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CERTIORARI REVIEW OF NON-FINAL ORDERS: DOES ONE SIZE REALLY FIT ALL?*

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In the era when astronauts tried to convince the world that Tang tasted better than real Florida orange juice,[1] designers toyed with "one-size-fits-all" clothing. The results were occasionally risqué and often dissatisfying. The use by Florida's district courts of appeal of a single three-prong test based on a "departure from the essential requirements of law"[2] to resolve the wide array

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1. Readers under the age of forty-five who do not understand this reference can view the 1966 Tang commercial at herocious, The Open End, *Tang: The Drink of Choice among Gemini Astronauts*, http://theopenend.com/2009/01/19/tang-the-drink-of-choice-among-gemini-astronauts/ (accessed Apr. 1, 2013).

2. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) (internal quotation marks omitted).

of issues presented by common law certiorari has produced similarly dissatisfying results.

In this Article, the Authors suggest that as applied to non-final orders in pending circuit court cases, the current three-prong test is inherently unpredictable because it contains no objective standards and often requires judges to inject their own unstated policies into these proceedings. Despite its best efforts, the Florida Supreme Court has proven that it cannot make this test more predictive by issuing additional caselaw discussing the overall application of this subjective test. Because attempts to clarify the current test have simply muddied the certiorari waters, lawyers should encourage the courts to restate the description of common law certiorari as applied to non-final orders in more functional language. A "functional" restatement would consider both the legitimate reasons for restricting appellate court interference into ongoing trial court cases and the practical reasons why such interference is occasionally warranted. Rather than overflowing with flowery adjectives, a functional restatement would articulate the standard for certiorari review of a non-final order in terms that have some hope of being measured by reason, logic, and common experience.

Once the courts provide such a functional restatement, the restatement's underlying policies should be applied in specific contexts. For example, the caselaw could separately address: (1) orders denying motions to dismiss; (2) orders granting discovery; (3) orders denying discovery; and (4) orders excluding state witnesses or evidence in criminal cases. As the courts encounter petitions for certiorari review of each type of non-final order, they could create precedent announcing narrower, functional tests for use only in that context, with a view toward helping lawyers decide whether to pursue a certiorari proceeding in a district court. The Authors believe that such an approach would not significantly alter the historic scope and use of the writ; rather, it would simply make the true decision-making process more uniform, more transparent, and more easily understood by both lawyers and judges.

In the first half of this Article, we briefly explain the relatively recent emergence of the current three-prong test and the difficulty the courts have had controlling it. We poke a little fun at the word games the courts have played in an attempt to sound

constrained while reaching the desired outcome in these proceedings. Then we suggest a rough outline of a possible functional restatement.

In the second half of this Article, we experiment with two non-final orders that practicing attorneys might wish to challenge by common law certiorari. We test to see if we could create context-specific tests that might be more predictive than the current universal three-part test.

I. A BRIEF HISTORY

We like to think our law is old and immutable. Really "good" law, we presume, must derive from a foundation that extends to the misty moorlands of medieval England. Common law certiorari is not brand new, and our English predecessors did create it.[3] But the truth is that Florida's approach to common law certiorari is neither old nor immutable.[4]

Although not an extraordinary writ,[5] common law certiorari is often referred to as an extraordinary remedy,[6] and perhaps rightly so given that the phrase "common law certiorari" appears in Florida caselaw only four times before 1929 and only thirty-

3. Certiorari in England dates back to around 1300, but the writ as used in the United States has evolved primarily on this side of the Atlantic. *See* Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y. L. Forum 478, 481, 516 (1963).

4. Indeed, the phrase "common law certiorari" became more popular after its use in the 1977 Florida Rules of Appellate Procedure. *See* Fla. R. App. P. 9.100(c) amend. comm. nn. (1977) (using the phrase "common law certiorari" and providing the procedure for pursuing a certiorari action). This phrase was removed from the rules in 1996. Fla. R. App. P. 9.100(c) amend. comm. nn. (1996). Before 1977, the phrase "common law writ of certiorari" was more prevalent. Although beyond the scope of this Article, the phrase "common law writ of certiorari" appears to have been used to distinguish the writ from the "constitutional certiorari" employed by the Supreme Court to review cases. *See State v. Harris*, 136 So. 2d 633, 634 (Fla. 1962) (discussing the distinction between "common law certiorari" and "constitutional certiorari," and explaining that the legislature may alter the former but not the latter); Fla. R. App. P. 9.100 amend. comm. nn. (1977) (discussing the procedural requirements for "constitutional certiorari" and for "common law certiorari"). The "constitutional" version of certiorari had its own separate standards of review and jurisdictional limitations that were distinct from the "common law" standard discussed in this Article. *See* Fla. Const. art. V, § 4(2) (1957) (providing the levels of appellate review available in Florida courts).

5. Raymond T. Elligett, Jr. & John M. Scheb, *Florida Appellate Practice and Advocacy* § 8.4, 144 (BookWorld Publ'ns 1998).

