

IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY
CANVASSING BOARD, ET AL.

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

**PETITIONER BROWARD COUNTY CANVASSING BOARD'S
AND BROWARD COUNTY SUPERVISOR OF ELECTION'S
INITIAL BRIEF ON THE MERITS**

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CERTIFICATE OF FONT SIZE AND STYLE

This brief is typed using a Times New Roman 14-point font.

INTRODUCTION

By Order of this Court dated November 16, 2000, the Broward County Canvassing Board and Broward County Supervisor of Elections were granted leave to intervene in the action filed by the Palm Beach County Canvassing Board. (Supreme Court Case No. SC00-2346). The Broward County Canvassing Board and Supervisor of Elections also filed a Motion to Intervene in the action filed by the Volusia County Canvassing Board in Leon County Circuit Court (Supreme Court Case No. SC00-2348). The undersigned counsel have been unable to determine whether that motion was granted by the circuit court.

The Broward County Canvassing Board and Supervisor of Elections (collectively, the “Board”) are facing some unique circumstances in this election process. One of those circumstances involves the evidence of voter intent the Board considers sufficient to count a ballot. As described below, due to rulings by Broward County Circuit Judge John A. Miller, in the case of *Florida Democratic Party et al. v. Jane Carroll, et al.*, Case No. 0019324 CA (07), the Board is uncertain as to the standard it is required to impose when attempting to determine voter intent.

Additionally, in that same circuit court case, on November 15, 2000, Judge Miller enjoined the Board from issuing a final ballot count to Secretary Harris until completion of the entire manual recount process. Given the temporal restraints already imposed by the Secretary of State, the Board is concerned that such injunction makes it possible the votes of Broward County voters will be wholly excluded. It is the overriding intent of the Broward County Canvassing Board that, beyond all else, the Board be permitted to submit all relevant vote totals and that all Broward County voters as to whom an intent can be ascertained are counted in those vote totals.

The Board respectfully requests direction from this Court so the Board can achieve a final and fair result as it endeavors to interpret the intent of the voters of Broward County.

FACTS

After the general election of November 7, 2000, the Board conducted a statutorily mandated machine recount of the ballots cast for President/Vice-President. The Board then, consistent with the requirements of §102.166(4), Fla. Stat., conducted a limited manual recount of the votes cast in three precincts, which comprised more than one percent (1%) of the total votes cast in Broward County for Gore/Lieberman. The limited manual recount indicated the Gore/Lieberman ticket received an additional four (4) votes.

On November 13, 2000, the Board voted not to proceed with a county-wide manual recount. That decision was made after consideration of an opinion issued by the Secretary of State, Division of Elections, to Mr. Al Cardenas, Chairman of the Republican Party. (DE-11). Critically, the Board never requested or received any opinion from the Secretary of State, Division of Elections. Although an opinion was subsequently issued from the Division of Elections to Jane Carroll, Supervisor of Elections, no opinion was ever requested by or issued to the Board.

On November 14, 2000, the Broward County Canvassing Board, pursuant to motion, reconsidered its decision not to conduct the county-wide manual recount. Reconsideration was granted at least in part due to an advisory opinion issued on November 14, 2000, by Florida's Attorney General (AGO-65) conflicting with previous opinions issued by the Division of Elections. (DE-10, DE-11, DE-12).

After considering the opinions issued by the Division of Elections and the Attorney General, the Board determined by a vote of two to one (2-1) that "errors in vote tabulation" which mandate a manual recount pursuant to Section 102.166(5), Fla. Stat., are not confined to errors in the tabulation machinery, and do include circumstances present in Broward County.

After determining that the statute allowed for a county-wide manual recount for reasons other than machinery difficulties, the Board considered, as required under

§102.166(5), Fla. Stat., whether the errors shown by the limited manual recount “could affect the outcome of the election.” On November 15, 2000, the Board determined that the results of the limited manual recount indicated that previously untabulated ballots could affect the outcome of the election. Therefore, the Board voted 2 - 1 to conduct a county-wide manual recount.

