

IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC00-2448
DCA CASE NO. 1D00-4829
CIRCUIT COURT CASE NO. 00-2850

RONALD TAYLOR, et. al
Appellants

v.

THE MARTIN COUNTY CANVASSING
BOARD, ETC., ET. AL.
Appellees.

**BRIEF OF KATHERINE HARRIS, L. CLAYTON ROBERTS,
AND BOB CRAWFORD, AS MEMBERS OF THE FLORIDA
ELECTIONS CANVASSING COMMISSION**

Deborah K. Kearney
General Counsel
Kerey Carpenter
Assistant General Counsel
DEPARTMENT OF STATE
PL 02 The Capitol
Tallahassee, Florida
32399-0250
(850) 414-5536

Jonathan Sjostrom
Victoria L. Weber
Donna E. Blanton
Elizabeth C. Daley
STEEL HECTOR & DAVIS LLP
215 South Monroe, Suite 601
Tallahassee, Florida
32301-1804
(850) 222-2300

Counsel for Appellees
Florida Elections Canvassing Commission

TABLE OF CONTENTS

Table of Authorities	iv
Certificate of Font Size and Style	1
I. Discretionary Jurisdiction of this Court	1
II. Introduction	2
III. Statement of the Case and Facts	5
IV. Standard of Review	5
V. Summary of Argument	6
VI. Argument	8
A. Absentee Ballots, Like All Ballots, May Not Be Invalidated Because of Hyper-technical Errors.	8
1. Substantial Noncompliance With Election Law Will Not Void Ballots Where There Has Been A Full and Fair Expression of the Will of the People.	10
2. Mere Irregularities <i>Even Involving the Ballots Themselves</i> Do Not Invalidate Absentee Ballots	11
3. Absentee Ballots Will Be Voided Only If Ballot Fraud Affects Outcome of Election.	15
B. Florida Law Permits and Facilitates Mass Mailing of Unsolicited Absentee Ballot Request Forms to Voters.	19
C. Filling in A Voter’s Identification Number on a <i>Request Form</i> Is Not a Basis to Invalidate Ballots.	21

D. Elections Officials Did Not Engage in Fraud or Misconduct	23
VII. Conclusion	25
Certificate of Service	27
Appendix	

TABLE OF AUTHORITIES

CASES

<i>Beckstrom v. Volusia County Canvassing Bd.</i> , 707 So. 2d 720, 725 (Fla. 1998)	7, 10, 11
<i>Boardman v. Esteva</i> , 323 So. 2d 259 (Fla. 1975)	7, 9, 10, 12, 14, 15, 18, 22
<i>Bolden v. Potter</i> , 452 So. 2d 564 (Fla. 1984)	16
<i>Dade County Sch. Bd. v. Radio Station WQBA</i> , 731 So. 2d 638, 644-45 (Fla. 1999)	6
<i>Florida Bar v. Abramson</i> , 199 So. 2d 457, 460 (Fla. 1967)	6
<i>McLean v. Bellamy</i> , 437 So. 2d 737 (Fla. 1 st DCA 1983)	7, 11, 13, 14, 15
<i>McPherson v. Flynn</i> , 397 So. 2d 665, 668 (Fla. 1981)	22
<i>Polly v. Navarro</i> , 457 So. 2d 1140, 1144 (Fla. 4 th DCA 1984)	23
<i>Protest Election Returns and Ballots</i> , 707 So. 2d 1170 (Fla. 3 rd DCA 1998)	15, 22
<i>Smith v. Tynes</i> , 412 So. 2d 925, 927 (Fla. 1 st DCA 1982)	23

FLORIDA STATUTES

Section 97.021(1)(d), Florida Statutes (2000) 8

Section 98.095(1)(b), Florida Statutes (2000) 20

Section 98.095(2)(d), Florida Statutes (2000) 20

Section 98.097, Florida Statutes (2000) 20

Section 101.5614(5), Florida Statutes (2000) 10

Section 101.62, Florida Statutes (2000) 8, 13, 18, 22, 23, 25

Section 101.62(1)(b), Florida Statutes (2000) 8

Section 101.62(b), Florida Statutes (2000) 22

Section 101.64, Florida Statutes (2000) 18

Section 101.65, Florida Statutes (2000) 18

Section 101.655, Florida Statutes (2000) 25

Section 101.657, Florida Statutes (2000) 8

Section 101.68(c)(1), Florida Statutes (2000) 8

Section 101.685, Florida Statutes (2000) 21

Section 102.111, Florida Statutes (2000) 1

Section 102.168, Florida Statutes (2000) 5

Section 104.047, Florida Statutes (2000) 19, 23, 24, 25

LAWS OF FLORIDA

Chapter 98-129, 1998 Laws of Florida 16, 22

RULES OF COURT

Fla. R. App. Proc. 9.030(B)(i)(2000) 1

CERTIFICATE OF FONT SIZE

This Brief is typed using a Times New Roman 14-point font.

