Treatment & Rehabilitation, Nonviolent Drug Offenses

Number: PETITION

Date: September 14, 2001

The Honorable Charles T. Wells
Chief Justice, and
Justices of The Supreme Court
of Florida
The Supreme Court Building
Tallahassee, Florida 32399-1925

Dear Chief Justice Wells and Justices:

In accordance with the provisions of Article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes, it is the responsibility of the Office of the Attorney General to petition this Honorable Court for a written opinion as to the validity of an initiative petition circulated pursuant to Article XI, section 3, Florida Constitution.

On August 16, 2001, this office received from the Secretary of State an initiative petition seeking to amend the Florida Constitution to establish a right to treatment and rehabilitation for nonviolent drug offenses. The full text of the proposed amendment states:

"BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

Article I, Section 26, Florida Constitution, is hereby created to read as follows:

Right to Treatment and Rehabilitation

(a) Any individual charged with or convicted of illegally possessing or purchasing a controlled substance or drug paraphernalia may elect to receive appropriate treatment as described in subsection (c), instead of being sentenced or incarcerated, which shall be a matter of right for the first and second offense after enactment of this section and at the discretion of the court for subsequent offenses. If more than one qualifying offense under this section occurs during a single criminal episode, it shall be considered a single offense. For purposes of this section, an individual who elects to receive appropriate treatment prior to conviction shall be deemed to have waived the right to a speedy trial.

(b) This section shall not apply to any individual who in connection with the same criminal episode as the drug offense described in (a) is also charged with or convicted of: any felony; any misdemeanor involving theft, violence or the threat of violence; trafficking, sale, manufacture, or delivery of a controlled substance; purchase or possession with intent to sell, manufacture, or deliver a controlled substance or drug paraphernalia; or operating a vehicle under the influence of alcohol or a controlled substance. This section also shall not apply to any individual who, within five years before committing the drug offense described in (a), has been convicted of, or in prison for, one of the serious or violent crimes described in Section 775.084(1)(c)1.a.-r., Florida

Statutes (2000), or such other violent crimes as may be provided by law.

(c) For purposes of this section, "appropriate treatment" means a state-approved drug treatment and/or rehabilitation treatment program, or set of programs, designed to reduce or eliminate substance abuse or drug dependency and to increase employability. Such program or programs shall include, as deemed appropriate, access to vocational training, literacy training, family counseling, mental health services, or similar support services. The determination of the type and duration of the appropriate treatment program or programs that an individual shall receive, and methods of monitoring the individual's progress while in treatment, shall be made by a qualified professional as defined in Section 397.311(25), Florida Statutes (2000).

(d) An individual receiving appropriate treatment under this section may be transferred to a different program due to violations of program rules or unsuitability to the form of treatment initially prescribed. An individual may be removed from appropriate treatment if, after multiple programs and violations, and upon an independent evaluation by a qualified professional as defined in Section 397.311(25), Florida Statutes (2000), the individual is found by the court to be unamenable to treatment and rehabilitation. Any such individual removed from appropriate treatment who has been convicted of the drug offense described in (a) may be sentenced for the offense. Prosecution may be recommenced against any individual removed from appropriate treatment who has not yet been convicted, and a conviction resulting from such prosecution may result in a criminal sentence without regard to this section.

(e) Appropriate treatment shall be terminated upon an individual's successful completion of the prescribed course of appropriate treatment, or upon an independent evaluation and finding by a qualified professional as defined in Section 397.311(25), Florida Statutes (2000), that an individual's appropriate treatment has been successful, or eighteen months after the date the individual elected to receive appropriate treatment, whichever occurs first. Upon termination of appropriate treatment, the individual may not be prosecuted, sentenced, or placed under continued court supervision for the offense which led to the appropriate treatment.

(f) This section shall become effective on July 1 of the year following passage by the voters, and shall apply prospectively only to qualifying drug offenses occurring on or after that date.

(g) The Legislature shall enact such laws as necessary to implement this section."

The ballot title for the proposed amendment is "Right to Treatment and Rehabilitation for Nonviolent Drug Offenses." The summary for the proposed amendment states:

"Individuals charged or convicted of possessing or purchasing controlled substances or drug paraphernalia may elect appropriate treatment as defined, instead of sentencing or incarceration, for first two offenses; discretionary with court thereafter. Excludes individuals committing serious crimes in same episode or convicted or in prison for violent crimes in past five years. Individual unamenable to treatment may be prosecuted or sentenced. Upon successful completion or eighteen months in treatment, no prosecution or sentencing. Legislative implementation."

