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IN THE  
DISTRICT COURT OF APPEAL  
FIFTH DISTRICT  
STATE OF FLORIDA

**FILED**  
JUN 13 1997  
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CLERK SUPERIOR COURT  
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Chief Deputy Clerk

91,642

GUS BECKSTROM,

Appellant,

v.

Case Number: 97-617

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

Appellees.

ON APPEAL FROM A FINAL ORDER  
OF THE CIRCUIT COURT OF FLORIDA, SEVENTH CIRCUIT

APPELLANT'S INITIAL BRIEF

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**ORIGINAL**

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STATEMENT OF THE CASE

This is an appeal of a final order of the Circuit Court of Florida, Seventh Circuit, Judge John V. Doyle, Case Numbers 96-11098-CIDL-01 and 96-11105-CIDL-01, dismissing an election protest and entering judgment in favor of the defendants in an election contest.

On November 8, 1996, Appellant Gus Beckstrom filed a protest of election returns pursuant to Section 102.166(11), Florida Statutes to the Circuit Judge of the Seventh Circuit Court challenging as fraudulent the returns of the November 5, 1996 Volusia County Sheriff's race. (R-92). On November 12, 1996, Mr. Beckstrom filed an Amended Protest along with a complaint for an election contest under Section 102.168, Florida Statutes alleging that the returns of the November 5, 1996 Sheriff's race were fraudulent and that the procedures followed by the Supervisor of Elections in the handling and processing of absentee ballots cast in that election involved fraud, gross negligence, or intentional wrongdoing. (R-98).

On December 18, 1996, Mr. Beckstrom filed a Second Amended Protest of Election Returns to Circuit Judge and Amended Complaint. That document became the pleading on which the case was ultimately tried. (R-123). The protest action and election contest were consolidated on January 15, 1997. (R-165). After three months of discovery including the parties' inspection of, and the Clerk of Court's manual recount of, approximately 27,000 absentee ballots as well as the review of the same number of

absentee ballot mailing envelopes and various other election materials, the cases culminated in an eight-day bench trial which ended on February 12, 1997. After announcing detailed factual findings and legal conclusions from the bench, the court dismissed the protest action and ruled in favor of the defendants on the election contest action. (R-712). The court's written opinion was issued on March 4, 1997, and Mr. Beckstrom's notice of appeal was timely filed on March 12, 1997. (R-712,728).

### STATEMENT OF FACTS

Gus Beckstrom ran for office in the November 5, 1996 election for Sheriff of Volusia County. Robert L. Vogel, Jr. ran as the incumbent in that race. After the precinct votes were counted, Mr. Beckstrom was ahead by 4,057 votes. (R-368-371 (Pl. Ex. 6); R-326-344). Once the absentee ballots were included in the tally, however, Mr. Beckstrom slipped behind by 819 votes. (Id.). In other words, out of 130,853 precinct votes, Mr. Beckstrom was ahead by 4,057, and out of 25,048 absentee votes, Mr. Beckstrom was behind by 4,876. (Id.) After all the votes were tallied, the Volusia County Canvassing Board declared Vogel the winner of the election by 819 votes. (R-326-344). Upon information and belief, Mr. Beckstrom promptly filed a protest action and election contest challenging the returns of the election and the absentee ballot process as involving fraud, gross negligence, or intentional wrongdoing. (R-92, 98, 159).

In his Second Amended Protest of Election Returns to Circuit Judge and Amended Complaint, Mr. Beckstrom alleged that the election involved a substantial failure to comply with essential requirements of the absentee voting law, as follows (R-159):

A. Absentee ballots were tampered with and modified in violation of Section 101.5614(5), Florida Statutes. At least 6,548 absentee ballots contain votes that were marked over with a black felt tip pen or permanent marker. Approximately 1,276 additional ballots were marked with a similar marker, but it is

impossible to tell whether they were marked over or newly voted. Election officials have stated that the marking over was the result of a procedure employed by the Elections Office to permit electronic tabulating machines to "read" ballots which had been rejected by the machines because the original votes on those ballots had been marked too lightly or with other than a #2 lead pencil. Those ballots, having been rejected by the machines, were neither duplicated nor manually counted in accordance with the procedures set forth in Section 101.5614(5). Further, on many of those ballots, only some of the original votes were marked over with a black pen or marker; other votes were left unretouched. There are, in addition, numerous ballots containing original votes that were not marked over, yet the votes are too light to have been read by the machines.

B. Absentee ballots were left unattended and accessible at the office of the Supervisor of Elections, in violation of Section 102.141(5), Florida Statutes.

C. Absentee ballots were opened by various persons outside the presence of any member of the Canvassing Board, in violation of Section 102.141(5), Florida Statutes.

D. Sheriff's deputies had access to and

participated in the opening of absentee ballots in violation of Section 102.141(5), Florida Statutes.

E. Individuals who were not employees of the Supervisor of Elections participated in the opening of absentee ballots in violation of Section 102.141(5), Florida Statutes.

F. The doors of the Supervisor of Elections Office were locked and not open to the public at all times when absentee ballots were being opened, in violation of Section 102.141(2), Florida Statutes.

G. Election officials began processing absentee ballots through electronic tabulating equipment at least four days prior to the election, in violation of Section 101.68(2)(a), Florida Statutes.

H. Prior to opening absentee ballot mailing envelopes, election officials failed to compare the signature of the voter on each voter's certificate with the signature of the voter as shown in the registration records, in violation of Section 101.68, Florida Statutes.

I. Election officials accepted and counted at least 915 and possibly as many as 1,463 illegal absentee ballots in violation of Section 101.68(c), Florida Statutes. Those ballots are illegal because the voter's certificates accompanying the ballots lack either (1) the voter's signature, as compared to the

signature on file in the registration records, (2) the signature of one witness, or (3) the address of the witness.

J. Election officials failed to count all of the absentee ballots received and accepted, and a number of ballots remain unaccounted for, in violation of Section 101.68(3), Florida Statutes.

K. Election officials failed to properly preserve all absentee ballots from which duplicates were made, and a number of duplicated ballots remain unaccounted for, in violation of Section 101.5614(5), Florida Statutes.

L. Election officials failed to properly preserve all absentee ballot mailing envelopes, and at least twenty-two such envelopes remain unaccounted for, in violation of Section 101.68, Florida Statutes.

M. Several voters who had requested absentee ballots but who had not received them in time for the election were denied the right to vote in person, in violation of Section 101.69, Florida Statutes.

