

**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: 2016-CA-425
Division: 53

**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.

FINAL JUDGMENT

The matter that came before the Court for final hearing on April 12, 2017, is an election contest filed pursuant to Section 102.168(3)(c), Florida Statutes, contesting the results of the race for Putnam County Sheriff (the "Sheriff's Race") held during the November 8, 2016 General Election ("the General Election"). Plaintiff, Jonathan Kinney ("Kinney" or "Plaintiff"), initiated this lawsuit by filing an Election Contest Complaint ("the Complaint") on November 28, 2016. The Complaint named the Putnam County Canvassing Board (the "Canvassing Board"), by and through its members Nancy Harris, Elizabeth Ann Morris, and Charles L. Overturf, III ("Supervisor Overturf"), and Homer D. DeLoach, III ("DeLoach"), as Defendants. During the evidentiary hearing, two witnesses testified: Supervisor Overturf and Carolyn Faunce, Chief Deputy of Elections Operations in the Putnam County Supervisor of Elections Office. In addition, Joint Exhibits 1-69 were admitted into evidence without objection by any of the Parties.

FINDINGS AND CONCLUSIONS

I. Background

(a) The Sheriff's Race

Three candidates ran for Sheriff of Putnam County in the General Election. The vote difference between Kinney and DeLoach was narrow enough that the Canvassing Board conducted a mandatory machine recount of all ballots pursuant to Section 102.141(7), Florida Statutes, followed by a manual recount. On November 18, 2016, following completion of the recounts, the Canvassing Board certified DeLoach as the winner of the Sheriff's Race over Kinney by a margin of 16 votes. There were 33,488 canvassed ballots cast in the General Election. There were 32,717 votes cast in the Sheriff's Race, meaning that 771 voters who cast canvassed ballots in the General Election did not vote in the Sheriff's Race.

(b) The Election Contest

The Complaint contained seven grounds for contesting the results of the Sheriff's Race. The first six grounds alleged misconduct by the Canvassing Board or members of the Canvassing Board. The seventh ground alleged the "[r]eceipt of a number of illegal votes . . . sufficient to change or place in doubt the results of the [Sheriff's Race]." *Section 102.168(3)(c), Florida Statutes*. The record and evidence indicate that extensive discovery and research were conducted by Kinney in the pursuit of his claims. In the Joint Pre-Trial Stipulation, the parties agreed that only the seventh ground remained to be pursued at trial, the other six claims pertaining to misconduct having been abandoned by Plaintiff. Thus, the sole issue to be resolved in this election contest is whether a sufficient number of illegal votes were received to change, or place in doubt, the result of the Sheriff's Race in the General Election. *Section 102.168(3)(c), Florida Statutes*. On this remaining claim, plaintiff seeks a judgment of "ouster" pursuant to Section

102.1682, Florida Statutes, or, in the alternative, a declaration of a vacancy in the office of Sheriff of Putnam County, to be filled by gubernatorial appointment.

Plaintiff's case focuses entirely upon 42 "illegal votes" of the 33,488 canvassed ballots cast in the General Election. Plaintiff alleges that 40 of the "illegal votes" were cast by voters who were ineligible to vote, and that two of the ballots were accepted and processed (canvassed) in violation of the applicable statute, such that, they too, were illegal votes (albeit presumably cast by legal voters).

This Court has jurisdiction pursuant to 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. The Court also has jurisdiction under Section 86.011, Florida Statutes, to issue the declaratory relief sought in this action. This election contest is governed by the Florida Election Code, Chapters 97-106, Florida Statutes.

This election contest is timely under Section 102.168(2), Florida Statutes. Pursuant to Section 102.1685, Florida Statutes, the venue for the election contest of the Sheriff's Race is in Putnam County, Florida.