6. *See e.g. Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (stating that the Court "has held that common law certiorari is an extraordinary remedy" and citing to cases with this holding) (internal quotation marks omitted).

five times between 1929 and July 1957.[7] Since the Florida Legislature created the district courts of appeal as intermediate appellate courts, common law certiorari has rapidly evolved from an uncommon remedy to a routinely invoked, albeit often misunderstood, tool of review. "Common law certiorari" has appeared in Florida caselaw 1,090 times since the emergence of the district courts of appeal.[8]

Valeria Hendricks correctly states the current three-prong test used in certiorari review of non-final orders in "Writ of Certiorari in Florida" in *Florida Appellate Practice*.[9]

> The standard of review in a certiorari proceeding involving non[-]final orders requires that
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> - the order constitute a departure from the essential requirements of law;
> - the order cause material injury throughout subsequent proceedings; and
> - the injury be one for which there will be no adequate remedy after final judgment.[10]

This test is sometimes attributed to *Haines City Community Development v. Heggs*.[11] In that case, Justice Anstead provided an excellent discussion of the confusing history of certiorari in Florida.[12] But *Heggs* addressed second-tier review of circuit court

7. These statistics are based on an August 6, 2011 Westlaw search for "common law certiorari" in the Florida cases database. Obviously, this search excludes a shorthand reference to "certiorari," which is a difficult term to study because the Supreme Court reviewed cases by certiorari until 1979. If the search is modified to include cases referring to the "common law writ" within three words of "certiorari," there are eighteen references to the writ before 1929 and seventy after 1929 and before 1957. This same search reveals 256 cases after 1957 (search performed on Dec. 27, 2012). Thus, the trend is essentially the same with the broader search.

8. Although the Supreme Court reviewed by certiorari circuit court orders reviewing county court judgments before the existence of the district courts, review of non-final orders in pending cases and of quasi-judicial agency actions quickly evolved with the major revision of Article V of the Florida Constitution and the adoption of the Administrative Procedures Act in the mid-1970s. *See e.g. Morris v. State*, 148 So. 182, 183 (Fla. 1933) (stating that for the Court to quash a judgment on certiorari, "[t]he error complained of . . . must be so flagrant as to constitute a departure from the essential requirements of the law").

9. Valeria Hendricks, *Writ of Certiorari in Florida*, in *Florida Appellate Practice* § 11.1, § 11.4 (7th ed., The Fla. Bar 2010).

10. *Id.*

11. 658 So. 2d 523.

12. *Id.* at 525–529.

appellate decisions.[13] The test for non-final orders can probably be traced to *Kilgore v. Bird*.[14] *Kilgore* involved a party's attempt to avoid answering interrogatories, which at that time were authorized by statute.[15] The Supreme Court ultimately required the trial court to strike the interrogatories.[16] The majority opinion described common law certiorari using language similar to the current test.[17]

In *Kauffman v. King*,[18] the court essentially repeated the *Kilgore* test, implying that it was well-established law:

> Common[ ]law certiorari is a discretionary writ and ordinarily will not be issued by this court to review interlocutory orders in a suit at law, since such errors as are made may be corrected on appeal. It is only in exceptional cases, such as those where the lower court acts without or in excess of jurisdiction, or where the interlocutory order does not conform to the essential requirements of law and may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal will be inadequate, that this court will exercise its discretionary power to issue the writ.[19]

The notion that the law has "essential requirements" critical to the analysis of a petition for writ of certiorari seems to have come to Florida from Illinois in *Jacksonville, T. & K. W. Railway Co. v. Boy*.[20] The first reference to a "departure" from the essen-

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13. *Id.* at 525.
14. 6 So. 2d 541 (Fla. 1942).
15. *Id.* at 543.
16. *Kilgore v. Bird*, 8 So. 2d 665, 670 (Fla. 1942).
17. *Kilgore*, 6 So. 2d at 544 (citation omitted).

> Certiorari is a discretionary common[ ]law writ which, in the absence of an adequate remedy by appeal or writ of error or other remedy afforded by law, a court of law *may* issue in the exercise of a sound judicial discretion to review a judicial or quasi judicial order or judgment that is unauthorized or violates the essential requirements of controlling law, and that results or reasonably may result in an injury which section 4 of the Declaration of Rights of the Florida constitution commands shall be remedied by due course of law in order that right and justice shall be administered.

Id. (emphasis in original).

18. 89 So. 2d 24 (Fla. 1956).
19. *Id.* at 26.
20. 16 So. 290, 291 (Fla. 1894) (citing *Donahue v. Will Co.*, 100 Ill. 94 (Ill. 1881), *overruled on other grounds, E. St. Louis Fed'n of Teachers, Local 1220, Am. Fed'n of Teachers, AFL-CIO v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel*, 687 N.E.2d 1050 (Ill. 1997); *Hyslop v. Finch*, 99 Ill. 171 (Ill. 1881)).

tial requirements that we have discovered comes from the syllabus by the Court in *Saucer v. State*.[21] Before these phrases were used, the Supreme Court suggested that certiorari could be used to correct a court's use of a "method unknown to the law or essentially irregular."[22]

The point we suggest that you take from this very brief discussion is that the language and meaning of the modern three-prong test do not derive from long-established, time-tested common law. Instead, they reflect an ongoing, relatively recent struggle to properly explain the nature and extent of review by a district court of appeal in a certiorari proceeding. If we can find better words, nothing in the common law prohibits us from using them.

