JURISDICTION CREEP* AND THE FLORIDA SUPREME COURT

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The Court of Appeals of Wisconsin has divided appellate courts into two categories, "error correcting" and "law declaring."[1] This difference appears to concern the jurisdiction of the two types of appellate courts. The "law declaring" court is the highest state court and its jurisdiction is limited to important questions of law.[2] In deciding cases within this limited jurisdiction, the "law declaring" court may correct errors, but its "error correcting" function is only incidental to its "law declaring" function.[3] The "error correcting" court hears appeals from trial courts and its decisions are final unless the issue before it was within the limited jurisdiction of the "law declaring" court above it in the judicial hierarchy.[4]

Prior to the creation of the district courts of appeal, by constitutional amendment, in 1956, the Florida Supreme Court functioned both as a "law declaring" court and an "error correcting"

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* This term, which may or may not be original with me, was taken from the similar "mission creep," a military term. "Jurisdiction creep" is the judicial version of it.

> Originating in Somalia in 1993, the modern term "mission creep" became part of official U.S. Army vocabulary a decade later. The [Army] Field Manual 3-07, *Stability Operations and Support Operations* . . . acknowledges two types of mission creep. The first occurs when "the unit receives shifting guidance or a change in mission for which the unit is not properly configured or resourced." The second occurs "when a unit attempts to do more than is allowed in the current mandate and mission."

Charles E. White, *Mission Creep During the Lewis and Clark Expedition*, http://www.army.mil/cmh-pg/LC/The%20Mission/mission_creep.htm (last visited Jan. 11, 2006) (footnotes omitted) (quoting DEP'T OF THE ARMY, STABILITY OPERATIONS AND SUPPORT OPERATIONS, FIELD MANUAL 3-07, ¶ 1-61).

The second of the two definitions is the obvious parallel with "jurisdiction creep."

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[1] *See* State v. Grawien, 367 N.W.2d 816, 818 (Wis. Ct. App. 1985).

[2] *See* State *ex rel.* La Crosse Tribune v. Circuit Court, 340 N.W.2d 460, 464–65 (Wis. 1983).

[3] *Id.*

[4] *See* State v. Mosley, 307 N.W.2d 200, 216–17 (Wis. 1981).

court.[5] Since the supreme court heard appeals as a matter of right from Florida's principal trial courts—the circuit courts—it was an "error correcting" court.[6] However, because the supreme court had the final say as to the meaning of Florida law, especially Florida constitutional law, it also functioned as a "law declaring" court.[7]

When the district courts of appeal set up shop in early 1957, the intent was that, with few exceptions,[8] the Florida Supreme Court would be a "law declaring" court only.[9] In most instances, the new district courts of appeal were to be the "error correcting" courts for the circuit courts (the state's principal trial courts).[10]

The new, and very limited role for the Florida Supreme Court, was set out in the Florida Constitution:

> Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments and decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have jurisdiction as may be necessary to complete determination of the case on review. Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of

[5] *See* FLA. CONST. of 1885, art. V, § 5 (amended 1956).
[6] *See id.*
[7] *See id.*
[8] *See infra* text accompanying note 11.
[9] Thomas C. Marks, Jr., *The State of Florida is not as Entitled to a Fair Trial or Right of Appeal in its Own Court as a Criminal or Juvenile Defendant*, 29 STETSON L. REV. 325, 326 (1999).
[10] *See* FLA. CONST. of 1885, art. V, § 5(3) (1956).

> appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . .[11]

The Florida Supreme Court was quick to recognize the huge change in its status. In 1958, the supreme court "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."[12] At almost the same time, it began to lay the groundwork to undermine its new role.

In *Lake v. Lake*,[13] the supreme court was, for the first time,[14] faced with a petition asking it to review a "per curiam affirmed" decision not supported by a written opinion.[15] The petitioner before the supreme court argued that the facts of *Lake* were "very similar" to the facts of an earlier supreme court case; however, here the decision of the district court of appeal apparently differed.[16] Thus, so the argument went, conflict jurisdiction existed.[17] In facing this question of first impression,[18] the supreme court reiterated, "[the district courts of appeal] *are and were meant to be courts of final, appellate jurisdiction*."[19] After stating the basis for conflict jurisdiction,[20] the supreme court then opined:

> It is another matter, however, for the Supreme Court to dig into a record to determine whether or not a per curiam affirmance by a district court of appeal conflicts with the interpretation the petitioner's counsel has placed upon former decisions in advancing his client's cause. By such procedure the safeguard intended by the pertinent provision would be distorted so that a suitor who had had one day in the appellate court would have a second.[21]

The supreme court then continued when it should have stopped:

> There may be exceptions to the rule that this court will not

[11] *See id.* § 4(2).

