

## CERTIORARI IN THE FLORIDA DISTRICT COURTS OF APPEAL

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Certiorari is one of the most commonly used writs in Florida's District Courts of Appeal. However, the scope of certiorari jurisdiction is often misunderstood, and many certiorari petitions are dismissed because the parties have sought review of an issue that is simply beyond the scope of proper certiorari review. This Article addresses the uses of certiorari review in the district courts of appeal and the standard of review applicable to the various types of certiorari.<sup>1</sup> This Article then provides suggestions for writing and filing a winning petition.

### *I. COMMON-LAW CERTIORARI*

As the name implies, common-law certiorari is not defined by the Florida Constitution or by statute. As the Florida Supreme Court has explained,

The common law writ of certiorari is a special mechanism whereby an upper court can direct a lower tribunal to send up the record of a pending case so that the upper court can "be informed of" events below and evaluate the proceedings for regularity. The writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists.<sup>2</sup>

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\* © 2003, Tracy E. Leduc. All rights reserved. Staff Attorney to The Honorable Craig C. Villanti, Second District Court of Appeal, Lakeland, Florida. J.D., *magna cum laude*, Stetson University College of Law, 1997. Before working for Judge Villanti, Ms. Leduc was a staff attorney to The Honorable Jerry R. Parker. Ms. Leduc dedicates this Article to her friend and mentor, the late Judge Jerry R. Parker.

1. This Article does not address the uses of the writ of certiorari in the Florida Supreme Court because of the significant differences between the uses and scope of the writ in that Court. For a discussion of these differences, see William A. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 210 (1977).

2. *Broward County v. G.B.V. Intl., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) (footnotes omitted); see also *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995) (citing George E. Harris, *A Treatise on the Law of Certiorari at Common Law and under the Statutes: Its Use in Practice* § 1 (Lawyers' Coop. Publ. Co. 1893)).

Thus, the writ will not issue to address simple legal error.<sup>3</sup> Rather, it will issue only when there is a “miscarriage of justice.”<sup>4</sup> Similarly, the writ will not issue when there is another remedy by way of direct appeal,<sup>5</sup> authorized nonfinal appeal,<sup>6</sup> or a different writ.<sup>7</sup>

To obtain a common-law writ of certiorari, the petitioner must establish that (1) the trial court departed from the essential requirements of the law; (2) the departure resulted in material injury that will affect the remainder of the proceedings below; and (3) the departure cannot be corrected through any other means.<sup>8</sup> These three requirements form the two steps for obtaining common-law certiorari review.<sup>9</sup> The first step encompasses the second and third elements and constitutes a jurisdictional test.<sup>10</sup> The second step, based on the first element, is a decision on the merits.<sup>11</sup>

#### A. Common-Law Certiorari Jurisdiction

Before 1939, a petition for a writ of certiorari actually proceeded in two formal, separate steps.<sup>12</sup> The parties first briefed the court on the jurisdictional elements.<sup>13</sup> If the parties established jurisdiction, they then filed separate briefs addressing whether the trial court’s order departed from the essential requirements of the law.<sup>14</sup> Today, these separate briefing phases have been eliminated.<sup>15</sup> However, the courts still consider the “jurisdictional” elements first.<sup>16</sup> Thus, regardless of how far a trial court may have departed from the essential requirements of the

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3. *G.B.V. Intl.*, 787 So. 2d at 842; *Heggs*, 658 So. 2d at 527 (quoting *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially)).

4. *G.B.V. Intl.*, 787 So. 2d at 842.

5. *Id.*

6. Fla. R. App. P. 9.130, 9.140(c)(1).

7. Haddad, *supra* n. 1, at 214.

8. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995); *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987).

9. *Parkway Bank v. Ft. Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d Dist. App. 1995).

10. *Id.*

11. *Id.*

12. *Id.* (citing Haddad, *supra* n. 1, at 208).

13. *Id.*

14. *Id.*

15. *Id.*; see also Fla. R. App. P. 9.100(g) (setting forth the requirements for a petition for certiorari, including both the basis for invoking the court’s jurisdiction and the argument in support of the petition).

16. *Parkway Bank*, 658 So. 2d at 649.

law, the writ will not issue if there is no material injury, if that injury will not affect the remainder of the proceedings, or if the injury can be corrected through some other means.<sup>17</sup>

What constitutes a “material injury” is not always answered intuitively. Some injuries are clearly material and clearly cannot be remedied on direct appeal. The most common example is the disclosure of materials or communications protected by Florida’s various statutory privileges.<sup>18</sup> Another example is the disclosure of materials relating to claims that are not yet properly before the court.<sup>19</sup> Other examples include review of pretrial orders excluding evidence at trial,<sup>20</sup> orders severing parties or counts for trial,<sup>21</sup> orders denying a stay of litigation,<sup>22</sup> orders granting or dissolving

