IN THE SUPREME COURT OF FLORIDA

Case No. 66,473

STATE OF FLORIDA, etc.,

Appellant,

v.

STATE BOARD OF EDUCATION OF FLORIDA, etc.,

Appellee.

IN RE $100,000,000 STATE OF FLORIDA, FULL FAITH AND CREDIT, STATE BOARD OF EDUCATION, PUBLIC EDUCATION CAPITAL OUTLAY BONDS, SERIES 1985.

On Appeal from the Circuit Court of the Second Judicial Circuit of Florida in and for Leon County, Florida

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee State Board of Education hereby concurs with and adopts the Statement of the Case and Facts located at pages iv-vii of the Initial Brief of Appellant State of Florida in this case.

Appellee State Board of Education also hereby concurs with and adopts the Appendix filed with the Initial Brief of Appellant State of Florida in this case.

SUMMARY OF ARGUMENT

I. The validation of the proposed Series 1985 bonds by the Circuit Court should not be reversed on the grounds that some of the projects to be financed with the proceeds of the bonds do not fall within the parameters of that section of the constitution which provides for the issuance of the bonds.

Of the three projects questioned by the State Attorney, one clearly meets the constitutional requirements. This project and another, both public broadcasting facilities, are attacked on the basis of a 1975 Attorney General Opinion, which is not binding on the courts.

Given the broad language of the applicable constitutional provisions, the fact that the Legislature has made a factual determination that all of the projects meet the constitutional requirements, and the fact that legislative enactments are presumed to be valid unless clearly erroneous, arbitrary or wholly unwarranted, the validation of the proposed bonds should be affirmed.

II. The Gross Receipts Taxes, as they are now defined, constitute a valid source of funds for the debt service on the proposed Series 1985 bonds because Amendment 8,

which contained a provision allowing for the change made to the definition of said taxes by the 1984 Legislature, became a part of the State Constitution after it had been approved by the voters in the November 6, 1984 general election. The fact that notice of the proposed Amendment 8 was not printed in newspapers in Hamilton and Madison Counties should not invalidate the passage of said amendment, notwithstanding Article XI, Section 5(b) of the State Constitution, because 1) the publication requirements of the constitutional amendment process are not mandatory, and therefore the question of defects in such requirements may not be raised after the election, 2) even if such publication requirements are mandatory, there is precedent for the proposition that de minimis noncompliance is not sufficient to reverse a favorable election result, 3) the requirements of Article XI, Section 5(b) were complied with, in that notice of said proposed amendment were published in two major Florida newspapers distributed in Hamilton and Madison Counties at the appropriate time, 4) even if all of the registered voters in Hamilton and Madison Counties had voted against Amendment 8, it would have still been overwhelming approved by the rest of the state electorate, and 5) it is impossible for any state agency or official to insure that the publication requirements of Article XI, Section 5(b) are complied with.

ARGUMENT

I. WHETHER ALL OF THE PROJECTS SCHEDULED TO BE FINANCED BY THE SERIES 1985 BONDS ARE PUBLIC EDUCATION CAPITAL PROJECTS FOR THE STATE SYSTEM OF PUBLIC EDUCATION, AS REQUIRED BY ARTICLE XII, SECTION 9(a)(2) OF THE FLORIDA CONSTITUTION.

Article XII, Section 9(a)(2) of the Florida Constitution authorizes the State Board of Education to issue bonds to finance or refinance public education capital projects theretofore authorized by the Legislature, "and [for] any purpose appurtenant or incidental thereto."

The brief of the State Attorney assails three specific projects (a performing arts center and the planning of one and construction of another public broadcasting facility) to be funded by the proposed Series 1985 bonds on the grounds that these projects are not "for the state system of public education", also as required by Section 9(a)(2).