The county-wide manual recount began at 2:00 p.m. on November 15, 2000. The recount is ongoing and will continue, from 8:00 a.m. to 6:00 p.m., day to day, until complete, unless an order is issued enjoining the process. It is expected the process will be completed on or shortly after November 20, 2000.

SUMMARY OF THE ARGUMENT

The Board has acted in accordance with its statutory obligation and authority in authorizing a county-wide manual recount of all ballots cast in Broward County, Florida in the November 7, 2000, Presidential Election. The Board exercised the discretion afforded it by statute in authorizing a limited manual recount of ballots cast and concluding that the results of that limited recount could affect the outcome of the election. Thereafter, the Board complied with its statutory mandate to take corrective action when it authorized a full county-wide manual recount of all ballots cast in the election.

In conducting the county-wide manual recount, the Board is acting in

accordance with its statutory obligation to determine the intent of the voter when considering individual ballots cast in the election. The Board believes use of the "two-corner rule" is an appropriate mechanism to determine the intent of the voter, but requests direction given an oral pronouncement by Circuit Judge Miller.

The Secretary of State's interpretation of her statutory discretion to impose temporal deadlines on the submission of certified election results from the Board must yield to the Board's statutorily imposed obligation and authority in authorizing a county-wide manual recount of all ballots cast in Broward County, Florida.

ARGUMENT

POINT I: THE BOARD HAS THE STATUTORY AUTHORITY TO CONDUCT A FULL MANUAL RECOUNT SINCE THE BOARD DETERMINED, BASED ON A PROPER LIMITED MANUAL RECOUNT, THAT THE PREVIOUSLY UNTABULATED BALLOTS COULD AFFECT THE OUTCOME OF THE ELECTION.

Section 102.166(4)(a), Florida Statutes, provides that any candidate whose name appeared on the ballot or any political party or committee that supports or opposes a candidate whose name appeared on the ballot may request a manual recount. Upon receipt of such a request, the county canvassing board may authorize a manual recount. The statute affords the canvassing board the discretion whether or not to authorize the manual recount. *Broward County Canvassing Board v. Hogan*,

607 So.2d 508, 510 (Fla. 4th DCA 1992). In *Hogan*, the court held:

Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. *Id.* at 510.

On November 9, 2000, the Board received a request from the Florida Democratic Party and the Broward Democratic Executive Committee on behalf of Gore/Lieberman, to conduct a manual recount. After a hearing on the request, on November 10, 2000, the Board authorized the manual recount.

The first phase of the manual recount is limited in scope. It must include a manual recount of at least three (3) precincts or one percent (1%) of the total votes cast for a candidate. Section 102.166(4)(d), Fla. Stat. In Broward County, the initial, limited manual recount indicated that the Gore/Lieberman ticket had received an additional four (4) votes.

After the initial limited manual recount, the county canvassing board must determine whether the results thereof indicate an error which could affect the outcome of the election. If the answer is yes, then the canvassing board must conduct further corrective action.

In Broward County, the Board concluded, exercising discretion afforded it by statute, that the results of the limited, initial recount could affect the outcome of the

election. Upon concluding that the outcome of the election could be affected, the Board acted upon the directive contained in Section 102.166(5), Florida Statutes, and authorized corrective action. The Board authorized a full county-wide manual recount of ballots cast in the election for President/Vice President.

POINT II: THE BOARD’S “TWO-CORNER” RULE IS CONSISTENT WITH THE BOARD’S MANDATE TO DETERMINE THE INTENT OF EACH VOTER WHENEVER POSSIBLE.

Section 101.5614(5), Florida Statutes, makes clear that the purpose of a manual recount is to determine the intent of the voters. It provides in pertinent part that:

No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.

