IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, STATE OF FLORIDA

CASE NO.: 5D17-1737
L.T. No.: 2014-DR-3255- FM-B

JONATHAN KINNEY,
Appellant,

v.

PUTNAM COUNTY CANVASSING BOARD, by and through members Nancy Harris, Elizabeth Ann Morris and Charles Overturf, III and HOMER D. DELOACH, III.
Appellees.

On Appeal from the Circuit Court, Seventh Judicial Circuit, in and for Putnam County, Florida.

ANSWER BRIEF OF APPELLEE HOMER D. DELOACH, III

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INTRODUCTORY STATEMENT

The Appellant, JONATHAN KINNEY, will be referred to as Appellant or by name ("Kinney"). The Appellee HOMER D. DELOACH, III., will be referred to as Appellee, or by name ("DeLoach"). The Co-Appellees, PUTNAM COUNTY CANVASSING BOARD, will be altogether referred to as "Canvassing Board" or by the name(s) of the individual member(s). The Record on Appeal contains one volume with consecutive page numbers appearing in the top left-hand corner. Citations thereto will be referred to by the letter "R" and the appropriate page number. The Supplemental Record will be cited in the same manner and denoted as "SR". Finally, the trial transcript included with the Supplemental Record and individually numbered in the upper right-hand corner will be referenced as "T" along with the corresponding page ("P.") and line ("L.") numbers. Any citations to the Initial Brief of Appellant will use the letters "IB" followed by appropriate page number. Any emphasis will be that of the scriveners, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

I. FACTS

Appellee does not dispute the procedural history recounted in Appellant's Initial Brief sections titled "Nature of the Case", "Course of Proceedings" and "Disposition of the Court Below", and will supplement the relevant facts and history herein.

The 2016 race for the Office of Sheriff of Putnam County, Florida was close. IB 8 and 9. After an initial mandatory recount revealed that the apparent winner had changed from Appellant to Appellee by a margin 14 votes, a subsequent manual recount was ordered. R 310-312, 675 and 1022. On November 18, 2016, the Canvassing Board certified Appellee DeLoach as the new Sheriff by a margin of 15,669 to 15,553 votes. R 312 and 1034. A third candidate, who was never a party to this action (Edison Edison) received 995 of a total 32,717 votes cast in the race. R 1034.

The official results revealed that Putnam County had a voter turnout of just over 70% for the 2016 General Election, with a total of 33,488 voters casting ballots. R 1037. This means that 771 people did not vote in the Sheriff's race. Of the 32,717 voters who participated in the race for Sheriff, 13,609 voted early, 12,734 voted on election day, and 6,351 voted by mail. There were also 23 provisional ballots cast. R 1034.

On November 28, 2016, Appellant timely filed his election contest complaint based on 1) alleged "misconduct" and 2) "receipt of a number of illegal votes… sufficient to change or place in doubt the result of the election." R 26 and 27. The allegations pertaining to "misconduct" were detailed in paragraphs 18-52 of the complaint. R 27-32. By the time this matter went to trial, the Appellant had abandoned all of his allegations other than the those relating to 42 voters whom he

argued cast "illegal votes." IB 4. In the jointly filed Pretrial Statement, the parties framed the "concise statement of facts that remain to be litigated" as "whether a number of illegal votes were accepted sufficient to change or place in doubt the result of the November 2016 election of Defendant DeLoach as Putnam County Sheriff." R 319. The parties stipulated that the "election contest is governed by the Florida Election Code, Chapters 97-106, *Florida Statutes*. R 321.

II. DISPOSITION IN TRIAL COURT

A. Final Judgment

On May 19, 2017, the Honorable Gary L. Wilkinson rendered a 21 page Final Judgment. R 458. According to the Final Judgment, the "sole issue" to be resolved was "whether a sufficient number of illegal votes were received to change, or place in doubt, the results of the Sheriff's race in the General Election." R 459. The court considered "(1) votes cast by allegedly 'illegal voters,' and (2) votes cast in a form or manner that does not comply with applicable rules." R 461.

The trial court explained that the process for identifying and removing "potential ineligible voters" is governed by Sections 98.093 and 98.075 of the Florida Statutes, respectively. R 462 and 463. In the first group (alleged illegal voters), the court analyzed "32 potential felons", "1 potentially incapacitated" person, 3 vote-by-mail voters whose ballots were postmarked after their death, 1

voter who allegedly voted in another state and 3 voters who allegedly did not reside in Putnam County. R 464.

In the second group (votes cast in a noncompliant form or manner), the court analyzed only 2 vote-by-mail ballots that were "alleged to be non-conforming for the Supervisor's Office having accepted them after the 7:00 p.m. deadline…" *Id*.

Of the 42 votes at issue, the trial court found that 29 were vote-by-mail ballots and 13 were cast in person, and that "it is impossible to determine for whom any of the subject voters voted in the Sheriff's race (if they even voted in the Sheriff's Race)." *Id*.

For the 32 "alleged felons", the trial court found that the Appellant failed to meet his burden of proving that the votes cast were illegal.

> Unequivocally, these 32 individuals were registered voters, and were included in the Statewide System at the time they voted in the General Election. No party to this lawsuit, or anyone else, has identified or questioned the eligibility of any of these 32 voters prior to the General Election or during the recount… Whether or not any of these voters have committed criminal actions is not an issue in this matter. Instead the Court must determine if these 32 voters cast 'illegal votes' as the term is found in Section 102.168(3)(c), Florida Statutes…Section 98.075(7), Florida Statutes, expressly provides that until a voter is granted all the procedural protections specifically created by the Florida Legislature in that section, the voter's status is 'potentially ineligible' and the voter cannot be removed from the Statewide System. Accordingly, this Court concludes that the votes cast by these 32 voters cannot be considered illegal votes unless the voter had been afforded his or her due process rights under Section 98.075(7), Florida Statutes, and removed from the Statewide System. Such had not occurred, or even been initiated, as of the General Election.

R 465 and 466.

As for the mentally incapacitated individual, "for the same reasons expressed above with respect to the alleged felons," the court found that the vote could not be considered illegal. R 467.

The trial court found that the 3 votes received from deceased voters, who died after signing their vote-by-mail ballots, were not illegally canvassed. R 468. The court reasoned that because the Supervisor of Elections had not received information pertaining to their deaths, and the statutory scheme for identification and removal from the statewide system had not been initiated, the canvassing of these votes did not constitute substantial non-compliance with election procedures. R 467 and 468.

The trial court also found no evidence presented about which state the alleged double-voter voted in first. Furthermore, no individual or entity informed the Supervisor of Election at the time the vote-by-mail ballot was received that the voter had voted elsewhere. The court again noted that there was no evidence as to whether this voter even voted in the Sheriff's race or for whom she voted. R 469. Finally, the court concluded that because there is no provision in the election code addressing the validity of a vote cast in a county election in Florida by a person who also voted in another state, the vote is not an "illegal vote." R 470.

The trial court found that the Supervisor permissibly believed that the intent of the 3 "out of town" voters was to "remain residents for the purposes of voting in

Putnam County", and that they had met the requirements of Section 101.045, *Florida Statutes*. R 472. Therefore, those 3 votes were not illegal. *Id*.

Finally, the trial court found that the 2 ballots challenged as "late" were cast by voters who were physically present and on time. R 474. The court also noted that no party to the lawsuit or any other person questioned the timeliness of the 2 ballots during recount, and no evidence was presented to establish that either voter voted in the Sheriff's race or for whom they voted. *Id*. The court concluded that the Supervisor acted appropriately in counting these 2 ballots because they were not illegal. *Id*.

