IN THE

SUPREME COURT OF FLORIDA

THOMAS C. SUTTON, et al., Petitioners, v. STATE OF FLORIDA, Respondent.	Case No. SC06-1000 District Court Case Nos. 1D05-5922; 1D05-5923; 1D05-5924; 1D05-5925; 1D05-5927; 1D05-5930; 1D05-5931; 1D05-5938; 1D05-5945; 1D05-5947; 1D05-5948

INITIAL BRIEF OF PETITIONERS

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.

The Petitioners[1] sought review in the First District Court of Appeal of the circuit court's final orders denying their petitions for writs of prohibition. The petitions were filed in the circuit court as original actions (i.e., the writs invoked the original jurisdiction of the circuit court, *see* Fla. R. App. P. 9.030(c)(3), as opposed to the appeal jurisdiction of the circuit court, *see* Fla. R. App. P. 9.030(c)(1)). The Petitioners requested the circuit court to issue the writs of prohibition directing a county judge to take no further action in their cases. The Petitioners had previously filed motions to disqualify in county court, which were denied by the county judge.

The Petitioners timely filed notices of appeal from the circuit court's denials of the writs of prohibition. On December 22, 2005, the First District issued an order to show cause as to why the notices of appeal should not be treated as invoking the district court's certiorari jurisdiction. The parties thereafter filed pleadings arguing their respective positions. Both parties acknowledged in their pleadings that there is a current conflict among the

[1] There are eleven Petitioners in this case. The issue in all eleven cases is identical. On April 24, 2006, the district court granted the Petitioners' motion to consolidate these cases "for all appellate purposes." Accordingly, the Petitioners filed one notice to invoke the discretionary jurisdiction of this Court, which contained all eleven case numbers from the district court.

district courts as to whether a circuit court's order on a petition for writ of prohibition is reviewable by appeal or certiorari. *Compare Housing Auth. of the City of Tampa v. Burton*, 873 So. 2d 356, 357-58 (Fla. 2d DCA 2004) (holding that the denial of a petition for writ of prohibition is reviewable by appeal); *with State v. Frazee*, 617 So. 2d 350, 351 (Fla. 4th DCA 1993) (holding that the issuance of a petition for writ of prohibition is reviewable by certiorari).

On April 20, 2006, the First District issued a decision "determin[ing] that the order[s] denying the petition[s] for writ[s] of prohibition [are] reviewable by petition for writ of certiorari."[2] In the decision, the First District acknowledged the conflict among the district courts by citing to *Frazee* from the Fourth District Court of Appeal and *Guzzetta v. Hamrick*, 656 So. 2d 1327 (Fla. 5th DCA 1995), from the Fifth District Court of

[2] Because the First District determined that the orders in this case are reviewable by a petition for writ of certiorari rather than by direct appeal, no record on appeal has been created in this case. The First District has stayed resolution of the cases pending the outcome in this Court. As a result, no petition for writ of certiorari has been filed in the district court (i.e., the circuit court documents that would be included in the appendix to the petition have not been filed in the district court).

Appeal.[3] On January 19, 2007, the Court accepted jurisdiction in order to resolve this conflict.

D. SUMMARY OF ARGUMENT.

A petition for writ of prohibition filed in the circuit court is an original proceeding. When the circuit court denied the petitions in the instant case, the Petitioners exercised their constitutional right to appeal to the First District Court of Appeal. The First District's decision to treat the direct appeals as petitions for writs of certiorari is contrary to the overwhelming weight of precedent.

This Court's decision in *Sheley v. Florida Parole Commission*, 720 So. 2d 216 (Fla. 1998), does not support the decision below. *Sheley* was decided in the context of the circuit court's appellate review of discretionary administrative decisions by the Florida Parole Commission. The fact that appellate review is denominated "mandamus" rather than "certiorari" is a product of history. Nothing in that decision suggests that it applies to original (as opposed to appellate) proceedings in the circuit court.

[3] In *Guzzetta*, the Fifth District held that the denial of a petition for writ of prohibition is reviewable by appeal. *See* 656 So. 2d at 1327.

E. ARGUMENT AND CITATIONS OF AUTHORITY.[4]

A circuit court's order on a petition for writ of prohibition is reviewable by direct appeal.

1. Standard of Review.

The Petitioners submit that the issue presented in this case is a pure question of law subject to the *de novo* standard of review. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) (stating that standard of review for pure questions of law is *de novo*).