Each of the above acts constitutes a departure from the essential requirements of the absentee voting law and demonstrates that the election was not conducted in substantial compliance with the requirements of the law. Moreover, each raises significant concerns regarding the sanctity of the

ballot process and the integrity of the election.

Mr. Beckstrom additionally alleged that the absentee ballot tabulation process was tainted with potential fraud, as follows (R-159):

A. Of the absentee ballots containing votes that are marked over with a black felt tip pen or marker, many ballots contain markings over some, but not all, of the original votes. Of the ballots containing an original vote in the Sheriff's race and in which the vote for Sheriff is not marked over but other votes on the ballot are so marked, approximately twenty-five contain a Beckstrom vote. Only one similarly marked ballot contains a vote for Vogel.

B. Of the absentee ballots containing votes that are marked over with a black felt tip pen or marker, at least fifteen contain a vote in the Sheriff's race that is marked over, whereas no other vote on the ballot is so marked. Each of the fifteen ballots contains a vote for Vogel. No similarly marked ballot containing a vote for Beckstrom has been discovered.

C. At least five ballots contain a vote for President and a vote for Sheriff, but no vote in any other race. Those ballots appear to be originally marked with a black felt tip pen or marker. Each ballot contains a vote for Vogel. No similarly marked

ballot containing a vote for Beckstrom has been discovered.

D. Two pairs of ballots, tabulated sequentially, match each other perfectly by vote, ink and penmanship. Each of those ballots contains a vote in the Sheriff's race for Vogel.

Finally, Mr. Beckstrom alleged that absentee ballots were changed and/or misplaced, lost, or otherwise not counted as a result of fraud, gross negligence, or intentional wrongdoing. (R-159). Mr. Beckstrom prayed that the court invalidate all or a portion of the absentee ballots and declare Mr. Beckstrom the winner of the election based on a tabulation of the remaining votes. (Id.).

Shortly after the litigation commenced, the court granted Mr. Beckstrom's motion for a court-supervised inspection of the absentee ballots. (R-102). Inspections were held on several different days during November and December 1996 and January 1997, during which time the parties were permitted to review approximately 27,000 absentee ballots along with the same number of absentee ballot mailing envelopes and various other materials related to the election. The inspections uncovered evidence supporting many of the allegations identified in the Amended Complaint, including the fact that elections personnel marked over votes on at least 6,497 ballots with a black felt-tip pen or magic marker when the automatic tabulating equipment was unable to read the ballot, and that on many of the ballots the remarking

did not accurately reflect the voter's original votes (R-372(Pl. Ex. 7); R-723). Additionally, the Clerk of Court conducted a manual recount of the votes on the absentee ballots which recount showed that over 1,000 votes in the Sheriff's race were not originally accounted for. (R-372(Pl. Ex. 7)).

During the eight-day bench trial, over 45 witnesses testified and over 55 exhibits were admitted, including all of the absentee ballots. The witnesses included all of the members of the Canvassing Board, numerous individuals who had participated in the handling of absentee ballots, several individual voters, and three statistical experts. There was evidence that at least two of the witnesses who testified that they witnessed or heard about wrongdoing in the processing of absentee ballots received threatening letters shortly after testifying. (R-556, 557).

On March 4, 1997, the court issued a written opinion in which it found that the Supervisor of Elections had violated the following absentee voter statutes: Section 101.68(2)(c)1, Florida Statutes (Supp. 1996) and Section 101.65, Florida Statutes (1995) by accepting 885 illegal voter certificates (7 certificates did not contain the voter's signature, 72 certificates did not contain a witness signature, 88 certificates either contained no witness address or contained an incomplete witness address, 308 certificates were apparently witnessed by Supervisor of Elections' staff but did not contain a witness address, and 410 certificates were apparently

witnessed by a notary public but did not contain a witness address); Section 102.141(5), Florida Statutes (1995) (there were various times during which no member of the Canvassing Board was present to supervise the processing of absentee ballots); Section 101.68(2)(a), Florida Statutes (Supp. 1996) (elections personnel began processing absentee ballots through the automatic tabulating equipment at least four days prior to election day); Section 102.141(2), Florida Statutes (1995) (the processing of absentee ballots took place in a building which at various times was locked and inaccessible to the public); Section 101.5614(5), Florida Statutes (1995) (elections personnel marked over votes which could not be detected by the automatic tabulating equipment in lieu of manually counting them; Section 101.69, Florida Statutes (Supp. 1996) (elections personnel failed to permit voters who had requested absentee ballots and who subsequently showed up at the polls to vote to execute affidavits stating that they had not voted absentee, and instead refused to permit such voters to vote when the elections office could not be reached to verify that the voter had not voted absentee; and Section 101.62, Florida Statutes (1995) (elections personnel sent absentee ballots to voters who had not requested them). (R-712-715).

The court specifically found that the process of marking over in lieu of manually counting those votes which could not be detected by the automatic tabulating equipment was a violation of the law that irreparably harmed the sanctity of the absentee ballots and the integrity of the election, and that the

Canvassing Board did not substantially comply with the absentee voting law. (R-715, 720, 724). The court's other findings include the following: There was conclusive evidence that the Supervisor of Elections' returns were wrong, and therefore the Supervisor is not entitled to a presumption of correctness (R-721); the Canvassing Board acted with gross negligence by programming its automatic tabulating equipment to accept any ballot upon which the equipment was able to detect just a single vote, with the result that over 1,000 votes in the Sheriff's race were not originally counted (R-716); the remarking procedure followed by the elections personnel constituted gross negligence (R-720); the statutory violations other than the remarking procedure constituted negligence (R-720); some of the ballots were marked over incorrectly and thus lend themselves to an inference of fraud, but they also lend themselves to an inference of negligence (R-723); there was no evidence of fraud (R-716); in the absence of fraud, courts have no jurisdiction to overturn an election (R-726).

The court ultimately ruled in favor of the defendants on the election contest action based upon its finding that there was no fraud in the election (R-726). Additionally, the court dismissed the election protest with prejudice (R-726). Mr. Beckstrom timely filed a Notice of Appeal to this court on March 12, 1997. (R-728).

## SUMMARY OF ARGUMENT

This appeal presents four major issues for review: (1) Whether the trial court erred when it allowed the November 5, 1996 Volusia County Sheriff's election to stand after determining that all of the Boardman factors existed in this case, (2) whether the trial court erred when it concluded that there was no evidence of fraud in the absentee ballot process; (3) whether the trial court erred when it concluded that the Canvassing Board did not violate Section 102.141(3), Florida Statutes (1995) requiring the Canvassing Board to determine that the election returns accurately reflected the number of votes cast; and (4) whether the trial court erred by not invalidating 885 ballots that it found to be illegal because the voter's certificates did not comply with Section 101.68(2)(c)1, Florida Statutes (Supp. 1996).

