

SUPREME COURT OF FLORIDA

Case No.: SC18-1366, 1367  
Lower Case: 1D18-3644; 372018CA001525

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DEPARTMENT OF STATE, ETC., et al.,

*Appellants,*

v.

LEE HOLLANDER; PATRICIA BINGHAM; and LEAGUE OF WOMEN  
VOTERS OF FLORIDA, INC.,

*Appellee.*

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BRIEF OF RESPONDENT/APPELLANT  
MARSY'S LAW FOR FLORIDA, LLC

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ON APPEAL IN THE SECOND JUDICIAL CIRCUIT  
LEON COUNTY, FLORIDA

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## STATEMENT OF THE CASE AND FACTS

In its Final Report, the 2018 Constitution Revision Commission (“CRC”) proposed a revision to Article I, section 16 of the Florida Constitution. The revision, designated Amendment 6 on the ballot, states in pertinent part:

### ARTICLE I DECLARATION OF RIGHTS

#### SECTION 16. Rights of accused and of victims.—

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) To preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims’ rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents, every victim is entitled to the following rights, beginning at the time of his or her victimization:

(1) The right to due process and to be treated with fairness and respect for the victim’s dignity.

(2) The right to be free from intimidation, harassment, and abuse.

(3) The right, within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused. However, nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida law.

(4) The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family.

(5) The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.

(6) A victim shall have the following specific rights upon request:

a. The right to reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct, including, but not limited to, trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding, notwithstanding any rule to the contrary. A victim shall also be provided reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent, and any proceeding during which a right of the victim is implicated.

b. The right to be heard in any public proceeding involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated.

c. The right to confer with the prosecuting attorney concerning any plea agreements, participation in pretrial diversion programs, release, restitution, sentencing, or any other disposition of the case.

d. The right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any presentence investigation or compiling any presentence investigation report, and to have any such information considered in any sentencing recommendations submitted to the court.

e. The right to receive a copy of any presentence report, and any other report or record relevant to the exercise of a victim's right, except for such portions made confidential or exempt by law.

f. The right to be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender, any scheduled release date of the offender, and the release of or the escape of the offender from custody.

g. The right to be informed of all postconviction processes and procedures, to participate in such processes and procedures, to provide

information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole or early release authority shall extend the right to be heard to any person harmed by the offender.

h. The right to be informed of clemency and expungement procedures, to provide information to the governor, the court, any clemency board, and other authority in these procedures, and to have that information considered before a clemency or expungement decision is made; and to be notified of such decision in advance of any release of the offender.

(7) The rights of the victim, as provided in subparagraph (6)a., subparagraph (6)b., or subparagraph (6)c., that apply to any first appearance proceeding are satisfied by a reasonable attempt by the appropriate agency to notify the victim and convey the victim's views to the court.

(8) The right to the prompt return of the victim's property when no longer needed as evidence in the case.

(9) The right to full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct.

(10) The right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings.

a. The state attorney may file a good faith demand for a speedy trial and the trial court shall hold a calendar call, with notice, within fifteen days of the filing demand, to schedule a trial to commence on a date at least five days but no more than sixty days after the date of the calendar call unless the trial judge enters an order with specific findings of fact justifying a trial date more than sixty days after the calendar call.

b. All state-level appeals and collateral attacks on any judgment must be complete within two years from the date of appeal in non-capital cases and within five years from the date of appeal in capital cases, unless a court enters an order with specific findings as to why the court was unable to comply with this subparagraph and the circumstances causing the delay. Each year, the chief judge of any district court of appeal or the chief justice of the supreme court shall report on a case-by-case basis to the speaker of the house of representatives and the president of the senate all cases where the court entered an order regarding inability to comply with this subparagraph. The legislature may enact legislation to implement this subparagraph.

(11) The right to be informed of these rights, and to be informed that victims can seek the advice of an attorney with respect to their rights. This information shall be made available to the general public and provided to all crime victims in the form of a card or by other means intended to effectively advise the victim of their rights under this section.

(c) The victim, the retained attorney of the victim, a lawful representative of the victim, or the office of the state attorney upon request of the victim, may assert and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of law for the violation of any right. The reasons for any decision regarding the disposition of a victim's right shall be clearly stated on the record.

