IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 00-2346

PALM BEACH COUNTY CANVASSING BOARD,

Petitioner,

v.

KATHERINE HARRIS, as Secretary of State, State of Florida,
and ROBERT A. BUTTERWORTH, as Attorney General of the State of Florida,

Respondents.

Response of Katherine Harris, as Secretary of State, to the Emergency Petition for Extraordinary Writ filed by the Palm Beach County Canvassing Board

Deborah K. Kearney
General Counsel
Kerey Carpenter
Assistant General Counsel
Florida Department of State
PL-02 The Capital
Tallahassee, Florida 32399-0250
(850) 414-5536

Joseph P. Klock, Jr.
Jonathan Sjostrom
Victoria L. Weber
Donna E. Blanton
Steel Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

Counsel for Respondent

TABLE OF CONTENTS

Table of Authorities 4

Certificate of Font Size and Style 5

I. Statement of the Case and Facts 6

II. Summary of Argument 12

III. Argument 13

A. This Court Has No Jurisdiction to Provide the Relief Sought by the Palm Beach County Canvassing Board. 13

B. Only the Division Opinion is binding upon the Board, and thus a resolution of any conflict between it and the Attorney General's advisory opinion is unnecessary. 14

C. Courts Must Defer to the Secretary's Interpretation of Section 102.166(5), Florida Statutes 16

D. The Division Opinion Correctly Construes Section 102.166(5), Florida Statutes 18

E. The Division Opinion is Supported by the Legislative History of Section 102.166, Florida Statutes 21

F. The Attorney General's Interpretation of sections 120.155(7) and (8) Is Erroneous. 25

Conclusion 28

Certificate of Service 29

Appendix

TABLE OF AUTHORITIES

CASES Page

STATUTES

Section 106.23(2), Florida Statutes 6

§102.166(5), Fla. Stat. 6, 11

Section 102.166(5), Florida Statutes, ... 10, 12

Section 102.166, Florida Statutes 10, 11

Section 102.166(5)(a) and (b), Florida Statutes. 11

CERTIFICATE OF FONT SIZE

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

I. STATEMENT OF CASE AND FACTS

A. Introduction

Petitioner, Palm Beach County Canvassing Board (the "Board") seeks to have this Court invalidate a binding opinion of the Florida Department of State, Division of Elections (the "Division Opinion") regarding the use of manual vote tabulation in the absence of a failure in the automated vote tabulation system. The Division of Elections (the "Division"), the agency allocated subject matter jurisdiction over such issues under section 106.23(2), Florida Statutes, has held that manual recounts may not be employed in such instances. The Florida Attorney General, who does not have regulatory authority over elections, has issued a contrary advisory opinion.[1]

Both the plain language and legislative history of Florida's election statutes indicate that the Division was correct: a manual recount of the ballots in a county is proper only where there has been a failure of the vote tabulation system. §102.166(5), Fla. Stat. Failure of certain voters to properly execute their ballots is not a basis for conducting a manual recount.

In the weeks before the November 7th, 2000, general election, each registered voter in the state was provided with a sample ballot and detailed instructions on

---

[1] Letter from Paula Wood to Frank Cuomo, attached hereto as Exhibit A.

how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. For those areas using punch cards, including Palm Beach County, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. As is evident from the instructions used in Palm Beach County, the instructions provided to the voters were clear and complete. Palm Beach County Voting Instructions, attached as Exhibit B.

The voter instructions were designed to prevent both undervoting and overvoting, and thus to ensure that each voter's choices were tabulated.[2] To prevent undervoting, the instructions explained in oversize type that each voter must check his or her ballot card to make sure that the desired chads were fully perforated and that no portion of a selected chad remained partially attached. The instructions included this specific action:

AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND

---

[2] A manual recount of ballots will recapture undervoted ballots, those for which the voter failed to properly cast a vote for a particular office, by attempting to divine the voters' intent from the state of the ballot. It will not generally be able to address overvoting, ballots for which more than one vote was cast for a particular elective office.

CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.

Exhibit A (emphasis in original).

To prevent overvoting, the instructions directed voters to refrain from attempting to correct mistakes on ballots. Voters were told to instead obtain a new ballot, on which their selections could then be properly noted: "If you make a mistake, return your ballot card and obtain another." Id. Any voter following this direction would have cast only one vote for each office, and his or her ballot would have been at no risk of invalidation based on overvoting.

When voters followed these instructions, the automatic tabulation accurately tabulated the ballots that were used statewide -- and particularly those used in Miami-Dade, Broward and Palm Beach Counties. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would be affected by the manual recount at issue.

Plainly stated, the type of manual recount discussed in the Division and Attorney General Opinions would not address the failure of automated equipment to tabulate properly executed ballots, the only purpose for which manual recounts are allowed under Florida law. This recount's only purpose would be to allocate

additional votes to certain candidates based on those ballots that voters failed to execute properly even after receiving clear instructions. To accomplish this result, small armies of local government employees would have to divine, without clear standards to guide them, the intent of electors who failed to clearly mark their ballots. Florida law in no way compels such a result. See, Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("Mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

B. Statement of the Case and Facts

The Palm Beach Canvassing Board ("Board") has petitioned this Court for a "final adjudication" to resolve the question of whether the Board may, in the circumstances presented, conduct a manual recount of the votes cast in Palm Beach County for President and Vice President of the United States. The requested "final adjudication" will actually be a resolution of conflicting advisory opinions of the Division[3] and the Attorney General[4], interpreting the term "error in the vote

---

[3] Attached as Exhibit C. The Division Opinion was rendered pursuant to section 106.23(2), Florida Statutes (1999), which provides as follows:

> The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties,

tabulation" in section 102.166(5), Florida Statutes, as a basis for a manual recount of ballots.

The statute at issue in both opinions, Section 102.166, Florida Statutes, provides in pertinent part:

> (5) If the manual recount [of at least three precincts and at least 1 percent of the total votes cast] indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (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, Fla. Stat. (emphasis added).

Both the Division and the Attorney General issued their advisory opinions in response to the following question asked by the Board's Chairperson:

> 1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an 'error in the vote tabulation' that could affect the outcome of an election within the meaning of section 102.166(5), Florida Statutes, thereby enabling the canvassing board to manually recount ballots for the entire county?

> political party, committee, person, or organization has taken or proposes to take.

[4] Attached as Exhibit D, hereafter "Attorney General's Opinion."

The Division Opinion answered this question by stating that a manual recount is available only in certain limited circumstances:

> [U]nless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

By contrast, the Attorney General answered the first question in the affirmative, without placing any limitation on the power of a local canvassing board to conduct a manual recount. The Attorney General concluded that an "error in voter tabulation" can be "a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count" of selected precincts. This answer was based on a construction of section 102.166(5), Florida Statutes, that omits any standard for the canvassing board. In other words, any discrepancy, regardless of the cause, would be sufficient to vest a local board with the discretion to call a wholesale manual recount according to the Attorney General.

II. SUMMARY OF THE ARGUMENT

This Court has been asked to resolve two conflicting opinions of executive branch officers. Only one of these opinions was binding on the Palm Beach County Canvassing Board. Because there is no case or controversy presented, all this Court

has been asked to do is give an advisory opinion, which it can only do in certain circumstances not present here.

It is well established that state administrative agencies are given deference in construction of the statutes they are charged by the Legislature with enforcing. The Division of Elections is a state agency given ultimate jurisdiction over election procedures, and it has issued an opinion based on its interpretation of the statutes at issue in this case. This Court must defer to the Division's construction of those statutes.

The Division's statutory interpretation, as expressed in the advisory opinion, is reasonable and is supported by the plain language and legislative history of the statutes. Conversely, the Attorney General's advisory opinion was outside the scope of his jurisdiction, unreasonable based on plain language of the statutes, and is entitled to no deference from this Court.