This case involves violations of the Florida absentee voting law of an unprecedented nature. The most striking violation involves the election department's remarking of 6,497 ballots that could not be read by the automatic tabulating equipment because the voter's marks were too light or were made with a writing instrument other than a #2 lead pencil. As a result of the remarking process, there are a substantial number of ballots on which it is impossible to determine what marks were made by election department staff members and volunteers and what marks, if any, were originally made by the voter. Accordingly, it is impossible to determine who actually won the election. The court properly found that the remarking process was a substantial

violation of the election law which constituted gross negligence on the part of elections officials and which irreparably harmed the sanctity of the ballot and the integrity of the election. Nevertheless, apparently relying on Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975), the trial court refused to throw out the absentee ballots. That ruling was a clear error of law.

The court also erred by concluding that there was no evidence of fraud in this case. There was statistical evidence that the disparity of the results of the Sheriff's race in the remarked ballots as compared to the uncontested ballots could not have occurred randomly but occurred systematically. The statistical experts concluded that the likelihood that such a disparity of results could have occurred randomly is less than one in a million. Additionally, the evidence shows (and the court so found) that numerous ballots were marked incorrectly. For example, there are a number of ballots on which all of the voter's votes except his or her vote for Sheriff are remarked. The result of such a mismarking is that the voter's vote for Sheriff would not be counted by the automatic tabulating equipment. In light of the placement of the Sheriff's race at the top and center of the ballot, the reasonable inference is that the mismarking occurred as a result of fraud rather than negligence.

Next, the trial court erred when it determined that the Canvassing Board did not violate Section 102.141(3), Florida Statutes (1995). In this case, there are disparities between the

number of votes certified by Canvassing Board in its returns to the Secretary of State and the number of votes counted by the Clerk of Court during the court-supervised inspection of the ballots. There is also a disparity between the number of ballots issued and the number of ballots reflected in the certified returns. Further, a number of ballots were "found" by the Canvassing Board subsequent to filing of this lawsuit. Under these circumstances, it is clear that the Canvassing Board did not ensure that its counts were correct and the court erred in determining that it complied with the statute requiring it to do so.

Finally, the trial court erred by not invalidating the 885 ballots that it found to be illegal under Section 101.68(2)(c)1, Florida Statutes (Supp. 1996), which requires, in order for a ballot to be counted, that the voter's certificate contain the signature of the voter, a signature of a witness, and the witness' address. In this case, the court found that 885 certificates did not comply with the statute. The court refused, however, to invalidate the ballots on the grounds that (1) the ballots reflect the will of the people, and (2) Mr. Beckstrom is barred from contesting the ballots because he did not challenge them before they were removed from their envelopes. The first ground is invalid and in clear contravention of the statute. As to the second ground, Mr. Beckstrom should not be barred from contesting the ballots because, due to the Canvassing Board's violation of the statute requiring it to canvass the envelopes

when convened in a meeting to canvass the vote, Mr. Beckstrom had no opportunity to challenge the ballots before they were removed from their envelopes. Therefore, the 885 ballots should be invalidated and the winner of the election determined based on the number of remaining votes.

## ARGUMENT

### INTRODUCTION

The case before this court is unprecedented in Florida history. There have been numerous cases that involved technical violations of Florida's election laws. There have also been cases that involved allegations of outright fraud. But no reported case has ever involved the depth and breadth of election laws violations as does the instant case.

Through seven days of trial the court heard about violations of the election laws: Violations that were not merely technical violations, but violations that cumulatively were so substantial that the court concluded that the violations constituted gross negligence that harmed the sanctity of the ballot and the integrity of the election.

Having made such a finding it seems somewhat incongruous that we are here on an appeal by the challenger of the election. It would seem that having found gross negligence affecting the sanctity of the ballot and the integrity of the election, the trial court would have certainly overturned the election, but it did not. Why? Because the Court concluded that despite the holdings of the Florida Supreme Court in Boardman v Esteva, 323 So. 2d 259 (Fla. 1975) and Bolden v Potter, 452 So. 2d 564 (Fla. 1984) it would not overturn an election without clear proof of fraud.

The fallacy of the court's conclusion is strikingly apparent when its factual finding regarding the marked-over ballots is

contrasted with its ultimate conclusion of law that the election should stand. As will be shown more fully below, the trial court found that several thousand ballots were marked over in such a way that it "is utterly impossible to make any intelligent judgment as to whether the voter's mark lies beneath the black marker overmark." (R-719). The court further found that "the procedure followed in this case for marking over votes that could not be detected by the automatic tabulating equipment, in lieu of manually counting those votes, violated Section 101.5614(5), Florida Statutes." (R-715). The court concluded that the remarking process constituted "gross negligence and that the harm would come to the sanctity of the ballot and the integrity of the election." (R-720).

Given those findings it was incumbent upon the court to invalidate the absentee ballots and determine the winner of the election based solely on the precinct votes. The court, however, allowed the election to stand because it concluded erroneously that only upon evidence of fraud could it invalidate the absentee ballots, and it erroneously concluded that there was no such evidence of fraud.

Set forth below are four key issues upon which the trial court erred and on which Appellant asks that this court reverse the decision of the trial court.

The first is the court's decision that having found such substantial violations of the election laws that the violations constituted gross negligence, it would nevertheless allow the

absentee ballots to be counted because it did not find fraud.

The second is the court's decision that there was insufficient evidence of fraud to overturn the election based upon the election protest action.

Third, Appellant challenges the court's decision that under the facts of this case he was barred from challenging the Canvassing Board's failure to comply with the statutes governing voter certificates.

Finally, Appellant challenges the court's decision that the Canvassing Board did not violate Section 102.141(3), Florida Statutes by failing to compare the tabulation of ballots cast to determine whether the returns correctly reflected the votes cast.

- I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO INVALIDATE THE ABSENTEE BALLOTS IN THE NOVEMBER 5, 1996 VOLUSIA COUNTY SHERIFF'S ELECTION AFTER FINDING THAT THE CANVASSING BOARD ACTED WITH GROSS NEGLIGENCE, THAT IT FAILED TO SUBSTANTIALLY COMPLY WITH THE REQUIREMENTS OF THE ABSENTEE VOTER LAW AND THAT THE CANVASSING BOARD'S WRONGDOING IRREPARABLY HARMED THE SANCTITY OF THE BALLOT AND THE INTEGRITY OF THE ELECTION.

