IN THE
SUPREME COURT OF FLORIDA

CASE NOS. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD	vs.	KATHERINE HARRIS, ETC., ET AL.
VOLUSIA COUNTY CANVASSING BOARD	vs.	MICHAEL MCDERMOTT, ET AL.
FLORIDA DEMOCRATIC PARTY	vs.	MICHAEL MCDERMOTT, ET AL.
Petitioners/Appellants		Respondents/Appellees.

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REPLY BRIEF OF THE ATTORNEY GENERAL

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PRELIMINARY STATEMENT

Due to the time constraints imposed by the Court, the Reply of the Attorney General to the Answer Brief filed by the Secretary of State will merely note some of the inaccuracies, inconsistencies, and other irregularities contained in the Secretary's submission. We will also cite additional judicial and legislative authorities and standards regarding the manual review of machine readable ballots.

The Attorney General appears in this action in his official capacity as the Chief Legal Officer of the State of Florida – a constitutional office created by Article IV, sec. 4(c), Fla. Consti. The Attorney General was named as a party to the action below by the Palm Beach County Canvassing Board, acting in their statutory capacity on behalf of the citizens of Palm Beach County. Neither the Attorney General nor any member of a county canvassing board appears in this action representing any political party nor to assert any partisan's position before this Court – these government officials, who are both democrats and republicans, are representing the people to whom they have been entrusted with public responsibilities.

I. THE SECRETARY OF STATE LACKS STATUTORY AUTHORITY TO REJECT RECOUNT TOTALS BECAUSE SHE BELIEVES THE CANVASSING BOARD ABUSED ITS DISCRETION IN CONDUCTING A RECOUNT.

One of the secretary's core contentions is that she has the authority to reject recount totals because she disagrees with a canvassing board's decision to conduct a recount pursuant to a lawful protest under s. 102.166, Fla. Stat. She points to no precise statutory authority for this power because she cannot. It does not exist.

Whether to conduct a manual recount is within the canvassing board's discretion. Sec. 102.166(4)(c), Fla. Stat.; *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. 4th DCA 1992).

Nothing in the elections code authorizes the secretary to review, to countermand, to interfere with or to reject such a decision.

However, the secretary apparently asserts that ss. 102.111 and 102.112, Fla. Stat., somehow give her such authority. But her authority to reject recount totals pursuant to these statutes is narrow. Her discretion is circumscribed by the purposes behind these two statutes. Their purpose is to encourage county canvassing boards to submit timely returns.[1] Thus, the secretary's discretion is limited to determining whether, under all the facts and circumstances, the boards are submitting their returns in a timely manner. She may take into account whether

[1] The purpose behind ss. 102.111 and 102.113 is clear from a plain reading of their language. *Hankey v. Yarin*, 755 So. 2d 93, 96 (Fla. 2000) ("statutes must be given their plain and obvious meaning"); *State v. Webb*, 398 So. 2d 820 (Fla. 1981) (legislative intent is the pole star of statutory interpretation).

results are delayed because of a recount taking place due to a protest, in which case she has no discretion but to grant a waiver and to accept amended results after the seven-day deadline. Simply put, these sections do not confer on the secretary the authority to disregard amended results because she disagrees with the reasons why a board decided to conduct a recount, because she believes the recount to be unlawful, or because she personally believes that manual recounts themselves are flawed.[2]

The assertion of such a power constitutes a claim of authority to override the lawfully exercised discretion of the canvassing boards. Had she the power to reject recount totals, her decision amounts to a rejection of a protest, a power she clearly does not possess.

If the Legislature had intended the secretary, whose role in tabulating and certifying elections results is almost entirely ministerial, to have such sweeping power, it would have expressly provided for it. But the Legislature did not.

II. JUDICIAL AND LEGISLATIVE STANDARDS REGARDING MANUAL REVIEW OF MACHINE-READABLE BALLOTS.

[2] That the secretary seems to believe that manual recounts are so flawed that they should not occur is not her judgment to make. In fact, the Legislature has decided that manual recounts may occur when, in the exercise of its discretion, the local canvassing boards feels one is necessary. See s. 102.166(5)(c), Fla. Stat.

A. Case law.

The objective of a manual recount is to examine ballots to determine the voter's intent. Sec. 102.166(7)(a), Fla. Stat.; *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (hand counting of machine readable ballots is justified to determine voter intent; "To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end."). While the statute provides no guidance on how examiners are to determine that intent, common sense and the body of law provide sufficient guidance.

Courts confronting the question of what standard to use when examining machine-scored ballots have applied standards used for reviewing paper ballots. *McCavitt v. Registrars of Voter of Brockton*, 434 N.E.2d 620 (Mass. 1982). This requires a reviewer to consider a "variety of factors", *id.* at 625, including the character and location of any marks and "'conditions attendant upon the election,'" and "patterns that may reveal the voters' intent.'" *Id.*

"Even if the voter's mark did not follow the precise instructions on the ballot, the vote is to be counted as long as the intent can be determined with '*reasonable certainty.*'" *Colten v. City of Haverhill*, 564 N.E.2d 987, 989 (Mass. 1991). The point of the examination is not to disenfranchise the voter. *Id.* See also

Meyer v. Lamm, 846 P.2d 862, 878 (Co. 1993). A ballot should only be rejected when it is impossible to determine with reasonable certainty, such as when one must guess at the intention. *Hughs v. Brooks*, 597 N.E. 2d 998 (Ind. Ct.App. 1992); *Escalante v. City of Hermosa Beach*, 241 Cal.Rptr. 199 (Cal. 2d Dist. 1988).

