

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

JONATHAN KINNEY, candidate for
Putnam County Sheriff,

Plaintiff,

v.

Case No:

Division:

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

Defendants.

ELECTION CONTEST COMPLAINT

This is an election contest complaint under section 102.168, Florida Statutes. Plaintiff Jonathan Kinney seeks a judgment establishing his right to the office of Putnam County Sheriff and declaring invalid the certification of election of Defendant Homer D. DeLoach by Defendant Putnam County Canvassing Board. As set forth below, this election contest is based upon (1) misconduct on the part of Putnam County elections officials and members of the Putnam County Canvassing Board sufficient to change or place in doubt the result of the election; and (2) receipt 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.

Jurisdiction and Venue

1. This court has jurisdiction under section 102.168(1), Florida Statutes, which provides that the certification of election of any person to office may be contested in the circuit court by any unsuccessful candidate.

2. This court also has jurisdiction under section 86.011, Florida Statutes, to issue the declaratory relief sought in this action. Plaintiff seeks a declaration regarding his rights, status, and other equitable or legal relations affected by the statutes at issue. Plaintiff does not seek damages and only asks for a declaration that the certification of election of Defendant DeLoach is invalid.

3. Venue is proper under section 47.011, Florida Statutes, because Defendants reside in Putnam County and the cause of action accrued here.

4. This election contest is timely under 102.168(2), Florida Statutes.

Parties

5. Plaintiff Jonathan “Jon” Kinney was a candidate for Putnam County Sheriff in the 2016 General Election. Under section 102.168(1), Florida Statutes, he has authority to file this election contest.

6. Defendant Homer D. DeLoach, III, was also a candidate for Putnam County Sheriff in the 2016 General Election. Under section 102.168(4), Florida Statutes, he is an indispensable party defendant in this election contest.

7. Defendant Putnam County Canvassing Board, by and through its members Commissioner Nancy Harris, Judge Elizabeth Ann Morris, and Supervisor of Elections Charles L. Overturf, III, was the board responsible for canvassing the election of Putnam County Sheriff. Under section 102.168(4), Florida Statutes, the Putnam County Canvassing Board is an indispensable party and its members are defendants in this election contest.

Factual Allegations

8. On election night, Tuesday, November 8, 2016, the Putnam County Canvassing Board completed its public canvass of the votes for Putnam County Sheriff. At the conclusion of the

canvass, the returns reflected that Plaintiff Kinney had prevailed in the Putnam County Sheriff election over Defendant DeLoach by a margin of 18 votes, 15,658 to 15,640.

9. On Wednesday, November 9, 2016, the Putnam County Canvassing Board held a meeting to explain to the public that, because Mr. Kinney's 18 vote margin of victory over Mr. DeLoach was less than one-half of a percent of the votes cast for the office, Florida law required an automatic recount of the votes cast for the office. The Putnam County Canvassing Board therefore reaffirmed the election night result demonstrating that Plaintiff Kinney had prevailed in the Putnam County Sheriff election over Defendant DeLoach by the same margin as reflected on election night: 15,658 votes for Kinney and 15,640 votes for DeLoach.

10. At the conclusion of the Putnam County Canvassing Board meeting on Wednesday, November 9, 2016, the board announced that the automatic recount would commence at 9:00 am on Thursday, November 10, 2016.

11. On Thursday, November 10, 2016, before commencing the automatic recount required by law, Putnam County Supervisor of Elections Charles L. Overturf, III, announced that an "audit" he had conducted outside of the canvassing board's presence had located an additional 428 vote-by-mail ballots (the "Suspect Ballots") and that the Suspect Ballots had not been included in the election night returns. These Suspect Ballots had allegedly been tabulated and their results recorded on a USB "thumb drive" that was not uploaded until after the election night results were known.

12. The addition of these 428 Suspect Ballots to the election night returns resulted in a significant swing of 27 votes in the Sheriff's race. Rather than an 18 vote margin in favor of Plaintiff Kinney, Supervisor Overturf announced that Defendant DeLoach led by 9 votes, 15,846 votes for DeLoach to 15,837 votes for Plaintiff Kinney.

