings do it and not computers. He noted that another variable impacting this discussion is peer pressure, an important force on collegial courts. Justice

Sundberg observed that it has been his experience from both sides of the bench that judges want to do the right thing. Judges will put pressure on each other to produce regularly.

Justice Hollenhorst addressed the old appellate axiom that: "It won't write, if it's not right." He noted that sometimes the exercise of writing an opinion helps define how the case should be decided. Justice Hollenhorst then asked the panel to address two general criticisms of PCAs: (1) they allow judges who may be result oriented to dispose of cases rather than confront the ones that should receive a written opinion; and (2) they are used by poor judges. Justice Sundberg responded by noting that peer pressure will preclude cases inappropriately receiving a PCA and judges not fulfilling their workload requirements.

Judge Barkdull observed that unless the chief judge of a district concludes that a judge is not pulling his or her load, complaints to the Judicial Qualifications Commission (JQC) are not likely to be entertained. Judge Barkdull indicated that chief judges brought similar ideas to the Supreme Court to change the Rules of Judicial Administration so that judges be responsive to internal orders or requests of chief judges. If they were not, then the chief judge could bring the matter before the JQC. Judge Barkdull agreed with the axiom if "it won't write, it's not right," citing the examples of cases that were initially set to receive written opinions by the three judge panel when coming out of conference and were later PCAed when the judges concluded that the case would not write. Judge Barkdull agreed with Justice Sundberg's comments that there is a tremendous amount of peer pressure on the appellate bench to do the right thing. Justice Sundberg agreed with Judge Barkdull's assessment that if one cannot justify a written opinion then the case should receive a PCA.

The panel then took questions from the floor. An audience member noted that as an attorney and litigant, he is interested in reading decisions from the appellate court that gives reasons as to why cases are decided. He noted that a PCA provides no reason or explanation to the litigant. The attorney then opined that it was his belief that the appellate court is the single most important court because it is to render a decision as to the merit or non-merit of a trial court's decision. The attorney stated that he views the DCA role is to render a decision and further that a PCA is not a decision. He suggested that at a minimum the appellate courts owe the litigant's some clue as to why they lost.

Judge Barkdull responded by noting that the purpose of the DCA is to correct harmful judicial error. If an opinion is not written, then one must assume that the three member panel felt that: (1) the issues raised by the appellant did not rise to the level of harmful judicial error; and (2) it did not warrant an opinion that would benefit the law in Florida. Judge Barkdull noted that as a litigant (having done a great deal of appellate work prior to assuming the bench) he wanted a prompt decision. Judge Barkdull echoed Justice Sundberg's earlier comment that it is understood that the DCAs are courts of finality and stated that nothing about that implies that they need to write on every case. Judge Barkdull noted that the rules of court state that it is incumbent upon

the appellant to raise harmful judicial error. A PCA is an opinion in which three judge concurred. Thus, it is not a unilateral action. If one judge disagrees, then that judge is free to write an opinion. Justice Sundberg then responded by noting that he has been a lawyer longer than he was a judge and observed that he has done a fair amount of appellate work. He expressed the view that the DCAs simply cannot provide each litigant with an explanation as to why a case was lost on appeal. This is especially so because everyone who has lost a case at the trial court can appeal to the DCA. The DCAs cannot fulfill these aspirations, not because they are unreasonable, but rather because they are impractical. The issues of finality and prompt resolution of cases are also impacting the DCAs in this regard.

An audience member opined that a DCA panel that disposes of a case via a PCA leaves a lot to be desired from a litigant's perspective. The attorney observed that even a case citation would be better than a PCA. The attorney suggested the adoption of a rule stipulating that even though a case citation is issued, it does not grant one leave to go to the Supreme Court. The attorney suggested that from a litigant's perspective, it would make more sense to receive some explanation from the DCA so that they can understand the panel's reasoning and just as important, can provide an explanation to their client. The attorney suggested that the end result is how the public views this procedure. Most appellate attorneys are not looking to go to the Supreme Court, but they are looking for a decision. For many reasons, PCAs are not a fair way to dispose of an appellate case.

Another audience member observed that there are three reasons why judges use PCAs. One, it limits jurisdiction to the Supreme Court. Two, PCAs are necessary because of judicial workload at the appellate level. Three, the appeal does not contain meritorious issues. The speaker took exception to points two and three. The audience member indicated that one of the tasks of the committee is to quantify the extent of the PCA problem. The speaker then suggested that the panel members were making contradictory statements in this regard. The speaker noted that Justice Sundberg sees a workload problem whereas Judge Barkdull believes otherwise. Justice Grimes and Judge Owen seem to disagree about the issue as well.

The speaker asked Justice Hollenhorst about the rule in California that requires that a written opinion be issued in every case. Specifically, the speaker wished to know how California appellate judges are able to write opinions in each case with such large caseloads. Justice Hollenhorst replied by noting that appellate judges in California handle between 100-200 cases per year, depending on the district. The average opinion length is approximately 10 pages. The judges are maxed out in terms of workload, leading to growing morale problems. The trial courts are becoming more efficient, thereby putting pressure on the appellate courts. One issue under discussion in California is how to best use their law clerks. A large number of appeals in California are jurisdictional. California Rule 13 requires that lawyers identify "up front" the jurisdictional grounds for their appeal. Consequently, a lot of cases are identified early in the appellate process as to whether they qualify. Appellate rules in California also require a review

within 90 days from the date of submission. This process helps to filter out those cases that are non appealable. California is the only state that issues tentative opinions. In California, the appellate courts "front load" their case processing system. All opinions are drafted prior to oral argument. Thus, the decision-making process is based upon the briefs submitted. Oral arguments in essence become petitions for rehearing.

Ms. Daniels asked the panel their views on the pros and cons of unpublished opinions. All cases processed by the appellate courts in California receive a written opinion. Most opinions, however, are not published. Career law clerks are of great assistance in this area. Justice Hollenhorst acknowledged the ability of large law firms to access unpublished opinions but he indicated that it did not bother him too much. Unpublished opinions are typically much shorter than published opinions and they do help in terms of volume. Moreover, unpublished opinions help to communicate answers to litigants which, in Justice Hollenhorst's opinion, is what the appellate process is all about. In California, approximately 8% of all opinions are published. That is the percentage of novel issues that come before the appellate courts.

Justice Grimes stated that he would not use different criteria for writing opinions even in a high tech society with an Internet/CD Rom environment. Justice Grimes also indicated that he would not write an opinion with any less care if it were not to be published and expressed concerns about unpublished opinions that are directly contrary to other unpublished opinions. Neither unpublished opinion can be cited. Legally, the whole process is put up for grabs and has the potential for being a disaster. In Florida, litigants face the unique challenge of getting to the Supreme Court. An unpublished opinion in direct conflict with a published opinion would not get a litigant to the Supreme Court. Thus, this would not be a good solution to this problem.

An audience member challenged the notion of appellate courts creating "the appearance of justice." He indicated that neither the public nor winning parties to an appeal care whether a PCA was issued or not. Rather, it is usually the losing party that cares. The speaker suggested that law clerks may wield too much influence in the appellate process particularly through their memorandum briefs to the judges. He asked whether it might be beneficial for judges to attempt writing opinions as one way to address this perceived law clerk influence. Through this process they could discover that the law clerk was incorrect in the analysis of the law. Justice Sundberg commented on the law clerk situation by noting that at one point the Supreme Court, when discussing its own jurisdiction, considered receiving open certiorari petitions. Several other states including California and the United States Supreme Court have this provision. The only way to proceed using this type of format would be to have lots of staff (law clerks) decide which cases would receive certiorari. It creates a dilemma, in that, to properly oversee those staff attorneys (who have never been appointed or elected by anyone), the justices would have to spend an inordinate amount of time supervising them, hence leaving little time to write opinions. At that time, the Supreme Court concluded that that was no way to conduct business. Justice

Sundberg noted that it was his observation that the majority of judges he served with did not rely on bench memorandum to decide cases.