(c) The Burden of Proof

Although there is no dispute that Section 102.168(3) places the burden of proof in this matter on Plaintiff as the election contestant, there is some dispute amongst the parties as to the applicable burden of proof. Defendant DeLoach argues that plaintiff should be required to prove his case "by a standard greater than preponderance of the evidence." While numerous courts have cautioned that extreme care must be applied in post-election challenges (*See Burns v. Tondreau*, 139 So.3d 481 (Fla. 3d DCA 2014)), and that election contest statutes must be strictly construed (*See McPherson v. Flynn*, 397 So.2d 665 (Fla. 1981)), no court has held that a

standard of proof higher than preponderance of the evidence applies in election contests. Accordingly, the court shall apply the preponderance of the evidence standard in this matter, as the traditional evidence standard applicable in civil cases. *South Florida Water Mgmt. v. RLI Live Oak, LLC*, 139 So.3d 869 (Fla. 2014).

II. What is an Illegal Vote?

In his post-trial brief, Plaintiff points out that the Florida Election Code does not include a definition of “illegal vote.” He notes that *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 by plaintiff). The two categories of “illegal votes” at issue in this matter are (1) votes cast by allegedly “illegal voters,” and (2) votes cast in a form or manner that does not comply with applicable rules.

(a) Illegal Voters

Section 97.041, Florida Statutes, prescribes the qualifications to register or vote. A person must be 18 years of age, a citizen of the United States, and a legal resident of Florida and the county in which the person seeks to be registered. A person otherwise qualified may not register or vote if (a) he or she has been adjudicated mentally incapacitated with respect to voting and has not had his or her right to vote restored, or (b) he or she has been convicted of any felony and has not had his or her right to vote restored. Voter registration books must be closed on the 29th day before each election, and must remain closed until after that election. *Section 97.055, Florida Statutes.*

The Secretary of State is the chief election officer of the state, and is responsible for implementing, operating and maintaining a uniform, centralized official statewide voter

registration system (“the Statewide System”). The Statewide System must contain the name and registration information of every legally registered voter in the state, and constitutes the official list of registered voters in the state. The Statewide System enables the various Supervisors of Election to provide, access, and update voter information. *Section 98.035, Florida Statutes.*

Each Supervisor of Elections must determine whether any voter registration applicant is ineligible to vote based on the various disqualifiers noted above, such as felony conviction, incompetency, and legal residence. *Section 98.045(1), Florida Statutes.*

“Once a voter is registered, the name of that voter may not be removed from the statewide voter registration system except. . . by reason of the voter’s conviction of a felony or adjudicated as mentally incapacitated with respect to voting, by death of the voter, or pursuant to a registration list maintenance activity conducted pursuant to [Section] 98.065 or [Section] 98.075.”

Section 98.045(2)(a), Florida Statutes.

The process for removing a voter from the Statewide System is initiated by the State Division of Elections (“the Division of Elections”) by electronically notifying the Supervisor of Election’s office. The Supervisor’s Office then reviews the information provided by the Division of Elections, and, if the information appears accurate, the Supervisor’s Office initiates the due process procedures required by statute. This process is initiated by the Supervisor of Elections providing the voter notice by certified mail within seven days of receipt of notice from the Division of Elections. The notice to the voter includes a statement of the basis for the voter’s potential ineligibility, along with the documentation provided by the Division of Elections; a statement that failure to respond within 30 days after receipt of the notice could result in the voter being removed from the system; and, a form informing the voter of the right to a hearing before the Supervisor of Elections to determine his or her voter eligibility. If the voter does not respond to the notice or if the notice is returned as undeliverable, the Supervisor’s Office must

publish notice in a local paper of general circulation and allow the voter 30 days from publication of the notice to respond. If a voter requests a hearing, the Supervisor of Elections must schedule a hearing to allow the voter to provide additional information to the Supervisor of Elections. Finally, a voter has the right to appeal the Supervisor of Election's eligibility determination to the Circuit Court. *Section 98.075, Florida Statutes.*

Section 98.093(1), Florida Statutes, creates a process for identifying "ineligible registered voters" by requiring numerous state and local agencies - including the Florida Department of Health, the Clerks of Circuit Courts, the Florida Department of Law Enforcement and the Florida Department of Corrections - to provide criminal records and the records of deceased persons to the Division of Elections. However, if a Supervisor receives information from sources other than these that a registered voter may be ineligible (including by reason of death), the Supervisor must, nevertheless, adhere to these same due process procedures described above prior to the removal of a registered voter from the Statewide System. *Section 98.075(6), Florida Statutes.*

