The Florida Bar Journal

October, 2009 Volume 83, No. 9

Original Proceedings, Writ Large

by Sylvia H. Walbolt and Joseph H. Lang, Jr.

The right to appeal a ruling other than a final judgment is limited to the specific category of rulings set forth in Florida's Rules of Appellate Procedure. But there also are certain extraordinary writs that can be sought as part of the appellate court's original jurisdiction. Such original jurisdiction is narrow, generally controlled by the case law that has developed over the years. That case law expresses an overwhelming bias against piecemeal appeals and appeals without a fully developed record, as well as a strong deference toward trial judge rulings, especially interim rulings. The original jurisdiction of the Florida Supreme Court is further circumscribed by the Florida Constitution, and that court has no certiorari jurisdiction at all.

With these constraints, not much usually changes in the state courts' original jurisdiction, and the contours of the writs have become fairly rigid and settled over the years. Indeed, relief by way of an original proceeding is quite hard to come by, thus, explaining the oft-used characterization "extraordinary writ." Yet, despite these formidable hurdles, it has been emphasized that "some lawyers tend to lose sight of the creative ways the writs can be used … [and that] in some circumstances, one of these so-called 'extraordinary writs' may provide jurisdiction when nothing else can."[1] Recently, the extraordinary grant of various extraordinary writs has proved that point.

Since much has been penned about the requisite showings to secure relief in certiorari, mandamus, prohibition, habeas corpus, quo warranto (or "all writs"), we will not recapitulate those excellent sources. Instead, we explore a recent spate of expansiveness in the application of the usually static writs. We focus on three writs in particular — quo warranto, habeas corpus, and certiorari.

Quo Warranto

The writ of quo warranto is a "writ of inquiry," meaning "by what authority."[2] Although historically developed by the English crown to use against its subjects, it generally is used in Florida as "the means by which an interested party can test whether any individual improperly claims or has usurped some power or right derived from the State of Florida."[3] One of the Florida Supreme Court's highest profile decisions in 2008 was a quo warranto writ to the governor of Florida.

At the behest of the Florida Legislature, the Florida Supreme Court issued a writ of quo warranto in *Florida House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008), invalidating a "compact" (a contract between two sovereigns) between the governor of Florida and the Seminole Indian Tribe of Florida that expanded casino gambling on tribal lands and granted the tribe the exclusive right to conduct certain types of gaming. The legislature had not approved the compact, and the court held the governor lacked "the constitutional authority to bind the [s]

tate to a gaming compact that clearly departs from the [s]tate's public policy by legalizing types of gaming that are illegal everywhere else in the [s]tate."[4]

The court concluded it had jurisdiction to grant quo warranto relief to preclude a state officer or agency from improperly exercising a power or right derived from the state. The majority rejected the complaint of Justice Lewis' "concurring-in-result-only opinion" that the court was expanding its "quo warranto jurisdiction to include issues normally reserved for declaratory actions."[5] Pointing to settled separation of powers precepts, the court declared "the importance and immediacy of the issue justifies our deciding this matter now rather than transferring it for resolution in a declaratory action."[6]

The governor filed an impassioned motion for rehearing, complaining that the decision "misapprehended longstanding jurisdictional principles and dramatically expanded [the court's] own jurisdiction by redefining the formerly 'extraordinary' writ of quo warranto."[7] According to the movants, "the [c]ourt's decision constitutes a sea change in the scope of the writ of quo warranto, expanding the writ (and through it, this [c]ourt's original jurisdiction) to encompass potentially all challenges to the validity of past and present decisions of public officer."[8] Specifically, the governor argued that "[t]he [c]ourt's decision reverses, sub silencio, prior precedent establishing that the '[m]ere function of office, as distinguished from the office itself, may not be the subject of quo warranto.'"[9] Without comment on the criticisms of its use of quo warranto, the court stood by its decision.[10]

Although this seemingly groundbreaking decision might encourage a surge in quo warranto petitions, there is reason to believe it may be limited to its unique facts. For example, noting "its increasing popularity," the Fifth District Court of Appeal specifically wrote in *Johnson v. Office of the State Attorney*, 987 So. 2d 206, 207 (Fla. 5th DCA 2008), "to explain why a writ of quo warranto is not a proper method to obtain postconviction relief." Although the Supreme Court had declined to address that issue in *Geffken v. Strickler*, 778 So. 2d 975, 976 n.1 (Fla. 2001), the Fifth District confronted it directly and dismissed the petition for a writ of quo warranto. The court held that the alleged lack of authority of the state attorney and trial court (due to their alleged failure to properly file an oath of office) should have been brought in a direct, timely quo warranto proceeding. "A defendant may not utilize the extraordinary writ of quo warranto as a postconviction safety net to challenge the authority of the prosecuting authority or judge when the outcome of the trial was not as he expected or hoped for."[11]