[12] Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958) (citing Diamond Berk Ins. Agency, Inc. v. Goldstein, 100 So. 2d 420, 421 (Fla. 1958); Sinnamon v. Fowlkes, 101 So. 2d 375, 377 (Fla. 1958)).

[13] 103 So. 2d 639 (Fla. 1958). The district court decision read in its entirety, "PER CURIAM. Affirmed." Lake v. Lake, 98 So. 2d 761 (Fla. Dist. Ct. App. 1957).

[14] *See* Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 222 (Fla. 1965).

[15] *Lake*, 103 So. 2d at 640.

[16] *Id.*

[17] *Id.* at 643; *see* FLA. CONST. of 1885, art. V, § 4(2) (1956).

[18] *See Foley*, 177 So. 2d at 222.

[19] *Lake*, 103 So. 2d at 642.

[20] *Id.* at 643.

[21] *Id.*

> go behind a judgment per curiam, consisting only of the word "affirmed" which does not reflect a decision that would interfere with settled principles of law, rendered by a district court of appeal, but the present case cannot be considered one. Conceivably it could appear from the restricted examination required in proceedings in certiorari that a conflict had arisen *with resulting injustice to the immediate litigant*. In that event the exception, not the rule, would apply.[22]

"Injustice to the immediate litigant"? Correcting injustice in this context is an "error correcting" function, not a "law declaring" one. In spite of the verbal support for the district court of appeal to perform its more traditional role of a court of last resort, the supreme court had perched itself on the edge of a very slippery slope.

The supreme court proceeded down that slippery slope and reached the bottom in *Foley v. Weaver Drugs, Inc.*[23] The *Lake* loophole[24] had by 1965 become, as might have been expected, "troublesome."[25] So, the supreme court decided in *Foley* to revisit it.[26] The court found that, not just in a few, but in "*each of such cases*,"[27]

> [S]ome members of the court have examined the "record proper"—meaning the written record of the proceedings in the court under review except the report of the testimony—to determine the probable existence of a direct conflict *and whether such conflict resulted in* "injustice to the immediate litigant" sufficient to invoke the exercise of our power of review under the exception noted in the Lake case. [28]

Thus, the court "ha[d] not been relieved of any substantial portion of its workload."[29] The above-mentioned bottom of the slippery slope was reached by the supreme court in these words:

> [W]e hold that this court may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal

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[22] *Id.* (emphasis added).
[23] 177 So. 2d 221 (Fla. 1965).
[24] *See supra* text accompanying note 22; *Foley*, 177 So. 2d at 222, 223.
[25] *Foley*, 177 So. 2d at 222.
[26] *Id.* at 222–26.
[27] *Id.* at 223 (emphasis added).
[28] *Id.* (emphasis added).
[29] *Id.*

> effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal.[30]

Justice Thornal dissented.[31] Referring back to the applicable constitutional provision, he called attention to the requirement that the conflict be "*on the same point of law*."[32] At the beginning of his dissent, he captured what I consider to be the crux of his argument with the following question: "What do we mean by 'a decision on the same point of law?' How can one word 'affirmed' be a 'decision on the same point of law' in conflict with some other decision? If it can be, what 'point of law' does the one word 'affirmed' decide?"[33]

These next words of Justice Thornal, near the close of his dissent, epitomize my argument about jurisdiction creep:

> All of this [digging into the record proper behind the one word "affirmed"] simply means that the District Court decisions are *no longer final* under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court, to come on up to the Supreme Court and be granted a second appeal—the very thing that many feared would happen—and the very thing which we assured the people of this state would *not* happen when the judiciary article was amended in 1956.[34]

To put my own interpretation on these events (I have been watching them evolve since 1973), three points, not necessarily original with me, must be made. First, the purpose of the conflict provision is to offer the supreme court the opportunity to harmonize the case law of Florida, assuming, of course, that review is sought in the proper manner. Second, I do not see how the word "affirmed" standing alone can truly be in conflict with any other decision. To put it differently, what effect does it have as precedent for any point of law? Third, if my first two observations are correct, then it was a very real possibility that the supreme court was actually concerned about harm to the petitioner. Remember that in *Lake*, Justice Thomas was concerned about injustice to the immediate litigant.[35] So, if I am correct, all of this was really about the Florida Supreme Court staying in the "error correcting" business as much as possible.