Another questioner remarked that he agreed with an earlier comment that the use of PCAs does speak to credibility for the appellate bench among practitioners of appellate law. He observed that a credibility gap exists between appellate judges and appellate practitioners. The divide comes from the time and cost in preparing an appeal from the attorney's perspective only to receive a PCA, which provides no explanation. This leaves both the attorney and client frustrated with a lack of feedback and, more importantly, foreclosed from pursuing review in the Supreme Court. PCAs also preclude rehearings en banc. In short, it is very difficult to justify to your client why you recommended going forward with the appeal if you receive no explanation from the DCA. The PCA process also impacts future clients. Lawyers must be able to help clients evaluate their chances and to determine if their clients are right on the law, and whether or not they will win. The credibility problem extends to future clients in terms of their perceptions as to whether or not the DCAs are reaching the merits of a case, particularly those decided by a PCA.

The questioner asked the panel members if they felt that additional resources should be given to the DCAs in hopes of reducing the number of PCAs. Justice Hollenhorst replied that no ameliorative effort comes without a price. Problems arise when one starts adding judges, staff, or even additional courthouses. The process of adding more staff tends to further remove judges from the decision-making process. Judge Campbell indicated that a quantitative analysis of PCAs is misleading. He opined that it did not matter how many cases came before the DCAs, if a case needed a written opinion it would receive one. Judge Barkdull noted that the two worst things he has witnessed happening to the appellate system in his lifetime are doing away with the limitation of oral argument and the proliferation of law clerks. As an appellant, if you do not get oral argument, you do not have as good a chance of getting a reversal, since you have got to convince one person on the panel to champion your cause. The latter removes from the decisional process the person who was elected or appointed to make decisions. Judge Barkdull opined that the product (written opinion) should be the work of the person who has the commission.

Another audience member wished the panel to address the use of standards and guidelines when issuing a PCA. The speaker observed that the Eleventh Circuit federal court codifies the grounds for issuance of a PCA. The speaker opined that he did not understand why anybody would oppose a rule codifying what a PCA means and making it the same for all five DCAs. The questioner wished to know if PCAs could be more meaningful and he cited correspondence to the committee from Judge Chris Altenbernd, Second DCA. Judge Altenbernd commented the use of notations attached to the PCA to provide some explanation to Bar members. The speaker suggested that such notations would be easy to execute and require little or no additional work on behalf of the court. Judge Barkdull noted that the Supreme Court has never been petitioned for

such a rule and observed that the Altenbernd proposal might work in some cases, but not necessarily all. This is especially true for cases with multiple issues on appeal. Judge Barkdull added that in many cases it would be difficult to make that process work.

Judge Cope asked Justice Hollenhorst about California's jurisdiction for the Supreme Court and the rehearing rule for appellate courts. Justice Hollenhorst indicated that the California Supreme Court has jurisdiction over any case that comes before the appellate courts on the basis of granting petitions for review. In reality, few petitions are granted. The Supreme Court reviews 150 petitions for certiorari each week. California has a statute that requires the appellate court to dispose of all issues raised on appeal. They can not dispose of issues that were not raised on appeal. Frequently, a court will find an issue that is necessary to discuss but was not raised on appeal, yet is germane to the case. A letter is typically sent to the appellant asking an amended brief to be filed with the court, which then becomes automatic grounds for rehearing. The Supreme Court can then hear the case under its discretionary review authority.

In his parting comments, Judge Owen stated the he was both empathetic and sympathetic to a number of the views expressed by audience members. Judge Owen suggested that courts need to give serious consideration to enacting a rule which provides for some explanation as to PCAs. This should not change either the quality of their work or their workload. Judge Barkdull asked Justice Grimes a question about the Article V Commission, specifically, whether the commission made a recommendation that a person who receives an adverse PCA can request the court to point out if there was conflict with another DCA. Justice Grimes indicated that he did not recall anyone filing a petition with the Supreme Court asking for same. Judge Campbell then read the proposed Article V recommendation.

Tom Elligett asked Justice Hollenhorst about the 150 petitions for certiorari that are reviewed each week. He wished to know whether law clerks were part of the review process. Justice Hollenhorst indicated that there were teams of law clerks who reviewed the petitions. Judge Cope then commented on California's post conviction relief process. In California such cases come before the appellate court on a petition for habeas corpus. Those petitions can be denied if warranted. However, the court writes an opinion in each instance. Justice Hollenhorst expressed his views on tentative opinions. He estimated that 50-60% of these lawyers know that they are going to lose and submit their request for oral argument based on these tentative opinions. They recognize that there is no way they will be granted oral argument. Mr. Onek replied by noting that lawyers want to learn. If there is no opinion, then the lawyers are not learning. Mr. Onek opined that if the appellate courts reversed trial court decisions without explanation the trial court judges would not tolerate it. Mr. Onek stated that trial lawyers want the same explanation. Trial lawyers want to learn, they want to see what error they made (e.g., preservation of error). Mr. Onek stated that the body of jurisprudence is not advanced by the use of PCAs.

Justice Grimes responded that most lawyers do not believe that they are filing frivolous appeals; however, many are mistaken. Many lawyers know they are filing frivolous appeals, yet they do so anyway. Justice Grimes indicated that this is more understandable in criminal matters than in civil and compared such vociferous attacks on the use of PCAs by the Bar with putting the cart before the horse. He noted that through this effort it appears that we are attempting to police the courts before we police the Bar. Justice Grimes asked how should the DCAs handle frivolous appeals without the use of PCAs.

Justice Hollenhorst commented on an earlier remark about the non-communicative nature of PCAs. Even in California, where the appellate courts are required to write opinions in all cases, judges are still criticized by the Bar. There exists a strong belief among lawyers that any loss is not based on the merits. Justice Hollenhorst stated that he has been an appellate judge for ten years. Over the last several years, he has stopped using the phrase "the appeal lacked merit" in his written opinions. Merit-less appeals are filed in California just as they are in Florida, however, most lawyers, are trying to make a decent appellate argument.

Tom Elligett asked Justice Hollenhorst about the issuance of tentative opinions, specifically, once one is issued and the parties appear for oral argument, what are the percentage of tentative opinions that are reversed. Justice Hollenhorst referred Mr. Elligett to his law review article. Nancy Daniels asked Justice Hollenhorst how California handles the problem of conflicting, unpublished opinions. Justice Hollenhorst stated that everyone benefits from the systematic and reasoned development of the law. The law should not be developed on the basis of exception. This creates a bizarre application of the law which can then create bad law for the state. Justice Hollenhorst said that the axiom "it won't write, if it's not right" applies to unpublished opinions as well.

Another audience member stated that he would be happy with either a three to four sentence explanation or a check-off system. This lawyer indicated that he would like to know why he lost. Having received hundreds of PCAs, he argued that anything would be better than a PCA. He cited some cases which originally received a PCA at the appellate level but were subsequently reversed by the Supreme Court. The speaker noted that the extensive use of PCAs by the DCAs gives a bad appearance to the appellate courts. That concluded the panel discussion.

The committee discussed the need for the continuation of PCA data from each DCA clerk's office. The committee agreed to extend the data collection period through June 1999, which will provide for one year's worth of data. The committee discussed their next meeting date, which would likely be in March, in Tallahassee. The meeting adjourned at 4:45 p.m.

