A CATCH-22 OF CERT REVIEW: HOW FLORIDA'S "CLEARLY ESTABLISHED LAW" REQUIREMENT STIFLES CASELAW DEVELOPMENT, AND HOW SUNBURSTING CAN HELP THE SUNSHINE STATE*

Hosea M. Horneman**
Steven M. Blickensderfer***
Trevor C. Jones****

I. INTRODUCTION

Everyone has encountered a catch-22 in some way, shape, or form. Job applicants find frustration when they need experience to get a job, but they need a job to get experience. Young adults cannot obtain a credit card without credit, but they need a credit card to gain credit. Similarly, Florida's district courts of appeal have encountered a catch-22 of their own in the context of certiorari review. For a petitioner to obtain relief, Florida's certiorari standards of review require that the lower court violated a clearly established principle of law or simply "clearly established law." Courts have interpreted this phrase to mean that the lower court must have violated controlling caselaw. This requirement may seem simple enough to apply when the law is cut and dry, but a

** Law clerk to the Honorable William D. Palmer of Florida's Fifth District Court of Appeal. J.D., *magna cum laude*, Liberty University School of Law, 2009; B.A., Thomas Edison State College, 2003. Mr. Horneman thanks his wife Janna and son Erik for their patience and encouragement.

*** Law clerk to the Honorable Jay P. Cohen of Florida's Fifth District Court of Appeal. J.D., *cum laude*, University of Florida College of Law, 2011; B.A., *magna cum laude*, University of South Florida, 2006.

**** Law clerk to the Honorable Vincent G. Torpy, Jr. of Florida's Fifth District Court of Appeal. J.D., *magna cum laude*, The Florida State University College of Law, 2011; Order of the Coif; B.S. Economics, *magna cum laude*, West Chester University of Pennsylvania, 2005.

quandary arises in the following recurring scenarios. First, what happens if no controlling caselaw exists (an issue of first impression) and the issue is a type that can be raised only by certiorari? In this scenario, the reviewing district court will deny relief due to the lack of clearly established law, preventing the law from ever being clearly established. Second, what happens if the issue has been decided by another district and the lower court has followed that decision (as it was required to do)? In this scenario, the reviewing district will deny relief without reaching the merits due to the lower court's adherence to the other district's decision. To illustrate these scenarios, consider the following hypotheticals.

A police officer pulls over a car going ten miles per hour over the speed limit. The officer approaches the vehicle and smells a mild odor of alcohol on the driver's breath. The officer asks the driver to step out of the vehicle to perform a field sobriety test. The driver complies and performs marginally. The officer then asks the driver to take a breathalyzer test, but the driver refuses. Due to a lack of clear evidence of driving under the influence, the State Attorney's Office declines to criminally charge the driver. However, because the driver refused the breathalyzer, the Department of Highway Safety and Motor Vehicles (DMV) automatically revokes the driver's license. The driver administratively appeals the revocation, and the DMV grants a hearing. At the hearing, the driver argues that the officer lacked reasonable suspicion for the sobriety test. The hearing officer disagrees and upholds the revocation. The driver seeks certiorari review in the circuit court. The circuit court grants relief and quashes the hearing officer's decision. The DMV now takes a turn seeking certiorari review, this time in the district court of appeal. The district court determines that the facts surrounding the sobriety test were unique and there is no Florida Supreme Court or district court case directly on point. As such, the district court decides that the circuit court did not violate clearly established law and denies certiorari relief.

The problem highlighted by this hypothetical is that as long as an issue raised on certiorari remains one of first impression in the district court, the court is prevented from reaching the merits of the issue decided below. Without definitive guidance from the district court, different circuits within the district (and different judges within the same circuit) may reach different results under

similar facts. Moreover, people whose decisions are controlled by law (here, the police and hearing officers) will simply follow the decisions of their particular circuit while the issue remains in perpetual limbo.

Now consider a slightly altered hypothetical. Instead of being an issue of first impression, the above field-sobriety issue has been decided by one district court, in a district other than the one in which the events took place. In this scenario, the circuit court is required to follow the decision of the other district, and it does. On certiorari review, however, the district court thinks the other district's decision was incorrect. Nevertheless, the reviewing district feels constrained to deny relief, since it is difficult to say that the circuit court violated clearly established law by doing exactly what it was required to do. This hypothetical reveals a variation on the problem: without the ability to express agreement or disagreement with a sister district, a reviewing district cannot weigh in on an issue and cannot create interdistrict conflict, a basis for Florida Supreme Court jurisdiction. Hence, the decision of the first district to reach the issue is perpetually binding in all subsequent certiorari cases throughout Florida.

As these hypotheticals illustrate, the "simple" requirement of clearly established law sometimes results in a troubling conundrum. In these cases, the requirement stands as a seemingly impassible roadblock, preventing the reviewing district from ruling on the merits of the issue raised for review. When district courts cannot rule on the merits, caselaw development is stifled. To remedy this problem, we suggest the district courts adopt a technique of prospective adjudication called "sunbursting."

Part II of this Article explains the origins of the clearly-established-law requirement, while Part III explores its unintended consequences for caselaw development. Part IV surveys the existing solutions employed by Florida courts to surmount this problem, highlighting their strengths and weaknesses. Part V proposes a new solution, a technique akin to the jurisprudential concept of "sunbursting." Finally, Part VI addresses potential objections to this solution.

II. THE REQUIREMENT OF CLEARLY ESTABLISHED LAW

Common law certiorari, which has its roots in England, is a procedure in which an appellate court issues a discretionary writ

to a lower court where a direct appeal or writ of error is otherwise unavailable.[1] The writ instructs the lower court to provide the case record to the appellate court for a determination as to whether the lower court exceeded its jurisdiction or failed to proceed according to the law.[2] From the beginning, the Florida Supreme Court has emphasized that certiorari is a very limited, narrow form of review, unlike the breadth afforded in a plenary appeal.[3] In 1894, the Court first expounded that certiorari relief could be granted if the lower court "failed to proceed according to the essential requirements of the law."[4] Eighty years later, the Court explained that in determining whether such failure occurred, the reviewing court "should not be as concerned with the mere existence of legal error as much as with the seriousness of the error,"[5] and that certiorari relief would only be proper where there has been "a violation of clearly established principle of law resulting in a miscarriage of justice."[6]

Today, the standard of review for certiorari relief has evolved into multiple standards, which vary depending on the type of order from which relief is sought.[7] Common to all of the standards, however, is the historic requirement that the lower court

1. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995).

2. *Id.*

3. *Id.* at 525–526; *see also Broward Co. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) (stating that the "writ never was intended to redress mere legal error" because the "writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists").

4. *Heggs*, 658 So. 2d at 526 (quoting *Jacksonville, T. & K. W. Ry. Co. v. Boy*, 16 So. 290, 291 (Fla. 1894)) (emphasis omitted).

5. *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983).

6. *Heggs*, 658 So. 2d at 528 (quoting *Combs*, 436 So. 2d at 96) (emphasis omitted).

7. There are now at least four standards: for review of interlocutory decisions in civil cases, see *Parkway Bank v. Ft. Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d Dist. App. 1995) (listing elements required for certiorari relief as (1) departure from essential requirements of law (2) resulting in material injury (3) that cannot be corrected on postjudgment appeal); and criminal cases, see *State v. Pettis*, 520 So. 2d 250, 254 (Fla. 1988) (stating, "[W]e cannot say that the ruling was a departure from the essential requirements of law. . . . [T]he extraordinary writ is reserved for those situations where there has been a violation of a clearly established principle of law resulting in a miscarriage of justice") (internal quotation marks omitted) (quoting *Combs*, 436 So. 2d at 96); and for review of final decisions at the first-tier and second-tier levels, see *G.B.V. Int'l, Ltd.*, 787 So. 2d at 843, 843 n. 16 (explaining that the standard for first-tier relief consists of three prongs—whether the decision being reviewed (1) violated procedural due process, (2) departed from the essential requirements of the law, or (3) was not supported by competent substantial evidence (paraphrased in the negative disjunctive); the standard for second-tier relief lacks the third prong).

made a "departure from the essential requirements of law."[8] This term is still defined as a "violation of a clearly established principle of law" that results in a "miscarriage of justice."[9]

This Article focuses on the first of these two components—a violation of clearly established law. In line with both the narrow purpose of certiorari and a straightforward view of the phrase "clearly established principle of law," Florida courts have traditionally understood clearly established law to mean binding, on-point caselaw governing the lower court's decision.[10] As we explain in Part III, this clearly-established-law requirement has had unintended consequences.

III. THE PROBLEM

The clearly-established-law requirement hinders caselaw development by Florida's appellate courts. This problem arises in two scenarios: (1) where the issue raised on certiorari review is one of first impression in Florida; and (2) where the issue has been previously decided by a district court of appeal other than the reviewing district.

---

8. *Combs*, 436 So. 2d at 96. In the standards of review for interlocutory decisions, this requirement is a conjunctive element, while in the standards for final decisions, it is an alternative prong. *See supra* n. 7 (listing standards of review for four types of interlocutory and final decisions).

9. *Miami-Dade Co. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) (quoting *Tedder v. Fla. Parole Comm'n*, 842 So. 2d 1022, 1024 (Fla. 1st Dist. App. 2003)); *Combs*, 436 So. 2d at 96 (continuing to use this definition in 1983). Although other definitions exist, this is the definition out of which the clearly-established-law problem arises and, thus, is the relevant definition for purposes of this Article.