(b) Nonconforming Votes

Likewise, Chapters 101 and 102, Florida Statutes, contain very detailed specifications for the methods and procedures related to conducting elections, including precinct voting, ballots, equipment, voting by mail, canvassing, reporting, and recounts. Failures or discrepancies with respect to these mandated processes and procedures can lead to the other type of nonconforming, "illegal vote" as succinctly defined by *Black's*. Examples could include canvassing a ballot that lacked signatures or witnesses, failing to compare signatures, or, as alleged in this case, accepting a vote-by-mail ballot after a deadline.

III. The 42 Potentially Illegal Votes

The 42 canvassed ballots at issue in this lawsuit include 40 potentially ineligible voters, described as follows:

- a. 32 potential felons (19 identified by Kinney and 13 identified by the Division of Elections);
- b. 1 potentially incapacitated person;
- c. 3 voters who cast vote-by-mail ballots that were postmarked or received by the Supervisor's Office after the voters died;
- d. 1 voter who allegedly voted in Florida and another state;
- e. 3 voters who allegedly do not reside in Putnam County.

The other 2 ballots in question are vote-by-mail ballots alleged to be non-conforming for the Supervisor's Office having accepted them after the 7 p.m. deadline on Election Day. (The voters who cast these ballots are not alleged to be illegal voters.)

Each of these 42 potentially illegal votes was cast in the General Election. Twenty-nine of the potentially illegal votes were vote-by-mail ballots, and 13 of the potentially illegal votes were cast in person in the General Election (during early voting or at their precinct on election day). It is impossible to independently determine whether any of the 42 potentially illegal votes included votes in the Sheriff's Race because the voters are entitled to cast a secret ballot.¹ For the same reason, it is impossible to determine for whom any of the subject voters voted in the Sheriff's Race (if they even voted in the Sheriff's Race).

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

(a) The 40 Potentially Ineligible Voters

1. 32 Alleged Felons

Kinney has identified 19 potential felons as part of this lawsuit. Each of the 19 potential felons cast vote-by-mail ballots in the General Election. Upon learning of Plaintiff's (post-election) allegations concerning the potential ineligibility of these 19 voters, the Supervisor's Office forwarded the voters' names to the Division of Elections for processing. As of the date of trial, 1 of the 19 had been removed from the Statewide System pursuant to Section 98.075; 14 were in the process of removal (such that the voters remained eligible to vote on April 12, 2017); and, no information had been provided by the Division of Elections on the other 4 (such that they, too, remained eligible voters as of the date of trial).

In addition, the Division of Elections notified the Supervisor's Office of 13 potential felons who voted in person during the General Election. As of the date of trial, 9 of these 13 voters have been processed under the provisions of the removal statute, and have been removed from the Statewide System. The other 4 are in the process but remain in the Statewide System and are eligible to vote.

Thus, of the 32 potential felons identified after the General Election, the Supervisor's Office has removed 10 of the 32 voters from the Statewide System. The other 22 voters remain in the Statewide System, and their eligibility under Section 98.075, Florida Statutes, has not been determined. Unequivocally, these 32 individuals were registered voters, and were included in the Statewide System at the time they voted in the General Election. No party to this lawsuit, or anyone else, has identified or questioned the eligibility of any of these 32 voters prior to the General Election or during the recount conducted by the Canvassing Board in the Sheriff's Race. Whether or not any of these voters have committed criminal actions is not at issue in this matter.

Instead, this Court must determine if these 32 voters cast “illegal votes” as that term is used in Section 102.168(3)(c), Florida Statutes.

Section 98.075(7), Florida Statutes, provides additional legislative guidance relevant to the determination of whether these 32 votes are “illegal votes.” As noted, Section 98.075(7), Florida Statutes, creates a specific procedural mechanism for removal of a voter from the Statewide System, affording and insuring a voter’s due process rights related to removal. *See also Adams v. Dade County*, 202 So. 2d 585, 588 n. 5 (Fla. 1967) (before a voter can be removed from the voter rolls, he must be provided notice and the opportunity to be heard). Section 98.075(7), Florida Statutes, expressly provides that until a voter is granted all the procedural protections specifically created by the Florida Legislature in that section, the voter’s status is “potentially ineligible” and the voter cannot be removed from the Statewide System.