2. Argument.

The Petitioners sought review in the First District Court of Appeal of the circuit court's final orders denying their petitions for writs of prohibition. The Petitioners requested the circuit court to issue the writs of prohibition

[4] The Petitioners note that the issue presented in this case is also pending before the Court in *Rivera v. State*, SC06-2236. In drafting this brief, undersigned counsel has relied substantially upon the arguments contained in the Brief of Petitioner in *Rivera*. Notably, in *Rivera*, both the defendant *and the State* are arguing that a circuit court's order on a petition for writ of prohibition is reviewable by direct appeal. *See Rivera v. State*, 939 So. 2d 116, 118 (Fla. 3d DCA 2006) ("*The State* argues that *Beshaw v. State*, 586 So. 2d 1284, 1284 (Fla. 3d DCA 1991) (concluding that "that the proper method of review from a final order of the circuit court denying a petition for writ or prohibition is by appeal"), and *State v. Brown*, 527 So. 2d 207, 208 (Fla. 3d DCA 1987) ("The order of prohibition which concluded the proceeding is thus appealable as a matter of right by the State – as it would be by any other litigant – as an appeal from a final order or judgment."), *mandate that the circuit court's order denying the instant petition for writ of prohibition be treated as an appeal from a final order*.") (emphasis added).

directing a county judge to take no further action in their cases. The Petitioners had previously filed motions to disqualify in county court, which were denied by the county judge.

The Petitioners sought review of the circuit court's final orders by filing timely notices of appeal. However, the district court below concluded that "the order[s] denying the petition[s] for writ[s] of prohibition [are] reviewable by petition for writ of certiorari" rather than by appeal.

a. Majority position: a circuit court's order on a petition for writ of prohibition is reviewable by direct appeal.

In *Housing Authority of the City of Tampa v. Burton*, 873 So. 2d 356, 357-58 (Fla. 2d DCA 2004), the Second District Court of Appeal addressed an *identical fact pattern* and held that the circuit court's denial of a petition for writ of prohibition was reviewable by the district court as an appealable final order:

> The Tampa Housing Authority seeks certiorari review of the circuit court's order denying its petition for writ of prohibition. The petition for writ of prohibition had sought to disqualify the county judge from further proceedings in litigation to evict a tenant of the Housing Authority. *We treat the petition for writ of certiorari as an appeal from the circuit court* and affirm.
>
> In Hillsborough County Court, the Housing Authority obtained a favorable jury verdict in the eviction trial of Connie Burton, a resident of public housing in Tampa. When ruling on Burton's motion for a new trial, the county judge denied the motion on the grounds asserted but ordered a new trial on his own initiative based on his personal observation that one juror was "consistently asleep in the jury box during the presentation

> of evidence" and that "to allow the jury verdict to stand would be a manifest injustice." The trial record did not contain any mention by either party or the judge of a sleeping juror. *The Housing Authority filed a motion to disqualify the county judge*, accompanied by affidavits of representatives of the Housing Authority who were present during the trial but did not observe the juror sleeping. The Housing Authority feared judicial prejudice or bias because the county judge did not raise the issue of juror misconduct until after the trial's conclusion, even though such misconduct could have been cured by seating an alternate juror during the trial. *The county judge denied the motion*.
>
> The Housing Authority filed a petition for writ of prohibition in the Circuit Court of the Thirteenth Judicial Circuit seeking to direct the county judge to disqualify himself. Ruling that the Housing Authority's motion lacked sufficient facts alleging prejudice or bias, *the circuit court denied the petition*. *The order denying the Housing Authority's petition for writ of prohibition concluded the original proceeding in the circuit court. As such, the order is an appealable final order*. *See Harris v. Culbreath*, 818 So. 2d 563, 564 (Fla. 2d DCA 2002); *Loftis v. State*, 682 So. 2d 632, 633 (Fla. 5th DCA 1996); *State v. Brown*, 527 So. 2d 207, 208 (Fla. 3d DCA 1987); Philip J. Padovano, *Florida Appellate Practice* § 21.4 (2003 ed. West Group); *but see State v. Shaw*, 643 So. 2d 1163 (Fla. 4th DCA 1994). *Accordingly, we treat the Housing Authority's petition for writ of certiorari as a timely filed notice of appeal. See* Fla. R. App. P. 9.040(c).

(Emphasis added.)

In another case involving an identical fact pattern, the Fifth District Court of Appeal also held that the circuit court's denial of a petition for writ of prohibition was reviewable by appeal rather than by certiorari:

> A petition for writ of prohibition is the proper vehicle for obtaining review of a lower tribunal's denial of a motion for disqualification. *See Bundy v. Rudd*, 366 So. 2d 440 (Fla.

