

FILED
IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION
09 SEP 29 PM 5:06

WILLIAM S. "BILL" ABRAMSON,
candidate for election to the office
of Circuit Court Judge, in and for the
Fifteen Judicial Circuit, Group 23,

BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

Plaintiff,

Case No. 2008 CA 002944

vs.

ELECTIONS CANVASSING COMMISSION
OF THE STATE OF FLORIDA; KURT S.
BROWNING, as SECRETARY OF STATE;
DEPARTMENT OF STATE, DIVISION OF
ELECTIONS; PALM BEACH COUNTY
CANVASSING BOARD; ARTHUR ANDERSON,
as PALM BEACH COUNTY SUPERVISOR OF
ELECTIONS; and RICHARD I. WENNET,
candidate for election to the office of Circuit
Court Judge, in and for the Fifteenth Judicial
Circuit, Group 23,

Defendants.

RICHARD I. WENNET,

Counter-Plaintiff,

vs.

WILLIAM S. "BILL" ABRAMSON, *et al.*,

Counter-Defendants.

**WENNET'S MOTION FOR NEW ELECTION AND
INCORPORATED MEMORANDUM OF LAW**

Defendant, Richard I. Wennet ("Wennet"), respectfully requests that this Court order a new election pursuant to Section 100.101(1), Florida Statutes, for the office of

Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23. In support of this motion, Wennet provides the following memorandum of law.

I. INTRODUCTION

This case presents a matter of first impression -- whether the judicial branch has the authority to grant equitable relief in the form of ordering a recount of election results after the statutorily prescribed canvassing and recount procedures have been exhausted and the Elections Canvassing Commission has certified under Florida law that it is unable to determine the true vote for the office at issue.

By extensive amendments to the election code in 2001, the Florida Legislature made clear its intent to remove any discretion from the canvassing boards with respect to ordering recounts. Instead, the Legislature laid out a clear and unambiguous structure for (i) canvassing election results, (ii) conducting mandatory machine and manual recounts under expressly specified conditions, and (iii) reporting and certifying the results of same. In addition, the Legislature has provided a very specific remedy where no candidate has been elected to fill an office that must be filled at such an election. Florida law is clear, where such express statutory procedures and remedies are present, courts cannot act in equity to grant relief outside of, or in conflict with, the statutory provisions.

Palm Beach County, a non-party to this suit, took the unprecedented step of appointing an assistant county administrator, Brad Merriman, to conduct an ad hoc reconciliation of the ballot totals for the election of Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23, held on August 26, 2008. That extra-judicial effort morphed into a weeks' long foray into attempted reconciliations and multiple recounts. That process, devoid of statutory authority, guidance and structure, evidences the danger

of reverting back, even though unintentionally, to a scheme of unfettered discretion in the conduct and canvass of recounts.¹ All totaled, the ballots were counted and recounted, in whole and in part, nine times.² Each time, the county reported different tallies for total number of ballots cast, number of votes cast in the Group 23 race, and the number of votes cast for each candidate. Most problematic, perhaps, was the unequal evaluation of ballots occasioned by the use of partial machine and manual recounts. Thus, even if the Court determines it had the authority to order a recount, it seems clear that the ad hoc procedures utilized to conduct the recount ran afoul of the statutory procedures and case law interpreting same.

In the end, the county could not achieve the stated purpose of the reconciliation effort: “to attempt to reconcile the discrepancy between the total ballot count that was reported from the August 26, 2008 primary election, and the total ballot count from the recount that was conducted on August 29-30, 2008.” Regardless, and after four weeks, the county simply stopped counting and certified the numbers reached in its last count -- presumably because they were close enough. In an election decided by 61 votes, the numerous and varying results released by the Canvassing Board demonstrates that such an ad hoc recount process “is not well calculated to sustain the confidence that all citizens must have in the outcome of elections.”

¹ To be abundantly clear, Judge Wennet does not denigrate Mr. Merriman and the numerous other county employees who worked tirelessly in the elections and reconciliation/recount process; he recognizes and appreciates their herculean and well-intended efforts. Instead, he challenges the respective authority of this Court and the Canvassing Board with respect to the non-statutory reconciliation and recount process.

² Note, at no time were all ballots counted by hand; rather the counts invariably relied upon previous tallies. If the statutory procedures are to be abandoned, then the only principled means of reconciling the ballot discrepancies and determining the true result lies in a complete hand recount.

II. BACKGROUND

A. The Statutory Scheme -- Then and Now.

The 2000 presidential election recount litigation created a seismic shift in Florida's election code. At that time, canvassing boards had the discretion to order a pre-certification manual recount of select precincts in a "protest" phase and circuit judges enjoyed the discretion to "provide any appropriate relief" in the election "contest" phase. *See* §§ 102.166 and 102.168, Fla. Stat. (2000), respectively. Such broad discretion famously spawned inconsistent recount procedures and standards in numerous counties -- resulting in a fatal lack of uniformity in canvassing the returns. In response, the 2001 Florida Legislature deliberately eliminated the protest phase and with it the canvassing boards' discretion to order recounts. Similarly, the 2001 amendments limited both the scope of claims available in an election contest as well as the circuit courts' discretion to fashion any orders and provide relief in a contest. In place of the discretion, the Legislature established a statutory framework for conducting mandatory recounts and provided that such recounts would occur only under specific circumstances.