I. DISCRETIONARY JURISDICTION OF THIS COURT

This Court has ordered that briefs in this matter address the issue of the Court's exercise of its discretion to accept this case. The Florida Rules of Appellate Procedure provide that the Supreme Court has discretionary jurisdiction to review orders and judgments of trial courts certified by district courts of appeal if the appeal requires immediate resolution and is a matter of great public importance. Fla. R. App. Proc. 9.030(B)(i)(2000). The Florida Elections Canvassing Commission ("Commission")¹ acknowledges the applicability of this rule to the present case and leaves to the sound discretion of this Court whether it should exercise its jurisdiction here.

¹Both the Commission and the Secretary of State, Katherine Harris, were named as defendants below. However, the Secretary of State was dismissed as a party defendant in the final order of the trial court based upon the court's determination that no affirmative relief could be attained against her. Appendix Tab 1 at 2. Due to the briefing schedule, it is impossible to determine whether this dismissal is a subject of the Appellants' appeal. However, Appellees assert that such dismissal was proper because pursuant to section 102.111, Florida Statutes, the Commission, not the Secretary, certifies the statewide returns and the relief sought in Appellants' Complaint relates to the acts of the Commission, not the Secretary.

II. INTRODUCTION

As evidenced by the final order on appeal entered by Judge Lewis of the Second Judicial Circuit, this election contest is not about voting at all. This case is about *requests for ballots* preliminary to voting. Judge Lewis held:

In the present case the persons who signed the *request forms* were duly qualified and registered voters in Martin County. *There is no evidence of fraud or other irregularities in the actual casting of the ballots, or the counting of the ballots.*

...

There is also no basis in the evidence to conclude that the irregularities affected the vote. The Democratic Party, like the Republican Party, also disseminated pre-printed *absentee ballot request forms* to registered Democrats.

...

Without question there were irregularities relative to the *requests for absentee ballots*. The evidence shows, however, that despite these irregularities, the sanctity of the ballot and the integrity of the election were not affected. The election in Martin County was a full and fair expression of the will of the people.

Final Order at pp. 8-9. (Emphasis added.) Appendix Tab 1.

Appellants Ronald Taylor et. al. (“Appellants”) ask this Court to reverse the final order of Judge Lewis in which he declined to invalidate 10,260 absentee ballots cast by voters in Martin County in the presidential election. They would have this Court invalidate those ballots despite the fact that Appellants asserted no claim that

any absentee ballot cast in Martin County was cast by any person other than the duly registered voter. The Appellants made no claim that the absentee ballots at issue lacked proper signatures of electors or witnesses. The Appellants asserted no claim that any absentee ballot in Martin County was cast by a deceased or otherwise ineligible person. The Appellants made no claim that any absentee ballot in Martin County was not timely cast. The Appellants asserted no claim that any person influenced, in any way, any voter's choice on any absentee ballot in Martin County. The Appellants made no claim that any person in Martin County voted more than once.

The only allegations during the trial below were that representatives of the Republican Party prepared *requests* for absentee ballots and sent those *requests* to the voters for execution by the voters. The voters then in reliance on the forms' instructions executed and returned the *requests* to the Martin County Supervisor of Elections ("Supervisor"). This action was perfectly legal.

However, the Republican Party failed to include the voter identification numbers on the request forms of some potential voters. Voters relied on the request forms and duly executed them, and such forms were submitted to the Supervisor. Rather than simply throw the request forms away and potentially disenfranchise those innocent voters, the Supervisor responded to the Republican Party's request to correct the error by allowing them to *insert the voter*

identification numbers on the request forms. The Supervisor then mailed absentee ballots to the appropriate voters, and the voters then duly voted for whomever they desired.

