Supreme Court of Florida

No. SC00-2431

ALBERT GORE, JR., and JOSEPH I. LIEBERMAN,
Appellants,

vs.

KATHERINE HARRIS, as Secretary, etc., et al.,
Appellees.
[December 8, 2000]

PER CURIAM.

We have for review a final judgment of a Leon County trial court certified by the First District Court of Appeal as being of great public importance and requiring immediate resolution by this Court. We have jurisdiction. See art. V, § 3(b)(5), Fla. Const.[1] The final judgment under review denies all relief requested by appellants Albert Gore, Jr. and Joseph I. Lieberman, the Democratic candidates for President and Vice President of the United States, in their complaint contesting

[1]The parties have agreed that this appeal is properly before this Court.

the certification of the state results in the November 7, 2000, presidential election.[2] Although we find that the appellants are entitled to reversal in part of the trial court's order and are entitled to a manual count of the Miami-Dade County undervote, we agree with the appellees that the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation. Accordingly, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

On November 26, 2000, the Florida Election Canvassing Commission (Canvassing Commission) certified the results of the election and declared Governor George W. Bush and Richard Cheney, the Republican candidates for President and Vice President, the winner of Florida's electoral votes.[3] The November 26, 2000, certified results showed a 537-vote margin in favor of Bush.[4]

On November 27, pursuant to the legislatively enacted "contest" provisions, Gore filed a complaint in Leon County Circuit Court contesting the certification

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[2]The appellants have alternatively styled their request for relief as a Petition for Writ of Mandamus or Other Writs.

[3]See §§102.111 & .121, Florida Statutes (2000).

[4]Bush received 2,912,790 votes while Gore received 2,912,253 votes.

on the grounds that the results certified by the Canvassing Commission included "a number of illegal votes" and failed to include "a number of legal votes sufficient to change or place in doubt the result of the election."[5]

Pursuant to the legislative scheme providing for an "immediate hearing" in a contest action, the trial court held a two-day evidentiary hearing on December 2 and 3, 2000, and on December 4, 2000, made an oral statement in open court denying all relief and entered a final judgment adopting the oral statement. The trial court did not make any findings as to the factual allegations made in the complaint and did not reference any of the testimony adduced in the two-day evidentiary hearing, other than to summarily state that the plaintiffs failed to meet their burden of proof. Gore appealed to the First District Court of Appeal, which certified the judgment to this Court.

The appellants' election contest is based on five instances where the official results certified involved either the rejection of a number of legal votes or the receipt of a number of illegal votes. These five instances, as summarized by the appellants' brief, are as follows:

> (1) The rejection of 215 net votes for Gore identified in a manual count by the Palm Beach

[5] See § 102.168(3)(c), Fla. Stat. (2000).

> Canvassing Board as reflecting the clear intent of the voters;
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> (2) The rejection of 168 net votes for Gore, identified in the partial recount by the Miami-Dade County Canvassing Board.
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> (3) The receipt and certification after Thanksgiving of the election night returns from Nassau County, instead of the statutorily mandated machine recount tabulation, in violation of section 102.14, Florida Statutes, resulting in an additional 51 net votes for Bush.
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> (4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Gore but which were not included in the Canvassing Board's certified results; and
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> (5) The refusal to review approximately 9000 Miami-Dade ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

For the reasons stated in this opinion, we find that the trial court erred as a matter of law in not including (1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board[6] and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board. However, we find no error in the trial court's findings, which are mixed questions of law and fact, concerning (3) the Nassau County Canvassing Board and the (4) additional 3300 votes in Palm Beach County that the Canvassing Board did not

[6]Bush claims in his brief that the audited total is 176 votes. We make no determination as to which of these two numbers are accurate but direct the trial court to make this determination on remand.

find to be legal votes. Lastly, we find the trial court erred as a matter of law in (5) refusing to examine the approximately 9000 additional Miami-Dade ballots placed in evidence, which have never been examined manually.

II. APPLICABLE LAW

Article II, section I, clause 2 of the United States Constitution, grants the authority to select presidential electors "in such Manner as the Legislature thereof may direct." The Legislature of this State has placed the decision for election of President of the United States, as well as every other elected office, in the citizens of this State through a statutory scheme. These statutes established by the Legislature govern our decision today. We consider these statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 (1994) entitled "Determination of controversy as to appointment of electors." That section provides:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as

> provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

(Emphasis supplied).

This case today is controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000). Indeed, an important part of the statutory election scheme is the State's provision for a contest process, section 102.168, which laws were enacted by the Legislature prior to the 2000 election.[7]

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[7]In a substantial and dramatic change of position after oral argument in this case, Bush contends in his "Motion for Leave To File Clarification of Argument" that section 102.168 cannot apply in the context of a presidential election. However, this position is in stark contrast to his position both in this case and in the prior appeal. In fact, in Oral Argument on December 7, 2000, counsel for Bush agreed that the contest provisions contained in the Florida Election Code have placed such proceedings within the arena for judicial determination, which includes the established procedures for appellate review of circuit court determinations. Further, Bush's counsel, Michael Carvin, in the prior Oral Argument in Palm Beach Canvassing Board v. Harris, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not

> think there would be any problem in producing...that kind of evidence in an election contest procedure...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. So you would bring some orderliness to the process, and they would be able to resolve that evidentiary question. One way or another, a court's going to have resolve it.