Prior to 2001, any candidate or political party could request a manual recount prior to certification. § 102.166(4)(a), Fla. Stat. (2000). The county canvassing board had the discretion to authorize a manual recount of at least three precincts. § 102.166(4)(c), Fla. Stat. (2000). If the manual recount indicated an error in the vote tabulation that could affect the outcome of the election, the county canvassing board was required to: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots. § 102.166(5), Fla. Stat. (2000).

The Legislature amended section 102.166 in 2001, however, and stripped the county canvassing boards of the discretion to authorize a manual recount. Rather, the Legislature enacted a non-discretionary procedure for conducting recounts as well as canvassing and filing the results for same. Under the new statutory scheme, each recount is automatic and mandatory where specified criteria are met. *First*, where the first set of unofficial returns indicates a margin of victory of one-half of one percent or less, then a mandatory machine recount of all ballots must be conducted; the result is reported to the Department of State as the second set of unofficial returns and must be filed no later than 3 p.m. on the fifth day after any primary election. § 102.141(7)(c), Fla. Stat. (2008). *Second*, where the second set of unofficial returns indicates a margin of victory of one-quarter of one percent or less, then a manual recount of the overvotes and undervotes is conducted. § 102.166(1), Fla. Stat. (2008).³ A manual recount must be made “of the overvotes and undervotes cast in the entire geographic region for such office or ballot measure.” *Id.* “A manual recount may not be ordered, however, if the number of overvotes, undervotes, and provisional ballots is fewer than the number of votes needed to change the outcome of the election.” *Id.*

The results of the machine recount and the manual recount are combined and certified by the canvassing board as the official result. § 102.141(7)(c), Fla. Stat. (2008). At this point the statute makes no provision for any other recount. If the returns are not filed with the Department of State by 5 p.m. on the seventh day following a primary

³ An “[o]vervote” means that the elector marks or designates more names than there are persons to be elected to an office or designates more than one answer to a ballot question, and the tabulator records no vote for the office or question.” § 97.021(23), Fla. Stat. (2008). An “[u]ndervote” means that the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question.” § 97.021(37), Fla. Stat. (2008).

election, they “**shall be ignored** and the results on file at that time shall be certified by the department.” § 102.112(2), (3), Fla. Stat. (2008) (emphasis added). Once filed with the Department, the canvassing board’s certified official returns are presented to the state Elections Canvassing Commission, which is charged with the duty to “certify the returns of the election and determine and declare who has been elected for each federal, state, and multicounty office.” § 102.111(1), Fla. Stat. (2008). “If any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office ..., the commission **shall so certify and shall not include** the returns in its determination, canvass, and declaration.” § 102.131, Fla. Stat. (2008) (emphasis added). In such a circumstance no person has been elected to the office, and the Legislature has provided but one form of relief: “a special election or special primary election shall be held ... if no person has been elected at a general election to fill an office which was required to be filled by election at such general election.” § 100.101(1), Fla. Stat. (2008).⁴

In addition to removing the discretionary recount power from canvassing boards, the 2001 amendments to Chapter 102 limited the scope and relief available under the election contest statute, section 102.168. First, the Legislature removed the broad catchall provision for contesting an election on the basis of “any other cause or allegation which would show that a person other than the successful candidate was the person duly

⁴ For non-partisan judicial races, such as the election at issue here, the primary election is the equivalent of the general election. For non-partisan judicial races, such as the election at issue here, the primary election is the equivalent of the general election. *State v. Gerow*, 85 So. 144, 146 (Fla. 1920) (“Primary election laws and laws governing general elections are so interwoven that together they comprise the election machinery of the state, and the rights, duties, privileges, and powers granted or imposed by one are equivalent to those granted or imposed by the other, in so far as the processes of the courts may be invoked to enforce or protect them”).

nominated or elected to the office in question.” § 102.168(3)(e), Fla. Stat. (2000). Second, the Legislature struck the provision that the circuit judge “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. § 102.168(8), Fla. Stat. (2000).

