IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE REV. DR. JAMES ARMSTRONG, et al.,	)	
Appellants,	)	
v.	)	Case No. 95,223
KATHERINE HARRIS, in her official capacity as Secretary of State, et al.,	)	
Appellees.	)	

Appeal from the First District Court of Appeals
Case Number 1999-989

S))Q

APPELLANTS' INITIAL BRIEF

S))Q

Respectfully submitted,

Randall C. Berg, Jr., Esq.
Peter M. Siegel, Esq.
JoNel Newman, Esq.

Florida Justice Institute, Inc.
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2310
305-358-2081

Attorneys for Appellants

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STATEMENT OF THE CASE AND FACTS

1. Nature of the Case. This is a legal challenge seeking a writ of mandamus, injunction and declaratory judgment that the ballot title and summary of House Joint Resolution 3505 ("Amendment Two") is legally deficient, and requesting that its passage in the November 3, 1998 general election be declared a nullity as well as the entry of such other equitable relief as may be just and proper. RII-221.

2. Course of the Proceedings and Disposition in the Lower Tribunals. On October 9, 1998, Appellants filed a Petition for a Writ of Mandamus in this Court to declare the ballot title and summary of House Joint Resolution 3505 legally deficient. Plaintiffs sought Amendment Two's removal from the ballot for the November 3, 1998 general election. By a four to three vote, this Court on October 19, 1998 "decline[d] to exercise jurisdiction without prejudice to file an appropriate action in the circuit court." *Armstrong v. Mortham*, No. 94,071 (Fla.).

On October 20, 1998, Appellants filed a Petition for a Writ of Mandamus and a Complaint for Injunctive and Declaratory Relief in the Second Circuit. RI-1. By Order dated October 26, 1998, the circuit court ruled that a Writ of Mandamus was an inappropriate remedy and would be dismissed, that the request for a preliminary injunction would be denied, and that the court would reserve for ruling the request for a declaratory judgment. RI-186.

Appellants filed a Petition for a Writ of Certiorari and Suggestion of Certification for Immediate Resolution with the district court on October 26, 1998. *Armstrong v. Mortham*, No. 98-3957 (Fla. 1st DCA). After Appellees argued that a suggestion of certification for immediate resolution could not issue from a petition for a writ of certiorari, Appellants voluntarily dismissed on October 27, 1998 the counts for injunctive and declaratory relief in the circuit court and so immediately informed the district court. RII-198.

On October 28, 1998, the district court deemed the petition for a writ of certiorari as an appeal of the denial of the preliminary injunction and certified it to this Court for immediate resolution stating "this appeal requires immediate resolution by the Supreme Court of Florida because the issues pending therein are of great public importance." *Armstrong v. Mortham*, No. 98-3957 (Fla. 1st DCA).

On November 2, 1998, this Court dismissed the appeal without prejudice. *Armstrong v. Mortham*, No. 94,205 (Fla.). Amendment Two passed the general election on November 3, 1998.

On November 11, 1998, Appellants requested that this Court remand the matter to the district court, or in the alternative, to the circuit court. *Armstrong v. Mortham*, No. 94,205 (Fla.).

In the interim, an Amended Complaint reinserting the request for injunctive

and declaratory relief and adding additional parties was filed on December 1, 1998. RII-246. Thereafter the parties filed cross motions for summary judgment. RII-256 & 277.

On February 2, 1999, this Court remanded this matter to the circuit court. *Armstrong v. Mortham*, No. 94,205 (Fla.).

On February 25, 1999, the circuit court granted defendants' motion for summary judgment and entered final judgment. RII-325. Notice of appeal was filed on March 15, 1999. RII-327. On March 31, 1999, the district court again certified this appeal to this Court for immediate resolution stating "this appeal requires immediate resolution by the Supreme Court of Florida because the issues pending therein are of great public importance." *Armstrong v. Harris*, No. 1999-989 (Fla. 1st DCA).

