americanpresidency.org

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

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

It is so ordered.

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

NO MOTION FOR REHEARING WILL BE ALLOWED.

WELLS, C.J., dissenting.

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

I want to make it clear at the outset of my separate opinion that I do not question the good faith or honorable intentions of my colleagues in the majority. However, I could not more strongly disagree with their decision to reverse the trial court and prolong this judicial process. I also believe that the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution.

My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion. The majority returns the case to the circuit court for this partial recount of under-votes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates.

Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis. I have to conclude that there

is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this Court as an institution.

On the basis of my analysis of Florida law as it existed on November 7, 2000, I conclude that the trial court's decision can and should be affirmed. Under our law, of course, a decision of a trial court reaching a correct result will be affirmed if it is supportable under any theory, even if an appellate court disagrees with the trial court's reasoning. Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 644-645 (Fla. 1999). I conclude that there are more than enough theories to support this trial court's decision.

There are two fundamental and historical principles of Florida law that this Court has recognized which are relevant here. First, at common law, there was no right to contest an election; thus, any right to contest an election must be construed to grant only those rights that are explicitly set forth by the Legislature. See McPherson v. Flynn, 397 So. 2d 665, 668 (Fla. 1981). In Flynn, we held that, "[a]t common law, except for limited application of quo warranto, there was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power." Id. at 667.

Second, this Court gives deference to decisions made by executive officials charged with implementing Florida's election laws. See Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840 (Fla. 1993). In Krivanek, we said:

> We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. Boardman v. Esteva, 323 So.2d 259 (Fla.1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed.2d 791 (1976). As noted in Boardman:
>
> > The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties.... [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Id. at 844-45. These two concepts are the foundation of my analysis of the present case.

At the outset, I note that, after an evidentiary hearing, the trial court expressly found no dishonesty, gross negligence, improper influence, coercion, or

fraud in the balloting and counting processes based upon the evidence presented. I conclude this finding should curtail this Court's involvement in this election through this case and is a substantial basis for affirming the trial court. Historically, this Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections. This to me is the import of this Court's decision in Boardman v. Esteva, 323 So.2d 259 (Fla.1975). We lowered that threshold somewhat in Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720 (Fla. 1998), but we continued to require a substantial noncompliance with election laws. That must be the very lowest threshold for a court's involvement.

Otherwise, we run a great risk that every election will result in judicial testing. Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters–not by judges. We must have the self-discipline not to become embroiled in political contests whenever a judicial majority subjectively concludes to do so because the majority perceives it is "the right thing to do." Elections involve the other branches of government. A lack of self-discipline in being involved in elections, especially by a court of last resort, always has the potential of leading to a crisis

with the other branches of government and raises serious separation-of-powers concerns.

I find that the trial judge correctly concluded that plaintiffs were not entitled to a manual recount. Petitioners filed this current election contest after protests in Palm Beach and Miami-Dade Counties. Section 102.168, Florida Statutes, in its present form is a new statute adopted by the Legislature in 1999. I conclude that the present statutory scheme contemplates that protests of returns[24] and requests for manual recounts[25] are first to be presented to the county canvassing boards. See § 102.166, Fla. Stat. This naturally follows from the fact that, even with the adoption of the 1999 amendments to section 102.168, the only procedures for manual recounts are in the protest statute. Once a protest has been filed, a county canvassing board then has the discretion, in accordance with the procedures set forth in section 102.166(4), Florida Statutes, whether to order a sample limited manual recount. See § 102.166(4)(c), Fla. Stat. (2000). Once the sample recount is complete and the county canvassing board concludes that there was an error in the vote tabulation that could affect the outcome of the election, section

---

[24]See § 102.166(1), Fla. Stat. (2000).

[25]See § 102.166(4)(b), Fla. Stat. (2000).

102.166(5) instructs what must then be done. One option is to manually recount all ballots. See § 102.166(5)(c), Fla. Stat. (2000).[26]

I believe that the contest and protest statutes must logically be read together. The contest statute has significant references to the protest statute. If there is a protest, a party authorized by the statute to file a contest must file a complaint "within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1)." §102.168(2), Fla. Stat. (2000). In the election contest, the canvassing board is the proper party defendant under section 102.168(4). Further, under section 102.168(8), the circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that the allegations upon which the complaint is brought are investigated, examined, or checked.