Upon analyzing each category of challenged votes, the trial court concluded that the will of the people had not been adversely affected, there was no evidence of misconduct by any of the defendants, and the actions of the Canvassing Board were appropriate. R 476. In denying the complaint, the trial court found:

> It is uncontroverted that each of the 42 voters at issue in this lawsuit were registered voters in the Statewide System at the time they voted in the General Election. It is also uncontroverted that no party to the lawsuit challenged… prior to canvassing or recounts. Thus, based on the information available to the Supervisor's Office and the Canvassing Board on election day, each of the 42 votes at issue in this proceeding appeared to be legal… Considering the delineation of illegal votes described in *Black's*, it cannot be said that any of the subject 42 votes were illegal… Even if we assume, hypothetically, that more than 16 illegal votes were received in the General Election, Plaintiff has, nevertheless, failed to meet his burden…of establishing that the votes are sufficient to change or place into doubt the result of the Sheriff's Race. Out of the 42 voters in question, only one testified that he voted for Defendant DeLoach... Thus, Plaintiff has failed to 'establish his

> right to such office.' Finally, Section 102.168(3)(c) appears to require the Plaintiff to show that the successful candidate 'received' a number of illegal votes that changed or placed in doubt the result of the election. The evidence does not demonstrate the receipt of any illegal votes.

R 476 and 477.

B. Order on Rehearing

On May 31, 2017, the Appellant filed a Motion for Rehearing[1]. R 1635. After the responses from the Appellees, on June 20, 2017, the trial court denied the motion. R 1787. This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should affirm the Final Judgment of the trial court because the votes cast by the 42 potentially ineligible voters were not illegal, and Appellant did not meet his burden of proving that he was entitled to the Office of Sheriff. Surprisingly, Appellant's brief is not focused on the analysis or conclusions of the lower court. Instead, Appellant sets out on a new legal theory for the first time on appeal—that the General Election suffered fraud. This Answer Brief is necessarily tailored to the issues presented by Appellant and therefore devotes substantial time to arguing the absence of fraud.

Appellant did not conduct discovery, present evidence, or argue at trial, that any voters committed fraud; yet, the vast majority of Appellant's brief concerns

[1] Appellant's motion for rehearing was the first time anywhere in the record that he referred to the alleged "illegal' votes as potentially "fraudulent."

alleged fraud. This Court should reject Appellant's attempt to litigate the fraud issue on appeal. The Appellant has waived the argument of voter fraud by not raising those arguments below.

In the alternative, if this Court permits Appellant to raise the alleged fraud issue for the first time on appeal, Appellant has not proven that any of the facts in this case rose to the level of fraud. Simply stating that certain votes were "illegal" is not enough for Appellant to carry his burden that he is entitled to the office of Sheriff. The few cases that Appellant cites are factually distinguishable and legally dissimilar to the case at bar.

At the time of the election on November 8, 2016, all 42 potentially ineligible voters complained of by Appellant were listed on the Florida State Wide Voter Registry. The trial court found, as Appellee argues, that the 42 potentially ineligible voters had not completed their statutory due process prior to the date of the election and could not have been removed from the voter rolls prior to the election. Therefore, these votes were not "illegal".

Furthermore, Appellant did not prove that he was entitled to the office of Sheriff which is a requirement for the only remedy available to him in law—ouster. Appellant did not prove the receipt of enough "illegal" votes to change or place in doubt the result of the election. Most, if not all, of Florida's election cases cited by Appellant involved specific deficiencies of "absentee ballots" and involved a former

version of the election contest statute. In those factually distinguishable cases, courts threw out absentee ballots in the presence of pervasive fraud. As of the 2016 General Election, absentee ballots no longer exist. Additionally, this case involved contested voters voting at both the polls and by mail. Expanding the absentee ballot invalidation rule, and granting an ouster in this case, would not be appropriate under these facts or the current law.

ARGUMENT

I. STANDARD OF REVIEW

The interpretation of the election code (statutes) is purely a question of law, reviewed *de novo*. *Department of State v. Martin*, 885 So. 2d. 453, 456 (Fla. 1st DCA 2004)(citing *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998) ("judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review")). However, factual findings of the trial court are typically reviewed for competent substantial evidence. *Grudem v. Fed. Nat'l Mortg. Ass'n*, 189 So. 3d 914, 916 (Fla. 5th DCA 2016).

In an election contest, some factual determinations should be reviewed for an abuse of discretion. *See Beckstrom v. Volusia County Canvassing Board* 707 So. 2d 720, 727 (Fla. 1998) (concluding "the trial court was within its discretion in determining from the evidence that the election was a 'full and fair expression of the will of the people'").

II. THE 42 CONTESTED BALLOTS WERE NOT FRAUDULENT OR ILLEGAL

This Court should affirm the Final Judgment of the trial court because the votes cast by the 42 potentially ineligible voters were not illegal. Further, the Appellant never conducted discovery on, or presented evidence of, any fraud, nor did Appellant present evidence of gross negligence or intentional wrongdoing.

Appellant now attempts to hedge his bets by framing the issue surrounding the 42 votes as "fraudulent" (as opposed to illegal) hoping something will resonate. Throughout his brief, Appellant bounces back and forth between the discussion of "illegal" and "fraudulent" votes. This new reliance on "fraud" is likely because the only authority Appellant references on the issues of "illegal" votes deal specifically with fraud. IB 22 (citing *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984)); IB 29 (citing *In re: The Matter of the Protest of Election Returns and Absentee Ballots in November 4, 1997 Election of the City of Miami, Fla.*, 707 So. 2d 1170 (Fla. 3rd DCA 1998)). Appellant did not argue fraud at trial and therefore waived these claims. because Appellant's Initial Brief is primarily devoted to the issue of fraud, Appellee will address each category of voter to show how Appellant failed to meet his burden of proof.

The Appellant begins his argument by making several conclusory statements without citations. For example, Appellant argued that case law "break(s) down into two factual categories: (1) illegal votes that were not fraudulent and (2) illegal votes

that were fraudulent," and that the Final Order was an "unconstitutional delegation of power away from the judiciary…" Not only does the Appellant fail to provide any legal authority for these assertions, or explain how constitutional scrutiny relates to "fraud", he also vastly oversimplifies the trial court's ruling.

The trial court was not condoning felons voting, nor was it stating that a felon has the right to vote as long as he is listed on the Statewide Registry. To the contrary, the court was simply analyzing the current system, and noting that "these 32 voters were registered voters, and were included in the Statewide System at the time they voted in the General Election… Whether or not any of these voters committed criminal actions is not an issue in this matter." R 465.

The more reasonable interpretation of what the judge concluded is that in this specific circumstance, under the election code and its various statutory provisions enacted to execute the rights afforded by the Constitution, certain potentially ineligible votes cast during the 2016 general election were not illegal. Stated another way, whether someone is qualified to vote pursuant to our Constitution, and whether a vote is "illegal", in the context of an election challenge under §102.168, are two different questions.