This Court should refuse to issue the advisory opinion that the Petitioners request.

III. ARGUMENT

A. This Court Has No Jurisdiction to Provide the Relief Sought by the Palm Beach County Canvassing Board.

The Board seeks jurisdiction in this Court on the basis of "an original action for declaratory relief -- in the nature of an interpleader." Petition at 2[5]. The

---

[5]What precisely is being interpled is not evident, as no property, cash, or intangible instruments appear involved at all. Moreover, the Supreme Court has no jurisdiction over an original declaratory action, which, of course, differs from an advisory opinion, in that an advisory opinion need not involve an actual case and controversy, otherwise mandated by Fla. Const. Art. V.

pleadings set forth no real case and controversy, and the Court has no jurisdiction to provide the relief sought by the Board. The Florida Constitution authorizes this Court to provide declaratory relief in the form of advisory opinions only when such opinions are requested by the Governor or the Attorney General.[6] Art. IV, § 1(c), (10) and Art. V, § 3(b)(10).

The Supreme Court of Florida has absolutely no jurisdiction to issue advisory opinions as to the merits of advisory opinions by the Attorney General, the Secretary of State or any other state or local officer. See Interlachen Lakes Estates, Inc. v. Brooks, 341 So. 2d 993 (Fla. 1976); Dep't of Administration v. Horne, 325 So. 2d 405 (Fla. 1976). Any response by this Court to this petition would constitute an advisory opinion exceeding its jurisdiction. See Interlachen Lakes Estates, 341 So. 2d at 995.

B. Only the Division Opinion is binding upon the Board, and thus a resolution of any conflict between it and the Attorney General's advisory opinion is unnecessary.

The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the Board: (i) it was rendered to a local officer with election-related duties under

---

[6]Supreme Court jurisdiction as to advisory opinion requested by the Attorney General is confined solely to the question of whether a citizen's petition to amend the state Constitution is valid. Art. IV, § 10; Art. V, § 3(b)(10), Fla. Const.

the Division's supervisory jurisdiction; (ii) it construed Florida's elections laws, a function specifically allocated to the Division under section 106.23(2); (iii) it related to actions Judge Burton proposed to take in his capacity as the chairperson of the Palm Beach County Canvassing Board, and (iv) it was fully supported by both the plain language and legislative history of the statute being construed. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." Smith v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); see also Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840, 844 (Fla. 1993).

In contrast, the Board is not bound to adhere to the Attorney General's opinion. Section 16.01(3), Florida Statutes (1999), grants the Attorney General authority to "give an official opinion and legal advice in writing on any question of law relating to the official duties of" local government officers and other government officials. Florida courts have made clear that Attorney General opinions are not legally binding. Beverly v. Division of Beverage, 282 So. 2d 657, 660 (Fla. 1st DCA 1973) ("While the official opinions of the Attorney General of the State of Florida are not legally binding upon the courts of this State, they are entitled to great weight in construing the law of this State.") Thus, only the Division's opinion directly affects the Board.

Moreover, it is questionable whether the Attorney General even had the authority to issue an opinion on an election issue, given the specific allocation of this function to the Division of Elections in section 106.23(2). The Attorney General conceded as much in a recent letter, wherein the Attorney General stated:

> After reviewing your correspondence, I regret to inform you that the Attorney General's Office does not have jurisdiction in this matter. I have taken the liberty, however, of forwarding your letter to the Department of State, Division of Elections, which appears to be the appropriate authority to review your concerns.

Exhibit A, (emphasis added).

Indeed, until issuance of the present opinion, the Attorney General had consistently declined to issue opinions on elections law issues in deference to the Division's jurisdiction. See Op. Att'y Gen. Fla. 86-55 (1986) ("it is the policy of this office to refer all questions concerning the Elections Code, . . . to the Division [of Elections] for its response"); Op. Att'y Gen. Fla. 87-17 (1984) ("any question relating to the applicability or possible violation of Ch. 106 or other provisions in the Florida election laws should be submitted to the Division of Elections").

