

Appellate Law

Certifying Questions to the Florida Supreme Court: What's So Important?

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So you receive the decision in the mail, and the only laudable thing about the opinion is that one was written. You scour the opinion for some rule of law, some fact that the panel overlooked. You find none. You then review the opinion again, this time trying to identify some basis for conflict with another district court of appeal. You come up empty. Once again, the panel outsmarted you. The opinion pretermits any possible avenue for further review. But suddenly a grin creeps over your face, and you sit there looking like the Grinch just before Christmas. This case, of course, presents an issue of great public importance!

The Florida Supreme Court possesses discretionary jurisdiction over cases that “pass upon a question certified to be of great public importance.”¹ But what questions are of “great public importance”? The answer is elusive.

Before you draft that motion for certification, you may want to consider your chances of having such a question certified. Discerning a court's reasons for certifying a question as one of great public importance is not easy. Most opinions do not discuss the reasoning behind the certification; much less do they discuss their reasons for denying it. Some cases, however, do offer a glimpse into the reasoning process. This article discusses some of the major reasons courts have articulated for certifying a question of great public importance. It is designed not as a scientific survey, but as a means to help lawyers better

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estimate whether their cases present certifiable questions.

One apparent requirement for certification is that the answer to the question will benefit more parties than simply the present litigants.² A mere conviction that the Florida Supreme Court should hear the case will not suffice.³ As one judge heatedly put it, “It will simply not do to say that an issue is of ‘great public importance’ just because, for reasons which may be worthy but are not reflected in the constitution, it is thought that the Supreme Court should hear the case. The end does not justify the means even in questions of appellate review.”⁴ Other judges have chastised a majority opinion for certifying unimportant issues: “If the

majority members of this court are interested in revising [the statute], then they should contact their legislative representatives rather than send a bogus issue to the Florida Supreme Court.”⁵ Still other judges have argued that some issues are *too* important for certification and should be left to the legislature.⁶

It also seems self-evident that an issue of “great public importance” must mean importance throughout the state, not just in a single geographic area.⁷ Courts of appeal can always hear or rehear cases en banc that are of “exceptional importance.” It would seem, therefore, that issues which arguably may be of “great public importance,” but nevertheless are limited in their reach to the jurisdiction of a particular appellate district, are more appropriate for en banc consideration by that district court than for certification to the Florida Supreme Court.

One thing is clear, however: Under the rule as amended in 1980, the issue need not be of great public *interest*, but only of great public *importance*.⁸ The distinction is deceptively crucial. The rule formerly allowed review of questions certified to be of “great public interest,” but was changed in 1980 out of recognition that some legal issues may have “great public importance” but may not be sufficiently known to generate “great public interest.”⁹

Important Issues with Far-reaching Consequences

One common reason for certification is that the question involved

may have far-reaching consequences. This, of course, begs the question of what issues have “far-reaching consequences.” In some cases, the consequences are quite obvious. For example, in *Smith v. State*, 497 So. 2d 910 (Fla. 3d DCA 1986), the issue was whether the trial court’s standard instruction concerning the burden of proof on the insanity defense, which the Supreme Court subsequently held reversible error, constituted fundamental error. The court of appeal certified the question because of the “far-reaching possible consequences” of a holding that would expose many previously final criminal convictions to collateral attack.¹⁰

Other examples offer further guidance. In one case, the court certified the question because the issue could “potentially affect[] thousands of mortgages in the state.”¹¹ Another court, in certifying a question involving a county’s challenge to the constitutionality of a statute, “[r]ecogniz[ed] the impact of Florida’s Growth Management Act upon county governments and the state.”¹² Yet another “recognize[d] the ever increasing need for new school facilities caused by the rapid development in this state and the budgetary problems faced by school boards throughout the state”¹³ Other cases present similar specific questions with important statewide consequences.¹⁴

Some courts are more vague in certifying questions on this ground, stating that they do so because the court could “foresee the potentially broad ramifications of this issue”¹⁵ Exactly what issues have far-reaching consequences, however, can be a matter of debate.¹⁶

Cases of First Impression

Another popular basis for certification is that the case presents an issue of first impression. The Florida Supreme Court has recognized that the certification function of the district courts of appeal “is particularly applicable to decisions . . . of first impression”¹⁷ Despite this statement, certification of a decision because it is one of first

impression can be controversial. At least one judge has objected to certification on this basis, arguing that the court “should not and, indeed, may not pass the buck to the Supreme Court merely because a particular case is difficult or one of first impression.”¹⁸ Thus, that a case presents an issue of first impression in this state would not in itself seem to establish a question of great public importance. One can think of many esoteric questions, of no particular relevance in other cases, that no Florida court has decided.

