IN THE SUPREME COURT FOR THE STATE OF FLORIDA

COUNTY OF VOLUSIA, et al., Appellants, v. **KENNETH DETZNER**, et. al., Appellees.	Case No. SC18-1339 1st DCA Case Nos. 1D18-3361 1D18-3362 1D18-3363 L.T. Case Nos. 372018 CA 001270 372018 CA 001342

REPLY BRIEF OF APPELLANT MIAMI-DADE COUNTY ON THE MERITS

Respectfully submitted,

ABIGAIL PRICE-WILLIAMS
MIAMI-DADE COUNTY ATTORNEY

By: /*s/ Oren Rosenthal*
Oren Rosenthal
Michael B. Valdes
Miguel A. Gonzalez
Assistant County Attorney
Florida Bar Nos. 86320, 93129 & 31045
Miami-Dade County Attorney's Office
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Phone: (305) 375-5151
Fax: (305) 375-5634
Email: orosent@miamidade.gov
mbv@miamidade.gov
gmiguel@miamidade.gov

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Summary of the Argument

Clear from the trial court's order, conceded by the Appellees,[1] and no longer at issue in this appeal is that Revision 10 will, if passed, eliminate "the constitutional rights of the people in the charter counties by their vote alone to restructure their county government." R.979. What is still at issue between the counties and the proponents of Revision 10 is whether the voters of this state, when confronted with an artificially limited 34-word ballot summary on this issue, will understand that these constitutional rights are at stake.

The ballot summary for Revision 10 uses a merely technical recitation of the change to hide the amendment's true chief purpose and its undisputed effect on the constitutional rights of charter county voters. Rather than accurately providing voters with crucial information about the practical significance of the change in the ballot box, the ballot summary of Revision 10 simply assumes voters will look beyond the carefully crafted language purporting to "ensure[ ] election," beyond the unnecessary, feel-good, anodyne proposals to "retain" an unthreatened department of veterans' affairs and "create" an already-existing office for domestic security and counterterrorism, and beyond the assumption that the ballot summary is complete

[1] Appellees Kenneth Detzner ("Detzner"), the Department of State ("the Department"), Florida Association of Court Clerks ("Clerks"), Florida Tax Collectors Association ("Tax Collectors"), and Anne M. Gannon ("Gannon") will be collectively referred to as "Appellees" or "Proponents." Amici Florida Sheriffs Association will be referred to as "Sheriffs."

on its face, to inform themselves of the tradeoff required by this proposed amendment. This is not about spoon-feeding voters: it is about ensuring that they are adequately informed about the meaning of their choices without assuming that they possess specialized knowledge.

Whether the Florida Constitution should be amended to eliminate key components of local home rule is a question only the voters can and should decide. But whether the ballot summary permits voters to make this decision "with eyes wide open" is a question that this Court must address. *Armstrong v. Harris*, 773 So. 2d 7, 22 (Fla. 2000) (holding that when "Florida citizens are being asked to nullify an original act of the Founding Fathers, each citizen is entitled-indeed, each is duty-bound-to cast a ballot with eyes wide open"). Here, as with the many other proposed constitutional revisions that this Court has routinely stricken for providing a ballot summary that "'fl[ies] under false colors' and 'hide[s] the ball' as to the amendment's true effect," this Court should reverse the decision of the trial court and remove Revision 10 from the 2018 General Election ballot. Allowing an amendment to be adopted based on this ballot summary will result in the voters of this state only learning of the significant rights they have unwittingly abandoned after the amendment has taken effect.

Argument

I. The Ballot Summary Cannot Fail to Disclose Material Rights by Assuming that Voters Possess Specialized Knowledge

The Proponents consider it an insult to the voters' intelligence to insist that the ballot summary contain sufficient information regarding the choice Revision 10 presents to the voters. *See, e.g.*, Clerks' Ans. Br. at 16-17 ("[T]he argument is premised on a truly dim view of the intelligence of the average voter. . . . The contention presumes that the average voter has the reading ability and attention span of a pre-school child."). Instead, the Proponents (and the trial court) have chosen to assume that voters are aware of the intricacies of Florida constitutional law and have decided to let voters "connect the dots," as if the ballot question was a puzzle to be solved.

