IN THE SUPREME COURT OF FLORIDA

Case No. 94,791

IN RE: ADVISORY OPINION TO THE GOVERNOR - TERMS OF COUNTY COURT JUDGES

BRIEF AMICUS CURIAE OF CONFERENCE OF COUNTY COURT JUDGES OF FLORIDA

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INTEREST OF AMICUS

Pursuant to Rule 9.500, Florida Rules of Appellate Procedure, Amicus Curiae, Conference of County Court Judges of Florida ("Conference"), responds to the inquiry of the Honorable Jeb Bush for an advisory opinion on the effect of the recent constitutional amendment that extended the terms of office of county judges from four to six years.

The Conference is an organization representing county court judges in Florida[1] and is thereby directly interested in the disposition of the questions presented. This Court's opinion will affect the substantial interests of the Conference's members and its practical and legal ramifications are of interest and importance to the Conference's membership.

The current number of Florida county court judges is 258.[2] Of this number, a total of 122 were elected or re-elected to their positions in the November 1998 election (112 were re-elected while ten were elected for the first time). A total of 124 were elected or re-elected in the November 1996 election. The remaining twelve[3] county court judges were appointed to office within the one year prior to the

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[1] The Conference consists of the duly commissioned county court judges in Florida. Fla. R. Jud. Admin. 2.120(a) (1998). The purpose of the Conference is the "betterment of the judicial system of the state" as well as the "improvement of procedure and practice" in the court system. *Id.* at R. 2.120(b).

[2] The Office of State Court Administrator provided the Conference with this data. Summary of Elected/Appointed County Court Judges, Office of the State Courts Administrator, sent to Raymond Ehrlich (Feb. 23, 1999). [A8]

[3] One of the thirteen appointed county court judges, Robert W. Lee of Broward County, was elected to office in November 1998. [A8]

November 1998 election under the vacancy provisions of Article V, section 11 of the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

In 1998, the Florida Constitution Revision Commission placed nine proposed revisions to the Florida Constitution on the ballot of the general election. On November 3, 1998, voters approved an amendment that, inter alia, modified Article V, section 10, of the Florida Constitution ("Amendment 7").[4] Amendment 7 revised subsection 10(b) of Article V to state:

> (1) The election of circuit judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of that circuit approves a local option to select circuit judges by merit selection and retention rather than by election. The election of circuit judges shall be by vote of the qualified electors within the territorial jurisdiction of the court.
>
> (2) The election of county court judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of the county approves a local option to select county judges by merit selection and retention rather than by election. The election of county court judges shall be by vote of the qualified electors within the territorial jurisdiction of the court.
>
> (3)a. A vote to exercise a local option to select circuit court judges and county court judges by merit selection and retention rather than by election shall be held in each circuit and county at the general election in the year 2000. If a vote to exercise this local option fails in a vote of the electors, such option shall not again be put to the electors of that jurisdiction until the expiration of at least two years.

[4] The amendment contained a number of provisions, two of which related to the local option for selection of judges and the funding of the state court system. Neither of these provisions are at issue in this proceeding. The amendment was approved by approximately 56.9% of those persons voting. Florida Constitution Revision Commission, 1998 Election Results for Proposed Constitutional Revisions, (visited Feb. 21, 1999) <http:www3.law.fsu.edu/crc/elecresults.html>.

> b. After the year 2000, a circuit may initiate the local option for merit selection and retention or the election of circuit judges, whichever is applicable, by filing with the secretary of state a petition signed by the number of electors equal to at least ten percent of the votes cast in the circuit in the last preceding election in which presidential electors were chosen.
>
> c. After the year 2000, a county may initiate the local option for merit selection and retention or the election of county court judges, whichever is applicable, by filing with the secretary of state a petition signed by the number of electors equal to at least ten percent of the votes cast in the county in the last preceding election in which presidential electors were chosen. *The terms of circuit judges and judges of the county courts shall be for six years.*

(Emphasis added). [A1][5] The ballot summary for Amendment 7 stated as follows:

> **Local Option for Selection of Judges and Funding of State Courts -** Provides for future local elections to decide whether to continue electing circuit and county judges or to adopt system of appointment of those judges by governor, with subsequent elections to retain or not retain those judges; *Increases county judges' terms from four to six years*; corrects judicial qualifications commission term of office; allocates state court system funding among state, counties, and users of courts.

[A1 & A2] (Emphasis added). Amendment 7 did not contain a specific effective date.

Due to questions about the scope of Amendment 7's applicability, the Executive Office of the Governor received written communications from the Conference,[6] the Florida Constitution Revision Commission,[7] and the Florida

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[5] Florida Constitution Revision Commission, *Proposed Florida Constitutional Revisions for November 1998 Ballot* (visited March 1, 1999), <http:www3.law.fsu.edu/crc/ballot.html>.

