IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

JIM ROOT, Petitioner, v. TONY "CHUBBY" BROWN, as a candidate for Sheriff of Macon County; and JOSH TANNER, as Macon County Clerk Constituting the Election Authority for Macon County, for the General Election held on November 6, 2018, Respondents.	)	Case No. 2018-MR-1027

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on a Verified Election Contest Petition ("the Petition") filed December 19, 2018. Both parties appeared personally and by counsel, and the Court heard evidence and has been fully advised.

THE COURT HEREBY FINDS as follows:

FACTS

This case arises out of an election controversy about who was elected Sheriff of Macon County in November 2018. The Respondent, Tony Brown ("Brown"), was declared the Sheriff of Macon County by a vote of 19,655 to 19,654 over Root – a difference of one vote. The Petitioner, Jim Root ("Root"), filed a Verified Election Contest Petition (the "Petition") on December 19, 2018, contesting the outcome of the election for Sheriff of Macon County in the General Election of November 6 , 2018. Root exercised his right under section 22–9.1 of the Illinois Election Code, 10 ILCS 5/22–9.1, to a discovery recount of not more than 25% of the precincts within Macon County.

Root's Petition asserts that various "mistakes and fraud have been committed in the casting and counting of ballots for the office of Sheriff of Macon County at this election." (Petition, ¶ 4.) Root alleges that "numerous duly qualified voters in Macon County were wrongly denied their right to vote in the election, and numerous individuals who were not qualified to vote wrongly voted." (Id. at ¶ 5.) Root further avers that "a correct and lawful count of the votes which were

properly cast and which should have been properly counted in Macon County shows a result different from that reported by the judges of election . . . [and] that Jim Root was elected Sheriff of Macon County at the General Election on November 6, 2018." (Id.) The Petition identifies several ballots that Root alleges should have been counted for him, and similarly identifies other ballots that he alleges should not have been counted in favor of Brown. Root alleges that if these errors are corrected, he would have more votes than Brown, and would therefore be declared the elected Sheriff of Macon County.

A. Motions with Respect to Pleadings and for Involuntary Dismissal

The named respondents opposed Root's petition in different motions. Brown filed his Combined Motion to Dismiss Pursuant to 735 ILCS 5/2-619.1 on January 25, 2019, contending that dismissal was warranted both because Root fails Illinois pleading standards under § 2-615, and also because it is subject to involuntary dismissal under § 2-619. Respondent Josh Tanner, as Macon County Clerk (hereinafter, "Tanner") filed his Motion to Dismiss on March 22, 2019. Brown's § 2-619(a)(9) motion alleged that the results of the discovery recount constituted an affirmative matter that defeated Root's claim. Brown and Tanner independently argued that allegations of fraud unsupported by fact should be stricken. Root argued that the well-pled allegations contained in his Petition, if proven, would place a sufficient number of votes at issue to demonstrate a reasonable likelihood that a recount will change the result of the election.

By written Order entered on June 28, 2019 (the June 2019 Order), this court denied Brown's § 2-619 challenge and found that there was a reasonable likelihood that a recount would change the results of the election. However, the court agreed with the § 2-615 challenges that Root's allegations of fraud, including that qualified voters were wrongly denied their right to vote in the election, and that numerous individuals who were not qualified to vote wrongly voted, were unsupported by specific fact. The June 2019 Order therefore struck the allegations within Paragraphs 4, 5, 6, 7 and 8.

B. Denial of Interlocutory Review

In the wake of the June 2019 Order, Brown sought appellate review. Brown filed a Motion for Illinois Supreme Court Rule 308 Finding, asking for leave to certify several questions for review in the Appellate Court. This court found that the questions presented were not appropriate to be certified for interlocutory review under Rule 308, and that an immediate appeal would not

materially advance the ultimate termination of the litigation. This motion was denied on October 15, 2019, and the case was set for trial in January 2020.

C. Pretrial, Recount, and Trial Proceedings, January 2020 through April 2021

After this lengthy motion practice, the cause was set for three days of trial in late January 2020. However, on the eve of trial the parties represented they had reached an agreement to conduct a full recount and agreed that the trial dates should be vacated. The agreement contemplated entry of an agreed order and the parties acknowledged that the recount might not be completed until after the intervening primary election was held in March 2020. In fact, it would take a great deal longer, because in March 2020 the Governor of the State of Illinois declared a public health emergency due to the COVID-19 pandemic, and many businesses, offices, and courts were closed to prevent exposure to the virus and to slow the spread of the disease. Nevertheless, the court entered an Agreed Order on June 25, 2020 and the recount was completed in July 2020. The Macon County Clerk filed the Underlying Report on Recount on July 24, 2020 (the "Recount Report").

The Recount Report indicated that there were 1,337 contested ballots and 57 uncounted ballots. Without including those ballots, as well as 395 agreed undervotes and four agreed overvotes, Brown received 18,982 votes and Root received 18,964 votes. The cause was again set for trial over four nonconsecutive days in late October 2020. At a pretrial conference on October 19, 2020, the parties represented they were working toward a partial stipulation regarding the contested ballots to further narrow the number of ballots in dispute, and two of the trial dates were vacated by agreement of the parties. On October 26, 2020, the parties represented that they had narrowed the number of ballots in dispute but needed time to review certain ballots at the County Clerk's office. The parties agreed to vacate the October trial dates to give them time to conduct their review, and the case was reset for its third trial setting, to begin on December 10, 2020.

At a pretrial conference on December 9, 2020, Respondent Brown made an oral motion to continue the trial. This was opposed by Root, and the court denied the motion. Trial began December 10, 2020 and continued on December 18, 2020, January 20, 2021, January 25, 2021 and February 11, 2021. The parties called various witnesses, including several election judges, the current County Clerk, Josh Tanner, and the former County Clerk, Steven Bean. All contested and uncounted ballots, except two, were admitted into evidence by agreement, and many were examined in open court.

At the conclusion of the evidence, the parties requested time to obtain the trial transcripts prior to submitting their closing arguments. The parties were thereafter directed to file a joint Exhibit List with the Court and the cause was set for a scheduling conference on March 5, 2021. At the scheduling conference, each party was directed to file closing arguments by March 29, 2021 and any reply arguments by April 12, 2021. An Agreed Summary of Exhibits was filed on March 12, 2021. The parties filed their closing arguments on March 29, 2021, and both parties filed reply arguments on April 12, 2021. The court took the matter under advisement.

ANALYSIS

The issues in this case must be resolved according to the Election Code and controlling judicial interpretation of that Code. "[T]he purpose of a proceeding to contest an election is to ascertain how many votes were cast for or against a candidate, or for or against a measure, and thereby ascertain and render effective the will of the people." *Louden v. Thompson*, 1 Ill. App. 3d 809, 811, 275 N.E.2d 476, 477 (3d Dist. 1971). "The Election Code is a comprehensive scheme which regulates the manner in which election shall be carried out." *Pullen v. Mulligan*, 138 Ill. 2d 21, 46 (1990). "Judges and clerks of election are presumed to perform the duties required of them by the statute and their records are the best evidence of the qualification of the voter to vote at an election." *Tuthill v. Rendelman*, 387 Ill. 321, 332, 56 N.E.2d 375, 382 (1944). "While it is a rule that mistakes or omissions of the officers in charge of an election will not defeat the plainly expressed will of the voters, yet the rule does not apply where the officers have failed to perform mandatory duties of a precautionary character which safeguard the votes of the electors." *Tuthill v. Rendelman*, 387 Ill. 321, 330, 56 N.E.2d 375, 381 (1944).

Section 23-23.2 of the Election Code, 10 ILCS 5/23-23.2, directs that "[a] court hearing an election contest pursuant to this Article or any other provision of the law shall grant a petition for a recount properly filed where, based on the facts alleged in such petition, there appears a reasonable likelihood the recount will change the results of the election." Although "the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions, there should be such strictness as will prevent the setting aside of the acts of sworn officials without adequate and well defined cause." *Zahray v. Emricson*, 25 Ill. 2d 121, 124, 182 N.E.2d 756, 758 (1962). "The judgment of the court in cases of contested election, shall confirm or annul the election according to the right of the matter; or, in case the contest is in

relation to the election of some person to an office, shall declare as elected the person who shall appear to be duly elected." 10 ILCS 5/23-26.

Initially, there were 39,309 ballots, combined, counted for the parties in the 2018 Macon County election for Sheriff. There were 425 ballots cast that did not include a vote for Sheriff (undervotes) and four ballots that contained votes for both candidates for Macon County Sheriff (overvotes). Petitioner Root received 19,654 votes and Respondent Brown received 19,655 votes according to the certified election results.

The parties agree that the recount in July 2020 revealed the following:

Figure 1: Agreed July 2020 Recount Tally

18,982 votes for Respondent Brown
18,964 votes for Petitioner Root
1,337 contested ballots
395 undervotes
4 overvotes
57 uncounted ballots
39,739 Total

Upon agreeing to the recount, the parties put the issue of properly counting all ballots before the court. There are six main issues raised by the parties: (A) uninitialed ballots, including those cast by early voting, in person voting, and mail-in votes; (B) ballots raising issues of voter intent; (C) one ballot with a purported distinguishing mark; (D) remade damaged ballots; (E) whether a proportional reduction in votes is warranted due to ballots cast exceeding ballot applications in certain precincts; (F) the two "found" ballots; and (G) miscellaneous ballot issues. The court addresses each of these issues in turn, but finds it is helpful to summarize the number of ballots within each category. Of the 1,337 contested and 57 uncounted ballots (1,394 total), there were at least 110 ballots cast in-precinct on election day that did not bear the initials of an election judge, as noted in Brown's Appendix 1. The parties agree that 106 of these should not be counted. The other four ballots bore the numbers of the precinct instead of an election judge's initials. Root asks for these to be counted, to which Brown objects.

