IN THE
SUPREME COURT
OF FLORIDA

CASE NO.: SC01-1950

In re: ADVISORY OPINION
TO THE ATTORNEY GENERAL –
RIGHT TO TREATMENT AND REHABILITATION
FOR NONVIOLENT DRUG OFFENSES

ANSWER BRIEF OF INTERESTED PARTY, SAVE OUR SOCIETY FROM DRUGS, INC. IN OPPOSITION TO AMENDMENT

KENNETH W. SUKHIA
Florida Bar No. 266256
FOWLER, WHITE, GILLEN,
BOGGS, VILLAREAL AND
BANKER, P. A.
101 North Monroe Street, Suite 1090
Tallahassee, FL 32301
Phone: 850 681-0411
Fax: 850-681-6036

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SUMMARY OF ARGUMENT

A. Despite acknowledging that the merits of amendments are irrelevant, proponents attempt to justify their initiative on its merits. In any event, their arguments as to the merits are invalid, as the initiative would in fact have disastrous effects on our state.

B. Proponents' wrongly claim the Court is extremely reluctant to strike initiatives for §101.161 deficiencies. The Court vigorously enforces §101.161 requirements. The title is misleading by stating the amendment grants a right to "treatment and rehabilitation." In fact, offenders escape prosecution once 18 months has elapsed from the date they elected treatment, whether or not they have been rehabilitated. Proponents assert that summaries are acceptable if they give sufficient notice to allow voters "an opportunity to become fully informed" by their own investigations. The Court has never endorsed this lenient interpretation. Summaries themselves must inform voters of the true meaning and ramifications of amendments and provide the information necessary to allow an informed vote. If drafters could meet §101.161 obligations by merely referring the electorate to the text, sponsors could meet their §101.161 obligations with the five word caveat "See amendment for important features."

Contrary to the proponents' claim, the matters addressed after the first sentence

of the summary are not mere insignificant "details," but material issues concerning the amendment's chief purpose. In any event, the drafters are still obligated not to misstate the substance of the amendment. This summary omits material information necessary to make it not misleading, including the fact that the amendment removes judicial authority, the stipulation allowing treatment for those committing multiple offenses, the existence of the Drug Court Program it abolishes, and the fact that an offender may only be found "unamenable to treatment" after "multiple programs and violations." The disagreement between the Attorney General and the proponents as to whether the amendment grants treatment to felons underscores the difficulty voters would have in understanding its meaning. If the state's chief law enforcement officer responsible for interpreting the criminal laws is confused as to a key component of the amendment, how can it be said the average voter would not be confused. The proponents fail to justify the summary's failure to include the proviso that all offenses in a "single criminal episode" must be treated as a single offense. By this omission, the summary misleads voters into believing the amendment grants a right to treatment only to those committing their first two offenses. Voters are not informed that those committing three or more offenses as part of a single criminal episode are also constitutionally entitled to treatment. The summary is therefore fatally defective.

As to the summary's failure to mention the amendment's effect on the authority

of the state judiciary, the proponents wrongly assert that concerns over the loss of the judiciary's role are exaggerated. They claim the judiciary retains the duty to monitor offenders and determine whether violations merit transfer to new programs. The amendment, however, grants this authority to "qualified professionals." As to a judge's authority to determine treatment eligibility, this is merely the ministerial duty of applying the amendment's automatic eligibility requirements. The proponents' assertion that the summary meets the legal requirements "regardless of the level of detail it includes about . . . treatment professionals," evades the point that the summary omits any reference whatsoever to "treatment professionals."

As to the summary's false statement that an offender must successfully complete treatment or spend "18 months in treatment" before escaping prosecution, the proponents' arguments are unpersuasive. Their claim that the wording is only "slightly different" and "of no consequence," is patently erroneous. As to their repeated complaint that the summary "is not allowed enough words" to inform the voters on this point, the proponents ignore the fact that they have an absolute obligation not to mislead voters on such material issues. Far from requiring that offenders spend "18 months in treatment," the amendment actually contains no requirement that any treatment be received whatsoever. It only requires that 18 months pass from the date an offender elected treatment, whether or not an offender

spends any time in treatment. In this respect, the ballot summary does not merely confuse voters, it actively deceives them on one of the amendment's most crucial components.

The summary omits the material qualification that offenders cannot be found "unamenable to treatment" until they have had "multiple programs and violations." The proponents claim that because the phrase "unamenable to treatment" does not limit an offender to a "single opportunity to succeed in the treatment program," the summary is not misleading. Like the flowers which bloom in the spring, whether an offender has more than one chance to succeed in treatment is irrelevant to this issue. To intelligently cast their ballots, voters have a right to be informed in the summary of the peculiar and limited circumstances under which offenders can be found unamenable to treatment and thereby face prosecution.

C. Despite their claim that voters may refer to the text for important details, the proponents neglect to note that the text also fails to provide information necessary to enable voters to make an informed decision. For instance, the text does not define "single criminal episode," "in connection with," and "same criminal episode," all of which are material concepts subject to radically different interpretations.

D. The amendment creates a right to treatment for "Nonviolent Drug Offenses," rather than "Nonviolent Drug Offenders. See Title to Amendment.

Proponents' counsel fail to recognize this critical distinction, and misstate the purpose of the amendment as one which gives "nonviolent drug offenders" a right to receive treatment. No further proof need be shown to demonstrate the lack of clarity in the title and summary.

E. Not content with the single subject rule announced by the Court, the proponents announce a new rule and then proclaim the amendment valid under their refashioned rule. No argument, however, can lessen the substantial impact the amendment has on multiple government functions. Contrary to the proponents' claim, the amendment does not merely build upon the existing drug court program, it radically alters and redefines it. The Marine Net Fishing case is distinguishable, as the amendment there did not have the same impact on government functions and constitutionally vested powers.