10. Philip J. Padovano, *Florida Appellate Practice* § 19:8, 372–373 (2011 ed., Thomson Reuters 2010); Sylvia H. Walbolt & Leah A. Sevi, *The "Essential Requirements of the Law"—When Are They Violated?* 85 Fla. B.J. 21, 21–22 (Mar. 2011); *cf.* Judge Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21, 23 (Feb. 2012) (proposing certiorari policy that "[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" and suggesting that "[s]uch a nondebatable error will normally require a showing that the lower court [among other possibilities] failed to follow binding precedent"); Tracy E. Leduc, *Certiorari in the Florida District Courts of Appeal*, 33 Stetson L. Rev. 107, 112 (2003); *e.g.*, *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682–683 (Fla. 2000); *Pettis*, 520 So. 2d at 254 n. 5; *id.* at 259 (Shaw, J., dissenting); *State v. Edenfield*, 58 So. 3d 904, 905 (Fla. 1st Dist. App. 2011); *Fla. Dep't of Transp. v. Piccolo*, 964 So. 2d 773, 775 (Fla. 2d Dist. App. 2007); *Dep't of Hwy. Safety & Motor Vehs. v. Roberts*, 938 So. 2d 513 (Fla. 5th Dist. App. 2006); *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979 (Fla. 2d Dist. App. 1997).

A. Issues of First Impression

Where the issue raised on certiorari review in a district court of appeal is one of first impression, by definition no on-point caselaw existed to bind the lower court. Thus, historically, in this scenario, district courts have often simply denied relief without reaching the merits of the issue.[11] Sometimes district courts have written opinions explaining that they were denying relief due to lack of clearly established law,[12] but presumably in many such cases, courts have denied relief without a written opinion.

Certain issues can be reviewed only by certiorari, due to the procedural posture in which they arise. In these cases, if district courts deny relief without reaching the merits, clearly established law never develops in the first place. In this way, the clearly-established-law requirement prevents certain issues from ever being decided by the district courts, condemning them to perpetual "first impression-hood."[13] This quirk short-circuits Florida's normal caselaw development process.

B. Issues Decided by Another District Court

Under the *Pardo v. State*[14] line of cases, if a lower court is confronted with an issue that has not been decided by its district court of appeal but has been decided by another district, the lower court must follow the other district's precedent.[15] This rule has

11. *E.g. Dep't of Hwy. Safety & Motor Vehs. v. Carillon*, 95 So. 3d 901, 903 (Fla. 1st Dist. App. 2012); *Gaines v. Fla. Parole Comm'n*, 962 So. 2d 1040, 1042, 1044 (Fla. 1st Dist. App. 2007) (including dissenting opinion); *Caravakis v. Allstate Indem. Co.*, 806 So. 2d 548, 549–550 (Fla. 2d Dist. App. 2001), *quashed, Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 887 (Fla. 2003); *Sjuts v. State*, 754 So. 2d 781, 783–784 (Fla. 2d Dist. App. 2000); *Citizens Prop. Ins. Co. v. Bertot*, 14 So. 3d 1073 (Fla. 3d Dist. App. 2009); *Achord v. Osceola Farms Co.*, 52 So. 3d 699, 702, 704 (Fla. 4th Dist. App. 2010) (including concurring and dissenting opinions); *Wolf Creek Land Dev., Inc. v. Masterpiece Homes, Inc.*, 942 So. 2d 995 (Fla. 5th Dist. App. 2006).

12. *See* cases cited *supra* n. 10 (providing examples of such opinions).

13. *E.g. Ivey*, 774 So. 2d at 683; *Dep't. of Hwy. Safety & Motor Vehs. v. Robinson*, 93 So. 3d 1090, 1094 (Fla. 2d Dist. App. 2012); *Stilson*, 692 So. 2d at 982–983.

14. 596 So. 2d 665 (Fla. 1992).

15. *E.g. Nader v. Fla. Dep't of Hwy. Safety & Motor Vehs.*, 87 So. 3d 712, 724 (Fla. 2012) [hereinafter *Nader II*]; *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 973 n. 4 (Fla. 2009); *State v. Barnum*, 921 So. 2d 513, 522–523 (Fla. 2005); *Pardo*, 596 So. 2d at 666–667.

been dubbed "the *Pardo* principle."[16] Quite logically, certiorari cases have held that such other-district precedent is "clearly established law" for the lower court.[17] Thus, where the lower court obeys *Pardo* and the losing party seeks certiorari review, the reviewing district has historically denied relief on the basis that the lower court did not violate clearly established law.[18] Conversely, if the lower court disobeys *Pardo* and does not follow the precedent of the other district, the reviewing district has granted relief.[19]

In either case, if the reviewing district simply denies or grants relief based on *Pardo*, that court will never reach a holding on the merits of the underlying issue or consider the correctness of the other district's precedent.[20] Because of this phenomenon, where an issue is reviewable only by certiorari, the first district to rule on an issue dictates the law for all of Florida,[21] frustrating the normal process of districts weighing in and potentially disagreeing with each other.[22] The potential for disagreement is essential to Florida's appellate system, which relies on interdistrict conflict to refine and develop caselaw and ultimately to provide Florida Supreme Court jurisdiction.[23] But the intersection of

16. Keith W. Rizzardi, *"Controlling Jurisdiction" and the Duty to Disclose Adverse Authority: Florida's District Courts of Appeal Reign Supreme on Matters of First Impression*, 85 Fla. B.J. 46, 46 (Dec. 2011).

17. *E.g. CMI, Inc. v. Landrum*, 64 So. 3d 693, 695 (Fla. 2d Dist. App. 2010) (defining clearly established law as that arising from any on-point case that deals with the same legal issue); *Dep't of Hwy. Safety & Motor Vehs. v. Nader*, 4 So. 3d 705, 709–710 (Fla. 2d Dist. App. 2009) [hereinafter *Nader I*] (stating that it "is a little disingenuous . . . to suggest that the circuit court 'departed from the essential requirements of the law' when it followed the only precedent"); *State v. Veilleux*, 859 So. 2d 1224, 1232 (Fla. 2d Dist. App. 2003) (Altenbernd, C.J., dissenting) (stating, "I admit that to the extent the trial court followed the only available precedent, it did not depart from the established law"); *Auto Owners Ins. Co. v. Marzulli*, 788 So. 2d 1031, 1032 (Fla. 2d Dist. App. 2001) (finding that a circuit court violated clearly established law when conflicting with the precedent of another district).

18. *See Landrum*, 64 So. 3d at 695 (denying relief); *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d Dist. App. 2005) (same); *Maddox v. State*, 862 So. 2d 783, 784–785, 785 n. 1 (Fla. 2d Dist. App. 2003) (same).

19. *See Marzulli*, 788 So. 2d at 1034–1035 (granting the certiorari petition).

20. *CMI, Inc. v. Ulloa*, 73 So. 3d 787, 790 (Fla. 5th Dist. App. 2011).

21. *Id.*; *Nader I*, 4 So. 3d at 709–710; *Veilleux*, 859 So. 2d at 1232 (Altenbernd, C.J., dissenting).

22. *See Nader II*, 87 So. 3d at 724–725 (alluding to this problem); *Nader I*, 4 So. 3d at 709–710 (same); Veilleux, 859 So. 2d at 1232 (Altenbernd, C.J., dissenting) (same).

23. Fla. Const. art. V, § 3(b)(3) (providing for Supreme Court jurisdiction of "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of

the clearly-established-law requirement with *Pardo* forecloses debate, abruptly shutting down caselaw development when it has just begun.

IV. EXISTING SOLUTIONS

To deal with these hindrances to caselaw development, Florida's appellate courts have developed two solutions. First, courts have looked beyond the absence of on-point caselaw and found clearly established law on the face of constitutional provisions, statutes, and rules. Second, courts have avoided the constraints of certiorari by using certified questions of great public importance. In this Part, we examine these existing solutions and assess their limitations and weaknesses.

A. Constitutional Provisions, Statutes, and Rules

In *Allstate Insurance Co. v. Kaklamanos*,[24] the Florida Supreme Court held that clearly established law does not derive solely from caselaw.[25] Rather, clearly established law can derive from a constitutional, statutory, or rule provision, even in the absence of prior caselaw applying that provision to the issue being reviewed.[26] This holding seems sound because the absence

another district court of appeal . . . on the same question of law"); Fla. R. App. P. 9.030(a)(2)(iv) (providing for the same); *Nader II*, 87 So. 3d at 724–725; *Nader I*, 4 So. 3d at 709–710; *Ulloa*, 73 So. 3d at 790.

24. 843 So. 2d 885.

25. *Id.* at 890.

