

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT**

JONATHAN KINNEY,

Appellant,

v.

Case No: 5D17-1737
LT Case No: 2016-CA-425

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

Appellees.

**ANSWER BRIEF OF APPELLEE,
PUTNAM COUNTY CANVASSING BOARD**

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

John T. LaVia, III, Esquire
Florida Bar No. 853666
Firm name: Gardner, Bist, Bowden,
Bush, Dee, LaVia & Wright, P.A.
Address: 1300 Thomaswood Drive
Tallahassee, Florida 32308
Telephone: (850) 385-0070
Facsimile: (850) 385-5416
Email: jlaviala@gbwlegal.com

Ronald A. Labasky, Esquire
Florida Bar No. 206326
Firm name: Brewton Plante, P.A.
215 South Monroe Street
Suite 825
Tallahassee, Florida 32301
Telephone: (850) 222-7718
Facsimile: (850) 222-8222
Email: rlabasky@bplawfirm.net

Attorneys for Putnam County Canvassing Board

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT1

STATEMENT OF THE CASE AND OF THE FACTS2

 Statement of the Case2

 Statement of the Facts.....4

SUMMARY OF THE ARGUMENT20

ARGUMENT21

 I. The 42 votes at issue were neither fraudulent nor illegal
 and the Final Judgment should be affirmed 21

 A. Standard of review 21

 B. Applicable statutory and legal framework..... 22

 C. Kinney’s distinction between fraudulent and
 illegal votes is misguided..... 24

 D. The trial court’s determination that no illegal votes
 were cast in the General Election should be affirmed 32

 II. The procedures established by the Florida Legislature in
 Section 98.075 for removing ineligible voters from the
 Statewide System are reasonable and do not improperly
 conflate due process issues and the validity of a vote..... 41

 A. Standard of review 41

 B. Applicable statutory and legal framework..... 41

C.	The trial court’s construction of the Florida Election Code is constitutional.....	43
III.	Kinney failed to meet his burden under Section 102.168(3)(c) and failed to establish his right to the office of Sheriff.....	45
A.	Standard of review	45
B.	Kinney did not meet his burden of proving the receipt of a number of illegal votes sufficient to change or place into doubt the result of the Sheriff’s Race.....	46
C.	Kinney is not entitled to ouster	49
	CONCLUSION.....	50
	CERTIFICATE OF SERVICE	51
	CERTIFICATE OF COMPLIANCE.....	51

TABLE OF AUTHORITIES

Cases

<u>Adams v. Dade Cnty.</u> , 202 So. 2d 585 (Fla. 3d DCA 1967)	34
<u>Bell v. Cox</u> , 642 So. 2d 1381 (Fla. 5th DCA 1994)	22, 46
<u>Bloomfield v. City of St. Petersburg Beach</u> , 82 So. 2d 364 (Fla. 1955)	37
<u>Boardman v. Esteva</u> , 323 So. 2d 259 (Fla. 1975)	passim
<u>Bolden v. Potter</u> , 452 So. 2d 564 (Fla. 1984)	passim
<u>Burns v. Tondreau</u> , 139 So. 3d 481 (Fla. 3d DCA 2014)	42, 47, 49
<u>Bush v. Gore</u> , 531 U.S. 98 (2000)	23
<u>Bush v. Palm Beach Cnty. Canvassing Bd.</u> , 531 U.S. 70 (2000)	42
<u>Clegg v. Chipola Aviation, Inc.</u> , 458 So. 2d 1186 (Fla. 1st DCA 1984)	22
<u>Cobb v. Thurman</u> , 957 So. 2d 638 (Fla. 1st DCA 2006)	21, 22, 39, 41
<u>Dade Cnty. Sch. Bd. v. Radio Station WQBA</u> , 731 So. 2d 638 (Fla. 1999)	23, 25
<u>Gore v. Harris</u> , 772 So. 2d 1243 (Fla. 2000), <u>rev'd on other grounds</u> , <u>Bush v. Gore</u> , 531 U.S. 98 (2000)	23, 47
<u>Gunn Plumbing, Inc. v. Dania Bank</u> , 252 So. 2d 1 (Fla. 1971)	25
<u>Heart of Adoptions, Inc. v. J.A.</u> , 963 So. 2d 189 (Fla. 2007)	33-34
<u>In re: Post</u> , 347 B.R. 104 (Bankr. M.D. Fla. 2006)	27-28
<u>In re: Matter of the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami, Fla.</u> , 707 So. 2d 1170 (Fla. 3d DCA 1998)	30, 31

<u>Krivanek v. Take Back Tampa Political Comm.</u> , 625 So. 2d 840 (Fla. 1993).....	37, 39, 40
<u>Levey v. Dijols</u> , 990 So. 2d 688 (Fla. 4th DCA 2008).....	42, 47
<u>Levy v. Woods</u> , 195 So. 3d 1161 (Fla. 4th DCA 2016).....	21, 41, 45
<u>McPherson v. Flynn</u> , 397 So. 2d 665 (Fla. 1981).....	22
<u>Neuman v. Harper</u> , 106 So. 3d 974 (Fla. 5th DCA 2013).....	22, 45-46
<u>Palm Beach Canvassing Bd. v. Harris</u> , 772 So. 2d 1220 (Fla. 2000), vacated, <u>Bush v. Palm Beach Canvassing Bd.</u> , 531 U.S. 70 (2000).....	42
<u>Pearson v. Taylor</u> , 32 So. 2d 826 (Fla.1947).....	22
<u>Republican Party of Miami-Dade Cnty. v. Davis</u> , 18 So. 3d 1112 (Fla. 3d DCA 2009).....	34, 35, 44, 45
<u>Reynolds v. Sims</u> , 377 U.S. 533 (1964).....	42
<u>Sanford v. Rubin</u> , 237 So. 2d 134 (Fla. 1970).....	44
<u>Seminole Elec. Co-op., Inc. v. Dep't of Env'tl. Prot.</u> , 985 So. 2d 615 (Fla. 5th DCA 2008).....	25
<u>State ex rel. Barancik v. Gates</u> , 134 So. 2d 497 (Fla. 1961).....	34, 42
<u>The Florida Bar v. Lobasz</u> , 64 So. 3d 1167 (Fla. 2011).....	25
<u>Trushin v. State</u> , 425 So. 2d 1126 (Fla. 1982).....	43
<u>Walker v. Harris</u> , 398 So. 2d 955 (Fla. 4th DCA 1981).....	38
<u>Worrell v. Worrell</u> , 23 So. 3d 199 (Fla. 4th DCA 2009).....	28
 Other	
<u>Black's Law Dictionary</u> (10th ed. 2014).....	26, 32

<u>Div. of Elections Op. 16-01 (Jan. 4, 2016)</u>	37-38
<u>Div. of Elections Op. 93-05 (June 23, 1993)</u>	38

Florida Constitution

Art. VI, § 1	41, 45
--------------------	--------

Florida Statutes

§ 97.041, Fla. Stat.	46
§ 97.041(1)(a)4, Fla. Stat.	37
§ 97.041(2), Fla. Stat.....	33, 35
§ 97.051, Fla. Stat.	46
§ 97.053, Fla. Stat.	46
§ 98.045, Fla. Stat.	46
§ 98.0655, Fla. Stat.	46
§ 98.075, Fla. Stat.	passim
§ 98.075(7), Fla. Stat.....	passim
§ 98.093(1), Fla. Stat.....	34
§ 101.045(1), Fla. Stat.....	17, 38
§ 101.6103(2), Fla. Stat.....	39
§ 101.62, Fla. Stat.	31
§ 101.62(4)(c)5, Fla. Stat.	15, 16
§ 101.68(2)(c)1, Fla. Stat.	35-36

§ 102.141(7), Fla. Stat.....	6
§ 102.166, Fla. Stat.	7
§ 102.168(3), Fla. Stat.....	passim
§ 102.168(3)(c), Fla. Stat.	passim
§ 102.1682(1), Fla. Stat.....	49-50
§ 104.011, Fla. Stat.	33
§ 104.15, Fla. Stat.	33
§ 104.18, Fla. Stat.	37
§ 744.3215, Fla. Stat.	28
§ 744.3215(2)(b), Fla. Stat.....	11
§ 744.331, Fla. Stat.	28

PRELIMINARY STATEMENT

The Appellee, the Putnam County Canvassing Board, by and through its members, Nancy Harris, Elizabeth Ann Morris, and Charles L. Overturf, III, are identified as the “Canvassing Board.” Appellant, Jonathan Kinney is identified as “Kinney.” Appellee, Homer D. DeLoach, III is identified as “DeLoach.” The Canvassing Board, DeLoach, and Kinney are collectively referred to as the “Parties.” Putnam County Supervisor of Elections, Charles L. Overturf is identified as the “Supervisor of Elections” or “Supervisor Overturf.” The Putnam County Supervisor of Elections office is identified as the “Supervisor’s Office.” The Florida Department of State, Division of Elections is identified as the “Division.”

The November 8, 2016 general election is identified as the “General Election.” November 8, 2016, is identified as “Election Day.” The race for the office of Putnam County Sheriff held during the General Election is identified as the “Sheriff’s Race.” The final evidentiary hearing held on April 12, 2017, is identified as the “Bench Trial.”

The record on appeal is cited as “R [page #].” Kinney’s Initial Brief is cited as “IB at [page #].” The transcript of the Bench Trial, contained in the Supplemental Record on Appeal (R 1809), is cited as “TR [page #].”

