

SUPREME COURT  
STATE OF FLORIDA

1986  
BY: \_\_\_\_\_  
DATE: \_\_\_\_\_

IN RE:

THOMAS C. TODD and :  
PEOPLE AGAINST LEGALIZED :  
LOTTERIES, INC., :

CASE NO. 69,426

Appellants, :

vs. :

HONORABLE GEORGE :  
FIRESTONE and E.X.C.E.L., :  
INC., :

Appelles. :  
\_\_\_\_\_ /

INITIAL BRIEF OF APPELLANTS THOMAS C. TODD  
AND PEOPLE AGAINST LEGALIZED LOTTERIES, INC.

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TABLE OF CONTENTS

Table of Contents . . . . . i

Table of Citations . . . . . ii

Statement of the Case . . . . . iii-iv

Statement of the Facts. . . . . v

Summary of Argument . . . . . vi

Point I:

PROPOSITION 5 VIOLATES  
THE SINGLE SUBJECT  
REQUIREMENT OF ARTICLE  
XI, SECTION 3 FLA. CONST. . . . . .1-5

Point II:

PROPOSITION 5'S BALLOT  
SUMMARY VIOLATES THE  
REQUIREMENTS OF F.S.  
101.161 AND OF CASE LAW . . . . .6-13

Point III:

"FRAUD IN INDUCING"  
VOTERS TO SIGN PETITION  
FORMS IS A VALID REASON  
TO STRIKE PROPOSITION 5 . . . . .14

Conclusion and Relief Sought . . . . .15

Certificate of Service . . . . .16

TABLE OF CITATIONS

FLORIDA CONSTITUTION:

Article V: 12  
Article X, Section 7: 3, 11, 12  
Article XI, Section 3: 1, 12

FLORIDA STATUTES (1985):

F.S. Chapter 68: 12  
F.S. 101.161: 6

CASES:

Askew v. Firestone , 421 So. 2d 151(Fla. 1982): 6, 10  
Evans. v. Firestone, 457 So. 2d 1351(Fla. 1984): 1,6,9,10,11  
Fine v. Firestone, 448 So. 2d 984(Fla. 1984): 1,2,3,7,13  
Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d  
337(Fla. 1978): 2,3  
Weber v. Smathers, 338 So. 2d 819(Fla. 1976): 3

OTHER AUTHORITIES:

Blacks' Law Dictionary, 4th Ed.: 9  
27 Fla. Jur. 2d "Gambling" § 2.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. STATEMENT OF THE CASE

This cause is a pre-election challenge to the validity of the placement on the November, 1986, ballot of Proposition 5, "State Operated Lotteries". On July 30, 1986, the Florida Secretary of State, HONORABLE GEORGE FIRESTONE, issued a Certificate of Ballot Position to Proposition 5 (R-4-10).

On August 29, 1986, THOMAS C. TODD and PEOPLE AGAINST LEGALIZED LOTTERIES, INC., filed a Complaint for Declaratory and Injunctive relief, seeking to remove Proposition 5 from the ballot. (R-1-3). On September 3, 1986, the Defendant, HONORABLE GEORGE FIRESTONE, filed a response, admitting certification of Proposition 5 for the ballot. (R-11-14). The response further indicated that the Defendant had "no authority to inquire into the legality of the content of the initiative.", and that the Secretary of State would not take any position as to the legality of Proposition 5's content. In Addition, the Secretary of State declined to further appear, and suggested that the political committee who sponsored the "State Operated Lotteries" initiative, E.X.C.E.L., was the appropriate party in interest. (R-13). JOSEPH W. LITTLE, ROBERT T. MANN, and JOHN CARROLL, moved to intervene as Plaintiffs (R-33-34) which was granted by the Circuit