F. The amendment is also defective for other reasons set forth in our Initial Brief, but not addressed in the proponents' Initial Brief.

ARGUMENT

A. While Acknowledging the Inappropriateness of Addressing the Merits of the Initiative, the Proponents Proceed to Address the Merits of the Initiative.

The Court has repeatedly held that it does not have the authority or responsibility to rule on the merits or wisdom of proposed initiative amendments. See Advisory Opinion to the Attorney General re Tax Limitation, 644 So.2d 486, 489 (Fla. 1994). While paying lip service to this limitation, the proponents spend the brunt of their statement of the case and facts and 36 pages of their Appendix in an attempt to justify their initiative on its merits. Their Brief and attachments are replete with references to initiatives in California and Arizona which were sponsored by the same legalization entities behind the initiative in question. The primary "authorities" relied on in the Appendix are none other than the initiative's sponsors, the California and Florida Campaigns for New Drug Policies. Not surprisingly, these sponsors tend to present a favorable account of the California and Arizona initiatives. More objective accounts are much less encouraging, showing in California, for instance, that nearly 25% failed to show up at treatment centers, that those who did attend were given poor oversight or dropped out and disappeared, that there is inadequate funding for the services required and that there is "nothing to hold over offender's heads except the threat of more treatment." Christian Science Monitor, Sept. 25, 2001 *"Prop. 36*

Implementation Marred by No-Shows." In any event, the merits of the proposed amendment are irrelevant because (1) the Court has rejected such an analysis, (2) the laws governing initiatives differ in every state, and (3) the California and Arizona initiatives differ in material respects from the initiative in question.

B. Proponents' Arguments Concerning the Title and Summary are Unpersuasive

1. Contrary to the Proponents' Claim, the Court Vigorously Enforces the Clear and Unambiguous Requirement.

The proponents suggest in their Initial Brief that the Court is extremely reluctant to strike ballot initiatives for failure to comply with section 101.161. To the contrary, the Court "vigorously enforce[s] the clear and unambiguous requirement" and has repeatedly struck ballot initiatives (1) which "do not adequately define terms," (2) which fail to mention constitutional provisions they affect, (3) which contain divergent terminology requiring "the voter to infer a meaning which is nowhere evident on the face of the summary itself" and (4) "which do not adequately describe the general operation of the proposed amendment." See Advisory Opinion to the Attorney General re Amendments to Bar Government From Treating People Differently Based on Race, 778 So.2d 888, 896-99 (Fla. 2000); Smith v. American Airlines, 606 So.2d at 621. As explained in our Initial Brief, the proposed amendment suffers from each of the above deficiencies.

2. The Title of the Amendment Incorrectly Indicates that the Amendment Grants a Right to be Rehabilitated.

The Title of the proposed amendment is "Right to Treatment and Rehabilitation for Nonviolent Drug Offenses." While the proposed amendment can be said to create a constitutional right to be treated, it emphatically does not grant a right to be "rehabilitated." To be accurate and not misleading, the Title should have been worded "Right to Treatment or Rehabilitation for Nonviolent Drug Offenses." Under the actual text of the amendment, offenders totally escape the possibility of prosecution, sentencing or supervision once 18 months has elapsed from the date they elected to receive treatment, whether or not their treatment was "successful" and whether or not they have achieved "rehabilitation." Amendment, Section (e). The amendment is internally inconsistent in that it purports in its Title to extend a "right to treatment and rehabilitation," but implicitly acknowledges in its text that many offenders will not be "rehabilitated" and that this so-called "right" is illusory and often unattainable. By falsely stating that the amendment grants a right to "treatment and rehabilitation," the Title is misleading and inaccurate.

3. Proponents Incorrectly Argue that the Requirements of Section 101 are Met if Voters are Given the Opportunity to Educate Themselves by Reading the Text of the Amendment.

Relying on a statement by Justice Boyd in his concurring opinion in Carroll v. Firestone, 497 So.2d 1204, 1207 (Fla. 1986), the sponsors contend that summaries are acceptable as long as inquisitive voters have an opportunity to become fully informed by their own investigations concerning the text of proposed amendments.[1]

In their Brief, the proponents have repeatedly invoked this erroneous notion that summaries need only give sufficient notice to allow voters "an opportunity to become fully informed." Proponents' Initial Brief at 15. The proponents argue, for instance, that the Attorney General's objection to the summary's omission of the mandatory

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[1]Justice Boyd tended toward the populist view that all initiative positions should be allowed to remain on the ballot for the vote of the people. See Carroll v. Firestone, 497 So.2d at 1207 (Boyd, J., concurring); Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337, 342 (Fla. 1978) (Boyd, J., concurring specially); Smathers v. Smith, 338 So.2d 825, 832 (Fla. 1976) (Boyd, J., concurring specially). Even when reviewing a ballot summary which the majority found to be blatantly deceptive and misleading, Justice Boyd concurred in the majority opinion to remove the amendment only "with reluctance," lamenting that he simply did "not feel there was [a] lawful basis to dissent." Askew v. Firestone, 421 So.2d 151, 157 (Fla. 1982). In any event, the sponsor's quote from Justice Boyd must be read in context and cannot mean that summaries are sufficient when they merely tweak the voters' interest in examining the text of the amendment. Justice Boyd never interpreted section 101 in that manner and in fact recognized that the "law requires that before voting, the citizen must be able to learn from the proposed question and explanation [in the summary] what the anticipated results will be." Askew v. Firestone, 421 So.2d at 156. (Boyd, J., concurring specially).