(d) The granting of the rights enumerated in this section to victims may not be construed to deny or impair any other rights possessed by victims. The provisions of this section apply throughout criminal and juvenile justice processes, are self-executing, and do not require implementing legislation. This section may not be construed to create any cause of action for damages against the state or a political subdivision of the state, or any officer, employee, or agent of the state or its political subdivisions.

(e) As used in this section, a "victim" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term "victim" includes the victim's lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term "victim" does not include the accused. The terms "crime" and "criminal" include delinquent acts and conduct. ~~Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.~~

Section 8 of Article V of the State Constitution is amended, and section 21 is added to that article, to read:

ARTICLE V  
JUDICIARY

SECTION 8. Eligibility.—No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court. No justice or judge shall serve after attaining the age of seventy-five ~~seventy~~ years except upon temporary assignment ~~or to complete a term, one half of which has been served~~. No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years, a member of the bar of Florida. No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of county court judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if the person is a member in good standing of the bar of Florida.

SECTION 21. Judicial interpretation of statutes and rules.—

In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

A new section is added to Article XII of the State Constitution to read:

ARTICLE XII  
SCHEDULE

Eligibility of justices and judges.—The amendment to Section 8 of Article V, which increases the age at which a justice or judge is no longer eligible to serve in judicial office except upon temporary assignment, shall take effect July 1, 2019.

The ballot summary for Amendment 6 states:



CONSTITUTIONAL AMENDMENT  
ARTICLE I, SECTION 16  
ARTICLE V, SECTIONS 8, 21  
ARTICLE XII, NEW SECTION

**RIGHTS OF CRIME VICTIMS; JUDGES.**—Creates constitutional rights for victims of crime; requires courts to facilitate victims’ rights; authorizes victims to enforce their rights throughout criminal and juvenile justice processes. Requires judges and hearing officers to independently interpret statutes and rules rather than deferring to government agency’s interpretation. Raises mandatory retirement age of state justices and judges from seventy to seventy-five years; deletes authorization to complete judicial term if one-half of term has been served by retirement age.

**SUMMARY OF ARGUMENT**

This Court has recognized four grounds for removing a measure from the ballot due to a misleading summary: (1) the amendment would operate in concert with existing, undisclosed provisions to produce an effect inconsistent with the purpose stated in the summary; (2) the summary fails to mention a material provision of the amendment; (3) the summary contains an incorrect description of a material provision of the amendment; or (4) the summary contains an ambiguity that leaves the voter having to guess what the amendment would do. The current summary contains none of those defects.

The summary states that the amendment creates constitutional rights for victims of crime, requires courts to facilitate those rights, and authorizes victims to enforce the rights. The amendment does precisely that by creating nine new rights that do not currently exist in Florida law, and providing a more detailed exposition

of several rights that do currently exist. The lower court did not suggest that the summary is inaccurate because it states that the amendment creates victims' rights. Rather, the lower court concluded that the summary is misleading because it purportedly omits material effects of the amendment.

The lower court erroneously stated that the amendment curtails defendants' constitutional rights without disclosing it in the summary. The amendment does not curtail any defendants' rights. Those rights are set forth in Article I, sections 14, 15, and 16 of the Florida Constitution. A review of each of the rights listed in those sections clearly demonstrates that nothing in the amendment would adversely affect them.

The lower court erroneously held that the ballot summary is defective because it fails to note that the amendment creates rights of victims in juvenile proceedings. The summary states that the amendment creates constitutional rights for victims and "authorizes victims to enforce their rights throughout the criminal and *juvenile justice* processes." (Emphasis added).

The lower court erroneously held that the summary is misleading because it fails to mention that victims currently have constitutional rights to be informed, to be present, and to be heard in criminal proceedings. The summary accurately states that the amendment "creates rights for victims of crime." The amendment creates

nine new rights that do not currently exist. There is nothing about the creation of new rights that implies that no other rights currently exist.

Finally, the lower court erroneously concluded that the ballot title is defective because it only mentions “judges” and says nothing about the elimination of the Chevron doctrine. This Court has held that a ballot title cannot be read in isolation but must be read together with the summary. The summary clearly explains the significance of the amendment’s repeal of the Chevron doctrine.

## **ARGUMENT**

### **I. Standard of Review**

The standard of review is *de novo*.

