THE PROPOSAL TO RESTATE THE CERTIORARI STANDARD TO ENSURE REVIEW OF NON-FINAL ORDERS THAT IMPLICATE THE RIGHT TO DUE PROCESS WOULD CHANGE THE HISTORICAL SCOPE AND USE OF THE CERTIORARI WRIT

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I. INTRODUCTION

The authors of two Florida Bar Journal articles, Judge Chris W. Altenbernd and Jamie Marcario, issued a call to arms for Florida judges and lawyers to critically question the functionality of Florida's standard for deciding petitions for certiorari review of non-final orders.[1] Their premise is that the current standard is so vague and subjective that its application is, at times, unpredictable.[2] They propose that the solution is to rewrite the standard, using functional language instead of the vague and poetic terms currently used to determine the availability of certiorari review.[3] It is their hope that their proposed functional certiorari standard will "make the true decision[-]making process more uniform, more transparent, and more easily understood by both lawyers and judges."[4]

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1. Judge Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21 (Feb. 2012) [hereinafter Altenbernd & Marcario I]; Judge Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Trying On a Functional Certiorari Wardrobe, Part II*, 86 Fla. B.J. 14 (Mar. 2012) [hereinafter Altenbernd & Marcario II].

2. Altenbernd & Marcario I, *supra* n. 1, at 21; Altenbernd & Marcario II, *supra* n. 1, at 14.

3. Altenbernd & Marcario I, *supra* n. 1, at 21; Altenbernd & Marcario II, *supra* n. 1, at 14.

4. Altenbernd & Marcario I, *supra* n. 1, at 21.

This Article examines one narrow aspect of the proposed revision of the standard for obtaining certiorari review. In conjunction with their expressed goals of uniformity, transparency, and clarity, Judge Altenbernd and Ms. Marcario predict that their proposed functional standard will not significantly change the historic scope and use of the writ.[5] Their second article, however, makes clear that this is exactly what will occur if their standard is applied to non-final orders that implicate the right to due process.[6]

II. THE CERTIORARI STANDARD AS IT IS, AND AS IT IS PROPOSED

As is the case for several articles in this symposium addressing certiorari review, the starting point is the current standard that Florida courts use to determine a petition for writ of certiorari review. This standard requires that: (1) the order constitute a departure from the essential requirements of the law; (2) the order cause material injury throughout subsequent proceedings; and (3) the injury be one for which there will be no adequate remedy after final judgment.[7] The subsequent two prongs are sometimes referred to as the jurisdictional prongs because, absent this level of harm, the appellate court cannot examine the alleged error itself.[8]

Judge Altenbernd and Ms. Marcario advocate for replacing the current vague test with what they describe as a more functional inquiry, as follows:

> (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 reso-

5. *Id.*
6. Altenbernd & Marcario II, *supra* n. 1, at 14.
7. *Kauffman v. King*, 89 So. 2d 24, 26 (Fla. 1956).
8. *E.g. Barker v. Barker*, 909 So. 2d 333, 336 (Fla. 2d Dist. App. 2005).

> lution process that it should use its resources to interfere in the trial court proceeding to correct the problem?[9]

What is interesting about their proposal is that it is not a "one-size-fits-all" standard to be applied to all non-final orders. Instead, Judge Altenbernd and Ms. Marcario suggest that the appellate courts should modify the inquiry to create separate tests particular to each category of non-final order. To this end, they list several goals and policies that should be used as guideposts for determining whether exceptional circumstances exist that warrant interfering with the ongoing work of a trial court by reviewing a particular non-final order.[10]

Given the exceptional nature of certiorari review, some of these guideposts focus on protecting constitutional rights, particularly the right to due process.[11] As to the first question of the proposed functional-inquiry standard, which focuses on whether the error can be easily identified, Judge Altenbernd and Ms. Marcario suggest that the goals of certiorari review should include: (1) reviewing non-final orders that violate the right to due process as a matter of law; and (2) where the non-final order is a discretionary ruling, granting review if the order is an ongoing deprivation of the right to due process.[12] The guideposts for the second question, which focuses on the significance of the error, again include those errors that violate the right to due process.[13]