Court on September 24, 1984, (R-54). THOMAS C. TODD and PEOPLE AGAINST LEGALIZED LOTTERIES, INC., moved for a "partial" final judgment on the pleadings on September 9, 1986. (R-15-17), together with a memorandum of law in support. The Motion for partial judgment requested that the Court construe the facial validity of the amendment. The Intervenor, LITTLE, MANN, and CARROLL also submitted argument in support. The Circuit Court accelerated disposition of this cause, and a hearing was scheduled for September 11, 1986. On September 10, 1986, (R-51-52), E.X.C.E.L., INC., moved to intervene. The Circuit Court granted E.X.C.E.L., INC.'S Motion to Intervene (R-53). An answer was filed by E.X.C.E.L., INC., who thereafter moved for final summary judgment (R-91-94). \*After oral argument, the court entered a final judgment (R-Supplemental) denying Plaintiffs all relief. A Notice of Appeal to the District Court of Appeal was filed on October 2, 1986, (R-96). A joint suggestion to the District Court of Appeal to certify this matter the Supreme Court was made by all parties. On October 6, 1986, the District Court of Appeal entered an Order certifying the matter to the Florida Supreme Court.

\*Intervenors, LITTLE, MANN, and CARROLL voluntarily dismissed their portion of this action on September 29, 1986. LITTLE, MANN, and CARROLL then filed an original mandamus action in the Florida Supreme Court.

**B. STATEMENT OF FACTS**

The only facts of record are the issuance of a Certificate of Ballot Position (R-4-10) and the contents of Proposition reproduced on Pages 1 and 2.

## SUMMARY OF ARGUMENT

Proposition 5 violates Florida Constitution's Single subject Requirement. Proposition 5, although it uses the words "Education Lottery" and "Education Lottery Trust Fund", has nothing to do with education. However, the use of these terms is a classic logroll: combining gambling with funding of education - two unrelated subjects. Preventing logrolling is the primary reason for the single subject requirement.

Proposition 5 also violates the single subject requirement because of its combining permitting lotteries with a "severability clause", and with the establishment of a "trust fund". Regulation of gambling is a police power function of the Legislature. Establishing "trust funds" for the user fees and profits is a separate function of government. Requiring courts to render a decision leaving the lottery portion of Proposition 5 on the ballot in the event it is multi-subject affects the judicial function of initiatives.

The "State Operated Lotteries" ballot summary violates the requirements of the statutes and case law by failing to reveal the substantial effect that the initiative has on the present constitutional prohibition against lotteries. Further, the summary does not accurately explain the actual affect of Proposition 5, its "severability" clause and its "trust fund". The term "education" which is without function by admission of E.X.C.E.L.

is misleading the electors into believing that this proposition will aid education.

The signatures, pursuant to a verbal proffer made by PALL, were gathered by false statements of the factual import of Proposition 5.

For these reason, the Proposition should be stricken from the ballot.



PROPOSITION 5 VIOLATES THE SINGLE  
SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3, FL. CONST.

The Florida Constitution limits initiatives to "a single subject and matter directly related thereto. Florida Constitution, Article XI, Section 3. This requirement is strictly construed. Fine vs. Firestone, 448 So.2d 984 (Fla. 1984) at 989.

The following tests are relevant in determining if an initiative is a single subject:

(a) The primary test is whether the initiative is a logroll, Evans at 1354.

(b) Does the initiative affect two functions of government in the same branch, Fine at 990.

(c) Does the initiative affect two functions of government, each in a different branch, Evans vs. Firestone, 457 So.2d 1351 (Fla. 1984).

(d) Does the initiative have a "logical and natural oneness of purpose", Fine at 990.

(e) Does the initiative propose a singular change in government, Id at 987.

(f) Does the initiative allow a vote on a singular change in government, Ibid.

(g) Does the initiative "identify the articles or sections of the constitution substantially affected, Id at 989.

(h) "How an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal". Id at 990.

Proposition 5 clearly violates the single subject requirement because it does not meet the tests set forth above. The Proposition in full states:

(a) Lotteries may be operated by the State.

(b) If any subsections of the Amendment of the Florida Constitution are held unconstitutional for containing more than one subject, this Amendment shall be limited to subsection (a) above.

(c) This Amendment shall be implemented as follows:

- (1) On the effective date of this Amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.