Florida's election code permits election officials to count absentee ballots using automatic tabulating equipment if the ballots have been marked by the voter in such a manner that they may be properly counted by the equipment. § 101.5614(7), Fla. Stat. (1995) Volusia County's Supervisor of Elections utilizes automatic tabulating equipment that is designed to detect certain carbon marks using infrared sensors.

This case centered on a remarking procedure employed by the Volusia County Canvassing Board to remark votes on ballots that allegedly could not be read by the county's automatic tabulating equipment. The process was simple - and totally at variance with the requirements of Florida's election laws. As ballots were fed into the automatic tabulating equipment, large numbers of ballots were being rejected because the equipment could not detect a single vote on the ballot. The tabulating equipment can be programmed in a variety of ways from rejecting a ballot if any race was left blank to only rejecting ballots if all the races are blank. (T-190-191). The Canvassing Board chose to program the equipment to reject a ballot only if all races were read as blank. (T-734-735). If the machine read only one vote in one race it would accept the ballot, tabulate the one vote, and report the

remainder of the races as blank. (T-734-735). That programming decision ultimately resulted in thousands of votes not being counted.

Florida law requires, as is discussed more fully below, that when automatic voting equipment rejects ballots, the ballots must then be tabulated by hand. § 101.564(5), Fla. Stat. (1995). The Supervisor determined that following the law would be too time consuming. Instead, she directed her employees to "mark over" the voter's marks so that the ballots could then be tabulated by the automatic equipment. At trial, elections employees testified that they marked over the voter's votes on thousands of ballots using a black felt-tip pen or magic marker. Initially the Supervisor's deputy claimed that the mark-over process only occurred after the ballots were rejected by the automatic tabulating equipment. (T-202). The testimony showed, however, that in some cases ballots were marked over before ever being inserted into the tabulating equipment. (T-1282). The elections staff would mark over some or all of the voter's votes with a black, carbon-containing felt tip pen or marker and then reprocess the ballot through the machine. Based on the Clerk's count of the ballots during the court's pre-trial inspection, approximately 6,497 ballots were remarked in this manner. (R-372 (Pl. Ex.7)).

The problem with the markover process is that in many cases the magic marker mark is so large, dark and opaque that no voter's mark can be seen underneath it. Thus, on many ballots an

original mark cannot be detected, and it is therefore impossible to determine whether the voter voted in the Sheriff's race at all. Indeed, the court conducted its own inspection of thousands of ballots and found that this problem existed "in a substantial minority of the remarked ballots." (R-719). In its written opinion, the court specifically found as follows:

I personally inspected several thousand of these ballots and I find that in the large majority of these ballots the voter's mark beneath the overmark can be seen. It is a difficult, arduous process, but it can be seen. Unfortunately, **in a substantial minority of the remarked ballots it is utterly impossible to make any intelligent judgment as to whether the voter's mark lies beneath the black marker overmark.** These are the ballots that cause the problem. We just do not know if the mark is under there. Perhaps analysis by a forensic expert or a crime lab could tell, perhaps not, but I do not think that this is the situation that the legislature envisioned when they enacted this statute.

(R-718-719) (emphasis added). On this basis alone, the remarked ballots should have been thrown out and the results of the election determined based upon a count of the remaining votes for Sheriff.

The statute the court was referring to in the above excerpt is Section 101.5614(5), Florida Statutes (1995). That statute provides strict procedural controls for the processing of ballots through automatic tabulating equipment, as follows:

If any ballot card of the type for which the offices and measures are not printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged

ballot card in the presence of witnesses and substituted for the damaged ballot. Likewise, a duplicate ballot card shall be made of a defective ballot which shall not include the invalid votes. All duplicate ballot cards shall be clearly labeled "duplicate," bear a serial number which shall be recorded on the damaged or defective ballot card, and be counted in lieu of the damaged or defective ballot. If any ballot card of the type for which offices and measures are printed directly on the card is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy may be made of the damaged ballot card in the presence of witnesses and in the manner set forth above, or the valid votes on the damaged ballot card may be manually counted at the counting center by the canvassing board, whichever procedure is best suited to the system used. ***If any paper ballot is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, the ballot shall be counted manually at the counting center by the canvassing board.*** The totals for all such ballots or ballot cards counted manually shall be added to the totals for the several precincts or election districts. No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board. After duplicating a ballot, the defective ballot shall be placed in an envelope provided for that purpose, and the duplicate ballot shall be tallied with the other ballots for that precinct.

§ 101.5614(5), Fla. Stat. (1995) (emphasis added).

Absentee voting statutes are in derogation of the common law and, therefore, must be strictly construed. Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975). In the November 5, 1996 general election, the Volusia County Canvassing Board used paper absentee ballots. Therefore, Section 101.5614(5) mandated, by

the use of the word "shall," that all damaged or defective ballots be counted manually by the Canvassing Board. The trial court found that the term "defective ballot" as used in the statute "includes those ballots containing original marks of a voter that cannot be detected by the automatic tabulating equipment." (R-714-715). Thus, the Canvassing Board was required to manually count all of the ballots rejected by the machines as unreadable.

However, the rejected ballots were neither counted manually nor counted by the Canvassing Board. Instead, the Elections Office had numerous employees and volunteers, many of whom were unsupervised, "fixing" thousands of ballots by taking a pen or magic marker and marking over the voter's votes. As the trial court found, the inspection of the ballots showed that in many cases it is impossible to tell whether all the markings are over original votes or whether the markings are themselves original votes. Moreover, numerous ballots were marked over incorrectly. (R-723). The remarked ballots were subsequently fed back into the machines and, presumably, automatically tabulated.

The remarking procedure employed by the Canvassing Board is neither authorized nor even contemplated by Florida's absentee voter law. As the trial court found, the procedure was no substitute for compliance with the law. (R-719). Nothing in our election code authorizes election officials to mark ballots in any manner. Indeed, other jurisdictions have expressly recognized a **duty** on the part of election officials to refrain

from marking ballots. See Evans v. Reiser, 3 P.2d 253 (Utah 1931). The same duty to preserve the sanctity of the ballot is evident in our own legislative scheme which details the procedures to be followed by election officials in conducting all phases of elections. The statutes' severe circumscription of the discretion of those officials reflects the legislature's vital concern with the prevention of fraud. Under these circumstances, the trial court correctly found that the forbidden markover procedure employed by the Volusia County Canvassing Board was a substantial violation of the law.

