



IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

MICHAEL McDERMOTT, ANN McFALL
and PATRICIA NORTHEY, as the
CANVASSING BOARD FOR VOLUSIA
COUNTY, FLORIDA, CANVASSING BOARD
FOR PALM BEACH COUNTY, FLORIDA,
DEMOCRATIC PARTY OF FLORIDA, and
VICE PRESIDENT ALBERT GORE,

Plaintiffs,

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CLERK OF COURTS
LEON COUNTY, FLORIDA

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FILED

CASE NO: 00-2700

vs.

HONORABLE KATHERINE HARRIS, as
Secretary of State, State of Florida,
and HONORABLE KATHERINE HARRIS,
HONORABLE BOB CRAWFORD and
HONORABLE LAURENCE C. ROBERTS, as
the Elections Canvassing Commission,
GOVERNOR GEORGE W. BUSH, and MATT
BUTLER,

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR TEMPORARY INJUNCTION**

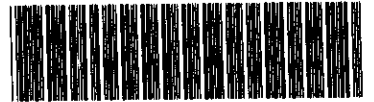
This declaratory judgment action is before me on the Motion of the Canvassing Board for Volusia County for a temporary injunction against the Secretary of State and the Elections Canvassing Commission. By Motion and agreement of the parties, the Florida Democratic Party, Candidate Al Gore, and the Canvassing Board of Palm Beach County have intervened as Party Plaintiffs, and Candidate George W. Bush and Elector



Matt Butler have intervned as Party Defendants.

The heart of the issue raised by the Motion is this: Section 102.166, Florida Statutes, contemplates that upon request a county canvassing board may authorize a manual recount of votes cast in an election. Both Volusia and Palm Beach Counties have so authorized, and are in the process of conducting, a manual recount. The Boards are concerned that the manual recounts may not be completed by 5:00 p.m. today, November 14, 2000, which is the deadline imposed upon them by Section 102.112, Florida Statutes, to certify and report the election returns to the Secretary of State. This Section provides that if the returns are not received by the deadline, such returns may be ignored by the Secretary in her certification of results statewide.

The Plaintiffs insist that the Secretary of State must consider the certified results from Volusia and Palm Beach Counties, even if they are filed late, if they are still engaged in the manual recount of the votes. The Secretary of State insists that, absent an Act of God such as a hurricane, any returns not received by the statutory deadline will not be counted in the statewide tabulations and certification of the election results. For the reasons set forth below, I find that the County Canvassing Boards must certify and file what election returns they have by the statutory deadline of 5:00 p.m. of November 14, 2000, with due notification to the Secretary of State of any pending manual recount, and may thereafter file supplemental or corrective returns. The Secretary of State may ignore such late filed returns, but may not do so arbitrarily, rather, only by the proper exercise of discretion after consideration of all appropriate



facts and circumstances.

The Secretary of State takes the position that the law requires the County Canvassing Boards to certify and report the results of elections in their counties no later than 5:00 p.m. November 14, 2000, that there are no exceptions to this mandate, and that the Secretary is likewise required by law to ignore any untimely received returns unless the untimeliness is caused by a hurricane or other Act of God.¹ I give great deference to the interpretation by the Secretary of the election laws, and I agree that the Canvassing Boards must file their returns by 5:00 p.m. today. I disagree, however, that the Secretary is required to ignore any late filed returns absent an Act of God.

There are several reasons for my conclusion:

1. A reading of the entire Election Code suggests a legislative intent to balance the desire for accuracy with the desire for finality. By concentrating on the deadline imposed by Section 102.112, Florida Statutes, the Secretary has come down hard on the side of finality. This interpretation ignores, however, Section 102.166, Florida Statutes, which gives to the County Canvassing Boards the authority to authorize a manual recount. A request for such recount may be made within three days of the election. If a manual recount of at least three precincts and at least one percent (1%) of the total votes indicates an error in vote tabulation which could effect the outcome of the election, the Canvassing Board shall either (a) correct the error and

¹The Secretary of State acknowledges that Section 102.112, rather than Section 102.111, Florida Statutes, prevails as to the question of the whether the Department has any discretion in whether to ignore late filed results.



recount the remaining precincts with the vote tabulation system, (b) request the Department of State to verify the tabulation software, or (3) manually recount all ballots.