B. The Election At Issue.

The following facts, supported in the official elections records, concerning the election at issue are not in dispute:

1. On August 26, 2008 (“Primary Election Day”), the State of Florida conducted a primary election for numerous offices, including the office of Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23 (the “Group 23 Election”). Early voting and voting by absentee ballot were permitted for this election, as for all state elections. (Compl. ¶ 15)
2. Section 102.141(5), Florida Statutes, requires that the Palm Beach County Canvassing Board submit to the Defendant Department of State unofficial returns for each federal, statewide, state, or multicounty office no later than noon on the third day after any primary election. The first set of unofficial returns for the Group 23 Election were timely submitted to the Department of State and appeared to indicate that there were 45,375 votes for Abramson and 45,358 votes for Wennet (90,733 votes cast in that race), and a total of 102,523 ballots cast. (Compl. ¶ 17; Compl. Ex. A)
3. Because the apparent margin of victory was less than one half of one percent of the votes cast in that race, on August 29, 2008, the Elections Canvassing Commission ordered a machine recount for the election pursuant to Section 102.141(7). (Compl. ¶¶ 20, 21)
4. As a result of the machine recount conducted pursuant to Section 102.141(7), the Palm Beach County Canvassing Board timely submitted a second set of unofficial returns to the Department of State on August 30, 2008, which appeared to indicate that there were 42,973 votes for Wennet and 42,912 votes for Abramson. (Compl. ¶ 23)
5. The second set of unofficial returns, following the machine recount, appeared to indicate that Wennet received 61 more votes than Abramson. (Compl. ¶ 24)
6. Because the result of the machine recount indicated a margin of victory of less than one quarter of one percent of the votes cast for that race, on August 29, 2008, Elections Canvassing Commission ordered a manual recount of the

undervotes and overvotes pursuant to Section 102.166. (Compl. ¶ 21; Compl. Ex. B)

7. Palm Beach County Canvassing Board conducted the manual recount of the undervotes and the overvotes, the result of which appeared to indicate that there were 43,932 votes for Wennet and 43,872 votes for Abramson -- or, a margin of victory for Wennet of 60 votes. (Compl. ¶¶ 26, 28, 29, Compl. Ex. C).

8. Palm Beach County Canvassing Board certified the official returns indicating that Wennet received 43,932 votes to Abramson's 43,872 votes and timely submitted them to the Department of State. (Compl. Ex. E; Official Certification of Election Results and Conduct of Election Report).

9. In certifying the official returns, the board stated:

We certify that pursuant to Section 102.112, Florida Statutes, the canvassing board has compared the number of persons who voted with the number of ballots counted and that the certification includes all valid votes cast in the election.

Compl. Ex. E (“**Official** Certificate of County Canvassing Board”).

10. Due to the fact that there was a 3,478 vote difference in the unofficial returns reported on election night and those certified after the recounts, the Elections Canvassing Commission refused to certify the result and in its Official Certificate stated:

Due to an irregularity appearing in the returns for the race of Circuit Judge 15th Circuit, Group 23, the Elections Canvassing Commission was unable to determine the true vote for this office and has excluded such returns from this certificate. See Section 102.131, Fla. Stat. (2008).

(Compl. Ex. “F”).

Once the Elections Canvassing Commission declined to certify the results of the Group 23 race, the statutorily prescribed recount procedures terminated and neither candidate was -- nor could be -- declared the winner. Save for the ordering of a special election pursuant to section 100.101(1) -- the Florida Election Code remains silent as to what, if anything could happen next. Nonetheless, the ballots continued to be counted and recounted. As can be seen from the chart attached as Exhibit “A,” the ballots in this election underwent no less than *nine* forms of counting -- ranging from hand counts of certain ballots cast to multiple (and partial) machine and manual recounts. Not

surprisingly, a different number of the total ballots cast and votes for each candidate was reported each time.

C. The County's Ad Hoc Reconciliation and Certification by the Canvassing Board.

After the statutory recount procedures had run their course and the result certified to -- but not approved by -- the Elections Canvassing Commission, Palm Beach County (a non-party to this suit), with the consent of the Supervisor of Elections, tasked an assistant county administrator to attempt to reconcile the discrepancies in the ballot totals. This effort was not ordered by this or any court, and it is undisputed that the county's attempted "reconciliation" has no basis in statutory authority nor in the case law under the election code. Its purpose was not to assist the canvassing board in canvassing the returns - for that had been completed previously; rather, its purpose was "to attempt to reconcile the discrepancy between the total ballot count that was reported from the August 26, 2008 primary election, and the total ballot count from the recount that was conducted on August 29-30, 2008." *See* Memorandum of B. Merriman to A. Anderson, dated 9/15/2008 (Ex. B). A second purpose was to "recommend any necessary changes to the process for implementation prior to the November 4, 2008 election." *Id.*

On Friday, September 12, one day before a specially set hearing for summary judgment, the parties here were surprised by the sudden announcement that the county had apparently found the approximately 3,400 "missing" ballots. Placing this litigation at a standstill, the county was free to create ad hoc procedures for attempting to locate and account for all ballots cast. The discrepancy in the number of ballots cast has not been resolved (and in fact, continued to change with each new tally). As time wore on, however, the effort morphed into an extra-judicial exercise in multiple recounts and

further attempts at reconciliation. Again, it is undisputed that this ad hoc multiple recount process has no basis in statutory authority nor case law under the election code.