Logrolling is "an aggregation of dissimilar provisions (designed) to attract support of diverse groups to assure its passage". Fine, 448 So.2d at 988. The public lacks input through legislators, and the courts also lack a legislative history to aid them in determining the import of an initiative. An "education lottery" (although the word education is a non-functional emblem added to the initiative, see argument p. 7) is a logroll. There is no rational relationship between gambling and education. No more persuasive statements can be made to prove that this is a logroll than Justice Ehrlich's concurring remarks, in Fine vs. Firestone,

It would be difficult to imagine a better illustration of logrolling than the initiative proposal approved in Floridians. Tying increased funding of education to the casino gambling proposal was unarguably an attempt to enlist the support of those concerned with the quality of education in Florida for a measure inherently unrelated to education. Fine, 448 So.2d at 996.

Floridians Against Casino Takeover vs. Let's Help Florida, 363

So.2d 337 (Fla. 1978) approved an initiative described in the quotation above by Justice Ehrlich, in an opinion applying a "broad view" of the single subject requirement. This same "narrow view" would have compelled finding the ethics in government amendment (considered in Weber vs. Smathers, 338 So.2d 819 (Fla. 1976) was five subjects. Floridians Against Casino Takeover, 363 So.2d at 340. Having now adopted a narrow view, the logrolling effect of invoking "education trust funds" and "education lotteries" (although these labels are deceptive, see argument at page 7) cannot be ignored. The very concept of a lottery to aid a specific funding need is a logroll.

Closely related to the question of logrolling is the "functional" test. The proposition has the following functional effects:

- (1) Amending the prohibition against lotteries contained in Article X, Section 7.
- (2) Permitting the legislature to regulate gambling, a police power function fo the legislature. 27 Fl.Jur.2d "Gambling" Section 2.
- (3) Permitting the legislature to appropriate user fees (regulation of user fees is a single function of government, Fine at 991.)
- (4) Establishing a named "trust fund" for proceeds (although it is clearly not a trust fund.)
- (5) Directing the courts to retain subsection

(a) of the proposition should it violate the single subject requirement of Article XI, Section 3.

It is sufficient for the Court to find two subjects, and the analysis above demonstrates the multifarious nature of E.X.C.E.L.'s Proposition 5.

For the same reasons there is no "logical and natural oneness" of purpose. In any permutation clause (a), permitting the lottery has no relationship to clause (b) which directs the Courts to leave clause (a) intact in the event that it is determined to violate the single subject rule. Clause (c) has no relationship to Clauses (a) or (b): the only possible relationship between clause (a) and clause (c) is a cynical political one (discussed more fully in argument Page 8). An initiative to permit gambling by lotteries would have a unity and oneness of purpose. The two additional clauses are entirely divorced from what the sponsors describe as the "functional" effect Proposition 5: to authorize a lottery. This is a devastating admission, and totally proves the failure to limit the initiative to a "single subject".

Factor (e), limiting a proposition to a "singular change" in government is only met by Proposition 5 if clause (b): which directs the effect of court review of the proposition and clause (c) which directs the expenditures to be placed in a "trust fund" are ignored. This E.X.C.E.L. invites this Court to do by describing clauses (b) and (c) of the proposition as surplus and non-functional. The Court must reject this tactic; the lower Court opinion in finding Proposition 5 to be a single subject

refused to consider the severability clause as having any present meaning (R-47). This is a tacit admission that the severability clause, if it has affect, is unrelated to the subjects contained in clauses (a) and (b). The pernicious effect of clause (c) has already been examined, and its lack of relation, other than as a logroll is manifest.

The factor (f) requiring that the amendment allow a vote on a singular change in government is violated both by the misnamed "education" lottery and the "severance" clause. This issue is briefed on Pages 11-12 of this argument.

Factors (g) and (h) are briefed in the second point on Pages 11-12.

For the reasons stated, this Court should find Proposition 5 violates the single subject requirement of Article XI, Section 3.

PROPOSITION 5'S BALLOT SUMMARY VIOLATES  
THE REQUIREMENTS OF F.S. 101.161 AND OF CASE LAW

This states' electors have two protections to insure that the momentous task of constitutional revision is fair and lawful. The strictures of Fl. Const. XI Section 3 limit the initiative to one subject. The Legislature has enacted F.S. 101.161 requiring the sponsor to prepare a 75 word explanation of the substance of the amendment and requiring the sponsor to prepare a title. The ballot summary of Proposition 5 reads:

Ballot summary : The Amendment authorizes the state to operate lotteries. It provides a severance clause to retain the above provision should any subsections be held unconstitutional because of more than one subject. The schedule provides, unless changed by law, for the lotteries to be known as the Florida Education Lotteries and for the net proceeds derived to be deposited in a state trust fund, designated State Education Lotteries Trust Fund, for the appropriation by the Legislature.