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17. *Id.*

18. See Fla. Stat. § 90.5015 (2002) (journalist privilege); *id.* at § 90.502 (attorney–client privilege); *id.* at § 90.503 (psychotherapist–patient privilege); *id.* at § 90.5035 (sexual assault counselor–victim privilege); *id.* at § 90.5036 (domestic violence advocate–victim privilege); *id.* at § 90.504 (husband–wife privilege); *id.* at § 90.505 (clergy privilege); *id.* at § 90.5055 (accountant–client privilege); *id.* at § 90.506 (trade–secrets privilege). For cases using certiorari as a means to review the application of these privileges, see, for example, *Harley Shipbldg. Corp. v. Fast Cats Ferry Serv., LLC*, 820 So. 2d 445, 447 (Fla. 2d Dist. App. 2002) (trade–secrets privilege); *Viveiros v. Cooper*, 832 So. 2d 868, 869 (Fla. 4th Dist. App. 2002) (psychotherapist–patient privilege); *Choice Rest. Acq. Ltd. v. Whitley, Inc.*, 816 So. 2d 1165, 1166 (Fla. 4th Dist. App. 2002) (accountant–client privilege); *Katlein v. State*, 731 So. 2d 87, 88 (Fla. 4th Dist. App. 1999) (sexual assault counselor–victim privilege); *News-Journal Corp. v. Carson*, 741 So. 2d 572, 573 (Fla. 5th Dist. App. 1999) (journalist privilege).

19. See e.g. *Liberty Mut. Ins. Co. v. Farm, Inc.*, 754 So. 2d 865, 866 (Fla. 3d Dist. App. 2000) (granting certiorari and quashing the orders under review because the insured’s claim of bad faith was premature); *Old Republic Natl. Title Ins. Co. v. HomeAmerican Credit, Inc.*, 844 So. 2d 818, 819–820 (Fla. 5th Dist. App. 2003) (granting certiorari and quashing a discovery order that required production of an insurance company’s claim file when the statutory bad-faith claim that supported the discovery order was premature); *Am. Bankers Ins. Co. of Fla. v. Wheeler*, 711 So. 2d 1347, 1348 (Fla. 5th Dist. App. 1998) (granting certiorari and quashing the trial court’s order compelling disclosure of an insurance company’s claim file when a coverage issue had not been resolved).

20. See e.g. *State v. Pettis*, 520 So. 2d 250, 253 (Fla. 1988) (“The ability of the district courts of appeal to entertain state petitions for certiorari to review pretrial orders in criminal cases is important to the fair administration of criminal justice in this state.”); *State v. Gates*, 826 So. 2d 1064, 1065 (Fla. 2d Dist. App. 2002) (granting certiorari review of the trial court’s order preventing the State from arguing inconsistent theories of guilt).

21. See e.g. *Norris v. Paps*, 615 So. 2d 735, 736 (Fla. 2d Dist. App. 1993) (certiorari review of order severing counts); *Clevetrust Realty Investors v. Toothaker*, 362 So. 2d 1044, 1045 (Fla. 4th Dist. App. 1978) (certiorari review of order severing parties); *State v. Gres*, 361 So. 2d 733, 733 (Fla. 4th Dist. App. 1978) (certiorari review of order severing parties and counts).

22. See e.g. *Dykes v. Trustbank Sav., F.S.B.*, 567 So. 2d 958, 959 (Fla. 2d Dist. App. 1990); *Schwartz v. DeLoach*, 453 So. 2d 454, 454 (Fla. 2d Dist. App. 1984); *Shooster v. BT Orlando LP*, 766 So. 2d 1114, 1115 (Fla. 5th Dist. App. 2000).

lis pendens,<sup>23</sup> and orders granting a “quick taking” in condemnation proceedings.<sup>24</sup> Similarly, the courts have held that an order dispensing with a statutorily mandated presuit procedure constitutes a material injury that cannot be remedied on direct appeal.<sup>25</sup> This is because the entire purpose of the presuit procedure is to avoid litigation, if possible, before the suit is actually filed.<sup>26</sup> The same consideration exists when parties raise issues of statutory immunity from suit.<sup>27</sup> In addition, certiorari jurisdiction exists to protect some procedural rights because the safeguards intended by the statutory procedures cannot be remedied postjudgment; one example is whether the trial court complied with the requirements of Florida Statutes Section 768.72 in granting a plaintiff leave to amend a complaint to add a claim for punitive damages.<sup>28</sup>

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23. See e.g. *Aryeh Trading v. Trimfast Group, Inc.*, 778 So. 2d 336, 337 (Fla. 2d Dist. App. 2000); *Space Dev., Inc. v. Fla. One Constr., Inc.*, 657 So. 2d 24, 24 (Fla. 4th Dist. App. 1995); *Lennar Fla. Holdings, Inc. v. First Family Bank*, 660 So. 2d 1122, 1122 (Fla. 5th Dist. App. 1995).

24. See e.g. *Valleybrook Developers, Inc. v. Gulf Power Co.*, 272 So. 2d 167, 167–168 (Fla. 1st Dist. App. 1973); *Cement Prods. Corp. of Sarasota, Inc. v. Div. of Administration, Dept. of Transp.*, 363 So. 2d 866, 866 (Fla. 2d Dist. App. 1978); *Red Oak Farm, Inc. v. City of Ocala*, 636 So. 2d 97, 97–98 (Fla. 5th Dist. App. 1994).