(emphasis supplied). Moreover, the Answer Brief of Bush in Case Nos. SC00-2346, 2348, and 2849 (Nov. 18, 2000 a page 18 states that "to implement Petitioners' desired policy of manual recounts at all costs, the Court is asked to . . . (5) substitute the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of the vote tallies." (emphasis supplied). In addition, the December 5, 2000 brief of Amici curiae of the Florida House of Representatives and the Florida Senate, in case nos. SC00-2346, SC00-2348 & SC00-2349 (Dec. 5, 2000) at 8 "The Secretary's opinion was also consistent with the fact that the statutory protests that can lead to manual recounts are county-specific complaints about a particular county's machines, whereas a complaint about punchcards generally undercounting votes really raises a statewide issue that should be pursued,

Although courts are, and should be, reluctant to interject themselves in essentially political controversies, the Legislature has directed in section 102.168 that an election contest shall be resolved in a judicial forum. See § 102.168 (providing that election contests not pertaining to either house of the Legislature may be contested "in the circuit court"). This Court has recognized that the purpose of the election contest statute is "to afford a simple and speedy means of contesting election to stated offices." Farmer v. Carson, 110 Fla. 245, 251, 148 So. 557, 559 (1933).

In carefully construing the contest statute, no single statutory provision will be construed in such a way as to render meaningless or absurd any other statutory provision. See Amente v. Newman, 653 So. 2d 1030, 1032 (Fla. 1995). In interpreting the various statutory components of the State's election process, then,

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if at all, only in a statewide contest." (emphasis supplied). Finally the Amended Answer Brief of the Secretary of State asserted that

> [p]etitioner has confused a pre-certification election protest (section 102.166) with a post-certification contest (section 102.168). such facts and circumstances are usually discovered and raised in a contest action that cannot begin until after the election is certified. The Legislature imposed a deadline for certification because of the short time frame within which to begin and conclude an election contest. Petitioners are, in effect, asking this Court to delay the commencement of election contest actions, if any, by improperly using the protest procedures to contest the election before certification.Because the facts and circumstances concerning voter error and ballot design in Palm Beach County are more properly raised in a contest action, these facts were not relevant to the Secretary's decision to certify the election. Her decision triggered the time for bringing any election contest actions. (emphasis supplied).

a common-sense approach is required, so that the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated. Cf. Firestone v. News-Press Pub. Co., 538 So. 2d 457, 460 (Fla. 1989) (approving common-sense implementation of valid portion of section 101.121, Florida Statutes (1985)-- which broadly read, in pertinent part, that "no person who is not in line to vote may come [into] any polling place from the opening to the closing of the polls, except the officially designated watchers, the inspectors, the clerks of election, and the supervisor of elections or his deputy"-- so as not to exclude persons accompanying aged or infirm voters, children of voting parents, doctors entering the building to treat voters needing emergency care, or persons bringing food or beverages to the election workers because such activities are recognized as "incidental to the voting process and . . . sometimes necessary to facilitate someone else's ability to vote").

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five days after certification following a protest pursuant to section 102.166(1), Florida Statutes (2000), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or

rejection of a number of legal votes sufficient to change or place in doubt the result of the election." § 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances." (Emphasis added.)

The Legislature substantially revised section 102.168 in 1999.[8] That amendment preserved existing rights of unsuccessful candidates and made important additional changes to strengthen the protections provided to unsuccessful candidates in a contest action to be determined.[9] Moreover, rather

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[8]Viewed historically, section 102.168 did not always provide for contests of the type we consider today. As originally enacted, section 102.168 simply provided a mechanism for ouster of elected local officials. Under that version of the statute, election challenges were limited to county offices, and only the person claiming to have been rightfully elected to the position could challenge the election. See Ch. 38, Art. 10, §§ 7, 8, 9 (1845).

[9]The following language of section 102.168, Florida Statutes was changed in 1999 (words stricken are deletions; words underlined are additions):

> (1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.
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> (2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1),

whichever occurs later. ~~adjourns, and~~

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding

than restraining the actions of the trial court hearing the contest, the legislative amendment codified the grounds for contesting an election, entitled any candidate or elector to an immediate hearing and provided the circuit judge with express authority to fashion such orders as are necessary to ensure that each allegation in the complaint is investigated, examined or checked. See Fla. H. R. Comm. on Election Reform, HB 291 (1999) Staff Analysis (February 3, 1999).