### **II. The ballot summary accurately states the chief purpose and material legal effects of the proposed amendment.**

The judgment below pays tribute to this Court’s key cases in which it has set forth the high barrier for removing measures from the ballot and the appropriate standard for analyzing ballot summaries. Nonetheless, the lower court departed from the lessons taught by this Court.

The lower court correctly recognized *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) and *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the seminal cases which, along with their progeny, set forth the grounds for removal. *Askew* and *Armstrong*

have a key element in common. The amendments in both cases would necessarily operate in concert with existing, undisclosed provisions to produce an effect not only different from, but the antithesis of, the purpose stated in the summaries.

In *Armstrong*, the amendment would have changed the Florida Constitution's prohibition of "cruel *or* unusual punishment" to the narrower "cruel *and* unusual punishment" found in the U.S. Constitution. The amendment would also have required that the Florida Constitution be construed in conformity with U.S. Supreme Court construction of the federal cruel and unusual punishment clause. In addition, the wording of the summary gave the impression that its main effect was to preserve the death penalty, whereas the real effect would be to narrow application of the penalty. The court struck the measure because the ballot summary did not inform the voter that the chief purpose and main effect of the amendment was to repeal Florida's punishment standard in favor of the less stringent federal standard, the opposite of the message given by the summary.

In *Askew*, the ballot summary was equally devious. It stated:

Prohibits former legislators and statewide elected officers from representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, unless they file full and public disclosure of their financial interests.

*Askew*, 421 So. 2d at 153. The statement was technically accurate, but it hid the real purpose and effect of the amendment. At the time, legislators were already required to file financial disclosure and were absolutely prohibited from appearing before the

legislature for two years after leaving office. While the ballot summary gave the impression that it was imposing new restrictions on lobbying, it was actually easing restrictions by removing the two-year bar.

In addition to the forgoing ground for removal, which the Court has termed “hiding the ball,” the Court has removed measures for three other reasons: the summary fails to mention a material element of the amendment, see *1.35% Property Tax Cap*, 2 So. 3d 968 (Fla. 2009); the summary contains an incorrect description of a material provision of the amendment, see *FDLE v. Slough*, 992 So. 2d 142 (Fla. 2008); or the summary contains an ambiguity that leaves the voter having to guess what the amendment would do, see *Roberts v. Doyle*, 43 So. 3d 654 (Fla. 2010). As set forth below, the current summary contains none of these defects.

**A. The ballot summary accurately describes the chief purpose of the challenged portion of Amendment 6.**

The ballot summary states in pertinent part that the amendment:

Creates constitutional rights for victims of crime; requires courts to facilitate victims’ rights; authorizes victims to enforce their rights throughout criminal and juvenile justice processes.

That is precisely what the amendment would do. It creates nine new rights for victims of crime that do not now exist in the Florida Constitution or general law:

“The right to due process and to be treated with fairness and respect for the victim’s dignity.” § (b)(1).

“The right to be free from intimidation, harassment, and abuse.” § (b)(2).

“The right, within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused.” § (b)(3).

“The right to have the safety and welfare of the victim and the victim’s family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim’s family.” § (b)(4).

“The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information of the victim.” § (b)(5).

“The right to be provided “reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent, and any proceeding during which a right of the victim is implicated.” § (b)(6)a.

“The right to the prompt return of the victim’s property when no longer needed as evidence in the case.” § (b)(8).

“The right to full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct.” § (b)(9).

“The right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings.” § (b)(10).

In addition, the proposed amendment would add more detailed exposition of currently existing rights of victims to appear and be heard in criminal and juvenile proceedings.

The lower court did not suggest that the portion of the summary relating to victims’ rights is inaccurate so far as what it says. Instead, the court concluded that

the summary is misleading because it purportedly omits multiple material purposes and effects of the amendment. That conclusion is erroneous in all respects.