All citations to the Florida Statutes are to the 2016 edition.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

This is an appeal of an election contest filed pursuant to Section 102.168(3)(c), Florida Statutes, contesting the results of the Sheriff's Race held during the General Election. Kinney initiated this case by filing an Election Contest Complaint (the "Complaint") on November 28, 2016. R 23-34. The Complaint named the Canvassing Board and DeLoach as Defendants and contained seven alleged grounds for contesting the Sheriff's Race. R 23-34. The first six grounds alleged misconduct by the Canvassing Board or members of the Canvassing Board. The seventh ground alleged the receipt of illegal votes sufficient to change or place into doubt the results of the Sheriff's Race. Id.

Thereafter, the Parties conducted extensive discovery. Among other things, the Canvassing Board produced thousands of pages of documents and the Parties deposed over 20 potential witnesses. See, e.g., R 111-93.

The Parties filed a Joint Pre-Trial Stipulation ("Joint Stipulation") on April 5, 2017, in which they agreed that only one ground raised in the Complaint remained at issue in this proceeding: whether a number of illegal votes were accepted sufficient to change or place into doubt the result of the Sheriff's Race. R 319. As reflected in the Joint Stipulation, Kinney abandoned all the claims in the Complaint pertaining to misconduct by elections officials.

The Bench Trial was held before Judge Gary Wilkinson in Palatka, Florida, on April 12, 2017. At the Bench Trial, two witnesses testified: Supervisor Overturf and Carolyn Faunce, Chief Deputy of Elections Operations in the Supervisor's Office. R 458. In addition, Joint Exhibits 1-69 were admitted without objection by any of the Parties. R 458. At the conclusion of the Bench Trial, the Parties provided brief legal arguments and were provided the opportunity to submit post-trial orders and memoranda. All Parties timely submitted post-trial orders and memoranda. A transcript of the Bench Trial was prepared. R 1809.

The trial court issued a 21-page Final Judgment on May 19, 2017. R 458-78. In the Final Judgment, the trial court identified the "sole issue" to be resolved as "whether a sufficient number of illegal votes were received to change, or place in doubt, the result of the Sheriff's race in the General Election." R 459. The trial court determined that Kinney "abandoned" all claims in the Complaint pertaining to misconduct by election officials in the Sheriff's Race. Id. In denying Kinney's contest of the Sheriff's Race, the trial court found that:

1. Plaintiff failed to meet his burden of proof, in that he did not demonstrate by a preponderance of the evidence the receipt of a number of illegal votes sufficient to change or place into doubt the result of the Sheriff's Race;
2. Plaintiff has not established his right to the office of Putnam County Sheriff, and the final certified result of the Sheriff's Race reflects the will of the voters in Putnam County, and is upheld; and,
3. Final Judgment is entered in favor of all named Defendants and against the Plaintiff.

R 477.

Kinney filed a Motion for Rehearing and a Notice of Appeal. R 1635-1766; R 1612-34. The Canvassing Board and DeLoach filed responses in opposition to Kinney's Motion for Rehearing. R 1768-77; R 1778-84. On June 20, 2017, the trial court denied Kinney's Motion for Rehearing. R 1787-89. This appeal ensued.

STATEMENT OF THE FACTS

Kinney's statement of the facts is incomplete. Moreover, the Initial Brief includes a substantial portion of Kinney's recitation of the facts in the Argument. Thus, for clarity, the Canvassing Board will restate the relevant facts as follows:

The Parties

Kinney and DeLoach were candidates for Putnam County Sheriff in the General Election. R 309. The Canvassing Board, through its members Commissioner Nancy Harris, Judge Elizabeth A. Morris, and Supervisor Overturf, was the board responsible for canvassing the election for Putnam County Sheriff in the General Election. R 309.

Voter Registration in Florida

To register to vote in Florida, a voter must complete a Florida Voter Registration Application, which includes checkboxes that provide: (a) "I affirm that I am not a convicted felon, or if I am, my right to vote has been restored;" and (b) "I affirm that I have not been adjudicated mentally incapacitated with respect to voting

or, if I have, my right to vote has been restored.” TR 101-02. The application also specifically warns a voter (in large red letters, stating “Criminal Offense”) that it is a felony to submit false information. TR 103.

After a voter submits Voter Registration Application, the voter’s status is verified by the Division and the voter is added to the Florida Voter Registration System (the “Statewide System”). TR 103-04. The Division is responsible for maintaining the Statewide System. TR 104.

Once a voter has been added to the Statewide System, that voter can be removed from the Statewide System only pursuant to the procedures set forth in Section 98.075, Florida Statutes. TR 104. The process for removing a voter from the Statewide System is initiated by the Division electronically notifying the Supervisor’s Office. TR 52. The Supervisor’s Office then reviews the information provided by the Division and if the information appears accurate, the Supervisor’s Office then initiates the due process procedures set forth in Section 98.075, Florida Statutes, which require the Supervisor’s Office to provide the voter notice by certified mail within seven days of receipt of notice from the Division. TR 52. The notice to the voter includes: a statement of the basis for the voter’s potential ineligibility; the documentation provided by the Division; a statement that failure to respond within 30 days after receipt of the notice could result in the voter being removed from the Statewide System; and a form informing the voter of his or her

right to a hearing before the Supervisor of Elections to determine his or her voter eligibility. TR 52-53. If the voter does not respond to the notice or if the notice is returned as undeliverable, the Supervisor's Office must publish notice in a local paper of general circulation and allow the voter 30 days to respond after publication of the notice. TR 53, 173-74. If a voter requests a hearing, the Supervisor of Elections must schedule a hearing to allow the voter to provide additional information to the Supervisor of Elections. TR 121. A voter has the right to appeal the Supervisor of Elections's eligibility determination to the circuit court. See TR 59, 121.

Not all information provided by the Division to the Supervisor's Office concerning potentially ineligible voters is accurate. TR 52. The information sometimes contains mistakes. TR 52, 181. Supervisor Overturf testified that he personally handled a case in which a voter, who had been identified by the Division as an ineligible voter and removed from the Statewide System, had to be reinstated when it was determined that the information concerning his potential ineligibility was not accurate or complete. TR 122-24.

The Sheriff's Race

Three candidates ran for Sheriff of Putnam County in the General Election: Kinney, DeLoach, and Edison Edison ("Edison"). TR 98. The vote difference between Kinney and DeLoach was narrow enough that the Canvassing Board conducted a mandatory recount of all ballots pursuant to Section 102.141(7), Florida

Statutes, and a manual recount pursuant to Section 102.166, Florida Statutes. R 310. On November 18, 2016, after completing the recount and manual recount, the Canvassing Board certified DeLoach as winner of the Sheriff's Race over Kinney by a margin of 16 votes (15,869 for DeLoach versus 15,853 for Kinney). R 311; 1025-38; TR 48, 100. Edison received 995 votes. TR 48, 99.

A total of 33,488 votes were cast in the General Election. R 1025-38; TR 98. A total of 32,717 votes were cast in the Sheriff's Race: 13,609 votes were cast at the polls during early voting; 6,351 votes were cast by vote-by-mail ballots; 12,734 votes were cast at the polls on Election Day; and 23 votes were cast by provisional ballot. R 1038; TR 98. Thus, a total of 771 voters who voted in the General Election chose not to vote in the Sheriff's Race. TR 99. Stated differently, approximately 2.3% of the voters in the General Election chose not to vote in the Sheriff's Race. TR 99. In addition, because 995 voters in the Sheriff's Race voted for Edison, over 1,750 voters (771 + 995) in the General Election did not vote for Kinney or DeLoach. TR 99. Thus, nearly 5% of the voters in the General Election did not vote for either Kinney or DeLoach. TR 99-100.

The Potentially Ineligible Voters

Kinney identified 42 voters whose eligibility is at issue in this case. R 313-14. The 42 potentially ineligible voters fall into the following categories: (a) 32 potential felons (19 identified by Kinney and 13 identified by the Division) R 314-18; (b) 1

potentially mentally incapacitated person R 319; (c) 3 voters who cast vote-by-mail ballots that were postmarked or received by the Supervisor's Office after the voters died R 314; (d) 1 voter who allegedly voted in Florida and another state R 319; (e) 2 voters who allegedly cast vote-by-mail ballots after 7:00 p.m. on Election Day R 318; and (f) 3 voters who allegedly do not reside in Putnam County R 318-19.

The 42 potentially ineligible voters at issue in this case represent approximately 0.1% of the voters who cast ballots in the General Election (42 of 33,488). TR 107. Conversely, Kinney is not challenging the eligibility of approximately 99.9% of the voters who cast ballots in the General Election. TR 107. As previously noted, 771 voters who cast ballots in the General Election did not vote in the Sheriff's Race. Consequently, the number of voters who did not vote in the Sheriff's Race is approximately 18 times greater than the 42 potentially ineligible voters at issue. TR 107-08. Each of the 42 potentially ineligible voters was registered in the Statewide System and on the voting rolls in Putnam County at the time they voted in the General Election. TR 105. Each of the 42 potentially ineligible voters voted in the General Election. TR 105. Twenty-nine of the potentially ineligible voters cast vote-by-mail ballots and 13 of the potentially ineligible voters voted in person (during early voting or at their precincts on Election Day) in the General Election. TR 106. It is impossible to independently determine whether any of the 42 potentially ineligible voters voted in the Sheriff's Race because the voters are

entitled to cast a secret ballot.¹ TR 105-06. For the same reason, it is impossible to determine for whom the potentially ineligible voters voted in the Sheriff's Race (if they even voted in the Sheriff's Race). TR 106.

