

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.)

ANSWER BRIEF OF APPELLEES

On Certification from the District Court
of Appeal, First District of Florida

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0140084

JAMES A. PETERS
SPECIAL COUNSEL
FLORIDA BAR NO. 230944

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 300179

OFFICE OF THE ATTORNEY GENERAL
PL01 - THE CAPITOL
TALLAHASSEE, FL 32399-1050

COUNSEL FOR APPELLEES

STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

Pursuant to the Administrative Order of July 13, 1998, I hereby certify that the following brief is in 12 point proportionately spaced Courier New.

Louis F. Hubener

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. THE BALLOT SUMMARY INFORMS THE VOTER OF THE CHIEF
PURPOSE OF AMENDMENT TWO--TO CONFORM THE INTERPRETATION
OF "CRUEL AND UNUSUAL PUNISHMENT" TO THE EIGHTH
AMENDMENT--AND DOES NOT SUGGEST PROPORTIONALITY REVIEW
THEREUNDER DIFFERS FOR CAPITAL AND NON-CAPITAL CRIMES. . . . 8

II. THE BALLOT TITLE IS NOT A MISLEADING POLITICAL
SLOGAN, NOR DOES IT DUPLICATE SECTION 922.105, FLORIDA
STATUTES. 15

III. AMENDMENT TWO DOES NOT ALTER THE CONSTITUTIONAL
SEPARATION OF POWERS WITH RESPECT TO DESIGNATED CAPITAL
CRIMES AND METHODS OF EXECUTION. 21

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

CASES

*Advisory Opinion to the Attorney General
re Casino Authorization*, 656 So. 2d 466 (Fla. 1995) . . . 20

*Advisory Opinion to the Attorney General
Re: Prohibiting Public Funding of Political
Candidates Campaigns*, 693 So. 2d 972 (Fla. 1997) 12

*Advisory Opinion to the Attorney General
Re Tax Limitation*, 673 So. 2d 864 (Fla. 1996) 11,15

*Advisory Opinion to the Attorney General--
Restricts Laws Related to Discrimination*,
632 So. 2d 1018 (Fla. 1994) 9,14

*Advisory Opinion to the Attorney General--
Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994) . . . *passim*

Allen v. State, 636 So. 2d 494 (Fla. 1994) 14

Askew v. Firestone, 421 So. 2d 151 (Fla. 1982) *passim*

Broward County v. City of Fort Lauderdale, 480 So. 2d
631 (Fla. 1985) 23

Burnsed v. Seaboard Coastline Railroad, 290 So.2d 13,
(Fla. 1974) 23

Carroll v. Firestone, 497 So. 2d 1204 (Fla. 1986). . . 6,11,12

City of DeLand v. Fearington, 108 Fla. 498
146 So. 573 (1933) 7

Ellsworth v. Insurance Company of North America,
508 So. 2d 395 (Fla. 1st DCA 1987) 22

Evans v. Firestone, 457 So. 2d 1351 (Fla. 1984) 6,20

Ex Parte Browne, 111 So. 518 (Fla. 1927) 19

<i>Fine v. Firestone</i> , 448 So. 2d 984 (1984)	7
<i>Florida League of Cities v. Smith</i> , 607 So. 2d 397 (Fla. 1992)	7
<i>Gray v. Golden</i> , 89 So. 2d 785 (Fla. 1956)	8
<i>Grose v. Firestone</i> , 422 So. 2d 303 (Fla. 1982)	11,14
<i>Hale v. State</i> , 630 So. 2d 521 (Fla. 1993)	12,14
<i>Jones v. State</i> , 701 So. 2d 76 (Fla. 1997)	17
<i>Leftwich v. State</i> , 589 So. 2d 385 (Fla. 1st DCA 1991)	13
<i>Rummell v. Estelle</i> , 445 U.S. 263, 100 S.Ct. 1183, 63 L.Ed.2d 382 (1980)	13
<i>Tillman v. State</i> , 391 So. 2d 167 (Fla. 1991)	14
<i>Washington v. Dowling</i> , 109 So. 588 (Fla. 1926)	19
<i>Williams v. State</i> , 630 So. 2d 534 (Fla. 1994)	12