On April 15, 1999, this Court accepted jurisdiction, and issued an expedited briefing schedule. *Armstrong v. Harris*, No. 95,223 (Fla.).

3. Facts. The legislature is empowered under the Florida Constitution to propose amendments for submission to the voters. Art. XI, §§ 1 & 5(a), Fla. Const. Any resulting proposal must be embodied in a joint resolution. Art. XI, § 1, Fla. Const. The resolution must contain the wording which will appear on the ballot. § 101.161, Fla. Stat. (1997). The ballot text must consist of a short title and "an

explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." *Id*.

On May 5, 1998, the Legislature filed with Appellee Secretary of State House Joint Resolution 3505 to place on the ballot Amendment Two amending Article I, Section 17 of the Florida Constitution.

Only the ballot title and summary of the proposed Amendment Two, also drafted by the Legislature as a part of House Joint Resolution 3505, were to be on the ballot. § 101.161, Fla. Stat.; Art. XI, §5(a), Fla. Const.

The Ballot Title and Summary to House Joint Resolution 3505 provides:

> BALLOT TITLE: PRESERVATION OF THE DEATH PENALTY; UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT.
>
> BALLOT SUMMARY: Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

RI-1; Exh. B. The full text of the proposed amendment which is not on the ballot provides:

> SECTION 17. Excessive punishments.--Excessive fines, cruel and ~~or~~ unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty

> is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the death sentence can be lawfully executed by any valid method. This section shall apply retroactively.

RI-1; Exhs. A & B (emphasis in original).

Appellee Secretary of State submitted the ballot title and summary to the electorate for the November 3, 1998 general election. Amendment Two passed.

SUMMARY OF ARGUMENT

The ballot title and summary is required to be an explanatory statement of the chief purpose of a proposed amendment, written "in clear and unambiguous language for the ballot." § 101.161, Fla. Stat. It is not. The ballot title and summary violates Florida law because it fails to explain the chief purpose of the proposal in clear and unambiguous language and because it is misleading. *Id*.; Art. XI, § 5, Fla. Const. The ballot title and summary is unclear, ambiguous and misleading because:

a. it fails to disclose and give notice that the current prohibition against "cruel ***or*** unusual punishment" would be changed to "cruel ***and*** unusual punishment" and that this change would apply to all punishments in Florida, not simply the death penalty; indeed, the ballot summary uses the phraseology "cruel ***and/or*** unusual punishment," even though the full text of the amendment changes it to "cruel ***and*** unusual punishment" (emphasis supplied);

b. it conveys the impression that the death penalty needs to be preserved because it is threatened, which it is not because the legislature had already enacted an alternative method of execution should electrocution be deemed unconstitutional; and

c. it fails to give notice that it would arguably alter the separation of powers under the Constitution by allowing the legislature to have unfettered discretion as to the crimes susceptible to the death penalty and the method of execution without

approval by the Governor, or an override of the Governor's veto, and without any judicial oversight.

ARGUMENT

I.

THE BALLOT TITLE AND SUMMARY FAIL TO DISCLOSE THAT IT WILL AFFECT CITIZENS' RIGHTS IN NON-CAPITAL AS WELL AS CAPITAL CASES

The statute prescribing ballot summaries, section 101.161, implements the constitutional requirements of fair notice to the voters which has long been recognized by this Court. The Court has explained that "[t]he purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment" so that the voters are not "misled" and may "intelligently cast [their] ballot[s]." *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982); *accord Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998); *Advisory Opinion to the Attorney General -- Restricts Laws Related to Discrimination,* 632 So. 2d 1018, 1020 (Fla. 1994); *Advisory Opinion to the Attorney General–Limited Political Terms in Certain Elective Offices,* 592 So. 2d 225, 228 (Fla. 1991); *Evans v. Firestone,* 457 So. 2d 1351, 1355 (Fla. 1984).

The ballot title and summary is required to be an explanatory statement of the chief purpose of a proposed amendment, written "in clear and unambiguous language for the ballot." § 101.161, Fla. Stat. It is not. The ballot title and summary at issue

violates Florida law because it fails to explain the chief purpose of the proposal in clear and unambiguous language and because it is misleading. *Id*.; Art. XI, § 5, Fla. Const.