When these questions and guideposts are read together, the proposed functional standard appears to ensure certiorari review of most instances of due process violations. But that is not the current state of the law. Florida jurisprudence currently recognizes that some due process violations (like the right to be heard) are entitled to certiorari review, but that others (like the right to a jury trial and the right to self-representation) are not.[14]

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9. Altenbernd & Marcario I, *supra* n. 1, at 23.
10. *Id.* at 21–23.
11. *Id.*
12. *Id.* at 23–24.
13. Altenbernd & Marcario II, *supra* n. 1, at 14.
14. *See id.* (citing *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 214 (Fla. 1998), where the Florida Supreme Court held that an order denying a jury trial was not subject to review).

III. THE RIGHT TO BE HEARD

The First District Court of Appeal recently summarized Florida jurisprudence regarding the availability of certiorari review for a non-final order that denies a party the right to be heard in *K.G. v. Florida Department of Children and Families*.[15] In that case, a mother sought review of a shelter order that placed her child in the custody of the child's maternal grandmother.[16] The mother asked that the order be quashed because the trial court denied the mother the opportunity to be heard during the hearing on the shelter petition.[17] The court's analysis was brief and explicit. As to the jurisdictional prongs of the certiorari standard, the court held that the denial of the mother's due process right to be heard is an irreparable harm that must be immediately addressed, stating: "If the mother's allegation is found to be true, and she waits to raise it until she appeals a final dependency or termination order, the entire proceeding will have been based on a denial of her due process rights. We cannot allow this to occur."[18] Regarding the level of error required to secure certiorari review, the court equated the due process violation to a departure from the essential requirements of the law and cited to multiple Florida cases, which have consistently held that failing to honor a parent's right to be heard at a shelter proceeding is a due process violation.[19]

Other district courts of appeal have reached the same conclusion, granting certiorari review where a litigant is denied the opportunity to be heard. For example, in *Aiello v. Aiello*,[20] another appellate court again concluded that such a denial is a violation of the essential requirements of law because it is a due process violation.[21] As for the jurisdictional prongs, the *Aiello* court looked to the particular harm that would result from the temporary interference with a parent's right to visit a child and con-

15. 66 So. 3d 366, 368–369 (Fla. 1st Dist. App. 2011).
16. *Id.* at 367.
17. *Id.*
18. *Id.* at 368.
19. *Id.*
20. 869 So. 2d 22 (Fla. 2d Dist. App. 2004).
21. *Id.* at 24; *see also A.W.P. v. Dep't of Children & Fam. Servs.*, 10 So. 3d 134, 136 (Fla. 2d Dist. App. 2009) (holding that it was a violation of the father's due process rights to deny him a hearing on visitation with his son).

cluded that a direct appeal following entry of the final judgment cannot bring that time back.[22]

IV. THE RIGHT TO JURY TRIAL

Yet, in *Jaye v. Royal Saxon, Inc.*,[23] the Florida Supreme Court held long ago that another due process violation does not warrant certiorari review.[24] Resolving a conflict amongst the district courts, the Supreme Court focused on the jurisdictional prongs to hold that the denial of the right to a jury trial does not require certiorari review.[25] Unlike the jurisprudence addressing the right to be heard, the Supreme Court was not concerned about the risk posed by litigating a case to conclusion despite an underlying denial of due process that may well invalidate the final judgment.[26] Instead, the Supreme Court specifically held that none of the circumstances resulting from an initial non-jury trial cause the type of irreparable harm that cannot be remedied on direct appeal, including a party having to "show [his or her] hand" in the non-jury trial; the possibility that the offended party may die before the second trial; and "the time, effort, and expense of trying a case twice."[27] In support, the Supreme Court observed that, if the trial court rules in favor of the offended litigant, an appeal on this basis would be moot.[28] Absent the harm of an adverse final order, no appeal is necessary.[29]

At least one appellate court has extended the Supreme Court's analysis to another due process violation. In *Schneider v. Schneider*,[30] the Fourth District Court of Appeal held that certiorari review is not available to review an order denying the right to self-representation.[31] Citing *Jaye*, the court explained, "[I]f the importance of the right to trial by jury could not displace the