OTHER AUTHORITIES

Rule 9.210, Florida Rules of Appellate Procedure	1
Section 922.105, Florida Statutes	<i>passim</i>
Section 101.161, Florida Statutes	6,15,18
Section 922.10, Florida Statutes	17
Article X, Section 17, Florida Constitution	5,23
Article X, Section 9, Florida Constitution	19
Article I, Section 12, Florida Constitution	11
Article I, Section 17, Florida Constitution	12,13
Article I, Section 1, Florida Constitution	18

STATEMENT OF THE CASE AND FACTS

The appellants' statement of the case and facts is sufficient, and therefore appellees will omit the statement pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure. Appellees note the fact that the trial court, after full consideration of the arguments of both parties, found the argument of the defendants (appellees here) "to be more persuasive on each point...." (RII - 325) In addition, appellees note that proposed Amendment Two was approved by 72.8% of the voters casting ballots in the 1998 general election. (RII - 307)

For the Court's convenience, the ballot title and summary and the full text of proposed Amendment Two are set forth below:

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, Ex. B.

The text of the amendment 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, Exs. A & B (emphasis in original).

Section 101.161(1), Florida Statutes, provides:

(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be presented in clear and unambiguous language on the ballot....The substance of the amendment...and the ballot title shall be an explanatory

statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

SUMMARY OF THE ARGUMENT

I. The ballot title and summary must state the chief purpose of the amendment clearly and unambiguously, but it need not explain every actual or potential ramification of the proposed amendment. *In re Advisory Opinion to the Attorney General--Save Our Everglades*, 636 So.2d 1336, 1341 (Fla. 1994). The burden is upon anyone challenging a proposed amendment to prove it clearly and conclusively defective. *Askew v. Firestone*, 421 So.2d 151, 154 (Fla. 1982)

The ballot summary for Amendment Two explicitly informed the voters that the proposed amendment would conform the interpretation of the prohibition against "cruel or unusual" punishment to that of the Eighth Amendment's "cruel and unusual punishment," and thus explained its chief purpose and legal effect. The use of the term "and/or" in the summary is not ambiguous or misleading because it reflects the language of the amendment's text that states the previous "or" provision and the revised "and" provision shall be construed in conformity with the Eighth Amendment. Thus, the previous language will be interpreted in the same manner as the revised.

The contention that the summary does not inform voters that proportionality review has been "restricted" in criminal cases where the sentence is not death is without merit. First, the voters are explicitly told that in conforming the Florida provision to that of the federal constitution, the review of any sentence as cruel and unusual would be that permitted by the Eighth Amendment. Second, any difference in proportionality review is, as appellants acknowledge, at most only a "potential" ramification of the amendment. This Court never delineated the differences between the previous Florida prohibition and that of the Eighth Amendment. Even assuming there was a never-explicated substantive difference, the ballot summary informed the voter the standard of review would be that inherent in the Eighth Amendment. The voters thus knew the "legal effect" of the modification, and that is all the ballot summary was required to tell them.

II. The words "preservation" and "preserving" are neutral terms that in context mean only that Amendment Two seeks to protect or maintain the death penalty. The amendment achieves this purpose in a number of ways. First, by authorizing the death penalty, the amendment helps to insulate the death penalty from challenges based on the Florida Constitution. Second, it permits any method of execution unless prohibited by the federal constitution. Third, it

provides death sentences will continue in effect if a particular method of execution should be found unconstitutional. These changes all serve to "protect" or "maintain" the death penalty.

Amendment Two does not duplicate section 922.105, Florida Statutes (1998 Supp.). Section 922.105 does nothing more than provide for execution by lethal injection if electrocution is found to be unconstitutional punishment. Amendment Two does not duplicate that specification but rather authorizes the legislature to designate methods of execution. In providing as a matter of **state constitutional law** that death sentences may not be reduced if a method of execution is found invalid, the amendment helps insulate the death sentence from attack under the Florida Constitution. The legislature has no authority to specify by statute how the state constitution is to be interpreted, so Amendment Two cannot duplicate section 922.105.