Appellees point to no authority for the proposition that this issue is one of simple common knowledge, yet they blithely maintain that Florida voters will understand that Revision 10 will eliminate the power the voters currently possess to make local decisions regarding their local government. *See, e.g.*, Clerks' Ans. Br. at 8 (arguing that "it is not necessary to state the obvious" that voters' rights and charter powers would be eliminated based on Revision 10's ballot language). Exactly how voters will understand this is unclear, as there is no dispute that the ballot summary does not directly tell voters that they are losing a valuable right. Indeed, the trial court agreed with the Appellants that "the amendment does not inform the voter that

a yes vote 'repeals' or 'eliminates' the constitutional rights of the people in the charter counties by their vote alone to structure their county government." *See* R.979 (emphasis in original).

By insisting on the express disclosure that rights will be lost through the approval of Revision 10, Appellants are not insulting voters' intelligence but rather protecting voters who are not experts in an area of the law that this Court has recognized is "unique" and non-uniform throughout the state. *See, e.g., Metro. Dade Cty. v. City of Miami*, 396 So. 2d 144, 146 (Fla. 1980) ("This Court has noted that the metropolitan government of Dade County is unique in this state due to its constitutional home rule amendment…which set Dade apart from the state's other counties.") (citing *McNayr v. Kelly*, 184 So. 2d 428, 429 (Fla. 1966) ("Metropolitan government in Dade County has no counterpart in this State.")).

Secretary Detzner mockingly asserts that home rule law is an easy topic – "Florida civics 101." *See* Detzner Ans. Br. at 19. But proof positive that home rule law is not an easy subject – and is not readily within the grasp of the average voter – is demonstrated by this Court's relatively recent decision in *Telli v. Broward County*, in which the Court receded from years of contrary precedent based upon a prior misapplication of home rule. 94 So. 3d 504 (Fla. 2012).[2]

[2] Further emphasizing the complexity of these home rule issues surrounding the constitutional officers in question, the Tax Collectors rely on a law review article, co-authored by one of its counsel, arguing that this Court actually got in wrong in

In *Telli*, this Court unanimously receded from two longstanding precedents holding that electors in charter counties – exercising their power to adopt and amend charter provisions regarding the offices identified in Article VIII, § 1(d) – could not establish term limits for those offices. *See id.* at 513 ("Based on the foregoing, we recede from *Cook* [*v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002)] and the rationale it relied upon in *Thomas v. State ex rel. Cobb*[, 58 So. 2d 173 (Fla. 1952)] [and] hold that the term limits provided in Broward County's charter do not violate the Florida Constitution, and approve the Fourth District on different grounds").

In receding from *Cook* and *Cobb*, this Court acknowledged that its prior understanding of what Secretary Detzner refers to as "Florida civics 101" was "unsound in principle" and "unworkable in practice." *See Telli*, 94 So. 3d at 513. Instead, this Court adopted a dissenting opinion in *Cook* arguing that the broad authority granted to charter counties under the Florida Constitution eliminated the

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2012 and that its precedent had been correct. In particular, the article argues that this Court misunderstood this issue in *Telli* by "fail[ing] to acknowledge the important limitations" placed on home rule power and "undermin[ing] completely the status of the Constitution's five County Officers." *See* H. Kenza vanAssenderp & Kayla M. Scarpone, *Telli v. Broward County—A Misunderstanding of County Home Rule and an Abridging of the Status of the Constitution's County Officers Who are Not the Charter's County Officers*, 39 Nova L. Rev. 1, 2 & 6 (2014) ("When a state's court of last resort renders an opinion that abridges, ignores, and renders meaningless an express provision of that state's constitution, then that court shall have itself effectuated an amendment to its constitution erroneously and without the approval and longstanding support of the electors of that state. This is what the Supreme Court of Florida did in 2012 in the case of *Telli v. Broward County* . . . .").

