DROP BOX

IN TEE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, OF TEE STATE OF FLORIDA

Case No. 97-617

GUS BECKSTROM,

Appellant,

v.

VOLUSIA COUNTY CANVASSING BOARD, and ROBERT L. VOGEL, JR.,

Appellees.

91,642

Appeal from the Final Judgment of the Circuit court,
Seventh Judicial Circuit, Volusia County, Florida
Case Nos. 96-11098-CIDL-01
and 96-11105-CIDL-01

ANSWER BRIEF OF APPELLEES VOLUSIA COUNTY CANVASSING BOARD AND ROBERT L. VOGEL, JR.

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PRELIMINARY STATEMENT

Appellant, Gus Beckstrom, shall be referred to as Appellant. Appellees Volusia County Canvassing Board and Robert L. Vogel, Jr., shall be referred to as Appellees, or separately as Appellee Canvassing Board and Appellee Vogel. Appellees' fundamental interests are distinct, but in view of the common nature of their positions in this appeal file a consolidated answer brief.

References to the record on appeal shall be shown as [R.], while references to the court reporter's transcript of the trial shall be referred to as [T.].

STATEMENT OF TEE FACTS

Appellees believe *an* additional exposition of the facts would be helpful to the court's understanding and resolution of the case.

In the 1996 general election, Volusia County used an optical scan voting system. The system reads a carbon based mark made by the voter in a space next to the office or measure which is printed directly on the ballot. [T.721-22] Systems more tolerant of marks from other types of instruments were not certified for use at the time. [T.722]

At the polls, voters use a black felt pen which is provided to them. [T.732-3] Absentee voters are instructed to use a no. 2 pencil [T.163], but many failed to do so, and their ballots in many cases would be rejected by the machine. Those ballots would then be remarked with a black felt mark placed on top of the voter's original mark which could be read by the machine. [T.731-2] Remarking the ballots was primarily necessitated by the voter's failure to use a proper instrument or to mark the ballot correctly. [T.726, 746] Remarked ballots are also referred to in the record as marked over or overmarked.

The particular type of optical scan system used by the county is used by five other counties. [T.721, 949] Supervisors in three of those counties, Leon, Putnam, and Monroe, testified that ballots are remarked in a similar fashion [T.895, 961, 1007], though in Monroe it is the canvassing board instead of staff that does the marking. [T.961] Their testimony was that such a ballot is not damaged or defective vithin the meaning of the statutes since it

could be processed through the machine, though without having the mark scanned, whereas damaged or defective ballots could not. There was testimony that the two other counties, St. Lucie and Seminole, which use this identical system had processed ballots in a similar fashion [T.721, 728, 731], and that other counties which use other types of optical scan systems do the same. [R. 567] The supervisors of other counties also testified that remarking ballots to carry out the voter's intent was comparable to the practice previously used for punch card voting systems in their counties. In that process, incompletely detached pieces of the card known as hanging chads were removed prior to processing. [R.934, 10073 Volusia County had done the same. [T.988-93] It remains the practice to remove hanging chads in many counties where punch card systems are used. [T. 567]

The remarking procedure has been approved for Leon County by the Department of State for use in processing absentee ballots in its security procedures. [T.904] In spite of the prevailing understanding of elections officials that remarking furthers a voter's intent and conforms to election law, the trial court found that it was not in substantial compliance with section 101.5614(5), Florida Statutes (1995), because it did not provide sufficient verification of the underlying vote [R.720], and its use constituted gross negligence. CR.7201

There was no finding by the trial judge of the number of ballots that were remarked. It is thought some voters also used the same type of commonly available black felt pen used at the polls to originally mark their absentee ballots. [T.577, 1194]

The optical scan system had been in use in previous elections during 1995-96 [T.564, 1158], including the Republican presidential preference primary [T.564, 11503, and demonstrated on numerous occasions [T.564] The Volusia supervisor felt she could distinguish which black marks were made by the voter and which were remarks. [T.1194] Some ballots were remarked by voters with pencil to conform to directions after they first used another instrument. [T.1083, 1163]

However, it is fair to say that most of the ballots shown on the clerk's certificate [R.319-20] as black felt were remarked by elections workers with that type of instrument. The total count of black felt is 5,962.[1] The clerk also counted contested ballots set aside by Appellant in categories Appellant termed "C" and "D," which were ballots marked in a pen similar to the pens used to remark. [T.577] These total 535[2] according to the clerk's certificate [R.319-20]. The total of these two groups on the clerk's certificate is 6,497.[3]

A separate category of contested ballots which total 1,677[4] was counted by the clerk. These ballots were referred to in Appellee Canvassing Board's case as marked with some other instrument than pencil or black felt pen [R.590-7], and are not

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'3,690 contested and 35 uncontested for Vogel; 2,219 contested and 18 uncontested for Beckstrom.

[2]360 "C", 175 "D".

[3]The total obtained by addition of the sum of the counts set forth in the previous two notes, 5,962 and 535.

[4]1,030 Vogel, 647 Beckstrom.

indicated by the clerk as having black felt marking. [R.319-20] They are not included in Appellant's total of remarked ballots.

