IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1998

MARY BARLEY, as Personal Representative of the Estate of GEORGE M. BARLEY, JR., SHEILA MULLINS, BENJAMINE WERMEIL, and NATHANIEL PRYOR REED both individually and on behalf of others similarly situated,

Petitioners,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Respondent.
_____/

RESPONDENT, SOUTH FLORIDA WATER MANAGEMENT DISTRICT'S BRIEF ON JURISDICTION

On Discretionary Review from a
Decision of the Fifth District Court of Appeal

SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
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RUTH P. CLEMENTS
Florida Bar No. 813389
-and-
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STATEMENT OF THE CASE AND FACTS

The 1994 Everglades Forever Act ("EFA") authorized Respondent, South Florida Water Management District ("SFWMD"), to levy up to 0.1 mill on property for pollution abatement. Petitioners ("Plaintiffs") contest the district's authority to tax them for this purpose in light of the 1996 adoption of Amendment 5 (Fla. Const. art. II, § 7(b)). Amendment 5 provides that "those who cause water pollution within the [district] shall be primarily responsible for paying the costs of abatement of that pollution." Barley v. South Florida Water Management Dist., 766 So. 2d 433, 433-34 (Fla. 5th DCA 2000).

The lower court affirmed the trial court, holding:

> In our view, the trial court correctly ruled that: there is no constitutional impediment to levying a tax upon these taxpayers to clean the Everglades; and, Florida courts cannot force the legislature to pass the legislation which would implement Amendment 5. . . .

Id. at 434. In reaching its decision, the court relied on the persuasive authority of this Court's unanimous opinion in Advisory Opinion to the Governor--1996 Amendment 5 (Everglades), 706 So. 2d 278 (Fla. 1997) (hereinafter "Advisory Opinion--Amendment 5").

SUMMARY OF ARGUMENT

In its decision, the district court merely agreed with the trial court that there is no constitutional impediment to levying a tax on Plaintiffs to clean the Everglades and that courts cannot force the legislature to pass legislation. Nowhere in the court's opinion did it "expressly construe" Amendment 5. Nowhere in the court's opinion did it "expressly declare" the EFA valid

and enforceable. Nor did the court declare Amendment 5 invalid -- in effect or otherwise. Accordingly, it is respectfully suggested that this Court lacks jurisdiction to review the lower court's decision.

Even if this Court had discretionary jurisdiction, it should deny review because there is no issue of great public importance involved. Rather, the lower court merely applied well-settled principles of law established by this Court. Moreover, this Court, itself, has already directly addressed the controlling issues in the very context of Amendment 5 and the EFA, albeit in an advisory opinion.

ARGUMENT

I. THE LOWER COURT DID NOT EXPRESSLY CONSTRUE AMENDMENT 5.

Pursuant to article V, section 3(b)(3), Florida Constitution, this Court "[m]ay review any decision of a district court of appeal . . . that expressly construes a provision of the state . . . constitution." The constitutional requirement of "expressness" added in 1980 codified prior case law that rejected the "inherency doctrine" and required an express, overt construction of a constitutional provision to provide jurisdiction to this Court. See Gerald Kogan and Robert Craig Walters, Twenty-Five Years and Counting: A Symposium on the Florida Constitution of 1968 -- The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1218-20 (Winter 1994) (hereinafter "Jurisdiction").

In the seminal case of Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958), this Court held:

> [T]he mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the . . . court does not in and of itself convey jurisdiction . . . to this court. . . . [I]n order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. [The lower court] must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.
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>
> [I]t is not sufficient to sustain our jurisdiction merely to point to a set of facts and contend that the [lower court] failed to apply correctly a recognized provision of the Constitution. To convey jurisdiction to this court . . . it is necessary that the [lower court] actually construe or interpret a section of the Constitution and then apply [its] construction to the factual situation presented to [it].

Id. at 409-10.

The Armstrong rule was reaffirmed by this Court in Ogle v. Pepin, 273 So. 2d 391, 392 (Fla. 1973), where the court expressly rejected the "inherency doctrine" which would allow exercise of jurisdiction where a district court of appeal "inherently" construed a provision of the state constitution by virtue of its decision.[1] As later summarized by the Court:

> [I]t is insufficient to invoke our . . . jurisdiction that there was an inherent construction of a constitutional provision in the judgment appealed from, but rather there must be a ruling by the [lower] court which explains, defines or overtly expresses a view which eliminates some existing doubt as to a constitutional provision in order to support [jurisdiction]. . . . Applying is not synonymous with constructing; the former is NOT a basis for our jurisdiction, while the express construction of a constitutional provision is.

