

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE REV. DR. JAMES ARMSTRONG,)
et al.,)
)
Appellants,)
)
v.) Case No. 95,223
)
KATHERINE HARRIS, in her)
official capacity as)
Secretary of State, et al.,)
)
Appellees.)
_____)

Appeal from the First District Court of Appeals
Case Number 1999-989

¶

APPELLANTS' REPLY BRIEF

¶

Respectfully submitted,

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STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

Pursuant to the Administrative Order entered July 13, 1998, I hereby certify that the following reply brief is in 14 point proportionately spaced Times New Roman.

Randall C. Berg, Jr., Esq.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT CERTIFYING SIZE AND STYLE OF TYPE	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
ARGUMENT	1
I. THE BALLOT TITLE AND SUMMARY FAIL TO PROVIDE FAIR NOTICE TO THE VOTERS BECAUSE THEY FAIL TO DISCLOSE THAT THE ACTUAL LANGUAGE OF THE FLORIDA CONSTITUTION IS BEING CHANGED	1
II. “PRESERVATION OF THE DEATH PENALTY” IS EVEN MORE MISLEADING AND INFLAMMATORY THAN “SAVE OUR EVERGLADES”	3
III. IF THE LEGISLATURE WANTED “DESIGNATED BY THE LEGISLATURE” TO MEAN “ENACTED” OR “PROVIDED BY LAW,” IT COULD HAVE STATED AS MUCH. BUT IT DID NOT.	6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<i>Advisory Opinion to the Attorney Gen.</i> -- <i>Fee on the Everglades Sugar Prod.</i> , 681 So. 2d 1124, 1128-30 (Fla. 1996)	7
<i>Advisory Opinion to the Attorney General</i> - <i>Save Our Everglades</i> , 636 So. 2d 1336 (Fla. 1994)	3, 4, 5, 6
<i>Evans v. Firestone</i> , 457 So. 2d 1351 (Fla. 1984)	3, 6
<i>Grose v. Firestone</i> , 422 So. 2d 303 (Fla. 1982)	4, 5, 6
 <u>Statutes</u>	
§ 101.161, Florida Statutes	4, 7
 <u>Constitution</u>	
Article X, Section 17(b) of the Florida Constitution	6
Constitutional Amendment, Article I, Section 12	4
 <u>Other</u>	
1996 Op. Atty. Gen. Fla. 96-92 (Nov. 12, 1996)	7
House Joint Resolution No. 31-H, <i>Laws of Florida</i> (1982)	5

ARGUMENT

I.

THE BALLOT TITLE AND SUMMARY FAIL TO PROVIDE FAIR NOTICE TO THE VOTERS BECAUSE THEY FAIL TO DISCLOSE THAT THE ACTUAL LANGUAGE OF THE FLORIDA CONSTITUTION IS BEING CHANGED

Defendants' argument that the ballot title and summary need not state every actual or potential ramification of the proposed amendment misses the point. At issue is fair notice to the voters of the meaning and impact of a proposed constitutional amendment. At a minimum, fair notice mandates that the ballot title and summary inform the voter that the very language of the Constitution is being changed. It does not.

Contrary to Appellees' contention, the summary does not "mirror[] the language used in the text of the amendment." Appellees' Brief at 10. The amendment clearly strikes the word "**or**" and substitutes the word "**and**." But the voter is never informed of this change. No where is the voter told that the proposed amendment changes the language of Article I, Section 17, from "cruel or unusual punishment" to "cruel and unusual punishment."

Appellees' argument that "[t]he voter is clearly informed that the Florida prohibition applies to all crimes in the same way as does the Eighth Amendment" is incorrect. Appellees' Brief at 9. The ballot title states the proposed amendment pertains to "Preservation of the Death Penalty." No where in the title is there even a hint that the proposed change will apply to all other crimes.

The ballot summary is similarly deficient. Indeed it is affirmatively misleading. Sandwiched between a sentence which tells the voter that the proposed amendment is intended to "preserv[e] the death penalty, and permit... any execution method unless prohibited by the Federal Constitution" and a sentence which tells the voter that the proposed amendment "prohibits reduction of a death sentence based on invalidity of execution method" is the statement that the amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment." Even an informed voter is likely to conclude that the entire sum and substance of Amendment Two, including any "actual or potential ramification," operates on the death penalty. As with the ballot title, no where in the ballot summary is there even a hint that the proposed change will apply to all crimes.

The only conclusion a voter can draw from the ballot title and ballot summary is that the proposed change effects only capital crimes and nothing more. That is simply not fair notice.

II.

“PRESERVATION OF THE DEATH PENALTY” IS EVEN MORE MISLEADING AND INFLAMMATORY THAN “SAVE OUR EVERGLADES”

The misleading, inflammatory, and political rhetoric used by Amendment Two’s ballot title cannot be distinguished from the language struck down in *Advisory Opinion to the Attorney General — Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994). Appellees’ argument that there is nothing emotional about the use of the phrase “preservation of the death penalty” is intellectually dishonest. Appellees’ Brief at 16. With the possible exception of “abortion,” there are no more emotionally charged words in today’s political culture than “death penalty” and “execution.” Combine these terms as set forth in the ballot title and summary at bar, and you have a virtual powder keg.