As authority for his contention that fixed capital outlay needs of the state system of public broadcasting may not be financed with revenues accruing from the gross receipts tax, the State Attorney cites Opinion No. 075-150 of the Florida Attorney General. This Opinion reasons that, since the state system of public broadcasting does not fall within the definition of an institution of higher learning, it is not part of the state system of public education.

While it is true that Opinions of the Attorney General are persuasive and entitled to great weight, it is well established that they are not legally binding on a court. Richey v. Town of Indian River Shores, 337 So.2d 410, 414 (Fla. 4th DCA 1976); Leadership Housing, Inc. v. Department of Revenue, 336 So.2d 1239, 1241 (Fla. 4th DCA 1976); Beverly v. Division of Beverage of the Dep't of Business Regulation, 282 So.2d 657, 660 (Fla. 1st DCA 1973).

With respect to item (Z) of the State Board of Education's authorizing resolution, the argument of the State Attorney is clearly erroneous. That item authorizes the expenditure of $1,700,000 of bond proceeds by the State Board of Education for the construction of a public broadcasting facility for WUSF-FM, Tampa, on the campus of the University of South Florida. It is evident that this facility is intended for use as an integral part of the University of South Florida by its journalism and broadcasting students, and is clearly an expenditure for the state system of public education.

While it may not be as clear on the face of the evidence that the other two items attacked by the State Attorney (items (N) [A-17] and (W) [A-18]) are "for the state system of public education", the Legislature has made a factual determination, in Section 1 of Chapter 84-542, Laws of Florida (the Public Education Capital

Outlay Bill), that " ... the items and sums designated in this section shall constitute authorized capital outlay projects within the meaning [of] and as required by s. 9(a)(2), Article XII of the State Constitution, as amended, and any other law."

It is well settled that legislative findings are presumed to be correct and are binding on the courts unless "clearly erroneous, arbitrary or wholly unwarranted." Moore v. Thompson, 126 So.2d 543, 549 (Fla. 1961); Miami Home Milk Producers Ass'n v. Milk Control Board, 124 Fla. 797, 800, 169 So. 541, 542 (1936). In addition, all legislative enactments are presumed to be valid and constitutional. State v. Lick, 390 So.2d 52, 53 (Fla. 1980); State v. Cormier, 375 So.2d 852, 854 (Fla. 1979); Owen v. Cheney, 238 So.2d 650, 654 (Fla. 2d DCA 1970).

In light of the inconclusive language of the Public Education Capital Outlay Bill and the Board of Education's resolution concerning the challenged items, and in light of the language of Section 9(a)(2) which permits bond proceeds to be spent for educational capital projects "and any purpose appurtenant or incidental thereto", it cannot with any certainty be said that these items constitute unconstitutional projects. As this Court stated in Florida State Board of Architecture v. Wasserman, 377 So.2d 652, 656 (Fla. 1979), "[w]hen the

constitutionality of a statute is questioned, and it is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, a court must adopt the interpretation that will render the statute valid." Accord Lick, 390 So.2d at 53; Cormier, 375 So.2d at 854; Hamilton v. State, 366 So.2d 8, 10 (Fla. 1978); State v. Bales, 343 So. 2d 9, 11 (Fla. 1977); Golden v. McCarty, 337 So. 2d 388, 389 (Fla. 1976); Miami Home Milk Producers, 124 Fla. at 800, 169 So. at 542; Owen, 238 So.2d at 656.

Appellee State Board of Education therefore submits that the projects to be funded by the proceeds of the proposed Series 1985 bonds are public education capital projects as required by Article XII, Section 9(a)(2) of the Florida Constitution.

II. WHETHER THE FAILURE TO PUBLISH NOTICE OF A PROPOSED AMENDMENT TO THE FLORIDA CONSTITUTION IN TWO COUNTIES IN WHICH NEWSPAPERS OF GENERAL CIRCULATION ARE PUBLISHED, IN CONTRADICTION OF ARTICLE XI, SECTION 5(b) OF THE FLORIDA CONSTITUTION, INVALIDATES SAID PROPOSED AMENDMENT AFTER IT HAS BEEN APPROVED BY THE VOTERS OF THE STATE.

