

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

**CASE NO. 5D17-1737**

**JONATHAN KINNEY,**

L.T. No.:2016-CA-425

Appellant,

v.

**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.

---

**ON APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL  
CIRCUIT, IN AND FOR PUTNAM COUNTY, FLORIDA**

---

**INITIAL BRIEF OF APPELLANT**

---

**KELLER LEGAL**

Attorney for Appellant

/s/ Zachery Lucas Keller

Zachery Lucas Keller,

Florida Bar No.: 109146

417 St. Johns Avenue, Suite 8

Palatka, Florida 32177

(386) 530-2279 (telephone)

(888) 383-9077 (facsimile)

Service email address:

[zkeller@kellerlegal.org](mailto:zkeller@kellerlegal.org)

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....ii

TABLE OF CITATIONS .....iii

STATEMENT OF THE CASE AND FACTS.....1

    I. Nature of the Case.....1

    II. Course of Proceedings.....1

    III. Disposition of the Court Below.....2

    IV. Statement of Relevant Facts.....2

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....6

    I. Jurisdiction and Standard of Review.....6

    II. Illegal and Fraudulent Votes Cast  
        In the Putnam 2016 General Election.....6

        A. Fraudulent Votes.....9

            i. Convicted Felons.....10

            ii. Incompetent Voter.....13

            iii. Vote-By-Mail Ballot Cast by Voter  
                Who Voted in Two States.....14

            iv. Out of State and Out of County Voters.....15

            v. Fraudulent Votes Not Addressed in the Final Judgment.....22

            vi. Equitable Principle Under the Law  
                “Son of Sam Law” .....31

        B. Illegal Votes .....32

            i. Deceased Voters.....32

            ii. Late Voters-  
                Vote-By-Mail Ballots Received After Deadline.....33

    III. Conflated Issue of Due Process for Removal  
        From the Voter Roll and Validity of a Vote.....36

        A. Challenges Before Election.....37

            i. Challenge Before Election Not Required.....38

        B. Failure of Public Notice  
            For Public Inspection Period of Vote-By-Mail Ballots.....40

    IV. Appellant has Established his Right to the Office of Sheriff.....46

CONCLUSION .....	49
CERTIFICATE OF SERVICE.....	50
CERTIFICATE OF COMPLIANCE.....	50

**TABLE OF CITATIONS**

**Cases:**

<i>995 N.E. 125th St. Corp. v. Cty. Nat’l Bank,</i> 349 So. 2d 758 (Fla. 3d DCA 1977).....	39
<i>Allstate Ins. v. Boecher,</i> 733 So. 2d 993 (Fla. 1999).....	39
<i>Amente v. Newman,</i> 653 So.2d 1030 (Fla. 1995).....	18
<i>Barber v. Moody,</i> 229 So. 2d 284 (Fla. 1st DCA 1969) cert. denied 237 So.2d 753 (Fla. 1970).....	<i>passim</i>
<i>Beacham v. Braterman,</i> 300 F. Supp. 182 (S.D. Fla. 1969) aff’d without opinion 396 U.S. 12 (1969).....	9, 28
<i>Boardman v. Esteva,</i> 323 So.2d 259 (Fla. 1975).....	22-23, 28
<i>Bolden v. Potter,</i> 452 So.2d 564 (Fla. 1984).....	22, 23, 28-29, 46
<i>Firestone v. News-Press Pub. Co.,</i> 538 So.2d 457(Fla. 1989).....	18
<i>Fla. State Conf. of the NAACP v. Browning,</i> 569 F.Supp.2d 1237 (N.D. Fla. 2008).....	46
<i>Friedman v. Heart Inst. Of Port St. Lucie, Inc.,</i> 863 So.2d 189 (Fla. 2003).....	39
<i>Gore v. Harris,</i> 772 So.2d 1243 (Fla. 2000).....	18
<i>Howanitz v. Blair,</i> 394 So. 2d 479 (Fla. 3d DCA 1981).....	38-39, 47
<i>In re The Matter of the Protest of Election Returns &amp; Absentee Ballots in the November 4, 1997 Election for the City Miami, Fla.,</i> 707 So.2d 1170 (Fla. 3d DCA 1998).....	29, 46
<i>Jackson v. Leon Cnty. Elections Canvassing Bd.,</i> 204 So.3d 571 (Fla. 1st DCA 2016).....	39, 40, 47

<i>Peacock v. Wise</i> , 351 So.2d 1134 (Fla. 1st DCA 1977).....	29
<i>Simon &amp; Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.</i> , 502 U.S. 105 (1991).....	31

**Florida Constitution:**

Art VI, 2, Fla. Const.3.....	4, 19
Art VI, 4(a), Fla. Const.3.....	4-5, 9, 13, 14

**Statutes:**

§ 97.021, Fla. Stat. (2016).....	7, 15
§ 97.021(3), Fla. Stat. (2016).....	18
§ 97.041, Fla. Stat. (2016).....	7, 14
§ 97.041(1)(a), Fla. Stat. (2016).....	15, 19
§ 97.041(2), Fla. Stat. (2016).....	9-10, 25
§ 97.055, Fla. Stat. (2016).....	26
§ 98.075, Fla. Stat. (2016).....	10, 24, 36-37
§ 101.045(1), Fla. Stat. (2016).....	17, 19, 20
§ 101.045(2), Fla. Stat. (2016).....	18
§ 101.6103(2), Fla. Stat. (2016).....	33
§ 101.6103(3), Fla. Stat. (2016).....	23-24, 30
§ 101.6103(5), Fla. Stat. (2016).....	33-34
§ 101.6103(8), Fla. Stat. (2016).....	32
§ 101.67(2), Fla. Stat. (2016).....	34
§ 101.68(2)(c)(2), Fla. Stat. (2016).....	40
§ 101.111, Fla. Stat. (2016).....	40
§ 102.168, Fla. Stat. (2016).....	1, 6

§ 102.168(3)(c), Fla. Stat. (2016).....	40
§ 102.1682, Fla. Stat. (2016). ....	1
§ 104.011, Fla. Stat. (2016).....	30
§ 104.011(1), Fla. Stat. (2016).....	25-26
§ 104.011(2), Fla. Stat. (2016).....	26
§ 104.13, Fla. Stat. (2016).....	24
§ 104.15, Fla. Stat. (2016).....	5, 24
§ 944.292(1), Fla. Stat. (2016).....	10
§ 944.512, Fla. Stat. (2016).....	31

**Dictionary References:**

<i>Election fraud</i> , <i>Black’s Law Dictionary</i> (10th ed. 2014).....	8
<i>Fraud</i> , <i>Black’s Law Dictionary</i> (10th ed. 2014).....	7
<i>Illegal vote</i> , <i>Black’s Law Dictionary</i> (10th ed. 2014).....	7, 37
<i>Temporary</i> , <i>Black’s Law Dictionary</i> (10th ed. 2014).....	18

## **STATEMENT OF THE CASE AND FACTS**

### **I. Nature of the Case**

This case involves an election contest to the 2016 General Election for the Putnam County Sheriff's Office. Appellant, Jonathan Kinney, was the Republican Candidate for Sheriff on the 2016 Ballot for Putnam County, FL. Appellant was announced as the winner of the race by a margin of 18 votes, before ultimately losing the race by 16 votes after the recounts were concluded. This appeal follows a timely filed election contest pursuant to Florida Statutes Section 102.168 seeking the relief of a judgment of Ouster to remove Appellee, Homer "Gator" DeLoach, from office as outlined in Florida Statutes Section 102.1682.

### **II. Course of Proceedings**

Appellant filed his Election Contest Complaint on November 28, 2016. On the same day as filing, Terrance Perkins, as Chief Judge of the Seventh Judicial Circuit sent a request to the Honorable Jorge Labarga, Chief Justice of the Florida Supreme Court, requesting that the case be assigned to a Judge from outside of the Seventh Judicial Circuit. On November 29, 2016, Chief Justice Labarga granted the Honorable Gary Wilkinson, Circuit Judge for the Fourth Judicial Circuit special authority to hear this case in the Seventh Judicial Circuit. Appellee, Putnam County Canvassing Board, filed its Answer and Affirmative Defenses on December 19, 2016. Appellee, the then Democratic Candidate Homer "Gator"

DeLoach, filed its Answer and Affirmative Defenses on December 22, 2016. On December 29, 2016, Appellant filed a Plaintiff's Emergency Motion for Preliminary Injunction and Incorporated Memorandum of Law to prevent Appellee, Homer "Gator" DeLoach from taking office pending the outcome of the Election Contest Proceeding. The Plaintiff's Emergency Motion for Preliminary Injunction was heard on December 30, 2016 and the trial court entered an Order Denying Plaintiff's Emergency Motion for Preliminary Injunction on January 6, 2017. On April 5, 2017, counsel for all parties, filed a Joint Pre-Trial Stipulations document. Trial was conducted on April 12, 2017 and the trial court ordered that each party should file a Post-Trial Memorandum by April 21, 2017. Each party did file a Post-Trial Memorandum on April 21, 2017.

