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Case No. SC18-79

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ORANGE COUNTY, FLORIDA,

Petitioner,

v.

RICK SINGH, individually and as
Orange County Property Appraiser,
SCOTT RANDOLPH, individually and as
Orange County Tax Collector, and
JERRY DEMINGS, Sheriff of Orange County,

Respondents.

On review of a decision from the Fifth District Court of Appeal,
Lower Tribunal Case Numbers 5D16-2509 and 5D16-2511

RESPONDENTS' BRIEF ON JURISDICTION

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PREFACE

The Petitioner, ORANGE COUNTY, FLORIDA, will be referred to herein as the "County."

The Respondents, RICK SINGH, individually and as Orange County Property Appraiser, SCOTT RANDOLPH, individually and as Orange County Tax Collector, and JERRY DEMINGS, Sheriff of Orange County, will be referred to herein as "Respondents."

The Appendix to Petitioner's Brief on Jurisdiction will be referred to herein as "A.__."

SUMMARY OF ARGUMENT

The Opinion of the Fifth District does not "expressly construe[] a provision of the state . . . constitution." Rather, the Opinion merely cites and applies constitutional provisions and settled law to the facts of the case. This is insufficient to invoke this Court's jurisdiction.

There is no conflict between the Fifth District's Opinion and this Court's opinion in *Telli*. *Telli* involved terms limits, a qualification for office that is unrelated to election process or procedure. On the other hand, this case involves the County's efforts to modify and adapt both the state constitution and general law regarding election process and procedures.

Moreover, even if *Telli* were applicable, there is no conflict. On *Telli*'*s* own rationale, the Charter Amendment is impermissible both because it is unauthorized by the constitution, and because it would violate the constitution and state statutes.

There is no important question presented in this case warranting this Court's exercise of jurisdiction. The County did not seek certification from the Fifth District below. Because no question has been certified, the issues described by the County, as exaggerated as they are, provide no independent basis for this Court's jurisdiction.

In the unlikely event this Court will accept jurisdiction, it should also consider and adjudicate the numerous alternative grounds for affirmance of the Fifth District

below, as well as the Respondents' cross-appeal to invalidate the remainder of the Charter Amendment.

ARGUMENT

I. THE FIFTH DISTRICT'S OPINION DID NOT EXPRESSLY CONSTRUE THE FLORIDA CONSTITUTION, BUT MERELY APPLIED IT.

The Florida Constitution does not grant discretion to this Court to review any decision that cites or applies the state constitution; rather, this Court is granted discretion to review only decisions "that expressly construe[] a provision of the state . . .constitution." Art. V, § 3(b)(3), Fla. Const.

This Court has consistently interpreted this language to mean that a district court decision must do more than merely cite and apply a constitutional provision. Instead, the decision must "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision" to invoke jurisdiction. *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (quoting *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958)). The Armstrong decision went on to say that "[i]t is not sufficient merely that the [lower court] examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution." *Armstrong*, 106 So. 2d at 409.

This Court emphatically reiterated that applying the state constitution does not constitute construing the state constitution in *Rojas v. State*, 288 So. 2d 234 (Fla. 1973), when this Court stated:

> There must be a ruling by the [lower] court which explains, defines or overtly expresses a view which eliminates some existing doubt as to a constitutional provision . . . . In the present case there is no such definition or explanation . . . . [I]f anything, [the lower court] merely applied the provisions . . . to the facts it determined existed in the instant case. . . . Applying is not synonymous with construing; the former is NOT a basis for our jurisdiction, while the express construction of a constitutional provision is.

Id. at 236 (all emphasis by the Court). See also, *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973) ("[O]ur . . . jurisdiction is not properly invoked merely because the [lower] court may *apply* a constitutional provision to the facts before it, but rather is properly invoked as to the construction of a constitutional provision only where the trial court has *expressly construed* the constitutional provision involved.") (footnote omitted) (emphasis by the Court). Note that these cases predating the 1980 constitutional reforms are applicable to the current constitution, and with greater force, due to the addition of the word "expressly" in the 1980 Constitution. Anstead, Kogan, Hall, and Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova Law Review 431, 505 (2005).

In this case, the Fifth District did not construe any provision of the state constitution. No word is defined; no language is parsed; no uncertainty is explained.

Rather, the court merely applied settled law when applying Article V, section 1(d) of the Florida Constitution to the facts presented.

To do so, the Fifth District looked to *In re Advisory Opinion to the Governor*, 313 So. 2d 717, 721 (Fla. 1975), and Attorney General Opinion Fla. 86-62 (1986) and reiterated what this Court has already explained – that section 1(d) merely authorizes "another manner than election for the selection of" county constitutional officers. 313 So. 2d at 721. The cited Attorney General Opinion likewise applied this Court's *In re Advisory Opinion* to opine that the power to determine whether or not to elect county constitutional officers does not convey the power to modify the election law of the state. Op. Att'y Gen. Fla. 86-62 (1986) (explaining that the "Florida Election Code contemplates the partisan election of [county officers] and accordingly a county charter providing for nonpartisan election of such an officer would be 'inconsistent with general law'" and therefore unauthorized by Article VIII, section 1(g) of the Florida Constitution.) This constitutes established law that was merely applied by the Fifth District. *State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993) ("[A]lthough an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive."); *14269 BT LLC v. Village of Wellington*, Florida, __ So. 3d __, slip op. at 3 n1, (Fla. 4th DCA Jan. 17, 2018).