25. See e.g. *Okaloosa County v. Custer*, 697 So. 2d 1297, 1297 (Fla. 1st Dist. App. 1997); *Parkway Bank*, 658 So. 2d at 649; *St. Anthony's Hosp., Inc. v. Lewis*, 652 So. 2d 386, 386 (Fla. 2d Dist. App. 1995); *Hord v. Taibi*, 801 So. 2d 1011, 1012 (Fla. 4th Dist. App. 2001); *C. Fla. Regl. Hosp. v. Hill*, 721 So. 2d 404, 405 (Fla. 5th Dist. App. 1998).

26. *Parkway Bank*, 658 So. 2d at 649; *Cohen v. DeYoung*, 655 So. 2d 1265, 1266–1267 (Fla. 5th Dist. App. 1995).

27. See e.g. *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 864–865 (Fla. 2d Dist. App. 2002) (reviewing by certiorari a nonfinal order denying a motion for summary judgment based on worker's compensation immunity after finding that the facts of the case did not fall within Florida Rule of Appellate Procedure 9.130(a)(3)(C)(v)); *Bd. of Regents v. Snyder*, 826 So. 2d 382, 386–387 (Fla. 2d Dist. App. 2002) (reviewing by certiorari a nonfinal order denying a motion to dismiss based on the defense of sovereign immunity); *Stephens v. Geoghegan*, 702 So. 2d 517, 521 (Fla. 2d Dist. App. 1997) (permitting certiorari review to address the denial of a motion for summary judgment based on a claim of absolute immunity from state tort-law claims and noting that certiorari review is appropriate because the entire purpose of the immunity is to prevent the public official from having to defend the suit at all).

28. *Globe Newsp. Co. v. King*, 658 So. 2d 518, 519–520 (Fla. 1995). However, certiorari review is not available to review the trial court's determination about whether the evidence presented by the plaintiff to support the claim for punitive damages was sufficient. *Id.* at 519; cf. *Martin-Johnson*, 509 So. 2d at 1100 (refusing to permit certiorari review of an order denying a motion to strike a punitive damages claim and holding that the financial disclosure required in a punitive damages case does not constitute the type of “material injury” that certiorari review was designed to address).

Less intuitively, however, the courts also have used certiorari to review miscellaneous orders that are neither final judgments nor interlocutory orders, such as orders requiring counties to pay attorney's fees,<sup>29</sup> orders disqualifying attorneys in various proceedings,<sup>30</sup> and orders granting motions to conduct postverdict jury interviews.<sup>31</sup>

In addition, contrary to intuition, the courts have repeatedly held that expense and delay, alone, do not constitute a material injury sufficient to justify the issuance of a writ of certiorari.<sup>32</sup> The reason for this is threefold. First, nonfinal appellate proceedings, such as filing a petition for writ of certiorari, also result in expense and delay.<sup>33</sup> Thus, the parties are simply trading one expense for another. Second, every erroneous interlocutory order will result in some level of expense and delay for at least one party.<sup>34</sup> Third, the erroneous interlocutory order may become a nonissue if the party aggrieved by that order wins the case or if some later ruling lessens or eliminates the effect of the erroneous order.<sup>35</sup>

The Florida Supreme Court has addressed the issue of expense and delay by using its constitutional rule-making authority to establish the right to a nonfinal appeal for those situations that, it believes, merit such treatment.<sup>36</sup> Thus, in deference to the rule-making authority of the Supreme Court, the district courts of

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29. See e.g. *Swartz v. Bd. of County Commrs. of Manatee County*, 842 So. 2d 980, 982 (Fla. 2d Dist. App. 2003); *Dade County v. McCrary*, 260 So. 2d 543, 544–545 (Fla. 3d Dist. App. 1972); *Soven v. Palm Beach County*, 422 So. 2d 91, 91 (Fla. 4th Dist. App. 1982).

30. See e.g. *Vick v. Bailey*, 777 So. 2d 1005, 1007 (Fla. 2d Dist. App. 2000); *Garner v. Somberg*, 672 So. 2d 852, 854 (Fla. 3d Dist. App. 1996).

31. See e.g. *Baptist Hosp. of Miami, Inc. v. Maler*, 579 So. 2d 97, 98–99 (Fla. 1991); *Pesci v. Maistrellis*, 672 So. 2d 583, 585 (Fla. 2d Dist. App. 1996).

32. See e.g. *Martin-Johnson*, 509 So. 2d at 1100; *Parkway Bank*, 658 So. 2d at 650.

33. *Parkway Bank*, 658 So. 2d at 650.

34. See *Martin-Johnson*, 509 So. 2d at 1100 (pointing out that litigation of a nonissue always will involve time and expense, but that this cannot justify the extraordinary use of a writ of certiorari); see also Haddad, *supra* n. 1, at 222–223 (“The possibility that the trial court is committing reversible error and that an ensuing case will have to be reversed for a new trial, entailing waste of time and money, exists in all cases and does not mean that an appeal after final judgment is ‘inadequate.’”).

35. *Martin-Johnson*, 509 So. 2d at 1100 (citing Haddad, *supra* n. 1, at 227–228).