The ballot summary for Amendment Two is misleading because of "what it does not say." *Askew,* 421 So. 2d at 156; *accord Term Limits Pledge*, 718 So. 2d at 804; *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1355 (Fla. 1998); *Advisory Opinion to the Attorney General re Casino Authorization, Taxation, and Regulation*, 656 So. 2d 466, 469 (Fla. 1995). The ballot summary states that the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment." The ambiguous reference to "cruel and/or unusual punishment" does not clearly advise voters that the text of the Florida Constitution will actually be altered to substitute "and" for "or," nor does the summary give any hint that this change will limit the rights of all Florida citizens accused or convicted of ***any*** crime, from shoplifting to driving under the influence, not just the rights of persons charged with capital crimes.

The excessive punishments clause of the Florida Constitution, prior to Amendment Two, prohibited punishments that were either "cruel ***or*** unusual." Art. I, § 17, Fla. Const. (1997). As this Court has noted, it is therefore potentially broader

than the Eighth Amendment to the federal constitution, which prohibits only punishments that are both cruel ***and*** unusual. *Compare* U.S. Const. amend. VIII *and* Fla. Const. Art. I, § 17 (1997); *see Allen v. State,* 636 So. 2d 494, 497 & n.5 (Fla. 1994); *Hale v. State,* 630 So. 2d 521, 526 (Fla. 1993), *cert. denied,* 513 U.S. 909 (1994); *Tillman v. State,* 591 So. 2d 167, 169 n.2 (Fla. 1991). This Court has held that Article I, Section 17 would permit an appellate court to undertake proportionality review of a non-death sentence "in a proper case." *Williams v. State,* 630 So. 2d 534 (Fla. 1993); *Hale,* 630 So. 2d at 525-26.

By conforming the language of Article I, Section 17 to that of the Eighth Amendment, and requiring that the Florida Constitution "be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution," Amendment Two would preclude Florida courts from ever holding that a sentence for *any* crime (from shoplifting to DUI) was disproportionate as a matter of state constitutional law unless it was also disproportionate under the minimal standards of the federal constitution. *See Harmelin v. Michigan*, 501 U.S. 957 (1991).

Contrary to Appellees' assertion below, the title and summary do *not* "clearly inform [voters] that the Florida prohibition applies to the same crimes in the same way

as does the Eighth Amendment." RII-284-285. Although the summary *does* inform voters that any interpretation of Article I, Section 17 would have to conform to the federal constitutional standard, this information is sandwiched between two sentences dealing exclusively with the death penalty. The wording of the title similarly suggests that conforming the interpretation of the state constitution to that of the federal constitution is necessary to accomplish the overarching goal of "preserv[ing]" the death penalty.[1] The ballot title and summary therefore do not disclose the scope of the constitutional changes with sufficient clarity to allow voters to make an informed decision.

This Court has made clear that a ballot title and summary cannot fail to disclose that a "proposed amendment would curtail the authority of government entities."

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[1]Indeed, it is not surprising that the title and summary would convey this meaning since the House Report never addresses the implication of Amendment Two for other crimes and punishments. RI-103; Exh. F. Rather, it identifies insulating the death penalty as the sole reason for tying Article I, Section 17 to the Eighth Amendment:

> The proposed constitutional amendment would ensure that the cruel or unusual provision in Article I, Section 17 could not be a basis for the Florida Supreme Court to rule the death penalty unconstitutional unless the death penalty also violates the United States Constitution.

RI-103; Exh. F at 4. Thus, it is far from clear that the legislators themselves gave much thought to the impact of the amendment on other crimes and punishment, let alone attempted to make that impact clear to voters.