Although the right to contest an election is created by statute, it has been a long-standing right since 1845 when the first election contest statute was enacted. See ch. 38, art. 10, §§ 7-9 Laws of Fla. (1845). As well-established in this State by our contest statute, "[t]he right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a proper count, call, tally, or return of the votes as required by law, and this fact has been duly established as the basis for granting such relief." State ex rel. Millinor v. Smith, 107 Fla. 134, 139, 144 So. 333, 335 (1932) (emphasis added). The Staff Analysis of the 1999

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primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Ch. 99-339, § 3, Laws of Fla.

legislative amendment expressly endorses this important principle. Similarly, the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

> Recounts are an integral part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.
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> Furthermore, with voting statistics tracing a decline in voter turnout and in increase in public skepticism, every effort should be made to ensure the integrity of the electoral process.
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> Integrity is particularly crucial at the tabulation stage because many elections occur in extremely competitive jurisdictions, where very close election results are always possible. In addition, voters and the media expect rapid and accurate tabulation of election returns, regardless of whether the election is close or one sided. Nonetheless, when large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in canvassing.

Id. at 15 (footnotes omitted). It is with the recognition of these legislative realities and abiding principles that we address whether the trial court made errors of law in rendering its decision.

III. ORDER ON REVIEW

Vice President Gore claims that the trial court erred in the following three ways: (1) The trial court held that an election contest proceeding was essentially an appellate proceeding where the County Canvassing Board's decision must be reviewed with an "abuse of discretion," rather than "de novo," standard of review; (2) The court held that in a contest proceeding in a statewide election a court must review all the ballots cast throughout the state, not just the contested ballots; (3) The court failed to apply the legal standard for relief expressly set forth in section 102.168(3)(c).

A. The Trial Court's Standard of Review

The Florida Election Code sets forth a two-pronged system for challenging vote returns and election procedures. The "protest" and "contest" provisions are distinct proceedings. A protest proceeding is filed with the County Canvassing Board and addresses the validity of the vote returns. The relief that may be granted includes a manual recount. The Canvassing Board is a neutral ministerial body. See Morse v. Dade County Canvassing Board, 456 So. 2d 1314 (Fla. 3d DCA 1984). A contest proceeding, on the other hand, is filed in circuit court and addresses the validity of the election itself. Relief that may be granted is varied and can be extensive. No appellate relationship exists between a "protest" and a "contest"; a protest is not a prerequisite for a contest. Cf. Flack v. Carter, 392 So.

2d 37 (Fla. 1st DCA 1980) (holding that an election protest under section 102.166 was not a condition precedent to an election contest under section 102.168). Moreover, the trial court in the contest action does not sit as an appellate court over the decisions of the Canvassing Board. Accordingly, while the Board's actions concerning the elections process may constitute evidence in a contest proceeding, the Board's decisions are not to be accorded the highly deferential "abuse of discretion" standard of review during a contest proceeding.

In the present case, the trial court erroneously applied an appellate abuse of discretion standard to the Boards' decisions. The trial court's oral order reads in relevant part:

> The local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion.

Gore v. Harris, No. 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000) (Proceedings at 10). The trial court further noted: "The court further finds that the Dade Canvassing Board did not abuse its discretion. . . . The Palm Beach County Board did not abuse its discretion in its review and recounting process."[10] In applying the abuse of discretion standard of review to the Boards' actions, the trial court relinquished an improper degree of its own authority to the Boards. This was error.

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[10]Gore v. Harris, No. 00-2808 (Fla. 2d Cir. Ct. Dec. ___, 2000) (Proceedings at 10-11).

B. Must all the Ballots be Counted Statewide?

Appellees contend that even if a count of the undervotes in Miami-Dade were appropriate, section 102.168, Florida Statutes (2000), requires a count of all votes in Miami-Dade County and the entire state as opposed to a selected number of votes challenged. However, the plain language of section 102.168 refutes Appellees' argument.

Section 102.168(2) sets forth the procedures that must be followed in a contest proceeding, providing that the contestant file a complaint in the circuit court within ten days after certification of the election returns or five days after certification following a protest pursuant to section 102.166(1), whichever occurs later. Section 102.168(3) outlines the grounds for contesting an election, and includes: "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." § 102.168(3)(c) (emphasis added). Finally, section 102.168(8) authorizes the circuit court judge to "fashion such orders as he . . . deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances."

As explained above, section 102.168(3)(c) explicitly contemplates contests based upon a "rejection of a number of legal votes sufficient to change the outcome of an election." Logic dictates that to bring a challenge based upon the rejection of a specific number of legal votes under section 102.168(3)(c), the contestant must establish the "number of legal votes" which the county canvassing board failed to count. This number, therefore, under the plain language of the statute, is limited to the votes identified and challenged under section 102.168(3)(c), rather than the entire county. Moreover, counting uncontested votes in a contest would be irrelevant to a determination of whether certain uncounted votes constitute legal votes that have been rejected. On the other hand, a consideration of "legal votes" contained in the category of "undervotes" identified statewide may be properly considered as evidence in the contest proceedings and, more importantly, in fashioning any relief.