In this election contest, the appellants sought to disenfranchise every absentee voter in Martin County because of the failure of the Republican Party to include voter identification numbers on some of the absentee ballot request forms the Republican Party lawfully submitted to the voters of Martin County. There is no allegation of any irregularity with any absentee ballot in Martin County. The only allegations of technical error were that the Republican Party failed to include the proper voter identification numbers, and that the county elections workers permitted the error to be corrected. These irregularities cannot be visited upon the innocent voters who did nothing more than mark, execute and submit their ballots in accordance with Florida law.

The Appellants attempted to cloak their allegations with fraud or misconduct on the part of various elections officials. However, the Appellants did not prove -- or even allege -- facts that would support a finding of fraud or criminal misconduct on the part of those named. At most, Appellants proved that the local elections officials permitted a political party to correct an error in an Elections Division sanctioned, legal absentee ballot request program. As a result, duly qualified voters voted pursuant to Florida law.

III. STATEMENT OF CASE AND FACTS

Appellants, in an election contest brought pursuant to section 102.168, Florida Statutes, sought to invalidate 10,2600 absentee ballots cast by voters in Martin County. Following an evidentiary hearing on December 6th and 7th, Judge Lewis entered a Final Judgment For Defendants on December 8, 2000, in which he found that there was no factual or legal basis to invalidate the absentee ballots. Appendix Tab 1.

The relevant facts of this case are those found by Judge Lewis in his Final Judgment at page three. Appendix Tab 1 at 3. Additional facts are set forth in the Joint Stipulations of the Parties. Appendix Tab 2.

IV. STANDARD OF REVIEW

Judge Lewis ruled that the evidence in this case did not demonstrate “fraud nor other intentional misconduct, and that the noncompliance with applicable statutory procedures did not compromise the integrity of the election or the sanctity of the ballot.” Appendix Tab 1 at 4. He found that “the persons who signed the request forms in question were duly qualified and registered voters in Martin County; that “[t]he failure to comply with the statutory procedure was not intentional wrongdoing, but was rather the result of an erroneous understanding of the statutory requirements;” and that “[t]here is no basis in the evidence to conclude that the irregularities affected the vote.” *Id.* at 8-9. And, he found that

“[t]he Democratic Party, like the Republican Party, also disseminated pre-printed absentee ballot request forms to registered Democrats,” with the difference being “their printed forms did not have the errors that the Republicans did.” *Id.* at 9.

The trial court’s judgment should be upheld “if there is any basis which would support the judgment in the record.” *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999). Evidentiary findings and conclusions of the trial judge that are supported by legally sufficient evidence should not be lightly set aside. *Florida Bar v. Abramson*, 199 So. 2d 457, 460 (Fla. 1967). As Judge Lewis noted, he “carefully considered the evidence presented, the arguments of counsel, and the applicable law.” Appendix Tab 1 at 2-3. Judge Lewis’ factual findings are presumptively correct and are fully supported by the evidence presented at trial. The Final Order, therefore, should be affirmed.

V. SUMMARY OF THE ARGUMENT

This case does not involve ballots; it involves ballot request forms. The trial court’s order refusing to invalidate 10,260 absentee ballots in Martin County due to irregularities in the completion of such ballot request forms should be upheld. The final order is grounded upon factual findings that are presumptively correct because they are based upon legally sufficient evidence. *Florida Bar v. Abramson*, 199 So. 2d 457, 460 (Fla. 1967). Likewise, the order is based upon a correct reading of the Florida law as it existed on November 7th.

Absentee ballots are not presumed to be fraudulent or otherwise disfavored under Florida law. Florida law does not permit the disenfranchisement of a voter who made an unequivocal choice for a candidate within the appropriate time on an official ballot. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975). The Martin County absentee voters were qualified to vote and timely cast unequivocal votes on official ballots. Even substantial noncompliance with election laws will not void ballots where there has been a full and fair expression of the will of the people. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998). The trial court correctly determined that there was in fact a full and fair expression of the will of the voters in Martin County.

Mere irregularities--even involving the ballots themselves, not just the ballot request forms--will not invalidate absentee ballots. *McLean v. Bellamy*, 437 So. 2d 737 (Fla. 1st DCA 1983). Here there were no irregularities with the ballots themselves. Absentee ballots will be voided if ballot fraud affects the outcome of the election. Here there was no showing of fraud, or any affect on the outcome of the election.

