IN THE
SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
ATTORNEY GENERAL RE:

RIGHT TO TREATMENT AND REHABILITATION FOR NONVIOLENT DRUG OFFENDERS
_____/

CASE NO. : SC01-1950

BRIEF OF GOVERNOR JOHN ELLIS "JEB" BUSH

Simone Marstiller
Assistant General Counsel
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, Florida 32399-0001
(850) 488-3494; Fax (850) 488-9810

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Florida Constitution

Statutes

Laws of Florida

STATEMENT OF THE CASE AND FACTS

On August 16, 2001, the Secretary of State submitted to the Office of the Attorney General an initiative petition seeking to amend Article I of the Florida Constitution to establish a right to treatment and rehabilitation for individuals who commit nonviolent drug offenses. In accordance with Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes (2001), the Office of the Attorney General has petitioned this Court for a written opinion as to the validity of that initiative petition.

SUMMARY OF THE ARGUMENT

Article XI of the Florida Constitution provides four methods for amending the constitution. At issue in this matter is an amendment proposed by citizen initiative. Because the initiative process provides no opportunity for public hearing and debate before the proposal is put before the voters, the constitution requires that a citizen initiative "embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. To satisfy this single-subject rule, a proposed amendment must evince "oneness of purpose." While it may affect more than one branch of government, it cannot substantially alter or perform the functions of multiple branches.

The "Right to Treatment and Rehabilitation" initiative on review in this Court substantially alters or performs functions of all three branches of government. The

initiative implements a public policy of statewide importance – a legislative function. Specifically, it contains a detailed scheme of treatment and rehabilitation for drug offenders that fundamentally alters the existing statutory framework. Also, the proposed amendment forecloses the exercise of prosecutorial discretion and reassigns the monitoring of treatment from the Department of Corrections to independent "qualified professionals." In so doing, it substantially alters and performs executive functions. Finally, the proposal limits the courts' sentencing power and permits independent "qualified professionals" to make findings and determinations that traditionally have been matters for the courts.

Because the "Right to Treatment and Rehabilitation" citizen initiative substantially alters or performs legislative, executive and judicial functions, it lacks the "oneness of purpose" required by the single-subject rule. Accordingly, this Court should deem the initiative invalid.

ARGUMENT

THE "RIGHT TO DRUG TREATMENT AND REHABILITATION" PROPOSED AMENDMENT EMBRACES MORE THAN ONE SUBJECT IN THAT IT SUBSTANTIALLY ALTERS OR PERFORMS THE FUNCTIONS OF ALL THREE BRANCHES OF GOVERNMENT.

An amendment to the Florida Constitution, when proposed by citizen initiative, must satisfy two requirements before it can be put before the electorate. First, it must "embrace but one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. Known as the single-subject requirement or rule, this limitation recognizes that, unlike other methods of proposing constitutional amendments,[1] the initiative process provides no opportunity for public hearing and debate. See Fine v. Firestone, 448 So. 2d 984 (Fla. 1984). The rule both "insulate[s] Florida's organic law from precipitous and cataclysmic change," In re Advisory Opinion to the Attorney General – Save Our Everglades, 636 So. 2d 1336, 1339 (Fla. 1994), and "prevents logrolling, a practice that combines separate issues into a single proposal to secure passage of an unpopular issue," Advisory Opinion to the Attorney General re Amendment to Bar Government From Treating People Differently Based on Race in Public Education, 778 So. 2d 888, 891 (Fla. 2000).

To satisfy the single-subject requirement, a proposed amendment must evince a "logical and natural oneness of purpose." Fine, 448 So. 2d at 990. When determining whether such "oneness of purpose" exists, as pertinent here, this Court examines the proposal's effect on governmental functions. See Advisory Opinion to

[1] Amendments to the Florida Constitution may also be proposed by the legislature, by a constitution revision commission, or by a constitutional convention. See Art. XI, §§ 1, 2, 4, Fla. Const.

the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So. 2d 1304 (Fla. 1997).

The second requirement for ballot initiatives is found in section 101.161(1), Florida Statutes (2001), which provides:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . . Except for amendments and ballot language proposed by joint resolution, the substance of the amendment . . . 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.

As this Court has determined, the statute requires the ballot summary and title to accurately inform voters, in clear and unambiguous language, of the proposed amendment's main purpose, meaning and ramifications. Askew v. Firestone, 421 So. 2d 156 (Fla. 1982); accord Bar Government From Treating People Differently Based on Race; Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998).

A proposal defective as to either requirement set forth above renders it invalid, without regard to substantive merit. See Bar Government From Treating People

Differently Based on Race. The discussion in this brief addresses only the single-subject rule.

The "Right to Drug Treatment and Rehabilitation" proposed amendment presently before this Court for review embraces more than one subject. While a proposal may affect more than one branch of government and not run afoul of the single-subject rule, it cannot "substantially alter or perform the functions of multiple branches." Save Our Everglades, 636 So. 2d at 1340 (emphasis in original). As this Court has explained:

> The test . . . is functional and not locational, and where a proposed amendment changes more than one government function it is clearly multi-subject . . . . We recognize that all power for each branch of government comes from the people and that the citizens of the state have retained the right to broaden or to restrict that power by initiative amendment. But where such an initiative performs the functions of government, it clearly fails the functional test for the single-subject limitation the people have incorporated into article XI, section 3, Florida Constitution.

Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984) (emphasis in original).

The ballot initiative at issue here purports to create a right to treatment and rehabilitation for first and second time nonviolent drug offenders, and does the following to effectuate the right created: specifies qualifying offenses and prescribes permissible prior criminal history; mandates diversion of the offender from

prosecution into treatment upon assertion of the right prior to trial; allows the offender, upon conviction, to choose treatment over incarceration or other criminal sanction(s); permits prosecution or sentencing only if an offender is deemed not amenable to treatment after "multiple programs and violations;" assigns the responsibility for managing and monitoring an offender's treatment to an independent "qualified professional;" and gives the "qualified professional" sole authority to determine the nature and duration of the treatment program, successively transfer an offender to other programs if the offender violates program rules, deem the treatment successful and terminate the treatment. These provisions substantially alter or perform the functions of all three branches of government.

First, the ballot initiative legislates by implementing public policy. The legislature has expressed and implemented public policy regarding drug treatment and rehabilitation for individuals charged with or convicted of certain drug offenses. Within the statute governing pretrial intervention programs in general is a subsection particularly addressing drug treatment intervention. It provides, in pertinent part:

> Notwithstanding any provision of this section, a person who is charged with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893, tampering with evidence, solicitation for purchase of a controlled substance, or obtaining a prescription by fraud; who has not been charged with a crime involving violence, including, but not limited to

> murder, sexual battery, robbery, carjacking, home-invasion robbery, or any other crime involving violence; and who has not previously been convicted of a felony nor been admitted to a felony pretrial program referred to in this section is eligible for admission into a pretrial substance education and treatment intervention program approved by the chief judge of the circuit, for a period of not less than 1 year in duration, upon motion of either party or the court's own motion....

§ 948.08(6)(a), Fla. Stat. (2001).[2] In addition, recently enacted section 948.16, Florida Statutes (2001), extends pretrial drug treatment intervention to persons charged with misdemeanor possession of a controlled substance or drug paraphernalia, provided that the offender has no prior felony convictions and has not previously been admitted to a pretrial program. See ch. 2001-48 § 4, at 222, Laws of Fla. The criteria for eligibility contained in these statutes reflect the legislative determination that pretrial drug treatment intervention is not an effective tool for individuals who have participated in such a program before or for individuals with criminal histories.

Existing sentencing statutes also embody the public policy decision that possessing or purchasing controlled substances constitutes criminal activity, but that offenders should receive drug treatment and rehabilitation in lieu of incarceration, if the court finds it appropriate. See §§ 921.187(1)(a)6, (a)11, (b); 948.034(1), (2), (4),

[2] Prior to 2001, qualifying offenses were limited to second or third degree felony purchase or possession of a controlled substance, and not having been charged with a violent crime was not a criterion for eligibility. See § 948.08(6)(a), Fla. Stat. (2000). See also ch. 2001-48, § 3, at 221, Laws of Fla.; ch. 2001-110, § 16, at 651, Laws of Fla.

Fla. Stat. (2001). Such treatment is made a condition of probation or community control, the period of ordered treatment takes into account prior drug offenses, and the offender is closely monitored by the Department of Corrections and by the court to ensure compliance.[3]

The ballot initiative at issue sets forth a detailed scheme of drug treatment and rehabilitation for drug offenders that fundamentally alters the current legislative scheme. Paragraphs (a) and (b) greatly expand the eligibility criteria for pretrial diversion by, inter alia, ignoring prior attempts at intervention and all felony convictions older than five years. Paragraphs (c) and (d) shield offenders from monitoring and control by the criminal justice system. Paragraphs (a) and (e) permit a convicted person to choose treatment over incarceration and preclude the court from imposing any criminal sanctions either when treatment is chosen or after treatment is completed. Whether seen as attempting to reduce drug abuse or attempting to decriminalize certain drug activity, the ballot initiative "implements a public policy decision of statewide significance and thus performs an essentially legislative function." Save Our Everglades, 636 So. 2d at 1340.

---

[3] Recognizing that "integration of judicial supervision, treatment, accountability, and sanctions greatly increases the effectiveness of substance abuse treatment," the legislature has seen fit to require every judicial circuit to establish a model treatment-based drug court program. § 397.334, Fla. Stat. (2001); see ch. 2001-48, § 1, at 220, Laws of Fla.

The ballot initiative also substantially alters the executive enforcement function. See Art. IV, § 1, Fla. Const. Foremost, it forecloses the exercise of prosecutorial discretion. "[T]he decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986). See also Valdes v. State, 728 So. 2d 736 (Fla. 1999). Under sections 948.08 and 948.16, the state attorney has the discretion to deny admission into pretrial drug treatment intervention if a defendant previously declined the offer on the record. The state attorney also may preclude admission if the circumstances of the case indicate the defendant was dealing drugs. See §§ 948.08(6)(a)1, (a)2, 948.16(1), Fla. Stat. (2001).