The following facts concerning the ad hoc reconciliation are not in dispute:

1. Prior to the county's ad hoc reconciliation, the Supervisor's office conducted an unofficial hand count of all paper ballots cast and arrived at the result of 100,002.
2. At the start of the county's reconciliation, a count utilizing previously determined totals and a machine count resulted in a total of 102,721 total ballots cast. 9/17/2008 Supp. Reconciliation Report.
3. Based upon the county's Supplemental Reconciliation Report, this Court authorized a second machine recount that was conducted on September 19 and 20, 2008, resulting in 45,233 votes for Abramson and 45,118 votes for Wennet (90,351 votes cast in that race), and a total of 102,750 ballots cast.
4. A second manual recount of over and undervotes was conducted on September 21, 2008, resulting in 45,176 votes for Abramson and 45,175 votes for Wennet (90,195 votes cast in that race), and a total of 102,586 ballots cast.
5. Because the canvassing board could still not reconcile the total number of ballots cast, it did not certify the result of the recounts conducted September 19-21.
6. Instead, a third machine recount limited to 54 designated precincts was conducted; approximately 1800-1900 ballots were counted in this partial machine recount, which was conducted on September 22, 2008.
7. The result of the partial third machine recount was apparently somehow reconciled and added to the totals for the previous machine and manual recounts and was reported as the "Second Unofficial" Return as follows: 45,223 votes for Abramson, 45,118 votes for Wennet, for a total number of votes cast for the race of 90,351.⁵
8. A third manual recount of approximately 160 overvotes and undervotes that were sorted, but not counted, in the partial machine recount of September 22 was conducted on September 23, 2008.
9. Adding the result of the partial third manual recount to the prior results, the canvassing board made its last tally: 45,531 votes for Abramson, 45,470 votes for Wennet, for a total number of votes cast in the race of 91,001, and a total number of ballots cast of 102,746.

⁵ This, in fact, is the second "Second Unofficial" Return reported for this race. (See Compl. Ex. E).

10. The Canvassing Board certified the result on September 24, 2008 and filed the official return with the Department of State for consideration by the Elections Canvassing Commission, which certified the result today, September 29, 2008.

All totaled, the ballots were counted, both officially and unofficially, *nine* times (*see* Ex. A) and each time different results were reported. In the end, the county could never achieve the original purpose of the reconciliation effort -- reconciliation of the total number of ballots cast. Instead, after four weeks, it simply stopped recounting.

II. LEGAL ARGUMENT

A. **The Court Lacks the Authority to Order Equitable Relief in Light of, and in Conflict with, the Statutorily Prescribed Procedures.**

As detailed above, the Legislature intended, via the 2001 revisions to sections 102.166 and 102.168, to eliminate the disparate procedures and standards that arose under the former discretionary scheme and, in its place, create a uniform procedure for the conduct of elections, recounts and canvassing the results. There simply is no discretion for any court or official elections body to order ad hoc, multiple recounts in contravention of the clear, mandatory recount procedures set forth in the statute. The rationale for this is clear. *Gore v. Harris*, 772 So.2d 1243, 1261 (Fla. 2000) (“the need for accuracy must be weighed against the need for finality”) *rev'd on other grounds Bush v. Gore*, 531 U.S. 98 (2000); *Kinzel v. City of North Miami*, 212 So.2d 327, 328 (Fla. 3d DCA 1968) (“As to this type litigation [statutory action for an election contest] there is a public interest in promptness and finality of decision”). In light of the statutorily prescribed procedures governing the canvass of returns, conducting mandatory recounts, and certification of the results (as well as the consequences of non-certification of the results), the court may not act in equity to order a recount.

“The court may not exercise its equity powers when there is an adequate remedy at law.” *Lake Tippecanoe Owners Ass'n Inc. v. National Lake Developments, Inc.*, 390 So.2d 185 (Fla. 2d DCA 1980); *see also Williams v. Keyes*, 186 So. 250, 261 (Fla. 1939) (court cannot order equitable relief that violates controlling election statutes); *Engle Homes, Inc. v. Krasna*, 766 So.2d 311 (Fla. 4th DCA 2000) (declining to act in equity where “the [Interstate Land Sales Full Disclosure Act] provides its own remedy and where there is a statutory or remedy at law, this court will not exercise its equitable jurisdiction”). Moreover, “[e]quity is usually reluctant to interfere in any way with an election.” *Treadwell v. Town of Oak Hill*, 175 So.2d 777, 778 (Fla. 1965) (“It has frequently been said that . . . an election is a political matter as to which courts of equity have, and should have, nothing to do”); *see also Wexler v. Lepore*, 878 So.2d 1276, 1282 (Fla. 4th DCA 2004) (“The rule is well settled that equity will neither determine questions involving rights that are purely political nor will it undertake the protections of such rights by the writ of injunction”).