Some cases base the decision to certify solely on this ground.¹⁹ Others do not expressly certify on this ground, but note that the case presents an issue of first impression, and later certify the question with no stated reason, thus implying that at least a tacit basis for the certification was that the issue was one of first impression.²⁰ Cases certifying on this ground may also articulate other bases for certification.²¹

Issues That Arise Frequently

Another ground for certification is that an issue has arisen frequently or may arise frequently in the future. Several courts have certified questions on this ground.²² For example, in *Ordini v. Ordini*, 701 So. 2d 663, 666 (Fla. 4th DCA 1997), the court certified the question of whether “income” for purposes of child support includes gifts from family members, certifying in part because “the cases in which adult children are regularly receiving assistance from parents are probably going to become more frequent, because the opportunity to earn and save substantial sums is not the same for this generation, as it was for the last.” As with cases certifying issues of first impression, however, cases certifying issues that arise frequently also generally assert other grounds as well.²³ Therefore, although the fact that an issue arises frequently may constitute some evidence that it is an issue of great public importance, it may not be enough, standing alone, to obtain certification of a question.

Unclear Case Law

Another major reason for certifying a question as one of great public importance is unclear or confused case law.²⁴ For example, in *Hastings v. Demming*, 682 So. 2d 1107 (Fla. 2d DCA 1996), the Second District certified a question concerning appeals from orders determining entitlement to workers’ compensation immunity.²⁵ The court noted the “conflicting manner” in which courts, even within the same dis-

trict, had resolved the jurisdictional problem associated with the rule.²⁶ Also, in *In re Estate of Tolin*, 594 So. 2d 309 (Fla. 4th DCA 1992), the dissent argued that the question concerning the destruction of a will should be certified because “[t]he case law is unclear, one case holding that destruction of a carbon copy is effective, and another case holding that destruction of a conformed copy is not.”²⁷ On rehearing, the panel members agreed to certify the question.²⁸

Some cases have certified questions of great public importance even though the court noted conflict with another case.²⁹ These cases do not explain why certification was granted on the basis of a question of great public importance rather than a conflict, which is another ground for Florida Supreme Court jurisdiction. Certification for either reason, however, affords the Florida Supreme Court discretionary jurisdiction, and the Supreme Court liberally accepts jurisdiction over certified questions regardless of the basis for certification. The court certifying the question may, however, want to frame the issue in the Supreme Court, and answer the question itself elsewhere in its opinion.³⁰ Moreover, in a few cases where the Florida Supreme Court has accepted (or reserved a determination of) jurisdiction based on certified conflict, upon reviewing the case the court determined that in fact no conflict existed, and therefore dismissed the appeal for lack of jurisdiction.³¹ Certification of a question avoids that risk.

Perhaps with this danger in mind, some cases have certified questions of great public importance where conflict with other cases was debatable or only implied. This was most apparent in *Hillsborough County Aviation Auth. v. Hillsborough County Governmental Employees Ass'n*, 482 So. 2d 505, 509 (Fla. 2d DCA 1986), in which the court emphasized that because the conflict arose from dicta in one of the cases, it did not certify a conflict. Instead, the court certified a question of great public importance.

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tion when its decision might appear to conflict with Florida Supreme Court precedent.³² The possible reason for such certification is that a district court of appeal should never issue an opinion conflicting with the Florida Supreme Court,³³ and therefore courts do not certify a conflict with a Florida Supreme Court case. Instead, courts certify a question. At least one judge disagrees with this use of the certification process, however, arguing that “it is one of our basic functions to interpret, and by that extend in proper situations, cases decided by our Supreme Court.”³⁴ According to that judge, for courts to certify questions regarding interpretation of the Supreme Court’s decisions “is to transfer our duty in this regard.”³⁵ As with other bases for certification, some cases seem to invoke a conflict in decisions as an additional, but not the sole, basis for certifying the question.³⁶

Public Policy Issues

“The Florida Supreme Court is, of course, the ultimate judicial policymaker and perceiver.”³⁷ Therefore, courts often certify questions when the answer depends less on applying current law than on considerations of public policy. For example, in *Brown v. City of Pinellas Park*, 557 So. 2d at 161, police were involved in a high-speed chase of a car that ran through a red light. Eventually, 14 officers joined the

chase, running through several red lights in the process. During the chase, a squad car slammed into a bystander vehicle, killing the occupants of both cars. Although the court acknowledged the general Florida law granting immunity to law enforcement personnel involved in high-speed chases, the court thought the facts involved in that case were much more egregious, and the tragedy more avoidable, than those involved in previous cases. In certifying the question, the court noted that “this case hinges basically upon a determination of public policy as to which there may be reasonably differing views.”³⁸

Other courts have certified similar questions involving public policy issues.³⁹ In fact, at least one judge has disagreed with a court’s failure to certify a question where the issue in the case, at least in the opinion of the dissenting judge, was “a policy question, not a purely legal question, or even a fairness question.”⁴⁰ Some courts also certify questions involving interpretation of the legislature’s public policy.⁴¹

Old Precedent

Another basis for certification is the reexamination of an issue as a consequence of the passage of time.⁴² For example, in *Taylor v. State*, 401 So. 2d 812, 816 (Fla. 5th DCA 1981), the court certified the question whether attempted manslaughter is a crime under Florida Statutes, “[b]ecause the question has not been directly addressed by the Supreme Court in almost 50 years” Other cases have certified a question “in order to permit the Supreme Court to revisit” an issue it has not addressed in some time.⁴³