> 1978). An order of the circuit court ruling on a petition for writ of prohibition is a final order reviewable by appeal. *See Guzzetta v. Hamrick*, 656 So. 2d 1327 (Fla. 5th DCA 1995), *rev. denied*, 663 So. 2d 630 (Fla. 1995).

Pinfield v. State, 710 So. 2d 201, 201 n.1 (Fla. 5th DCA 1998).

In fact, the overwhelming majority of cases that have considered the issue have determined that a circuit court's order on a petition for writ of prohibition is reviewable by direct appeal. *See Harris v. Culbreath*, 818 So. 2d 563, 564 (Fla. 2d DCA 2002) (reviewing denial of petition for writ of prohibition as an appealable final order); *Harrell v. State*, 700 So. 2d 808, 809 (Fla. 5th DCA 1997) (stating that "certiorari is not the proper remedy" to review trial court's final order denying petition for writ of prohibition); *Loftis v. State*, 682 So. 2d 632, 633 (Fla. 5th DCA 1996) ("A circuit court's order on a writ of prohibition is a final appealable order, and is not reviewable by certiorari."); *Beshaw v. State*, 586 So. 2d 1284, 1284 (Fla. 3d DCA 1991) (citing cases that hold that proper method of review from a final order of the circuit court denying a petition for a writ of prohibition is by appeal); *State v. Brown*, 527 So. 2d 207, 207 (Fla. 3d DCA 1987) (holding that it was proper to review by appeal a circuit court's order "which granted the defendant's petition for writ of prohibition and precluded the county court from trying her because of a violation of the speedy trial rule"); *Adams v. State ex rel. Eagan*, 478 So. 2d 1190, 1190 (Fla 5th DCA 1985) (citing

cases that hold that proper method of review from a final order of the circuit court denying a petition for a writ of prohibition is by appeal); *Bradley v. McDermott*, 466 So. 2d 1108, 1108 (Fla 5th DCA 1985) (involving an *appeal* from the circuit court's order denying a petition for writ of prohibition); *Treiman v. State*, 343 So. 2d 819, 820-21 (Fla. 1977) (involving an *appeal* from the circuit court's order granting a petition for writ of prohibition precluding county judge from presiding over case); *Mank v. Hendrickson*, 195 So. 2d 574, 574 (Fla. 4th DCA 1967) (same).[5]

[5] Similarly, Florida courts have entertained appeals from final orders on writs of mandamus. *See, e.g.*, *Mazer v. Orange County*, 811 So. 2d 857, 858 (Fla. 5th DCA 2002) ("Appellate courts have generally allowed direct review of an order dismissing a petition for writ of mandamus."); *Sanford v. Black*, 782 So. 2d 548, 548 (Fla. 5th DCA 2001) (involving an *appeal* from the circuit court's order denying a petition for writ of mandamus); *Weeks v. Golden*, 764 So. 2d 633, 634 (Fla. 1st DCA 2000) (same); *Ponton v. Moore*, 744 So. 2d 1159, 1160 (Fla. 1st DCA 1999) (same); *Masiello v. Moore*, 739 So. 2d 1196, 1196 (Fla. 1st DCA 1999) (involving an *appeal* from the circuit court's orders dismissing petitions for writ of mandamus); *Hensley v. Singletary*, 690 So. 2d 653, 653 (Fla. 1st DCA 1997) (same); *Lee County v. State Farm Mut. Auto. Ins. Co.*, 634 So. 2d 250, 250 (Fla. 2d DCA 1994) (involving an *appeal* from the circuit court's order granting a petition for writ of mandamus); *Conner v. Mid-Florida Growers, Inc.*, 541 So. 2d 1252, 1256 (Fla. 2d DCA 1989) ("In the present case, however, we have determined that the 'writ of mandamus' represents an end to judicial labor in this proceeding except for enforcement where necessary, and is therefore a final, appealable order."); *Caverly v. State*, 436 So. 2d 191, 191-92 (Fla. 2d DCA 1983) (stating that denial of petition for writ of mandamus is reviewed by appeal); *City of Miami Beach v. State ex rel. Pickin' Chicken*, 129 So. 2d 696, 696-98 (Fla. 3d DCA 1961) (involving an *appeal* from the circuit court's order granting a petition for writ of mandamus).