Here, the only statutorily prescribed recount remedy is to conduct a machine recount of all ballots cast and, if necessary, conduct a manual recount of all of the overvotes and undervotes cast in the geographical area for the race at issue in accordance with sections 102.141(7) and 102.161(1). If a certifiable result cannot be reached at the end of this statutory process, then no one can be declared the winner and the only relief available is the ordering of a special election under section 100.101(1).

Because the court was without discretion to order a recount beyond that contemplated by the statutory framework, any results arising from same are void *ab initio*. *State v. Chillingworth*, 143 So. 294, 295 (Fla. 1932) (finding that although “each

and every order or decree made in the suit to foreclose the trust deed prior to the order of disqualification was made through oversight and was harmless, nevertheless they were void for lack of authority to enter them”).

B. The County’s Ad Hoc Reconciliation and Recount Procedures Conflict With the Statutorily Prescribed Procedures.

Assuming, *arguendo*, that the Court has the authority to order a recount, such an order should be narrowly tailored to and carried out in conformance with the statutory recount procedures. That was not done here. The county’s reconciliation effort and multiple recounts devolved into the same unregimented approach that caused so much chaos in the 2000 presidential election fallout, albeit on a far smaller scale. All totaled, the ballots were counted, both officially and unofficially nine times and each time different tabulations were produced. Not only did the ballots cast for each candidate continually change, but so did the total number of votes for that race as well as the total number of ballots cast in the entire county. Ultimately, the Palm Beach County Canvassing Board remains unable to determine whether the second official return represents the complete universe of ballots cast; at best, we can only presume that it is “close enough.” Although the Board was never able to determine the true number of ballots cast, the Board certified the second official return.

Particularly problematic of the ad hoc multiple recount process was the use of partial machine and manual recounts. Recall, the canvassing board could not certify the result of its second machine and second manual recounts of September 19-21. Thus, it decided to conduct a partial machine recount of approximately 1800-1900 ballots from 54 precincts and, from that, a manual recount of approximately 160 overvotes and undervotes. This type of “unequal evaluation of ballots” evokes the concerns exposed in

2000 and underscores the Legislature's elimination of such discretion in the recount process. *Bush v. Gore*, 531 U.S. 98, 106 (2000). The numerous and varying results released by the Canvassing Board demonstrates that such an ad hoc process "is not well calculated to sustain the confidence that all citizens must have in the outcome of elections." *Id.*, 531 U.S. at 109.

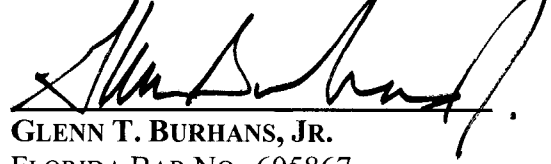
The Legislature attempted to prevent such results, and similar outcomes resulting from unbridled discretion, by replacing discretionary provisions with mandatory procedures. Permitting recounts beyond those specifically authorized by statute undermines the 2001 revisions to Chapter 102. The Board's extrajudicial non-statutory recount of the ballots is contrary to the procedure provided for under Chapter 102 and the clear legislative intent to promote uniformity by limiting discretion.

CONCLUSION

For all of the foregoing reasons, Defendant/Cross-claimant Wennet seeks entry of an order: (i) rescinding the Court's Recount Order *nunc pro tunc*; (ii) declaring that any result of the Group 23 race certified by the Palm Beach County Canvassing Board and the Elections Canvassing Commission after September 5, 2008 is void *ab initio*; (iii) declaring that no one has been elected to the Group 23 seat; and (iv) ordering that a new election for the Group 23 race be conducted pursuant to law at the November 4, 2008 general election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail this 29th day of September, 2008, to the following counsel of record:

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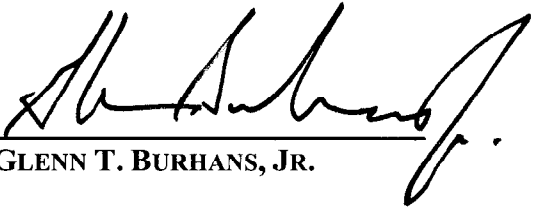
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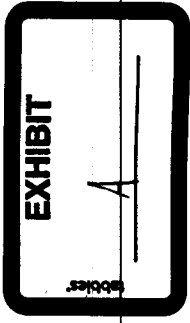


GLENN T. BURHANS, JR.