36. Fla. Const. art. V, § 4(b)(1); see also *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854–855 (Fla. 1992) (amending Florida Rule of Appellate Procedure 9.130 to add an order finding that a party is not entitled to worker's compensation immunity as an appealable nonfinal order to avoid the expense involved in taking a case through trial when it is evident that the plaintiff's exclusive remedy is to obtain worker's compensation benefits).

appeal have refused to extend certiorari jurisdiction to situations in which the only material injury is expense and delay.<sup>37</sup>

### B. Common-Law Certiorari Merits

If a petitioner establishes that certiorari jurisdiction exists, the court will address the merits of the petition.<sup>38</sup> A writ of certiorari will issue only if the petitioner has shown that the trial court's order "depart[s] from the essential requirements of [the] law."<sup>39</sup> The Florida Supreme Court recently reiterated the definition of this phrase:

[T]he departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.<sup>40</sup>

Of course, this definition begs the question of what constitutes a "clearly established principle of law." The Second District has held that, to constitute a "clearly established principle of law," the law must provide controlling precedent on the particular question at issue.<sup>41</sup> Thus, if the issue is one of first impression or if there is confusion in the caselaw, a writ of common-law certiorari would not issue because no "clearly established" principle of law exists from which the trial court could have departed.<sup>42</sup>

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37. *E.g. Parkway Bank*, 658 So. 2d at 650 (noting that the Supreme Court has constitutional rule-making power and that "the district courts have no jurisprudential reason to expand certiorari beyond its time-honored limitations"); *Whiteside v. Johnson*, 351 So. 2d 759, 760 (Fla. 2d Dist. App. 1977) ("Certiorari is not designed to serve as a writ of expediency and should not be granted merely to relieve the petitioners . . . from the expense and inconvenience of a trial.").

38. *Parkway Bank*, 658 So. 2d at 649.

39. *Martin-Johnson*, 509 So. 2d at 1099.

40. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) (emphasis in original) (citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000); *Heggs*, 658 So. 2d at 528).

41. *Caravakis v. Allstate Indem. Co.*, 806 So. 2d 548, 549–550 (Fla. 2d Dist. App. 2001); *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979, 982 (Fla. 2d Dist. App. 1997).

42. The Second District's reasoning is similar to that applied in cases involving qualified immunity under 42 U.S.C. § 1983 (2000). See *e.g. Junior v. Reed*, 693 So. 2d 586, 591 (Fla. 1st Dist. App. 1997) (explaining that, to be "clearly established," a right "must have been earlier developed in case law in such a concrete and factually defined context as to make [the violation] obvious"). In these cases, a state official may be liable only if he or she takes action that violates "clearly established" law. *Id.* at 590. Thus, if the law is unclear,

The recent Florida Supreme Court decision in *Allstate Insurance Co. v. Kaklamanos*<sup>43</sup> has thrown the issue of what constitutes a “clearly established principle of law” into question, arguably expanding the doctrine of common-law certiorari in the process. In *Kaklamanos*, the Florida Supreme Court accepted jurisdiction based on a direct conflict between the Second District’s decision in *Caravakis v. Allstate Indemnity Co.*<sup>44</sup> and the First District’s decision in *Kaklamanos v. Allstate Insurance Co.*<sup>45</sup> The Court resolved the issue of whether the district courts properly exercised certiorari review in a dispute involving the interpretation of a statutory provision concerning Personal Injury Protection (PIP) benefits.<sup>46</sup> Although the *Kaklamanos* opinion directly addressed the issue of second-appeal certiorari jurisdiction,<sup>47</sup> the Court took the opportunity to address what constituted “clearly established law.”<sup>48</sup>

According to *Kaklamanos*, “clearly established law” is not limited to questions of law that have been settled.<sup>49</sup> Rather,

“clearly established law” can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review.<sup>50</sup>

Thus, in *Kaklamanos*, even though the district courts were in conflict and the Court admitted it had not specifically addressed the effect of the statutory provision at issue, the Court found that

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there can be no liability because there is no “clearly established principle of law” to be violated. *Cf. Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”); *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001) (defining “clearly established law” in the context of qualified immunity as that which is “preexisting, obvious and mandatory”).

43. 843 So. 2d 885.

44. 806 So. 2d 548.

45. 796 So. 2d 555 (Fla. 1st Dist. App. 2001).

46. *Kaklamanos*, 843 So. 2d at 891.

47. *See infra* § II (discussing second-appeal certiorari review).

48. *Kaklamanos*, 843 So. 2d at 890.

49. *See id.* (explaining that “clearly established law” can come from “a variety of legal sources”).

50. *Id.*

the trial court in *Caravakis* violated a “clearly established principle of law.”<sup>51</sup>

*Kaklamanos* clearly expands the scope of common-law certiorari review. Before *Kaklamanos*, if there was no controlling law on the issue, certiorari review was improper.<sup>52</sup> After *Kaklamanos*, it appears that the district courts of appeal may create the “clearly established law” in their decisions and then apply that newly established law to grant certiorari review based on a finding that the trial court departed from the new law. How far *Kaklamanos* will ultimately expand common-law certiorari review is yet to be seen.

## II. SECOND-APPEAL CERTIORARI REVIEW

Second-appeal certiorari review is a variation of common-law certiorari review.<sup>53</sup> In the district courts of appeal, second-appeal certiorari review arises when a petitioner seeks review of a decision of a circuit court sitting in its appellate capacity.<sup>54</sup> Thus, the circuit court has provided the direct appeal, and the district court of appeal is providing a “second appeal.”

