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Closing the Deadly Loopholes in Firearms Laws: The History and Impact of Amendment 12

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**CLOSING THE DEADLY LOOPHOLES IN THE FIREARMS LAWS:
THE HISTORY AND IMPACT OF AMENDMENT 12**

*Katherine Fernandez Rundle**

*Paul Mendelson***

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I. INTRODUCTION

As a Commissioner on the 1997-98 Constitution Revision Commission, I made it my top priority to propose a constitutional amendment that would improve our firearm laws and ultimately save lives by giving back to Florida's counties the authority to enact ordinances regulating the purchase and sale of firearms.¹ I proposed and advocated such an amendment because as a career prosecutor and as the State Attorney of Miami-Dade County since 1993, I had become increasingly frustrated with the Florida Legislature's refusal to enact meaningful firearm safety legislation. Even after the shooting at the Empire State Building in early 1997 with a firearm purchased in Florida exposed our state's notoriously weak firearm laws to nationwide criticism, efforts to enact legislation to strengthen these laws, or at least to give counties the authority to do so, were unsuccessful. My belief that the people of Florida did not share the legislature's reluctance to enact significant firearm regulations would be put to the test by my proposed firearm amendment that would become the most controversial issue before both the Commission and the electorate. How the proposal became a constitutional amendment that was supported by twenty-four of the thirty-seven Commissioners and seventy-two percent of the electorate, despite persistent opposition from the National Rifle Association (NRA), will be discussed in this Article.² The Article will also examine the significance of the amendment by reviewing and contrasting the county ordinances that were enacted in response to it.

II. WHY LOCAL OPTION?

The first question in drafting a constitutional amendment was whether the amendment should apply uniformly statewide or whether it was preferable to give each of Florida's sixty-seven counties the authority to enact their own gun control ordinances. This question was resolved in favor of giving counties the option of enacting their own ordinances because all the pertinent information demonstrated that firearm violence was much more prevalent in the more populous urban counties. For example, 1996 statistics from the Florida Department of Health showed that more than half of all the firearm related deaths for the year occurred in the seven most populous counties, Miami-Dade, Broward, Palm Beach,

1. In 1987, the legislature had taken away this authority when it enacted the "Joe Carlucci Firearms Act," which gave the state legislature the exclusive authority to enact laws relating to firearms and ammunition, and any existing county or municipal ordinances were declared null and void. See FLA. STAT. § 790.33(1) (1999).

2. See Division of Elections, Florida Department of State, Nov. 3, 1998.

Hillsborough, Pinellas, Orange, and Duval.³ These statistics also show that eighty-one percent of firearm related deaths of victims age twenty-four or under occurred in these same seven counties (The charts on the following page illustrate the predominance of firearm related deaths in the seven most populous counties).⁴

Also factoring into the decision to propose a county option were pragmatic considerations. We knew that it would be difficult to convince the members (Commissioners) of the Constitution Revision Commission (Commission), who were of course aware that all the amendments proposed by the prior Commission had been rejected by the electorate, to support a gun control proposal that was certain to arouse opposition from well-financed opponents. Because the proposed constitutional amendment would only give counties the option of enacting gun control regulations, we were able to assure the Commissioners, and later the electorate, that a vote for the amendment would not result in any such regulations in a county whose elected representatives believed that the existing state laws were adequate. Based upon the responses to the amendment from Commissioners and the electorate, it is clear that the decision to limit its scope to a county option played an important role in the placing of the amendment on the ballot by the Commission, and the overwhelming support it received from the electorate.