Often, these appeals are by the State after the circuit court has granted a writ of prohibition terminating a criminal prosecution. *See Birkin v. Sheer*, 543 So. 2d 330, 331 (Fla. 4th DCA 1989) ("The state appeals a writ of prohibition entered by the circuit court directing a judge of the county court to discharge a criminal defendant on speedy trial grounds."); *Brown*, 527 So. 2d at 208 ("The order of prohibition which concluded the proceeding is thus appealable as a matter of right by the State – as it would be by any other litigant – as an appeal from a final order or judgment."); *State v. Phillips*, 520 So. 2d 609, 609 (Fla. 3d DCA 1987) ("The state appeals from a judgment in prohibition precluding the further prosecution of criminal charges in the county court on the ground that the speedy trial time had run."); *State v. Wassel*, 502 So. 2d 476, 476 (Fla. 3d DCA 1987) ("The state appeals from a writ of prohibition precluding the county court from proceeding against the defendant–appellee in a d.u.i. case on speedy trial grounds.").[6]

[6] The Petitioners note that when this Court heard direct appeals (before the creation of the district courts of appeal in 1957), this Court heard appeals or their common law predecessor, writs of error, from writs of mandamus and writs of prohibition. *See Hoffman v. Land*, 55 So. 2d 806, 806-09 (Fla. 1952) (involving an appeal from final order granting petition for writ of mandamus); *Chapman v. State ex rel. Carlton*, 11 So. 2d 335, 335-37 (Fla. 1943) (involving an appeal from final order granting petition for writ of prohibition); *Cobb v. State ex rel. Pitchford*, 3 So. 2d 855, 855-56 (Fla. 1941) (involving writ of error from order granting petition for writ of

b. Minority position: a circuit court's order on a petition for writ of prohibition is reviewable by certiorari.

In *State v. Frazee*, 617 So. 2d 350 (Fla. 4th DCA 1993), which was relied upon by the court below,[7] the Fourth District Court of Appeal held that the circuit court's issuance of a writ of prohibition is reviewable by

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prohibition); *State ex rel. City of Miami v. Knight*, 189 So. 425, 426-27 (Fla. 1939) (same); *Harrison v. Murphy*, 181 So. 386, 387-90 (Fla. 1938) (same).

[7] When the court below followed *Frazee*, it seemingly receded from its previous precedent of reviewing the denial of a petition for a writ of prohibition as an appealable final order. *See Underwood v. Johnson*, 651 So. 2d 760 (Fla. 1st DCA 1995). In *Underwood*, the defendant filed a motion for discharge in county court arguing that his speedy trial rights had been violated. *See id*. at 760-61. The county court denied the motion for discharge and the defendant filed a petition for writ of prohibition in the circuit court seeking to prevent the county court from criminally prosecuting him due to the alleged speedy trial violation. *See id*. The circuit court denied the petition and the defendant appealed. *See id*. The case was reviewed by the First District as an appealable final order as opposed to a petition for writ of certiorari. The First District held that "the petition for writ of prohibition should have been granted" and therefore the circuit court's order was reversed. *Id.* at 760. Although the *Underwood* opinion did not directly address whether the denial of a petition for writ of prohibition is reviewable as an appealable final order as opposed to a petition for writ of certiorari, it is clear from the language in the opinion that the First District treated the case as a direct appeal. The *Underwood* opinion referred to the parties as "Appellant" and "Appellee," rather than "Petitioner" and "Respondent," and the First District "reversed" the circuit court's order rather than "quashing" it. *See, e.g., Lane v. Florida Prob. Comm'n*, 894 So. 2d 1087, 1087 (Fla. 1st DCA 2005) ("Accordingly, we grant the petition for writ of certiorari, *quash* the circuit court's order and remand this cause for further proceedings.") (emphasis added).

certiorari.[8] *Frazee* involved a review of the issuance of a writ of prohibition by the circuit court directed to the county court wherein the county court had denied the defendant's motion for discharge under the speedy trial rule. *See Frazee*, 617 So. 2d at 351. The defendant attempted an interlocutory appeal of the county court's denial of his motion to dismiss.[9] The circuit court properly treated the appeal as a petition for prohibition and granted the writ, causing the State to appeal to the Fourth District. *See id*. The Fourth District treated the State's appeal as a petition for writ of certiorari:

> The State of Florida has perfected this appeal to review the issuance of a writ of prohibition by the circuit court directed to the county court wherein that court had denied Douglas Paul Frazee's motion for discharge under the speedy trial rule. *We believe this matter is properly reviewed by this court under Florida Rule of Appellate Procedure 9.030(b)(2)(B) and thus we treat it as a petition for writ of certiorari.*

Id. (emphasis added).[10]

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[8] In *State v. Shaw*, 643 So. 2d 1163, 1164 (Fla. 4th DCA 1994), the Fourth District followed *Frazee* without further analysis.