There were also 68 ballots cast in person by early voting that were not initialed, as noted in Brown's Appendix 2. The parties dispute whether these ballots should be counted. There were three vote-by-mail ballots without the initials of an election judge, which the parties agree may be counted. In addition, there were 15 ballots that were damaged or remade, and the parties disagree as to whether seven of these should be counted. There were two ballots that raised issues of voter

intent and one that Brown alleges has distinguishing marks, and the parties dispute whether those should be counted. There were two "found ballots" that were not originally counted in the election returns. Root asks that these two ballots be counted, and Brown disagrees. There are seven miscellaneous ballots, primarily undervotes and overvotes. The remainder of the ballots were initialed ballots that the parties now agree should be counted.

Root also requests that there be a proportional reduction in vote totals for each party due to the number of ballots cast exceeding the number of ballot applications in certain precincts. He alleges that this would result in a net gain of 29.89 votes for him (a gain of 85.70 votes for him compared to a gain of 55.81 votes for Brown). Brown argues that Root has waived the issue of there being more ballots cast than voter applications, due to the allegations of fraud being stricken from the original Petition. He also argues that, if not waived, Root's argument for a proportional reduction fails due to the ability to exclude illegally cast ballots cast for each candidate from the totals. For other precincts at issue, Brown argues that the written reports prepared by election judges on election day confirmed that the ballots cast were not exceeded by ballot applications.

For the reasons that follow, this court rules that 68 uninitialed ballots cast in person by early voting may not be counted, that 11 of the 15 remade damaged ballots should be counted, that the two ballots raising issues of voter intent should be counted, that one ballot with alleged distinguishing marks should be counted, that the two "found ballots" should not be counted, and that no proportional reduction is appropriate. As a result of these rulings, the final vote count is 19,579 votes for Root and 19,563 votes for Brown; Root – not Brown – was elected Sheriff on November 6, 2018 by a margin of 16 votes.

A. Ballots not initialed by an election judge

In the 2018 election for Macon County Sheriff, individuals could vote by mail, vote early (before election day) in person, or vote in person in the precinct of his or her residence on election day. Each option is addressed by a separate article of the Illinois Election Code, although the various provisions are related and often require reference to other sections of the Code. *See*, *Morandi v. Heiman*, 23 Ill. 2d 365, 370, 178 N.E.2d 314, 317 (1961). The requirement to initial ballots in Illinois predates the current version of the Election Code and can be traced back at least as far as the Ballot Act of 1891. *Id.* at 368.

Various Articles of the Election Code are relevant to the issues in dispute: § 17-1*et seq.*, governs the conduct of elections and making returns in general. Section 19-1, *et seq.*, governs voting by mail. Section 19A-5, *et seq.*, governs early voting by personal appearance. Moreover, "[a]ny references to absentee ballots, absentee voters, absentee registration, or absentee voting procedures in this Code shall be construed to refer to vote by mail ballots, persons who vote by mail, registration by mail, or voting by mail." 10 ILCS 5/1-3.5. Additionally, specific provisions apply to any election that utilizes certain tabulation optical scan technology authorized under the Election Code. There is no dispute that § 24B-1, governing precinct tabulation optical scan technology, applies to this case.

1. In Person Voting (in-precinct)

For in-person voting, the Election Code, 10 ILCS 5/17-9, requires that election judges give each voter only one ballot, "on the back of which ballots such judge shall endorse his initials in such manner that they may be seen when each such ballot is properly folded, and the voter's name shall be immediately checked on the register list." Additionally, "[n]o ballot without the official endorsement shall be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this Act shall be counted." 10 ILCS 5/17-16. The use of Precinct Tabulation Optical Scan Technology ("optical scan") voting is authorized by the Illinois Election Code. 10 ILCS 5/24B-1. By using this technology, "the voters or precinct judges record votes by means of inserting marked ballots in scanning and tabulating machines, which machines have voting defect identification capability, and are so designed that ballots will be counted by such machines at one or more counting places." 10 ILCS 5/24B-1. "*So far as applicable, the procedure provided for voting paper ballots shall apply when Precinct Tabulation Optical Scan Technology electronic voting systems are used.* However, the provisions of this Article 24B will govern when there are conflicts." 10 ILCS 5/24B-4 (emphasis added).

Following the requirements of §§ 17-9, 17-16, and 24B-4, all ballots are required to be initialed when using the Precinct Tabulation Optical Scan Technology. Moreover, after the closing of the polls:

> The judges of election shall then examine all ballots which are in the ballot box to determine whether the ballots contain the initials of a precinct judge of election. If any ballot is not initialed, it shall be

> marked on the back "Defective", initialed as to such label by all judges immediately under the word "Defective" and not counted.

10 ILCS 5/24B-10.1. In *Tuthill v. Rendleman*, 387 Ill. 321, 330 56 N.E.2d 375 (1944), the Illinois Supreme Court held that the statutory directive to election judges that ballots be initialed is mandatory, and that only initialed ballots may be counted. In *Tuthill*, more than one hundred ballots that bore the initials of an individual who was not an election judge were deemed invalid and not to be counted. *Id.* The Illinois Supreme Court's decision in *Boland v. City of LaSalle,* 370 Ill. 387, 19 N.E.2d 177 (1938) to the contrary was specifically overruled on that point by the Court's later decision in *Tuthill. Tuthill*, 387 Ill. at 330.

The parties in this case agree that ballots cast in person on election day may be counted only if they bear the initials of an election judge, but they disagree on how and where this principle applies. Brown asserts that there are 110 uninitialed ballots from the overall total of contested ballots that were cast in person on election day. For his part, Root asserts there are in fact 197 uninitialed ballots, although his total includes the ballots cast early in person, which the court addresses separately, *infra.* The parties agree that most of these ballots should not be counted. They disagree, however, regarding whether the ballots in Exhibits 63A, 58A, 80A, and 80B from Brown's Appendix 1 should be counted. On each of these ballots, a number is present in the space designated for the initials of an election judge, and no initials appear there or elsewhere on the ballots. Pursuant to the Election Code's mandatory initialing requirement, these ballots may not be counted.

Although Brown generally agrees that uninitialed in-precinct ballots cast on election day should not be counted, he argues that some uninitialed ballots should be counted because no one testified that they should not be counted. Specifically, there are six ballots with votes for Brown and one ballot with a vote for Root in Exhibits 25 and 26, all of which Brown argues should be counted. Brown alleges that since these ballots were not specifically marked as individual exhibits at trial, Root did not really contest them. Root disagrees.

Brown's argument regarding the uninitialed in-precinct ballots is not well taken. All ballots were admitted into evidence, putting the burden on either party to present evidence and arguments regarding whether and how the ballots were to be counted. No testimony is necessary if a party's argument is based on what can be observed from the face of the ballot itself. The ballots found within Exhibits 25 and 26 fall within this category. Moreover, these were ballots that were

specifically contested at the July 2020 recount, putting Brown on notice that he would need to provide any evidence beyond the face of the uninitialled ballots themselves, if there was a reason they should be counted.

According to the parties' final arguments, there are 605 ballots with votes for Root and 567 ballots with votes for Brown that were contested but, upon review, do bear the initials of an election judge. The court's tally of these ballots is attached and incorporated by reference as Exhibit A. Adding these ballots to the overall vote total results in updated totals for each candidate as follows:

Figure 2: July 2020 Recount Tally after dispensing with uninitialed in-person ballots

19,569 votes for Root (18,964 + 605)

19,549 votes for Brown (18,982 + 567).

2. Voting By Mail

Election Code provisions governing in-person voting also apply to voting by mail. *See* 10 ILCS 5/17; 10 ILCS 5/18. The Election Code imposes additional requirements for voting by mail, and specifically provides:

> within 2 days after a vote by mail ballot is received, but in all cases before the close of the period for counting provisional ballots, the election judge or official shall compare the voter's signature on the certification envelope of that vote by mail ballot with the signature of the voter on file in the office of the election authority.

10 ILCS 5/19-8(g). If the two signatures of each voter match, and the voter is qualified to vote, the ballots are cast and counted on election day or later. *Id.* On the other hand, if the signatures do not match, "then without opening the certification envelope, the judge or official shall mark across the face of the certification envelope the word 'Rejected' and shall not cast or count the ballot." *Id.* Vote by mail ballots may be rejected for a number of other reasons as well, including if the voter is determined to have voted in person on election day. 10 ILCS 5/19-8(g)(1)-(4). If a vote by mail ballot is rejected, the election authority must notify the voter, who then has an opportunity to appear on or before the 14th day after the election "to show cause as to why the ballot should not be rejected." 10 ILCS 5/19-8(g-5).

In this case, there are three uninitialed vote by mail ballots within the category of contested ballots. Root asserts that uninitialed ballots that appeared to have been folded could be distinguished as vote by mail ballots, and should, therefore be counted even without an election

judge's initials. Brown agrees that these uninitialed vote by mail ballots should be counted. The parties agree that an exception to the usual initialing requirement applies, as discussed further below. Each of these ballots contain votes for Brown, resulting in an updated vote total for each candidate as follows:

Figure 3: *July 2020 Recount Tally counting vote-by-mail ballots*

19,569 votes for Root

19,552 votes for Brown (19,549 + 3).