TAL 451,488,603v2 9-29-08

CHRONOLOGY OF DIFFERENT BALLOT COUNTS FOR - GROUP 23 RACE

Event	Date	Total Ballots Cast	Total Votes Group 23	Abramson	Wennet	Notes
Count #1 - Election Night.	08/26/08	102,523	90,733	45,375	45,358	Statutory canvass of provisional ballots, absentee ballots and early voting; results in filing of First Set of Unofficial Returns
Count #2 - First Statutory Machine Recount	08/29/08	N/A because only count race at issue	85,885	42,912	42,973	Authorized by 102.141(7), F.S. Does not count overvotes and undervotes (which were sorted); results in filing of Second Set of Unofficial Returns
Count #3 - First Statutory Manual Recount/ results Official Return	8/30/08	99,045	87,804	43,872	43,932	Authorized by 102.166(1), F.S. Canvassing board adds machine and manual recounts to arrive at the total; results in Canvassing Board certifying the Official Return and filing same with Department of State
CANVASSING BOARD REFUSES TO CERTIFY						
Count #4 - Canvassing Board conducts hand count of ballots		100,002				



CHRONOLOGY OF DIFFERENT BALLOT COUNTS FOR - GROUP 23 RACE

Event	Date	Total Ballots Cast	Total Votes Group 23	Abramson	Wennet	Notes
Count #5 - Supplemental Reconciliation Report	09/17/08	102,721				Not authorized by statute.
Count #6 - 2d Machine Recount	09/19/08 09/20/08	102,750	90,351	45,233	45,118	Not authorized by statute.
Count #7 - 2d Manual Recount of over and undervotes from Count #6	9/21/08	102,586		45,526	45,468	Not authorized by statute; total ballot count was off by approximately 159 ballots, therefore, Canvassing Board did not certify.
Count #8 - Third partial machine recount	9/22/08		+160			Not authorized by statute; partial recount approx. 1800-1900 ballots from 54 designated precincts.
Count #9 - Third partial manual recount of approx 160 ballots kicked out from prior partial machine recount	9/23/08	102,746		+3 [net]	-3 [net]	Not authorized by statute; 3 of the approximately 160 were touchscreen ballots.
Second "Official" Return	09/23/08	102,746	91,001	45,531	45,470	Certified by Canvassing Board and Elections Canvassing Commission

TAL 451,488,534v1 9-29-08



INTER-OFFICE COMMUNICATION

To: Dr. Arthur Anderson,
Supervisor of Elections

From: Brad Merriman, *BMM*
Assistant County Administrator

Date: September 15, 2008

Re: **Ballot Reconciliation - August 26, 2008 Primary Election**

County Administration

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**Palm Beach County
Board of County
Commissioners**

Addie L. Greene, Chairperson

Jeff Koons, Vice Chair

Karen T. Marcus

Robert J. Kanjian

Mary McCarty

Burt Aaronson

Jess R. Santamaria

County Administrator

Robert Welsman

As a result of your request to our office on September 8, 2008, I was tasked to lead an effort to attempt to reconcile the discrepancy between the total ballot count that was reported from the August 26, 2008 primary election, and the total ballot count from the recount that was conducted on August 29-30, 2008. You further requested that we recommend any necessary changes to the process for implementation prior to the November 4, 2008 election.

It should be noted that our review indicates that the Elections staff does operate with many controls currently in place. By no means are we suggesting that no controls or systems are in place, however some changes are necessary that address the complexity of the new voting system.

Following your request, I assembled a team of approximately 25 County and Supervisor of Elections employees to proceed with the reconciliation. Included on the team were two Certified Public Accountants; Joe Doucette, County Budget Director, and Mike Simmons, Deputy Director of Airports for Finance and Administration, and two representatives from Sequoia, the manufacturer of the voting equipment. On the morning of September 10, 2008, we began the process.

* It is noted that our process is being described as a reconciliation effort. There have been numerous references to the "missing", or "lost" ballots in describing this situation. To characterize the ballots as "missing" or "lost", assumes that the election night count is correct. We did not make that assumption. Our goal was to determine the number of ballots currently on hand, compare the totals on a precinct-by-precinct basis, and analyze and attempt to reconcile the differences. *

* Our team met at the Supervisor of Elections tabulation center and began by consulting with key Supervisor of Elections staff to get an overview of the election process and key control points of the ballot management process. Many on the County team had not participated in the election night process or any of the recount efforts and it was critical for us to gain an understanding of the sequence of events in order to reconstruct what happened and where events may have occurred that led to the discrepancy. Elections staff gave us a detailed account of the systems in place and the intricacies of the election night and the recount events. I should add that the Elections staff was very co-operative in their assistance throughout the process. *

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EXHIBIT

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Organizing and cataloging of all boxes of ballots on hand at the tabulation center, sorted by voting type and precinct was the fundamental basis of our reconciliation method. We found ballots from numerous precincts to be co-mingled with other precincts and many precinct ballots in multiple boxes. Precinct boxes were not physically stored in chronological order and a paper index (which we found to be inaccurate) was necessary for retrieval. As a result of these issues, we determined that a hand recount of the ballots in the precinct boxes was necessary. Furthermore, it was necessary to combine or segregate precincts so that each precinct had only one ballot box and each ballot box contained only one precinct. The approximately 700 precinct boxes were then re-shelved into precinct order. The early voting precinct boxes, which had previously been hand counted but not stored in chronological order, were also resorted into chronological order. The absentee ballots had been previously sorted, hand counted, and stored chronologically by precinct. In an effort to minimize the human handling of early voting and absentee ballots, with the exception of a few boxes that had no hand count information affixed to the box, we relied on the results of the previous hand count to be entered into the data base. It is noted that there were many boxes of over vote/under vote ballots that had been reviewed by the Canvassing Board during the recount and then stored in separate boxes. These ballots and boxes had to be counted and cataloged. A complete description of the chain of custody and re-sorting process is contained in attachment 2.