We do agree, however, that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and, hence a concern that not every citizen's vote was counted. This election should be determined by a careful examination of the votes of Florida's citizens and not by strategies extraneous to the voting process. This essential

principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes.

We are dealing with the essence of the structure of our democratic society; with the interrelationship, within that framework, between the United States Constitution and the statutory scheme established pursuant to that authority by the Florida Legislature. Pursuant to the authority extended by the United States Constitution, in section 103.011, Florida Statutes (2000), the Legislature has expressly vested in the citizens of the State of Florida the right to select the electors for President and Vice President of the United States:

> Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

Id. In so doing, the Legislature has placed the election of presidential electors squarely in the hands of Florida's voters under the general election laws of

Florida.[11] Hence, the Legislature has expressly recognized the will of the people of Florida as the guiding principle for the selection of all elected officials in the State of Florida, whether they be county commissioners or presidential electors.

When an election contest is filed under section 102.168, Florida Statutes (2000), the contest statute charges trial courts to:

> fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Id. (emphasis added). Through this statute, the Legislature has granted trial courts broad authority to resolve election disputes and fashion appropriate relief. In turn, this Court, consistent with legislative policy, has pointed to the "will of the voters" as the primary guiding principle to be utilized by trial courts in resolving election contests:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct

[11] In other words, the Legislature has prescribed a single election scheme for local, state and federal elections. The Legislature has not, beyond granting to Florida's voters the right to select presidential electors, indicated in any way that it intended that a different (and unstated) set of election rules should apply to the selection of presidential electors. Of course, because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict.

> interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). For example, the Legislature has mandated that no vote shall be ignored "if there is a clear indication of the intent of the voter" on the ballot, unless it is "impossible to determine the elector's choice . . . ." § 101.5614(5)-(6) Fla. Stat. (2000). Section 102.166(7), Florida Statutes (2000), also provides that the focus of any manual examination of a ballot shall be to determine the voter's intent. The clear message from this legislative policy is that every citizen's vote be counted whenever possible, whether in an election for a local commissioner or an election for President of the United States.[12]

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[12]In the election contest at issue here, this Court can do no more than see that every citizen's vote be counted. But it can do no less. In a scenario somewhat analogous to that presented here, and in an election contest for a seat in the United States House of Representatives, the contesting candidate sought to exclude some 11,000 votes from being counted because the votes were not timely reported to the Secretary of State. See State ex rel. Chappell v. Martinez, 536 So. 2d 1007. This Court, in a unanimous opinion authored by Justice McDonald, refused to exclude the votes and held that the contesting candidate "has presented no compelling reason for disenfranchising the 11,000 residents of Flagler County who cast their ballots on November 8." Id. at 1009.

The demonstrated problem of not counting legal votes inures to any county utilizing a counting system which results in undervotes and "no registered vote" ballots. In a countywide election, one would not simply examine such categories of ballots from a single precinct to insure the reliability and integrity of the countywide vote. Similarly, in this statewide election, review should not be limited to less than all counties whose tabulation has resulted in such categories of ballots. Relief would not be "appropriate under [the] circumstances" if it failed to address the "otherwise valid exercise of the right of a citizen to vote" of all those citizens of this State who, being similarly situated, have had their legal votes rejected. This is particularly important in a Presidential election, which implicates both State and uniquely important national interests. The contestant here satisfied the threshold requirement by demonstrating that, upon consideration of the thousands of undervote or "no registered vote" ballots presented, the number of legal votes therein were sufficient to at least place in doubt the result of the election. However, a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or "no registered vote" ballots of all Florida counties, as well as the legal votes already tabulated.

C. The Plaintiff's Burden of Proof

It is immediately apparent, in reviewing the trial court's ruling here, that the trial court failed to apply the statutory standard and instead applied an improper standard in determining the contestant's burden under the contest statute. The trial court began its analysis by stating:

> [I]t is well established and reflected in the opinion of Judge Joanos and Smith v. Tine[13] [sic], that in order to contest election results under Section 102.168 of the Florida Statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.
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> It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.
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> In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

This analysis overlooks and fails to recognize the specific and material changes to the statute which the Legislature made in 1999 that control these proceedings. While the earlier version, like the current version, provided that a

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[13] Smith v. Tynes, 412 So. 2d 925 (Fla. 1st DCA1982) (involving allegations of enumerated acts asserted to constitute fraud and misrepresentation to the electorate sufficient to produce a different result) (citing Nelson v. Robinson, 301 So. 2d 508 (Fla. 2d DCA 1974), cert. denied 303 So. 2d 21 (Fla. 1974) (involving a post-election challenge to a form of ballot which listed the candidates for a single office in alphabetical order using the same color ink, but on different lines)).