A. Waiver of Issues Not Presented at Trial

As a threshold matter, the Appellant waived or abandoned several arguments, including voter fraud, by failing to present evidence on the issue at trial. Alleged

voter fraud was not raised as an issue until after trial. As the trial court pointed out in the Order on Plaintiff's Motion for Rehearing "[t]he issue of fraudulent (as distinguished from illegal) activity was not addressed, or even mentioned, in the Joint-Pre-Trial Stipulation as an issue to be litigated." R 1792. The word "fraud" does not appear anywhere in the Joint Pre-Trial Stipulation under the "Brief Statement of Plaintiff John Kinney's Position" (R 305), the "Concise Statement of Facts that Remain to Be Litigated (R 319) or the "Statement of Agreed Issues of Law" (R 321). Plaintiff was bound to his pre-trial stipulations, which did not include the litigation of fraud.

> 'A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court…'

Lewis v. S & T Anchorage, Inc., 616 So. 2d 478, 480 (Fla. 1st DCA 1993)(citing *Gunn Plumbing Inc., v. Dania Bank,* 252 So. 2d 1, 4 (Fla. 1971)). The defendants were not made aware by Appellant that they were litigating a fraud case at the trial level. To reverse course and base an entire appeal on a matter not litigated at trial is improper. *Marin v. Aaron's Rent to Own*, 53 So. 3d 1048, 1050 (Fla. 1st DCA 2010)("While there are certainly occasions which might require the voiding of a stipulation or agreement, a party's mere change of litigation strategy, without more, provides insufficient grounds …").

As Appellant points out, "fraud" is a "knowing misrepresentation or knowing concealment of material fact…" IB 7 (citing *Black's Law Dictionary* (10th ed. 2014)). A finding of fraud requires some determination of a person's state of mind. By completely failing to litigate the issue at trial, the Appellant never gave the lower court, sitting as a trier of fact, an opportunity to hear evidence of the challenged voters' states of mind. Nor did Appellant allow the defendants a chance to defend a "fraud" theory.

The term "fraud" is not defined in the election code. Therefore, Appellant consults the dictionary as persuasive authority. See *Neheme v. Smithkline Beecham Clinical Labratories, Inc.*, 863 So. 2d 201, 205 (Fla. 2003) citing *Seagrave v. State,* 802 So.2d 281, 286 (Fla. 2001) ("When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary). Appellant's own cited definition of fraud however, required the factual finding that "a knowing misrepresentation" or "concealment of material fact…" occurred. No such evidence was litigated at trial.

Now, Appellant asks this Court to conclude that the act of voting alone was enough to constitute fraud. This is not the role of an Appellate Court. *Heifetz v. Depart. of Business Regulation*, 475 So. 2d 1277, 1282 (Fla. 1st DCA 1995)("As an appellate court, we are sometimes faced with affirming lower tribunal rulings because they are supported by competent, substantial evidence even though, had we

been the trier of fact, we might have reached an opposite conclusion. As we must, and do, resist this temptation because we are not the trier of fact…").

Appellant abandoned any fraud arguments, and the trial court cannot therefore be said to have abused its discretion in declining to find that any fraud occurred. *See generally C&J Sapp Pub Co. v. Tandy Corp.*, 585 So. 2d 290, 291 (Fla. 1st DCA 1991)(affirming the trial court's summary judgment on certain counts where trial counsel, although filing a timely notice of appeal, specifically abandoned arguments relating thereto).

Similarly, for the first time on appeal, the Appellant makes what can only be described as a desperate "as applied" constitutional argument, asserting that "[a]ny statutory scheme that permits the vote of a convicted felon, or person adjudicated incompetent… constitutes a legal nullity." IB 9. The brief, however, lacks a citation to any authority in support of such a bold conclusion. Even though the Appellant was well aware of the Appellees' contention that the 42 votes were not *per se* "illegal"[2], this argument ("the statutory scheme" is unconstitutional) was also not presented at trial, and was therefore waived. "In the absence of fundamental error, an appellate court will not consider constitutional issues that have been raised for

[2] In the Joint-Pretrial Stipulation section entitled "Brief Statement of Defendant Canvassing Board's Position," Co-Appellees specifically included the argument pertaining to §98.075 Fla. Stat. (2016). R. 307 and 308.

the first time on appeal." *Turner v. State*, 888 So. 2d 73, 74 (Fla. 5th DCA 2004)(citing *Sanford v. Rubin*, 237, So. 2d 134 (Fla. 1970)).

Appellant also failed to litigate, and therefore waived, any "equitable" principles at trial, such as the argument described as the "Son of Sam Law." IB 31. Although Appellant surfaced this argument after trial in the motion for rehearing, he never presented evidence that either the Appellee or the individual voters benefited from their own "fraud" or "wrongdoing."

Finally, Appellee spends considerable time in his brief discussing an alleged issue related to public notice, which could only fall into the "misconduct count" of his complaint that was abandoned before trial. IB 40-46. Even though the Canvassing Board's position statement in the Joint-Pretrial-Statement mentioned the failure of any party to challenge votes prior to the election, no evidence was presented on this issue at trial. R 308. Appellant's complaints regarding an alleged "failure of public notice" (IB 40-44) is irrelevant and rendered moot by the fact that he specifically abandoned all claims of misconduct by the canvassing board and is now raising this issue for the first time on appeal. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978)("As a general matter, a reviewing court will not consider points raised for the first time on appeal.")

Appellant's arguments on appeal about defective notice should be rejected.

B. Categories of Allegedly Fraudulent Votes

Although Appellant has waived any claim relating to "voter fraud", no voter fraud occurred in this election. Furthermore, there was no evidence presented to show that these 42 individuals voted in the Sherriff's race or for whom they voted. Conspicuously absent from this section of the argument, as framed by Appellant in his brief, is any discussion of what fraud he believes took place, or how he claims to have met his burden of proving such conduct. Appellant uses pages 10-22, under a section entitled "Fraudulent Votes", to recount largely stipulated facts and evidence about each category of the 42 individual votes he contested. However, nowhere in these four individual subsections does the Appellant ever explain how he proved fraud.

i. Convicted Felons

There were no "felons" ever called to the stand at trial. There was no evidence pointing to a voting conspiracy, improper motives, ballot tampering, vote purchasing, or any other type of fraud from the 32 individuals. The evidence at trial simply focused on two things; the fact the votes were cast and by whom. The only evidence in the record actually dispels the Appellant's accusations of "fraud." Out of the 32 "felons", Appellant took the deposition of only 2, which were entered into evidence. R 227 and 228.

The first felon deposed was Melvin Oxendine. R 1144. When asked at the beginning of his deposition for his voter identification card, Mr. Oxendine stated "I don't vote." R 1148. Appellant's counsel then asked if Mr. Oxendine had ever been convicted of a felony. He responded "[n]ot that I can remember." R 1156. When pressed further on the specific charge, the following exchange occurred:

> Q: So based on your recollection you don't recall being sentenced in July of 2001 for driving with a license suspended, revoked, cancelled or disqualified?
> A: Not that I can recall I don't…

R 1158. It is abundantly clear, from the only testimony that was ever elicited of Mr. Oxendine, that he did not intend to commit any type fraud in the 2016 election, he did not remember voting, and did not understand his status as a convicted felon. Even if he could recall, Mr. Oxendine was never asked for whom he voted, or whether he voted in the Sheriff's race.

Daniel J. Pierce was the second felon deposed by Appellant. Mr. Pierce testified that he and his wife were discussing politics one night when she challenged him about not voting. Based on that exchange, Mr. Pierce decided to register to vote. R 1218. Appellant's attorney then inquired as follows:

> Q:…[A]re you aware of whether or not your civil rights for voting in elections was ever restored as part of your sentencing or anything…
> A: No, but I was curious about that and I brought up the point to my wife and we had looked it up and we though---I mean, you know, with the way this is being presented we could be wrong, you know, we could have misinterpret (sic) something that we

> looked up, but from what we looked up we thought that our voting rights automatically got restored upon release. So that's the reason why I felt like I could go and register. That was the reason why I felt like I could vote. And seeing that it was the first time in my life that I voted I was pretty proud of the fact, you know, that I had actually contributed you know.