The court additionally found that the remarking procedure constituted gross negligence (R-720) and that it completely defeated the purpose of the statute which is to ensure the accuracy of the election returns. (R-718-719). Finally, the court determined that the remarking process ***irreparably harmed the sanctity of the ballot and the integrity of the election*** (R-724). For all of these reasons, the court should have thrown out the marked-over ballots and determined the winner of the election based upon a count of the remaining votes for Sheriff.

In Boardman v. Esteva, *supra*, 323 So. 2d 259, the issue was "whether the absentee voting law requires absolute strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the ballot." Boardman, 323 So. 2d at 262. The case involved a contest of the October 3, 1972 election for a seat on the Second District Court of Appeal. The ballots challenged in that case included a number

of ballots on which the voter's affidavit did not indicate the voter's reason for voting absentee, as well as ballots in which the absentee envelopes did not contain a postmark. After analyzing in detail the effect of technical irregularities in the absentee voting law on the integrity of the election, the court determined that, on the facts before it, the challenged irregularities did not warrant the invalidation of the absentee votes because the irregularities did not affect the integrity of the election. However, the Court emphasized that evidence of fraud, gross negligence, or intentional wrongdoing may well have produced a different result: "Notably existent in this dispute is the complete absence of any allegation of fraud, gross negligence or even the hint of intentional wrongdoing, either on the part of the voters or of the election officials." Id. at 263. The court held that trial courts must consider the following factors in determining whether to invalidate absentee ballots:

- (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.

Following analysis of the Boardman factors, the trial court concluded that there was gross negligence and intentional wrongdoing in this case. It concluded that there was substantial

incompliance with the election laws and it concluded that the irregularities complained of adversely affected the sanctity of the ballot and the integrity of the election.

In Boardman, the Court emphasized that in determining the effect of election code violations on the integrity of the election, "*a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will.*" Id. at 265. In this case, the expression of the will of the absentee voters was neither full nor free nor fair.

As already discussed, many of the remarked ballots contain markings over some, but not all, of the elector's original votes. Presumably, the votes that were not touched up by election personnel were not read by the tabulating machines at all. Had the absentee voting law been complied with, all of the votes marked by each elector would have been counted in the November 5 election. Therefore, as a result of the election officials' violation of §101.5614(5), Florida Statutes, the public will was not **fully** expressed in the election. To the contrary, thousands of voters were disenfranchised.

Furthermore, there was evidence of fraud in the handling of the absentee ballots. One example concerns the ballots containing an original vote in the Sheriff's race, where the vote for Sheriff is not marked over but other votes on the ballot are so marked. Approximately twenty-five contain a Beckstrom vote, whereas only two or three contain a Vogel vote. Had the absentee

voting law been complied with, that discrepancy would not have occurred. Therefore, as a result of the election officials' violation of §101.5614, Florida Statutes, and also as a result of potential fraud or corruption in the handling of absentee ballots, the public will was not **fairly** expressed in the November 5 election.

Finally, none of the irregularities that took place in this election, specifically the grossly negligent or fraudulent manner in which as many as 6,497 ballots were altered in violation of the election code, were performed at the direction of or with the knowledge and approval of the absentee voters. Therefore, as a result of the election officials' clear and substantial violation of the law, the public will was not **freely** expressed in the November 5 election. Based on Boardman, the court was required to invalidate the absentee ballots or at least to invalidate all those that were marked over and determine the results of the election based upon the precinct votes or the precinct votes plus the unchallenged absentee votes. The court, however, finding no fraud, refused to disqualify the absentee ballots.

It found instead:

The Boardman decision requires that if there is a full and fair expression of the will of the people, that the courts should simply stay out of the election process. I find that is the ultimate decision that has to be made. The clerk of the court has counted these ballots. I find that there was no fraud in this election. It follows that there has been an expression of the people. We do have an accurate count of the votes. Vogel won it.

\* \* \*

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

Therefore, I dismiss the election protest with prejudice and enter judgment for the defendants upon the election contest proceeding and declare that each party shall bear its own costs.

(R-725-726).

The court's ultimate conclusion that there was a "full and fair expression of the will of the people" is clearly wrong and in conflict with its own findings. The court's conclusion is wrong when it finds "We do have an accurate count of the votes. Vogel won it." (R-726). The court was wrong when it found "there was no fraud." (R-726).

The conflict between the Court's clear factual findings and its ultimate conclusion is readily apparent and unresolvable.

On the one hand the court found:

"Unfortunately, in a substantial minority of the remarked ballots it is utterly impossible to make any intelligent judgment as to whether the voter's mark lies beneath the black marker overmark. These are the ballots that were the problem. We just do not know if the mark is under there."

(R-719).

On the other hand it found: "We do have an accurate

count of the votes." We certainly do NOT have an accurate count of the votes in this case because it is impossible to determine on many of the ballots how the voter voted, and even if the voter voted, in the Sheriff's race.

The only accurate count possible under the circumstances is a count of tainted ballots - corrupted through gross negligence at a minimum. Under such circumstances it is "utterly impossible" to conclude that there was a full and fair expression of the will of the people. It is also "utterly impossible" to conclude Vogel won it. The court erred by not either disqualifying all the absentee ballots or, at a minimum, disqualifying all ballots containing an "overmark."

II. THE COURT ERRED WHEN IT CONCLUDED THAT THERE WAS NO EVIDENCE OF FRAUD IN THE ABSENTEE BALLOT PROCESS.

The record below is replete with evidence of potential fraud. The trial court appeared to want more than evidence of fraud. It wanted "proof" of fraud, a standard not found in wither Boardman or Bolden.

Early in the pretrial proceedings, the trial court suggested to counsel for both sides that a determination of whether fraud occurred perhaps could be achieved through the use of statistics. The court postulated that if the remarking process had resulted in alteration of the ballots there would be a statistical discrepancy between the so-called good ballots and the marked over ballots.

As a result of the court's suggestion both sides retained expert witnesses who testified at trial.

The courts's suggestion was well founded. Statistically, the absentee ballots constitute a single set. If the set is randomly divided into two segments, statistical theories show that the two sets will equal one another within a relatively minor margin of error. Here, the absentee ballots were all processed through the tabulating equipment. Some ballots were read the first time through. Others were rejected, marked over, and re-processed through the equipment. According to the Supervisor, the only difference between the ballots that were rejected and subsequently marked over and the ballots that were read by the equipment the first time through was the type of

marking instrument used by the voter or the intensity of the mark.