Per Curiam Affirmed Committee Meeting Four
Supreme Court Building
Tallahassee, Florida
March 5, 1999

Minutes

Members Present:

Judge Monterey Campbell, III, Chair
Judge Gerald B. Cope, Jr.
Judge Peter Webster
Judge John Antoon, II
Mr. Bernie McCabe
Mr. Brian Onek
Mr. Raymond Thomas Elligett
Mr. Robert Krauss
Ms. Nancy Daniels

Members Absent:

Judge Barry J. Stone

Guests Present:

Ms. Peggy Horvath, Chief of Strategic Planning, Office of the State Courts Administrator
Mr. Tom Hall, Senior Staff Attorney, First District Court of Appeal
Mr. Clyde Conrad, Senior Information Systems Consultant,
Office of the State Courts Administrator

Staff Present:

Mr. Gregory Youchock
Mr. Richard Cox

Judge Campbell began the meeting by reviewing the January 20 panel discussion held in Miami at the Florida Bar's Mid-Year meeting. Judge Campbell conveyed comments made by

Judge Barkdull (a panel participant) to him regarding the fact that the Dade County Appellate Bar is very active. Judge Barkdull interpreted the small turnout at the panel discussion as an indication that there is disinterest, on behalf of the Bar, to the use of Per Curiam Affirmed (PCA) decisions by the District Courts of Appeal (DCA). Ms. Daniels observed that she did not necessarily agree with Judge Barkdull's observation given the large amount of correspondence to the committee criticizing PCAs and further noted, on another matter, that she needed more information on unpublished opinions.

Judge Webster indicated that he was inclined to agree with Judge Barkdull's observation and added that he was amazed at the lack of attendance. Judge Webster noted that while there is a small minority of lawyers who find PCAs distasteful, they are also likely to be lawyers who do not regularly practice appellate law. Judge Webster stated that he did not believe that most appellate practitioners are bothered by the use of PCAs. With regards to correspondence received by the committee, Judge Webster observed that considering the total number of attorneys practicing appellate law in Florida, the number of letters was not that great.

Judge Webster stated that the public defender offices are unique because they do most of the criminal appellate work in the state. Moreover, their problem is not common to everyone. One key public defender problem is affirmances without opinions when an issue is not preserved at trial. Judge Webster opined that the public defender situation is a distinct and legitimate problem separate from the those identified in the correspondence and could perhaps be resolved without having to upset the whole system.

As a private lawyer, Tom Elligett remarked that most of the criticism of PCAs that he hears is from lawyers who do one or two appeals per year. According to Mr. Elligett, many lawyers profess not to understand why their appeals received a PCA. In response to this perceived problem, he and Mr. Krauss developed a checklist for committee review. The checklist would provide the lawyer with a brief explanation and provide minimal work to the court. Mr. Elligett mentioned that some legitimate concerns have been raised; he cited a recent Fourth DCA case which originally received a PCA, but then on a motion for rehearing en banc received a full written opinion by the court.

Mr. Elligett reviewed comments made by Justice Hollenhorst of California (also a member of the Miami panel) in which he indicated that all cases in California receive a written opinion. Mr. Elligett expressed concern that under the California scenario much of the work and discretion is delegated to law clerks with judges only providing oversight. Although Mr. Elligett noted that Florida has many excellent law clerks, he would prefer to have his case reviewed and decided by a judge.

Judge Cope, while acknowledging his respect for Judge Barkdull, nonetheless disagreed with his observation that a lack of Bar attendance at the January 20 panel discussion indicated that all is well with the use of PCAs. Attorneys are busy and scheduling time plays a large role in whether or not they may be able to attend a meeting. Judge Cope remarked that he hoped that the work of the committee is not dictated by opinion polls or attendance at Bar meetings. Rather, Judge Cope noted that reasoned arguments have been brought to the committee' s attention and that they should be addressed accordingly.

Judge Cope felt that the panel discussion was very helpful primarily because it gave rise to Judge Owen's letter (also a panel participant). Judge Cope indicated that he will recommend that the committee adopt the Owen letter as its position. The panel discussion also illustrated the polar opposites where California judges are mandated to write in every case and Florida judges write only when the case sets a precedent. Judge Cope expressed his belief that the Owen letter is in the middle of these extremes and is essentially the American Bar Association (ABA) standard on the issuing of written opinions.

In essence, the ABA standard says that courts are a publicly funded branch of government, they are in the business of issuing "reasoned" decisions, and that litigants on appeals as a matters of right should receive an explanation as to how and why their case was decided by the court. In essence, the standard provides that a statement of reason should be provided by the court in all appeals as a matter of right. The majority view throughout the country is the ABA standard, which is not the standard currently used in Florida. Florida's standard is that judges write only for precedential reasons. Judge Cope reiterated that in his opinion, the most positive result from the panel discussion was Judge Owen's letter.

Mr. McCabe suggested that from the perspective of a trial lawyer, Judge Cope's argument that an appeal as a matter of right which leads to a parties' right to good reasons seems inconsistent with common sense. Appeals as a matter of right means that attorneys can appeal whether they have any reason to or not. However, lawyers and judges are constrained to find a basis for an appeal. In response, Judge Cope noted that he meant to say 'fully-briefed' appeals rather than Anders' briefs or similar appeals. Mr. McCabe noted that many appeals are filed knowing that there is not a hint of reversible error. Further, much of the correspondence to the committee suggests that the attorney contends that precedent was wrong and they want to change

the law even though the law was clearly against them. Even under that circumstance there is no reason to write an opinion, according to Mr. McCabe.

Judge Antoon stated that when we look at Florida's judiciary, whether within this context or any other, we must look at the overall quality that exists. Judge Antoon opined that no other state has the quality of judges as Florida. The use of District Courts of Appeals (DCA) as courts of finality was contemplated by those who established them. By design, DCAs are not designed to provide further review in all cases.

Mr. Onek noted that like Mr. McCabe he is a trial lawyer and his perspective derives from the fact that there are not that many trials. Consequently, what the trial lawyer is looking for from an appellate court is a reasoned explanation as to why they are wrong with regards to legitimate issues. For example, either an evidentiary ruling or some other issue has been appealed and the attorney needs to know it has no merit. Lawyers are asking for opinions from the court on issues raised during the trial. Mr. Onek opined that judges are being put on the spot during a trial and they do not have time to research many issues prior to making a ruling. Mr. Onek added that many times, trial judges are making the wrong decision. Thus, lawyers are asking for opinions on trial issues, not Anders briefs or 3.850 issues. Mr. Onek suggested that judges should write on every issue that might result in a reversal.

Judge Webster suggested that one of the problems that trial lawyers have is that they do not understand the concept of standard of review. Ninety percent of the issues raised on appeal relate to the abuse of discretion standard. The test in Florida for abuse of discretion is, whether any reasonable person could have reached the result the trial judge reached. If so, then it is not an abuse of discretion. It is not a question of whether one disagrees with the trial judge; hence, it is a very onerous burden to carry. Therefore, many appellate judges are of the opinion that there is little to be gained by the appellate court writing an opinion that states that the trial court did not abuse its discretion. Further, evidentiary issues involve abuse of discretion issues most of the time. Judge Webster indicated that most evidentiary questions are section 90.403, Florida Statutes, issues, namely, does the prejudice of allowing it in outweigh its relevance. Mr. Onek noted that trial judges are making evidentiary decisions during trial that he believes are incorrect. Therefore, he is looking to the appellate court to provide guidance and explanation as to the correctness of the decisions.

Judge Cope again referred the committee to Judge Owen's letter and the ABA standard which states that, the extent to which an appellate court explains its reasons is discretionary. He observed that the flaw in the California system is that they write on every issue resulting in an average opinion length of ten pages. What the ABA standard and Judge Owen are saying is, that if the case is disposed of by an existing precedent can be affirmed on that authority. How much to say is then left to the appellate judge's discretion when stating the grounds on which the ruling is made. Judge Owen is not suggesting the California system.

Judge Campbell indicated that he did not find a lot to disagree with in Judge Owen's letter. However, he does have concerns about the committee sending a message to one portion of Florida's judiciary by suggesting that the manner in which they are doing their job is suspect. Judge Campbell indicated that he is absolutely convinced that his colleagues on the appellate bench and all of the appellate judges he has had the privilege of knowing over the last 20 years are striving conscientiously to do the job they were sworn to do.