II. THE JUDICIARY'S THREE-PRONG TEST HAS FAILED TO CREATE A COHERENT DECISION-MAKING STRUCTURE

Although the use of common law certiorari by district courts to review appellate decisions of circuit courts is not our focus in this Article, the caselaw for that category has colored the language of the test courts apply to non-final orders. A careful reading of the five leading cases discussing such second-tier certiorari proceedings is warranted.[23] These cases reveal that despite the Supreme Court's valiant efforts to explain what constitutes a "departure from the essential requirements of the law," this prong of the test has been very difficult for the court to regulate. Like the pendulum of a broken clock that swings too high or too low, the district courts tend to respond to the most recent Supreme Court pronouncement with decisions that are either too passive or too aggressive in the eyes of the Supreme Court.

In contrast, the pendulum of district-court review of non-final orders has not swung so widely. Nevertheless, the caselaw beginning with *Martin-Johnson, Inc. v. Savage*[24] and *Allstate Insurance*

21. 90 So. 703, 703 (Fla. 1922).

22. *Basnet v. Jacksonville*, 18 Fla. 523, 526 (Fla. 1882).

23. *E.g. Custer Med. Ctr. v. United Automobile Ins. Co.*, 62 So. 3d 1086 (Fla. 2010); *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885 (Fla. 2003); *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679 (Fla. 2000); *Heggs*, 658 So. 2d 523; *Combs v. State*, 436 So. 2d 93 (Fla. 1983).

24. 509 So. 2d 1097, 1098 (Fla. 1987) (holding that certiorari is not a proper vehicle to review denial of a motion to strike a claim for punitive damages), *superseded by statute on other grounds*, Fla. Stat. § 768.72 (1989); *see Henn v. Sandler*, 589 So. 2d 1334, 1335–1336 (Fla. 4th Dist. App. 1991) (describing how *Martin-Johnson* was superseded by statute).

Co. v. Langston[25] clearly demonstrates that the "departure" and "irreparable injury" standards do not provide the district courts with much guidance as to when or why they should step into an ongoing trial court proceeding.

The problem is that concepts like "departure," "essential requirements," "material injury," and "adequate remedy" are all subjective terms that nearly defy definition. In a famous concurrence, Justice Boyd suggested: "The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice."[26]

Although this sounds poetic, it is unlikely that many appellate judges would limit their review only to "an act of judicial tyranny." If the goal of the judicial system is to provide the best possible, most cost-effective forum for dispute resolution, limiting review to acts that are illegal or gross miscarriages of justice would not seem to achieve the goal. Instead, we need to decide upon the goals and policies to be fostered by certiorari review and then announce measurable tests to achieve them.

III. A SUBJECTIVE TEST TENDS TO GENERATE MORE RHETORIC THAN REASON

Subjective tests that do not state the underlying goals and policies seem only to encourage literary license in appellate judges. The Supreme Court, on occasion, has transformed the requirement for a "departure from the essential requirements"—which seems pretty serious—into a requirement for a "clear" departure.[27] One can only wonder what circumstance more than "judicial tyranny" would be required to establish a clear departure. Yet district courts seem to adopt the rhetoric of "clear depar-

25. 655 So. 2d 91, 94–95 (Fla. 1995), *aff'g* 627 So. 2d 1178 (Fla. 4th Dist. App. 1993) (holding that irrelevant discovery alone is not a basis for granting certiorari unless disclosure of the materials sought would reasonably cause irreparable, material injury).

26. *Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring).

27. *E.g. State v. Pettis*, 520 So. 2d 250, 252 (Fla. 1988).

ture" to emphasize that they are on firm ground or that the trial court was on thin ice.[28]

Especially since the Supreme Court issued *State v. Pettis*[29] and *Heggs*, it has become more common for the courts to require a clear departure from the essential requirements that amounts to or results in "a miscarriage of justice."[30] This phrase adds little or nothing to the certiorari analysis because a "miscarriage of justice" is even more subjective in this context than a "departure from essential requirements of the law." And what would constitute a "nonessential requirement" of the law anyway? The truth is that rather than providing guidance that might lead to consistent results, this test forces appellate judges, especially in close cases, to rely on their own unstated rules and policies, which in turn leads to unpredictability.

Influenced by the caselaw on second-tier certiorari when the second reviewing court checks to see if the first reviewing court applied the correct law, the courts sometimes suggest that to obtain certiorari review, the error in the non-final order must not be a mere misapplication of the law; it must be an application of the wrong law.[31] Given that in many cases only a Zen master could distinguish between a misapplication of the law and an application of the wrong law, this principle only adds to the rhetoric. Even if you can make this distinction, there is no stated goal or policy that explains why irreparable harm caused by a misapplication of law should be treated differently than a comparable harm caused by applying the wrong law. Arguably, discretionary acts by trial courts should be harder to review by certiorari, but the "misapplication" standard does not seem to limit itself to discretionary decisions.

The courts have also developed another line of cases that deny certiorari review because the material injury is only a matter of litigation expense, which is not regarded as an irreparable

28. Our Westlaw search for "certiorari" and "clear departure" in the Florida cases database turned up more than seventy-five cases.

29. 520 So. 2d 250.

30. *E.g. A.G. v. Fla. Dep't of Children & Fams.*, 65 So. 3d 1180, 1182 (Fla. 1st Dist. App. 2011). Notably, "a miscarriage of justice" is a statutory description of the test for harmful error on direct appeal. Fla. Stat. § 59.041 (2010).

