IN THE

Supreme Court of Florida

RONALD TAYLOR and JOHN AND JANE DOES 1-NNN, Plaintiffs/Appellants, v. THE MARTIN COUNTY CANVASSING BOARD, PEGGY S. ROBBINS, THE HONORABLE STEWART HERSHEY, MARSHALL WILCOX, THE FLORIDA REPUBLICAN PARTY, TOM HAUCK, GEORGE W. BUSH, RICHARD CHENEY, THE STATE OF FLORIDA ELECTION CANVASSING COMMISSION and KATHERINE HARRIS, Defendants/Appellees, and JOHN THRASHER, RICHARD J. KOSMOSKI, ROSE CARMEL KOSMOSKI, ANN F. FORD, HORACE S. FORD, JR., WILLIAM F. ZIER, KATHARIN P. ZIER, VIRGINIA WHITE, JOANNE D. PAYSON and DIANNE JOFFE, Intervenors/Appellees.	Case No. 00-2448 Certified Question from 1st District Court of Appeal

INITIAL BRIEF OF APPELLANTS

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

Counsel for Plaintiff/Appellants

EDWARD S. STAFMAN
Edward S. Stafman, P.A.
6950 Bradfordville Road
Tallahassee, Florida 32308-1804

STEVEN BRIAN WHITTINGTON
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 0055972

JASON MICHAEL SAVITZ
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 190063

ROBERT L. KING
Carr, Korein, Tillery, Kunin, Montroy,
Cates, Katz & Glass, L.L.C
Gateway One Building
Suite 300
701 Market Street
St. Louis, Missouri 63101

MICHAEL B. MARKER
Carr, Korein, Tillery, Kunin, Montroy,
Cates, Katz & Glass, L.L.C
Gateway One Building
Suite 300
701 Market Street
St. Louis, Missouri 63101

JOHN T. KENNEDY
Attorney at Law
477 Riverside Drive
Stuart, Florida 34994

GARY M. FARMER
Gillespie, Goldman, Kronengold & Farmer
6550 North Federal Highway, Suite 511
Ft. Lauderdale, Florida 33308-1417

GARY W. KOHLMAN
805 15th Street, NW
Suite 1000
Washington, DC 20005

ALICE O'BRIEN
805 15th Street, NW
Suite 1000
Washington, DC 20005

Co-Counsel for Plaintiffs/Appellants

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1. Statement of the Case

The Plaintiffs filed an elections contest complaint on 1 December 2000 in the Second Judicial Circuit Court, in and for Leon County, Florida, which alleged that the Supervisor of Elections for Martin County, Florida, Peggy S. Robbins, permitted Republican Party members to remove from the public record repository,[1] absentee ballot request forms which had been previously rejected by the Supervisor as being facially deficient, to another location where the public records were altered by Republican Party representatives who changed the facial deficiencies in the voter registration number on the absentee ballot request forms. (Complaint ¶ 16). The public record absentee ballot request forms were in fact altered in such a manner that the previously rejected forms would be acceptable to the Supervisor of Elections. (Complaint ¶ 26). It was contended that the Supervisor knew and intended to give public records to unauthorized third parties, and the third parties knew and intended to alter those absentee request forms in such a manner that legitimate absentee ballots would issue. (See Complaint ¶ 30).

2. Statement of the Facts.

In the Summer or early Fall of 2000, the Florida [and national] Republican Party prepared several thousand absentee ballot request forms to be delivered to registered

[1]Once received by Supervisor Robbins, the absentee ballot request forms became "public records" within the meaning of Section 119.011, Florida Statutes. Supervisor Robbins was the lawful custodian of these public records, pursuant to Section 119.021, Florida Statutes. (Complaint ¶ 40).

Republican electors in Martin County. (JPS[2] ¶ 1).[3] The potential Republican absentee electors in Martin County were to complete the prepared forms ("the party forms") and then submit the forms to the Supervisor of Elections.[4] (Complaint ¶ 19). The Party forms were delivered by the Florida Republican Party to the potential Republican absentee electors during the Summer and early Fall of 2000, and the potential Republican absentee electors completed the Party forms and submitted them to the Martin County Supervisor. (Complaint ¶ 20-22). A total of 1,218 prospective voters completed and signed the Party forms and submitted them to the Martin County Supervisor of Elections to request absentee ballots. (JPS ¶ 4).

Upon receipt and review of the submitted forms, Martin County Supervisor of Elections Peggy S. Robbins, also a member of the Martin County Canvassing Board, noticed that several hundred party forms were missing the electors' voter identification number and/or had other legal flaws. (JPS ¶ 5; 7). The party forms had been delivered to the prospective Republican voters with the missing or incorrect voter registration numbers. (JPS ¶ 3). Supervisor Robbins' policy, in accordance with Florida law and the direction of the Florida Department of Elections, was not to issue an absentee ballot when the office observed that a voter registration number was missing or incorrect on an absentee ballot request form. Supervisor Robbins initially did not issue absentee ballots pursuant to the deficient party forms because these

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[2]References to the Joint Pretrial Stipulation will be "JPS."

[3]Prior to the election, the Florida Democratic Party also disseminated preprinted absentee ballot request forms to registered Florida Democratic voters. (JPS ¶ 2).

[4]The Democratic Party addressed similar preprinted party forms that were mailed back to the Democratic Party after being completed by the voter, which representatives of the Democratic Party delivered to the Supervisor of Elections. (JPS ¶ 40).

forms were facially incomplete under Florida Statutes. (JPS ¶ 8). The submitted deficient party forms were *not* recorded or logged in by Supervisor Robbins as being received, and all rejected absentee ballot request forms received were placed in a separate bin in the office. (JPS ¶ 9-10).

Late in October of 2000, Republican Party representative Tom Hauck learned from the staff of the Martin County Elections Office that a number of preprinted party forms had been submitted to the supervisor which had either missing or incorrect voter identification numbers. (JPS ¶ 11). Mr. Hauck contacted Supervisor Robbins and requested that the Republican Party be permitted to correct the problem.[5] (JPS ¶ 12). Supervisor Robbins thereafter arranged for and allowed Mr. Hauck and others to remove the Party forms from the Office of the Supervisor of Elections and take the forms to places unknown, where Republican representatives altered them. Defendant Hauck intended to amend the forms in order to refile them with Supervisor Robbins in an altered condition. (JPS ¶ 13-14). Defendant Hauck and other unidentified Republican Party representatives altered hundreds of absentee request forms by adding missing voter identification numbers on each form, despite the fact that the request forms had been signed previously by the designated elector and submitted to the supervisor. (JPS ¶ 24). No prior notice was given to the voters who had signed and mailed the absentee ballot request form. (JPS ¶ 15-16; 29). Neither the Democratic Party of Martin County nor the general public were notified of the activities engaged in by the Republican Party representatives. (JPS ¶ 19-20).