The trial court found that in a large majority of ballots that were overmarked, the voter's mark beneath the overmark can be seen. [R.718) The court found, though, that *in* a substantial minority of the remarked ballots it is impossible to make a judgment as to whether the voter's mark lies beneath the black overmark. [R.719] The trial court based this finding upon its own inspection of several thousand ballots. [R.718] However, the trial court found no fraud. [R.712, 718-9, 722-3, 725-6] It found that there had been a full and fair expression of the will of the people [T.726], and on the basis of the clerk's manual recount, there was an accurate count of the ballots [R.725]. The result of the clerk's manual recount [R.319-20] was an increased margin among the absentees for Appellee Vogel from 4,997 to 5,212,[5] and a percentage increase from 59.75% [R.257] to 59.9%. [R.590-7]

Appellant's second amended protest and amended complaint was served on December 9, 1996 [R.129], more than 30 days after the election, which for the first time raised alleged defects on the face of the voter's certificates. Plaintiff had not made any protest as to voter's certificates to the Canvassing Board [R.713], which adjourned on November 22, 1996 [R.532], nor had such been

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[5]The certified absentee count was Vogel 15,102, Beckstrom 10,105 [R.257], a difference of 4,997. The clerk's recap [R.325-6] shows Vogel with 10,283 uncontested, 41 separately listed duplicates, and 5,330 contested, a total of 15,644. Beckstrom had 7,258 uncontested, 17 separately listed duplicates, and 3,191 contested, a total of 10,466. The difference (15,644 -10,466) is 5,212.

included in his initial pleadings. [R.92-97, 98-101, 167-9] The court found 885 ballot certificates to be statutorily defective [R.712-3], but no evidence to indicate the ballots had been cast by other than qualified voters. [R.714] The court further found that Plaintiff's challenge was untimely because no challenge had been made as to defects appearing on the face of the certificate under sections 101.6104 and 101.68(2)(c)2, Florida Statutes. [R.713] The timeliness of Appellant's certificate challenge under the time limitation for a contest under section 102.168, Florida Statutes, was determined to be moot. [R.714]

Of the 885 certificates, 308 were witnessed in the office of the supervisor of elections, but did not have the office address put on the envelope [R.713], while 410 were witnessed by a notary public who did not put his or her address. Many of those were witnessed by a Florida notary public [T.297-330] whose address is registered with the Secretary of State, the chief elections official of Florida. There was testimony as to the 88 which had no address or an incomplete address that some were apparently witnessed by family or fellow armed services members. [R.256-85] The number of challenged certificates is larger than Appellant's margin of defeat certified by the Canvassing Board, but smaller than his margin of defeat according to the clerk's manual recount. [R.319-20][6]

[6]The precinct certified totals were Vogel 63,358, Beckstrom 67,436 [R.257], a deficit of 4,078 for Vogel. However, the clerk's manual recount [R.319-20] increased his margin to 5,188, raising the total Vogel margin of victory from 819 to 1,110 votes. The 885 challenged certificates are less than this corrected total.

SUMMARY OF ARGUMENT

The unifying principle of over a century of Florida elections cases is that elections will not be set aside for administrative failures or irregularities when there has been a full and *fair* expression of the people. The trial judge's ruling refusing to invalidate the absentee ballots disenfranchising the voters who cast them is consistent with that doctrine.

The trial judge's finding that there was no fraud should be sustained if there is competent evidence to support an inference otherwise. In this case, the ballots themselves which were methodically examined by the trial judge are such evidence. The clerk's manual recount was also such evidence. The testimony of expert and lay witnesses also furnished an ample basis supporting the court's rejection of an inference of fraud. The court could also have relied upon testimony by elections officials as to the regularity of the process. Each supports a conclusion that the votes marked by the voters were those counted by the clerk.

The trial court appropriately found that the small discrepancy in the number of ballots had been resolved by the clerk's manual recount. The trial court also correctly found that section 102.141(3), Florida Statutes, had not been violated.

The trial judge correctly found that Appellant's challenge to voter's certificates for defects alleged on their face was untimely and barred by sections 101.6104 and 101.68(2)(c)2, Florida Statutes (1995). The trial judge could also have rejected Appellant's challenge for lack of jurisdiction *in* that such challenge was not

made within the 10 day period prescribed for election contests by section 102.168, Florida Statutes. Based upon the clerk's manual recount of absentee ballots, the number of challenged certificates are substantially fewer than Appellant's margin of defeat.

ARGUMENT - ISSUE I

THE TRIAL COURT CORRECTLY REFUSED TO INVALIDATE ABSENTEE BALLOTS WHERE IT FOUND THE ELECTION HAD BEEN A FULL AND FAIR EXPRESSION OF THE PEOPLE.

Appellant seeks an appellate reversal of an adverse electoral decision. His argument is that the court should disenfranchise all those who exercised their absentee ballot privilege because of various irregularities and departures from statutory guidelines by election officials in the handling of their ballots, none of which in the trial court's opinion were sufficient to have affected the ultimate result. The trial court found that there had been no fraud [R.726]. Rejecting Appellant's contention that he should be awarded the office, the trial judge summarized:

> The question gets to be, do we set aside an election when there has been an expression of the will of the people when we have these other difficulties under the Boardman analysis. We do have problems. In my view, the courts have no business interfering with the electoral process in the absence of fraud. I do not have jurisdiction to set this election aside. We do have a full and fair expression of the will of the people. Vogel won it. [R.726]

The trial court's analysis is consistent with over a century of elections law, the unifying principles of which have been that elections are a political process where the voter's interest is primary conducted by executive officials who have authority to determine whether a vote shall be counted. State ex rel. Lilienthal v. Deane, 23 Fla. 121, 1 So. 698 (1887). Where there has been an administrative failure or irregularity, the courts have

looked at its result. If there was a full and free election, the result was sustained. The extreme reluctance of courts to invalidate elections was expressed early by the supreme court in State ex rel. Smith v. Burbridge, 24 Fla. 112, 3 So. 869 (1888), where it declared:

> The disposition and the duty of courts are to sustain popular elections whenever they have been free and fair, and it is clear that the voters have not been deprived of their right to vote, and the result has not been changed by irregularity.

Id. at 877.[7]

In Carn v. Moore, 74 Fla. 77, 76 So. 337 (1917), the case involved ballot printing errors so that the places to mark "for" and "against" were reversed on alternate ballots. The supreme court provided what it later described as a "definitive standard" for judging the effect of election irregularities.[8] The words of Carn apply directly to this case:

> It appears that the courts have established no rule which is generally recognized by which it may be definitely determined when a provision

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[7]In the present case, the trial court found that the elections office violated section 101.69, Florida Statutes (1996 Supp.), by failing to maintain an affidavit at the polls for voters to execute that they ha not voted a previously furnished absentee ballot. The procedure used instead was for poll workers to phone the elections office for verification. Only one person testified that she was deprived the right to vote because phone lines were busy. [T.131] The trial court found simple negligence as to this issue [R.720], and notwithstanding this isolated failure, a full and fair expression of the will of the people. [R.727]

[8]Winterfield v. Town of Palm Beach, 455 So.2d 359, 361 (Fla. 1984), decided in the same year and by the same panel as Bolden v. Potter, infra.

