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

REPLY BRIEF OF APPELLANTS

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1. The trial court erred as a matter of law, even if the trial court's findings of fact were all correct.

The ultimate question on appeal is how inserting accurate voter identification numbers in absentee ballot request forms can perpetrate an elections fraud warranting the disqualification of 673 ballots cast in good faith. The answer is that the act of inserting those numbers on previously signed and rejected ballot request forms was the means to the unlawful end employed by certain defendants of having Supervisor Robbins issue ballot request forms to people she had already rejected as fatally defective forms (due to the missing voter identification numbers). The means of inserting voter identification numbers in ballot request forms was a first degree misdemeanor. Even if Republican Party members did not know their conduct of changing public records was a crime, as the trial court found, the unlawful end which the means accomplished was to make invalid ballot request forms appear valid, thereby giving Governor Bush enough votes to produce the razor-thin margin of victory in Florida and win the Presidency despite losing the national vote. The changes were without attestation, or confirmation, or certification by the voter.

The trial court ended its analysis after concluding that the Republican Party members did not know their means were independently unlawful. The court never considered that the Republican Party members necessarily had to have known that

those means would achieve their end, the end of manipulating Supervisor Robbins into issuing absentee ballots on the basis of fatally defective ballot requests forms which she had already determined did not warrant the issuance of such ballots. This conduct circumvented the intent of the election code. *In re the Matter of November 4, 1997 Election for City of Miami,* 707 So.2d 1170, 1171 (Fla. 3d DCA 1998) (intent of those laws frustrated). While the trial court concluded that the party members did not know their means were independently unlawful, the party members' knowledge that their end was unlawful cannot be seriously questioned, and the trial court never found to the contrary.

The answer to this ultimate question has two parts; unfortunately, the trial court prematurely ended its analysis with the first part. First, the act of supplying the accurate voter identification numbers was itself an unlawful act which act is a first degree misdemeanor. That act was the means by which the party members successfully reached their unlawful (elections) fraudulent end, which goes to the second part of the analysis which the trial court never reached.

The second and crucial step is that, by supplying those voter identification numbers, party members succeeded in creating the false and fraudulent appearance that Supervisor Robbins had 766[1] more valid ballot request forms from registered

[1]Supervisor Robbins received 766 ballot requests which did not bear accurate voter identification numbers. After the Republicans altered those 766 ballot requests

Republicans than she in fact had. On the basis of the unaltered public record in her custody prior to and at the time she unlawfully turned it over to the Republicans, Supervisor Robbins had 766 ballot requests from registered Republicans for which she could not issue ballots, consistent both with her own office policy and that of the Secretary of State's Department of Elections. After the Republicans returned that public record, Supervisor Robbins had an unlawfully altered, and thus *fraudulent*, public record before her, on the basis of which she could and did issue 766 additional ballots exclusively to registered Republicans.

Although the trial court made two errors in its analysis (one of which is a legal conclusion, and the other of which was an error in its finding of a single factual conclusion, discussed below), the legal error alone requires reversal, even if the court's findings of fact is not reversible error. As noted, the trial court's legal error was in focusing narrowly and exclusively on the first step in the analysis. In taking that first step in the analysis, the trial court correctly concluded "that the procedure utilized was contrary to section 101.62, Florida Statutes, and the Public Records Act, and that it offered an opportunity for fraud and created the appearance of partisan favoritism

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and submitted them to Supervisor Robbins, she then issued 766 ballots to those voters, and of those, only 673 were returned and counted.

on the part of the Supervisor of Elections."[2] (A-4). The court further 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." (A-9). Putting aside Plaintiffs/Appellants' exception to that factual finding, the trial court's first error was in ending its legal analysis at that point.

Assuming for purposes of argument that the trial court correctly found that the violations of statutory requirements were "unintentional misconduct" because those violations were "the result of an erroneous understanding of the statutory requirements," the trial court completely missed the bigger picture. The acts which constitute those statutory violations, whether they were intentional or not, indisputably worked an elections fraud. The intentional acts materially altered the public record. They were material because they made a public record upon which Supervisor Robbins would not issue ballots appear, falsely and fraudulently, to be a public record upon which she *could* issue ballots.

The "failure to comply with the statutory procedure," was merely the means by which the Republicans carried out their fraud. Whether or not the Republicans knew that removing the ballot request forms from the Supervisor's office and altering them were violations of law, those same acts worked the very elections fraud which the trial

[2]There were no records maintained of what records or how many left the office or what was returned (Joint Pretrial Stipulation ¶¶ 21-22).

court failed to consider, the same fraud which is at the heart of Plaintiffs' complaint. The trial court failed to consider the elections fraud because the court erroneously focused strictly upon whether the Republicans knew their *means* (i.e., taking the ballot requests out of the Supervisor's office and altering them) was lawful, rather than their fraudulent *end* (i.e., creating a public record which would falsely and fraudulently "authorize" Supervisor Robbins to send out 766 more ballots to registered Republicans).