[6] Letter from Peter D. Blanc, President-Elect, Conference of County Court Judges of Florida, to Dan R. Stengle, General Counsel, Executive Office of the Governor, (November 18, 1998). [A5]

[7] Letter from Deborah K. Kearney, General Counsel, Florida Constitution Revision Commission, to Dan R. Stengle, General Counsel, Executive Office of the Governor, (November 9, 1998). [A7]

Department of State,[8] which attempted to provide guidance on the application of Amendment 7 to the county court judiciary.

On February 1, 1999, the Honorable Jeb Bush requested an opinion of this Court as to the application of Amendment 7 to the terms of county court judges.[9] [A4] Specifically, the Governor requested the Court's opinion on the following two questions:

> I. Are those county court judges whose terms began on January 5, 1999, to be commissioned for a term of office of four years to expire on January 6, 2003, or six years to expire on January 4, 2005?
>
> II. Are the remaining county court judges in office as of the date of this letter (generally those judges elected in 1996 and those judges appointed less than 28 months before the end of a term expiring January 2, 2001) to be re-commissioned for a term of office to expire on January 6, 2003?

[A4] On February 2, 1999, this Court issued an order, which held that the questions presented are within the purview of Article IV, section 1(c) of the Florida Constitution and that the Court would exercise its discretion to provide an opinion. The Court indicated that interested parties may file briefs with service upon the Governor.

On February 24, 1999, the Governor requested that the second question be revised to state:

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[8] Letter from Michael L. Cochran, Assistant General Counsel, Florida Department of State, Divisions of Elections, to the Honorable Mercedes A. Bach, County Judge, Eleventh Judicial Circuit, copied to Dan R. Stengle, General Counsel, Executive Office of the Governor, (November 9, 1998). [A6]

[9] Letter from The Honorable Jeb Bush, Governor of Florida, to Chief Justice Major B. Harding, Florida Supreme Court, (February 1, 1999).

II. Are those elected county court judges whose terms began on January 7, 1997, to be re-commissioned for a term of office to expire on January 6, 2003?

[A4][10] The Conference has requested leave to file this Brief as timely filed in order that it provide an analysis of the questions that the Governor has presented.

[10] Letter from Frank R. Jimenez, Deputy General Counsel, Office of the Governor, to Chief Justice Major B. Harding, Florida Supreme Court, (February 24, 1999).

SUMMARY OF ARGUMENT

Amendment 7, which extended the terms of office for county court judges from four to six years, should be applied to all judges elected at the November 1998 general election. The terms of each of these judges began on the effective date of the amendment, which explicitly extended such terms to six years. The purpose of Amendment 7, which was to increase the term of county judgeships from four to six years, would be frustrated if those judges who received their commissions in January 1999 were limited to four-year terms. Moreover, county court judges elected (or re-elected) in the November 1998 election had a reasonable expectation that they would be commissioned for the term of office that was effective at the beginning of their terms on January 5, 1999, which was a six year term.

In similar manner, Amendment 7 should be applied to extend the terms of office of those judges elected in November 1996. But for Amendment 7, these judges would serve four-year terms that expire in January 2001 (following the 2000 election). The overriding purpose of Amendment 7, however, was to equalize the terms of *all* members of Florida's judiciary. All judicial officers -- supreme court justices, district court judges, and circuit court judges -- are commissioned to six year terms, except for county judges. Amendment 7 eliminated this differential by making clear that the terms of county court judges "*shall* be for six years."

In summary, Amendment 7 states a clear intent that there be a uniform term of office for all members of the elected judiciary. This important interest in a unified and uniform judiciary justifies the application of Amendment 7 to equalize the term

of every elected county court judge. As such, the terms of office for county court judges elected in November 1998 and November 1996 should be increased to six-year terms.

ARGUMENT

Although this Court has resolved many questions regarding the qualifications and conditions applicable to members of Florida's judiciary, it has never addressed the precise questions that are at issue in this proceeding. The Court's prior decisions provide useful guidance, but resolution of the unique questions presented also requires consideration of judicial policy and administration. In this regard, the Conference's position is that Amendment 7 should be construed to require uniform six-year terms for all members of the elected county judiciary, whether commissioned in January 1998 or previously. The following two sections present the Conference's views for ensuring that this Court's advisory opinion authorizes the Governor to commission or re-commission all elected county court judges for six year terms in a legally sound manner.[11]

I. AMENDMENT 7 APPLIES TO COUNTY JUDGES WHOSE TERM OF OFFICE BEGAN ON JANUARY 5, 1999.

The first question presented is resolved based upon straightforward principles of law. The Conference's position is that Amendment 7's enlargement of the term of office for county court judgeships from four to six years applies to all judges elected

[11] The Conference suggests that the Court advise the Governor to issue six-year commissions for each elected county court judge. *Cf.* In re Advisory Opinion to the Governor, 271 So. 2d 128 (Fla. 1972) (Court advised that the governor was not required to issued new commissions to judges whose terms did not expire, but were scheduled to be elevated to circuit judges or county judges for the remainder of their terms; Court indicated, however, that governor issue an official proclamation attested to by the Secretary of State, which proclaimed that each of the affected judicial officers have the status of either circuit or county judge, whichever is appropriate).