requirement that multiple offenses in the same episode be treated as a single offense "presumes that the voter will not take the time to read and understand the text of the amendment." Id. at 18. They argue it is enough for the summary to disclose that treatment "must be offered for the first two offenses," because "any voter who cares to understand more fully what is meant by the term 'offenses' need only proceed to read the text of the Amendment." Id. at 18. As to the summary's blatant misstatement that offenders cannot be sentenced or prosecuted upon successful completion or "18 months in treatment," the proponents argue that the "time limit is accurately disclosed in the summary so that the voter may become further educated about the details of its operation if the voter so chooses." Id. at 25. As to the summary's total failure to notify the electorate that offenders cannot be found unamenable to treatment absent "multiple programs and violations," the proponents reason that "[t]he summary discloses the concept of an individual 'unamenable' to treatment and allows the voter the opportunity to become educated as to what that means. That is enough." Id. at 26.

This Court has never endorsed the proponents' lenient interpretation of the section 101.161 requirement. Instead, the Court has repeatedly held that the summary itself must "clearly and unambiguously inform the voters of the purpose and substance of the amendment" and "assure that the electorate is advised of the true meaning, and

ramifications, of an amendment" by providing whatever information is necessary to allow the public to "cast an intelligent and informed ballot." Askew v. Firestone, 421 So.2d at 155; Advisory Opinion to the Attorney General re Lower Casino Authorization, Taxation and Regulation, 656 So.2d 466, 469 (Fla. 1995); Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So.2d 798, 803 (Fla. 1998); Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998).

As the Court has stated, section 101.161 requires the Court "to ensure that the ballot summary clearly communicates what the electorate is being asked to vote upon." Smith v. American Airlines, Inc., 606 So.2d 618, 621 (Fla. 1992). The "people who are asked to approve [constitutional amendments] must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself. . . ." Smathers v. Smith, 338 So.2d 825, 829 (Fla. 1976) (emphasis added). This Court, then, requires that ballot summaries themselves "explain to the reader" or "sufficiently inform the public" of important aspects of proposed amendments. Term Limits Pledge, 718 So.2d at 803, citing Advisory Opinion to the Attorney General re Fish & Wildlife Conservation Commission, 705 So.2d 1351, 1355 (Fla. 1998).

Without question, the number of actual offenses a person must commit to forfeit his "constitutional right" to treatment, the circumstances under which someone may

be found "unamenable" and the circumstances under which an offender in treatment shall be automatically released from further treatment and prosecution are "important aspects of the proposed Amendment" of which the public should be informed in the ballot summary. Term Limits Pledge, 718 So.2d at 803.

This Court has never ruled that proponents of ballot initiatives can fulfill their obligations under section 101.161 by merely referring the electorate to the text of the amendment itself. If this were an acceptable practice, initiative sponsors could meet their section 101.161 obligations with the five word caveat "See Amendment for Important Features." Section 101.161(1) provides, however, that "the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot," not that the substance of the amendment shall be "referred to" or "incorporated by reference." The summary itself must "accurately describe the scope of the text." Advisory Opinion to the Attorney General re Casino Authorization, Taxation, and Regulation, 656 So.2d at 469. As Justice Overton observed in his concurring opinion in Evans v. Firestone, "[w]e emphatically stated in Askew v. Firestone, 421 So.2d 151, 155 (Fla. 1982), that the ballot language must be objective and fair and must sufficiently advise the voter so as to permit a knowledgeable decision on the merits of the proposal." 457 So.2d, 1351, 1356 (Fla. 1984). (emphasis added).

While this Court has recognized that voters are expected to inform themselves about the details of proposed amendments, "the availability of public information about a proposed amendment cannot be a substitute for an accurate and informative ballot summary." See In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994); Smith v. American Airlines, Inc., 606 So.2d at 621. As the Court stated in Askew v. Firestone, "[t]he burden of informing the public should not fall only on the press and opponents of the measure – the ballot title and summary must do this." 421 So.2d at 156.

4. Proponents Incorrectly Claim that the Opponents Should Not Be Permitted to Raise Objections to So-Called Nonessential "Details" in the Summary.

The proponents argue that the summary would have been adequate had it stopped after its first sentence and that the additional detail in the summary was only furnished in an attempt to be thorough. Proponents' Initial Brief at 15. This argument is unfounded. As this Court observed in the above cases, it is the obligation of the ballot summary to provide fair notice of the content of a proposed amendment so that the voter will not be "misled as to its purpose, and can cast an intelligent and informed ballot." Health Care Providers, 705 So.2d at 566. Accordingly, ballot summaries are defective if they omit material facts necessary to make them not misleading. Limited Political Terms, 592 So.2d at 228. The subjects addressed after the first sentence of

the summary are not mere insignificant "details," but are material issues which "cut to the very core of the chief purpose of the proposed amendment." Term Limits Pledge, 718 So.2d at 803-804.

As discussed in our Initial Brief, the summary violates the clear and unambiguous language requirement of section 101.161 by omitting material information necessary to make it not misleading. This information includes, among other things, (1) the fact that the amendment removes authority from the state judiciary, (2) the stipulation in the amendment that allows a treatment right for those committing multiple offenses, (3) the very existence of the statewide Treatment Based Drug Court Program it abolishes, (4) the fact that an offender may only be found "unamenable to treatment" after "multiple programs and violations," and (5) the fact that upon completion of treatment an offender cannot even be placed under continued "supervision" for the underlying offense. Even if the proponents were correct in asserting that the summary merely provides non-essential detail, the drafters still retain the obligation to not misstate the substance of the amendment as this summary clearly does.