The ballot title is "State Operated Lotteries".

Only this title and summary will appear on the ballot. The ballot summary must:

a) Provide actual notice of the amendment's purpose, Askew vs. Firestone, 421 So.2d 151 (Fla. 1982) at Page 155.

b) Clearly tell the voters what the amendment will do, Evans vs. Firestone, 457 So.2d 1351 (Fla. 1984) at Page 1355.

c) Limit its content to legal effect: "The ballot summary should tell the voter the legal effect of the amendment, and no more. The political motivation behind a given change must be propounded outside the voting booth. Evans at 1355.)

d) Accurately inform the voters of the state of present law, particularly any constitutional "trade offs", Askew vs. Firestone, 421 So.2d at 157 (although not implying a "trade off" when one is not caused by the initiative, Evans vs. Firestone,

457 So.2d 1351 (Fla. 1984) at 1355.

e) Identify any article or sections of the Constitution substantially affected, Fine vs. Firestone, 448 So.2d 984 (Fla. 1984) at 989 (e.s.).

The lower Court found that the ballot summary was adequate. (R-47-50). However, this lower Court did not address several of the standards detailed above. Justice Ehrlich in his concurrence in Askew, pointed out that a correct statement of the proposition's import is not sufficient.

In my opinion the proposed ballot summary is deceptive, because although it contains an absolutely true statement, it omits to state a material fact necessary in order to make the statement made not misleading. Askew vs. Firestone, 421 So.2d at 158.

The lower Court does not go beyond determining if the ballot summary correctly set forth the wording of the proposition (although this was not correctly determined.) Proposition 5's supporters have conceded that the proposition, although it mentions the word "education" actually has nothing to do with education. (Brief of E.X.C.E.L., Pages 16-17, R-88-89). The Circuit Court further held:

Regardless of labels used, it is apparent that education has nothing to do with the proposal and the Legislature may utilize such funds as it sees fit. Indeed, Defendant's brief concedes that the Legislature has full and unfettered access to the lottery funds but hopes the Legislature will "respond" to the "will" of the people and appropriate the fund for education purposes. Of course, the Legislature has no duty legally, constitutionally, morally, ethically, or even politically to so "respond". Order Denying Partial Final Judgment on the Pleadings, Page 2. (R-48).

The effect of Proposition 5 is totally unchanged if the word "education" is excised each time it appears.

In Askew this court struck an initiative although it accurately set forth its effect, because in totality it was misleading. Actual notice is not given in Proposition 5 to the voters and the voters do not receive an explanation of what the amendment will do (factors(a) and (b) listed above.) The surplusage in Proposition 5 should not be in the ballot summary. The only "actual notice" of what the amendment will do would be to establish a lottery, which funds would be placed in the "Education Lotteries Trust Fund", and, that the Courts, if they find a multiplicity of subjects only retain the first subject ("lotteries") and the summary would need to state that the funds do not have to go education. All of the references to education are insidious attempts to mislead and logroll. (See argument Page 10).

On Page 6 of its legal memorandum to the lower Court (R-78) E.X.C.E.L. states that sections (b) and (c) of Proposition 5 are "non-functional". If these parts are purposeless (or useless) why are not the electors so told? Since section (b) and (c) are "non-functional", they should not be in the initiative at all, and the ballot summary must so state to comply with F.S. 101.161.

Thus the term "education" is also non-functional, although it is not so described in the ballot summary. "Education", "trust funds", and all such other terms were included only to add the allure of the illusion of paying for education through gambling to the proposal. (Thus the lottery could be renamed the "Florida Environmental Protection Lottery", and the proposed amendment would have the IDENTICAL legal effect. Education was



chosen by E.X.C.E.L. for its title because it is politically expedient to name the lottery for a powerful constituency. Likewise, the Lottery could be named the Policeman's retirement, Volunteer Fire Department equipment acquisition and helping of little old ladies across the street Lottery" with an appropriate trust fund name with identical legal effect to Proposition 5. These extreme examples prove that E.X.C.E.L. is not fairly treating the voters. The titles, do have meaning, despite E.X.C.E.L.'s statement that they are non-functional or else they would not be placed in the proposition. This Court should not be a party to allowing useless labels to be put onto proposals to increase the political attraction of the proposal. This Court should find,

. . . the ballot language in the instant case appears to have been intentionally drawn to create an erroneous perception of the effect of this constitutional proposal. Concurring opinion of Justice Overton, Evans, 457 So.2d at 1356.