R 1221 and 1222. Mr. Pierce may have been wrong about his ability to register or vote, but his motives were not impure. He certainly had no intention to commit fraud. Quite the opposite, Mr. Pierce tried to confirm his eligibility before acting. Again, his actions may have been imprudent, but they were not fraudulent.

Appellee agrees there may be criminal implications for these two individuals. But as the trial court stated: "Whether or not any of these voters committed criminal actions is not at issue in this matter." R 465. The pertinent question here is whether anyone had a "knowing" intent to defraud the people of Putnam County. For the 2 convicted felons on record, the answer is a clear no.

Appellant made the strategic decision not to depose or call as witnesses at trial any of the remaining 30 alleged "felons" and therefore the court could not consider any evidence on the issue of fraud. For this reason, the trial court did not abuse its discretion in finding that no fraud occurred among this group of voters.

ii. Mentally Incompetent Voter

Using the same analysis as the alleged "felons", the court concluded that the one "incompetent" voter did not cast an illegal ballot. At trial, the Appellant only provided the documentary proof that this person voted. Much like the group before,

no testimony or evidence was presented on state of mind or intent. The trial court found that no evidence was introduced that this person voted in the Sheriff's race, or for whom he voted. As such, the Appellant failed to meet his burden, and the trial judge's findings should be affirmed. R 467.

iii. Vote-by-mail ballot cast by voter in two states

After briefly discussing the case of Susan Novack, who participated in some capacity in the 2016 general election in two states, the Appellant proclaims that "it is illegal to vote twice in a single general election" and therefore the vote "should have been rejected as a fraudulent vote." IB 15. Ms. Novack was never deposed or called as a witness. There was no evidence presented on her state of mind or why she voted twice or in which race(s) she cast votes.

As the trial court pointed out, there was also no evidence to indicate which state Ms. Novack voted in first, and certainly no evidence that she voted in the Sheriff's race. R 469. Clearly, Ms. Novack did not vote for the Sheriff of Putnam County, Florida in New Jersey, and did not vote twice in Putnam County, Florida. *Id*. The Appellant did not prove that this vote was fraudulent, and the trial court did not err in finding it was not illegal for the purposes of the Putnam County Sheriff's race.

iv. Alleged Non-Resident Voters

Next, Appellant argues 3 voters were non-residents. None of these 3 voters testified at trial. The only testimony elicited about these individuals was from Supervisor Overturf and his assistant Ms. Faunce. Mr. Overturf testified that as far as he knew Susan and William Ivey had been long-time residents of Putnam County with deep ties to the community. Both are passionate about their hometown and seek to remain active. T P. 87 L. 1-10.

As Appellant explained, the Ivey's moved to North Carolina, and upon doing so, they sought the advice of Mr. Overturf on how to remain Putnam County voters. IB 15 and 16. Mr. Overturf explained that his understanding was as long as the voter had the intent to remain a resident of the county in which they desired to vote, and did not register in any other county, they could continue to do so. T P.91 L. 4-14. Mr. Overturf did not just make this decision on his own, however. Instead, he sought the advice of the Director of the Florida Division of Elections, Maria Mathews.

Only after receiving an email (R 1550) from Ms. Matthews, did Mr. Overturf feel comfortable advising the Ivey's that they could remain Putnam County voters by listing the Supervisor of Elections Office as their address of record. In her deposition, Ms. Ivey stated her honest belief was that they were legally entitled to vote in Putnam County. R 1479 and 1480.

Similarly, Mr. Faunce testified in his deposition that he "stays" at a property in St. Augustine Florida (R 1526) but has always voted in his home town, and considers himself a Putnam County resident. R 1531 and 1532. Mr. Faunce's driver's license still has a Putnam County address and he owns a cabin within the county as well. Id. Mr. Faunce finally stated that the "main reason" he maintained his voter registration in Putnam was due to his ties to the community and his expectation of returning full time. R 1534. Mr. Faunce's sister, corroborated his claim. T P. 176 L. 22-25; P. 179 L. 3-11.

Appellant points out in his brief that the Florida election code does not define "temporary absence" under section 101.045(1), *Florida Statutes*. As for the Iveys, the trial court recounted that Ms. Ivey confirmed her intent "in no uncertain terms." R 471. The judge also recalled Mr. Faunce's testimony about where he considered his residence, and the fact that he is not registered to vote in any other county or state. *Id*. The court went on to note that the term "legal resident" is not defined in the election code. *Id*.

However, as the court articulated, "[l]egal residence is a concurrence of both fact and intention. The bona fides of intention is a highly significant factor." R 472; *Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364 (Fla. 1995). Finally, the court explains, "the Supervisor of Elections 'is not required to resolve factual

disputes in the face of evidence supporting possible legal residence.'" R 472; *Division of Elections Op. 16-01* (Jan. 4, 2016).

The Supervisor cannot act arbitrarily in deciding the validity of individual voters who have expressed their own stated intentions. This falls in line with the idea that voting is a fundamental right and therefore "such (election) laws must be liberally construed in favor of the citizens' right to vote." R 475; *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000)(rev'd on other grounds). Accordingly, the judgments of election officials "are entitled to be regarded as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge… might deem more appropriate." R 472; *Boardman v. Esteva*, 323 So. 2d 259, 268, n.5 (Fla. 1975).

Appellant does not dispute the stated intent of these 3 individuals. Instead he advances a wild hypothetical about "a large number of people" getting together to affect the electoral college by registering to vote in Florida, and articulating that they "intend to reside in Putnam County." IB 20. Respectfully, this analogy is absurd.

First, it would be highly unlikely that so many people from another state would all have the same ties to Putnam County as the Iveys and Mr. Faunce. Secondly, such a concerted effort by a large group of Californians would raise obvious flags of intentional voter fraud, warranting great scrutiny from election

officials. As with the previous categories of voters, the Appellant never presented any evidence of fraud or intentional wrongdoing. The individuals in question testified to their good faith beliefs that they were eligible to vote-by-mail under the current law.

The trial court heard competent substantial evidence and found that the actions and determinations of the Supervisor were appropriate, and that the 3 votes were not illegal. R 473.

v. Deceased voters

The Appellant also argues that, "by operation of law", the vote-by-mail ballots of 3 deceased individuals should have been rejected. IB 33. Once again, there is no precedent for this bold assertion. Appellant does not include these 3 in his list of "fraudulent" votes, and it is important to note that there was no evidence of any fraud or misconduct. The trial court found that all 3 voters signed and dated their ballots before they died, but that the envelopes were postmarked after. R 467. The court recognizes that the votes were "technically illegal", but points out that the Supervisor's Office was not privy to this information when the votes were canvassed. R 468. Again, there is no evidence to suggest that these were fraudulent vote-by-mail ballots submitted in the name of the deceased in some conspiracy to swing an election.

Courts have historically recognized that even our most sacred democratic practices are not immune to human error. Nonetheless, we must instill confidence in those charged with carrying out these important tasks. The general rule is that elected officials are presumed to perform their duties in a proper and lawful manner, and there is a presumption that the returns certified by election officials are accurate. *Boardman*, 323 So. 2d at 267 (Fla. 1975). "When voters have done all that the State has required them to do, they will not be disenfranchised solely on the basis of failure of the election officials to observe directory statutory instructions." *Id*. Putting aside the notion of fraud or intentional misconduct, a court will only void an election if there has been substantial non-compliance with the statutory election procedures. *See Id.* at 266; *Beckstrom*, 707 So. 2d 720 (Fla. 1998).