13. The Canvassing Board ordered an automatic recount of the votes cast for Putnam County Sheriff and included in that recount the Suspect Ballots that had not been included in the election night returns as well as provisional ballots canvassed and accepted post-election. Following the automatic recount, the Canvassing Board submitted a second set of unofficial returns reflecting a vote count in the Sheriff's contest that Defendant DeLoach led by 12 votes: 15,852 for Plaintiff Kinney and 15,864 for Defendant DeLoach.

14. Because the second set of unofficial returns indicated that Plaintiff Kinney had been defeated by less than one-quarter of a percent, the Canvassing Board ordered a manual recount of the overvotes and undervotes cast for Putnam County Sheriff. Following the manual recount, the Canvassing Board announced a vote count in the Sheriff's contest of 15,857 for Plaintiff Kinney and 15,870 for Defendant DeLoach.

15. The Canvassing Board met once again on November 18, 2016, to canvass vote-by-mail ballots received from overseas voters. There were four UOCAVA ballots that would be counted towards the Sheriff's contest. Following the canvass of overseas ballots, the Canvassing Board included the 4 UOCAVA votes and announced an inexplicably reduced vote count total in the Sheriff's contest of 15,853 for Plaintiff Kinney and 15,869 for Defendant DeLoach.

16. The Board certified Defendant DeLoach's election as Putnam County Sheriff on November 18, 2016, by a total of 15,869 votes counted for Defendant DeLoach and 15,853 votes counted for Plaintiff Kinney.

Contest Grounds

17. As set forth in more detail below, Plaintiff Kinney intends to establish his right to the office of Putnam County Sheriff on two principal grounds: (1) misconduct on the part of Supervisor of Elections Overturf and members of the Putnam County Canvassing Board

sufficient to change or place in doubt the result of the election; and (2) receipt 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.

Misconduct by Putnam County Canvassing Board – Violations of Public Meeting Laws

18. Both the Florida Constitution and Florida’s “Sunshine Law” require all meetings at which official acts are to be taken to be open and noticed to the public at all times.

19. County canvassing boards are subject to the Sunshine Law.

20. The Florida Election Code likewise requires county canvassing boards to “meet in a building accessible to the public,” pursuant to “public notice,” and to “publicly canvass” the ballots and votes given to each candidate. § 102.141(2), Fla. Stat.

21. Defendant Putnam County Canvassing Board and its members violated these laws by meeting and deliberating outside of publicly noticed meetings throughout the canvassing and recount process for the Putnam County Sheriff contest.

22. Members of the public present at the Canvassing Board meeting witnessed the Canvassing Board engage in discussions in a “back conference room” during recesses or adjournments of Canvassing Board meetings. Despite having concluded scanning ballots at approximately 11:00 am, the Canvassing Board at approximately 2:04 pm gave the following statement in response to questions about these non-public deliberations:

We have got to review some reports and verify everything that we have done, and uh, they think that they are going to be through with that shortly, but I’m gonna give us another hour. Hey it, you know it’s like waiting on a baby, I’m sorry. But you know, our job is to get it right, okay. If that takes all afternoon and into the evening, that’s what we’re gonna work on doing. So, I will continue to update y’all. We, you know, we all hoped that we would have it at 1 o’clock, we could give y’all some information and everybody could go home, but, we’re gonna keep on working on it. So, again about an hour.

23. Recognizing that the Sunshine Law should be construed so as to frustrate all evasive devices, the courts have held that action taken in violation of the law is void *ab initio*.

24. Defendant Putnam County Canvassing Board's violation of the public meeting laws constitutes misconduct sufficient to change or place in doubt the result of the election.

***Misconduct by Putnam County Canvassing Board –
Illegal Inclusion of Allegedly Missing Ballots***

25. To the extent Defendant Putnam County Canvassing Board contends that the 428 Suspect Ballots added to the vote totals on the day after the election were "missing" or "omitted" from the election night returns, the laws governing missing or omitted returns were not followed in addressing these ballots.

26. Defendant Putnam County Canvassing Board did not order a retabulation of the allegedly missing returns.

27. Defendant Putnam County Canvassing Board did not examine the tabulation of the ballots cast in such precinct or determine whether the returns correctly reflect the votes cast.

28. Defendant Putnam County Canvassing Board's violation of the laws governing alleged missing or omitted returns constitutes misconduct sufficient to change or place in doubt the result of the election.