BALLOT TITLE AND SUMMARY

Section 16.061, Florida Statutes, requires the Attorney General's Office to petition this Honorable Court for an advisory opinion as to whether the proposed ballot title and summary comply with section 101.161, Florida Statutes.

Section 101.161(1), Florida Statutes, provides in relevant part:

"Whenever a constitutional amendment . . . is submitted to the vote of the people, the substance of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . . The wording of the substance of the amendment . . . shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of."

This Court has stated on several occasions "that the ballot [must] be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), *quoting, Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954). While the ballot title and summary must state in clear and unambiguous language the chief purpose of the measure, they need not explain every detail or ramification of the proposed amendment. *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986); *Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991).

While the summary attempts to convey the wide scope of the proposed amendment within the 75-word limitation, it appears to fall short of expressing the full intent of the amendment in terms that are "clear and unambiguous" to the average voter.

The ballot summary indicates that treatment programs are available for individuals charged with or convicted of offenses involving controlled substances or drug paraphernalia, but does not inform the voter that this option is unavailable if the offender commits either of these offenses at a level subject to felony charges.

In addition, the summary indicates that the offender may elect treatment and rehabilitation "for [the] first two offenses." The text of the proposed amendment, however, states that multiple offenses occurring in the same criminal episode are to be treated as a single offense. A voter, therefore, might be misled by the summary to believe that any offender who commits three offenses would be ineligible for the treatment option offered by the amendment, completely unaware that the option would remain open if the offender committed the multiple offenses as part of the same criminal episode. Such a voter would be led by the summary to believe, simply, that three offenses could result in prison time, when in fact the full text of the amendment says otherwise. Thus, the ballot summary would not appear to accurately reflect the effect of the proposed amendment.

Similarly, it may not be clear to the voter from the summary that at least for the first two offenses, the court has no role or apparent jurisdiction over the assignment of the individual to drug treatment and rehabilitation. The text of the amendment states that a "qualified professional" shall determine the course of treatment and the methods of monitoring progress while in treatment; the amendment, however, fails to specify who appoints the qualified professional. Through a rich tradition of modern jurisprudence, the citizens of Florida have come to expect that

judges are the ultimate authority for determining the appropriate punishment for criminal offenders. Nothing in this ballot language properly advises the voter that this history would be negated by having a "qualified professional," rather than a member of the judiciary, determine where certain drug offenders pay their debt to society, and for how long.

The proposed amendment provides that appropriate treatment shall be terminated "eighteen months after the date the individual elected to receive appropriate treatment." The ballot summary, however, refers to "eighteen months in treatment." These time periods may not be the same. Thus, the ballot summary does not appear to accurately reflect the text of the proposed amendment.

The ballot summary advises the voter that an individual unamenable to treatment may be prosecuted or sentenced for failure to successfully complete a treatment regimen. However, nothing in the summary advises the voter that an offender is not subject to prosecution or sentencing until after he or she has committed multiple violations and has failed to successfully participate in multiple programs. The text of the amendment allows the offender to be transferred repeatedly in hopes of finding a treatment program at which he or she may succeed. The ballot language could lead the voter to believe that an offender who is given one chance but fails at treatment would then be subject to prosecution and sentencing, whereas the text of the amendment offers the offender numerous chances. Thus, the summary does not accurately advise the voter of the ramifications of the proposed amendment.

The ballot summary also concludes with a two-word sentence fragment--"Legislative implementation."--that is likely to leave voters with substantial uncertainty. Lacking the requisite verb to qualify as a sentence, this fragment gives no indication as to its meaning. It is not clear whether the amendment requires legislative implementation or merely authorizes it. If a verb were present, such as "Requires legislative implementation," voters would clearly be advised that statutory provisions would be needed in order to give effect to the amendment. Voters choosing to support the amendment would then have a clear expectation that some follow-up action would have to be taken by the Florida Legislature for the amendment to be implemented. Lacking a verb, however, the sentence fragment gives voters no idea if legislative action is required for implementation or is only authorized. Therefore, this portion of the ballot summary fails to adequately advise the voters of what to expect if the amendment is adopted.

Therefore, I respectfully request this Honorable Court's opinion as to whether the ballot title and summary of the proposed constitutional amendment comply with section 101.161, Florida Statutes.

