

**DE 84-16 - May 31, 1984**

**VOTING BY ABSENTEE BALLOT  
s. 97.063(1), F.S.**

*To: Honorable David E. "Spike" McDonald, Supervisor of Elections, Santa Rosa County, 801 Caroline Street, S.E., Milton, Florida 32570*

*Prepared by: Division of Elections*

Pursuant to your request, this is a formal elections opinion under s. 106.23(2), F.S., on essentially the following question:

"Are persons who are incarcerated in the county jail awaiting trial and, therefore, not convicted of a felony, entitled to vote by absentee ballot?"

Section 97.063(1)(f), F.S., provides that residents of the state qualified to vote pursuant to s. 97.041, F.S., who are "unable to register in person" are entitled to register absentee. Section 101.62(1), F.S., allows an absent elector to request from the supervisor of elections an absentee ballot during the one-year period preceding an election. Sections 97.021(8)(a) and (e), F.S., define an "absent elector" as a qualified voter who is "unable without another's assistance to attend the polls" or who will not be in the county of his residence during the hours the polls are open. Those two sections, standing alone, would seem to encompass a prisoner in county jail awaiting trial. However, s. 97.021(8)(e), F.S., goes on to state that "any person confined in prison shall not be entitled to vote absentee." That section, therefore, on the face of it, would preclude a prisoner in county jail awaiting trial from voting as an absentee voter.

The United States Supreme Court in *O'Brien v. Skinner*, 414 U.S. 524, 94 S. Ct. 740, 38 L.Ed. 2d 702 (1974), however, held that the denial by New York of the right to register and vote by absentee ballot in the case of pretrial detainees and persons convicted of misdemeanors was "wholly arbitrary" and was a denial of equal protection of the laws guaranteed by the Fourteenth Amendment. The New York statute operated as a restriction so severe as to constitute an unconstitutionally onerous burden on the exercise of the right to vote.

As stated in AGO 075-187, the Florida statutory system for absentee voting "appears to be identical in all relevant characteristics to the New York situation in the *O'Brien* case." The Attorney General in AGO 075-187 concluded, therefore, that "pretrial detainees or convicted misdemeanants who are otherwise legally qualified to register and vote should not be denied the right to register and vote pursuant to the absentee provisions of ss. 97.063 and 101.62, F.S."

Your question, therefore, is answered in the affirmative. Section 101.62(1), F.S., provides that the supervisor of elections "may accept a request for an absentee ballot for an elector from any person designated by such elector. Such request may be made in

person, by mail, or by telephone.”

### SUMMARY

Pretrial detainees or persons convicted of misdemeanors who are otherwise qualified to vote who are in county jail are entitled to vote by absentee ballot.