Accordingly, this Court concludes that the votes cast by these 32 voters cannot be considered illegal votes unless the voter had been afforded his or her due process rights under Section 98.075(7), Florida Statutes, and removed from the Statewide System. Such had not occurred, 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.

2. 1 Voter Adjudged As Incapacitated

After the General Election, the Division of Elections notified the Supervisor’s Office of one potentially mentally incapacitated voter who cast a vote-by-mail ballot during the General Election. This voter requested a vote-by-mail ballot in October 2016, and was adjudicated incapacitated to vote on November 5, 2016. Two days later, he cast his vote-by-mail ballot. No party to this lawsuit, or anyone else, has identified or questioned the eligibility of this voter prior to the General Election or during the recount conducted by the Canvassing Board. No evidence

was introduced indicating that this voter voted in the Sheriff's Race, and if the voter did so, for whom he or she voted. As of the day of trial, the Supervisor's Office was in the process of determining the eligibility of this potentially mentally incapacitated voter pursuant to Section 98.075, Florida Statutes, and the voter remained registered in the Statewide System.

Accordingly, for the same reasons expressed above with respect to the alleged felons, the Court finds that the vote cast by this individual cannot be considered illegal, and Plaintiff failed to meet his burden of establishing that this vote cast in the General Election is an illegal vote.

3. 3 Voters Who Cast Vote-by-Mail Ballots That Were Postmarked Or Received
By The Supervisor's Office After The Voter Died

Kinney identified three voters who cast vote-by-mail ballots that were postmarked or received by the Supervisor's Office *after* the voters died. It is undisputed that each of the three voters signed and dated their ballots before they died. Further, Supervisor Overturf testified that their signatures matched. However, the evidence also clearly establishes that each of these three voters' ballots were postmarked or received by the Supervisor's Office after the voters died. Section 101.6103(8), Florida Statutes, provides that a ballot otherwise comporting with statutory requirements shall be counted even if the elector dies after mailing the ballot but before election day as long as prior to death the ballot was postmarked or date stamped and in the possession of the Supervisor.

At the time the Supervisor's Office received the three vote-by-mail ballots and processed the ballots, neither the Division of Elections nor any other party had provided notice to the Supervisor's Office of the voters' deaths. Further, there is no evidence to indicate whether any of these three voters voted in the Sheriff's Race, and if they voted, for whom they voted.

No party to this lawsuit, and no other party, identified or questioned the eligibility of any of these three voters prior to the General Election, or during the recount conducted by the Canvassing Board in the Sheriff's Race.

Here again, all three of these voters were eligible voters validly registered with the Statewide System. The Supervisor's Office did not know of their deaths. Moreover, even if the Supervisor's Office had been informed of their deaths, the statutory scheme provided under Sections 98.045(1) and 98.075 would not have permitted the removal of these individuals from the rolls without fulfilling the due process requirements of the law. The Court acknowledges that leaves remaining the question of whether the Supervisor or Canvassing Board could have rejected these votes had they been informed of the deaths and the post-mortem ballot delivery, before final certification of the vote. Had such occurred, the Supervisor and Canvassing Board could have known they were illegal and may have rejected them. Not having known, the Court cannot conclude that the acceptance and canvassing of these votes constituted substantial non-compliance with statutory election procedures. *See Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998).