At the Bench Trial, Supervisor Overturf testified that he would report to the local State Attorney's office any of the 42 voters determined to have voted illegally. See TR 55, 87, 174-75.

32 Potential Felons

Kinney identified 19 potential felons. R 315-16. Each of these 19 potential felons cast vote-by-mail ballots in the General Election. TR 115. The Parties stipulated to the admission of the documents concerning the eligibility of these 19 potential felons. R 1043-1320. Upon learning of Kinney's allegations concerning the potential ineligibility of these 19 voters, the Supervisor's Office forwarded the voters' names to the Division for processing: two of the voters' names were forwarded to the Division in January of 2017, shortly after completion of their depositions in this case, and 17 were forwarded to the Division during the weeks prior to the Bench Trial, with a request that the Division expedite its review process. TR 116-18.

The Bench Trial was held in this case on April 12, 2017, more than five

¹ One of the 42 voters indicated in a deposition that he cast a vote in the Sheriff's Race for DeLoach. See R 1221.

months after the General Election. See R 458. At the time of the Bench Trial, the eligibility status of these 19 potential felons was as follows: (a) the Supervisor's Office had fully processed 1 of the 19 voters pursuant to Section 98.075 and removed the voter from the Statewide System; (b) the Supervisor's Office was in the process of determining the eligibility of 14 of the 19 voters pursuant to Section 98.075 and these voters remained in the Statewide System; and (c) the Division had not provided any information regarding 4 of the 19 voters and those voters remained in the Statewide System. TR 124-25.

In addition, the Division notified the Supervisor's Office of 13 potential felons who voted in person during the General Election. R 318. The Parties stipulated to admission into evidence of the documents provided by the Division concerning the eligibility of these 13 potential felons. R 1372-1404. On the day of the Bench Trial, the eligibility status of these 13 potential felons was as follows: (a) the Supervisor's Office had fully processed 9 of the 13 voters pursuant to Section 98.075 and removed the voters from the Statewide System; and (b) the Supervisor's Office was in the process of determining the eligibility of 4 of the 13 voters pursuant to Section 98.075 and the voters remained in the Statewide System. TR 126-27.

In summary, on the day of the Bench Trial (April 12, 2017), of the 32 potential felons identified in this case, the Supervisor's Office had removed 10 of the 32 voters from the Statewide System. TR 61, 66. The other 22 voters remained in the Statewide

System and their eligibility under Section 98.075 had not been determined. See TR 66.

No Party to this litigation and no other person questioned the eligibility of any of these 32 voters prior to the General Election or during the recount by the Canvassing Board in the Sheriff's Race. TR 125, 127-28, 155. Except for one of the 32 voters (see supra note 2), no evidence was introduced at the Bench Trial to establish that any of the other 31 voters voted in the Sheriff's Race, and if they voted in the Sheriff's Race, for whom they voted. See TR 105-06.

One Potentially Mentally Incapacitated Voter

The Division notified the Supervisor's Office of one potentially mentally incapacitated² voter who cast a vote-by-mail ballot during the General Election.³ R 319; TR 145. The Parties stipulated to admission of the document provided by the Division concerning the eligibility of this potentially mentally incapacitated voter. R 1405. The document provided by the Division was dated November 5, 2016, (i.e., only three days before the General Election) and stated that the voter was adjudicated mentally incapacitated in respect to voting Id.

² Section 744.3215(2)(b), Florida Statutes, identifies the right to vote as a right that may be removed from a person determined to be incapacitated but that cannot be delegated to the incapacitated person's guardian.

³ The record does not reflect the date on which the notice was actually received by the Supervisor's Office. However, Supervisor Overturf testified that the notice was not received prior to the General Election. TR 146.

On the day of the Bench Trial, the Supervisor's Office was determining the eligibility of this potentially mentally incapacitated voter pursuant to Section 98.075 and the voter remained registered in the Statewide System. R 319; TR 146. The Division did not notify the Supervisor's Office that this voter was potentially mentally incapacitated before the General Election. TR 146. No Party to this litigation and no other person challenged this voter's ballot or status during the recount conducted by the Canvassing Board in the Sheriff's Race. TR 147. No evidence was introduced at the Bench Trial to establish that the potentially mentally incapacitated voter voted in the Sheriff's Race, and if the voter voted in the Sheriff's Race, for whom he voted. See TR 105-06.

Three Voters Who Cast Vote-by-Mail Ballots that were Postmarked or Received by the Supervisor's Office After the Voters Died

Kinney identified three voters who cast vote-by-mail ballots that were postmarked or received by the Supervisor's Office after the voters died. R 314. The Parties stipulated to admission into evidence of the documents that establish when the three voters died and when their ballots were postmarked or received by the Supervisor's Office. R 1322-30. Each of the three voters signed and dated their ballots before they died. TR 108-15. Each of these three voters' ballots were postmarked or received by the Supervisor's Office after the voters died. Id.

At the time the Supervisor's Office received the three vote-by-mail ballots and processed the ballots, all three of these voters were eligible voters, validly

registered in the Statewide System. R 314. Neither the Division nor any other person had provided notice to the Supervisor's Office of the voters' deaths, and the Supervisor's Office did not know of their deaths. TR 111, 113, 114. No Party to this case and no other person identified or questioned the eligibility of any of these three voters prior to the General Election or during the recount conducted by the Canvassing Board in the Sheriff's Race. TR 112-15, 155. No evidence was introduced at the Bench Trial to establish that any of these three voters voted in the Sheriff's Race, and if they voted in the Sheriff's Race, for whom they voted. See TR 105-06.

One Voter Who Allegedly Voted in Two States

Kinney identified one voter who allegedly cast vote-by-mail ballots in Florida and in New Jersey during the General Election. R 319. The Parties stipulated to admission into evidence of the documents concerning the voting history of this voter during the General Election. R 1331-33. The voter identified in Joint Exhibit 47 requested that a Florida vote-by-mail ballot be mailed to an address on file with the Supervisor's Office in New Jersey. TR 84, 147. The voter cast a vote-by-mail ballot in Florida in the General Election. TR 84. The Supervisor's Office also confirmed that the voter identified in Joint Exhibit 47 cast a vote-by-mail ballot in New Jersey during the General Election. Id.

No evidence was introduced to establish, and Supervisor Overturf does not know, whether the voter voted in Florida or New Jersey first. TR 148. It is against the law to cast a ballot in more than one state in the same election and Supervisor Overturf testified at the Bench Trial that he would report the voter to the local State Attorney's office at the conclusion of the case. TR 86-87.

At the time the Supervisor's Office received the vote-by-mail ballot cast by the voter identified in Joint Exhibit 47, neither the Division nor any other person had informed the Supervisor's Office that the voter had also cast a vote-by-mail ballot in New Jersey in the General Election. TR 147-48. No Party to this litigation and no other person identified or questioned the ballot or eligibility of the voter prior to the General Election or during the recount conducted by the Canvassing Board in the Sheriff's Race. TR 148, 155. No evidence was introduced at the Bench Trial to establish that the voter identified in Joint Exhibit 47 voted in the Sheriff's Race, and if the voter voted in the Sheriff's Race, for whom the voter voted. See TR 105-06.

Two Voters Who Allegedly Cast Vote-by-Mail Ballots after 7:00 p.m. on Election Day

Kinney identified two voters who allegedly cast vote-by-mail ballots after 7:00 p.m. on Election Day. R 318. The Parties stipulated to the admission into evidence of the vote-by-mail envelopes for those two voters. R 318. One of the vote-by-mail envelopes bears a time-stamp stating "Received – Putnam County Supervisor of Elections" on November 8, 2016 at 7:02 p.m. and the other vote-by-

mail envelope bears a time-stamp stating “Received – Putnam County Supervisor of Elections” on November 8, 2016 at 7:06 p.m. R 318.

Pursuant to Section 101.62(4)(c)5, Florida Statutes, a voter may cast a vote-by-mail ballot at a Supervisor of Elections’s office on Election Day if the voter executes an affidavit swearing that the voter has experienced an emergency and is unable to go to the assigned polling place. TR 129, 136, 158-59. Supervisor Overturf described the procedure in place on Election Day for accepting vote-by-mail ballots at the Supervisor’s Office. Continuing the long-standing practice of his predecessor, Supervisor Overturf would allow voters to enter the front lobby of the Supervisor’s Office to request a vote-by-mail ballot on Election Day up to 7:00 p.m. TR 129. At precisely 7:00 p.m., a member of Supervisor Overturf’s staff, along with an off-duty law enforcement officer, would lock the door to the Supervisor’s Office’s front lobby so no additional voters could enter the lobby. TR 129-30. Any voters in the lobby who requested vote-by-mail ballots would be allowed to complete their ballots. See TR 129, 167. After all voters in the lobby had completed casting their ballots, a member of Supervisor Overturf’s staff would unlock the door to the lobby. TR 166-67. Access to the lobby of the Supervisor’s Office was restricted while the doors were locked, but members of the public could use a separate, unlocked, entrance to enter the portion of the Supervisor’s Office where election results were being announced. TR 169-70.