The adoption of Amendment 8 at the general election of November 6, 1984 was necessary for the issuance of any additional Public Education Capital Outlay Bonds pursuant to Article XII, Section 9(a)(2) of the Florida Constitution.

As the State Attorney has pointed out in his Initial Brief, the question of alleged noncompliance with the publication requirements of Article XI, Section 5(b) of the Constitution appears to present a case of first impression in this state.

Appellee State Board of Education first submits that the notice requirement found in Article XI, Section 5(b) is directive, rather than mandatory, in nature. This Court has for many years recognized that some steps in the amendment process are more important than others:

> The two important vital elements in any constitutional amendment are the assent of ... the Legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to essentials is secured; but they are not themselves the essentials.

Constitutional Prohibitory Amendment Cases, 24 Kan. 700, cited with approval in Crawford vs. Gilchrist, 64 Fla. 41, 55, 59 So. 963, 968 (1912).

The State Attorney implies in his Brief that the Crawford Court did not include publication of proposed constitutional amendments as a third "vital element" in the amendment process because suit had been brought in that case before publication was required to occur. This contention does not bear scrutiny. The Crawford Court was certainly aware of the publication requirement (at that time found in Article XVII, Section 1 of the Constitution of 1885). It is unreasonable to believe that that Court would have listed two "vital elements" in the amendment process and designated all others as "mere machinery and forms" if it was aware of another "vital element", even one that was not in question at the time. Indeed, since the case was decided before the election, on the basis of a legislative irregularity, the second "vital element" the Court did mention, i.e., the vote of the electors, had obviously not been in question either.

It follows then that, if the publication requirement of Article XI, Section 5(b) is not mandatory, some leeway is to be given in determining the degree of compliance necessary to satisfy this particular provision. As this Court stated in Pope v. Gray, 104 So.2d 841, 842 (Fla. 1958),

> Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the organic

> law in proposing the amendment ... (emphasis added).

Whether or not this Court finds that the publication requirements of Article XI, Section 5(b) are mandatory, the State Board of Education nevertheless contends that the passage of the amendment should be upheld, since the defect in such publication was not initially raised until long after the amendment had been favorably voted upon.

There is a long line of cases holding that defects concerning non-essential aspects of the amendment process may not be raised after the election. As the Court said in Pearson v. Taylor, 159 Fla. 775, 776, 32 So.2d 826, 827 (1947) (itself not a constitutional amendment case):

> [T]he constitution places a mandatory duty on the legislature to follow certain procedure as a necessary prerequisite to bringing about an election to amend the constitution, however more than once we have said, in substance, that the neglect to follow such procedure was fatal if raised before the election, yet the defect was cured by the election itself.

Accord Sylvester v. Tindall, 154 Fla. 663, 669, 18 So.2d 892, 895 (1944); State ex rel. Landis v. Thompson, 120 Fla. 860, 876, 163 So. 270, 276-77 (1935); cf. State v. County of Sarasota, 155 So.2d 543, 546 (Fla. 1963); Carn v. Moore, 74 Fla. 77, 88-89, 76 So. 337, 338-40 (1917); Nelson v. Robinson, 301 So.2d 508, 510-12 (Fla. 2d DCA 1974) (these cases also did not involve constitutional amendments, but defects in the election process generally).

The State Attorney cites Sylvester, Thompson and a few other cases in his argument that publication is a mandatory prerequisite to the valid adoption of a constitutional amendment. While it is true that the Court in each of those cases did include proper publication in its litany of requirements for amending the Constitution, improper publication was never alleged in any of the cases. This reduces the pertinent parts of these citations to dicta. It may be supposed that the Court only mentioned publication at all because it is one of the few procedures outlined in Article XI, Section 5(b) of the Constitution. In any event, the Court's remarks in those cases should not be persuasive in this appeal.