contestant shall file a complaint setting forth "the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election," the prior version did not specifically enumerate the "grounds for contesting an election under this section." Those grounds, as contained in the 1999 statute, now explicitly include, in subsection (c), the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." (Emphasis supplied.) Assuming that reasonableness is an implied component of such a doubt standard,[14] the determination of whether the plaintiff has met his or her burden of proof to establish that the result of an election is in doubt is a far different standard than the "reasonable probability" standard, which was applicable to contests under the old version of the statute, and erroneously applied and articulated as a "preponderance of a reasonable probability" standard by the trial court here. Where, as here, a person authorized to contest an election is required to demonstrate that there have been legal votes cast in the election that have not been counted (here characterized as "undervotes" or "no vote registered" ballots) and that available data[15] shows

[14]Cf. Standard Jury Instructions in Criminal Cases, 697 So. 2d 84, 90 (Fla. 1997) (approving standard jury instruction regarding "reasonable doubt," which is "not a mere possible doubt, a speculative, imaginary or forced doubt," and which "may arise from the evidence, conflict in the evidence or the lack of evidence").

[15]In this case, the circuit court did not review the ballot presented as evidence.

that, applying an analysis of the historical recovery rate of legal votes within those undervotes or "no vote registered" ballots, by extrapolation, a number of legal votes would be recovered from the entire pool of the subject ballots which, if cast for the unsuccessful candidate, would change or place in doubt the result of the election. Here, there has been an undisputed showing of the existence of some 9,000 "under votes" in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or "no vote registered" ballots, has been made.

LEGAL VOTES

Having first identified the proper standard of review, we turn now to the allegations of the complaint filed in this election contest. To test the sufficiency of those allegations and the proof, it is essential to understand what, under Florida law, may constitute a "legal vote," and what constitutes rejection of such vote.

Section 101.5614(5), Florida Statutes (2000), provides that "[n]o 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." Section 101.5614(6) provides, conversely, that any vote in which the board cannot discern the intent of the voter must be discarded. Lastly, section 102.166(7)(b) provides that, "[i]f a counting team is

unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent." This legislative emphasis on discerning the voter's intent is mirrored in the case law of this State, and in that of other states.

This Court has repeatedly held, in accordance with the statutory law of this State, that so long as the voter's intent may be discerned from the ballot, the vote constitutes a "legal vote" that should be counted. See McAlpin v. State ex rel. Avriett, 155 Fla. 33, 19 So. 2d 420 (1944); see also State ex rel. Peacock v. Latham, 25 Fla. 69, 70, 169 So. 597, 598 (1936) (holding that the election contest statute "affords an efficient available remedy and legal procedure by which the circuit court can investigate and determine, not only the legality of the votes cast, but can correct any inaccuracies in the count of the ballots by having them brought into the court and examining the contents of the ballot boxes if properly preserved"). As the State has moved toward electronic voting, nothing in this evolution has diminished the longstanding case law and statutory law that the intent of the voter is of paramount concern and should always be given effect if the intent can be determined. Cf. Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975), cert. denied, 425 U.S. 967 (1976) (recognizing the overarching principle that, where voters do all that statutes require them to do, they should not be

disfranchised solely because of failure of election officials to follow directory statutes).

Not surprisingly, other states also have recognized this principle. Cf. Delahunt v. Johnston, 671 N.E. 2d 1241 (Mass. 1996) (holding that a vote should be counted as a legal vote if it properly indicates the voter's intent with reasonable certainty); Duffy v. Mortensen, 497 N.W.2d 437 (S.D. 1993) (applying the rule that every marking found where a vote should be should be treated as an intended vote in the absence of clear evidence to the clear contrary); Pullen v. Mulligan, 561 N.E.2d 585 (Ill. 1990) (holding that votes could be recounted by manual means to the extent that the voter's intent could be determined with reasonable certainty, despite the existence of a statute which provided that punch card ballots were to be recounted by automated tabulation equipment).

Accordingly, we conclude that a legal vote is one in which there is a "clear indication of the intent of the voter." We next address whether the term "rejection" used in section 102.168(3)(c) includes instances where the County Canvassing Board has not counted legal votes. Looking at the statutory scheme as a whole, it appears that the term "rejected" does encompass votes that may exist but have not been counted. As explained above, in 1999, the Legislature substantially revised the contest provision of the Election Code. See H.R. Comm.

on Election Reform, HB 281 (February 3, 1999). One of the revisions to the contest provision included the codification of the grounds for contesting an election. See id. at 7. The House Bill noted that one of the grounds for contesting an election at common law was the "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." As noted above, the contest statute ultimately contained this ground for contesting the results of an election.

To further determine the meaning of the term "rejection", as used by the Legislature, we may also look to Florida case law. In State ex rel. Clark v. Klingensmith, 121 Fla. 297, 163 So. 704 (1935), an individual who lost an election brought an action for quo warranto challenging his opponent's right to hold office. The challenger challenged twenty-two ballots, which he divided into four groups. One of these groups included three ballots that the challenger claimed had not been counted. See 121 Fla. at 298, 163 So. at 705. This Court concluded that "the rejection of votes from legal voters, not brought about by fraud, and not of such magnitude as to demonstrate that a free expression of the popular will has been suppressed," is insufficient to void an election, "at least unless it be shown that the votes rejected would have changed the result." 121 Fla. at 300, 163 So. at 705. Therefore, the Court appears to have equated a

"rejection" of legal votes with the failure to count legal votes, while at the same time recognizing that a sufficient number of such votes must have been rejected to merit relief. This notion of "rejected" is also in accordance with the common understanding of rejection of votes as used in other election cases. In discussing the facts in Roudebush v. Hartke, 405 U.S. 15 (1972), the United States Supreme Court explained:

> If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject ballots initially counted and count ballots initially rejected. Id.