### **III. Disposition in the Court Below**

The trial court entered Final Judgment on May 19, 2017 denying Appellant the relief requested in the Election Contest Complaint. Appellant filed a Motion for Rehearing and a Notice of Appeal on May 31, 2017. On June 20, 2017, the trial court entered an Order On Plaintiff's Motion for Rehearing, denying a rehearing.

### **IV. Statement of Relevant Facts**

The public first noticed of their right to inspect vote by mail ballots in a Public Notice published on September 21, 2016 indicating that the public would have an inspection period on November 3, 2016 through November 7, 2016, prior to vote-

by-mail ballots being opened and tabulated. R.481. The record demonstrates that 4,752 vote-by-mail ballots were opened, canvassed, and accepted by the canvassing board prior to the first publicly noticed opportunity of inspection on November 3, 2016. R.481, R.518-19, R.523-24, R.537. On the night of the election, November 8, 2016, Appellant was named the winner of the race for the Office of Putnam County Sheriff by a narrow margin of 18 votes, (15,658 votes for Appellant and 15,640 votes for Appellee, DeLoach). R.642 and R.1020.

On November 9, 2016, the Canvassing Board held a meeting to inform the public that, because of Appellant's 18 vote margin of victory over Appellee was less than one-half of a percent of the votes cast in the Sheriff's Race, Florida Statutes required a recount that would commence at 9:00 am on November 10, 2016. R.310. On November 10, 2016, the Canvassing Board announced that an additional 428 vote-by-mail ballots had not been included in the preliminary election night returns. After the additional 428 vote-by-mail ballots were included the first set of unofficial returns for the Sheriff's Race reported that now Appellee, DeLoach, was the winner by 14 votes (15,866 for DeLoach and 15,852 for Kinney). R. 675 and R.311. After completing the recount, the Canvassing Board reported a second set of unofficial returns, reflecting Appellee, DeLoach the winner of the race by only 12 votes (15,864 for DeLoach and 15,852 for Kinney). R.312. Subsequent to the completion of the manual recount, required by state statute, the Canvassing Board announced

on November 18, 2016 their certified results with Appellee winning the race by a mere 16 votes (15,869 for DeLoach and 15,853 for Kinney). R.312 and R.1014.

Following the certification of the election results, Appellant filed an Election Contest Complaint on November 28, 2016, stating in pertinent part, “[o]n information and belief, the certification includes the tabulation of ballots cast by other ineligible voters to be more specifically identified through discovery. [...] [t]he receipt of illegal votes is sufficient to change or place in doubt the result of the election.” R. 33. Over the course of discovery 42 individuals were identified whom Appellant argued at trial were not qualified to vote and therefore cast illegal votes. R.313.

### **SUMMARY OF THE ARGUMENT**

The underpinning of a legitimate democratic form of government is the integrity of the election process. The Florida Constitution establishes that “[e]very citizen of the United States who is at least eighteen years of age and *who is a permanent resident of the state*, if registered as provided by law, shall be an elector of the court registered.” Art VI, 2, Fla. Const.3. (Emphasis added). However, the Florida Constitution has also lawfully and purposefully disqualified certain individuals the right to vote in local elections. Specifically, the Florida Constitution states, “[n]o person *convicted of a felony*, or adjudicated in this or any other state to

*be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.”* Art VI, 4(a), Fla. Const.3. (Emphasis added).

In an election contest certified by 16 votes, Appellant introduced uncontroverted evidence that 32 convicted felons -who never received a restoration of civil rights- voted in the 2016 General Election. Additionally, Appellant introduced evidence that individuals living outside of the State of Florida voted in the 2016 General Election for Putnam County, FL.

The trial court failed to uphold the Florida Constitution and alternatively claimed that the 42 votes set out in detail below were not illegal, because Florida Statute establishes a procedure for Supervisor’s of Elections to remove individuals from the voter registration lists. The trial court’s error was in conflating the issue of removal of individuals from the voter registration list and the legality of a vote cast by an individual disqualified by the Florida Constitution. The trial court specifically stated, “a convicted felon knowingly voting has not necessarily committed a crime under Section 104.15 [Florida Statutes], and his vote may be legal if he or she is validly registered on voting day.” R. 1793. Any statutory basis for the trial court’s decision is inherently preempted by the Florida Constitution and the trial court has committed reversible error by not overturning the election when Appellant introduced evidence illegal votes -that more than twice the margin of victory- were cast in the 2016 General Election for Putnam County, FL.

## **ARGUMENT**

### **I. Jurisdiction and Standard of Review**

This appeal is derived from an election contest pursuant to Florida Statutes Section 102.168 and filed in the Circuit Court of the Seventh Judicial Circuit in and for Putnam County, FL. In that the Seventh Judicial Circuit is under the Fifth District Court of Appeals, the Fifth District Court of Appeals has jurisdiction to hear this case. Whether the trial court committed error by specifically allowing the inclusion of ballots cast by individuals disqualified by the Florida Constitution is a question of law reviewed *de novo*. Similarly, the trial court's analysis between the nuances of "illegal votes," "fraudulent votes," "ineligible voters," "potentially ineligible voters" and "legal votes" are determination of law reviewed *de novo*.

### **II. Illegal and Fraudulent Votes Cast in the Putnam 2016 General Election**

In the 2016 General Election 42 votes were illegal. In a race decided by 16 votes, 42 votes necessarily creates absolute doubt in the true outcome of the election requiring the election be overturned. Voter fraud and disputes over illegal votes are not a new phenomenon. Florida courts have been issuing opinions on how to handle illegal votes since the legislature set out a statutory cause of action to challenge the results of an election. The case law on these issues breaks down into two factual categories: (1) illegal votes that were not fraudulent and (2) illegal votes that were fraudulent. The Florida Election Code does not specifically define "illegal vote."

Fla. Stat. §97.021 (2016). *Black's Law Dictionary* defines "illegal vote" as "[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.*" *Illegal vote, Black's Law Dictionary* (10th ed. 2014)(emphasis added). Florida Statutes Section 97.041 governs "Qualifications to register or vote" and states:

(1)(a) A person may become a registered voter ***only if*** that person:

1. Is at least 18 years of age;
2. Is a citizen of the United States;
3. *Is a legal resident of the State of Florida;*
4. *Is a legal resident of the county in which that person seeks to be registered; and*
5. *Registers pursuant to the Florida Election Code.*

(2) The following persons, who might have 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.

(Emphasis added). Similarly, while there is no statutory definition of "fraud" in the Florida Election Code, *Black's Law Dictionary* defines "fraud" as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud, Black's Law Dictionary* (10th ed. 2014). *Black's Law Dictionary* more specifically defines "election fraud" as "illegal

conduct committed in an election, usu. in the form of fraudulent voting. Examples include voting twice<sup>1</sup>, voting under another person's name (usu. a deceased person)<sup>2</sup>, or voting while ineligible<sup>3</sup>.” *Election fraud, Black's Law Dictionary* (10th ed. 2014). (Internal citations added). At trial Appellant presented evidence of six categories of illegal votes identified in the Putnam County 2016 General Election.<sup>4</sup> The six categories of illegal votes included convicted felons who had not had their civil rights restored (32), vote-by-mail ballots cast by deceased voters (3), late vote-by-mail votes cast after the statutory deadline (2), vote-by-mail ballots cast by non-residents of Putnam County (3), a vote-by-mail ballot cast by an individual who cast a ballot in both Putnam County, Florida and in the State of New Jersey in the 2016 General Election (1), and a ballot cast by an individual adjudicated mentally incompetent who had not had the right to vote restored (1).

Appellant recognizes that while all fraudulent votes are illegal votes, not all illegal votes are fraudulent. The distinction is not without merit, illegal votes may be illegal merely because of a procedural deficiency (such as the date of a post-mark

---

<sup>1</sup> See discussion of Sandra Novak *infra*.

<sup>2</sup> See discussion of Edward L. Wallace, Violet L. Crews, and Carolann Deal *infra*.

<sup>3</sup> See discussion concerning felons, adjudicated mentally incompetent, and out of state/ county voters *infra*.

<sup>4</sup> In the pretrial stipulation there were seven categories of illegal votes merely because the pool of convicted felons were divided into those identified by Appellant (19) and those identified by the Division of Elections (13). At trial these felons were handled collectively as the analysis for “illegality” is the same.

falling outside of a statutory deadline). In other words the term “illegal votes” connotes a data set which must include all subsets including the subset “fraudulent votes.” This concept was acknowledged by the trial court in the Order Denying the Motion for Rehearing. R. 1793.

### **A. Fraudulent Votes**

The Florida Constitution, states “[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal or disability.” Art VI, 4(a), Fla. Const.3. (Emphasis added). *See also Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969) aff’d without opinion 396 U.S. 12 (1969). Any statutory scheme that permits the vote of a convicted felon, or person adjudicated incompetent, to stand prior to the restoration of civil rights or removal of the disability is unconstitutional and constitutes a legal nullity.