However, the term “second appeal” is a misnomer for two reasons. First, the courts repeatedly have cautioned that certiorari is not to be used as a “second appeal.”<sup>55</sup> The reason for this is constitutional. According to Article V, Section 5 of the Florida Constitution and Florida Statutes Section 26.012(1), circuit courts are the courts of final appellate jurisdiction for cases arising in county court.<sup>56</sup> Thus, if a district court of appeal provides a “second appeal,” it has effectively usurped the constitutional role of the cir-

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51. *Id.* at 892.

52. *Ivey*, 774 So. 2d at 682 (noting that, without controlling precedent, an appellate court cannot conclude that a lower court violated a “clearly established principle of law”); *Stilson*, 692 So. 2d at 982 (holding that, when there is no case law squarely discussing the proper interpretation of a statutory or contractual provision, an appellate court may be able to conclude that a court misapplied the correct law, but cannot conclude that a lower court violated a “clearly established principle of law”).

53. See Fla. Jur. 2d *Appellate Review* § 500 (2003) (“In exercising its common-law certiorari jurisdiction to review a decision of the [c]ircuit [c]ourt acting in its review capacity, the [d]istrict [c]ourt’s review is even more limited in scope than that of the [c]ircuit [c]ourt.”).

54. *Id.*

55. *Heggs*, 658 So. 2d at 526.

56. See also *id.* at 526 n. 4 (explaining that “[t]he circuit court is the court of final appellate jurisdiction in cases originating in county court”).

cuit courts.<sup>57</sup> To avoid this constitutional violation, the district courts of appeal may not use certiorari as a guise to grant a second appeal.

Second, the phrase “second appeal” implies that the petitioner will receive a second plenary review of the entire case. However, second-appeal certiorari jurisdiction is not that broad. In second-appeal certiorari cases, the district courts of appeal are limited to reviewing two issues: “[1] whether the circuit court afforded procedural due process and [2] whether the circuit court applied the correct law.”<sup>58</sup> As this limited jurisdiction makes clear, the petitioner does not receive a second plenary review of the case.

Because of the constitutional restraints and the limited jurisdiction, the petitioner does not actually receive a “second appeal” in a “second-appeal certiorari” proceeding. Rather, second-appeal certiorari functions solely as a check to ensure that the initial appeal in the circuit court was fundamentally fair, both procedurally and legally.

#### A. Procedural Due Process

The first question asked in a second-appeal certiorari proceeding is whether the circuit court afforded the petitioner procedural due process.<sup>59</sup> The issue is not whether the county court or administrative body afforded procedural due process in the original proceeding.<sup>60</sup> Rather, the issue is whether the circuit court afforded procedural due process during the initial appellate proceeding.<sup>61</sup>

Decisions granting a writ of certiorari relief on this basis are rare; however, they do exist. For example, in *Swain v. Florida Parole Commission*,<sup>62</sup> the district court found that the circuit court denied the petitioner procedural due process by refusing to re-

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57. *Id.*

58. *Id.* at 530. “Arguably, this is really one issue because any violation of procedural due process should be regarded as a serious error resulting in a miscarriage of justice.” *State v. Wilson*, 690 So. 2d 1361, 1364 (Fla. 2d Dist. App. 1997).

59. *Heggs*, 658 So. 2d at 530.

60. *See Britt v. Mascara*, 830 So. 2d 221, 223 (Fla. 4th Dist. App. 2002) (holding that the circuit court, sitting in its appellate capacity, violated plaintiff’s due process rights when it denied his petition for certiorari).

61. *Id.*

62. 776 So. 2d 1079 (Fla. 4th Dist. App. 2001).

quire the Parole Commission to provide “accurate and complete information” before the court reviewed and denied the petitioner’s petition for writ of mandamus.<sup>63</sup> The lack of a complete record deprived the petitioner of procedural due process during the appeal.<sup>64</sup> In *Cook v. City of Winter Haven Police Department*,<sup>65</sup> the district court granted certiorari relief because the circuit court ruled on a pending appeal before ruling on the petitioner’s pending motion for leave to supplement his appendix.<sup>66</sup> Similarly, in *Department of Children & Families v. Jackson*,<sup>67</sup> the district court granted certiorari relief after the circuit court entered its order without affording the petitioner an opportunity to present evidence on the issue before the court.<sup>68</sup> Finally, in *Burkette v. Sharp*,<sup>69</sup> the district court granted certiorari relief when the circuit court dismissed an appeal as untimely based on the circuit court’s incorrect determination of when the jurisdictional clock began to run.<sup>70</sup> Because it was clear, in each of these cases, that the circuit court did not afford procedural due process during the initial appeal, the district courts granted certiorari relief in the “second-appeal” proceeding.

### B. Application of the Correct Law

The second element for review in a second-appeal certiorari case is whether the circuit court applied the correct law.<sup>71</sup> Again, the question is not whether the county court applied the correct law in deciding the case initially.<sup>72</sup> Rather, the question is

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63. *Id.* at 1079.

64. *Id.* Relief, by way of certiorari review, is appropriate for “violations which effectively deny appellate review.” *Combs v. State*, 420 So. 2d 316, 317 (Fla. 5th Dist. App. 1982), *aff’d in part*, 436 So. 2d 93, 96 (Fla. 1983). Such a violation occurs when “the circuit judge render[s] a decision without allowing briefs to be filed and considered, a circuit judge [makes] a decision without a record to support the decision . . . or the circuit court [dismisses] an appeal improperly . . .” *Id.* (citing *Lee v. State*, 374 So. 2d 1094 (Fla. 4th Dist. App. 1979); *Lynch v. State*, 409 So. 2d 133 (Fla. 5th Dist. App. 1982)).