26. *Id.* Earlier cases had found clearly established law in these types of sources, without expressly delineating *Kaklamanos*' expanded list of sources. *E.g. State v. Steele*, 921 So. 2d 538, 547–548 (Fla. 2005) (finding clearly established law in a statute and standard jury instructions); *Dep't of Hwy. Safety & Motor Vehs. v. Green*, 702 So. 2d 584, 585 (Fla. 2d Dist. App. 1997) (finding clearly established law in a statute); *cf. Dep't of Hwy. Safety & Motor Vehs. v. Mowry*, 794 So. 2d 657 (Fla. 5th Dist. App. 2001) (granting relief based on a statute because the "circuit court departed from the essential requirements of law"). For examples of post-*Kaklamanos* cases applying its holding, see *Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d Dist. App. 2004) (applying *Kaklamanos* to statutes); *S. Motor Co. of Dade Co. v. Doktorczyk*, 957 So. 2d 1215, 1218 (Fla. 3d Dist. App. 2007) (same); *Dees v. Kidney Group, LLC*, 16 So. 3d 277, 279 (Fla. 2d Dist. App. 2009) (applying *Kaklamanos* to rules of procedure); *see also Donaldson v. State*, 895 So. 2d 1220, 1222 (Fla. 1st Dist. App. 2005) (granting relief based on a rule of procedure without citing *Kaklamanos* or using the words "clearly established law"); *United Automobile Ins. Co. v. Active Spine Ctrs., LLC*, 899 So. 2d 1235 (Fla. 3d Dist. App. 2005) (same); *Famsun Inv., LLC v. Therault*, 95 So. 3d 961, 963–964 (Fla. 4th Dist. App. 2012) (same).

of on-point caselaw surely should not preclude relief where the lower court has violated a legislative or popular enactment, if the correct interpretation of that enactment is not reasonably disputable.[27] Of course, such indisputability would seem essential to prevent *Kaklamanos*' expansion of the sources of clearly established law from conflicting with the historic principle that relief cannot be granted based on "mere disagreement" with the lower court's interpretation of the law.[28]

But this solution is by no means a cure-all for the clearly-established-law problem. First, it would seem to apply only where there is a constitutional, statutory, or rule provision that clearly dictates a particular result. This probably describes a small minority of cases. In many instances, there will be no applicable provision; in many others, a provision will apply, but its correct interpretation will be less than crystal clear.

Second, this solution is sensible when applied to issues of first impression. But a problem arises when it is applied in a *Pardo* scenario—where there is an on-point decision from another district interpreting the relevant constitutional, statutory, or rule provision. Under the *Pardo* principle, the lower court is bound to follow that decision. Thus, it is difficult to say that the lower court violated clearly established law by following the decision, even if the reviewing district thinks the other district's interpretation was clearly wrong.[29]

---

27. *But see* Leduc, *supra* n. 10, at 119–121 (criticizing *Kaklamanos* as inconsistent with prior caselaw holding that a reviewing court cannot grant certiorari relief based on mere disagreement with lower court's application of law).

28. *See Fassy*, 884 So. 2d at 370 (stating, "The circuit court's error rises to a departure from the essential requirement of law [because] we did not resort to rules of statutory construction in order to determine the error; a plain reading of the statute sufficed. . . . Thus we are not merely disagreeing with the circuit court's interpretation of an otherwise applicable provision") (citations omitted); Altenbernd & Marcario, *supra* n. 10, at 23 (proposing certiorari policy that "[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 nondebatable error will normally require a showing that the lower court [among other possibilities] failed in the application of *unambiguous* statutory law") (emphasis added). *But see Doktorczyk*, 957 So. 2d at 1216, 1218 (citing *Kaklamanos* for the proposition that "certiorari review properly lies where . . . a case calls for the *interpretation or application* of a statute" and granting relief because the lower court's decision was a "complete misapplication" of the statute) (emphasis added).

29. *See Nader I*, 4 So. 3d at 710; *Veilleux*, 859 So. 2d at 1228 n. 3 (stating, "It is notable that in *Kaklamanos*, no appellate case controlled the issue and bound the trial court"); *id.* at 1232 (Altenbernd, C.J., dissenting) (stating, "I admit that to the extent the trial court

Nevertheless, in *Nader v. Florida Department of Highway Safety & Motor Vehicles* (*Nader II*),[30] the Florida Supreme Court held that the reviewing district can find that the other district's interpretation conflicts with clearly established law on the face of the provision, allowing the reviewing district to grant relief even where the lower court obeyed *Pardo*.[31] This holding would seem to give short shrift to the clearly-established-law requirement. If the lower court is truly bound by the other district's decision, how can that decision not be "clearly established law" for purposes of the lower court's ruling?[32] Thus, although *Nader II*'s application of this solution circumvents the roadblock at the intersection of the clearly-established-law requirement and the *Pardo* principle, the downside is that it results in an incoherent[33] relationship between the two.[34]

B. Questions of Great Public Importance

To promote definitive rulings on Florida's important legal questions, Florida law allows courts to certify issues to higher courts as questions of "great public importance."[35] Specifically, a county court may certify a question to its district court of

followed the only available precedent, it did not depart from the established law"). Incidentally, the fact that the other district reached a different interpretation at least suggests that the provision's meaning is not indisputable.

30. 87 So. 3d 712.

31. *Id.* at 716, 727; *see e.g. Bowers v. State*, 23 So. 3d 767, 769–771 (Fla. 2d Dist. App. 2009) (applying *Nader II*'s rationale to a rule of evidence); *State v. Freeman*, 63 So. 3d 23, 27 (Fla. 3d Dist. App. 2011) (applying *Nader II*'s rationale to a statute); *Ulloa*, 73 So. 3d at 790–791 (same). *Nader II*'s holding may have been foreshadowed by a district judge's reasoning in at least one earlier case. *Veilleux*, 859 So. 2d at 1232 (Altenbernd, C.J., dissenting).

32. *See State v. Bolware*, 999 So. 2d 660, 663 (Fla. 1st Dist. App. 2003) (Allen, J., dissenting) (making this point).

33. We use "incoherent" not in its colloquial, pejorative sense, but in the sense of "not logically harmonious." *See Merriam-Webster's Collegiate Dictionary* (11th ed., Merriam-Webster, Inc. 2007) (defining "coherent" as "logically . . . ordered or integrated").

34. Moreover, it is not at all clear that *Nader II*'s rationale is limited to cases involving constitutional, statutory, or rule provisions—i.e., that *Nader II* merely extended *Kaklamanos*. If a reviewing district finds that the other district misinterpreted clearly established law on the face of *prior caselaw from a higher court* (the United States or Florida Supreme Court), *Nader II*'s rationale would seem to support granting relief. One district judge reached this exact conclusion in a pre-*Nader II* case. *Bolware*, 999 So. 2d at 662–663 (Ervin, J., concurring).

35. Fla. Const. art. V, § 3(b)(4); Fla. Stat. §§ 34.017(1), 35.065 (2012); Fla. R. App. P. 9.030(a)(2)(A)(v), (b)(4), 9.160.

appeal,[36] and a district court may certify a question to the Florida Supreme Court.[37] Both avenues have been proposed as solutions to the clearly-established-law problem.

1. Questions from County Court to District Court

If a case originates in county court, the losing party can appeal to circuit court.[38] The next level of review is second-tier certiorari in the district court,[39] which is subject to the clearly-established-law requirement. On the other hand, a certified question allows parties to bypass the circuit court and obtain plenary appellate review in the district court for issues important enough to merit direct consideration by the higher court.[40] Thus, to avoid the clearly-established-law problem, a county court may certify a question directly to the district court, either at the request of a party or sua sponte.[41] The Florida Supreme Court and at least one district have suggested this solution.[42]

This work-around has been applied successfully in several cases.[43] Yet using certified questions is not a panacea for certiorari's caselaw-development woes. To begin with, it applies only to

---

36. Fla. Stat. §§ 34.017(1), 35.065; Fla. R. App. P. 9.030(b)(4), 9.160.

37. Fla. Const. art. V, § 3(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v).

38. Fla. Stat. §§ 26.012(1), 924.08; Fla. R. App. P. 9.030(c)(1), 9.140(c)(2).

39. *See* Fla. R. App. P. 9.030(b)(2)(B) (providing district courts' certiorari jurisdiction over "final orders of circuit courts acting in their review capacity"); *Heggs*, 658 So. 2d at 526 n. 4 (stating, "The circuit court is the court of final appellate jurisdiction in cases originating in county court" and explaining the rationale for limiting review of circuit courts' appellate decisions to certiorari rather than plenary appeal); *Hayman v. State*, 634 So. 2d 1097, 1098 (Fla. 2d Dist. App. 1994) (stating, "[O]ur authority to review final orders rendered by the circuit court in its appellate capacity is limited to review by common law certiorari").

40. Fla. Stat. §§ 34.017(1), 35.065; Fla. R. App. P. 9.030(b)(4). *See also* Fla. R. App. P. 9.160 advisory comm. nn. (explaining that various statutory formulations stating the importance required for a certified question are functionally synonymous with "great public importance").

41. Fla. R. App. P. 9.160(e)(1).

42. *E.g. Nader II*, 87 So. 3d at 725; *Stilson*, 692 So. 2d at 983.

43. *E.g. State Farm Mut. Automobile Ins. Co. v. Jones*, 789 So. 2d 504, 508 (Fla. 1st Dist. App. 2001) (addressing a county court certified question in hybrid issue-of-first-impression/*Pardo* scenario); *Moore v. State Farm Mut. Automobile Ins. Co.*, 916 So. 2d 871, 876 (Fla. 2d Dist. App. 2005) (same, in issue-of-first-impression scenario); *State v. Bastos*, 985 So. 2d 37, 38 (Fla. 3d Dist. App. 2008) (same); *Allstate Indem. Co. v. Derius*, 773 So. 2d 1190, 1191 (Fla. 4th Dist. App. 2000) (same); *AIU Ins. Co. v. Daidone*, 760 So. 2d 1110, 1111 (Fla. 4th Dist. App. 2000) (same, in *Pardo* scenario); *Derius v. Allstate Indem. Co.*, 723 So. 2d 271, 271 (Fla. 4th Dist. App. 1998) (same, apparently in issue-of-first-impression scenario).

cases originating in county court. Many, perhaps most, certiorari cases originate as decisions of a circuit court, a local government quasi-judicial tribunal, or a state agency from which there is no direct appeal to district court. Moreover, this solution applies only to issues ruled on by *final* county court orders,[44] with the exception of certain non-final orders appealable by the state in criminal cases.[45]

In addition, the county court must be persuaded that the issue is actually one of great public importance. Although such importance may be suggested by a lack of in-district caselaw on the issue, the absence of caselaw could also suggest a lack of importance.