Under the circumstances, there is no logical reason for the two sets of votes - the "good" pencil ballots and the marked over ballots-to differ statistically. In other words the good ballots should show the same Beckstrom/Vogel split as do the marked over ballots. Instead the marked over ballots contained more Vogel votes and the difference was so substantial that the parties' experts agreed that the likelihood of having such a wide divergence occur randomly is more than one in a million. (T-76,160). The question, then, is what caused the divergence.

The experts concluded that the results showed fraud could not be ruled out. (T-123,124,167,857,858). In fact the evidence showed that statistically, fraud was as likely an explanation as any other cause. (T-123,124,167).

The trial court concluded that it was not persuaded that fraud had occurred by this evidence because, although it acknowledged the statistical discrepancy, the court also noted there were large numbers of undervotes. (R-721-722). The court concluded that because there were more undervotes among the ballots containing overmarks than there were among the good pencil ballots, there must be some other factor that distinguished the two sets. In other words the court felt that if fraud was occurring the perpetrators of the fraud would have filled in more blank votes. To be sure, the undervote discrepancy is puzzling. Whether the discrepancy is related to

opportunity or to some other factor, we will never know. Moreover, the court's concern with undervotes does nothing to explain why there is a statistically significant higher number of marked over ballots for Vogel than are found in the non marked over ballots.

The bottom line of the experts' testimony is that fraud is at least as likely the cause of the unexplained discrepancies as any other explanation that has been advanced. That fact is the crux of the problem. Election laws are designed to as nearly as humanly possible prevent fraud from occurring. Here the problems exist not because the statutory scheme is flawed but because the statutory scheme was not followed. Neither Boardman nor Bolden addressed such a problem. Here evidence of potential fraud is present-not as a far fetched hypothesis-but as a theory that both the plaintiff's and defendants' experts conceded could not reasonably be ruled out.

That is not the way elections are by law to be conducted. Whether fraud occurred for sure no one can tell. The perpetrators may have been good at it. We do know:

1. Large numbers of ballots were marked over in such a way that no one can tell whether there was a real vote underneath.
2. The tabulation of the "good" absentee ballots and the marked over ballots differs in a statistically significant way that can not be reasonably explained. Fraud is at least as reasonable an explanation as are the explanations advance by the defendants.

Under such circumstances, analysis of the Boardman factors leads to the conclusion that the absentee votes, or at least the

remarked absentee votes, must be thrown out. If an election is so flawed that fraud is as likely an explanation as any other explanation, the election must be overturned.

The Appellant's inspection of the ballots revealed that 6,548 ballots apparently were marked over or otherwise marked with a black felt-tip pen or magic marker. Of the ballots that appear to have been marked over, many contain markings over some, but not all, of the original votes; this means that only some of the votes on those modified ballots were tabulated by the machines. Of the ballots containing an original vote in the Sheriff's race and in which the vote for Sheriff is not marked over but other votes on the ballot are so marked, approximately twenty-five contain a Beckstrom vote. The markings on those ballots suggest that someone was trying to ensure that the machine would accept the ballot but fail to read Beckstrom's vote. Only two or three similarly marked ballots contain a vote for Vogel. Those ballots, labelled during the inspection as XI, are indicators of fraud.

Second, of the absentee ballots containing votes that are marked over with a black felt tip pen or marker, at least fifteen contain a vote in the Sheriff's race that is marked over, whereas no other vote on the ballot is so marked. The markings on those ballots suggest that someone was trying to ensure that the machine would read the vote for Sheriff, without any concern for whether any other vote on the ballot was so read. Each of the fifteen ballots contain a vote for Vogel. No similarly marked

ballot containing a vote for Beckstrom has been discovered. Those ballots, labelled during the inspection as X2, are also indicators of fraud.

Third, at least five ballots contain a vote for President and a vote for Sheriff, but no vote in any other race. Those ballots appear to be originally marked with a black felt tip pen or marker. Statistically speaking, absent any wrongdoing, at least two of those ballots should have contained votes for Beckstrom. However, each of the five ballots contains a vote for Vogel, and no similarly marked ballot containing a vote for Beckstrom has been discovered. Thus, those ballots are indicators of fraud.

Finally, two pairs of ballots, tabulated sequentially, match each other perfectly by vote, ink and penmanship. Each of those ballots contains a vote in the Sheriff's race for Vogel. The ballots are patently suspect, and are therefore indicators of fraud.

Bolden v. Potter, 452 So. 2d 564 (Fla. 1984). involved a contested school board race that had been corrupted by extensive vote-buying. At issue was the necessity of the plaintiff, who was seeking to have all the absentee votes invalidated, to prove that the number of tainted votes was sufficient to change the result of the election. The Court answered in the negative, holding that "[o]nce substantial fraud or corruption has been established to the extent that it permeated the election process, it is unnecessary to demonstrate with mathematical certainty that

the number of fraudulently cast ballots actually affected the outcome of the election." Id. at 567. In reaching its decision, the Court emphasized that the source of the fraud is irrelevant, and that a failure to invalidate ballots where fraud or corruption has been involved "will cause the electorate to lose confidence in the electoral process, destroy the willingness of individuals to participate, and thereby allow our government to be controlled by corrupt influences." Id. Concern for the sanctity of the ballot in such circumstances clearly outweighs any countervailing interest in protecting a voter's franchise.

The trial court acknowledged that the above-described ballots lend themselves to an inference of fraud, but concluded that they "lend themselves equally to an inference of negligence in the over marking process." (R-723) The court drew on its own general the ballots presented were not the only ones that were marked incorrectly. Yet the defendants had an equal opportunity to inspect the ballots. Had they wished to present ballots that were marked in a manner so as to benefit Beckstrom to counter the inference of fraud on behalf of Vogel, they could have done so. If such ballots existed they almost certainly would have done so. They did not. Thus, the ballots separated and presented to the court are evidence of fraud because there are no ballots presented to counter the inference.

The trial courts own words are the best evidence of the problem:

"All of our election laws relating to elections are designed so that we have fair elections and

so that no one can question their fairness,  
because means of verification have been built  
into the process."

(R-719) .

Whether there was actual fraud - we will likely never know. But the likelihood of fraud is as high as the possibility of no fraud. The fairness of the election is questioned because the laws were not followed. Under the circumstances, the trial court erred in concluding that fraud did not exist and in sustaining the result of the election.

The concerns addressed by the Supreme Court in Boardman and Bolden are the same concerns presented in this case. There is evidence that fraud occurred during the markover procedure employed by the Volusia County Supervisor of Elections in the November 5 Sheriff's race. As a result, the credibility of the electoral process has been thrown into question.

It is clear that the irregularities in this case have affected the integrity of the election and the trial court specifically so found.