Judge Campbell reviewed a portion of the Owen letter suggesting that appellate judges, litigants, and their counsel have a legitimate need for some insight into the court's reasoning. Judges should be encouraged, without being mandated, to strive to meet that need. Judge Campbell opined that Florida's appellate judges are doing so now, where the need has been demonstrated. Judge Campbell reminded the committee that sometimes we forget that there is a burden on the appellant to demonstrate reversible error. Moreover, there is a presumption of correctness in relation to action taken by the trial court. Judge Campbell indicated that he was concerned that any committee recommendations not impugn the judges serving on DCAs.

Ms. Daniels stated that she believes that most lawyers believe that the DCA judges are acting in good faith and that the use of PCAs is a workload issue. Ms. Daniels, however, echoed Judge Cope's earlier argument that the litigants deserve some explanation as to the outcome of their case. Ms. Daniels indicated that she is referring to fully briefed appeals. In addition, the total number of criminal filings statewide dwarfs the number of appeals. She suggested that a non-published opinion could help the litigant to understand the court's reasoning. They would not further the law nor set precedent. Ms. Daniels observed that she selected a recent volume of the reporter for review and found that of the 500-600 cases included, approximately 70 opinions were non-precedential in their context.

Judge Webster noted that it is not the predominate view to write opinions in every case at the federal level although the ABA standard suggests otherwise for state appellate courts. Judge Webster observed that nationally, there are several prominent federal appellate judges who are of the view that there is only one proper way to dispose of 90% of cases on appeal, that is, via affirmances without opinion.

Judge Webster agreed that Florida could produce non-published opinions, but not without incurring the attendant problems that California is experiencing. However, the other issue is expense, specifically, the expense of reducing the number of appropriate appeals of merit per judge. Appellate judges cannot reasonably be expected to process 250 cases each per year if they are expected to write an opinion in every case. The necessary result would be law clerks writing opinions. Lastly, Judge Webster noted that Judge Patricia Wald of the District of Columbia Circuit believes that the average federal judge can not write more than 60 opinions in a year, and that is with three law clerks. Judge Webster speculated that the average state appellate judge in

Florida writes between 80-100 opinions a year. He also noted that some appellate judges in Florida make more use of their law clerks than others.

Judge Antoon observed that he has witnessed an increase in the number of 'junk' (e.g., one paragraph or citation) opinions coming out of the DCAs. He believes that the increase may be in response to the work of this committee. Some judges have told Judge Antoon that the writing of brief opinions will satisfy the critics of PCAs. Judge Antoon indicated that in select instances, life or mandatory sentences, he will write a brief opinion so that the appellant will have a chance at further review. Judge Antoon added that it is difficult for him to understand the criticism of PCAs in fully briefed cases where oral argument has occurred. The issues are clearly delineated and discussed and there should be an understanding of how the case was resolved, even without an opinion. Judge Antoon stated that it is difficult to understand those who say they need to know the court's reasoning when they have a brief, an answer brief, and a reply brief at their disposal.

Mr. Onek responded by paraphrasing those letters received by the committee where the attorneys suggest that they need a written opinion because they want to keep learning. Judge Antoon replied that today's appellate lawyer is inundated with information on a weekly basis, so much so, that it is difficult to imagine how one could read it all. Judge Antoon stated that he believes that one result of all this information overload is a loss of gifted appellate lawyers who are leaving the field because they cannot keep pace with the endless stream of information.

Judge Campbell remarked that writing opinions in cases where the defendant gets a life sentence has been a struggle for him. For a long time as a new appellate judge he took the position that he would write an opinion in all trials where a life sentence is imposed. However, over time, he realized that his position was unfair to those defendants who got a sentence other than a life sentence but who nonetheless could be facing 20 years or so in state prison. Further, he also concluded that often times life sentence cases did not deserve an opinion. Judge Campbell also noted that intermediate appellate courts have a special problem when three judge panels write 'throw away' opinions. Problems may be created for the remainder of the court, possibly resulting in less collegiality.

Judge Cope opined that a decision to write an opinion or not is often left to the initiating judge. He again referred to the Owen letter where Judge Owen discusses including a 'statement of reason' where appropriate as an aspirational goal for judges. A discussion of uniformity of opinions across DCAs followed. The diversity of legal cultures among DCAs was recognized as a good thing and not something that anyone would want to see diminished. As an example, the committee discussed the variation in the granting of oral argument from court to court.

Peggy Horvath provided the committee with a review of the work of the Court of Appeals Committee on Performance and Accountability. Ms. Horvath cited Article III, Section 19 of the

Florida Constitution which mandates that the judicial branch have a quality management and accountability program. In response, the Supreme Court established the above-named committee, which has a judge from each DCA, two attorneys and two trial judges. The focus of the committee work has been to answer three questions: (1) for what are the DCAs accountable; (2) to whom are they accountable; and (3) how can indicators or performance measurements be established, using both quantitative and qualitative information. Presently, Florida is the only state engaged in this effort.

The committee has nearly completed a mission statement for the DCAs. The committee is trying to establish performance indicators relative to DCA jurisdiction, namely the way in which cases are processed and how decisions are made. The committee believes that the district courts are accountable to the public, the Supreme Court, and to the legislature, the latter in relation to the requirement of performance-based budgeting. The committee has spent considerable time discussing judicial branch independence, concluding that for those matters that fall under the constitutional purview and are directly wed to the mission of the appellate courts the DCAs are only accountable to the judicial branch. The only matters for which the DCAs should be accountable to the legislature under performance-based budgeting are those known as programs. However, most of what the DCAs do does not fall under the definition of a program.

The committee's decisions are based largely on data supplied to the Office of the State Courts Administrator by each DCA clerk. Florida's data has been compared to that of other states; preliminary observations are that Florida's appellate courts compare favorably. The committee is reviewing the current workload standard used in the certification process for new judgeships. The committee is also developing a standard set of definitions for a case classification model that identifies key events in appellate cases. This will hopefully establish uniformity in reporting across DCAs. The DCA clerks have been actively involved in this process. The new case management system will be able to produce management reports using this data. A brief discussion of weighted caseload occurred. Ms. Horvath and Mr. Conrad reviewed a set of appellate data extracted from the case management system, which data, had been distributed to the committee.

Tom Hall provided the committee with an overview of the data collection problems that exist with the former case management system. The data varies considerably by DCA under the former case management system, hampering any comparisons across DCAs. Tom Hall then began a discussion of the new case classification system. Currently, there is great disparity between DCAs in terms of how cases are classified. The DCA clerks and the 'set-up' clerks (those who initially classify cases) have been meeting regularly to establish a new classification system. The new system is Windows-based with pull-down menu screens. The new case management system is capable of producing reports specific to a type of case, agency, or other qualifying feature. For example, all administrative cases filed by a particular agency can be obtained, as can the number of PCAs by casetype. However, disposition categories are still to be

refined. For example, the committee has not reached a decision as to whether judgment and sentence should be combined or separated. A key characteristic of the new system is that cases are forced into certain categories upon filing.

Clyde Conrad provided the committee with an overview of the new appellate case management system. Concomitant with the installation and testing of the new system, there has been a large effort to 'clean' the existing data base. The new system will have the capability to run numerous types of reports. By forcing the set-up clerk to use only certain designated categories, the new system will be able to generate uniform data across DCAs, which is important for comparison purposes. Currently, most reports produced from the old system are done manually. The installation is occurring incrementally. All DCAs are expected to be online by October 1999. The committee discussed the differences in data collection across states for intermediate courts of appeal and how those differences make it difficult to compare jurisdictions.

The committee reviewed the appellate data included in the agenda packet. It was noted that the table using historical PCA data needed to be amended to include criminal PCAs. Judge Cope indicated that by analyzing the historical data the committee is attempting to determine if there is any relationship between the growth in appellate filings and criminal PCAs. The committee discussed the apparent increase in post-conviction matters over the last several years, noting that the number of civil PCAs seemed high. Judge Webster discussed the impact of mediation on the disposition of civil cases at both the trial and appellate level.