This basis for certification often occurs in an expanding field of law or where new technology argues for a change in the law. In *McMullin v. State*, 660 So. 2d 340 (Fla. 4th DCA 1995), the issue was the admissibility of expert testimony concerning the reliability of eyewitness accounts as a result of psychological factors. The Florida Supreme Court had decided the issue 12 years earlier.⁴⁴ The court recognized the bind-

ing Florida law, but nevertheless certified the issue because the Florida Supreme Court might have wanted to consider the decisions rendered and studies conducted in the intervening years.⁴⁵ The dissenting opinion argued, however, that the passage of time alone should never be enough for certification.⁴⁶

Whether conditions have changed since the Florida Supreme Court's last pronouncement can be hotly disputed. In *Fisel v. Wynns*, 650 So. 2d 46, 52 (Fla. 5th DCA 1994), the court agreed to certify the question whether changing conditions in Florida in the last 21 years had altered the public policy "so that a livestock owner may now be liable for injuries resulting when the owner's livestock wanders through an open gate, and the reason the gate is open is unknown."⁴⁷ The dissent protested that "[t]here is nothing in the record before us in this case to suggest a 'change in conditions in Florida' since 1973 in regard to the liability of livestock owners"⁴⁸

This basis for certification raises the question of how much time should lapse before a court of appeal asks the Florida Supreme Court to reconsider its own precedent. Some cases suggest the passage of time need not be great for the issue to be revisited if the issue is important enough. For example, in *Young v. St.*

Vincent's Med. Ctr., Inc., 653 So. 2d at 499, the First District Court of Appeal certified a question even though the Florida Supreme Court had decided the question only 15 years earlier.⁴⁹ The issue, however, was whether the Florida Wrongful Death Act⁵⁰ permitted recovery on behalf of stillborn children who died as a result of injuries received while in the mother's womb, which the panel, in deference to the concurring judge, thought was important enough for the Florida Supreme Court to reconsider.⁵¹ In *McMullin*, the concurring judge seemed to believe the answer depended on the issue to be considered, and noted, as to the circumstances in that case, that "the world of psychology and the subject of eyewitness identifications has turned over several times in that brief [12-year] span."⁵²

Other courts have certified questions of "great public importance" when they believed that the Florida Supreme Court should modify or overrule its prior cases.⁵³ Indeed, the Florida Supreme Court itself has invited courts of appeal to certify questions on this basis in lieu of deviating from binding precedent.⁵⁴

Intervening Law

A related basis for certification is the confusion generated when decisions of the Florida Supreme Court seem to implicitly overrule prior

cases from that court or from the district courts of appeal. Courts often certify such questions to give the Florida Supreme Court the opportunity to clarify the issue.⁵⁵ These cases are unclear on whether the "great public importance" requirement was satisfied by the mere existence of an ambiguity or whether, aside from the ambiguity, the questions were independently of "great public importance."⁵⁶

Courts also certify questions when intervening decisions of the U.S. Supreme Court would seem to overrule a Florida Supreme Court case, but the court of appeal is reluctant to so hold on its own.⁵⁷ Sometimes intervening federal cases do not expressly overrule Florida law because they are based on the interpretation of a federal statute, but the court of appeal certifies the question anyway to give the Florida Supreme Court the opportunity to interpret a similar Florida statute in light of the new federal case.⁵⁸ The same happens when the U.S. Supreme Court overrules a case on which the Florida Supreme Court relied in formulating Florida law.⁵⁹

Popular Areas of Certification: Discerning the Trends

Statistics showing which areas of the law are most often certified can also help in predicting which issues

are more likely to receive favorable consideration. For example, of the questions certified in 1985, about 77 percent concerned procedural issues and 23 percent substantive issues. By far the greatest number of certifications — 60 percent — occurred in the area of criminal procedure. Issues of constitutional law and torts each were involved in 12 percent of the certifications. No other area of the law was involved to any significant extent. By 1995, the percentage of tort questions certified had increased to 25 percent, constitutional questions remained about the same at 10 percent, and criminal law questions had decreased to 52 percent. One new area of the law receiving a significant amount of certifications was administrative law (10 percent).

While percentages will change from year to year, these rough statistics do show the courts' predilection for certifying questions concerning criminal procedure, constitutional law, and torts. Issues in other areas of law have a substantially diminished chance of achieving certification.

The practitioner also should keep in mind that the chances that a court will certify a question are quite slim. From 1985 to 1995, the number of questions certified varied from a low of 88 in 1988 to a high of 189 in 1991, while averaging about 127 certifications per year, or roughly 25 per district. This averages to about two certified questions per month of the roughly 3,000 cases per year decided by the district courts of appeal. Because the courts of appeal often certify questions even without a request, the number of motions for certification granted is even less than that. Moreover, since 1991 the trend is toward a general reduction in the number of questions certified.