Nothing in Florida law prohibits a political party from mass mailing absentee ballot request forms to electors. To the contrary, the Division of Elections has opined that it is legal to do so. In any event, an election contest was never intended to reach decisions of elections workers and officials outside the balloting and

counting process itself. Finally, there is no evidence to suggest fraud or criminal misconduct on the part of the Appellees, and the trial court correctly concluded that there was no showing of fraud or intentional wrongdoing.

VI. ARGUMENT

A. ABSENTEE BALLOTS, LIKE ALL BALLOTS, MAY NOT BE INVALIDATED BECAUSE OF HYPER-TECHNICAL ERRORS.

Absentee ballots are not presumed to be fraudulent or otherwise disfavored under Florida law. Absentee voting advances the fundamental value of our democracy that every person who wishes to vote may do so; invalidation of legal absentee votes because of a third party's technical error in providing the ballot to the voter does not. Absentee voting is authorized by sections 97.021(1)(d) and 101.62, Florida Statutes. Electors may request absentee ballots either in person or by telephone. § 101.62(1)(b), Fla. Stat. Additionally, absentee voting is permitted at any time prior to the day of election at the office of the supervisor of elections -- the voter need only show a driver's license or other picture identification. § 101.657, Fla. Stat. Section 101.68(c)(1), Florida Statutes, expressly states the conditions under which an absentee ballot will be considered illegal. Nothing therein, or in section 101.62, the statute providing for a request for an absentee ballot, or anywhere else in the Election Code indicates any intent to disenfranchise

any absentee voter for some error in the means by which the voter obtained the absentee ballot.

Florida law does not permit the disenfranchisement of a voter who made an unequivocal choice for a candidate within the appropriate time on an official ballot. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975). *Boardman*, like this case, involved absentee ballots that were timely cast by qualified electors. The absentee ballots at issue in *Boardman* were contested because of errors on the part of elections officials. This Court considered and rejected the attempt to invalidate absentee ballots of innocent voters. The Court's words are plain:

Assuming that the absentee ballots counted in the election were cast by qualified, registered electors, who were otherwise entitled to vote absentee, notwithstanding the alleged defects, a majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

Boardman, 323 So.2d at 263.

The law of Florida, beginning with *Boardman*, compels the conclusion that invalidation of the ballots of innocent voters is not permissible here. Violation of a statute related to absentee ballots and the even more tangentially related *request for an absentee ballot* will not alone invalidate any ballot. Violation of the statutory

procedures related to absentee ballots will only invalidate a ballot if a statute says that the remedy for the specific violation is the exclusion of an otherwise valid ballot, or if the ballot itself does not reveal the true choice of an eligible, registered voter. Even if the actions of persons other than duly registered, eligible voters involved in the requests were subject to criminal penalties -- a highly dubious proposition here -- that would be no justification to disenfranchise the over 10,000 voters whose voices were heard through their absentee ballots in Martin County.

1. **Substantial Noncompliance With Election Law Will Not Void Ballots Where There Has Been A Full and Fair Expression of the Will of the People**

In 1998, this Court considered a request that it invalidate absentee ballots cast by voters in Volusia County because election officials involved in recounting those ballots utilized a “re-marking procedure that was not in substantial compliance with section 101.5614(5), Florida Statutes (1995), because the procedure provided no reasonable substitute means of verification of the results of the election.” *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 723 (Fla. 1998). This Court declined to do so holding:

As the trial court in this case recognized, the essence of our *Boardman* decision is that a trial court’s factual determination that a contested certified election reliably reflects the will of the voters outweighs the court’s determination of unintentional wrongdoing by election officials in order to allow the real parties in interest--the voters--to prevail. By

unintentional wrongdoing, we mean noncompliance with statutorily mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or, as we find occurred in this election, the election officials' erroneous understanding of the statutory requirements. In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

Beckstrom at 725. (Emphasis in the original.)

Judge Lewis determined that in Martin County there was a “failure to comply with a statutory procedure” and that the failure “was not intentional wrongdoing, but rather was the result of an erroneous understanding of the statutory requirements.” However, Judge Lewis made the further factual determination that “[t]he election in Martin County was a full and fair expression of the will of the people.” Appendix Tab 1 at 9. Pursuant to this Court’s directive in *Beckstrom*, this latter finding by Judge Lewis outweighs the unintentional noncompliance by the elections officials and requires that the real parties in interest--the absentee voters of Martin County-- prevail.