---

[26]Also problematic with the majority's analysis is that the majority only requires that the "under-votes" are to be counted. How about the "over-votes?" Section 101.5614(6) provides that a ballot should not be counted "[i]f an elector marks more names than there are persons to be elected to an office," meaning the voter voted for more than one person for president. The underlying premise of the majority's rationale is that in such a close race a manual review of ballots rejected by the machines is necessary to ensure that all legal votes cast are counted. The majority, however, ignores the over-votes. Could it be said, without reviewing the over-votes, that the machine did not err in not counting them?

It seems patently erroneous to me to assume that the vote-counting machines can err when reading under-votes but not err when reading over-votes. Can the majority say, without having the over-votes looked at, that there are no legal votes among the over-votes?

I find correct the analysis undertaken in Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992), a case recently cited by this Court in Palm Beach County Canvassing Board v. Harris, 25 Fla. L. Weekly S1062 (Fla. Nov. 21, 2000). In Hogan, the Fourth District Court of Appeal reversed the trial court's order granting a manual recount, in contravention of the county canvassing board's decision noting that:

> Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.

Id. at 510. I do not believe there is any sound reason to conclude that the Legislature's adoption of revised section 102.168 in 1999 intended to change this and provide for a duplicative recount by an individual circuit judge.

I also agree with the trial judge's conclusion that in a statewide election the only way a court can order a manual recount of ballots that were allegedly not counted because of some irregularity or inaccuracy in the balloting or counting process is to order that the votes in all counties in which those processes were used be recounted. I do not find any legal basis for the majority of this Court to simply cast aside the determination by the trial judge made on the proof presented at a two-day evidentiary hearing that the evidence did not support a statewide

recount. To the contrary, I find the majority's decision in that regard quite extraordinary.

Section 102.168(3), Florida Statues (2000), states in pertinent part:

> The grounds for contesting an election under this section are:
>
> . . . .
>
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(Emphasis added.) In other words, to establish a cause of action, plaintiff must allege an irregularity that places in doubt the result of the election. First, to "contest" simply means to challenge. See Webster's Dictionary 250 (10th ed. 1994). Second, section 102.168(5), provides:

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

(Emphasis added.) Upon my reading of the statute, I conclude that the language "grounds of contest" unambiguously means: a basis upon which a plaintiff can establish a cause of action. This standard is simply the threshold that must be met to bring forth the contest action. Thus, this standard is not the standard that the judge must use in deciding whether a plaintiff who brings the contest has successfully met his or her burden to order a recount or set aside election results.

Although it is unclear from case law what standard must be satisfied in order to grant appropriate relief, it undoubtedly cannot be a low standard. Recently, in Beckstrom, this Court declined to invalidate an election despite a finding that the canvassing board was grossly negligent and in substantial noncompliance with the absentee voting statutes. See Beckstrom. Thus, merely stating the cause of action under the contest statute does not entitle a party to a recount or require the court to set aside an election. More must be required. This is especially true here, where, as in Beckstrom, the trial judge found no dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes. Thus, a plaintiff's burden in establishing grounds on which a circuit judge could order relief of any kind was simply not met. It is illogical to interpret section 102.168(3)(c) to set such a low standard where a plaintiff merely has to allege a cause of action to successfully carry the contest.[27]

Furthermore, even conceding that the trial judge at the outset applied an erroneous "probability of doubt" standard in deciding that plaintiffs failed to meet their burden of establishing a cause of action, the trial judge faced a conundrum

[27]In addition, under a protest the threshold that must be met to order a recount must be lower than that under a contest, which action can only be brought after certification of the returns. Therefore, the threshold to successfully carry a contest must be higher than that of a mere protest.

that must be adequately explained. Plaintiffs asked the trial judge to grant the very remedy–a recount of the under-votes–he prays for without first establishing that remedy was warranted. Before any relief is granted, a plaintiff must allege that enough legal votes were rejected to place in doubt the results of the election. However, in order for the plaintiffs to meet this burden, the under-vote ballots must be preliminarily manually recounted. Following this logic to its conclusion would require a circuit court to order partial manual recounts upon the mere filing of a contest. This proposition plainly has no basis in law.