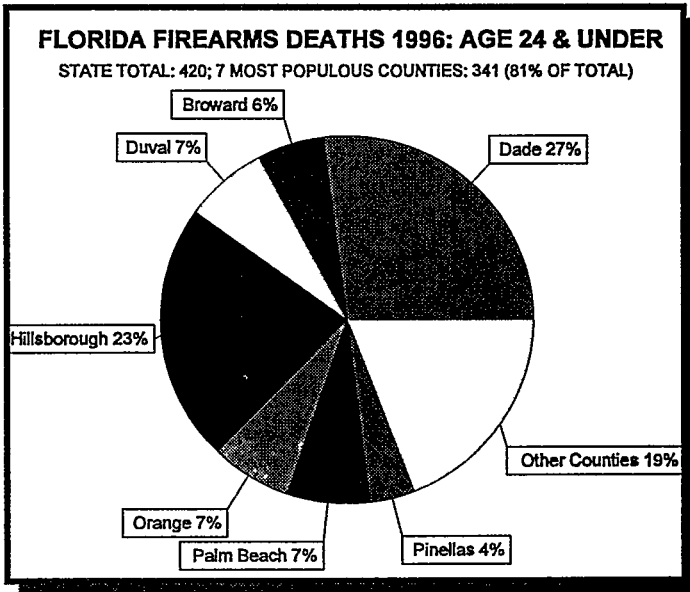
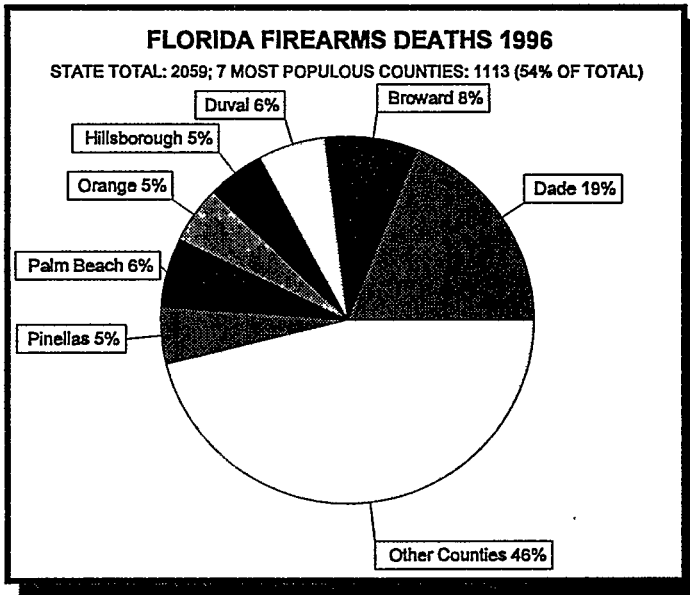
III. DRAFTING THE AMENDMENT

After deciding that the amendment should give counties the option of enacting gun control regulations, the next task was to decide what regulations should be available to the counties. The first draft was very broad, and gave counties the option of regulating the possession, purchase, and sale of firearms with the only limitation being that a county could not absolutely prohibit the possession, purchase, or sale of a firearm. This draft was flawed because it allowed for the regulation of the possession of firearms; therefore, it would be possible that a citizen who lawfully possessed a firearm in his or her own county could unknowingly become a criminal in another county. The amendment needed to be narrowed.

By changing the proposed amendment so that a county could only regulate the sale of a firearm, the argument that the possession of a firearm could unfairly be made criminal was eliminated. After determining that the amendment should only authorize the regulation of the sale of firearms, we reviewed the Florida Statutes to determine what regulations would be most effective in preventing the sale of firearms to the wrong people. We quickly realized that there were huge loopholes in our laws regarding

3. See Bureau of Economic and Business Research, University of Florida, Apr. 1, 1998.

4. See *id.*



background checks of potential firearm buyers and the three day waiting period.

In accordance with Section 790.065 of the Florida Statutes, licensed firearm dealers generally may not sell or deliver from their inventory at their premises a firearm to another person unless, and until, the Florida Department of Law Enforcement has reviewed the criminal history record of the potential buyer and approved the sale.⁵ A criminal history records check helps prevent convicted felons, juveniles, and other individuals who may not legally possess a firearm from purchasing one. In 1997, Florida's requirement that licensed firearm dealers conduct such a check resulted in the denial of 7,348 requests to purchase a firearm.⁶ There is, however, a loophole under Florida law because there is no requirement for a criminal history records check before a firearm is sold or delivered by a non-licensed seller.⁷ Because of this loophole, nonlicensed sellers of firearms have set up shop at gun shows, flea markets, and the trunks of their cars throughout Florida and sold all types of firearms without a criminal history records check. Thus, anyone whose attempt to purchase a firearm from a licensed seller was rejected because of a criminal history records check could go to one of the numerous gun shows held throughout the year in Florida and purchase a firearm. Giving counties the authority to close this loophole would become a main component of our proposal, which became known as the "gun show loophole amendment."

We also concluded that the proposed amendment should allow counties to close loopholes in our statewide waiting period. Florida's constitutional waiting period is limited because it applies only to the retail sale of any handgun.⁸ Because the sale of a handgun at a gun show by a non-licensed seller is not a retail sale, there is no waiting period before such a sale can be consummated. Moreover, the waiting period does not apply to even the retail sale of a firearm that is not a handgun, such as a rifle or shotgun. The foreseeable consequences of an emotionally traumatized person making an immediate purchase of a firearm are just as tragic if the firearm is purchased from a non-licensed seller, or is a rifle or shotgun, and the counties needed to be given the option of closing these loopholes.

5. See FLA. STAT. § 790.065(1) (1999). The only sales that a licensed firearms dealer can make from his or her premises without the department's approval are to other licensed dealers, licensed importers, licensed manufacturers or licensed collectors, and to persons who hold a concealed weapons or firearms license or hold an active certificate as a "law enforcement officer." *Id.*

6. See Records on file with the Florida Dept. of Law Enforcement.

7. See generally FLA. STAT. § 790.065 (1999).

8. See FLA. CONST. art. I, § 8(b). This constitutional amendment directed the legislature to enact implementing legislation. See FLA. STAT. § 790.0655 (1999).