Laws Related to Discrimination, 632 So. 2d at 1021. The summary in *Laws Related to Discrimination* explained that the proposed amendment "[r]estricts laws related to discrimination to classifications based upon race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status" and "[r]epeals all laws inconsistent with this amendment." *Id.* at 1020. As this Court emphasized, the summary failed to make clear that the proposed amendment would "restrict the power of governmental entities **to enact or adopt any law in the future** that protects a group from discrimination, if that group is not mentioned in the summary." *Id.* at 1021 (emphasis added). Thus, although the summary need not enumerate every possible law that ***could*** be enacted, it must at least disclose accurately the scope of the limitations it would impose on government entities, including restricting its ability to act in the future.

Accordingly, Appellees' argument below that any lack of disclosure is harmless since the significance of the differences between the language of the state and federal constitutions "were . . . never more than potential" is simply wrong. RII-286. The ballot title and summary of Amendment Two, which characterize the purpose of the proposed amendment as being to "preserv[e] the death penalty," fail to disclose that the amendment would also restrict the power of Florida courts to review the punishments for *all* crimes, not only capital offenses. As in *Laws Related to*

Discrimination, 632 So. 2d at 1021, the "omission of such material information is misleading and precludes voters from being able to cast their ballots intelligently."

II.

AMENDMENT TWO IS NOT NECESSARY TO PRESERVE THE DEATH PENALTY --- THE BALLOT TITLE IS A MISLEADING POLITICAL SLOGAN

Amendment Two's title, "Preservation of the Death Penalty," is a misleading political slogan which implied to voters that, if they did not approve the proposed amendment, the death penalty in Florida would be abolished. RI-1; Exhs. A & B. In 1994, this Court found a virtually identical flaw in the title of a proposed amendment to "Save Our Everglades." *Advisory Opinion to the Attorney General -- Save Our Everglades*, 636 So. 2d 1336, 1341 (1994). This Court held that the title "Save Our Everglades" was misleading in violation of § 101.161, because "[i]t implies that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be 'saved' via the proposed amendment." This Court further noted that "a voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment." *Id.* The Amendment Two ballot title is virtually synonymous with the ballot title "Save Our Everglades,"[2] and is even

[2]Appellees argued below that voters would understand that "preservation" (continued...)

more emotionally-charged given the intensity of public feeling regarding the death penalty.

In suggesting that the death penalty was in imminent danger of being abolished, the title and summary also suggest a peril that does not exist. *Save Our Everglades,* 636 So. 2d at 1341. Appellees' attempted below to distinguish *Save Our Everglades* on the ground that the ballot summary for Amendment Two does not refer to some unidentified threat to the death penalty but rather "plainly spell[s] out" that the Amendment is intended to "preserve[]" the death penalty against the "identified contingency" of an execution method being declared unconstitutional. RII-289. The summary does not, however, state that Amendment Two preserves the death penalty "***by***" prohibiting the reduction of death sentences in the event an execution method is

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[2](...continued)
means "to keep in perfect or unaltered condition; maintain unchanged" quoting from the AMERICAN HERITAGE DICTIONARY (2d College ed. 1985). RII-287. Appellees failed to note that the ***first*** definition of "preserve" from the AMERICAN HERITAGE DICTIONARY is "to keep safe from injury, peril, or other adversity." In what most scholars acknowledge as the authoritative unabridged dictionary, "preserve" is defined as "to keep safe from injury, harm, or destruction; guard or defend from evil; PROTECT, SAVE." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1986) (emphasis in original). In the WordPerfect Thesaurus, synonyms for "preserve" include "save" "keep" and "retain"; antonyms include "abolish," "eliminate" and "erase." And in LEGAL THESAURUS, synonyms for "preserve" include "save" "retain" ""uphold" "protect from injury" "perpetuate" "keep alive" "stand behind" and "lend support." Burton, LEGAL THESAURUS (MacMillan 1980).

declared invalid. Rather, it states that the amendment will "preserv[e] the death penalty, ***and*** permit[ ] any execution method unless prohibited by the Federal Constitution." (emphasis added). It therefore suggests that challenges to execution methods are just one possible threat to the death penalty.