Florida Statutes Section 97.041(2) states:

The following person, 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 or record and who has not had his or her right to vote restored pursuant to law.

(Emphasis Added). The fact that the legislature specified “to register **or** vote” implies the legislature recognizes that the two issues while related are distinct. Further, the legislature in Florida Statutes Section 944.292(1) states:

*Upon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s.8, Art. IV of the State Constitution.*

(Emphasis added).

The trial court in its Final Judgment has interpreted an unconstitutional delegation of power away from the judiciary, a court in this or any other state, to the Division of Elections by claiming that a convicted felon does not lose their voting rights upon conviction at the conclusion of their due process given in the criminal courts; rather, the trial court in error established that their voting rights terminate upon the removal from the voter registration list following a “due process” period provided by the Division of Elections through the local Supervisor of Elections in compliance with the process outlined in Section 98.075 of the Florida Statutes. The local Supervisor of Elections is not authorized by the Florida Constitution or statute to make such an “adjudication.”

### **i. Convicted Felons**

At trial Appellant’s trial counsel introduced uncontroverted evidence that 32 convicted felons who had not had their civil rights restored voted in the Putnam

County 2016 General Election. Appellant's trial counsel, Dan Nordby on direct examination inquired of Putnam County Supervisor of Elections, Charles Overturf, III, about Davis Lee Allen in the following exchange:

Q: So you believe Mr. Allen was ineligible to register or vote because of the felony conviction?

A: That's correct.

Q: So if that's the case, that means he voted illegally in the November 2016 general election, doesn't it?

Mr. DOUGLAS, JR.: Object to form, Your Honor. Calls for a legal conclusion.

THE COURT: Overruled.

THE WITNESS: Again, by definition, I guess it would be,

[...]

P.58 Ln 21- P.59 Ln 6<sup>5</sup>. Likewise, Appellant's trial counsel on direct examination of Overturf inquired about William Fernon St. Sauveur during the following exchange:

Q: So this is an individual who Plaintiff's counsel indicated to you might be someone who is ineligible?

A: Correct. And we were notified from the state. We turned it in and they're in the – they just let us know in the last week.

Q: So we provided the information to you?

A: Right.

Q: You provided the information to the state?

A: To the state, correct.

Q: And the state has turned around and given it back to you?

A: Correct.

Q: Does that mean the state found the information credible and reliable?

---

<sup>5</sup> References to the trial transcript contained in the Supplemental Record on Appeal will be given in the following format P.[Page#] LN [Line #]. Thus this first reference is to Trial transcript Page 59 Line 19 through P.60 Line 9.

A: I believe so, yes, sir.

Q: And you also have found it credible and reliable?

A: As of this moment, yes, unless he provides something different, correct.

Q: At this point you don't have any contrary evidence about his felony adjudication or lack of restoration of civil rights?

A: Not as of this moment, no, sir.

P.63 Ln 12-P.64 Ln 10. Appellant's trial counsel then inquired specifically inquired about the credibility and reliability of Appellant's evidence related to the status of the 32 identified convicted felons during the following exchange:

Q: Mr. Overturf, I'm going to try to save us some time. This is a thick notebook here. Is that okay?

A: Oh, yes, sir.

Q: Have you had an opportunity to review all of the court records identified as Plaintiff's Exhibits 1 through 21, and 37 through 49?

A: I have, yes, sir.

Q: Okay. The parties have stipulated and agreed that these are all authentic court records and have admitted them.

Do you agree that those records, based on your review, provide credible and reliable information regarding felony convictions of registered voters of Putnam County?

A: I do, yes, sir.

Q: And the court records in Exhibits 1 through 21 and 37 through 49 are the type of information that your office uses to initiate the statutory removal process?

A: It is, yes, sir.

Q: Do you have any contrary evidence about felony conviction status or restoration of civil rights as to any of these 32 potential felons identified by the Division of Elections, or by Mr. Kinney's counsel?

A: Not as of this moment, no, sir.

P.64 Ln 18-P.65 Ln 19.

Based on the uncontroverted evidence of the felony convictions, the lack of restoration of civil rights, and the witness testimony that the evidence is found to be authentic, credible and reliable, Appellant asserts that he met his burden to overturn the 2016 General Election by demonstrating that it is more likely than not that there was a receipt of a number of illegal votes sufficient to place in doubt the result of the election when the canvassing board accepted the votes of 32 convicted felons who pursuant to the Florida Constitution were not qualified to vote. Art VI, 4(a), Fla. Const.3.

**ii. Incompetent Voter**

As part of the joint exhibits admitted into evidence at trial are the documents supporting the allegation that there was one voter who had previously been adjudicated incompetent. At trial Appellant's Counsel inquired of Putnam County Supervisor of Elections, Charles Overturf, III, to confirm that the vote was counted in the following exchange:

Q: One ballot cast by a voter who previously had been adjudicated incompetent for voting purposes?

A: Correct.

P.93 Ln 12 -P.93 Ln 15.

As explained in greater detail *supra*, Florida Statutes Section 97.041 and the Florida Constitution Article VI, Section 4 state that an individual adjudicated mentally incompetent is not qualified to vote.

### **iii. Vote-By-Mail Ballot Cast by Voter Who Voted in Two States**

Appellant discovered over the course of this litigation that one voter, Sandra Novak, voted by vote-by-mail ballot in both Putnam County, Florida and in New Jersey for the 2016 General Election. The documentation verifying both votes were admitted into evidence without opposition. On direct examination Appellant's Counsel inquired about Sandra Novak's voter history:

Q: Does that indicate that a ballot was cast in the state of New Jersey by Sandra L. Novak in the November 2016 general election?

A: Yes, sir, it does.

Q: Do you know whether it's against the law to cast a ballot in more than one state in the same election?

A: Yes, sir. I believe it is.

Q: And you don't have any evidence to suggest anything other than exactly that happened here, do you?

A: No, sir. In fact, once we were notified of this voter, we called ourselves and verified the person had voted in two different states and we will proceed with the proper proceedings as soon as everything is completed.

P. 85 Ln 9- P.85 Ln 24. Based on this witness testimony, the Supervisor of Elections has independently verified the allegation as factually accurate.

In that it is illegal to vote twice in a single general election, the vote-by-mail ballot of Sandra Novak should have been rejected as a fraudulent vote.

#### **iv. Out of State and Out of County Voters**

Appellant has identified at least three individuals who do not reside in Putnam County, Florida, who cast vote-by-mail ballots in Putnam County for the 2016 General Election. Florida Statutes Section 97.021 (15) defines “elector” stating “[e]lector” is synonymous with the word ‘voter’ or ‘qualified elector or voter,’ except where the word is used to describe presidential electors.” Additionally, Florida Statutes Section 97.021(1) specifically defines “Absent elector” as “any registered and *qualified voter* who casts a vote-by-mail ballot.” (Emphasis added). Thus, a vote-by-mail ballot is **only** a legal vote if the absent elector is a qualified voter pursuant to the qualifications set out in Florida Statutes Section 97.041(1)(a).

Appellant’s Counsel asked about the residential status of William and Susan Ivey as follows:

Q: Okay. Is it your understanding that the Iveys sold their home in Putnam County and retired to Western North Carolina?

A: I was not aware of that until that issue was brought to my attention back in August, and I included that in the e-mail that I sent to the director.

Q: You became aware of that in August of 2016?

A: Correct.

P. 89 Ln 8-P.89 Ln 17. Appellant’s Counsel further inquired about how the Supervisor of Elections could allow an unqualified person to vote in Putnam County:

Q: Do you have any idea whether the Iveys will move back to Putnam County?

A: I have no idea whatsoever.

Q: Okay. Is it your position, your office's position that they can remain Putnam County voters as long as they want to vote in Putnam County?

A: Again, according to what I received from the Division of Elections, I interpreted it that way, but as long as the intent of the voter, that they're not registered anyplace else, that they have the right to do that if that is their intent, and that is what we made the judgement on.

It's not just them. There's many others that are like that that don't live even in our United States that have that right through federal postcard applications and all, as long as they have ties to Putnam County.

So that, to me, seemed consistent with what this case was and other cases that use the address that they do for my office.

Q: So it's generally your office's position that anyone who wants to live in Putnam County can continue to vote in Putnam County, no matter where they live as long as they want to vote in Putnam County and aren't registered elsewhere?

A: That is correct, due to the intent of what the chief sent me in the e-mail, that is correct.

P.90 Ln 23 - P.91 Ln 24. On cross examination of the Supervisor of Elections, Mr.

Lavia inquired what actions Charles Overturf took to verify the Iveys intentions:

[A: ...] And after discussing with Ms. Ivey --I never spoke with Mr. Ivey. After speaking with Ms. Ivey, she said it was, 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.

P.141 Ln 22- P.141 Ln 2. Appellee, Overturf, then a few minutes later acknowledged that he had updated an out of state voter's address without even speaking with them when answering Mr. Lavia's cross examination questions:

Q: Same analysis for Mr. Ivey, would it be fair to say?