This also comports with cases from other jurisidictions that suggest that a legal vote will be deemed to have been "rejected" where a voting machine fails to count a ballot, which has been executed in substantial compliance with applicable voting requirements and reflects, the clear intent of the voter to express a definite choice. See In re Matter of the Petition of Katy Gray-Sadler, 753 A.2d 1101, 1105-06 (N.J. 2000); Moffat v. Blaiman, 361 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1976).

Here, then, it is apparent that there have been sufficient allegations made which, if analyzed pursuant to the proper standard, compel the conclusion that

legal votes sufficient to place in doubt the election results have been rejected in this case.

THIS CASE

We must review the instances in which appellants claim that they established that legal votes were rejected or illegal voters were included in the certifications.

> The refusal to review approximately 9,000 additional Miami-Dade Ballots, which the counting machine registered as non-votes and which have never been manually reviewed.

On November 9, 2000, the Miami-Dade County Democratic Party made a timely request under section 102.166 for a manual recount.[16] After first deciding against a full manual recount, the Miami-Dade County Canvassing Board voted to begin a manual recount of all ballots cast in Miami-Dade County for the Presidential election, and the manual recount began on November 19, 2000. On November 21, 2000, this Court issued its decision in Palm Beach Canvassing Board v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000), stating that amended certifications must be filed by 5 p.m. on Sunday, November 26, 2000.

[16]On November 9, 2000, a manual recount was requested on behalf of Vice-President Gore in four counties — Miami-Dade, Broward, Palm Beach and Volusia. Broward County and Volusia County timely completed a manual recount. It is undisputed that the results of the manual recounts in Volusia County and Broward County were included in the statewide certifications.

The Miami-Dade Canvassing Board thereafter suspended the manual recount and voted to use the election returns previously compiled. Earlier that day, the panel had decided to limit its recount to the 10,750 "undervotes," that is, ballots on which no vote was registered by counting machines. The Board's stated reason for the suspension of the manual recount was that it would be impossible to complete the recount before the deadline set forth by this Court. At the time that the Board suspended the recount, approximately 9,000 of the 10,750 undervotes had not yet been reviewed. In the two days that the Board had counted ballots, the Board identified 436 additional legal votes (from 20 percent of the precincts, representing 15 percent of the votes cast) which the machines failed to register, resulting in a net vote of 168 votes for Gore. Nonetheless, in addition to suspending further recounting, the Board also determined that it would not include the additional 436 votes that had been tabulated in its partially completed recount.

Specifically as to Miami-Dade County, the trial court found:

> [A]lthough the record shows voter error, and/or, less than total accuracy, in regard to the punchcard voting devices utilized in Miami-Dade and Palm Beach Counties, which these counties have been aware of for many years, these balloting and counting problems cannot support or effect any recounting necessity with respect to Miami-Dade County, absent the establishment of a reasonable probability that the statewide election

> result would be different, which has not been established in this case.
>
> The Court further finds that the Dade Canvassing Board did not abuse its discretion in any of its decisions in its review in recounting processes.

This statement is incorrect as a matter of law. In fact, as the Third District determined in Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000), the results of the sample manual recount and the actual commencement of the full manual recount triggered the Canvassing Board's "mandatory obligation to recount all of the ballots in the county." In addition, the circuit court was bound at the time it ruled to follow this appellate decision. This Court has determined the decisions of the district courts of appeal represent the law of this State unless and until they are overruled by this Court, and therefore, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. See Pardo v. State, 596 So.2d 665, 666 (Fla. 1992).

However, regardless of this error, we again note the focus of the trial court's inquiry in an election contest authorized by the Legislature pursuant to the express statutory provisions of section 102.168 is not by appellate review to determine whether the Board properly or improperly failed to complete the manual recount. Rather, as expressly set out in section 102.168, the court's responsibility is to

determine whether "legal votes" were rejected sufficient to change or place in doubt the results of the election. Without ever examining or investigating the ballots that the machine failed to register as a vote, the trial court in this case concluded that there was no probability of a different result. First, as we stated the trial court erred as a matter of law in utilizing the wrong standard. Second, and more importantly, by failing to examine the specifically identified group of uncounted ballots that is claimed to contain the rejected legal votes, the trial court has refused to address the issue presented. Appellants have also been denied the very evidence that they have relied on to establish their ultimate entitlement to relief.[17] The trial court has presented the plaintiffs with the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence. We also note that whether or not the Board could have completed the manual recount by November 26, 2000, or whether the Board should have fulfilled its responsibility and completed the full manual recount it commenced,