Because of their similarities, the committee combined the Owen letter, Cope proposal, and Elligett and Krause proposal into one discussion. Tom Elligett observed that the Owen letter lends itself to a "check-list" type format. Mr. Elligett then provided the committee with some examples of how it might work. One issue was whether or not to flood the reporters with all of these opinions. Judge Antoon opined that one or two paragraph citation PCAs do more damage to the dignity of the court then does a check-list for PCAs. Mr. Krauss suggested that any change that he and Mr. Elligett were recommending would essentially be a change to an existing rule. Under the rule, the court could cite to the relevant provision for its reason when disposing of a case via a PCA. Mr. Elligett indicated that the check-list would be available to the parties upon request but that the information would not be published. Judge Cope observed that this proposal would be the functional equivalent of a citation PCA under the current system.

Mr. McCabe asked whether the purpose of a check-list PCA is for lawyers to be able to tell their clients why they lost, or if it will be used as a mechanism for further review in those cases with meritorious issues. If it is the latter, Mr. McCabe suggested that it could be accomplished through the rehearing process, which is essentially the Article V Task Force recommendation included within the Cope proposal. The committee discussed whether or not the appellate court has a duty to tell the lawyers why they lost. Judge Webster suggested that a simple solution

would be to amend the motion for rehearing rule to allow the motion to include a statement that the attorney believes there is a meritorious argument worthy of rehearing and the attorney requests an opinion. Judge Cope opined that the importance of placing this change in the rule is to get the lawyers to specifically cite the reason for the request for an opinion. Mr. Krauss noted that one of the problems with the current rehearing rule is its ambiguity; attorneys are hesitant to use it because they are uncertain as to what might have been overlooked by the court. The committee discussed the potential abuse of motions for rehearing. Judge Webster observed that there is probably more abuse on the civil side. The committee agreed that they had consensus for incorporating the Article V Task Force recommendation in the motion for rehearing rule.

The committee discussed the potential problems with a three judge panel using a check-list. Essentially, one of the key problems is the many different reasons why members of the panel might feel the decision should be affirmed. A lack of unanimity by the panel could lead to a "slippery slope." Mr. Krauss outlined the reasons militating against changing the current PCA system. He indicated that the only reason that he advocates the potential use of a check-list is to maintain public trust and confidence in the system. Judge Campbell noted that most information framing the issue of public trust and confidence comes from the media. Judge Campbell stated that the Judicial Management Council (JMC) has had similar conversations recently about this issue and is developing a strategy to effect public trust and confidence in the branch. Judge Campbell indicated that opinions from the DCAs will not shape public opinion.

The committee discussed the causes undermining public trust and confidence in the judicial branch. Mr. Elligett offered an example as to why the check-list might be important, which is that it demonstrates to the litigants that the matter has been considered. This would preclude attorneys from then stating that their case or argument was not considered by the panel. Ms. Daniels reviewed quotes from correspondence received by the committee from lawyers throughout the state. Ms. Daniels and Mr. Elligett discussed the mechanics of how a check-list might be employed. Ms. Daniels cautioned the committee that she did not want to lose any constitutional protections that are currently in effect.

The committee reiterated that there was consensus on the adopting the Article V Task Force recommendation which would permit requesting an opinion from the DCA on a motion for rehearing, which could then be the basis for further review by the Supreme Court. The committee also discussed the additional burden of including a request for a certified question. Judge Webster indicated that one way to address this problem would be to amend the rehearing rule to deal with conflict requests. Judge Campbell asked Judge Webster, Ms. Daniels, and Mr. Elligett to draft a proposal addressing the rehearing rule and the wording of the Article V Task Force recommendation for consideration at the committee's June meeting. The committee discussed the use of sanctions against lawyers who file frivolous motions for rehearing.

Judge Cope provided the committee a summary of his thoughts on the Owen letter. In principle, he believes that adopting some sort of a summary affirmance rule that would enumerate repetitive situations for affirmance would be a good idea, thus disagreeing with point five of the Owen letter. Judge Cope noted that the publish do not publish issue engenders a lot of controversy. Each system has some imperfection. The check-list issue should be treated like a citation PCA, and that type of an affirmance should not be published. In essence, what the Owen letter is describing in points one through four is the ABA standard. In fully briefed cases litigants are entitled to some statement of reasons from the court, the extent of which should be left discretionary with the judge. This should not be a mandate, rather it should be aspirational. Judge Cope concluded that the committee should adopt the Owen letter through the examples included within point four.

Judge Campbell read remarks from Judge Stone recommending the use of a check-list to the DCA judges. Judge Stone believes that rather than recommending that there be a requirement to attach a check-off list, we should simply recommend supplying a list of the alternative provisions (that would have appeared in the check-off list) to all DCA judges with a suggestion that they may want to consider inserting one or more of the appropriate clauses in lieu of simply stating "affirmed." Judge Campbell suggested that one way to handle this issue would be to dedicate one hour at the beginning of each DCA Educational Conference devoted to this subject. This would allow for a discussion among the judges on how best to implement these suggestions.

Mr. McCabe suggested amending the appellate rules to provide for those circumstances where a PCA is appropriate. The court could then cite to the rule when issuing a PCA. The committee discussed the appropriate level of response by the court to the litigants, using the Owen letter as a guide. The committee then discussed the awkwardness of PCAs with dissenting opinions and how it may affect the collegiality of the court. Judge Antoon cautioned the committee about the negative consequences of 'junk' opinions on lawyers and especially the law.

The committee discussed some of the disposition practices of appellate courts in states other than Florida. Mr. McCabe restated his belief that the check-list is a slippery slope and that the committee should only advance the Article V Task Force recommendation. The committee then discussed the role of the DCA in alerting counsel to unpreserved errors.

Judge Campbell asked that any committee member with a specific proposal other than the Article V issue put it in a form for consideration by the committee at the June 23 meeting of the committee. The committee will address and dispose of each at that time. Judge Cope expressed his hope that some form of aspirational statement would be part of the committee's final product. He asked the committee for their help in carving out common ground so that a consensus might be reached.

The next meeting of the committee will be Wednesday morning, June 23, 1999, at the Boca Raton Resort and Club, in conjunction with The Florida Bar's annual meeting. Judge Campbell expressed his hope that each member of the committee would get to vote on the committee's final recommendations, whether present or not.

The meeting adjourned at 12:30 p.m.

Per Curiam Affirmed Committee Meeting Five
Boca Raton Resort and Club
Veranda III Meeting Room
Boca Raton, Florida
10:00 am-2:00 PM
June 23, 1999

Minutes

Members Present:

Judge Monterey Campbell, III, Chair
Judge Gerald B. Cope, Jr.
Judge Peter Webster
Judge Barry Stone
Mr. Bernie McCabe
Ms. Nancy Daniels
Mr. Brian Onek
Mr. Raymond Thomas Elligett
Mr. Robert Krauss

Members Absent:

Judge John Antoon, II

Guests:

Judge James C. Dauksch, Jr., Fifth DCA
Judge Charles M. Harris, Fifth DCA

Staff:

Mr. Gregory Youchock

Judge Campbell began the meeting by welcoming Judge Harris and Judge Dauksch. Judge Campbell read the committee charge to help frame the meeting's discussion. The committee then began discussion of the subcommittee proposal amending rule 9.330(a), Florida Rule of Appellate Procedure. The subcommittee proposal closely mirrors a similar proposal advocated by the1995 Article V Task Force. Judge Webster, presenting the proposal by referring the committee to the agenda packet, noted that the proposed language would follow the last sentence of current rule 9.330(a).

Judge Webster then addressed Judge Cope's proposed amendments to the subcommittee proposal. Judge Webster noted that he saw little difference between the words "rehear" or "clarify" under the Cope proposal and had no problem with that aspect of the Cope amendment, other than to note that with a PCA there is nothing to clarify. Judge Webster expressed concern regarding the remaining part of the Cope amendment which would permit a rehearing where a written opinion is issued. Judge Webster observed that this aspect of the Cope proposal exceeds the scope of the committee's charge. Moreover, he indicated that litigants are not reluctant to engage in this process at present. Lastly, Judge Webster argued that the proposed statement that the requesting lawyer is required to sign does not make sense where a written opinion already exists.