SINGLE SUBJECT LIMITATION

Section 16.061, Florida Statutes, requires the Attorney General's Office to petition this Honorable Court for an advisory opinion as to whether the text of the proposed amendment complies with Article XI, section 3, Florida Constitution.

Article XI, section 3, Florida Constitution, provides in relevant part:

"The power to propose the revision or amendment of any portion or portions of this constitution

by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith."

The single-subject provision "is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." *Advisory Opinion to the Attorney General--Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994).

To comply with the single-subject requirement, an initiative must manifest a "logical and natural oneness of purpose." *Fine v. Firestone,* 448 So. 2d 984, 990 (Fla. 1984). This Court stated in *Advisory Opinion to the Attorney General--Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994), that "[t]o ascertain whether the necessary 'oneness of purpose' exists, we must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution."

As this Court stated in *Advisory Opinion to the Attorney General–-Save Our Everglades*, 636 So. 2d 1336, 1340 (Fla. 1994), although a proposal may affect several branches of government and still pass muster, it cannot substantially alter or perform the functions of multiple branches:

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

This proposed constitutional amendment appears to impermissibly perform functions of all three branches of government.

The amendment clearly affects the judiciary by limiting a court's ability to sentence offenders who have been convicted. *See Andrews v. Florida Parole Commission,* 768 So. 2d 1257 (Fla. 1st DCA 2000) (sentencing is quintessentially a judicial function). Moreover, it limits the prosecutorial discretion of the state attorneys to charge and prosecute offenders, thereby altering the functions of the executive branch of government. *See Valdes v. State*, 728 So. 2d 736 (Fla. 1999) (prosecuting officer has complete discretion in the decision to charge and prosecute and judiciary cannot interfere with this discretionary executive function); *State v. Bloom*, 497 So. 2d 2 (Fla. 1986).

In addition, the amendment gives the offender sole discretion to forestall his or her prosecution by electing to participate in drug treatment and rehabilitation. This may adversely affect the State's ability to effectively prosecute the violation of its criminal laws. The purpose of a trial under our system of justice is to permit the State the opportunity, in a fair proceeding, to prove beyond a reasonable doubt the accused's guilt. *Cf. Ward v. State*, 765 So. 2d 299, 302 (Fla. 5th DCA 2000). Allowing an accused to unilaterally divert the prosecutorial course of the criminal justice process substantially interferes with the state attorneys' executive function.

Similarly, the function of the legislative branch to prescribe penalties for crimes is also substantially altered by the terms of the amendment. *See Lightbourne v. State,* 438 So. 2d 380 (Fla. 1983) (it is within the province of the Legislature to determine the penalties for crimes as long as the penalties are not cruel and unusual); *Sowell v. State,* 342 So. 2d 969 (Fla. 1977). Further, if the State is responsible for the costs of appropriate treatment and rehabilitation, the legislative function of appropriating funds will clearly be substantially affected. Since the amendment makes no express provision for funding however, a voter may be unsure whether the constitutional amendment requires the state to pay the costs of such treatment or whether the offender is responsible for such costs. The voter would be left wondering exactly what the amendment requires of his or her elected representatives, and exactly what it will cost the taxpayer.

The proposed amendment would, in certain cases, remove decision-making duties from a proper official of the State, the trial judge, and place it in the hands of a private individual, the offender. Because the amendment limits the amount of time the eligible offender could remain in rehabilitation, the proposed amendment would, in effect, yield to a private individual the authority to make an official sentencing decision, a duty and responsibility traditionally vested in the judiciary. *See, e.g., Hatcher v. Davis,* Case No. 2D00-4770 (Fla. 2d DCA, filed August 22, 2001), in which the Second District Court of Appeal recently vacated an administrative order that effectively placed responsibility for official decisions, *i.e.,* the scheduling of child support enforcement hearing, in the hands of private individuals.

Therefore, I respectfully urge this Honorable Court to consider whether the constitutional amendment, proposed by initiative petition, complies with Article XI, section 3, Florida Constitution.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

cc: The Honorable Katherine Harris, Secretary of State

The Honorable Jeb Bush, Governor, State of Florida

The Honorable John McKay, President, Florida Senate

The Honorable Tom Feeney, Speaker, Florida House of Representatives

Mr. Sydney P. Smith, Chairperson, Florida Campaign for New Drug Policies