Further, the use of the term "trust fund" is totally unneeded and placed in the summary to confuse and mislead. The proposition does not establish a "trust fund". A "trust fund" is :

A fund by a trustee for the specific purposes of the trust, in a more general sense, a fund which, legally or equitably, is subject to be devoted to a particular purpose and cannot or should not be diverted therefrom Black's Law Dictionary, 4th Edition.

These funds are actually general revenue, to be appropriated by the Legislature. The voters reading the proposition's ballot summary will see the terms "State Education Lotteries Trust Fund", "education lottery" and believe them to mean exactly that.

E.X.C.E.L. INC., has described the terms used as "suggestion"s to the Legislature. (Brief of E.X.C.E.L. at Page 17, R-). They have no place in the proposition's ballot summary. (See factor (c) listed above.) Evans at Page 1355. The insertion of a great deal of "political puffing" in the proposition's summary makes the summary legally invalid. In fact, the only purpose for the use of this "non-functional" language is logrolling, which has been previously discussed. (See Argument Page 2).

Factors (a), (b), and (c) above have been clearly violated by the drafters of the Proposition. The drafters are attempting to load the summary with content that they now disclaim as unneeded or just added to persuade Legislature to take various action. Although it may be good politics it is of the same ilk as the "misinformation" placed in the "Citizens Rights" initiative stricken in Evans vs. Firestone and the lobbying law changes proposed by the Legislature and struck down in Askew vs. Firestone. In totality, the ballot summary utterly fails to deal with the voters with honesty and forthrightness. Considered as a whole, the ballot summary does not set forth plainly that the proposition's only certain legal effect is to establish a lottery. The reference to "state education lottery trust funds" and "state education lotteries" are unneeded and deceptive. If the answer of E.X.C.E.L. is that it is correct because the body of the initiative so states, it is sufficient rebuttal to point out that the ballot summary in Askew regarding lobbying was a correct statement of the content of the initiative, but was nevertheless misleading. (PALL would go further and suggest that there is no

place in Florida's Constitution for non-functional political puffing in initiatives, and that this Court should strike E.X.C.E.L.'s draftsmanship and send a clear message to the drafters of initiatives that such unneeded and misleading items not be included in ballot summaries and initiatives themselves.)

Factors (d) and (e) are closely interrelated. Propositions which alter existing protection must so state. (Factor (d) (Evans was struck in part because it failed to make clear that there already were summary judgment rules; Askew was struck because it failed to reveal that its net effect was to expand permitted lobbying.) The voters must not only be told that they are deleting an existing protection, but they must also be told if any sections or articles of the Constitution are substantially affected. (Factor (e)).

Article X, Section 7 of the Florida Constitution presently prohibits all lotteries except for pari-mutuel pools in existence at the time the Constitution was enacted. Although E.X.C.E.L. argues that Proposition 5 if enacted would not repeal Article X, Section 7, (E.X.C.E.L.'s Memorandum, R-72) it is clear that Proposition 5 would do exactly this. If the reader presumes that Article X, Section 7 is not repealed, it is indisputably substantially affected. This alone is reason to find the ballot summary unlawful.

The purpose of the summary is to permit voters to intelligently decide whether or not to support a proposal. This duty also includes the duty to inform exactly what the initiative will do to existing law, what the initiative will remove from the Con-

stitution, and what sections the initiative substantially affects. Without mentioning Article X, Section 7 none of the requirements are met.