Presenting a Question to the Court

The appellate rules permit parties to request certification.⁶⁰ Some courts have certified "the issue" without delineating a specific question.⁶¹ The better practice, however, in view of the rule allowing certifi-

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cations of *questions* of great public importance, is for the court to articulate a specific question. Therefore, counsel should assist the court when requesting certification by submitting a proposed question. Sometimes, only when the court reviews the question will it realize the importance of the matter.

Finally, practitioners should be aware that a court's certification of a question does not automatically establish Supreme Court jurisdiction. The party who requested certification (most likely the nonprevailing party on appeal) must, pursuant to the appellate rules, file a notice to invoke the discretionary jurisdiction of the Florida Supreme Court within 30 days of rendition of the court of appeal's decision, as the term rendition is defined in the rules.⁶² Many certified questions have remained unanswered because counsel failed to realize that getting the question certified was only an important first step to Supreme Court review, and not the jurisdictional document itself. Where the court of appeal has certified the question, however, the party seeking review need not file a jurisdictional brief in the Florida Supreme Court, as is usually required in discretionary jurisdiction cases, but can wait for the court to accept (or reserve ruling on) jurisdiction and establish a briefing schedule.

Conclusion

While the kinds of questions discussed do not establish to a scientific certainty which questions are likely to be certified, they do provide some guidance to the practitioner in discerning whether a particular issue is likely to be certified, and allow a basis from which a practitioner can argue for certification.

So you look over that opinion you received once again, this time keeping in mind some of the trends discussed in this article, and you scour the pages for some important question. You find no issue of far-reaching consequences, no issue of first impression, no issue repeatedly coming before the court, no Supreme Court precedent that has not been revisited in the last 50 years, no need for clarification of the law, and no issues of public policy. To make matters worse, the case is not about criminal procedure, constitutional law, or torts, but about the rule against perpetuities. Now what do you do? Well, there's always that motion for clarification . . . □

¹ See FLA. R. APP. P. 9.030(a)(2)(A)(v). See also FLA. CONST. Art. 5, § 3(b)(4) (1980) (providing that the Florida Supreme Court "may review any decision of a district court of appeal that passes upon a question of great public importance . . ."). Although jurisdiction is discretionary, as a practical matter the Supreme Court accepts jurisdiction in nearly all cases in which a district court of appeal certifies conflict.

² See *Sunshine Meadows Condo. Ass'n, Inc. v. Bank One, Dayton, N.A.*, 599 So. 2d 1004, 1009 n.1 (Fla. 4th D.C.A. 1992) (Farmer, J., dissenting) (arguing that no "great public importance" existed "in a case involving abstruse questions of parties' expectations in investing in an equestrian center").

³ See *Sunshine Vistas Homeowners Ass'n v. Caruana*, 597 So. 2d 809, 811 (Fla. 3d D.C.A. 1992) (Schwartz, C.J., dissenting). In *Caruana*, Chief Judge Schwartz castigated the majority for agreeing to certify a question that was not of great importance "to anyone but the litigants and an abstractor or two." *Id.*

⁴ *Caruana*, 597 So. 2d at 811 n.1 (Schwartz, C.J., dissenting).

⁵ *Fisel v. Wynns*, 650 So. 2d 46, 52 (Fla. 5th D.C.A. 1994) (Cobb, J., dissenting).

⁶ See, e.g., *Young v. St. Vincent's Med. Ctr., Inc.*, 653 So. 2d 499, 507 (Fla. 1st D.C.A. 1995) (Webster, J., dissenting).

⁷ Cf. *Young v. State*, 678 So. 2d 427, 429 (Fla. 4th D.C.A. 1996) (certifying a question in part because the issue “affects numerous criminal defendants within this district and throughout the state”); *Gibbs v. State*, 676 So. 2d 1001, 1006 (Fla. 4th D.C.A. 1996) (certifying a question in part because the issue “affects numerous prosecutions in this and other districts”).

⁸ See FLA. R. APP. P. 9.030 committee’s note on 1980 amendment.

⁹ *Id.*

¹⁰ *Smith*, 497 So. 2d at 912.

¹¹ See *Beach v. Great Western Bank*, 670 So. 2d 986, 994 (Fla. 4th D.C.A. 1996).

¹² See *Santa Rosa County v. Admin. Comm’n, Div. of Admin. Hearings*, 642 So. 2d 618, 624 (Fla. 1st D.C.A. 1994). The dissent disagreed with certification, arguing that “[t]here is certainly nothing remarkable or unique in the application of [a long-standing] rule to a county, an arm of the state, forbidding it to sue its head.” *Id.* at 624 (Ervin, J., dissenting).

¹³ *St. John’s County v. Northeast Florida Builders Ass’n*, 559 So. 2d 363, 364 (Fla. 5th D.C.A. 1990).