[9] It is possible that the defendant's erroneous initiation of appeal in the circuit court misled the court in *Frazee* into thinking that any subsequent review by it had to be by certiorari (because the circuit court acted pursuant to its "review capacity"). *See* Fla. R. App. P. 9.030(b)(2)(B); Fla. R. App. P. 9.030(c)(1).

[10] In his most recent edition, Judge Padovano acknowledges that there is a conflict on this issue between the Second and Fifth Districts and the Fourth District. *See* Philip J. Padovano, *Florida Appellate Practice* § 21.4, pg. 411 n.16 (2006 ed. West Group). Judge Padovano distinguishes between pleadings filed pursuant to the circuit court's original jurisdiction and

The only written explanation for *Frazee's* holding is in Judge Farmer's dissenting opinion, which concurred with the majority that a petition for writ of certiorari is the proper vehicle to review a circuit court's order granting a petition for writ of prohibition. *See id*. at 352-54 (Farmer, J., dissenting). Judge Farmer's opinion (hereinafter "*Frazee* dissent") examines the Florida rules of procedure, noting that Florida Rule of Appellate Procedure 9.030(b)(2)(B) specifies that district courts of appeal have certiorari jurisdiction over "final orders of circuit courts acting in their review capacity." *See id.* at 352-53. The *Frazee* dissent holds that prohibition is "a form of review" within the meaning of that rule. *Id*. at 353. The *Frazee* dissent, however, never considered the different constitutional bases for jurisdiction. The *Frazee* dissent then makes the leap that because certiorari would be an available means of review, it is the only appropriate means. The *Frazee* dissent never addresses or acknowledges the long-standing body of case law to the contrary nor the case law holding that rules of procedure cannot alter substantive rights. These failures may have been the result of the parties not briefing the issue. *See id.* at 352 ("Although the

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pleadings filed pursuant to the circuit court's appeal jurisdiction. *See* Padovano, *supra,* § 21.4 at pg. 411, n.16 & pg. 412 n.17. However, Judge Padovano cites to *Burton* with approval and states, "The proper method of reviewing a final order denying a complaint for writ of prohibition is by appeal, not certiorari." Padovano, *supra*, § 21.4 at pg. 411 n.16.

parties themselves have not raised it, I believe that we are confronted with a jurisdictional problem").

The analysis in the *Frazee* dissent is wrong for three reasons. First, it starts in the wrong place. The opinion begins with an analysis of the rules of procedure rather than the constitutional grants of jurisdiction. The Florida Constitution sets forth separate jurisdictional bases for the circuit court's jurisdiction over appeals and extraordinary writs. The first sentence of article V, section 5(b), grants the circuit courts original and appellate jurisdiction: "The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law." Art. V, § 5(b), Fla. Const. The second sentence then makes an additional jurisdictional grant over original proceedings seeking extraordinary writs: "They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary and proper to the complete exercise of their jurisdiction." *Id.* By looking only to the rules of procedure, the *Frazee* dissent collapses these two distinct jurisdictional grants into "review capacity." Substantive rights conferred by law can never be altered by procedural rules adopted by this Court. *See State v. Furen*, 118 So. 2d 6, 11-12 (Fla. 1960). Prohibition is, and has always been, an original proceeding. *See State ex rel. Rheinauer v.*

Malone, 23 So. 575, 576 (Fla. 1898) ("[I]t is said, in speaking of writs of prohibition, that 'it is an original remedial writ.'") (quoting *McConiha v. Guthrie*, 21 W. Va. 134 (1882)).[11] *See also Crill v. State Road Dept.*, 117 So. 795 (Fla. 1928) (same). "Proceedings by mandamus, quo warranto, habeas corpus, certiorari and prohibition are original in their nature, though they may be invoked to perform functions that are appellate in their nature." *State ex rel. Assoc. Util. Corp. v. Chillingworth*, 181 So. 346, 348 (Fla. 1938). This Court has treated writs of prohibition filed before it as original proceedings. *See, e.g., Burkhart v. Circuit Court*, 1 So. 2d 872, 873 (Fla. 1941); *State ex rel. Smith v. Gomez*, 179 So. 651, 652 (Fla. 1938). The appellate rules of procedure recognize this constitutional grant of original jurisdiction. *See* Fla. R. App. P. 9.030(a)(3), (b)(3) & (c)(3) (describing prohibition as a case of "original jurisdiction."). Therefore, when the circuit court in the instant case denied the Petitioners' petitions for writs of prohibition, the denials were final orders in original proceedings.