III. Appellants have no credible basis for contending that in authorizing the legislature to "designate" crimes punishable by death and to "designate" methods of execution, Amendment Two grants the legislature a power subject neither to gubernatorial veto nor judicial review. The common definition of the term designate is only to "indicate" or "make known." Furthermore, the word designate is used elsewhere in the Florida Constitution,

specifically in Article X, Section 17(b), in the sense of "to provide by law." Nothing in Amendment Two remotely suggests an intent to limit the constitutional powers of the governor to veto, and the judiciary to review, the legislature's actions.

ARGUMENT

Standard of Review

The question presented to the lower court was one of law only; there were no disputed issues of fact. The issue on appeal therefore is whether the lower court erred as a matter of law in deciding whether the ballot title and summary complied with section 101.161(1), Florida Statutes. Before addressing point by point the arguments of the appellants, the appellees will briefly set forth those requirements as enunciated in this Court's decisions.

This Court held in *In re Advisory Opinion to the Attorney General--Save Our Everglades*, 636 So.2d 1336, 1341 (Fla. 1994), that:

"Section 101.161 requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So.2d 151, 154-55 (Fla. 1982). This is so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot. *Id.* at 155. However, "**[it is not necessary to explain every ramification of a proposed amendment, only the chief purpose.]**" *Carroll v. Firestone*, 497 So.2d 1204, 1206 (Fla. 1986). (e.s.)

The ballot summary "should tell the voter the legal effect of the amendment, and no more." *Evans v. Firestone*, 457 So.2d 1351, 1355

(Fla. 1984).

In *Florida League of Cities v. Smith*, 607 So.2d 397 (Fla. 1992), this Court also acknowledged "a strong public policy against courts interfering in the democratic processes of elections." *Id.* at 400 (citing *Askew v. Firestone*, 421 So.2d 151 (Fla. 1982), and *City of DeLand v. Fearington*, 108 Fla. 498, 146 So. 573 (1933)). As stated in *Askew*, "[i]n order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly and conclusively defective." *Askew v. Firestone*, 421 So.2d at 154.

The public policy against judicial interference with the ballot is particularly apposite when the amendment has been proposed by the legislature rather than by the citizens initiative process, for the former has "structural safeguards" that the latter does not. See *Fine v. Firestone*, 448 So.2d 984, 999 (1984) (Shaw, J., concurring). Thus, what Justice Terrell said many years ago is still true today:

[W]e are dealing with a constitutional democracy in which sovereignty resides in the people....They have a right to change, abrogate or modify [the state constitution] in any manner they see fit so long as they keep within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is

to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval....

Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956).

Amendment Two was approved by nearly 73% of the voters casting ballots in the 1998 general election. This Court should not overturn that vote in the absence of a persuasive showing that the ballot title and summary were clearly and conclusively defective. Appellants fail to make that showing.

I. THE BALLOT SUMMARY INFORMS THE VOTER OF THE CHIEF PURPOSE OF AMENDMENT TWO--TO CONFORM THE INTERPRETATION OF "CRUEL AND UNUSUAL PUNISHMENT" TO THE EIGHTH AMENDMENT--AND DOES NOT SUGGEST PROPORTIONALITY REVIEW THEREUNDER DIFFERS FOR CAPITAL AND NON-CAPITAL CRIMES.

The appellants first assert that the language of the ballot title and summary is not clear and unambiguous, and that it is misleading "because of what it does not say." More specifically, appellants claim that:

1. the "ambiguous" reference to "cruel and/or unusual punishment" in the summary does not clearly advise the voters that the text will be altered to substitute "and" for "or";
2. the summary does not inform the voters that the change

will affect not just the death penalty, but will limit proportionality review for sentences for all crimes to the standards of the federal constitution;

3. the summary does not inform voters that the proposed amendment "would curtail the authority of government entities" as required by *Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination*, 632 So.2d 1018 (Fla. 1994).