In the same vein, the Supreme Court denied a petition for writ of quo warranto against the Fourth District Court of Appeal in *Langon v. Fourth District Court of Appeal*, 994 So. 2d 1105, 2008 WL 4277345 (Fla. 2008) (unpublished disposition), finding it to be procedurally barred. "A petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues which were or could have been raised on direct appeal or in prior postconviction proceedings."[12]

Habeas Corpus

Habeas corpus means "that you have the body," and is a writ of inquiry used to test the validity of a person's detention.[13] In recent years, it has most famously been the vehicle for testing the legality of the detention of prisoners at Guantanamo Bay without a trial or other legal recourse.[14] "Potentially, any deprivation of personal liberty can be tested by habeas corpus," and it often is called the "great writ."[15] The great writ has recently been employed expansively by Florida courts to cure several injustices.

For instance, in *Lago v. State of Florida*, 975 So. 2d 613 (Fla. 3d DCA 2008), the Third District treated an appellant's appeal from the denial of his Rule of Criminal Procedure 3.800 motion to correct illegal sentence as a petition for common law habeas corpus and then granted relief. The appellant was convicted and sentenced to consecutive sentences for robbery with a firearm and unlawful possession of a firearm while engaged in a criminal offense (the same robbery). Acting pro se, the appellant had unsuccessfully asserted several challenges to his convictions and sentences. Thereafter, with the aid of counsel, he filed a Rule 3.800 motion asserting that the consecutive sentences for those offenses violated his constitutional protection against double jeopardy.

Although the trial court found the sentence to be "patently illegal," it agreed with the state that relief was barred by the "law of the case."[16] The trial court expressly found that application of this principle "'works … a manifest injustice in this case.'"[17] The Third District agreed with the trial court that the sentence for possession of a firearm during the commission of felony was "patently illegal," that it was in violation of the double jeopardy clause, that this sentence was "manifestly unjust," but that the trial court correctly denied relief based on the law of the case.[18] Nonetheless, the court concluded it had the power, and indeed the "responsibility," to correct this injustice, and granted a writ of habeas corpus to do so.

So, too, the Second District "exercised its inherent authority to grant a writ of habeas corpus to avoid incongruous and materially unfair results" in *Stephens v. State*, 974 So. 2d 455, 457-458 (Fla. 2d DCA 2008). The appellant had been sentenced to a life term and he appealed, asserting the trial judge erroneously believed that was a mandatory sentence. Stating that the court's prior opinion requiring reconsideration of the sentence "did not adequately direct the court's or parties' attention to the fact that a fundamental sentencing error had occurred," the court concluded the appellant "was deprived of a real opportunity to have his sentence reconsidered."[19]

In granting the writ, the Second District noted that it had held in an earlier case involving different parties but "virtually identical circumstances" that the same trial judge had discretion not to enter a life sentence.[20] The court concluded that to grant relief in that case but not for the appellant would be "a manifest injustice that does not promote — in fact it corrodes — uniformity in the decisions of this [c]ourt."[21] Although the state argued that the appellant had previously raised the same claim, the court found this case "presents one of those uncommon and extraordinary circumstances" where, as a matter of due process, "relief may be afforded even to a litigant raising a successive claim."[22] Accordingly, the court treated this issue in the appellant's Rule 3.850 motion as a petition for a writ of habeas and granted the petition, requiring the trial court to reconsider the sentence.

These invocations of the great writ demonstrate its flexibility to effectuate relief in situations where other appellate options are simply unavailable.

Certiorari

Certiorari, which literally means "to be more fully informed," has been described as a "safety net" writ that "gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists."[23] Although "intended to fill the interstices between direct appeal and the other prerogative writs, . . . [it] never was intended to redress mere legal error, for common law certiorari — above all — is an extraordinary remedy, not a second appeal."[24]

A traditional touchstone for certiorari has been its requirement that there be irreparable harm or no adequate remedy at law. Writs of certiorari are seen regularly on issues such as attorney-client privilege claims in discovery[25] and errors in the procedure used to allow amendments to plead claims for punitive damages.[26] But recently, in some other notable cases, courts have put some more teeth into certiorari's promise of preventing irreparable harm.