> of an election law is to be regarded as mandatory and when merely directory, or under what circumstances a provision which is mandatory upon the officials charged with the duty of arranging for and conducting elections will be regarded as ground for nullifying an election, when the electors have freely exercised the right of suffrage, and there is no charge that if the law had been strictly complied with the result would have been different. Republics regard the elective franchise as sacred, and the courts should not set aside an election because some official, has not complied with the law governing elections, where the voter has done all in his power to cast his ballot honestly and intelligently, unless fraud has been perpetrated or corruption or coercion practiced to a decree to have affected the result.
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> . . .A voter may sacrifice his right to have his ballot accepted and counted for wrongful or illegal acts on his part; but he is not to be deprived of his constitutional rights by the neglect or willful wrong of a public officer charged with the duty of supplying him with the means or the opportunity of expressing his choice. [Emphasis supplied,]

Id. 76 So. at 340.

Only four months later the supreme court decided Gilligan v. Special Road and Bridge District, 74 Fla. 320, 77 So. 84 (1917). In Gilligan, the appellant had contended that the election was void because of certain irregularities in the conduct of the election, in that in some precincts there was no deputy sheriff present (as then required by law), and in one precinct there were only two inspectors, and in some precincts the electors were not properly sworn. The Gilligan court stated:

> It is conceded by appellant that under a long line of decisions in this state the doctrine is firmly established that irregularities in

> the holding and conduct of popular elections will not invalidate. where thev have been free and fair, and the result was not changed by reason of such irregularity. *State ex rel. McClenney v. County Commissioners of Baker County,* 22 Fla. 29; State *ex rel. Bisbee, Jr. V. Board of County Canvassers of Alachua County,* 17 Fla. 9; State *ex rel* Smith *v. Burbridge,* 24 Fla. 112, 3 South. 869; *Carn v. Moore,* 76 South. 337. [Emphasis supplied.]

Id.*I* 77 So. at 85.

The appellant had argued, however, that such doctrine applied only to popular elections and not to those whereby a tax was to be authorized. The court found no distinction in the manner of holding general and special elections, and held that its decision governing the latter should apply to the former.

Through the course of this century, the cases have followed this principle except for certain absentee ballot cases later rejected in Boardman v. Esteva, infra. For example, in McGregor v. Burnett,[9] 105 Fla. 447, 141 So. 599 (1932), Justice Terrell who had

[9]McGregor is the first in a series of populist election opinions by Justice Terre11 spanning over thirty years, concluding shortly before his death with Stat8 v. Sarasota County, 155 So.2d 543 (Fla. 1963), without particular reference to State ex rel. Smith v. Burbridae, supra, or Carn v. Moore, supra, but with adherence to their principles. See, e.g., Town of Baldwin v. State, 40 So.2d 348 (Fla. 1949); State v. City of Port St Joe, 47 So.2d 584 (Fla. 1950); Willets v. North Bav Villas&, 60 So.2d 922 (Fla. 1952); State ex rel. Robinson v. North Broward Hospital District, 95 So.2d 434 (Fla. 1957). Only in State v. Sarasota County, supra, where the supreme court found compensating notice for missing advertisements, does Justice Terrell make specific reference to Carn v. Moore. Representative of these cases is his famous Opinion in Ervin v. Collins, 85 So.2d 852, 857 (Fla. 1956) where he stated "since it is the people's Constitution we are interpreting what could be more appropriate to give them an opportunity to impose their views and say what they meant."

The voters' interest as bedrock becomes the basis for the supreme court's decision in Boardman v. Esteva, supra, which held substantial compliance with absentee voting laws to be the rule.

argued as counsel for the prevailing side in Gillisan, suara, wrote for the court:

> [I]n cases where fraud or other palpable violations of the election laws is charged prior to an election, any elector is entitled to his relief by injunction or such other appropriate remedy as is available to him under law; but after the election has been held courts generally will consider only such charges of fraud and illegality as will result in a chancre of the result of the election. [Emphasis supplied.]

Id. at 599.

The same year as McGregor the Florida supreme Court decided State ex rel. Hutchins v. Tucker, 106 Fla. 905, 143 So. 754 (1932), where it upheld the constitutionality of the absentee ballot law against the challenge that it violated the protection of the secrecy of the ballot. The absentee ballot law in Florida had first been enacted as Ch. 7370, Laws of Florida (1917), as the United States entered World War I in the same year as the supreme court's decisions in Carn v. Moore and Gilligan v. Special Road and Bridge District, supra.

In Tucker, the supreme court applied a substantial compliance test to the absentee ballot law. It held that a canvassing board for an election of an Orange County judge improperly rejected

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Justice Terrell's opinion in Wilson v. Revels, infra, upholding an election in spite of polling place irregularities, is relied upon by Justice Adkins in his opinion for the court in Boardman.

There are some absentee ballot cases after State ex rel Hutchins v. Tucker, infra, where the supreme court applied a substantial compliance standard in which Justice Terre11 sides with a strict compliance rule; however as discussed below, even the strict compliance rule followed by the court for a time between Hutchins and Boardman had its exceptions.

certain ballots where they were not signed by all the inspectors of the election precinct at which the ballots were deposited by the elector. The court also held that the canvassing board improperly rejected ballots which had slips of paper pasted thereto upon which were written the names of the candidate with the office to be voted and were marked as required by the statute.

Also in 1932, the supreme court decided Joughin v. Parks, 107 Fla. 833, 143 so. 145 (1932). Rejecting a request for an injunction to supervise an election in Hillsborough County, the court explained that the holding and conduct of an election during its progress is a political matter with which courts of equity had nothing to do. Id. at 145.