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[1] In Ogle, this Court expressly receded from the language in Board of County Commissioners v. Boswell, 167 So. 2d 866 (Fla. 1964), relied upon in Plaintiff's jurisdictional brief as to the lower court "effectively defin[ing] the meaning and effect" of a constitutional provision giving rise to jurisdiction. 273 So. 2d at 392-93.

Rojas v. State, 288 So. 2d 234, 236 (Fla. 1973). In defining the "express construction" required to invoke jurisdiction, the Court has repeatedly "emphatically reiterated, one does not 'construe' silently or 'inherently' but only by express overt language and statements, which can offer some 'construction' for our review." Id. at 238. Accord Dykman v. State, 294 So. 2d 633, 634-35, 638 (Fla. 1973).

A simple review of the lower court's brief opinion in this case clearly demonstrates that the court neither applied nor construed Amendment 5. Although the lower court quoted a portion of Amendment 5 in its opinion, the opinion is dereft of any attempt by the lower court to explain, define or otherwise overtly express any view to eliminate any existing doubt as to the appropriate construction of Amendment 5. To the contrary, the lower court simply acknowledged that it is within the exclusive province of the legislature "to enact supplementary legislation . . . to define any rights intended to be determined, enjoyed or protected" under Amendment 5. 766 So. 2d at 434 (quoting from Advisory Opinion--Amendment 5, 706 So. 2d at 281).

Thus, while the lower court discussed this Court's advisory opinion in rendering its decision,[2] it did not "expressly

[2] Although irrelevant to the jurisdictional issue, Plaintiff's assertion that the lower court misapplied this Court's advisory opinion is without merit. As conceded by Plaintiffs, although not binding precedent, this Court's advisory opinions are very persuasive and should be adhered to absent some compelling showing why a court should depart from the opinion. See Lee v. Dowda, 155 Fla. 68, 19 So. 2d 570, 572-73 (1944); State ex rel. Williams v. Lee, 121 Fla. 815, 164 So. 536, 538 (1935). Plaintiffs have never suggested this Court's legal

construe" Amendment 5 so as to give rise to jurisdiction in this Court. At most, Plaintiffs' argument suggests that the lower court "inherently" construed Amendment 5, which is insufficient to invoke this Court's jurisdiction. See Jurisdiction at 1218-1221. In reality, all the lower court did was agree with the trial court that Plaintiffs were not entitled to the relief they requested under Amendment 5, and it did not construe (inherently or expressly) any provision of Amendment 5. Accordingly, this Court should deny review. See Carmazi v. Board of County Commissioners, 104 So. 2d 727, 729 (Fla. 1958) (having determined that plaintiffs had no existing rights protected under constitutional provision, lower court was not called upon to actually construe constitutional provision and, therefore, no jurisdiction existed in supreme court to review decision).

II. THE LOWER COURT DID NOT EXPRESSLY DECLARE VALID THE EFA.

Pursuant to article V, section 3(b)(3), Florida Constitution, this Court "may review any decision of a district court of appeal that expressly declares valid a state statute." Under the pre-1980 comparable constitutional provision, this Court had developed the so-called "inherency doctrine" by which jurisdiction was deemed to exist if the lower court had tacitly, but not expressly, held a statute valid. See Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959). The 1980 constitutional amendments, however,

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analysis and conclusions in Advisory Opinion--Amendment 5 were wrong or should be disregarded for any reason.

overruled the inherency doctrine and now require a district court to "expressly declare" a state statute valid before this Court's discretionary jurisdiction can be invoked. See Fla. R. App. P. 9.030 Committee Notes -- 1980 Amendment; Jurisdiction at 1218. Accordingly, for jurisdiction to exist, the decision under review must contain some statement to the effect that a specified statute is valid and enforceable. Id. at 1217-18.

As noted above, the simple holding of the lower court was that the trial court correctly ruled that there is no constitutional impediment to levying a tax upon Plaintiffs to clean the Everglades and that the courts cannot force the legislature to pass implementing legislation. 766 So. 2d at 434. Nowhere in the opinion does the court "expressly declare" the EFA is valid and enforceable.

This is not surprising given Plaintiffs maintained before the district court, as they do here, that they have never challenged the facial constitutionality of the EFA. (Am. Jur. Brief at 6) Rather, Plaintiffs claim to have only challenged the constitutionality of SFWMD's "agency action" in levying the taxes. (Id.) Even assuming the lower court expressly rejected Plaintiffs' challenge to SFWMD's "agency action" as Plaintiffs argue, such does not give rise to jurisdiction in this Court.[3]

At best, Plaintiffs' argument, relying on Harrell's, suggests that this Court has jurisdiction because the lower court

[3] Moreover, the language Plaintiffs' quote from the lower court's opinion (id. at 7), is the lower court paraphrasing this Court's analysis in Advisory Opinion--Amendment 5. 466 So. 2d at 434.

inherently declared the EFA valid. But as discussed above, the inherency doctrine was overruled by the 1980 jurisdictional amendments to the constitution and "obviously is no longer viable." See Jurisdiction at 1218; Fla. R. App. P. 9.030 Committee Notes -- 1980 Amendment. Accordingly, because the lower court did not "expressly declare" the EFA valid and enforceable, this Court should deny review. See id.