Judge Campbell and Judge Webster discussed a modification to the subcommittee proposal striking the words "*rehear the case and*" currently found on line three, paragraph one. Judge Webster noted that since the subcommittee proposal will be located in the rehearing rule, there is no reason to say "rehear the case." Judge Webster indicated that this would simplify the proposal and eliminate the semantic conflict of using the term *rehear*. The committee then discussed the merits and implications of the proposal. Judge Stone noted that there appears to be some differences among the DCAs as to whether a motion for rehearing may be filed once a PCA has been issued. Judge Stone further observed that there appears to be a lack of clarity as to the ethics of requesting a motion for rehearing upon receiving a PCA. He indicated that it was his opinion that it is appropriate for an attorney to file a motion for rehearing upon receiving a PCA and that the court will rule on the motion.

Judge Webster observed that the subcommittee proposal is drafted to codify Recommendation # 15 of the 1995 Article V Task Force. Judge Webster noted that the Article V recommendation was drafted to narrow the permissible scope of rehearing requests following the receipt of a PCA. The attorney is required to state his or her good faith belief as to why the Supreme Court would review the appeal. Judge Webster indicated that this is a tacit admonition to the Bar that it is not good appellate practice to file motions for rehearing as a routine practice.

He stated that the First DCA routinely entertains these types of motions and observed that there is merit to the proposition that the DCA judges may have missed an argument. He further observed that as a lawyer, if you believe that there is basis for Supreme Court review, you are obligated to get an opinion by telling the district court why it missed that argument. Judge Webster indicated that sometimes the court will miss an argument and observed that the subcommittee proposal will have the beneficial effect of forcing the attorney to focus on that issue.

Ms. Daniels stated that she did not want the subcommittee proposal to limit a litigant's ability to file a motion for rehearing. Judge Campbell reviewed the Article V recommendation for the committee. Part of the concern is that there are some requests for written opinions simply on the basis that the decision was a PCA, an improper basis for a rehearing. Judge Webster observed that the subcommittee proposal as presented does not preclude one from filing a motion for rehearing based on other reasons (e.g., the court was wrong). He reviewed the intent of rule 9.330(a) for the committee, which he described as making an attorney state with particularity the points of law or fact that the court has overlooked or misapprehended.

Judge Webster and Mr. Onek discussed the mechanics of how the rule would be interpreted and applied. Ms. Daniels noted that there are a number of reasons why criminal, as well as civil, practitioners make motions for rehearing to get a written opinion. In criminal practice, it is important to know if the basis of the decision was harmless error or failure to preserve. Such information is important when advising criminal clients on post-conviction relief. Ms. Daniels noted that this argument was an impetus of this study (i.e., the problem in criminal cases of not knowing exactly why the error would not result in a reversal).

Judge Cope noted that where the subcommittee proposal is beneficial is in those cases where there is a reasoned basis for stating that there is a conflict, since it would provide a basis for Supreme Court review. Judge Cope opined that in cases that deserve Supreme Court review, the DCAs are obligated to write an opinion; however, appellate judges have differing perspectives on this issue. Judge Cope observed that the intent of the Article V recommendation was to provide a vehicle for codifying what current case law already provides. In addition, the subcommittee proposal and Article V recommendation are explicit and precise in their argument as to why there is a need for Supreme Court review. The option still rests with the district court as to whether or not it will write an opinion.

Mr. Elligett suggested the possibility of amending the subcommittee proposal to address instances of intra-district conflict. Judge Campbell noted that the Second DCA addresses those types of situations with motions for rehearing en banc. Mr. Elligett asked if doing something in the affirmative implies something in the negative. He asked if that would be the impression that many might have of the subcommittee proposal. Judge Stone, noting that the Fourth DCA gets motions for rehearing for many different reasons, commented that he does not see any difference

between current practice and the subcommittee proposal. Judge Campbell observed that a big criticism of PCAs is that they bar further review. The intent of the Article V recommendation and the subcommittee proposal is to address this criticism.

The committee voted unanimously to adopt the subcommittee proposal as amended, striking the words *rehear the case and*, found on line three, paragraph one. The committee then voted "in concept" to amend the Comment section of the subcommittee proposal. The proposed conceptual amendment would be added to the last sentence of the Comment section and would generally read that the amendment is not intended to restrict the opportunity to seek rehearing or clarification from a per curiam affirmance for other reasons. The committee voted to pass the proposal *in concept* and will refine the exact language or comment at a later date.

The committee then reviewed the Krauss/Elligett proposal listing categories justifying a PCA. Mr. Krauss suggested to the committee that they discuss the proposal as amended by Judge Cope. Mr. Elligett provided the committee with background as to the rationale for the proposal; namely, that it would be representative of a "typical" case. Judge Webster asked if the committee should first discuss this issue "in concept." Judge Webster noted that he had some concerns about the Krauss/Elligett proposal. Judge Webster observed that the Krauss/Elligett proposal is non-binding. Therefore, he was uncertain about its impact on the DCAs. He noted that Judge Cope's amendments to the Krauss/Elligett proposal improved it somewhat, yet still contained inconsistent language. Judge Webster opined that if the committee was going to advance this issue "in concept" that it would be better off adopting a rule similar to that of the Federal Fifth Circuit, Rule 47.6, Affirmance Without Opinion.

Judge Webster read the Fifth Circuit's rule to the committee. The rule states as follows: "The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of the matter submitted for decision: (1) a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such a case, the court may, in its discretion, enter either of the following orders: "Affirmed, see Fifth Circuit Rule 47.6" or "Enforced, see Fifth Circuit Rule 47.6"

Judge Webster noted that this rule covers all legitimate situations in which the DCAs presently issue PCAs. Judge Stone asked about the possibility of adding an "abuse of discretion" category (i.e., there was no abuse of discretion by the trial court). Judge Webster observed that a no abuse of discretion finding is probably covered under the no reversible error section of the rule. This category would apply to post-conviction relief matters as well. Ms. Daniels observed that the Fifth Circuit rule does not clarify that there is a preservation issue, a point with which Judge Webster agreed.

Judge Stone stated that he was opposed generally to the concept of making the Krauss/Elligett proposal a rule of judicial administration. Judge Stone observed that this movement is new to the appellate courts in Florida. Judge Stone noted that any rule should acknowledge that an opinion can be issued without a written opinion. Then, an expanded list similar to that of the Krauss/Elligett proposal should be provided with the attention of appellate judges focused on those matters as legitimate grounds for issuing a PCA. Judge Stone opined that there is no need to have a specific rule in this matter and to do so would engender litigation for violation of the rule. The main purpose should be for appellate judges to understand the circumstances under which a PCA is appropriate and inappropriate. He noted that this can be accomplished with less draconian measures.

Judge Cope and Judge Webster discussed their interpretation of the Fifth Circuit's rule, specifically, how the Fifth Circuit cites its own rule when issuing a PCA. Judge Webster believes that the Fifth Circuit rule is cited as "Affirmed see Fifth Circuit Rule 47.6." Judge Cope discussed the merits of appellate judges being able to check a subcategory of rule when issuing a PCA as provided for in the Krauss/Elligett proposal. The committee discussed the merits of the Krauss/Elligett proposal. Judge Webster argued that he was not convinced that the Krauss/Elligett proposal would preclude a party from seeking Supreme Court review. He further observed that if he is correct, that there could be a dramatic increase in review petitions submitted to the Supreme Court. Judge Webster noted that any rule that might increase the workload for the Supreme Court would likely not be adopted.