¹⁴ See, e.g., *Humana of Florida, Inc. v. McKaughan ex rel. McKaughan*, 652 So. 2d 852, 863 (Fla. 2d D.C.A. 1995) (“recognizing the statewide importance of our decision and the significant impact it will have on the future administration of the [Florida Birth-Related Neurological Injury Compensation] Plan, we certify”); *In re E.F.*, 639 So. 2d 639, 645 (Fla. 2d D.C.A. 1994) (“the unfulfilled mandate for guardians ad litem in termination proceedings creates an important issue with potential constitutional ramifications”); *Dykstra-Gulick v. Gulick*, 604 So. 2d 1282, 1283 (Fla. 5th D.C.A. 1992) (noting the “important social implications of the doctrine of interspousal immunity”); *Sunshine Meadows*, 599 So. 2d at 1007 (certifying the question “[b]ecause the condominium development industry is a vital part of the Florida economy and is affected by the ability of lending institutions to loan money for such developments”).

¹⁵ *Publix Super Markets, Inc. v. McGuire*, 629 So. 2d 862, 866 (Fla. 1st D.C.A. 1993).

¹⁶ See, e.g., *Sunshine Meadows*, 599 So. 2d at 1009 n.1 (Farmer, J., dissenting).

¹⁷ *Duggan v. Tomlinson*, 174 So. 2d 393, 393-94 (Fla. 1965).

¹⁸ See *Caruana*, 597 So. 2d at 811 (Schwartz, C.J., dissenting).

¹⁹ See *Dumas v. State*, 686 So. 2d 625, 626 (Fla. 5th D.C.A. 1996) (“Since this appears to be a case of first impression, we certify the issue”); *Ruth v. State*, 661 So. 2d 901, 904 (Fla. 2d D.C.A. 1995) (“Because this is a case of first impression in Florida, we certify”); *Pate v. Threlkel*, 640 So. 2d 183 (Fla. 1st D.C.A. 1994) (“because this case presents an issue of first impression in Florida, we certify”).

²⁰ See, e.g., *Beach*, 670 So. 2d at 988; *Sunshine Meadows*, 599 So. 2d at 1007;

Davis v. Snyder, 681 So. 2d 1191, 1192 (Fla. 2d D.C.A. 1996); *State v. Ashley*, 670 So. 2d 1087, 1090 (Fla. 2d D.C.A. 1996); *C.W. v. State*, 645 So. 2d 26, 26 (Fla. 1st D.C.A. 1994). See also *Johnson v. State*, 578 So. 2d 419, 427 (Fla. 5th D.C.A. 1991) (recommending certification because issue was one of first impression and “will have a tremendous impact on law enforcement”) (Sharp, J., dissenting).

²¹ See, e.g., *O’Neill v. State*, 661 So. 2d 1265, 1268 (Fla. 5th D.C.A. 1995) (also justifying certification based on “the doctrine of lenity in interpreting criminal statutes”); *Houck v. State*, 634 So. 2d 180, 184 (Fla. 5th D.C.A. 1994) (issue also “may impact upon future cases and jury instructions”); *Ricketts v. Haynes*, 630 So. 2d 1232, 1234 (Fla. 2d D.C.A. 1994) (“Because this is a case of first impression which affects the relationship of guardians and their employees, we certify”); *Spotmaster Cleaners v. Special Disability Trust Fund*, 580 So. 2d 263, 266 (Fla. 1st D.C.A. 1991) (stating that the situation in the case may arise frequently). See also *Frank J. Rooney, Inc. v. Leisure Resorts, Inc.*, 624 So. 2d 773, 776 (Fla. 4th D.C.A. 1993) (noting earlier in opinion that the case was one of first impression, and certifying because the question was one of great public importance “and is likely to have a great effect on the proper administration of justice throughout the state”); The doctrine of lenity in interpreting criminal statutes, stated in *O’Neill* as an independent basis for certification, does not seem in itself to justify certifying a question to the Florida Supreme Court. It is simply a rule of decision.

²² See *Young*, 678 So. 2d at 429 (issue concerning defendant’s entitlement to credit for time spent on probation “arises frequently”); *Gibbs*, 676 So. 2d at 1006 (issue whether defendant could be separately convicted for trafficking cocaine and simple possession of controlled substance for same quantity of cocaine “arises frequently throughout the state”); *Downs v. Stockman*, 555 So. 2d 867, 867 (Fla. 4th D.C.A. 1989) (“[t]he issue involved is a recurring one of great public importance”); *Spotmaster Cleaners*, 580 So. 2d at 266 (stating that the situation in the case may arise frequently); *Files v. State*, 586 So. 2d 352, 357 (Fla. 1st D.C.A. 1991) (certifying question involving the standard of review for trial court’s finding that peremptory challenge of prospective black juror was race-neutral because “such issues frequently recur”); *Reddick v. Globe Life and Acc. Ins. Co.*, 575 So. 2d 207, 214 (Fla. 1st D.C.A. 1990) (the “case [involving extension of insurance coverage after overdue premium payment] presents an issue which recurs frequently”); *Robertson v. State*, 569 So. 2d 861, 863 (Fla. 5th D.C.A. 1990) (certifying because “criminal prosecutions for death or injury caused by intoxicated drivers are so frequent and because it is important for the state to know exactly