Further, the district court's decision whether to accept the certified question is purely discretionary.[46] Although some cases have suggested general attributes of questions of great public importance,[47] there are no formal criteria for acceptance.[48] In

---

44. Fla. R. App. P. 9.030(b)(4)(A), 9.160 comm. nn. to 1984 amend. (stating, "[T]his rule does not provide for appeals from non-final orders in civil cases"); *State Farm Mut. Automobile Ins. Co. v. Atmore*, 790 So. 2d 1232, 1233 (Fla. 2d Dist. App. 2001); *State Farm Mut. Automobile Ins. Co. v. U.S.A. Diagnostics, Inc.*, 696 So. 2d 1334, 1335 (Fla. 4th Dist. App. 1997); *State v. Johnson*, 467 So. 2d 412, 413 (Fla. 4th Dist. App. 1985); *Bush v. State Farm Mut. Automobile Ins. Co.*, 554 So. 2d 31, 31 (Fla. 5th Dist. App. 1989); Padovano, *supra* n. 10, at § 4:8, 110, 110 n. 6.

45. Fla. R. App. P. 9.030(b)(4)(B); *State v. Ratner*, 948 So. 2d 700, 705 (Fla. 2007); *State v. Slaney*, 653 So. 2d 422, 424 (Fla. 3d Dist. App. 1995); *State v. Magrath*, 517 So. 2d 29, 30 (Fla. 3d Dist. App. 1987); *State v. Kepke*, 596 So. 2d 715, 716 (Fla. 4th Dist. App. 1992); *State v. Muldowny*, 871 So. 2d 911, 912 (Fla. 5th Dist. App. 2004); *State v. Langer*, 490 So. 2d 1019, 1020 (Fla. 5th Dist. App. 1986).

46. Fla. Stat. § 34.017(4); Fla. R. App. P. 9.160(e)(2); *Bradley v. State*, 615 So. 2d 854, 855 (Fla. 1st Dist. App. 1993); *Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th Dist. App. 2003).

47. *Compare Bradley*, 615 So. 2d at 855 (accepting review because the issue was of "constitutional magnitude" and was frequently raised in lower courts with inconsistent results), *and State v. Meador*, 674 So. 2d 826, 827 (Fla. 4th Dist. App. 1996) (accepting review because of "disparate approaches and conclusions of the county court judges" regarding admissibility of a certain type of evidence), *with Moore*, 916 So. 2d at 879 (Stringer, J., concurring) (arguing that the question was not one of great public importance because "it requires only the application of well-settled contract law principles to the specific [contract] at issue"); *Rosa v. Beracha*, 996 So. 2d 958, 960 (Fla. 4th Dist. App. 2008) (declining review of "such an ordinary question of statutory construction"); *Star Cas.*, 855 So. 2d at 252–253 (analogizing to policy for determining whether the district court should certify question to the Supreme Court, noting that "one general guide is that a question should be certified where our decision will affect a large segment of the public and the extant decisional law may not coalesce around a single answer to the question," but declining review because a plethora of circuit and county court cases had uniformly interpreted applicable statute); *and Everard v. State*, 559 So. 2d 427, 427 (Fla. 4th Dist. App. 1990) (declining review because nothing in the record showed that the interpretation

some cases, already burdened district courts[49] may be inclined to forego review based on a determination that the issue is not sufficiently important, even where there is no in-district caselaw on point.[50] If the district court declines the case, then it is transferred to the circuit court for plenary appellate review,[51] after which it can come up to the district court on certiorari as usual. Thus, if the district court declines the certified question, certification will merely have elongated the appellate review process.

2. Questions from District Court to Supreme Court

A district court may certify a question of great public importance to the Florida Supreme Court.[52] Thus, in either the issue-of-first-impression or *Pardo* scenario, a district court can attempt to avoid the clearly-established-law problem by denying relief yet certifying the merits issue to the Supreme Court.[53] This procedure allows the Supreme Court to decide the merits issue without the constraints of certiorari. It also has the benefit of allowing a decision that is binding throughout the state.

Nevertheless, as with county court certified questions, this solution is easier said than done. The district court must first be persuaded that the issue is actually one of great public impor-

---

of the applicable statute involved "complex or difficult issues, or that the case [had] such widespread ramifications").

48. *See Bradley*, 615 So. 2d at 855 (noting the dearth of caselaw guidance on when to exercise discretion to accept review); *Star Cas.*, 855 So. 2d at 252–253 (same).

49. *Cf. Bradley*, 615 So. 2d at 855 (stating, "[W]e find no useful purpose to be served by accepting more than one appeal presenting this issue. Our caseload is already highly taxing. To accept more than one of these appeals with the same issue would only delay resolution of other matters before our court") (citation omitted).

50. *See Moore*, 916 So. 2d at 879 (Stringer, J., concurring) (arguing that an issue of first impression was not a question of great public importance because it merely required application of well-settled general principles of contract law to the specific contract at issue); *Rosa*, 996 So. 2d at 959 (in a case involving an issue of statutory interpretation, rejecting the argument that the fact that the issue was one of first impression was sufficient to elevate it to one of great public importance, reasoning that accepting this argument would undermine the constitutional and statutory structure of appeals from county court to circuit court); *but see Everard*, 559 So. 2d at 428–429 (Glickstein, J., dissenting) (arguing that district courts should be inclined to accept review because they have better research resources than circuit courts).

51. Fla. Stat. § 34.017(4)(b); Fla. R. App. P. 9.160(f)(2).

52. Fla. Const. art. V, § 3(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v).

53. *See e.g. Robinson*, 93 So. 3d at 1094 (certifying a question in an issue-of-first-impression scenario); *Veilleux*, 859 So. 2d at 1232 (same in a *Pardo* scenario).

tance.[54] Although a district court is more likely to certify a question if it has certain attributes,[55] the court's discretion is absolute,[56] and few questions are actually certified.[57] Likewise, the Florida Supreme Court has absolute discretion in deciding whether to accept the case.[58] Overall, the Court has been accepting comparatively fewer questions over the last couple of decades,[59] and the chance of acceptance is perhaps fifty percent.[60] The Court is unlikely to accept an unusual, nonrecurring legal issue.[61] And it is not clear that the procedural difficulties created by the clearly-established-law problem are enough to transform a

54. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n. 1 (Fla. 1995) (explaining that the Florida Supreme Court may only review a question if it is certified by a district court).

55. *See generally* Raoul G. Cantero III, *Certifying Questions to the Florida Supreme Court: What's So Important?* 76 Fla. B.J. 40 (May 2002) (surveying various reasons why district courts certify questions).

56. *Rupp v. Jackson*, 238 So. 2d 86, 88 (Fla. 1970); *Novack v. Novack*, 195 So. 2d 199, 200 (Fla. 1967); *Duggan v. Tomlinson*, 174 So. 2d 393, 394 (Fla. 1965); *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596–597 (Fla. 1961).

57. Cantero III, *supra* n. 55, at 44 (examining statistics regarding certification and summarizing that the "chances that a court will certify a question are quite slim"); Diana L. Martin & Robin I. Bresky, *Taking the Pathway of Discretionary Review toward Florida's Highest Court*, 85 Fla. B.J. 55, 57 (Nov. 2009) (stating that certification by district courts is rare); *cf. Stilson*, 692 So. 2d at 983 (noting that the concept of a question of great public importance in the statute authorizing questions from county court to district court is broader than the concept in the constitutional provision for questions from district court to the Florida Supreme Court).

58. *Zirin*, 128 So. 2d at 597; *see also Rupp*, 238 So. 2d at 89 (noting that the Supreme Court's decision whether to answer a certified question "remains solely within our prerogative under the constitution").

59. *See* Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 525–527 (2005) (discussing the Court's trend of accepting a lower percentage of cases since at least the late 1990s, driven by caseload and resources concerns); Steven L. Brannock & Sarah Pellenbarg, *Supreme Court Procedures and Practices* in *Florida Appellate Practice* § 4.11, 4–12 (8th ed., The Florida Bar 2012) (stating, "In the past the court has generally accepted for review the vast majority of cases certified by district courts. However, in recent years, the court has become more selective, and it is not uncommon for these cases to be dismissed without a decision on the merits . . . .").

60. *See* Martin & Bresky, *supra* n. 57, at 56–57 (noting that in 2008, the Florida Supreme Court accepted review of about forty-two percent of district court certified questions, and most of these accepted questions were certified by district courts sua sponte); *but see* Cantero III, *supra* n. 55, at 40 n. 1, 42 (noting that as "a practical matter the Supreme Court accepts jurisdiction in nearly all cases in which a district court of appeal certifies conflict" and "the Supreme Court liberally accepts jurisdiction over certified questions regardless of the basis for certification").