65. 837 So. 2d 492 (Fla. 2d Dist. App. 2003).

66. *Id.* at 494.

67. 790 So. 2d 535 (Fla. 2d Dist. App. 2001).

68. *Id.* at 538.

69. 752 So. 2d 77 (Fla. 2d Dist. App. 2000).

70. *Id.* at 78.

71. *Heggs*, 658 So. 2d at 530.

72. *Supra* nn. 60–61 and accompanying text (discussing the elements for review in a second-appeal certiorari case).

whether the circuit court applied the correct law when it reviewed the case on direct appeal.<sup>73</sup>

Until recently, it was clear that the phrase “applied the correct law” did not mean “correctly applied the law.” As early as 1882, the Florida Supreme Court distinguished between “applying the correct law” and “correctly applying the law”:

A decision made according to the forms of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not an illegal or irregular act or proceeding remediable by *certiorari*.<sup>74</sup>

In restating this principle eighty years later, one court stated,

It seems to be the settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have had the remedy by due course of law . . . if the judge fails or refuses to perform that duty.<sup>75</sup>

Forty years after this, in *Ivey v. Allstate Insurance Co.*,<sup>76</sup> the Florida Supreme Court reiterated that certiorari review was not a proper means to correct what the district court perceived to be an erroneous interpretation of the applicable law.<sup>77</sup> In *Ivey*, the plaintiff sued her insurance carrier, Allstate, in county court after it refused to pay a portion of a medical bill that it allegedly owed as part of the plaintiff’s PIP benefits.<sup>78</sup> During discovery, Allstate realized that it owed the amounts the plaintiff claimed, and Allstate paid the remaining amount.<sup>79</sup> The plaintiff then sought an award of attorney’s fees pursuant to Florida Statutes Sections 627.736(8) and 627.428(1).<sup>80</sup>

The county court denied the plaintiff’s request for attorney’s fees.<sup>81</sup> In its holding, the county court reasoned that Allstate had

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73. *Id.*

74. *A.D. Basnet v. City of Jacksonville*, 18 Fla. 523, 526–527 (Fla. 1882) (emphasis in original).

75. *State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st Dist. App. 1960).

76. 774 So. 2d at 682.

77. *Id.* at 681.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

no duty to look beyond the health insurance claim form to resolve any uncertainties, and Allstate had paid the disputed amount within thirty days of discovering its mistake.<sup>82</sup> The plaintiff appealed to the circuit court, which reversed the county court's decision.<sup>83</sup> The circuit court held that the plaintiff was entitled to her attorney's fees because Allstate could have discovered its error within the statutory thirty-day investigation period, thereby avoiding the entire lawsuit.<sup>84</sup> Allstate then sought second-appeal certiorari review in the district court.<sup>85</sup> The Third District granted Allstate's petition, holding that the plaintiff was not entitled to attorney's fees because the original medical bill contained an error, and Allstate was not responsible for that error.<sup>86</sup>

The Florida Supreme Court granted review based on direct conflict between the Third District's decision and the Supreme Court's decision in *Heggs*.<sup>87</sup> In quashing the Third District's decision, the Supreme Court expressly stated that a district court's mere disagreement with a decision of the circuit court sitting in its appellate capacity "is an improper basis for common-law certiorari."<sup>88</sup> Reiterating its earlier statements that second-appeal certiorari is a very limited form of review, the Court stated,

[T]he district court below expressly created a new category of appellate review never before recognized under Florida law and in express and direct conflict with authority to the contrary. District courts have never been allowed to review decisions, under the guise of certiorari jurisdiction, simply because they are dissatisfied with the result of a decision of a circuit court sitting in its appellate capacity.<sup>89</sup>

Thus, after *Ivey*, it was still clear that "applied the correct law" did not mean "correctly applied the law." As long as the circuit court applied the correct law to the facts of the case, the fact that it ultimately applied that law incorrectly was not a basis for certiorari review.

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 683.

89. *Id.*

Despite 120 years of clear precedent, the Florida Supreme Court recently muddied the waters of second-appeal certiorari review in *Kaklamanos*.<sup>90</sup> In *Kaklamanos*, the Court accepted certiorari jurisdiction based on direct conflict between the First District's decision in *Kaklamanos* and the Second District's decision in *Caravakis*.<sup>91</sup> Both district courts had been faced with exactly the same question: Could an insured pursue a breach of contract action against his or her insurer for PIP benefits when the insured had not paid the medical bills, when the insured had not been sued for payment by the medical provider, and when the PIP policy contained a provision that the insurer would defend and indemnify the insured if the insured was sued for collection by the medical provider?<sup>92</sup> Both county courts had held that the insured could not maintain the action because the insured had suffered no damages.<sup>93</sup> Both circuit courts affirmed the county court decisions.<sup>94</sup> On second-appeal certiorari, the First District Court granted the petition, concluding that "the circuit court applied the incorrect law."<sup>95</sup> The Second District Court, on the other hand, denied certiorari review, concluding that, because there was no law repudiating the policy provision, it could not say that the circuit court had applied the incorrect law.<sup>96</sup> The Supreme Court accepted jurisdiction based on the conflict over the propriety of certiorari review to address the issue.<sup>97</sup>

The Supreme Court first reaffirmed its holding from *Ivey* that it is improper for a district court to grant certiorari review simply because it disagrees with the circuit court's interpretation of the applicable law.<sup>98</sup> The Court then attempted to distinguish *Ivey* by noting that the First District, in *Kaklamanos*, "was 'persuade[d]' that 'the circuit court applied the incorrect law.'"<sup>99</sup> However, the Court then summarized its own holding by stating,

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90. 843 So. 2d 885.