The two voters identified in Joint Exhibits 39 and 40 cast their vote-by-mail ballots in the lobby of the Supervisor's Office on Election Day after completing the affidavit required by Section 101.62(4)(c)5. TR 159. Supervisor Overturf testified that given the procedures at the Supervisor's Office for processing vote-by-mail ballots on Election Day, the time-stamps of 7:02 p.m. and 7:06 p.m. on the envelopes do not necessarily mean that the Supervisor's Office received the two vote-by-mail ballots at the time indicated in the time-stamps. TR 131-32. It is possible that the voters handed the vote-by-mail ballots to a member of Supervisor Overturf's staff before 7:00 p.m. and the ballots were stamped after 7:00 p.m. TR 132. Given the procedures at the Supervisor's Office for processing vote-by-mail ballots received on Election Day, the two vote-by-mail ballots identified in Joint Exhibits 39 and 40 were cast by voters in the Supervisor's Office before 7:00 p.m., when the door to the lobby of the Supervisor's Office was locked. TR 137.

Supervisor Overturf also testified that, in his capacity as Supervisor of Elections, he believes the ballots identified in Joint Exhibits 39 and 40 should be counted because it reflects his policy "to err on the side of the voter." TR 133.

No Party to this litigation and no other person questioned the timeliness of the two ballots identified in Joint Exhibits 39 and 40 during the recount by the Canvassing Board in the Sheriff's Race. TR 134-35, 155. No evidence was introduced at the Bench Trial that either of these voters voted in the Sheriff's Race,

and if they voted in the Sheriff's Race, for whom they voted. See TR 105-06.

Three Voters Who Allegedly Do Not Reside in Putnam County

Kinney identified three voters who cast vote-by-mail ballots in the General Election that he contends do not reside in Putnam County. R 318-19. The three voters were deposed and the Parties stipulated to the introduction of their depositions into evidence. R 1331-70, 1457-1510, 1511-48.

With regard to the two voters (a married couple) identified in Joint Exhibits 48 and 67 (the "Iveys"), Supervisor Overturf testified that he received a complaint from a third party about the residency status of these two voters after the August 2016 Primary Election. TR 140. Supervisor Overturf then sent an e-mail to Maria Matthews, the Director of the Division, in which he requested guidance from Ms. Matthews. R 1550-52; TR 140. In the e-mail, Supervisor Overturf noted that the Iveys had sold their house in Putnam County in 2015, thus they no longer owned property in the County, and they had cast vote-by-mail ballots from their home in North Carolina for the past 3 or 4 years. R 1552. Ms. Matthews sent two e-mails in response to Supervisor Overturf's inquiry. R 1550-51; TR 149. The first e-mail outlined five courses of action Supervisor Overturf could pursue. R 1550-51. In the second e-mail, Ms. Matthews stated that:

. . . these voters may legitimately fall under section 101.045(1), Fla. Stat., . . . as registered voters in Florida and in your county who are temporarily away without permanent residence/property in your county but who intend to remain registered in your county and Florida.

As such they can legally continue to be registered here if they haven't registered elsewhere. They just won't be able to vote in [municipal elections] but they can vote in all other elections. You will want to re-assign them to the precinct designated for your [Supervisor of Elections] office.

So that is the other likely possibility that might actually have happened here.

R 1550. Supervisor Overturf relied on Ms. Matthews' second e-mail in making a determination concerning the residency status of the Iveys. TR 141.

Shortly after receiving Ms. Matthews' e-mail, Supervisor Overturf contacted Mrs. Ivey and she confirmed "in no uncertain terms, that it was [her] intent to remain a voter of Putnam County from here on out as long as the state would allow her to."

TR 142. The Iveys both submitted written applications confirming their addresses and requesting that their precincts be changed to the Supervisor's Office. See TR 89, 143. The Iveys are not registered to vote in any other state. TR 143. The Iveys are registered at the precinct designated as the Supervisor's Office. TR 89. Supervisor Overturf, in his capacity as Supervisor of Elections in Putnam County, testified that given the voters' intent, he believes the Iveys are residents of Putnam County. TR 143. No Party to this litigation challenged the residency status of either of the Iveys prior to the General Election. TR 143-44. No Party to this case and no other person challenged the validity of the Iveys' ballots during the recount by the Canvassing Board in the Sheriff's Race. TR 144.

With regard to the voter identified in Joint Exhibit 51, the record establishes that: (a) the voter considers his residence to be 150 River Drive, East Palatka, Putnam County, Florida, TR 139, 180; (b) the voter's Florida Driver's License lists 150 River Drive, East Palatka, the home in which he was raised, as the voter's home address, R 1523, 1527; (c) the voter still receives mail at the 150 River Drive, East Palatka address, R 1522-23; (d) the voter has voted in Putnam County for his "whole life," R 1531; (e) the voter may return to Putnam County to open a new restaurant, R 1532-33; (f) the voter is not registered to vote in any other county in Florida, R 1531, TR 110; and (g) the voter is not registered to vote in any other state, R 1531, TR 180.

Supervisor Overturf testified in his capacity as Supervisor of Elections for Putnam County that, based on the voter's intent, he believes the voter identified in Joint Exhibit 51 is a resident of Putnam County. TR 139.

Before the General Election, no Party to this litigation and no other person challenged the eligibility to vote in Putnam County of the voter identified in Joint Exhibit 51. TR 138, 155. During the recount by the Canvassing Board in the Sheriff's Race, no Party to this case and no other person challenged the eligibility to vote in Putnam County of the voter identified in Joint Exhibit 51. TR 138, 155. No evidence was introduced at the Bench Trial to establish for whom the voter identified in Joint Exhibit 51 voted in the Sheriff's Race. See TR 105-06.

SUMMARY OF THE ARGUMENT

The trial court's findings in the Final Judgment that Kinney failed to demonstrate by a preponderance of the evidence the receipt of a number of illegal votes sufficient to change or place in doubt the result of the Sheriff's Race is supported by competent, substantial evidence in the record and should be affirmed.

The 42 voters challenged by Kinney in this election contest were each registered voters in the Statewide System at the time their votes were cast and canvassed in the General Election. No Party to this proceeding, or anyone else, questioned the eligibility of any of these 42 voters prior to the General Election or during the recount conducted by the Canvassing Board in the Sheriff's Race. The record is devoid of any evidence of misconduct by any election officials in the General Election and Kinney abandoned any claim that he may have had that any election official committed misconduct in the General Election.

The 42 votes at issue were neither fraudulent nor illegal. At the Bench Trial Kinney did not raise the claim that 37 of the 42 voters cast fraudulent votes, and thus he has waived his right to litigate the issue. He cannot raise this issue for the first time in this appeal. Moreover, Kinney's attempt to distinguish fraudulent votes from illegal votes is not supported by the Florida Election Code, or applicable case law and is irrelevant to this appeal. In addition, the record is devoid of any evidence of fraudulent votes being cast in the General Election.

The trial court’s determination that each of the 42 voters at issue cast legal votes because they were each registered in the Statewide System at the time they cast their votes, is consistent with the plain language of the Florida Election Code and should be affirmed.

Section 98.075(7) represents the Legislature’s clear directive that until a voter receives due process protections, the voter is only “potentially ineligible” and cannot be removed from the Statewide System. Accordingly, the trial court’s construction of Section 98.075(7) correctly harmonized that statute with the remainder of the Florida Election Code and is constitutional. The trial court’s construction of Section 98.075 is also consistent with the public policy of liberally construing the Florida Election Code in favor of a citizen’s right to vote.

Finally, Kinney failed to demonstrate that he is entitled to the office of Putnam County Sheriff; thus, ouster does not apply. The Court should reject Kinney’s attempt to disenfranchise over 32,000 Putnam County voters.

In summary, the Final Judgment should be affirmed.

ARGUMENT

I. The 42 votes at issue were neither fraudulent nor illegal and the Final Judgment should be affirmed.

A. Standard of review.

Issues of statutory interpretation and questions of law are reviewed de novo. Levy v. Woods, 195 So. 3d 1161, 1163 (Fla. 4th DCA 2016) (citing Cobb v.

Thurman, 957 So. 2d 638, 642 (Fla. 1st DCA 2006)). The standard of review as to findings of fact is whether the findings are supported by competent, substantial evidence. See Neuman v. Harper, 106 So. 3d 974, 976 (Fla. 5th DCA 2013). “The factual determinations of the trial court are clothed with the presumption of correctness.” Bell v. Cox, 642 So. 2d 1381, 1382 (Fla. 5th DCA 1994). “The resolution of factual conflicts by a trial judge in a non-jury trial will not be set aside on review unless totally unsupported by competent substantial evidence.” Clegg v. Chipola Aviation, Inc., 458 So. 2d 1186, 1187 (Fla. 1st DCA 1984).

B. Applicable statutory and legal framework.

It is well-settled in Florida that "there is no inherent power in the courts of this state to determine election contests." McPherson v. Flynn, 397 So. 2d 665, 667 (Fla. 1981). “Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out.” Id. at 668 (citing Pearson v. Taylor, 32 So. 2d 826 (Fla. 1947)). The Florida Election Code, Chapters 97-106, Florida Statutes, sets forth the statutory framework that governs the Sheriff’s Race. This Court is constrained by the express legislative directives in the Florida Election Code. See id; see also Cobb, 957 So. 2d at 642 (“the conduct of elections . . . is controlled by statute.”).

Section 102.168(3)(a)-(d) provides four specifically enumerated grounds for contesting an election in Florida. The Parties stipulated that the only ground at issue

in this election contest is Section 102.168(3)(c),⁴ which provides in part:

The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office The grounds for contesting an election under this section are:

* * *

(c) Receipt of a number of illegal votes . . . sufficient to change or place in doubt the result of the election.