3. Early Voting by Personal Appearance

Some of the most difficult legal issues in this controversy arise out of ballots cast early by personal appearance. Therefore, the court devotes considerable effort to explaining this portion of the ruling. Article 19A governs early voting by personal appearance. Section 19A-35 provides, in relevant part as follows:

> In conducting early voting under this Article, the election judge or official is required to verify the signature of the early voter by comparison with the signature on the official registration card, and the judge or official must verify (i) that the applicant is a registered voter, (ii) the precinct in which the applicant is registered, and (iii) the proper ballots of the political subdivision in which the applicant resides and is entitled to vote before providing an early ballot to the applicant.

10 ILCS 5/19A-35. Article 19A also provides:

> If the election authority has adopted the use of tabulation optical scan technology voting equipment under Article 24B of this Code [10 ILCS 5/24B-1 et seq.], and the provisions of that Article are in conflict with the provisions of this Article 19A, the provisions of Article 24B shall govern the procedures followed by the election authority, its judges of election, and all employees and agents; provided that early ballots shall be counted at the election authority's central ballot counting location and shall not be counted until after the polls are closed on election day.

10 ILCS 5/19A-25.5(c). Additionally, 10 ILCS 5/19A-35 further provides that a voter whose ballot is not accepted by the voting machine may surrender that ballot and request another ballot during early voting. At that point, "[t]he voter's surrendered ballot shall be initialed by the election

judge or official conducting the early voting and handled as provided in the appropriate Article governing the voting equipment used." *Id.*

There are 68 uninitialed ballots cast by early voting in person within the category of contested ballots. Of these ballots, 40 bear votes for Brown and 28 bear votes for Root. The parties dispute whether these ballots should be counted. Brown argues that a judicially created exception to the mandatory initialing requirement applies, and Root disagrees.

"The Election Code is a comprehensive scheme which regulates the manner in which elections shall be carried out." *Pullen v. Mulligan*, 138 Ill. 2d 21, 46, 561 N.E.2d 585, 595, 149 Ill. Dec. 215, 225 (1990). "Strict compliance with all applicable provisions in the Election Code is not necessary, however, to sustain a particular ballot. Rather, our courts draw a distinction between violations of 'mandatory' provisions and violations of 'directory' provisions." *Id.* "Failure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots." *Id.* In both *Tuthill, supra,* and *Morandi v. Heiman,* 23 Ill. 2d 365, 178 N.E.2d 314 (1961), thousands of ballots were deemed invalid and could not be counted due to the absence of an election judge's initials.

In 1968, however, the Illinois Supreme Court created an exception to the otherwise mandatory application of the initialing requirement. In *Craig v. Peterson*, 39 Ill. 2d 191, 201-202, 233 N.E.2d 345, 351 (1968), the Court held that "the statutory requirements relating to the initialing of ballots by election judges are directory, rather than mandatory, when considered in relation to an election where the only paper ballots used on the issue or office in question are those of absentee voters, and the only irregularity complained of is the absence of such endorsement." In the *Craig* election, the only paper ballots for contested offices were those cast by absentee voters; all other ballots were cast by use of voting machines. *Id.* at 192.

In *Craig,* absentee voters intervened in the case and raised constitutional issues regarding their disenfranchisement as voters due to their ballots being uninitialed through no fault of their own. *Id.* at 193. The Court in *Craig* noted that the constitutional argument related to the initialing requirement had not been raised historically. *Id.* at 196. The Court attributed this to "the fact that such requirement, as applied to an all-paper ballot election, is a patently reasonable one in that it serves a salutary purpose by enabling the election judges to identify those ballots which they have personally initialled and therefore constitutes an effective safeguard against corrupt practices such as 'stuffing' a ballot box." *Id.* at 197. This "method of separating the legally cast ballots from those

illegally cast" is necessary to guarantee the integrity of the election, and "suffices to make its application in the usual case constitutionally permissible even though it results in disenfranchisement of those absentee voters whose ballots are uninitialled." *Id.* at 199.

"Likewise the same considerations have been held to apply to absentee ballots in an all-paper ballot election, for there is no other equally effective method of identifying and separating the legally cast from the illegally cast votes." *Id.* at 197. The Court in *Craig* pointed out that in *Morandi* there were both absentee and in person ballots that did not bear the initials of election judges; however, there was "no satisfactory method of separating the absentee ballots from the illegally cast regular ballots." *Id.* at 198. Moreover, "while it was argued that such absentee ballots had been folded differently from those cast in the usual fashion, the court there stated that attempting to distinguish 'a validly cast ballot from an illegal one upon such fortuitous circumstance would be a dangerous rule.'" *Craig*, 39 Ill. 2d at 198; citing *Morandi v. Heiman*, 23 Ill. 2d 365, 374, 178 N.E.2d 314, 319 (1961).

Ultimately, the Court in *Craig* held "that the statutory commands construed in *Tuthill, Griffin* and *Morandi* to be mandatory in an all-paper ballot election must be held only directory when applied in the context of the case before us." *Craig*, 39 Ill. 2d at 197. The initialing requirement in the context of an election where all but the absentee ballots were cast on voting machines, "does not assist in identifying the ballots for no identification problem exists." *Id.* at 198. Therefore, "the necessity, in order to guarantee the integrity of the election, of some such method of separating the legally cast ballots from those illegally cast" is not present. *Id.* at 199.

a. Illinois Supreme Court Cases Applying the *Craig* Exception

Following the *Craig* decision, the Illinois Supreme Court again addressed the initialing requirement in the context of absentee ballots in *Pullen v. Mulligan*, 138 Ill. 2d 21, 52, 561 N.E.2d 585, 598, 149 Ill. Dec. 215, 228 (1990). "Under *Craig*, uninitialled absentee ballots may be counted only if: (1) the absentee ballots can be identified and distinguished from in-precinct ballots; and (2) the initialling requirement does not contribute to the integrity of the election process." *Id.* at 52. In *Pullen*, "[t]he testimony at trial established that all absentee ballots have handwritten precinct numbers, while in-precinct ballots have preprinted precinct numbers." *Id.* at 53. Thus, the absentee ballots were readily identifiable and distinguishable from in-precinct ballots. *Id.* at 52-53. Moreover, "absentee ballots are not cast in the polling place, and are not opened until after the polls have closed." *Id.* at 53. Therefore, "application of the initialling

requirement to such ballots is not necessary to prevent voters from fraudulently stuffing the ballot box," and, the initialing requirement is "not necessary to safeguard the integrity of the election process." *Id.* The Court, therefore, upheld the counting of the absentee ballots under these circumstances. *Id.* at 54.

In *Bazydlo v. Volant*, 164 Ill. 2d 207, 214, 647 N.E.2d 273, 276 (1995), the Illinois Supreme Court further held that the party asserting the *Craig* exception must demonstrate the requirements of the exception by clear and convincing evidence. *Bazydlo*, 164 Ill. 2d at 214. Clear and convincing evidence is "the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question." *Id.* It is defined as "more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense." *Id.* Moreover, in election cases, "a clear and convincing standard adequately balances the conflicting interests in preserving the integrity of the election and avoiding unnecessary disenfranchisement of qualified absentee voters." *Id.*

In *Bazydlo*, there were roughly two dozen uninitialed ballots that could be clearly identified and distinguished from in-precinct ballots. *Id.* at 214. The identification was provided through uncontradicted testimony from the election judge who "testified that the absentee ballots were formed into more than one stack and that she remembered initialling only one stack," as well as the fact that absentee ballots were observed clustered together at the discovery recount. *Id.* at 215. Additionally, "all of the in-precinct ballots were initialed, counted and verified before the envelope containing the absentee ballots was opened." *Id.* at 214. Addressing the second requirement of the *Craig* test, the Court held that "because absentee ballots are not cast in the polling place and are not opened until after the polls have closed, application of the initialling requirement to absentee ballots is not necessary to prevent voters from fraudulently stuffing the ballot box." *Id.* at 217. Thus, application of the initialing requirement was "not necessary to preserve the integrity of this election" and the *Craig* exception was "clearly and convincingly met." *Id.*

b. Illinois Supreme Court Cases Barring the *Craig* Exception

In *McDunn v. Williams*, 156 Ill. 2d 288 (1993), the Illinois Supreme Court addressed the ballot initialing requirement in a case where uninitialed absentee ballots could not be readily identified. In *McDunn*, the parties were primary opponents for the position of circuit court judge in Cook County. *Id.* at 292. Williams was declared the winner of the primary, and McDunn filed a timely petition to contest the election. *Id.*

The trial court granted a recount, which revealed that there were thousands of uninitialled ballots for each candidate. *Id.* at 296. These ballots were not marked "defective," despite the applicable requirement in Section 24A-10.1 of the Election Code, 10 ILCS 5/24A-10.1, and were included in the original count after the primary election. *Id.* Moreover, there was no way "to determine which of the uninitialled ballots at issue had been cast absentee and which had been cast in-precinct." *Id.* At 297.

The parties in *McDunn* stipulated that there were no issues of fraud pending before the court, as the trial court had dismissed McDunn's allegations of fraud as unsupported by specific evidence. *Id.* at 296-97. The trial court determined that the uninitialled ballots could not be counted pursuant to the Election Code, and, thus, McDunn was the winner of the primary election. *Id.* At 297. The Appellate Court agreed but further ordered that Williams would also continue to serve as a circuit court judge. *Id.* Neither party appealed that judgment, but the Illinois Supreme Court recalled the mandate of the Appellate Court under its supervisory authority and stayed enforcement. *Id.* at 292-93.