As I have stated, I conclude in the case at bar that sections 102.166 and 106.168 must be read in pari materia. My analysis in this regard is bolstered in situations, as here, where there was an initial protest filed in a county pursuant to section 102.166 and a subsequent contest of that same county's return pursuant to section 102.168. It appears logical to me that a circuit judge in a section 102.168 contest should review a county canvassing board's determinations in a section 102.166 protest under an abuse-of-discretion standard. I see no other reason why the county canvassing board would be a party defendant if the circuit court is not intended to evaluate the canvassing board's decisions with respect to manual recount decisions made in a section 102.166 protest. Finally, it is plain to me that it is only in section 102.166 that there are any procedures for manual recounts

which address the logistics of a recount, including who is to conduct the count, that it is to take place in public, and what is to be recounted.[28]

The majority quotes section 101.5614(5) for the proposition of settling how a county canvassing board should count a vote. The majority states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." § 101.5614(5), Fla. Stat. (2000). Section 101.5614(5), however, is a statute that authorizes the creation of a duplicate ballot where a "ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." There is no basis in this record that suggests that the approximately 9000 ballots from Miami-Dade County were damaged or defective.

Laying aside this problem and assuming the majority is correct that section 101.5614(5) correctly annunciates the standard by which a county canvassing board should judge a questionable ballot, section 101.5614(5) utterly fails to provide any meaningful standard. There is no doubt that every vote should be counted where there is a "clear indication of the intent of the voter." The problem

---

[28]I am persuaded that even with these procedures manual recounts by the canvassing board are constitutionally suspect. See Touchston v. McDermott, No. 00-15985 (U.S. 11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting). This would be compounded by giving that power to an individual circuit judge and providing him or her with no standards.

is how a county canvassing board translates that directive to these punch cards. Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.[29]

Based upon this analysis and adhering to the interpretation of the 1992 Hogan case, I conclude the circuit court properly looked at what the county canvassing boards have done and found that they did not abuse their discretion. Regarding Miami-Dade County, I find that the trial judge properly concluded that the Miami-Dade Canvassing Board did not abuse its discretion in deciding to discontinue the manual recount begun on November 19, 2000. Evidence presented at trial indicated that the Miami-Dade Board made three different decisions in respect to manual recounts. The first decision was not to count, the second was to count, and the third was not to count. The third decision was based upon the determination by the Miami-Dade Board that it could not make the

[29]See n. 5.

November 26, 2000, deadline set by this Court in Harris and that it did not want to jeopardize disenfranchising a segment of its voters. The law does not require futile acts. See Haimovitz v. Robb, 130 Fla. 844; 178 So. 827 (1937). Section 102.166(5)(c) requires that, if there is a manual recount, all of the ballots have to be recounted. I cannot find that the Miami-Dade Board's decision that all the ballots could not be manually recounted between November 22 and November 26, 2000, to be anything but a decision based upon reality. Moreover, not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount. Thus, I agree with the trial court that the Miami-Dade Board did not abuse its discretion in discontinuing the manual recount.

In respect to the Palm Beach County Canvassing Board, I likewise find that the trial judge did not err in finding that the Palm Beach Board was within its discretion in rejecting the approximately 3300 votes in which it could not discern voter intent. As set forth in Boardman, the county canvassing boards are vested with the responsibility to make judgments on the validity of ballots, and its determinations will be overturned only for compelling reasons when there are

clear, substantial departures from essential requirements of law. See id., 323 So. 2d at 268 n 5. Petitioners have not met this burden.

I also agree with the trial judge that the Election Canvassing Commission (Commission) did not abuse its discretion in refusing to accept either an amended return reflecting the results of a partial manual recount or a late amended return filed by the Palm Beach Board. I conclude that it is plain error for the majority to hold that the Commission abused its discretion in enforcing a deadline set by this Court that recounts be completed and certified by November 26, 2000. I conclude that this not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.