Section 102.168(3)(c) creates a two-part test that requires Kinney to establish: (a) the receipt of a number of illegal votes; and (b) that the number of such illegal votes is sufficient to change or place in doubt the result of the election. Kinney has failed to meet his burden⁵ of establishing either part of the test.

⁴ The Complaint included six other grounds for contesting the Sheriff's Race, which alleged misconduct in the handling of the election by the Canvassing Board and individual members of the Canvassing Board. No evidence of misconduct of any kind by the Canvassing Board or any of its members was introduced at the Bench Trial. Accordingly, the trial court found that the allegations of misconduct by the Canvassing Board and the Canvassing Board's members were abandoned by Kinney and are no longer at issue. R 459. Given that Kinney clearly abandoned any claims of misconduct by the Canvassing Board, the argument in his Initial Brief concerning an alleged failure of the Canvassing Board to provide public notice of an opportunity to inspect certain vote-by-mail ballots is irrelevant. See IB at 40-46. Moreover, the Parties specifically stipulated that the Canvassing Board "held noticed meetings" R 310. This issue was not presented to, or addressed by, the trial court. Consequently, this issue cannot be litigated for the first time in this appeal.

⁵ Kinney, as the contestant under Section 102.168(3), bore the burden of establishing by a preponderance of the evidence the grounds for contesting an election set forth in Section 102.168(3)(c). See Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), rev'd on other grounds, Bush v. Gore, 531 U.S. 98 (2000). See Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999) ("Generally, if a claim is not raised in the trial court, it will not be considered on appeal.").

C. Kinney's distinction between fraudulent and illegal votes is misguided.

1. *Kinney waived his claim that fraudulent votes were cast in the Sheriff's race.*

Kinney devotes a substantial portion of his Initial Brief to a discussion of the distinction between fraudulent and illegal votes.⁶ See IB at 7-32. Though not entirely clear, it appears that Kinney asserts that of the 42 potentially illegal votes, 37 of the votes were fraudulent (and also illegal) and 5 were just illegal. See IB at 32-35. For the reasons discussed below, Kinney's attempt to distinguish fraudulent votes from illegal votes is not supported by the Florida Election Code or applicable case law, is irrelevant to this case, and should be rejected.

As a threshold issue, the Court should reject Kinney's attempt to litigate for the first time in this appeal the issue of whether any fraudulent votes were cast in the Sheriff's Race because Kinney waived the issue by not litigating it during the Bench Trial. As the trial court clearly stated in its 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. In fact, the terms "fraud" or "fraudulent" do not even appear in the operative portions of the Joint Stipulation. See R 304. It is well-settled in Florida

⁶ Kinney frequently uses the terms "illegal" vote and "fraudulent" vote interchangeably. For example, he states "[i]n that it is illegal to vote twice in a single general election, the vote-by-mail ballot of Sandra Novak [sic] should have been rejected as a fraudulent vote." IB at 15 (emphasis supplied).

that absent fraud, misrepresentation or mistake, stipulations are binding on the parties and the court. Seminole Elec. Co-op., Inc. v. Dep't of Env'tl. Prot., 985 So. 2d 615, 621 (Fla. 5th DCA 2008) (citing Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1, 4 (Fla. 1971)).

The issue of whether fraudulent activity occurred in the General Election was not identified as an issue in the case; no Party offered any evidence addressing the alleged fraudulent activity during the Bench Trial; and the trial court was not given the opportunity to consider any issues related to alleged fraudulent activity. Consequently, Kinney waived his right to argue that fraudulent votes were cast in the General Election and this Court should reject Kinney's attempt to litigate the issue now, after the close of evidence, and without the Canvassing Board having had an opportunity to present evidence to rebut Kinney's claim of fraud. See The Florida Bar v. Lobasz, 64 So. 3d 1167, 1178 (Fla. 2011) (stating that trial by ambush tactics will not be condoned); see also Dade Cnty. Sch. Bd., 731 So. 2d at 644 (claim not raised in trial court will not be considered on appeal).

2. *The record is devoid of evidence of any fraudulent votes being cast in the General Election.*

Assuming, arguendo, that Kinney adequately preserved the issue of whether fraudulent activity occurred during the General Election, the argument is nonetheless meritless. As stipulated by the Parties, and as recognized in the Final Judgment, this election contest is governed by Section 102.168(3)(c), which provides that the basis

for contesting the results of the Sheriff's Race is "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." The trial court thoroughly analyzed all 42 votes at issue to determine whether the votes were illegal. Having found the votes to be legal at the time they were cast and counted, nothing in Section 102.168(3) or the Florida Constitution required the trial court to make a separate determination as to whether the votes were fraudulent. Accordingly, the Final Judgment fully comported with the requirements of Section 102.168(3).

Kinney assumes that 32 alleged felons, the alleged mentally incapacitated person, the voter who allegedly voted in two states, and the three voters who allegedly do not reside in Putnam County each committed fraud by voting in the General Election. However, absolutely no evidence of fraud was introduced at trial. In his Initial Brief, citing Black's Law Dictionary, Kinney defines fraud as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." IB at 7 (emphasis supplied). Employing this definition of fraud, it is clear that no fraudulent votes have been proven to have been cast in the General Election because there is absolutely no evidence of any "knowing" misrepresentation or "knowing" concealment by any of these 37 voters. For example, consider the testimony of Daniel J. Pierce, a representative "fraudulent" voter described in the Initial Brief. See IB at 25. In his

deposition, Mr. Pierce explained why he thought he could legally vote in Florida.

Responding to questions from Kinney's counsel, Mr. Pierce stated:

KELLER: Were you – are you aware of whether or not your civil rights for voting in elections was ever restored as part of your sentencing or anything thereafter in respect to the 2007 felony?

PIERCE: No, but I was curious about that and I brought the point up to my wife and we had looked it up and we thought – I mean, you know, with the way that this is being presented we could be wrong, you know, we could have misinterpreted 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.

KELLER: Right.

PIERCE: In a positive way.

KELLER: Absolutely. When you said that you were reviewing everything and you were having this discussion with your wife, were some of those documents that you were looking at were those documents specific to your case?

PIERCE: No, they weren't.

KELLER: Okay.

PIERCE: No, they weren't. It was basically, hey, Google, can convicted felons in Florida vote? And that was among the answers that . . . came.

R 1218-19 (emphasis supplied). Mr. Pierce's sworn testimony shows that he did not "knowingly" vote illegally. See In re: Post, 347 B.R. 104 (Bankr. M.D. Fla. 2006)

(false statement resulting from ignorance or carelessness is not knowing or fraudulent).

In addition, Kinney offered no evidence that the potentially mentally incapacitated voter committed fraud by voting after he was determined to be incapacitated. IB at 8, 13-14. For example, if the voter were determined to be totally incapacitated pursuant to Sections 744.3215 and 744.331, Florida Statutes, the Canvassing Board asserts the voter would be legally incapable of “knowingly” committing fraud. Thus, it is improper for Kinney to assume that the potentially incapacitated voter cast a fraudulent vote.

As to the remaining 35 voters alleged to have committed fraud, Kinney introduced absolutely no evidence as to the voters’ intent and thus no conclusions can be drawn as to whether any of the voters knowingly violated the Florida Election Code. See Worrell v. Worrell, 23 So. 3d 199, 201 (Fla. 4th DCA 2009) (stating “[a]llegations of fraud involve the intent or state of mind of the alleged perpetrator and thus require that the fact finder evaluate the credibility of witnesses and other evidentiary matters.”). In summary, in the absence of any evidence to the contrary, it must be assumed that individual voters acted in good faith. Nothing in this record establishes that the individual voters cast fraudulent votes.⁷

⁷ Kinney’s reliance on the “Son of Sam Law” (IB at 31) is also misplaced because absolutely no evidence of fraud has been introduced into the record.

3. Boardman and Bolden are distinguishable.

Kinney's strategy of focusing on allegedly "fraudulent" votes appears to be an attempt to reconcile the facts of this case with the facts and holdings in Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975) and Bolden v. Potter, 452 So. 2d 564 (Fla. 1984). The Court should reject this attempt.

In Boardman, the court addressed the effect of irregularities on the validity of certain absentee ballots cast in an election for a seat on the Second DCA. 323 So. 2d at 261. In upholding the results of the election, the court stated:

In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots cast, the following factors shall be considered:

- (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

Id. at 271 (emphasis supplied).

Bolden also involved the validity of absentee ballots. In Bolden, "the trial court found that the buying of absentee-ballot votes was so pervasive that it tainted the entire absentee-voting procedure in a Liberty County School Board election."

Id. at 565.⁸ The court in Bolden described the pervasive fraud as follows:

At the trial, Bolden presented approximately 75 witnesses who testified about corrupt election practices including the sale of votes. The record reflects that 46 electors admitted that their ballots had been bought and that 70 additional ballots were witnessed by the same person who had witnessed the bought ballots and conducted the organized vote-buying operation. In addition, 10 other ballots were witnessed by individuals who had no contact with the respective voters and no independent knowledge of such voters or the nature of their signatures.

* * *

The trial court expressly found, however, that “the witnesses painted a picture of promiscuous vote buying and other conduct on the part of certain individuals indicating intentional wrongdoing and gross negligence, all of which adversely affected the integrity of the election.” Concluding that “the fraud and illegal activities . . . were so conspicuously corrupt and pervasive that it has tainted the entire absentee voting procedure in this election,” the trial court invalidated all of the absentee votes.