**B. The amendment does not curtail any constitutional rights of criminal defendants.**

The lower court concluded that the summary fails to inform voters that the amendment would reduce the rights of criminal defendants in two respects. First, the court found that the amendment would reduce current constitutional rights of defendants with respect to pretrial release. Article I, section 14 of the Florida Constitution provides:

Pretrial release and detention.—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release *on reasonable conditions*. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

(emphasis added). The proposed amendment does nothing to change section 14 or impose more restrictive conditions than a court can currently impose. Subsection (b)(4) of the proposed amendment provides that a victim of crime shall have “the right to have the safety and welfare of the victim and the victim’s family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim’s family.” That right is well within the scope of the existing language of section 14, which entitles a criminal defendant to

pretrial release “on reasonable conditions.” Under the current constitution, judges can and do take into consideration the safety and welfare of the victim and the victim’s family in setting pretrial conditions.

The lower court also concluded, without explanation, that the proposed amendment somehow interferes with the rights of criminal defendants by stating in section 16(b) that a purpose of the proposed amendment is to ensure that a victim is “protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents.” In the first place, the statement itself creates no rights. It is simply a statement of general purpose which is followed by a specific list of rights, none of which interferes with a criminal defendant’s rights. In the second place, the lower court cites no defendants’ rights that would be curtailed by the amendment. Article I, section 16(a) of the Florida Constitution provides:

In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Not one of those rights is adversely affected in any way by the proposed amendment.

The only right that even tangentially touches on the subject of the proposed



amendment is the right of a criminal defendant to a speedy trial. The amendment would give victims the right to a speedy criminal process as well. Nothing about it restricts a defendant's right to demand and receive a speedy trial, and nothing in the Constitution entitles a criminal defendant to a delay of trial.

**C. The ballot summary adequately covers the creation of rights of victims in juvenile proceedings.**

The lower court concluded that the ballot summary is defective for failing to indicate that the amendment would extend the rights of victims under Article I, section 16 to the juvenile delinquency system. The summary states that the amendment “creates constitutional rights for victims of crime,” and “authorizes victims to enforce their rights through the criminal and *juvenile justice* process.” The statement clearly informs the voter that the rights created by the amendment can be enforced in the juvenile as well as the adult system. Moreover, measures are removed from the ballot when they fail to disclose *material* effects. *See 1.35% Property Tax*, 2 So. 3d at 976 (“a ballot summary may be defective if it omits material facts necessary to make the summary not misleading.”). A factual statement in the ballot summary is not material if it would not logically affect a reasonable voter's decision. It stands to reason that a voter who favors additional victims' rights would not be swayed to vote against the amendment simply because those rights include juvenile as well as adult criminal proceedings. Conversely, there is no

reason why a person who opposes victims' rights would vote for the amendment upon learning that it includes juvenile proceedings.

**D. The ballot summary is not misleading simply because it does not mention that victims currently have the constitutional right to be informed, be present, and be heard at crucial stages of criminal proceedings.**

The lower court concluded that the title and summary are defective for failure to state that victims currently have certain rights. The ballot summary's statement that the amendment "creates constitutional rights for victims of crime" is accurate. The amendment would create nine new victims' rights that do not currently exist in the Florida Constitution or elsewhere in Florida law. The statement that the amendment creates rights does not imply that there are no current rights of victims and such a conclusion by a voter would be irrational.

**E. The fact that the ballot title does not specifically mention the Chevron doctrine does not render it deceptive.**

The Chevron doctrine requires judges to give deference to administrative agency interpretations of statutes they are charged with administering. The amendment would eliminate that deference requirement. The title of the ballot provision under review is, "rights of crime victims; judges." While the reference to "judges" broadly covers the Chevron issue, it is true that it does not by itself provide the voter with much information. However, this Court has made clear that the ballot title cannot be read in isolation, but must be read together with the summary. *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984). The ballot summary accurately describes

the effect of the amendment upon the Chevron doctrine: “requires judges and hearing officers to independently interpret statutes and rules rather than deferring to government agency’s interpretation.”

A plaintiff challenging a proposed constitutional amendment, and a court reviewing such a challenge, should not be able to cause the amendment to be removed from the ballot by little more than recitation of the “clearly and conclusively defective” standard set by this Court. Surely, the Court had something more in mind when it imposed that high standard and surely that standard has not been met in this case.

### **CONCLUSION**

The Court is respectfully urged to reverse the decision of the lower court and remand with instructions to enter judgment for the Appellants.

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## CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to the Clerk of the Court via the First District's eDCA and served to the following by email on August 30, 2018:

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**CERTIFICATE OF FONT COMPLIANCE**

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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