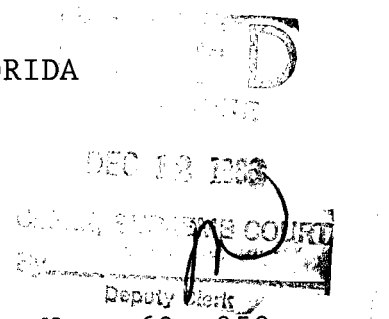
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 69, 359
	)	
WILLIAM S. GRASSI,	)	
	)	
Appellee	)	
	)	
	)	

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The appellant was the prosecution/appellant and the appellee was the defendant/appellee in the County Court of the Seventeenth Judicial Circuit of Florida in and for Broward County, Florida, and the Fourth District Court of Appeal, respectively. In this brief the parties will be referred to as defendant and state.

The symbol "R" will be used to designate the record on appeal. All emphasis in this brief is supplied by the state unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The defendant was charged by information with knowingly and unlawfully qualifying as a candidate for Broward County Commissioner, District Three, without being a resident thereof contrary to Florida Statute §99.032 (R. 18).

The defendant filed a motion to dismiss asserting, among other things, that §99.032 Fla.Stats. 99.032 (1983) was unconstitutional because it prescribed qualifications for theoffice of County Commissioner in addition to those prescribed by the Florida Constitution. (R. 20-24).

On May 17, 1985, the trial court held a hearing on said motion to dismiss (R. 2-16).

The defendant argued, as he had in his motion, that the statute prescribed qualifications for the position of county commissioner which were not contained in the constitution (R. 2). The defendant argued that a similar statute, in effect prior to the amendments to the Florida Constitution in 1968, was declared unconstitutional for the same reason (R. 2-5); the defendant further argued that a 1974 Attorney General's opinion construing Article VIII, §1(e) of the Florida Constitution (1968), stated that a candidate for county commissioner did not have to reside in the district at the time he filed his qualification papers. (R. 5).

The state responded that under the 1968 Constitution the language regarding the qualifications of county commissioners had changed such that the Constitution now stated: "One commissioner residing in each district shall be elected[.]," and that all the statute (99.032) did was to restate the language of the constitution (R. 10-11).

The trial court initally reserved ruling on the motion to dismiss (R. 13), but the next day on May 22, 1985, granted the motion to dismiss finding that Florida Statute 99.032, which requires a candidate for county commission to live in the district in which he was running at the time he qualified, is inconsistent with Article VIII, Section 1(e), which provides that a commissioner residing in the district shall be elected by the electors. The trial court found that the constitutional provision only required a candidate to live in the district at the time of election (R. 32-39).

The state's motion for extension of speedy trial pending appeal was granted (R. 42); the state timely filed its notice of appeal (R. 43), and appeal followed to the Fourth District Court of Appeal. Said court affirmed the lower courts finding of unconstitutionality stating that the constitution only provides that a candidate for county commission be a resident of his district at the time of election: the disputed Statute goes one step further in

requiring residency at an earlier date--the time of qualifying as a candidate. This appeal follows.

SUMMARY OF THE ARGUMENT

The District Court of Appeal erred in holding §99.032 (1977) unconstitutional as Art. VIII §1(e) was clarified by amendment in November, 1984, to include the phrase "as provided by law" which phrase expressly authorizes the legislature to enact statutes such as the one in question. Further, as Art. VIII §1(e) Florida Constitution (1968), expressly provides that a candidate for county commision must be residing in the district in which he is elected, §99.032 Fla.Stat., is wholly consistent with it and adds no qualifications to those prescribed in the constitution.

POINT ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURTS GRANTING OF THE DEFENDANT'S MOTION TO DISMISS WHICH HELD SECTION 99.032 UNCONSTITUTIONAL?

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURTS GRANTING OF THE DEFENDANT'S MOTION TO DISMISS WHICH HELD SECTION 99.032 UNCONSTITUTIONAL.

The District Court of Appeal, Fourth District, held §99.032 Fla. Stat. to be unconstitutional. In holding so it interpreted the constitutional provision requiring that "one commissioner residing in each district shall be elected by the electors of the county" as providing only that a candidate for county commission be a resident of his district at the time of election." It was reasoned that as the "statute goes one step further in requiring residency at an earlier date--the time of qualifying as a candidate--the statute constitutes an impermissible addition to the constitutional qualifications for the office of county commissioner."