III. THE LOWER COURT DID NOT DECLARE AMENDMENT 5 INVALID.

Plaintiffs' assertion that this Court "must assume jurisdiction" over this case under article V, section 3(b)(1) is specious. That constitutional provision provides this Court with mandatory appeal jurisdiction from "decisions of district courts of appeal declaring invalid . . . a provision of the state constitution." The plain language of the constitution requires that the lower court's decision "must actually and expressly hold the . . .constitutional provision invalid" and "it is not enough that the opinion can merely be construed to have reached the same result tacitly." Jurisdiction at 1215 and n. 319. Moreover, any state court opinion declaring invalid a provision of the Florida Constitution could do so "only on grounds that the provision violated the United States Constitution, a federal statute, or a treaty binding upon the state through the Supremacy Clause." Id. at 1217 (emphasis added).

Certainly, the lower court never expressly declared Amendment 5 invalid -- under the Supremacy Clause or otherwise. Accordingly, this Court has no appeal jurisdiction under article V, section 3(b)(1).

Moreover, contrary to Plaintiffs' argument, the inherent effect of the lower court's decision is not "to declare invalid and meaningless" Amendment 5 and it does not "frustrat[e] the will of the people." To the contrary, the lower court expressly gave effect to the will of the people who voted for Amendment 5, which was to adopt an amendment that requires legislative implementation. 466 So. 2d at 434. In doing so, the lower court cited to this Court's conclusion that, "in adopting Amendment 5, the voters expected the legislature to enact supplementary legislation to make it effective, to carry out its intended purposes, and to define any rights intended to be determined, enjoyed or protected." Id. (quoting from Advisory Opinion--Amendment 5, 706 So. 2d at 281).

IV. THE PURPORTED "IMPORTANCE" OF THE LOWER COURT'S DECISION DOES NOT GIVE RISE TO JURISDICTION OR A BASIS FOR EXERCISE OF ANY DISCRETIONARY JURISDICTION.

Plaintiff's rhetorical hyperbole aside, this case does not present any issue of great public importance. As a preliminary matter, any such "great public importance" would not give rise to jurisdiction in any event given the lower court did not certify it as such. See Allstate Ins. Co. v. Langston, 655 So. 2d 91, 93 n.1 (Fla. 1995) (no jurisdiction to review decision based on party's contention that it involves great public importance absent certification from district court); art. V, § 3(b)(4), Fla. Const. See also Armstrong, 106 So. 2d at 410 (notwithstanding importance of cause, court has no discretion as to reviewing a case where no jurisdiction exists under constitution).

But even if discretionary jurisdiction existed under article V, section 3(b)(3), this case does not present any new important issue requiring the attention and limited resources of this Court. The lower court did no more than apply well-established principles of law already developed by this Court -- concerning the effect of constitutional provisions that are not self-executing -- to the allegations and claims asserted by Plaintiffs. Indeed, this Court has already opined directly on the controlling issues in the very context of Amendment 5 and the EFA. See Advisory Opinion-Amendment 5. Accordingly, even if this Court otherwise had discretionary jurisdiction, given this Court's limited resources and the lack of any real justification for review in this case, the Court should decline to exercise that jurisdiction and deny review in this case. See Zirin v. Charles Pfizer & Co., 128 So. 2d 594, 596-97 (Fla. 1961) (court can exercise its discretionary jurisdiction to determine review is not justified or required).

CONCLUSION

Based upon the foregoing discussion and authorities, this Court should deny review in this case.

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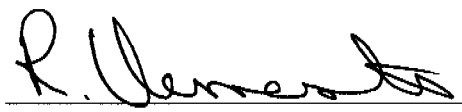
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U. S. Mail this 7Th day of November, 2000 to E. THOM RUMBERGER, ESQ. and RICHARD A. KELLER, ESQ., Rumberger, Kirk & Caldwell, Counsel for Appellants, Signature Plaza, Suite 300, 201 South Orange Avenue, P. O. Box 1873, Orlando, FL 32802; JON MILLS, ESQ. and TIMOTHY McLENDON, ESQ., Counsel for Appellants, P.O. Box 2099, Gainesville, FL 32602; William L. Hyde, Esq. and Rebecca A. O'Hara, Counsel for Amicus, Gunster Yoakley et al., 215 S. Monroe St., Tallahassee, FL 32301.



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