A: Yes, sir.

I had no conversation with him, but I would agree with it, yes, sir.

P.143 Ln 5- P.143 Ln 7.

Appellant acknowledges Appellee, Canvassing Board, relies on the e-mails from Maria Matthews contained in Joint Exhibit 69, to stand for the proposition that anyone can vote in Putnam County, Florida as long as they can articulate that they “intend to reside in Putnam County, Florida at some point in the future” regardless of where their physical residence is located provided that they have not registered to vote elsewhere. R.1550. In support of this misguided position, Appellee, quotes out of context the second half of Florida Statutes Section 101.045(1). Florida Statutes Section 101.045 (1) states:

*A person is not permitted to vote in any election precinct or district other than the one in which the person has his or her legal residence and in which the person is registered. However, 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.*

(Emphasis added). While there is no statutory definition for “temporarily,” *Black’s Law Dictionary* defines “temporary” as “Lasting for a short time only; existing or continuing for a limited (usu. Short) time; transitory.” *Temporary, Black’s Law Dictionary* (10th ed. 2014). Florida Statutes Section 97.021(3) defines “Address of legal residence” as “the legal residential address of the elector and includes all information necessary to differentiate one residence from another, including, but not limited to, a distinguishing apartment, suite, lot, room, or dormitory room number or other identifier.” The Florida Supreme Court in *Gore v. Harris* stated:

[...] no single statutory provision will be construed in such a way as to render meaningless *or absurd* any other statutory provision. In interpreting various statutory components of the State’s election process, then, common-sense approach is required, so that the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated.

772 So.2d 1243, 1249 (Fla. 2000) citing *Amente v. Newman*, 653 So.2d 1030, 1032 (Fla. 1995); *Firestone v. News-Press Pub. Co.*, 538 So.2d 457, 460 (Fla. 1989).

Statute Section 101.045(2) provides for the process of an elector who moves from the precinct where they are registered and provides in subsection (b) that:

an active uniformed services voter or a member of his or her family and except for an elector who has moved his or her legal residence to a precinct within a county that uses an electronic database as a precinct register at the polling place, an elector whose change of address is from outside the county may not

change his or her legal residence at the polling place and must vote a provisional ballot.

Reading Florida Statutes Section 101.045 in context demonstrates that the exception in subsection (1) should be read to apply to members of the armed services. While the Florida Statutes make a provision for those residing *temporarily* outside of the state, the Florida Constitution requires an elector be a “*permanent resident of the state*” of Florida. Art VI, 2, Fla. Const.3.

William and Susan Ivey are not qualified voters in the State of Florida because they are not a legal resident of the State of Florida. Fla. Stat. §97.041(1)(a)(3). *See also* R. 1339-43 and R.1347-49. Likewise, William and Susan Ivey are not qualified voters in Putnam County, Florida because they are not legal residents of Putnam County, Florida. Fla. Stat. §97.041(1)(a)(4). Likewise, in that an open ended indefinite hiatus from owning or residing in the State of Florida, such as the Iveys’, is not a fixed defined time with a terminal date foreseeable, their home ownership in North Carolina is not temporary as that term is defined by the *Black’s Law Dictionary*.<sup>6</sup>

---

<sup>6</sup> The Deposition transcripts of William Ivey and Susan Ivey were admitted into evidence as Joint Exhibits 48 and 67. Of note, there is no definitive statement of intention from either that of them that they will return to Florida, let alone Putnam County.

Furthermore, if Florida Statutes Section 101.045(1) were read to mean as Appellees assert, it would lead to absurd conclusions. For example, our electoral college is determined based on the population of each state. However, hypothetically once the cutoff for the allocation of electoral college votes was settled in a historically “died-in-the-wool” state such as California, a large number of people could register to vote in Putnam County, Florida to push the swing state one direction or the other, provided that those “swing voters” verbally via telephone could articulate that they “intend to reside in Putnam County, Florida in the future and are not registered to vote elsewhere.” Appellant argues that individuals who have state issued Drivers License identification from another state are not temporarily residing outside of the state of Florida. Mrs. Ivey for example only possesses a current North Carolina Drivers License. R. 1367 and R. 1459.

Similarly situated to the Iveys is the vote-by-mail ballot of Christopher Faunce, the brother of the Chief Deputy Supervisor of Elections for Putnam County. There is no dispute of fact that Christopher Faunce “stays” in St. Augustine, St. Johns County, Florida. Appellant’s Counsel inquired of Chief Deputy Supervisor of Elections, Carolyn Faunce, as follows:

Q: When you say he’s staying in St. Augustine, can you tell us what you mean by that?

A: He has a place over there that he lives in.

Q: Does he own property or lease property?

A: No.

Q: He leases property in St. Augustine?

A: Yes.

Q: Does he live there with anyone else?

A: His fiancée.

Q: Does he have a job in St. Johns County?

A: Yes.

Q: He receives mail in St. Johns County, to your knowledge?

A: I assume so. I don't know for sure, but yes.

Q: If he called and invited you over to his place for dinner, you would go down to St. Augustine, correct?

A: Yes.

Q: But your brother is registered to vote in Putnam County?

A: Yes, sir.

Q: And what address is he registered to vote in Putnam County?

A: 150 River Drive, East Palatka.

Q: What is that address to you?

A: That is our parents' home -- house.

Q: When is the last time your brother lived at your parents' house?

A: I don't remember, to tell you the truth. It's been a few years. He's been a few years since he stayed there.

Q: Can you say that again?

A: It's been a few years since he stayed there. A couple years. I'm not exactly sure how long. He's been back and forth, so it's hard to keep up.

Q: Okay. I mean, can you tell me the last time he lived there as opposed to an overnight trip at Christmas?

A: I don't remember exactly when he moved over there or started staying over there in St. Augustine, I don't remember exactly. It's been a couple years.

Q: Does he continue to vote in Putnam County?

A: Yes.

Q: As part of your duties as the chief deputy Supervisor of Elections, is that a concern to you, someone who is not living in Putnam County is continuing to vote in Putnam County?

A: No. He's been registered here for 30-some odd years. He's not registered anywhere else. He considers this as his permanent residence, and so no, that's not a concern for me.

Q: So as long as he intends to consider this as a residence, he can continue to be a registered voter and vote in Putnam County elections no matter where he is under your view?

A: Yes, sir.

P.177 Ln 1 - P.179 Ln 11.<sup>7</sup>

The identified out of county and out of state voters are not qualified to vote in Putnam County, Florida and as such their vote-by-mail ballots do not comply with the applicable rules of the Florida Statutes and therefore by definition illegal votes.

### **v. Fraudulent Votes Not Addressed in the Final Judgment**

Notably absent from the Court's Final Judgment was any analysis relating to the fraudulent votes identified by Appellant. The Court in the Final Judgment specifically acknowledged the Florida Supreme Court decision of *Bolden v. Potter*; yet, the Court did not address the essential conclusion of the *Bolden* Court:

When substantial fraudulent vote-buying practices are clearly shown to have been involved, the election must be declared void. Failure to do so will cause the electorate to lose confidence in the electoral process, destroy the willingness of individuals to participate, and thereby allow our government to be controlled by corrupt practices.

452 So.2d 564, 567 (Fla. 1984). The trial court seemingly relied on the decision in *Boardman v. Esteva*, however, the trial court failed to consider that the first factor of the *Boardman* test is "the presence or absence of *fraud*, gross negligence, or

---

<sup>7</sup> The deposition transcript of Christopher Faunce was admitted into evidence as Joint Exhibit 68.

intentional wrongdoing [...]” 323 So.2d 259, 269 (Fla. 1975) (Emphasis added).

The *Bolden* court specifically rejected the proposition that the number of fraudulent votes identified must exceed the margin of victory to overturn an election. 452 So.2d at 566. The *Bolden* court continued by stating:

To require evidence which would establish with mathematical certainty the specific number of invalid votes sufficient to change the result of the an election would make the task of setting aside an election because of intentional fraud or corruption virtually impossible, particularly in metropolitan areas.

*Id.* at 567.

The *Bolden* court also rendered guidance that there need not be a showing that a Defendant to an election contest actually created, or participated in, the fraudulent activity. The *Bolden* court stated:

We also reject the district court’s implication that the burden of proof, with regard to *fraud* or corruption, is dependent upon the status of the offender. It makes no difference whether the fraud is committed by candidates, elections officials, or third parties. The evil to be avoided is the same, irrespective of the source. As long as the fraud, *from whatever source*, is such that the true result of the election cannot be ascertained with reasonable certainty, *the ballots affected should be invalidated*.

*Id.* (Emphasis added). Every vote-by-mail ballot must contain a signed “Voters Certification” which includes the statement:

I, (print Name) , do solemnly swear (or affirm) that *I am a qualified voter* in this election and that *I have not and will not vote more than one ballot* in this election.

I understand that failure to sign this certificate and give my residence address will invalidate my ballot.

