

The Conflict PCA: When an Affirmance Without Opinion Conflicts with a Written Opinion

About two-thirds of all appellate decisions at the district court level include no opinion at all.¹ The affirmance without opinion, better known to appellate practitioners as a PCA,² is by far the most prevalent appellate disposition in our district courts of appeal. PCAs are necessary to efficiently handle the heavy case load shouldered by our appellate judges. Some cases might merit a written opinion, but the judges decide to address other pending cases instead.³ Unfortunately, public perception is that PCAs are issued because district courts do not want to explain their decisions or want to foreclose Supreme Court review.⁴ This public perception is at least partly justified by cases ending with a “conflict PCA,” where an affirmance without opinion in one case is inconsistent with a written opinion in another case.

This article explores cases involving conflict PCAs and discusses some options available to attorneys and litigants faced with a conflict PCA. This article suggests that an appellant may respond to a conflict PCA by moving the appellate court for a written opinion, rehearing, or rehearing en banc. Additionally, under limited circumstances, an appellant may move the appellate court to recall and modify its mandate.

The Affirmance without Opinion in General

Affirmances without opinion come in two varieties, depending on the nature of the appellate proceeding. In appeals from nonfinal orders authorized by Fla. R. App. P. 9.130 and appeals from final orders, the affir-

mance without opinion consists of the words, “PER CURIAM. Affirmed.”⁵ In original proceedings involving petitions for such writs as habeas corpus or certiorari, the affirmance without opinion instead reads, “Per curiam. DENIED.”⁶ Either way, the appellate court determines it has jurisdiction to hear the case but decides to affirm for some undisclosed reason.

Appellate practitioners should know why the district courts usually issue PCAs. After all, the district courts have explained some of the reasons why they decide to forego a written opinion when affirming:

- The standard of review is abuse of discretion and the panel did not find an abuse of discretion;⁷
- Any error was harmless;⁸
- The error was not preserved;⁹
- The appellant failed to establish error because no transcript of the lower court’s proceedings was available;¹⁰ or,
- The appellant did not identify any specific error, but was unhappy with the lower court’s decision.¹¹

The appellate courts will write an opinion when affirming if the opinion will 1) explain something that is not readily apparent from the record or 2) serve some useful purpose.¹² In other words, a district court will write an opinion to support an affirmance only if a written explanation would be of “any significant assistance to the bench or bar of this state.”¹³

Nevertheless, attorneys, litigants, and the general public remain concerned about the use of PCAs. Some believe that appellate courts issue PCAs because they are too busy, do not want to explain their decisions,

or wish to avoid further review by the Supreme Court.¹⁴ In the words of one such critic, “an unexplained PCA rejecting an argument appears arbitrary when another court or panel accepts the identical argument and writes a reasoned opinion to support it.”¹⁵ Unfortunately, this criticism appears valid because similarly situated appellants throughout the state sometimes receive disparate treatment by different panels of the same court or different district courts.¹⁶

Two Representative Conflict PCAs

Conflict PCAs are not hard to find. One example is *University of Florida v. McLarthy*, 483 So. 2d 723 (Fla. 1st DCA 1985), in which a deputy commissioner held that F.S. §440.28 did not bar a supplemental workers’ compensation claim for additional benefits. The court affirmed the order on appeal without opinion.¹⁷ Eleven days later, a different panel held that a similar claim for additional benefits was barred by the statute in *General Electric Co. v. Spann*, 479 So. 2d 289, 290 (Fla. 1st DCA 1985). The University of Florida moved for rehearing based on conflict between the PCA in its case and the subsequent written opinion by the *Spann* panel.¹⁸ The *McLarthy* panel granted the motion, reconciled the two cases, and reversed the compensation order.¹⁹

More recently, in *McLaughlin v. Department of Highway Safety & Motor Vehicles*, 2 So. 3d 988, 989 (Fla. 2d DCA 2008), *review granted*, 4 So. 3d 676 (Fla. 2009), a driver’s license was suspended for failing to submit to a breath alcohol test. The hear-

ing officer who reviewed the license suspension refused to consider the legality of the driver's arrest and upheld the suspension.²⁰ The driver challenged the hearing officer's decision by petition for certiorari to the circuit court, but the circuit court denied the petition.²¹ The driver then sought second-tier certiorari review at the Second District, which denied the petition without opinion.²² Nine days later, in *Department of Highway Safety & Motor Vehicles v. Pelham*, 979 So. 2d 304, 308 (Fla. 5th DCA), review denied, 984 So. 2d 519 (Fla. 2008), the Fifth District ruled that a hearing officer must consider the legality of a driver's arrest when reviewing an administrative license suspension. The Second District subsequently withdrew the original PCA, issued a written opinion, and certified conflict with *Pelham*.²³