C. Courts Must Defer to the Secretary's Interpretation of Section 102.166(5), Florida Statutes.

The Division is the state agency allocated ultimate jurisdiction over election procedures. § 97.012, Fla. Stat. As such, it is charged with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation

of the election laws." § 97.012(1), Fla. Stat. The Division has the specific power and duty to determine, under section 102.166(5), Florida Statutes, the circumstances under which a manual recount of ballots is authorized. Pursuant to this authority, the Division has issued an opinion based on its reading of the statutory language and its specialized knowledge and understanding of the legislative history and intent.

This Court must accord deference to the Division's construction and application of the statutes within its jurisdiction; its interpretation may not be overturned so long as it is a reasonable construction of the statutes, even if the court would favor a different construction. As the First District Court of Appeal stated in an analogous elections case:

> [I]n construing and applying these statutory provisions, a court is required to give deference and great weight to the agency's construction of the statutes it is charged with administering, and a court is not authorized to overturn the agency's determination unless it is 'contrary to the language of the statute' or 'clearly erroneous.' If an agency's construction is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.

Smith v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994) (citations omitted) (emphasis added). "If an agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives." Pershing Industries, Inc. v. Department of Banking, 591 So. 2d 991, 993 (Fla. 1st DCA 1991). "The reviewing court will defer to any interpretation within the range

of possible interpretation." Natelson v. Department of Insurance, 454 So. 2d 31, 32 (Fla. 1st DCA 1984).

The Board has made absolutely no showing that the Division's exercise of discretion and interpretation of the statute is outside the range of possible interpretation. The Board simply points to the Attorney General's opinion, which construes section 102.166 so as to give unbridled local discretion to canvassing boards to order manual recounts.

By contrast, the Division has interpreted "error in the vote tabulation" to impose specific requirements: the existence of either (i) "a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots," (ii) an "error [resulting] from incorrect election parameters," or (iii) "an error in the vote tabulation and reporting software of the voting system." The statutory language and legislative history support this interpretation. The fact that there may be other permissible interpretations is irrelevant. The Division's interpretation is reasonable and within the permissible range of statutory interpretation, and must therefore be granted deference and upheld.

D. The Division Opinion Correctly Construes Section 102.166(5), Florida Statutes.

The Division of Elections has interpreted section 102.166(5) as follows:

> An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched punchcard ballot is not an error in the vote tabulation. Unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of the sample precincts is caused by incorrect election parameters or software errors, a county canvassing board is not authorized to manually recount ballots for the entire county, nor reform any action specified in Section 102.166(5)(a) and (b), of the Florida Statutes.

This interpretation (i) properly construes the term "vote tabulation" in the context of tabulation machines; (ii) is logical; and (iii) is consistent with the statute as a whole. It is certainly within the permissible range of statutory interptretation and must therefore be upheld.

First, in section 102.166(5), the legislature used the term "vote tabulation" to mean the result derived through the electronic or electromechanical equipment. The Division, having extensive experience with the application of the statute, recognizes the term "tabulation" as a term used within the context of electronic or electromechanical equipment, such as the machine used in Palm Beach County. When the votes are counted by the vote tabulation equipment, the Legislature uses

the terms "tabulate" or "tabulation," and when votes are counted manually, the Legislature uses the term "recount" rather than "retabulate."

Second, the Division's interpretation is logical when read with the statute as a whole. When a sample manual recount indicates a problem with the vote tabulation system, the canvassing board first attempts to correct the error and recount the remaining precincts with the system under subsection (5)(a). If the error cannot be corrected, the board may request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system cannot be corrected or verified to work properly, then as a last resort, the board may manually recount the ballots.

