

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH, *ET AL.*,

Petitioners,

v.

ALBERT GORE, JR., *ET AL.*,

Respondents.

Brief on the Merits of Katherine Harris, Florida Secretary of State,
Katherine Harris, Laurence C. Roberts, and Bob Crawford,
as Members of the Florida Elections Canvassing Commission

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I. Summary of the Argument

The Supreme Court of Florida created many new provisions in Florida's election laws on November 21, 2000, by applying common law and constitutional principles to change the opportunities for and method of conducting a manual recount, changing the dates for election certification, authorizing amendments to previously-filed certifications even after the statutory deadline had passed, removing much of the discretion granted to the Secretary of State to administer Florida's electoral system, and granting significantly expanded powers to local canvassing boards. *Palm Beach Canvassing Board v. Harris*, 2000 WL 1725434 (Fla. Nov. 21, 2000) ("*Harris I*"), at 3. This Court vacated that order and directed the Florida court to clarify its reasoning, which it has not yet done.

The decision below, the Florida court's second regarding the presidential election, while acknowledging the legislature's role, expands upon, and continues to give effect to, its first order and further encroaches upon the legislative scheme and the powers delegated by the legislature to the Department of State, the Division of Elections and the Elections Canvassing Commission. In particular, the decision (i) continues to allow manual recounting based on mere allegations of voter error, (ii) creates a new counting methodology, unknown in the legislative scheme, which allows vote tabulation equipment to be used to screen votes for manual counting, and (iii) creates what is in effect an absolute right to a manual recount whenever the number of ballots counted with no-

vote for an office exceed the margin of victory of one candidate. In addition, the court continued to apply, and actually expanded, the alternative certification deadline created in its previous order. As noted by Chief Justice Wells in his dissent, the decision of the Florida court “has no foundation in the law of Florida as it existed on November 7, 2000, or at any time prior to the issuance of [the decision below].” *Gore v. Harris*, 2000 WL 1800752 (Fla. Dec. 8, 2000) (“*Harris II*”), at 41 (Wells, C.J. dissenting).¹

These actions by the Supreme Court of Florida do significant violence to the legislative scheme, in direct contravention of the exclusive grant of authority over presidential elections granted to state legislatures, makes *post hoc* changes to the Florida electoral system, and raises serious and far reaching concerns that would have been avoided by applying the Florida legislative scheme as written.

II. Statement of the Case and Procedural History

Both of the Florida Supreme Court’s decisions *Harris I* and *Harris II* make substantial changes to Florida’s Election Code, as it existed on November 7, 2000.

A. The November 21, 2000 Decision of the Florida Supreme Court (*Harris I*)

In *Harris I*, the Florida Supreme Court changed the election law of Florida as it existed on November 7 in several material respects:

¹

The text of this opinion can be found at Tab A to Petitioner Bush’s Index of Exhibits.

- County canvassing boards *now* have the authority to amend certified returns filed within the statutory deadline for up to 12 days after the deadline for certification of the election results to accommodate manual recounting (i.e., the protest period was extended from 7 to 19 days);
- The Commission *now* must accept amended election returns filed after the statutory deadline so long as the filing does not violate the Florida Supreme Court’s judicially-created alternative deadline of November 26, designed to accommodate manual recounting in this election;
- The Commission *now* is to ignore its statutory duty to certify election results based solely on the returns filed within the seven-day deadline set by the Legislature, so that late-filed amendments may be submitted to reflect manual recounts that extend beyond the deadline;
- County canvassing boards *now* enjoy broad discretion to order manual recounts in selected counties for a statewide election, even where the “error in vote tabulation” (i.e., the failure of the tabulation system) required under the statute has been found not to exist, irrespective of whether the recount will extend beyond the statutory deadline for filing election returns; and
- Where a uniform system of automated counting was previously in place, Florida’s votes, including votes for the electoral college, will *now* be decided based on standards developed by individual canvassing boards in selected areas of the state.

From the outset of *Harris I*, the Florida Supreme Court made clear that “hyper-technical statutory requirements” must give way to the right of suffrage implicit in the Florida Constitution. *See id.* at *4 (“the will of the people, not hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.”); *Id.* at *6 (“all political power is inherent in the people”). After reviewing the relevant portions of the Florida Election Code, the court observed that:

the County canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. *The statutes make no provision for exceptions following a manual recount.* If a Board fails to meet the deadline, the Secretary is not required to ignore the county’s returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

Id. at *11 (emphasis added).

The court then looked to principles of Florida constitutional law and stated that the judiciary must “attend with special vigilance whenever the Declaration of Rights is in issue,” and that “[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished.” *Id.* at *12. In accordance with these general principles, the court held that “the Legislature may enact laws regulating the electoral process . . . only if they impose no

‘unreasonable or unnecessary’ restraints on the right of suffrage.”
Id.

Looking as well to the principles of Florida constitutional law for guidance, the court concluded:

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county’s returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

Id. at *15.

This Court subsequently granted Governor Bush’s petition for certiorari review to address whether the Florida court’s decision conflicted with federal constitutional and statutory law. *Bush v. Palm Beach Canvassing Board*, 2000 WL 1731262 (U.S. Nov. 24, 2000). On December 4, 2000, this Court issued an opinion in which it vacated the Florida Supreme Court’s decision. *Bush v.*

Palm Beach County Canvassing Board, 2000 WL 1769093 at *4 (U.S. Dec. 4, 2000). In its decision, this Court asked the Florida Supreme Court to clarify its opinion concerning its impact on the legislature’s power to select the method of appointing electors for President and Vice President of the United States in light of 3 U.S.C. § 5 or article II of the U.S. Constitution. *Id.* In so doing, the Court counseled:

Since § 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 *3. The Florida Supreme Court has not yet responded to this Court’s mandate.

B. The Present Case (*Harris II*)

On November 27, 2000, Vice President Albert Gore, Jr. and Joseph I. Lieberman (the “Gore Respondents”) filed an election contest under section 102.168(3)(c), Florida Statutes (2000), one day after the newly-created conclusion of the protest period. This section provides that an unsuccessful candidate may contest an election when there has been, among other things, a “rejection of a number of *legal votes* sufficient to change or place in doubt the result of the election.” (Emphasis added.) After a two-day bench trial, the trial court denied the Gore Respondents any relief and entered a judgment in favor of the defendants. The Gore Respondents immediately appealed. The intermediate district court of appeals passed the case through to the Florida Supreme Court.

On review, the Florida Supreme Court reversed the trial court in part and ordered that partial manual recounts previously performed by the canvassing boards of Miami-Dade and Palm Beach counties be counted notwithstanding the fact that they were certified after the judicially-created deadline set in *Harris I.*² Moreover, the court ordered a statewide manual recount of the so-called “undervotes” in all counties where the undervote had not been subjected to a manual recount. *Id.* at 2. The court’s decision is bottomed on a holding that “a legal vote is one in which there is a ‘clear indication of the intent of the voter’” (*Id.* at 25), which is borrowed from section 101.5614(5). That provision deals with counting of damaged or defective ballots, which are not at issue here.³

III. Argument

² This, of course, conflicts with the court’s prior ruling that all manual recounts *had to be* completed by 5 p.m. on November 26, 2000. Even assuming the validity of the extension of the protest period, these counties were not able to complete their manual recounts on time and, therefore, should not have been able to amend their certifications. *See Fla. Stat. § 102.111 (2000).*

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The proceedings in the trial court upon remand, and the trial court’s order on remand entered before this Court’s stay, are contained in Respondent’s Appendix. The trial judge was constrained to a specific number of actions based upon the language of *Harris II.*

A. The Decision below and in *Harris I* Dramatically Changed the Purpose for Which Manual Recounts May Be Used.

The Supreme Court of Florida’s decision is a further extension of its previous holding and reflects further developments in the Florida Election Code. As noted by Chief Justice Wells in his dissent below, there is no basis under the section 102.168 or any other provision of the Election Code for a manual recount, let alone a recount of only the so-called “undervotes,” when there is no justification other than voter error.⁴ The Gore Respondents cite no instance in Florida election history when a manual recount was conducted because of an allegation that the total number of undervotes was greater than the margin of victory.⁵

Section 102.168, Florida Statutes, imposes a burden on the contestant to show, among other things, that “*legal* votes sufficient in number to change or place in doubt the result of the election” were rejected. Fla. Stat. § 102.168(3)(c) (2000) (emphasis added).

⁴ See *Harris II*, at 41 (Wells, C.J. dissenting) (“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.”).

⁵ The appellees cannot rely on *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998). There, the issue was not—as has been asserted—voter error, but rather whether “fraud,” “gross negligence” or “incompetence” by election officials who re-marked ballots so that they could be counted by an electronic scanner should void an election. *Id.* at 723-24.