The principle of avoiding disenfranchising voters is paramount, and "extreme care must be given to post-election challenges" to ensure this. *Burns v. Tondreau,* 139 So. 3d 481 (Fla. 3rd DCA 2014). The type of harm that must be shown by an election contestant is high, and much more than simple negligence. In *Beckstrom v. Volusia County Canvassing Board*, the Florida Supreme Court found the following examples did not rise to the level of substantial non-compliance: 1) Ballots that lacked signatures/witnesses; 2) absentee ballots left unattended; 3) failure to compare signatures; 4) failing to preserve the original ballot with a duplicate. 707 So. 2d. 720 (Fla. 1998).

Competent substantial evidence supports the inclusion of these ballots, in this case, because the same does not constitute substantial noncompliance with election laws. Therefore, the Final Judgment should be affirmed.

vi. Alleged late voters

The final group of contested votes consisted of 2 potentially illegal vote-by-mail ballots cast by individuals who were alleged to have voted after the 7:00 p.m. cut-off time on election day. IB 33. The unrefuted evidence is that both of these ballots were cast inside the Supervisor of Election's office. T P. 78 L 8-24. Florida law allows anyone who experiences an emergency to submit their vote-by-mail ballots in person at the Supervisor's office before 7:00 p.m. on the date of the election. §§101.6103 and 101.67, Fla. Stat. (2016). Both of the voters in question signed an affidavit affirming their emergency circumstances. Supervisor Overturf testified that there are no legal parameters for what constitutes an emergency, and as long as the ballots are received by his office by 7:00 p.m., they are accepted. T P. 135 L. 5-10 and P. 135 L. 5-14.

Appellant's qualms with these 2 particular ballots is simply that they were "late." He supports this argument solely on the time stamps on the two envelopes, which read 7:02 p.m. and 7:06 p.m., respectively. IB 34. The Appellant ignores the fact that not all ballots which are received are always stamped immediately. Mr. Overturf testified that the ballots would have been received by the office before 7:00

p.m. because the doors were ceremoniously locked and an off-duty officer was present to make sure no voters turned in any ballots after the deadline. T P. 128 L. 20- P. 131 L. 9. Supervisor Overturf explained during his examination that, while these ballots were unquestionably received by his staff before 7:00 p.m., it takes time to gather and process them through the time stamp machine:

> Q: Does this time stamp mean that your office—mean that your office received the ballot at 7:02 p.m.?
> A: No, sir.
> Q: What does it mean?
> A: It means we stamped it at 7:02.
> Q: Why is that?
> A: That's the time we walked around to the machine to do the time stamp, so that is what was reflective of the time they walked around and did that.

T P. 130 L. 4-14. Testimony from the only witness who presented evidence on this point provided the court with competent substantial evidence to conclude that these 2 voters cast their ballots on time, even though they were time-stamped several minutes after 7:00 p.m. R 474. Additionally, and in the alternative, Appellee would contend that under *Beckstrom, supra*, these ballots were substantially compliant and therefore validly upheld by the trial court.

C. Fraud was not an Issue in this Case

Appellant's argument is essentially that 42 people voted, various laws say they should not have voted, and therefore they committed fraud. This is simply not the law. It would be incongruent with the high standards of due process in Florida

for this Court to do what Appellant asks and ignore the elements of fraud by creating an almost strict liability cause of action in an election contest. Although Appellant's entire argument appears to be built on the existence of fraud, he only provides two examples. The first is Mr. Pierce. IB 25. As stated above, Mr. Pierce did not knowingly vote illegally. In fact, he even tried to confirm his eligibility through independent research. R 1221 and 1222.

Appellant's second example is Ms. Novack. Even though she was never questioned in either deposition or trial, Appellant concludes that her vote was fraudulent because she signed an oath. The trial court, nor this Court now, has any evidence to show what Ms. Novack's intentions were, whether she knowingly voted in both elections, or whether she even cast a ballot in the Sheriff's race. The other 36 challenged voters were not called upon as witnesses.

The sparse case law that Appellant finally cites on the issue of fraud betrays his own arguments in this case. For instance, in *Bolden v. Potter*, the "fraud" consisted of actual, physical, "vote-buying." 452 So. 2d at 566 (Fla. 1984). This type of unscrupulous behavior is obviously a "knowing", "intentional" (and most likely concerted) effort to influence the outcome of an election. Had evidence been presented that anyone of the 42 voters were paid to cast votes in the 2016 election, perhaps Appellant would have carried his burden for those individuals. Similarly, in *In re: The Matter of the Protest*, the testifying expert stated that the district of

Miami in that case "was the center of a massive, well conceived and well orchestrated absentee ballot voter fraud scheme." 707 So. 2d at 1172 (Fla. 3rd DCA 1998).

Nothing even remotely close to these two scenarios took place in Putnam County. Appellant provided no expert testimony as to the impact of these 42 voters. There is no evidence to suggest that anyone was involved in any fraudulent scheme. Furthermore, where the fraud complained of in the aforementioned cases involved votes actually cast in those specific races, we do not know whether all except for one of the voters complained of here even voted for Sheriff. As such, Appellant failed to meet his burden and the court's ruling should be affirmed.

D. Misapplied equitable principles

After completely failing to raise the issue of fraud at the trial level, Appellant contends that equitable principles should compel a reversal in this case. Specifically, Appellant cites what he calls the "Son of Sam law" for an idea that "no one shall be permitted to profit by his own fraud, or take advantage of his wrong..." (IB 31 citing *Simon & Schuster, Inc., v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991)). This argument, raised for the first time in the motion for rehearing, is irrelevant to the case at bar. As explained above, there was never any evidence presented that the individual defendants had any involvement whatsoever in the alleged "illegal" voting, which is the only "fraud" or "wrongdoing" that could

arguably be involved in this case. Therefore, Appellee DeLoach cannot logically be said to have benefited or profited from his own wrong, inequity, or crime.

More importantly, the Appellant never proved that "fraud" was committed by anyone. There was no evidence presented on any of the alleged ineligible voters' states of mind or whether purposeful conduct occurred. Quite the contrary, it appears from the few witnesses that were deposed, nobody had any fraudulent intent. Nevertheless, even assuming *arguendo* that some wrongdoing took place, there was no evidence presented to conclude that it had an impact on the Sheriff's race. We do not know for whom the vast majority of these alleged ineligible votes were cast. Therefore, we cannot say that any one of the alleged ineligible voters "profited" from their own "wrong, inequity, or crime." As such, the trial court ruling should be affirmed.