what its evidentiary alternatives (and burdens) are in such cases”); *Keegan v. State*, 553 So. 2d 797, 798 (Fla. 5th D.C.A. 1989) (certifying question concerning whether enactment of statute violated single subject rule “[t]o expedite an early and final resolution of this frequently raised issue”); *State, Dep’t of Agric. and Consumer Servs. v. Mid-Florida Growers, Inc.*, 505 So. 2d 592, 596 (Fla. 2d D.C.A. 1987) (certifying question because “this case involves such an important area of the law and because this malady [citrus canker] is likely to revisit us”); *Jones v. State*, 498

So. 2d 1359, 1361 (Fla. 2d D.C.A. 1986) (the issue [whether imposition of court costs pursuant to a statute enacted after crime was committed] "has been repeatedly raised in this district"); *Ferguson v. State*, 481 So. 2d 924, 925 (Fla. 2d D.C.A. 1985) (issue whether a determination that a defendant is a habitual felony offender is sufficient to deviate from the recommended range of the sentencing guidelines "is likely to frequently reoccur"); *Bustos v. Fleet*, 461 So. 2d 1039, 1039 (Fla. 4th D.C.A. 1985) (issue in the case concerning speedy trial time "arises frequently"); *Westlake v. Minor*, 460 So. 2d 430, 433 (Fla. 1st D.C.A. 1984) ("we perceive the issue presented here [concerning speedy trial time] as one which arises frequently"); *Neil v. State*, 433 So. 2d 51, 51 (Fla. 3d D.C.A. 1983) (issue of whether a party should be required to state basis for peremptory challenges "is particularly troublesome and is capable of repetition").

²³ See, e.g., *Ordini*, 701 So. 2d at 666 (stating as second reason court's concern with a broad statement made in a previous Florida Supreme Court case that the court of appeals wanted the Supreme Court to clarify); *Young*, 678 So. 2d at 429 (issue also "affects numerous criminal defendants within this district and throughout the state"); *Gibbs*, 676 So. 2d at 1006 (issue also "affects numerous prosecutions in this and other districts"); *Hillsborough County Aviation Auth. v. Hillsborough County Governmental Employees Ass'n, Inc.*, 482 So. 2d 505, 509 (Fla. 2d D.C.A. 1986) (noting conflict between cases and the likelihood that the issue will arise "in other similar circumstances in the future"); *Bustos*, 461 So. 2d at 1039 (issue also had "considerable impact on the administration of justice"); *Westlake*, 460 So. 2d at 433 (citing "comparative lack of precedent for our holding" and the fact that the issue causes "considerable impact on the administration of criminal proceedings in the circuit courts").

²⁴ See, e.g., *Zundell v. Dade County Sch. Bd.*, 609 So. 2d 1367, 1371 (Fla. 1st D.C.A. 1992) (citing, in certifying question, "the lack of direct precedent on this important and potentially far-reaching issue . . ."); *Brown v. City of Pinellas Park*, 557 So. 2d 161, 178 (Fla. 2d D.C.A. 1990) (certifying question concerning sovereign immunity for high-speed police chase because "this case calls for a fully binding clarification of Florida law"); *Geodata Servs., Inc. v. W.R. Grace and Co.*, 526 So. 2d 922 (Fla. 2d D.C.A. 1988) (certifying question "[b]ecause the law in Florida is unclear as to the circumstances under which the doctrine of promissory estoppel may be applied"); *Fiveash v. Fiveash*, 523 So. 2d 764, 765 (Fla. 1st D.C.A. 1988) (certifying question "in light of the conflicting interpretations of [the statute] in recent case law"); *Barritt v. State*, 517 So. 2d 65, 68 (Fla.

1st D.C.A. 1987) (finding reckless driving an included lesser offense of vehicular homicide, but certifying the question because of the need for clarification of the Florida Supreme Court's cases); *Cauthen v. State*, 514 So. 2d 75, 75 (Fla. 1st D.C.A. 1987) (certifying question "[i]n view of conflicting decisions on this point of law"); *Wimberly v. State*, 476 So. 2d 272, 274 (Fla. 1st D.C.A. 1985) (certifying question based on acknowledged ambiguity of criminal rule and Florida Supreme Court's "potentially conflicting language on this issue"); *Carter v. City of Stuart*, 433 So. 2d 669, 670 (Fla. 4th D.C.A. 1983) ("being unsure as to the state of the law, as many other District Courts appear to be, we hereby certify the following question . . .").

²⁵ See FLA. R. APP. P. 9.130(a)(3)(C)(vi) (providing for review of orders determining "that, as a matter of law, a party is not entitled to workers' compensation immunity").

²⁶ 682 So. 2d at 1116.

²⁷ *Id.* at 310 (Anstead, J., dissenting).