In this case, legal votes were not rejected. “Legal votes,” as that term is used in section 102.168(3)(c), means votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places. By properly executing their ballots, voters can ensure that their vote will be counted by the tabulation machinery. Otherwise, these same voters risk having their vote disregarded. No other definition for “legal votes” fits the legislature’s scheme.

The Division of Elections, charged with interpreting and enforcing the Florida Election Code, has opined that there is no basis in the legislature’s scheme for a manual recount when there are no allegations other than voter error. Consistent with the statutory scheme for manual recounts, legislative history and prior interpretation of the statute, the Division issued a formal advisory opinion,⁶ stating that:

[a]n “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

⁶ Although this opinion was written in the context of an election protest, the basis of the opinion is equally applicable to an election contest.

parameters or software errors, a 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) of the Florida Statutes.

Harris I JA 57. Both the plain language and legislative history of Florida's election statutes indicate that the Division was correct: a manual recount of the ballots is proper only when there has been a failure of the vote tabulation system, i.e., the counting apparatus. Fla. Stat. §102.166(5) (2000).

The legislature has set out an elaborate system to ensure that all voters are educated on how to vote. In the weeks before the November 7, 2000, general election, each registered voter in the state was provided with a sample ballot and detailed instructions on how to vote according to the method used in his precinct. *Id.* § 101.46. For the instruction of voters on election day, each polling place is provided with instructions illustrating the manner of voting with the particular system in use. By law, before entering the voting booth, each voter is to be offered instruction in voting by use of the instruction model, and each voter is to be given "ample opportunity" to operate the model. *Id.* § 101.5611(a).

Additionally, a copy of the instructions was placed prominently in each voting booth. For those areas using punch cards, including Miami-Dade and Palm Beach counties, 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 were clear and complete. Harris Appendix to Response to Petition for Writ of Certiorari in Case No. 00-836.

The voter instructions were designed to prevent both undervoting and overvoting, and thus to ensure that each voter's choices were tabulated. 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 punched positions were fully perforated, and that no chad remained partially attached in the selected punch positions. The instructions included this specific action:

AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.

*Id.*⁷

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.

In case any voter, after entering the voting booth, asks for instructions about how to vote, two election officers who are not members of the same political party shall assist and give

⁷ At no time, although frequently urged upon it, has the Florida Supreme Court made any comment upon these instructions and how they might impact the issue of voter intent.

instructions, then leaving the voter to vote in secret. *Id.* § 101.46. The fact that this assistance is available is made clear in the “NOTICE, Instructions to Voters” that are posted at all precincts. Moreover, all inspectors, clerks, and deputy sheriffs are given training classes for the purpose of instructing such persons in their duties and responsibilities as election officials. *Id.* § 102.012(8). In addition, sample ballots are furnished to each polling place as are a number of reduced-size ballots that are made available to any voter so requesting. *Id.* § 101.20.

When voters followed these instructions, the automatic tabulation system accurately tabulated the ballots. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices would have been affected by the manual recount at issue.

Plainly stated, the type of manual recount allowed—indeed, required by the Florida Supreme Court—does not address the failure of automated equipment to tabulate properly executed ballots, the only purpose for which manual recounts were allowed under Florida law as it existed on election day. The sole purpose of the recount mandated by the Florida Supreme Court is 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 are left 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 Fladell v. Palm Beach Canvassing Board*, 2000 WL 1763142 (Fla. Dec. 1, 2000) (rejecting challenge to Palm Beach County’s so-called “Butterfly Ballot”); *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.”).

There can be no doubt that the Florida Supreme Court's decision creates new rights and obligations. *See Harris II* at 55 (Wells, C.J., dissenting) (“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.”). Again, the legislature was well within its right to set forth a scheme whereby voters that followed the proper procedure were deemed to have cast legal votes. *U.S. Const. art. II, § I*. Those who did not follow instructions ran the risk that their vote would not be counted. It is critical to note that the no votes at issue here include ballots that contain chads that for one reason or another were never fully dislodged. Under the Election Code, these votes are not legal votes. Moreover, there was absolutely no evidence that the ballots were damaged.

Another indication that manual recounts are not available for voter error is found in section 101.5606, Florida Statutes (2000). This section requires that all electronic or electromechanical voting systems used must be capable of correctly counting votes. If the Florida Supreme Court is correct in its broad definition of a legal vote, then there can no longer be any voting machines because those machines will never be capable of counting all the votes. The Florida Supreme Court's opinion relegates the voting machines to a screening device used to locate undervotes and is thus anathema to this section, among others, of the Code.

A simple reading of the Florida Supreme Court's decision, especially under the light of Chief Justice Wells' powerful and

persuasive dissent, can lead to only three conclusions: (1) the Florida Supreme Court made new law when it ordered a manual recount based on unsubstantiated allegations of voter error; (2) the court made new law by requiring that only the “undervotes” be counted, instead of *all* ballots; and (3) the court made new law by requiring a manual recount whenever the number of undervotes exceeded the margin of victory.⁸

B. Although the Court below Created New and Unprecedented Rights to Manual Ballot Counts, it Created No Standards by Which Such Counts Are to Be Conducted.

Because the Florida legislature never authorized manual recounts to correct voter error, it has enacted no standards by which to judge improperly executed machine ballots. The utter lack of objective standards in the partial manual recount ordered by the court below will inevitably lead to a chaotic counting process with different counting methodologies being applied in different areas of the state:

[T]he majority returns this case to the circuit court for a recount with no standards. I do not, and neither will

⁸ In fact, that is what the court held. *Id.* at 23 (“Here, there has been an undisputed showing of the existence of some 9,000 ‘under votes’ in an election contest decided by a margin measured in the hundreds. Thus, a threshold contest showing that the result of an election has been placed in doubt, warranting a manual count of all undervotes or ‘no vote registered’ ballots, has been made.”). That is not what the statute says; this a new rule enunciated by the Florida Supreme Court to facilitate selective recounting.

the trial court, 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 [the trial judge]. . . . 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. . . .

Harris II at 56-57 (Wells, C.J., dissenting).

Other states that (unlike Florida) provide broad manual recount rights for correction of voter error also generally provide standards by which to judge the ballots. For example, Indiana provides clear and definitive standards for manual counts of erroneous ballots, requiring ballots with pierced or partially detached chads to be counted and ballots with mere indentations to be considered as having no vote. *See* Ind. Code Ann. § 3-12-1-9.5 (West 2000). The fact that Florida has no similar objective standards underscores that the Florida Legislature did not intend manual recounts to be used to correct voter error.⁹ Many states,

⁹ The only other conclusion would be that the legislature chose to enact a system that is so fraught with subjectivity that it denies due process and equal protection. A system that allows votes to be evaluated differently based on where the voter resides cannot stand. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964) (“Weighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simplified modes of

like Florida, use manual recounts solely to confirm machine calibration or correct machine failure.¹⁰ Additionally, states with

discrimination.”).

¹⁰ See, e.g., Col. Rev. Stat. 10-10.5-102 (West 2000) (“Prior to any recount, the canvass board shall choose a precinct at random and a test number of ballots on which to conduct a machine count and a hand count of ballots. The precinct chosen shall have at least fifty ballots for the count. If the results of the machine count and the hand count are identical, then the recount shall be conducted in the same manner as the original ballot count.”); Iowa Code Ann. § 50.48 (West 2000) (“If an electronic tabulating system was used to count the ballots, the recount board may request the commissioner to retabulate the ballots using the electronic tabulating system. The same program used for tabulating the votes on election day shall be used at the recount unless the program is believed or known to be flawed”); Neb. Rev. Stat. § 32-119 (West 2000) (“The procedures for the recounting of ballots shall be the same as those used for the counting of ballots on election day. . . . Counties counting ballots by using a vote counting device shall first recount the ballots by use of the device. If substantial changes are found, the ballots shall then be manually counted in any precinct which might reflect a substantial change.”); W. Va. Code § 3-4A-28 (West 2000) (“[Ballots . . .] shall be reexamined . . . in the same manner . . . utilized in the original vote count During . . . any requested recount, at least five percent of the precincts shall be chosen at random and the ballot cards cast therein counted manually. The same random selection shall also be counted by the automatic tabulating equipment. If the variance between the random manual recount and the automatic tabulating equipment count of the same random ballots, is equal to or greater than one percent, then a manual recount of all ballot cards shall be

liberal manual recount rights, unlike Florida, almost invariably provide detailed standards by which to conduct those recounts.¹¹

Prior to the decision below and the *Harris I* decision, votes in Florida were counted according to an objective system based on approved and calibrated tabulation equipment.¹² Under this system, voters are required to indicate their votes in such a way that properly functioning tabulating equipment will register the vote. For this reason, voters were instructed to carefully check their ballots for mistakes, as exemplified in the instructions used in Palm Beach County and quoted *supra*. When voters followed these instructions, the tabulation equipment accurately tabulated the ballots according to their accepted operational parameters. Only the ballots of those voters who, by their own actions, failed to

required.”).