After addressing the jurisdictional and constitutional issues arising from the Appellate Court's determination that both Williams and McDunn could serve as judges arising from one vacancy, the Illinois Supreme Court upheld the determination that the uninitialled ballots could not be counted. *Id.* at 310. The Supreme Court noted that "the equitable powers of a court may not be exercised to direct a remedy in contradiction to the plain requirements of a statute." *Id.* at 309. The Court found the Appellate Court's order troubling "because the court based its decision for McDunn on the law as to uninitialled ballots, but then granted relief to Williams, in part, *by ignoring the same law*." *Id.* (emphasis added.)

The Supreme Court reiterated the general rule that "[t]he Election Code provides that ballots uninitialled by judges of election shall not be counted." *Id.* at 310. The *McDunn* Court cited the provisions of the Election Code specifically pertaining to the counting of ballots in primary elections, 10 ILCS 5/7-44, and to the procedures for counting and tallying of ballots in election jurisdictions where in-precinct optical scanning equipment is used, 10 ILCS 5/24A-10.1, both of which require ballots to be initialed. *Id.* Moreover, there was no requirement that the petitioner in an election contest make claims of fraud or specific allegations of ballot-stuffing for the initialing requirement to apply. *Id.* at 319-20. Consequently, the uninitialed ballots, which could not be

identified as absentee or in-precinct ballots, were not valid, and McDunn was declared the winner of the primary election, with no relief afforded to Williams. *Id.* at 320.

The *McDunn* Court further noted that the Court "has long adhered to the rule that statutes requiring election judges to initial ballots are mandatory, and that uninitialled ballots may not be counted." *Id.* at 311. Applying the analysis from both *Craig* and *Pullen,* the Court held that "the statutes requiring initialling are not constitutionally suspect." *Id.* at 314. This holding is supported by the fact that "[v]oters who cast a ballot in-precinct will not lose the right to vote without fault of their own because such voters could tell whether the election judge had initialled their ballots . . . [and] could ask the election judge to initial his ballot and thus ensure that his vote would be counted." *Id.* Furthermore, "judges of election are presumed to perform the duties required of them by statute," and "[t]hus, it must be presumed that the judges of election performed their duty and initialled the ballots, and that the uninitialled ballots were not legally cast." *Id.* at 318. Even though the uninitialled ballots were not marked "Defective," the Court reiterated that "the precautionary nature of initialling is such that we have held it cannot be supplied or corrected after the ballots have once been deposited in the ballot box." *Id.* at 319.

Similarly, in *DeFabio v. Gummersheimer*, 192 Ill. 2d 63, 733 N.E.2d 1241, 248 Ill. Dec. 243 (2000), the Illinois Supreme Court affirmed the invalidation of more than 500 uninitialled ballots cast in-precinct. None of the ballots contained the requisite initials, and neither party argued that any of the uninitialed ballots could be distinguished or identified as absentee ballots. *DeFabio*, 192 Ill. 2d at 68. The Court cited Section 24A-10.1 of the Election Code, which applies to elections using in precinct counting equipment and states "[i]f any ballot card or ballot card envelope is not initialed, it shall be marked on the back 'Defective', initialed as to such label by all judges immediately under the word 'Defective' and not counted." *Id.* at 65. The Court held that this provision, and "more than 100 years of this court's jurisprudence compel the invalidation of those ballots." *Id.* at 68.

The *DeFabio* Court went on to note that "[f]or more than 100 years, this court has 'adhered to the rule that statutes requiring election judges to initial ballots are mandatory, and that uninitialed ballots may not be counted.'" *Id.* at 65-66. Moreover, "[t]his is true even when the parties agree that there was no knowledge of fraud or corruption." *Id.* at 66. The Court described its decisions in *Craig* and *Pullen* as "relaxation of the mandatory requirement under very limited circumstances," and emphasized that the Court "has *never* permitted relaxation of the mandatory

initialing requirement for in-precinct ballots." *Id.* (emphasis in original). Citing its decision in *Craig*, the Court again observed that the initialing requirement "substantially contributes to the integrity of the election process and is a *valid, mandatory provision which the courts must enforce*." *Id.* (emphasis in original).

c. Whether the *Craig* Exception Applies to Early In-person Voting

The parties in this case agree in general that ballots are required to be initialed. Brown, however, first questions whether there is an explicit initialing requirement for ballots cast early and in person under Article 19A of the Election Code. This argument ignores both the specific statutory provisions and the general requirement to read the Election Code as a whole, in its entirety. In Section 19A-25.5, the Election Code states that if tabulation optical scan technology voting equipment is used, and the provisions of Article 24B are in conflict with Article 19A, the provisions of Article 24B govern. 10 ILCS 5/19A-25.5(c). Tabulation optical scan technology voting equipment was used in the 2018 Macon County election.

Section 24B-4 states that "[s]o far as applicable, the procedure provided for voting paper ballots shall apply when Precinct Tabulation Optical Scan Technology electronic voting systems are used." 10 ILCS 5/24B-4. Article 24B also requires election judges to examine the ballots to ensure that they are initialed and to not count ballots that are not initialed. 10 ILCS 5/24B-10.1. This provision is identical to the provisions cited in *McDunn* and *DeFabio*. To say that Article 24B requires ballots to be initialed but that Article 19A does not require the ballots to be initialed would indeed be a conflict. Therefore, the provisions of Article 24B govern, and require application of the procedure for voting paper ballots to ballots cast in person by early voting.

Article 17 applies to the procedures for voting paper ballots. Section 17-9 requires the election judges to give each voter only one ballot, which is endorsed with the election judge's initials, 10 ILCS 5/17-9, and Section 17-16 requires that "none but ballots provided in accordance with the provisions of this Act shall be counted." 10 ILCS 5/17-16. Consequently, when these provisions are read together, the initialing requirement applies to early vote ballots cast in person in the 2018 Macon County election. Moreover, the initialing requirement is mandatory because ballots without initials may not be counted.

Having found that the initialing requirement applies to early, in-person ballots, the only remaining question is whether the initialing requirement can be excused due to the *Craig* exception. The *Craig* exception applies to vote by mail ballots (formerly called absentee ballots),

but only where it can be shown by clear and convincing evidence that: (1) the vote by mail ballots can be distinguished from ballots cast in-precinct, and (2) the initialing requirement does not contribute to the integrity of the election process in the specific context of the election in question. The parties agree that the exception applies to three vote by mail ballots in this case (Exhibits 6D, 14L, 15B), although this is probably incorrect considering the holding in *Morandi* that the mere observation of fold marks is insufficient to distinguish a vote by mail ballot from an in-precinct ballot. Brown asks that the *Craig* exception for vote by mail ballots be extended to uninitialed early vote ballots cast in person. Root does not agree.

There is no foundation in the Election Code or the decisions of the Illinois Supreme Court and Appellate Court cited by either party for the argument to extend the *Craig* exception to ballots cast early and in person. As Brown acknowledges, the early voting process became effective with the passage of Article 19A of the Illinois Election code, 10 ILCS 5/19A-5 et seq., on August 22, 2005, and there are no reported decisions addressing the issue of whether the *Craig* exception to the mandatory ballot initialing requirement applies to early vote ballots. However, "[a] statute will not be construed to effect a change in the settled law of the State unless its terms clearly require such a construction." *Hoffer v. School District U-46*, 273 Ill. App. 3d 49, 54, 652 N.E.2d 359, 362 (2nd Dist. 1995).

The theory advanced by Brown that the court should extend the *Craig* exception to votes cast early and in person is twofold. First, he attaches significance to the fact that *Craig* and its progeny require that absentee ballots be readily identified and distinguished from "*in-precinct*" ballots. Brown argues that in this case, the early in-person ballots were kept separate from the ballots cast in the various precincts on election day. However, the early ballots here were obviously cast in person at a polling place (the county clerk's office), just as other in person ballots were cast on election day. Since *Craig* and the cases cited by the parties were decided before the advent of early in person voting in Illinois, there was no reason for the courts to distinguish between early voting in person and in-precinct voting in person on election day. The distinction was simply between absentee ballots and election day ballots. Additionally, the fact that absentee ballots were not cast in the polling places, and not even opened until the polls closed, was expressly cited as a basis for the Court's holdings in *Pullen* and *Bazydlo,* in which the *Craig* exception was applied. The early vote ballots in this case, on the other hand, were clearly cast at a polling place, in person, just as other in-precinct ballots are cast in person on election day. In fact, none of the early vote

ballots were separated from the vote by mail ballots in the 2018 Macon County election, so there were ballots cast in person and ballots cast by mail that were intermingled and fed into the same tabulators prior to election day. No reasonable explanation was given to treat in person early vote ballots differently from in person in-precinct ballots. These facts are irreconcilable with the holding and reasoning of the *Craig* exception, and the analysis could simply end there.

Brown's second argument is that the initialing requirement does not contribute to the integrity of the election when applied to early voting, at least in Macon County in 2018. He asserts that because early voting was conducted at the county clerk's office only, the election judges there were better able to watch voters to ensure that only ballots given by election judges were voted and inserted into the ballot tabulators. No witness testified that ballots cast early and in person were not required to be initialed. In fact, former Macon County Clerk Bean, who oversaw the 2018 general election, testified that he was aware of the initialing requirement for early vote ballots, but he explained that the process was not perfect because sometimes election judges or staff became distracted by other requests. Mr. Bean testified that his office did reconcile the number of ballots with the number of ballot applications for ballots cast by mail and through early voting each evening. Brown asserts that Mr. Bean's testimony is unrebutted and demonstrates that the initialing requirement does not contribute to the integrity of the election process in these circumstances.