As I stated at the outset, I conclude that this contest simply must end.

Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots. The Constitution reads in pertinent part: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Art. II, § 1, cl. 2, U.S. Const. The Supreme Court has described this authority granted to the state legislatures as "plenary." See McPherson v. Blacker, 146 U.S. 1, 7 (1892). "Plenary" is defined as "full, entire,

complete, absolute, perfect, [and] unqualified." Black's Law Dictionary 1154 (6th ed. 1990).

The Legislature has given to the county canvassing boards–and only these boards–the authority to ascertain the intent of the voter. See § 102.166(7)(b), Fla. Stat. (2000). Just this week, the United States Supreme Court reminded us of the teachings from Blacker when it said:

> [Art. II, §1, cl. 2] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

Bush v. Palm Beach Canvassing Bd., No. 00-836, slip op. at 4-5 (U.S. Dec. 4, 2000) (quoting Blacker, 146 U.S. at 7). Clearly, in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide. This Court's order to do so appears to me to be in conflict with the United States Supreme Court decision.

Laying aside the constitutional infirmities of this Court's action today, what the majority actually creates is an overflowing basket of practical problems. Assuming the majority recognizes a need to protect the votes of Florida's

presidential electors,[30] the entire contest must be completed "at least six days before" December 18, 2000, the date the presidential electors meet to vote. See 3 U.S.C. § 5 (1994). The safe harbor deadline day is December 12, 2000. Today is Friday, December 8, 2000. Thus, under the majority's time line, all manual recounts must be completed in five days, assuming the counting begins today.

In that time frame, all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public.[31] Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who were able to correctly cast their ballots on election day.

Another significant problem is that the majority returns this case to the circuit court for a recount with no standards. I do not, and neither will the trial

---

[30] As the Supreme Court recently noted, 3 U.S.C § 5 creates a safe harbor provision regarding congressional consideration of a state's electoral votes should all contests and controversies be resolved at least six days prior to December 18, 2000, if made pursuant to the state of the law as it existed on election day. See Bush at 6. There is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision.

[31] See § 102.166(6), Fla. Stat. (2000).

judge, know whether to count or not count ballots on the criteria used by the canvassing boards, what those criteria are, or to do so on the basis of standards divined by Judge Sauls. A continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by a human will be subjective, and the intent gleaned from that ballot is only in the mind of the beholder. This subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots.

I must regrettably conclude that the majority ignores the magnitude of its decision. The Court fails to make provision for: (1) the qualifications of those who count; (2) what standards are used in the count–are they the same standards for all ballots statewide or a continuation of the county-by-county constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a counter; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

This Court's responsibility must be to balance the contest allegations against the rights of all Florida voters who are not involved in election contests to

have their votes counted in the electoral college. To me, it is inescapable that there is no practical way for the contest to continue for the good of this country and state.

I am persuaded that Justice Terrell was correct in 1936 when he said:

> This court is committed to the doctrine that extraordinary relief will not be granted in case where it plainly appears that although the complaining party may be ordinarily entitled to it, if the granting of such relief in the particular case will result in confusion and disorder and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks.

State v. Wester, 126 Fla. 49, 54, 170 So. 736, 738-39 (1936) (citations omitted; emphasis added).

For a month, Floridians have been working on this problem. At this point, I am convinced of the following.

First, there have been an enormous number of citizens who have expended heroic efforts as members of canvassing boards, counters, and observers, and as legal counsel who have in almost all instances, in utmost good faith attempted to bring about a fair resolution of this election. I know that, regardless of the outcome, all of us are in their debt for their efforts on behalf of representative democracy.

Second, the local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance. Only to state a few of the incongruities, the time limits of sections 102.112, 102.166, and 102.168 and 3 U.S.C. §§ 1, 5, and 7 simply do not coordinate in any practical way with a presidential election in Florida in the year 2000. Therefore, section 102.168, Florida Statues, is inconsistent with the remedy being sought here because it is unclear in a presidential election as to: (1) whether the candidates or the presidential electors should be party to this election contest; (2) what the possible remedy would be; and (3) what standards to apply in counting the ballots statewide.