(or re-elected) at the November 1998 general election. As discussed below, the terms of each of these judges began on or after the effective date of Amendment 7 thereby requiring that their commissions be for six years. The purpose of Amendment 7, which was to increase the term of county judgeships from four to six years and thereby equalize the terms of all members of Florida's judiciary, would be frustrated if judges who received their commissions on January 5, 1999 or thereafter were limited to four-year terms.

An important point is that Amendment 7 became effective on the same date, January 5, 1999, that marked the beginning of the new term of office for almost half of the county court judiciary.[12] Historically, when an amendment lacked an effective date it was deemed to have become effective immediately upon the vote of the electorate. The latin phrase that described this concept, *eo instanti*, signified that the amendment became effective immediately.[13]

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[12] One hundred and twenty-two judges were either re-elected or elected for the first time in November 1998 to take office for terms effective on January 5, 1999. [A8] Also, the Conference acknowledges that it is the *term of office*, and not the commission, that has legal significance. *See* State ex rel. Hodges v. Amos, 101 Fla. 114, 133 So. 623 (Fla. 1931) (law and not commission issued to officer controls the term of office).

[13] Perry v. Consolidated Special Tax Sch. Dist., 89 Fla. 271, 103. So. 639 (Fla. 1925) (amendment proposed by legislature and adopted by majority of electors voting became operative upon receiving majority of votes); In re Advisory Opinion to the Governor, 34 Fla. 500, 16 So. 410 (Fla. 1895) (constitutional amendment becomes effective and operative upon receiving majority of votes); *cf.* Correlis v. State, 78 Fla. 44, 82 So. 601 (Fla. 1919) (amendment goes into effect on date certain specified in amendment rather than upon receiving approval by a majority of votes of electors).

This concept does not apply, however, where an amendment's effective date is governed by the state constitution. Here, Amendment 7's lack of an explicit effective date results in the application of Article XI, section 5(c), Florida Constitution, which provides that if a "revision is approved by vote of the electors, it shall be effective as a[] . . . revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the revision." Art. XI, § 5(c), FLA. CONST. (1998). Under this provision, Amendment 7 became effective on January 5, 1999. Under ordinary rules of construction, this effective date means the entire day, i.e., from 12:01 a.m. of the effective date to midnight of the effective date.[14] As such, the Governor was authorized on January 5, 1999 to issue six-year commission to each county court judge who was elected in November 1998 to begin a new term of office that began on January 5, 1999. In other words, the Governor should be advised that the commissions for county court judges elected for terms of office to begin on the January 5, 1999 should be for the six year term mandated under Amendment 7.

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[14] *See* In re: Advisory Opinion to the Governor, 131 So. 2d 196 (Fla. 1961) ("first day" of time period specified in constitution begins at 12:01 a.m. and "last day" expires at midnight). This point is reflected in the ancient principle that the "law makes no fractions of a day." McGill v. Bank of U.S., 25 U.S. 511, 514 (1827); *see also* First Nat. Bank of Cincinnati v. Burkhardt, 100 U.S. 686, 689 (1879) ("For most purposes, the law regards the day as an indivisible unit."); Tappy v. State ex rel. Byington, 82 So. 2d 161, 171 (Fla. 1955) ("law does not recognize fractions of the day"; "It is a matter of such common knowledge that every day in the week commences at midnight the night before, it does seen silly to labor the point.") (Terrell, J., dissenting).

This conclusion is based both on applicable legal principles as well as common sense. The commonly understood meaning of "effective date" is that new laws apply to affected persons on that date. For example, if Amendment 7 had stated that the "salary of county court judges shall be $150,000" -- and this salary increase were effective on January 5, 1999 -- it would be nonsensical to defer the salary increase. To do so would thwart the purpose of the amendment. Likewise, it would be nonsensical to defer the enforceability of new civil and criminal laws that become effective in the year of their enactment. Instead, the common sense conclusion is that an enactment is effective and operative on its effective date, even if that day happens to be the first day of a judicial term of office.