Moreover, even if the "[p]reservation of the death penalty" language is construed solely in light of the summary's further provision that the amendment "[p]rohibits reduction of a death sentence based on invalidity of execution method," it is still misleading. It fails to disclose that the legislature has already enacted a statute that provides for death sentences to be carried out by lethal injection in the event that the electric chair is declared unconstitutional. § 922.105, Fla. Stat. (1998).

In *Askew,* 421 So. 2d at 155, this Court held that the ballot summary of an amendment proposed by the legislature was invalid because, while it purported to limit lobbying, it "neglect[ed] to advise the public" that a more comprehensive ban on lobbying was already in effect, so that "the amendment's chief effect" was to weaken existing restrictions. In *Evans*, 457 So. 2d at 1355, the ballot summary stated that the amendment "'establishes' citizen's rights in civil suits." One of the "rights" specified in the text was the right "for a court to dispose of lawsuits when no dispute exists over the material facts" -- that is, summary judgment. This Court found the "establishes" language in the summary to be inaccurate and misleading because the summary

judgment "provision has long been established in Florida." *Id.* Thus, the actual "effect of the amendment was to elevate the procedural rule to a constitutional right," but the summary failed to inform voters of that fact. *Id*. Finally, in *Casino Authorization,* 656 So. 2d at 469, this Court held that a ballot summary which stated that the proposed amendment would "prohibit casinos unless approved by the voters . . ." was fatally defective because "it suggests that the amendment is necessary to prohibit casinos in this state," creating "the false impression that casinos are now allowed in Florida" when, in fact "most types of casino gambling are currently prohibited by statute."

Like the ballot summaries at issue in *Askew*, *Evans* and *Casino Authorization*, the ballot summary for Amendment Two suggests that the amendment is necessary to accomplish something that is, in fact, already accomplished by existing law. The summary states that Amendment Two "[p]rohibits reduction of a death sentence based on invalidity of execution method," suggesting that such a reduction is *not* now prohibited. RI-1; Exhs. A & B. In fact, however, the legislature had already followed Chief Justice Harding's advice in his separate concurrence in *Jones v. State*, 701 So. 2d 76, 80-81 (Fla. 1997), and passed legislation to ensure that, if the electric chair is ever declared unconstitutional under state or federal law, lethal injection would become the alternative method of execution. Justice Harding recommended in

Jones that the legislature amend section 922.10, Florida Statutes, to "avert a possible constitutional 'train wreck' if this or any other court should ever determine that electrocution is unconstitutional." *Jones,* 701 So. 2d at 80. Significantly, he did not suggest that it was also necessary to amend the state constitution.

Appellees nevertheless argued below that section 922.105 is ***not*** sufficient to prevent the reduction of death sentences "because that question would depend on construction of the ex post facto clause and perhaps other provisions of the Florida Constitution." RII-290. Thus, Appellees argued, the legislature concluded that Amendment Two was necessary to "ensure [ ] that the Florida Constitution will not be interpreted to require the reduction of a death sentence." *Id*. That, however, is directly contrary to what the legislature itself said in enacting section 922.105. There, the legislature recited specifically:

> WHEREAS, changing the method of carrying out the death penalty both for those previously sentenced and for those who will be sentenced in the future is merely procedural and does not increase the quantum of punishment imposed upon a defendant and therefore does not violate the prohibition against ex post facto laws under the Constitution of the United States, Malloy v. South Carolina, 237 U.S. 180 (1915) and Ex Parte Kenneth Granviel, 561 S.W. 2d 503 (Tex. App. 1978), and
>
> WHEREAS, the United States Supreme Court has previously declared, in the case of Dobbert v. Florida, 432 U.S. 282 (1977), that changing the practices and procedures of the application of the death penalty statute does not violate the ex post facto clauses of the State

Constitution or the Constitution of the United States, and

> WHEREAS, the Florida Supreme Court has previously held a claim under Article X, Section 9 of the State Constitution against retroactive changes in death penalty procedures to be without merit, in the case Dobbert v. State, 375 So. 2d 1069 (Fla. 1979), NOW, THEREFORE [section 922.105 is created]

Ch. 98-3, *Preamble*, Laws of Fla. The legislature therefore contemplated that section 922.105 ***would*** be sufficient, as Justice Harding's opinion contemplated, to prevent the reduction of death sentences in the event that electrocution was declared unconstitutional.