31. *E.g. State v. Smith*, 951 So. 2d 954, 957 (Fla. 1st Dist. App. 2007); *Graham v. Dacheikh*, 991 So. 2d 932, 933 (Fla. 2d Dist. App. 2008).

harm.[32] When a litigant cannot get money back at the end of the case if it is reversed on direct appeal, this rule only makes sense if it is not your money. When your money is gone, that is permanent irreparable damage to you. Obviously, depending on the timing, nature, and size of the litigation expense, policy reasons dictate that an appellate court should not reach down into a pending case to prevent monetary losses, but the "it's only money" reason to avoid certiorari review does not help create a rational review policy.

Finally, when a particular category of non-final order creates repetitive problems that the courts do not reliably resolve by common law certiorari, pressure arises within the bar for the Supreme Court to create an interlocutory appeal under Florida Rule of Appellate Procedure 9.130.[33] Interestingly, when this happens, the standard of review usually transforms to de novo, and the trial court cannot enter judgment until the appellate court finishes its review.[34] The Authors believe that the need for additional appellate rules governing non-final appeals could be limited if courts better state the standards for certiorari review.

IV. A STAB AT A FUNCTIONAL RESTATEMENT

A basic, functional definition of certiorari for review of non-final orders would merely state: a district court of appeal may use certiorari under exceptional circumstances to review an erroneous non-final order in a pending trial court proceeding.[35] The goal of a functional analysis is to announce policies and related predictable rules for determining when "exceptional circumstances" exist.

A full discussion of the policies and goals underlying the use of the common law writ of certiorari cannot be presented in this short Article, so we will focus on the most obvious. A reviewing court is always concerned with balancing the need for finality in

32. *E.g. AVCO Corp. v. Neff*, 30 So. 3d 597, 601 (Fla. 1st Dist. App. 2010).

33. Fla. R. App. P. 9.130.

34. *Id.* at 9.130(f).

35. By contrast, the basic functional definition of certiorari for second-tier review would be: a district court of appeal may use certiorari to review a final appellate decision of a circuit court in a case that warrants exceptional review. The Authors would expect that the policies and related rules for second-tier certiorari review of final appellate decisions would be very different from those used to justify interference in a pending trial court proceeding.

the trial courts with the need for quality judgments—judgments that resolve cases fairly, consistently, accurately, and even-handedly. There are many reasons to avoid interference by a reviewing court into the ongoing work of a trial court. There are valid concerns about reserving the scarce resources of the appellate courts for final appeals, which are more reliable vehicles for the creation of precedent. Sometimes the record in a certiorari proceeding is not adequate, or the issue is not truly ripe for a resolution that will create precedent.

The public, however, has every reason to expect that the judiciary will provide a fast, efficient, and fair dispute-resolution process in the trial courts. There are times when errors by the trial court will not resolve themselves if left unchecked, when errors will make settlement difficult or impossible, and when any remedy provided by direct appeal can never cure the damage to the wronged party or a third party. All of these factors undoubtedly require a complex and delicate balance.

The caselaw suggests that the three-prong test really addresses two issues: the nature and degree of the trial court error and whether there is an adequate justification for the reviewing court to interfere in the trial court's proceeding by the exercise of its discretionary jurisdiction.[36] In that vein, perhaps a restatement could begin with the following questions:

(1) Has the trial court committed an error that can be identified with a high level of confidence from the limited record provided in an original proceeding?

(2) Can the reviewing court confidently state that the trial court's error will be so detrimental to the goal of providing a fair, consistent, accurate, and even-handed dispute-resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem?

For purposes of debate, one might answer the first question with reference to the following policies:

36. *Parkway Bank v. Ft. Myers Armature Works, Inc.*, 658 So. 2d 646, 648–649 (Fla. 2d Dist. App. 1995); *Bared & Co. v. McGuire*, 670 So. 2d 153, 156 (Fla. 4th Dist. App. 1996).

- A reviewing court should not conclude that an order contains an error of law unless the record establishes an error that would result in a reversal on direct appeal with little or no debate among appellate judges.
- Such a non-debatable error will normally require a showing that the lower court violated due process, failed to follow binding precedent, or failed in the application of unambiguous statutory law.
- For the appellate court to conclude that certiorari relief should be provided in the absence of such a showing, e.g., when there is no established precedent or statute, the appellate court would be required to announce that it had determined that there was a clear ability for the appellate court to adequately address the issue on the limited record before it and also that some overriding need within the law and society existed that legitimated a decision to resolve the issue at this time rather than at some later stage in legal proceedings.
- If the challenged order involves a discretionary decision by the trial court and not an error of law, the abuse of discretion would need to rise to the level of an ongoing deprivation of due process or perhaps some other constitutional right to warrant interference.

For purposes of debate, one might answer the second question with reference to the following policies:

- A reviewing court should not determine that an error will be so detrimental to the goal of providing an adequate trial court dispute-resolution process that it warrants appellate court interference unless the error:
    - Deprives a party of a statutorily mandated prelitigation process;[37]
    - Involves an ongoing due process violation that will prevent a fair trial;

37. An example of this includes medical malpractice presuit-screening procedures. *Pearlstein v. Malunney*, 500 So. 2d 585, 586 (Fla. 2d Dist. App. 1986).