This Court stated in *Save Our Everglades* that emotional language found in a ballot title can be misleading. 636 So. 2d at 1341. This Court also found that “[t]he ballot summary is no place for subjective evaluation of special impact.” 636 So. 2d at 1342, quoting *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). The same

emotionally charged language and political rhetoric this Court found offensive in *Save Our Everglades* are present here. The two cases are indistinguishable.

While Appellees rely on *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982) to support their position, that reliance is misplaced. Appellees' Brief at 11. *Grose* is actually instructive as to how a ballot title and summary should be drafted to avoid the problems presented here. The ballot title and summary in *Grose* gave fair notice because they notified the voter in clear and unambiguous language what the amendment was designed to accomplish.

It is instructive to compare and contrast the ballot title and summary upheld in *Grose* to the one at bar:

Grose Ballot Title:

CONSTITUTIONAL AMENDMENT, ARTICLE I,
SECTION 12

Amendment Two's Ballot Title:

PRESERVATION OF THE DEATH PENALTY; UNI-
TED STATES SUPREME COURT INTERPRETATION
OF CRUEL AND UNUSUAL PUNISHMENT.

RI-1.

Absent from the *Grose* ballot title is the political sloganeering this Court found misleading in *Save Our Everglades*. The 1982 legislature did not attempt to

appeal for example to the voter’s emotions by entitling the amendment “prevent the guilty from going free.” As this Court explained in *Save Our Everglades*, employing such political rhetoric violates § 101.161 because “[a] voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment.” 636 So. 2d at 1341.

The ballot summary in *Grose* similarly states:

SEARCHES AND SEIZURES.--Proposing an amendment to the State Constitution to provide that the right to be free from unreasonable searches and seizures shall be construed in conformity with the 4th Amendment to the United States Constitution and to provide that illegally seized articles or information are inadmissible if decisions of the United States Supreme Court make such evidence inadmissible.

House Joint Resolution No. 31-H, *Laws of Florida* (1982).

Amendment Two’s ballot summary, on the other hand, instead of providing a clear and neutral explanation of the proposed amendment, states:

Proposing an amendment to Section 17 of Article I of the State Constitution preserving the death penalty, and permitting any execution method unless prohibited by the Federal Constitution. Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment. Prohibits reduction of a death sentence based on invalidity of execution method, and provides for continued force of sentence. Provides for retroactive applicability.

RI-1.

The ballot summary was upheld in *Grose* because it put the voters on notice as to the total effect of the amendment. “There [can be] no hidden meanings and no deceptive phrases.” 422 So. 2d at 305. Here, as previously mentioned, the electorate is not even informed that the language of the Constitution is being changed. The title is little more than a political slogan. The title and summary imply that the amendment will only affect the death penalty, while the amendment will effect the Court’s power to review all punishments.

It would have been a simple matter to follow *Grose*’s example, but the legislature instead chose political rhetoric over dispassionate, full disclosure. This Court has stated on at least two occasions that “[t]he political motivation behind a given change must be propounded outside the voting booth.” 636 So. 2d at 1342, quoting *Evans*, 457 So. 2d at 1355. The case at bar is no exception.

III.

IF THE LEGISLATURE WANTED “DESIGNATED BY THE LEGISLATURE” TO MEAN “ENACTED” OR “PROVIDED BY LAW,” IT COULD HAVE STATED AS MUCH. BUT IT DID NOT.

Appellees argue that the terms “designated by the legislature” means the same thing as “enacted” or “provided by law.” Appellees’ Brief at 22. If the

legislature wanted it to mean “enacted” or “provided by law,” it should have stated as much. It did not.

Appellees reliance on the use of the term “designated by the Legislature” in Article X, Section 17(b) of the Florida Constitution in relation to the Everglades Trust Fund can be distinguished. This amendment to the Constitution passed on a voter initiative in 1996. No mention was made of a legal challenge to this specific provision as being violative of separation of powers in *Advisory Opinion to the Attorney Gen. -- Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1128-30 (Fla. 1996). The only other cited material dealing with the amendment does not address this issue. 1996 Op. Atty. Gen. Fla. 96-92 (Nov. 12, 1996). Just because this provision was recently added to the Constitution without challenge as to whether it violates separation of powers does not make it correct, nor does it undercut Appellants’ argument. If nothing else, there may be two provisions in the Constitution which violate separation of powers.

CONCLUSION

For the foregoing reasons and those in the Initial Brief, Amendment Two should be declared in violation of § 101.161, Fla. Stat., be declared invalid, and Appellees should be directed to take those steps necessary to implement the Court’s judgment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-going has been furnished to Louis F. Hubener, Assistant Attorney General, and James A. Peters, Special Counsel, and Richard B. Martell, Assistant Attorney General, Office of the Attorney General, The Capitol, Suite PL01, Tallahassee, Florida 32399-1050 by e-mail and First Class United States Mail on June 18, 1999.

Randall C. Berg, Jr., Esq.