The District Court was incorrect. An amendment to Article VIII §1(e) has since been passed by the electors of the State of Florida in November 1984. See Article VIII §1(e), Fla. Stat. Anno. (1985). The amendment substitutes the phrase "by the electors of the county" in the second sentence of subsection (e) of article VIII §1. The present pertinent provision reads as follows: "One commissioner residing in each district shall be elected as provided by law". As this change is not substantive but rather merely an interpretation

of the original constitution it may be considered by this Court in arriving at a proper constitutional interpretation of Article VIII §1(e), Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985); Gay v. Canada Dry Bottling Co. 59 So.2d 788 (Fla. 1952); see also State v. Lanier, 464 So.2d 1192, 1193 (Fla. 1985).

State v. Thomas, 293 So.2d 40 (Fla. 1974) discusses the term "as provided by law" and is controlling. In Thomas the applicable consitutional provision read very similar to the instant constitutional provision, as amended:

> In each school district there shall be a school board composed of five or more members chosen by vote of the electors for approximately staggered terms of four years, as provided by law. (emphasis supplied)
>
> Art. IX, §4(a)
> Fla. Constitution 1968.

Respondent, in Thomas at 42 argues that this constitutional provision "set forth the qualifications of the school board members." A statute which additionally set forth qualifications was then argued to be unconstitutional as imposing additional qualifications for the office where the basic document of the constitution had already undertaken to set forth the requirements. This court, however, saw said provision "as simply saying that such school board members shall be 'chosen . . . as provided by law.'"

Such is the instant case. Article VIII §1(e), pursuant to the new amendment, clearly delegates the establis-

ment of specific county commissioner qualifications to the legislature. As in Thomas the term "shall be elected as provided by law" is utilized as the vehicle of delegation. As the instant constitutional amendment constitutes the direct voice of the people it is controlling.[1]

Further, when the constitution, was changed in 1968 to include the requirement of residency §99.032, Fla. Stat. (1977), which similarly requires residency, unlike its predecessor, did not add a residency requirement not prescribed by the constitution. Article VIII §1(e) used the word "residing" which, like the word "maintain", also construed in Thomas, is a "continuing verb." It necessitates that the candidate must be a resident of the district in which he seeks election prior to the election date.

The trial Court relied upon two decisions in reaching its finding of unconstitutionality. The first is Wilson v. Newell, 223 So.2d 734 (Fla. 1969). Wilson decided the constitutionality of former § 99.032, Fla. Stat. in light of the predecessor of Article VIII §1(e) of the Florida Constitution - Article VIII §5 of the 1885 Florida Constitution. Article VIII §5 made no reference or provision regarding residency of the county commissioners or candidates for that office and had no provision for delegation to the legislature of specific qualifications for election. As such said statute

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[1] As in Thomas no real qualifications for election were established by the constitution but were to be "provided by law."

which had a residency requirement of six months prior to qualifying was properly held unconstitutional. The Statute clearly added residency to the constitutionally provided qualifications which were complete upon adoption at the general election.

Secondly, the trial Court relied upon 1974 Op. Att'y Gen Fla 074-293 (September 23, 1974). Reliance on said opinion was misplaced as it construes Art. VIII, §1(e), Florida Constitution (1968) without regard to §99.032, Fla Stat. (1977) . The Attorney General was considering only the constitutional provisions, without regard to the effect of any statutory provisions. Said intent is made clear as this court, some six months prior to said opinion approved the type of statute in question in Thomas, supra.

As it is a well establised rule that courts in determining the constitutionality of legislation must give the legislation a construction which will uphold rather than invalidate the legislation, State v. Keaton, 371 So.2d 86, 89 (Fla. 1979); Emhart Corporation v. Brantley, 257 So.2d 273, 275 (Fla. 3d DCA 1972); and, it is the duty of courts to resolve doubts as to constitutionality in favor of vaility, State v. Cormier, 375 So.2d 852, 854 (Fla 1979); Hamilton v. State, 366 So.2d 8, 11 (Fla 1979), the lower courts decision must be reversed.

CONCLUSION

Based upon the foregoing reasons and citations of authorities it is respectfully requested that the lower courts decision be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to BRUCE D. LINCOLN, ESQUIRE, Attorney for Appellee, 2701 E. Sunrise Boulevard, Sunrise Bay Building, Suite 212, Fort Lauderdale, Florida 33304, on this 3rd day of December, 1986.

Diane Leeds

Of Counsel