Query whether this analysis would apply with respect to the alleged felons. If the Supervisor had been informed by an appropriate agency of a convicted felon having voted in the General Election, should the Canvassing Board have rejected the vote? The Florida Legislature has provided a process by which individuals are allowed to register to vote. Likewise, the Legislature has provided for removal of individuals who are registered to vote. However, the Legislature has not provided any guidance on what should occur or what actions are to be taken by election officials concerning a registered voter whose qualifications are in question during the course of the election itself. Nonetheless, the Court sees a distinction between deceased voters

and the alleged felons in this case. Death can be confirmed by a death certificate. On the other hand, not all information provided by the Division of Elections to the Supervisor's Office concerning potentially ineligible voters is accurate. The information provided by the Division of Elections sometimes contains mistakes. Supervisor Overturf testified that he handled a case in which a voter, who had been identified by the Division of Elections as an ineligible voter and removed from the Statewide System, had to be reinstated when it was determined that the information concerning his potential ineligibility was not accurate or complete. Carolyn Faunce testified she has found errors in information received from the Division of Elections which has resulted in termination of the removal process under Section 98.075.

For all of these reasons, and while acknowledging that these three votes were technically illegal, the Court finds that they were not improperly canvassed or included in the final tally.

4. 1 Voter Who Allegedly Voted in Two States

The plaintiff identified one voter who allegedly cast vote-by-mail ballots in both Florida and New Jersey during the General Election. The voter 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. At the time the Supervisor's Office received the vote-by-mail ballot cast by this voter, neither the Division of Elections nor any other person had informed the Supervisor's Office that the voter had also cast a vote-by-mail ballot in New Jersey. There is no evidence to indicate that the voter voted in the Sheriff's Race, and if the voter voted in the Sheriff's Race, for whom the voter voted. Of course, the voter did not vote for Sheriff of Putnam County on the New Jersey ballot. No provision of the Florida Election Code specifically

addresses whether a vote cast in Florida in a county election is an illegal vote if the voter also cast a ballot in another state. Accordingly, the Court concludes that this was not an illegal vote.

5. 3 Voters Who Allegedly Do Not Reside In Putnam County

Kinney identified three voters who cast vote-by-mail ballots in the General Election that he contends do not reside in Putnam County. The three voters were deposed during the course of these proceedings. Two of the voters are a married couple who presently reside in North Carolina. Supervisor Overturf testified that he received a complaint from a third party about the residency status of these two voters after the August 2016 Primary Election. Thereafter, Supervisor Overturf sent an e-mail to Maria Matthews, the Director of the Division of Elections, in which he requested guidance from Ms. Matthews. In the e-mail he noted that the voters sold their house in Putnam County in 2015, and no longer owned property in the County. He also indicated that they had cast vote-by-mail ballots from their home in North Carolina for the past 3 or 4 years.

Ms. Matthews sent two e-mails in response to Supervisor Overturf's inquiry. The first e-mail outlined five general courses of action Supervisor Overturf could pursue. Her second email instructed as follows:

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

* * *

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

Supervisor Overturf relied on Ms. Matthews' second e-mail in making a determination concerning the residency status of these two voters. In addition, Supervisor Overturf contacted one of the voters, who confirmed "in no uncertain terms, that it was [the voter's] intent to remain a voter of Putnam County from here on out as long as the state would allow her to." Critically, these voters are not registered to vote in any other state. They are properly registered at the precinct designated as the Supervisor's Office. Supervisor Overturf testified that, given the voters' intent, he believes they are residents of Putnam County.

The deposition testimony of the third voter indicates the following:

- a. the voter considers his residence to be 150 River Drive, East Palatka, Putnam County, Florida;
- b. the voter's Florida Driver's License lists 150 River Drive, East Palatka, the home in which he was raised, as his home address;
- c. the voter still receives mail at the 150 River Drive, East Palatka address;
- d. the voter is a long-time resident of Putnam County;
- e. the voter may return to Putnam County to open a new restaurant;
- f. the voter is not registered to vote in any other county in Florida; and,
- g. the voter is not registered to vote in any other state.

Supervisor Overturf testified that, given the voter's intent, he believes the voter is a resident of Putnam County. There was no evidence introduced at trial to establish for whom this voter voted in the Sheriff's Race.

