

**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: 54-2016-CA-425CAAXMX
Division: Circuit Civil

**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.

**PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff Jonathan Kinney moves for the entry of a preliminary injunction preventing Defendant Homer D. DeLoach, III, from taking the oath of office for Putnam County Sheriff or otherwise entering upon the duties of that office pending a final judgment by this Court on the Election Contest Complaint. Under the circumstances of this case, a preliminary injunction preserving the status quo for the short time necessary to resolve this case on the merits is warranted and would serve the public interest.

BACKGROUND FACTS

This case involves a contest of the election for the office of Sheriff of Putnam County. The facts supporting this motion are set forth at length in the Election Contest Complaint. In accordance with Florida Rule of Civil Procedure 1.130, Plaintiff hereby incorporates all statements made in the Complaint into this Motion.

To summarize those facts, the election for Putnam County Sheriff was decided by a very narrow margin. On election night, the returns reflected that Plaintiff Kinney had prevailed in the election over Defendant DeLoach by a margin of 18 votes. Two days later, the Supervisor of Elections announced that an additional 428 vote-by-mail ballots (the “Suspect Ballots”) had been located and tabulated. 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 in favor of Defendant DeLoach, accounting for nearly the entire margin reflected in the Canvassing Board’s final certified results. If the Suspect Ballots had not been included, Plaintiff Kinney rather than Defendant DeLoach would have been certified as the prevailing candidate for the office of Putnam County Sheriff.

But the inexplicable discovery of more than 400 ballots after Election Day was not the only flaw in the canvassing process. Throughout the canvassing and recount process, members of the Putnam County Canvassing Board violated Florida’s Sunshine Law by meeting and deliberating in a closed “back conference room” not accessible to members of the public. At other times, the Canvassing Board violated the Election Code by absenting themselves from the room while ballots continued to be scanned with no Canvassing Board oversight. And at the commencement of the manual recount, members of the public witnessed a “stack” of ballots being removed from a sealed bag that purportedly contained the overvoted and undervoted ballots. The “stack” of ballots was taken from the room and never included in the manual recount.

In addition to the Suspect Ballots and Canvassing Board misconduct, ballots were cast illegally in the General Election by individuals who were not eligible to vote in Putnam County. The receipt of these illegal ballots is sufficient to change or place in doubt the result of the election.

LEGAL STANDARD FOR THE ENTRY OF A PRELIMINARY INJUNCTION

“The primary purpose of a temporary injunction is to preserve the status quo while the merits of the underlying dispute are litigated.” *Gawker Media, LLC v. Bollea*, 129 So.3d 1196, 1199 (Fla. 2d DCA 2014) (quoting *Manatee Cnty. v. 1187 Upper James of Fla., LLC*, 104 So.3d 1118, 1121 (Fla. 2d DCA 2012)). A party seeking a preliminary injunction must establish the following criteria: 1) the likelihood of irreparable harm; 2) the unavailability of an adequate remedy at law; 3) substantial likelihood of success on the merits; and 4) consideration of the public interest. *Reserve at Wedgefield Homeowners' v. Dixon*, 948 So.2d 65, 67 (Fla. 5th DCA 2007).

Establishment of these elements carries with it the duty to grant an appropriate remedy — in this case, injunctive relief. *See Sentry Ins. v. Dunn*, 411 So. 2d 336, 336 (Fla. 5th DCA 1982) (“While a temporary or preliminary injunction is an extraordinary remedy which should be sparingly granted, the establishment of legal rights carries with it the duty to grant an appropriate remedy”). The appropriate remedy here is a narrowly crafted injunction preserving the status quo for the short time necessary to resolve this matter on the merits.

ARGUMENT

I. Plaintiff will suffer irreparable harm in the absence of an injunction and has no adequate remedy available at law.

Plaintiff, Jonathan Kinney, will suffer irreparable harm if this Court declines to enter the requested injunction. But for the misconduct by the Canvassing Board as stated in the Election Contest Complaint, Plaintiff would have been certified as the prevailing candidate and would be preparing to assume office as the next Putnam County Sheriff. The harm experienced by Plaintiff cannot adequately be compensated if, at the conclusion of this litigation, he is ultimately

determined to be entitled to the office. The quintessential remedy at law—money damages-- certainly cannot remedy Plaintiff’s harm in being deprived from the exercise of the duties of public office. Nor can any loss of goodwill or reputational harm to Plaintiff in the interim be adequately addressed by any remedy at law.