Allowing a mere citation to a constitutional provision to merit the exercise of the Court's jurisdiction would greatly expand that jurisdictional authority, contrary to the intent of the 1980 reforms limiting the Court's discretion. This Court should adhere to its long-standing limitations of this jurisdiction.

II. THE FIFTH DISRICT'S OPINION DOES NOT CONFLICT WITH *TELLI* BECAUSE IT DOES NOT ADDRESS THE SAME QUESTION OF LAW.

The County purports to find conflict between the Opinion and this Court's decision in *Telli v. Broward County*, 94 So. 3d 504 (Fla. 2012), a case that was not even cited in the Opinion. The reason *Telli* was not cited by the Fifth District in its Opinion is because it is irrelevant to the actual legal issue addressed in the Opinion.

Telli addressed the question of term limits, describing term limits as a "qualification" for office. *Telli*, 94 So. 3d at 506. In contrast, the Charter Amendment invalidated by the Fifth District created a non-partisan election and election procedures. Qualifications for office and the procedure for elections are two distinct topics. The home rule authority for a county to address one of those topics does not imply the authority to address the other.

The *Telli* court concluded that imposing a qualification for officers was not prohibited by any constitutional or statutory provision, and thus could be adopted locally under Article VIII, section 1(g), which conveys powers of local self-government to a charter county to the extent "not inconsistent with general law." In

contrast, the Charter Amendment here changed the nature and method of the elections to be held for the constitutional county officers and created local election procedures. See, App.4. This violates the Florida Election Code (which preempts such matters to the Florida Legislature) and thereby violates the Florida's Constitution (which extends "powers of local self-government" only where "not inconsistent with general law.") App.5-6.

In *Telli*, this Court overruled *Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002), and "agree[d] with Justice Anstead's dissenting opinion" in *Cook*. *Telli*, 94 So. 3d at 512. In *Cook*, Justice Anstead laid out two questions, both of which require affirmative answers to find a charter amendment affecting county officers to be valid. The first question is whether the charter amendment is within the scope of the County's constitutional home rule authority. 823 So. 2d at 95. The second is whether the charter amendment violates some other constitutional provision. *Id*. at 95, 96. The charter amendment at issue here fails on both questions.

As to the first question, the home rule power granted in Article VIII, section 1(g) of the Florida Constitution does not grant charter counties the authority to conduct non-partisan elections of county officers, especially through locally created non-partisan election processes. Indeed, as Justice Anstead noted himself in *Cook*, this constitutional provision "specifies that county officers may be elected *or chosen in some other manner*." 823 So. 2d at 96 (emphasis in opinion). The choices that a

charter county has are limited to conducting elections in accordance with the constitution and statutes, or choosing some method other than election. Hybrid or modified election procedures are not authorized. Thus, the inapplicability of *Telli* to the facts of this case is demonstrated by *Telli* itself.

As to the second question, the Charter Amendment violates other constitutional provisions. Article VI, section 1 of the Florida Constitution requires elections to be "regulated by law." App.7. This quoted phrase means a statute enacted by the Legislature. *Grapeland Heights Civic Ass'n v. City of Miami*, 267 So. 2d 321, 324 (Fla. 1972). Florida's Constitution does not authorize elections to be regulated by a mere county charter in contravention of general law. Thus, the Charter Amendment exceeds the authority of a charter county under Article VIII, section 1(g) of the Florida Constitution, and also runs contrary to Article VI, section 1. The District Court did not cite to *Telli* precisely because it is inapplicable here.

Indeed, the County's liberal construction of the proviso of Article VIII, section 1(d) that is inherent in the County's overbroad interpretation of *Telli* places *Telli* in conflict with *In re Advisory Opinion*. In the *Advisory Opinion*, this Court construed the same home rule provision of the constitution and held that the proviso authorizing "another manner than election for the selection of these officers" must be strictly construed. 313 So. 2d at 721. The County's interpretation of *Telli* and the County's liberal construction of the proviso necessarily implies that the Advisory Opinion and

its strict construction was overruled *sub silentio* in *Telli*. Of course, this Court does not overrule itself *sub silentio*. *Stevens v. State*, 226 So. 3d 787, 792 (Fla. 2017); *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002).

The Fifth District Opinion cannot be read to be in conflict with *Telli* without stretching *Telli* contrary to its own rationale and beyond its own constitutional underpinnings. This Court should therefore conclude that *Telli* is not in conflict with the Fifth District's Opinion and should decline to exercise jurisdiction.

III. THE IMPACT OF THE DISTRICT COURT'S OPINION DOES NOT WARRANT THIS COURT'S EXERCISE OF DISCRETION.

The County indiscriminately ropes in numerous local officials who are not constitutional county officers defined in Article VIII, section 1(d) of the Florida Constitution, in an effort to exaggerate the impact of the Opinion. County's Brief, p.9, 10. This argument should be rejected.

The County did not request the District Court to certify any question of great public importance. Of course, none has been certified. Accordingly, while the Respondents do not agree with the County's arguments regarding the impact of the Fifth District's Opinion, those arguments are also of no import in the absence of a basis for discretionary jurisdiction.

The Respondents also note that the briefing before the Fifth District addressed numerous alternative bases for affirmance that were not reached by the Opinion. The

case also involved a cross-appeal which would have further invalidated other portions of the Charter Amendment. In the event that this Court were to accept jurisdiction it should consider those issues as well, *see*, *e.g.*, *Boulde v. Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977), and affirm, affirm on other grounds, or grant the Respondents' requested additional relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should decline to exercise jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing and e-served on counsel of record as noted below, this 7th day of February 2018.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

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