  - Places burdens on a party that are so extreme that the public would perceive the trial court as an illegitimate forum for fair decision-making;
  - Places burdens on a party so extreme that they will compel the party to settle a case prior to final judgment merely to avoid the burden of the error; or
  - Violates the privacy rights of people, especially those who are not parties in the proceeding.
- A reviewing court should not intervene in an ongoing trial court proceeding unless it is convinced that the benefits of intervention, either economic or social, outweigh the costs of intervention.
- A reviewing court should provide the narrowest available holding and remedy in an opinion granting certiorari.
- A reviewing court should never purport to create precedent or issue a "holding" in a case in which a writ is denied beyond an explanation of why the use of the writ is unwarranted.

These proposals are obviously incomplete, but we suggest that they demonstrate that certiorari rules could be written in a way that is more objective and allows for more consistent and transparent rulings. Thus, alternatives to the current uniform approach to certiorari review of non-final orders do exist, and we think they could prove more authentic and satisfying than either Tang or one-size-fits-all clothing. While our more tailored, functional test may not be as poetic as the existing test, it may yield more reliable and fair results. In the following sections, we leave it to you, the reader, to try on our functional approach and decide whether it fits in the context of two[38] controversial types of non-

38. Originally, we examined a third type: orders granting or denying disqualification of a party's attorney. Our research indicated that in such cases, the district courts may refer to the existing three-prong test, but their review is closer to de novo. *E.g. Frye v. Ironstone Bank*, 69 So. 3d 1046, 1049 (Fla. 2d Dist. App. 2011); *Cont'l Cas. Co. v. Przewoznik*, 55 So. 3d 690, 691 (Fla. 3d Dist. App. 2011); *Health Care & Ret. Corp. of Am. v. Bradley*, 944 So. 2d 508, 510 (Fla. 4th Dist. App. 2006). Accordingly, we suggest that these orders ought to be reviewable by non-final appeal under Florida Rule of Appellate Procedure 9.130.

final orders: (1) orders denying trial by jury and (2) orders denying discovery.[39]

V. ORDERS DENYING TRIAL BY JURY

Assume you represent an elderly female plaintiff who developed AIDS as a result of a surgery during which an HIV-positive doctor accidentally cut himself and bled into the surgical opening. After unsuccessful presuit negotiations, she sues the doctor for malpractice and demands a trial by jury. The trial is expected to last two weeks and will require the testimony of three experts who will travel from out of state to testify. At the pretrial conference, the trial judge denies your client's request for jury trial, stating that he is too busy dealing with foreclosure cases to take the time to pick a jury.

In deciding how to remedy this clearly erroneous order, you discover that under the one-size-fits-all certiorari test, your client cannot obtain relief. In the controlling case, *Jaye v. Royal Saxon, Inc.*,[40] the Florida Supreme Court, reasoning that any error in denying a demand for trial by jury does not create "irreparable harm" that cannot be remedied on appeal, held that certiorari review is not available for orders denying jury trial.[41] According to *Jaye*, the fact that your client is being denied a constitutional right; will have to "show [her] hand" in a preliminary nonjury trial; may die before the reviewing court can order a second trial; and will have to go through "the time, effort, and expense of trying a case twice" is not irreparable harm.[42] Additionally, you do

39. We confess that we did not select our test subjects randomly. The commentators list at least a dozen common issues that are appropriate for certiorari review and an equal number of issues that are not. *See* Raymond T. Elligett, Jr. & John M. Scheb, *Florida Appellate Practice and Advocacy* 169–175 (6th ed. 2011) (describing circumstances in which courts have granted and denied certiorari review); Valeria Hendricks, *Writ of Certiorari in Florida*, in Fla. Bar, *Florida Appellate Practice* § 19.1, § 19.4 (5th ed., LexisNexis 2003) (listing examples of instances in which courts have and have not granted certiorari review). We have selected two that can be addressed in a short Article and that seem to represent a reasonable cross-section of the more controversial issues discussed in certiorari caselaw.

40. 720 So. 2d 214 (Fla. 1998).

41. *Id.* at 214.

42. *Id.* at 215 (internal quotation marks omitted). In *Parkway Bank*, 658 So. 2d 646, Judge Altenbernd authored an opinion with a similar outcome. That case was somewhat context specific and suggested that a clear violation of a constitutional right to a jury trial could still be corrected by mandamus. *Id.* at 649 n. 4. Since *Jaye*, the Authors are unaware of any case in which mandamus has been used to quash an order denying trial by jury.

not understand why *Jaye* proclaims that certiorari review should not be used to circumvent the rule allowing for only limited interlocutory appeals when there is no such rule to address your client's jury-trial issue.[43]

But let us take a look at what happens when you apply the Authors' proposed functional approach to certiorari review to your hypothetical client's circumstances. Under the first prong of the functional test, it is clear to you that in denying your client's demand for a jury trial, the trial court committed a legal error that the appellate court can identify with a high level of confidence from the limited record provided in a certiorari proceeding because the policies underlying this prong of the functional test support this conclusion. First, you are certain that this erroneous denial of a demand for jury trial is an error that the reviewing judges in the certiorari proceeding would reverse on direct appeal without debate. Second, because both the federal and state constitutions guarantee the right to a jury trial, you will have no trouble establishing that this error amounts to a violation of due process. Even if this denial does not amount to a due process violation, certiorari review is warranted because the appellate court can adequately address this issue by reversing the order denying jury trial. The overriding need of both law and society to protect the sanctity of trial by jury legitimates appellate court intervention at this stage of the litigation, particularly when this order is not a tentative non-final order that the trial court is likely to revisit. Third, the ruling involves a pure question of law; it does not involve discretion.[44] Finally, a denial of trial by jury is regarded as a structural or per se error, which means that an appellate court will not examine the record on direct appeal to