None of these points has merit. The ballot summary expressly informs the voter that the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to the United States Supreme Court interpretation of the Eighth Amendment." This language does not reasonably suggest that the amendment would apply **only** to the death penalty, and not to non-capital crimes. The voter is clearly informed that the Florida prohibition applies to all crimes in the same way as does the Eighth Amendment. Appellants' brief acknowledges the import of the above-quoted sentence from the ballot summary but complains that because "it is sandwiched in between the sentences dealing exclusively with the death penalty" it lacks "sufficient clarity." (App. Br. at 11) Appellees submit there is nothing misleading in this sentence and it could not more clearly state that the Florida provision must be construed in

conformity with the Eighth Amendment. No decision of this Court has ever faulted a ballot summary because a sentence might arguably have been better placed.

Nor can appellants wring anything misleading out of the ballot summary's use of "and/or", because that term reflects the language of the text of the amendment:

The prohibition against cruel **or** unusual punishment [the original Florida term], and the prohibition against cruel **and** unusual punishment [the new term], shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment [the federal term] provided in the Eighth Amendment....(e.s.)

The shorthand "and/or" in the summary refers to both the previous and the proposed Florida term and mirrors the language used in the text of the amendment. It was likely used because of the 75-word limitation imposed on ballot summaries by section 101.161(1), Florida Statutes. The purpose this part of the text reflects is to conform the Florida prohibition to that of the Eighth Amendment. To the extent the previous provision might still apply to some cases, it must be construed in conformity with Supreme Court decisions interpreting the Eighth Amendment. The ballot summary advises the voters that the amendment is to apply retroactively. Thus, there is nothing misleading about the use of the term

"and/or." Moreover, it is not necessary to inform the voters expressly that "or" will be changed to "and" because they are plainly instructed that the amended language will be interpreted in conformity with the Eighth Amendment.

Appellants also assert that the summary is deficient because "and" **potentially** provides a narrower standard of proportionality review for non-capital crimes than did the previous "or," and voters are not informed that their rights are more limited as a result. (App. Br. at 10) This claim also fails. In the first place, the summary explicitly informs the voter that the Florida provision as amended will be construed in conformity with the Eighth Amendment. "[I]t is sufficient that the ballot summary clearly and accurately sets forth the general rule to be applied and informs the voters of the chief purpose of the proposal...." *Advisory Opinion to the Attorney General Re Tax Limitation*, 673 So.2d 864, 868 (Fla. 1996). See also *Askew v. Firestone, supra*, 421 So.2d at 154-155. It is not necessary to explain every incidental ramification of a proposed amendment much less a "potential" ramification. *Carroll v. Firestone, supra*, 497 So.2d at 1206.

The case that forecloses appellants' argument, which they do not even attempt to distinguish, is *Grose v. Firestone*, 422 So.2d

303 (Fla. 1982). *Grose* involved a challenge to the ballot summary for an amendment to Article I, section 12, Florida Constitution, conforming that search and seizure provision to its federal counterpart in the Fourth Amendment. This Court denied the challenge, stating that

[a]ppellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. To satisfy their request would require a lengthy history and analysis of the law of search and seizure and the exclusionary rule. Inclusion of all possible effects, however, is not required in the ballot summary.

Id. at 305. The ballot summary for Amendment Two informs the voter how the amendment must be construed and therefore meets the requirement of telling the voter "the legal effect of the amendment, and no more." See *In re Advisory Opinion to the Attorney General--Save Our Everglades*, 636 So.2d 1336, 1342 (quoting *Evans v. Firestone*, *supra*, 457 So.2d at 1355).

