IN THE SUPREME COURT OF FLORIDA
SC Case No. 00-2346

PALM BEACH COUNTY
CANVASSING BOARD, et. al.,

Petitioners/Appellants,

vs.

HONORABLE KATHERINE
HARRIS, et. al.

Respondents/Defendants.

ANSWER BRIEF OF RESPONDENT/APPELLANT MATT BUTLER

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Consolidated with Case Nos. SC00-2348 and SC00-2349

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CERTIFICATE OF FONT SIZE AND STYLE

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

INTRODUCTION

Appellee Butler intervened in this action on Monday, Nov. 14, 2000, shortly after the action commenced. He joined as a result of his interest as a voter in Collier, County, State of Florida and feels strongly that his and others votes' would be substantially discounted and diluted if the lower court's decision is reversed.

Butler takes a narrow position in this Answer Brief as described below in the Questions Presented. Butler feels the that Secretary of State Harris is vested with the authority to interpret Section 102.166, Florida Statutes, and feels she can best defend her position.

Butler also points out that he believes that the manual recount provisions of Section 102.166, Florida Statutes, are unconstitutional because they deprive him and similarly situated voters in Florida of equal protection of the laws. This issue was raised before the trial court, but not in the form of a request that the statute be struck down. However, this issue was raised squarely before Judge Clark in the Leon County Circuit Court on Friday, Nov. 17, 2000. She entered a declaratory judgment upholding the constitutionality of the statute. Butler appealed that Order Friday afternoon, and

has filed a Suggestion that the matter be certified as one of great public importance so that this Court can address the constitutionality issue along with these other issues. However, as that case is not currently before the Court, Butler simply points out that the arguments herein are made knowing that the constitutionality of the statute has not been addressed. Thus, this brief will assume for the purpose of argument that there is a right to a manual recount under the facts of this case. It will conclude however, that this statutory right does not affect the duty to timely certify returns and does not preclude Secretary Harris from ignoring late filed returns.

STATEMENT OF CASE AND FACTS

Appellee Butler feels that the case posture and essential facts have been sufficiently briefed by the Initial Briefs.

QUESTIONS PRESENTED (RESTATED)

1. Whether the trial court properly concluded that Section 102.112, Florida Statutes, vests the Secretary of State with the discretion to ignore late filed election returns.
2. Whether Secretary of State Harris abused that discretion in refusing to accept late filed returns when the sole reason for the intended late filing was to perform manual recounts under Section 102.166, Florida Statutes.

SUMMARY OF ARGUMENT

Chapter 102, Florida Statutes creates a clear post-election scheme which both requires counties to provide final official returns (with the exception of overseas absentee ballots for which Florida is required by federal law to provide more time) within seven days of the election and provides the Secretary of State the discretion to ignore any later filed returns. The statute does not have to be "interpreted" in a manner which ignores this discretion or provides for counties to turn in late returns. To the extent the statute provides remedies which cannot be completed within the seven days, the legislature has provided a post-certification remedy. The entire statute is capable of being read together without ignoring any part of it, and therefore must be read that way. It does not require or permit the Secretary of State to simply wait until counties are finished counting and recounting before certifying the final election results for the state.

Secretary Harris has properly exercised her discretion in these cases. At worst, whether to allow late returns is an issue on which reasonable people can and do have differing opinions. Neither the counties nor this Court can substitute their judgment for that of Secretary Harris. At best, Secretary Harris exercised her discretion in the only reasonable manner available. She has simply enforced a statutory deadline which is reasonable and even handed. Further, given the political gamesmanship surrounding selection of these counties, it would have been inherently unfair to allow those few

counties special privileges which could have skewed the overall, statewide results of the election. These counties are no different than the other counties in Florida which followed the statute. Neither should they be treated differently.

ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND THAT SECTION 102.112, FLORIDA STATUTES GIVES THE SECRETARY OF STATE DISCRETION WHETHER TO ACCEPT LATE CERTIFICATIONS FROM COUNTY CANVASSING BOARDS.

The first question facing Judge Lewis was whether the county canvassing boards had the legal right to provide election certifications after 5 p.m. seven days after the election. This issue is governed by Section 102.112, Florida Statutes, which provides that they "shall" provide their certifications by that time. It also says that any late returns "may be ignored and the results on file may be certified by the department." Judge Lewis concluded that this language means exactly what it says: that the canvassing boards were obligated to comply with the 5 p.m. deadline. He also ruled that Secretary Harris had discretion under the statute to accept late certifications, but the decision whether to accept them was hers.