> [T]he jurisdiction of courts having general equity powers does not include mere election contests of any kind, unless so provided expressly or impliedly by organic or statute laws.

Id. at 146, citing Markert v. Sumter County, 60 Fla. 328, 53 So. 613 (1910).

In 1936, the Florida supreme court issued a series of opinions regarding a contested election for the office of justice of the peace in Volusia County: State ex rel, Titus v. Peacock, 125 Fla. 452, 170 so. 127 (1936); Peacock v. Frederick, 125 Fla. 414, 170 So. 129 (1936); and State ex rel. Titus v. Peacock, 125 Fl. 810, 170 So. 309 (1936). From the opinions it appears that Titus and Beers were candidates that year at the June democratic primary election for nomination of the office of justice of the peace in Volusia County. The canvass of the returns initially showed the

candidates to be tied. Under the order of the supreme court, a recanvass and a recount were conducted, and Beers was declared the winner. The supreme court stated:

> The rule is general that, if ballots had been cast by voters who were, at the time, qualified to cast them, and such voters had at the time done all on their part that the law required the voters to do to make their voting effective, an erroneous or even unlawful handling of the ballots by the election officers charged with such responsibility will not be held to have disenfranchised such voters by throwing out their votes on account of erroneous procedure had solely by the election officers, provided the votes were legal votes in their inception, and are still capable of being given proper effect as such. [Emphasis supplied.]

Id, 170 So. at 309.

In Bay County v. Stab, 157 Fla. 47, 24 So.2d 714 (1946), the controlling statute provided that the polls would be open from 7:00 a.m. until 7:00 p.m., but the notice for a bond election incorrectly stated that the polls would remain open until sundown. In fact, the polls did remain open past the statutorily prescribed time of 7:00 p.m. Nevertheless, the court sustained the election upon the authority of State ex rel. Smith v. Burbridae, supra, and Carn v. Moore, supra, finding that no one had been deprived of their right of suffrage and that there was no intimation that if the statute had been strictly complied with the result would have been different.

In Wilson v. Revels, 61 So.2d 491 (Fla. 1952) (Terrell, J.), the ballot stubs at a precinct had been signed by elections officials instead of by the voters as required by the statute, and

absentee ballots though distinguishable by their markings had been deposited into the same precinct election box. The response of the court was that:

> This court has repeatedly held that mere irregularities in handling absentee or other ballots did not invalidate the ballots on the election. State ex rel Titus v. Peacock, 125 Fla. 452, 170 So. 127; Id. 125 Fla. 810, 170 so. 309; Jolley v. Whatley, Fla. 60 So.2d 762. ... the findings of the court and the record discloses that appellant suffered no wrong from the irregularities complained of. Not only that, it shows that the will of the people was effected.

In Boardman v. Esteva, 323 So.2d 259 (Fla. 1975) (Adkins, C.J.), the court confronted a verification problem similar to the present. Central among allegations of various election law violations was that elections officials had lost absentee ballot mailing envelopes involving substantial numbers of votes so that there could be no judicial review of the ballot certificates." At issue was whether the absentee law required absolute strict compliance with all its provisions, as had been held by the district court," or whether substantial compliance is sufficient to give validity to the ballot. The court held substantial compliance to be the rule. Its analysis began:

> We first take note that the real parties in nterest here, not in the leaal sense but in

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"Section 101.68(2)(c)2, which prohibits challenges to defects apparent upon the face of voter's certificates after the envelope is opened, was not in effect at the time of Boardman. It was enacted two years later as part of Chapter 77-175, Laws of Florida.

[11] Esteva v. Hindman, 299 So.2d 633 (Fla. 1st DCA 1974).

> realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration The contestants have direct interest; certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ouro is a government of, by and for the people. our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The risht to votes the 'h to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize . . otherwise valid exercise of the risht to a citizen to vote for the sake of sacred, unvieldins adherence to statutory script re, we would in effect nullifv that right. [Emphasis supplied.]

Id. at 263.

The court noted that it had first announced the standard of substantial, rather than strict, compliance with the absentee voting law, in State ex rel. Hutchins v. Tucker, supra. However, after that there were several decisions 'of the court which overlooked Tucker and required strict compliance. The court observed that even the strict compliance rule had exceptions such as the rule stated above in Titus v. Peacock, that an erroneous or unlawful handling of otherwise valid absentee ballots by election officials would not void the ballot provided the votes were legal in their inception and still capable of being given proper effect as such. The court stated that it would be naive to fail to recognize that accommodation of the public has become the primary basis for the privilege of voting absentee, and that it was not

required to interpret the law with a turn of the century perspective. The Boardman court then receded from the strict compliance rule and reaffirmed the rule adopted in Tucker that substantial compliance with the absentee *voting* laws is all that is required to give legality to the ballot.

Without citation to Carn, but with evident faithfulness to its teachings, the court stated:

> In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, *a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will.* Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, *provided such irregularity* is *not calculated to affect the integrity of the ballot or election.* [Italics in original.]

Id. at 265.

Reconciling Justice Terrell's opinion in Wilson v. Revels, supra, which dealt with irregularities at the polls with the absentee ballot process in the case before the court, Justice Adkins wrote that:

> What is important in both cases is the absence of fraud or any wrong suffered from the irregularities complained of, and the fact that the will of the people was affected.

Id. at 267.

As to the validity of those ballots whose certificates were

missing, the **Boardman** court stated that the counting of ballots is an executive function. **Id.** at 268 (f.5). It applied the rule that elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary. The court relied upon such presumption not to excuse honest error by elections officials, but to avoid disenfranchisement of voters. The court placed the burden on the contestor to establish that the ballots had been irregularly cast. In the absence of such a showing, the court reiterated the familiar theme that when the voters have done all that the statute required them to do, they would not be disenfranchised on the basis of the failure of election officials to observe the statutory instructions.