When Justice Arthur England took up the battle, his view ran

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[30] *Id.* at 225.
[31] *Id.* at 231 (Thornal, J., dissenting).
[32] *Id.* (quoting FLA. CONST. of 1885, art. V, § 4(2) (1956)).
[33] *Id.*
[34] *Id.* at 234.
[35] *See supra* note 22 and accompanying text.

roughly parallel to mine:

> Since *Foley*, as I have attempted to point out, the district courts have more and more been regarded by a majority of this Court simply as inconvenient rungs on the appellate ladder. The high cost of *Foley* in dollars and time to litigants and to the judiciary of Florida now demands that the majority decision there be reconsidered. My own conviction is that *Foley* should be scrapped, along with the stillborn traces of decisional control which were conceived in the *Lake* decision. To my mind, there is no possible way that a district court's affirmance without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention. The foul assumption which underlies any review is that the district court perpetrated an injustice which it could not explain away in an opinion. I refuse to indulge that assumption.
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> An honest analysis by my colleagues would compel them to admit that decisional conflict in this class of cases exists today solely on the grounds that we say it does. This is, of course, contrary to our recognition that the reasons for the district courts' decisions in such cases are not capable of being discovered. The only rationale for our continued search of a basis for review in non-opinion decisions, then, is an unarticulated notion that we should, when necessary, give "justice" not provided by the lower courts. That notion is simply not good enough for me since the Constitution was amended to assign that responsibility to the district courts.[36]

A 1980 amendment to the Florida Constitution should have put an end to the *Foley* type retention of an "error correcting" function. Or so it was thought. After all, the addition of the word "expressly" to the allocation of the court's conflict jurisdiction ("expressly and directly conflicts") clearly foreclosed review of one word "affirmed" decisions.[37] This in fact worked against the court's ability to review for conflict—by going into the "record proper"—a district court per curiam decision not supported by a written opinion. Such a decision could not "expressly" create conflict with another decision.[38]

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[36] Fla. Greyhound Owners & Breeders Ass'n v. W. Flagler Assocs., 347 So. 2d 408, 411 (Fla. 1977) (England, J., concurring) (footnotes omitted).

[37] *Compare* FLA. CONST. art. V, § 3(b)(3), *with* FLA. CONST. art. V, § 3(b)(3) (amended 1980).

[38] This vindicates the views of Justice Thornal. *See supra* notes 31–34 and accompanying text. It also vindicates Justice England. *See supra* note 36 and accompanying text. It should

Initially, the word "expressly" had the same effect on the so-called "citation" per curiam affirmance—a per curiam decision not supported by a written opinion but one that, for benefit of counsel, cites an earlier decision.[39] The citation, presumably, explains the reason for the per curiam affirmance. Such a decision did not expressly create conflict and, in any case, any conflict would be between the cited case and some third case.[40]

At this point, the ability of the Florida Supreme Court to search for conflict of decisions, absent a written opinion explaining the conflict, was apparently at an end. Then the proverbial "hard case makes bad law" took a hand in things in *Jollie v. State*.[41]

Jollie was one of four cases involving the same legal issue before a district court of appeal.[42] Rather than write four identical opinions, the district court elected to write an opinion in one of the four cases —the lead case—and then tie the other three cases to the lead case by affirming them per curiam and linking them to the lead case by merely citing to it.[43] These were true citation per curiam affirmances but not of the common counsel advising variety that the court dealt with in *Dodi*.[44] At that point, fate, if you will, intervened. Two of the per curiam affirmances citing the lead case made it to the supreme court before the effective date of the 1980 amendment adding the word "expressly" to the court's conflict jurisdiction.[45] They, then, could be heard under the old rules.[46] Because of some type of glitch in the clerk's office of the district court, the *Jollie* per curiam affirmance did not get to the supreme court until after the effective date of the crucial 1980 amendment.[47] The court could not, then, hear *Jollie* under the old rules; instead, it had to deal with the word "expressly" which the court in *Dodi* had already decided precludes reviews of citation per curiam

be pointed out that Justice England was one of the fathers of the 1980 amendment that added the word "expressly." *See* Jenkins v. State, 385 So. 2d 1356, 1360–63 (Fla. 1980) (England, C.J., concurring) (exploring the background of the 1980 amendment); Arthur J. England, Jr. et al., *An Analysis of the 1980 Jurisdictional Amendment*, 54 FLA. B.J. 406, 410–11 (1980).