The committee further discussed the merits of the Krauss/Elligett proposal, specifically, how it might impact post-conviction relief motions (3.850). Judge Cope reviewed the state's arguments in every criminal case as appellee, to wit, that: (1) there was no error; (2) if there was an error, it was not preserved; and (3) if it was preserved and it was an error, it is harmless error. With regards to a criminal PCA, Judge Cope opined that as a litigant, since you know the state made these arguments and you do not know the basis of the ruling, inevitably a 3.850 motion will be filed. Under the checklist format, if the court identifies the reason for the PCA, it is unlikely that the 3.850 motion will further advance the case. Judge Webster opined that what this process does is ask the court to provide an advisory opinion on a direct appeal. He argued that there are many appellate judges in Florida who believe strongly that the DCAs should not engage in that practice. Ms. Daniels noted that public defenders simply want to know with which argument the appellate court agreed.

Judge Harris stated that DCA judges know why they are issuing a PCA in a case and asked why they should mind identifying the reason. Judge Campbell noted that panel members do not always agree why a case should receive a PCA. One judge may feel that the issue is not preserved, another that the error is harmless. Often, there is a split within the panel and deciding which issue to cite could be problematical. Judge Webster noted that the Fifth Circuit rule would solve that problem because the court cites to the rule.

Judge Stone suggested that before any rule of judicial administration is voted on by the committee, committee members should decide whether they wish for the concept to move forward as a rule or merely be an educational matter. Mr. Onek asked whether a checklist format would assist an attorney in drafting a motion for rehearing. The attorney would know where the court focused its review and could thus argue accordingly. This would give the litigator some knowledge of what the appellate courts are thinking.

Mr. Elligett reminded the committee that one of the reasons that this proposal was drafted was for the appellate courts to better explain their reasons to the public. The checklist is an explanatory tool for non-judges. Moreover, it would help attorneys explain to their clients the court's reasoning if they receive a PCA. Judge Campbell read from Judge Owen's letter to the committee where he notes that "the use of checklists should be avoided. In my opinion the use of such is not befitting an appellate court's dignity and the depreciative effect of their use would totally offset any value they might have."

Ms. Daniels observed that there is a strong feeling among the appellate bar that DCAs should be writing more opinions. She further noted that a rule of judicial administration would send a good message to the bar. Judge Campbell noted that he is very reluctant to impose a rule of judicial administration that singles out one element of Florida's judiciary and tells them how to do their job. Mr. McCabe indicated that he shares Judge Campbell's concern that unless there is some constitutional or statutory preclusion of Supreme Court review, this proposed rule of judicial administration could be problematical by significantly increasing certiorari petitions to the Supreme Court. Mr. McCabe added that the checklist will not deter litigants from seeking certiorari review. Mr. McCabe indicated that ideally he would like to see any rule or proposal contain the following elements: the demeaning aspect of the checklist omitted, preclusion of Supreme Court review, and more information provided to litigants. Mr. Krauss suggested that one way to achieve this is to conform the Krauss/Elligett proposal to the Fifth Circuit's rule.

Judge Webster then asked if the committee should determine whether there is a need for any type of rule such as the one being discussed. Judge Stone agreed and cited Justice Hollenhorst's example in California where he has to write a lot of unnecessary opinions, which then cause him to hire more law clerks to address the increase in workload. The end result is that he, in essence, becomes a manager of law clerks and not a judge. Judge Stone suggested that he doubts that the Florida Bar would want DCA judges to become managers of law clerks.

Mr. Onek asked if it would be possible to get a separate citation attached to the PCA citing the appropriate rule pertaining to the disposition of the case. Judge Campbell responded by noting the problem in California with unpublished opinions, that is, that they may not be cited for precedential value. Even so, they created a lot of intra-district conflict in that the court(s) was receiving companion cases based on the unpublished opinions that had gone before other panels. Judge Campbell acknowledged a lot of pros and cons regarding unpublished opinions but felt

that the subject was beyond the charge of the committee. Judge Stone observed that Judge Antoon was absent because he is attending a Masters Program at the University of Virginia. However, he wished to remind the committee that Judge Antoon is opposed to a rule of judicial administration regarding this issue and felt it is best addressed through the judicial education process.

Mr. Elligett and Judge Campbell discussed the possibility of the committee recommending to the Judicial Management Council (JMC) that the use of PCAs be included in future educational forums for DCA judges as part of their ongoing curriculum. Mr. Elligett opined that he did not believe that citation to a rule would promote access to the Supreme Court through petitions for certiorari review. Judge Cope noted that the Supreme Court is restrictive in terms of which cases they choose to review.

Judge Stone moved that there not be a rule of judicial administration regarding a checklist for PCAs. Judge Webster seconded the motion. Judge Campbell opened the floor for discussion. Ms. Daniels suggested that the committee not disregard the significant amount of correspondence from the bar regarding this subject. Judge Cope noted that adoption of a rule would not be inconsistent with educational efforts in this regard. He expressed his hope that the committee would issue consensus recommendations to the JMC rather than closely divided votes on important issues. Judge Cope observed that the statistics gathered by the committee reveal that a significant number of fully-briefed civil and criminal appeals receive a PCA. He remarked that with repetitive types of cases (e.g., harmless error) perhaps a combination of techniques might be employed. Thus, in cases that are currently receiving a PCA there might be greater specification of the reason.

Judge Stone noted that there are a myriad of factors that go into the case review process. He reviewed the process used by the Fourth DCA judges for the committee. He noted that every final briefed appeal is conferred upon by three judges. The cases are thoroughly discussed and are often accompanied by legal memoranda written by law clerks that are 15-20 pages long. He asked if it would be better for their law clerks to write an opinion and have it circulated among panel members. He cautioned that the committee should be slow to change a process that has been developed to protect the litigants simply to comply with a rule that many appellate judges feel is unnecessary. Judge Stone read Judge Antoon's statement from the March 5 meeting of the committee in which he comments on the increase of "junk opinions" issued by the DCAs as a response to the work of the committee.

Judge Webster opined that he has grave doubts as to whether a rule of judicial administration is either appropriate or desirable. However, he noted that he could live with a rule such as the current Fifth Circuit rule. The intent of that rule is not to tell the judges of the Fifth Circuit how to do their business, but rather, to inform the litigants of the situations in which a per curiam affirmance will be issued. The litigants know, because of the rule, that a case is affirmed for one

or more of the reasons listed. In addition, to a certain degree it serves an educational function. Citing the rule is mandatory for the court in the Fifth Circuit when issuing a PCA. Judge Webster opined that he does not favor the checklist system because it denigrates the role of an appellate court. Moreover, as Judge Campbell noted, it tells appellate judges how to do their work and suggests they are presently not doing it properly. Ms. Daniels remarked that she knows that appellate judges put a lot of time and effort into their work. She also noted that many members of the bar put considerable effort into their briefs, reply briefs, and oral argument. As such, they would like more explanation from the appellate courts than a PCA.

Judge Cope stated that the committee seems to be struggling with the competing ideas of how to encourage more opinion writing in certain types of cases without placing an extra burden on the system. Judge Campbell observed that a checklist will encourage more opinion writing. The committee then voted on the motion not to have a rule of judicial administration regarding checklists for PCAs. The motion passed.

Judge Webster proposed that the committee recommend to the JMC that it urge those who teach the new judge's appellate course at the judicial college to include an educational component on the proper use of PCAs and, as important, when it is appropriate to write an opinion. It is important that new judges understand the proper use of per curiam affirmances. Judge Campbell stated that Judge Webster's proposal should become part of the regular education conference for appellate judges. This will help new judges overcome the "intimidation factor" that might exist when serving on panels with veteran appellate judges.

The committee discussed the work of the Appellate Performance and Accountability Committee of the JMC, including the reporting system that it will use in the future for the DCAs. Judge Cope, who attended the most recent meeting of the Appellate Performance and Accountability Committee, noted that he got the sense that it is waiting for this committee to make recommendations in this regard. Judge Webster noted that the new case management system should be able to capture the statistical data on PCAs currently being submitted to the committee by the DCA clerks. The committee also discussed recommending that The Florida Bar and the DCA Conference join forces to host educational forums to discuss the issue of PCAs. Mr. Elligett discussed ways in which the DCAs can communicate the process of issuing PCAs to the bar.