After deciding that our proposed amendment would be directed to the closing of the background check and waiting period loopholes, we drafted a proposal for presentation to the other members of the Constitution Revision Commission. This proposal read as follows: "Each county shall have the authority to require a background check and a waiting period in connection with the sale of any firearm occurring within such county. For purposes of this section 'sale' shall mean the transfer of money or other valuable consideration for any firearm."

IV. PREPARING FOR THE CONSTITUTION REVISION COMMISSION

In presenting this proposal to the Commissioners, we made sure that they were aware of the need to close the loopholes in our firearm laws by providing them each with a copy of a news story videotaped by a local television station. The videotape vividly illustrated the ease in which people could attend a gun show and purchase a firearm without having their criminal history records checked and without having to abide by any waiting period. While the response of the Commissioners was generally favorable, we knew that we needed to be prepared to address any possible opposition to the proposal.

As it became publicly known that the Constitution Revision Commission would consider placing on the ballot a proposed constitutional amendment that would authorize Florida's counties to enact ordinances restricting the sale of firearms, the NRA organized its opposition. At public hearings and through letters, faxes, and e-mails, the Commissioners were inundated by opponents of any form of gun control. Nervous Commissioners advised us that even though they supported stronger firearm laws, they were concerned that, because there appeared to be strong opposition to our proposal, the amendment would be rejected by the electorate and could cause the rejection of all the other proposed amendments. We decided that the best way to respond to these concerns was to poll the electorate.

Peter D. Hart Research Associates, Inc. conducted a poll of 605 registered Florida voters between January 30 and February 1, 1998.⁹ The results were most encouraging and persuasive. When asked about the current law that requires a criminal background check and three day waiting period before a handgun is purchased at a gun store, seventy-five percent of the respondents reacted very favorably, fourteen percent were somewhat favorable, three percent somewhat unfavorable and six percent were very unfavorable.¹⁰ When asked if they were concerned that, under

9. See Poll, conducted by Peter D. Hart Res. Assocs., Inc., Jan. 30 to Feb. 1, 1998 (on file with author) [hereinafter Hart Poll].

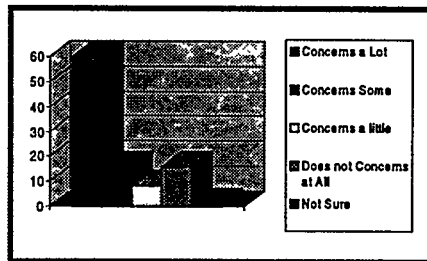
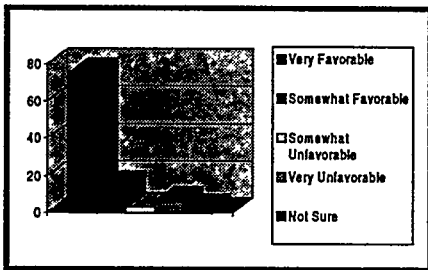
10. See *id.*

current law, people can purchase handguns from private dealers at gun shows and avoid the waiting period and background check that would be required at a gun store, sixty percent of the respondents answered that they were concerned a lot, sixteen percent were concerned some, eight percent were concerned a little, and sixteen percent were not concerned at all.¹¹ The respondents were then read the actual proposed amendment, and sixty-two percent said they would definitely vote to approve, thirteen percent would probably vote to approve, eleven percent would probably vote not to approve, eight percent would definitely vote not to approve, and six percent were unsure.¹² Equipped with the results of the poll, which are illustrated in the following charts, I was ready to present the proposed amendment to the entire Commission.

As you may know, under Florida law, handgun purchasers must undergo a criminal background check and wait three days before purchasing a firearm at a gun store. What is your reaction to this law -very favorable, somewhat favorable, somewhat unfavorable or very unfavorable?

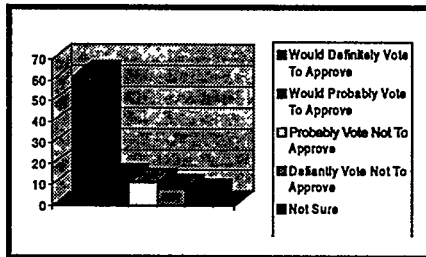
Gun shows often are held at civic centers and other government-owned buildings. Current regulations of gun shows here in Florida allow people to purchase handguns from private dealers at gun shows and avoid the waiting period and background check that would be required at a gun store.

How do you feel about this issue would you say that it concerns you a lot, concerns you some, concerns you a little, does not concern you at all?