2. Mere Irregularities Even Involving the Ballots Themselves Do Not Invalidate Absentee Ballots

In *McLean v. Bellamy*, 437 So. 2d 737 (Fla. 1st DCA 1983), the First District was asked by an unsuccessful candidate to void 293 absentee ballots

based upon the violation of various statutory requirements governing absentee voting. In evaluating the case, the court first reviewed the legal principles established in *Boardman*. The First District noted this Court's statement:

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.

...

[W]e 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;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the ballot and the integrity of the election. 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.

Id. at 742 (quoting *Boardman* 323 So.2d at 269.)

The First District applied these legal principles and determined that the following acts in violation of the Florida absentee voting law did not constitute

irregularities sufficient to void the absentee ballots that were cast by qualified, registered voters:

- (1) the mailing of unrequested ballots to voters where the City Auditor-Clerk mailed such ballots to individuals who voted absentee in a primary election but did not expressly request an absentee ballot for a runoff election;
- (2) improperly witnessed ballots where one of two required witnesses signed the ballot at the time the voter marked the ballot, but the second required witness signed the ballot without witnessing the voter's action;
- (3) failure of the voter to check on the ballot application the "appropriate reason" for which the voter was entitled to vote absentee; and
- (4) distribution of the absentee ballot forms to third persons without written authorization from the elector.

In evaluating these technical statutory violations, the First District explained:

"We are unable to glean from the provisions of [section 101.62] a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee." *McLean* 437 So. 2d at 743-44. The Court noted that the 1977 Legislature "relaxed some of the former rigidities of Section 101.62 regarding requests for absentee ballots," and explained that "we find no declaration in Section 101.62, implied or explicit, that strict compliance with its provisions is essential to

the validity of the ballot or that the failure to strictly follow any of its provisions will cause the ballot not to be counted.” *Id.*

In rejecting the unsuccessful candidate’s request to invalidate the absentee ballots, the First District repeatedly considered whether such rejection was necessary to ensure a full, fair and free expression of the will of the people. The First District held that rejection was not appropriate despite the irregularities. In concluding that it would be inappropriate to disenfranchise absentee voters for errors on the part of elections officials, the First District explained:

It is obvious that the subject election was managed by the election officials in a manner other than in strict conformance with the applicable voting laws. It may well be that such irregularities were the result of negligence on the part of the election officials. However, any such negligence avails the appellant nothing because such negligence ***did not descend to the kind of gross negligence which the Supreme Court in Boardman equated with fraud or intentional wrongdoing.***

Id. at 750 (emphasis added).

Similarly, in Martin County, there may have been a failure by the local election officials to apply the technical letter of the request form statute. Judge Lewis explained, “I agree that the procedure utilized was contrary to Section 101.162, Florida Statutes, and the Public Records Act, and that it offered an opportunity for fraud and created the appearance of partisan favoritism on the part of the Supervisor of Election.” Appendix Tab 1 at 4. However, he also ruled that

there was, in fact, no fraud or other intentional misconduct. *Id.* Thus, as with the acts at issue in *McLean*, the acts of the elections officials in Martin County “did not descend to the kind of gross negligence which the Supreme Court in *Boardman* equated with fraud or intentional wrongdoing.” *McLean*, 437 So. 2d at 750.

3. Absentee Ballots Will Be Voided Only if Ballot Fraud Affects Outcome of Election

In clear contrast to *McLean* and this action is *Protest Election Returns and Ballots*, 707 So. 2d 1170 (Fla. 3rd DCA 1998). In that case, the Court reviewed a decision in which the circuit court, evaluating events involving the 1997 Miami mayoral election, found an extensive “pattern of fraudulent, intentional and criminal conduct that resulted in such an extensive abuse of the absentee ballot laws that it can fairly be said that the intent of these laws was totally frustrated.” *Id.* at 1171. The Third District ruled that it was appropriate in that situation to void all of the absentee ballots cast in the election.

In reaching its decision, the court reviewed evidence presented to the trial court, including an expert document examiner’s conclusion that 225 illegal absentee ballots were cast; an FBI agent’s identification and confirmation of 113 false voter addresses; evidence of 14 stolen ballots; 140 falsely witnessed ballots; and evidence that over 480 ballots were procured or witnessed by approximately 29

ballot brokers who invoked their privilege against self-incrimination instead of testifying at trial. *Id.* at 1172. In summary, the court found “ample evidence of fraud” to support the trial court’s finding that “the integrity of the election was adversely affected.” *Id.* at 1172.²

Clearly, rampant absentee ballot fraud is justification for invalidating absentee ballots. Correction of a technical error created in a political party’s legally sanctioned absentee ballot request program is not.