Finally, the contention that Amendment Two will result in a narrower standard of proportionality review for non-capital crimes

is a matter of speculation at best.¹ This Court's decisions consistently have held that the ballot summary does not have to inform the voter of "all possible effects" or speculative and incidental effects. *Advisory Opinion to the Attorney General Re: Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So.2d 972 (Fla. 1997) (ballot summary must state chief purpose of the measure, and need not explain every detail or ramification); *Save Our Everglades, supra*, 636 So.2d at 1341 (quoting *Carroll v. Firestone*, 497 So.2d at 1206). Although this Court ruled in *Williams v. State*, 630 So.2d 534 (Fla. 1994), that there could be proportionality review of criminal penalties other than death under Article I, section 17 of the Florida Constitution, it has never explored the differences between the Article I, section 17 and the Eighth Amendment. In *Hale v. State*, 630 So.2d 521 (Fla. 1993), the Court expressly declined to place a broader construction on Article I, section 17:

Hale asserts that the "cruel **or** unusual" clause in the Florida Constitution is broader than the "cruel **and** unusual" clause in the United States Constitution. Hale invites this

¹Appellants' brief and their trial court memorandum acknowledge the fundamental difficulty with their argument when they refer to proportionality review under the previous Florida provision as only "potentially" broader than that available under the Eighth Amendment. (See App. Br. at 10 and trial memorandum RII-256, 264 ¶27)

Court to formulate a test to define the scope of this right under the Florida Constitution, and to then declare that his sentence is cruel or unusual. We decline to do so. It is not necessary to delineate the precise contours of the Florida guarantee against cruel or unusual punishment in this case because Hale's sentence is clearly not disproportionate to his crime.

Any evaluation of the proportionality of a sentence to its associated crime involves an often imprecise analysis. The federal constitution protects against sentences that are **both** cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are **either** cruel or unusual... A more searching inquiry into the scope of the guarantee under the Florida Constitution is plainly not warranted at this time. In reaching this conclusion, we reaffirm our commitment to the proposition that "[t]he length of the sentence actually imposed is generally said to be a matter of legislative prerogative." *Leftwich v. State*, 589 So.2d 385, 386 (Fla. 1st DCA 1991) (citing *Rummell v. Estelle*, 445 U.S. 263, 100 S.Ct. 1183, 63 L.Ed.2d 382 (1980)).

Id. at 525-526 (emphasis the Court's).

Hale stated that proportionality review of **noncapital** sentences is available under both the federal and the state constitutions, but the decision made no attempt to define the differences between the clauses in the two constitutions other than to note that one is "**arguably**" broader. The Court has not engaged in substantive analysis of this issue in any later case. The

differences between the two constitutional provisions were therefore never more than "potential," as plaintiffs admit.

Thus, in conclusion, the question whether and to what extent proportionality review will be narrower under the amended provision is a matter of speculation, as this Court never explained how the former provision might have been broader.² All we know is that proportionality analysis is "often imprecise" and this Court regards the length of a sentence to be generally a matter of "legislative prerogative." In this vale of uncertainty, appellants' reliance on *Restricts Laws Related to Discrimination*, *supra*, 632 So.2d 1018, is misplaced. The amendment there at issue clearly took away government power to enact a discrete and identifiable category of laws related to discrimination, which the ballot summary did not make clear. Amendment Two does not curtail or take away legislative power. Rather, it mandates a certain interpretation of the Florida Constitution. Here, it would be impossible to tell the voter what, if anything, is lost. It

²Appellants cite two cases, *Allen v. State*, 636 So.2d 494, 497 n.5 (Fla. 1994), and *Tillman v. State*, 391 So.2d 167, 169 n. 2 (Fla. 1991), stating that use of the word "or" in Article I, section 17 indicated that "alternatives were intended." This dicta does nothing to advance the question that the Court expressly refrained from addressing in *Hale v. State*, *supra*, whether and how the Florida provision differed in any material way from the Eighth Amendment.

therefore suffices to tell the voters what they will have, and that is whatever the Eighth Amendment provides. See *Grose v. Firestone*, *supra*.