Id. at 565-66. The evidence in Bolden established that over 30% of the absentee ballots (126 out of 381) “could be said to be tainted” and over 10% of absentee voters (46 of 381) admitted “that their votes were bought . . .” Id. at 567. The Bolden court concluded that if fraud “permeated a substantial part of the absentee election process” a challenging party would not be required “to establish with mathematical certainty the specific number of invalid votes sufficient to change the results of the election.” Id.

⁸ In re: Matter of the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1977 Election for the City of Miami, Fla., 707 So. 2d 1170, 1172-73 (Fla. 3d DCA 1998) similarly involved “massive absentee voter fraud” that adversely affected the integrity of an election.

Thus, Boardman and Bolden stand for the proposition that if voter fraud concerning absentee ballots is pervasive (i.e., vote-buying or other similar schemes occur) then the challenging party need not demonstrate with mathematical certainty that there were a sufficient number of illegal votes cast to place in doubt the results of the election. Kinney would clearly like this standard to apply in the instant case, because, as discussed in Section III, Kinney has failed to meet his burden under the Florida Election Code of placing in doubt the results of the Sheriff's Race.

The facts in Boardman and Bolden are clearly distinguishable from the facts in this case and Bolden's remedy for pervasive fraud does not apply. First, Boardman and Bolden both addressed the validity of votes cast by absentee ballots.⁹ In contrast, no votes were cast by absentee ballot in the Sheriff's Race. Second, and most importantly, the record is devoid of any evidence of fraud by any voter or election official during the General Election. Nothing in the record indicates any concerted effort or collusion between any of these 37 voters. Third, even assuming hypothetically that the 37 voters at issue (out of a total of 33,488 who voted in the General Election) each committed fraud in casting their ballots, that fraud is clearly

⁹ Absentee ballots no longer exist in Florida; they have been replaced by vote-by-mail ballots. See §101.62, Fla. Stat. During the time voting by absentee ballot was available in Florida, the courts recognized that voting by absentee ballot was a privilege, not a right. See, e.g., In re: Matter of the Protest of Election Returns, 707 So. 2d at 1173. In contrast, no court has found voting by mail to be merely a privilege.

not the “pervasive” and “not inconsequential” fraud at issue in Bolden, where more than 30% of the absentee ballots were tainted. Individual decisions made by 37 individual voters is not pervasive fraud. Kinney has not identified a single case in Florida where alleged fraudulent actions taken separately by individual voters was found to rise to the level of the type of “pervasive” fraud present in Bolden. In summary, no record evidence exists of any fraudulent votes being cast in the General Election and this Court should reject Kinney’s improper attempt to now focus on “fraudulent” votes, after previously waiving this issue.

D. The trial court’s determination that no illegal votes were cast in the General Election should be affirmed.

The term “illegal vote” is not defined in the Florida Election Code. The trial court utilized a definition of “illegal vote” from Black’s Law Dictionary:

. . . [a] vote that does not count because it was cast by someone not entitled to vote, or for an ineligible choice, or in a form or manner that does not comply with the applicable rules.

R 461. The trial court explained that the two categories of illegal votes at issue in this case are “(1) votes cast by allegedly ‘illegal voters’ and (2) votes cast in a form or manner that does not comply with the applicable rules.” Id. The trial court found that none of the votes cast by the 42 voters at issue in this case were illegal votes. R 476. Each category of voter will be addressed separately.

1. *32 alleged felons and one alleged potentially mentally incapacitated voter.*

Section 97.041(2) provides:

The following persons, who might be otherwise qualified, are not entitled to register or vote:

(a) A person who has been adjudicated mentally incapacitated with respect to voting in this or any other state and who has not had his or her right to vote restored pursuant to law.

(b) A person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law.

The competent, substantial evidence in the record clearly established, and the trial court found, that these 33 individuals were registered voters and included in the Statewide System at the time they voted in the General Election. If the voters were in fact not qualified to register or vote pursuant to Section 97.041(2), then those voters would be subject to criminal prosecution under the Florida Election Code. See §§ 104.011 and 104.15, Fla. Stat. (providing that a person who willfully submits false voter registration information or who willfully votes during an election knowing he or she is not a qualified elector is guilty of a third degree felony). However, the potential criminal actions of individual voters were not at issue in the Bench Trial. Instead, the trial court was tasked with determining if these 33 voters cast “illegal votes” as that term is used in Section 102.168(3)(c).

Section 98.075(7) provides additional legislative guidance relevant to the determination of whether these 33 votes are “illegal votes.” See Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189 (Fla. 2007) (courts must construe related statutory

provisions in harmony with one another); see also Republican Party of Miami-Dade Cnty. v. Davis, 18 So. 3d 1112, 1117 (Fla. 3d DCA 2009) (stating that different provisions of the Florida Election Code “should be construed together to harmonize the statutes.”). Section 98.075(7)¹⁰ creates a specific procedure for providing due process rights to a voter before he or she is removed from the Statewide System. See Adams v. Dade Cnty., 202 So. 2d 585, 588 n. 5 (Fla. 3d DCA 1967) (before a voter can be removed from the voter rolls, the voter must be provided notice and the opportunity to be heard) (citing State ex rel. Barancik v. Gates, 134 So. 2d 497 (Fla. 1961)). Section 98.075(7) 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.

Thus, the trial court properly concluded that the votes of the 32 felons

cannot be considered illegal votes until the voter has 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, nor even been initiated, as of the General Election. Consequently, [Kinney] failed to meet his burden of establishing that the votes they cast in the General Election are illegal votes.

¹⁰ Section 98.093(1), Florida Statutes, creates a process for identifying “ineligible registered voters.” Among other things, the statute requires numerous state and local agencies, including the Florida Department of Health, the Clerks of Circuit Courts, the Florida Department of Law Enforcement and the Florida Department of Corrections to provide criminal records and the records of deceased persons to the Division.

R 466.¹¹ The trial court reasonably harmonized Sections 97.041(2) and 98.075(7) of the Florida Election Code in concluding that the time to determine whether these 33 voters cast illegal votes was the time when the votes were cast and canvassed in the Sheriff's Race. The trial court's construction of these provisions is wholly consistent with the applicable rules of statutory construction and is reasonable. See Republican Party of Miami-Dade Cnty., 18 So. 3d at 1117.

Hypothetically, this Court could find, although it is not required by the Florida Election Code, that the appropriate time to determine whether any of those 33 votes were "illegal votes" under the Florida Election Code was at the conclusion of the Bench Trial, when all of the evidence had been submitted. Since the evidence established that 10 of the 33 voters had been removed from the Statewide System, those voters could arguably be found to have cast illegal votes in the General Election. However, the remaining 23 voters were only "potentially ineligible" voters at the time of the Bench Trial and they remained registered in the Statewide System. Consequently, Kinney failed to meet his burden of establishing that the 23 votes they cast in the General Election were illegal votes.

2. *Three voters who cast vote-by-mail ballots that were postmarked or received by the Supervisor's Office after the voter died.*

Section 101.68(2)(c)1 provides in pertinent part:

¹¹ The trial court reached the same conclusion regarding the allegedly incapacitated voter. R 467.

. . . The ballot of an elector who casts a vote-by-mail ballot shall be counted even if the elector dies on or before election day, as long as, prior to the death of the voter, the ballot was postmarked by the United States Postal Service, date-stamped with a verifiable tracking number by a common carrier, or already in the possession of the supervisor of elections. . . .

The record established that three voters completed their vote-by-mail ballots and died before the vote-by-mail ballots were postmarked or received by the Supervisor's Office and that the Supervisor's Office was not provided notice of the deaths of these three voters until after their vote-by-mail ballots had been fully processed. The trial court found that these three votes "were technically illegal," but "they were not improperly canvassed or included in the final tally." R 469. Thus, consistent with its determination concerning the alleged felons and the allegedly mentally incapacitated voter, the trial court found that when these three vote-by-mail ballots were processed, the Supervisor's Office or the Canvassing Board could not determine they were illegal votes. Accordingly, they were not improperly canvassed or included in the final results of the Sheriff's Race.

3. *One voter who allegedly voted in two states.*

Competent, substantial evidence supported the trial court's finding that one voter cast vote-by-mail ballots in the General Election in both Florida and New Jersey. However, the trial court specifically found no evidence to determine which vote-by-mail ballot was cast first. R 469. Moreover, because the Putnam County Sheriff's Race was not on the ballot in New Jersey, this voter only cast one vote in

the Sheriff's Race. Id.

No provision of the Florida Election Code specifically addresses whether a vote cast in Florida in a county election is an illegal vote if the voter also voted in another state. The trial court concluded that this was not an illegal vote. R 470. Absent clear legislative guidance, Kinney failed to meet his burden of establishing that this vote is an illegal vote¹² and the trial court's conclusion should be affirmed.

4. *Three voters who allegedly do not reside In Putnam County.*

The Florida Election Code requires that a voter must be a "legal resident" of a county to vote in that county. See § 97.041(1)(a)4., Fla. Stat. The term "legal resident" is not defined in the Florida Election Code, but the Division issued an advisory opinion to Supervisor Overturf that succinctly summarizes the case law and the Division's guidance concerning residency.¹³ In Div. of Elections Op. 16-01 (Jan. 4, 2016), the Division explained:

the term "legal residence" has two components-both intention and fact. *See Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364, 368 (Fla. 1955). In other words, to establish legal residence, a person must have a "good faith intention" to reside in a particular place, coupled with "positive overt acts" that demonstrate that intention. *See id.* Such "overt acts" could include the person buying a home in the county, applying for homestead in the county, registering his or her vehicle in the county,

¹² The Legislature has provided that a voter who casts more than one ballot in any election is subject to prosecution for a third degree felony. See § 104.18, Fla. Stat.