[39] *See* Dodi Publ'g Co. v. Editorial Am., S.A., 385 So. 2d 1369, 1369 (Fla. 1980).

[40] *Id.* The theory rejected in *Dodi* is that the cited case is like the per curiam decision that cited it; thus, if there is conflict between the cited case and some third case, then ipso facto that conflict should extend to the per curiam case. *Id.*

[41] 405 So. 2d 418 (Fla. 1981).

[42] *See id.* at 419.

[43] *Id.*

[44] *See id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

affirmances.[48] *Jollie* was thus a potential miscarriage of justice, but under the law, the meaning of "expressly," was clear.

Or was it? The court, in an opinion that obviously had to be murky and was, decided that the court could hear Jollie's petition for review because it was not a normal, everyday "counsel advising" citation per curiam affirmance, but was rather one that linked a companion case to its lead case.[49] This being so, the court reached far back into its store of precedents and found that the court *could* review it because "[c]ommon sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it."[50] The court "thus conclude[d] that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction."[51] This rule, or at least the part about a decision reversed (or quashed) by the court, was "long-standing" and "in effect well before the 'record proper' doctrine" of *Foley*.[52] Thus, a citation per curiam affirmance could be reviewed if the cited case was pending before or had been reversed by the Florida Supreme Court.

The rule was supposed to be very narrow; only linkage cases like *Jollie* were to fall under the rule, not counsel advising citation per curiam affirmances which had been dealt with in *Dodi*.[53] The supreme court advised the district courts to devise a distinctive labeling scheme so the supreme court could determine which citation per curiam affirmances were linkage, and which were counsel advising.[54] However, it appears that this labeling scheme was never fully implemented. The court failed to explain why its duty to "acknowledge its own public record actions" applied only to those citation per curiam affirmances, like in *Jollie*, and not the far more common counsel advising citations which happened to cite a case pending review in or reversed by the Florida Supreme Court.[55] In reality, the likelihood of a counsel advising citation per curiam affirmance citing such a case was not great; however, it was not

[48] *See supra* note 39 and accompanying text; *Jollie*, 405 So. 2d at 419.
[49] *Jollie*, 405 So. 2d at 420.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *See id.*
[54] *Id.* at 421.
[55] *Id.* at 420.

impossible either. In 1991, the court accepted jurisdiction and decided such a case in *Stupak v. Winter Park Leasing, Inc.*[56]

In *Stupak*, no reference was made to the supposed inapplicability of the *Jollie* rule to such cases; *Jollie* was merely cited.[57] Justice Boyd got it right in *Jollie* when he noted:

> The majority opinion says that even before *Foley v. Weaver Drugs, Inc.*, a district court decision without opinion but citing a case that had been reversed by the supreme court provided prima facie ground for the exercise of conflict certiorari jurisdiction. I have been unable to find any decisional or documentary authority for that statement. The majority cites only "common sense". . . .[58]

As Justice Boyd suggests, the 1980 addition of the word "expressly" wiped out "the concept of the 'record proper'" "for purposes of discretionary 'conflict' review jurisdiction" "pending review or been reversed" rule, no matter when or how that rule was created.[59]

As can be seen, the addition of the word "expressly" in 1980 slowed jurisdiction creep, but did not stop it. However, the jurisdiction creep was slowed to the point where it is unlikely that a justice would say, as Justice Campbell Thornal did about the "record proper" doctrine of *Foley*: "If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a District Court."[60]

In another context, however, "expressly" did stop jurisdiction creep in its tracks. Prior to 1980, the Florida Supreme Court had established that a decision could pass on "the validity of a state statute" without referring to the language of the statute itself in the decision.[61] This was possible if the court below must have ruled that a statute was constitutional in order to reach the result it did.[62] The addition of the word "expressly" to the 1980 version of this basis of jurisdiction clearly put an end to this so called "doctrine of inherency."[63]

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[56] 585 So. 2d 283, 283 (Fla. 1991) ("The basis for our jurisdiction lies in the fact that the district court of appeal rendered a per curiam decision in reliance upon . . . a case which this Court subsequently accepted for review.").

[57] *See id.*

[58] *Jollie*, 405 So. 2d at 423 (Boyd, J., dissenting).

[59] *Id.*

[60] Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 234 (Thornal, J., dissenting).

[61] Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So. 2d 439, 441 (Fla. 1959).

[62] *Id.* at 441–42.

[63] *Id.* at 441. If it must be done expressly, it can hardly be done "inherently."