91. *Id.* at 887.

92. *Id.*

93. *Id.* at 888.

94. *Id.*

95. *Id.*

96. *Id.* at 889.

97. *Id.* at 887.

98. *Id.* at 889.

99. *Id.* at 890 (quoting *Kaklamanos*, 796 So. 2d at 557-558).

[W]e agree with the First District that the lower courts' interpretation of damages is too narrow and is inconsistent with both the intent and language of the PIP statute and the general principles governing contracts. Thus, we find that the First District properly exercised its certiorari jurisdiction to address the merits of Kaklamanos's petition.<sup>100</sup>

It is clear from this last statement that both the First District and the Florida Supreme Court merely disagreed with the circuit courts' interpretation of the applicable law. Neither the First District nor the Supreme Court found that the circuit courts applied the incorrect law.<sup>101</sup> Rather, they both agreed with the circuit courts that the PIP statute and general contract principles controlled.<sup>102</sup> However, both the First District and the Supreme Court found that the circuit courts had misapplied the correct law.<sup>103</sup> Under 120 years of Supreme Court precedent, a misapplication of the correct law to existing facts was insufficient to support certiorari review. However, the *Kaklamanos* Court found this basis sufficient and affirmed the First District's decision to grant second-appeal certiorari review on this basis.<sup>104</sup>

As Justice Charles T. Wells points out in his dissenting opinion, there is no way to reconcile the decision in *Kaklamanos* with the decision in *Ivey*.<sup>105</sup> The Supreme Court's attempt to distinguish the two decisions is not persuasive. The Court notes that, in *Ivey*, the Third District explicitly stated that it was basing its certiorari review on its disagreement with the circuit court's decision.<sup>106</sup> In *Kaklamanos*, however, the First District stated that it was persuaded "that the circuit court had applied the incorrect law and that [this error] was sufficiently egregious or fundamental to require certiorari review."<sup>107</sup> Although the two district courts used different words to support granting certiorari review, their ultimate decisions were the same: granting the writ because they disagreed with the circuit court's decision. Just like the Third District in *Ivey*, the First District in *Kaklamanos* simply dis-

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100. *Id.* at 891.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 897 (Wells, J., dissenting).

106. *Id.* at 890.

107. *Id.*

agreed with the result reached by the circuit court. The fact that the First District did not explicitly state this does not alter the substance of its decision. The language chosen makes a distinction without a difference, and the Supreme Court's reliance on this difference in language to distinguish the two cases elevates form over substance.

Worse still, the decision in *Kaklamanos* does not expressly overrule the decision in *Ivey*.<sup>108</sup> In fact, *Kaklamanos* purports to rely on *Ivey* as authority for its holding.<sup>109</sup> Accordingly, until the Florida Supreme Court addresses the issue again, the district courts of appeal appear to be allowed to use certiorari jurisdiction to "correct" what they perceive to be misapplications of the correct law on certiorari review, so long as they do not state that this is their reason for granting review.<sup>110</sup> Until the Florida Supreme Court revisits *Kaklamanos*, practitioners can expect that the decision of whether to grant second-appeal certiorari review is not governed by a particular standard, but rather, is subject to the whims of the different district courts of appeal.<sup>111</sup>

### III. WRITING THE PERFECT PETITION OR RESPONSE<sup>112</sup>

Once a decision is made to file a petition for certiorari, the next step is making sure the petition is timely and properly filed.<sup>113</sup>

The jurisdiction of the district court of appeal to issue a writ of certiorari is invoked by filing a petition with the court within thirty days of the date on which the order to be reviewed is ren-

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108. See *Puryear v. State*, 810 So. 2d 901, 905–906 (Fla. 2002) (stating that the Florida Supreme Court "does not intentionally overrule itself sub silentio" and requiring the lower courts to apply the express holding of a former decision until the Court specifically recedes from that former holding).

109. *Kaklamanos*, 843 So. 2d at 890.

110. *Id.* at 898 (Wells, J., dissenting).

111. Should the district court wish to grant second-appeal certiorari review, it may cite to *Kaklamanos* and find that the error is "sufficiently egregious or fundamental" to warrant review. Should the district court wish to deny second-appeal certiorari review, it may cite to *Ivey* and find that the circuit court simply misapplied the correct law. As Justice Wells pointed out in his dissenting opinion in *Kaklamanos*, certiorari review will become "standardless and subject to the particular views of different appellate court panels as to which decisions meet an amorphous criterion." *Id.*

112. The recommendations in this section are those of the Author, based on her experience, and do not reflect specific recommendations by the Second District Court of Appeal.