Mr. Hauck and other Republican Party representatives changed the deficient Party forms over a period of several hours, working late into the night to complete the

[5]Supervisor Robbins knew at the time that these Republican representatives were members of the Republican Party and/or officers of the Republican Party executive committee. (JPS ¶ 23).

changes. (JPS ¶ 17). Mr. Hauck understood from the staff of the Martin County Elections office that the Republicans were to return the altered party forms as soon as possible, and, in any event, no later than the opening of business the day after the party forms were removed from the office. (JPS ¶ 18). Neither Supervisor Robbins nor any member of her staff observed or supervised the activities engaged in by the Republican Party representatives. (JPS ¶ 26). The Republican Party representatives, and not the electors, re-submitted the request forms after the missing voter information was added, which Supervisor Robbins accepted from the Republican Party knowing that the party forms had been altered after the voter had signed the Party Form. (JPS ¶ 30). No records were kept of how many, or which ones, of the party forms were taken by Defendant Hauck, nor was a record kept of which records were returned by Mr. Hauck to Supervisor Robbins. (JPS ¶ 21-22). Absentee ballots were subsequently issued to electors based upon the void and unlawfully altered requests. (JPS ¶ 25).

In the weeks prior to the 2000 election, Supervisor Robbins received absentee ballot request forms from individual Democratic voters, not those submitted on Democratic party forms, where the request did not contain all information required by Section 101.62(1)(b), Florida Statutes. (JPS ¶ 41). Supervisor Robbins made no arrangements to attempt to contact those Democratic electors or members of the Democratic Party to allow them to alter void forms submitted by potential Democratic absentee electors. (JPS ¶ 42).

In Martin County, 10,260 absentee ballots were returned and counted in the 07 November 2000 election for the President of the United States. Defendant Republican Candidates, George W. Bush and Richard Cheney, received 6,294 absentee votes in Martin County, while Democratic candidates Albert Gore, Jr. and Joseph Lieberman, received 3,479 absentee votes. (JPS ¶ 58). The Martin County Office of Elections

mailed absentee ballots to 12,355 applicants, of which 7,081 were registered Republicans and 2,283 were registered Democrats; the remainder had no party affiliation or were registered in other political parties. (JPS ¶ 59-60; 62). On 26 November 2000, Florida Secretary of State Katherine Harris certified the election results for the state of Florida, and the number of votes cast for Governor Bush exceeded those cast for Vice President Gore by 537 votes. (JPS ¶ 62).

The trial court denied various motions to dismiss alleging a failure to state a cause of action filed by the Defendants, deferring ruling on the arguments until evidence was presented. (T-74-75). Thomas Hauck, (T-94), committee member of the Republican Party in Martin County, learned that potential Republican voters were experiencing delays in receiving their absentee ballots in Martin County. (T-99). As a result, Mr. Kane telephoned Supervisor Robbins and visited her at the supervisor's office that same day. (T-103). Mr. Kane left the office with a stack of the rejected absentee ballot request forms. (T-110).[6] Mr. Hauck told Supervisor Robbins that he was going to take the party forms back to Republican Party Headquarters, where volunteers would call the individual voters to verify their information. (T-113; 116).

Supervisor Robbins told Mr. Hauck that the Party forms needed to be returned to her quickly. (T-118). Mr. Hauck, Charles Kane, and one or two volunteers participated in altering the party forms. (T-122). Mr. Hauck denied that there were multiple occasions in which either he or other members of the Republican Party went to Supervisor Robbins' office and took the party forms, and said he was unaware of any other time that someone else may have done the same. (T-136). Mr. Hauck admitted that potential Republican voters were expressly instructed, on the face of the

[6]Mr. Hauck visited Supervisor Robbins' office frequently, on a daily basis before the election and weekly after. (T-143).

mailing received from the Republican Party along with the party form, to verify the information on the request cards. (T-156). Mr. Hauck also knew that the only person who could request an absentee ballot under Florida law was either the voter or someone in the voter's immediate family. (T-157).

Charles W. Kane, (T-163), Republican State Committee member for Martin County, desired to make sure that the maximum number of Republican voters came out to the polls on 7 November 2000 because he knew the Presidential race was tight. (T-165). After learning about the problems with the party forms, Mr. Kane realized the error had been committed by the Republican Party of Florida. (T-170). Todd Schnick, Political Director of the Republican Party of Florida informed Mr. Kane that a similar problem had arisen in another county in Florida. (T-172). When verifying the voter identification numbers by contacting the voters directly became problematic, Mr. Kane and Mr. Hauck "went to the computer." (T-173). Mr. Kane ran the names through the computer, read the voter identification number to Mr. Hauck, who then physically altered the absentee ballot request forms. (T-173). Mr. Hauck admitted that there was not enough time (T-189) to contact the individual voter before the election.

Todd Schnick was responsible for the entire absentee ballot request program initiated by the Republican Party of Florida, which cost the party about $500,000. (T-195; 211). Mr. Schnick met with L. Clayton Roberts in the office of the Secretary of State Division of Elections, for approval of the program. (T-196). Mr. Schnick knew that the voter was required to disclose the voter identification number submitted on the request, and that the request could be rejected by the Supervisor of Elections if the request lacked the voter identification number. (T-196-197). The instructions sent by the Florida Republican Party to the potential absentee voters included directions to verify all the preprinted information before submitting the request. (T-198). Mr. Schnick realized that once the card reached the Supervisor of Elections, it would

constitute a "request," and further admitted that the voter identification number was required to be properly disclosed by the voter. (T-199-201).

Mr. Schnick first learned of problems with the preprinted cards from Seminole County, where the Supervisor of Elections refused his request to allow Republican representatives to remove the cards from her office and alter them. (T-202). Mr. Schnick called Supervisor Robbins in Martin County, who informed him a similar problem existed and needed to be solved. (T-204). Mr. Schnick knew that unless the problem was solved, Supervisor Robbins would not process the deficient Party forms. (T-206). Mr. Schnick admitted it was not his normal practice to change documents that had already been signed by another person. (T-221).