Section 102.166(5) was not enacted to allow canvassing boards to correct voter errors caused by improperly marked or punched ballots. Rather, it was enacted to provide a remedy when a vote tabulation system fails to read properly marked ballots. It was not intended to allow counties to utilize any method of counting votes they may choose after an election has been completed.

Moreover, the Division's reading of the law is supported by the rules of statutory construction. It is black letter law that all parts of a statute should be considered as a whole and not read in isolation from one another. Acosta v. Richter, 671 So.2d 149 (Fla. 1996). The reference to "vote tabulation" must be read in conjunction with various other provisions of the Florida Election Code

wherein the term "tabulation" is used in the context of the equipment itself. See, e.g., §§101.5603(1)(definition of "automatic tabulating equipment); 101.5606(3) ("automatic tabulating equipment will be set to reject all votes" under certain circumstances); 101.5607(1)(b) ("within 24 hours after the completion of any logic and accuracy test conducted pursuant to s.101.561(1), the supervisor of elections shall send by certified mail to the Department of State a copy of the tabulation program which was used in the logic and accuarcy testing); and 101.5612, Florida Statutes ("the supervisor of elections shall have the automatic tabulating equipment tested to ascertain that the equipment will correctly count the votes").

Finally, statutes should be interpreted in a manner that avoids constitutional issues. State Ex. Rel. City of Casselberry v. Mager, 356 So.2d 267 (Fla. 1978) (Statute construed to vest jurisdiction in circuit court partly to avoid argument that vesting jurisdiction in appellate court would implicate constitutional issues.). Interpreting section 102.166, Florida Statutes, to allow individual counties to selectively order manual counting of ballots to correct voter error in one county, within the context of a national election and without adherence to any uniform standards, invites a constitutional due process challenge to the statute.

E. The Division Opinion is Supported by the Legislative History of Section 102.166, Florida Statutes.

Under section 102.166(4)(a)-(c), Florida Statutes, a county canvassing board may, pursuant to a timely written request by a candidate or political party with candidates on a ballot, conduct a manual recount as prescribed by § 102.66(4)(d) for the purpose of determining the existence vel non of "an error in the vote tabulation which could affect the outcome of the election." § 102.66(5), Fla. Stat. (emphasis added).[7] Section 102.66(5) does not authorize, as the Attorney General contends, a manual recount of all of the votes cast in a given county in a statewide election because some marksense or punchcard ballots were not properly marked or punched pursuant to instructions provided to all voters. Rather, section 102.66(5) specifies the corrective action to be taken in the event that a sample manual recount conducted under section 102.166(4)(d) indicates that an electronic vote tabulation system has failed to operate as it was designed to do. The statutory provisions in question were enacted to provide added assurance that electronic vote tabulation systems work as intended. They were not intended to hamper and bog down an already cumbersome electoral process by sanctioning county-wide manual recounts where an electronic vote tabulation system has functioned properly.

---

[7] Under § 102.66(4)(d), Fla. Stat., such a sample manual recount "must include at least three precincts and at least 1 percent of the total votes cast for such candidate . . . . i.e., the candidate who requested the manual recount]."

Crucially, the provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15 Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act noted:

> Recent media articles have focused attention on security of electronic voting systems. With over half of the votes in the nation being counted electronically, the accuracy of electronic voting systems is paramount. The questions most often asked are "Do computerized systems count accurately? Are they vulnerable to fraud?"
>
> * * *
>
> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported on in the media, but in testimony before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out

> that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic - and - accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process, would enhance public confidence in our voting system.

Exhibit E (emphasis added).

As this legislative history indicates, the statute was intended to provide an alternate recounting procedure to be used in situations in which mechanical or computer problems caused tabulation equipment to fail to function as intended. The legislature never intended for manual recounts to be used to evaluate ambiguous ballots that voters failed to properly execute. Consistent with the legislative intent, the Division Opinion expressly leaves open the possibility of a full manual recount where there has been a significant problem with the tabulation system, but precludes a recount to assign votes to candidates based on improperly executed ballots that are cannot be read by properly operating tabulation equipment.