In a split opinion in *Commonwealth Land Title Ins. Co. v. Higgins*, 975 So. 2d 1169 (Fla. 1st DCA 2008), the First District addressed the balance required to be struck between proper discovery for class certification and the burden such discovery imposes on a defendant in a case that had not yet been determined to be a proper class action. The court declined to reach the respondent's argument that the First District should adopt a general rule following the decisions of the Second and Fourth districts holding that "financial ruin" test in determining whether the ordered discovery imposed an "undue burden" requiring certiorari relief.[27] It squarely held, however, that this "is not the correct standard to apply at the precertification stage of a putative class action."[28] In granting the writ of certiorari quashing the discovery order, the court pointed to Judge Easterbrook's pointed observations that, although discovery is "'a tool for uncovering facts essential to accurate adjudication,'" it also is "'a weapon capable of imposing large and unjustifiable costs on one's adversary,'" thereby creating leverage to force a settlement.[29]

Likewise, the Second District granted a petition for writ of certiorari on a trial court order compelling discovery from a nonparty expert witness in *Miller v. Harris*, 2 So. 3d 1070 (Fla. 2d DCA 2009). The discovery requests at issue included "[a]ll documents or statements which establish an approximation of the portion of the doctor's involvement as an expert witness, which may be based upon the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness during each of the last three (3) calendar years," and "[c]opies of all reports issued in connection with any and all compulsory examinations which the doctor performed for all insurance companies and/or defense attorneys during each of the last three (3) calendar years."[30]

The objections to these requests did not invoke privileges, but rather were based upon the requested discovery being overly broad; unduly and financially burdensome to [the nonparty expert]; not calculated to lead to the discovery of admissible evidence; violative of nonparty patients' privacy rights; and violative of Florida Rule of Civil Procedure 1.280 (a)(4) in that [the plaintiff] "failed to show any unusual or compelling circumstances that would require the doctor to produce these documents."[31]

The Second District resolved the case based upon the rule itself, explaining that "[t]hese documents are clearly within the scope of the financial and business records that an expert must produce only under the most unusual or compelling circumstances,"[32] and that "[t]he trial court departed from the essential requirements of the law by ordering this subpoena to issue before determining whether the usual interrogatories would provide the limited information that is normally discoverable in this type of lawsuit."[33]

In doing so, however, the Second District also noted that it had concerns that the requested discovery could be read to be too "far-ranging" and that

> the production of a physician's appointment calendar, containing the names of both traditional patients and persons for whom examinations were scheduled or performed pursuant to [R]ule 1.360 would seem to be an extraordinary production that could be required by the trial court only after careful attention to the significant privacy issues inherent within such a production.[34]

In *Hernando County v. Morana*, 979 So. 2d 276 (Fla. 5th DCA 2008), a writ of certiorari was issued by the Fifth District to quash the circuit court's denial of a writ of prohibition sought to prevent the county court from proceeding in a putative class action. The respondent asserted the county court lacked subject matter jurisdiction because the aggregate amount of the individual claims exceed county court jurisdiction. The Fifth District agreed that, if the aggregated claims exceeded the county court jurisdiction, jurisdiction rested "exclusively" in the circuit court.[35]

Many past decisions denying certiorari have made it clear that the time and expense of litigation does not create irreparable harm that can be remedied by resort to certiorari.[36] Nonetheless, in *Gielchinsky v. Vibo Corp.*, 2009 WL 764657, *1, 34 Fla. L. Weekly D649 (Fla. 3d DCA 2009), the Third District recently quashed a trial court order denying a motion to dispense with a special magistrate's services. Originally, both parties had agreed to the special magistrate's services but, due to financial pressures, one party withdrew consent. The Third District agreed that certiorari was warranted to correct the trial court's refusal to end the special magistrate's participation in the case: "if a party withdraws his consent, as Gielchinsky did here with good cause due to financial reasons, then it logically follows that the matter is no longer appropriate for a special magistrate."[37]

Finally, a recent decision from the Second District underscores that even in cases where the presence of irreparable harm may be a close call, a petition for writ of certiorari may generate an opinion denying the writ that actually provides guidance to the litigants as the case proceeds. This is a collateral (and maybe unpredictable) benefit that may come from a creative and good faith use of certiorari practice.

In *Trollinger v. MHC/CSI Florida, Inc.*, 2009 WL 928578, *1, 34 Fla. L. Weekly D724 (Fla. 2d DCA 2009), a Ch. 400 lawsuit against a nursing center, the trial court granted a motion to dismiss, with leave to amend, on the basis that plaintiffs did not elect the remedy of wrongful death damages or survival damages in the complaint (the complaint sought both types of damages). The plaintiff sought certiorari to challenge the dismissal order.[38] She asserted that she would not have an adequate remedy on plenary appeal because she would "be forced to show her hand in an initial trial."[39]

The Second District denied the petition, which it recognized as raising an issue of first impression. The court concluded that the plaintiff could not demonstrate that she would be irreparably harmed by electing a remedy in her complaint.[40] But Judge Altenbernd provided some more guidance to the parties in a concurrence. He wrote that "I reluctantly agree that the trial court's order, which I regard as erroneous, cannot be quashed at this time."[41] He then proceeded to include a lengthy analysis of why the trial court's order was erroneous.