When the appropriate test is applied to the issues addressed in Section I of the Proponents' Initial Brief, it is clear the ballot summary violates section 101.161 by omitting material facts necessary to make it not misleading, by failing to identify

constitutional provisions substantially affected by the amendment, by failing to define legally significant terms, by including fatal divergent terminology and by containing serious falsehoods.

5. The Disagreement Between the Attorney General and the Proponents Over "The Correct Interpretation" of the Amendment Concerning the Option of Treatment for Felony Offenders Underscores the Difficulty the Average Voter Would Have in Understanding its Meaning.

The Attorney General interpreted the proposed amendment to exclude the option of treatment for felony offenders. The proponents say the Attorney General has "misread" the amendment and that "the correct interpretation" is that the amendment grants treatment to felons. Proponents' Initial Brief at 16-17. The proponents claim that "when the text is correctly interpreted, it becomes clear that the summary clearly and accurately discloses the essence of the text." Id. at 17. Whatever the "correct interpretation" of the amendment, the proponents' argument merely underscores the ambiguous and confusing nature of the proposed amendment. If, in his careful reading of the amendment, the chief law enforcement officer of the state responsible for interpreting and applying the criminal laws is confused as to the meaning of the amendment, how can the average voter be expected to understand its meaning? Like the defective initiative in Smith v. American Airlines, the amendment and summary are not written "clearly enough for even the more educated voter to understand" them. 606 So.2d at 621. The two largest public and private law firms in

Florida, with all their resources, present differing, though plausible, interpretations as to one of the most important components of the proposed amendment – whether the constitutional right will apply to felons. Under these circumstances, how can it be said that the average voter would not be confused. As this Court has held, "[w]e cannot approve an ambiguity that will in all probability confuse the voters who are responsible for deciding whether the amendment should be included in the state constitution." In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination, 632 So.2d 1018, 1021 (Fla. 1994).

6. The Proponents Fail to Legally Justify the Summary's Failure to Include the Proviso that All Offenses in a "Single Criminal Episode" Must be Treated as a Single Offense.

As set forth on pages 35-37 of our Initial Brief, the summary states that the right to treatment will be available to offenders who commit their "first two offenses," but omits any reference to the proviso in the text requiring all offenses in a "single criminal episode" to be treated as a single offense. Voters reviewing the summary would falsely be led to believe that the amendment grants a constitutional right to treatment for those committing their first two offenses only, and that it will not apply to those committing three or more offenses. The ballot initiative, therefore, "flies under false colors" and misleads the voters "as to the content and purpose of the proposed amendment." Askew v. Firestone, 421 So.2d at 156. The proponents

respond to this issue by first arguing that it is the voter's responsibility to "take the time to read and understand the text of the amendment" and that "any voter who cares to understand more fully what is meant by the term 'offenses' need only proceed to read the text of the amendment." Proponents' Initial Brief at 18. As discussed above, this analysis misstates the law, and eliminates the need for a ballot summary altogether.

The proponents also argue that despite the omission of this key proviso, when "viewed in its proper context, the summary is not misleading." Id. at 19. The proponents then artfully redefine the amendment's chief purpose into something which the summary does not contradict, and pronounce the summary "not misleading" in its new and "proper context." Id. at 19. They suggest that the burning question for the average voter would be merely "how many times a drug offender can elect this diversion in lieu of prosecution." Id. at 19. Since the answer to that question is "twice," the proponents reason that the "reference in the summary to two offenses" is full and adequate disclosure. Id. at 19. Under their analysis, the amendment would have been more accurately named the "Right to Elect Treatment Twice" initiative. The proponents carefully avoid any discussion of the much more relevant and substantive question as to the actual circumstances under which offenders will be granted a constitutional right to treatment. The summary will lead voters to believe

the amendment grants the right to treatment to those committing their first two offenses only and that those who commit three or more offenses will be ineligible for the treatment option offered by the amendment. This issue, as to the circumstances under which offenders will have a constitutional right to treatment, "cuts to the very core of the chief purpose" of the amendment. Term Limits Pledge, 718 So.2d at 803-804. Because the "single criminal episode" proviso in the amendment is entirely omitted from the summary, voters are not informed in the summary that those committing three or more offenses as part of a single criminal episode are constitutionally entitled to treatment under the amendment. Because the summary gives the reader the erroneous impression that the amendment applies to certain individuals while the actual text suggests it applies to others, the summary is fatally defective. See In Re Advisory Opinion to the Attorney General – Save Our Everglades, 636 So.2d 1336, 1341 (Fla. 1994).

7. The Proponents' Arguments As to the Summary's Failure to Mention the Amendment's Effect on the Authority of the State Judiciary Are Unconvincing.

As we argued in our Initial Brief, the summary makes no mention whatsoever of the fact that under the amendment, substantive decisions affecting liberty interests are removed from the state judiciary and transferred to private individuals. The proponents claim that concerns over the loss of the judiciary's role are exaggerated.

They assert that the judiciary retains authority "to determine whether any given offender is eligible to elect treatment and rehabilitation." Id. at 20. This "judicial determination," however, is nothing more than the ministerial duty of identifying when an offender meets the automatic eligibility requirements under the amendment. The proponents also argue that under the amendment the judiciary has "the continuing duty to monitor the offender," but the amendment does not say this and in fact provides that the "methods of monitoring an individual's progress while in treatment shall be made by qualified professionals." Id. at 20; Amendment, Section (c). The proponents claim the trial judge retains "the authority to determine whether violations or other problems in the course of treatment merit transfer of the offender to a new program," but the amendment provides otherwise, stating that "qualified professionals" will determine the "type and duration of the appropriate treatment program or programs that an individual shall receive." Id at 20-21; Amendment, Section (c). The only authority reserved to the court under the amendment is the determination whether the person is unamenable to treatment. This determination, however, is severely restrictive. An individual may not be removed from treatment until he has had "an independent evaluation by a qualified professional" and "multiple programs and violations." Amendment, Section (b).