The court concluded:

> In summary, we hold that the primary Consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots case, the following factors shall be considered:
>
> (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
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> (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
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> (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.
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> The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots is

> whether they were cast by qualified, registered voters, who were entitled to vote absentee and who did so in a proper manner. [Emphasis supplied.]

Id, at 269.

In Boardman, the court upheld the election where the allegations were of administrative error. In stark contrast are the facts in Bolden V. Potter, 452 So.2d 564 (Fla. 1984), where the supreme court upheld a trial court judgment setting aside an election upon findings of actual fraud clearly which affected the integrity of the election. Bolden v. Potter was the culmination of a vote buying scandal involving the 1978 election for the Liberty County School Board.[12] Liberty County is the smallest county in the state and then had only 4,260 residents.

The Bolden opinion restates the principle:

> . ..courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct. See *Boardman; Gilligan v. Special Road & Bridge District, 74 Fla. 320, 77 so. 84 (1917).* However, when there is present fraud and intentional wronadoincr which clearly affect the sanctity of the ballot and the integrity of the election process courts must not be reluctant to invalidatk those elections to ensure public credibility in the electoral process. [Emphasis supplied.]

Id. at *566.*

However, as to the facts of the case, the court declares:

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[12]For a further description of the circumstances surrounding this matter, see Beckwith v. State, 386 So.2d 836 (Fla. 1st DCA 1980), rev. denied 392 So.2d 1379 (Fla. 1980)(reversing trial court order granting state change of venue in vote buying prosecution arising from same election).

> The evidence established such extensive vote buying that over thirty percent of the absentee ballots could be said to be tainted (126 out of 381). Seldom is there a more obvious case of pervasive corruption where over ten percent of the absentee voters admit that their votes were bought (46 out of 381).

Id. at 567.

Applying Boardman considerations, the Bolden court found that there was clear fraud and intentional wrongdoing; officials substantially complied with the voting procedures; and there was no question but that the vote buying scheme adversely affected the sanctity of the ballot and the public's perception of the integrity of the election. The court found the fraud to be blatant and corrupt and to permeate the entire absentee ballot process. Its description of the pervasiveness of the stench, even though its effect could not be determined with mathematical certainty, is compelling. However, the reluctance of the supreme court to interfere with the political process is demonstrated, even upon these aggravated facts. The court did not declare the defeated candidate to be the winner. It ordered a new election, and that only by a 4-3 majority.

The Bolden court's citation to Gilligan, which applied the principle of Carn v. Moore, supra, to all elections, leave no doubt as to its scope and vitality. See also Winterfield v. Town of Palm Beach, supra. Neither Bolden nor Carn required the court to find that a specific number of votes have been tainted to overturn an election; both require the effect of any fraud to be substantial enough so that it could be said that there was not a choice by the

electors. That is not the circumstance here. The trial court found that there was no fraud and there was a full and fair expression of the will of the people.

From this long line of cases, it is clear that the judgment upholding the election is consistent with Florida case law refusing to disenfranchise voters because of errors by election officials absent a strong likelihood of change in the result. It is also consistent with the statutory directive of section 101.5614(5), Florida Statutes, that no vote shall be declared invalid if there is an indication of intent as determined by the canvassing board.

ARGUMENT - ISSUE II

THE TRIAL COURT'S FINDING THAT THERE WAS NO FRAUD IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The detailed final judgment in this case demonstrates that the issue of fraud was of paramount concern to the trial judge and that he carefully considered every possibility that it had occurred. The record supports his finding that it did not, The principles applicable to this court's review of that finding have been set forth frequently in the decisions of the supreme court and of this district. The supreme court's opinion *in* Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976), provides one example:

> It is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as pointed out in Westerman, supra, is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' (FN2) it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court. [Emphasis supplied.]

Accord, Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972); Cra & Crouse. Inc. v. Palm Bav Towers Corporation, 326 So.2d 182 (Fla. 1976); Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983); Deakyne v. Deakyne, 460 So.2d

582 (Fla. 5th DCA 1984); Dourado v. Chousa, 604 So.2d 864 (Fla. 5th DCA 1992); State v. Cardoza, 609 So.2d 152 (Fla. 5th DCA 1992); Ferry v. Abrams, 679 So.2d 80 (Fla. 5th DCA 1996); Lonergan v. Estate of Budahazi, 438 So.2d 1062 (Fla. 5th DCA 1996).

Indicative of the attention given to this issue is that prior to trial, the judge conducted his own examination of several thousand absentee ballots. The trial judge was entitled to and did draw inferences from the examination of the ballot [R.712, 716, 718-9, 722-3, 725-6], which by themselves are competent, substantial evidence. Cf. State ex rel. Lilienthal v. Deane, 23 Fla. 121, 1 So. 698 (1887); State ex rel. Nuccio v. Williams, 97 Fla. 159, 120 So, 310 (1929); State ex rel. Millinor v. Smith, 107 Fla. 134, 144 So. 333 (1932); State ex rel. Peacock v. Latham, 125 Fla. 69, 169 So. 597 (1936).

A total of 20 witnesses verified that they had honestly and faithfully followed the voter's intent in remarking the ballot.[13] The county judge and the county council member who were members of Appellee Canvassing Board moved about from time to time to observe that ballots were being marked fairly. [T.47-50, 53, 1120-4] However, there were some evident errors to be reconciled.