Moreover, there can be no doubt that the Republicans' exclusive purpose in altering those ballots was to maximize the Republican absentee voter "turn out" in Martin County. Defendant Kane admitted that fact at trial. (T-189-90). Obviously, the Republicans' unlawful act of altering the 766 ballots *guaranteed* that 766 additional ballots would issue on the basis of a fraudulently altered public record. According to their own trial testimony, the lawful alternatives, running public announcements in the newspaper, TV and radio media or sending out another mass mailing to the voters whose request forms were invalid, never "occurred" to the Republican Party members. They never seriously entertained "a massive paid phone bank," although that did apparently occur to them. A telephone campaign to the voters was discontinued. The unlawful means of "correcting" the ballot request problem would yield the issuance of ballots to 100% of the 766 registered Republican voters who submitted defective

ballot request forms to the Supervisor of Elections. A media or mailing campaign would not have guaranteed that same 100% success rate. Because the trial court prematurely concluded its analysis, it never considered these undisputed, critical facts.

The trial court failed to consider, in conjunction with the other evidence which Plaintiffs presented, that the "procedure utilized" stood to guarantee the issuance of 766 registered Republican absentee ballots, despite the true, unaltered public record which warranted the issuance of *none* of those ballots. As noted, the lawful alternatives for correcting the Republican Party's original mistake would certainly have yielded fewer ballots. It only stands to reason that fewer than all of those prospective voters would have taken the necessary corrective action because those people were, after all, the same people who did not even bother to verify their voter identification number on their pre-printed ballot request – despite being explicitly instructed by the Republicans to verify the accuracy of the information. Had the trial court correctly considered this part of Plaintiffs' claim, the remaining evidence, evidence which persuaded the trial court that the party members had in fact violated the Public Records Act and the election code under an "erroneous understanding of the statutory requirements," would have taken on a whole new light.

Peggy Robbins is and has been for some 23 years the Supervisor of Elections in Martin County. After all those years of service, Supervisor Robbins allegedly did

not understand the simple proposition that any document her office receives is a "public document" which she must vouchsafe and keep safe under her constant custody and supervision. Supervisor Robbins' testimony that she was ignorant of the Public Records law is deeply disturbing. The same Martin County public official who alone is charged with protecting the sanctity of the ballot and the integrity of elections has now testified under oath that she did not know that turning over public election records to partisan party operatives violates the law. She is the "very guardian[] of the ballot." *Potter v. Bolden*, 416 So.2d 6, 8 (Fla. 1st DCA 1982) reversed and remanded on other grounds, *Bolden v. Potter*, 452 So.2d 564 (Fla. 1984).

The remaining circumstantial evidence, however, conclusively demonstrates that Robbins is not really that incompetent. Robbins gave the ballot request forms to the Martin County Republican Party, subject to her own requirement that they immediately return them the following day. What was the urgency of returning ballot request forms which Supervisor Robbins herself had pitched into a dead request bin? There are only two potential answers to that question.

First, Supervisor Robbins must have known that she was violating the Public Records Act, and she wanted the forms back quickly before she was caught in that compromising situation. Second, Supervisor Robbins wanted the forms back quickly *with the correct voter identification numbers inserted* so that she could issue ballots

to those 766 registered Republicans whom she had already determined were not entitled to receive them due to their incomplete or inaccurate request forms. The first alternative would show that Supervisor Robbins knew what she was doing was wrong; the second would show that she was intentionally advancing the Republican Party's intent to falsify the public record for the purpose of maximizing registered Republican absentee "turnout." One can debate which of the two is correct, but either is sufficient to establish the first *Boardman* factor of "intentional misconduct." Both are probably true. It is not difficult to understand why Republican Supervisor Robbins would turn those request forms over to partisans without giving them the same instruction she emphasized to her own staff which was never to change the information without first speaking to and receiving the permission of the potential voter requesting an absentee ballot (T-286); she did it because she wanted to maximize Republican absentee turnout. The partisan end which affected the integrity of the election thus justified the means, in the minds of the Martin County Republicans, including Supervisor Robbins.

For their part, the Republican Party members also knew that what they were doing violated the law. Even if they thought what they were doing was perfectly lawful, why did they not broadcast as fast and as furiously as they could that there was a major problem in Martin County and that hundreds of Republican ballot request forms were fatally defective and thereby maximize the number of registered

Republicans voters who could have lawfully cured the error on their own request forms? Instead, party members worked feverishly and silently (through a single night, according to their testimony) (Joint Pretrial Stipulation, ¶ 17-18) to alter those ballot request forms. Unlike most people who would give pause before unilaterally altering a document someone else had already signed, especially without creating a record of the alteration and the reason for it, the party members in this case didn't give a second thought to doctoring documents. If there is any doubt that most people would not alter executed documents so cavalierly, one need only consult the criminal code to know that such obvious misconduct under Florida law. Fla. Stat. § 839.13 (alteration of a public document).