Peggy Robbins, Supervisor of Elections for Martin County (T-274), testified that her office logged the date that the absentee ballot request was received, or "requested," on the sleeve in which the absentee ballot request was submitted. (T-278). Also the dates that the absentee ballots were issued, and subsequently received, were also logged on the same sleeve. (T-279-280). A much higher volume of absentee ballot requests were received by Supervisor Robbins for the 2000 presidential election than in any other election year. (T-284). Although Supervisor Robbins possessed a database in her office containing the correct voter identification number for every registered voter in Martin County, she would not correct or affix an omitted number without first speaking to the voter and obtaining permission. (T-286).

Supervisor Robbins did not inform Mr. Hauck that he should not add a voter identification number to any of the public records without first obtaining permission from the prospective voter. (T-298). Because the Republican Party of Florida had made the mistake on its own forms, Supervisor Robbins thought it was logical to allow

the Party to correct its own mistake.[7] (T-299). When the Republicans returned the party forms the next day, members did not tell Supervisor Robbins that they had changed the forms without first speaking to the voter. (T-302). Supervisor Robbins knew that the voter identification number is required by law to be included in order for an absentee ballot request form to be valid. (T-319).

Excerpts from the depositions of Martin County Supervisor of Elections workers Brenda Lindsley (T-339) and Emma Smith (T-343) were read into evidence. Ms. Lindsley testified that she thought representatives of the Republican Party removed the Party forms on three separate occasions, but acknowledged that she possessed no personal knowledge of the fact. (T-340; 342). Ms. Smith asserted that she saw Mr. Hauck in the office several times, but had no personal knowledge of how many times Mr. Hauck actually picked up party forms. (T-343; 348).

Christine Moody, one of the attorneys for the Plaintiffs, she was present when Supervisor Robbins made copies of all applications for absentee ballots that had been pre-printed on the Republican Party form. (T-363-364). Ms. Moody was able to determine that 1,222 Republican Party forms were on file at the office of the Martin County Supervisor of Elections, of which 766 had been altered in terms of the voter identification number. (T-364). Of the 766 altered party forms, 684 resulted in ballots being returned to the Supervisor of Elections, with 11 of the 684 ballots ultimately rejected. (T-364-365). Of the 766 altered party forms, 673 resulted in ballots actually cast in the 7 November 2000 general election. (T-365). Ms. Moody further testified that on 16 October 2000, 38 altered Party Forms were received and logged by the Supervisor, with 74 altered Party Form requests on 17 October, and 413 altered Party

[7]Out of 108 total absentee ballot requests that ultimately were not processed, 82 were requests submitted on the Republican preprinted form cards. (T-310).

Form requests on 26 October 2000. (T-366). 140 additional altered Party Form requests were logged in on 27 October 2000. (T-367).

Statistician Arlene Ash, Ph.D., (T-368), testified that exit polling revealed that approximately 91% of registered Republican voters actually cast votes for the Bush/Cheney ticket, with 8% casting votes for the Gore/Lieberman ticket. (T-384). Among the 673 disputed absentee ballots, statistical analysis revealed that the Bush/Cheney ticket would receive 612 votes, and Gore/Lieberman would receive 54 votes. (T-387). Dr. Ash testified that the difference between the two tallies was 558, which was her best estimate as to the net effect of the relative vote counts resulting from removing the 673 disputed ballots. (T-387). Dr. Ash characterized it as the best estimate as to the differential in votes between the two campaigns likely to be found from the disputed absentee ballots. (T-388).

In her opinion the statistics would end up giving Vice President Gore 20 more votes than Governor Bush, (T-392), and acknowledged that the statistics could change depending on factors such as gender, race, and age. (T-402-403). The statistics would also change when considering a financial income factor into the equation. (T-405).

Deborah Dent, who was in charge of processing absentee ballot requests in Martin County, (T-419), testified that the first date listed on the sleeves of the absentee ballot request forms indicated the date the request was processed, and not the date the request was received by the Office of the Supervisor of Elections. (T-421-422). Absentee ballot requests were generally processed within two days after receipt. (T-422). Tom Hauck brought approximately 400 Party Forms to Ms. Dent, to the best of her recollection, and it took her office several days to process all of those requests. (T-422). Therefore, there were several dates listed on the sleeves of the absentee ballot request forms returned by Mr. Hauck. (T-422-423). Ms. Dent admitted that she

had never allowed unprocessed absentee ballots to leave her office before the election at issue. (T-424).

D. SUMMARY OF ARGUMENT

1. The trial court denied plaintiffs all relief based essentially upon a single legal conclusion which was, in turn, based upon a single finding of fact. The trial court concluded that Plaintiffs failed to establish any intentional misconduct in connection with the absentee ballot request forms and ballots at issue. (A-9). The trial court based his conclusion upon a finding that Supervisor Robbins and the Republican Party members acted wrongfully based upon an erroneous understanding of certain statutory requirements. *Id*. However, even if the trial court was correct to conclude that the violation of these statutes were unintentional, his finding that Plaintiffs failed to prove intentional misconduct is still erroneous as a matter of law. That is because the trial court ignored the fact that the statutory violations were merely means to the fraudulent end of undermining the integrity of the electoral process by altering fatally defective ballot request forms so as to cause ballots to issue. The trial court' analysis is that he construed the wrongdoing which Plaintiffs are alleging much too narrowly. The trial court focused exclusively upon violations of the Election Code and the Public Records Act. However, the violations of these laws were merely means by which the Republicans achieved the fraudulent objective of making fatally defective ballot request forms appear valid. Even if the Republicans did not realize that the means by which they succeeded in accomplishing this fraudulent objective were independently wrongful, they still acted with intent to commit fraud which undermined the integrity of the election process. Under controlling decisions of this Court, that intentional conduct in and of itself requires the invalidation of the tainted ballots. Furthermore, The trial court also erred in finding that Supervisor Robbins and the Republican Party members acted in ignorance of those laws which they violated.

2. The trial court erroneously found that no fraud or intentional misconduct was present in the actions of Peggy Robbins, as Supervisor of Elections, and the

agents of the Florida Republican Party. The trial court's finding that the Supervisor and the Republicans altered the ballot request forms in a manner contrary to both §101.62, Florida Statutes and the Public Records Act necessarily should have resulted in the finding that the acts at issue were intentional. The conduct which the Defendants stipulated to and which the trial court found, does not meet the definition of "unintentional wrongdoing" as previously defined by the Court. Because the conduct constituted intentional wrongdoing and fraud, the Court should invalidate the questioned ballots because the fraud and intentional wrongdoing permeated the election in Martin County to such an extent that the integrity of the election has been affected.