The court's own examination of ballots convinced it to reject Appellant's assertion that some votes had intentionally not been remarked so as not to be read by the machine. It found that those were not the only votes that were not marked correctly; there were

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[13]T.384-5, 565, 732, 771, 780, 867-8, 873-4, 879-80, 887-88, 946, 975, 1020, 1028-9, 1043-5, 1056-7, 1066-7, 1087-8, 1092-4, 1098-9, 1240-1 (by stipulation).

incorrect markings involving virtually every single race; and numerous ballots were inconsistently marked. The court chose to draw from this an inference of negligence instead of fraud. [R.723] The clerk's manual recount assisted in this conclusion. [R.723]

The expert testimony also provided support for the conclusion that there was no fraud. Appellant's argument is that the contested ballots should have been a random sample of the absentees. However, the statisticians agreed that a random selection is one in which each member of the class has an equal chance of selection. [R.723] The trial court found that the ballots were not rejected randomly from the machines because ballots that had been improperly marked by the voters had a greater chance of selection than a ballot that was not improperly marked. CR.7231

Appellant's own expert mathematician testified that he "would not want to make an allegation of fraud" [T.167], upon the basis of the calculation he was asked to make. Appellant's other expert, a political scientist with statistical training, calculated that applying the same percentage obtained by Appellee Vogel in uncontested ballots to the contested ballots, the result of the election was not changed. IT.1133 He agreed that votes are linked to numerous other demographic factors, including age, gender, income, educational level [T.101], and that time was a system affecting votes. [T.106] He conceded that there were logical explanations why the results of the contested ballots could be different than the remainder. [T.124] Finally, he agreed that the

qualifications of Appellee Canvassing Board's expert statistician, Dr. James McClave, are superb. [T.1302]

Dr. McClave testified[14] that among the demographic characteristics of voters, there were data available as to three, age, party, and gender, which explained virtually all the difference between the poll and the absentee results. [T.804-9] Since demographic differences explained such a large difference, and the main reason that ballots were remarked was improper voter marking, it was *in* his opinion likely that demographic factors also explained the difference between the contested and uncontested votes, [T.823] For example, the voters who cast the contested ballots need be in combination only 2.6% more Republican, 3% more over 70, and 2% more male, all of which characteristics were strongly associated with a vote for Vogel at the polls, and the 4% difference between the contested and uncontested absentees would disappear just like the much larger 11.5% difference between the absentees and the poll votes. [T.818]

Dr. McClave calculated by day the vote totals of the ballots which had been removed from the tabulating machines on November 2, 3, 4, and 6. [T.826] They showed a steady <u>decrease</u> in Appellee Vogel's tally over that time, among <u>both</u> the contested and uncontested absentee ballots, which was consistent with increased negative publicity such as newspaper endorsements. [T.815,824] However, the difference between the contested and uncontested

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[14]Dr. McClave's extensive curriculum vitae is in evidence [R.558-84]. Charts referred to the his testimony are part of the record. [R.590-7]

ballots on a day-by-day basis was a persistent 4%. [T.815] In his opinion, this difference was demographically related. [T.828] Using the clerk's recount totals, but excluding the 4% difference between the contested and uncontested votes, Dr. McClave computed that Appellee Vogel still wins by about 500 votes. [T.822]

Addressing the court's questions as to the various possible methods for fraud, Dr. McClave showed there were more blank votes in the contested ballots [T.818], even excluding duplicates [T.821], which was inconsistent with votes being filled in for the incumbent. [T.854-855] As to the idea that Beckstrom votes might be negated by someone filling in the Vogel oval creating what is known as an overvote, Dr. McClave testified that the 10 overvotes found among the contested ballots was so small a number that it would not have any effect upon a statistical analysis at all. [T.856-860] Concerning the possibility that ballots were being substituted, Dr. McClave stated that there was no spike upward in the Vogel count. [T.818] Any fraud therefore would have to have occurred in a very systematic way over a four day period that the votes were counted. [T.858] However, statisticians look for rational behavior. If fraud were occurring, one would expect that it would possibly affect the outcome. Dr. McClave concluded that it does not in this case. [T.851] With regard to Beckstrom votes which had not been remarked with black felt to be machine read, Dr. McClave testified that number was less than one-tenth of a percent of the absentee ballots and too small to have had any effect upon the statistical analysis. [T.860] He also testified that almost anything can happen with a small sample, and it is therefore

difficult to draw any inferences. [T.841] Particularly as to these points, it is apparent that the trial court found Dr. McClave's expert testimony to be helpful. Portions of his analysis are reflected in the trial court's final judgment. [R.721-3]

Appellant's expert testimony on the improper marking of ballots was less than compelling. Prior to Appellant's rebuttal, Appellant again inspected a sample of uncontested ballots, and found a ballot for Appellee Vogel which had not been remarked. Plaintiff's expert concluded from this demonstration that a further review of the uncontested ballots was in order [T.1324], far from contradicting the trial judge's personal observation that Beckstrom votes were not the only ones marked incorrectly.

The trial judge's evaluation of lay testimony influenced his rejection of the insinuation that deputies who provided security committed fraud. The deputies who were asked by Appellant testified that they did not mark any ballots [T.415-6, 441, 475], and no witness testified that they had seen a deputy do so. The court stated that any evidence to be drawn to the contrary would be based on hearsay or rumors, which it found insufficient to base a conclusion of fraud. [R.724] The court also found that the witness who did testify concerning this testified inconsistently at trial and at deposition. [R.724] The trial judge was entitled to draw the inferences he deemed appropriate based upon the credibility of the witnesses.

The evidence presented by Appellee Canvassing Board that remarking is consistent with section 101.5614, Florida Statutes (1995), was unconvincing to the trial judge. Evidence as to the

regularity of the process nonetheless furnishes an additional basis upon which to reject an inference of fraud.

The Volusia supervisor of elections testified that the remarking had been done *in* good faith to carry out the voter's intent. IT.11711 Three supervisors of elections from other counties testified that remarking is consistent with the statute [R.895-7, 957, 1006-7], and comparable to removing hanging chads from punch card ballots. [R.934, 954, 1011] The county judge who served on the Volusia Canvassing Board testified that he found remarking consistent with the statute [R.56]. A circuit judge who had served on numerous prior Volusia canvassing boards testified as to the necessity and legality of the comparable practice of removing hanging chads, [R.989-993] Through the approval of security procedures in Leon County [R.904], the remarking procedure has been acquiesced in by the Department of State, the chief elections office of the state. Cf. Krivanek v. Take Back Tampa Political Corn., 625 So.2d 840 (Fla. 1993) (administrative interpretation of election law entitled to presumption of correctness). Each of the Canvassing Board members testified that by their observation the election had been fair [T.47-50, 53, 1191].