61. Padovano, *supra* n. 10, at § 3:11, 78; Anstead et al., *supra* n. 59, at 527; Martin & Bresky, *supra* n. 57, at 56; *e.g. State v. Brooks*, 788 So. 2d 247, 247 (Fla. 2001); *Dade Co. Prop. Appraiser v. Lisboa*, 737 So. 2d 1078, 1078 (Fla. 1999); *State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999).

substantively unimportant issue into one of great public importance.[62]

In summary, each of the existing solutions to the clearly-established-law problem has some benefits but also important drawbacks. Next, we propose a comprehensive solution that resolves the problem without these limitations.

V. OUR PROPOSED SOLUTION: "SUNBURSTING"

To overcome the caselaw-development hindrances caused by the clearly-established-law requirement, Florida's district courts of appeal should adopt a judicial decision-making approach known as "sunbursting." Under this approach, a reviewing court reaches a holding on the merits in a case without applying that holding to the parties. In effect, the court's decision operates prospectively. Utilizing that technique in the certiorari context, a district court would grant or deny relief based on whether the lower court followed clearly established law, while also ruling on the merits of the issue raised for review. By sunbursting, the district courts could refine and develop caselaw where it is needed, while faithfully adhering to the traditional understanding of the clearly-established-law requirement. In other words, sunbursting would allow courts to escape the clearly-established-law conundrum.

In this Part, we first explain more fully what sunbursting is and how it has developed as an alternative decision-making approach. Then, we illustrate how the sunbursting concept has been applied in a closely analogous area of law—federal Section 1983 tort cases. Finally, we explain in more detail how district courts can apply sunbursting to the clearly-established-law problem.

A. What Is Sunbursting?

Sunbursting stems from a more general theory of judicial decision-making—called prospective adjudication.[63] A full exami-

62. In one case, a district court denied relief based on the *Pardo* problem and certified the merits issue as a question of great public importance, but the Florida Supreme Court denied review. *Veilleux*, 859 So. 2d at 1224, 1229, *rev. denied*, 880 So. 2d 1212 (Fla. 2004).

nation of the method is beyond the scope of this Article, but a brief synopsis of this theory is necessary to understand our proposed solution.[64] Prospective adjudication arose to address situations where overruling prior caselaw would cause unfairness to the party relying on the old law.[65] To remedy the inequity and instability resulting in such instances, courts and scholars have considered the remedy of applying the new law only to events occurring after the precedent-setting decision, or only to future occurrences and not to the parties of the precedent-setting case.[66]

The concept of prospective adjudication is nothing new. State courts have been ruling prospectively since at least 1848.[67] Justice Benjamin Cardozo is greatly credited with having championed the technique in his 1932 decision, *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*[68]

That case involved a 1921 Montana Supreme Court decision allowing for a shipper to recover from a railroad for excessive freight payments after the shipper satisfied certain conditions.[69] Relying on that decision, Sunburst Oil satisfied the conditions, sued a railroad for excessive payments, and obtained a judgment.[70] While the case was on appeal, the Montana Supreme Court overruled its prior decision and held that a shipper could

63. For purposes of this Article, the term "prospective adjudication" is used loosely to refer to a court's prospective application of the law. The theory has many names. *See e.g.* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1060 (1997) (calling the theory "prospective adjudication"); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 58 (1965) (naming the theory "prospective limitation"); Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631, 631 (1967) (referring to this theory as "prospective overruling"); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 Syracuse L. Rev. 1515, 1518 (1998) (referring to the theory as "prospective ruling[ ]").

64. For more on the theory of prospective adjudication, see generally Schaefer, *supra* n. 63 (examining origins of prospective overruling); Bradley S. Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv. J.L. & Pub. Policy 811, 812–833 (2003) (outlining the history and development of the prospective application of judicial decisions).

65. Shannon, *supra* n. 64, at 813.

66. *Id.*

67. Schaefer, *supra* n. 63, at 631 n. 2 (citing *Bingham v. Miller*, 17 Ohio 445 (Ohio 1848)).

68. 287 U.S. 358 (1932); *see generally* Schaefer, *supra* n. 63 (discussing the impact Justice Cardozo had on legitimacy of prospective overruling).

69. *Sunburst*, 287 U.S. at 359–360; *see also Doney v. N. Pac. Ry. Co.*, 199 P. 432, 434 (Mont. 1921) (also involving unreasonable freight charges and was cited by *Sunburst*).

70. *Sunburst*, 287 U.S. at 360.

not recover from rates established and in effect at the time of the contract, even if they were later considered excessive.[71] Nevertheless, the Montana Supreme Court applied its earlier decision to Sunburst Oil because it had relied on that decision in good faith.[72] The railroad sought review by the United States Supreme Court, claiming the decision violated due process.[73] The Court rejected that argument. Writing for the Court, Justice Cardozo explained:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . [N]ever has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted.[74]

Justice Cardozo's *Sunburst* opinion and other writings helped establish the legitimacy of prospective ruling.[75] The opinion was so influential, in fact, that courts and scholars have characterized the act of prospective ruling as "sunbursting," and prospective decisions as "sunbursts."[76] It is from Justice Cardozo's opinion that this Article finds its inspiration for the name of a new solution to Florida's clearly-established-law problem.[77]

Prospective adjudication stands in contrast to traditional theories of judicial decision-making. Blackstone posited that a court's role is to maintain and expound the law, not pronounce

---

71. *Id.* at 361; *see also Mont. Horse Prods. Co. v. Great N. Ry. Co.*, 7 P.2d 919, 925 (Mont. 1932) (stating that "so long as the rates established by the commission are in force, they are presumed to be reasonable").

72. *Sunburst*, 287 U.S. at 361.

73. *Id.*

74. *Id.* at 364 (emphasis in original) (citations omitted).

75. *See* Schaefer, *supra* n. 63, at 633–634 (discussing the *Sunburst* case and Justice Cardozo's other work lending support to the theory, *The Nature of the Judicial Process* (1921)).

76. *E.g. State ex rel. Buswell v. Tomah Area Sch. Dist.*, 732 N.W.2d 804, 818 n. 12 (Wis. 2007).

77. There are those who would argue the term "sunbursting" does not accurately describe the *Sunburst* holding—which was that the Constitution is silent as to a state's power to rule prospectively. E.g. Mishkin, supra n. 63, at 59 n. 15. For the purposes of this Article, however, the term is employed loosely and refers to the overarching premise of Justice Cardozo's writings—that courts have the power to adjudicate prospectively.

new law.[78] The authority to create and temporally establish new law has long been viewed as belonging to legislatures, not courts.[79] Under the Blackstonian theory, once a court determines the law, that decision must be given retroactive effect.[80] This includes decisions that overrule prior caselaw because such new decisions are viewed as "more enlightened."[81] Prospective adjudication also stands in contrast to the view explained by Chief Justice John Marshall that courts must apply the law in effect at the time the decision is rendered.[82] Under either of these theories, retroactivity is the cornerstone.

Despite the resistance to prospective adjudication by the traditionalist camp, the technique gained traction with the Warren Court in the 1960s.[83] Although the Supreme Court has largely curtailed its use of the method since then,[84] virtually every state recognizes the right to sunburst to a degree.[85] Recently, the con-

78. Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1, 2 (1960); *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 907 n. 4 (1962) [hereinafter *Prospective Overruling*] (citing William Blackstone, *Commentaries on the Laws of England* 69 (Oxford 1769)).

79. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1731 (2012).

80. *Prospective Overruling*, *supra* n. 78, at 907–908.

81. *Id.* at 908; *but see id.* at 909–910 (discussing how retroactivity is subject to constitutional limitations).

82. *Id.* at 912 (citing *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801)).

83. *See* Shannon, *supra* n. 64, at 817–818 (stating modern doctrine began with *Linkletter v. Walker*, 381 U.S. 618, 640 (1965), which rejected retroactive application of *Mapp v. Ohio*, 367 U.S. 643 (1961), to a state conviction that occurred before *Mapp* was decided). The Supreme Court's use of prospective adjudication, however, has been revisited in recent years. For a discussion of *Linkletter* and its progeny, see Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1738–1749 (1991) (discussing the historical developments of retroactivity in criminal cases); Shannon, *supra* n. 64, at 817–819 (stating that the prospectivity doctrine started with *Linkletter* and discussing its progeny); Stephens, *supra* n. 63, at 1519–1521 (discussing the effect the Warren Court had on retroactivity/prospective adjudication in criminal cases).

84. *See generally* Fallon & Meltzer, *supra* n. 83, at 1738–1757 (chronicling the Supreme Court's use of prospective adjudication from the Warren Court to the early 1990s).

85. Forty-seven states, including Florida, have in some fashion adopted prospective adjudication, whether in the criminal or civil context. *E.g. Ex parte Coker*, 575 So. 2d 43, 53 (Ala. 1990); *Moore v. State*, 553 P.2d 8, 28 (Alaska 1976); *State v. Gates*, 576 P.2d 1357, 1359 (Ariz. 1978); *In re Lopez*, 398 P.2d 380, 388 (Cal. 1965); *Marinez v. Indus. Comm'n of State of Colo.*, 746 P.2d 552, 556 (Colo. 1987); *Luurtsema v. Comm'r of Correction*, 12 A.3d 817, 832 (Conn. 2011); *Hoffman v. Jones*, 280 So. 2d 431, 440 (Fla. 1973) (circumscribing retroactivity of adoption of comparative negligence rule without reference to sources of prospective adjudication power); *Findley v. Findley*, 629 S.E.2d 222, 225 (Ga. 2006); *Daw-*

cept has also been applied in a body of federal law closely analogous to our certiorari problem—Section 1983 cases—which we discuss next.