Third, under the United States Supreme Court's analysis in Bush v. Palm Beach County Canvassing Board, wherein the Supreme Court calls to our attention McPherson v. Blacker, 146 U.S. 1 (1892), there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections.

Fourth, there is no available remedy for the petitioners on the basis of these allegations. Quite simply, courts cannot fairly continue to proceed without

jeopardizing the votes and rights of other citizens through a further count of these votes.

I must take seriously the counsel of the Supreme Court in Bush:

> Since [3 U.S.C.] §5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

Id. at 6.

This case has reached the point where finality must take precedence over continued judicial process. I agree with a quote from John Allen Paulos, a professor of mathematics at Temple University, when he wrote that, "[t]he margin of error in this election is far greater than the margin of victory, no matter who wins."[32] Further judicial process will not change this self-evident fact and will only result in confusion and disorder. Justice Terrell and this Court wisely counseled against such a course of action sixty-four years ago. I would heed that sound advice and affirm Judge Sauls.

---

[32]The election is a tie, so let's get on with it," St. Petersburg Times, Dec. 3, 2000, at 3D.

HARDING, J., dissenting.

I would affirm Judge Sauls' order because I agree with his ultimate conclusion in this case, namely that the Appellants failed to carry their requisite burden of proof and thus are not entitled to relief. However, in reaching his conclusion, Judge Sauls applied erroneous standards in two instances. First, in addressing the Appellants' challenges of the election certifications in Miami-Dade and Palm Beach Counties, the judge stated that "[t]he local boards have been given broad discretion, which no court may overrule, absent a clear abuse of discretion." Applying this standard, the judge concluded that the Miami-Dade County Canvassing Board did not abuse its discretion in any of its decisions in the review and recounting process. While abuse of discretion is the proper standard for assessing a canvassing board's actions in a section 102.166 protest proceeding, it is not applicable to this section 102.168 contest proceeding. Judge Sauls improperly intertwined these two proceedings and the standards applicable to each.

In 1999, the Florida Legislature extensively amended the contest statute to specify the grounds authorized for contesting an election and to set up a time frame for contests. See ch. 99-339, § 3, at 3547-49, Laws of Fla. The Legislature also amended the protest statute by eliminating the role of the circuit courts in

protest proceedings. See id., §1, at 3546. The county canvassing boards have been granted discretion to authorize a manual recount when requested by a candidate, political party, or political committee who seeks to protest the returns of an election as being erroneous. See § 102.166(4)(c), Fla. Stat. (2000) ("The county canvassing board may authorize a manual recount.") (emphasis added).

In contrast, a contest proceeding involves a legal challenge to the outcome of an election. The circuit judge is statutorily charged with three tasks in a contest proceeding: (1) to ensure that each allegation in the contestant's complaint is investigated, examined, or checked; (2) to prevent or correct any alleged wrong; and (3) to provide any relief appropriate under such circumstances. See § 102.168(8), Fla. Stat. (2000). Where a contestant alleges that the canvassing board has rejected a number of legal votes "sufficient to change or place in doubt the result of the election" due to the board's decision to curtail or deny a manual recount, the circuit judge should examine this issue de novo and not under an abuse of discretion standard. § 102.168(3)(c), Fla. Stat. (2000).

Second, Judge Sauls erred in concluding that a contestant under section 102.168(3)(c) must show a "reasonable probability that the results of the election would have been changed." Judge Sauls cited the First District Court of Appeal's decision in Smith v. Tynes, 412 So. 2d 925, 926 (Fla. 1st DCA 1982), as

establishing this standard for election contests. However, as discussed above, when the Legislature amended section 102.168 in 1999, it specified five grounds for contesting an election, including the "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." (Emphasis added.) Smith v. Tynes, which was decided in 1982, addressed the pre-amendment statute which did not specify the grounds for a contest. Thus, the current statutory standard controls here.