Upon completion of the above process and data entry, we proceeded to do a precinct-by-precinct analysis of total ballots, by voting type, and compare the results to the election night totals. This analysis revealed specific discrepancies which further directed our efforts to pinpoint the causes.

SUMMARY AND FINDINGS:

Attachment 1 is the summary report of our findings. You will note that currently, our records indicate that there are 190 more ballots on hand than ballots recorded on election night. A significant individual finding was discovery of a precinct cartridge which was not properly read on election night resulting in the election night total being understated. This one component accounted for 110 ballots of the 190 ballot differential. Therefore, the total difference of un-resolved discrepancies is 80 ballots. The summary report identifies other precincts with material discrepancies and possible causes/explanations. As you are aware, judicial constraints were imposed on September 12, 2008 that prevented us from reviewing any more ballots or cartridges, therefore we were not able to positively identify the cause(s). We have identified other precinct specific data, which if given the opportunity for further review, may reduce the current net difference in total ballots to 12.

Other differences exist in our detailed precinct analysis which were unresolved due to the judicial constraints; the source of the differences are unknown but could be attributed to our reliance on unverified prior hand counts of absentee and early voting ballots, other ballot count errors, or the fact that our analysis is incomplete due to the above referenced judicial action. Nonetheless, we believe that the total ballot count from our reconciliation effort is materially accurate.

Given the relatively close reconciliation count to the election night totals, we feel confident that there was no wholesale loss of paper ballots in the 3,400 count range as was feared after the recount efforts. Our belief is that during the recount process a number of boxes of ballots were inadvertently excluded from counting. These excluded boxes were most likely stored in the tabulation facility along with all other stored ballots.

The newly implemented optical scan voting system requires a tremendous amount of paper. A ballot management and storage system lacking the necessary level of control can cripple the recount process, causing confusion as it apparently did in the recount efforts.

This was the first county-wide election with the new voting system, and as such, staff had no experience conducting a recount using this system. During the recount a Sequoia representative was not present. Additionally, the recount process is very labor intensive and relies on the accuracy and efficiency of human beings. Working long hours into the night can cause employees to become fatigued and significantly reduce their effectiveness.

RECOMMENDATIONS:

We offer the following recommendations which are by no means complete. Further recommendations may be brought forward as we continue our review of the entire system and processes.

1. Improved ballot management/storage procedures including the following:
 - a. one to one relationship for precinct and ballot storage boxes, whenever possible
 - b. ballot storage boxes should be warehoused in precinct order, with pre-designated locations, clearly labeled and established prior to elections enabling the warehouse staff to store and retrieve boxes in an orderly and timely fashion.
 - c. improved labeling systems clearly marking precinct number and other data
 - d. strict chain of custody procedures for ballots and data cartridges to insure security and tracking of ballots, which would also be in effect during recount procedures insuring an orderly process
 - e. designation of a senior staff person to monitor chain of custody, storage operations, and oversee the handling of ballot storage boxes during recount procedures to insure the orderly and complete handling of all ballots.
2. More timely reporting of precinct-by-precinct results
3. Oversight of the entire tabulation process by a qualified senior staff person to monitor and control ballot counting, insuring an orderly, complete, and valid count regardless of machine or hand count requirements.
4. Improved poll worker training, especially as it relates to obtaining signatures, handling ballots, and reconciling ballots with signatures.
5. Improved self auditing of election results including the timely review of poll worker reconciliations and signature data which should be compared to election results to determine if any material differences exist. This procedure is critical to detect any voting hardware failures or ballot irregularities. A timely review of this sort would have detected the cartridge read failure discussed above.
6. Additional Information Technology staff on site with proper training on tabulation software to insure backup and redundancy. Additionally, Sequoia staff should be present during any recount.
7. Timely review of cartridge data by staff to ensure error messages are discovered and investigated. The primary goal is to determine if paper ballot counts and cartridge data agree, and if not, properly handling any noted discrepancies pursuant to our recommendations below.

8. Implementation of policy that prohibits manual updates/corrections to cartridges (or any vote calculating software/ hardware) without the proper oversight and documentation. It appears that the Election Night cartridge (discussed above, which had not properly recorded/downloaded a possible 110 votes) was attempted to be manually corrected by staff. We recommend that any cartridges which appear to have incorrect totals be immediately separated for evidence purposes and reviewed to determine the cause of the error. The cartridge should be examined by the appropriate Supervisor of Elections staff and the hardware provider to determine and document the cause. Causes could be either machine (cartridge failure) or human error (cartridge accidentally erased , for example). Additionally, any corrections to the vote totals should be clearly documented and double checked by multiple senior staff members to ensure integrity of vote and ballot totals.