[17]The Miami-Dade Canvassing Board stated as its reasons that it stopped an ongoing manual recount because it determined that it could not meet this Court's certification deadline. However, nothing in this Court's prior opinion nor the statutory scheme governing manual recounts would have prevented the Board from continuing after certification the manual recount that it had properly started. The Canvassing Board is a neutral ministerial body. See Morse v. Dade County Canvassing Board, 456 So. 2d 1314 (Fla. 3d DCA 1984). Therefore, although the Board may have acted in a neutral fashion, the fact remains that three other Boards (Broward, Palm Beach and Volusia) completed the recounts.

the fact remains that the manual recount was not completed through no fault of the Appellant.[18]

3300 Votes in Palm Beach County

Appellants also contend that the trial court erred in finding that they failed to satisfy their burden of proof with respect to the 3,300 votes that the Palm Beach County Canvassing Board reviewed and concluded did not constitute "legal votes" pursuant to section 102.168(3)(c). However, unlike the approximately 9,000 ballots in Miami-Dade that the County Canvassing Board did not manually recount, the Palm Beach County Canvassing Board did complete a manual recount of these 3,300 votes and concluded that, because the intent of the voter in these 3,300 ballots was not discernable, these ballots did not constitute "legal votes." After a two-day trial in this case, the circuit court concluded:

> [W]ith respect to the approximately 3,300 Palm Beach County ballots of which plaintiffs seek review, the Palm Beach Board properly exercised its discretion in its counting process and has judged those ballots which plaintiffs wish this court to again judge de novo. . . . The Palm Beach County board did not abuse its discretion in

[18]On Thanksgiving Day, November 23, 2000, an Emergency Petition for Writ for Mandamus was filed in which Gore sought to compel the Miami-Dade Canvassing Board to continue with the manual recount. Although we denied relief on that same day, in our order denying this relief, the Court specifically stated that the denial was "without prejudice to any party raising any issue presented in the writ in any future proceeding." Accordingly, at the time that we denied mandamus relief we clearly contemplated that this claim could be raised in a contest action.

> its review and recounting process. Further, it acted in full compliance with the order of the circuit court in and for Palm Beach County.

We find no error in the trial court's determination that appellants did not establish a preliminary basis for relief as to the 3300 Palm Beach County votes because the appellants have failed to make a threshold showing that "legal votes" were rejected. Although the protest and contest proceedings are separate statutory provisions, when a manual count of ballots has been conducted by the Canvassing Board pursuant to section 102.166, the circuit court in a contest proceeding does not have the obligation de novo to simply repeat an otherwise-proper manual count of the ballots. As stated above, although the trial court does not review a Canvassing Board's actions under an abuse of discretion standard, the Canvassing Board's actions may constitute evidence that a ballot does or does not qualify as a legal vote. Because the appellants have failed to introduce any evidence to refute the Canvassing Board's determination that the 3300 ballots did not constitute "legal votes," we affirm the trial court's holding as to this issue. This reflects the proper interaction of section 102.166 governing protests and manual recounts and section 102.168 governing election contests.

Whether the vote totals must be revised to include the legal votes actually identified in the Palm Beach County and Miami-Dade County manual recounts?

Appellants claim that the certified vote totals must be amended to include legal votes identified as being for one of the presidential candidates by the County Canvassing Boards of Palm Beach County and Miami-Dade during their manual recounts. After working for a period of many days, the Palm Beach County Canvassing Board conducted and completed a full manual recount in which the Board identified a net gain of 215 votes for Gore.[19] As discussed above, the Miami-Dade Canvassing Board commenced a manual recount but did not complete the recount. During the partial recount it identified an additional legal votes, of which 302 were for Gore and 134 were for Bush, resulting in a net gain of 168 votes for Gore.

The circuit court concluded as to Palm Beach County that there was not any "authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election." This conclusion was erroneous as a matter of law. The deadline of November 26, 2000, at 5 p.m. was established in order to allow maximum time for contests pursuant to section 102.168. The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a

[19]Bush asserted that the audited total is 176 votes.

recount of less than all of a county's ballots. In the same decision we held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election.

As to Miami-Dade County, in light of our holding that the circuit court should have counted the undervote, we agree with appellants that the partial recount results should also be included in the total legal votes for this election. Because the county canvassing boards identified legal votes and these votes could change the outcome of the election, we hold that the trial court erred in rejecting the legal votes identified in the Miami-Dade County and Palm Beach County manual recounts. These votes must be included in the certified vote totals. We find that appellants did not establish that the Nassau County Canvassing Board acted improperly.

CONCLUSION

Through no fault of appellants, a lawfully commenced manual recount in Dade County was never completed and recounts that were completed were not counted. Without examining or investigating the ballots that were not counted by the machines, the trial court concluded there was no reasonable probability of a different result. However, the proper standard required by section 102.168 was

whether the results of the election were placed in doubt. On this record there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt. We know this not only by evidence of statistical analysis but also by the actual experience of recounts conducted. The votes for each candidate that have been counted are separated by no more than approximately 500 votes and may be separated by as little as approximately 100 votes. Thousands of uncounted votes could obviously make a difference.