***Misconduct by Putnam County Canvassing Board – Canvassing Board Members Absent
During Proceedings***

29. Although Florida law permits a canvassing board to employ clerical assistance in conducting the work of the board, at least one member of the canvassing board must be present at all times until the canvass of the returns is completed.

30. On several occasions throughout the canvassing and recount process, members of the public witnessed the work of the canvassing board being conducted outside the presence of any

member of the Putnam County Canvassing Board.

31. Specifically, at 4:36 p.m. on Thursday, November 10, 2016, a member of the public witnessed the scanning of ballots with no members of the canvassing board present in the room. On the following day, Friday, November 11, 2016, a member of the public witnessed Nancy Harris, the only canvassing board member in the room, leave the room unattended at 11:13 a.m. while ballots were out on tables being gathered as the ICE machines were closed up after the automatic recount.

32. Defendant Putnam County Canvassing Board's violation of the laws requiring at least one member of the Canvassing Board to be present at all times during the canvassing of returns constitutes misconduct sufficient to change or place in doubt the result of the election.

***Misconduct by Putnam County Canvassing Board –
Exclusion of Ballots From Manual Recount***

33. On November 11, 2016, the Putnam County Canvassing Board convened to conduct a manual recount of overvotes and undervotes that had been sealed in a pink bag with seal number 1352335.

34. At the commencement of this meeting, the public was informed that the pink bag sealed with seal number 1352335 contained 769 ballots containing overvotes and undervotes in the Putnam County Sheriff contest that had been segregated in the event a manual recount was required.

35. After the sealed bag was opened to begin the manual recount, a stack of ballots was removed from the bag. Canvassing Board member Nancy Harris identified these removed ballots as "provisional." The same stack of ballots was then taken to the rear of the room, away from public, where Canvassing Board Chair Morris identified them as "write-ins" that were "mixed in."

36. Chair Morris then announced to the public assembled to witness the manual recount:

Just to let y'all know, I'm gonna leave the room with this batch of ballots. I'm gonna leave the room with them because we're counting undervotes, these were inadvertently put in the bag with the undervotes. They've already been counted. They've, we just don't want them in here so that we get them mixed up, we're gonna place them in the vault.

37. Following the manual recount, the Canvassing Board announced a vote count in the Sheriff's contest of 15,857 for Plaintiff Kinney and 15,870 for Defendant DeLoach.

38. The Board certified Defendant DeLoach's election as Putnam County Sheriff on November 18, 2016, by a total of 15,869 votes counted for Defendant DeLoach and 15,853 votes counted for Plaintiff Kinney seemingly excluding all votes accepted during the manual recount.

39. Defendant Putnam County Canvassing Board's "mixing in" ballots to a "sealed bag," its decision to remove an unstated number of ballots from the sealed bag containing overvotes or undervotes in the Putnam County Sheriff's race before the manual recount, and its exclusion of votes counted during the manual recount constitute misconduct sufficient to change or place in doubt the result of the election.

Misconduct by Canvassing Board member Nancy Harris – Service by Disqualified Member

40. Florida law prohibits canvassing board members from actively participating in the campaign or candidacy of any candidate who has opposition in the election being canvassed.

41. On June 6, 2016, Putnam County Commissioner Chip Laibl was disqualified as a member of the Putnam County Canvassing Board because he had personally contributed to the campaign of a candidate with opposition in the election being canvassed.

42. On June 14, 2016, County Commissioner Nancy Harris was appointed as a substitute member of the Putnam County Canvassing Board. At the time of her appointment, Commissioner Harris was explicitly advised by the Putnam County Attorney that she was

prohibited from contributing to candidates or otherwise actively participating in the campaign or candidacy of any candidate with opposition.

43. The county's campaign finance records reflect that, despite the explicit instruction from counsel, Commissioner Harris made another campaign contribution to a candidate with opposition on the 2016 General Election Ballot on August 10, 2016.

44. Although Commissioner Harris should have been disqualified from service on the canvassing board based on this contribution, and had knowledge that her actions were disqualifying, she continued to serve as a member of the Putnam County Canvassing Board for the General Election.

45. Commissioner Harris's participation on the Canvassing Board constitutes misconduct sufficient to place in doubt the result of the election.