Conclusion

The lessons of these recent judicial writings on extraordinary writs are plain: Litigants should not just stop after reviewing the rules on appeals. Creative thinking and careful drafting may provide avenues for extraordinary relief in some cases. Manifest injustice may be avoided in criminal cases. Relief may be obtained in civil cases in time to avoid the effect of the ruling — an effect that may be incurable after compliance with the ruling.

That said, it is doubtful that these recent decisions signal a trend of more aggressive issuance of

original writs. Nor, from a policy perspective, would that be wise. The extraordinary writs should be just that — extraordinary relief for extraordinary cases, not a readily available means for avoiding Florida's carefully tailored rules defining the right to appeal.

[1] Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 536 (2005).

[2] *Id*. at 543.

[3] *Id.*

[4] *Crist*, 999 So. 2d at 603.

[5] *Id.* at 607.

[6] *Id.* at 608.

[7] Governor Crist's Motion for Rehearing, at 1 (served July 17, 2008).

[8] *Id.* at 2.

[9] *Id.* (quoting, *State ex rel. Landis v. Valz,* 157 So. 651, 654 (Fla. 1934)).

[10] Order denying rehearing dated September 11, 2008. Justice Lewis dissented, without opinion, from the denial of rehearing.

[11] *Johnson*, 987 So. 2d at 208.

[12] *Langon*, 2008 WL 4277345 at *1.

[13] Anstead, Kogan, Hall & Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. at 548.

[14] *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[15] Anstead, Kogan, Hall & Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. at 548.

[16] *Lago*, 975 So. 2d at 614.

[17] *Id.*

[18] *Id.*

[19] *Stephens*, 974 So. 2d at 457.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Valeria Hendricks, *Writ of Certiorari in Florida*, Florida Appellate Practice §10-B.1 (Fla. Bar CLE 6th ed. 2006) (quoting, *Broward County v. G.V.B. International, Ltd*., 787 So. 2d 838, 842 (Fla. 2001)).

[24] *Id*. (quoting, *Broward County*, 787 So. 2d at 842).

[25] *Mathis v. Shands Teaching Hosp. & Clinics, Inc.,* 984 So. 2d 627 (Fla. 1st D.C.A. 2008).

[26] *Ford Motor Co. v. Hall-Edwards*, 5 So. 2d 786 (Fla. 3d D.C.A. 2009). Joe Lang assisted in the briefing for this case. He also was lead appellate attorney for Commonwealth in *Commonwealth Land Title Ins. Co. v. Higgins*, 975 So. 2d 1169 (Fla. 1st D.C.A. 2008).

[27] *Higgins*, 975 So. 2d at 1178.

[28] *Id.*

[29] *Id.* at 1175.

[30] *Miller*, 2 So. 3d at 1071-72.

[31] *Id.* at 1072.

[32] *Id.* at 1073.

[33] *Id.*

[34] *Id.*

[35] *Morana*, 979 So. 2d at 278.

[36] *See, e.g., Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987) (inconvenience and expense of litigating non-issue not the type of harm sufficient to permit certiorari review); *Whiteside v. Johnson*, 351 So. 2d 759, 760 (Fla. 2d D.C.A. 1977) ("[c]ertiorari is not designed to serve as a writ of expediency and should not be granted merely to relieve the petitioners seeking the writ from the expense and inconvenience of a trial").

[37] *Gielchinsky*, 2009 WL 764657 at *1.

[38] *Trollinger*, 2009 WL 928578 at *1.

[39] *Id.*

[40] *Id.*

[41] *Id.* (Altenbernd, J., concurring).

Sylvia H. Walbolt *received her J.D. degree from the University of Florida. She has practiced with Carlton Fields, P.A., since 1963, where she previously has served as chair of the board of directors for the firm and chair of its appellate practice and trial support group.*

Joseph H. Lang, Jr.*, received his J.D. degree from the University of Florida and his LL.M. degree from Georgetown University Law Center. He is a shareholder with Carlton Fields, P.A., in its appellate practice and trial support group.*

This column is submitted on behalf of the Appellate Practice Section, Dorothy F. Easley, chair, and Tracy R. Gunn, Heather M. Lammers, and Kristin A. Norse, editors.

Journal HOME
[Revised: 09-24-2009]