¹³ Advisory opinions of the Division are "persuasive authority and, if the construction of the law in those opinions is reasonable, they are entitled to great weight in construing the law as applied to that affected agency or government." Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 844 (Fla. 1993).

receiving mail at an address in the county, or undertaking any other activity normally associated with home life. *Cf id.* (indicating that factors to examine when determining where a person has legal residence include where the person's vehicle is registered, where the person's family resides, and where the person calls "home," among other factors); *Div. of Elections Op. 93-05* (June 23, 1993) (listing more factors). Thus, the determination of legal residence is fact-intensive and turns on the particular circumstances of each individual case. *See id.* at 369 ("[E]stablishment of one's residence will usually depend on a variety of acts or declarations all of which must be weighed in the particular case as evidence would be weighed upon any other subject"). A person can only have one "legal residence." *See Walker v. Harris*, 398 So. 2d 955, 958 (Fla. 4th DCA 1981).

Id. at 2. Thus, a voter must decide whether he or she is a legal resident of the county in which the voter claims residency. Id. Moreover, the Supervisor of Elections "is not required to resolve factual disputes in the face of evidence supporting possible legal residence" Id. at 3.

In addition, Section 101.045(1), Florida Statutes, provides in pertinent part:

. . . a person temporarily residing outside the county shall be registered in the precinct in which the main office of the supervisor, as designated by the supervisor, is located when the person has no permanent address in the county and it is the person's intention to remain a resident of Florida and of the county in which he or she is registered to vote. Such persons who are registered in the precinct in which the main office of the supervisor, as designated by the supervisor, is located and who are residing outside the county with no permanent address in the county shall not be registered electors of a municipality and therefore shall not be permitted to vote in any municipal election.

The term "temporarily residing" outside of a county is not defined in the Florida Election Code. However, as noted in the guidance provided by the Division to Supervisor Overturf, Section 101.045(1) focuses on the intent of the voter. See supra

pp. 18, 38.

The competent, substantial evidence established, and the trial court found, that the Iveys met the requirements of Section 101.045(1) and qualify as voters who are temporarily residing outside Putnam County, but who intend to remain residents for purposes of voting in Putnam County. See supra p. 18. In addition, Supervisor Overturf testified that in his capacity as Supervisor of Elections for Putnam County, he believes the two voters are residents of Putnam County.¹⁴ Accordingly, the two vote-by-mail ballots cast by the Iveys in the General Election are not illegal votes and the trial court's determination should be affirmed.

Similarly, the competent, substantial evidence demonstrates that the third voter who resides in East Palatka had both the intent and the supporting factual basis to be a legal resident of Putnam County. See supra p. 19. Accordingly, Kinney failed to meet his burden of establishing that the vote cast by this voter is an illegal vote and the trial court's finding should be affirmed.

5. *Two voters who allegedly cast vote-by-mail ballots after 7:00 p.m. on Election Day.*

The trial court analyzed two ballots as allegedly non-conforming ballots. Section 101.6103(2), Florida Statutes, provides with regard to vote-by-mail ballots:

¹⁴ Florida courts have traditionally deferred to the judgment of election officials. Cobb, 957 So. 2d at 642-43; Krivanek, 625 So. 2d at 844-45 (judgments of elections officials are presumptively correct and such judgments should be upheld).

“The elector shall mail, deliver, or have delivered the marked ballot so that it reaches the supervisor of elections no later than 7 p.m. on the day of the election.”

The competent, substantial evidence introduced at trial established that two voters cast vote-by-mail ballots in person at the Supervisor’s Office close to 7:00 p.m. on Election Day. R 473-74. The envelopes for the vote-by-mail ballots bear the time-stamps of 7:02 and 7:06, respectively. R 473. The two voters entered the Supervisor’s Office before the doors were locked at 7:00 p.m., marked their ballots and handed their marked ballots to staff before the doors were unlocked. Supervisor Overturf testified that, given the procedures employed by the Supervisor’s Office, it is possible that the time-stamps on the two ballots do not necessarily mean that the marked ballots were received by the Supervisor’s Office after 7:00 p.m. Supervisor Overturf also testified that he believes the votes should be counted, consistent with the state’s policy of erring on the side of the voter. R. 474; see Krivanek, 625 So. 2d at 844 (stating that election laws should “generally be liberally construed in favor of the elector”).

Given that the two ballots reasonably could have been received by the Supervisor’s Office prior to 7:00 p.m. on Election Day and given the state’s policy of liberally construing the election laws in favor of the elector, the trial court correctly determined that Kinney failed to meet his burden of proving that the two vote-by-mail ballots were received by the Supervisor’s Office after 7:00 p.m. on

Election Day and that the two votes are not illegal votes.

In summary, the trial court's conclusion that no illegal votes were cast in the Sheriff's Race is supported by competent, substantial evidence, and should be affirmed. The trial court's ruling upholding the results of the Canvassing Board should be affirmed by this Court, even if this Court concludes that the eligibility of the voters should have been determined as of the time of the Bench Trial. On April 12, 2017, only 13 of the 42 voters at issue (10 potential felons and 3 voters who cast vote-by-mail ballots that were postmarked or received by the Supervisor's Office after the voter died) had been removed from the Statewide System pursuant to Section 98.075(7). Since the Sheriff's Race was decided by 16 votes, Kinney failed to meet his burden of identifying a sufficient number of illegal votes to change or place in doubt the results of the Sheriff's Race.

II. The procedures established by the Florida Legislature in Section 98.075 for removing ineligible voters from the Statewide System are reasonable and do not improperly conflate due process issues and the validity of a vote.

A. Standard of review.

The standard of review for issues of statutory interpretation and questions of law is de novo. Levy, 195 So. 3d at 1163 (citing Cobb, 957 So. 2d at 642).

B. Applicable statutory and legal framework.

Article VI, Section 1 of the Florida Constitution provides that “[r]egistrations and elections shall . . . be regulated by law.” Section 98.075(7) establishes a specific

procedure for providing due process to a voter before that voter can be removed from the Statewide System. Until a challenged voter is granted all the procedural protections set forth in Section 98.075(7), that voter remains eligible and is considered a “potentially ineligible” voter. The public policy behind this statutory scheme is clear -- as noted by the trial court “the right of qualified individuals to vote is a fundamental and foundational right” See Reynolds v. Sims, 377 U.S. 533 (1964); Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000), vacated, Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000). The trial court concluded:

“Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens’ right to vote.” Palm Beach County Canvassing Board, 772 So. 2d at 1237.

It follows that,

a qualified elector who complies with the law and who is registered has a personal right to have his or her name remain on the register or voting list for the period prescribed by law. He cannot be deprived of this right without some procedure which complies with the requirements of due process of law . . . [nor] should his name be stricken in the absence of proof that he is disqualified, or where there is any uncertainty as to the facts.

State ex rel. Barancik v. Gates, 134 So. 2d 497 (Fla. 1961) (citing 29 C.J.S. Elections § 48 (1941)). It also logically follows that such a fundamental right cannot be unduly compromised by a post-election challenge to a voter’s eligibility, or to a ballot as invalidly cast or canvassed. ‘[E]xtreme care must be given to post-election challenges to avoid disenfranchising Florida’s voters.’ Burns v. Tondreau, 139 So. 3d 481 (Fla. 3d DCA 2014) (citing Levey v. Dijols, 990 So. 2d 688 (Fla. 4th DCA 2008)).

R 475.

C. The trial court's construction of the Florida Election Code is constitutional.

Kinney contends, without citation to any case law and without any explication, that the trial court's construction of the Florida Election Code: is preempted by the Florida Constitution (IB at 5); is unconstitutional and a legal nullity (IB at 9); and is an "unconstitutional delegation of power away from the judiciary" to either the Division or the Supervisor of Elections (IB at 10). Kinney's contentions are wholly without merit and should be rejected.

As a threshold matter, Kinney waived his as-applied challenge to the constitutionality of the Florida Election Code. See Trushin v. State, 425 So. 2d 1126 (Fla. 1982). The Canvassing Board clearly identified in the Joint Stipulation its position that voters could not be removed from the Statewide System until they received their due process rights under Section 98.075(7). R 307-08. In contrast, Kinney did not raise his claim that the Florida Election Code is unconstitutional in the Joint Stipulation. The Canvassing Board also presented testimony from Supervisor Overturf describing the process for removing voters pursuant to Section 98.075(7). See supra pp. 5-6. In addition, the Canvassing Board clearly addressed its position concerning the interplay of Section 98.075(7) and allegedly illegal votes in its Post-Trial Memorandum. R 377-78. In contrast, Kinney did not raise his constitutional claim during the Bench Trial or in his post-trial filings. Instead,

Kinney raised his constitutional claim for the first time in his motion for rehearing, where he made a vague reference, without citing any authority, to an “unconstitutional delegation of power away from the judiciary.” R 1637. This vague reference, made for the first time in a motion for rehearing, is not sufficient to preserve Kinney’s constitutional claims. See Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970). Accordingly, Kinney’s constitutional claims should be rejected.