Similarly, the concept that county court judges elected in November 1998 could have had no expectation of receiving six year terms is misguided. Viewed correctly, *the county court judges elected in the November 1998 election had a reasonable expectation that they would be commissioned for the term of office that was effective at the beginning of their terms on January 5, 1999*. In other words, candidates for office had a legitimate expectation that they would be commissioned for whichever term of office a majority of the voters supported, whether it be four or six years.

These conclusions are buttressed by this Court's decision in Fuchs v. Wilkinson, 630 So. 2d 1044 (Fla. 1994). In Wilkinson, the issue was the effective date of a constitutional amendment that related to the assessment date for homestead property. The amendment provided that an assessment was required "as of January

1 of the year following the effective date of this amendment." *Id.* at 1045. Due to the absence of a specific effective date in the amendment, this Court held that the amendment became effective "on the first Tuesday after the first Monday in January" following the date of the election as mandated under Article XI, section 5(c). *Id.* at 1045. As such, the Court determined that the amendment became effective on January 5, 1993 and that the assessment was required as of January 1, 1994, which was "January 1 of the year following the effective date of this amendment." *Id.*

Here, the rationale of Wilkinson supports the proposition that six-year terms were authorized for judges commissioned on January 5, 1999. Unlike the constitutional amendment in Wilkinson, Amendment 7 does not specify that the assessment should occur in "the year following the effective date of this amendment." Instead, Amendment 7 is self-executing[15] and became operative immediately upon its effective date thereby empowering the Governor to issue six-year commissions on January 5, 1999.

Likewise, this Court's decision in In re Advisory Opinion to the Governor, 192 So. 2d 757 (Fla. 1966) is supportive of the Conference's position. This case involved a candidate for circuit judge who was elected on the same date the electorate voted in favor of a constitutional amendment that limited the eligibility of persons for the

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[15] The provision is self-executing because it does not require any legislative action. *See* State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561 (Fla. 1980) (right to propose constitutional revision by initiative petition is self-executing); Plante v. Smathers, 372 So. 2d 933 (Fla. 1979) ("Sunshine Amendment" is self-executing); Alsford v. Broward Cty., 333 So. 2d 457 (Fla. 1976) (provision that property located in municipality not subject to taxation for services in unincorporated areas is self-executing).

office of circuit court judge to only persons who had been a member of The Florida Bar for five years. The constitutional amendment contained no effective date, although there was a reference to such a date in its preamble. *Id.* at 758. The issue was whether the newly-elected judge -- who would have not have been a member of The Florida Bar for five years at the time of taking the oath of office -- was subject to the newly-enacted provision.

This Court held that the amendment "was adopted by the people and became effective simultaneously with the election" of the circuit court judge at issue.[16] The Court further held that the bar membership requirement referred to the eligibility of the candidate "*at the time of assuming office* and not at the time of qualification or election to office." *Id.* at 759 (emphasis added). Because the successful judicial candidate did not have (nor could he have obtained) the qualifications to hold the office of circuit court judge by the time he was to be commissioned, this Court advised that the governor was not authorized to sign his commission.

This Court's opinion is important because of its emphasis on applying the amendment to judges "at the time of assuming office." It is also instructive because of the emphasis placed on applying the constitutional amendment in an expedited manner to those who were about to take office. Of course, the opinion is distinguishable because it involved the qualifications to hold judicial office rather than an extension of the term of office. And the amendment at issue in Advisory

[16] At that time, the provisions of Article V, section 5(c) had not been enacted, which provide for a "default" effective date as the first Tuesday after the first Monday in January following the election.

Opinion had already become effective "simultaneously" with the election thereby making its application much clearer than in the instant case.

Nevertheless, this Court applied the amendment despite the seemingly harsh result on the successful candidate who was just a few months shy of meeting the bar membership requirement. Here, this Court need not be concerned with such harsh results, however. Instead, the Court need only determine whether that Governor has the authority to issue six year commissions as of January 5, 1999, the date upon which the constitutional amendment became effective and created such authority. As argued above, the Governor should have this authority to effectuate the constitutional purpose of increasing county court judgeships to uniform six-year terms.

In this regard, a number of this Court's decisions stand for the general proposition that an amendment must not interfere with substantive rights absent a clearly expressed intent to do so.[17] In other words, amendments that effect an ouster or shorten the terms of an incumbent's office are impermissible unless specifically intended.[18] These decisions are inapplicable to the instant questions, which relate to *increasing* the terms of judicial offices. Nonetheless, it is important to review these cases to demonstrate that they are factually and legally distinguishable.

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[17] *See* Myers v. Hawkins, 362 So. 2d 926 (Fla. 1978); State of Florida ex rel. Judicial Qualifications Comm'n v. Rose, 286 So. 2d 562 (Fla. 1973); State ex rel. Reynolds v. Roan, 213 So. 2d 425 (Fla. 1968).