Even if it is found that the publication requirements of Article XI, Section 5(b) are mandatory, the amendment currently in question should be upheld. In one case which is similar to the case at hand, there was a discrepancy between the versions of a proposed amendment voted on by the House and the Senate. While the House passed a proposed amendment creating a Game and Fresh Water Fish Commission, and gave the Commission the power to "acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission ... ", the Senate version, and the version voted upon at the general election, did not

contain the words "or otherwise". The Court, in upholding the amendment, said "[t]he variation is so slight in degree and devoid of meaning that it was cured by the ratification in 1942." Revels v. De Goyler, 159 Fla. 898, 900, 33 So.2d 719, 720 (1948).

Technically, there was no consent of the Legislature to the proposed amendment, one of the "essential" requirements set forth in Crawford. The Revels Court, in effect, carved out a de minimis exception to one of the mandatory requirements of the constitutional amendment process. The same exception should apply to the present case. The publication requirements were complied with completely in sixty-five, or ninety-seven percent, of Florida's sixty-seven counties, and were allegedly only partially complied with in Madison County [A-58]. No notice of the proposed amendment was published in a Hamilton County newspaper. When it is considered that 4,177,984 Floridians voted in the November 6, 1984 general election [A-60], and that the total number of registered voters in Hamilton and Madison Counties combined was 12,597 [A-66], or less than one-third of one percent of the number of persons who voted in the election, it can be seen how truly de minimis this alleged defect was.

Alternatively, the State Board of Education asserts that the publication requirements of Article XI,

Section 5(b) were complied with, since notice of the proposed amendment was published in newspapers of general circulation, i.e., the Tallahassee Democrat and the Florida Times-Union (Jacksonville), in Hamilton and Madison Counties [A-67-78]. This assertion is based on the premise that the word "published", the second time it is used in Article XI, Section 5(b) (" ... [notice] shall be published in one newspaper of general circulation in each county in which a newspaper is published."), is synonymous with the word "distributed".

While there are many possible interpretations of the word "published", it seems evident that the underlying principle of the requirement to publish in general, and the requirement to publish found in Article XI, Section 5(b) in particular, is that the people, in order to exercise their freedom of choice, must first be given the opportunity to be made aware of their choices. When regarded in this light, the definition of "published" found in Black's Law Dictionary (rev. 5th ed. 1979), "[t]o 'publish' a newspaper ordinarily means to compose, print, issue, and distribute it to the public, and especially its subscribers, at and from a certain place", seems too restrictive; the only one of these four functions related to the dissemination of information is the last one - the distribution of a newspaper in a

certain area is the vital element in getting information to the people.

Thus the Florida Attorney General, citing with approval a decision of the Supreme Court of New Mexico which held that "published" does not mean "printed", went on to say that:

> The location of a newspaper's business offices and the place where the newspaper is first circulated are also irrelevant factors to a determination of whether the newspaper is qualified to accomplish the purpose of legal notice statutes. The factors which are relevant - local significance, local availability, and local circulation - are required by s. 50.011, F.S.

1947 Op. Att'y Gen. Fla. 074-124 (April 18, 1974). Although referring to a statutory rather than a constitutional requirement, the logic seems applicable to both instances.

The brief of the State Attorney points to the difference between the language of Article XI, Section 5(b) and Section 100.021, Florida Statutes (1983), the "Notice of general election" section. That section requires that notice shall be "published two times in a newspaper of general circulation in each county ... " It is the contention of the State Board of Education that the constitutional and statutory provisions are identical in this regard i.e., that the only requirement is that the newspaper be circulated, or distributed, in the county. The difference in form

between the two sections may be attributed to stylistic differences between the drafters of the respective sections.