II. THE BALLOT TITLE IS NOT A MISLEADING POLITICAL SLOGAN, NOR DOES IT DUPLICATE SECTION 922.105, FLORIDA STATUTES.

Appellants next argue that the use of the word "preservation" in the ballot title was misleading and tantamount to fear-mongering because it falsely implied to the voters that the death penalty would be "abolished" in Florida if they did not approve Amendment Two. Appellants also contend that in prohibiting the reduction of death sentences based on a future finding that a method of execution is unconstitutional, Amendment Two accomplishes only what is already prescribed by section 922.105, Florida Statutes (1998 Supp.), and the ballot summary is misleading in failing to so inform voters.

The ballot title should be read in conjunction with the ballot summary--as most voters would do and this Court must. See *Advisory Opinion to the Attorney General Re Tax Limitation*, 673 So.2d 864, 868 (Fla. 1996) ("Section 101.161 requires the ballot title and summary to be read together.") Nothing in what the voters read implies that the death penalty will stand abolished if they do not

approve it. To suggest otherwise, appellants ransack two dictionaries and a legal thesaurus for synonyms of "preserve." Appellants can make nothing of such synonymous and innocuous terms as "keep safe from injury," "protect," or "keep in perfect or unaltered condition; maintain unchanged." Looking further, they espy the word "save" and without further pause or regard for text conclude that the Amendment Two ballot title "is virtually synonymous with the ballot title "Save Our Everglades," but is "even more emotionally charged." (App. Br. at 14)

With all due respect, this point is near frivolous. There is nothing "emotional" about the words "preservation" and "preserving." These words clearly are used in accord with their common meaning--to maintain or protect. Amendment Two does in fact serve to maintain or protect the death penalty in several ways. First, the death penalty itself, because it is authorized by the amendment for capital crimes designated by the legislature, cannot be found to violate the Florida Constitution. It is preserved unless it is found to be cruel and unusual punishment under the Eighth Amendment. Second, as the voter is informed, Amendment Two "permit[s] any execution method unless prohibited by the Federal Constitution," further insulating the death penalty from attack except on federal constitutional grounds. Third, as the voter is

also informed, the amendment

[p]rohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

This language advises the voter that once meted out death sentences will continue in effect--*i.e.*, be "preserved"--if a particular method of execution should be found constitutionally invalid. Nothing in the ballot title and summary implies the death penalty will be "abolished" if the amendment is not approved.

It is beyond dispute that the death penalty would be threatened for all those under sentence of death at any time electrocution should be found unconstitutional under the federal constitution. This fact was underscored in *Jones v. State*, 701 So.2d 76, 80-81 (Fla. 1997) (Harding, J., concurring specially), wherein Chief Justice Harding pointed out that invalidation of a means of execution could constitute the basis for the commutation of all death sentences imposing that method and urging amendment of section 922.10, Florida Statutes, to avert a possible constitutional "train wreck." The word "preservation" therefore is not misleading. One purpose of Amendment Two is to preserve the death penalty in that circumstance (suggested by Chief Justice Harding) where it could conceivably fail. (See House of Representatives Committee on Crime and Punishment Final Bill

Research and Economic Impact Statement) (RII-277, Ex. B)

Plaintiffs' reliance on *In re Advisory Opinion to the Attorney General--Save Our Everglades*, 636 So.2d 1336 (Fla. 1994), is unavailing. There, the Court found that use of the word "save" in the ballot title implied the Everglades were lost or in danger of being lost, while nothing in the **text** of the proposed amendment even "hints at such peril." *Id.* at 1341. The title implied a critical fact that the text did not support.