This court is not persuaded. The difference between vote by mail ballots and early vote ballots is that the ballots sent in by mail were sent to voters after the voters submitted applications to vote and had been identified as qualified voters. *See* 10 ILCS 5/19-4. There is also a separate process for confirming the voters' eligibility once the vote by mail ballot is received. 10 ILCS 5/19-8(g). Individuals who vote through the early voting process, however, are deemed qualified to vote in the same way as voters who vote in precinct on election day: by providing their name to the election judge, signing an application, and receiving an appropriate ballot marked with the election judge's initials, to verify that the voter's information was checked against the voter registration. Each election judge overseeing early voting also testified that they were aware of the requirement to initial early vote ballots. Moreover, there is nothing about the layout of the County Clerk's office that rendered the initialing requirement unnecessary. In fact, one could argue that there was greater potential for irregularities due to the distractions created by other ongoing activities at that office. There was, therefore, no meaningful distinction between the requirements and activities of election judges during early in person voting and election day in-precinct voting.

The requirement that election judges initial ballots is a mandatory provision which the courts must enforce. Ballots not initialed may not be counted unless the *Craig* exception applies. The initialing requirement serves to enable election judges to identify ballots which they have personally initialed and constitutes an effective safeguard against corrupt practices such as "stuffing" a ballot box. The procedure to reconcile the number of ballots cast with the number of ballot applications is just one of the safeguards in the voting process, and the fact that it was performed does not excuse the performance of other, mandatory, safeguards, such as initialing.

Because the *Craig* exception only applies to vote by mail ballots, it does not apply to the ballots cast by early voting in this case. This court is required to follow the Supreme Court's very clear directives in *Craig, Pullen, McDunn* and *DeFabio* that ballots cast in person *must* be initialed by an election judge. It is not the prerogative of this court to create a new judicial exception. However, it would also strain logic to apply the *Craig* exception to any ballots cast in person, regardless of whether they are cast early or on election day. The safeguards necessary for in person voting apply whether that voting is done early or on election day. The voting process for early voting is in all pertinent respects identical to the voting process for in-precinct voting on election day, both according to the Election Code and as testified to by the witnesses at trial in this case. There is nothing that makes early voting more like voting by mail than in-precinct voting, and in fact, the evidence in this case is to the contrary. This court, therefore, finds that the Respondent has failed to demonstrate by clear and convincing evidence that the *Craig* exception applies to early in person ballots. As a result, none of the 68 uninitialed ballots cast early and in person may be counted. The vote count for each candidate, therefore, remains as tallied in Figure 3:

19,569 votes for Root

19,552 votes for Brown.

B. Issues of Voter Intent

Root argues that certain ballots should be counted because they contain sufficient indicia of voter intent, even though the voter did not mark the ballot according to the instructions. Since Optical Scan Technology was utilized to tabulate ballots in this election, the provisions of Section 24B-9.1 apply to the examination of the ballots. 10 ILCS 5/24B-9.1(a). Pursuant to Section 24B-9.1, "[a] voter shall cast a proper vote on a ballot sheet by making a mark, or causing a mark to be made, in the designated area for the casting of a vote for any party or candidate or for or against

any proposition." 10 ILCS 5/24B-9.1(a). Moreover, a "mark is an intentional darkening of the designated area on the ballot, and not an identifying mark." *Id.*

If the voter fails to darken the designated area, such that the ballot does not register a vote for a particular candidate, there are several accepted marks that nevertheless constitute a valid vote if:

> **(1)** the designated area for casting a vote for a particular ballot position on the ballot sheet is fully darkened or shaded in;
> **(2)** the designated area for casting a vote for a particular ballot position on the ballot sheet is partially darkened or shaded in;
> **(3)** the designated area for casting a vote for a particular ballot position on the ballot sheet contains a dot or ".", a check, or a plus or "+";
> **(4)** the designated area for casting a vote for a particular ballot position on the ballot sheet contains some other type of mark that indicates the clearly ascertainable intent of the voter to vote based on the totality of the circumstances, including but not limited to any pattern or frequency of marks on other ballot positions from the same ballot sheet; or
> **(5)** the designated area for casting a vote for a particular ballot position on the ballot sheet is not marked, but the ballot sheet contains other markings associated with a particular ballot position, such as circling a candidate's name, that indicates the clearly ascertainable intent of the voter to vote, based on the totality of the circumstances, including but not limited to, any pattern or frequency of markings on other ballot positions from the same ballot sheet.

10 ILCS 5/24B-9.1(b).

Ballots in this election that fall within this category include Exhibits 97B and 106I. Exhibit 106I is a ballot from the Hickory Point 7 precinct, in which the voter placed an "X" beside Root's name in the vote for Macon County Sheriff. In fact, the voter marked votes for all offices on the ballot in the same manner, with an "X" to the right of each name. Pursuant to Section 24B-9.1 of the Election Code, this "X" mark indicates the clearly ascertainable intent of the voter based on the totality of the circumstances, including but not limited to the pattern or frequency of marks on other ballot positions from the same ballot sheet. *See,* 10 ILCS 5/24B-9.1(b). Exhibit 106I, therefore, is a valid ballot, and should be counted, with one vote for Root.

Exhibit 97B is a ballot from Hickory Point 2. This ballot is marked with a vote for Root and other candidates with a particular outline of each box. The ballot is initialed, and Brown appears to agree in his closing argument (p. 25) that this ballot should be counted as a vote for

Root. However, the vote totals within Brown's Appendix 3 did not appear to match for the Hickory Point 2 precinct, and this ballot could have been the cause of the discrepancy. In any event, Exhibit 97B is a valid ballot and should be counted.

The updated vote count for each candidate is as follows:

Figure 4: Adding valid "voter intent" ballots to Figure 3 Tally

19,571 votes for Root (19,569 + 2)

19,552 votes for Brown.

C. One Ballot With Alleged Distinguishing Marks

"Our courts have consistently held that any deliberate marking of a ballot by a voter, not made to indicate his choice for a candidate, and which is effective as a mark by which his ballot may be distinguished, is a distinguishing mark which invalidates the ballot." *Pullen v. Mulligan*, 138 Ill. 2d 21, 69, 561 N.E.2d 585, 606, 149 Ill. Dec. 215, 236 (1990). Whether certain marks are "distinguishing marks" is a question of fact. *Id.* Two elements must be met to qualify as a "distinguishing mark." First, "the mark must be one which has been placed on the ballot by the voter himself." *Id.* at 69. Second, "the mark must be made with the deliberate intention of violating the secrecy of the ballot." *Id.* at 70.

"If it appears that marks were placed upon a ballot as the result of an honest effort by the voter to indicate his choice of a candidate, and not as an attempt to signify the identity of the voter, the ballot should not be invalidated." *Id.; see also, Tuthill v. Rendelman*, 387 Ill. 321, 347, 56 N.E.2d 375, 388 (1944), *accord Griffin v. Rausa*, 2 Ill. 2d 421, 424, 118 N.E.2d 249, 251 (1954) ("the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake or ignorance, if an honest intention can be ascertained from his ballot, unless to give effect to such intention would tend to destroy the secrecy of the ballot.")

In this case, one ballot contained within Exhibit 155A bears a mark that Brown argues is a distinguishing mark. Specifically, Exhibit 155A is marked with an asterisk (*) for all voted races and bears a vote for Root. This ballot is initialed, and Root argues that it falls within the type of accepted marks that nevertheless constitute a valid vote. The marks on Exhibit 155A do not appear to have been made for any purpose other than to indicate the voter's choice for a candidate. Similar to the ballots within Exhibits 97B and 106I, these marks indicate the intent of the voter based on the totality of the circumstances, including the pattern of marks on other ballot positions from the

same ballot. Exhibit 155A, therefore, is a valid ballot, and should be counted, with one vote for Root. The updated vote count for each candidate is as follows:

Figure 5: Resolving a "distinguishing mark" challenge to 155A

19,572 votes for Root (19,571 + 1)

19,552 votes for Brown.

D. Remade Ballots

Root claims that certain ballots with extraneous writing, such as "Remade Ballot," "Remake," or "Duplicated damaged ballot" should be counted if the ballots bear the initials of an election judge, while Brown argues that these ballots should be counted regardless of whether they bear the initials of an election judge, so long as there was testimony at trial regarding those specific ballots. These arguments apply to ballots marked Exhibits 106A, 106B, 107A, 107B, 125B, 125C, 126A, 131B, 131C, 131D.

The Election Code supplies a process for election judges to deal with defective or damaged ballots, as follows:

> If any ballot is damaged or defective, or if any ballot contains a Voting Defect, so that it cannot properly be counted by the automatic tabulating equipment, the voter or the judges of election, consisting in each case of at least one judge of election of each of the 2 major political parties, shall make a true duplicate ballot of all votes on such ballot by using the ballot of the precinct and one of the marking devices of the precinct, or equivalent. If a damaged ballot the original ballot shall be clearly labeled "Damaged Ballot" and the ballot so produced shall be clearly labeled "Damaged Ballot" and the ballot so produced shall be clearly labeled "Duplicate Damaged Ballot", and each shall contain the same serial number which shall be placed by the judges of election, beginning with number 1 and continuing consecutively for the ballots of that kind in the precinct. *The judges of election shall initial the "Duplicate Damaged Ballot" ballot and shall enter or otherwise scan the duplicate damaged ballot into the automatic tabulating equipment.*

10 ILCS 5/24B-10.1 (emphasis added).

The parties agree that the ballots in Exhibits 106A (vote for Brown), 106B (vote for Brown), 125B (vote for Brown), 125C (vote for Brown), 131B (vote for Brown), 131C (vote for

Brown), 131D (vote for Brown), and 18D (vote for Brown) should be counted.[1] These ballots each contain the initials of an election judge, even though they also contain additional language, such as "Remade," or "Duplicated damaged ballot." Election judges also testified to the specific circumstances regarding the need to remake these ballots.