¹¹ See, e.g., Cal. Elec. Code §§ 15628-15631 (West 2000) (detailing exact procedures for manual recounts); Ind. Code Ann. § 3-12-1-9.5 (West 2000) (detailing exact standards for “chad irregularities”; Tex. Elec. Code Ann. § 127.130 (West 2000) (detailing exact procedures for manual Counting, including “chad” standards).

¹² This automated equipment is regulated to ensure that a standardized result occurs for all properly cast ballots. See Fla. Stat. § 101.015. The Secretary has implemented this statute through administrative rules that regulate the performance of tabulating machines and designate a defined maximum error rate. See Fla. Admin. Code. R. 1S-2.015.

clearly indicate their elective choices would have been affected by the manual recounts at issue below.

Thus, the use of automated tabulation according to uniform performance standards for the tabulation equipment provided both uniformity and objectivity. Moreover, the equipment is accurate so long as ballots are properly executed. For these reasons, the Florida legislature chose to rely principally on automated equipment, with manual recounts being one of a series of remedies to be employed only when the equipment fails to operate as intended.

The decision below throws out the standardized system created by the legislature in favor of undisciplined and result-selective manual counting for the sake of divining the intent of improperly executed ballots. The only “standard” by which this is to be guided is found in Florida Statutes section 101.5614, which provides that a “damaged or defective ballot” may not be discarded “if there is a clear indication of the intention of the voter as determined by the [county] canvassing board.”¹³ With nothing more than this vague concept to guide the counting, the court below would have a trial judge enlist hundreds of independent counters throughout the state to recount the votes. Yet, there will be no objective standards for these persons to apply during the counting process. The practical effect of the decision below will be that numerous teams of counters will exercise vast unchecked

¹³ The ballots that were ordered recounted are not damaged or defective. The failure to count these ballots stems from the failure of voters to execute the ballots as instructed, not from defects in the ballots themselves. Thus, the cited statute has no application to the ballots at issue. *Harris II*, Slip. Op. at 52 (Wells, C.J. dissenting).

discretion to review improperly executed ballots, and will create *ad hoc* standards for judging those ballots.

Moreover, the partial nature of the recount forces the vote tabulation equipment to be used as, essentially, a screening device to find undervotes.¹⁴ The equipment was not designed for this function. The type of counting the court below directed would require special software to be installed in the tabulation machines. And, because of the short time frame involved, there would be no time for the machines and their software to be evaluated for accuracy by the Division of Election as required by section 101.015 and its implementing regulations. Thus, if the decision below were to stand, the voting machines would be used for a purpose that has no basis in the legislative scheme and the resulting recount would be of questionable accuracy as it is impossible to know whether the machines would be accurate in their selection of undervotes for counting.

In his dissent below, Chief Justice Wells correctly recognized that (i) section 101.5614, the statute cited as the appropriate “standard” for manual recounts, was never intended by the Florida legislature to apply to a recount of improperly executed ballots intended to correct for voter error and (ii) the lack of any

¹⁴ This partial counting approach results in a different counting method applying to 64 predominantly Republican counties vis a vis the heavily populated and overwhelmingly Democratic Broward and Palm Beach Counties, which underwent *full* manual recounts. It also creates voter differentiation within Florida’s largest county, Miami-Dade, where 139 heavily Democratic precincts underwent full manual recounts while the remaining 635 largely Republican precincts were to only have manual recounts of undervotes.

objective criteria by which to conduct the recount raises serious federal concerns:

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 announces 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 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.

Harris II at 51-52 (Wells, C.J. dissenting).

C. The *Harris II* Decision Further Modifies the Legislative Scheme Meant to Ensure Timely Election Results.

The *Harris II* decision has further modified the statutory election certification scheme. The Florida Supreme Court expanded the extension on the seven-day statutory deadline imposed by sections 102.111 and 102.112, Florida Statutes, that it had granted in *Harris I*. Though the Florida Supreme Court held in *Harris I* that the seven-day deadline should be extended to 19 days in Presidential elections (and presumably longer in local elections), the *Harris II* court held that results received after the statutory and *Harris I* deadline had to be included in the Election Canvassing Commission's certification. The ramifications of this continuing duty to re-certify election results is directly counter to section 102.111, Florida Statutes,¹⁵ and the legislative desire to ensure a timely resolution of election disputes.

Additionally, the *Harris II* decision modified the then existing rule in Florida that county canvassing boards are responsible for determining the number of votes cast for each candidate, Fla. Stat. § 102.141 (2000), and once a canvassing board certifies results, those

¹⁵That section reads, in pertinent part, that “[i]f the county returns are not received by 5 p.m. of the seventh day following the election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.” Fla. Stat. § 102.111 (2000).

results are presumed to be correct. See, e.g., *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1976) (“[E]lected officials are presumed to perform their duties in a proper and lawful manner . . . [Accordingly] returns certified by election officials are presumed to be correct.”).

D. The Proceedings On Remand Demonstrate the Serious Flaws in Harris II’s Demands

The most cursory review of the proceedings in the Leon County Circuit Court that followed the remand in *Harris II* (*R.A. 1 - ___*), demonstrate the number of changes in the law, lack of standards, and deviations from Florida law in existence on November 7, 2000. Despite extensive objections by both the Secretary and the co-respondents, as well as the Bush petitioners, the Circuit Judge was unable to do more than simply follow the Florida Supreme Court’s directions. (*R.A. 1- ___*). Thus, with just hours’ notice, more than 60 canvassing boards were assembled and instructed to begin counting only ballots with undervotes for President, with some counties having manually counted all votes, some counties having manually counted some votes, and some counties having manually counted no-votes. In addition, no counts were made of all of the votes, nor were counts made of over-votes. *Harris II* ordered the inclusion of partial returns from some counties, as well as some returns, like Palm Beach County’s that had never been certified at all, as well as ordering Miami-Dade County votes to be “counted” in Leon County by the Supervisor of Elections or such other personnel ordered by the circuit judge. Unable to allow legal arguments and challenges because of time constraints, the circuit court allowed the filing of written objections to the proceedings. (Respondents’ 31 objections are set forth in *R.A. ___ - ___*).

In short, until the entry of this Court’s stay of Saturday, December 9, everybody was counting everywhere, under whatever

standards they established, without regard to any statutorily-defined criteria.

IV. Conclusion

The Gore Respondents will argue that the decision below is garden-variety statutory construction. The order below, though couched in terms of statutory construction, is actually a significant departure from the pre-election legislative scheme. When “judicial construction of a statute is unexpected and indefensible by reference to the law which had been expressed,” it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). The changes outlined above have no basis in the legislative enactments and constitute such a change.

Respectfully submitted,

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**IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA.**

CASE NO.00-2808

ALBERT GORE, JR., et al.,

Plaintiffs,

vs.

KATHERINE HARRIS, as Secretary of State,
STATE OF FLORIDA, et al.,

Defendants.

_____X

IN RE: Motions Hearing

BEFORE:HONORABLE TERRY LEWIS
Circuit Court Judge

DATE: Friday, December 9, 2000

TIME: Commenced:8:35 p.m.
Concluded: 11:39 p.m.

LOCATION: Leon County Courthouse
Courtroom 3D
Tallahassee, Florida

REPORTED BY: B. J. QUINN, RPR, CMR, CP
Certified Realtime Reporter
Notary Public in and for the
State of Florida at Large

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1 PROCEEDINGS

2 (REPORTING STARTED AFTER HEARING COMMENCED.)

3 THE COURT: What's your Plan B?

4 MR. BECK: I think it would be good to reflect this

5 over the evening, because I know you're going to need a

6 Plan B, and I don't think you need to decide that tonight.

7 What you need to decide tonight, is that people in the

8 counties shouldn't be segregated in the ballots, in the way

9 that makes our life more difficult.

10 In terms of what needs to be counted, we think that,

11 first of all, the Supreme Court opinion sometimes talks about

12 undervotes.

13 And by our count, through -- in the most recent machine

14 run statewide, there are 64,780 undervotes.

15 Those are votes, those are ballots, where nobody

16 punched through the chad for any presidential candidate. The

17 Supreme Court elsewhere talks about counting all the

18 nonvotes.

19 The nonvotes is a broader category. That also includes

20 the ballots where people punched through for two candidates.

21 There's 175,660 of those nonvotes. So we have to sort that

22 through.

23 We think, also, that it is --

24 THE COURT: What does the Supreme Court say that I

25 should do about nonvotes?