(Signature)  
(Residence Address)

Fla. Stat. § 101.6103(3). (Emphasis added). By operation of Florida Statutes an unsigned Voter Certificate will result in the invalidation of the ballot; however, the legal precedent under the trial Court's Final Judgment, establishes that a Voter's Certificate containing an intentionally false representation (because felons are not qualified voters) will always count, provided that the individual is on the voter registration rolls. The trial court creates in the Final Judgment a dangerous precedent that is not supported by the legislative intent, the Florida Constitution, Florida Statutes, or basic understandings of voting integrity; in that regardless of whether an individual only made it on the voter registration list through a fraudulent oath on the voter registration application, their vote will always be "legal" until the Division of Elections removes the person pursuant to Florida Statutes Section 98.075(7).

Additionally, Florida Statute Section 104.15, states "Whoever, knowing he or she is not a qualified elector, willfully votes at any election is guilty of a felony of the third degree [...]." Further yet, the Legislature has determined that willfully mixing nonqualified votes in a ballot box with qualified votes is a third degree felony. Fla. Stat. §104.13. It is logically inconsistent for the legislature to establish criminal acts regarding elections constituting felonies that result in "legal" votes.

Consider the conclusively established case of Daniel J. Pierce who cast a ballot in the 2016 General Election for Defendant, Gator DeLoach, while simultaneously having the status of being a convicted felon without having his civil rights restored by the office of executive clemency. R.1199 (JE31), R.1203-1236 (JE31A), R.1296 (JE37), and R.1314 (JE38). Daniel J. Pierce was not a qualified voter on or about October 11, 2016 when he executed a Florida Voter Registration Application. Florida Statute 97.051 requires:

A person registering to vote must subscribe to the following oath: “I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, and *I am qualified to register as an elector* under the Constitution and laws of the State of Florida, and *that all information provided in this application is true.*”

(Emphasis added). Daniel J. Pierce was not a qualified voter on November 8, 2016. Fla. Stat. § 97.041(2)(b). Daniel J. Pierce executed the voters certificate when he cast a vote-by-mail ballot on November 8, 2016. R.1314 (JE38). A false statement on a Florida Voter Registration *application* is a fraud and any resulting vote is a fraudulent vote. Similarly, a false statement on a *voters certificate* is a fraud, and the resulting vote is a fraudulent vote. Willfully voting when one knows they are an unqualified elector is fraud, and the resulting vote is a fraudulent vote. The Florida legislature has specifically stated that it is a felony of the third degree to vote a fraudulent ballot. Fla. Stat. § 104.16. Similarly, the Florida legislature made it a separate third degree felony to “willfully swear or affirm[s] falsely to any oath or

affirmation [...]” Fla. Stat. §104.011(1). Likewise, it is a separate third degree felony if a person “willfully submits any false voter registration information [...]” Fla. Stat. §104.011(2). Despite identifying 19 convicted felons who did not have their civil rights restored on November 8, 2016 who executed a false statement on the vote-by-mail certificate, the trial court chose to disregard any violation of the penalty provisions of Florida Statutes Chapter 104 to instead conclude that each of the votes were “legal.” R.466, R. 467, R. 470, R. 474, R. 476, and R.1793. This is an erroneous conclusion, and a dangerous legal precedent. As the trial court acknowledged in the Final Judgment, the voter registration books must be closed on the 29th day before each election, and must remain closed until after that election. Fla. Stat. § 97.055. By establishing that the only requirement to establish a “legal” vote is to be on the registration list on election day, the trial court opens up virtually every ballot-box stuffing scheme to drive elections, as based on trial testimony the process for removal from the registration list requires a minimum of 37 days (7 days for mailing of a notice to the suspect voter and then a hearing period of 30 days excluding any appeals or additional time for service by publication). Simply put, the trial court’s interpretation of the election code framework is inconsistent with maintaining faith in the integrity of the elections process.

In the Order Denying the Motion for Rehearing the trial court for the first time addressed the issue of fraud, by effectively claiming that fraud was somehow waived

as an issue by Appellant. R. 1792. Appellant never waived the issue of attacking fraudulent votes, because fraudulent votes are illegal votes. If all fraudulent votes are illegal votes, but illegal votes are not necessarily fraudulent votes, logic dictates that the data set of “illegal votes” must contain the subset of “fraudulent votes.” R. 1793. The trial court specifically stated:

While Fraudulent activity is most likely illegal, illegal activity is certainly not necessarily fraudulent. It follows that an “illegal” vote is not necessarily a fraudulent one. In order to be found guilty of the third degree felony related to illegal voting, the state must prove that the perpetrator voted “knowing he or she is not a qualified elector.” Section 104.15, Florida Statutes (emphasis added). As such, mere illegal voting is not criminal if not fraudulent. A false statement resulting from ignorance or carelessness is not knowing or fraudulent. *See In re Post*, 347 B.R. 104 (Bankr.M.D.Fla. 2006). Thus, *a convicted felon knowingly voting has not necessarily committed a crime under Section 104.15, and his vote may be legal if he or she is validly registered on voting day.*

R.1792-93 (Emphasis added). The trial court departed from Florida Law to find a Federal Bankruptcy law definition and then applied it the most sacred right of voting to determine that a person disqualified from voting under the Florida Constitution was permitted to enjoy the benefit of their wrongfully cast vote and avoid criminal prosecution if they could merely articulate that they were ignorant of the law and wrongfully on the voter roll on election day. The trial court fails to appreciate that this method of interpreting the Florida Election Code violates the ancient maxim *ignorantia legis neminem excusat*. Ignorance of the law excuses no one, and should

not be a viable defense to violating state constitutional law regarding our more sacred privilege in a democracy. Furthermore, individual states rights to place restrictions on felons voting has been upheld on constitutional challenges in federal court. *See Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969) aff'd without opinion 396 U.S. 12 (1969).

Similarly, the trial court in error claimed:

As noted herein, and by defendants in their responses to the Motion [for rehearing], such issues [fraud] were not tried by this Court. Nor were there any *allegations of fraud*, gross negligence, or intentional wrongdoing *by the Supervisor of Elections, his staff, the Canvassing Board, or Defendant DeLoach*. Thus, plaintiff's reliance upon *Bolden v. Potter*, 452 So.2d 564 (Fla. 1984), and *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975), in the contexts cited, is misplaced.

R.1793 (Emphasis added). The trial court inappropriately reads into the cases of *Boardman* and *Bolden* a requirement that one of the defendants to the election contest be proven to have committed the alleged fraud. To the contrary, in the concurring opinion of *Boardman*, Justice England wrote, “[i]t is important to recognize that in the instant case *there is no allegation or suggestion of any fraud, corruption, or other intentional misconduct on the part of either candidate or the election officials* in the several counties and districts involved.” 323 So.2d at 271(Fla. 1975) (Emphasis added). The Florida Supreme Court specifically denied the requirement that the fraud or wrong doing be committed by a Defendant to an election contest, when the *Bolden* Court ruled, “[i]t makes no difference whether the

fraud is committed by candidates, election officials, or third parties. The evil to be avoided is the same, irrespective of the source.” 452 So.2d at 567 (Fla. 1984) (Emphasis added). While the specific fraud outlined in the facts of the *Bolden* decision related to the vote buying, the Courts analysis remains 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 an election [...]” *Id.* Following the holding in *Bolden*, the Third District Court of Appeals similarly stated in *In re The Matter of the Protest of Election Returns & Absentee Ballots in the November 4, 1997 Election for the City Miami, Fla.*, “[w]e are mindful of the fact that the trial court found there was no evidence that [Candidate] knew of, or in any way participated in, the absentee voter fraud.” 707 So.2d 1170, 1173 (Fla. 3d DCA 1998). *See also Peacock v. Wise*, 351 So.2d 1134 (Fla. 1st DCA 1977).

Similar to the example of Daniel J. Pierce is the example of Sandra Novak.

The trial Court stated:

The voter [Sandra Lee Novak] cast a vote-by-mail ballot in Florida in the November 2016 General Election. The Supervisor’s Office confirmed that the subject voter also cast a vote-by-mail ballot in New Jersey in the General Election. There is no evidence to indicate in which state the voter voted first.

R.469. It was conclusively established at trial both through documentary evidence and testimony that Sandra Novak voted twice in the 2016 General Election. Sandra

Novak's vote-by-mail ballot contained the executed Voter's Certificate which stated in pertinent part "I have not and will not vote more than one ballot in this election." Fla. Stat. § 101.6103(3).

For purposes of determining there is a fraudulent oath on a ballot, it does not matter in which state the individual cast her ballot first; rather, the "have not and will not" language provides that either way the oath on the voter's certificate is fraudulent when it is conclusively established that there were two votes cast in the 2016 General Election. If Sandra Novak cast her first vote-by-mail ballot in New Jersey then by executing the voter certificate required by Florida Statutes Section 101.6103(3) she falsely affirmed the oath *contra* Florida Statutes Section 104.011 when she cast her Florida vote-by-mail ballot because she **had** cast a ballot in the 2016 General Election. Alternatively, if Sandra Novak cast her first vote-by-mail ballot in Florida then by executing the voter certificate required by Florida Statutes Section 101.6103(3) she falsely affirmed the oath *contra* Florida Statutes Section 104.011 when she cast her New Jersey vote-by-mail ballot because she swore that she **would not** vote more than one ballot in the 2016 General Election.