While I disagree with Judge Sauls on the standards applicable to this election contest, I commend him for the way that he conducted the proceedings below under extreme time constraints and pressure. Further, I believe that Judge Sauls properly concluded that there was no authority to include the Palm Beach County returns filed after the explicit deadline established by this Court.

I conclude that the application of the erroneous standards is not determinative in this case. I agree with Judge Sauls that the Appellants have not carried their burden of showing that the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this statewide election. That failure of proof controls the outcome here. Moreover, as explained below, I do not believe that an adequate remedy exists under the circumstances of this case.

I conclude that Judge Sauls properly found that the evidence presented by Appellants, even if believed, was insufficient to warrant any remedy under section 102.168.

The basis for Appellants claim for relief under section 102.168 is that there is a "no-vote" problem, i.e., ballots which, although counted by machines at least once, allegedly have not been counted in the presidential election. The evidence showed that this no-vote problem, to the extent it exists, is a statewide problem.[33] Appellants ask that only a subset of these no-votes be counted.

In a presidential election, however, section 102.168, by its title, is an "Election" contest and, as such, it is not a local contest seeking to define the correct winner of the popular vote in any individual county. The action is to determine whether the Secretary of State certified the correct winner for the entire State of Florida. By its plain language, section 102.168(1) provides that only the "unsuccessful candidate" may contest an election. If this contest provision may be invoked as to individual county results, as argued by Appellants, then Vice

---

[33] No-votes (ballots for which the no vote for Presidential electors was recorded) exist throughout the state, not just in the counties selected by Appellants. Of the 177,655 no-votes in the November 7, 2000, election in Florida, 28,492 occurred in Miami-Dade County and 29,366 occurred in Palm Beach County. See Division of Elections, Voter Turnout Report, S-DX 41; Division of Elections, General Election Results, S-DX 40.

President Gore's choice of the three particular counties was improper because he was not "unsuccessful" in those counties. I read the statute as applying to statewide results in statewide elections. Thus, Vice President Gore, as the unsuccessful candidate statewide, could contest the election results. However, in this contest proceeding, Appellants had an obligation to show, by a preponderance of the evidence, that the outcome of the statewide election would likely be changed by the relief they sought.

Appellants failed, however, to provide any meaningful statistical evidence that the outcome of the Florida election would be different if the "no-vote" in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient. It would be improper to permit Appellants to carry their burden in a statewide election by merely demonstrating that there were a sufficient number of no-votes that could have changed the returns in isolated counties. Recounting a subset of counties selected by the Appellants does not answer the ultimate question of whether a sufficient number of uncounted legal votes could be recovered from the statewide "no-votes" to change the result of the statewide election. At most, such a procedure only demonstrates that the losing candidate would have had greater success in the subset of counties most favorable to that candidate.

Moreover, assuming that there may be some shortfall in counting the votes cast with punch card ballots, such a problem is only properly considered as being systemic with the punch card system itself, and any remedy would have had to be statewide. Any other remedy would disenfranchise tens of thousands of other Florida voters, as I have serious concerns that Appellant's interpretation of 102.168 would violate other voters' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

As such, I would find that the selective recounting requested by Appellant is not available under the election contest provisions of section 102.168. Such an application does not provide for a more accurate reflection of the will of the voters but, rather, allows for an unfair distortion of the statewide vote. It is patently unlawful to permit the recount of "no-votes" in a single county to determine the outcome of the November 7, 2000, election for the next President of the United States. We are a nation of laws, and we have survived and prospered as a free nation because we have adhered to the rule of law. Fairness is achieved by following the rules.