Assuming, hypothetically, Kinney did not waive his right to bring an as-applied constitutional challenge, Kinney’s claim that the trial court “has interpreted an unconstitutional delegation of power away from the judiciary . . . to the Division . . .” (see IB at 10) is wholly without merit. First, and foremost, no delegation of power “away from the judiciary” occurred; rather, the trial court properly exercised its authority to determine the status of the 42 voters at issue. Moreover, Kinney’s argument completely ignores the plain meaning of Section 98.075(7), which expressly provides that until a voter is granted all the procedural protections specifically created by the Legislature in Section 98.075(7), the voter’s status is “potentially ineligible.” Thus, rather than improperly delegating authority to the Division (or the Supervisor of Elections), the Final Judgment reasonably harmonizes two provisions of the Florida Election Code. See Republican Party of Miami-Dade Cnty, 18 So. 3d at 1117. Finally, Kinney cites absolutely no authority for his novel contention that the trial court’s adherence to the statutory scheme results in an

improper delegation to the Division. Accordingly, this Court should affirm the Final Judgment.

Kinney similarly contends that the trial court improperly “conflated” the issue of due process for removal from the voter rolls with the validity of a vote. See IB at 36. Kinney’s contention misconstrues the Florida Election Code and should be rejected. Again, Kinney’s position completely ignores the Legislature’s clear intent in Section 98.075(7) to create a category of voters known as “potentially ineligible.” The trial court didn’t improperly “conflate” Section 98.075(7) with voter eligibility issues. Instead, it harmonized the two provisions of the Florida Election Code to give them full effect. See id.

Finally, the Court should reject Kinney’s claim that the trial court’s construction of the Florida Election Code is “preempted” by the Florida Constitution. See IB 5. Article VI, Section 1 of the Florida Constitution clearly grants the Legislature the authority to regulate the registration of voters and the conduct of elections. Preemption simply does not apply to this case.

III. Kinney failed to meet his burden under Section 102.168(3)(c) and failed to establish his right to the office of Sheriff.

A. Standard of review.

Issues of statutory interpretation and questions of law are reviewed de novo. Levy, 195 So. 3d at 1163. The standard of review as to findings of fact is whether the findings are supported by competent, substantial evidence. See Neuman, 106

So. 3d at 976. “The factual determinations of the trial court are clothed with the presumption of correctness.” Bell, 642 So. 2d at 1382.

B. Kinney did not meet his burden of proving the receipt of a number of illegal votes sufficient to change or place into doubt the result of the Sheriff’s Race.

The Legislature has provided a process by which individuals are allowed to register to vote pursuant to Sections 97.041, 97.051, 97.053, and other statutes. Likewise, the Legislature has provided for the removal of registered voters pursuant to Sections 98.045, 98.0655, 98.075 and other sections. However, the Legislature has not provided any specific guidance as to what actions are to be taken by election officials concerning a registered voter whose qualifications are in question during the election itself.¹⁵ Florida courts have consistently held that “courts must not interfere with the election process when the will of the people is unaffected by the wrongful conduct.” Bolden, 452 So. 2d at 567 (emphasis supplied). In this case, the trial court and this Court cannot determine, based on the record, that the will of the people has been adversely affected. In the absence of clear evidence, the result of the election, as certified, should stand.

As a threshold issue, it is uncontroverted that all of the 42 voters at issue in this lawsuit were registered voters in the Statewide System when they voted in the

¹⁵ Similarly, the Legislature has not provided guidance as to whether such voter would be denied the right to vote because his or her status was questioned prior to voting.

General Election. It is also uncontroverted that no Party to the lawsuit challenged the eligibility of any of the 42 voters prior to the General Election. Accordingly, based on the information available to the Supervisor's Office and the Canvassing Board on Election Day, each of the 42 voters at issue in this proceeding appeared to be a legal voter. On Election Day, it became clear that the margin of victory in the Sheriff's Race was extremely narrow. Presented with this extremely close result, Kinney decided to spend the next five months pouring over the records of voters in Putnam County to ferret out potentially "illegal votes." As a matter of public policy, this Court should reject Kinney's attempt to look in the rearview mirror and overturn the results of the Sheriff's Race certified by the Canvassing Board. Elections in Florida need to have a prompt resolution and finality. See Gore, 772 So. 2d at 1261. Since each of the 42 voters at issue in this proceeding were registered in the Statewide System on Election Day, the Plaintiff failed to meet his burden and this election contest should be rejected.

"[E]xtreme care must be given in post-election challenges to avoid disenfranchising Florida voters." Burns v. Tondreau, 139 So. 3d 481, 484 (Fla. 3d DCA 2014); Levey v. Dijols, 990 So. 2d 688, 692 (Fla. 4th DCA 2008). Election officials are presumed to perform their duties in lawful manner and returns certified by an election official are presumed to be correct. Boardman, 323 So. 2d at 268. Given these principles, the results of the Sheriff's Race should be upheld.

The trial court found that Kinney failed to meet his burden to establish that any illegal votes were cast in the General Election. This finding is supported by competent, substantial evidence and is entirely consistent with the plain language of the Florida Election Code. Even if this Court disagrees with the trial court, Kinney presented evidence establishing that, at most, 13 illegal votes were cast in the General Election. Since the Sheriff's Race was decided by 16 votes, Kinney failed to meet his burden of identifying a sufficient number of illegal votes to change or place in doubt the results of the Sheriff's Race. Under either approach to the facts, the trial court properly rejected Kinney's contest of the Sheriff's Race and the results of the Sheriff's Race certified by the Canvassing Board should be upheld.

Even assuming, hypothetically, that more than 16 illegal votes were received in the General Election, Kinney has nevertheless failed to meet his burden under Section 102.168(3)(c) 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 DeLoach. Kinney has introduced no evidence that any of the other 41 voters actually voted in the Sheriff's Race. Further, even assuming, hypothetically, that they did vote in the Sheriff's Race, Kinney has not proven for whom they voted. Thus, Kinney has failed to "establish his right to such office." § 102.168(3), Fla. Stat. The trial court appropriately rejected Kinney's contest of the Sheriff's Race on this basis.

Kinney also argues that because “fraudulent” votes were cast in the General Election in early voting, vote-by-mail voting, and Election Day voting, the Sheriff’s Race should be decided solely based on the 22 provisional ballots that were cast 13-9 in his favor.¹⁶ IB at 48. This Court should reject this absurd attempt by Kinney to effectively disenfranchise the remaining 32,694 Putnam County voters who voted in the Sheriff’s Race, but did not cast provisional ballots. See Burns, 139 So. 3d at 484 (“extreme care must be given in post-election challenges to avoid disenfranchising Florida voters”).

Finally, Section 102.168(3)(c) requires Kinney to show that the successful candidate “received” a number of illegal votes that changed or placed in doubt the result of the election. The record does not demonstrate the receipt of any illegal votes (except possibly one vote described supra note 2) for Defendant DeLoach.

C. Kinney is not entitled to ouster.

Section 102.1682(1) provides that "If the contestant is found to be entitled to the office, if on the findings a judgment to that effect is entered, and if the adverse party has been commissioned or has entered upon the duties thereof or is holding the office," the court should enter a judgment of ouster. (Emphasis supplied.) The plain language of Section 102.1682(1) provides that a condition precedent to a judgment

¹⁶ A total of 23 provisional ballots were cast in the Sheriff’s Race: 13 for Kinney; 9 for DeLoach; and 1 for Edison.

of ouster is that the contestant is “entitled to the office.” Because it is impossible to determine whether 41 of the subject 42 voters voted in the Sheriff’s Race, and, if they did, for whom they voted, it is equally impossible to determine that Kinney is entitled to the office. Accordingly, no basis for ouster exists.

CONCLUSION

The trial court’s finding that Kinney failed to meet his burden of proving the receipt of a number of illegal votes sufficient to change or place into doubt the result of the Sheriff’s Race is supported by competent, substantial evidence and is wholly consistent with the applicable provisions of the Florida Election Code. Accordingly, the Final Judgment should be affirmed.

Respectfully submitted this 14th day of December, 2017.

/s/John T. LaVia, III

John T. LaVia, III
Florida Bar No. 853666
Firm name: Gardner, Bist, Bowden,
Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308
Telephone: 850/385-0070
Email: jlavia@gbwlegal.com

Ronald A. Labasky, Esquire
Florida Bar No. 206326
Firm name: Brewton Plante, P.A.
215 S. Monroe Street
Suite 825
Tallahassee, Florida 32301
Telephone: (850) 222-7718
Email: rlabasky@blawfirm.net

Attorneys for Putnam County Canvassing Board

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2017, a true and correct copy of the foregoing was electronically served via electronic mail to the parties listed below:

Zachary Lucas Keller (zkeller@kellerlegal.org)
Keller Legal
417 St. Johns Avenue, Suite 8
Palatka, FL 32177-4724

Charles T. Douglas, Jr. (charlie@dhclawyers.com) (vikki@dhclawyers.com)
Douglas & Hedstrom, P.A.
601 Saint Johns Avenue
Palatka, FL 32177-4643

Jason Gonzalez, Esquire (jasongonzalez@shutts.com) (mpoppell@shutts.com)
Shutts & Bowen, LLP
215 South Monroe Street, Suite 804
Tallahassee, FL 32301

/s/ John T. LaVia, III
John T. LaVia, III, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.210(a)(2), I certify that this Answer Brief of Appellee was generated using Times New Roman, a proportionately spaced font, and has a typeface of 14 points.

/s/ John T. LaVia, III
John T. LaVia, III, Esq.