McLarthy and *McLaughlin* demonstrate that an appellant confronted with a conflict PCA has tools at his or her disposal to move the appellate court to resolve or certify the conflict. The type of motion available to respond to a conflict PCA depends on when the conflict becomes apparent. An appellant may file motions for a written opinion, rehearing, and rehearing en banc within 15 days of the PCA.²⁴ Thereafter, the appellant may file a motion to recall and modify the court's mandate until the term of the court expires on the second Tuesday of January or July — whichever comes first — following issuance of the mandate after the PCA.²⁵

Motions for a Written Opinion, Rehearing, and Rehearing En Banc

If the conflict becomes apparent before the period for rehearing expires, an appellant may request a written opinion or move the court for rehearing or rehearing en banc.²⁶ Each motion has particular requirements that might make it inappropriate for all cases.

The Florida Rules of Appellate Procedure allow a motion for written opinion only when "a party believes that a written opinion would provide a legitimate basis for [S]upreme [C]ourt review."²⁷ Such a motion would be appropriate when a PCA conflicts with an opinion from the Supreme Court

or another district court because the Supreme Court could exercise its conflict jurisdiction under Fla. Const. art. V, §3(b)(3).

When the PCA conflicts only with an opinion from the same district court, an appellant should file a motion for rehearing coupled with a motion for rehearing en banc. The panel may grant rehearing to reverse or write to explain why the PCA does not conflict with that district's case law.²⁸ Alternatively, the court may rehear the case en banc to reverse or affirm with a written opinion that recedes from earlier case law.²⁹ Of course, all three motions may be appropriate if the PCA conflicts with cases from the same court and other appellate courts.

Such motions have been successful in obtaining an explanation for the court's affirmance.³⁰ For example, the appellant in *Bates v. Islamorada*, 939 So. 2d 171, 171-72 (Fla. 3d DCA 2006), requested rehearing, a written opinion, or rehearing en banc after the court issued a PCA. The appellant claimed that the PCA conflicted with earlier opinions from the same court, other district courts, and the Supreme Court.³¹ The appellate court denied the motions for rehearing or rehearing en banc but granted the motion for a written opinion to explain that the cases cited by the appellant were distinguishable.³²

Motions to Recall and Modify Mandate

If the conflict becomes apparent after the period for rehearing expires but before the term of court ends, an appellant may move the district court to recall and modify its mandate. A motion to recall mandate is appropriate when recalling the mandate is necessary to correct a manifest injustice.³³ But appellate courts have the discretion to recall a mandate only during the term in which the mandate was issued.³⁴ The crucial date when filing a motion to recall mandate is the last day of the term of court as determined by F.S. §35.10, when the appellate court loses temporal jurisdiction over the case.³⁵

Two cases from the Second District and the Fifth District indicate that timely motions to recall and modify

mandate may be used to confront a conflict PCA and correct a manifest injustice. In *McLaughlin*, the appellant moved the Second District to recall and modify its mandate during the term of the issuance of the mandate following the PCA in that case.³⁶ The Second District withdrew the PCA six days before the end of the term³⁷ and issued the new opinion, certifying conflict with *Pelham* during the subsequent term.³⁸ *McLaughlin* shows that a timely motion to recall and modify a mandate may be an appropriate response to a conflict PCA.

However, an appellant is left without any recourse if the conflict becomes apparent after the term of court ends. In *Rogers v. State Farm Mutual Automobile Insurance Co.*, 383 So. 2d 1221 (Fla. 5th DCA 1980) (table decision), the trial court dismissed a policyholder's complaint for personal injury protection benefits against his insurer. The Fifth District per curiam affirmed the trial court's order without a written opinion, but the court issued *State Farm Mutual Automobile Insurance Co. v. Bergman*, 387 So. 2d 494 (Fla. 5th DCA 1980), a directly conflicting opinion, after the term of court ended. The policyholder moved for rehearing based on the newly apparent conflict.³⁹ The Fifth District denied the motion and, on its own motion, reconsidered the case en banc and reversed the trial court's order.⁴⁰ However, the Florida Supreme Court directed the Fifth District to reinstate the conflict PCA because the district court's jurisdiction over the *Rogers* case had expired when the term of court ended, before it decided the *Bergman* case.⁴¹ Under these rare circumstances, a conflict PCA is unassailable, and similarly situated appellants will invariably receive disparate treatment.