Judge Lewis was correct in both of these findings. Where the language of a statute is clear and unambiguous, there is no need to resort to rules of statutory construction. McLaughlin v. State, 721 So. 2d 1170 (Fla. 1998); see also State v. Jett,

626 So. 2d 691 (Fla. 1993)(this rule applies even when it may appear wise to alter the plain language). The plain meaning of a statute is the first consideration by any court in a statutory construction analysis. State v. Dugan, 685 So.2d 1210 (Fla. 1996).

Florida law is clear that the use of the term "shall" in a statute is intended to indicate a mandatory requirement. Drury v. Harding, 461 So. 2d 104 (Fla. 1984). Conversely, the use of the term "may" is permissive. This court must presume that the legislature meant to use the words it chose unless there is a clear reason to indicate otherwise. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911 (Fla. 1995). Therefore, county canvassing boards were legally required to file their certified returns last Tuesday, not only because Secretary Harris said so, but because Florida law demanded it. Likewise, Florida law gives Secretary Harris discretion as to whether or not to accept late returns of any sort, be they initial returns filed late or proposed amended returns.[1]

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[1] Petitioners point out that Section 102.112, Florida Statutes, does not "impose[] any deadline for the submission of corrected, amended or supplemental returns." However, they fail to point to any statutory authority to even file any such materials. There is no such authority. In fact, Section 102.111 says that the county is to certify the results "as soon as the official results are compiled," but that this may not be later than the seventh day after the election. How could the "official" returns not be the final ones to be filed without statutory authority? They cannot. Only overseas absentee ballots, which Florida must count pursuant to federal law, are automatically permitted after seen days. Appellee recognizes that the "official return of the election" includes the added return of write in, absentee, and manually

Petitioners argue that there is an inherent conflict between the seven day deadline provided in Section 102.112 and the protest and manual recount provisions in Section 102.166. They claim this "conflict" must be resolved by concluding that the true intent of the legislature was that the seven day deadline was not really a deadline, and that the term "may" with respect to the Secretary of State's ability to ignore late filed returns really means "may not." Petitioners do not merely suggest that this Court *interpret* these provisions, they ask that you *rewrite* them.

The allegedly "conflicting" portions of Chapter 102, Florida Statutes can be easily harmonized by looking at the statute as a whole. Indeed, this is exactly what is required, and even Petitioners agree, citing Acosta v. Richter, 671 So.2d 149, 153-54 (Fla. 1996), for exactly this proposition. This requires an analysis of more than just the few parts of the statute addressed in Petitioner's claim. Compare Reyf v. Reyf, 620 So. 2d 218 (Fla. 3d DCA 1993).

The legislature created a workable elections process with two separate potential remedial actions for disgruntled voters or candidates. The first is found in Section 102.166 - the statute relied on by Petitioners. This entitles people to "protest" the

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counted votes. §101.5614(8), Fla. Stat. (1999). This does not mean that such materials can be provided after the statutory deadline. It merely means that there will be votes beyond the machine tally. Those must also fall within the deadline.

election results, and provides a few remedies. One of the arguably available remedies (though only at the request of a candidate or political party) is a manual recount. The remedies in Section 102.166 are available before certification of the election results by the Secretary of State, but by their very nature may exceed the time provided for filing returns seven days after the election.[2]

The next action provided for by the legislature is found in Section 102.168, Florida Statutes. This is not available until after certification. It provides that someone who feels the election results are improper may bring an action in circuit court[3] to present evidence to support their claim. If the court agrees, and it appears the outcome of the election did not express the will of the people, the court is vested with broad authority to fashion a remedy. § 102.168(8), Fla. Stat. (1999).

The major flaw in Petitioners' claim that Chapter 102 cannot be harmonized without ignoring the plain mandatory language with respect to the filing deadline, thereby creating a nonexistent right to file amended returns by effectively changing the

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[2] For example, some requests under Section 102.166 could be made several days after the election, and it could take several more to get approval from a canvassing board. This may leave insufficient time to complete any inspections, partial manual recounts, or full recounts.

[3] The venue for such an action is in the disputed county, unless the election results would affect more than one county. In that case, venue is in Leon County. § 102.1685, Fla. Stat. (1999).

word "may" to "may not" vis a´ vis the Secretary of State's obligation as to late returns, is that they look *only* to harmonize Section 102.112 with Section 102.166. They leave Section 102.168 out of the equation. A simple review of the three sections in context illustrates that they are perfectly compatible.