There was more than ample competent evidence from which the trial court could conclude that fraud had not occurred. The testimony of expert and lay witnesses, officials and election workers alike, as well as the trial court's observations of the ballots themselves, all support his implicit conclusion that the votes cast by the electors were those counted by the clerk. [R.726]

ARGUMENT ISSUE III

TEE TRIAL COURT CORRECTLY CONCLUDED TEAT THE CLERK OF COURT'S MANUAL RECOUNT RESOLVED MINOR DISCREPANCIES IN VOTE TOTALS AND DOES NOT CHANGE THE OUTCOME OF THE ELECTION.

There is but a small discrepancy between the total count of ballots by the elections department and the total number of ballots manually recounted by the clerk of circuit court. The reconciliation of total ballots by the Canvassing Board which is in evidence shows that the clerk had on hand only 5 more absentee ballots than the elections department indicated were to be counted. [R.408] No discrepancy in total votes asserted by Appellant in contradiction to this is sufficient to alter the outcome.

There were votes among the total on hand that had not been machine counted and included in the certified totals; however, no manual recount was required and none was requested of the Canvassing Board prior to the time the ballots were delivered to the custody of the clerk. Cf. Boardman V. Esteva, supra at 268-9 (f.5) (counting of ballots is an executive function). Those votes have now been included in the clerk's manual recount.

It was Appellant's burden to show that votes were illegal in their inception. Id., at 268. However, the trial judge found that there was no evidence to indicate that any ballot had been cast by other than a qualified elector. [R.714] He considered and rejected every possibility that the ballots had been altered or substituted by fraud. [R.712, 718-9, 722-3, 725-6] He further found that there is no dispute with the clerk's count, and there is

now an accurate count of the ballots. [R.725] The trial judge therefore found appropriately that the inaccuracies in the count ultimately were corrected by the clerk's count, conducted in open court in the presence of the candidates, supporters, press, and public. [R.725] The result of the clerk's manual recount was that the margin among the absentee ballots increased for Appellee Vogel. Cf. Smith v. Tynes, 412 So.2d 925 (Fla. 1st DCA 1982) (request for a manual recount as discretionary requires as a basis a showing of a strong likelihood of a change in the result); accord, Broward County Canvassing Board v. Hogan, 607 So.2d 508 (Fla. 4th DCA 1992).

The trial court found that Appellee Canvassing Board did not violate section 102.141(3), Florida Statutes, [R.715], with good reason. It does not apply to absentee ballots and there is no evidence that the Canvassing Board failed to take any action which it directs. Section 102.141(3) refers to the canvass of returns from the precincts, This is apparent from the legislative history and the context of the statute. The last three sentences of this section were added by Ch. 77-175, Laws of Florida. The session law deleted language requiring that the board ignore "precinct returns" missing at noon on the day following the election. It added reference to "counters" of the type on mechanical automatic voting machines. Such machines were used in Volusia County at the time of the amendment [R.986]; however, paper absentee ballots were used until the mid-1980's. [R.987] Assuming the application of this subsection to absentee ballots, it is noteworthy that its last sentence contemplates the possibility of minor discrepancies in

totals such as in this case and provides the counters shall be presumed correct.

In sum as to this point, Appellant did not prove any violation of section 102.141(3). The small variance between the elections department total of votes and the clerk's manual recount has no effect on the outcome. The clerk's manual recount supported the trial court's conclusion that there had been a reliable expression of the will of the people.

ARGUMENT ISSUE IV

THE TRIAL COURT CORRECTLY REFUSED TO INVALIDATE ABSENTEE RETURNS ON THE BASIS OF PLAINTIFF'S BELATED CHALLENGE TO VOTER CERTIFICATES.

Section 101.64 provides for two envelopes, a secrecy envelope, into which the absentee voter shall enclose his or her marked ballot; and a mailing envelope into which the absentee elector shall place the secrecy envelope. In dispute are voter certificates on the outside of the mailing envelope. Once opened and separated from the ballot as required, section **101.68(2)(d),** Florida Statutes (1996 Supp.), the envelope can no longer be matched to the ballot,

Sections 101.6104 and **101.68(2)(c)2,** Florida Statutes (1996 Supp.), provide respectively as follows:

> 101.6104. If any elector present for the canvass of votes believes that any ballot is illegal due to any defect apparent on the voter's certificate, the elector may, at any time before the ballot is removed from the envelope, file with the canvassing board a protest against the canvass of such ballot, specifying the reason he or she believes the ballot to be illegal. **No challenge based upon any defect on the voter's certificate shall be accepted after the ballot has been removed from the return mailing envelope.** [Emphasis supplied.]

> **101.68(2)(c)2.** If any elector or candidate present believes that an absentee 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, specifying the precinct, the ballot, and the reason he or she believes the ballot to be

> illegal. 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. [Emphasis supplied.]

Section 101.68(2)(c)2[15] has been construed to bar challenges for defects apparent upon the face of the voter's certificate after the ballot has been removed from the mailing envelope. Flack v. Carter, 392 So.2d 37 (Fla. 1st DCA 1980); Howanitz v. Blair, 394 So.2d 479 (Fla. 1st DCA 1981). Section 101.6104 was enacted following these decisions and reinforces the principle for which they stand. The challenge in this case relates entirely to matters on the face of the certificates, and the trial court correctly applied controlling authority.

Appellant attempts to excuse his failure to make a timely challenge by arguing that section 101.6104 applies only if he was present when absentee ballot envelopes were opened and that he was not present because they were not opened during a noticed meeting of the Canvassing Board. Appellant's argument ignores the lack of corresponding language in section 101.68(2)(c)2. It is also inconsistent with the statutory scheme for processing ballots.