The trial court additionally noted in the Final Judgment that "the voter [Sandra Novak] did not vote for Sheriff of Putnam County on the New Jersey ballot." R. 469. Appellant notes that the voter certification required by Florida Statutes Section 101.6103(3) does not specifically reference individual races; rather, the requirement

of the oath is that the voter swear or affirm they will not vote “more than one ballot in this election.” Sandra Novak did vote more than once in this election: the 2016 General Election.

**vi. Equitable Principle Under the Law- “Son of Sam Law”**

The United States Supreme Court has recognized the “‘fundamental equitable principle’ that ‘no one shall be permitted to profit by his own fraud, or to take advantage of his wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.’” *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991).<sup>8</sup> The trial court has abandoned this fundamental principle in rendering the Final Judgment. In effect, the Final Judgment, if affirmed, has established that unqualified voters who commit voter fraud shall never be deprived of the “fruit of their crime” because the fraudulently cast vote will always be “legal” provided the unqualified voter is on the registration list at the time of the election (even if the unqualified individual only made it onto the list by fraudulent felonious acts). The trial court ruling, if not overturned, demonstrates that those who are not qualified - to register or vote - and who engage in a scheme to cast fraudulent ballots may get away with it (but for the diligent efforts of candidates

---

<sup>8</sup> The Florida Legislature has enacted Fla. Stat. §944.512 which is a parallel statute to the one in New York at issue in the *Simon & Schuster* case.

challenging elections to identify them), and even when they are identified and confirmed to be unqualified, the fraudulent vote will be considered “legal.”<sup>9</sup>

Appellant supplied the trial court with evidence at trial that 42 identified individuals were not qualified to cast ballots in the 2016 General Election. As of May 22, 2017 only 20 of those 42 identified individuals had completed the process for removal. Among those 20 who have completed the removal process were 16 convicted felons, the 3 deceased voters identified by Appellant, and 1 person who had been adjudicated mentally incompetent.

## **B. Illegal Votes**

### **i. Deceased Voters**

Through discovery Appellant identified three individuals who were deceased prior to their vote-by-mail ballots being returned to the Supervisor of Elections Office or postmarked. Florida Statutes §101.6103(8) states:

(8) A ballot that otherwise satisfies the requirements of subsection (5) shall be counted even if the elector dies *after mailing the ballot* but before election day, *as long as*, prior to the death of the voter, the ballot was:

- (a) *Postmarked by the United States Postal Service;*
- (b) *Date-stamped with a verifiable tracking number by a common carrier; or*

---

<sup>9</sup> While not directly at issue in this case, one must consider how the State Attorneys can prosecute “criminal acts” under Florida Statutes Chapter 104, when the resulting vote has been determined by the trial Court to be “legal.”

(c) *Already in the possession of the supervisor of elections.*

(Emphasis Added). Admitted into evidence are copies of the vote-by-mail envelopes for Edward Lee Wallace, Violet L. Crews, and Carolann Deal who were deceased prior to November 8, 2016. Also admitted into evidence are copies of the certified death certificates for these individuals.

The trial court specifically found that the three votes from the deceased voters were “technically illegal.” R.1632. However, the trial court rejected the notion that the inclusion of these votes in the final tally was in error by stating the deceased voters “ballots were validly canvassed and included.” R.1632. Appellant asserts that by operation of law, the vote-by-mail ballots of these three deceased voters should have been rejected. In that the inclusion of these vote-by-mail ballots violated the applicable rules as outlined by Florida Statutes, these are by definition illegal votes.

**ii. Late Voters- Vote-By-Mail Ballots Received After deadline**

Appellant identified two individuals who cast vote-by-mail ballots after the statutory deadline. Florida Statutes § 101.6103(2) states in pertinent part “[...] 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.” (Emphasis Added). Florida Statutes § 101.6103(5) continues:

- (5) A Ballot shall be counted *only if*:
  - (a) It is returned in the return mailing envelope;

(b) The elector's signature has been verified as provided in this subsection; and

(c) It is received by the supervisor of elections *not later than 7 p.m.* on the day of the election.

(Emphasis Added). Appellant introduced into evidence copies of the vote-by-mail envelopes showing a time-stamp from the Putnam County Supervisor of Elections Office showing 7:02 p.m. and 7:06 p.m. on November 8, 2016. R.1320 and R.1321. Florida Statutes Section 101.67(2) states “[e]xcept as provided in s.101.6952(5), *all marked absent elector's ballots to be counted must be received by the supervisor by 7 p.m. the day of the election.* All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office.” (Emphasis added). Appellant's trial counsel inquired if Supervisor of Elections, Overturf, had been in the lobby of the Supervisor of Elections Office at 7:00 p.m. on election day:

Q: And to confirm, you weren't in the lobby when these arrived at 7:02 and 7:06, were you?

A: I don't believe so, but I couldn't be 100 percent sure. I was everywhere that I could be.

P. 77 Ln 25-P.78 Ln 3. Appellant's trial counsel then inquired specifically about the timestamp as follows:

Q: Do you have any documents to show that these ballots were received at a time other than the time they were marked: Received- Putnam County Supervisor of Elections?

A: I have documents to show when the ballots were issued, yes.

Q: Okay. But no documents to contradict the 7:06 or 7:02 date received?

A: As far as the date stamp--or the time stamp, no, sir.

P. 79 Ln 14- P. 79 Ln 23. Subsequently during the cross examination of Charles Overturf by Appellee's, canvassing board counsel, Mr. Lavia's inquiries reiterated this point:

Q: So are you testifying a ballot could have been received several minutes prior to that time stamp using the procedures that your office employs?

MR. NORDBY: Objection, Your Honor. The witness testified on direct he wasn't there and he had no information other than the stamp on the envelope.

THE COURT: Well, my understanding was he was testifying about the process. If he's testifying about the process, I'll allow it. If he is testifying that he knows it's what happened, then he is speculating, so I think you need to clarify.

Are you saying that it's possible somebody was there, handed it before 7:00?

THE WITNESS: Yes, sir.

THE COURT: And it got stamped after 7:00?

THE WITNESS: Correct.

THE COURT: Or you know it happened?

THE WITNESS: No, sir, I can't 100 percent say that.

THE COURT: Does that clarify?

MR. NORDBY: It does, Your Honor. Thank you.

MR. LAVIA, III:

Q: So to clarify, it's possible it could have happened; you have no personal knowledge?

A: Correct.

P. 130 Ln 15- P. 131 Ln 18.

In that there is no contradictory evidence, or witness testimony to the contrary, the time-stamp on the vote-by-mail ballots must stand for the premise of the matter

asserted: two ballots were accepted after the statutory deadline of 7:00 p.m. on election night, November 8, 2016. In that these ballots were accepted outside of compliance with the applicable rules, pursuant to the dictionary definition cited *supra* these are illegal votes.

### **III. Conflated Issue of Due Process for Removal From the Voter Roll and Validity of a Vote**

In the Final Order, the trial court's analysis centered on the process for removal of individuals from the Statewide Registration System. Specifically, the Court stated:

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, nor even been initiated, as of the General Election. Consequently, Plaintiff failed to meet his burden of establishing that the votes they cast in the General Election are illegal votes.

R. 466. The trial court blended two separate and distinct issues of law: (1) whether a vote does not count because it is illegal/fraudulent, and (2) the statutory process for removing unqualified individuals from the Statewide Registration System. The trial court's misapplication of the law constitutes reversible error.

Appellees further conflated the issues by highlighting the statutory framework for removing ineligible voters from the voter roll pursuant to Florida Statute Section

98.075, and asserting that those who cast illegal, and fraudulent, ballots are entitled to due process before they are removed from the voter rolls. P.33 Ln20- P.37 Ln19.

Whether a ballot is illegal and/or fraudulent, is a separate issue from how to afford due process while removing an ineligible individual from the voter rolls. By definition an illegal vote “does not count” it does not require due process before its determination as illegal. *Illegal vote, Black’s Law Dictionary* (10th ed. 2014).

#### **A. Challenges Before Election**

The trial court in justification of its erroneous legal conclusion, claims Appellant cannot rely on challenges to illegal votes in this election contest when the illegal voters were not identified before the canvassing of the votes. R.465, R.466, R.468, and R.476. Counsel for Appellee, DeLoach, similarly attempted to assign blame to Appellant at trial by specifically stating:

[MR. DOUGLAS, JR.]