[18] Roan, 213 So. 2d at 428 ("an intention to apply the shortened term of an office, of the changed qualifications thereof, to an incumbent, resulting in his ouster from the office before the end of his term, must be clearly expressed in the statute or constitutional amendment making the change before it will be given that effect.")

For instance, in State of Florida ex rel. Judicial Qualifications Comm'n v. Rose, 286 So. 2d 562 (Fla. 1973), this Court addressed the effect of a constitutional amendment, which provided that "[n]o justice or judge shall serve after attaining the age of seventy years," upon judges currently serving terms of office. In ruling that the amendment did not have the effect of requiring a judge who was elected prior to the amendment's effective date to retire at age seventy, the Court stated:

> It is clear that the Constitution means that a judge who has entered by appointment or election to a judgeship knowing that he must retire at age seventy shall do so. This requirement is legally and morally certain. However, it is a different situation where a judge elected to a judgeship and commissioned for a four-year term has no foreknowledge at that time from then existing constitutional language that he will be compelled to retire at seventy.

Id. at 564. The Court noted that in the "transition from the old to the new judicial system" the provision prescribing for mandatory retirement upon age seventy "shall stand in abeyance until the incumbent elevated judge serves out his commissioned term." *Id*. at 564. The Court focused upon a "reasonable interpretation" of the provisions in the unmodified section of the Constitution that must be read in accord with the newly-adopted amendments, which related to the interim transition period. *Id*. The Court's decision also emphasized the principle that judges are entitled to serve the remainder of their terms absent a clear intent to the contrary in a constitutional amendment.

This Court's decision in Advisory Opinion to Governor, 12 So. 2d 876 (Fla. 1943) is insightful, but distinguishable based upon the language of the constitutional amendment that was interpreted. Governor Spessard L. Holland sought an advisory

opinion regarding whether his appointment to fill a circuit court vacancy should be for a term of six years or, instead, was subject to the interim appointments process requiring confirmation by senate. At the 1942 general election, the people adopted a constitutional amendment that provided for the election of circuit judgeships, which were then appointed offices. The amendment provided that: "Circuit judges shall hereafter be elected by the qualified electors of their respective judicial circuits as other State and County officials are elected." Id. at 688 (*quoting* Art. 5, § 46 of the then-existing Constitution). The amendment also provided that the "first election of Circuit Judges shall be held at the General Election in 1948 to take office on the first Tuesday after the first Monday in January, 1949, for a term of six years." *Id.* The amendment also provided that the terms of all circuit judgeships existing at the time of the amendment's adoption were extended until the first Tuesday after the first Monday in January, 1949 (i.e., after the 1948 general election).

Due to the election of Circuit Judge H.L. Sebring to the Florida Supreme Court, Governor Holland made an appointment to fill the vacancy created in the circuit judgeship. This Court held that, although the term of office for circuit judges had been extended by the constitutional amendment at the time of the appointment, the language of the amendment also made clear that the "first election" of circuit judges eligible for a term of six years was to be at the 1948 general election. As a consequence, this Court advised that the commission issued for the circuit court appointee was "until the end of the next ensuing session unless an appointment

should be sooner made and confirmed by the Senate" rather than for a term of six years.

This Court's decision is distinguishable from the instant case. Most apparent is that the 1942 amendment provided that circuit judgeships were to be elected positions -- but not until *after* the next general election to be held in 1948. The 1942 amendment made clear that the transition to an elected circuit judiciary was to occur at a future election, rather than having an immediate effect. In contrast, Amendment 7 does not have such a "prospective" limitation and, instead, emphatically states that the terms of county judges "*shall*" be for six years. As such, Amendment 7 reflects the imperative that the terms of incumbent county judges must be extended from four to six years, presumptively upon the amendment's effective date. Of course, the 1942 amendment explicitly extended the terms of office for all circuit judges until the term after the 1948 general election. For these reasons, this Court's decision did not directly address the question presented in Governor Bush's request and is distinguishable on its facts.

Finally, the Conference respectfully points out that the two cases the Florida Constitution Revision Commission presented to the Governor in its communication are distinguishable and thereby inapplicable. First, the Commission cited to State ex rel. Reynolds v. Roan, 213 So. 2d 425 (Fla. 1968). But, as the Commission acknowledged and the Conference argues below, the decision in Roan is the converse of the instant case. In Roan, the issue was whether an amendment would be applied to effectively oust an incumbent county superintendent of instruction. The

amendment changed the term of office from four-years to at the school board's pleasure. This Court refused to apply the amendment, which would have undermined substantive rights and defeated the incumbent's well-founded expectations. In contrast, Amendment 7 -- which *lengthens* the term of office -- involves entirely different policy issues and legal concerns. Because Amendment 7 increases judicial terms and does not effectuate an ouster or otherwise shorten an incumbent's term of office, the holding of Roan simply does not apply.