III. THE FINAL JUDGMENT CORRECTLY APPLIED THE STATUTORY PROCEDURES AND WEIGHED DUE PROCESS IN DETERMINING THE VALIDITY OF VOTES IN THIS CASE

Appellant argues that the trial court "conflated" the issues by "blending" the question of whether a vote is "illegal/fraudulent" with the process for removing individuals from the Statewide Voter Registry (hereinafter "FVRS" or "voting roll"). This opinion ignores the fact that the trial court is not simply called upon to determine whether a vote was technically illegal[3] in a vacuum, but rather whether

[3] Appellee reiterates that Appellant never raised the issue of fraud at trial.

there was the receipt of enough illegal votes to change or place in doubt the results of an election. §102.168 Fla. Stat. (2016). Therefore, a judges' analysis of what constitutes an "illegal vote" must be conducted in the context of each individual case. Otherwise, if Appellant's argument was the bright-line-rule, the election in *Beckstrom* (and any other election where a contestant could prove a sufficient number of technical irregularities) would have been vacated for all the reasons cited therein. 707 So. 2d. 720 (Fla. 1998). That type of absolutism would lead to a hypersensitive and fragile system subject to a myriad of post-election challenges. It simply would not square with the principles of facilitating suffrage and liberally construing election laws to err on the side of the voter. *Palm Beach County Canvassing Board v. Harris*, 772. So. 2d 1220, 1237 (Fla. 2000)(rev'd on other grounds).

Unquestionably, the Florida constitution is the bedrock document that creates, explains, and enumerates certain rights of the citizens of this State. In some cases, however, such as for felons, it also takes rights away. Fla. Const. Art VI, 4(a). The Legislature determines how the executive branch will monitor and enforce these laws found in our constitution. For example, Sections 104.15 and 104.011(2), *Florida Statutes* create penalties for anyone who may violate the aforementioned constitutional provision. The Legislature also created the election code including Section 98.075, *Florida Statutes*.

The 42 challenged voters here were merely potentially ineligible in the context of this election challenge. The canvassing of their votes was not "illegal" and Appellee can point to no case in Florida that would definitively say otherwise. In order to effectuate the constitutional proscription on the voting rights of certain individuals, and still adhere to the sanctity of due process, Florida lawmakers created Section 98.075 as a statutory procedure for removing necessary individuals from the FVRS.

Therein, the Legislature listed 7 categories of what it specifically refers to as "potential" ineligible voters. 1) Deceased; 2) adjudicated mentally incapacitated without having his or her voting rights restored 3) convicted as a felon without having his or her civil rights restored; 4) those who do not meet age the requirement; 5) non-citizens; 6) a fictitious person; 7) those who list a residence that is not his or her legal residence. The statute does not place greater weight on any single category of potential ineligible voter and none are regarded as being more or less severe or important than any other.

The statute also makes abundantly clear that the maintenance of the voter registration records, as well as the determination of eligibility, is left up to the Division of Elections (hereinafter "DOE"). Before any of these potential ineligible individuals can be legally removed from the voter rolls, however, there is a specific due process procedure that must be carried out:

1. The Division sends the Supervisor of Elections names of any potential ineligible voters.
2. The Supervisor sends the potential ineligible voter a certified mail notifying of potential ineligibility.
3. If the mail is returned as undeliverable the Supervisor must publish notice in the papeR
4. Once noticed, the voter can request a hearing where evidence can be received and reviewed.
5. If the voter is not satisfied with the result, he or she can appeal pursuant to Section 98.0755, *Florida Statutes*.

Both Mr. Overturf and his deputy supervisor, Ms. Faunce, testified that they had no authority to stop anyone who was validly registered from voting unless they were given the directive by the DOE. T P 150 L 16-25; P 152 L 9-16; P 172 L 18-P 173 L 12. The due process procedure must be followed and completed before an individual is removed from the voter roll.

The considerations of due process in the context of Florida voting rolls is not a new concept. Over 50 years ago, in the case of *State ex rel Barancik v. Gates*, the issue before the Florida Supreme Court was "whether the failure…to provide for notice and a hearing… before striking (his) name from the registration list comports with the requirements of due process under the Federal and State Constitutions." 134 So. 2d 497 (Fla. 1961). The high Court answered in the negative, explaining that "[t]he legal mind would reject instantly the idea that any judicial officer could render a judgment… against a person without previous notice and an opportunity to be heard. Here we are dealing with a far more sacred concept. We know of no

principle under which one's name may be stricken from a registration list without previous notice and an opportunity to be heard." *Id.* at 499; *see also Adams v. Dade County*, 202 So. 2d 585 (Fla. 3rd DCA 1967)(discussing a predecessor statute to §98.075 holding that a ruling to show cause, requiring the alleged ineligible voters to "show cause why they should not be removed from the registration list" did not "square with due process").

In Florida, just because a voter may later be determined to be ineligible does not automatically mean that their votes are retroactively made illegal in an election contest. Imagine the slippery slope that would be created if candidates, party officials, or other politically motivated individuals, were able to go back and determine the eligibility of voters in any election at any time. Much like the concept of *res judicata* favors finality in judgments, there is an obvious public policy favoring finality in elections.

If the Legislature wanted a summary proceeding or instantaneous mechanism for supervisors of election to police the voter rolls at the local level, they would have written such procedures into the law. If the Legislature intended a bright-line-rule that all votes which are found, at any time, to be cast in an illegal manner or by an ineligible person are deemed "fraudulent" or "illegal", then the election code would say as much.

Instead, our lawmakers recognize that the voter rolls are constantly updating. Therefore, in balancing the fundamental right to vote with the reality that some ineligible voters might be present on the rolls on election day, they decided that the former is most important. Not dissimilar to the old adage that "it is better to let a hundred guilty men go free than to condemn one innocent man", the Legislature clearly believes it is more tolerable to allow in a relatively few number of potentially ineligible votes than to remove one valid voter without due process.[4]

It is an unavoidable truth that in a system that values the right to vote but also recognizes that certain individuals can lose that right, voter rolls will be in flux. At any given time, ineligible voters are coming on the rolls and ineligible voters are going off the rolls. Election day is a moment in time when the State takes a snapshot of the voter roll and those who are listed are valid. This is the operative point in time where we must determine eligibility. Not some arbitrary future point. If the election at issue in this case is any indication, the good news is that this number (0.1%) will usually be relatively small. T P. 106 L. 2-9.

As stated earlier, absent fraud or intentional misconduct, a court will only void an election if there has been substantial non-compliance with the statutory election

[4] Supervisor Overturf testified that even under the current framework the procedures are not perfect. Mr. Overturf specifically remembered at least one instance where a potential ineligible voter undertook the statutory procedures in §98.075, was initially determined to be ineligible, and then later provided proof that the determination was made in error. T P 121 L 14- P 122 L 23.

procedures. *See Beckstrom*, 707 So. 2d at 720 (Fla. 1998). Therefore, we have to assume that the election officials are properly policing the voter rolls. There is no evidence to suggest anything less in this case.

While the Appellee concedes that this may not be a perfect system, it is the system under which we are all currently governed, and it is the same for all candidates, from all parties, in all races. Appellee respectfully requests that this Court do as the trial court did and reject the invitation to impermissibly bypass the statutory due process procedures currently in place.

IV. APPELLANT DID NOT MEET HIS BURDEN TO ESTABLISH HIS RIGHT TO THE OFFICE OF SHERIFF

Although Section 102.168, *Florida Statutes*, offers Appellant a cause of action to sue his opponent and the Canvassing Board, the Supreme Court emphasized in the seminal case of *Boardman v. Esteva* whose interests are truly paramount in an election contest:

> We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people.

323 So. 2d at 263 (Fla. 1975); *see also Burns*, 139 So. 3d at 484 (Fla. 3rd DCA 2014)(noting that "extreme care must be given to post-election challenges to avoid disenfranchising Florida's voters").