"legal justification for concluding that charter counties should not be allowed to ask their citizens to vote on eligibility requirements of local elected officials, including term limits, since they could abolish the offices completely or decide to select the officers in any manner of their choosing." *See id.* at 512 (quoting from Justice Anstead's dissent in *Cook*).[3]

Telli, which culminated in this Court's self-reversal, confirms that what this Court has long held about the complexity of home rule in Miami-Dade County in fact applies equally to charter counties state-wide. If this Court can err on the scope of voters' rights with regard to constitutional offices set forth in Article VIII, § 1(d) after study of the Florida Constitution, years of prior precedent, and argument from learned counsel, how can the Proponents now presume that voters will understand the breadth of their rights with a mere 34 words of explanation that only disclose the narrow technical language of the amendment? And, if learned counsel can, after a unanimous Florida Supreme Court has clearly spoken on this issue, argue that such decision "is untenable, disconcerting, not judicially cognizant, devoid of constitutional integrity, and, if enforced, precipitates needlessly an unnervingly serious constitutional problem, which must be solved," then how can the Proponents

[3] Justice Anstead has filed a separate action in this Court (recently transferred to the Circuit Court of the Second Judicial Circuit in and for Leon County) seeking the removal of multiple ballot summaries, including Revision 10, from the ballot. *See Anstead v. Detzner*, Case No. SC18-1344 (filed Aug. 14, 2018).

presume that voters without legal training will correctly grasp the rights they will lose through Revision 10 with respect to the same issues, without being told that those rights are even at issue? *See* vanAssenderp & Scarpone, 39 Nova L. Rev. at 34-35.

Simply put, it cannot be presumed that voters take a ballot summary that "ensures elections" and "removes county charters' ability" and, without further explanation, "connect the dots" to the voters' independent right to choose the manner in which they want constitutional county officers to exercise powers in their county.

This Court has routinely held that an erroneous presumption of outside knowledge necessitates removal of a proposed amendment from the ballot. *See, e.g., Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008) ("The text of the constitutional amendment will not be present in the voting booth; rather, the ballot title and summary will be the only information that is available to voters. For this reason, accuracy of the title and summary is "of paramount importance.") (quoting *Armstrong*, 773 So. 2d at 13); *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("The 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."); *Wadhams v. Bd. of Cty. Commr's of Sarasota Cty.*, 567 So. 2d 414, 417 (Fla. 1990) (rejecting an argument that a ballot question should not be invalidated based on "voter confusion because the voters were afforded ample opportunity to become informed on the issue

before the election by public hearings, advance publication of the proposal, and media publicity" and holding that the law instead requires the ballot summary to inform the public).

In short, there is no merit to appellees' argument that the mechanisms for effecting change to local government structure are a matter of common knowledge and that voters will understand that they are voting to deprive themselves of a future right based upon the skeletal language contained within the Revision 10 question. Revision 10 hides the ball and flies under false colors and must be stricken from the ballot accordingly.

II. The Ballot Language Misleads Voters Because It Does Not Accurately Describe the Only Change Being Made

"The proposal of amendments to the Constitution is a highly important function of government that should be performed with the greatest certainty, efficiency, care and deliberation." *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912). For that reason, Fla. Stat. § 101.161 requires that a ballot question describe the "chief purpose of the measure" to provide the voter "fair notice of the content of the proposal so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." "The purpose of this requirement is above reproach it is to ensure that each voter will cast a ballot based on the ***full*** truth." *Armstrong*, 773 So.2d at 21 (emphasis in original). *See also Fla. Dep't of State v. Fla. State Conference of NAACP Branches*, 43 So.3d 662, 667 (Fla. 2010) (internal quotation

omitted) (instructing courts to consider "the amendment's true meaning and ramifications" to ensure that the amendment can "stand on its own merits and [is] not [] disguised as something else"). Anything less, and "the validity of the electoral process [is] fundamentally compromised." *Armstrong,* 773 So.2d at 21.