B. Sunbursting in Federal Section 1983 Cases

Without calling it sunbursting, the United States Supreme Court has adopted a similar decision-making tool in constitutional tort cases under 42 U.S.C. Section 1983. In Section 1983 cases, to overcome a government official's qualified immunity

---

son v. Olson, 496 P.2d 97, 101 (Idaho 1972); *Sunich v. Chi. & N. W. Transp. Co.*, 478 N.E.2d 1362, 1365 (Ill. 1985); *Ray-Hayes v. Heinamann*, 768 N.E.2d 899, 900 (Ind. 2002); *Beeck v. S.R. Smith Co.*, 359 N.W.2d 482, 484 (Iowa 1984); *Sharp v. State*, 827 P.2d 12, 16 (Kan. 1992); *Lasher v. Cmmw. ex rel. Matthews*, 418 S.W.2d 416, 419 (Ky. 1967); *Succession of Clivens*, 426 So. 2d 585, 594 (La. 1982); *Black v. Solmitz*, 409 A.2d 634, 640 (Me. 1979); *Schiller v. Lefkowitz*, 219 A.2d 378, 380 (Md. 1966); *Powers v. Wilkinson*, 506 N.E.2d 842, 849 (Mass. 1987); *Placek v. City of Sterling Heights*, 275 N.W.2d 511, 522 (Mich. 1979); *Schultz v. Chi. & N. W. Ry. Co.*, 175 N.W.2d 177, 182 (Minn. 1970); *Harrell v. State*, 386 So. 2d 390, 393 (Miss. 1980); *Sumners v. Sumners*, 701 S.W.2d 720, 724 (Mo. 1985); *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483, 489 (Mont. 2004); *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization & Assessment*, 494 N.W.2d 535, 539 (Neb. 1993); *Clem v. State*, 81 P.3d 521, 529 (Nev. 2003); *Hampton Nat'l Bank v. Desjardins*, 314 A.2d 654, 657 (N.H. 1974); *Darrow v. Hanover Township*, 278 A.2d 200, 205 (N.J. 1971); *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1378 (N.M. 1994); *People v. Favor*, 624 N.E.2d 631, 635 (N.Y. 1993); *State v. Lewis*, 164 S.E.2d 177, 186 (N.C. 1968); *Olson v. Dillerud*, 226 N.W.2d 363, 369 (N.D. 1975); *DiCenzo v. A-Best Prods. Co., Inc.*, 897 N.E.2d 132, 140 (Ohio 2008); *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 448 (Okla. 1986); *Buchea v. Sullivan*, 497 P.2d 1169, 1179 n. 14 (Or. 1972); *Cmmw. v. Geschwendt*, 454 A.2d 991, 999 (Pa. 1982); *State v. Gannites*, 221 A.2d 620, 623 (R.I. 1966); *Brown v. Anderson Co. Hosp. Ass'n*, 234 S.E.2d 873, 877 (S.C. 1977) (abrogated by statute as stated in *Simmons v. Tuomey Reg'l Med. Ctr.*, 533 S.E.2d 312, 317 (S.C. 2000) (noting the existence of a new statute but not criticizing or otherwise discussing the *Brown* Court's decision to rule prospectively)); *Fisher v. Sears, Roebuck & Co.*, 214 N.W.2d 85, 87 (S.D. 1974); *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 519 (Tenn. 2005); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 515 (Tex. 1992); *Rio Algom Corp. v. San Juan Co.*, 681 P.2d 184, 196 (Utah 1984); *Am. Trucking Ass'ns, Inc. v. Conway*, 566 A.2d 1323, 1332 (Vt. 1989); *Cradle v. Peyton*, 156 S.E.2d 874, 877 (Va. 1967); *Lunsford v. Saberhagen Holdings, Inc.*, 208 P.3d 1092, 1096 (Wash. 2009); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531, 534 (W. Va. 1986); *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 732 N.W.2d 804, 818 (Wis. 2007); *Farbotnik v. State*, 850 P.2d 594, 602 (Wyo. 1993).

Some courts have refused to exercise prospective adjudication. *See Felton v. Rebsamen Med. Ctr., Inc.*, 284 S.W.3d 486, 493 (Ark. 2008) (affirming the principle that state court decisions applied retroactively); *see also Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 588 (Del. 1976) (refusing to deprive plaintiffs the benefit of the law's development); *but see United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998) (ruling prospectively without discussion). Hawaii and the District of Columbia have aligned themselves with the federal courts in limiting their jurisdictions' use of prospective adjudication. *See Davis v. Moore*, 772 A.2d 204, 231 (D.C. 2001) (applying change in law retroactively under guide of federal jurisprudence); *State v. Garcia*, 29 P.3d 919, 930 (Haw. 2001) (same).

from civil liability, the plaintiff must establish that the official should reasonably have known that his or her conduct violated the plaintiff's constitutional rights.[86] Like Florida courts in the certiorari context, the Supreme Court has interpreted this standard to require that on-point caselaw existed at the time of the official's conduct.[87] If the law was not clearly established, federal courts historically have dismissed the suit without reaching the merits of the constitutional claim.[88]

Recognizing the importance of developing caselaw on these constitutional issues, however, the Supreme Court has recently permitted federal courts to determine whether a right was violated (the merits) before addressing whether the law was clearly established,[89] and thus, whether immunity attaches.[90] By doing

86. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See generally* Alan K. Chen, *The Facts about Qualified Immunity*, 55 Emory L.J. 229, 233–261 (2006) (describing the qualified immunity doctrine in Section 1983 cases and tracking its development); Fallon & Meltzer, *supra* n. 83, at 1749–1753 (same). The doctrine also applies to suits against federal officers under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). *Harlow*, 457 U.S. at 818 n. 30.

87. *Harlow*, 457 U.S. at 818.

88. *See id.* (holding that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed").

89. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The United States Supreme Court previously mandated that courts had to first address the merits and then the issue of immunity, in *Saucier v. Katz*, 533 U.S. 194, 199 (2001). Expressing its desire to end constitutional stagnation, the *Saucier* Court explained:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Id. at 201.

Eight years later, however, the Court receded from the mandatory procedure that the merits be decided first and held that courts could decide which of the two prongs to address first. *Pearson*, 555 U.S. at 236. Despite overruling *Saucier*, the *Pearson* Court emphasized its support for reaching the merits where appropriate and stated, "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.*

90. *See e.g. Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) (approving the Ninth Circuit's decision to determine the merits because the circumstances of the case made it advantageous to provide guidance as to the constitutional question at issue).

so, federal courts create precedential caselaw while remaining faithful to the established standard for qualified immunity.[91]

C. Applying Sunbursting to the Clearly-Established-Law Problem

Like their federal counterparts, Florida's district courts of appeal should consider applying a form of sunbursting when confronted with cases involving the clearly-established-law problem.[92] This approach would involve a two-step process. First, the district court would determine whether the lower court violated clearly established law and thus, whether to grant or deny relief. Second, the court may, in its discretion, analyze and reach a holding on the issue raised for review.[93]

For example, in an issue-of-first-impression scenario, the district court should deny relief because of the absence of clearly established law that the lower court could have violated. Then, the court may analyze and reach a holding on the merits to provide clearly established law for future cases. In a *Pardo* scenario, the district court should deny relief if the lower court followed the other district's precedent and grant relief if the lower court failed to follow that precedent. Then, the court may analyze the merits; express agreement or disagreement with the other district's precedent; and, in case of disagreement, certify conflict.[94]

---

91. *Id.* at 2030 (opining that constitutional determinations of lower courts are not mere dicta; rather, "[t]hey are rulings that have a significant future effect on the conduct of public officials . . . and the policies of the government units to which they belong . . . [and] they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules").

92. Another commentator has pointed out the similarity between the clearly-established-law requirements of Section 1983 and Florida's certiorari standards. Leduc, *supra* n. 10, at 112 n. 42.

93. Incidentally, the order of the two steps is not significant for jurisprudential purposes. What matters is that the district court both adheres to the clearly-established-law requirement in granting or denying relief and reaches a holding on the merits.

94. One can envision other scenarios where sunbursting can be applied, such as a *Pardo*-like scenario in which other districts have ruled on the issue and reached opposite results. In such a case, the other districts' decisions would cancel each other out, and the lower court would not be bound by any of them. As a result, the case would be treated like an issue-of-first-impression scenario for purposes of our solution. On the other hand, when multiple other districts have reached the *same* result on the issue, the case would be treated as a *Pardo* scenario.

Some Florida cases have commented on the merits while granting or denying relief based on the clearly-established-law requirement. However, these cases have not discussed the precedential effect of their comments or its potential as a systemic solution to the clearly-established-law problem. *See e.g. Piccolo*, 964 So. 2d at 775–776 (denying relief

Sunbursting is superior to all of the existing solutions to the clearly-established-law problem. First, unlike the *Kaklamanos* solution of finding clearly established law on the face of constitutional, statutory, or rule provisions, sunbursting does not require that such a provision apply or that its interpretation be clear. In addition, unlike *Nader II*'s application of *Kaklamanos*, sunbursting can be applied to a *Pardo* scenario without breaking down the coherent relationship between the clearly-established-law requirement and the *Pardo* principle—which *Nader II* does by finding that law was not clearly established even though the lower court was clearly bound by it. Second, unlike certifying questions of great public importance, sunbursting is not limited to cases arising in particular courts or to issues of great public importance, and it does not require obtaining certification or acceptance by courts in their absolute discretion. In summary, sunbursting can be straightforwardly applied in all certiorari contexts and comprehensively solves the clearly-established-law problem.