1MR. BECK: I haven't been able to figure that out,
2 frankly, Your Honor. I just know they refer to nonvotes on
3 page 39. And nonvotes, to those who sat through the trial,
4 is a broader category. And those may have to be examined, as
5 well, to see if you can discern voter intent from the
6 nonvotes.

7There are also, we have said in this litigation, if
8 you're going to start counting dimples as votes, then perhaps
9 you need to look at all the ballots, because if somebody
10 punched through successfully for George Bush, but then
11 dimpled one for Al Gore, then if that dimple counts as a vote
12 on the other ballots, it ought to count as a vote on all the
13 other ballots, and that would create an overvote situation.
14 So there's that problem, as well.

15But focusing now on the undervotes, we think that you
16 need to look at all of the undervotes in Miami-Dade County,
17 including the 20 percent that were already looked at by the
18 Canvassing Board. And the reason for that, Your Honor, is
19 that it now becomes a judicial function to make sure that
20 they are all treated under the same standard using the same
21 factors.

22We have a real serious problem in Miami-Dade County,
23 where we had a Canvassing Board that applied a very, very
24 loose approach of divining voter intent.

25And they only went through 20 percent of the precincts,

1 and the 20 percent of the precincts happened to be
2 overwhelmingly Democratic. That's just the sequence they did
3 them in. Now, and they came up with a number of votes that
4 they divined, and Al he Gore picked up a whole bunch of
5 votes.

6And, now, unless Your Honor looks at that, again, we're
7 going to start looking at the other 80 percent. And someone
8 is going to be using a different approach that was used for
9 the 20 percent that's heavily Democratic.

10The remaning 80 percent, according to the regular votes
11 that came in was actually 52 percent Bush, 48 percent Gore.
12So if someone was going to use a real meaningful
13 standard for the Republican parts of that county, then those
14 voters, including a lot of Hispanic voters, who tended to
15 vote Republican in this last election, are going to have
16 their votes evaluated under a standard that's different than
17 was used for the Democrats.

18That creates big problems under the Voting Rights Act
19 for a protected group, like Hispanic Americans, the equal
20 protection clause for everybody, as well as 3 US Code
21 Section (5).

22So we believe that the Court is required to include
23 that 20 percent of the Miami votes so that all the votes are
24 counted in the same way.

25We also believe that Broward, which underwent a manual

1 recount, those votes also need to be examined by whoever the
2 Court determines should do the examining, using the factors
3 that the Court identifies as appropriate.

4What we had in Broward was testimony in this record
5 that they used different standards at different times during
6 the manual counts, and that the standards were much, much
7 looser than, say, the ones that were attempted to be applied
8 in Palm Beach.

9So Broward was a very heavily Democratic county, voted
10 heavily for Al Gore. It picks up hundreds of votes in this
11 process in the Canvassing Board, and uses a standard that was
12 not used in Palm Beach, which I believe is not going to be
13 the one that Your Honor sets for the rest of the state.

14So we think that the Broward votes have to be
15 reevaluated, using the same factors that Your Honor, we
16 think, will have to be identifying for the rest of the state.
17 Otherwise we've got the same problems identified before.
18 Different people's votes are treated differently, depending
19 on where they live. And whether their Canvassing Board is
20 all Democrats or has a mix.

21So it's my big concern about consistent standards. And
22 then, also, Judge, less controversially, I believe, we got a
23 ruling today from Pensacola concerning Overseas ballots, the
24 Military ballots, that the Democrats had initially succeeded
25 in including. And now the Overseas and Military people

1 should have their votes counted even though they don't have a
2 postmark on the ballot. We'll be giving Your Honor a copy of
3 the opinion.

4I haven't seen it, yet, but I understand it was
5 favorable to the overseas voters. So those votes will have
6 to be included in the tally, as well.

7We believe that as to where it should be counted,
8 consistent with our position, that the Court should be doing
9 the counting, or at least under the direct supervision of
10 Your Honor, if you're going to use personnel here, that the
11 votes ought to be shipped up here.

12We also believe, lastly, on the procedures that, the
13 counting ought to be done in the Sunshine, with observers
14 from each side present. These are going to be factual
15 determinations that are going to be made by somebody under
16 the auspices of the Court. And there are go to be disputes
17 like there were in front of the Canvassing Boards, over
18 whether this stray mark is a vote for Al Gore, or whether it
19 isn't a vote for Al Gore, and we're going to have to be heard
20 on that. So we're going to have to have some mechanism,
21 where we can have observers present, both sides, obviously.
22And we believe that, under Florida law, since this is,
23 essentially, a taking of evidence and an examination of
24 evidence in Court, that needs to be done in the Sunshine.
25Now, Your Honor --

1THE COURT: Tell me some specifics on that. How many
2 people? What would they do?

3MR. BECK: I guess, Your Honor, I don't know, yet, what
4 Your Honor is going to order in terms of who is going to be
5 counting these votes. But I think we basically need to have,
6 for each person or group of people who are counting a set of
7 ballots.

8I think we need one observer from each side, who has
9 the opportunity to be heard. And we need this transcribed so
10 that, ballot by ballot, if there are disputes, those can be
11 resolved.

12It may be that Your Honor, takes an approach of
13 allowing others to do the first cut. And then disputed
14 ballots, you'll examine yourself.

15But if you're going to do that, I think we're going to
16 need a record so that Your Honor can name this evaluation.
17 And even if Your Honor, decides: I'm not going to look at
18 any ballots, we still need a record, because we're still
19 entitled to appeal.

20And I don't think that the Supreme Court created a
21 whole new mechanism where not only do we have new people
22 doing a manual recount, but it's conclusive that we're not
23 allowed, even though it's done in the course of a lawsuit, to
24 ever have an appeal or that.

25So we're going to need to have court reporters

1 transcribing objections and arguments and records being kept,
2 of which ballots are in dispute. So you can resolved that,
3 or some other judge, or some other Court, can resolve it.
4 On the question of standards, Your Honor, I guess what
5 I'll do, since I don't know exactly how comprehensive Your
6 Honor's order is going to be tonight I'd like to give you a
7 preview of what our position is, with the caveat that, since
8 we didn't know Judge Sauls was going to be recusing himself,
9 I didn't come ready with a two-hour evidentiary presentation.
10 But let me tell you what I think the evidence showed in this
11 case concerning standards.

12 THE COURT: I want to hear from Mr. Douglass and you.
13 And it's ten of nine. And I may want to come back and hear
14 some evidence on it, but, really, based upon what you heard,
15 and the evidence, what criteria should be applied, in your
16 mind?

17 MR. BECK: That's what I'll say, without getting into
18 the evidentiary discussion. I apologize, but we have to say
19 that, both from a legal point of view as well as a factual
20 point of view, we think the criteria are: If you
21 successfully punch the chad through all the way, or if you
22 dislodge the chad partially. So that it's what is so-called
23 a hanging chad. I trust Your Honor has sort of seen enough
24 in the newspapers to know what a hanging chad is.

25 THE COURT: Yes, sir.

1MR. BECK: But that is a fair indication of voter
2 intent. We think the standard ought to be that a dimple or
3 indentation is not something from which you can discern voter
4 intent. Now, Judge, I want to go to the next step, to
5 Plan B.

6If Your Honor decides that you're going to articulate a
7 standard, whether people are going to take into account
8 dimples and indentations, here is what I think the factors
9 are: Number one, the indentation has to come in a stylus,
10 not from a fingernail or a finger.

11And believe it or not, we had evidence, Your Honor, you
12 can tell when it comes from a stylus, and when it's just
13 other some stray marking. When it comes from a stylus, it
14 leaves, basically a fingerprint of a stylus. There will be a
15 circular dimple that is the same diameter of the stylus, and
16 you can tell.

17So, number one, the only dimples that ought to even be
18 considered, is if they come from a stylus.

19Number two is, the stray or so-called rogue dimple;
20 that is, where there's a dimple next to George Bush's name,
21 or Al Gore's name, but the voter managed to successfully vote
22 in the rest of the races, that that is not an indication of
23 voter intent. And it is, in fact, at least as consistent and
24 more consistent with the hypothesis that the voter chose to
25 affirmatively not to vote for Al Gore or George Bush.

1 We only heard from one voter. He put his stylus in, he
2 thought about it, searched his soul and brought it out. So
3 that's a man who chose not to vote. If you count that as a
4 vote, you disenfranchise that man.

5 He's got a right not to vote for either one, we all
6 love our candidates. But I read in the paper there are a lot
7 of people who are not as crazy about either one of them, so
8 they chose not to vote.

9 So a stray or rogue dimple is not a vote. And that
10 simply is pretty consistently the rule throughout the
11 country. And I hope tomorrow to have an opportunity to
12 present you with the law, as well as the facts on this.

13 Now, we also did hear evidence from our expert, as well
14 as theirs that, occasionally what happens is people don't
15 insert the ballot in what's called a throat. Instead they
16 put it on top of the device, and then they are never able to
17 punch the chads through.