It is axiomatic that the will of an electorate should be followed whenever possible. *Trotti v. Detzner*, 147 So. 3d 641, 644 (Fla. 1st DCA 2014). Because the right to contest an election did not exist at common law, the election code must be strictly construed to grant only that which is expressly given by the statute. *McPherson v. Flynn*, 397 So. 2d 665 (Fla.1981)("[T]he statutory right to bring an election contest after an election has taken place, which section 102.168 confers, should be construed in strict conformity with the language of the statute.").

Section 102.1682, *Florida Statutes*, states that a judgment of ouster shall be entered against an adverse party who has been commissioned or has entered upon the duties of an office if "the contestant is found to be entitled to the office..." In order to prove that he is entitled to office, Appellant must have established that he received more votes than his opponent. Anything short of this does not prove the requisite entitlement.

Simply saying there were 42 people who should not have voted is not the same as proving the true winner. Stated another way, showing Appellee may not be entitled to the office is not the same as proving his own entitlement, which is what the plain language of the statute requires. Appellant has not proven he received the majority of legal votes and is entitled to office.

Appellant's counsel believes he establishes entitlement to the office of Sheriff merely by placing in doubt the results of the election. This error confuses what the

statute requires for a party to initially bring an election lawsuit ("place in doubt") with what the statute requires for a party to avail himself of the remedy of ouster. The statute specifically refers to the "receipt of a number of illegal votes…," which refers not to the simple canvassing of a vote, but to the "receipt" of said vote by a particular candidate. §102.168(3)(c) Fla. Stat. (2016). The Canvassing Board "receives" no votes; they simply count the votes that are received by the candidates. Appellant produced no evidence that the alleged illegal or fraudulent votes were received by either candidate, which the ouster remedy requires.

Ouster is currently the only enumerated remedy provided by §102.1682 (other than *quo warranto*, which was not requested here). This was not always the case, however. Section 102.168, *Florida Statutes* currently contains eight detailed sections. Section 102.168(3) specifically states that an election contest complaint must "set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum." However, prior to 1999, when the vast majority of Florida election contest cases were determined, §102.168 read much differently.

> Contest of election.--The certification of election or nomination of any person to office…may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto.... Such contestant shall file a complaint, together with the fees prescribed in Section 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns adjourns, and the complaint shall set forth the grounds on which the contestant intends to establish his or her right to

> such office... The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

§102.168 Fla. Stat. (1998). Then, in 1999, the law expanded to add more detail. Specifically, subsection (8), which stated as follows:

> The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide <u>any</u> relief appropriate under such circumstances."

§102.168(8) Fla. Stat. (1999). This was the statutory framework in place during the controversial presidential election of 2000, and the changes in statutory language were discussed by the Florida Supreme Court in the later overturned decision of *Gore v. Harris*.

> The Legislature substantially revised section 102.168 in 1999. That amendment preserved existing rights of unsuccessful candidates and made important additional changes to strengthen the protections provided to unsuccessful candidates in a contest action to be determined. Moreover, rather than restraining the actions of the trial court hearing the contest, the legislative amendment codified the grounds for contesting an election, entitled any candidate or elector to an immediate hearing and provided the circuit judge with express authority to fashion such orders as are necessary to ensure that each allegation in the complaint is investigated, examined or checked. *See* Fla. H.R Comm. on Election Reform, HB 281 (1999) Staff Analysis (February 3, 1999).

2 So. 2d 1250, 1251 (Fla. 2000).

This broad judicial discretion was short lived. Subsection (8) was removed the following year.[5] The former language which allowed the Circuit Court to fashion "any relief necessary", has been absent from the statute since the turn of the millennium and therefore not available in the instant case. After the political storm that occurred in 2000, the Legislature clearly made a public policy decision to scale back the judiciary's involvement in election contests.

The previous election cases that contemplated various different forms of relief (such as throwing out all absentee ballots) are not relevant to the issues herein because they were decided under a different election code, as well as different factual scenarios. For example, in cases such as *Beckstrom*, not only did the challengers file under the old Section 102.168, they also made "election protests" under Section 102.166. 707 So. 2d at 727 (Fla. 1998); *see also In re: The Matter of Protest*, 707 So. 2d at 1174 (Fla. 3rd DCA 1998) (holding that the "legally 'appropriate relief'" to invalidate all absentee ballots came from §102.166(11))(citing *Bolden v. Potter*, 425 So. 2d 564 (Fla. 1984)); *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975); *McLean v. Bellamy*, 437 So. 2d 737 (Fla. 1st DCA 1983); *Peacock v. Wise*, 351 So. 2d 1134 (Fla. 1st DCA 1977).

[5] In 2011 a new subsection (8) was added to section 102.168 which deals with comparing signatures on absentee ballots and has nothing to do with the issues of relief or ouster.

In 2001, the Legislature also took discretion away from the courts in this area when they replaced the election protest under Section 102.166 with an entirely new statute that provides a mechanism for conducting manual recounts. The election code today eliminates judicial authority to render "any relief necessary." The only relief that has survived is ouster under Section 102.1682, *Florida Statutes,* and Appellant did not prove he is entitled to such relief.

Appellant hopes this Court will utilize this "any relief necessary" language to justify throwing out all vote-by-ballots, which in this case would give Appellant the greater number of votes. In past Florida cases where there has been proof of <u>significant</u> fraud or substantial non-compliance in the <u>absentee</u> voting process, the courts fashioned a general rule that is not applicable here. *In re: The Matter of Protest,* 707 So 2d at 1172 (Fla. 3rd DCA 1998)(citing *Frink v. State ex rel. Turk,* 35 So. 2d 10 (Fla. 1948)(explaining "the general rule is that where the number of *invalid absentee* ballots is more than enough to change the result of the election then the election shall be determined solely upon the basis of the machine vote" (emphasis provided in original)).

For many reasons, this is not a legal solution in this case. Here, the 42 alleged ineligible voters not only voted by mail, but also at the polls. T P 105 L 18-25. In cases where the aforementioned "general rule" was applied, the fraud or irregularities were limited to absentee ballots alone. *See e.g., Bolden,* 452 So. 2d at

566-67 (Fla. 1984); *Wakulla County Absentee Voter Intervenors*, 419 So. 2d at 1127 (Fla. 1st DCA 1982).

There is no written opinion in Florida dealing with alleged "illegal votes" cast both at the precinct and by mail. There are, of course, many cases that discuss election challenges, and almost all of those within the last half century have focused on "absentee ballots." All of the cases in Florida where "illegal absentee ballots" were considered, whether found to be substantial enough to affect the results of the election or not, included fraud or some significant irregularity in the casting or handling of the ballots themselves. *See, e.g. Bolden*, 452 So. 2d. 564 (Fla. 1984); *In re: The Matter of Protest* 707 So. 2d 1170 (Fla. 3rd DCA 1998); *Wakulla County Absentee Voter v. Flack*, 419 So. 2d. 1124 (Fla. 1st DCA 1982).

The Appellant improperly asserts that the lower court's ruling "reads into the cases" a requirement that the defendant(s) must be responsible for the fraud. IB 28. He points out that the *Boardman* court noted that no fraud was committed by either candidate or the election officials. *Id*. citing 323 So. 2d at 271 (Fla. 1975). Appellant then cherry picks holdings from the *Bolden* case explaining that "it makes no difference whether the fraud is committed by candidates, election officials, or third parties" and the that "once fraud has been conclusively established the challenger no longer must demonstrate with mathematical certainty the specific number of invalid votes sufficient to change the result of the election." *Id*. citing 452 So. 2d at 567

(Fla. 1984). It is this same flawed premise that the Appellant relies on for his claim that he established his right to the Office of Sheriff.