113. Fla. R. App. P. 9.100(c), (f).

dered.<sup>114</sup> An order is “rendered” when it is signed by the trial judge and filed in the court file.<sup>115</sup> Thus, the jurisdictional time clock runs from the date stamped on the order by the circuit court clerk’s office.

The rules of appellate procedure require the petition to contain the basis for invoking the jurisdiction of the court, the facts on which the petitioner relies, the nature of the relief sought, and the argument in support of the petition, with citations to authority.<sup>116</sup> Clearly, a successful petition must contain these items, and one that does not is subject to being stricken by the court.<sup>117</sup> However, these minimum requirements do not ensure success. A successful petition addresses the specific jurisdictional elements required for each type of certiorari review and explains why this particular case warrants the court’s granting the writ.

A petition seeking a writ of common-law certiorari should first specifically explain what the material injury is and why no other remedy is available.<sup>118</sup> For example, a petition seeking to quash an order requiring the disclosure of privileged documents should explain why this particular disclosure results in a material injury to this particular party and why review on direct appeal will not provide this particular party with an adequate remedy. It is not enough simply to parrot the words of the standard. Rather, the standard must be applied to the specific facts surrounding this erroneous order. Because the court will not reach the merits of the petition unless it first determines that it has jurisdiction, this portion of the petition is vital. Citing cases in which a district court of appeal exercised certiorari review to address the same type of order in the same type of situation should ensure that the court will reach the merits of the petition.

Once the petition has addressed jurisdiction, it should address, as clearly and concisely as possible, how the trial court departed from the essential requirements of the law.<sup>119</sup> Although *Kaklamanos* may arguably have expanded the definition of

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114. *Id.* at 9.100(c)(1).

115. *Id.* at 9.020(h).

116. *Id.* at 9.100(g)(1)–(4).

117. *Id.* at 9.410.

118. *See Parkway Bank*, 658 So. 2d at 648 (discussing the three-prong test for a certiorari petition).

119. *Id.*

“clearly established law” and, therefore, may have expanded the number of errors that can be corrected by certiorari, the petition should nevertheless argue that the error meets the more stringent standard. Despite the apparent broadening of jurisdiction by the Florida Supreme Court, the district courts of appeal are unlikely to significantly relax the requirements for showing a true departure from the essential requirements of the law. As with the jurisdictional element, it is most helpful to the court if the petition cites cases that have held that the particular ruling at issue constitutes a departure from the essential requirements of the law. In addition, cases showing that the law on the particular issue raised by the petition is, in fact, clearly established will go a long way toward convincing the court that certiorari relief is proper.

Once the court has initially reviewed the petition, it may issue an order to show cause.<sup>120</sup> The basis for issuing an order to show cause is that the petition demonstrates “a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal.”<sup>121</sup> Despite this language, the fact that the court has ordered a response does not mean it has necessarily concluded it has jurisdiction.<sup>122</sup> Rather, it has determined that the petition appears to state a basis for relief, and the court wants further briefing on the issue.<sup>123</sup> Thus, the respondent should not ignore the jurisdictional elements required for certiorari review. If the respondent has a good-faith basis for believing that jurisdiction does not exist, then the respondent should raise these arguments, clearly stating why the petitioner has not suffered a material injury under the particular facts of the case or why the petitioner has some other adequate remedy.

However, the respondent should not stop there. Even if it seems clear that there is no jurisdiction for certiorari review, the respondent should nevertheless address the merits of the petition. Certainly, the respondent should argue, if legally possible, that the trial court did not make any legal error in entering the order on appeal. However, because the petitioner must show more than simple legal error, the respondent is also free to argue that, al-

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120. Fla. R. App. P. 9.100(h).

121. *Id.*

122. *Id.*

123. *Id.*

though the trial court's order was error, it was a simple legal error that does not constitute a departure from the essential requirements of the law. Moreover, in a second-appeal certiorari proceeding, the respondent may argue that the law is not "clearly established" and, therefore, the trial court could not have violated "clearly established law."<sup>124</sup>

What is most important is that the response actually *respond* to the arguments raised by the petitioner. A response that fails to address the petitioner's arguments does not help the court in deciding either the jurisdictional elements or the merits of the petition. Even if all the caselaw establishes that there is no certiorari jurisdiction, the response should address the merits of the case raised by the petitioner. It should explain why the petitioner's authority is inapplicable or provide alternate authority showing that relief is not proper. The failure of a respondent to respond to all of the arguments raised leaves the court with only one side of the issue—the petitioner's side—briefed. Although the court will frequently conduct its own research, a respondent's failure to address, directly and adequately, the issues raised by the petitioner puts the respondent at a serious disadvantage in certiorari proceedings.

#### IV. CONCLUSION

The scope of certiorari relief tends to expand and contract as changes in the law occur. As the Florida Supreme Court amends Florida Rule of Appellate Procedure 9.130, certiorari jurisdiction either expands or contracts to fill the voids. In addition, Florida Supreme Court rulings, such as *Kaklamanos*, can expand or contract certiorari jurisdiction. The power of the writ of certiorari to correct otherwise uncorrectable error makes it one of the strongest tools in the litigator's arsenal when used correctly.

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124. *Supra* nn. 40–52 and accompanying text (discussing "clearly established" law).