18 But both experts said, in that event, you'll see a
19 pattern of dimpled chads. Because there's nothing magic
20 about Al Gore, all the way down the ballot they will have
21 failed to punch the chad through, or in almost all of the
22 races.

23 So we believe that if you're going to be looking at
24 dimples, which you should not do, that you should only count
25 the dimples where there is a pattern of clear attempts, but

1 failures to punch the chad through.

2That is the kind of standard that was attempted to be
3 applied in Palm Beach County to varying degrees of success at
4 different times. It's the kind of standard that was applied
5 in the Illinois case, and in the Pullen case, and it's also
6 the kind of standard embodied in some regulations from around
7 the country.

8We think dimples shouldn't count. But if you're going
9 to count them, that's a fair indication of voter intent, that
10 the rogue dimples ought not to be counted.

11And one thing we feel very strongly about, Your Honor,
12 what happened in Broward County was just awful. They said:
13 This person voted for a whole bunch of Democrats; and,
14 therefore, I can read his mind and tell that indentation next
15 to "Al Gore" was really a vote for Al Gore.

16We feel like trying to read his mind based on what he
17 did in other races is really improper. Because at the
18 presidential race, in particular, people decide not to vote
19 for the head of the ticket or they switch parties, or cross
20 other parties, because they often vote for the man, and the
21 future of the woman, rather than the party. And they have
22 second thoughts, and they often say: I'm a loyal Democrat,
23 but I can't stomach Al Gore. Or, I'm a local Republican, but
24 don't like George Bush. But when you describe intent based
25 on what they did in other races, you disenfranchise those

1 people and water down all the votes of other people in
2 Florida.

3So that's my shorthand version of what we think the
4 factors would be. And we hope Your Honor would give us an
5 opportunity to summarize the evidence on it, because there
6 was quite a lot of evidence in the trial record on this.

7THE COURT: When do you envision in your procedure that
8 actual counts would begin?

9MR. BECK: Well, I think that they ought to begin -- I
10 assume Your Honor wants to move forward expeditiously and not
11 on a leisurely basis. So I think people ought to be working
12 on the weekends here, and I think that the counties ought to
13 be reporting to the Court on their success in segregating the
14 undervotes, and ought to be reporting to the Court the
15 numbers, so that we have it in the record here of the new
16 tabulation, whatever this may be used for in the future, of
17 Gore votes, Bush votes, all the other candidates, and the
18 number of undervotes.

19And then once those are segregated, you know, when it
20 should begin, I'm assuming Your Honor is not going to take me
21 up on my suggestion that they all get shipped down to your
22 courtroom and you look at them all.

23So I think, then, we're talking about, you know,
24 the day after that.

25But I don't know who Your Honor is going to decide

1 should look at these votes.

2THE COURT: Whoever, that is.

3MR. BECK: Whoever looks at them, I think ought to be

4 looking at them. Basically, as soon as the Court is

5 satisfied they've segregated these in a proper way and

6 recorded the tabulations in a proper way, and as soon as we

7 can get a court reporter and observers from either side

8 there.

9So I'm anticipating that some counties may be able to

10 do that process, and conceivably start, you know, tomorrow

11 afternoon. I don't know if they can get it done that fast or

12 not.

13We also have a whole issue of -- I think the Supreme

14 Court ordered that every county, including the ones that use

15 optical scanners, have to go through this process:

16And I'll tell you, I haven't given a moment's thought

17 to what an undervote is, what the implication is in an

18 optical scanning county.

19We need to talk to the Court about that. There are

20 some counties with very view undervotes. And it may be an

21 easier task. So the short answer is: As soon as Your Honor

22 has been satisfied that they've been properly segregated and

23 tabulated, and we can get observers there, then I think the

24 counting would begin.

25Now, let me also say that we actually intend to seek a

1 stay of this entire matter from the Florida Supreme Court and
2 the United States Supreme Court, because I think that it
3 can't possibly result in anything that's actually meaningful
4 and helpful. And all it's go to do is create constitutional
5 difficulty.

6So, but in the meantime, we want to be cooperative with
7 the Supreme Court. So that's what I think ought to be done.
8We're just now thinking about who are we going to draft
9 to be observers. I don't know whether it's true. My wife
10 told me that she was watching television before I came over
11 here, and that she heard that the Democrats had chartered a
12 plane and were flying in 100 lawyers from Washington to act
13 as observers.

14So I suppose we'll have to round up volunteers on our
15 side. I don't have a toll free number to call. But we're
16 going to have to get volunteers on our side, as well, lawyers
17 who are going to be with each one of these counters, lodging
18 objections and making arguments.

19THE COURT: Anything else?

20MR. BECK: No, Your Honor.

21MR. KLOCK: Your Honor, we have objections to what the
22 Republicans are suggesting.

23THE COURT: The Republicans are suggesting -- I'd like
24 the objections, but I'd rather focus on the positive. You
25 tell me what you want to do.

1MR. KLOCK: If I can explain why. I don't mean to be
2 mean or problematical. But you have the desirable position
3 of not only reporting to the Supreme Court of Florida, but
4 also having the Eleventh Circuit Court of Appeals and the
5 United States Supreme Court watching what is going on, having
6 orders simultaneously filed in Washington and Atlanta.
7Our concern is to preserve the record for a review
8 before the Eleventh Circuit Court of Appeals and also the
9 United States Supreme Court.
10And, Your Honor, I'll understand if you don't want to
11 hear it, and we'll just file it in writing. But one thing
12 I'd like to start out with that's problematical, if you turn
13 to page 38 of the slip of the Supreme Court, they say:
14 "Moreover, because the venue of an election contest that
15 covers more than county, lies in Leon County, the Circuit
16 Court has jurisdiction, as part of the relief it ordered,"
17 presumably, "to order the Supervisor of Elections and the
18 Canvassing Boards, as well as the other necessary public
19 officials in all counties that have not conducted a manual
20 recount or tabulation of the undervotes in this election, to
21 do so forthwith. Said tabulation is to take place in the
22 individual counties where the ballots are located." That's
23 what they ordered you to do.
24You'll recall the argument put forth before that
25 indicated that the only provision for a manual recount

1 provides for three people that are designated by office.

2And, Your Honor, the identity of those people are very
3 important, because, for instance, in Dade County, the
4 supervisor of elections, who is one of the three, is a
5 registered Independent.

6If you look down here further, after the Supreme Court
7 has said that you're supposed to do it in the county where
8 the votes were cast, they then go on, on page 39, to suggest
9 that, because time is of the essence, the Circuit Court with
10 respect to the Miami-Dade ballots is to go forward and be
11 assisted by the Leon County Supervisor of Elections, or its
12 sworn designees, directly contradictory to the paragraph
13 before. And it's my understanding -- I've never met the
14 man -- that he is an elected official who ran as a Democrat.

15Now, Your Honor, if you look at the transcript when you
16 have the opportunity to look through, you'll find that the
17 number of votes that are generated through this divining
18 process seems to be tied not only to the number of registered
19 voters of each party in the county, but also who is looking
20 at it.

21So our view would be, and we would reiterate and
22 respectfully disagree with our colleagues that are
23 representing the Republicans, that it must be done by the
24 Canvassing Boards, the standards have to be established by
25 the Canvassing Boards there.

1And if the Court is going to overlook that, that's
2 fine. But it can't be done the way that it's being suggested
3 that it be done. That would be improper with the statutes.
4 Now, we have a number of objections I'd be happy to go into,
5 but --

6THE COURT: The positive thing that you suggest I do is
7 have the Canvassing Boards in the county do the manual
8 recount?

9MR. KLOK: Yes, Your Honor.

10THE COURT: Okay.

11MR. KLOCK: And then, Your Honor, also with respect to,
12 you know, certain other points that we can raise, we can do
13 it now or later. But the Secretary -- the Division of
14 Elections has issued two advisories to the supervisors. And
15 I'll pass one up to the Court, if I may, and pass one around
16 here, with the Court's approval.

17And, Your Honor, what our hope is, is we have advised
18 the supervisor of elections they should watch TV so if there
19 is anything that is ordered from the bench, that it can be
20 immediately implemented.

21But, Your Honor there is going to have to be a need to
22 deal with those issues. I assume these people are going to
23 comply without being served. But you never know. And that's
24 something that the Court has to consider, as well.

25Another point the Court has to consider is that, you

1 know, this process has now extended -- the protest/contest
2 period, which apparently ran together -- for a longer period
3 of time. And when, Judge, is to be the appellate review of
4 this process if everything has to be done by midnight on the
5 12th?

6So Your Honor also has to give some thought to a cutoff
7 point. And as has been argued before also under the
8 statutes, if you don't have a complete count done, it is not
9 fair to include them.