As the Court recognized in *Boardman*, "the real parties in interest here, not in the legal sense but in realistic terms, are the voters." *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975). In the Martin County case, the question is *which voters*? (1) Is it the millions of Floridian voters who got up early before work, fed their children, packed lunches, left work early (or even late) and stood in lines at the polling places, and followed *all* of the rules the law imposes upon them to cast their ballots? Their "will" was that Vice President Gore should be the next President. (2) Or is it the will of those voters who sent in ballots at their convenience,[3] ballots they were permitted

[3]Abundant authority holds that absentee voting under Florida law is a "privilege," not a right. *Boardman*, *supra*, 325 So.2d at 264. The federal Voting

to cast only as a result of Republican Supervisor Robbins' commission of intentional wrongdoing in violation of the Public Records Act; ballots they were permitted to cast only as a result of the Republican Party members' intentional wrongdoing in violation of the criminal code provision which prohibits the alteration of public records; ballots they were permitted to cast only as a result of the Republican Party members' commission of intentional wrongdoing in violation of the absentee voter anti-fraud provision which prohibits third parties from requesting absentee ballots for someone else; ballots they were permitted to cast only after the intentional wrongdoing in the alteration of a public record, a public record on the basis of which they *would not have received a ballot* but for the fraudulent alteration of that public record? The question answers itself – it is the will of the voters who strictly played by the rules whose votes should count, just as these same Defendants argued in West Palm Beach.

In that same vein, the 766 absentee voters in this case are *not* totally blameless. In Martin County, the Republican ballot request form was attached to a newsletter which included 3 simple instructions in all capital letters: *Verify* the information, *sign* the form and *mail* it. (T-156). The Republican Party instructed Martin County Republicans to "verify" the information on their pre-printed ballot request forms. The very first instruction was that they should "*verify*" the accuracy of the information on

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their pre-printed form. Indisputably, 766 registered Republicans failed to follow that very simple instruction, necessitating (at least in the minds of the Republicans) the intentional alteration of all 766 of those ballot request forms. Plaintiffs have no quarrel with the Court's toleration of a certain level of "incompetence" in election officials' administration of the election code. It is quite another thing, however, to tolerate intentional wrongdoing ("erroneous understanding of the statutory requirements" or not) obviously, purposefully and intentionally calculated to affect the outcome, and thus the integrity, of an election.

It is no answer that criminal penalties for election fraud are sufficient deterrence to protect the integrity of the election process. Even despite the clear violations of law which the trial court found in this case, no prosecutor has opened any criminal investigation into this matter. Moreover, even were a prosecutor inclined to prosecute such criminal violations, a thief is not allowed to keep his spoils. Robbers are required to give up the proceeds of their heists in addition to the prison time they serve. Those who purloin votes in the election process may not keep the precious treasure from the people, simply because they might someday face a criminal prosecution. The wrong "literally and figuratively, stole the ballot from the hands of every compliant voter" in the election. *See In re Matter of November 4, 1997 Election, City of Miami, supra*, 707 So.2d at 1172.

In most cases, once absentee ballot fraud is proven, the only remedy is to throw out an entire county's absentee ballot vote. In this case, however, the parties' stipulations of fact pinpoint 673 bad apples. The Court should disqualify those 673 ballots and deduct them from the side that unlawfully procured them, rather than disqualifying the 10,000-plus absentee ballots cast in Martin County. If the sanctity of the ballot, the integrity of the election process and the will of the people are meaningful, such relief should be granted.

Plaintiffs request the Court to reverse the trial court's judgment, to disqualify the 673 ballots in dispute and to deduct them from the Republican side which unlawfully procured them.

2. Rejoinder to Governor Bush's jurisdictional and statute of limitations arguments.

First, Governor Bush argues that the Court should decline to exercise its Article V, section 3(b)(5), jurisdiction to hear this case on the grounds that Governor Bush's position on the merits is right, and the trial court correctly found in their favor. In other words, the Court *should* entertain this appeal just long enough to hear them say that they are right on the merits and then to ignore the District Court's certification of this case as one of great public importance. The Martin County case is obviously of great public importance because it could change the outcome of a presidential election.

It also requires this Court's immediate resolution because declining to hear this case will effectively deny Plaintiffs all appellate review, for reasons of which the Court is well aware.

Second, Governor Bush argues that this case, indisputably filed timely on December 1 as measured from the November 26 certification date, was rendered untimely by the U.S. Supreme Court's recent decision vacating the Court's opinion in which it set that November 26 certification date. The argument is wrong. A party may rely on the interpretations of state law by the highest court in the state, and if changes in those interpretations shorten a statute of limitations, due process concerns obviously limit the extent to which such a change in the law may be applied retroactively. If any of the Florida contest cases had been filed prior to November 26, Governor Bush would undoubtedly have argued for their dismissal on the grounds they were premature. To apply a shorter statute of limitations to Martin County because of a U.S. Supreme Court decision rendered *after* this case was filed in reliance on this Court's controlling interpretation of Florida law would so clearly violate due process, no citation of authority is necessary.

Third, Governor Bush now presses an argument which he all but abandoned below – that the presidential electors are indispensable parties and that the failure to join them requires dismissal. This argument would likewise have required dismissal

of the *Gore* case in which the Court issued its latest opinion just last Friday, December 8. One of those electors – Intervenor Thrasher – *is* a party, but more importantly, every single real party in interest is a named party to this action. Governor Bush's indispensable party argument is disingenuous, it lacks any merit, and it should accordingly be rejected.

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