VI. POTENTIAL OBJECTIONS

With any potential solution to an existing problem, there will always be arguments against the proposed solution; sunbursting is no exception. In an attempt to eliminate any doubt about sunbursting, we will address a few objections in this Part: (1) sunbursting will create mere obiter dicta; (2) sunbursting, as a type of prospective ruling, will erode the doctrine of stare decisis; (3) sunbursting will remove litigants' incentive to seek certiorari review; and (4) sunbursting will waste judicial resources.

---

due to lack of clearly established law, but also discussing merits); *Stilson*, 692 So. 2d at 980 (denying relief due to lack of clearly established law while analyzing merits); *Progressive Express Ins. Co. v. Devitis*, 924 So. 2d 878, 880 (Fla. 4th Dist. App. 2006) (granting relief because the lower court violated *Pardo* by failing to follow other district's case on point; also expressing agreement with other district); *cf. Roberts*, 938 So. 2d at 514–516 (agreeing with the lower court on merits; alternatively, denying relief due to lack of clearly established law). *But see* Altenbernd & Marcario, *supra* n. 10, at 24 (proposing certiorari policy that a "reviewing court should never purport to create precedent or issue a 'holding' in a case where a writ is denied beyond an explanation of why the use of the writ is unwarranted").

A. Obiter Dicta

In sunbursting, a district court will reach a holding on the merits but not apply that holding to the parties because of the clearly-established-law requirement.[95] An obvious argument is that any language or legal ruling in the court's opinion not dispositive of the case is mere obiter dictum.[96] "Obiter dictum" (or dicta when plural)[97] is defined as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)."[98] Whereas, a "holding" is "[a] court's determination of a matter of law pivotal to its decision."[99] In our proposed solution the reviewing court will have "held" that the lower court either did or did not violate clearly established law and granted or denied the petition. In its most simplistic form, any further comments by the court on the merits could be considered mere dicta and nonbinding.[100]

This objection has two facets. The first argument is that, as dicta, the seemingly superfluous merits analysis will have no binding effect in future cases and thus, will defeat the objective of creating clearly established law.[101] This argument can be dis-

---

95. *Supra* pt. V(C).

96. *See e.g. State v. Fla. State Improvement Comm'n*, 60 So. 2d 747, 750 (Fla. 1952) (en banc) (opining that the language in a prior decision of the court that was not essential to the decision in that case was obiter dicta and not controlling in case at bar).

97. *Black's Law Dictionary* 800 (Bryan A. Garner ed., 9th ed., West 2009). For the remainder of the Article we will refer to dictum in the plural form for the reader's convenience.

98. *Id.*; *see also Doherty v. Brown*, 14 So. 3d 1266, 1267 (Fla. 1st Dist. App. 2009) (stating that a "purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle, or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple" (quoting *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th Dist. App. 1975))); *see generally* 12A Fla. Jur. 2d *Courts and Judges* § 119 (WL current through Nov. 2012) (discussing obiter dicta).

99. *Black's Law Dictionary*, supra n. 97, at 800.

100. District courts of appeal do not have the power to give advisory opinions, and their decisions are limited to actual controversies between litigants. *Schwarz v. Nourse*, 390 So. 2d 389, 392 (Fla. 4th Dist. App. 1980); *see also* Fla. Const. art. IV, § 1(c) (giving power to the governor to request an advisory opinion from the Florida Supreme Court concerning interpretation of the constitution). Sunbursting will be limited to issues properly in front of the district court.

101. *See Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 253 (Fla. 2002) (holding that where the Florida Supreme Court's decision had discharged certiorari review as improvidently granted, any comments in that decision were nonbinding dicta).

posed of by drawing the distinction between pure obiter dicta and "judicial dicta."[102]

In *Frost v. State*,[103] Florida's Fourth District Court of Appeal endorsed the difference between purely gratuitous dicta and judicial dicta: "Judicial dicta are comments in a judicial opinion that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. . . . Judicial dicta have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court."[104] Based on this distinction, the court applied judicial dicta from a prior opinion to affirm the lower court.[105] Florida is not the only jurisdiction to apply the judicial dicta doctrine,[106] and its principles can be used to justify sunbursting in the context of certiorari review. Simply stated, if the parties have argued an issue—regardless of whether the court's decision on it is dispositive—that decision will be binding on the lower courts and future panels of the district court. Thus, in sunbursting, the district court's judicial dicta will create binding precedent that provides clearly established law for future cases.

By analogy, the concept of judicial dicta has been used systematically and effectively in other areas of law that employ a clearly-established-law requirement. These analogies include federal Section 1983 cases, as explained above,[107] and Fourth Amendment "good-faith exception" cases. In Fourth Amendment cases, courts determine whether a government actor's conduct constituted an unreasonable search or seizure.[108] If it did, then

102. *See generally* 12A Fla. Jur. 2d *Courts and Judges* § 119 (stating that distinct "from obiter dicta, 'judicial dicta' are comments in a judicial opinion that are unnecessary to the disposition of the case but involve an issue briefed and argued by the parties").

103. 53 So. 3d 1119 (Fla. 4th Dist. App. 2011), *quashed on other grounds*, 94 So. 3d 481 (Fla. 2012).

104. *Id.* at 1123 (citation omitted) (typeface altered).

105. *Id.* at 1124.

106. *E.g. Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978–979 n. 39 (3d Cir. 1980); *Ex parte M.D.C.*, 39 So. 3d 1117, 1129 n. 4 (Ala. 2009); *State v. Widenhouse*, 582 So. 2d 1374, 1382 (La. 1991); *State v. Baby*, 946 A.2d 463, 497–498 (Md. 2008) (Raker, J., concurring and dissenting); *Johnson v. White*, 420 N.W.2d 87, 90 n. 2 (Mich. 1988); *State ex rel. Ahern v. Young*, 141 N.W.2d 15, 19 (Minn. 1966); *Dyer v. Drucker*, 104 N.Y.S. 166, 168 (N.Y. Gen. Term 1906); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773 (Tex. 1964); *W. Va. Dep't of Transp. v. Parkersburg Inn*, 671 S.E.2d 693, 699–700, 699 n. 6 (W. Va. 2008); *Brown v. Chi. & N.W. Ry. Co.*, 78 N.W. 771, 776 (Wis. 1899).

107. *Supra* pt. V(B).

108. *Montgomery v. State*, 69 So. 3d 1023, 1033 (Fla. 5th Dist. App. 2011).

courts generally exclude the evidence obtained as a result of that conduct. Courts may decline to exclude the evidence, however, if the government actor acted in reasonable, good-faith reliance on existing law.[109] For instance, Florida's Fifth District Court of Appeal recently held that Florida's vehicle noise statute violated the First Amendment's freedom of speech, thus rendering a traffic stop based on the statute an unreasonable seizure under the Fourth Amendment.[110] The court concluded, however, that given the state of the law at the time of the stop, a reasonable officer would not have known that the statute was unconstitutional; therefore, the good-faith exception applied, and evidence obtained from the stop was admissible.[111] Such rulings in Fourth Amendment cases follow the same conceptual pattern as sunbursting: ruling on the merits but declining to apply that ruling to the case at bar. Similar to the problem with Florida's standard for certiorari review, if courts declined to rule on the merits in good-faith exception cases because the merits would not be dispositive, the courts would stifle development of Fourth Amendment caselaw.

The second challenge to sunbursting is that, as dicta, sunbursts will not create interdistrict conflict for purposes of Florida Supreme Court jurisdiction.[112] This challenge is unavailing, however, because if the above theory of "judicial dicta" is accepted, such holdings will create binding precedent, which should provide a sufficient basis for interdistrict conflict. This view is consistent with cases in which the Supreme Court has expressly recognized interdistrict conflict based on dicta.[113] Thus, the concept of sun-

109. *See Ill. v. Krull*, 480 U.S. 340, 356–357 (1987) (applying good-faith exception based on government actor's reliance on an existing statute); *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (same, based on reliance on existing caselaw). The reliance may also be on other sources of apparent legal authority, such as a warrant. *See United States v. Leon*, 468 U.S. 897, 900 (1984) (holding that good-faith exception applied to reliance on warrant); *see generally* Michael E. Allen, *Florida Criminal Procedure* vol. 22, § 4:3 (West 2012) (discussing good-faith exception, including various sources of apparent authority that can trigger applicability of exception).

110. *Montgomery*, 69 So. 3d at 1025, 1028–1032.

111. *Id.* at 1033.

112. *Nader I*, 4 So. 3d at 710 (stating that pure dicta would not create conflict with another district); *see also* Fla. Const. art. V, § 3(b)(3) (providing for Supreme Court's discretionary jurisdiction based on interdistrict conflict); Fla. R. App. P. 9.030(a)(2)(iv) (same).

113. *See e.g. Twoney v. Clausohm*, 234 So. 2d 338, 340 (Fla. 1970) (citing *Sundad, Inc. v. Sarasota*, 122 So. 2d 611 (Fla. 1960)) (stating that even "if the statement from one of the earlier cases can be regarded as obiter dictum the conflict still establishes our jurisdic-

bursting will only legitimize that which has already been recognized as cognizable.[114] Indeed, if the district courts are more aware that their judicial dicta will allow for interdistrict conflict[115]—via sunbursting—the proper evolution of the law will be more consistent.