Although in all elections the Legislature and the courts have recognized that the voter's intent is paramount, in close elections the necessity for counting all legal votes becomes critical. However, the need for accuracy must be weighed against the need for finality. The need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law. Notwithstanding, consistent with the legislative mandate and our precedent, although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included in the final election results.[20] As recognized by the Florida House of

[20]This Presidential election has demonstrated the vulnerability of what we believe to be a bedrock principle of democracy: that every vote counts. While there are areas in this State which implement systems (such as the optical scanner) where the margins of error, and the ability to

Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts:

> [A]ll election contests and recounts can be traced to either an actual failure in the election system or a perception that the system has failed. Public confidence in the election process is essential to our democracy. If the voter cannot be assured of an accurate vote count, or an election unspoiled by fraud, they will not have faith in other parts of the political process. Nonetheless, it is inevitable that legitimate doubts of the validity and accuracy of election outcomes will arise. It is crucial, therefore, to have clearly defined legal mechanisms for contesting or recounting election results.

Id. at 21 (emphasis supplied) (footnote omitted).

Only by examining the contested ballots, which are evidence in the election contest, can a meaningful and final determination in this election contest be made. As stated above, one of the provisions of the contest statute, section 102.168(8), provides that the circuit court judge may "fashion such orders as he . . . deems necessary to ensure that each allegation in the complaint is investigated, examined or checked, to prevent any alleged wrong, and to provide any relief appropriate under such circumstances. (emphasis supplied).

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demonstrably verify those margins of error, are consistent with accountability in our democratic process, in these election contests based upon allegations that functioning punch-card voting machines have failed to record legal votes, the demonstrated margins of error may be so great to suggest that it is necessary to reevaluate utilization of the mechanisms employed as a viable system.

In addition to the relief requested by appellants to count the Miami-Dade undervote, claims have been made by the various appellees and intervenors that because this is a statewide election, statewide remedies would be called for. As we discussed in this opinion, we agree. While we recognize that time is desperately short, we cannot in good faith ignore both the appellant's right to relief as to their claims concerning the uncounted votes in Miami-Dade County nor can we ignore the correctness of the assertions that any analysis and ultimate remedy should be made on a statewide basis.[21]

We note that contest statutes vest broad discretion in the circuit court to "provide any relief appropriate under the circumstances." Section 102.168(5). Moreover, because venue of an election contest that covers more than one county lies in Leon County, see 102.1685, Florida Statutes (2000), the circuit court has jurisdiction, as part of the relief it order, to order the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties

[21]The dissents would have us throw up our hands and say that because of looming deadlines and practical difficulties we should give up any attempt to have the election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature. While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law. We can only do the best we can to carry out our sworn responsibilities to the justice system and its role in this process. We, and our dissenting colleagues, have simply done the best we can, and remain confident that others charged with similar heavy responsibilities will also do the best they can to fulfill their duties as they see them.

that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located.[22]

Accordingly, for the reasons stated in this opinion, we reverse the final judgment of the trial court dated December 4, 2000, and remand this cause for the circuit court to immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed, and for other relief that may thereafter appear appropriate. The circuit court is directed to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County[23] and the 168 additional legal votes from Miami-Dade County.

Because time is of the essence, the circuit court shall commence the tabulation of the Miami-Dade ballots immediately. The circuit court is authorized,

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[22]We are mindful of the fact that due to the time constraints, the count of the undervotes places demands on the public servants throughout the State to work over this week-end. However, we are confident that with the cooperation of the officials in all the counties, the remaining undervotes in these counties can be accomplished within the required time frame. We note that public officials in many counties have worked diligently over the past thirty days in dealing with exigencies that have occurred because of this unique historical circumstance arising from the presidential election of 2000. We commend those dedicated public servants for attempting to make this election process truly reflect the vote of all Floridians.

[23]See discussion at n.6, supra.

in accordance with the provisions of section 102.168(8), to be assisted by the Leon County Supervisor of Elections or its sworn designees. Moreover, since time is also of the essence in any statewide relief that the circuit court must consider, any further statewide relief should also be ordered forthwith and simultaneously with the manual tabulation of the Miami-Dade undervotes.

In tabulating the ballots and in making a determination of what is a "legal" vote, the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a "legal" vote if there is "clear indication of the intent of the voter." Section 101.5614(5), Florida Statutes (2000).

It is so ordered.

ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.
WELLS, C.J., dissents with an opinion.
HARDING, J., dissents with an opinion, in which SHAW, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

WELLS, C.J., dissenting.

I join Justice Harding's dissenting opinion except as to his conclusions with regard to error by Judge Sauls and his conclusions as to the separateness of section 102.166 and 102.168, Florida Statutes (2000). I write separately to state my additional conclusions and concerns.