Amendment Two does not present such an inconsistency. It works to preserve the death penalty in the several ways outlined above and the voters are appropriately informed. That is all that section 101.161 requires. Even assuming that reasonable minds might differ over the emotional content of the word "preservation," that is hardly a sufficient basis for a court to void the express will of the people and the legislature.³

The fact that the ballot summary does not allude to section 922.105, Florida Statutes (1998 Supp.), does not render it defective or misleading. Section 922.105(1) provides for execution

³As pointed out, the voters overwhelmingly approved the amendment. Article I, section 1 of the Florida Constitution provides that "all political power is inherent in the people...." Article 1, section 1 requires that a constitutional amendment proposed by the legislature must be approved by a three-fifths vote of each house. It cannot be doubted that Amendment Two expresses the will of the people and the legislature.

solely by lethal injection if electrocution is found to be unconstitutional. (It is interesting that appellants' argument nowhere informs the Court exactly what section 922.105(1) states.) Amendment Two does not specify lethal injection as an alternative method of execution; rather, it authorizes the legislature to designate alternative methods. The authorization to designate an alternative method is necessary because it cannot be said with certainty--there being no Florida case--that lethal injection is constitutional in this state, or that electrocution will forever remain so. Thus, the very premise of appellants' argument--that Amendment Two and section 922.105 are redundant--is erroneous.

Appellants fare no better in arguing that section 922.105 already ensures that a death sentence will not be reduced to life. Section 922.105 alone does not and cannot "ensure" that a death sentence will not be reduced because that question could depend on construction of the ex post facto clause and perhaps other provisions of the Florida Constitution.⁴ See *Jones v. State*, *supra*. Section 922.105 by itself can do no more than specify the

⁴For example, it has been contended that the "saving clause" in Article X, section 9, of the Florida Constitution prohibits changing the method of execution in a capital case. See *Washington v. Dowling*, 109 So. 588 (Fla. 1926), and *Ex Parte Browne*, 111 So. 518 (Fla. 1927). Amendment Two forecloses a reduction argument based on any provision of the Florida Constitution.

alternative use of lethal injection **if** death sentences are not **constitutionally required** to be reduced. Amendment Two ensures that the Florida Constitution will not be interpreted to require the reduction of a death sentence. Therefore, Amendment Two is not a redundancy.

The cases plaintiffs cite in support of their redundancy argument may be easily distinguished. In *Askew v. Firestone*, 421 So.2d 151 (Fla. 1982), the legislature proposed an amendment that purported to "prohibit" various state officers from lobbying certain entities for a two-year period immediately after leaving office unless they complied with financial disclosure requirements. The ballot summary did not advise voters that an existing statute imposed a blanket prohibition on such lobbying for two years after the office holder left office. *Id.* at 155-156. The Court noted the chief purpose of the amendment was not to prohibit lobbying but to remove the statutory two-year ban, and that the ballot summary did not reflect that purpose. *Id.* at 156. Amendment Two is not so flawed.

In *Advisory Opinion to the Attorney General re Casino Authorization*, 656 So.2d 466 (Fla. 1995), the Court discerned multiple flaws in the ballot summary, one of them much like the flaw in *Askew*, *supra*. There, the summary stated that "[t]his

amendment prohibits casinos unless approved by the voters...." That statement falsely implied casinos were allowed in Florida, when, in fact, most casino gaming was prohibited. The summary suggested, contrary to statutory law, that casinos were not prohibited, **and** it falsely suggested the purpose of the amendment was to prohibit casinos when its plain effect was to authorize them. *Id.* at 469 and n. 3. Amendment Two suffers no such defect. The title, the summary and the text of the amendment are perfectly consistent.

Plaintiffs' reliance on *Evans v. Firestone*, 457 So.2d 1351 (Fla. 1984), is also unavailing. The Court found the Citizens Rights in Civil Actions ballot summary was misleading in informing the voter that the proposed amendment established a right to summary judgment when such a right had long been established in Florida as a rule of procedure. The voter was not advised of this fact or of the real effect of the amendment--to elevate an existing procedural right to constitutional status. Amendment Two has no comparable effect. Lethal injection is not a right or a punishment the amendment elevates to constitutional status. The amendment gives the legislature authority to designate alternative methods of execution; it does not "lock-in" lethal injection. Furthermore, contrary to what plaintiffs contend, section 922.105 standing alone

cannot be said to preserve the death penalty. Unlike a summary judgment rule of unquestioned validity, any attempt to preserve the death penalty on the occurrence of a specified contingency must be read against constitutional standards. The legislature is not the final authority on constitutional standards. Hence, Amendment Two does not duplicate section 922.105 or raise established law to constitutional status. Rather, it provides a constitutional foundation for the legislature to specify alternative methods of execution should electrocution or even lethal injection fail.