The legislature determined that it wanted returns from the counties within 7 days of the election. See § 102.12, Fla. Stat. (1999). This statute must be interpreted in such a manner as to not render this language meaningless if possible. Forsythe v. Longboat Key Beach Erosion Control Distr., 604 So. 2d 452 (Fla. 1992). It also provided the remedies in Section 102.166, including the manual recount option. Assuming, as has been argued, that there may be times when a complete manual recount or other option available under Section 102.166 cannot be accomplished within seven days, does that mean there is an inherent conflict in the statute? The answer is no.

There is no indication that the legislature assumed that all options under the protest statute would be capable of completion before certification. In fact, as argued by Petitioners and discussed by Judge Lewis below, given the various deadlines, it is actually likely in some cases that these would not be complete before final certification. The legislature had to know this was possible. Nevertheless, it still provided a mandatory deadline for certifications. Had it meant to excuse counties from this

deadline when they were in the middle of a Section 102.166 process, it would have simply said so. Likewise, had it intended to allow "amended" returns beyond the seven day deadline, it would have said so. The legislature's omission of these exceptions indicates it did not intend to provide for them.

It is clear that the legislature placed a great deal of importance on having the certification numbers provided to the Secretary of State in seven days, and to allow for the statewide election results to be completed quickly. That did not make the protest process irrelevant, however, as would be suggested by Petitioners. There still exists a post certification remedy: an election contest under Section 102.168, Florida Statutes. When these three are viewed together, a pattern appears. An election takes place; the counties count; "protests" and their responses may occur in the times defined by statute; all certifications must be filed within seven days, regardless of the status of any "protest" activity under Section 102.166; the election is certified by the Secretary of State; any information learned through the protest period, whether before or after certification, may be used to contest the election under Section 102.168, Florida Statutes, if a voter or candidate so desires. In this manner, none of the plain language of the statutory scheme is ignored.

Of course, Petitioners do not urge this construction because they want to prevent certification by the Secretary of State. They want to avoid having to contest

the election under Section 102.168. However, how to require voters and candidates to proceed is not their decision to make, nor is it a decision for this Court. All that matters is that the legislature indeed created a scheme that allows for counties to complete their returns in seven days. That deadline was within the prerogative of the legislature to make. The legislature also determined that protests could occur during that time, and that completed ones may be included in the "official results." Again, this was within the legislature's prerogative. Finally, it allowed for any information gleaned after the county had provided its "official results" to be part of an election contest. Again, this was within its prerogative. The Petitioners may not like the legislative scheme because they feel it makes it difficult for them to prove that the outcome of the election would be affected, but that is not a reason to ignore a simple interpretation that allows all of the relevant parts of the statute to be given full effect, without sacrificing any of its terms in order to create a reading favorable to a party's preferred interpretation. See Forsythe, 604 So. 2d at 452.

Given this simple interpretation, there is no reason to ignore any part of the statute, as suggested by Petitioners. The term "may" means "may," and provides Secretary of State Harris with the discretion to accept or ignore any late filed returns. Petitioners' suggestion that this Court rewrite Section 102.112 must be rejected.

2. THE SECRETARY OF STATE'S DECISION TO APPLY THE CLEAR STATUTORY DEADLINE WAS WITHIN HER DISCRETION AND WAS THE MOST FAIR DECISION FOR THE ENTIRE FLORIDA ELECTORATE.

From the close of the polls on Nov. 7, 2000, the Florida vote count has been manipulated by those who saw how close the vote was in our state and how critical our state's electoral college votes were to the presidency. The Florida Democratic Executive Committee sought to take advantage of Florida's manual recount provisions by asking only a select few counties to perform recounts.

The record in this case does not provide any basis for these requests other than that there may have been "under reporting" of votes by the machines which tabulate the vote. There is no claim this was the result of machine error, fraud, or any similar problem. Petitioner merely suggests that a recount may result in finding some votes that were not counted because they were not properly used, and therefore the machines could not count them properly.[4]

The record in this case is completely devoid of any evidence that Palm Beach County or the other counties requested to perform recounts are any different than other Florida counties in this regard.

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[4] The problem has widely been described in the media by showing how some votes still have "chads" on them.

Palm Beach County agreed to perform a manual recount as requested by Vice President Gore. However, it was also governed by the mandatory deadline set forth in Section 102.112, Florida Statutes. Therefore, it faced the substantial likelihood that it would not complete a manual recount before the results had to certified.