The parties dispute, however, whether the ballots in Exhibits 34A (bearing a vote for Brown), 106C (vote for Brown), 106D (vote for Brown), 106E (vote for Brown), 107A (bearing a vote for Root), 107B (vote for Root), and 126A (vote for Root) may properly be counted. Of these, Exhibits 34A, 106C, 106D and 106E are electronic ballots, which do not bear an election judge's initials. The back of the ballot in Exhibit 34A states "Remade #1" in red ink; the ballot in Exhibit 106C states "Remade #2;" the ballot in Exhibit 106D states "Remade #3;" and the ballot in Exhibit 106E states "Remade #4." No witness testified to having any direct knowledge of these ballots. The former County Clerk, Mr. Bean, and the current County Clerk, Mr. Tanner, testified about possible scenarios that could have resulted in these ballots having certain language on the back. Both admitted, however, that the ballots should have been initialed by an election judge, regardless of the circumstances. These ballots were not vote-by-mail ballots, but were cast in person, either early or in-precinct on election day. Thus, the *Craig* exception cannot apply. Section 24B-10.1 of the Election Code requires that the election judges initial the reproduced ballots prior to counting. Thus, without the initials of an election judge, these ballots may not be counted.

The remaining ballots in this category, 107A (bearing a vote for Root), 107B (vote for Root), and 126A (vote for Root), are remade ballots that are initialed by an election judge. There is no reasonable distinction between these ballots and the ballots within this category that the parties agree should be counted (above). Brown's argument to not count these ballots centers on the fact that there was not testimony at trial specific to the ballots. However, Root argues that a witness, election judge Anita Massey, testified that the ballot in Exhibit 126A was one of the ballots she remade. (TR 1-20-21 p. 143-144). Regardless, the Election Code does not require there to be testimony to confirm the actions of the election judges when the procedure in the Code has been followed – that is, when the ballots are marked and initialed as required. Consequently, these three ballots should be counted.

[1] Root's position on Exhibit 18D may have changed between the filing of his original Summation and his Reply to Respondent's Summation, comparing page 18 of Petitioner's Summation to page 6 of Petitioner's Reply.

Including the appropriately remade and initialed ballots, the updated vote count for each candidate is as follows:

Figure 6: Adding "remade" votes to the tally in Figure 5

19,575 votes for Root (19,572 + 3)

19,560 votes for Brown (19,552 + 8).

E. Proportional Reduction in Votes

Root requests that there be a proportional adjustment to each candidate's vote tallies due to the number of ballots cast exceeding the number of ballot applications received at several polling places. He cites no provision of the Election Code requiring a proportional adjustment, but bases his argument on two cases, *Boland v. City of La Salle,* 370 Ill. 387, 19 N.E.2d 177 (1938), and *Hoffer v. School District U-46*, 273 Ill. App. 3d 49, 53, 652 N.E.2d 359, 362 (2nd Dist. 1995), for the proposition that a court may reduce the number of votes cast for each candidate proportionally in these circumstances. Brown argues that Root has waived his argument to reduce the votes proportionally. He points out that Root raised allegations of fraud in his Verified Election Contest Petition, including that "numerous individuals who were not qualified to vote wrongly voted," and these claims were stricken by the Court because they were unsupported by specific fact. Root did not request thereafter to amend the Petition to allege fraud supported by specific fact. Brown cites the general rules regarding waiver; however, these do not apply as squarely in an election contest. The parties have cited no precedent that would preclude the court from applying Illinois election law once the recount is allowed, regardless of whether the specific issue was raised within the original election contest petition.

In *Boland* the Supreme Court was "confronted with 666 ballots, neither spoiled nor defective, cast by 665 electors." *Id.* at 396. There were 669 ballot applications, but a total of 670 ballots cast, including 666 ballots counted and four defective ballots that had to be removed. *Id.* The excess ballot could not be attributed to any voter, nor to either side of the ballot proposition at issue. *Id.* Therefore, "[u]nder these circumstances the excess vote should have been deducted from the total vote cast on the third proposition on a *pro rata* basis." *Id. Boland* was subsequently overruled on other grounds, as noted previously.

However, the *Boland* Court cited its prior decision in *Talbott v. Thompson*, 350 Ill. 86, 97, 182 N.E. 784, 789 (1932), for the proposition that a proportional reduction in votes was

appropriate. The *Talbott* Court held that "[w]here the evidence does not disclose the candidates for whom illegal votes were cast, such votes will be eliminated by dividing them between the candidates in the proportions that the number cast for each bears to the total cast in the precinct." *Id.* In that case, nine uninitialed absentee ballots were placed in the ballot box, then later withdrawn from the box, initialed, and placed back into the ballot box. *Id.* at 91. There was no evidence of the candidates for whom seven of the nine previously uninitialed absentee ballots were cast. *Id.* The election authorities also removed one ballot which was observed to not have initials, because the votes cast exceeded the number of names on the poll-list by one. *Id.* at 95. The *Talbot* Court held this removal improper because the election judges should have publicly withdrawn one ballot at random and destroyed it. *Id.* at 97-98. Consequently, the Court conducted a proportional reduction to apportion the seven uninitialed absentee ballots and one ballot that should have been withdrawn between the parties, to effectively eliminate those eight ballots from the count. *Id.*

Root also cites the *Hoeffer* case, *supra*, although that case provides little additional support for a proportional adjustment. In *Hoeffer*, the trial court conducted a proportional reduction in votes because there was a difference between the number of ballots cast versus the number of ballots found during the recount. *Hoeffer*, 273 Ill. App. 3d at 53-54. This issue was apparently not in dispute and was therefore not addressed in detail by the Appellate Court, other than a citation to the *Boland* case with approval. *Id.* This court has previously addressed *Hoeffer* in this election contest, the holding of which was specifically called into question by the Appellate Court in *Andrews v. Powell*, 365 Ill. App. 3d 513, 520, 848 N.E.2d 243, 249 (4th Dist. 2006), although on other grounds. In *Hoeffer,* there was no issue of fraud pending before the trial court when it conducted the proportional reduction. Allegations and proof of fraud are not required, however, to grant a recount or to determine the winning candidate after a recount. The proportional reduction was simply the mechanism utilized by the trial court in *Hoeffer* to determine the outcome of the election after the recount. Brown's claim of waiver fails in this context.

The Recount Report lists the number of ballots cast at each polling place, along with the number of ballot applications received, the number of contested ballots, and the number of under and over votes for the Sheriff's race. In Decatur 1, for example, the Report shows 168 ballots counted at the polling place, along with 4 contested ballots, and 6 under votes, for a total of 178 ballots. There were 178 ballot applications in that precinct. Root agrees there is no need for a proportional adjustment in Decatur 1. In other precincts, however, Root alleges that there must be

a proportional adjustment because the number of ballots cast exceeds the number of ballot applications.

The discrepancy between the number of ballot applications versus the number of ballots cast at a given polling location is at least in part resolved by the exclusion of uninitialed ballots, for which the selection of a particular candidate is known. By this court's calculations, there were 27,984 ballots cast in precinct versus 27,909 ballot applications at the various polling places for the November 2018 Macon County election. The resulting 75 extra ballots could be explained by uninitialed in person ballots that have been excluded. Neither party has cited to any particular ballot application by exhibit number, although they were admitted at trial. The only testimony offered by either party on the issue in general was that of Clerk Bean, who testified that he did not recall any election in which there were significantly more in-precinct ballots received than applications.

The need to conduct a proportional reduction in addition to excluding uninitialed ballots is questionable, especially when the excluded ballots bring the number of legally cast ballots within the total number of ballot applications. Perhaps unlike in the cases cited, the ballots in this case were preserved, and the candidate selection on each uninitialed contested ballot is known. As argued by Brown, to hold otherwise would create a double reduction of ballots, first for the uninitialed ballots that are excluded and, second, through the proportional reduction.

This is the situation in the following precincts, after deducting the appropriate number of uninitialed ballots in each location, and including the number of ballots with over or under votes: Decatur 2 (280 valid ballots/285 ballot applications); Decatur 3 (394 counted + 4 of the contested = 398 ballots/403 applications); Decatur 23 (283 ballots/283 applications); Decatur 29 (341 ballots/342 applications); Harristown (669 ballots/669 applications); Hickory Point 4 (436 counted + 16 of the contested + 3 undervotes = 470 ballots/471 applications); Hickory Point 7 (401 counted + 29 of the contested + 2 = 432 ballots/436 applications); and Mt. Zion 2 (1010 counted + 31 of the contested + 6 undervotes = 1047 valid ballots/1051 applications).

In some precincts, the number of ballots cast was greater than the number of ballot applications, even after taking out defective ballots. In Decatur 7, there were 166 ballots cast and 165 ballot applications. Brown again argues that this perceived discrepancy is resolved by the fact that several precincts shared a polling place. Decatur 7 shared a polling place with Decatur 4, Decatur 14, Decatur 28 and Decatur 31. When those ballots are considered together, Brown asserts

that there were 1,207 ballot applications and 1,196 ballots counted. Clerk Bean confirmed the shared polling locations.

In Blue Mound, there were 319 cast ballots and 318 ballot applications. Originally, there were four ballots set aside as contested; however, three of the four clearly were marked with the initials of election judges. The fourth, marked Exhibit 4A, was faded but the parties agreed that it contained a vote for Root. (TR 12-10-21, p. 36 – 37.) Root asserts that a proportional adjustment is necessary, and that it would result in a .42 vote gain for Brown.