The proponents also claim that even if the amendment does change the

judiciary's role, amendments are supposed to bring about change and the summary is not fatally misleading for failure to identify the effect it has on the judiciary. This Court rejected virtually the same argument regarding the changed role of the Secretary of State in the Term Limits Pledge case. 718 So.2d at 803-4.

The amendment fails to even mention the involvement of qualified professionals, much less the extensive constitutional authority granted them under the amendment. The proponents claim the summary meets the legal requirements "regardless of the level of detail it includes about the interplay of the trial court and treatment professionals." Id. at 22 (emphasis added). The problem is, there is no "level of detail" in the summary "about the interplay of the trial court and treatment professionals" because the summary is entirely void of any reference whatsoever to qualified or treatment professionals.

The proponents assert that, in any event, the amendment adequately discloses the effect it has over the judiciary when it states that offenders may elect treatment instead of sentencing "for first two offenses; discretionary with court thereafter." Id. at 22. The argument is meritless. This phrase tells voters only that the right to treatment is automatic for the first two offenses and that a court can still authorize treatment for subsequent offenses. The summary says nothing of the fact that the amendment strips the judiciary of its constitutionally vested powers under Article V,

removes the judiciary's articulated authority under section 397.334, transfers quintessential judicial decisions affecting fundamental liberty interests from the state judiciary to unaccountable "qualified professionals," and essentially creates a de facto court system in violation of Article V, section 1.

8. The Proponents' Arguments as to the Summary's False Assertion that a Defendant Must Successfully Complete Treatment or Spend "18 Months in Treatment" Before Being Free of Prosecution Are Meritless and Merely Highlight the Weakness in Their Position.

The summary contains a complete falsehood concerning a material feature, namely, when a defendant is free of prosecution or sentencing. The summary states that once a defendant has either successfully completed treatment or spent "18 months in treatment," he can not be further prosecuted or sentenced. The text of the amendment provides an entirely different period, namely, "18 months after the date the individual elected to receive appropriate treatment." Amendment, Section (e).

The proponents' arguments concerning this patent misrepresentation merely highlight the weakness in their position. First, they claim the wording is only "slightly different" and "of no consequence." Proponents' Initial Brief at 23. That is somewhat like informing your spouse that you "still love her" but are no longer "in love with her," while assuring her that though the wording is "slightly different," it is "of no consequence."

Second, they complain "the summary is not allowed enough words to repeat

these details," and spend three pages attempting to explain why this blatant falsehood on a material issue "is inconsequential." Id. at 24. No legal argument, however, can convert a materially deceptive summary into an accurate one. It would be difficult to imagine a more material issue for the voter than the determination of when a defendant will be free of prosecution or sentencing under the amendment. This is precisely the type of information which would reasonably be taken into consideration by voters deciding on the amendment.

Voters will wrongly conclude from the summary that further prosecution and sentencing are automatically excused after an offender has been "in treatment" for 18 months. In reality, because there are inherent delays associated with the assessments and program assignments referred to in the amendment, nearly all offenders who have not otherwise successfully completed treatment will be automatically released from the criminal justice system after spending less than "18 months in treatment" as promised the voters in the summary.

What's more, there is actually no requirement in the amendment itself that any treatment be received whatsoever. All the amendment requires is (1) that an offender file an election and (2) that 18 months pass from that date. In fact, the amendment provides a ready means by which offenders may avoid prosecution and treatment altogether. A person arrested for the purchase of heroin, for example, could

immediately elect treatment, eventually be assigned to a treatment program, attend one meeting and then jump bail and allude capture until 18 months from "the date [he] elected to receive appropriate treatment." Amendment, Section (e). Because of yet another undisclosed provision in the text, that offenders cannot be found "unamenable to treatment" unless they have already had "multiple programs and violations," the fugitive heroin purchaser who participated in only one program cannot be found "unamenable to treatment" and therefore cannot be terminated from treatment early to face prosecution. Under this circumstance, the heroin purchaser will escape both treatment and prosecution after 18 months has passed from the date he elected treatment. The above scenario cannot possibly be deduced from the summary because the public is neither told of the "multiple programs and violations" proviso nor of the "18 months after the date of election" provision.

This Court has repeatedly struck ballot summaries which were "ambiguous," which "create[d] . . . false impression[s]" or which "could lead . . . voter[s] to believe" something inaccurate about the underlying amendment. Casino Authorization, Taxation and Regulation, 656 So.2d at 469; Advisory Opinion to the Attorney General re Tax Limitation, 644 So.2d 486, 495 (Fla. 1994); Askew v. Firestone, 421 So.2d at 156; Amendment to Bar Government From Treating People Differently Based on Race, 778 So.2d at 899; see also, Restricts Laws Related to Discrimination, 632 So.2d

at 1021 ("a voter might conclude" from the summary that the amendment would restrict existing laws only, when it would also restrict future laws); Smith v. American Airlines, 606 So.2d at 621(reading the summary, "the voter could conclude" something which the underlying amendment did not provide). In this instance, the ballot summary does not merely confuse or mislead. It actively deceives the voter on one of the amendment's most crucial components. By telling the voter that an offender must successfully complete treatment or spend at least "18 months in treatment" before he can escape prosecution or sentencing, the summary deceives the voter on a material point and therefore must be stricken from the ballot.[2]

9. The Proponents Fail to Justify the Summary's Omission of the Material Qualification that Offenders Cannot be Found Unamenable to Treatment Until They Have Had "Multiple Programs and Violations."