3. Florida courts have broad discretion to fashion appropriate remedies to redress the deleterious effects of election fraud and misconduct. In the Martin County case, the precise number of tainted ballots are known, the identity of the party responsible for fouling those ballots is known, and the party affiliation of the voters who cast those ballots is known. Plaintiffs accordingly propose that the party who is guilty of fouling the electoral process and the ballots at issue – the Republican Party and its candidate – be the party who forfeits all 673 ballots. In the alternative, Plaintiffs propose that the Republican Party and its candidate forfeit the probable number of those ballots which were cast for Governor Bush. The only evidence presented at trial showed that registered Republican voters statewide voted 91% for Governor Bush and that, in all statistical probability, so did the Martin County absentee registered Republican voters whose 673 ballots are at issue in this case.

E. ARGUMENT AND CITATIONS OF AUTHORITY

1. The Supreme Court of Florida should exercise its jurisdiction as the Martin County case is of great public importance and the appropriate relief requested would change the outcome of the election.

On 08 October 2000 the District Court of Appeal, First District, certified that the order of the Second Judicial Circuit Court in the Martin County case passes upon a question of great public importance requiring immediate resolution by the Court. At issue are 673 absentee ballots known to have been cast by registered Republican voters in the 07 November 2000 presidential election in Martin County. Plaintiffs seek to have those votes invalidated because of election fraud. At the time of the filing of the Martin County case, Governor Bush had defeated Vice President Gore by 537 votes according to the vote tally certified by the Secretary of State. If the Court were to grant the relief Plaintiffs/Appellants seek, the relief would change the outcome of the election. The presidential electors are constitutionally required to meet and cast their votes on 18 December 2000. The State of Florida, however, can only protect its slate of presidential electors from Congressional scrutiny under the "safe harbor" provision of 3 U.S.C. § 5 if there is a final determination of those presidential electors by December 12, 2000. *See Bush v. Palm Beach County Canvassing Board*, 531 U.S. __, slip op. at 6 (December 4, 2000).

The Court has already exercised its jurisdiction under Article V, section 3(b)(5) of the Constitution of Florida in three other election contest cases involving the same presidential election at issue as in the Martin County case. *Gore v. Harris*, __ So.2d __ (Dec. 8, 2000 Fla.); *Fladell v. Palm Beach County Canvassing Board*, __ So.2d __ (Dec. 1, 2000 Fla.); *Palm Beach County Canvassing Board v. Harris*, __ So.2d __, (Nov. 21, 2000 Fla.). The resolution of the Martin County case could determine

which slate of presidential electors the State of Florida may finally certify. The case not only presents a question of great public importance, but also a question that requires the Court's immediate resolution, due to the timing of the deadline for final certification of that slate of electors. *See McPherson v. Flynn*, 397 So.2d 665 (Fla. 1981) (involving a challenge to the qualification of a state representative just prior to the opening of the legislative session).

2. Regardless of whether the trial court was right or wrong in holding that certain statutory violations relating to the absentee ballot request forms at issue were based upon an erroneous understanding of the statutes, the trial court's conclusion that there was no intentional misconduct was erroneous. The public records and elections code violations were merely the *means* by which third parties implemented their fraudulent scheme to make 673 invalid ballot request forms appear valid. Beyond a reasonable doubt the third parties *did* act intentionally to alter ballot forms for this improper purpose.

a. The trial court's conclusion that statutory violations were unintentional was wrong even if the trial court's finding that those violations were based upon a misunderstanding of the law was correct.

The 673 ballot request forms at issue in Martin County reached Supervisor Robbins' office were placed in a "reject bin" because they lacked the statutorily required voter registration numbers. The Defendants stipulated that initially, Supervisor Robbins, "in accordance with the law and interpretations of the Florida Division of Elections" (JPS ¶ 8) treated the defective request forms as legal nullities by literally pitching them in a reject bin. (JPS ¶ 10). Supervisor Robbins, a Republican, subsequently notified local county Republican Party members of the problem with the ballot request forms and allowed those local Republican members

to remove the invalid forms from her office for the purpose of altering the ballot request forms. (JPS ¶¶ 11, 12, 13). This panoply of intentional misconduct was undertaken for the obvious purpose, and with the actual consequence, of affecting the integrity of the election by making fatally defective request forms appear valid and doing so for the exclusive benefit of her own political party. The intentional effort to obtain ballots for Republican voters based upon fatally defective ballot request forms undermined the integrity of the election process and therefore requires the invalidation of all ballots which it taints. *Boardman*, 323 So.2d at 265 (when misconduct relating to absentee ballots is "calculated to affect the integrity of the ballot or election," all absentee ballots tainted by the violation must be invalidated).

The above analysis does not conflict with the trial court's factual findings in any way. Even accepting for the sake of argument that the trial judge did not abuse his discretion in making his factual finding, it is clear that the trial court's denial of relief is wrong as a matter of law.

The trial court's factual finding was that the conduct of the Martin County Republican Party members "was not intentional wrongdoing, but rather was the result of an erroneous understanding … of statutory requirements." (Final Judgment, reprinted in Appendix, hereinafter "A," page 9). The error in the judge's conclusion that the Republican Party members' conduct was unintentional is that the judge focused exclusively upon conduct other than party members' intent and purpose of compromising the integrity of the election by resubmitting the same signed absentee ballot request form which had been previously rejected now in altered form with no attestation or certification by the voter.

The only misconduct which the trial judge considered was the violation of the election code's prohibition against third parties requesting ballots on behalf of voters (a third degree felony) and Supervisor Robbins' violation of the Public Records Act

by allowing the members to remove the ballot request forms from her office (a first degree misdemeanor). Even if the trial court were correct in finding that the members erroneously understood such well-known statutory requirements (Robbins was the official charged with administering the very statute of which she claims ignorance), that finding most certainly does not excuse the members' obviously intentional undermining of the integrity of the election process by Republican Party members who altered the ballot request forms with intent to circumvent the election law.

b. The trial court's conclusion that statutory violations were unintentional was wrong because it was not supported by competent substantial evidence.