In sum, judicial dicta should be viewed as a prospective-rule-making tool that can aid in the proper development of Florida caselaw. The value of such can be gleaned from Justice Cardozo's words in his 1932 address: "The objection will be made that courts are without power to tie the hands of their successors by a declaration of purpose not wrought into a judgment. If I conceive the situation justly, they are not attempting to tie the hands of any one. They are untying and releasing."[116] Stated differently, the use of judicial dicta should be embraced as a means to create clear caselaw and conflict when needed, not eschewed as a mode of judicial activism.

B. Stare Decisis

One argument against prospective ruling is that it erodes a long tradition of following the doctrine of stare decisis.[117] Indeed, the always eloquent Justice Scalia has opined that

> [p]rospective decision[-]making is the handmaid of judicial activism, and the born enemy of stare decisis. It was formu-

---

tion"); *Hawkins v. Williams*, 200 So. 2d 800, 801 (Fla. 1967) (stating that obiter dictum is "sufficient to create conflict in decisions necessary to invoke our jurisdiction").

114. This is not to say that the Florida Supreme Court endorses the practice of district courts granting or denying *certiorari relief* based on mere disagreement with another district; in fact, it has expressly rejected that notion. *Nader II*, 87 So. 3d at 725. However, this does not affect our proposed solution because in sunbursting in a *Pardo* scenario, the reviewing district will not grant or deny relief based on disagreement with another district; rather, the reviewing district will grant or deny relief based on a clearly-established-law analysis and then state whether it disagrees with the other district.

115. Even allowing for districts to *agree* with other districts—via judicial dicta—would prove to create more clearly established law. *See e.g. Veilleux*, 859 So. 2d at 1227–1228 (denying relief based on lower court's adherence to other district's holding, but also expressly agreeing with that other district's holding); *Progressive Express Ins. Co.*, 924 So. 2d at 880 (granting certiorari relief based on lower court's failure to follow the *Pardo* principle but also agreeing with sister district's holding on merits).

116. Schaefer, *supra* n. 63, at 635–636 (quoting Benjamin N. Cardozo, Address (N.Y. Bar Assoc., N.Y. Jan. 22, 1932), in 55 N.Y.S.B.A. Rep. 263, 295 (1932)).

117. *See generally* Shannon, *supra* n. 64 (discussing the contrast between stare decisis and prospective ruling).

> lated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent.[118]

Stare decisis is a principle of adherence to judicial precedent, specifically that

> when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.[119]

The doctrine "provides stability to the law and to the society governed by that law."[120]

However, the doctrine's principles are not relevant to the problem and solution at issue. First, in the issue-of-first-impression scenario, no applicable precedent exists; thus, there is no prior decision to which to apply stare decisis. Second, in the *Pardo* scenario, no precedent exists that is binding on the reviewing district because the district courts are not bound by their fellow districts' decisions—those decisions are "merely persuasive."[121] In either scenario, prospective ruling will simply establish the law without overruling any prior decision. In sum, in the context of Florida certiorari review, sunbursting will not offend stare decisis.

C. Removing Litigants' Incentive to Seek Certiorari Review

Another potential argument against sunbursting is that it will remove losing parties' incentive to seek certiorari review because they will not receive the benefit of a merits holding in

---

118. *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring) (typeface altered).

119. *Black's Law Dictionary*, supra n. 97, at 1537 (quoting William M. Lile et al., *Brief Making and the Use of Law Books* 321 (3d ed., Ulan Press 1914) (typeface altered)).

120. *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995), *superseded by statute on other grounds*, 1996 Fla. Laws ch. 96-359, § 1, at 2052.

121. *Pardo*, 596 So. 2d at 666–667 (citing *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. App. 1976)).

their favor.[122] This argument, however, overestimates the incentive that exists in the alternative, non-sunbursting model. In a non-sunbursting model, the district court's grant or denial of relief will be determined by its analysis of whether the lower court violated clearly established law. The exact same is true in a sunbursting model. In other words, the sunbursting model's addition of a merits analysis does not change the potential benefit to the petitioner, because that potential benefit is based on the clearly-established-law analysis. Thus, the potential result for petitioners is the same under either model.[123]

Further, practically speaking, any theoretical disincentive created by the possibility of sunbursting will be mitigated by the effects of imperfect knowledge in the real world. First, in considering whether to seek certiorari review, few losing parties below will know for sure whether the district court will find that clearly established law exists, so the possibility of sunbursting will likely be a marginal consideration. Second, even without sunbursting, litigants currently flood the district courts with certiorari petitions and *rarely* receive relief—often for failure to show that the lower court violated clearly established law. If litigants do not now go through a strict analysis prior to filing their certiorari petitions, there is no indication that the specter of sunbursting will deter them from continuing to challenge lower court decisions. If district courts adopt sunbursting, it will neither reduce losing parties' theoretical incentive to seek certiorari review, nor likely alter their real-world cost/benefit analyses in deciding whether to do so.

D. Wasting Judicial Resources

With incessant cases flowing through the doors of the district courts, any proposal encouraging more work for judges and sup-

122. *See* Schaefer, *supra* n. 63, at 638 (addressing purely prospective ruling as not applying to litigants at issue); Shannon, *supra* n. 64, at 859–860 (discussing the positive aspects of retroactive rulings).

123. In fact, the benefit to the petitioner may be marginally greater under the sunbursting model because a ruling on the merits clarifies the law for everyone. In other words, a rising tide of caselaw lifts all boats, including the petitioner's. Of course, the question of whether that marginal benefit is worth the expense of seeking certiorari review is one that must be answered by prospective petitioners on a case-by-case basis.

port staff should be advanced delicately. One argument against sunbursting is that it could create more work for district courts, which will have to undertake merits analyses as opposed to just determining whether the lower court abided by clearly established law. The conservation of judicial resources is not just an abstract concept;[124] however, it must be balanced with fairness to litigants.[125] The simple question is whether the proper evolution of Florida law and clarity for future litigants outweighs any burdens on the judiciary created by sunbursting. To answer that question, we must examine the workload effect of sunbursting at both the micro and macro levels.

First, on a micro level, sunbursting is a purely discretionary tool for the district courts to use when they deem appropriate. It is not a technique designed to be employed in every certiorari case. Instead, the reviewing panel can decide on a case-by-case basis whether the issue on review is worthy of a merits analysis. Indeed, judges will be in the best position to determine when sunbursting is worth the judicial resources.[126]

Second, on a macro level, the value of a system that allows for the proper evolution of the law is outweighed by any minor increase in judicial labor. In the issue-of-first-impression scenario, the problem with allowing the lower courts to determine the law on a circuit-by-circuit basis is troublesome. Uniform laws create stability for citizens and state officers alike,[127] a benefit of sunbursting that outweighs the costs expended on establishing clear laws. The courts are already well equipped to handle such situations in direct appeals, so the concept is not completely new, and any increase in labor would be marginal. Likewise, if an issue has been decided by only one district (the *Pardo* scenario), the value of having other districts weigh in on the matter is substantial. If two heads are commonly better than one, so too are multi-

124. *See e.g. Ryder Sys., Inc. v. Davis*, 997 So. 2d 1133, 1135 (Fla. 3d Dist. App. 2008) (acknowledging the principle of judicial economy in reviewing lower court's ruling).

125. *See E.C. v. Katz*, 731 So. 2d 1268, 1270 n. 1 (Fla. 1999) (stating that the court was "not convinced that any judicial economies which might be achieved [by the proposed rule] would be sufficient to affect [its] concerns over fairness for the litigants" (quoting *Stogniew v. McQueen*, 656 So. 2d 917, 920 (Fla. 1995))).

126. As the system stands now, judges occasionally take the time to discuss the merits notwithstanding the decision to deny relief on other grounds. *See* cases cited *supra* n. 94 (giving examples of such discussions).

127. *See Gray*, 654 So. 2d at 554 (expressing society's interest in stable laws).

ple districts better than just one. As the system now stands, a district court can essentially decide an issue with finality for all of Florida; yet we have only one state court that has the power to have the final word on the interpretation of Florida law—the Florida Supreme Court.[128] Maintaining this pecking order of our judicial system is an important benefit of sunbursting. Taken together, these macro-level benefits outweigh the extra effort required to apply sunbursting.

In summary, none of these objections to sunbursting undermine its theoretical validity and practical value as a tool of certiorari jurisprudence. Sunbursting will act simply as a release valve in certiorari's dam that holds back the growth and development of Florida law. Once the district courts acknowledge their ability to rule prospectively in certiorari cases, the law will become clearer in each district and, ultimately, statewide.

VII. CONCLUSION

The clearly-established-law requirement, while serving a worthy purpose of limiting certiorari review, has ultimately created clouds of uncertainty in the law by hindering caselaw development. Existing solutions have attempted to overcome the problem, but each has its own shortcomings. In contrast, sunbursting provides a comprehensive, straightforward solution. By granting or denying relief based on the clearly-established-law requirement while also reaching a holding on the merits, district courts of appeal can clarify the law without offending certiorari standards.

128. *See State v. Moss*, 206 So. 2d 692, 696 (Fla. 2d Dist. App. 1968) (stating that it "is readily apparent upon a reading of Article V, Section 4(2), of the Florida Constitution that one of the intended predominant functions of the Supreme Court is to pass *ultimately* upon the written law, i.e., statutes, treaties, and constitutional provisions") (emphasis in original).