Please advise if any further information or clarification is necessary.

Attachments

**Cc: Judge Barry Cohen, and Members, Palm Beach County Canvassing Board
Kurt Browning, Secretary of State**

Palm Beach County
 Reconciliation Count
 9/13/2008

	PRECINCT	PCT ADA	ABSENTEE	EARLY VOTE	EV ADA	PROVISIONAL	TOTAL	Possible Explanation
Count 9/13/08	73215	8	18020	11284	1	185	102713	
Election Night	73015	8	18128	11187	1	184	102523	
Difference	200	0	-108	97	0	1	190	
Possible Identified:	-110						-110	precinct 4072 cartridge/header failure
	-10						-10	precinct 2078 - 10 undervotes in count-0 in Enight
	-25						-25	precinct 6180 60 ballots counted and signed vs 35 election night
	-32						-32	precinct 7047 signature count supports counted 43 vs Enight 11
	-1						-1	precinct 5042 additional per State audit
Subtotal	-178	0	0	0	0	0	-178	
Net difference	22	0	-108	97	0	1	12	

ATTACHMENT 1

Attachment 2

CHAIN OF CUSTODY**PRECINCT BOXES**

- Ten separate counters were set up in groups of two (20 County and SoE staff). Each group was stationed at a separate table in the center room in view by the County and SoE oversight staff.
- Four SoE staff used existing inventory/location schedule to record each box removed from shelf and taken to counters. The first objective was to segregate boxes with multiple precincts, then re-count the number of ballots in single precinct boxes, then combine and count precincts with multiple boxes.
- Each counter group was equipped with white labels (no boxes had white labels to this point), new seals, pens, clear label holders to affix to the boxes, calculators
- When each box was opened, the old seal number was recorded onto the new white labels and then placed in the box with the re-counted ballots. The new seal number was also written onto the white label that was affixed to the outside of each of the boxes.
- Each count required that one counter count the number of ballots, write down their count total and give the ballots to the second counter for confirmation. If they both came up with the same count number, that was the number to be affixed to the box. If they did not each come to the same result, they BOTH recounted until they did.
- Once the number of ballots were re-counted and the box re-sealed the boxes were delivered to a recording station where two County staff recorded the precinct number, seal number and latest count from the white label affixed to each box.
- Once recorded at the recording station, the precinct boxes were returned to the shelves in their newly catalogued order (the precincts were re-shelved in sections C thru E)

OVER/UNDER BOXES

- The Over/Under boxes containing ballots (64 boxes) were removed from their shelves (F-7 thru F-11) and one-by-one delivered to the counters.
- The counters recorded the existing seal numbers, broke the seals, opened the box, re-counted the number of ballots by precinct and returned everything to the box. The box was then re-sealed and delivered to the recording station where the seals and precinct count information was recorded.
- Once recorded at the recording station the 64 boxes were returned to sections F-7 thru F-11)

ABSENTEE BALLOT BOXES

- The absentee ballot boxes were stored in near precinct order in rows 1-30 and sections A-1 and A-2. These boxes had ballot count information affixed to the outside of each box. County staff recorded the ballot count information affixed to the outside of the box onto a paper inventory list of precinct numbers and then that information was delivered to the recording station where it was entered into the spreadsheet.

Attachment 2

- If there was an absentee ballot box with no count information affixed to the outside, it was delivered to a counter table where two staff opened the box, counted the number of ballots, recorded the broken seal, put everything back into the box, re-sealed it and delivered it to the recording station for input and recording. It was then returned to the absentee ballot shelf.

EARLY VOTING BOXES

- Early voting ballot boxes were originally stored in sections A-4 through B-11, but not in precinct order. Starting with section A-4, two county staff began the process of recording the ballot count that was affixed on the outside of the ballot box into the computer spreadsheet. In some cases there was no count affixed to the outside of the box so it was delivered to the counters to be opened, counted, resealed, recorded and then returned to the absentee ballot section.
- When other county staff became available, they assisted in the recording by writing precinct and count information onto a sheet of paper. In groups of two they recorded the info and then provided it to the recording station where it was entered into the early voting count section of the spreadsheet. The early voting ballot section was re-inventoried into precinct order.

MISCELLANEOUS BOXES

- All remaining ballot boxes that were not Precinct, Early, Absentee, or Over/Under were delivered to the counters, re-counted, re-sealed, recorded and returned to their shelves.

Once all ballot count information for Precinct, Early, and Absentee ballot boxes was recorded in the spreadsheet the number of boxes recorded was compared to a recount of the physical boxes that had been re-shelved. This process confirmed that the number of boxes on the shelves reconciled to the number of boxes recorded in the spreadsheet.

- All seal information is recorded and all seals remain with the ballots they once sealed
- All count information is affixed to the outside of each box (except for six early voting boxes that lost their count tags during the re-shelving and the judge order the process to stop before the six boxes could be re-tagged)