Another reason Amendment 8 should be upheld is that assuming, arguendo, none of the registered voters in Hamilton and Madison Counties had received notification of the proposed amendment and that all of said voters had voted against the amendment, the outcome of the general election would not have been altered. As previously noted, the total number of registered voters in those two counties at the time of the November 6, 1984 general election was 12,597. Amendment 8 was passed statewide by a vote of 2,553,312 to 778,114 [A-61]. In fact, the amendment passed in Hamilton County by a vote of 1,167 to 613, and in Madison County by a vote of 2,401 to 950 [A-66]. As the Court said in an appellate decision from a local bond validation case involving a change of polling place from that specified in the statute, " ... the violation of [the statute] cannot affect the validity of an election nor the result thereof where such election has been fairly held and there has been no charge of fraud, corruption or coercion that is alleged to have affected the result thereof." Marler v. Board of Public Instruction of Okaloosa County, 197 So.2d 506, 508 (Fla. 1967). Similarly, in a case involving the calling of a referendum by two councilmen when a minimum of three were

required, the Court said "[t]he rule seems approved on good authority that whether mandatory or directory, informalities or irregularities which do not affect the result of an election, will not render it invalid. This is all the more true as to the expression of the popular will when that is satisfied."

Willets v. North Bay Village, 60 So.2d 922, 924 (Fla. 1952). See also Gilligan v. Special Road and Bridge Dist. No. 4 of Lee County, 74 Fla. 320, 322-23, 77 So. 84, 85 (1917).

Finally, the State Board of Education submits that Amendment 8 should be upheld by this Court because there was complete compliance by the Florida Department of State with the publication requirements of Article XI, Section 5(b) that were within its control, in that a request to publish notice of the proposed amendment was sent to a newspaper of general circulation in each of the state's sixty-seven counties [A-58]. The fact that there was only substantial compliance (since the notice only appeared the requisite number of times in sixty-five of those newspapers) as opposed to complete compliance with the terms of Article XI, Section 5(b) can be attributed to the fact that the terms of that section are unenforceable. Whether or not anything is printed in a privately-owned newspaper is beyond the control of any government agency. There is no way to force a newspaper

to honor a request to publish a legal notice. Moreover, there is no way to know if a newspaper has actually published a notice in, say, the tenth week before an election, until the last edition in that week is printed. If the notice has not appeared by then, it is too late; the tenth week is over. So, even if the Supervisor of Elections in each county monitored its newspaper for the notice, the event of its nonappearance could never be discovered until it is too late to comply with the terms of the Constitution. Such lack of control should not deprive the electors of the State of their opportunity to amend one of their most basic legal documents. To hold otherwise would give one or two newspapers a stranglehold on the entire amendment process.

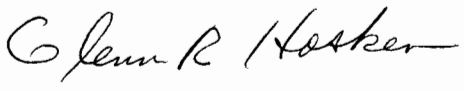
Appellee State Board of Education therefore submits that Amendment 8 was validly adopted at the November 6, 1984 general election, and that the debt service requirements of the proposed Series 1985 bonds may therefore be funded by the Gross Receipts Taxes as the same are currently defined.

CONCLUSION

The projects to be financed by the proposed Series 1985 bonds have been found by the Florida Legislature to be, and are, authorized capital outlay projects within the meaning of and as required by Section 9(a)(2), Article XII of the Florida Constitution.

Amendment 8 to the Florida Constitution was validly adopted by the electors of this State on November 6, 1984. Any alleged defect in the publication of said amendment was cured by said election and by substantial compliance and the impossibility of the assurance of complete compliance with applicable Constitutional provisions, and constituted harmless error. The Gross Receipts Taxes therefore constitute a valid source of revenue for the proposed Series 1985 bonds, and the court below properly entered its final judgment validating said bonds. Wherefore Appellee prays that the final judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, be affirmed.

Respectfully submitted,



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CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been hand-delivered to William N. Meggs, State Attorney, Second Judicial Circuit, Counsel for Appellant, Suite 500, Lewis State Bank Building, Tallahassee, Florida 32301, on this fourth day of March, 1985.

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