Second, the Commission cited to the Nevada Supreme Court's decision in Torvinen v. Rollins, 560 P.2d 915 (Nev. 1977) for the proposition that an amendment to judicial terms of office should be given prospective effect only. In Torvinen, the voters approved a constitutional amendment that increased elective terms of district court judges from four to six years. The amendment stated:

> The District Judges shall be elected by the qualified electors of their respective districts, and shall hold office for the term of (four Years) 6 years (excepting those elected at said first election) from and including the first Monday of January, next succeeding their election and qualification; . . .

Id. at 916 n.1 (capitalization in original). The trial court ruled that the amendment applied to all judges holding office at the time the amendment was adopted.

The Nevada Supreme Court, however, reversed. The basis for its conclusion was that the amendment became effective "upon the canvassing of the votes by the supreme court." *Id.* at 917. In other words, the effective date of the amendment was based upon the nuances of Nevada's state constitutional law, specifically article V, section 4, which imposed the canvassing requirement on the supreme court. Of

course, Florida does not have a similar requirement that caused the uncertainty in Torvinen. Instead, the effective date for Amendment 7 is not in dispute. It became effective on January 5, 1999 and thereby enabled the Governor to issue six-year commission on that date.

Moreover, the constitutional amendment at issue in Torvinen differs markedly from the instant amendment because it contains operative language "excepting those [judges] elected at said first election." *Id.* at 916 n.1. Admittedly, the court in Torvinen recognized the "general rule" that an amendment has "prospective application from its effective date unless the intent to make it retrospective clearly appears from its terms." *Id.* at 917. Nonetheless, the court did not address the specific issue of Florida law presented in this action, i.e., whether the Governor has the authority to issue six-year commissions to elected county court judges under a self-executing constitutional amendment.

II. **AMENDMENT 7 APPLIES TO COUNTY JUDGES WHOSE TERMS WOULD OTHERWISE EXPIRE ON JANUARY 5, 2001**.

The overriding purpose of the constitutional increase in county court judicial terms is to equalize the tenure of the entire judiciary, whether trial or appellate. Prior to Amendment 7, the terms of all judicial officers under Article V were set at six years -- *except for county court judges*. While the term of office for supreme court justices, district court judges, and circuit court judges is six years, county judges were limited to four year terms.

Amendment 7 equalized the terms of office for all Florida judicial officers by requiring six year terms for county court judges. This purpose is best served by

commissioning and re-commissioning all currently elected county court judges for six year terms. Notably, a "two-tiered" county judiciary will result without uniform application of the constitutional amendment. Approximately half of the county judges (112) will be "four-year" judges while the remainder (122) will be "six year" judges. This disparity is contrary to the intent of Amendment 7 and creates the potential establishing -- albeit for two years -- an unwarranted and undesirable division among county court judges.

Although the county court judges elected in November 1996 may not have had an expectation -- at that time -- to six year commissions, they do have a reasonable expectation that the self-executing provisions of Amendment 7 will be applied uniformly. It bears noting that the policy implications of an extension of judicial terms are unlike those for amendments that result in ousters or shortening of terms. For example, although this Court has held that the mandatory retirement age amendment did not apply to incumbent judges (because it would effectively oust them or shorten their terms),[19] an extension of judicial terms does not impinge upon such interests. As an example, suppose Amendment 7 provided that "no county court judge shall serve after attaining the age of *seventy-five years*." Such an amendment would effectively lengthen the terms of some county court judges, who had no expectation at the time they were elected that they might serve beyond the age of seventy. Permitting these judges to serve beyond the age of seventy would not result

[19] *See* State of Florida ex rel. Judicial Qualifications Comm'n v. Rose, 286 So. 2d 562 (Fla. 1973).

in an impermissible "retroactive" application of the amendment. Instead, it would simply be a recognition of the amendment's purpose that their terms of office were not limited by the previous age limitation of seventy.

Importantly, this Court should avoid becoming enmeshed in whether Amendment 7 should be applied "prospectively" or "retroactively." This distinction provides little assistance in the current context, particularly where the overarching purpose of Amendment 7 is to implement uniform six-year terms for Florida's judiciary. Because Amendment 7 increases judicial terms and does not interfere with incumbent's expectations or substantial rights, its purported "retroactive" effect is of little or no consequence. Rather, a holding that the amendment applies to lengthen the terms of all incumbent elected county court judges would be neither "retroactive" nor "prospective" and, instead, would simply be a recognition of Amendment 7's purpose of a uniform, mandatory term of office for Florida's judiciary.