Before the manual recount commenced in Broward County, the Board adopted a fixed standard to determine the intent of each voter whose vote had not been capable of machine tabulation. Specifically, the Board decided that, in all cases, in order for a vote to be counted, a ballot had to have at least two (2) corners of the chad detached (the “two-corner rule”). At all times during the recount, the Board has used this two-corner rule as a clear indication of voter intent.

The Board believes the two-corner rule is consistent with its statutory mandate

to determine the intent of the voters. However, on November 17, 2000, the two-corner rule was seemingly rejected by the Broward County Circuit Court in the case of *Florida Democratic Party and Broward Democratic Executive Committee v. Broward County Canvassing Board*, Case No. 00-19324(07). In that case, Judge Miller orally indicated that this rule is too restrictive and that the totality of the ballot must be considered to determine the will of the voter behind each ballot.¹ (See copies of pgs 21 - 23 of transcript of hearing held November 17, 2000, attached as exhibit “A”). No written order has yet been rendered in that case. Thus, as of the time of filing of this brief, the two-corner rule is still being utilized by the Board. Because of Judge Miller’s statements, the Board seeks specific direction from this Court as to the validity of the two-corner rule.

**POINT III THE SECRETARY OF STATE IS CONSTITUTIONALLY
REQUIRED TO ACCEPT BROWARD COUNTY’S
POST-RECOUNT VOTE TOTALS SINCE THE
CIRCUMSTANCES JUSTIFY AN AMENDED
CERTIFICATION OF COUNTY RETURNS.**

¹ Specifically, Judge Miller stated:

I would like to think [the Canvassing Board] knows they’re not supposed to limit the examination to just one or two criteria. (Pg. 21, lines 4 - 6). And if I find that the Board isn’t counting the pregnant chads and all this other stuff that’s supposed to show the totality of the ballot and show the intent of the voter, then I will tell them to do it again. (Pg. 21, line 25 - Pg. 22, line 4).

The arguments seeking to prevent certification of Broward County's amended vote totals are based on two false premises. The first premise is that finality of result is the overriding factor, when state law clearly recognizes that the overriding factor is determining the true intent of each voter if possible. The second false premise is that the manual recount somehow negatively impacts the integrity of the tabulation process. In truth, the manual recount is necessary, as determined by the Board, to preserve the integrity of the process in Broward County.

On November 14, 2000, the Secretary of State required the Board to submit a written statement of facts and circumstances justifying an amended certification of county returns. The Secretary of State's November 14 letter prescribed no standards to determine which facts and circumstances would justify additional time to submit vote counts. The Board timely submitted a detailed written statement on November 15, 2000 (attached hereto as exhibit "B") which was summarily rejected by the Secretary of State only hours after it was submitted.

The Secretary's insistence that the Board certify votes by November 14, 2000 appears based on §102.112(1), Florida Statutes. However, that section, which contains some of the process by which election results are effectuated, cannot override the numerous provisions in Chapter 102 governing election protests, election challenges and vote recounting. The Secretary of State's attempt to mechanically

administer certification of votes would disenfranchise many voters and may force canvassing boards to conduct manual recounts with undue haste, which may lead to inaccurate results. The Secretary of State has advanced no compelling reason why certification by the Board upon completion of the recount should not be permitted. And the Secretary's interpretation of §102.112(1) ignores the basic rule of statutory construction that particular statutory sections should not be read in isolation but rather in pari materia with the remainder of the statute. *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981 (Fla. 1981).

Even if the Secretary's interpretation of electoral process was accurate, it must still yield when strict enforcement would override the expressed will of a substantial number of Florida voters. The first clause in the Florida Constitution states that "All political power is inherent in the people." Art. I, §1, Fla. Const. No statutory process can deprive the people of this inherent power.

CONCLUSION

For the foregoing reasons, the Broward County Canvassing Board respectfully requests this Court rule that the manual recounting of ballots in Broward County is valid, that the standards utilized by the Board are valid, and that the Secretary of State is mandated to accept Broward County's post-recount vote totals.

Respectfully submitted,

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