Here, Appellees acknowledge that the chief purpose of Revision 10 is "to make the *default* state-Constitution County Officers structure established under the current Constitution mandatory in every county and not subject to change." Tax Collectors' Ans. Br. at 14-15. *See also, e.g.*, Detzner's Ans. Br. at 14-15 (noting that the "legal effect" of Revision 10 is to "leave intact" the language Article XIII, Section 1(d)…"). But, if the purpose of Revision 10 is to make the current "default" option the only option, then the sole change being made to the Florida Constitution is that voters will be losing the right that they—and not their charters—currently possess. Clerks' Ans. Br. at 9 ("The real purpose of the amendment is to eliminate the ***option*** to amend the charter to appoint…") (emphasis in original). And, when such a loss of rights is at stake, voters ***must*** be expressly told of that choice. *See Armstrong,* 773 So. 2d at 17 ("…where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election"). Put simply, Revision 10 does not place that critical (and sole) change plainly before the voters so that they can cast an intelligent and informed ballot on this issue. *Cf.* R.979

(noting "that the amendment does not inform the voter that a yes vote 'repeals' or 'eliminates' the constitutional rights of the people in the charter counties by their vote alone to restructure their county government"). Instead, Revision 10 hides that significant choice as to whether voters want to lose rights under the false colors of "ensuring elections" and making changes to "county charters" rather than voters' rights.

In their Answer Briefs, Appellees contend that the use of the phrase "ensures elections" is necessary because it "accurately indicates what the amendment would do and is no more emotionally charged than any alternative terminology that would be necessary to fully explain the amendment." Clerks' Ans. Br. at 15. However, that language clearly implies the protection of an existing right rather than the loss of one. *See, e.g.*, Tax Collectors' Br. at 24 (noting that "ensures" is defined as "to make sure, certain, ***or safe***") (emphasis added). This Court has instructed that language bearing similarly protective connotation is misleading for the very same reasons argued by Appellants here.

In *Armstrong*, for example, the ballot language stated that the proposed amendment would "preserve the death penalty." *Armstrong*, 773 So. 2d at 10. This Court accepted appellants' argument that the use of such language "give[s] the false impression that the death penalty is in danger of being abolished and needs to be 'preserved.'" *Id*. The language in Revision 10 is no different.

Additionally, Revision 10's use of the phrase "county charters' ability" rather than, for example, "county voters' ability" depersonalizes the choice for voters and misleads them into believing that the amendment addresses a procedural mechanism of counties rather than a fundamental right of voters. And this effort to depersonalize, and thus mislead, extends to Appellees' argument. *See, e.g.*, Tax Collectors' Ans. Br. at 29 (describing the failure to describe the voters' loss of home rule rights as an "omission of [a] precise procedural mechanism" used to effectuate the will of the people); Detzner Ans. Br. at 8 (noting that Revision 10 "would take away the ability of 'a county charter'"); Sheriffs' Amicus Br. at 9 (stating that Revision 10 creates a "loss of the right of counties" rather than voters).

Appellees nonetheless contend that their focus on "county charters" rather than "county voters" does not mislead because such language accurately describes "the legal effect [Revision 10] will have on the ***Florida Constitution***." Detzner Ans. Br. at 7 (emphasis added). Appellees' concentration on this mechanical change to the Florida Constitution is misplaced because it is not the Florida Constitution that needs to be informed of these technical changes, it is the voters who need to be informed of Revision 10's practical effects. This ballot language fails to meet that requirement and therefore should be stricken.

III. The Chief Purpose and Effect of Revision 10 Can and Must Be Disclosed Within the Ballot Summary Word Limits

In an attempt to excuse Revision 10's failure to sufficiently describe the chief purpose and effect the proposed amendments will have on the rights of county voters, Appellees mischaracterize Appellants' position, asserting that given "Appellants' multipage description of the nuances of home rule and the different ways the voters hypothetically could be impacted by Revision 10 [it would be] impossibl[e] and impractical[] [within] a 75 word ballot summary [to] include[e] the level of details Appellants suggest is required." Gannon Ans. Br. at 15; *see also* Clerks' Ans. Br. at 13 ("If it were necessary to explain the impact of the amendment on every individual county that has made charter changes … it would be impossible to meet the 75-word limit.").