Bolden is limited to its facts and inapplicable to the case at bar. 452 So. 2d at 567 (Fla. 1984). That case involved a vote buying scheme where the Court specifically stated it was trying to avoid corruption. *Id.* The court's preferred course of action to cure the fraud was to throw out all absentee ballots after finding "substantial" absentee-voter-fraud. *Id.* The court held that "once fraud has been conclusively established the challenger no longer must demonstrate with mathematical certainty the specific number of invalid votes sufficient to change the result of the election." *Id.* Here Appellant never came close to "conclusively establishing" fraud. The *Bolden* principle is based upon the finding of "substantial" absentee voter fraud. Moreover, *Bolden* did not confront alleged fraud occurring by mail and at the polls.

The Appellant also cites *In re: the Matter of Protest* to further his wish to throw out all vote-by-mail ballots. IB 48. There, the Appellate Court decided to throw out all absentee votes, counting only the machine votes. Much like *Bolden*, however, *In re: The Matter of Protest* is distinguishable because (1) its holding was based on a prior statute that gave courts the latitude to order any "relief appropriate" (2) it included massive absentee voter fraud not present here and (3) the court relied

on precedent to invalidate only absentee ballots, which is not an option since the alleged illegal votes were cast by mail and in person.

These cases that summarily discarded all absentee ballots were decided almost 20 years ago or more. There have been many practical and legal changes since then. The original theory, which lead courts to determine that it was acceptable to throw out all absentee ballots in the face of fraud or substantial noncompliance, was based on the premise that absentee voting was merely a privilege. *In re: The Matter of Protest*, 707 So. 2d at 1172 (Fla. 3rd DCA 1998) (noting that "unlike the right to vote, which is assured to every citizen… the ability to vote absentee ballot is a privilege").

Times have certainly changed, and as we become a society of convenience, using cell phones to accomplish in seconds what used to take hours, it stands to reason that how people vote changes as well. This is a principle the Florida Supreme Court has previously recognized. *Boardman*, 323 So. 2d at 263 (Fla. 1975)("We are no longer in the horse and buggy age… Regardless of the original reasons for the enactment of absentee voter laws, they must be interpreted in light of modern conditions… This does not require a full scale re-enactment of the law. This is for the Legislature to do.").

In 2016 the Legislature finally acknowledged the significant shift by unanimously enacting Senate Bill 112, changing the term "absentee" to "vote-by-

mail" in the Florida Statutes to "address possible confusion on the part of voters who mistakenly believe that they must be away from home, or "absent" in order to request a ballot remotely." (*The Florida Senate SB 112-Absentee Voting*, https://www.flsenate.gov/Committees/billsummaries/2016/html/1295).

It is a fact of life now that people vote-by-mail at a much greater rate than ever before in history. At least one recent Federal Court has held that vote-by-mail is a constitutionally protected right. *Fla. Democrats v. Detzner*, Case No. 4:16 cv607-MW/CAS, (U.S. N.D. Fla. October 16, 2016). In these modern times, vote-by-mail is on par with all other types of voting, and that it carries the same constitutional protections.

Therefore, the old general rule of throwing out the "absentee ballots" in the face of absentee voter fraud or substantial non-compliance, is no longer good law. It is certainly not an option in this case because the 42 potentially ineligible voters voted via a mix of vote-by-mail, early voting, and precinct voting.

Appellant essentially argues that proving the physical "receipt" of "illegal votes" is very difficult, and therefore he should only have to show that enough of said votes were cast. That is not the law. In keeping with the principles of separation of powers, and upholding the will of the electorate, judicially overturning an election should be difficult. Nothing should be left up to speculation or uncertain facts.

Requiring direct proof of votes for a specific candidate is not as impossible of a task as the Appellant would have the Court believe. There are many avenues through which enough evidence could be uncovered to reveal that a sufficient number of illegal votes were actually, physically cast for a certain candidate. The obvious way is through discovery.

While the secrecy of the ballot is privileged, it is a personal one that can be waived. *Boardman*, 323 So. 2d at 269 (Fla. 1975). During the early stages of this lawsuit, Appellant began taking depositions of voters to ask them for which Sheriff candidate, if any, they voted. Then, for whatever reason, they team stopped asking. While not all of the 42 voters could have been questioned (3 were dead), with further inquiry, there could have been a much clearer picture of the number of potentially illegal votes assigned to each candidate. At the very least, Appellant could have ascertained who voted in the Sheriff's race. Had Appellant advanced more proof on that subject, perhaps he would have at least provided enough competent substantial evidence to "place in doubt" the results of the election. He did not.

Additionally, Plaintiff could have identified potential ineligible voters before the questionable ballots were mixed in with all of the others. Under section 101.111, *Florida Statutes*, any interested poll watcher may challenge the right of a person to vote. If a voter is challenged, their ballot becomes provisional. As Appellant points out, both the trial judge and Appellees have referenced this law.

However, no one ever argued that this was a prerequisite to brining an election challenge, as Appellant tries to assert. IB 37 and 38. Nonetheless, where the trial court here has to determine whether Appellant met his burden of proving "receipt" of enough "illegal votes", and the case centers around the status of potentially ineligible voters currently on the voting rolls, stating that nobody challenged the eligibility prior to the election as allowed by law is an appropriate finding of fact.

Turning to secondary authority can be helpful in the absence of any Florida cases discussing what should happen under the unique facts of this case. In 2006, a Harvard Law Review article discussed difficulties faced by courts when individuals such as felons vote, and how other states have dealt with these situations. Cass R Sunstein, *Developments in the Law: Voting and Democracy*, *IV Deducting Illegal Votes in Contested Elections*, 119 Harv. L. Rev. 1155 (February 2006).

The one option that appears to reconcile itself with Florida's burden in an election challenge under §102.168 is the "direct evidence" approach, which requires a challenging party to provide direct proof of illegal votes going to his opponent in order to overturn the election. Five state supreme courts have used this approach "saying it is the fairest and most accurate way to determine the outcome of an election in which illegal voting occurred." *Id.* at 1158.

Critics, much like Appellant here, point to the burden of providing evidence, claiming that in many cases it is difficult to find out the names of potential illegal

voters. As Appellant himself showed, however, that is not as impossible as it may seem. If the primary consideration is, as the Supreme Court stated in *Boardman*, to determine "whether the will of the people has been affected", then should there not be some requirement of direct proof? 323 So. 2d at 269 (Fla. 1975). The Appellant in this case provided no such proof, whatsoever.

Nonetheless, after conceding that the alleged illegal votes were not limited to just vote-by-mail ballots, Appellant goes as far as suggesting that the court should have thrown out everything but the provisional ballots. This argument, which has no legal basis, would result in the Putnam County Sheriff's race being decided by a total of 22 votes, disenfranchising over 32,000 people. Such a ridiculous result certainly would not reflect the will of the people.

CONCLUSION

Wherefore, Appellant failed to prove that any fraud occurred in this election, or that any illegal votes were actually cast or received, and has not shown entitlement to the office of Sheriff sufficient to meet his burden for a judgment of Ouster. Therefore, the foregoing considered, Appellee respectfully asks this honorable Court to affirm the lower court's judgment.

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was furnished to all interested parties below via electronic transmission through the State of Florida E-filing Portal this 14th day of December 2017.

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CERTIFICATE OF COMPLIANCE WITH RULES

I HEREBY CERTIFY that this Initial Brief of Appellant complies with the form requirements of Rule 9.100, Florida Rules of Appellate Procedure.

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