III. AMENDMENT TWO DOES NOT ALTER THE CONSTITUTIONAL SEPARATION OF POWERS WITH RESPECT TO DESIGNATED CAPITAL CRIMES AND METHODS OF EXECUTION.

Appellants' last argument takes issue with language in the text of Amendment Two that says the death penalty "is an authorized punishment for crimes designated by the legislature" and that "[m]ethods of execution may be designated by the Legislature." Appellants contend, citing no supporting authority, that the word "designated" means something other than "enacted" or "provided by law." In fact, they contend the word "implies" that the Legislature has arrogated an unprecedented power to itself, the power to "designate," that is not subject to a gubernatorial veto or to judicial review, and that the ballot summary is defective in

failing to disclose this "radical change" to separation of powers.

"Designate" means nothing more portentous than to "specify," "indicate," "make known directly" or "denominate." Webster's Third New International Dictionary (1981). None of these meanings connotes an exclusive and unreviewable constitutional power, and nothing in the legislative history surrounding the adoption of House Joint Resolution 3505 reflects an intent to deprive the governor and the judicial branch of their constitutional powers. The legislature can only designate a capital crime or a method of execution through the exercise of its lawmaking power--*i.e.*, by enacting a law.

Examination of the staff analysis of the Senate companion resolution indicates that the legislature would "designate" capital crimes by enacted law. See House of Representatives Committee on Crime and Punishment Final Bill Research and Economic Impact Statement. (RII-277, Ex. B) See also *Ellsworth v. Insurance Company of North America*, 508 So.2d 395 (Fla. 1st DCA 1987) (appellate courts may consider legislative staff summaries in construing statutes). The staff analysis recognizes that if the amendment passes, the legislature would be precluded from abolishing the death penalty but "could enact laws that effectively nullify the effect of this provision [by] eliminating capital

crimes." Staff Analysis at 5.

Furthermore, it is fundamental that all provisions of the constitution should be interpreted with reference to each other unless a different intent is clearly manifested. See *Broward County v. City of Fort Lauderdale*, 480 So.2d 631, 633 (Fla. 1985) (quoting *Burnsed v. Seaboard Coastline Railroad*, 290 So.2d 13, 16 (Fla. 1974)). Amendment Two does not purport to amend other sections of the state constitution relating to the executive and judicial branches. Therefore, Amendment Two must be read together with existing provisions relating to the separate powers of those branches.

In addition, the term "designated by the legislature" already appears in Article X, section 17(b), of the Florida Constitution in relation to funding the Everglades Trust Fund. In that context, the term "designated by the legislature" is synonymous with the terms "provided by law" and "provided by general law," which appear throughout the Constitution and are consistent with the executive approval and veto powers set forth in Article III, section 8, of the Florida Constitution.

Nothing in the amendment or its legislative history supports the highly strained and essentially frivolous argument that the word "designate" conceals the legislature's intent to create and

exercise unreviewable power. Indeed, appellants aptly referred to this point in the trial court as only "arguable" (RII-291, ¶38), a far cry from the clear and conclusive showing the case law compels them to make.

CONCLUSION

Appellants have not shown the ballot title and summary to be clearly and conclusively defective. The judgment of the trial court must therefore be affirmed.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 0140084

JAMES A. PETERS
Special Counsel
Florida Bar No. 230944

RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

Office of the Attorney General
The Capitol - PL01
Tallahassee, Florida 32399-1050
(850) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RANDALL C. BERG, Jr., Esq., and PETER M. SIEGEL, Esq., Florida Justice Institute, Inc., 2870 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309 this _____ day of May, 1999.

LOUIS F. HUBENER

f:\users\appeals\barbara\armbrf.wpd