The Florida Election Code requires that a voter must be a "legal resident" of a county to vote in that county. *Section 97.041(1)(a)4, Florida Statutes*. The term "legal resident" is not defined in the Florida Election Code; however, "[l]egal residence consists of the concurrence of

both fact and intention. The bona fides of the intention is a highly significant factor.” *Bloomfield v. City of St. Petersburg Beach*, 82 So. 2d 364 (Fla. 1955). Thus, a voter must decide whether he or she is a legal resident of the county in which the voter claims residency. Moreover, the Supervisor of Elections “is not required to resolve factual disputes in the face of evidence supporting possible legal residence” *Division of Elections Op. 16-01* (Jan. 4, 2016).

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

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

The evidence establishes that the three voters who are registered to vote at the Supervisor’s Office have met the requirements of Section 101.045, Florida Statutes, as voters who are temporarily residing outside Putnam County but who intend to remain residents for purposes of voting in Putnam County. Supervisor Overturf testified that in his capacity as Supervisor of Elections for Putnam County, he believes these voters are residents of Putnam County.

“The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties.... [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the

intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.”

Boardman v. Esteve, 323 So.2d 259, 268-69, n.5 (Fla. 1975).

Accordingly, the Court finds that the actions of Supervisor Overturf were appropriate, and these three votes were not illegal.

(b) 2 allegedly non-conforming ballots

Plaintiff identified two other voters whom he claims cast vote-by-mail ballots after 7:00 p.m. on November 8, 2016. One of the vote-by-mail envelopes bears a time-stamp indicating “Received – Putnam County Supervisor of Elections” on November 8, 2016 at 7:02 p.m. The other vote-by-mail envelope bears a time-stamp indicating “Received – Putnam County Supervisor of Elections” on November 8, 2016 at 7:06 p.m.

Section 101.62(4)(c)5, Florida Statutes, provides that a voter may cast a vote-by-mail ballot at a Supervisor of Election’s office on election day if the voter executes an affidavit swearing that the voter has experienced an emergency and is unable to go to his or her assigned polling place.

Supervisor Overturf described the procedure for accepting vote-by-mail ballots at the Supervisor’s Office on an election day. Continuing a long-standing practice adopted by his predecessor, Supervisor Overturf would allow voters to enter the front lobby of the Supervisor’s Office to request a vote-by-mail ballot up to 7:00 p.m. At precisely 7:00 p.m., a member of his staff, along with an off-duty law enforcement officer, locks the front lobby door to the Supervisor’s Office so that no additional voters can enter the lobby. Any voters then present in the lobby would be allowed to complete their ballots. A few minutes after 7:00 p.m., a member

of his staff would unlock the door to the lobby, after all voters in the lobby had completed casting their vote-by-mail ballots. Supervisor Overturf also testified that procedures in place might allow for such a vote-by-mail ballot to be handed to a member of his staff but not time-stamped as received until after 7:00 p.m. Thus, the time-stamps of 7:02 p.m. and 7:06 p.m. on the subject envelopes do not necessarily mean that the Supervisor's Office received the two vote-by-mail ballots at the time indicated in the time-stamps. Given the procedures in place for processing vote-by-mail ballots received on an election day, the Court concludes that these two vote-by-mail ballots were utilized by voters physically present in the Supervisor's Office before 7:00 p.m., at which time the door to the lobby of the Supervisor's Office was locked. Plaintiff has failed to prove otherwise. The two subject voters cast their vote-by-mail ballots on November 8, 2016, in the lobby of the Supervisor's Office after completing the required affidavit. No party to this lawsuit and no other person questioned the timeliness of these two ballots during the recount conducted by the Canvassing Board. No evidence has been introduced to establish that either of these two voters voted in the Sheriff's Race, and if they voted in the Sheriff's Race, for whom they voted.

Supervisor Overturf also testified that, in his capacity as Supervisor of Elections for Putnam County, he believes these ballots should be counted because it reflects his policy "to err on the side of the voter." *See, e.g., Boardman, supra.*

Accordingly, the Court finds that Plaintiff has failed to meet his burden of proving that these two ballots were received by the Supervisor's Office after 7:00 p.m. on election day. The Court further finds that the actions of Supervisor Overturf were appropriate, and these votes were not illegal.