Counsel should be aware of and disclose any prior or pending cases involving any issues that will be determinative to the issues raised on appeal.⁴² Timely disclosure of similar cases may signal to the appellate court that conflict might lurk on the horizon. In a case decided near the end of the term of court, this knowledge might prompt the appellate court to hold the PCA until the new term begins. Ultimately, the best way to deal with

a conflict PCA is to prevent one.

Conclusion

Conflict PCAs should be rare. In a majority of cases, a PCA reflects that a written opinion would serve little purpose other than to address a routine issue that involves well-settled principles of law, such as preservation of error.⁴³ The post-disposition motions discussed in this article should allow an appellant to mount an effective response to a conflict PCA. But counsel should know that the abuse or misuse of these motions may lead to sanctions.⁴⁴ Our appellate courts simply cannot write an opinion in every case due to their heavy workload. The district courts do not rely on PCAs because of some nefarious desire to hide their reasoning or to foreclose Supreme Court review. PCAs and their critics will remain a staple of appellate practice in Florida until the state decides to substantially increase the number of appellate judges.⁴⁵ The well-prepared appellate practitioner should be familiar with the tools at his or her disposal to respond to any conflict PCAs. □

¹ Judicial Management Council Committee on Per Curiam Affirmed Decisions, FINAL REPORT AND RECOMMENDATIONS 25 (2000) [hereinafter PCA REPORT]; Office of the State Courts Administrator, FLORIDA DISTRICT COURTS OF APPEAL: A DESCRIPTIVE REVIEW 33 (2006).

² The term "PCA," as used in this article, refers to both per curiam denied decisions in original proceedings and per curiam affirmed decisions in appeals as of right.

³ District Court of Appeal Workload and Jurisdiction Assessment Committee, REPORT AND RECOMMENDATIONS 11 (2006) [hereinafter D.C.A. ASSESSMENT]; see also *Elliott v. Elliott*, 648 So. 2d 137, 138 (Fla. 4th D.C.A. 1994) ("The sheer volume of appeals, in and of itself, would seemingly indicate the impossibility of a written opinion on every affirmation.")

⁴ D.C.A. ASSESSMENT, n.2, at 19-20, 32.

⁵ See, e.g., *Samad v. Lassalle*, 39 So. 3d 334 (Fla. 5th D.C.A. 2010) (table decision); *Lamour v. Deer Run Prop. Owners Ass'n, Inc.*, Case No. 4D08-3960, 2009 WL 860754 (Fla. 4th D.C.A. Apr. 1, 2009) (unpublished table decision) (nonfinal appeal), *superseded* by 11 So. 3d 446 (Fla. 4th D.C.A. 2009).

⁶ See, e.g., *Gomer v. Tallahassee Medical Center, Inc.*, 43 So. 3d 694 (Fla. 1st D.C.A. 2010) (table decision) (certiorari); *Wade v. Cameron*, 41 So. 3d 225 (Fla. 2d D.C.A. 2010) (table decision) (habeas corpus).

⁷ *Lowe Inv. Corp. v. Clemente*, 685 So. 2d 84, 85 (Fla. 2d D.C.A. 1996).

⁸ *Id.*

⁹ *Id.*; *Horn v. Marine Hospitality Corp.*, 745 So. 2d 329, 330 (Fla. 4th D.C.A. 1998).

¹⁰ *Horn*, 745 So. 2d at 330.

¹¹ *Id.*

¹² *Id.*

¹³ *Whipple v. State*, 431 So. 2d 1011, 1012 (Fla. 2d D.C.A. 1983).

¹⁴ D.C.A. ASSESSMENT, n.2, at 20, 32. Although the Supreme Court has jurisdiction to consider cases that expressly and directly conflict with cases from another district court, the Florida Constitution does not permit the Supreme Court to review PCAs. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 988-90 (Fla. 2004); *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

¹⁵ Stephen Krossschell, *DCAs, PCAs, and Government in the Darkness*, 1 FLA. COASTAL L.J. 13, 31 (1999).

¹⁶ See *Dixon v. State*, 730 So. 2d 265, 268 n.4 (Fla. 1999) (explaining that two convicts appealed the denial of their respective motions for conviction relief based on the same argument but the third district affirmed without opinion while the second district reversed).

¹⁷ *McLarthy*, 483 So. 2d at 724.

¹⁸ *Id.* at 724.