Thus, contrary to the view of the Attorney General, the Legislature enacted section 120.166(5), Florida Statutes to address a failure of an electronic system for vote tabulation to operate as designed and intended. The use of the terms "vote tabulation system" and "automatic tabulating equipment" in section 120.66 do not

indicate any different intent by the Legislature. Rather, when section 120.66 is read in its entirety -- and especially in the context of its legislative history -- the correctness of the Division Opinion is manifest.

F. The Attorney General's Interpretation of sections 120.155(7) and (8) Is Erroneous.

The interpretation in the Attorney General Opinion is erroneous and does not supercede that of the Division. As a preliminary matter, it must be noted that only the Division has jurisdiction to administratively apply and interpret Florida's elections laws. It is the only state agency with subject matter jurisdiction over election procedures and specialized administrative expertise in the area. Therefore, only the Division's interpretation is entitled to the deference afforded to agency interpretive decisions. Its decision, unlike that of the Attorney General, must be upheld if reasonable.

Moreover, the Attorney General's interpretation of the meaning and purpose of sections 120.166(7) and (8) is demonstrably erroneous. Subsection (7) only provides for the procedures to be followed for the conduct of a sample manual recount in response to a request filed by a candidate or party under § 102.66(4)(a) and for the conduct of a complete manual recount in the event that the failure of an electronic vote tabulation system to operate properly cannot be rectified either by correcting an identified error and recounting the remaining precincts with the

repaired system or by verification of tabulation software by the Department of State. Nothing in subsection (7) opens the door to a manual recount of an entire county to search for any imagined possible error in a vote tabulation result.

The Attorney General argues in his opinion that manual examination of all ballots in the county must occur under section 102.166(7) to determine whether a marksense has been marked or punchcard punched because "[t]he statutes do not specify how a punchcard must be punched." However, by statute, such instructions must be given to the voters. § 101.5611, Fla. Stat. And, as shown by Exhibit B clear instructions were provided to Palm Beach County voters.

Sections 101.5614(5) and (6), Florida Statutes, also cited by the Attorney General in support of the proposition that § 102.166(7) provides an open-ended authorization for manual recounts, provide no substance for his argument. Section 101.5614(5) merely provides for the duplication of a ballot card that has been so mutilated that it cannot be read by a vote tabulation machine. The clear purpose of that subsection is to facilitate machine vote tabulation. Section 101.5614(6) simply authorizes disqualification of a ballot for marking more names than persons to be elected or marking in a manner that makes it impossible to determine a voter's intent -- nothing in this latter subsection prohibits such a determination from being made by a machine vote tabulator, and there is no requirement for a manual determination of all such ballot disqualifications.

Florida law authorizes the use of electronic voting systems. A voter must comply with the instructions provided concerning how a ballot must be completed so that it will be read and counted by an electronic system. If a voter fails to comply with these instructions, and his or her vote cannot be counted as valid by the electronic system as a consequence, no violation of Florida law has occurred. Sections 102.166(4) and (5) were not enacted to authorize county-wide manual recounts -- with all of delay, added expense, and potential for fraud and abuse -- for the purpose of locating any possible instance that a voter might have somehow marked a ballot to indicate intent to cast a vote that could not be discerned by a properly operating electronic vote tabulation system. If that were the case, electronic systems would really have no purpose. The statutory provisions at issue were written to promote and facilitate the use of electronic systems, and not to frustrate their use and bog down the election process with county-wide manual recounts in the absence of evidence of the failure of an electronic system to operate as it was designed to do.