IV. Protecting Fundamental Rights

The right of qualified individuals to vote is a fundamental and foundational right protected by the constitutions of the United States and the State of Florida. *B.A. Reynolds v. M.O. Sims et al.*, 377 U.S. 533 (1964); *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000)(overruled on other grounds, *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000)). Equally fundamental is the right of the individual to have his or her vote ‘put in the box’ and counted. *B.A. Reynolds*, 377 U.S. at 554. “Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens’ right to vote.” *Palm Beach County Canvassing Board*, 772 So.2d at 1237.

It follows that,

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

State ex rel. Barancik v. Gates, 134 So.2d 497 (Fla. 1961)(citing 29 C.J.S. Elections § 48 (1941).

It also logically follows that such a fundamental right cannot be unduly compromised by a post-election challenge to a voter’s eligibility, or to a ballot as invalidly cast or canvassed. “[E]xtreme care must be given to post-election challenges to avoid disenfranchising Florida’s voters.” *Burns v. Tondreau*, 139 So.3d 481 (Fla. 3d DCA 2014)(citing *Levey v. Dijols*, 990 So.2d 688 (Fla. 4th DCA 2008)).

Plaintiff Has Failed to Meet His Burden Under Section 102.168(3)(c), Florida Statutes.

Florida Courts have consistently held that “courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct.” *Bolden v. Potter*, 452 So. 2d 564, 567 (Fla. 1984). Based upon the evidence received in this case, the Court cannot

conclude that the will of the people has been adversely affected. Further, there is no evidence of misconduct by any of the defendants. On the contrary, it appears to the Court that the actions of Supervisor Overturf, his staff, and the Canvassing Board were appropriate.

It is uncontroverted that each of the 42 voters at issue in this lawsuit were registered voters in the Statewide System at the time they voted in the General Election. It is also uncontroverted that no party to the lawsuit challenged the eligibility of any of the 40 voters alleged to be illegal prior to the General Election, or that the two alleged non-conforming were challenged prior to canvassing or recounts. Thus, based on the information available to the Supervisor's Office and the Canvassing Board on election day, each of the 42 votes at issue in this proceeding appeared to be legal. On election day, it became clear that the margin of victory in the Sheriff's Race was extremely narrow (16 votes). This election contest ensued, with the identification of these 42 potential illegal votes determined by Plaintiff after months of extensive research and discovery.

Considering the delineation of illegal votes described in *Black's*, it cannot be said that any of the subject 42 votes were illegal. Rather, this Court's findings and conclusions herein indicate that 39 of the alleged 42 illegal votes were legal votes, and, although 3 votes were cast by deceased voters such that they were technically illegal voters, their ballots were validly canvassed and included. Plaintiff has presented evidence establishing that, as of the date of trial, 10 of the 42 voters had been removed from the Statewide System. Thus, since the Sheriff's Race was decided by 16 votes, Plaintiff has failed to meet his burden of identifying a sufficient number of illegal votes to change or place in doubt the results of the Sheriff's Race. Even if we assume, hypothetically, that more than 16 illegal votes were received in the General Election, Plaintiff has, nevertheless, failed to meet his burden under Section 102.168(3)(c) of establishing

that the votes are sufficient to change or place into doubt the result of the Sheriff's Race. Out of the 42 voters in question, only one testified that he voted for Defendant DeLoach. Plaintiff introduced no evidence that any of the other 41 voters actually voted in the Sheriff's Race. Further, even if we assume, hypothetically, that they did vote in the Sheriff's Race, Plaintiff has not proven for whom they voted. Thus, Plaintiff has failed to "establish his right to such office." *Section 102.168(3), Florida Statutes.*

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


CONCLUSION

For all of the reasons expressed herein, it is hereby **ORDERED** and **ADJUDGED** as follows:

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

DONE and ORDERED in chambers in Green Cove Springs, Clay County, Florida, this

19th day of May, 2017.



GARY L. WILKINSON
Circuit Court Judge

Copies furnished electronically to:

Zachary Lucas Keller (zkeller@kellerlegal.org)

Charles T. Douglas, Jr. (charlie@dhclawyers.com)

Ronald A. Labasky (rlabasky@blawfirm.net)

John T. LaVia, III (jlavia@gbwlegal.com)