43. Fla. R. App. P. 9.130(a); 720 So. 2d at 214–215. The Florida Constitution gives the Supreme Court the right to decide which non-final orders can be challenged by interlocutory appeal. Fla. Const. art. V, § 2(a). It also gives the district courts jurisdiction over original certiorari proceedings. *Id.* at § 5(b). Whether certiorari relief should be restricted because the Supreme Court can create alternative relief by interlocutory appeal or whether non-final appeals should be limited because of the availability of certiorari relief is a topic worthy of its own article.

44. *See e.g. Tampa HCP, LLC v. Bachor*, 72 So. 3d 323, 324 (Fla. 2d Dist. App. 2011) (holding that the trial court erred as a matter of law in concluding that the plaintiff did not waive her constitutional right to jury trial by agreement); *Gen. Impact Glass & Windows Corp. v. Rollac Shutter of Tex., Inc.*, 8 So. 3d 1165, 1167 (Fla. 3d Dist. App. 2009) (holding that the trial court erred as a matter of law in finding that a valid arbitration agreement existed between the parties when the defendant presented no evidence that the plaintiff waived its right to jury trial).

determine whether it was harmless.[45] Thus, this order is capable of review on certiorari with essentially the same level of accuracy as a direct appeal.

Under the second prong of the functional test, it seems obvious to you that this denial of a jury trial is so detrimental to the goal of providing a fair dispute-resolution process that the appellate court should use its resources to interfere in the trial court proceeding. This is even clearer when you examine the policy reasons for appellate involvement in your case. First, the erroneous denial of a jury trial involves a due process violation that will prevent a fair trial. Despite the discussion in *Jaye*, trial by jury is a constitutional right.[46] In fact, deprivation of trial by jury was one of the grievances listed in the Declaration of Independence as grounds for the American Revolution[47] because the Founders considered the right to a jury trial essential to a fair dispute-resolution process.

Second, you know that from the perspective of a cost-benefit analysis, this is an order that the appellate court can correct on certiorari review with a short, simple opinion that will take little time or expense to issue. That appellate cost is likely to save the parties and the trial court considerable expense. In your case, this may be the only way for your client to attend her trial.

In testing the functional approach, it seems clear to you that this erroneous order involves the type of error and the appropriate circumstances to satisfy the general policies that the Authors suggest should be used to determine whether the ruling fits into the small group of orders that should be appropriate for certiorari review. Having satisfied the general policies, what test should the court announce to determine whether orders denying trial by jury can be corrected on certiorari review?

The court could hold that certiorari relief would be granted to require the trial court to grant a party a trial by jury if: (1) the petitioner provides an adequate record from which it can be established that he or she is entitled to have a claim resolved by jury trial as a matter of law; (2) the record also demonstrates that

45. *See Johnson v. State*, 994 So. 2d 960, 968–970 (Fla. 2008) (Anstead, J., dissenting) (explaining that a denial of the right to trial by jury is a structural error that defies a harmless-error analysis).

46. U.S. Const. art. III, § 2; *id.* at amend. VII; Fla. Const. art. I, § 22.

47. *Declaration of Independence* [¶ 20] (1776).

the petitioner has taken no action that the trial court could reasonably treat as a waiver of the right to trial by jury; and (3) the respondent provides no record or argument to demonstrate that the trial court has a reasonable basis in law or fact to deny trial by jury.

This carefully tailored test would allow appellate courts to review the question of whether a party is entitled to trial by jury as a matter of law under the usual de novo standard without trying to determine whether it was also a nebulous "clear departure"[48] or "miscarriage of justice,"[49] as would be required under the existing certiorari test. Additionally, the results would be predictable because the precedent on which lawyers and judges would be required to rely would be limited to the law of certiorari addressing trial by jury. Most importantly, while the one-size-fits-all approach would preclude certiorari relief for those wrongfully denied a trial by jury, this tailored approach would permit the appellate courts to intervene only when the circumstances warrant such intervention. Thus, the appellate court applying this contextual test would almost certainly grant certiorari review in your client's case.

VI. ORDERS DENYING DISCOVERY

Now assume that your client is sued for negligence by her good friend who happened to be a passenger when your client was involved in a terrible automobile accident. The plaintiff incurred a minor scar on her face as a result of the accident. The plaintiff's primary damages claim is that her husband left her because of this "disfigurement," causing her extreme emotional distress. Your client knows that for years the plaintiff has been contemplating leaving her husband to live a life of celibacy as a student of a semi-religious "guru" in Tibet with whom she frequently exchanges email messages. Your client is convinced that the email messages to the Tibetan guru will reveal that the plaintiff plans to leave her husband, which would disprove her loss-of-consortium claim.

48. *Sarasota-Manatee Airport Auth. v. Alderman*, 238 So. 2d 678, 679 (Fla. 2d Dist. App. 1970).

49. *Jones*, 477 So. 2d at 569 (Boyd, J., concurring).