III. THE UNCONTROVERTED EVIDENCE SHOWS SIGNIFICANT UNEXPLAINED DISCREPANCIES BETWEEN THE NUMBERS OF VOTES THAT SHOULD HAVE BEEN COUNTED AND THOSE THAT WERE COUNTED. THE TRIAL COURT ERRED IN CONCLUDING THAT WE HAVE AN ACCURATE COUNT.

Section 102.141(3), Florida Statutes (1995) provides as follows:

The canvass, except the canvass of absentee electors' returns, shall be made from the returns and certificates of the inspectors as signed and filed by them with the county court judge and supervisor, respectively, and the county canvassing board shall not change the number of votes cast for a candidate, nominee, constitutional amendment, or other measure submitted to the electorate of the county, respectively, in any polling place, as shown by the returns. All returns shall be made to the board on or before noon of the day following any primary, general, special, or other election. If the returns from any precinct are missing, if there are any omissions on the returns from any precinct, or if there is an obvious error on any such returns, the canvassing board shall order a recount of the returns from such precinct. Before canvassing such returns, the canvassing board shall examine the counters on the machines or the tabulation of the ballots cast in such precinct and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

Plaintiff's Exhibit 1 (R-326-344) shows that the total certified votes submitted to the Secretary of State's office were 77,541 for Mr. Beckstrom and 78,360 for Mr. Vogel. The absentee ballot machine tapes show that the total absentee votes were 10,086 for Mr. Beckstrom, 14,962 for Mr. Vogel, a total of 25,048

absentee votes. Exhibit 3A shows there were 29,664 returned ballots. There were 2,458 rejected ballots. That leaves 27,206 ballots to be accounted for but only 25,107 votes.

Another method of trying to determine how many votes there were to be tabulated is to track the actual number of ballots issued. Witness Joseph T. Muller, Jr. testified that there were 34,481 ballots removed from the inventory 334 of those had been spoiled. (T-1063). That left a total of 34,147. The total number of ballots issued per Exhibit 3A was 33,536. (R-367). There were also some duplicate ballots. When ballots came back in, elections personnel had to use up some additional ballots to duplicate ballots that were damaged.

Subtracting the number of ballots that according to Muller, were withdrawn from inventory, take out the spoiled, take out the ballots that we know were mailed out, we are left with 611 missing ballots. If we then subtract out the duplicates that were used to make up for ballots that came in damaged, the result is that 83 ballots are unaccounted for. Where are those ballots? There is no answer in the record in this case. If the only issue in the case was the 83 missing ballots perhaps the discrepancy could be overlooked, but the 83 ballot discrepancy is just the tip of the iceberg.

As outlined above, there were 27,206 ballots to be counted. The total ballots processed by the Supervisor of Elections, according to the evidence in this case, was 27,414, 208 more votes than what there were to be counted, by the supervisor's own

statistics. How could there be 208 more votes counted than there were ballots to be counted?

It doesn't stop there. A comparison of the total certified votes and the clerk's count reveals that the total votes for Vogel by the clerk's count were 15,654. The total votes for Beckstrom by the clerk's count were 10,465. The total absentee votes, those two added together, equals 26,119. Subtract from the total clerk's count of 26,119 the total votes certified by the supervisor to the Secretary of State, 25,107, and that leaves a difference of 1,012 ballots. More than one thousand votes cast that were not reported by the Supervisor. Could that difference be explained by the evidence that the tabulating equipment did not count all the votes? In theory yes but again the totals do not match.

Finally, going back to the ballots that were processed, according to the Supervisor of Elections there were 27,310 ballots processed on election night. Subsequently the Supervisor counted 58 more ballots that were found the next day. Then in the process of handling all the ballots, during the court-permitted inspection process, the clerk found seven more ballots that were stuck in various boxes or envelopes. Other than the obvious lack of due care, there was no explanation how ballots could just "be found." In addition there were ten-day federal extension ballots received after election day. Adding all the numbers together and the total is 27,414 ballots, according to the numbers presented by the Supervisor. According to the count

by the clerk of the court, adding comparable numbers, totals 27,419 ballots, an unexplained difference between the Supervisors figures and the tallies by the clerk of the court of five. That fact was admitted in Defendant's answer to the interrogatories in this case, yet not explained. We know that there was an undervote, as well. The clerk's count established that 1,112 ballots were blank in the Sheriff's race. After those are separated out, the result is that there should either be 26,302 votes or 26,307. Yet, when the clerk counted the votes, the total votes totaled 26,119, a discrepancy of either 183 missing votes or 188 missing votes. The bottom line is that no matter what way the numbers are reviewed, nothing adds up. The Canvassing Board must in accordance with Section 102.141(3), Florida Statutes compare the tabulation of ballots cast, to a tabulation of the number of ballots eligible to be cast and reconcile any discrepancies. The record is undisputed that unexplained discrepancies exist. The Canvassing Board failed to meet its responsibility to count the ballots and count them accurately. The evidence below is clear that there are unexplained discrepancies. There was no evidence before the trial court that explains the differences.

The voters are entitled to know that the number of votes eligible to be counted and the number of votes counted either match or that there are reasonable explanations for the discrepancy. The Canvassing Board failed to meet the requirements of Section 102.141(3) Florida Statutes

IV. THE TRIAL COURT ERRED IN FAILING TO  
INVALIDATE THE ABSENTEE RETURNS AFTER  
DECLARING 885 BALLOTS ILLEGAL BECAUSE THEY  
DID NOT CONTAIN EITHER THE VOTER'S SIGNATURE,  
A WITNESS SIGNATURE OR THE WITNESS' ADDRESS.

In the instant case, the trial court determined that 885 ballots were illegal because they did not comply with Section 101.68(2)(c)1, Florida Statutes (Supp. 1996). (R-712-713). That section, which became effective July 1, 1996, provides as follows:

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

§ 101.68(2)(c)1, Fla. Stat. (Supp. 1996) (emphasis added).

Prior to the statute's amendment in 1996, the sentence highlighted above did not exist; thus, it is clear that the Legislature intended by the amendment that as of July 1, 1996, only those ballots for which the voter's certificate contains the voter's signature, a witness signature and the witness' address shall be counted. Eight hundred eighty five ballots were declared illegal by the trial court because they did not contain

either the voter's signature, a witness signature, or the witness' address. The number of illegal ballots is more than enough to change the result of the election in this case. However, the trial court refused to throw out the ballots because it found that (1) Mr. Beckstrom was barred under Sections 101.6104, Florida Statutes (1995) and 101.68(2)(c)2, Florida Statutes (Supp. 1996) from challenging the 885 ballots, and (2) the challenged absentee ballots expressed the will of the electorate. (R-713, 714).