Second, the *Frazee* dissent acknowledges, but then discounts as "occasional statements," decades of case law holding that writs of

[11] The pinpoint citation to the *McConiha* opinion is not available on Westlaw.

prohibition are not appeals. *See Frazee*, 617 So. 2d at 353. Contrary to the *Frazee* dissent, for the past century Florida law has recognized that writs of prohibition are not appeals. *See, e.g., Benton v. Circuit Court*, 382 So. 2d 753, 753 (Fla. 1st DCA 1980); *Pacha v. Salfi*, 381 So. 2d 373, 375 (Fla. 5th DCA 1980); *Corbin v. State ex rel. Slaughter*, 324 So. 2d 203, 204 (Fla. 1st DCA 1975); *State ex rel. Rash v. Williams*, 302 So. 2d 474, 475 (Fla. 3d DCA 1974); *State ex rel. B.F. Goodrich, Co. v. Trammell*, 192 So. 175, 176-77 (Fla. 1939). Unlike appeals, prohibition does not correct errors previously made; rather, it is preventative. If the court has already acted, prohibition will not issue. *See Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986). Additionally, prohibition is not concerned with correcting errors, even if couched as an "erroneous exercise of jurisdiction." *English v. McCray*, 348 So. 2d 293, 297 (Fla. 1977). The basic description of prohibition has not changed since this Court first articulated it:

> It is a fundamental principle, and one which will be strictly enforced, that this writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals. The courts will not permit a writ which proceeds upon the ground of an excess or usurpation of jurisdiction to become an instrument itself of usurpation, or be confounded with a writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded.

Rheinauer, 23 So. at 576 (quoting *McConiha*, 21 W. Va. 134). Since *Rheinauer*, Florida courts have been careful to limit prohibition to situations where appeal is not an adequate remedy. *See Maliska v. Broome*, 609 So. 2d 711, 711 (Fla. 4th DCA 1992); *Bondurant v. Geeker*, 499 So. 2d 909, 910 (Fla. 1st DCA 1986); *Sparkman*, 498 So. 2d at 895-96; *English*, 348 So. 2d at 297; *Wright v. Worth*, 91 So. 87, 88 (Fla. 1922).

Finally, the Petitioners submit that the *Frazee* dissent analyzes the wrong question. The opinion focuses exclusively on whether certiorari could be used to review a circuit court ruling on prohibition. Because certiorari is so broad, it is not surprising that it could include reviewing a final order on a petition for a writ of prohibition. What the *Frazee* dissent never addresses is why certiorari must be used. That opinion also overlooks that the *sine qua non* for certiorari is the lack of an adequate remedy at law. *See, e.g., Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998). In other words, the *Frazee* dissent assumes without argument or analysis that appeal as of right is unavailable.

For all of the reasons set forth above, and in light of the overwhelming number of Florida cases holding to the contrary, the Petitioners respectfully request the Court to reject the minority position articulated by the Fourth District in *Frazee*. The Petitioners request the Court to adopt the holdings in

Burton and *Pinfield* (as well as dozens of other cases) and hold that the denial of the petition for writ of prohibition is reviewable by appeal rather than certiorari.

c. *Sheley*.

In its original order directing the Petitioners to show cause why this case should not be treated as invoking the district court's certiorari jurisdiction, the court below cited to this Court's opinion in *Sheley v. Florida Parole Commission*, 720 So. 2d 216 (Fla. 1998).[12] *Sheley*, however, is factually distinguishable from the instant case. *Sheley* involved an order of the Florida Parole Commission suspending a defendant's presumptive parole release date. *See Sheley*, 720 So. 2d at 217. The defendant petitioned the circuit court for a writ of mandamus to review the Parole Commission's order. *See id*. The circuit court denied the petition and the defendant sought further review. *See id*. The First District treated the appeal as a petition for writ of certiorari and denied the petition, and this Court approved the First District's decision. *See id*. at 217-18.

The holding in *Sheley* is limited to the atypical type of mandamus relied upon by the defendant in that case. In *Moore v. Florida Parole and*

[12] However, in the April 20, 2006, decision, the court below did *not* cite to *Sheley* as the basis for its decision to treat the Petitioners' cases as invoking the district court's certiorari jurisdiction.