Now let me read the wording of another voter initiative that may be on the November Ballot in Florida and ask for your reaction. In this voter initiative the wording has been changed to include all locations. "Each county shall have the authority to require a background check and a waiting period in connection with the sale of any firearm occurring within such county. For purposes of this section, 'sale' shall mean the transfer of money or other valuable consideration for any firearm."

How would you vote on this voter initiative, would you vote to approve or not approve it? (If "Not Sure" ASK) Well which way do you lean at this time?



11. See id.

12. See id.

V. THE COMMISSION DEBATE

On February 10, 1998, Commission Chairman Dexter Douglas, mindful of the huge public response that had already been generated by the proposed firearm amendment and the controversy that would attach to this proposal if it was approved by the Commissioners, made sure that all the Commissioners were attentive when he announced that the proposal was the next item on the agenda. The ensuing debate was enlightening and resulted in several amendments.

As sponsor of the proposal, I began the debate by explaining that the amendment would enable the counties to close potentially dangerous loopholes in our state firearm laws. I stressed that in our most populous urban counties, firearm related deaths were an increasing problem, and that the Constitution Revision Commission should give these counties the opportunity to take control over their communities and protect their citizens. I also reminded the Commissioners, who had been provided with a copy of the Hart poll, that Florida's voters were solidly behind the amendment.

Commissioners, who were generally supportive of the proposal, then offered amendments that would narrow its scope but still allow counties to close the loopholes. Commissioners James A. Scott and H.T. Smith proposed an amendment that holders of a concealed weapons permit be exempt from the background check and waiting period authorized by the proposal. They reasoned that holders of concealed weapons permits are exempt from the already existing constitutional waiting period and the statute requiring a background check for the retail sale by a firearms dealer because they have undergone background checks, which revealed that they are not disqualified from possessing a firearm, and have demonstrated their competency with a firearm. This amendment was approved by the Commission without opposition. In response to the apprehension expressed by several Commissioners that a county could impose an unlimited waiting period, the proposal was amended so that only a waiting period of three to five days would be authorized. A majority of the Commissioners felt that five days was sufficient time to conduct a thorough background check and to allow an emotionally traumatized individual the opportunity to regain his or her composure. Because several Commissioners were concerned that the proposal, as written, would allow counties to regulate the private sale of a firearm, Commissioner Carlos J. Alfonso proposed an amendment limiting the right of counties to require background checks and waiting periods only "when any part of the transaction is conducted on property to which the public has the right of access." This language was added to the proposal.

As amended, the proposal now read:

Each county shall have the authority to require a background check and a waiting period of not less than three days nor more than five days, excluding weekends and legal holidays, in connection with the sale of any firearm occurring within such county. For purposes of this subsection, the term "sale" means the transfer of money or other valuable consideration for any firearm when any part of the transaction is conducted on property to which the public has the right of access. Holders of a concealed weapons permit as prescribed in Florida law shall not be subject to the provisions of this subsection when purchasing a firearm.

By a vote of twenty to nine, the amended proposal was approved for further consideration.¹³

VI. WHY A CONSTITUTIONAL AMENDMENT RATHER THAN LEGISLATION

In the five weeks between the initial vote approving the revised constitutional amendment, and the final vote needed to place the proposal on the ballot, the overriding issue was whether this was a matter that needed to be in the constitution or should be dealt with by legislation. My initial position on this issue, was that there was precedence for adding the proposed amendment to the constitution. In 1989, there was widespread public support for a law establishing a statewide three-day waiting period for the sale of handguns. The legislature did not pass such a law, but concluded that if this was to be the law it should be part of the constitution; therefore, it proposed an amendment to article I, section 8 of the Florida Constitution, SJR 43 (1989), which was overwhelmingly approved by the electorate. I also advised Commissioners of the repeated failure to gain legislative support for firearm safety regulations, ever since the "Carlucci Act" was adopted in 1987.¹⁴ Nevertheless, members of my staff and I met with the president of the NRA to ascertain if we could agree on legislation that would close the loopholes in our firearm laws.

The position of the NRA was that there were no loopholes in the law since federal laws regulating the sale of firearms applied to gun shows. We disagreed because the federal laws perpetuate the loopholes by exempting from their regulations "a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms

13. Despite opposition from a minority of the Commissioners, the amended proposal still authorized counties to impose a waiting period on the sale of all firearms, not just handguns.

14. See FLA. STAT. § 790.33 (1999) (adopted in 1987).

. . . .”¹⁵ Inasmuch as these are the very people who set up shop at gun shows, sell their firearms without having to conduct a criminal history records check of the buyer, and do not abide by a waiting period, the loopholes clearly exist under the federal law.¹⁶ NRA attorneys drafted state legislation that they claimed would close the loopholes, but which, in fact merely parroted the inadequate federal law.