Although not directly on point, the decision in Myers v. Hawkins, 362 So. 2d 926 (Fla. 1978) is instructive. In Myers, a state senator challenged a requirement of the Public Service Commission that he not personally represent another person before the Commission for compensation during the term of his office. The Commission adopted the restriction after passage of an amendment to the Florida Constitution, which provided that: "No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals." *Id.* at 932, n.23. A primary issue was whether the amendment applied to legislators in office on its effective date.

This Court dismissed concerns that the amendment applied to the Senator's prior practice before the Public Service Commission. Although the parties characterized the issue as whether the amendment applied retroactively or prospectively, the court rejected this distinction. The Court stated as follows:

> The labels "retroactive" and "perspective" do not aid our analysis. "In dealing with the problem of retroactivity it is extremely difficult to establish definite criteria upon which court decision can be foretold. A statute must not act unreasonably upon the rights of those to whom it applies, but what is reasonable and what is unreasonable is difficult to state in advance of actual decisions. `. . . (T)he method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather it is the method of intelligently balancing and discriminating between reason for and against.' It is misleading to use the terms `retrospective' and `retroactive,' as has sometimes been done, to mean that the act so labeled is unconstitutional, since the question of validity rests on further subtle judgments concerning the fairness or unfairness of applying the new statutory rule to affect interests which accrued out of events which transpired and under circumstances which obtained when a different prior rule of law was in force. . . ."

Id. at 933, n. 25 (*quoting* 2 Sands, SUTHERLAND STATUTORY CONSTRUCTION § 41.05, pp. 259-61 (4th ed. 1973)). In recognizing and applying this rule of statutory construction, the Court noted that "settled expectations honestly arrived at with respect to substantial interests ought not to be defeated." *Id.*

Significantly, the Court also stated that "Florida case law seems to describe the application of a constitutional amendment to conduct following its effective date as prospective in nature." *Id.* Thus, where the application of the restriction would frustrate the incumbent senator's honest expectations at the time he sought office, the application of the amendment was inapplicable. As such, the Court held that the

amendment "does not apply to effected officials, legislators and statewide elected officers who held office on its effective date." *Id.* at 935.

The important point of the Myers decision is this Court's emphasis on balancing the respective interests at issue. Rather than merely applying the rigid concepts of retroactivity and prospectivity in a rote manner, this Court considered the purpose of the amendment as well as the expectations of office holders who were affected. In doing so, this Court made evident that burdens placed on the terms and qualifications of an incumbent officeholder would not be applied unless clearly expressed and required in the constitutional amendment making such changes. Of course, Amendment 7 does not place such burdens and, instead, enlarges the terms of office for elected county court judges.

This point is consistent with Holley v. Adams, 238 So. 2d 401 (Fla. 1970) and State ex rel. Reynolds v. Roan, 213 So. 2d 425 (Fla. 1968). In Reynolds, this Court refused to allow the ouster of a school board superintendent after passage of a constitutional amendment directing that such positions shall serve at the pleasure of the respective appointed boards. Because the incumbent superintendent had received a board appointment for a fixed term prior to the amendment, this Court held the amendment did not apply absent express language in the amendment that directed that it apply to existing office holders contract. Likewise, in Holley this Court applied a newly enacted "resigned-to-run" law that required incumbent office holders to resign their positions in order to run for other positions. The Court held that the statute did not affect the qualifications of office or shorten the terms of such incumbent office

holders. Nor did the change effect "an ouster" of the incumbents from their offices. Thus, the constitutional amendment applied to office holders as of its effective date.

Despite the lack of any legislative history or other such materials from the proceedings of the Constitution Revision Commission, the apparent intent of Amendment 7 was to provide for a unified judiciary with uniform six-year terms of office. Importantly, the ballot summary made this intent clear by stating that the amendment's purpose was to "[i]ncrease[] county judges' terms from four to six years[.]" [A1 & A2] This intent was also reflected in the commentary on the proposed amendment by respected members of the profession. For example, two respected commentators stated that Amendment 7 "makes the terms for county judges consistent with terms of other Florida judges. Currently, county court judges serve four-year terms while circuit court judges, district court of appeal judges, and supreme court justices serve six-year terms. *Under the proposal, all judges would serve six-year terms.*"[20] In addition, the Commission explained Amendment 7 by stating that a "pro" for the enlargement of the term of office was that a "6-year term for county judges would make the terms of all state judges the same."[21] Although these secondary authorities do not specifically address the questions that Governor

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[20] Ben F. Overton & Ian Levingood, *1998 Proposed Changes to the Constitution of the State of Florida* (visited Feb. 14, 1999) <http:www3.law.fsu.edu/crc/overton.html>.