Finally, even if I were to conclude that the Appellant's allegations and evidence were sufficient to warrant relief, I do not believe that the rules permit an

adequate remedy under the circumstances of this case. This Court, in its prior opinion, and all of the parties agree that election controversies and contests must be finally and conclusively determined by December 12, 2000. See 3 U.S.C. § 5. This Court is "not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief." State v. Strasser, 445 So. 2d 322, 322 (Fla. 1983). See also Hoshaw v. State, 533 So. 2d 886, 887 (Fla. 3d DCA 1988) ("The law does not require futile acts."); International Fidelity Ins. Co. v. Prestige Rent-A-Car, Inc., 715 So. 2d 1025, 1028 (Fla. 5th DCA 1998) ("Florida law does not require trial courts to enter orders which are impossible to execute or which require parties to perform acts that cannot be of any force or effect."). Clearly, the only remedy authorized by law would be a statewide recount of more than 170,000 "no-vote" ballots by December 12. Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions. In order to undertake this unprecedented task, the majority has established standards for manual recounts–a step that this Court refused to take in an earlier case,[34] presumably because there was no authority for such action and nothing in the

[34] See Palm Beach County Canvassing Bd. v. Harris, Nos. SC00-2346, SC00-2348, SC00-2349 (Fla. Nov. 21, 2000), vacated by Bush v. Palm Beach Canvassing Bd., 531 U.S. ____ (2000).

record to guide the Court in setting such standards. The same circumstances exist in this case. All of the parties should be afforded an opportunity to be heard on this very important issue.

While this Court must be ever mindful of the Legislature's plenary power to appoint presidential electors, see U.S. Const. art. II, § 1, cl. 2, I am more concerned that the majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos. In giving Judge Sauls the option to order a statewide recount, the majority permits a remedy which was not prayed for, which is based upon a premise for which there is no evidence, and which presents Judge Sauls with options to order entities (i.e. local canvassing boards) to conduct recounts when they have not been served, have not been named as parties, but, most importantly, have not had the opportunity to be heard. In effect, the majority is allowing the results of the statewide election to be determined by the manual recount in Miami-Dade County because a statewide recount will be impossible to accomplish. Even if by some miracle a portion of the statewide recount is completed by December 12, a partial recount is not acceptable. The uncertainty of the outcome of this election will be greater under the remedy afforded by the majority than the uncertainty that now exists.

The circumstances of this election call to mind a quote from football coaching legend Vince Lombardi: "We didn't lose the game, we just ran out of time."

SHAW, J., concurs.

Appeal of Judgment of Circuit Court, in and for Leon County, N. Sanders Sauls, Judge, Case No. CV 00-2808 - Certified by the District Court of Appeal, First District, Case No. 1D00-4745

John D.C. Newton, II of Berger Davis & Singerman, Tallahassee, Florida; Mitchell W. Berger of Berger Davis & Singerman, Fort Lauderdale, Florida; W. Dexter Douglass of the Douglass Law Firm, Tallahassee, Florida; David Boies of Boies, Schiller & Flexner, LLP, Armonk, New York; Ronald A. Klain and Andrew J. Pincus, c/o Gore/Lieberman Recount, Washington D.C.; Jeffrey D. Robinson of Baach, Robinson & Lewis, Washington, D.C.; Joseph E. Sandler of Sandler & Rieff, P.C., Washington, D.C.; Mark R. Steinberg, Los Angeles, California; John J. Corrigan, Jr., Boston, Massachusetts; Dennis Newman, Reading, Massachusetts; Kendall Coffey, Miami, Florida; Benedict E. Kuehne, Miami, Florida; and Theresa Wynn Roseborough, Atlanta, Georgia,

for Albert Gore, Jr. and Joseph I. Lieberman, Appellants

Deborah K. Kearney, General Counsel, and Kerey Carpenter, Assistant General Counsel, Florida Department of State, Tallahassee, Florida; and Joseph P. Klock, Jr., John W. Little, III, Alvin F. Lindsay III, Robert W. Pittman, Gabriel E. Nieto, Walter J. Harvey, and Ricardo M. Martinez-Cid of Steel, Hector & Davis, LLP, Tallahassee, Florida, for the Secretary of State and the Elections Canvassing Commission; Robert A. Ginsburg, Miami-Dade County Attorney, Murray A. Greenberg, First Assistant County Attorney, and Lee Kraftchick, Thomas A. Tucker Ronzetti, and Jeffrey P. Ehrlich, Assistant County Attorneys, Miami, Florida, for Miami-Dade County Canvassing Board, Lawrence D. King, Myriam Lehr, and David C. Leahy; Michael S. Mullin, Fernandina Beach, Florida, for