As a direct result of absentee voter fraud problems in the 1997 Miami mayoral election, the Legislature enacted Chapter 98-129, 1998 Laws of Florida. This legislation addressed voter registration, absentee voting, and criminal penalties associated with violation of election laws.³

² The plaintiffs’ reliance on *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) is likewise unavailing. The Florida Supreme Court in *Bolden* noted that the facts there showed “promiscuous vote buying” and that “fraud and illegal practices were so conspicuously corrupt and pervasive that it has tainted the entire absentee voting procedure in this election” *Id.* at 565.

³The Division of Elections and the Elections Canvassing Commission are well aware of the intent of this 1998 legislation. Clay Roberts, the Division Director and one of three members of the Elections Canvassing Commission, was the Staff Director for the House of Representatives Committee on Elections Reform in 1998, and was personally involved in the creation of this law. See Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HBs 3743, 3941 (Passed as CS/SB 1402), May 12, 1998. Appendix Tab 3.

The final staff report on the legislation, prepared by the House of Representatives Committee on Election Reform, describes the situation existing at the time of the legislation as follows:

Issues of voter fraud, with an emphasis on absentee balloting, arose in the 1997 Miami mayoral race and in a 1997 city commission race in Miami Beach. Similar allegations had arisen as early as 1993 in the Hialeah mayoral election. Specific allegations in the Miami mayor's race included:

- Someone voting on behalf of someone else
- The purchasing or selling of absentee ballots or another's vote
- Non-City-of-Miami residents voting
- Changing the markings on ballots
- False statements or information being provided with regard to address information and changes of address on voter registrations
- Use of certain addresses within the City as the "new address" for persons not residing within the City for the sole purpose of allowing non-residents to vote in the municipal election
- Voting by absentee ballots under the name of deceased persons
- Voting by non-U.S. citizens

Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HBs 3743, 3941 (Passed as CS/SB 1402), May 12, 1998. Appendix Tab 3.

The legislative report notes that an "absentee ballot is 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." *Id.* at 8. The report further explains that "[a]lthough the statutes emphasize the importance of all the instructions, only the voter's signature and the signature of the *attesting* witness are

mandatory; all other provisions are directory in nature.” *Id.* (citing *Boardman v. Esteve*). The Legislature quoted *Boardman*’s admonition that “[u]nless 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 the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot.” *Id.* (quoting *Boardman*, 323 So. 2d at 265). The legislature certainly did not specify that a third party’s correction of an error in a request form would invalidate a ballot thereby acquired.

Section 101.62, Florida Statutes (request for absentee ballots), and sections 101.64 and 101.65, Florida Statutes (delivery of absentee ballots and instructions to absent electors), take differing approaches. In section 101.62, the law directs that certain information be set forth in the ballot request form. However, nothing in that provision states that failure to include the information will invalidate the ballot so requested. In comparison, both sections 101.64 and 101.65 contain clear instructions to the voter that failure to sign the voter’s certificate on the ballot, or to have the signature properly witnessed, will invalidate the ballot. Nothing in the statutes, or in the attendant legislative history, suggests an intent to turn otherwise directory provisions in the absentee ballot law into mandatory provisions that will invalidate an absentee ballot.

The 1998 legislation also created or increased criminal penalties imposed for violations of election laws, and these penalty provisions are referenced in Appellants' complaint. Section 104.047 was created to provide new penalties for the following absentee voting violations: vote brokering; requesting an absentee ballot on behalf of another without permission; witnessing more than five ballots in an election; marking the ballot of another; and returning more than two voted absentee ballots to supervisors. None of these penalty provisions contain the barest hint of an intent to disenfranchise all absentee voters based on the means by which some voters obtained their absentee ballots.

B. Florida Law Permits and Facilitates Mass Mailing of Unsolicited Absentee Ballot Request Forms to Voters

In 1990, the Division of Elections was asked to opine on the following question: "Can a candidate legally mass mail unsolicited absentee ballot applications to the voters?" The Division answered unequivocally: "A candidate may legally mass mail unsolicited absentee ballot applications to the voters."