Depending on when a request is made and then acted upon, it is easy to imagine a situation where a manual recount could be lawfully authorized, commenced, but not completed within seven days of the election. The Secretary of State responds that the authority to authorize a manual recount is subject to the requirement that such recount be done and the results certified no later than the deadline imposed by Section 102.112, Florida Statutes. This would mean, however, that only in sparsely populated counties could a Canvassing Board safely exercise what the Legislature has clearly intended to be an option where the Board has a real question as to the accuracy of a vote.

2. Section 102.166, Florida Statutes, gives any candidate, or qualified elector, the right to protest the returns of a County Canvassing Board by filing a sworn written protest, and that protest may be filed within five (5) days of the election, or any time before the Canvassing Board certifies the results, whichever occurs later. This suggests that the Canvassing Board might be in a position of having to address a protest of its returns the day before, or hours before, it was to certify the results pursuant to the deadline in Section 102.112, Florida Statutes, thus making it impossible to correct any error before the deadline. It is unlikely that the Legislature would give the right to protest returns, but make it meaningless because it could not be acted upon



in time.

3. Section 102.168 provides for the contesting of an election by an unsuccessful candidate or a qualified elector, by filing a complaint in Circuit Court within ten (10) days after the Canvassing Board certifies the result of an election or within five (5) days after the Canvassing Board certifies the results of an election following a protest pursuant to Section 102.166(1), Florida Statutes, whichever occurs later. This provision suggests that certifications of the results in an election might occur later than usual if there is a protest of the returns.

4. The Secretary of State acknowledges that, by consent decree with the Federal Government, the absentee ballots of overseas electors must be counted if received up to ten (10) days after the election (three days beyond the deadline imposed by Section 102.112, Florida Statutes). The County Canvassing Board can not report final returns, nor can the Election Canvassing Commission determine a winner of the election until all of these overseas absentee ballots are counted. The Secretary explains this anomaly by inferring a requirement to do one certification of results seven (7) days after the election and a "supplemental certification" ten (10) days after the election. There is, however, no statutory provision that provides for such a supplemental certification. Instead, Section 102.111, Florida Statutes, which deals specifically with the duty of the Elections Canvassing Commission, requires the Commission to, "as soon as the official results are compiled from all Counties, certify the returns of the election and determine and declare who has been selected for each office. . . ."



5. As noted earlier, the Secretary acknowledges that Section 102.112, Florida Statutes, uses the discretionary term "may", instead of the mandatory term "shall" as to whether late returns are to be ignored by the Secretary in certifying the results of the election. That the Secretary may ignore late filed returns necessarily means that the Secretary does not have to ignore such returns. It is, as the Secretary acknowledges, within her discretion.

To determine ahead of time that such returns will be ignored, however, unless caused by some Act of God, is not the exercise of discretion. It is the abdication of that discretion. An Act of God has long been considered to excuse even the most mandatory of requirements. Rather, the exercise of discretion, by its nature, contemplates a decision based upon a weighing and consideration of all attendant facts and circumstances.

The Florida Supreme Court has stated that "substantial compliance" is sufficient to comply with such mandatory filing deadlines. See Chappel v. Martinez, 536 So. 2d 1007 (Fla. 1988). If the returns are received from a County at 5:05 p.m. on November 14, 2000, should the results be ignored? What about fifteen minutes? An hour? What if there was an electrical power outage? Some other malfunction of the transmitting equipment? More particularly related to this case, when was the request for recount made? What were the reasons given? When did the Canvassing Board decide to do a manual recount? What was the basis for determination that such a recount was the appropriate action? How late were the results?



Obviously, the list of scenarios is almost endless and the questions that would need to be asked in properly exercising discretion as to whether to ignore or not ignore late filed returns are numerous. The Secretary may, and should, consider all of the facts and circumstances.

The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.

Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.



I also note that although the Canvassing Boards cannot properly contest an election, an unsuccessful Candidate, or any qualified Elector, may file, pursuant to Section 102.168, Florida Statutes, a complaint in Circuit Court contesting the election results. One of the specific itemized grounds for such a challenge is the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election".

Accordingly, it is

ORDERED AND ADJUDGED that the Secretary of State is directed to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion. In all other respects, the Motion for Temporary Injunction is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 14th day of November, 2000.


TERRY P. LEWIS, Circuit Judge

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