10And, Your Honor, I would, again, refer back to the
11 testimony that was taken at the trial, where they
12 demonstrated in Miami-Dade County, where the numbering of the
13 precincts starts with one, not surprisingly, starts over by
14 the coast, that heavily Democratic precincts with over an
15 80 percent Democratic content were counted in the first 135
16 that they did where they stopped, and then the rest of the
17 county went 53 percent, as opposed to a higher number, I
18 believe 53 percent for Governor Bush.

19So, consequently, if you don't do the entire county,
20 again, you're skewing the votes. So you do have to
21 respectfully figure out a way to have all of these people in
22 all of these counties get everything done. So it's either
23 everything or nothing. And we'd also suggest that the whole
24 state has to be done, or they can't be permitted. There is a
25 statutory provision that says you can't have partial

1 recounts.

2THE COURT: When you say, "all the votes," are you
3 talking about all of the votes, or all of the undervotes?

4MR. KLOCK: Our position is all of the votes, that's
5 plan A, which Your Honor has indicated you don't have a great
6 deal of affection for.

7THE COURT: Plan A was that I personally look at
8 everything.

9MR. KLOCK: This was a modified plan A. This is more
10 attractive. But the fact is, again, all the votes have to be
11 looked at, because the overvotes are just as significant as
12 the undervotes, because as you go through the process, if the
13 chads flip this way, they can flip that way.

14THE COURT: I'm going by a very narrow thing, and what
15 the Supreme Court told me to do is what would be done.

16MR. KLOCK: I'll be happy to put all of our objections
17 in writing, I just don't want the Court to claim its
18 sandbagged later on if these objections are raised.

19Finally, with respect to the standard, with respect to
20 what Mr. Beck raised, the only testimony -- they had an
21 expert that the Democrats put on. He was asked the following
22 several questions. He was asked: If you pick up a ballot
23 and you go to the presidential race, and you see a hole
24 punched through all the way, and you see a dimple below it,
25 and another candidate, how do you read that? And he said,

1 well, there's no question. The dimple is a mistake, and the
2 punch-through is correct.

3The next question: Well, if you pick up a ballot, and
4 there is only a dimple, and he said: Well, if it's only a
5 dimple, you count that as a vote.

6Now, how Your Honor, something that is a mistake in one
7 instance, then becomes not a mistake in another instance, I
8 think points to the fact that anything having to do with a
9 dimple should be immediately suspect, especially since we
10 don't have any standards.

11And I don't understand how you can have a standard if
12 something is or is not a mistake or a vote, depending on what
13 you want to do, which gets us back, again, Your Honor, to the
14 Canvassing Boards that have to make these determinations. I
15 guess with some sort of Court supervision.

16And if Your Honor wants, we'll put other objections
17 into writing and file them in the morning. We want them in
18 the record, and we want Your Honor to be able to look at
19 them.

20And, in addition, I would ask, with respect to what one
21 of the appellate courts is looking at, that is the
22 Eleventh Circuit Court of Appeals, we want to pass up a copy
23 of the Touchtone decision, and its dissent. And particularly
24 call Your Honor's attention to the dissent of
25 Judge Cholak (phonetic) for Your Honor to look at.

1 I had asked for copies of each of the opinions to be
2 brought over, and, apparently they brought over twice as many
3 of one.

4 I'll also hand up the Seagull opinion. And the other
5 objections, we'll file in writing.

6 THE COURT: And I appreciate that many of you may have
7 objections to what needs to be done. My only concern is I'm
8 going to try to do what's been directed. I fully expect you
9 to make your objections on the record.

10 But if we have to do this done, what's the best way
11 to do it?

12 Finally, also, I was just handed this. This is an
13 order of the United States District Judge for the Northern
14 District of Florida which commands that Military ballots that
15 are, as the language says -- if I can read this from the
16 ordering clause: "Accordingly the Court hereby orders any
17 state statute, regulation administrative rule, or procedure,
18 that rejects a federal write-in ballot which has been signed
19 pursuant to the oath provided therein, (a), solely because
20 the ballot envelope does not have an APO, FPO or foreign,
21 postmark; or, (b), solely because there was no need for an
22 application for a state absentee ballot, conflicts with
23 federal law. It is further ordered that all federal write-in
24 ballots objected to for the above-stated reasons, are
25 declared valid, this 8th day of December, 2000, by Judge

1 Leahy Collier (phonetic), United States District Court,
2 which, of course, is binding upon the Secretary of the
3 Canvassing Commission. So we'll be in that process, as well,
4 Your Honor.

5MR. BECK: Your Honor, there were a couple of points
6 that I either didn't make, or didn't make clear, but I'll at
7 least make them short.

8The first one is that on the question of whether there
9 was a statewide standard as to not counting dimples and
10 indentations, there was, we believe, a statewide standard in
11 practice, in effect, which was to count, fully dislodged
12 chads, only, and that the Palm Beach regulation was a
13 recognition of that.

14It's not so much that the Palm Beach regulation governs
15 statewide, but it is a reflection of the fact that,
16 statewide, that was the practice and standard.

17So if this Court now articulates a standard that allows
18 dimples and indentations to be counted, that will be a new
19 and different approach and standard than was in place in the
20 Court -- in the state, although not written up in the state
21 regulations; and, therefore, would violate 3 US Code
22 Section 5.

23THE COURT: When you say at statewide standard, where
24 did it come from?

25MR. BECK: I think where it came from is probably the

1 instructions that came with the machine, and the instructions
2 that came from the manufacturer, and that the way that votes
3 are tallied, using the Votomatic machine is that somebody
4 dislodges the chad fully, then the light shines through and
5 it counts as a vote for Al Gore or for George Bush.

6And no one has ever, previous to this in Florida,
7 counted ballots any other way. No one had ever, previous to
8 this, using Votomatic ballots, ever used the standard of
9 indentations or anything else. So it was a machine count of
10 the ballots with fully dislodged chads. And to do something
11 other than that is a new and different standard, is your our
12 position on that.

13Secondly Your Honor --

14THE COURT: It's sort of like a common usage, or common
15 practice, as opposed to some standard proposed?

16MR. BECK: It was not a legislatively -- it was not
17 written in the statute, but it was -- when the officials who
18 determined how votes were to be counted and tabulated brought
19 the Votomatic machines, and followed the instructions from
20 the Votomatic manufacturer, and put the instructions on the
21 back of the voting booth, telling the voters what counts as a
22 vote, and having the instructions in the ballots.

23And what the instructions in the ballots say, and on
24 the back of the voting booth say, is that in order to vote,
25 you must fully dislodge the chad.

1And it says that, if I haven't fully dislodged the chad
2 you have to pull it off. So there, in fact, were written
3 standards in the form of the instructions that were at the
4 polling place on the wall, and in the back of the booth. We
5 saw it on television. I don't know if you were paying
6 attention to that part of the testimony.

7And is written on the ballots, themselves. So the
8 voters are instructed in language adopted by all the local
9 officials across the state who use these machines.

10So the standard is in writing, adopted by the local
11 boards and given to the voters. So we do believe we have
12 written standards that say: To vote, you dislodge the chad
13 completely, otherwise it's not going to count as a vote.

14So now to change that, we think would be a change in
15 the law and, in effect, in the written standards, which would
16 violate the federal statutes.

17And we can elaborate on that tomorrow, if you want.

18Then lastly, Judge, whatever procedure you adopt, and
19 whomever you delegate the task to of reviewing the ballots,
20 in the first instance, we think that for all challenged
21 ballots, those should be segregated further, identified by
22 number in some way, a record kept of the objections, and the
23 arguments made, and those should come to Your Honor from
24 around the state.

25I don't know how many there's going to be, but they --

1 I think if the standards are articulated clearly enough, I
2 don't think there's going to be very many nonvotes that are
3 transformed into votes. If, in fact, the factors are
4 identified correctly, there's very few people who put the
5 ballot on top of the machine and leave a pattern, because
6 they don't follow the instructions.

7 So it's not going to be that big an issue, I don't
8 think, if the factors are clearly articulated.

9 But whatever they are, we think that disputes need to
10 be resolved, in the last analysis, by this Court, rather than
11 by your -- whoever you delegate the initial counting to,
12 because the Canvassing Boards are not given any discretion in
13 the contest. They're not mentioned in the contest.

14 And if the Supreme Court has decided to order, or to
15 suggest to Your Honor that you can enlist their aid, we think
16 that's a mistake. We think it creates horrible
17 constitutional problems. But if you go down that road, then
18 at the very least, there has to be some judicial review of
19 these determinations that are being made by nonjudicial
20 officers.

21 So we hope all of the challenged ballots will be
22 bundled up, segregated, brought here to Tallahassee, and then
23 we can have a hearing and go through them.