Under section 102.1682, Florida Statutes, a contestant who prevails in an election contest is entitled to a judgment of ouster against an opponent who has been commissioned and found to hold the office in error. Although this remedy is an important aspect of the *ultimate* relief, it cannot provide complete *interim* relief in the manner of a preliminary injunction. Ouster is therefore an insufficient and inadequate remedy as compared to a preliminary injunction.

In an interlocutory appeal arising out of an election contest case, the First District Court of Appeal recently issued a constitutional stay writ prohibiting a city commissioner from taking the oath of office pending entry of a final judgment on the election contest. *Jackson v. Leon County Canvassing Bd.*, Case No. 1D16-5205, 2016 WL 6901444 (Fla. 1st DCA Nov. 23, 2016). Like the First District, this Court should act to preserve the status quo until this case is resolved on the merits to avoid irreparable harm to Plaintiff and to maintain the status quo.

II. Plaintiff has a substantial likelihood of success on the merits.

Although discovery in this case is ongoing, both the facts discovered to this point and the law point to a substantial likelihood of success on the merits. The Election Contest Complaint identifies numerous examples of misconduct and violations of the law by members of the Canvassing Board. The misconduct included violations of the Sunshine Law, the improper inclusion of 428 Suspect Ballots, the failure of Canvassing Board members to be present and provide oversight throughout the canvassing process, the improper exclusion of a “stack” of ballots from the manual recount, participation on the Canvassing Board by a member who

contributed to the campaign of a candidate in an election being canvassed, and failure to properly secure voting equipment. The Election Contest Complaint also identified at least two ballots allegedly cast by ineligible voters, while even more have been identified through preliminary discovery and public records requests.

Under the law, even *unintentional* misconduct by elections officials can require a court to void an election when the negligence is so pervasive that it thwarts the will of the people. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So.2d 720, 725-26 (Fla. 1998). The factual evidence supporting the many examples of misconduct identified in the Complaint readily surpass that standard.

Plaintiff has established a substantial likelihood of success on the merits.

III. The public interest would be served by entry of a preliminary injunction preserving the status quo until this case is resolved.

The Florida Supreme Court has noted that the people have “a right to an orderly election.” *Yorty v. Stone*, 259 So. 2d 146, 149 (Fla. 1972). Nearly 45 years later, the citizens of Putnam County also have a strong public interest in ensuring the integrity of the election process and in preserving continuity in the office of sheriff. A preliminary injunction preserving the status quo would be consistent with that public interest and with precedent.

Under the Florida Constitution, state and county officers shall “continue in office until a successor qualifies.” Art. II, § 5(b), Fla. Const. Under longstanding precedent, an incumbent officeholder whose term has expired “holds over” in that office as a *de jure* officer until such time as a successor has taken the oath of office and otherwise qualified for office. *See, e.g., State ex rel. Landis v. Bird*, 120 Fla. 780, 820-21, 163 So. 248, 265 (Fla. 1935) (affirming authority of *de jure* officers); *Tappy v. State ex rel. Byington*, 82 So. 2d 161, 166 (Fla. 1955) (reversing

judgment of ouster and affirming authority of outgoing governor to exercise and perform all the duties and powers of office until successor has qualified by taking the oath of office).

In *Masters v. State*, 100 Fla. 1660, 1665 (1931), the Florida Supreme Court confirmed that a *de jure* officer who holds over during the pendency of an election contest to determine his successor is entitled to continued compensation during the extended term. As a constitutional matter, therefore, the entry of a preliminary injunction in this case would simply extend the service of the current Putnam County Sheriff, Jeff Hardy, for a short time until his successor is determined through this litigation. The public's interest would be well-served by the entry of such an order to ensure an orderly succession in the office of sheriff.

CONCLUSION

For all of the reasons stated in this motion, entry of an injunction preserving the status quo is the "most sensible and expedient remedy" available to the Court. *NRD Investments, Inc. v. Velazquez*, 976 So.2d 1, 4 (Fla. 3d DCA 2007). This Court should enter an order preliminarily enjoining Defendant DeLoach, until a Final Judgment has issued in this case, from:

1. Taking the oath of office for Sheriff of Putnam County; and
2. Accepting a commission as Sheriff of Putnam County; and
3. Qualifying as Sheriff of Putnam County; and
4. Entering upon the duties of the Sheriff of Putnam County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this document was served by email on December 29, 2016, to:

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