Misconduct by Canvassing Board Member and Supervisor of Elections Charles Overturf

46. As soon as the polls are closed, Florida law requires all voting devices to be secured against further voting.

47. As soon as the polls are closed, Florida law requires verification, in the presence of members of the public desiring to witness the proceedings, that the number of voted ballots, unused ballots, provisional ballots, and spoiled ballots corresponds to the number of ballots issued by the supervisor of elections.

48. If there is a difference between the number of voted ballots, unused ballots, provisional ballots, and spoiled ballots and the number of ballots issued by the supervisor of elections, this fact shall be reported in writing to the county canvassing board with the reasons therefor if known.

49. On information and belief, Supervisor of Elections Overturf failed to secure the voting

devices against further voting following the closing of the polls.

50. On information and belief, Supervisor of Elections Overturf failed to verify, in the presence of members of the public desiring to witness the proceedings, that the number of voted ballots, unused ballots, provisional ballots, and spoiled ballots corresponds to the number of ballots issued by the supervisor of elections..

51. On information and belief, Supervisor of Elections Overturf failed to report in writing to the county canvassing board the reasons for any discrepancy between the number of voted ballots, unused ballots, provisional ballots, and spoiled ballots and the number of ballots issued by the supervisor of elections.

52. Supervisor of Elections Overturf's actions constitute misconduct sufficient to place in doubt the result of the election.

Receipt of Illegal Votes Sufficient to Change or Place in Doubt the Result of the Election

53. Under Florida law, only a legal resident of Putnam County may register and vote in elections in Putnam County.

54. In the November 8, 2016, General Election, individuals who were not legal residents of Putnam County cast vote-by-mail ballots in Putnam County that were accepted by the Canvassing Board in the General Election.

55. Plaintiff has specifically learned that voters who are lawful residents of North Carolina were permitted to register and cast ballots in the General Election in Putnam County.

56. The individuals living in North Carolina were reported to Supervisor of Elections Overturf on allegations of potential voter fraud following the 2016 Primary Election.

57. Rather than investigating the voter fraud as outlined by Florida Statutes Section 104.42, Supervisor Overturf knowingly allowed the residents of North Carolina to register using the

Supervisor of Elections office “2509 Crill Ave., Suite 900, Palatka, FL 32177” as their registration address.

58. On information and belief, the certification of election includes the tabulation of ballots cast by other ineligible voters to be more specifically identified through discovery.

59. Plaintiff reserves the right to amend this Complaint to further allege the receipt of additional illegal votes as they are identified through discovery.

60. The receipt of illegal votes is sufficient to change or place in doubt the result of the election.

RELIEF SOUGHT

Wherefore, Plaintiff Jonathan Kinney requests a judgment:

a. Declaring invalid the Putnam County Elections Canvassing Commission’s certification of election of Homer D. DeLoach, III, as Putnam County Sheriff;

b. Declaring void the election of Homer D. DeLoach, III, as Putnam County Sheriff;

c. Declaring that Plaintiff Kinney has established his right to the office of Putnam County Sheriff;

d. If Homer D. DeLoach, III, has been commissioned or has entered upon the duties of the office of Putnam County Sheriff, entering a judgment of ouster against Defendant DeLoach;

d. In the alternative, should the Court conclude that the true winner of the election cannot be determined, declaring a vacancy in office in the position of Putnam County Sheriff to be filled as provided by law; and

e. Providing additional relief as this Court deems just and proper.

Respectfully submitted,

Keller Legal

/s/ Zachery Lucas Keller

Zachery Lucas Keller, FBN: 109146

Service email address: zkeller@kellerlegal.org

417 St. Johns Avenue, Suite 8

Palatka, Florida 32177

(386) 530-2279 (telephone)

(888) 383-9077 (facsimile)

Co-counsel for Plaintiff Jonathan Kinney

SHUTTS & BOWEN LLP

/s/ Daniel E. Nordby

DANIEL E. NORDBY (FBN 014588)

Email: dnordby@shutts.com

DEEDEE BITRAN (FBN 123493)

Email: dbitran@shutts.com

SHUTTS & BOWEN LLP

215 South Monroe Street, Suite 804

Tallahassee, Florida 32301

(850) 521-0600

-and-

200 East Broward Boulevard, Suite 2100

Fort Lauderdale, Florida 33301

(954) 524-5505

Counsel for Plaintiff Jonathan Kinney