Section 101.68(1) provides:

> The suwervisor of the county where the absent elector resides shall receive the voted ballot, at which time the suwerviswr mav compare the signature of the elector on the voter's certificate with the signature of the elector in the registration books to determine whether the elector is duly registered in the county . . . . [Emphasis supplied.]

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[15]As noted earlier, this section was first enacted by Ch. 77-175, Florida Statutes, subsequent to Bwardman v. Esteva, supra.

Section 101.68(2)(c)(1) directs:

> The canvassing board shall, if the supervisor has not already done so, compare the signature of the elector on the voter's certificate with the signature of the elector in the registration books to see that the elector is duly registered in the county and to determine the legality of that absentee ballot;. An absentee ballot shall be considered illegal if it does not include the signature of the elector, as shown by the registration records, and the signature and address of an attesting witness. However, an absentee ballot shall not be considered illegal if the signature of the elector or attesting witness does not cross the seal of the mailing envelope. If the canvass- board determines that anv ballot is illeaal. a member of the board shall, without opening the envelope, mark across the face of the envelope: "rejected as illegal." The envelope and the ballot contained therein shall be preserved in the manner that official ballots voted are preserved. [Emphasis supplied.]

It is illogical to conclude as does Appellant that the elections supervisor, who receives the ballots over a period of time prior to the election, may compare the voter signature, but not observe whether there is a witness signature and address. The canvassing board compares the signature only if the supervisor has not already done so, "to determine the legality of the ballot." Id. That the supervisor or her staff will have initially screened the ballots is contemplated by the statute which requires the personal act of the canvassing board anly to reject a ballot.

Appellant's argument is also contradicted by the facts. Appellant's campaign manager attended the initial public meeting of the Canvassing Board, and observed that the elections department

had set aside doubtful certificates for the Canvassing Board's determination. [T.655, 14-16] He was aware that ballots were going to be opened prior to election day [T.666, 20-22], but never returned to the elections office looking for ballot certificates. [T.670] Perhaps this is because while he was aware that a voter certificate can be challenged before the envelope is opened, he was unaware that a certificate cannot be challenged once it has been opened. [T.687] Appellant's political consultant was in attendance at the first part of the meeting. [T.33] He was advised as to the procedures to be followed with absentee ballots [T.33], including the requirements for witness signature and address, and left. IT.343 In sum, Appellant paid no attention to the certificate process until he became a defeated candidate.

The trial court concurred with Appellant that such certificates did not conform to section 101.68, as newly amended.[16] As to most of the 885 contested certificates, this ruling was unnecessary. Cf. Jollev v. Whatlev, supra at 766 ("It is a familiar rule of statutory construction that a statute should be construed as to give legislative intent *even* if the result seems contradictory to rules of construction and the strict letter of the statute." [Citations omitted.]) Disqualification of ballots witnessed by elections personnel or Florida notaries, whose address

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[16]Ch. 96-57, Laws of Florida, amended section 101.68 to require that there be the signature of only one witness whose address must be included instead of two witnesses or a notary whose address is not required. The changes to section 101.68 were effective July 1. 1996. However, the session law amended sections 101.64 and .65 pertaining respectively to the form of absentee envelopes and instruction sheets to absentee voters effective January 1. 1997, after the 1996 general election..

is on file with Secretary of State, is not consistent with legislative intent. In the same category are those with identifying information tantamount to an address of an attesting witness. However, reaching the same result the trial court stated that "the purpose of the statutes is to insure that only qualified electors cast absentee ballots." [R.714] It could "find no evidence on which to conclude that anyone other than qualified electors cast a challenged absentee ballot." Cf. Boardman, supra, at 268.

The trial court did not reach the question of whether the issue of the certificates had been timely raised within the 10 day period for an election contest under section 102.168. [R.714] However, Appellant's challenge to certificates, first pleaded after the statutory time limitation, should be disregarded on this basis as well. Courts do not ordinarily possess jurisdiction to entertain suits regarding election contests in the absence of a statute. Pearson v. Taylor, 159 Fla. 775, 32 So.2d 826, 827 (1947). Since jurisdiction is granted by statute, the relief afforded may not exceed its scope. Id. On this ground in Griffin v. Knoth, 67 So.2d 431 (Fla. 1953), the supreme court rejected a challenge to machine counts raised by answer two months after the election.

In Kinzel v. City of North Miami, 212 So.2d 327 (Fla. 3d DCA 1968), the third district affirmed an order of dismissal of an election contest where the complaint failed to meet the statutory requirement then in effect that it be verified and failed to name the successful candidate and the canvassing board or election board

as defendants. The court stated:

> The general proposition that when a statutory action is availed of the provisions for its exercise must be strictly followed is especially applicable here, as we are dealing in this instance with a statutory action for an election contest. As to this type litigation there is a public interest in promptness and finality of decision. In apparent recognition thereof the leaislature, in granting the privilege of contest by suit in equity, sought to secure promptness by requiring that such actions be filed within 10 days after canvass and required the contest to be submitted by a sworn complaint, setting forth the grounds relied upon and addressed to designated defendants. Jurisdiction of the trial court to entertain an election contest under that statute depends uwon the filing of a complaint thereunder within the time and in the f rm and con ent as directed in the statutoe. [Emphasis supplied.]

Id. at 327-328.

A final reason that Appellant's certificate challenge lacks validity is that he is incorrect that the challenged number of certificates is larger than the margin of his defeat. The 885 challenged are substantially fewer than the 1,134 votes by which Appellant lost after the clerk's manual recount. [R.319-20]

To hold an election is to make a choice. Pearson v. Taylor, supra, 32 So.2d at 827. As the trial court succinctly concluded, "Vogel won it." [R.726]

CONCLUSION

The judgment of the trial court upholding the election should be affirmed. Appellant's claim of entitlement to attorney's fees within the conclusion of his brief has no basis in law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to DONALD W. WEIDNER, ESQ., 10161 Centurion Parkway North, Suite 190, Jacksonville, FL 32256, this 7th day of July, 1997.

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