In Hickory Point 3, there were 389 ballots cast and 388 ballot applications. Originally there were 15 contested ballots; however, all 15 bore the initials of an election judge and should have been counted. There was one undervote. Respondent Brown's Group Exhibit 3, page 41, is the Statement of Ballots for Hickory Point 3, which confirms 389 ballots cast and 388 ballot applications. Root asserts that a proportional adjustment is necessary, and that it would result in a .02 vote gain for Brown.

In Long Creek 6, there were 601 ballots counted during the recount, 48 contested ballots and three undervotes. Of the contested ballots, 44 contained election judges' initials and should be counted (although three of these also had extraneous markings). Four of the contested ballots had no initials and were not counted, leaving a total of 648 valid ballots (including three with no vote for either sheriff candidate). There were reportedly only 644 ballot applications for Long Creek 6. Accordingly, Root asserts that a proportional adjustment is necessary, and that it would result in a 2.20 vote gain for Brown.

However, the Statement of Ballots for Long Creek 6 was combined with Long Creek 3. (Respondent Brown's Group Exhibit 3, page 54.) There were 488 ballot applications in Long Creek 3 and 644 ballot applications in Long Creek 6, as reported on the Statement of Ballots. There were a total of 1132 ballots counted by the optical scan tabulator, as reported on the Statement of Ballots. This number of total ballots matches the number of total applications for the two precincts. Indeed, as reported in the Underlying Report, there were nine more ballot applications than ballots cast for the Long Creek 3 precinct. Mr. Bean testified that Long Creek 3 and Long Creek 6 were consolidated polling places. (TR 1-25-21, 84: 20-23.) This resolves the purported conflict between the number of ballots cast and the number of ballot applications for Long Creek 6, and no proportional adjustment is appropriate.

In Long Creek 7, there were 414 ballots counted, 22 contested ballots and two ballots with undervotes during the recount, for a total of 438 ballots. There were 437 ballot applications. The Statement of Ballots in Respondent Brown's Group Exhibit 3, page 56, indicates that there were 410 ballot applications and 409 ballots counted by the optical scanner on election day. Root requests that all the previously contested ballots be counted. Brown agrees. Thus, there remain 438 ballots cast (including the two with undervotes for the sheriff's race) and 437 ballot applications. Root asserts that a proportional adjustment is necessary, which would result in a .15 vote gain for Brown.

In Decatur 18 there were 146 ballots cast and 144 ballot applications. There were five contested ballots, all of which the parties agreed should be counted. However, the Statement of Ballots in Respondent Brown's Group Exhibit 3, page 18, indicates that there were 142 ballot applications and 142 ballots counted by the optical scanner on election day. Root contends that there should be a proportional reduction, which would result in a .82 vote gain for Root.

The largest claimed discrepancies between ballots cast and voter applications were in Decatur 5 and Decatur 10. In Decatur 5, the Recount Report indicates there were a total of 395 ballots cast at the polling place, including seven contested and five under votes. The Recount Report indicates there were only 336 ballot applications. However, Respondent Brown's Group Exhibit 3, page 5, is the Statement of Ballots from the election judges at the Decatur 5 precinct on November 6, 2018. This Statement of Ballots indicates there were 395 applications to vote and 395 ballots counted by the optical scan tabulator. Root requests a proportional adjustment that would result in a vote gain of 9.86 in his favor.

In Decatur 10, the Recount Report indicates that there were a total of 360 ballots cast at the polling place, with 11 contested and three undervotes. The Report indicates that there were only 301 ballot applications. Similar to Decatur 5, Respondent Brown's Group Exhibit 3, page 10, is the Statement of Ballots from the election judges at the Decatur 10 precinct on November 6, 2018. This Statement of Ballots shows that there were 359 spindled applications to vote and 359 ballots counted by the optical scan tabulator at the Decatur 10 polling place. Root requests a proportional reduction that would result in a vote gain of 20.15 in his favor.

In sum, the court does not find that a proportional adjustment is necessary in this case. Although not dispositive, there appear to be 75 more ballots than ballot applications overall, which could be explained by uninitialed ballots that should not be counted. After accounting for defective

ballots, the number of ballots cast is within the number of ballot applications in most precincts. In other precincts, the number of ballots cast is within the number of applications after accounting for the combination of precincts at one polling location. Finally, where the number of ballots cast is greater than the number of ballot applications at certain precincts according to the recount but not according to the reports created by the election judges on election day, the best evidence appears to be the reports of the election judges. Ultimately, the proportional reductions requested in these later precincts would not result in a different outcome in this case, with a purported total gain of 30.83 votes for Root and 3.46 votes for Brown. Therefore, the request to conduct a proportional reduction is denied. The vote count remains as calculated in Figure 6:

19,575 votes for Root

19,560 votes for Brown

F. The Two Found Ballots

The parties also dispute whether two ballots (both within Exhibit 169) discovered but not included in the original count of ballots on election day should be counted. These have been referred to as the "two found ballots." Root asks that both ballots be counted, and they contain two votes for him. Brown argues that the ballots may not be counted, asserting that there was inadequate foundation for the ballots to be admitted and that there was not a proper chain of custody established.

In addressing a similar issue in *Pullen*, the Illinois Supreme Court held:

> The contestant, as the moving party, bears the burden of proving that the ballots have been kept intact. If the evidence discloses that the ballots were exposed to the reach of unauthorized persons, and the returns are not likewise discredited, the ballots will not be regarded as better evidence of the result of the election. If the evidence shows that there was no reasonable opportunity for tampering with the ballots, however, they are the best evidence of the result of the election.

Pullen, 138 Ill. 2d at 72.

"The return of the judges of election is *prima facie* evidence of the result of such election, but the ballots are the original evidence of the vote cast and the better evidence of the result, if they have been preserved in such a manner as to maintain their integrity as evidence." *Anderson v. Wierschem*, 373 Ill. 239, 241, 25 N.E.2d 803, 803 (1940); *accord MacWherter v. Turner*, 52 Ill.

App. 2d 270, 273, 201 N.E.2d 325, 326 (4th Dist. 1964). "They are, under the statute, admissible in evidence, and their probative value depends upon the care with which they have been preserved." *Anderson,* 373 Ill. at 241. "To entitle the ballots to overcome the returns it is incumbent upon the contestant to show that they have been so kept that there was no reasonable opportunity to tamper with them, otherwise their effect as evidence is destroyed." *Id.* Moreover, "[i]t is not necessary for a respondent to show that there was actual tampering with the ballots, but it is sufficient to invalidate the ballots as evidence, that the opportunity for unlawful interference of *unauthorized persons* existed." *MacWherter, 52* Ill. App. 2d at 273. "The question of proper preservation and chain of custody is a factual one based on the circumstances of each case." *Qualkinbush v. Skubisz*, 357 Ill. App. 3d 594, 620, 826 N.E.2d 1181, 1204, 292 Ill. Dec. 745, 768 (1st Dist. 2005).

In this case, an election judge testified that he found multiple ballots after he "broke down" the ballot tabulators at his precinct. Specifically, in the process of breaking down the voting machines (tabulator) at the end of election day, he printed the tally of all ballots on the first voting machine, then started to tear the machine down. That process includes taking an "overflow ballot box" off the back of the machine. In doing so, he found two ballots in that box.

He testified that the election judges are taught to check the overflow ballot box on the back of the tabulators before shutting the machines down, because you cannot count the ballots there if the machine has already run its report and is shut down. Election judges are instructed to put any ballots in that overflow box if the power goes out or the machines are inoperable during election day. The overflow ballot box is a locked box on the back of the machine. This machine was locked that night. Ballots can be put into the overflow box when it is locked, but the ballots cannot be taken back out until it is unlocked. The power had not gone out at the polling location that day, and he was unaware of any problem that left the tabulator inoperable.

Nevertheless, to resolve the problem of these two ballots, the election judge took them to the second vote tabulator and ran them through so that they would be counted. He then ran the tally on the second tabulator. Unfortunately, in breaking this machine down, he again found two more ballots in the overflow ballot box, the "two found ballots." Since it was no longer possible to run these ballots through the tabulator, he brought them to the attention of another election judge at his polling location. The first election judge did not look at the ballots at all, to verify whether

they had initials, were for the same precinct, or for any other purpose. There is also no evidence of whether the overflow ballot boxes were empty at the time the polls opened on election day.

The remaining ballots from the tabulators at the precinct were put into large blue bags and sealed, but the two found ballots were not placed in those bags. The election judge testified that it would not have been proper to include the two found ballots in these bags because they had not been counted by the tabulators. Both election judges rode together to the county clerk's office to deliver all the ballots. The first election judge was unaware of how the second transported the two found ballots, and he did not see whether the second election judge handed the two found ballots to the clerk, or to any other person at the clerk's office. The second election judge did not testify.

Former County Clerk Bean testified that he first saw the ballots two days after the election, on his desk with a note. All the note indicated was that the ballots had not been counted. At that point, Clerk Bean had a discussion with one of his employees, and then put the ballots into an envelope and secured them in his office's vault. This vault is locked at night. He did not remember to address the ballots until after the results of the election were certified two weeks later. Clerk Bean observed the ballots in Exhibit 169 at trial as being from the same precinct as the ballots that he saw on his desk with the note two days after the election. The ballots in Exhibit 169 had the initials "K.A." which he thought was consistent with one of the election judges at that precinct. This court allowed the ballots to be admitted into evidence, over Brown's objection, noting that a separate determination would be made as to whether the ballots could properly be counted.