Division of Elections Opinion DE 90-31.⁴ Appendix Tab 4. Thus, for at least ten years, it has been the explicit law of this state, well known to both political parties, that mass mailing of unsolicited absentee ballot applications is permissible.

⁴Division of Elections Opinions are published on the Division's official web site at <http://election.dos.state.fl.us/index.html>.

Additionally, the statutes themselves provide the political parties the means to prepare such mass mailings. All necessary, voter specific information required for request forms is available to both political parties from the Division of Elections in the form of the Central Voter File pursuant to section 98.097, Florida Statutes. Both political parties can routinely obtain the most current information from the local Supervisors of Election pursuant to sections 98.095(1)(b) & (2)(d), Florida Statutes.

The Legislature's revisions to the absentee ballot laws in 1998 preserved the parties' participation in the request form process. Indeed, following enactment of this legislation, the Division was once again asked to opine concerning mass mailing of request forms. It issued its opinion DE 98-14 addressing the effect of the 1998 legislation. Appendix Tab 5. The Division extensively analyzed the statutory changes and concluded that "[c]andidates, political parties, or other persons may provide absentee ballot request forms to electors in order that the elector can complete the form and return it to the supervisor of elections by mail, in person, or by delivery to a third party for transmittal to the supervisor." *Id.* at 6.

Thus, nothing prohibits a political party from mass mailing absentee ballot request forms to electors. To the contrary, such mass mailings have been specifically permitted by the Division for ten years, and such mailings are

specifically permitted by the Division under the statutory scheme in effect today. The practice has the effect of giving both political parties the incentive and means to effect maximum voter participation. For example, in this most recent election, both of the major political parties' absentee ballot request programs generated many thousands of requests statewide for absentee ballots. See Democratic Absentee Ballot Request and Republican Absentee Ballot Request Forms, Appendix Tab 6.

Nor is it unusual or at all improper that the two major, institutional political parties should have substantial responsibility for implementing voter turnout efforts, including with respect to absentee ballots. For example, the Legislature has specifically permitted political parties to appoint "Absentee Ballot Coordinators" for the purpose of assisting in the execution and witnessing of absentee ballots. § 101.685, Fla. Stat. Far from creating some nefarious scheme, our election laws contemplate and encourage participation by the political parties that are integral to our democratic process.

C. Filling in a Voter's Identification Number on a *Request Form* is Not a Basis to Invalidate Ballots

Like any right or privilege, the right to vote by absentee ballot can be abused. Such was the case in the 1997 Miami mayoral elections in which dead people voted by absentee, multiple absentee ballots were submitted on behalf of a single voter,

and ballots were stolen and falsely witnessed. *See Protest Election Returns and Ballots*, 707 So. 2d at 1172. The Florida Legislature intervened and enhanced the requirements for absentee voting. *See generally* Ch. 98-129, Laws of Florida. As previously noted, the Legislature required that additional information be included on the request for absentee ballots, including the elector's name and address, the last four digits of the elector's social security number and the registration number on the elector's registration identification card. § 101.62(b), Fla. Stat. However, the Legislature did not reverse *Boardman* and render the directory language in section 101.62 mandatory such that it would require invalidation of the absentee ballots due to technical irregularities with the absentee ballot request forms. As stated in *Boardman*, the directory language of section 101.62(b) could invalidate a ballot only by "expressly declar[ing] that the particular act is essential to the validity of the ballot." Appendix Tab 3 at 8, (quoting *Boardman*). The Legislature did not so declare. Thus, the law of this state remains that an error in the request form cannot invalidate the ballot itself.

Additionally, an election contest was never intended to reach decisions of elections workers and officials outside the balloting and counting process itself. The election contest statute only permits consideration of the balloting process and does not extend to matters outside the balloting. *McPherson v. Flynn*, 397 So. 2d

665, 668 (Fla. 1981) (“Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out. . . . The statutory elections contest has been interpreted as referring only to consideration of the balloting and counting process.”) *See also Smith v. Tynes*, 412 So. 2d 925, 927 (Fla. 1st DCA 1982) (same); *Polly v. Navarro*, 457 So. 2d 1140, 1144 (Fla. 4th DCA 1984).

D. Elections Officials Did Not Engage in Fraud or Misconduct

Appellants repeatedly and broadly allege fraud and misconduct and criminal election law violations on the part of various elections officials, including Secretary of State Katherine Harris and the Florida Elections Canvassing Commission.