Probation Commission, 289 So. 2d 719, 719-20 (Fla. 1974), this Court approved mandamus as a remedy to force the Florida Parole Commission to comply with the constitutional mandates of *Gideon v. Wainwright*, 372 U.S. 355 (1963). Subsequent developments made it clear that this use of mandamus was a form of *appeal* from administrative action:

> Subsequent to *Moore*, the legislature enacted chapter 120 (Administrative Procedure Act). Section 120.68, Florida Statutes (1981), provides for appeals from final administrative action. . . . We held in *Roberson* [*v. Florida Parole and Probation Commission*, 444 So. 2d 917 (Fla. 1983),] that the [prisoner] exemptions [from rulemaking] did not preclude prisoners from being parties for purposes of seeking judicial review of final Florida Parole and Probation Commission action by a section 120.68 appeal. The legislature amended section 120.52(10) in 1983 by adding a sentence: "Prisoners shall not be considered parties in any other proceedings and may not seek judicial review under s. 120.68 of any other agency action." . . . [W]ith the demise of section 120.68 jurisdiction, the situation has reverted to that situation existing at the time of *Moore*; judicial review is still available through the common law writs of mandamus, for review of [presumptive parole release dates], and habeas corpus, for review of effective parole release dates.

Griffith v. Florida Parole and Prob. Comm'n, 485 So. 2d 818, 819-20 (Fla. 1986).

In light of *Moore* and *Griffith*, the First District in *Sheley* concluded that: "Under the current practice then, a petition for writ of mandamus in the circuit court takes the place of an appeal." *Sheley v. Florida Parole*

Comm'n, 703 So. 2d 1202, 1205 (Fla. 1st DCA 1997). The First District explained:

> When the circuit court denies a petition for writ of mandamus to challenge the decision of an administrative agency such as the Parole Commission, the court is plainly acting in its "review capacity." Therefore, the order of the circuit court is reviewable in the district court by certiorari under rule 9.030(b)(2)(B), and not by a subsequent plenary appeal on the merits of the case.

Sheley, 703 So. 2d at 1205.[13] This Court agreed with the First District and held that "[m]andamus is an accepted remedy for *reviewing* an order of the Florida Parole Commission." *Sheley*, 720 So. 2d at 217 (emphasis added).

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[13] Despite using the name "mandamus," the First District noted that this nontraditional use of mandamus was more akin to certiorari review:

> In retrospect it appears to us that certiorari might have been a more appropriate remedy, at least for those cases in which the inmate is challenging the merits of the Parole Commission's order. Mandamus is now used not only to review the merits of a Parole Commission order – an application well beyond its limited function – but also as a preliminary step to an appeal. We do not think the supreme court intended to approve of such an expansive use of the writ of mandamus. But the decisions of the court in *Moore* and *Griffith*, nevertheless, stand for the proposition that mandamus is the proper remedy and we are not at liberty to hold otherwise.

Sheley, 703 So. 2d at 1205 n.2. Hence, the mandamus utilized in *Sheley* is not traditional mandamus. Instead, it appears to be identical to "first tier certiorari review" used to review other discretionary administrative actions. "First tier certiorari review" is "akin in many respects to a plenary appeal." *Broward County v. G.V.B. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001). *See also Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) ("However, certiorari in circuit court to review local administrative action

Accordingly, the holding in *Sheley* is limited to mandamus proceedings that are used to review discretionary decisions of an administrative agency such as the Florida Parole Commission.[14] When the

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under Florida Rule of Appellate Procedure 9.030(c)(3) is not truly discretionary common-law certiorari, because the review is of right. In other words, in such review the circuit court functions as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency."). Additional review of the circuit court certiorari decision by the district courts of appeal, labeled "second tier certiorari review," is further restricted. *See G.V.B. Int'l, Ltd.*, 787 So. 2d at 843 ("first-tier certiorari review is not discretionary but rather is a matter of right . . . whereas second-tier certiorari review is more restricted and is similar in scope to true common law certiorari"). *Sheley* is a mirror of this two-level approach to reviewing administrative actions. The only difference is that, perhaps for historical reasons, the first tier is called mandamus rather than certiorari. This difference in nomenclature appears to exist because *Moore* was already in place before this Court established the current scheme of using certiorari to review administrative decisions in *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 625-26 (Fla. 1982). *See Gibson v. Florida Parole Comm'n*, 895 So. 2d 1291, 1291 (Fla. 5th DCA 2005) (acknowledging mandamus was the correct mechanism for review under the case law but referring to that law as "arcane and often confusing"). The district courts of appeal have begun treating circuit court mandamus proceedings to the Florida Parole Commission as though it is first tier certiorari, with their own review as second tier certiorari. *See Richardson v. Florida Parole Comm'n*, 924 So. 2d 908, 910 (Fla. 1st DCA 2006); *Mabrey v. Florida Parole Comm'n*, 858 So. 2d 1176, 1181 (Fla. 2d DCA 2003); *Tedder v. Florida Parole Comm'n*, 842 So. 2d 1022, 1024 (Fla. 1st DCA 2003).