While we knew that members of the Constitution Revision Commission would not be fooled by the NRA’s proposed legislation, we were still confronted with the legitimate concerns of Commissioners who agreed with us that the loopholes needed to be closed, but felt that this could and should be accomplished through legislation.¹⁷ Therefore, we drafted legislation that would close the loopholes statewide, or, as with the proposed constitutional amendment, give counties the authority to do so. We obtained sponsors for this legislation and enlisted the support of Governor Chiles. Because the critical vote needed to advance the proposed amendment would take place while the legislature was still in session, we assured the Commissioners that if they voted in support of the amendment and the legislature subsequently enacted this legislation, I would agree to a reconsideration of the amendment.

VII. THE OPPOSITION RESPONDS

Recognizing that, by all appearances, the Constitution Revision Commission was likely to support a constitutional amendment authorizing counties to close the loopholes in our firearm laws, the NRA tried one final attempt to defeat the amendment. In the days before the critical vote, NRA members inundated the Commissioners with a letter claiming that the proposed amendment would result in the reduction of existing statewide penalties for illegal firearm sales. The NRA claimed that, because counties can only make the violation of an ordinance a misdemeanor, this would mean that county ordinances providing for misdemeanor penalties for the illegal sales of firearms would supersede state statutes, which make certain illegal sales of firearms a felony. This was patently false.

There would obviously be an overlap between state statutes that require criminal history records checks for the retail sale of firearms and waiting periods for the retail sale of handguns, and a county ordinance that

15. 18 U.S.C. § 921(21)(c) (1994).

16. *See id.* Even after the Columbine shootings, an attempt to close the loopholes in the federal law was unsuccessful.

17. There was a justifiably strong belief by all the Commissioners that the Florida Constitution should only be amended when necessary. Because of this belief, my proposal that the current statutory requirement that defendants sentenced to state prison be required to serve 85% of their sentence be included in the constitution was narrowly rejected by the Constitution Revision Commission.

would require a criminal history records check and a waiting period for the sale of all firearms. The only legal and logical way to enforce such an overlapping statute and ordinance is that the state statutes with their felony penalties would continue to apply to sales which they prohibit, and the county ordinances with their misdemeanor penalties would apply to sales not prohibited by the state statutes. Obviously, as clearly stated in the Florida Constitution, a county may not enact an ordinance that is inconsistent with a state statute.¹⁸ Therefore, the NRA claim that the proposed amendment would authorize the counties to enact ordinances that would reduce state penalties was incorrect. Fortunately, the Commission was not misled by this argument.

VIII. THE FINAL COMMISSION VOTE

On March 17, 1998, the Constitutional Revision Commission met to vote on the proposed amendments that had made it through the preliminary process. A final change was made to the proposed amendment by changing the words "background check" to "criminal history records check" to assure that the counties could not require that legitimate private matters be disclosed before a firearm could be purchased. The vote was then called, and twenty-four Commissioners, two more than needed for approval, voted for the amendment. We now knew that unless the amendment was withdrawn, which would only occur if the legislature enacted our proposed legislation that mirrored the amendment, the people of Florida would have the opportunity to vote on a constitutional amendment that would allow the counties to close the loopholes in state firearm laws.

IX. LEGISLATION FAILS

For the month after the Commission's final approving vote, we worked diligently in support of the proposed legislation that would close the firearm loopholes. Regretfully, the influence of the NRA in the Florida Legislature was too strong, and our proposed legislation was rejected in Committee and never even made it to the floor for a vote. Any attempt to enact firearm laws opposed by the NRA during the 1998 session was clearly doomed to failure.

X. GETTING OUT THE VOTE

With the conclusion of the 1998 legislative session, it was now certain that the firearm amendment would be on the ballot in November. The task of educating the electorate about the need for the amendment

18. See FLA. CONST. art. VIII, §§ 1(f) & 1(g).

began in earnest.

Over the next several months, we appeared before numerous groups and associations and advocated for the firearm amendment, which had been designated as Amendment 12. Flyers, letters, and cards detailing the need for the amendment, and explaining why the arguments advanced in opposition were invalid and false, were prepared and circulated to voters. Invariably, the response was overwhelmingly positive. Indeed, the most frequent response from the voters was that the proposed amendment did not go far enough, that it should apply statewide and allow for additional firearm regulations. Our belief that the amendment was very popular with the electorate was confirmed by a poll prepared for the Constitution Revision Commission in July 1998, which indicated that the percentage of voters who would definitely vote for the amendment was fifty-eight percent and that twenty percent would probably vote for it.¹⁹ The one nagging concern was trying to anticipate the opponents' plan, since they were largely silent for the summer and early fall of 1998.