IV. CONCLUSION

As stated, Florida law does not allow a county canvassing board to order a countywide manual recount based upon allegations, standing alone, that certain

voters failed to follow instructions for casting effective ballots. Therefore, the Respondent asks this Court to affirm that the Division Opinion binds the Board and thus the Board is unauthorized to order a countywide manual recount in Palm Beach County unless it has found that the county's vote tabulation system failed to count properly marked marksense or properly punched punchcard ballots.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery, mail or fax on this 16th day of November, 2000 to the following:

Frank B. Gummey, III
Assistant County Attorney
123 West Indiana Avenue
DeLand, Florida 327204613

Daniel D. Eckert
Volusia County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613

Tura Schnebly
Assistant County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613

Mark Herron, P.A.
301 South Bronough Street
Suite 200
Tallahassee, Florida 32301

Michael D. Crotty
Crotty & Bartlett, P.A.
1800 W. International Speedway Blvd.
Building 2, Suite 201
Daytona Beach, Florida 32114

Douglas A. Daniels
523 North Halifax Avenue
Daytona Beach, Florida 32118

Dexter Douglass
211 East Call Street
Tallahassee, FL 32302-1674

Barry Richard
Greenburg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32302-1838

Bill Bryant
Katz Kutter Et Al
106 East College Avenue, Floor 12
Tallahassee, FL 32301

Harold McLean
Florida Dept. of Agriculture & Consumer Serv.
515 Mayo Building
407 South Calhoun Street
Tallahassee, FL 32399-0800

Karen Gievers
524 East College Avenue, Suite 2
Tallahassee, FL 32301

John D.C. Newton, II
215 South Monroe Street
Suite 705
Tallahassee, FL 32301

Ronald G. Meyer
Meyer and Brooks, PA

400 South Monroe Street
Tallahassee, FL 32302

Deborah Kearney
Florida Department of State
PL02
Tallahassee, FL 32399

Mitchell Berger
Berger Davis & Singerman
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301

Harold Mardenborough
McFarlain Wiley Et Al
215 South Monroe Street, Suite 600
Tallahassee, FL 32301

17th Judicial Circuit of Florida
In and for Broward County
Chief Judge Dale Ross
201 SE 6th Street
Ft. Lauderdale, Florida 33301

15th Judicial Circuit of Florida
In and for Palm Beach County
Palm Beach County CourthouseChief
Judge Walter N. Colbath, Jr.
205 North Dixie Highway
West Palm Beach, Florida 33401

11th Judicial Circuit of Florida
In and for Dade County

Chief Judge Joseph P. Farina
Dade County Courthouse
73 West Flagler Street, Room 511
Miami, Florida 33130

Dade County Canvassing Board
Miami, Florida

Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

Broward County Canvassing Board
Fort Lauderdale, FL

Bruce Rogow
Beverly A. Pohl
Bruce Rogow, P.A.
Broward Financial Centre
500 East Broward Blvd., Suite 1930
Fort Lauderdale, Florida 33394

Edward A. Dion
County Attorney for Broward County
Government Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301

Samuel S. Goren
Michael D. Cirullo
Josias, Goren, Cherof Et Al
3099 East Commercial Blvd., Suite 200
Fort Lauderdale, Florida 33308

David Boies
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite 110
Armonk, New York 10504

Lawrence A. Gottfried
11211 S. Military Trail, Apt. 1224
Boynton Beach, Florida 33436

Denise D. Dytrych
Palm Beach County Attorney
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401

Robert A. Butterworth
Attorney General
George Waas
Assistant Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050

Cecile Dykas, Assistant Attorney General
Fax 954-712-4707

Kendall Coffey, Attorney for Democrataic Party
Fax 305-285-0257

William Scherer, Attorney for Republican Party
Fax 954-463-9244

Gary Farmer, Esq.
Fax 954-771-9880

Henry Handler, Esq.
Fax 561-997-5280

Marcos Jimenez, Esq.
Fax 305-358-5744

Benedict Kuehne for Democratic Party
Fax 305-789-5987

Patrick Lawlor, Esq.
Fax 954-481-3631

Mark Cullen, Esq.
Fax 954-989-9660

Andrew Meyers, Esq.
Fax 954-357-7641

Jonathan Sjostrom