The parties stipulated and the trial court found that in contravention of the policy in Martin County and § 101.62, the Supervisor of Elections allowed one or more representatives of the Florida Republican Party to remove from the supervisor's office several hundred absentee ballot request forms that were legally deficient in that the forms had either missing or incorrect voter identification numbers. The request forms were removed from the office of the supervisor with her knowledge that the Republican Party representatives intended to alter those forms by adding the voter's identification number. The trial court found that the "procedure utilized was contrary to Section 101.162, Florida Statutes, [*sic*] 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 Elections." (Appendix, Page 4). The trial court continued, however, that despite these violations, there was no fraud nor other intentional misconduct. *Id*. The trial court concluded that "[t]he failure to comply with the statutory procedure was not intentional wrongdoing, but rather was the result of an erroneous understanding of the statutory requirements." *Id*. at 9. The trial

court's finding that there were violations of election laws and the Public Records Act, but no intentional wrongdoing or fraud, constitutes an abuse of discretion.

A person wishing to vote absentee in Florida must first request a ballot from the supervisor of elections in the county of which the elector is a resident. The supervisor may accept a written or telephonic request from the elector for an absentee ballot. If directly instructed by the elector, a member of the elector's immediate family, or the elector's legal guardian, may also request an absentee ballot. § 101.62(1)(a) and (b), Florida Statutes. The person making the request, however, *must* disclose the following:

1. The name of the elector for whom the ballot is requested;
2. The elector's address;
3. The last four digits of the elector's social security number;
4. *The registration number on the elector's registration identification card*;
5. The requester's name;
6. The requester's address;
7. The requester's social security number and, if available, driver's license number;
8. The requester's relationship to the elector; and
9. The requester's signature (written requests only).

Section 101.62(1)(b). (emphasis added).

Once the absentee ballot request form is returned from the requesting elector to the supervisor's office, the ballot request form becomes a public record. Section 119.011, Florida Statutes defines "public records" as "all documents, papers ... or other material, regardless of physical form … made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." The term "public record" has been broadly interpreted to encompass all material made or received by an agency in connection with the transaction of official business which

is used to perpetuate, communicate, or formalize knowledge. *See Shevin v. Byron, Harless, Reid & Associates, Inc*, 379 So.2d 633, 640 (Fla. 1980). In *State v. Short*, 483 So.2d 10 (Fla. 2d DCA 1985), the court held that no person of common intelligence should have to guess as to what is an "official record" and "official document." The request forms at issue were received by the supervisor of elections from electors in Martin County. Once the forms were received, Ms. Robbins, as Supervisor of Elections in Martin County, became the lawful custodian, pursuant to § 119.021, as she was the "elected or appointed … county … officer charged with the responsibility of maintaining the office having public records …." Clearly, Robbins, as the supervisor of elections would not have to guess that the absentee ballot request forms she received from electors of Martin County were a public or official record within the meaning of Florida law.

A statutorily imposed duty of the supervisor of elections is to keep the public records under her charge "in the buildings in which they are ordinarily used." § 119.031, Florida Statutes. A public official is not authorized by law to remove, or allow the removal, of public records from the office or building in which they are customarily used except to accomplish official purposes. *Op.Atty.Gen.* 93-16, March 4, 1993. Further, § 119.07(1)(a), Florida Statutes provides that the person having custody of a public record shall permit the record to be inspected and examined by any person desiring to do so "under supervision by the custodian of the public record or the custodian's designee."

The conduct of the Republican Party and Ms. Robbins also violated Florida Statutes § 839.13,[8] falsifying records. The pertinent language provides that no

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[8]The complete text of § 893.13(1), Fla. Stat., reads: (1) If any judge, justice, mayor, alderman, clerk, sheriff, coroner, or other public officer, or any person whatsoever, shall steal, embezzle, alter, corruptly withdraw, falsify or avoid any

> (1) … public officer, … shall fraudulently alter … falsify any … documents … belonging to any public office within this state; or if any person shall cause or procure any of the offenses aforesaid to be committed, or be in anywise concerned therein, the person so offending shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

To add information to the absentee voter request form after attestation by the voter is to alter a record within the meaning of the Florida Public Records Act. Section 893.13(1) provides for a penalty for alteration of documents belonging to a public office in the state of Florida by any person and penalizes the procurement of such in offense. This law applies to all public documents made public by law. See *Pou v. Ellis,* 66 Fla. 358, 63 So.723 (Fla. 1913).

As Robbins admitted, she relinquished custody of the already fatally defective ballot requests to Republican party representatives, and for their part, those Republican representatives admitted that they then altered those ballot requests. If such a break in the chain of custody and tampering had occurred with respect to an item of physical evidence, that evidence would be spoiled and inadmissible evidence in any court in this state. *Pate v. State*, 256 So.2d 223, 226 (Fla. 1st DCA 1972) (reversing conviction where "others had access to [a] record" because state failed "to

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record, process, charter, gift, grant, conveyance, or contract, or any paper filed in any judicial proceeding in any court of this state, or shall knowingly and willfully take off, discharge or conceal any issue, forfeited recognizance, or other paper above mentioned, or shall forge, deface, or falsify any document or instrument recorded, or filed in any court, or any registry, acknowledgment, or certificate, or shall fraudulently alter, deface, or falsify any minutes, documents, books or any proceedings whatever of or belonging to any public office within this state; or if any person shall cause or procure any of the offenses aforesaid to be committed, or be in anywise concerned therein, the person so offending shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s.775.083.

prove the continuity of possession"). Even putting aside momentarily the fatal deficiencies in the ballot requests when Robbins received them from the would-be voters, those ballot requests were irredeemably spoiled by the break in the chain in custody and the admitted tampering by partisan, Republican party representatives.

As the absentee ballot request forms were removed from the office of the Supervisor of Elections of Martin County by Republican Party representatives and altered, in the absence of any supervision from the authorized custodian or her designee, the Plaintiff's proved a direct violation of both §§ 119.031 and 119.07(1)(a), Florida Statutes. The acts constituted a willful and knowing violation of the above statutes and, therefore, constitute violations of §§ 119.10 and 119.02 Florida Statutes, first degree misdemeanors.

The trial court found that all of the above conduct, while in contravention of several statutes, was unintentional.[9] Under the *Beckstrom* definition, the complained of conduct here does not meet the definition of unintentional misconduct. There was no finding by the trial court, or evidence presented at the trial, that Ms. Robbins was incompetent in her role as supervisor of elections. Nor did the trial court find that the release of the absentee ballot request forms was the result of a lack of care. Instead, the court found, as had been found in *Beckstrom*, that the noncompliance was the result of an erroneous understanding of the statutory requirements. (Appendix, Page

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[9]Unintentional conduct is defined under *Beckstrom* as: 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 v. Volusia County Canvassing Board*, 707 So.2d 720, 725 (Fla. 1998).