24 THE COURT: Mr. Myers? I'll give everybody a chance.

25 MR. MYERS: May it please the Court, as you may not be

1 aware, I represented West Florida Intervenors in this action.

2 Early on in this litigation we had asked the Court to do a
3 statewide manual recount and asked the Court to take a
4 statewide perspective.

5If the Court looks at page 38 of the Florida Supreme
6 Court's decision, you'll see the Florida Supreme Court has
7 agreed with the Intervenor's position that a statewide count
8 should been done. So presumably they agreed with some of the
9 positions we presented.

10I wanted to answer Your Honor's question about votes
11 that are no votes, or not undervotes, in other words, the
12 overvotes, and perhaps the Military ballots, or any other
13 absentee ballots.

14I took some time to look through the Florida Supreme
15 Court's order, Your Honor, to determine whether you should be
16 ordering a recount of those.

17If the Court looks at page 39, you'll see that the
18 Florida Supreme Court has directed you to enter such orders
19 as are necessary to add any legal votes to the total
20 statewide certifications, any legal votes, Your Honor.

21And if you look back, you'll see on page 16 of that
22 decision that the Florida Supreme Court also agreed, it says,
23 "We do agree that a manual recount be conducted for all legal
24 votes in this state."

25Furthermore, the Court further discusses the need for

1 looking at all legal votes in the State so that every vote
2 that should have been counted is counted for purposes of this
3 manual recount.

4 On page 11, the Court goes on to say, about halfway
5 through the page, Your Honor: "The right to a correct
6 count" --

7 THE COURT: What page?

8 MR. MYERS: Page 11, it's a quotation, as well
9 established in this state by our contest statute. "The right
10 to a correct count of the ballots in an election is a
11 substantial right, which is the privilege of every candidate
12 for office to insist on. In every case where there has been
13 a failure to make a proper count, called tally, or return of
14 the votes as required by law," and this fact has been duly
15 established as the basis for granting such relief, a correct
16 count of all the ballots, Your Honor, is one of the things
17 the Supreme Court has pointed out to you.

18 And if you look at page 19, about two-thirds of the way
19 down, over toward the right, you'll see it says, "The clear
20 message from this legislative policy is that every citizen's
21 vote be counted whenever possible."

22 So I think it's clear, Your Honor, that from the
23 Florida Supreme Court's decision today, that as a floor or a
24 minimum threshold for Your Honor, you must order a recount
25 all of the undervotes.

1However, the Court has broadly ordered you to include
2 any legal vote that the Court feels would be there, and also
3 to ensure that every legal vote be counted so that every
4 citizen's vote would count in the State of Florida.

5I think it's pretty clear that the Court has the
6 authority to do that here, and that would include absentee
7 ballots, and would exclude the overvotes or no votes that had
8 been registered. I'll represent to the Court that --

9THE COURT: Can I stop you for a second? Do you
10 consider overvotes and no votes or nonvotes the same thing?

11MR. MYERS: Not necessarily, no, I don't. A no vote
12 would be, for example, the counties reported, and it's part
13 of the record in this case, that the State Elections
14 Commission received a report that there were over 180,000 no
15 votes. And those no votes would include undervotes and
16 overvotes. So the no votes is a more, a broader concept.

17THE COURT: So no votes include both undervotes and
18 overvotes?

19MR. MYERS: From my understanding, yes, Your Honor. I
20 also point out to the Court that we heard testimony from
21 Judge Burton in this particular trial. We learned that there
22 is now an art to manually recounting the votes. It was
23 readily apparent that he had picked up this art from
24 obviously spending hours and hours from looking at these
25 ballots.

1 I recommend to the Court that you, at least, at part of
2 the hearing here look at some of the ballots by hand, so you
3 can begin to understand some of the these that you would need
4 to convey to the rest of the boards.

5 Also, Your Honor, if you would be so inclined to review
6 the testimony of Judge Burton or others who actually went
7 through a manual recount, you'll be able to pick up some of
8 the standards that Mr. Beck was talking about earlier. So I
9 recommend the Court do that.

10 Notice, you asked Mr. Beck about when and where. First
11 of all, it's clear that the Florida Supreme Court intended
12 that the votes be done in the counties in which they were
13 cast, with the exception of those votes that are right here
14 in Leon County.

15 We recommend to the Court that, at the earliest, the
16 Court ordered the manual recounts to begin at noon tomorrow
17 on Saturday. That would be sufficient notice for the public
18 to go to the locations of the manual recounts so they could
19 witness this, and also give sufficient time for the observers
20 who want to be there, to be at the various locations
21 throughout the state.

22 Any earlier than that, Your Honor, would deprive the
23 public of proper notice to watch this proceeding.

24 I also recommend to the Court that you have a time
25 certain for reporting the results of these manual recounts so

1 that we can meet our -- the deadline that we have on
2 December 12th. I would recommend that noon on Monday the
3 11th, would be an appropriate time to stop the manual recount
4 and report.

5The reason I say that, Your Honor, is it will take time
6 to tabulate the results. And the Court must also consider
7 who do they report? To the Court? Well, who in the Court?
8And they need to understand that, because the Court
9 administrator may not be able to physically receive 67 faxes,
10 or I guess it would be more like 63 faxes from the various
11 counties at five o'clock on Monday afternoon, in order to
12 begin tabulating results?

13Then, of course, as Your Honor knows, once the counties
14 report, there has to be a tabulation of the statewide count
15 and there need to be time for that to be don. That's why I
16 recommended noon on Monday, at the latest, so that these
17 results can be done.

18I also agree with the concept that you have to look at
19 all of the votes, or at least run all of the votes through
20 the machines, in order to identify the no votes that have to
21 be looked at by hand.

22I recognize that there's not enough time in the next
23 two days count 6,000,000 votes in the State of Florida.

24However, running those through the machines will
25 eliminate the problems Mr. Beck identified, and that is every

1 time they're run through the machine, additional no votes are
2 identified. So we have to make sure we get an accurate
3 count. And that's of utmost importance to the voters in the
4 State of Florida.

5THE COURT: Let me ask you this: Every time you run it
6 through the machine, you get a different count. Well, why
7 would the count you do next time be any different than the
8 one you already have?

9MR. MYERS: The point is, if they have already run them
10 through the machine and they already have their counts that
11 they've certified -- and they've done it twice, we know --
12 then they may not be able to identify which of those votes
13 had registered as no votes, without running them through the
14 machine, again. If Your Honor orders them to only count the
15 no votes, and they haven't segregated them, and we don't know
16 that they have, then you have basically crippled that
17 Canvassing Board from doing their job, and they're going to
18 have a difficult time.

19However, if you order every Canvassing Board to run
20 them through, again, you ensure that everyone starts with the
21 same ground zero approach, and that is that we make sure we
22 separate the no votes away. And that way we're much more
23 likely to have an accurate count come in from the Canvassing
24 Boards once they report.

25I also agree with Mr. Beck that you have to have

1 objective standards, Your Honor. And that's why I suggest you
2 take a look at the votes. But Your Honor needs to tell statewide
3 what those standards would be, so, again, the count is done with
4 the same standard statewide.

5And who will vote? I recommend to Your Honor that the
6 people who vote are people who are experienced with handling these
7 ballots.

8Obviously, the Canvassing Boards are the best
9 candidates; however, some of the Canvassing Boards will not have
10 an opportunity to have just those three people that are members of
11 the board do the count in some of the counties that have a large
12 number.

13So Your Honor has to consider how can they delegate to
14 people that necessarily may not have any experience.

15Let me give you an example: Let's say that
16 Hillsborough County has to manually recount all of their
17 undervotes this weekend. Well, up to now, to my knowledge,
18 they've not had to do any manual recounts, so they haven't trained
19 anybody up to now to know how to do a manual recount. And only
20 the three members of the Canvassing Board are experienced with --
21 and their staff -- are experienced with handling the ballots
22 themselves.

23So the Court needs to give some direction to the
24 Canvassing Boards, especially in the more populous counties, on
25 how they are to delegate, if at all, to those members who would be

1 working for them, and what kind of training that they need to give
2 them, in order to have this manual recount done within the two-day
3 time period.

4And I suggest to Your Honor, by giving a time certain
5 that they have to report the results, and telling them how they
6 must report the results will, of course, help them establish how
7 fast they have to go through this process, how many people that
8 they will need, and how they would go about it to meet the
9 deadline.

10Now it, there are some concerns about how to ascertain
11 the Palm Beach County undervotes and overvotes or no votes. And
12 I'm not sure that that's been handled by the Palm Beach County
13 personnel.

14However, Your Honor has to address the fact that those
15 ballots were all shipped up here from both Miami-Dade County and
16 Palm Beach County, and that they went necessarily segregated.