Section 101.6104, Florida Statutes provides as follows:

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

Similarly, Section 101.68(2)(c)2, Florida Statutes provides as follows:

If any elector or candidate present believes that an absentee ballot is illegal due to a defect apparent on the voter's certificate, he or she may, at any time before the ballot is removed from the envelope, file with the canvassing board a protest against the canvass of that ballot, specifying the precinct, the ballot, and the reason he or she believes the ballot to be illegal. A challenge based upon a defect in the voter's certificate may not be accepted after the ballot has been removed from the mailing envelope.

Clearly, both of those statutes contemplate that electors or

candidates will have an opportunity to witness the Canvassing Board's removal of absentee ballots from their mailing envelopes. The statutes simply provide that if such an individual is present to witness the event, he must at that time contest any ballots whose mailing envelopes fail to comply with the requirements of the law. If he does not raise such a challenge at that time, he cannot raise it later.

In this case, Mr. Beckstrom was not present for the removal of the 885 challenged ballots from their mailing envelopes, nor was he provided notice and an opportunity to be present at such event. That is because most of the absentee ballot mailing envelopes were not opened by the Canvassing Board at a noticed public meeting. Rather, the envelopes were opened and sorted by Elections Office staff members on a regular, ongoing basis between Friday, November 1, 1996 and election day. (T-44, 45, 331, 337). The Canvassing Board relied upon the staff to bring to the Board's attention questionable ballots-Mr. Beckstrom's staff likewise determined that the process was properly outlined by the Elections Department Staff and would be followed. The only envelopes brought to the attention of the Canvassing Board were approximately 355 that the elections staff had deemed "questionable" (T-44, 45, 336, 337). None of those envelopes are part of the 885 ultimately ruled illegal by the court. All of the other approximately 27,000 envelopes were opened by elections staff outside the presence of, and without any review by, the Canvassing Board. Thus, neither Mr. Beckstrom nor anyone else

(other than Elections Office staff) had an opportunity to inspect the 885 challenged mailing envelopes before they were opened. The fact that the Supervisor began removing ballots from the envelopes prior to election day should not be allowed to be used as a shield to prevent a challenge to the ballots when it is conclusively shown that the Canvassing Board failed to carry out its mandated responsibility.

Here two requirements of the law ("that ballots shall be illegal if the certificates do not contain the requisite information and the provision that challenges to the certificates must be made before the envelope is opened) seem to work in contravention to one another. Clearly 101.68(2)(c)2 provides that the challenge must be raised timely-but assumes that the Canvassing Board is present and "canvassing"the ballots. The record in this case shows conclusively that the Canvassing Board failed in its mandated responsibility.

Under these circumstances, Mr. Beckstrom should not be barred from challenging the 885 ballots as illegal. Since the 885 ballots are illegal and since 885 votes are more than the number needed to overturn the election, the absentee ballots should be thrown out and Mr. Beckstrom declared the winner of the election. See Boardman, supra, 323 So. 2d at 268 ("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").

It should be noted that the Boardman court *upheld* the trial court's invalidation of 88 ballots. The illegal ballots included "13 in which the application was not signed by the applicant, 17 in which return envelopes were not signed across the flap, 39 in which the official title of the subscribing witness was not indicated and 19 in which the names of the electors were not on record." Id. at 250. These ballots were illegal under the laws that existed at that time. Since the 88 ballots were less than the number required to change the result of the election, however, the election was allowed to stand.

Additional evidence of the Canvassing Board's failure to comply with the substantial requirements of law is found in their failure to maintain any written policy or guidelines for staff to follow in determining whether a certificate contained a voter's signature. Five hundred six (506) certificates presented to the court showed that numerous ballots were accepted when the voter's signature on file with the Supervisor was vastly different than that appearing on the certificate. The Supervisor's staff had no policy to follow and not surprisingly the application of the law varied.

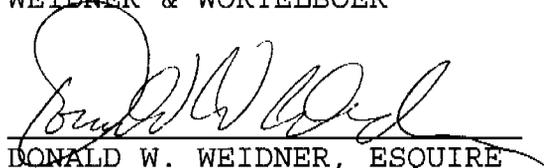
### CONCLUSION

As the Court recognized in Bolden, while "the will of the electorate must be protected, so must the sanctity of the ballot and the integrity of the election." Bolden v. Potter, *supra*, 452 So. 2d at 567. The extent and nature of the irregularities presented in this case are unprecedented. Unlike the facts presented in Boardman and its progeny, where the irregularities complained of were merely insignificant, technical violations of procedural rules, this case uniquely and directly involves the purity of the ballot itself. Under these circumstances, the importance of vindicating the interests of the public in preserving the sanctity of the ballot and in conducting a full, fair and free election clearly outweighs any countervailing concern over the disenfranchisement of qualified voters. The court must not ignore the violations that occurred in this case and thereby sanction official conduct that, in gross contravention of a statute designed to deter fraud and corruption in the electoral process, unlocks the door to the same risks.

For the reasons set forth fully herein, Appellant, Gus Beckstrom, respectfully requests that the court reverse the final order under review and remand the case with directions to the trial court to either grant judgment for the plaintiff in the election contest proceeding by either (1) invalidating the absentee ballots cast in the November 5, 1996 Volusia County Sheriff's election or (2) invalidating the 6,497 absentee ballots

that were marked on by elections officials in the November 5, 1996 Volusia County Sheriff's election. The trial court should thereby be required to declare Gus Beckstrom the winner of the election and issue an order of "ouster" removing Mr. Vogel from office. Additionally or Alternatively Appellant requests that this court reverse the trial court's dismissal with prejudice of the election protest and direct that the trial court enter judgment for Mr. Beckstrom thereover. Finally, Appellant request that the court direct an award of costs and attorney's fees to Appellant.

Respectfully Submitted  
WEIDNER & WORTELBOER

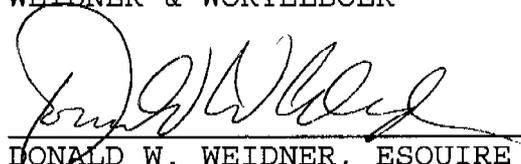


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Initial Brief has been furnished via regular U.S. mail this 9th day of June, 1997 to Daniel D. Eckert, Volusia County Attorney, 123 W. Indiana, Deland, Florida 32721-0569 and James R. Clayton, Esquire, 114 West Rich Avenue, Deland, Florida 32720.

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