22. *Aiello*, 869 So. 2d at 24.
23. 720 So. 2d 214 (Fla. 1998).
24. *Id.* at 215–216.
25. *Id.* at 215.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. 732 So. 2d 1147 (Fla. 4th Dist. App. 1999).
31. *Id.* at 1148.

requirement of injury that cannot be corrected on appeal, then neither can the right of self-representation."[32]

V. APPLICATION OF THE FUNCTIONAL STANDARD TO THE RIGHT TO A JURY TRIAL

In their second article, Judge Altenbernd and Ms. Marcario specifically discuss the *Jaye* decision and rely on their proposed functional standard to argue, in essence, that *Jaye* was wrongly decided because the decision fails to recognize the importance of the right to due process, or at least the importance of fiercely protecting the right to a jury trial.[33] They assert that the "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."[34] Relying on the goals of their functional restatement of the certiorari review standard, they also assert that a cost-benefit analysis supports granting certiorari review.[35] As for the cost, they believe that the impact of the appellate review proceeding will be relatively minimal because the denial of the right to a jury trial: (1) is a pure question of law that does not require review of an entire record to search for harmlessness; (2) is the type of error that would be reversed on direct appeal without debate; and (3) is the type of error that would require little analysis and only a short opinion because the error is obvious.[36] The only benefit they identify is saving substantial time and expense for the courts and the parties.[37]

Based on this analysis, Judge Altenbernd and Ms. Marcario suggest a simple three-part test for obtaining certiorari: (1) the petitioner must provide a sufficient record for the reviewing court to discern whether the petitioner was denied the right to a jury trial as a matter of law; (2) the petitioner must not have waived this right below; and (3) the respondent does not identify any basis for denying the right to jury trial.[38]

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32. *Id.* at 1148–1149.

33. *See* Altenbernd & Marcario II, *supra* n. 1, at 14–15 (stating that the improper denial of a jury trial violates due process and prevents a fair trial).

34. *Id.* at 15.

35. *Id.* at 15–16.

36. *Id.* at 15.

37. *Id.*

38. *Id.* at 16.

VI. THE RIGHT TO DUE PROCESS UNDER THE FUNCTIONAL STANDARD

If the goal of the proposed functional standard is uniformity in appellate decisions, it would certainly be achieved by adopting this proposed standard for determining certiorari petitions of non-final orders that implicate the right to due process. The conflict between those cases that permit certiorari review of orders denying the right to be heard and those cases that deny certiorari review of orders denying the right to a jury trial is an example of the uncertainty in the appellate courts' consideration of certiorari petitions. There appears to be no tenable basis for the distinction between the Supreme Court's analysis of irreparable harm in the context of the right to a jury trial and the analysis of Florida's district courts in the context of the right to be heard. In both circumstances, entire proceedings are based on a denial of the right to due process, and in both circumstances, the offended party would not object to that wrong if the party nonetheless prevails below.

Judge Altenbernd and Ms. Marcario's proposed analysis for reviewing the denial of the right to a jury trial applies equally when the denial of a party's right to be heard is asserted. Both due process rights are equally important to our judicial system,[39] and the right to be heard can be addressed just as easily on certiorari review as the right to a jury trial. In fact, the three decisions discussed above demonstrate this point.[40] In each case, the violation of the right to be heard was clear and, therefore, was quickly addressed (either the same year or the following calendar year after the certiorari petition was filed) with a short, simple opinion.[41]

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39. *Duncan v. La.*, 391 U.S. 145, 149 (1968) (concluding that the right to a jury trial, which applies to states through the Fourteenth Amendment, is "fundamental to the American scheme of justice"); *Ownbey v. Morgan*, 256 U.S. 94, 110–111 (1921) (stating that Due Process "restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings").

40. *K.G.*, 66 So. 3d at 367 (granting certiorari to protect the right to be heard); *A.W.P.*, 10 So. 3d at 136 (same); *Aiello*, 869 So. 2d at 24 (same).