[21] Florida Constitution Revision Commission, *Analysis of the Revisions for the November 1998 Ballot* (visited Feb. 21, 1999), <http:www3.law.fsu.edu/crc/tabloid.html>. A "con" was that "[s]horter terms give the voters greater opportunities to voice their preferences." *Id.*

Bush has presented, they do support the general notion that the mandate of Amendment 7 is a uniform six-year term of office for all judges, including all county court judges.

Finally, it should be acknowledged that twelve county court judges are currently serving by appointments made within one year prior to the November 1998 election. Governor Bush's revision to his second question does not directly address this category of the county court judiciary. The reason appears to be that under the vacancy provisions of Article V, section 11,[22] these judges do not serve full elected terms. Instead, they serve appointed terms that end at the time new terms begin after the next general election (unless the appointment was less than one year prior to such election).[23] Based upon this constitutional limitation, it appears that the Governor's revised request for an advisory opinion is intended to exclude county judges who were appointed under section 11 after September 1997 but before the November 1998 election.

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[22] Article V, section 11, which is entitled "Vacancies," states in pertinent part:

> (b) The governor shall fill each vacancy on a circuit court or on a county court by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

Art. V, § 11(b), FLA. CONT. (1998).

[23] It is clear that those county judges appointed under section 11 who are elected in the November 2000 election will be issued six year commissions.

Nonetheless, it is the Conference's position that Amendment 7 should apply to all county court judges without limitation in order to promote uniformity. As a matter of judicial policy, Amendment 7 decrees a uniform judicial term of office. Moreover, the voters passed an amendment that -- conceptually -- should apply to the term of all judges thereby supporting the conclusion that appointed judges should be treated similarly and not be excluded.

As such, the Conference's preference is that all judges, elected or appointed, serve uniform terms of six years. The Conference acknowledges that the specific language of Article V, section 11 of the Florida Constitution affects the terms of office for appointed judges by applying limitations that do not apply to elected judges. As such, the Conference recognizes that Amendment 7 must be read in conjunction with the language and process set forth in Article V, section 11.[24] Notwithstanding this apparent constitutional limitation on the terms applicable to county court judges appointed under Article V, section 11, the Conference expresses its preference that this Court issue an opinion that recognizes the importance of a uniform term of office for the county court judiciary, whether elected or appointed.

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[24] *See* In re Advisory Opinion to the Governor, 96 So. 2d 541 (Fla. 1957) (Court advised that appointments to fill vacancies in circuit judgeships should be commissioned only until the first Tuesday after the first Monday in January following the next ensuing general election); *see also* Klein v. Schulz, 87 So. 2d 406 (Fla. 1956) (appointment of Judge George Schulz for the unexpired term of a judge who had resigned, held, proper where appointed and incumbent judge would serve out term, but be subject to election upon expiration of such term).

CONCLUSION

Based upon the foregoing, the Conference of County Court Judges respectfully suggests that this Court should advise the Governor to issue six-year commissions to all elected county court judges in conformity with Amendment 7, which amended Article V, Section 10 of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and accompanying appendix was furnished by hand delivery to: Frank R. Jimenez, Deputy General Counsel, Office of the Governor, The Capitol, Tallahassee, Florida 32399-0001 this _____ day of March, 1999.

Attorney

JAX1-344588.2

IN THE SUPREME COURT OF FLORIDA

Case No. 94,791

IN RE: ADVISORY OPINION TO THE GOVERNOR - TERMS OF COUNTY COURT JUDGES

APPENDIX TO BRIEF OF CONFERENCE OF COUNTY COURT JUDGES OF FLORIDA

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APPENDIX

Tab

1. Constitutional Revision No. 7 ("Amendment 7")

2. Ballot Summary for Amendment 7

3. Letter from The Honorable Jeb Bush, Governor of Florida, to Chief Justice Major B. Harding, Florida Supreme Court, (February 1, 1999)

4. Letter from Frank R. Jimenez, Deputy General Counsel, Office of the Governor, to Chief Justice Major B. Harding, Florida Supreme Court, (February 24, 1999)

5. Letter from Peter D. Blanc, President-Elect, Conference of County Court Judges of Florida, to Dan R. Stengle, General Counsel, Executive Office of the Governor, (November 18, 1998)

6. Letter from Michael L. Cochran, Assistant General Counsel, Florida Department of State, Divisions of Elections, to the Honorable Mercedes A. Bach, County Judge, Eleventh Judicial Circuit, copied to Dan R. Stengle, General Counsel, Executive Office of the Governor, (November 9, 1998)

7. Letter from Deborah K. Kearney, General Counsel, Florida Constitution Revision Commission, to Dan R. Stengle, General Counsel, Executive Office of the Governor, (November 9, 1998)

8. Summary of Elected/Appointed County Court Judges, Office of the State Courts Administrator, sent to Raymond Ehrlich (Feb. 23, 1999).