Thus, for instance, punch card ballots have been counted where the voter marked her choice in pen rather than punched the ballot as expected. *Escalante, supra*.

In *Pullen v. Milligan*, 561 N.E.2d 585 (Ill. 1990), which involved a recount of machine-scored ballots, the court held that partly punctured ballots with partly dislodged "chads" could be visually inspected and manually counted.

And in *Escalante v. City of Hermosa Beach*, the court held that machine scored ballots should be counted even though one of the choices had been punched out, and the chad replaced with tape.

Even slight indentations on a machine-scored ballot that did not perforate have been held to be a sufficient indication of voter intent to count. *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996).

In many of these cases, the courts involved reviewed the ballots themselves and applied these common sense rules in reaching their respective results. Thus, the

courts themselves applied that same standards they expected citizen reviewers to apply. They are rules that spring from common sense, rules that must remain flexible to address the wide variety of fact patterns that are bound to crop up on a review. They are not so subjective that they lead to unfair results. And, ultimately, the decision of reviewers is subject to judicial review, as these cases demonstrate.

B. Legislative standards.

A number of states have adopted legislative criteria for determining voter intent when presented with questionable ballots. For example, the California Code provides:

> The following ballot conditions shall not render a ballot invalid:
> (1) Soiled or defaced.
> (2) Two or more impressions of the voting stamp or mark in one voting square.

Division 15, Ch. 3, Art. 1, s. 15154, California Statutes.

Colorado law provides:

> Votes cast for an office to be filled or a ballot issue to be decided shall not be counted if a voter marks or punches more names than there are persons to be elected to an office or if for any reason it is impossible to determine the elector's choice of candidate or vote concerning the ballot issue. A defective or an incomplete mark or punch on any ballot in a proper place shall be counted if no other mark or punch is on the ballot indicating an intention to vote for some other candidate or ballot issue. (e.s.)

Colorado Revised Statutes Ann. 1-7-508(2).

Indiana has specific criteria for chad irregularities in ballot card votes.

Section 9.5(c)-(g), ch. 1, Art. 12, title 3, Indiana Stat. Ann., prescribes:

> (c) A chad that has been pierced, but not entirely punched out of the card, shall be counted as a vote for the indicated candidate or for the indicated response to a public question.
> (d) A chad that has been indented, but not in any way separated from the remainder of the card, may not be counted as a vote for a candidate or on a public question.
> (e) Whenever:
> (1) a ballot card contains a numbered box indicating which chad should be punched out by the voter to cast a vote for a candidate or on a public question;
> (2) the indicated chad has not been punched out; and
> (3) a hole has been made in the card that touches any part of the numbered box;
>
> the hole shall be counted as a vote for the candidate or on the public question as if the indicated chad had been punched out. However, if a hole has been made in the ballot that does not touch a numbered box or punch out a chad, the hole may not be counted as a vote for a candidate or on a public question.
> (f) Whenever:
> (1) a chad has been punched out of a ballot card;
> (2) a numbered box indicates that another chad may be punched out to cast a vote for:
> (A) a different candidate for the same office as the candidate for whom a vote was cast under subdivision (1); or
> (B) a different response to the same public question on which a vote was cast under subdivision (1); and
> (3) a hole has been punched in the card that touches the numbered box described in subdivision (2);
>
> neither the chad described in subdivision (1) nor the hole described in

> subdivision (3) may be counted as a vote for a candidate or on a public question.
> (g) This subsection applies to a ballot card that:
> (1) has been cast in a precinct whose votes are being recounted by a local recount commission or the state recount commission;
> (2) is damaged or defective so that it cannot properly be counted by automated tabulating machines; and
> (3) cannot be counted for the office subject to the recount due to the damage or defect.
>
> The ballot card shall be remade only if the conditions in subdivisions (1) through (3) exist.

Finally, the Michigan election law provides criteria for vote recounts when votes are cast by punch, mark, or stamp. Pursuant to this statute:

> (2) If the electronic voting system requires that the elector cast a vote by punching out a hole in a ballot, the vote shall not be considered valid unless the portion of the ballot designated as a voting position is completely removed or is hanging by 1 or 2 corners or the equivalent.

Section 168.799a., Michigan Stats.

Thus, there are numerous examples of legislatively prescribed criteria to determine voter intent. See, e.g., Alabama Code (1975), s. 17-24-7(a) (procedures for voting paper ballots same as those for voting machines); Georgia Statutes, 21-2-438 (vote counts notwithstanding ballot is marked other than manner prescribed by statute); Nevada Statutes, s. 293C.367 2.(I) (superfluous punch does not constitute grounds for rejection of ballot); New Jersey Statutes 19:53C-7b. (punch out completely hole adjacent to candidate's name as acceptable marking); and

Wisconsin Statutes, s. 7.50(2)(a) (hole punched in or near space indicated constitutes vote for candidate).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery or fax on this 19th day of November, 2000 to the those persons whose names appear on the attached list of counsel.

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