9). The question then becomes whether any alleged "erroneous understanding" of the election and public records law was reasonable. Ms. Robbins was the supervisor of elections for several years in Martin County. As supervisor, she was charged with understanding and implementing the election laws of Florida. Ms. Robbins reasonably should have known that the removal of public records from her custody for the stated purpose of altering those records by partisan officials was in violation of the very election laws she was sworn to uphold.

Furthermore, the evidence strongly suggests that Robbins knew full well that the conduct she engaged in was contrary to the intent of the election and public records laws. Robbins insisted to Mr. Hauck that he bring the absentee ballot request forms back to her office the next day. (JPS ¶ 18). Ms. Robbins had previously instructed her staff not to process absentee ballot request forms that did not include a correct voter identification number, and that the staff were not to fill in the correct voter identification numbers on incomplete or incorrect forms. (T-286). The Martin County Elections Office did not fill in, or correct, or otherwise alter voter registration information included on absentee ballot request forms submitted by an individual without that individual's express permission. (T-286). Finally, Ms. Robbins admitted that she knew it was improper to fill in, or correct, or otherwise alter the voter registration number without the elector's permission. (T-286). The trial court clearly abused its discretion in finding that Robbins and the Republican Party officials labored under an erroneous understanding of the relevant law.

Because the intentional wrongdoing present occurred in more than just an isolated manner, but, instead was pervasive in that it affected several hundred absentee ballot request forms through the calculated conduct of Ms. Robbins and the Republican Party officials, the Court is not obligated to look at whether the "will of the people" was adversely affected. When "there is present fraud and intentional

wrongdoing, which clearly affect the sanctity of the ballot and the integrity of the election process, courts must not be reluctant to invalidate those elections to ensure public credibility in the electoral process." *Bolden v. Potter*, 452 So.2d 564, 566 (Fla. 1984). In this case, the intentional wrongdoing present did affect the sanctity of the ballot and the integrity of the election.

When a public official, who is charged with ensuring fairness acts in a partisan fashion in an election, allows partisan actors to remove protected documents from her custody for the purpose of altering those documents to promote partisan interests, public confidence in the electoral process is harmed. The trial court even found that the conduct in question "created the appearance of partisan favoritism on the part of the Supervisor of Elections." (Appendix, Page 4). The appearance of favoritism is one of the evils sought to be remedied. The fraud and intentional wrongdoing in this case was not inconsequential. It was blatant and apparent on the fact of the stipulated record permeated a substantial part of the absentee-election process in favor of Republican candidates.

c. Plaintiffs proved substantial noncompliance in the form of multiple violations of laws bearing directly on the integrity of the electoral process.

The trial judge "agree[d]" that the conduct of the Republican Party members "was contrary to section 101.[]62, Florida Statutes, and the Public Records Act." (A-4). Although for purposes of this argument Plaintiffs are not disputing the trial judge's finding that the Republican Party members and Supervisor Robbins violated these laws based upon an erroneous understanding of the statutory requirements, there can be no reasonable doubt that these violations were calculated to affect the integrity of the election process and frustrate the intention of Florida's election laws. In addition,

the Republican Party members violated at least two other statutes[10] which Judge Lewis did not specifically mention in his opinion. The violation of one of those statutes – section 101.62's prohibition against third party submission of ballot applications – is a third degree felony. Fla. Stat. § 104.047(2). Violation of the other statute – section 839.13's prohibition against falsifying public records – is a first degree misdemeanor.

All of the foregoing violations go to the essence of the integrity of the electoral process in general and the absentee ballot laws in particular. For instance, section 101.62 was amended in the wake of the absentee vote corruption in the 1997 Miami mayoral election for the purpose of strengthening the very anti-fraud provisions violated here. The clear violations of this and the other statutes cited above constitute substantial noncompliance more than sufficient to satisfy the second *Boardman* factor.

d. The three-part *Boardman* test for invalidation of absentee ballots in Florida.

In *Boardman* the court attempted to harmonize its prior precedents on the issue of the appropriate remedy for irregularities affecting absentee ballots in Florida elections. Acknowledging that prior cases were not wholly consistent on the point, the Florida Supreme Court announced that "substantial compliance," rather than strict compliance, "is all that is required to give legality" to absentee ballots. 323 So.2d at 264. The Court thus made clear that absentee ballots were not to be invalidated by Florida courts solely for inadvertent technical violations of Florida law unrelated to the integrity of the electoral process or the accuracy of the election results. In order to

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[10]The Republican Party members' conduct also violates the Florida Administrative Code's prohibition against "voter fraud," defined to include "intentional misrepresentation, trickery, deceit, or deception arising out of or in connection with . . . voting[.]" 1 FAC 1S-2.025.

guide future judicial decisions on these issues, the Court held that, in determining the appropriate remedy for violations of the election laws affecting absentee ballots, 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 election.

Id. at 269.

Of the three *Boardman* factors, the presence or absence of fraud or intentional misconduct is pivotal to the Martin County analysis. The Court has emphasized that "[c]ourts cannot ignore fraudulent conduct which is purposely done to foul the election and corrupt the ballot." *Bolden v. Potter*, 452 So.2d 564, 567 (Fla. 1984). *Wilson v. Revels*, 61 So.2d 491 (Fla. 1952). In each and every reported case where fraud or intentional misconduct was present, Florida courts have held that there was substantial noncompliance with absentee voting laws and that the fraud or intentional misconduct adversely affected the sanctity of the ballot and integrity of the election. *Bolden v. Potter*, 425 So.2d 564 (Fla. 1984); *In re Matter of November 4, 1997 Election for City of Miami*, 707 So.2d 1170 (Fla. 3d DCA 1998). On the other hand, Florida courts which find unintentional misconduct in connection with absentee ballot irregularities routinely stress the significance of that fact. *E.g.*, *Boardman*, 323 So.2d at 263 ("Notably existent in this dispute is the complete absence of fraud, gross negligence or even the hint of intentional wrongdoing, either on the part of the voters

or of the election officials.")[11]

There can be no doubt that the Republican Party members' deliberate alteration of facially defective ballot request forms for the calculated purpose of making those forms to appear to be valid constitutes fraud or intentional misconduct within the meaning of the first *Boardman* factor. In the language of the Court's decision in *Boardman,* this was clearly misconduct "calculated to affect the integrity of the ballot or election." *Boardman, supra*, 323 So.2d at 265. The intent of the members was to frustrate the election law pertaining to absentee ballot procurement. *In re Matter of November 4, 1997 Election for City of Miami, supra*, 707 So.2d at 1171.