Appellees' argument creates a false dichotomy between accurately describing the "chief purpose of the measure" and doing so within a 75-word limit. While the multiple material changes to the rights of county voters need not be separately and individually identified with Revision 10's ballot summary, the ballot summary must still accurately ***summarize*** those effects within the 75-word limit. *See Fla. State Conference of NAACP Branches*, 43 So.3d 662, 669 (Fla. 2010) (striking down ballot summary which "fails to inform the voter of the chief purpose of [the amendment] and the effect it will have on the existing, mandatory constitutional provisions"). *See also Advisory Op. to Att'y Gen. re: Amendment to Bar Gov't From*

Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 899-900 (Fla. 2000) ("[a]lthough significant detail regarding implementation and speculative scenarios may be omitted … ballot summaries which … fail to mention constitutional provisions that are affected[] and do not adequately describe the general operation of the proposed amendment must be invalidated").

As this Court has made clear, while a summary need not "explain the proposal at great and undue length … the word limit does not give drafters of proposed amendments leave to ignore the importance of the ballot summary and to provide an abbreviated, ambiguous statement in the hope that this Court's reluctance to remove issues from the ballot will prevent us from insisting on clarity and meaningful information." *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992).

And, contrary to Appellees' assertion, adequately disclosing the chief purpose and effect of Revision 10 is easily achieved. An accurate and complete description of Revision 10 using a similar word count would be: "***removes charter county voters' ability to independently abolish, change term, transfer duties, or eliminate elections of sheriffs, property appraisers, supervisors of elections, tax collectors and clerks of courts and invalidates prior elections to that effect.***"

Such a ballot summary would inform voters of the rights they will lose through an amendment that "removes county charters' ability to abolish, change term, transfer duties, or eliminate election of these offices." Voters reading this

accurate summary would understand that the amendment removes rights that belong to county voters, rather than removing authority from county government; that county voters would no longer be solely able to determine the structure of their county government by placing the powers and duties of county constitutional officers within their county government; that the only method of undoing this decision would be for the voters of the state to again amend the Florida Constitution; and that the decision of voters in charter counties that have previously abolished and reconstituted the county constitutional offices in another elected or unelected office would have those decisions reversed.

Moreover, the Constitutional Revision Commission's decision to bundle (or logroll) four disparate ballot measures into a single ballot summary does not relieve the ballot summary of its duty to accurately describe all of the changes being proposed. While Appellees argue that the artificial imposition of a stricter word limit necessitated by bundling multiple measures was both historically and practically justified by the potential total length of the 2018 General Election ballot (Anne E. Gannon Ans. Br. at 25), neither the Florida Legislature nor this Court has ever recognized such concerns as sufficient to artificially constrain a portion of the ballot summary and allow material changes to the rights of the electorate to remain undisclosed and hidden in the ballot box. Rather, this Court has consistently held that "[t]he purpose of [the accuracy] requirement is above reproach – it is to ensure

that each voter will cast a ballot based on the *full* truth…[t]o function effectively – and to remain viable – a constitutional democracy requires no less." *Armstrong*, 773 So. 2d at 21 (emphasis in original).

This attempt to strip voters of charter counties of their home rule powers, whether presented independently or stuffed within feel-good ministerial changes, must meet the same statutory requirement of candor necessitated of every other proposal placed before the electorate.

Conclusion

For the reasons set forth in the Appellants' briefs both in this Court and in the trial court, this Court should hold that the ballot language for Revision 10 falls short of the "truth in packaging" requirements of Fla. Stat. § 101.161(1) and related case law. As such, the decision of the trial court should be reversed and this measure should be removed from the General Election ballot.