²⁸ *Id.* at 310.

²⁹ See *Pennington v. State*, 526 So. 2d 87, 90 (Fla. 4th D.C.A. 1987) (recognizing conflict with another district's case, though certifying not on that basis, but instead as a question of great public importance); *Maritime Ltd. P'ship v. Greenman Advertising Assocs., Inc.*, 455 So. 2d 1121, 1123 (Fla. 4th D.C.A. 1984) (acknowledging that the "ruling here is contra to considerable case precedent and is, apparently, in conflict with the Third District Court of Appeal").

³⁰ One judge has emphasized that a court should formulate the question certified argumentatively, that is, suggesting the answer the court would give: "A question so certified should not thereby be susceptible of the inference that this court is neutral, rather than being of assistance to the Florida Supreme Court by putting into focus the basis on which this court has decided the case and which is considered to be appropriate for supreme court review." *Schultz v. TM Florida-Ohio Realty Ltd. P'ship*, 553 So. 2d 1203, 1226 (Fla. 2d D.C.A. 1989) (Lehan, A.C.J., concurring specially).

³¹ See, e.g., *Curry v. State*, 682 So. 2d 1091 (Fla. 1996); *Vega v. Independent Fire Ins. Co.*, 666 So. 2d 897 (Fla. 1996).

³² See, e.g., *Walsingham v. State*, 576 So. 2d 365, 366 (Fla. 2d D.C.A. 1991) (certifying question of great public importance where decisions of the court "appear to be in conflict with" a Florida Supreme Court case); *Fridovich v. State*, 537 So. 2d 648, 650 (Fla. 4th D.C.A. 1989) (noting that "there are [Florida Supreme Court] cases containing language that might appear to conflict with our holding here . . .").

³³ See *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (noting that the desired practice is to follow the Florida Supreme Court precedent and advocate change in a certified question).

³⁴ *Hannah v. State*, 402 So. 2d 555, 557

(Fla. 5th D.C.A. 1981) (Dauksch, C.J., dissenting).

³⁵ *Hannah*, 402 So. 2d at 557 (Dauksch, C.J., dissenting).

³⁶ See, e.g., *Fridovich*, 537 So. 2d at 650 (certifying a question because the decision potentially conflicted with the Florida Supreme Court and "because we believe this is a question of great public importance"); *Fiveash*, 523 So. 2d at 765 (certifying a question because of conflicting interpretations of the statute and "our belief that this issue raises a question of great public importance"); *Kirchner v. Aviall, Inc.*, 513 So. 2d 1273, 1275 (Fla. 1st D.C.A. 1987) (certifying "because this case presents a question of great public importance and because of the conflict in the district courts of appeal").

³⁷ *Florida Ins. Guar. Ass'n, Inc. v. Coleman*, 501 So. 2d 32, 35 (Fla. 2d D.C.A. 1986).

³⁸ 557 So. 2d at 178.

³⁹ *Sheffield v. State*, 580 So. 2d 790, 792 (Fla. 1st D.C.A. 1991) (certifying as involving a "serious public policy issue, especially with regard to the sanctity of the pretrial investigation and the need for a defendant's cooperation therewith," whether the state may impeach a defendant with statements made for purposes of a presentence investigation report); *First Florida Bank, N.A. v. Max Mitchell & Co., P.A.*, 541 So. 2d 155, 157 (Fla. 2d D.C.A. 1989) (certifying, in part because of "the public policy implications of this issue," whether doctrine requiring strict privity of contract to assert cause of action for accountant's negligence should be modified); *Gordon v. Etue, Wardlaw & Co., P.A.*, 511 So. 2d 384, 389-90 (Fla. 1st D.C.A. 1987) (same); *Carguillo v. State Farm Mut. Auto. Ins. Co.*, 517 So. 2d 138, 138 (Fla. 4th D.C.A. 1988) (certifying whether public policy reasons render void a policy exclusion for uninsured motorist coverage for vehicles designed primarily for off-road use); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 509 So. 2d 945, 948 (Fla. 3d D.C.A. 1987) (certifying whether public policy prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination); *Meister v. Fisher*, 435 So. 2d 981, 983 (Fla. 4th D.C.A. 1983) (certifying whether golf carts should be considered dangerous instrumentalities because of "public policy considerations").

⁴⁰ *Finley v. Scott*, 687 So. 2d 338, 344 (Fla. 5th D.C.A. 1997) (Dauksch, J., concurring specially).

⁴¹ See *Coleman*, 501 So. 2d at 35 (certifying question of uninsured motorist coverage involving the number of UM coverages available for stacking because "this issue . . . is, in the final analysis and similar to various other uninsured motorist insurance issues, determined by a judicial perception of legislatively established public policy").

⁴² See, e.g., *St. Vincent's Med. Ctr.*, 653 So. 2d at 499.

⁴³ See *State ex rel. Reno v. Neu*, 434 So. 2d 1035, 1036 (Fla. 3d D.C.A. 1983).