The misconduct which the trial judge found to be "unintentional" was merely the means by which the Republican Party members achieved the fraudulent objective. The court's legal conclusion that the Republican Party acted "unintentional[ly]," was based strictly upon his factual finding that they had acted with "an erroneous understanding of the statutory requirements" of the Election Code and the Public Records Act. See Appendix, *Cf.* slip op. at 9, *with Beckstrom*, 707 So.2d at 725 ("unintentional wrongdoing" includes "situations in which … noncompliance results from election officials' erroneous understanding of the statutory requirements"). However, even if the Republican Party members here acted unintentionally with respect to the *means* by which they implemented their fraudulent purpose, that does not change the fact that they intentionally undertook that fraudulent scheme. *Cf.* 18 U.S.C. § 1341; *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir. 1979); binding on the Eleventh Circuit, *Bonner v. City of Pritchard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981).

e. Sanctity of the ballot and the integrity of the election were compromised.

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[11]*Accord McLean v. Bellamy*, 437 So.2d 737 (Fla. 1st DCA 1983).

The reason that fraud or intentional misconduct regularly results in invalidation of ballots is that such misconduct imperils the very credibility of the electoral process. As the Court has explained, "when there is present fraud and intentional wrongdoing, which clearly affect the sanctity of the ballot and the integrity of the election process, courts must not be reluctant to invalidate those elections to ensure public credibility in the electoral process." *Bolden*, 452 So.2d 566. The effect of the misconduct at issue in Martin County on public confidence is particularly grave in view of the undisputed fact that the Republican Party which committed the misconduct solely for the undeserved benefit of voters registered with their party, to the exclusion of all other voters regardless of their political party affiliations.

The fraud in this case distorted the will of those voters. There can be no question that the 673 tainted absentee ballots cast in Martin County were more than the margin of victory in the presidential race statewide. Allowing those votes to be cast is indistinguishable from allowing a busload of registered voters who are one minute late to the polling place on election day due to a mechanical breakdown on their bus and through no fault of their own. If the election officials permitted them to vote, the ballots they cast would undoubtedly accurately reflect *their* will. But it would just as surely unfairly dilute the votes of all those voters who complied with the letter of the law. No one would suggest that the busload of voters should be allowed to vote. No one would suggest that if the busload were allowed to vote in violation of the law, that their votes should be counted. Notwithstanding the fact that the votes cast after the polls closed would accurately affect the will of the would-be voter. This case is no different, and the 673 Republican ballots at issue here should not be counted.

The Republican Party's conduct, clearly intended to affect the integrity of the election, in fact had just that effect, just as the members intended. There were 673 registered Republican voters who were allowed to cast ballots despite having

submitted fatally defective ballot request forms. The intent of the voters whose votes were *not* tainted would be unfairly diluted just as surely as if the Republicans had stuffed the ballot box with wholly fabricated "votes."

Plaintiffs are cognizant of the Court's admonition that "[w]hen voters have done all that the statute has required them to do they will not be disenfranchized solely on the basis of the failure of election officials to observe directory, statutory instructions." *Boardman,* 323 So.2d at 268. However, the voters who improperly received absentee ballots in this case are not entirely without blame. The voters did not comply with the Republican absentee ballot request forms' express instructions to verify their personal registration number. (T-156). Moreover, the court made clear in *Boardman* that the requirements of § 101.62 *are* mandatory, rather than directory, when, as here, there is "irregularity … calculated to affect the integrity of the ballot or election." *Id.* at 265.

3. Remedy.

In an election contest case, the Florida Legislature has vested broad discretion in the circuit court "to … correct any alleged wrong, and to provide any relief appropriate under such circumstances." Fla. Stat. § 102.168(8). For all practical purposes, there are only two general remedies available in this case: invalidating all absentee ballots cast in Martin County or invalidating just the 673 ballots procured by the Republican Party members' fraud. The Court has previously declared:

> The general rule is that where the number of invalid absentee ballots is more than enough to change the result of the election, then the election shall be determined solely upon the basis of the machine vote. The reason for the rule is that since all the ballots have been commingled and it is impossible to distinguish the good ballots from the bad, because all ballots are required by law to be unidentifiable, then in fairness all the ballots must be thrown out.

Boardman, supra, 323 So.2d at 268.

In Martin County the precise number of ballots at issue is known, the identity of the party responsible for those tainted ballots is known, *and* the party affiliation of the persons casting those ballots is known. The Court has at its disposal a scalpel to surgically remove only the bad votes in lieu of the meat axe remedy of discarding all Martin County absentee votes. That surgical remedy, however, raises the question of whether to deduct all of those 673 tainted ballots from the vote total of the candidate whose Party procured those votes by fraud or whether the votes should be deducted on a pro rata basis from each of the candidates (and if so, how to determine the proportions to be deducted).

The remedy which Plaintiffs propose is to deduct from the Republican candidate's vote total *all* 673 tainted ballots because this entire mess resulted solely from his Party members' intentional wrongdoing and the resulting fraud from which the Republican Party candidate benefitted. A second remedy would be to deduct from each candidate's vote total the pro rata share of the 673 ballots which each candidate probably received; this method suffers from imprecision, but imprecision is more palatable than the alternative of counting votes procured by fraud.

a. The Court should deduct the 673 tainted ballots from the Republican candidate's total Martin County vote because, but for the unlawful conduct of the Republican Supervisor and the Martin County Republican Party, those 673 ballots *would not* have been cast as a matter of undisputed fact.

The Court in *Bolden*, stated that "[t]he ballots affected should be invalidated." *Bolden v. Potter*, 452 So.2d 564, 567 (Fla. 1984) (invalidating all absentee ballots cast). In Martin County, the Republican Supervisor of Elections and the Republican Party acted in concert unlawfully and in secret to salvage 766 ballot requests from

registered Republicans, requests which were pronounced dead on arrival in the Supervisor's office. The Republican Party altered those defective ballot requests to create an absolutely false public record of an additional 766 valid Republican ballot requests. The Republican Party and its candidate should be held accountable and required to forfeit the 673 votes that should never have been cast, and had standard Florida and Martin County procedures been properly followed, those absentee ballots never would have been cast.