Within a week of the November 3 election, we and all the citizens of Florida learned of the opponents' campaign. A massive radio campaign, shamelessly and falsely claiming that the firearm amendment would result in the reduction of penalties for state firearm laws from felonies to misdemeanors was launched throughout Florida. The centerpiece of this campaign was a message from Charlton Heston who reminded Floridians that he had portrayed Moses²⁰ in the movies and now needed their help to stop an amendment that would "give criminals less jail time for gun crime."²¹ Equally as absurd and offensive was another commercial that reiterated this claim and alleged that Florida newspapers opposed the firearm amendment, when in fact fourteen of the twenty largest newspapers in Florida had actually endorsed the amendment. In the few days prior to election day, we did our best to respond to the NRA's false claims. Volunteers throughout the State Attorney's Office printed flyers and stuffed envelopes so that the truth about the firearm amendment, at least in Miami-Dade County, would be available to the voters.²² The

19. See Fredrick Schneider's Research Poll, conducted June 29-30, 1998.

20. Apparently, Mr. Heston felt that it was more important to remind Floridians of a movie role he played almost 50 years ago than to advise them that he was currently the president of the NRA.

21. Transcript of advertisement of file with author.

22. When questions were raised because financial resources of the State Attorney's Office were used in this effort, we responded by citing to *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1375 (Fla. 1991), which rejected a challenge to a governmental agency's use of public funds to mount an information campaign regarding a referendum. As the court reasoned "local governments are not bound to keep silent in the face of a controversial vote that will have profound consequences for the community. Leaders have both a duty and a right to say which course of action they think best, and to make fair use of their offices

weekend before the election, the volunteers passed out flyers urging support for Amendment 12 at football games, concerts, and any location where large groups of people gathered.

XI. THE ELECTION RETURNS

Finally, on election day, a small group of volunteers, who had been working for the proposed amendment for eighteen months, gathered in a Coconut Grove apartment and waited for the results. We were immediately gratified when early returns showed that the firearm amendment, as well as all the other amendments proposed by the Constitution Revision Commission, were winning by large margins. As the evening wore on and the margins of victory increased we came to the realization that all our efforts over the last year had been worth it. We had made history.

Seventy-two percent of the electorate voted for the firearm amendment, which was approved by majority vote in fifty-five of Florida's sixty-seven counties.²³ A further breakdown of the election results confirmed our belief that additional firearm regulations were particularly needed, and wanted, in the more populous counties. Voters in Florida's forty-four most populous counties voted for the amendment.²⁴ The percentage of votes for the amendment was particularly high in Florida's three most populous counties, Miami-Dade, Broward, and Palm Beach, which have experienced a disproportionately high number of firearm related deaths. In these three counties the vote in favor of the amendment was eighty-five percent in Miami-Dade, eighty-four percent in Broward and eighty-three percent in Palm Beach.²⁵

XII. THE COUNTY ORDINANCES

As of January 1, 2000, the following ten counties have enacted firearm ordinances pursuant to the constitutional amendment: Miami-Dade, Broward, Palm Beach, Hillsborough, Pinellas, Orange (the six most populous counties), Volusia, Charlotte, Hernando, and Citrus.²⁶ Two other counties, Sarasota and Osceola, currently have ordinances pending before

for this purpose. The people elect governmental leaders precisely for this purpose." *Id.* at 1375.

23. *See supra* note 2.

24. *See supra* note 3.

25. *See id.*

26. *See* METROPOLITAN DADE COUNTY, FLA., CODE § 98-169 (Jan. 5, 1999); BROWARD COUNTY, FLA., CODE § 1998-45 (Jan. 5, 1999); PALM BEACH COUNTY, FLA., CODE § 99-5 (Mar. 1999); HILLSBOROUGH COUNTY, FLA., CODE § 99-1 (Mar. 1999); PINELLAS COUNTY, FLA., CODE § 99-6 (Mar. 1999); ORANGE COUNTY, FLA., CODE § 98-34 (Jan. 5, 1999); VOLUSIA COUNTY, FLA., CODE § 99-26 (Oct. 1999); CHARLOTTE COUNTY, FLA., CODE § 99-9 (Oct. 1999); HERNANDO COUNTY, FLA., CODE § 99-4 (Oct. 1999); CITRUS COUNTY FLA., CODE § 99-4 (May 1999).

their Board of Commissioners.²⁷ The remaining counties have not yet enacted ordinances.²⁸