The summary states merely that "an individual unamenable to treatment may

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[2]The proponents state that "the inability of the summary to explain within its 75-word limit exactly how the eighteen month limit would work in practice is far from fatal." Proponents' Initial Brief at 25. They also state that "the summary . . . is not allowed enough words to repeat these details" about the actual "18 months after the date of election" provision. Id. at 23. It is the responsibility of those proposing amendments, however, to accurately convey "the substance of the amendment" within the 75-word statutory limit. § 101.161(1), Fla. Stat. (2000). They may not use the 75-word limit as a justification for deceiving the public on a material issue. Smith v. American Airlines, 606 So.2d at 621 (the "word limit does not give drafters . . . leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement" in lieu of "clarity and meaningful information."

be prosecuted or sentenced." The text contains a material qualification to this concept which is no where mentioned in the ballot summary, namely that an individual can only be found unamenable to treatment "after multiple programs and violations and upon an independent evaluation by a qualified professional." Amendment, Section (d). This Court has repeatedly emphasized that ballot initiatives must adequately define legally significant terms to permit voters to cast their ballots intelligently. Amendments to Bar Government From Treating People Differently Based on Race, 778 So.2d at 898-99; Peoples' Property Rights Amendments, 699 So.2d at 1309. Like the defective summary in Amendments to Bar Government From Treating People Differently Based on Race, the summary's reference to the phrase "unamenable to treatment" leaves voters "to guess at its meaning" and to "rely on their own conceptions" of what the phrase should mean. 778 So.2d at 899.

The proponents argue that since the phrase "unamenable to treatment" does not limit the offender to a "single opportunity to succeed in the treatment program," the summary "accurately reflects the text and is not misleading." Proponents' Initial Brief at 25-26. The proponents' argument evades the point. Contrary to the proponents' suggestion, the problem extends far beyond a potential voter being hung up on the notion that an offender may have more than one chance to succeed in treatment. This amendment constitutionally guarantees that no matter how incorrigible, disruptive or

"unamenable" to treatment, an offender can under no circumstances be removed from treatment if he has not already had "multiple programs and violations," as well as "an independent evaluation by a qualified professional." Amendment, Section (d).

The proponents complain that the summary "cannot possibly address all of the potential scenarios that may occur once an offender enters treatment," that the meaning of the phrase "is provided in the text" of the amendment, and that the summary's disclosure of the "concept" of an offender being unamenable to treatment "allows the voter the opportunity to become educated at to what that means." Proponents' Initial Brief at 26. Unfortunately, none of these arguments have been endorsed by the Court, which requires that summaries include "material facts necessary to make [them] not misleading" and that they define significant terms. Limited Political Terms, 592 So.2d at 228; Restricts Laws Related to Discrimination, 632 So.2d at 1021; Amendments to Bar Government From Treating People Differently Based on Race, 778 So.2d at 898-99; Peoples' Property Rights Amendments, 699 So.2d at 1309. The proponents' arguments might be more tenable had the phrase not been defined so oddly in the text of the amendment itself.

"All the Court asks for is 'fair notice' of the meaning and effect of the proposed amendment." Restricts Laws Related to Discrimination, 632 So.2d at 1021. In this case, in order to receive "fair notice," the voter has a right to be informed in the

summary of the highly restrictive and peculiar circumstances under which an offender can be found "unamenable to treatment" and thereby face prosecution and sentencing under the amendment. The omission of this information is misleading and precludes the voters from being able to cast their ballots intelligently.

C. Despite Their Claim That Voters May Refer to the Text of the Amendment for Important Details, the Proponents Neglect to Note that the Text of the Amendment also Fails to Provide the Information Necessary to Enable the Voters to Make an Informed Decision.

The proponents repeatedly, though incorrectly, assert that if voters are interested, they may refer to the text of the amendment for the answer to questions concerning so-called "details" of the amendment. The proponents fail to observe, however, that in many respects the text of the amendment also fails to provide information essential and material to the voter. For instance, as noted above, in a far-reaching and ill-defined section of the proposed amendment, the drafters state that "[i]f more than one qualifying offense under this section occurs during a single criminal episode, it shall be considered a single offense." Amendment, Section (a). Unfortunately, the phrase "single criminal episode" is no where defined in the proposed amendment. Given this lack of definition, the provision is subject to radically different interpretations. Would a middleman in a drug ring who has purchased heroin on 60 occasions over a two-year period be deemed to have committed his offenses during a "single criminal episode?" As to the more mundane

multiple possessor, will all prior possession offenses, no matter how many, be deemed to be part of a "single criminal episode," because the defendant claims to be an "addict" or abuser?

Section (b) states that the amendment does not apply to those who "in connection with the same criminal episode as the drug offense described in subsection (a)" are also charged with or convicted of felonies and other specified offenses. This provision is clearly material as it deals with one of only two exclusions to the right to "treatment and rehabilitation" contained in the amendment. The text of the amendment, however, fails to define the phrases "in connection with" and "same criminal episode." Accordingly, voters wishing to become "further educated" by "taking the time to read" the text, as the proponents suggest, will be no better informed as to what is meant by the phrases or how the courts may interpret them. Proponents' Initial Brief at 18, 25-26.

D. The Ambiguous and Confusing Nature of the Proposed Amendment is Evidenced by Counsels' Own Inability to Accurately Describe the Chief Purpose of the Amendment in the Proponents' Initial Brief.