So if there is any substantial noncompliance that is placed at the feet of the Division of Elections for not timely getting people off of the rolls, we argue that the Plaintiff is partly to blame for that, and that is from the Florida Statute 101.111 that calls for voter challenges, which says that if anyone has a belief that someone is trying to cast an illegal vote, they should raise their hand and submit this form that’s provided in the statute, and then that person’s vote becomes a provisional ballot. [...]

Had the Plaintiff raised that challenge when they should have and could have before this election, and the same evidence they’re using now after the fact which was available before the election, we wouldn’t be here.

P.210 Ln 23 - P. 211 Ln 19.

### **i. Challenge Before Election Not Required**

Election contests are subject to expedited proceedings and it is an unreasonable burden to place on Appellant to require real time challenges to every vote believed to be illegal. The First District Court of Appeals in *Barber v. Moody* contemplated a prior version of the election contest statute and stated:

There can be no doubt that the purpose of the statutes permitting election contests is to prevent the thwarting of the will of the electors either by fraud or by common mistakes honestly made. If both the rights of the electors and the candidates are to be protected, a reasonable interpretation must be given to the statutes where same is necessary to accomplish the purposes for which it was enacted. *Our statute does not specifically require that the complaint state only those facts which are within the personal knowledge of the contestant. The election laws make it impossible for a contestant to know of his own personal knowledge any or all irregularities that took place in an election and how they occurred. Under statutes such as ours it is generally held that if upon investigation a contestant learns of mistakes, errors, or frauds effectuating a declaration of an improper result of an election, and if he believes such information, he may proceed by making allegations upon information and belief that such statements are true.*

229 So. 2d 284, 286-87 (Fla. 1st DCA 1969) cert. denied 237 So.2d 753 (Fla. 1970) (Emphasis added). Specifically addressing issues with vote-by-mail ballots, the Third District Court of Appeals in *Howanitz v. Blair* stated, “[...] the irregularities complained of were not apparent on the face of the Voter’s Certificate and were not waived for failure to challenge before the ballot was removed from the mailing

envelope.” 394 So. 2d 479, 481 (Fla. 3d DCA 1981) citing *Barber v. Moody*, 229 So.2d 284, 287 (Fla. 1st DCA 1969). cert. denied, 237 So.2d 753 (Fla. 1970).

In a decision rendered on November 22, 2016, the First District Court of Appeals in *Jackson v. Leon Cnty. Elections Canvassing Bd.* acknowledged the time sensitive nature of election contests filed under Florida Statutes Section 102.168 when they held, “[i]n light of the time-sensitive nature of challenges brought under section 102.168, the trial court has broad discretion to control the scope and limitation of discovery.” 204 So.3d 571, 578-79 (Fla. 1st DCA 2016) citing *Barber v. Moody*, 229 So. 2d 284, 287 (Fla. 1st DCA 1969); *Friedman v. Heart Inst. Of Port St. Lucie, Inc.*, 863 So.2d 189, 194 (Fla. 2003); *Allstate Ins. V. Boecher*, 733 So. 2d 993, 995 (Fla. 1999)(holding the primary purpose of discovery is to prevent the use of legal gymnastics and to prevent trials from being carried on in the dark); *995 N.E. 125th St. Corp. v. Cty. Nat’l Bank*, 349 So. 2d 758, 760-61 (Fla. 3d DCA 1977)(holding due process of law requires an adequate opportunity for discovery).

In the present case paragraph 58 of the *Complaint* alleged “[o]n information and belief, the certification of election includes the tabulation of ballots **cast by other ineligible voters** to be more specifically identified through discovery.” R. 33 (Emphasis added). Paragraph 60 of the *Complaint* continued “[t]he receipt of illegal votes is sufficient to change or place in doubt the result of the election.” R. 33. Based on the analysis in *Barber*, which is controlling case law as of November 22, 2016 as

cited in *Jackson*, Appellant has fully met his burden to effectively challenge the receipt of a number of illegal votes, or ballots cast by ineligible voters, sufficient to change or place in doubt the result of the election pursuant to Florida Statutes Section 102.168(3)(c). Merely because the Florida Statutes set out a framework in section 101.111 on *how to assert a challenge prior* to an election, it does not require that *all* challenges be presented prior to the canvassing of the ballots especially when ballots were canvassed prior to the public's noticed inspection period.

**B. Failure of Public Notice  
For Public Inspection Period of Vote-By-Mail Ballots**

Appellant elected not to pursue the allegation of Putnam County Canvassing Board misconduct in the 2016 General Election at trial to save time and maintain focus on the issue of the illegal and fraudulent votes. However, in order to adequately respond to the arguments of Appellee it is necessary to highlight an issue of Public Notice relating to the public inspection of the vote-by-mail ballots.

Pursuant to Florida Statute Section 101.68(2)(c)(2),

if any elector or candidate believes that a vote-by-mail ballot is illegal due to a defect apparent on the voter's certificate, he or she may, at any time before the ballot is removed from the envelope, file with the Canvassing Board a protest against the

canvass of that ballot [...] A challenge based upon a defect in the voter's certificate may not be accepted after the ballot has been removed from the mailing envelope.

Joint Exhibit 1 a composite exhibit of Newspaper advertisements was admitted into evidence. R.481. Page one of Joint Exhibit contains a Public Notice published in the *Palatka Daily News* on September 21, 2016, which states in pertinent part:

Public inspection of sealed Vote by Mail Ballots is scheduled for November 3, 2016 through November 7, 2016 from 9:00 AM to 11:00 AM, excluding Sunday November 6, 2016.

Those wishing to inspect Vote by Mail Ballots on November 8, 2016 must be present throughout the day. Shortly after receipt those ballots will be opened and processed, but not tabulated.

R.481.

On re-direct examination at trial Supervisor of Elections, Overturf stated:

BY MR. NORDBY:

Q: Mr. Overturf, when did the Canvassing Board start opening the vote-by-mail ballots and tabulating them?

A: 24th of October.

Q: Okay. Was the public provided any notice they would have the right to challenge any ballots before that time?

A: The public was given notice of the meetings, and so it's all open to the public. Unfortunately nobody ever shows up, except in a situation like this. Yes, sir.

P. 165 Ln 5 - P.165 Ln 19. The Putnam County Canvassing Board Meeting Transcript from October 24, 2016 was admitted into evidence as Joint Exhibit 3.

Joint Exhibit 3 confirms that the opening and processing of vote-by-mail “absentee” ballots started on October 24, 2016:

JUDGE MORRIS: Do you want to go ahead and get those ladies started opening the Absentees, and we’ll start working on canvassing those?

MS. FAUNCE: Okay. Here’s the tray, if you want to start without me.

R.510. The transcript of Joint Exhibit 3 continues to show that 1,860 vote-by-mail ballots were opened, canvassed, and accepted on October 24, 2016:

JUDGE MORRIS: All right.

Okay. So we’re opening and processing Returned Ballots. So we will stand adjourned while we get that completed. (Short recess).

JUDGE MORRIS: All right. We’re back on the record.

We have the ICE Zero Report Tape for our high speed machine that’s going to count our Absentee Ballots. And each Canvassing Board Member needs to look over the report and sign it.

MRS. HARRIS: So what kind of machine?

Ms. FAUNCE: Pardon?

JUDGE MORRIS: This is the Zero Tape for the high speed --

Ms. FAUNCE: Scanner.

JUDGE MORRIS: -- Scanner.

MRS. HARRIS: Okay.

JUDGE MORRIS: To scan the -- that we’re going to use to scan the Absentee Ballots.

MRS. HARRIS: Okay.

JUDGE MORRIS: It’s in the next room.

MS. FAUNCE: It’s right over here.

MRS. HARRIS: Right, where we sat in there and looked at it?

JUDGE MORRIS: Right.

Any questions about the Zero Tape?

That paper is not all that cooperative; is it?

MRS. HARRIS: It's not.

My fingers aren't cooperative either.

No questions.

MR. OVERTURF: No, ma'am.

JUDGE MORRIS: All right. So we're going to go back to being adjourned while we process.

(Short recess.)

JUDGE MORRIS: Okay. We are back on the record, and we have opened and processed the 2000 Absentee Ballots from earlier today.

We have --1860 have been accepted by the scanner. And the other 140 have various issues that need to be addressed that the Canvassing Board will need to address.

R.518-R.519. Similarly the Putnam County Canvassing Board Meeting Transcript from October 28, 2016 was admitted into evidence as Joint Exhibit 4. Joint Exhibit 4 acknowledged that the advertisement of the canvassing board meeting was published on September 21, 2016 and that there were no new items to be added to the agenda:

JUDGE MORRIS: Our meeting has been noticed and published in the Palatka Daily News on Wednesday, September 21, 2016, and published on the Supervisor of Elections website.

Are there any Agenda Items to be added?

MR. OVERTURF: No, ma'am.

JUDGE MORRIS: All right. We'll go right on to the Report on Absentee Ballots, then.

MR. OVERTURF: Okay. For the record, as you see, we've issued -- First Issued 7645, had 143 Replacements, for a total of 7788.

As of this report we've had 4447 Returned, and we have 2000 to open and process.