Specifically, with regard to the Secretary and the Commission, Appellants allege:

By certifying the statewide election, in spite of violations of Sections 102.62 [sic] and 104.047, Defendants Katherine Harris and the State of Florida Election Canvassing Commission violated those sections of the Florida Statutes. (Complaint at 46).

As Judge Lewis found, the only violation -- violation of section 101.62, Florida Statutes, by local officials -- was “unintentional” and “the result of an erroneous understanding of the statutory requirements.” Appendix Tab 1 at 4. Appellants’ suggestion that the Secretary and the Commission have committed criminal violations by certifying election returns submitted to them by Martin

County must first be measured against section 104.047, Florida Statutes, which contains no provisions whatsoever related to certification of election results.

Section 104.047, Florida Statutes, prohibits a person from providing, offering or accepting a pecuniary or other benefit in exchange for *distributing, ordering, requesting, collecting, delivering or otherwise physically possessing absentee ballots*. With certain exceptions, it prohibits a person other than the voter from requesting an absentee ballot. It prohibits, with certain exceptions, a person marking the ballot of another person. And it prohibits a person from returning more than two absentee ballots to a Supervisor of Elections, again with certain exceptions. No provision in section 104.047 addresses the Division-approved mass mailing process, access to ballot request forms, or the certification process undertaken by either the county canvassing boards or the state Elections Canvassing Commission.

As previously noted, the complaint relates to allegations regarding *request forms, not ballots*. Here, there can be no question but that the voter ordered or requested the absentee ballots. Appellants admit as much in paragraph 21 of their Complaint. In order to find any violation of section 104.047, this Court would have to find that a third party's insertion of a voter identification number on the absentee ballot request form *after it was submitted by the elector* was tantamount to that

third party's *ordering or requesting* the absentee ballot in lieu of the voter having done so. Not only would such a reading stretch the plain meaning of the words "ordering" and "requesting," it would be contrary to the legislative history of this section.

When the 1998 Florida created section 104.047, it explained:

Section 26. Creates §104.047, F.S., relating to absentee voting and penalties. Creates new penalties related to absentee voting:

Vote brokering (third degree felony)

Requesting an absentee ballot on behalf of another without permission, except as provided in §§101.62 or 101.655, F.S. (third degree felony)

Witnessing more than 5 ballots in an election, with exceptions (first degree misdemeanor)

Marking the ballot of another, with exceptions (third degree felony)

Returning more than 2 voted absentee ballots to supervisors, with exceptions (first degree misdemeanor)

Appendix Tab 3 at 23.

Appellants, through their broad conclusory assertions of fraudulent conduct and violations of section 104.047, Florida Statutes, would have this Court read acts into this specific penal statute that were not contemplated either by the law or by those who wrote it.

VII. CONCLUSION

For the reasons expressed, this Court should affirm the final order of Judge Lewis.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
Counsel for Defendant Katherine Harris as
Secretary of State, State of Florida
215 South Monroe Street, Suite 601
Tallahassee, FL 32301
(850) 222-2300

BY _____

Jonathan Sjostrom
Florida Bar No. 816108
Victoria L. Weber
Florida Bar No. 0266426
Donna E. Blanton
Florida Bar No. 948500
Elizabeth C. Daley
Florida Bar No. 0104507

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and facsimile or hand delivery this 11th day of December, 2000, to the following:

Ronald Labasky
Skelding, Labasky & Cox
Ronald A. Labasky
P.O.Box 669
Tallahassee, Florida 32302-0669
Fax 850-224-6422

Edward S. Stafman
Edward S. Stafman, P.A.
6950 Thomasville Road
Tallahassee, Florida 32308
Fax 850-681-7830

B. Daryl Bristow
Brandy Edwards
Michael B. Bennett
910 Houston, Texas 77002
Fax 202-293-1827

John T. Kennedy
477 Riverside Drive
Stuart, Florida 34994
Fax 561-221-1565

Gary Farmer
Gillespie, Goldman, Kronengold &
Farmer
6550 North Federal Highway

Suite 511
Fort Lauderdale, Florida
Fax 954-771-9880

Greenberg Traurig
Barry Richards
101 East College Avenue
Tallahassee, Florida 32301
Fax 850-681-0207

By _____

— Victoria L. Weber