[14] Since *Sheley*, the First District has continued to recognize that direct appeal is the proper means to review a final order on a petition for a writ of mandamus, unless the mandamus is a certiorari-like review of discretionary administrative actions:

defendant in *Sheley* filed the petition for a writ of mandamus in the circuit court, the petition invoked the appeal jurisdiction of the circuit court, pursuant to Florida Rule of Appellate Procedure 9.030(c)(1), and further review of the Parole Commission's decision invoked the district court's certiorari jurisdiction, pursuant to rule 9.030(b)(2)(B). *See Sheley*, 720 So. 2d at 217.

In contrast, when a defendant files a petition for writ of prohibition in the circuit court seeking to prevent a county court from taking further action in a case, the petition invokes the circuit court's *original jurisdiction* pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). *See Brown*, 527 So. 2d at 208 ("[The defendant's] petition for writ of prohibition instituted *an original proceeding* in the circuit court which challenged the

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> Appellant's petition filed in the trial court sought to compel the Department to comply with its own rules. It was a new civil action, and did not seek review of quasi-judicial action taken by the Department. Accordingly, this matter is appropriately treated as an appeal from a final order of the trial court, pursuant to Florida Rule of Appellate Procedure 9.110, rather than as a petition for writ of certiorari pursuant to rule 9.100.

Rivera v. Moore, 825 So. 2d 505, 506 (Fla. 1st DCA 2002). The key fact in *Rivera* was that mandamus was not used to review a discretionary administrative decision, but the administrative agency's failure to follow its own rules – a traditional use of mandamus. The First District has also accepted at least three other appeals from orders denying/dismissing petitions for writs of mandamus since *Sheley*. *See Weeks*, 764 So. 2d 633; *Ponton*, 744 So. 2d 1159; *Masiello*, 739 So. 2d 1196.

jurisdiction of the county court judge.") (emphasis added).[15] In *Sheley*, the First District recognized this distinction:

> We acknowledge that if mandamus is used to initiate a new civil action in the circuit court, the resulting final order is subject to review by appeal. Mandamus is an action at law, and, as with other actions at law, a final judgment on a complaint for writ of mandamus is reviewable by appeal.

703 So. 2d at 1204 (citation omitted). The Petitioners submit that the petitions for writs of prohibition filed in the circuit court in the instant case were "new civil actions" and therefore the "final judgments on the complaints for the writs of prohibition are reviewable by appeal. In light of this procedural posture, the holding in *Sheley* does not apply.[16]

d. State constitutional right to appeal.

Finally, the Petitioners submit that applying certiorari review in the instant case violates their constitutional right to appeal. *See Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773, 774 (Fla. 1996) (recognizing state constitutional right to appeal). Article V, section (4)(b)(1), of the Florida Constitution states that "[d]istrict courts of appeal

[15] Such a petition is not necessarily directed towards an order of the county court. *See Baez v. State*, 699 So. 2d 305, 305-06 (Fla. 3d DCA 1997) (reversing denial of petition for writ of prohibition, thereby precluding subsequent trial on double jeopardy grounds).

[16] The Petitioners note that the decision in *Burton* was released *after Sheley*, indicating that the Second District concluded that *Sheley* is inapplicable to the instant fact pattern.

shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . not directly appealable to the supreme court or a circuit court." As noted above, a petition for a writ of prohibition is an original proceeding. As an original proceeding in the circuit court, a final order on a petition for a writ of prohibition is directly appealable to the district court of appeal. By extending the holding in *Sheley* beyond situations where the proceeding in the circuit court is an appellate review of discretionary administrative actions, the court below denied the Petitioners their constitutional right to appeal.

F. CONCLUSION.

The Petitioners respectfully request that the First District's order below be quashed and that this case be remanded to the district court with directions that the case proceed as a direct appeal. All appropriate relief is respectfully requested.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
PL01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 15th day of March, 2007.

Respectfully submitted,

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief complies with the type-font limitation.

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