R.1554-R.1555. The transcript from October 28, 2016 demonstrates that 2000 vote-by-mail ballots were opened and canvassed that day:

JUDGE MORRIS: Yeah, we'll stand adjourned.  
(Short recess.)

JUDGE MORRIS: Okay. We're going to go back on the record.

And we have opened 2000 ballots today, we've duplicated some ballots that needed to be duplicated. And right now we're just waiting on some information from our Vendor before we can complete running the ballots in our high speed counter.

R.1607. Likewise the Putnam County Canvassing Board Meeting Transcript from November 1, 2016 was admitted into evidence as Joint Exhibit 5. Joint Exhibit 5 acknowledged that the advertisement of the canvassing board meeting was published on September 21, 2016 and that there were no new items to be added to the agenda:

JUDGE MORRIS: Our meeting was published in the Palatka Daily News on Wednesday, September 21st, 2016, and it has also been published on the Supervisor of Elections website.

Are there any Agenda Items to be added?

MR. OVERTURF: No, ma'am.

JUDGE MORRIS: Okay. Report on Absentee Ballots.

MR. OVERTURF: First Issued, 7777, 176 Replacements, for a total of 7953.

As of this report we had 5258 Returned.

We will open and process 1000 today, along with 44 ballots to canvass, and 217 Duplication Verifications.

JUDGE MORRIS: Okay. Anything else before we stand adjourned and start opening and processing?

MR. OVERTURF: No, ma'am.

R.523-R.524. Further in the body of the transcript of Joint Exhibit 5 it states:

JUDGE MORRIS: Okay. We'll adjourn for now.

(Short recess.)

JUDGE MORRIS: Okay. We'll go back on the record.

We have opened and processed the Returned ballots, and Carolyn, I'm going to let you report on how many we've processed so far.

MS. FAUNCE: We have a total Absentee Ballots processed over the last three Canvassing Board Meetings as 4752, 4752 ballots total.

JUDGE MORRIS: All right.

R.537. Joint Exhibit 5 demonstrates that 4,752 vote-by-mail ballots were opened, canvassed, and accepted before the first publicly noticed opportunity of inspection on November 3, 2016. The Putnam County Canvassing Board Meeting Transcript from November 18, 2016 was admitted into evidence as Joint Exhibit 11. An exhibit to Joint Exhibit 11 states that 6,351 vote-by-mail ballots were returned to the Supervision of Elections Office. Therefore, seventy-five percent (75%) of the vote-by-mail ballots were canvassed before the Public had the opportunity to inspect them at the Publicly Noticed Inspection period (November 3-8, 2016). R.1038.<sup>10</sup>

As the First District Court of Appeals stated in *Barber*:

The proceedings in this election contest reflect that man is still unsuccessful in compiling a simple set of rules by which a cause may be tried expeditiously since one recalcitrant party may successfully delay until a critical date upon which he can cry, "Mootness." We will not permit nor condone such tactics.

---

<sup>10</sup>  $4,752/6,351 = .7482286 * 100 = 74.82286\%$  of the vote-by-mail ballots cast in the Sheriff's Race rounded to 75%.

229 So.2d at 287 (Fla. 1st DCA 1969). Appellant likewise asserts that Appellees, along with the trial court, cannot claim a fatal flaw in the timing of a challenge to a vote-by-mail ballot when the Public was not properly noticed of the opportunity to challenge 75% of the vote-by-mail ballots. The trial court, if the decision is affirmed, creates dangerous precedent diminishing the integrity of the election process and undermining the faith electors have in fair outcomes of elections, as election officials can deprive candidates (as members of the public) notice of their opportunity to inspect vote-by-mail ballots while circuit courts can penalize candidates for not utilizing the inspection period that was not properly noticed.

#### **IV. Appellant has Established His Right to the Office of Sheriff**

The Florida Supreme Court decision of *Bolden v. Potter* as cited *supra*, the Third District Court of Appeals case *In re Protest of Election Returns & Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170 (Fla. 3rd DCA 1998), and the United States District Court for the Northern District of Florida decision in *Fla. State Conf. of the NAACP v. Browning*, 569 F.Supp.2d 1237 (N.D. Fla. 2008) support the conclusion that once fraud has been conclusively established, it is presumed to have permeated the entire pool of ballots identified and that same pool of ballots must be invalidated to preserve the integrity of the election. Similarly, Appellant reincorporates: the First District Court of

Appeals decision in *Barber v. Moody*, 229 So.2d 284 (Fla. 1st DCA 1969) cert. denied 237 So.2d 753 (Fla. 1970), the Third District Court of Appeals decision of *Howanitz v. Blair*, 394 So.2d 479 (Fla. 3d DCA 1981), the First District Court of Appeals decision of *Jackson v. Leon Cnty. Elections Canvassing Bd.*, 204 So.3d 571 (Fla. 1st DCA 2016), to support the conclusion that Appellant was not required to know with certainty all of those errors, illegal votes, and fraudulent acts at the time of filing the election contest; rather, Appellant is entitled to engage in discovery to determine those facts that support the allegations of the complaint.<sup>11</sup>

Appellant was announced the winner of the 2016 General Election on election night by a margin of 18 votes. Two days after the close of the polls and after the inclusion of ballots discovered to have been omitted from the final tallies on election night, Appellee, DeLoach was eventually certified the winner of the 2016 General Election. Appellant, through extraordinary effort, has conclusively established the existence of fraud in the 2016 General Election by the inclusion of ballots cast by unqualified electors. While not necessary, Appellant actually demonstrated that the pervasiveness of the fraud exceeded the margin of victory of 16 votes. Once fraud has been conclusively established in the vote-by-mail ballots, based on legal

---

<sup>11</sup> The trial court that “It is undisputed that each of the three [deceased] voters signed and dated their ballots before they died.” R.467. Appellant never stipulated to this fact, and could not, in discovery all copies of the vote-by-mail ballots produced were redacted such that signatures were not visible.

precedent, the trial court should have invalidated the vote-by-mail ballots. When the vote-by-mail ballots are properly excluded in accordance Supreme Court guidance, Appellant was the winner of the 2016 General Election by a margin of 272 votes. R.1038. If the trial court had determined that the day of and early voting fraudulent votes should be given in Appellee's favor, then Appellant won the 2016 General Election by a margin of 259 votes. R.1038. If the trial court determined that there were also fraudulent votes in the day of, the early votes, and the vote-by-mail ballots, the Appellant won by 4 votes. R.1038. The only category of votes in which there were no allegations of fraud were the provisional ballots. Appellant, Jon Kinney, received 13 provisional votes. Appellee, Gator DeLoach, received only 9 provisional votes. R.1038. If the trial court had followed any of the methods of resolving elections tainted by fraud, or votes cast by ineligible voters, Appellant would have been granted a judgment of ouster against Appellee, DeLoach. Thus, the trial court committed reversible error by abandoning the strictures of the Florida Constitution and including votes from ineligible voters, beyond the margin of victory, and subsequently denying Appellant's right to a Judgment of Ouster.

## CONCLUSION

Appellant has demonstrated that more than twice the number of ballots separating the candidates were cast by ineligible voters. The trial court erred by not overturning the election through the proper exclusion of those ballots cast by ineligible voters, or properly excluding those pools of ballots tainted by fraud. Had the trial court properly excluded those ballots cast by ineligible voters, or tainted by fraud, Appellant should have been declare the winner of the race for Putnam County Sheriff from the 2016 General Election.

WHEREFORE, Appellant, Jonathan Kinney, requests this Court (1) overturn the trial court's denial of the election contest complaint, (2) determine that there is sufficient doubt in the result of the election to warrant the election contest, (3) find that Appellant has proven his right to the office of Sheriff of Putnam County, Florida, and (4) entered an order remanding this case to the trial court with specific instructions to enter a Judgment of Ouster to remove Appellee, Homer "Gator" DeLoach, from the seat of the Office of Putnam County Sheriff.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing document has been furnished to those parties listed below by electronic mail on this 20th day of October 2017.

<p>Ronald A. Labasky Brewton Plante, P.A. 225 South Adams Street, Suite 250 Tallahassee, Florida 32301 rlabasky@bplawfirm.net fsase@bplawfirm.net</p> <p>John T. LaVia, III 1300 Thomaswood Drive Tallahassee, Florida 32308 jlavia@gbwlegal.com Rhonda@gbwlegal.com <i>Counsel for Appellee Putnam County Canvassing Board</i></p>	<p>Charles T. Douglas, Jr. Douglas &amp; Hedstrom, P.A. 601 Saint Johns Avenue Palatka, Florida 32177 charlie@dhclawyers.com Efiling@dhclawyers.com <i>Counsel for Appellee DeLoach</i></p>
---	---

/s/ Zachery Lucas Keller  
Zachery Lucas Keller, Esq.  
Florida Bar No.: 109146

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Zachery Lucas Keller  
Zachery Lucas Keller, Esq.  
Florida Bar No.: 109146