Judge Webster moved that the committee recommend to the JMC that it either mandate, or urge, those charged with administering Florida's judicial education component to train judges on the proper use of per curiam affirmances without opinion. Training should occur for both new appellate judges as part of the College of Advanced Judicial Studies, and the new appellate judges program, and on a regular basis (i.e., periodically) at the annual meeting of the District Court of Appeal Judges Conference. Judge Cope asked to what standards will the appellate

courts adhere when choosing to PCA a case. Judge Cope noted that the committee seems to be in agreement on *Anders Briefs* and *Post Conviction Relief Motions* (3.850), but beyond that there appears to be disagreement as to which cases qualify for receiving a PCA. Judge Stone replied that the educational program should encompass all materials currently before the committee including the divergent views of the bar and public defenders. The committee discussed the meaning of the word "proper" as used in the motion and also the application of ABA standards for PCAs and the structure on an educational program. Mr. Elligett suggested that perhaps the motion should be amended to read "the proper use of PCAs without opinion and guidelines for opinion writing." The motion passed as amended.

The committee then began a discussion of Judge Cope's proposal on Suggested Guidelines for Opinion Writing. Judge Cope proposed that the committee move forward with guidance on when opinions should be written. Judge Cope opined that unless the committee commits itself to establishing guidelines for opinion writing the "good intentions" regarding PCAs will disappear. Judge Cope pointed to the statistics gathered by the committee, the ABA Standards on Opinion Writing, as well as the survey of other states to support his argument. Judge Cope observed that, except in rare cases, there is no discussion in the Third DCA as to when opinions should be written. In the Third DCA, the practice is to defer to the writing judge. Judge Cope opined that some guidance or set of recommendations is desirable and useful and stated that until the committee gets more specific in this regard, it will not make much progress.

Judge Webster noted that to get from the general to the specific in terms of mandating educational programs, the curricula of said programs need to be given serious thought. However, Judge Webster used non-fully briefed appeals (e.g., *Anders Briefs* or the *Termination of Parental Rights* cases) to illustrate his point that there are fundamental differences across DCAs as to how an appeal is processed. For example, in the First DCA the public defenders office never asks to be removed via *Anders* and the court would not permit it anyway. With respect to the termination of parental rights, many judges believe that these cases deserve a short opinion most of the time. In response, Judge Cope indicated that he is amenable to adjusting or amending his proposal to comport with the consensus view of the committee. However, he indicated that the more substantial issue is, if not these guidelines, then which guidelines. Judge Cope opined that he felt strongly that the committee needed to advance some sort of meaningful guidelines for opinion writing.

Judge Cope stated that one explanation for the high number of PCAs without opinion is that the panel agreed on the affirmance and the writing judge decided not to write an opinion. He noted that type of situation is the current practice on the Third DCA and estimated that this type of practices explains an over 50% PCA rate in fully-briefed criminal and civil appeals. Judge Cope suggested that perhaps the committee should first decide conceptually if it wishes to

proceed in this area. It was suggested by Judge Campbell and Judge Stone that perhaps the term "suggestions," rather than "guidelines," be used.

The committee discussed the most appropriate way to advance said guidelines or suggestions. Because jurists and others have addressed this subject over the years, many reaching different conclusions, it was suggested that perhaps any "guidelines" or "suggestions" encompass as many divergent views on the subject as possible. Judge Cope observed that it was difficult for him to determine what such a course might accomplish. Mr. McCabe echoed Judge Cope's concerns by noting that the motion suggests to him that someone, either the committee or others would develop a list of suggested standards or procedures for when PCAs would or would not be used. Mr. McCabe suggested that the committee advance a "best practices" approach to the problem.

The committee then discussed its charge in the context of establishing guidelines, suggestions, or the design of course curricula on the subject of the use of PCAs. The committee agreed to provide Judge Cope with written suggestions to his proposed "Suggested Guidelines for Opinion Writing" to further refine his proposal. The committee discussed ways to delineate or describe when cases should receive a written opinion and when they should not. The committee also discussed how to best address dissents that accompany PCAs. The committee agreed that Judge Cope would amend his proposal to incorporate the committee comments and any others that members might provide to him either via e-mail or other correspondence. Ms. Daniels asked that her proposal also be reviewed by the committee.

The committee advised staff to notify the DCA clerks to discontinue submission of the monthly PCA data report. The committee discussed future collection of PCA data via the new appellate case management system currently being installed in the DCAs. A motion was made and seconded that the committee recommend to the JMC that statistical information (i.e., PCA data similar to that collected by the committee) be captured and included in future reports by the appropriate entity. The motion passed.

The committee then discussed its final report. It was agreed that Judge Cope would circulate his revised proposal to the committee for comment. Judge Campbell agreed to mediate any issues that lack consensus. Once he receives committee comment on his proposal, Judge Cope will circulate a proposal in final form to the committee for a vote. Judge Campbell stated that the committee should target the JMC meeting of December 1 for its submission of its final report. The meeting adjourned at 12:45 PM.

Per Curiam Affirmed Committee Meeting Six
Multi-site Video-Conference
2:00PM-3:00 PM
March 16, 2000

Minutes

Members Present:

Judge Monterey Campbell, III, Chair
Judge Gerald B. Cope, Jr.
Judge Peter Webster
Judge Barry Stone
Judge John Antoon, II
Ms. Nancy Daniels
Mr. Raymond Thomas Elligett
Mr. Robert Krauss

Members Absent:

Mr. Bernie McCabe
Mr. Brian Onek

Staff:

Mr. Gregory Youchock
Mr. Richard Cox

The Committee met via video-conference for its final meeting. Each district court of appeal was linked to the Supreme Court with exception of the First and Fifth DCA. Those in Tallahassee attended at the Supreme Court Building, including Judge Webster, Judge Antoon, Ms. Daniels, and staff. Mr. Krauss and Mr. Elligett were at the Tampa location of the Second DCA. Judge Campbell, Judge Cope, and Judge Stone attended at their district court locations.

Judge Campbell began the meeting by thanking the members and staff for their diligent effort and work over the last two years. He also provided a brief review of his introductory Chairman's Remarks for the Committee. There were no objections to his remarks.

Judge Campbell then began a discussion of the unresolved issues facing the Committee. Ms. Daniels noted that the draft report made no mention of a party's ability to file a motion for a rehearing if they receive a PCA without an opinion. She further suggested that this language be inserted as part of the final report. Judge Campbell commented that one reason for its absence was attributable to differing practices across DCAs. Judge Stone noted that the Fourth DCA has conducted many educational seminars with the Bar about this issue and indicated that there are no impediments in his district to the filing of a motion for rehearing upon receipt of a PCA without opinion. With no further discussion or objection, staff was instructed to insert language into the final report indicating that, under existing rules of court, it is appropriate to file a motion for rehearing in cases receiving a PCA without opinion.

The committee then discussed Judge Cope's Revised Minority Report. Judge Cope advised the Committee that he had amended or revised his original minority report and sent each member a copy via fax prior to the meeting. With no further discussion or objection, Judge Cope's Minority Report was accepted by the Committee as amended. Judge Campbell asked if there were any comments or objections to Ms. Daniels' Minority Report. There were none.

The Committee then discussed a series of technical amendments to the report in response to previous comments from Judge Cope, Judge Stone, and Mr. Elligett. It was agreed that Mr. Elligett's letter to the Committee would be included in the final report in the same section as the Cope and Daniels minority reports. It was suggested and approved by the Committee that this section should be titled "Minority Reports and Individual Member Comments."

The Committee discussed the release of the report. It was agreed that the report would not be publicly released until it was officially sent to Chief Justice Harding and the Judicial Management Council. It was further agreed that copies of the final report would be sent to the section chairs at The Florida Bar. They would be asked to provide copies for their members.

Staff was instructed to contact the Chief Justice's Office concerning who should receive copies of the report. Staff was also instructed to determine if the final report could be loaded onto the Supreme Court's homepage for Internet access. Judge Campbell again thanked the members and staff for their hard work on this issue.

The meeting was adjourned at 3:00 p.m.