¹⁹ *Id.* at 726-27.

²⁰ *McLaughlin*, 2 So. 2d 988.

²¹ *Id.* at 990.

²² *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 976 So. 2d 1109 (Fla. 2d D.C.A. 2008) (table decision), *superseded* by 2 So. 3d 988 (Fla. 2d D.C.A. 2008), *review granted*, 4 So. 3d 676 (Fla. 2009).

²³ *McLaughlin*, 2 So. 3d at 992.

²⁴ Fla. R. App. P. 9.330(a) and 9.331(d)(1).

²⁵ FLA. STAT. §35.10 (2010).

²⁶ See generally Arthur J. England, Jr., *PCAs in the DCA: Asking for Written Opinion from a Court That Has Chosen Not to Write One*, 78 FLA. B.J. 10 (Mar. 2004) (addressing motions for written opinion under Rule 9.330); Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path Around a Brick Wall*, 32 STETSON L. REV. 367 (2003) (describing several methods to confront any PCA).

²⁷ FLA. R. APP. P. 9.330(a).

²⁸ See *Amador v. Walker*, 862 So. 2d 729, 730-33 (Fla. 5th D.C.A. 2003) (denying rehearing but writing to explain why PCA did not conflict with cases from other appellate courts); *McLarthy*, 483 So. 2d at 724 (granting rehearing and reversing based on case law from the same district).

²⁹ See *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 829 (Fla. 4th D.C.A. 2009) (granting rehearing en banc, receding from prior PCA, and reversing).

³⁰ But see *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 248 (Fla. 1st D.C.A. 2009) ("It is meritless to argue that an opinion which says nothing more than 'Affirmed' conflicts with a written opinion issued by another district court.")

³¹ *Bates*, 939 So. 2d at 172.

³² *Id.*

³³ *Vega v. McDonough*, 956 So. 2d 1205, 1206 (Fla. 1st D.C.A. 2007).

³⁴ See *Peter v. Seapine Corp.*, 678 So. 2d 508, 508-09 (Fla. 1st D.C.A. 1996) (hold-

ing that court had jurisdiction to consider motion to recall mandate filed during the same term as the challenged mandate).

³⁵ See *Pinecrest Lakes, Inc. v. Shidel*, 802 So. 2d 486, (Fla. 4th D.C.A. 2001) ("[A]ppellate courts have the discretion to recall a mandate, limited to the term during which the mandate was issued."); *Peter v. Seapine Corp.*, 678 So. 2d 508, 508-09 (Fla. 1st D.C.A. 1996) (holding that court had jurisdiction to consider motion to recall mandate filed during the same term as the challenged mandate).

³⁶ Second District Court of Appeal Case Docket, *Case Number: 2D07-4891*, at http://199.242.69.70/pls/ds/ds_docket_search.

³⁷ See *McLaughlin*, 976 So. 2d at 1109.

³⁸ See *McLaughlin*, 2 So. 3d 988.

³⁹ *Rogers v. State Farm Mut. Auto. Ins. Co.*, 390 So. 2d 138, 139 (Fla. 5th D.C.A. 1980).

⁴⁰ *Id.*

⁴¹ *State Farm Mut. Auto. Ins. Co. v. Judges of the Dist. Ct. of Appeal, Fifth District*, 405 So. 2d 980, 981-83 (Fla. 1981).

⁴² See Fourth District Court of Appeal, *Docketing Statement*, available at <http://www.4dca.org/opinions/forms/docket2.pdf> (last visited Dec. 3, 2010) (requiring disclosure of cases involving similar issues); Second District Court of Appeal, *Notice to Attorneys and Parties*, available at <http://www.2dca.org/Clerk/Notices/noticetoattorneys.pdf> (requiring disclosure of related cases).

⁴³ See *Boyo v. State*, 922 So. 2d 453, 454 (Fla. 4th D.C.A. 2006) (explaining that PCA was based on appellant's failure to preserve issue for appellate review).

⁴⁴ *Amador*, 862 So. 2d at 733-34 (reserving jurisdiction to impose sanctions for filing motions for rehearing and for written opinion in violation of the rules); *Marion v. Orlando Pain & Medical Rehabilitation*, Case No. 5D06-4243, 2011 WL 111418, at *2 (Fla. 5th D.C.A. Jan. 12, 2011) (same).

⁴⁵ See PCA REPORT at 54 (comments by Raymond T. (Tom) Elliget, Jr.) ("The key to fewer [PCAs] . . . is a dramatically increased commitment from the state for more appellate judges.")

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