41. For instance, the online docket for the *Aiello* case reflects that the appellate court's jurisdiction was invoked in April 2003 and that the case was decided in February 2004, meaning that the case was decided in only ten months. Fla. Dist. Ct. of App., *Online Docket*, http://199.242.69.70/pls/ds/ds_docket_search, *select* Case Numbers, *search* 2D03-

However, Judge Altenbernd and Ms. Marcario's analysis in this context was not to promote uniformity. For example, their articles did not identify the conflict between these two lines of cases. Instead, their proposed functional standard seeks to significantly alter the historic scope and use of the certiorari writ, despite their initial representation that this would not be the case. Their proposed functional standard requires Florida courts to ignore the Supreme Court's decision in *Jaye* and, instead, virtually ensures review of non-final orders that implicate the right to due process. To that end, they propose that, for those orders that deny the right to a jury trial, the certiorari standard ask only whether: (1) the appellate record is sufficient to review the error; (2) the petitioner waived the error; and (3) there was any other justification for the trial court's ruling. This, of course, is no different than the inquiry that an appellate court would undertake on direct appeal.[42]

This raises an important concern that the authors note but do not address: if the particular standard for certiorari review of non-final orders denying the right to a jury trial or the right to be heard amounts to a direct appeal of a non-final order, is this an abuse of the certiorari petition? In fact, this was the very concern of the Florida Supreme Court in 1998 when it issued *Jaye*. The Supreme Court cited its previous decisions, which emphasize that certiorari "'is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders.'"[43] Judge Altenbernd

1822 (2003). While the online dockets are not available for *A.W.P.* and *K.G.*, pursuant to Sections 39.411 and 39.467, Florida Statutes (2013), which require that proceedings relating to terminating parental rights are protected and not subject to public access, the appellate decisions themselves make clear that they were decided just as quickly. Every decision includes the date on which the appellate court decided the case. Decisions also reflect the year that the case was commenced, by including the last two digits of the year in the case number, following the letter "D." So, the decision in *K.G.* reflects that it was issued within six months from the court's jurisdiction being invoked. *See* 66 So. 3d 366, 366–367 (issuing the decision on July 26, 2011 about a child who was born March 29, 2011).

42. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (holding that an issue that was not raised in the lower tribunal is waived on appeal); *Dade Co. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (holding that an order may be affirmed if it is correct, even for a reason not relied upon by the lower tribunal); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (holding that an adequate appellate record is required to demonstrate reversible error).

43. *Jaye*, 720 So. 2d at 214–215 (quoting *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987)).

and Ms. Marcario recognized the Supreme Court's concern, but did not address it, stating:

> 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. Fla. Const., art. V, §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]

Without that analysis, the part of their proposed functional certiorari standard that addresses non-final orders that impact the right to due process cannot be fully considered. Judge Altenbernd and Ms. Marcario are essentially requesting a significant change in certiorari law, so that its scope is extended to automatically include orders that violate the right to due process, such as the right to a jury trial. The Florida Supreme Court, however, has consistently declined to carve out categories of non-final orders that are automatically entitled to certiorari review, stating that is the purpose of the appellate rule identifying non-final orders that are subject to interlocutory review.[45] Judge Altenbernd and Ms. Marcario have offered no basis for deviating from Supreme Court law on this point. In fact, the reasons they identify for their proposal are the type of factors that the Florida Supreme Court would consider when determining which non-final orders are entitled to interlocutory review.[46] For that reason, it might be better for these concerns to be vetted by The Florida Bar's Appellate Rules Committee and considered by the Florida Supreme Court in its rulemaking capacity.[47]

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44. Altenbernd & Marcario II, *supra* n. 1, at 19 n.7.

45. *E.g. Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 348–349 (Fla. 2012); *Martin-Johnson, Inc. v. Savage*, 509 So. 2d at 1098–1099.

46. *E.g. Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 818–820 (Fla. 2004) (discussing factors supporting appellate review of non-final orders denying workers' compensation immunity defense).

47. In recent years, Florida Rule of Appellate Procedure 9.130 has been frequently amended to change the types of non-final orders that are appealable. *E.g. In re Amends. to Fla. R. of App. P.*, 2 So. 3d 89 (Fla. 2008); *Amends. to Fla. R. App. P.*, 780 So. 2d 834 (Fla. 2000); *In re Amends. to Fla. R. App. P.*, 609 So. 2d 516 (Fla. 1992).