The significance of the firearm amendment is illustrated by the urgency with which the counties enacted their ordinances. Although the firearm amendment did not become effective until January 5, 1999, under Article XI, Section 5(c) of the Florida Constitution, Miami-Dade, Broward, and Orange counties enacted ordinances in the interim between election day and the beginning of 1999, and these ordinances became effective on the same date as the amendment.²⁹ The other more populous counties quickly followed suit, and by early March 1999, ordinances were effective in Palm Beach, Hillsborough, and Pinellas.³⁰ The ordinances in Volusia, Charlotte, Hernando, and Citrus became effective by October of 1999.³¹ A comparison of the ten ordinances that have already been enacted and the two pending ordinances, shows that while there are similarities in how the counties have implemented the amendment, there are also differences.³²

Under state law, criminal history records checks are required when a licensed dealer makes a retail sale of any firearm,³³ but the three day waiting period is only applicable when a licensed dealer makes a retail sale of a handgun.³⁴ Only one county, Palm Beach, enacted an ordinance which followed the state statutes and made its criminal history records check applicable to firearms and its waiting period applicable only to handguns.³⁵ While the other counties differed in their determination of whether all firearm sales or just handguns sales should be regulated, they all concluded that criminal history records checks and waiting periods should be applicable to the same sales.³⁶ Perhaps in recognition that it was standing alone from the other counties, Palm Beach amended its ordinance on September 28, 1999 to require a waiting period on the sale of firearms.³⁷

In so amending its ordinance, Palm Beach joined Miami-Dade, Broward, Hillsborough, Pinellas, Hernando, and Citrus counties, in enacting ordinances that require criminal history records checks and

27. Drafts of Proposed Ordinance on file with authors.

28. One county, Santa Rosa, adopted a resolution criticizing the amendment and stating its intention not to enact an ordinance. Ironically, 57% of the voters in Santa Rosa voted in favor of the amendment. *See supra* note 2.

29. *See supra* note 26.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See* FLA. STAT. § 790.065 (1999).

34. *See* FLA. STAT. § 790.33(2) (1999).

35. *See* PALM BEACH COUNTY, FLA., CODE § 99-5 (Mar. 1999).

36. *See supra* note 26.

37. *See* PALM BEACH COUNTY, FLA., CODE § 99-40 (amended Sept. 28, 1999).

waiting periods for the sale of all firearms.³⁸ The pending ordinances in Sarasota and Osceola counties would also apply to the sale of all firearms.³⁹ In Orange, Volusia, and Charlotte counties the ordinances only apply to the sale of handguns.⁴⁰ The most effective use of the firearm amendment is to apply it to the sale of all firearms. Hopefully, the three counties in the minority will amend their ordinances before a convicted felon or emotionally traumatized person is able to purchase a rifle or shotgun through the loopholes that still exist in these counties with tragic consequences.

While the firearm amendment authorizes waiting periods of three to five days, only Miami-Dade, Broward, and Palm Beach counties, the three most populous counties, mandate the maximum five days.⁴¹ The other counties all have three day waiting periods.⁴² The pending ordinances in Sarasota and Osceola counties have five day waiting periods.⁴³

The ordinances are generally the same with regard to the criminal history records check in that they require compliance with the procedures and requirements of Section 790.065 of the Florida Statutes, and provide that if a seller is not licensed and cannot comply with the statute, he or she shall obtain the assistance of a licensed dealer.⁴⁴ One issue that is not addressed in several of the ordinances, but which should be is what happens if Section 790.065 is repealed, as is currently scheduled to occur on June 1, 2000.⁴⁵

The Miami-Dade, Broward, Pinellas, and Volusia counties ordinances expressly address this issue by providing that, in case of repeal of Section 790.065, all the procedures and requirements of other state or federal laws relating to background checks must be complied with by persons selling or buying firearms.⁴⁶ While not expressly noting that Section 790.065 may be repealed, the ordinance in Palm Beach county and pending ordinance in Osceola county provide that the criminal history records, check of the buyer shall be requested of, and approval received

38. *See supra* notes 26, 37.

39. *See supra* note 27.

40. *See supra* note 26.

41. *See id.*

42. *See id.*

43. *See supra* note 27.

44. *See* FLA. STAT. § 790.065 (1999).

45. When section 790.065 was enacted, the law provided that it would expire on the effective date of the federal law which provides access to national criminal history information and requires national criminal history checks on potential buyers or transferees on firearms. *See* 1989 Fla. Laws ch. 89-191. In 1993, the repeal date of the statute was established as October 1, 1999. *See* 1993 Fla. Laws ch. 93-197. In 1999 the repeal date was delayed until June 1, 2000. *See* 1999 Fla. Laws ch. 99-300.

46. *See supra* note 26.

from, the Florida Department of Law Enforcement, as provided for in Section 790.065, or the National Instant Criminal Background Check System established pursuant to Title 18, United States Code, Section 922.⁴⁷ In the ordinances enacted by Hillsborough, Orange, Charlotte, Hernando, and Citrus counties, and the proposed Sarasota county ordinance, however, there is no alternative to the criminal history records check available under Section 790.065, and no replacement for that statute if it is repealed.⁴⁸ These ordinances should be amended so that the citizens residing therein can be assured that the loophole in the firearm laws, having been appropriately closed, will not be reopened.