You file a request for production of the email messages pursuant to Florida Rule of Civil Procedure 1.350,[50] to which the plaintiff objects. At the hearing, the trial judge makes it clear that because there is no caselaw on the topic of religious communication, he has decided to treat the sect leader as "clergy," but he states that he would be willing to certify a question to the appellate court. He then denies your motion to compel discovery on the theory that production would violate the religious-communication privilege[51] and the plaintiff's right to privacy.

In researching your options, you discover that the body of law addressing discovery orders is not well developed. You find only 134 reported opinions in Florida even mentioning Rule 1.350,[52] and most of these are certiorari proceedings involving trial court orders granting discovery, not denying it.[53] Under the current one-size-fits-all test, the appellate courts rarely grant certiorari review of orders denying discovery, reasoning that in most cases the harm can be remedied on direct appeal.[54]

But your reasonable search turns up only one denial-of-discovery case reversed on direct appeal in the last ten years.[55] You are not surprised because it seems clear that these errors evade appellate correction. To obtain relief on direct appeal, you will have to prove that the errors you raise on appeal actually harmed your client. If you never obtain the discovery, you can never prove what admissible evidence would have resulted from the discovery. The denial of discovery creates a proverbial black box, the content of which is unknown and unknowable. Without

50. Rule 1.350 addresses production of documents and things. Fla. R. Civ. P. 1.350.

51. *See* Fla. Stat. § 90.505 (2012) (stating that communication between a member of the clergy and a person is confidential and does not have to be disclosed).

52. By contrast, there are more than 755 cases discussing Florida Statutes Section 768.28, which is a newer statute applicable only to civil cases against a governmental entity. Fla. Stat. § 768.28.

53. *See e.g. Parker v. James*, 997 So. 2d 1225, 1225 (Fla. 2d Dist. App. 2008) (granting a petition for certiorari of an order compelling expert witnesses to answer expert-witness interrogatories); *Harley Shipbuilding Corp. v. Fast Cats Ferry Serv., LLC*, 820 So. 2d 445, 446–447 (Fla. 2d Dist. App. 2002) (granting a petition for certiorari of an order compelling the production of documents protected by trade-secret privilege); *State Farm Fla. Ins. Co. v. Kramer*, 41 So. 3d 313, 313 (Fla. 4th Dist. App. 2010) (granting a petition for certiorari review of a non-final order compelling the production of documents).

54. *E.g. Sjuts v. State*, 754 So. 2d 781, 783 (Fla. 2d Dist. App. 2000); *Am. So. Co. v. Tinter, Inc.*, 565 So. 2d 891, 893 (Fla. 3d Dist. App. 1990) (Ferguson, J., concurring in part and dissenting in part); *Indus. Tractor Co. v. Bartlett*, 454 So. 2d 1067, 1067 (Fla. 5th Dist. App. 1984).

55. *Behm v. Cape Lumber Co.*, 834 So. 2d 285, 286 (Fla. 2d Dist. App. 2002).

knowing what is inside the black box, you will never be able to argue in good faith that its content would have made a difference at trial. You recognize, however, that if the appellate courts ruled that denial-of-discovery errors cannot be rectified on appeal, they would be inundated with certiorari proceedings challenging all varieties of discovery. You surmise that the denial of certiorari review of orders denying discovery is actually a form of appellate case management.

Upon further research, you find hope in a few relatively recent decisions that allow for certiorari review of orders denying discovery under the current three-prong test in very narrow circumstances.[56] Although these rulings give lip service to the "departure" test, they actually apply what appears to be a type of functional test. These cases stress that certiorari will be granted to review orders denying discovery only when such an order "effectively eviscerates"[57] a party's claim or defense and there is "no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings."[58] So if your client has no evidence other than the email messages to prove her defense—that her former friend had planned to leave her husband well before the accident—the appellate court may grant certiorari relief in this case. But then again, maybe not. After all, "eviscerate" is a pretty strong word indicating a pretty high standard.

So under the existing certiorari test, your client may or may not be able to obtain certiorari relief, and the chances of reversal on direct appeal because of this order denying discovery are slim to none. Clearly, the appellate courts will not interfere with trial court discovery orders unless there is a reasonably clear error and their holdings do not invite an avalanche of new certiorari filings. But what happens when you apply the Authors' functional approach to certiorari review?

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56. *Anderson v. Vander Meiden*, 56 So. 3d 830, 831 (Fla. 2d Dist. App. 2011); *Giacalone v. Helen Ellis Mem'l Hosp. Found.*, 8 So. 3d 1232, 1233–1234 (Fla. 2d Dist. App. 2009); *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 951–952 (Fla. 3d Dist. App. 2011); *Kaye Scholer LLP v. Zalis*, 878 So. 2d 447, 448 (Fla. 3d Dist. App. 2004); *Off. of Att'y Gen., Dep't of Leg. Affairs v. Millennium Commc'ns & Fulfillment, Inc.*, 800 So. 2d 255, 256 (Fla. 3d Dist. App. 2001).

57. *Giacalone*, 8 So. 3d at 1234.

58. *Anderson*, 56 So. 3d at 832 (quoting *Giacalone*, 8 So. 3d at 1234–1235).