Plaintiffs proved the Republican Party' serious intentional wrongdoing which fouled the election process. It would be inequitable to saddle plaintiffs with the additional burden of proving with mathematical certainty how many of those 673 ballots each candidate received, a burden which the secrecy of the ballot renders impossible. Moreover, this Court already lifted any such burden from a plaintiff contesting an election once he has proven fraud. In *Bolden*, this Court held that "[t]he burden of establishing a certainty that a specific number of ballots were tainted so as to affect the outcome of the election would be too great." *Bolden*, 452 So.2d at 566.

From the evidence it is clear that the ill-gotten ballots inured to the benefit of the one party which unlawfully procured those ballots. If someone goes to the trouble of secretly perpetrating an election fraud and violating the law in order to procure ballots, he or she would not take such a risk (or go to such lengths) to benefit anyone other than the candidate that he or she favors. That the candidate himself may be innocent of the wrongdoing does not matter. *Bolden*, 452 So.2d at 567 ("It makes no difference whether the fraud is committed by candidates, election officials, or third parties. The evil to be avoided is the same, irrespective of the source.")

In Martin County, the Defendants all admitted that the defective ballots which the Republican Party unlawfully salvaged were ballot requests which the Republican Party had solicited from registered Republicans. Further, it is undisputed that no other

party or candidate was informed of any irregularities with its candidate's absentee ballot requests. It is undisputed that no other party or candidate was informed that Republican Party representatives were being permitted to retrieve defective Republican ballot requests for the express purpose of doctoring them so as to give the appearance that the Supervisor had received 766 more legally valid ballot requests than she in fact did. There is no sound reason why any candidate other than the Republican candidate should be required to forfeit even one of the 673 tainted ballots which the Republicans single-handedly steered into the ballot box.

b. Alternatively, the Court may disqualify each candidates' proportionate share of the number of disputed ballots cast for him.

While the only remedy sanctioned under Florida law in circumstances such as these is invalidation of all absentee ballots cast in Martin County, there is an alternative remedy which the Court may wish to consider:

> In purging the polls of illegal votes, the general rule is that unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division ….

McCrary on Elections, § 495 at 364 (emphasis added) [*quoted in State v. Boehner*, 119 N.W.2d 147, 152 (Neb. 1963)]. The *McCrary* treatise suggests that "in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each;" to reiterate, however, that remedy is the one to be employed "unless it be shown for which candidate they were cast." *Id.* In this case, Plaintiffs presented expert statistical evidence that the overwhelming majority (91%) of registered Republicans in Florida voted for Governor Bush. The same statistical evidence showed that 91% of the affected Martin County absentee ballots (all cast by registered Republicans) were probably cast for Governor Bush, and accordingly, that 91% of the ballots be deducted from the total Martin

County votes for Governor Bush. (T-384). While this remedy suffers from being imprecise, it remains far preferable "to let[ting] illegal votes count." *Huggins v. Superior Court, County of Navajo*, 788 P.2d 81, 85-86 (Ariz. 1990).

F. CONCLUSION

The circuit court's conclusion that there was no intentional wrongdoing in the Martin County case is the result of the trial court's narrow view of what occurred in this case. Even if the trial court were correct that the Republicans and the Supervisor violated statutory requirements based upon an erroneous understanding of those requirements, the court ignored entirely the fact that by altering the 766 defective and rejected ballot requests. The Republicans manufactured a fraudulent public record which created the false appearance that the Supervisor had 766 more valid ballot requests than she in fact had. On the basis of that falsified public record, the Supervisor sent out 766 ballots which should never have been delivered, resulting in 637 ballots which never should have been cast. Indeed, it is a matter of stipulated fact that but for the Republicans' alteration of the public record, those ballots would never have been issued or cast. Because the Republicans engaged in that misconduct – some of which constitutes serious criminal violations and all of which constitutes an intended effort to undermine the integrity of the electoral process and frustrate the statutory requirements of the election law – the Court should invalidate all 637 of those ballots and, for the reasons discussed in this brief, deduct them from the Republican candidate's vote total.

H. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Barry Richard
Greenberg, Traurig
101 E. College Avenue
Tallahassee, Florida 32301
850-681-0207 fax

Jonathan Sjostrom
Steel, Hector & Davis
215 S. Monroe Street
Tallahassee, Florida 32301
850-222-8410 fax

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

Kenneth W. Wright
Shutts & Bowen
300 S. Orange Avenue
Suite 1000
Orlando, Florida 32801
407-425-8316 fax

Stuart A. Levey
Miller, Cassidy, Larroca & Lewin L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037

Peter Antonacci
Gray, Harris & Robinson, P.A.
301 S. Bronough Street
Suite 600
Tallahassee, Florida 32302
850-577-3311 fax

B. Daryl Bristow
Baker, Botts, L.L.P.
910 Louisiana
Houston, Texas 77002

W. Robert Vezina III
310 N. Calhoun Street
Tallahassee, Florida 32301
850-224-1353 fax

by fax and hand or mail delivery this _____ day of December, 2000.

Respectfully submitted,

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

EDWARD S. STAFMAN
Edward S. Stafman, P.A.
6950 Bradfordville Road
Tallahassee, Florida 32308-1804

STEVEN BRIAN WHITTINGTON
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 0055972

JASON MICHAEL SAVITZ
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 190063

ROBERT L. KING
Carr, Korein, Tillery, Kunin, Montroy,
Cates, Katz & Glass, L.L.C
Gateway One Building
Suite 300
701 Market Street
St. Louis, Missouri 63101

MICHAEL B. MARKER
Carr, Korein, Tillery, Kunin, Montroy,
Cates, Katz & Glass, L.L.C
Gateway One Building
Suite 300
701 Market Street
St. Louis, Missouri 63101

JOHN T. KENNEDY
Attorney at Law
477 Riverside Drive
Stuart, Florida 34994

GARY M. FARMER
Gillespie, Goldman, Kronengold & Farmer
6550 North Federal Highway, Suite 511
Ft. Lauderdale, Florida 33308-1417

GARY W. KOHLMAN
805 15th Street, NW
Suite 1000
Washington, DC 20005

ALICE O'BRIEN
805 15th Street, NW
Suite 1000
Washington, DC 20005

Co-Counsel for Plaintiffs

APPENDIX

TO

INITIAL BRIEF OF APPELLANTS

I N D E X