The county canvassing board now claims the only fair thing is for Secretary Harris to allow their manual recount, despite the mandatory language of the statutory deadline. This must be their position because if Secretary Harris had other reasonable choices available, including refusing to accept late returns, they could not now complain she abused her discretion, which means "no reasonable [person] would take the view adopted." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

If anything is clear from the last few weeks, it is that reasonable people take opposite views on whether Secretary Harris should have ignored the statutory deadline simply to let a few counties take never-ending steps to find a few more votes for the Vice President. Even the news networks, with their need to find an inexhaustive supply of pundits to feed their "breaking news," can find people with different opinions on this topic every hour. Further, Judge Lewis agreed after hearing argument of everyone involved that the option chosen by Secretary Harris was one within her discretion. No one knows if Judge Lewis agreed with how Secretary Harris exercised

her discretion, but he acknowledged that his personal agreement or disagreement was not the standard for the trial court to apply. Nor is it the standard for this Court.

Petitioners/Appellants urge that accepting late filed and amended certified return reflecting manual recounts is the only fair way to divine the "will of the voter."[5] They completely ignore that there is actually a more fair and logical reason to refuse to waive the statutory deadline for accepting return in this case.

The nature of the use of Section 102.166(4), Florida Statutes in this controversy politicizes the entire idea of an election protest[6] under Florida law. The Florida Democratic Executive Committee chose several counties it felt could provide a net gain to Vice President Gore. As described in its brief, "Machine reading of punch card ballots will predictably misread a certain percentage of ballots." Thus, presumably if there were a few hundred votes cast but not counted by the machine,

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[5] *Compare* "This election is a matter that must be decided by the will of the people as expressed by the rule of law." Vice President Albert Gore, as quoted in the Tallahassee Democrat, P. 1A (November 18, 2000). Interestingly, however, they never bothered to ask for a recount in any other county, or for a state wide recount, within the deadlines provided in the statute.

[6] An election protest is the available remedy before an election has been certified and is handled through the county canvassing boards. § 102.166, Fla. Stat. (1999). With the noted exception of the manual recount provision, its limited remedies are available to any candidate, party or elector. Conversely, an election contest is the post-certification remedy available to any candidate, political party or elector, and is handled through the circuit court in Leon County for elections that affect more than one county. §102.168, Fla. Stat. (1999).

and the vice president received a pro rata share comparable to the rest of the votes, then he would gain precious ground.

Of course, the FDEC did not ask for recounts in other counties that used punch cards. The political intent behind this choice is unmistakable. The request for manual recounts was not about the "will of the people," it was about the will of the people who favored Vice President Gore. It was not about getting a more full and accurate vote count in Florida, it was about getting more votes for Vice President Gore in a few select counties. This political maneuvering is reprehensible.

It is against this backdrop, and the existing statutory framework defined above, that Secretary Harris had to exercise her discretion. Butler suggests Secretary Harris decision was not only well within the parameters of her legislatively authorized discretion, but that it was the only decision she could make which was fair for all the voters.

Had Secretary Harris permitted late returns (and by this it is meant days or weeks late, not a few minutes; by this it is meant results that were not even generated until after the deadline had passed, not timely counts that were just provided a little late) she would have allowed these counties to ignore the law and gain a benefit clearly not afforded them by the legislature. She also would not only have been ignoring a statutorily defined deadline for the express purpose of allowing those counties to

provide a skewed analysis of how their "changes" would affect the whole state, but also possibly to overrule the will of the rest of the state by only counting their changes. These counties were no different than other counties using similar machines. As Petitioners write in their Brief, machines will predictably misread some ballots. That is not a problem unique to those counties. Nevertheless, they wanted the statute ignored so they could "fix" any deficiencies while leaving the rest of Florida's counties without that benefit. Under those circumstances, Secretary Harris' decision was perfectly proper.

Again, it must be kept in mind that if Petitioner's actually believe that there is a problem state wide which would show the will of the people is not reflected in the certification, they are entitled to seek redress under Section 102.168. In fact, that remedy would be much fairer to the whole state because in trying to establish that some changes in voting numbers in a few counties establishes that the will of the people is not reflected, they would have to answer difficult questions regarding whether those geographically limited changes would be significant if the entire state went through the same process. This is a challenge they do not want to face because they probably cannot meet it. However, that result is infinitely more fair than allowing a few selected counties to ignore the law, for no reason, in an attempt to change the statewide election results.

Secretary of State Harris clearly did not abuse her discretion, and, in fact, made the best decision for the residents of the State of Florida.

CONCLUSION

For the reasons stated herein, the Order entered by Judge Lewis on Nov. 17, 2000 should be affirmed, and this Court's Stay Order of that same date should be withdrawn.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been sent by U.S. Mail this 19th day of November, 2000, to the attached service list, and/or hand delivery to those marked as such on the service list.

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