The firearm amendment authorizes the regulation of sales made “on property to which the public has the right of access,” and as stated in several of the ordinances, this includes, but is not limited to, gun shows, flea markets, and firearm exhibitions.⁴⁹ An often asked question about the amendment and the resulting ordinances is whether criminal history records checks and waiting periods are authorized and required for sales at garage sales that occur on the seller’s own property. If the public, without any restriction, is permitted to enter the seller’s property, then a sale of a firearm would be occurring on property to which the public has the right of access and the regulation of such a sale would be permitted. As expressly stated in the Miami-Dade, Pinellas, Volusia, and Hernando ordinances, and the pending Osceola ordinance, the phrase “property to which the public has the right of access,” includes property owned by either public or private individuals, firms, or entities.⁵⁰ In order to avoid confusion on this issue, the other counties that choose to regulate public sales of firearms on private property should amend their ordinances accordingly. However, just as some of the counties did not apply their ordinances to sales of all firearms as authorized by the amendment, they can also choose to exempt from regulation sales that occur on private residences, as was done in Orange and Citrus counties.⁵¹

There is a split among the counties as to whether law enforcement officers should be exempt from the criminal history records check and waiting periods.⁵² Law enforcement officers are exempt from both regulations in Miami-Dade, Volusia, Hernando counties, and in the

47. See PALM BEACH COUNTY, FLA., CODE § 99-5 (amended Sept. 28, 1999).

48. See *supra* note 26.

49. See *id.*

50. See *id.*

51. See *id.*

52. Law enforcement officers are exempt from the state criminal history records check for retail sales by licensed dealers. See FLA. STAT. § 790.065 (1999). However they are not exempt from the state waiting period. See FLA. STAT. § 790.0655 (1999); FLA. CONST. art. I, § 8(b).

proposed Sarasota county ordinance.⁵³ They are exempt from the criminal history records check in Hillsborough, Charlotte, and Citrus counties, and from the waiting period in Orange county and in the proposed Osceola county ordinance.⁵⁴ Law enforcement officers are not exempt from either regulation in Broward, Palm Beach, and Pinellas counties.⁵⁵

In one area there is unanimity among the ordinances. They all provide that the penalty for violating any provision is a fine not to exceed \$500.00 or imprisonment not to exceed sixty days in jail, or both.⁵⁶

The following chart illustrates the similarities and differences in the various ordinances:

| COUNTY | EFFECTIVE DATE | FIREARMS OR HANDGUNS | WAITING PERIOD | REPEAL OF 790.065 | PRIVATE PROPERTY | LAW ENFORCEMENT | PENALTY |
|--------------|----------------|----------------------|----------------|---------------------|---------------------------|--------------------------------|-------------------------------|
| | | | | | | OFFICERS EXEMPT | |
| Broward | 01/05/99 | Firearms | 5 days | Federal Law Applies | No Provision | NO | \$500 or 60 days Jail or Both |
| Hillsborough | 01/25/99 | Firearms | 3 days | No Provision | No Provision | CRIMINAL HISTORY RECORDS CHECK | \$500 or 60 days Jail or Both |
| Orange | 01/05/99 | Handguns | 3 days | No Provision | Exempts Private Residence | WAITING PERIOD | \$500 or 60 days Jail or Both |
| Charlotte | 09/04/99 | Handguns | 3 days | No Provision | No Provision | CRIMINAL HISTORY RECORDS CHECK | \$500 or 60 days Jail or Both |
| Citrus | 05/07/99 | Firearms | 3 days | No Provision | Exempts Private Residence | CRIMINAL HISTORY RECORDS CHECK | \$500 or 60 days Jail or Both |
| Osceola | Pending | Firearms | 5 days | Federal Law Applies | No Provision | WAITING PERIOD | \$500 or 60 days Jail or Both |

53. See generally *supra* note 52.

54. See *id.*

55. See *id.*

56. See *id.*

XIII. CONCLUSION

In the more than two years since we conceived of a constitutional amendment that would give back to the counties the authority to regulate the purchase and sale of firearms, we have experienced excitement, frustration, and ultimately great satisfaction. In ten counties, in which over fifty-three percent of Floridians reside, there are now gun control regulations that have closed deadly loopholes in our firearms laws. While this is not the answer to all the problems that result in firearm violence in our homes, our schools, and our streets, it is a significant step that is undoubtedly reducing firearm crimes and saving lives. As citizens, and particularly as prosecutors, there can be no greater accomplishment.