There is no better evidence of the confusion and lack of clarity in the proposed amendment than counsels' own inability to accurately describe the substance of the amendment in the Proponents' Initial Brief. In a most artful contrivance, the drafters

of the proposed amendment have made it appear from its summary that large categories of serious and violent offenders are excluded from its lenient provisions. A review of the text reveals, however, that no category of offender is excluded no matter how violent or notorious. Under this amendment, Ted Bundy, Timothy McVeigh and Pablo Escobar would all have a constitutional right to escape incarceration and to receive "treatment and rehabilitation," as long as their "violent crimes" or imprisonment occurred more than five years earlier and so long as their "serious crimes" were not committed "in connection with the same criminal episode" as the underlying purchasing or possession offense. Amendment, Section (b). This unsettling result, however, is not readily apparent from the summary, which is written in such a way as to leave a different impression. The fact that the drafters consciously intended to craft an amendment which actually grants treatment to violent offenders is evidenced by their careful description of the amendment in its title as one creating a "Right to Treatment and Rehabilitation for Nonviolent Drug Offenses," rather than a "Right to Treatment and Rehabilitation for Nonviolent Drug Offenders."

Counsel for the proponents have failed to recognize this critical distinction. Instead, they state that "[t]here can be no doubt that the single dominant plan or scheme of the drug treatment amendment is to give nonviolent drug offenders a right to receive treatment and rehabilitation instead of sentencing or incarceration."

Proponents' Initial Brief at 29. Ironically, in the very section of their Initial Brief in which they argue that the chief purpose and effect of the amendment is clearly set forth in the ballot title and summary, counsel for the proponents misstate the chief purpose and effect of the ballot initiative. No further proof need be shown to demonstrate the lack of clarity in the title and summary.

Despite the proponents' claim that the chief purpose of the amendment is to give "nonviolent drug offenders a right to receive treatment and rehabilitation," violent drug offenders still have an absolute right under the amendment to receive treatment, so long as their offenses or prison terms occurred more than five years earlier. The amendment's chief purpose, then, is not to give "nonviolent drug offenders" (as stated in the Proponents' Brief) the right to receive treatment, but to give this right to those committing "nonviolent drug offenses" (as stated in the Title), whether or not they are violent drug offenders or criminals. This distinction is critical, but not clearly evident upon reading the summary. Id. at 29; Amendment at Title. Despite the clever use of the phrase "nonviolent drug offenses" in the title to the amendment, voters reading the title and summary are left with the impression that the right to treatment is being extended only to "nonviolent drug offenders." After all, the proponents' attorneys conveyed this same misimpression in their own Brief. Proponents' Initial Brief at 19, 29 (As the proponents put it at page 19 of their Initial

Brief, "[t]he chief purpose of the amendment is to give nonviolent drug offenders a right to elect treatment and rehabilitation instead of sentencing or incarceration.") Because the chief purpose of the amendment is not clearly and unambiguously set forth in the title and summary, the initiative must be stricken from the ballot.

E. The Proponents' Arguments Concerning the Single Subject Rule are Unavailing.

1. In Addressing the Question Whether the Amendment Substantially Alters or Performs the Functions of Multiple Branches of Government, the Proponents Modify the Rule Announced by the Court and Argue that the Amendment Does Not Violate Their Refashioned Rule.

This Court has stated that a proposed amendment violates the single-subject rule when it "substantially alters or performs the functions of multiple branches" of government. Fish and Wildlife Conservation Commission, 705 So.2d at 1354; Evans v. Firestone, 457 So.2d at 1354 (when amendment "changes more than one government function, it is clearly multi-subject.") Undoubtedly concerned that their amendment fails this test, the proponents announce a new test based on a so-called "common analytical thread" they have divined from their review of the Court's decisions. Id. at 32. Not content to rely on the rule as stated by the Court, the proponents refashion a rule to their liking, claiming that as to the multiple function test, the Court has always "determine[d] whether the impact that the proposed amendment will have on each branch of government is limited to that specifically

related to the single-subject of the amendment." Id. If so, the proponents claim, "the Court approves the amendment." Id.

This new rule has rather limited application and utility. Its purpose is to render valid the proposed amendment in question, which is invalid under the real test announced and applied by the Court. At pages 10-22 of our Initial Brief, we applied the real test to the proposed amendment to demonstrate that it substantially altered and performed multiple functions of each branch of government. We identified each of the functions altered and performed and showed how the amendment would substantially alter or perform them by, among other things, (1) removing powers vested under the Constitution, (2) removing articulated statutory authority, (3) transferring constitutionally vested functions to private individuals, (4) modifying penalties for the possession or purchase of all illegal drugs, (5) authorizing a term of treatment for misdemeanor offenders which exceeds the maximum imposed by the Legislature, and (6) modifying the felony provisions set forth in Florida's Constitution. No artful contrivance or argument can lessen the substantial impact of the amendment on multiple government functions.

2. Proponents are Incorrect in Asserting that the Amendment Merely Builds upon the Current Statewide Drug Court Program.

In their discussion of the amendment's impact on various government functions, the proponents suggest that the amendment merely builds upon the current

statewide Treatment-Based Drug Court Program codified in section 397.334, Florida Statutes (2001). This position is untenable. The differences between the current system and the system contemplated under the amendment are remarkable. The proponents assert that Florida law "currently allows diversion to treatment on motion of either party or the trial court itself." Proponents' Initial Brief at 36. Under current law, however, the trial court alone decides whether an offender should be diverted to treatment. Under the amendment, the defendant alone makes this determination, and an entire class of offenders will be granted an automatic right to treatment with no input whatsoever from the executive or judicial branch.