⁴⁴ See *Johnson v. State*, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 So. 2d 1051 (1984).

⁴⁵ 660 So. 2d at 342.

⁴⁶ 660 So. 2d at 343 ("As I read the majority's opinion, its basis for certification is grounded primarily upon the passage of time since the Supreme Court's opinion in *Johnson v. State* and not upon any express disagreement by my colleagues with the holding stated therein") (Dell, J., dissenting).

⁴⁷ 650 So. 2d at 52.

⁴⁸ 650 So. 2d at 52 (Cobb, J., dissenting).

⁴⁹ See *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980).

⁵⁰ See FLA. STAT. §§768.16-768.27 (1989).

⁵¹ 653 So. 2d at 499. The dissenting judge argued that the issue was a policy decision for the legislature, not for the judiciary. *Id.* at 507 (Webster, J., dissenting).

⁵² 660 So. 2d at 342 (Farmer, J., concurring specially).

⁵³ See, e.g., *Gonzalez v. Metro. Dade County Public Health Trust*, 626 So. 2d 1030, 1033 (Fla. 3d D.C.A. 1993) (certifying whether the Florida Supreme Court should overrule a 52-year-old case and adopt the Restatement of Torts rule); *Atkins v. Rybovich Boat Works, Inc.*, 561 So. 2d 594, 595-96 (Fla. 4th D.C.A. 1990) (certifying a question where it agreed with respondent's arguments but felt that a Florida Supreme Court case required a contrary holding); *Grimes v. Leon County School Bd.*, 518 So. 2d 327, 335-36 (Fla. 1st D.C.A. 1987) (noting that the court's desired construction of FLA. STAT. ch. 440 would be more consistent with purposes of the act, but may be inconsistent with some Florida Supreme Court cases, and therefore certifying the question); *Lee v. State*, 508 So. 2d 1300, 1304 (Fla. 1st D.C.A. 1987) (reversing criminal conviction but certifying the question and suggesting that the Florida Supreme Court modify its harmless er-

ror standard in criminal cases); *American Federation of Govt. Employees v. DeGrio*, 454 So. 2d 632, 638-39 (Fla. 3d D.C.A. 1984) (asking Florida Supreme Court to modify the "impact rule" in cases concerning emotional distress caused by negligent omission).

⁵⁴ *Hoffman*, 280 So. 2d at 434 (district courts of appeal "are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change").

⁵⁵ See *Berry v. State*, 636 So. 2d 555, 558-59 (Fla. 2d D.C.A. 1994) (certifying whether a new Florida Supreme Court case implicitly overruled older ones); *Thrift v State*, 581 So. 2d 655, 655 (Fla. 2d D.C.A. 1991) (same); *Wheeler v. State*, 549 So. 2d 687, 692 (Fla. 1st D.C.A. 1989) (same); *Montague v. State*, 656 So. 2d 508, 510 (Fla. 2d D.C.A. 1995) (certifying whether recent Florida Supreme Court case implicitly overruled prior case from that district); *Employer's Cas. Ins. Co., Workers Comp. Lienholder v. Manfredo*, 542 So. 2d 1365, 1367 (Fla. 3d D.C.A. 1989) (same).

⁵⁶ For example, some cases merely certify the question as one of great public importance. See, e.g., *State v. Holland*, 680 So. 2d 1041, 1044 (Fla. 1st D.C.A. 1996); *Montague*, 656 So. 2d at 510; *Wheeler*, 549 So. 2d at 692. Others note that the issue is independently one of

great public importance. See, e.g., *Berry*, 636 So. 2d at 558; *Manfredo*, 542 So. 2d at 1367.

⁵⁷ See *Holland*, 680 So. 2d at 1044.

⁵⁸ See, e.g., *Brown v. State*, 700 So. 2d 447, 448 (Fla. 3d D.C.A. 1997); *State v. Owen*, 654 So. 2d 200, 202 (Fla. 4th D.C.A. 1995).

⁵⁹ See *State v. Powell*, 659 So. 2d 1301, 1302-03 (Fla. 1st D.C.A. 1995).

⁶⁰ See FLA. R. APP. P. 9.330(a).

⁶¹ See *Northeast Florida Builders*, 559 So. 2d at 364 ("we certify the issue to the Supreme Court as being one of great public importance"); *State v. Stevens*, 563 So. 2d 188, 190 (Fla. 1st D.C.A. 1990) ("we certify to the Supreme Court of Florida that the jurisdictional issue presented in this case is a question of great public importance"); *Overfelt v. State*, 434 So. 2d 945, 947 (Fla. 4th D.C.A. 1983) ("We certify the non-existence of the crime of attempted third degree murder to be a question of great public importance"). See also *Dumas*, 686 So. 2d at 625-26 (certifying only "the issue" in its original decision, but articulating a question on motion for clarification).

⁶² See *Hoffman v. Jones*, 280 So. 2d at 434 ("We point out that the mere certification to this Court by a District Court of Appeal that its decision involves a question of great public interest does not vest this Court with jurisdiction.").

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