Root bears the burden of demonstrating that these ballots were kept intact and not exposed to the reach of unauthorized individuals. There was no evidence that the overflow bin, where these ballots were discovered, was empty on the morning of election day. Moreover, there is no explanation offered for the reason ballots were placed into the overflow bin. The power had not gone out, and the election judge was unaware of any problems with the tabulators. The election judge who found the ballots did not transport the ballots himself to the county clerk's office, or to anyone there. There is no evidence of how the ballots made their way onto Clerk Bean's desk, or who wrote the note on the ballots. There is no evidence that the ballots were in the same condition when they reached Clerk Bean's desk as they were when the election judge found them on election day. Although there is no evidence that the two found ballots were tampered with, it cannot be said that they were kept in a manner that ensured there was no reasonable opportunity to tamper with

them. Consequently, the factual circumstances of this case demonstrate that the two found ballots were not properly preserved and they cannot be counted.

The vote count remains as calculated in Figure 6:

19,575 votes for Root

19,560 votes for Brown

G. Miscellaneous Ballots

There are several additional ballots that the court must address. First, the ballots within Exhibits 125A, 113A, 124C and a ballot within Exhibit 141 are all overvotes, which should not be counted as votes for either party. The ballot within Exhibit 22A is a Decatur 1 ballot found within the Decatur 12 precinct ballots. The parties agree this initialed ballot is otherwise compliant and that it should be counted as a vote for Brown. The parties agree that the ballot within Exhibit 12A does not have a vote for either party. The ballot within Exhibit 7A also bears no vote for either party.

The ballot within Exhibit 31A is a ballot that the parties stipulated should be counted as a vote for Root at trial. The ballots within Exhibits 83A, 101B and 137A are initialed ballots that the parties stipulate should be counted. Of these, Exhibits 83A and 101B bear votes for Root and Exhibit 137A bears a vote for Brown. Root contends that the ballot within Exhibit 100A is not initialed by an election judge and should not be counted. However, this ballot is an electronic ballot that bears the initials of an election judge in red on the front. This ballot should be counted as a vote for Brown. Brown claims that the ballot in Exhibit 142A is an overvote, however, this ballot was marked with a vote for Root and should be counted.

Including the miscellaneous ballots, the updated vote count for each candidate is as follows:

Figure 7: Adding miscellaneous votes to the tally in Figure 6

19,579 votes for Root (19,575 + 4)

19,563 votes for Brown (19,560 + 3).

CONCLUSION

After contested and uncounted ballots are resolved, this court finds that the following votes should be added for each candidate:

Root: 18,964 + 615 (Exhibit A)	19,579
Brown: 18,982 + 581 (Exhibit A)	19,563
Ballots not to be counted:	198
Previously agreed upon undervotes:	395
Previously agreed upon overvotes:	4
	39,739

WHEREFORE, for the reasons stated above, IT IS ORDERED and DECREED as follows:

Petitioner, Jim Root, is hereby declared the winner of the 2018 election for Macon County Sheriff.

May 28, 2021
Date

Anna M. Benjamin, Associate Judge

EXHIBIT A

CONTESTED & UNCOUNTED BALLOTS BY CATEGORY

BALLOTS TO BE COUNTED BY AGREEMENT

Ballot Exhibit #	Category of Ballot	Votes for Root	Votes for Brown	Total	Count?
1, 2	Austin	5	3	8	Yes
3,4, 4A	Blue Mound	2	2	4	Yes
5,6,7,8,9,10, 10D, 11 (excluding 6D & 7A)	Early/Mail-in	16	32	48	Yes
12,13,14 (excluding 14L and 12A)	Early/Main-in	27	42	69	Yes
15,16,17,18,19 (excluding 15B)	Early/Mail-in	19	40	59	Yes
20,21	Early/Mail-in	16	31	47	Yes
22,23,24	Decatur 1	0	0	0	Yes
27,28	Decatur 3	1	3	4	Yes
29,30	Decatur 4	5	1	6	Yes
31,32 (excluding 31A)	Decatur 5	4	2	6	Yes
33, 34 (excluding 34A & 34B)	Decatur 6	1	0	1	Yes
35	Decatur 7	0	0	0	Yes
36, 37	Decatur 8	2	0	2	Yes
38,39	Decatur 9	2	1	3	Yes
40,41	Decatur 10	8	3	11	Yes
42,43	Decatur 11	1	2	3	Yes
44,45	Decatur 12	7	7	14	Yes
46,47	Decatur 13	18	8	26	Yes
48,49	Decatur 14	3	4	7	Yes
50	Decatur 15	0	5	5	Yes
51,52	Decatur 16	6	3	9	Yes
53	Decatur 17	0	0	0	Yes
54,55	Decatur 18	1	4	5	Yes
56,57,58 (excluding 58A)	Decatur 19	4	5	9	Yes
59,60	Decatur 20	3	18	21	Yes
61,62	Decatur 21	1	0	1	Yes
63,64 (excluding 63A)	Decatur 22	6	7	13	Yes
65,66	Decatur 23	5	10	15	Yes
67,68	Deacatur 24	1	2	3	Yes
69,70	Decatur 25	8	6	14	Yes
71,72	Decatur 26	1	5	6	Yes
73	Decatur 27	0	0	0	Yes
74,75,76	Decatur 28	12	7	19	Yes
77,78	Decatur 29	2	7	9	Yes
79,80 (excluding 80A & 80B)	Decatur 30	3	8	11	Yes
81,82	Decatur 31	0	0	0	Yes
83,84 (excluding 83A)	Decatur 32	5	2	7	Yes
85,86	Decatur 33	7	5	12	Yes
87,88	Decatur 34	9	1	10	Yes

Ballot Exhibit #	Category of Ballot	Votes for Root	Votes for Brown	Total	Count?
89,90	Provisional	4	15	19	Yes
91,92	Harristown	6	5	11	Yes
93,94,95	Hickory Point 1	10	9	19	Yes
96,97 (excluding 97B)	Hickory Point 2	2	3	5	Yes
98,99	Hickory Point 3	6	9	15	Yes
100,101 (excluding 100A and 101B)	Hickory Point 4	15	15	30	Yes
102,103	Hickory Point 5	7	10	17	Yes
104,105	Hickory Point 6	6	9	15	Yes
106,107 (excluding 106A,106B,106I,107A, 107B)	Hickory Point 7	12	12	24	Yes
108,109	Hickory Point 8	5	3	8	Yes
110,111,112, 110A	Hickory Point 9	15	13	28	Yes
112,114	Hickory Point 10	2	2	4	Yes
115,116	Hickory Point 11	10	5	15	Yes
117,118	Hickory Point 12	10	8	18	Yes
119,120	Illini	16	11	27	Yes
121,122	Long Creek 1	16	7	23	Yes
123,124	Long Creek 2	1	3	4	Yes
125,126 (excluding 125B,125C,126A)	Long Creek 3	7	11	18	Yes
127	Long Creek 4	2	0	2	Yes
128,129,130	Long Creek 5	3	1	4	Yes
131,132 (excluding 131B, 131C, 131D)	Long Creek 6	27	14	41	Yes
133,134	Long Creek 7	13	9	22	Yes
135,136	Long Creek 8	8	9	17	Yes
137, 138 (excluding 137A)	Maroa	11	7	18	Yes
139,140	Mt. Zion 1	26	5	31	Yes
141, 142 (excluding 142A)	Mt. Zion 2	21	9	30	Yes
143	Mt. Zion 3	8	0	8	Yes
144,145	Niantic	3	1	4	Yes
146,147	Oakley	5	1	6	Yes
148,149	Pleasant View	8	4	12	Yes
150,151	South Macon	7	7	14	Yes
152,153	South Wheatland 1	2	2	4	Yes
154, 155 (excluding 155A)	South Wheatland 2	22	13	35	Yes
156, 157	South Wheatland 3	16	6	22	Yes
158, 159	Whitmore 1	36	27	63	Yes
160, 161	Whitmore 2	5	5	10	Yes
167,168	Friends Creek	21	21	42	Yes
	Totals	**605**	**567**	**1172**	

Ballot Exhibit #	Category of Ballot	Votes for Root	Votes for Brown	Total	Count?
ADDITIONAL CONTESTED BALLOTS TO BE COUNTED					
6D, 14L, 15B	Uninitialed Vote by Mail	0	3	3	Yes, by stipulation
22A	Decatur 1 Ballot found in Decatur 12	0	1	1	Yes, by stipulation
31A, 83A, 100A, 101B, 137A	Initialed in Precinct	3	2	5	Yes
106A, 106B, 125B, 125C, 131B, 131C, 131D, 18D, 107A, 107B, 126A	Initialed Remade Ballots	3	8	11	Yes
142A	Claimed Overvote	1	0	1	Yes
155A	Claimed Distinguishing Mark	1	0	1	Yes
97B, 106I	Voter Intent	2	0	2	Yes
	Totals	**10**	**14**	**24**	
	TOTAL BALLOTS TO BE COUNTED	**615**	**581**	**1196**	

BALLOTS NOT TO BE COUNTED

Ballot Exhibit #	Category of Ballot	Votes for Root	Votes for Brown	Total	Count?
Brown Appendix 2	Uninitialed Early	28	40	68	No
Brown Appendix 1, except 58A, 63A, 80A, 80B (see below); 25-26	Uninitialed in Precinct	58	55	113	No
34A, 34B, 106C, 106D, 106E	Uninitialed Remade Ballots	0	5	5	No
58A, 63A, 80A, 80B	# Instead of Initials	3	1	4	No
169	Two Found Ballots	2	0	2	No
113A, 124C, 125A, 141(unmarked)	Overvotes	0	0	4	No
7A, 12A	Undervotes	0	0	2	No
	Totals	**91**	**101**	**198**	
	Grand Total Contested & Uncounted			**1394**	