The "severability clause" will substantially affect Court jurisdiction. Proposition 5's clause is not the typical clause inserted in legislation which allows the Courts to retain whatever parts can be lawfully implemented. Judge Hall during oral argument made a compelling observation: what would be the legal affect of a clause stating, "No Court shall strike this proposition from the ballot?" Other interesting analogies offer themselves. For example, can an initiative contain a clause requiring ninety (90) days notice of suit to remove it from the ballot? Such a clause would also amend Article V, Article XI, Section 3 and F.S. Chapter 86 (Declaratory Judgment), as well as a variety of Rules of Court. It would also have to be explained as such in the ballot summary. The present "severance" clause's effect (if any) is not fairly explained by the summary. The severance clause adds a facet to this matter not adequately explained by the summary.

Voters must be informed by the summary that there is a risk that their votes may mean two separate things. First, that a "yes" or "no" vote may be a vote on the entirety of the proposal, or, that a "yes" vote carries with it a substantial risk of implementing only clause (a)? Are then the voters casting ballots on the whole proposition, or, on the whole proposition with a risk of severance or alternately just on clause (a). All are rational interpretations of the possible result of a vote on

Proposition 5. The foregoing discussion proves that there is no place for "severability clauses" directing Courts to leave certain parts of the proposition in initiatives. If this Court implements the "severance" clause either by allowing a vote on the proposition 5 to be multi-subject and then leaving section (a) intact, Pandora's box has been opened to manipulation of the Court's authority to enforce Article XI, Section 3. The single subject requirement:

was placed in the Constitution by the people to allow the citizens, by initiative petition, to propose and vote on singular changes in the function of our governmental structure. Fine vs. Firestone at 987.

A Proposition with a "severance" clause is at least two potential changes. If a ballot summary is to give meaning to the statutory requirement that a "yes" vote indicates approval and a "no" vote indicates disapproval, then a "severance" clause should never appear in the ballot summary (or the proposition's body itself.)

For the reasons stated the Court must find that the Proposition's ballot summary does not meet the legal requirements.

**"FRAUD IN INDUCING" VOTERS TO SIGN  
PETITION FORMS IS A VALID REASON TO STRIKE PROPOSITION 5**

The lower Courts Final Order (R- ) is equivalent to dismissing the "fraud in the inducement" challenge for failing to state a cause of action: The simple question is:

can parties persuade voters to sign petitions  
to place initiatives on the ballot by making  
statements of facts known to be false?

There is no constitutional value in knowing false statements of fact. No discovery or preliminary evidentiary hearing was held, and no factual predicate other than brief verbal proffer exists in this record. For purposes of determining a Motion to Dismiss the factual allegations of the complaint must be taken as true.

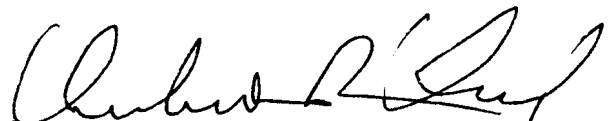
This is an issue of first impression. Even argument by analogy to election challenge cases fails to convey the precise nature of the case at bar. PALL preferred that the solicitors, in a deliberate campaign of fraud, gained the signatures of the voters by stating that the lottery would produce \$300,000,000.00 that would be used for education. This representation (if it is proven) is contrary to E.X.C.E.L.'s knowledge of the facts. In these circumstances, the courts should establish a new cause of action preventing parties from profiting from such fraud.

CONCLUSION AND RELIEF SOUGHT

The Court must find that Proposition 5 violates both the single subject requirement and the ballot summary requirement. If the Court finds that either of these requirements are not met, then the Court should enter a final declaratory judgment so find, and issue either an injunction or a Writ of Mandamus directing the Secretary of State to remove the Proposition from the ballot and revoke its certificate of ballot position. In the event that the Court so find, then it need not reach the fraud in the inducement issue.

The "fraud in the inducement" issue states a cause of action this matter to the Circuit Court, to try the factual issues, with instructions for expedited discovery and trial.

Respectfully submitted.

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF has been furnished by hand delivery to ERIC J. TAYLOR, ASSISTANT ATTORNEY GENERAL, Florida Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301, W. DEXTER DOUGLAS, ESQUIRE, Post Office Box 1674, Tallahassee, Florida 32302, THOMAS W. BROOKS, ESQUIRE, 911 East Park Avenue, Tallahassee, Florida 32308 this 9 day of October, 1986.



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