Amendment Two, like the proposed amendment at issue in *Save Our Everglades*, "fl[ies] under false colors." 636 So. 2d at 1341. In the guise of closing a loophole that has, in fact, already been closed by legislation, the Amendment will effect much broader constitutional changes than were disclosed to the electorate in the ballot summary.

III.

THE TITLE AND SUMMARY FAIL TO DISCLOSE THAT AMENDMENT TWO MAY ALTER THE CONSTITUTIONAL SEPARATION OF POWERS WITH RESPECT TO THE APPLICABLE CRIMES AND METHODS OF EXECUTION

The second and fifth sentences of this proposed amendment state: "[t]he death penalty is an authorized punishment for crimes ***designated by the Legislature***," and

later that, "[m]ethods of execution may be ***designated by the legislature***, ..." (emphasis supplied). RI-1; Exhs. A & B. The language of the proposed amendment is markedly different from other constitutional provisions which state that ". . [t]he legislature shall enact legislation implementing . .," Art. I, § 8(c), Fla. Const., or "[t]he legislature, however, may provide by general law . .," Art. I, § 24(c), Fla. Const. The deliberate choice of the word "designated" twice to describe the legislature's action implies that the legislature will have the unfettered discretion to select the crimes for which the death penalty is authorized as well as the methods of execution without the possibility of executive approval or veto as set forth in Art. III, § 8, Fla. Const.

Accordingly, the title and ballot summary fail to disclose that the proposed amendment would radically change our constitutional separation of powers and take away an important protection vested in the people of Florida, namely approval or veto by the executive branch and, if vetoed, the requirement of a legislative override.

The voter is not informed at all in the ballot summary that it will be the legislature -- and the legislature alone -- that will thereafter possess the constitutional power to designate those crimes punishable by death and the methods of capital punishment.

Prior ballot summaries have failed for less serious flaws. In *Askew*, the ballot summary fully and accurately disclosed how, in the text of the amendment, lobbying

activities of former office holders would be restricted. The ballot summary was struck by the Court because it failed to disclose that the amendment created a change in the already existing restrictions upon lobbying activities. The Court held that the "problem therefore, lies not with what the summary says, but, rather what it does not say." *Id.*, at 156; *Term Limits Pledge*, 718 So. 2d at 804. If a ballot summary which accurately describes the text of an amendment can be stricken for "what it doesn't say," then this ballot summary, which omits any mention whatsoever of the new powers designated by the legislature to itself, must be stricken for what it fails to say.

Furthermore, as in *Askew*, the voter here is not informed in the ballot summary of the dramatic changes this amendment will have on the separation of powers, the legislative process, and possible judicial review. Article III, Sections 7, 8, and 9 of the Florida Constitution pertain to the passage of legislation, gubernatorial veto and legislative override of vetoes. Article V, Sections 3, 4, and 5 pertain, *inter alia*, to the powers and duties of Florida's courts to review and interpret legislation. By designating the legislature as the sole determiner of crimes punishable by death and the methods of execution, this amendment arguably circumvents the constitutionally mandated processes of legislation, executive oversight and judicial review. Presently, the only situation in which the legislature can constitutionally "act alone" is "in periods of emergency resulting from enemy attack." Art. II, § 6, Fla. Const. The

drafters of the Constitution made it clear that the legislature could depart from other requirements of this constitution during enemy attack, "but only to the extent necessary to meet this emergency." *Id*. Is death penalty legislation without gubernatorial and judicial oversight the type of emergency measure resulting from enemy attack that merits unbridled legislative decision making? Certainly not. And even if it is, the electorate must be notified in the summary as to what is about to occur. *Term Limits Pledge*, 718 So. 2d at 804.