Under the first prong, establishing that the trial court committed an error that can be identified with a high level of confidence from the limited record on appeal is not as straightforward as it was for your case in which the trial court denied your client a trial by jury. Without a large body of existing caselaw, establishing that this order denying discovery would be reversed on direct appeal with little debate among appellate judges is not easy. There is simply no way to show a violation of due process or a failure to follow binding precedent. One of the policies underlying this prong, however, provides that in the absence of such a showing, the court should grant certiorari if: (1) the appellate court can adequately address the issue on the limited record before it; and (2) some overriding need within the law and society legitimates the appellate court's decision to resolve the issue at this stage of the litigation.

In your client's case, the hearing transcript is sufficient for the appellate court to evaluate the propriety of denying discovery under these circumstances. Moreover, because of the dearth of caselaw in the rapidly and technologically evolving area of discovery, there appears to be an overriding need within the law and society that legitimates appellate intervention to resolve this issue. Finally, because the "black box" problem means that this denial of discovery cannot be addressed adequately on direct appeal, appellate intervention at this stage of the proceedings may be warranted.

Passing the second prong of the functional test is more clear-cut. Because the discovery of personal electronic documents, like the plaintiff's email messages to the Tibetan guru, is a new, hot topic that confuses trial courts and results in different rulings among different divisions, you have no problem demonstrating that the trial court's error is so detrimental to the fair, consistent, accurate, and even-handed dispute-resolution process that the appellate court should interfere in the trial court proceeding to correct the problem. From a policy perspective, orders denying discovery of documents and things that a party reasonably anticipates will lead to relevant, admissible evidence that is not duplicative or collateral may burden the party denied so seriously that the public would perceive the trial court as an illegitimate forum for fair decision-making.

Additionally, in certain narrow circumstances, the benefits of appellate intervention to a party in such a discovery matter may outweigh the costs. If granting certiorari review of this order denying a legitimate discovery request would allow your client to prove her defense when she would not have been able to do so otherwise, it seems that the procedural costs of certiorari review are outweighed by the judicial system's interest in fairness.

Thus, under the functional approach, this appears to be a circumstance in which the appellate courts should fashion narrow, context-specific tests for determining whether certiorari review is appropriate. You envision the possibility of two such tests concerning orders denying discovery, one addressing denials of discovery in unique circumstances or emerging areas about which there is little caselaw and another addressing denials of discovery when there is law on point but a party believes the trial court's denial is in error.

In the first instance, when the trial court makes it clear that it would actually welcome appellate "interference" in a novel discovery matter, as in your client's case, the appellate courts could grant certiorari relief concerning an order denying discovery if: (1) there is no clear law resolving the issue of discovery; and (2) the trial court is willing to certify that the order involves an exceptional discovery issue unresolved by binding authority that warrants certiorari review both to assist in the resolution of the pending case and to create guiding precedent.

This contextual test would allow trial courts to exercise discretion to control discovery while authorizing the appellate courts to address evolving discovery matters, ensuring future consistency. Although the Florida Appellate Rules once allowed trial courts to certify questions to the appellate courts,[59] the current Rules do not authorize such certification.[60] So unless and until the Florida Supreme Court amends the Rules, this sensible contextual test is simply not a feasible avenue to certiorari relief.

Where there is relevant precedent and a trial court denies a discovery request, the appellate courts could grant certiorari relief when: (1) the petitioner demonstrates to the trial court and to the appellate court that a factual basis exists to predict that

59. Fla. R. App. P. 4.6 (1962).

60. *Palm Beach Newsps., Inc. v. Parker*, 417 So. 2d 323, 324 (Fla. 4th Dist. App. 1982).

there is a substantial probability that the requested discovery will lead to admissible evidence; (2) the evidence will not be merely duplicative, collateral, or only for purposes of impeachment; and (3) the evidence will be at least moderately relevant to a factual issue to be determined by the trier of fact.

Because this tailored test appears to authorize relief only in situations akin to an abuse of discretion, it upholds the necessary exercise of trial court discretion in controlling discovery. It would also require the party seeking discovery in a controversial area to lay the groundwork, perhaps through earlier discovery or affidavits, before a denial of discovery would create an issue the appellate courts would be willing to review. For your client to obtain relief under this test, she may need to articulate precisely why she thinks the plaintiff's email messages to the Tibetan guru will aid the case. If she can do that, the appellate court applying this contextual test will likely grant certiorari review of the order denying discovery.

VII. CONCLUSION

In our view, the benefits of a functional certiorari wardrobe tailored to specific contexts are clearly superior to the current one-size-fits-all approach. If the court announces a rule that is too broad or too narrow, it would not create a swinging pendulum for all certiorari proceedings. The misstated holding would affect only the small group of certiorari proceedings addressing trial by jury or denials of discovery. If the rule announced is too broad, it does not result in an influx of thousands of petitions for certiorari relating to other issues. The judiciary could incrementally modify the contextual rules over time and experience without causing dramatic shifts in the law of certiorari and without creating false hopes or confusion among lawyers. We believe that the contextual rules are easier to evaluate, which should make it easier for lawyers to decide whether to file the petition and for appellate judges and their staff to resolve the petition.

Admittedly, we have attempted to create certiorari tests tailored to only two types of non-final orders. We recognize that replacing the existing one-size-fits-all test would require a walk-in closet with a larger certiorari wardrobe. Although altering certiorari review to fit particular types of non-final orders would require an initial investment of time and effort on the part of

attorneys and appellate judges, we think the fairer, more accurate, and more even-handed results would be worth it.