Dated August 31, 2018

Respectfully submitted,

ABIGAIL PRICE-WILLIAMS
MIAMI-DADE COUNTY ATTORNEY

By: */s/ Oren Rosenthal*
Oren Rosenthal, Michael B. Valdes &
Miguel A. Gonzalez
Assistant County Attorney
Florida Bar Nos. 86320, 93129 & 31045
Miami-Dade County Attorney's Office
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Telephone: (305) 375-5151
Facsimile: (305) 375-5634
Email: orosent@miamidade.gov
mbv@miamidade.gov
gmiguel@miamidade.gov

Certificate of Type Size and Style

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/s/ Oren Rosenthal
Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Florida Court's E-Filing Portal and was served via e-mail generated by the Florida Courts E-Filing Portal on August 31, 2018 to:

Edward M. Wegner, Esquire **Jordan E. Pratt, Esquire** *Attorneys for Florida Secretary of State,* Edward.Wegner@myfloridalegal.com; Jordan.Pratt@myfloridalegal.com; Jenna.Hodges@myfloridalegal.com; Jennifer.Bruce@myfloridalegal.com Office of the Attorney General The Capital, PL-01 Tallahassee, FL 32399	**David A. Fugett, Esquire** **Jesse C. Dyer, Esquire** *Attorneys for Florida Secretary of State* David.Fugett@dos.myflorida.com Jesse.Dyer@dos.myflorida.com Ashley.Black@dos.myflorida.com 500 S. Bronough Street, Ste. 100 Tallahassee, FL 32399-0250
Barry S. Richard, Esquire *Attorney for Florida Association of Court Clerks* richardb@gtlaw.com; TrammellC@gtlaw.com Greenberg Traurig, P.A. 101 E College Avenue Tallahassee, FL 32301-7742	**Timothy R. Qualls, Esquire** **Kayla M. Scarpone, Esquire** *Attorneys for Florida Association of Tax Collectors* tqualls@yvlaw.net kscarpone@yvlaw.net stalevich@yvlaw.net Young Qualls, P.A. 216 South Monroe Street Tallahassee, FL 32301
John A. Tucker, Esquire JTucker@foley.com **Robert H. Hosay, Esquire** RHosay@foley.com **Benjamin J. Grossman, Esquire** BJGrossman@foley.com **Nicholas Meros, Esquire** NMeros@foley.com **Christina Kennedy, Esquire** ckennedy@foley.com	**Daniel D. Eckert, Esquire** County Attorney COUNTY OF VOLUSIA *Attorney for Plaintiffs* deckert@volusia.org (primary) mgallas@volusia.org (secondary) 123 W. Indiana Avenue DeLand, FL 32720-4613

James A. McKee, Esquire jmckee@foley.com AVWilliams@foley.com MLong@foley.com CForjet@foley.com gfinkelstein@foley.com *Attorneys for Palm Beach County Tax Collector* 106 E. College Avenue, Ste. 900 Tallahassee, FL 32301-7732	
Mark A. Journey, Esquire **Scott Andron, Esquire** **Joseph K. Jarone, Esquire** **Claudia Capdesuner, Esquire** *Attorneys for Broward County, Florida* MJourney@broward.org sandron@broward.org jkjarone@broward.org clcapdesuner@broward.org Office of the County Attorney 115 S Andrews Ave., Ste. 423 Fort Lauderdale, FL 33301-1826	**Jason Vail, Esquire** *Attorneys for the Florida Sheriffs Association* ejv@jollylaw.com Jolly, Peterson & Truckenbrod P.A. PO Box 37400 Tallahassee, FL 32315
Gigi Rollini, Esq. **Glenn Burhans, Jr., Esq.** *Attorneys for Florida Association for Constitutional Officers, Inc.* grollini@stearnsweaver.com gburhans@stearnsweaver.com ptassinari@stearnweaver.com cabbuhl@stearnsweaver.com Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. Highpoint Center 106 East College Avenue, Suite 700 Tallahassee, Florida 32301	**Laura Youmans, Esquire** *Attorney for Florida Association of Counties, Inc.* lyoumans@flcounties.com Florida Association of Counties 100 South Monroe Street Tallahassee, FL 32301
Thomas W. Poulton, Esquire *Attorney for Florida Sheriff's Association* poulton@debevoicepoulton.com	

DeBEVOICE & POULTON, P.A. Lakeview Office Park, Suite 1010 1035 S. Semoran Boulevard Winter Park, Florida 32792	