However, the proposed amendment provides that, as a matter of right, a drug offender can elect to receive treatment in lieu of prosecution for the first and second offenses. Consequently, where the individual has been charged with a qualifying drug offense but not yet convicted, the amendment mandates diversion from prosecution into a pretrial intervention program should the defendant assert his or her "right" to treatment. The proposed amendment thus strips the state attorney of the discretion to pursue prosecution where circumstances indicate that permitting pretrial intervention would be inappropriate.

Moreover, the provisions concerning the monitoring of treatment appear to contemplate performing an executive function. Specifically, the Department of Corrections (DOC) is the executive branch agency charged with implementing the sentences imposed by the criminal courts. See Art. IV, § 6, Fla. Const.; § 20.315, Fla. Stat. (2001); Pearson v. Moore, 767 So. 2d 1235 (Fla. 1st DCA 2000). As such, when the court orders a drug offender into treatment as a condition of probation or community control, DOC monitors the offender to ensure compliance with treatment requirements and other court-imposed conditions. Prior to such action by the court, DOC conducts a presentence investigation to determine, inter alia, the defendant's need for drug treatment and makes recommendations to the court regarding the appropriate type of treatment. See § 948.015, Fla. Stat. (2001). DOC also supervises all pretrial intervention programs, and thus is responsible for assessing treatment needs, monitoring progress, and determining whether the defendant has satisfactorily completed treatment at the end of the intervention period. See § 948.08, Fla. Stat. (2001).

The proposed amendment, however, assigns to a "qualified professional" the responsibility for determining the type and duration of the appropriate treatment program and the methods of monitoring the defendant's progress. The "qualified professional" also has the sole discretion to transfer the defendant from program to

program for violating program rules, and can do so as many times as he or she sees fit.

It could be argued that DOC still could monitor offenders' treatment by overseeing the activities of the "qualified professional." Hence, its function would be affected somewhat, but not substantially altered or performed. However, inasmuch as the apparent intent of this initiative is to divert from the criminal justice system and exempt from criminal sanctions those drug offenders who ask for treatment, the more reasonable conclusion is that DOC would have no role. Instead, an independent "qualified professional" would carry out DOC's enforcement responsibilities, thereby fully performing an executive function. See Save Our Everglades.

Finally, the ballot initiative substantially alters and performs judicial functions. The initiative proposes to give an independent "qualified professional" sole discretion to excuse violations of treatment program rules and to transfer an offender from program to program. It further authorizes the "qualified professional" to make a "finding" that the offender has successfully completed treatment, and provides that upon such finding treatment terminates. These are matters that traditionally have been squarely within the courts' jurisdiction and authority.

However, the more critical effect on judicial functions is the limitation on the courts' sentencing power. See Pearson, 767 So. 2d at 1239 ("Sentencing is a power,

obligation, and prerogative of the courts....”). Normally, a court has the discretion, within certain guidelines, to determine the appropriate sentence to impose, ranging from incarceration to supervised community control or probation. However, the initiative permits a first or second time convicted drug offender, as a matter of right, to “elect to receive appropriate treatment...instead of being sentenced or incarcerated.” It further provides that either upon successful completion of treatment or 18 months after the date the defendant elected treatment, the defendant cannot be sentenced or placed under court supervision. The initiative thus limits the courts’ sentencing power by precluding imposition of an appropriate criminal sanction upon an individual who has been found to have committed a crime.

CONCLUSION

The "Right to Treatment and Rehabilitation" proposed constitutional amendment substantially alters or performs functions of the legislative, executive and judicial branches of government. As such, it lacks the "oneness of purpose" required by the single-subject limitation set forth in the state constitution. See People's Property Rights. This defect is sufficient to render the proposed amendment invalid. See Bar Government From Treating People Differently Based on Race.

Respectfully submitted,

Simone Marstiller
Assistant General Counsel
Florida Bar No. 0129811
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, Florida 32399-0001
(850) 488-3494; Fax (850) 488-9810

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the individuals listed below, by □ postage-paid U.S. Mail, □ Hand-Delivery, □ E-mail, □ Facsimile Transmission on October 10, 2001.

_____
Simone Marstiller

The Honorable Katherine Harris
Secretary of State
PL-02, The Capitol
Tallahassee, Florida 32399-0250

The Honorable Robert A. Butterworth
Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

The Honorable John McKay
President, Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

The Honorable Tom Feeney
President, Florida House of Representatives
Room 420, The Capitol
Tallahassee, Florida 32399-1300

Mr. Sydney P. Smith
Florida Campaign for New Drug Policies
168 S.E. 1st Street, Suite 606
Miami, Florida 33131

Stephen H. Grimes, Esquire
Holland & Knight
Post Office Box 810
Tallahassee, Florida 32302-0810

Susan L. Kelsey, Esquire
Holland & Knight
Post Office Box 810
Tallahassee, Florida 32302-0810

Kenneth W. Sukhia, Esquire
Fowler White Boggs Banker
101 N. Monroe Street, Suite 1090
Tallahassee, Florida 32301-1547

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
Simone Marstiller