As a result, the ballot summary fails to alert the voter of the amendment's effect on long established and well settled constitutional principles and divisions of power. Again, many ballot summaries have failed for far less. In *Advisory Opinion to the Attorney General Re Fish and Wildlife Conservation and Commission*, 705 So. 2d. 1351 (Fla. 1998), the ballot summary accurately pointed out that two commissions would be combined into one. However, this Court struck the summary because it failed to delineate the differing constitutional status of each of the entities to be combined. The summary did, "not sufficiently inform the public of this *transfer of power*." *Id*., at 1355 (emphasis supplied).

In the end, it may be, as Appellees argued below, that Amendment 2 will be construed so that the term "designated by the legislature" is synonymous with the terms "provided by law" and "provided by general law." RII-294. But to make that

argument overlooks a fundamental rule of statutory construction, that all of the words used in a statute must be given effect.

This Court in *Laws Related to Discrimination,* 632 So. 2d at 1021, invalidated a ballot summary because it "fail[ed] to state that the proposed amendment would curtail the authority of government entities." Similarly, in *Term Limits Pledge*, 718 So. 2d at 804, this Court recently struck a ballot summary and title because it was silent as to the constitutional ramifications and the new discretionary authority to be vested in the Secretary of State. Because, by its plain language, Amendment Two may curtail the authority of the Governor, it too is invalid.

CONCLUSION

This Court has held repeatedly that a "proposed amendment," whether propounded by the legislature or by citizens' initiative, "cannot fly under false colors." *Askew,* 421 So. 2d at 156; *Save Our Everglades,* 636 So. 2d at 1341. Proposed Amendment Two is flying under false colors. The title and ballot summary, which conveyed falsely to voters that the proposed Amendment is an up-or-down vote on retaining the death penalty in Florida, "more closely resemble[d] political rhetoric than . . . an accurate and informative synopsis of the meaning and effect of the proposed amendment." *Save Our Everglades,* 636 So. 2d at 1342; *Casino Authorization,* 656 So. 2d at 469. The ballot summary failed to disclose that legislation already ensures

that death sentences will not be commuted to life in the event the electric chair is found unconstitutional and that the amendment would also affect Florida courts' ability to review non-capital as well capital cases.

The misleading ballot language and material omissions may have affected the outcome of the vote. If voters had understood that the ballot title and summary simultaneously *over*stated the amendment's effect on the death penalty, while *under*stating (indeed, omitting to mention altogether) its impact on citizen's rights in noncapital cases, they might well have declined to alter the time-honored text of Article I, Section 17. If, on the other hand, they believed (incorrectly) that they were voting on whether or not to retain the death penalty in Florida, passage of the proposed amendment, will have consequences the voters were never informed of.

This Court has historically and consistently reviewed ballot measures after elections to adjudicate their adequacy, sufficiency and legality and to instruct the Appellees as to her responsibilities with respect to challenged measures. *Wadhams v. Board of County Com'rs*, 567 So. 2d 414 (Fla. 1990). The fact that the challenged measure passed in the general election is therefore of no consequence. For the foregoing reasons, Amendment Two should be declared in violation of §101.161, Fla. Stat., be declared invalid, and Appellees should be directed to take those steps necessary to implement the Court's judgment.

Respectfully submitted,

Randall C. Berg, Jr., Esq.
Peter M. Siegel, Esq.
JoNel Newman, Esq.

Florida Justice Institute, Inc.
2870 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2309
305-358-2081
305-358-0910 (FAX)

Attorneys for Appellants

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By: Randall C. Berg, Jr., Esq.
Florida Bar No. 318371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-going has been furnished to Louis F. Hubener, Assistant Attorney General, and James A. Peters, Special Counsel, Office of the Attorney General, The Capitol, Suite PL01, Tallahassee, Florida 32399-1050 by E-Mail and First Class United States Mail on May 4, 1999.

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Randall C. Berg, Jr., Esq.

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