The amendment assumes that everybody arrested for drug possession or purchasing has a need for treatment and therefore, under the mentality of the drafters, has a constitutional right to treatment. Under the current system, judges decide which offenders are best suited for treatment. This point underscores a fallacy in the proponents' suggestion that the current statewide Treatment-Based Drug Court Program does not provide treatment to many who are "eligible." Proponents' Initial Brief at 6-7. The current system acknowledges that not everyone arrested for drug possession or purchasing has a need for treatment. The treatment option is not automatic under current law but may apply at the court's discretion after assessments supporting the need for such treatment. Under the proposed amendment, however, all

arrestees in the identified class have an automatic right to treatment, whether or not they need it.

Under current law, and incidentally under California's Proposition 36 Amendment touted by the proponents, the courts and probation office retain authority to monitor and supervise the offender's general activities and progress in treatment. Under the proposed amendment, however, there is no provision for judicial monitoring or supervision. Instead, the type and duration of appropriate treatment, the methods of monitoring an individual's progress while in treatment, the authority to transfer an individual from one treatment program to another and the exclusive right to determine when an individual's treatment has been successful are all given over to so-called "qualified professionals." Amendment, Sections (c) and (e). Given these and other fundamental changes wrought by the amendment which are chronicled in our Initial Brief, there is little to support the proponents' assertion that "the drug treatment amendment merely builds on the current state of Florida law." Id. at 34.

3. The Marine Net Fishing Case Relied on by Proponents is Not Controlling.

The proponents' reliance on the Marine Net Fishing case on pages 37 and 38 of their Initial Brief is unfounded. Advisory Opinion to the Attorney General -- Limited Marine Net Fishing, 620 So.2d 997 (Fla. 1993). The proposed amendment in that case cannot be said to have substantially affected or altered the judiciary's role.

It did not remove a defendant's incentive to enter into plea bargaining. It did not alter the discretion of the court and the prosecution regarding sentencing, prosecution, or continued court supervision. It did not eliminate or transfer constitutionally-vested powers. It did not supplant a statewide, court-administered and legislatively-mandated program of national acclaim. Given these major differences, it is hard to understand the proponents' assertion that the "drug treatment amendment is far less invasive than was the Net Ban Amendment." Proponents' Initial Brief at 38. This characterization is difficult to accept in light of the proponents' own claims that in calendar year 2000 alone, nearly 100,000 adults were arrested in Florida for drug possession, meaning that the proposed amendment would directly affect hundreds of thousands of citizens, whereas the Net Ban Amendment applied to a relatively small group of commercial net fishermen. See Appendix to Proponents' Initial Brief at 1, Amendment Petition Form, with Attached Position Papers.

F. The Amendment is Defective for a Number of Other Reasons Not Addressed in Proponents' Initial Brief.

The amendment fails for a number of other reasons which are set forth in our Initial Brief, but not addressed in Proponents' Initial Brief. These deficiencies include (1) the violation of the single subject prohibition against logrolling, by requiring voters to choose whether they wish to accept parts of the proposal which they might oppose (i.e., transfer of judicial authority, treatment for violent felons, de facto

decriminalization, treatment right for offenses involving dangerous narcotic drugs, etc.) in order to obtain a change which they might support (expanded treatment for addicts and abusers); (2) the failure of both the amendment and the summary to identify the numerous constitutional provisions it substantially affects, including Article I, sections 2, 9, and 21, Article V, sections 1, 2, 5, 8, 12, 13, and 17, Article III, sections 1 and 19 and Article IV, section 1; (3) the failure of the summary to define legally significant phrases, including "appropriate treatment," "unamenable to treatment," "serious crimes," and "in same episode;" and (4) the summary's failure to advise voters that upon completion of treatment, an offender cannot even be placed under continued court supervision for the offense which led to the appropriate treatment. Under this Court's decisions, any one of the failures addressed in this Answer Brief and referred to in our Initial Brief will render a summary defective. The proposed amendment must therefore be stricken from the ballot.

CONCLUSION

The proponents have failed to demonstrate in their Initial Brief that the proposed amendment meets the requirements of Florida's constitution and statutes. For the reasons set forth herein and in our Initial Brief, the proposed amendment fails to comply with both the single subject requirement of Article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (2000). The opponents therefore

urge that the proposed amendment be rejected and stricken from the ballot.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Amended Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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Kenneth W. Sukhia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been forwarded this 11th day of November, 2001 by U. S. Mail to: Honorable Jeb Bush, Governor, The Capitol, Tallahassee, FL 32399; Simone Marstiller, Assistant General Counsel, Executive Office of the Governor, Room 209, The Capitol, Tallahassee, FL 32399-0001; Honorable Katherine Harris, The Capitol, Tallahassee, FL 32399; Honorable John McKay, The Capitol, Tallahassee, FL 32399; Honorable Tom Feeney, 420 Capitol, 402 S. Monroe Tallahassee, FL 32399; Honorable Robert A. Butterworth, The Capitol, Tallahassee, FL 32399; Stephen H. Grimes, Esq. and Susan L. Kelsey, Esq., Holland & Knight; P. O. Box 800, Tallahassee, FL 32302; Martin Epstein, Esq., 3228 Gun Club Road, West Palm Beach, FL 33406; Michael R. Ramage, Esq., FDLE, P. O. Box 1489, Tallahassee, FL 32302; David P. Healy, Esq., 537 E. Park Ave., Tallahassee, FL 32301and Arthur I. Jacobs, Jacobs & Associates, P. A., 401 Centre Street, Fernandina Beach, FL 32035.

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Kenneth W. Sukhia