17As I recall during last week, they began to separate
18 some of the ballots from each other, and they were ordered by
19 Judge Sauls to stop the separation and just pack them all up and
20 send them up here. And they were doing some sort of separation
21 down in Miami-Dade County, as I recall, or maybe
22 Palm Beach County.

23So Your Honor has to get some instruction for the
24 personnel here in Tallahassee, on how the votes have been packaged
25 in Miami-Dade County and Palm Beach County so that the personnel

1 up here have to figure out how they're go to do it.

2And let me point this out to Your Honor : I don't

3 believe Leon County has the machines to run the Miami-Dade County

4 and Palm Beach County ballots through the machines to separate

5 them. So that's a concern, because I know when we vote, we use

6 the optical scanners here in Leon County.

7 If that's a concern, then the Court has to address

8 that, as well, is how are we going to have a machine separate them

9 when we don't have a machine here in Leon County that can actually

10 run those ballots through.

11 And that may be that we have to have someone from

12 Palm Beach County or Miami-Dade County to fly a couple of machines

13 up here first thing in the morning so the Court can have the no

14 votes separated from the rest of the ballots, so they can get

15 started on the manual recount.

16So those are all the concerns that we have. And from

17 the point of view of voters in west Florida, we just ask that you

18 keep in mind that the voters are the real parties in interest here

19 in this particular case, and that we're trying to be protect the

20 will of all of the voters of the entire State of Florida in

21 whatever standards you give everyone. Thank you.

22THE COURT: Thank you.

23MR. DOUGLASS: Your Honor, just a short remark. Number

24 one, what I'd like to ask the Court to consider, is that when

25 we have these types of presentations, that we impose some

1 time standard in the matter. In the Supreme Court, for
2 example, you've got so much per side. And you had to divide
3 it.

4Consequently we didn't have these long speeches by
5 Intervenors who were in here by virtue of being allowed to
6 come along as the Intervenors, and not to interfere in the
7 suit.

8But I would like to request that the Court consider,
9 when we have these hearings, that we put a time line for that
10 side and this side. Otherwise we -- we're usually very
11 short, anyway, and it seems like we're outweighed.

12Certainly we're outweighed tonight at least starting
13 out. Our position as stated in our motion, which will be
14 explained by Mr. Boies, is succinctly stated by the Supreme
15 Court, we think, which says, "Time is of the essence," Even
16 in this hearing. The circuit Court shall commence the
17 tabulation of the Miami-Dade ballots immediately which they
18 described above as the 9,000 undervotes which are segregated.

19And the Circuit Court is authorized in accordance with
20 the provisions of 168, which he will refer to, to be assisted
21 by the Leon County Supervisor of Elections, or its sworn
22 designee, which means you may employ others.

23And, moreover, since time is of the essence, in any
24 statewide relief, the Court must consider any further
25 statewide relief that should be ordered simultaneously with

1 the Miami recount.

2And so what we say, and Mr. Boies will answer some of
3 the things, is that it should begin immediately, as we said,
4 and go forth. And we had suggestions as how that would be
5 done.

6MR. BOIES: May it please the Court, my name is
7 David Boies, and I begin by expressing my appreciation and
8 I'm sure all of the parties' appreciation for sitting this
9 evening. This is something that is obviously very important
10 to us to be expedited.

11In terms of what we would like to see the Court do,
12 basically, what we would like to see the Court do is what the
13 Florida Supreme Court has set out in its opinion.

14First, there are 9,000 Miami-Dade County ballots that
15 have not been manually reviewed, and those are the ballots
16 that the Florida Supreme Court says should be reviewed
17 immediately here. And they have set out a procedure that
18 they've authorized the Court to use, not instructed the Court
19 to use, but authorized the Court to use, in terms of using
20 the supervisor of elections and that person's sworn
21 designees.

22The second thing that we would like the Court to do is
23 to commence the manual recount for counties, other than
24 Miami-Dade County, that have not already had a manual
25 recount.

1And I'm confronted a little bit with the Secretary of
2 State saying that it must be done by the Canvassing Boards,
3 and Governor Bush's lawyers saying: It can't be done by the
4 Canvassing Boards.

5We believe that the Supreme Court has said that it can
6 be done by the Canvassing Boards. We believe it could also
7 be done here in Leon County, using the Leon County Supervisor
8 of Elections if the supervisor of elections had adequate
9 resources to do that. We don't know whether that's so or
10 not.

11If there were adequate resources to do that, we would
12 have no objection to Governor Bush's suggestion. And we
13 believe that that would be entirely consistent with the
14 Supreme Court's opinion; that is, we disagree with the
15 Secretary of State that is somehow precluded. The Supreme
16 Court's opinion, in other portions, makes clear this is a
17 judicial function; that it is not a 166 protest. It is a 168
18 contest.

19Not only the majority opinion, but two of the three
20 dissenting Justices draw that distinction between 166 and
21 168, and make clear that 168 is a judicial proceeding, and
22 not one where you have to give discretion to the Canvassing
23 Boards.

24So if there is adequate resources to do it here, we
25 believe that that would be acceptable under the Supreme

1 Court's view. That's what Governor Bush's counsel has
2 suggested, and we would be agreeable to that, too. Our only
3 concern is whether or not there are adequate resources here
4 to get it done in the time available.

5Let me make one point that is a little bit, maybe, of
6 an reargument of something the Supreme Court decided against
7 us, but they've been rearguing a lot on what the Supreme
8 Court decided against them.

9THE COURT: Didn't they take my lead, though, when I
10 told him about it?

11MR. BOIES: I did, Your Honor. And I'll only mention
12 this one thing, and that is -- and I'll do it, in part,
13 because the Intervenor suggested it, as well, and that is the
14 3,300 votes from Palm Beach. Those were ballots that the
15 Supreme Court said, we had not shown that the Palm Beach
16 board didn't do those right. No one ever looked at those as
17 a judicial matter.

18And if we're going to go beyond the strictures of what
19 the Supreme Court has laid down, we think the very first
20 ballots -- and this may have been what the Intervenor had in
21 mind when he talked about the need to look at the Palm Beach
22 ballots.

23The first ballots that ought to be looked at are those
24 3,300 ballots that are already here.

25But we don't want to do anything until after everything

1 that the Supreme Court has ordered to be done has been done.

2Once that's done, maybe there's some things that

3 they're suggesting that we could do. Maybe there's some

4 things that we're suggesting that could be done. But I think

5 the Supreme Court has made clear that there are certain

6 limited things that have to be done immediately, and those

7 are the things that we would ask the Court to focus on, at

8 least first.

9In terms of when, we think the Court meant immediately

10 when it said, "Immediately."

11Hours make a difference here. We would like to see the

12 process with respect to the 9,000 Miami-Dade ballots start

13 immediately. First thing tomorrow morning.

14We would like to see the counties directed to start

15 first thing tomorrow morning. If the counties are going to

16 do it, or if it's going to be done here, that they be

17 instructed first thing tomorrow morning to get the ballots

18 here so they could be done here.

19We think that hours are going to make a difference

20 here. And the Court knows, I think, may know, that

21 Palm Beach was shut out of the certification process because

22 it finished its manual recount 127 minutes late.

23Minutes may make a difference here. So we don't want

24 to have any delay.

25Let me just talk, in response to some of the individual

1 points that were made.

2First, there was a question of what undervote meant.

3The Court, the Supreme Court does use the term

4 undervote and nonvote or no vote. I think it is clear from

5 the context that all of those words are being used in the

6 same sense; that is, a ballot for which there was no vote

7 recorded for the presidential race.

8There are overvotes where there are two or more votes

9 recorded for the presidential race.

10That's not what the Supreme Court was talking about.

11 And, indeed, when you look at the use of the word, nonvote,

12 or no vote, the Supreme Court uses that in the context of the

13 9,000 Miami-Dade votes.

14And there's no dispute that the 9,000 Miami-Dade votes

15 are undervotes.

16So we think that what is at issue here are undervotes.

17If somebody wanted to look at overvotes at sometime if

18 there was time, I'm not sure we would have an objection to

19 that.

20But what we absolutely would object to is anything to

21 do with overvotes, or any other votes, until we get what the

22 Florida Supreme Court has ordered to be done, which is a

23 review of all the undervotes.

24The number that was given to the Court of about 64,000

25 undervotes may be somewhat high, because I think that number

1 may include undervotes from Broward County and
2 Palm Beach County, which, of course, are two of the three
3 largest counties with undervotes.
4 And those votes have already been taken care of by the
5 Supreme Court.
6 In terms of the criteria to be used, we think the
7 Supreme Court's opinion is quite clear. They talk about the
8 clear intent of the voter, and we believe, that's always been
9 the appropriate standard in Florida. Judge Labarga in
10 Palm Beach County, issued two opinions on that.
11 And those were opinions that we had thought previously
12 from what the Defendants had said, were opinions that they
13 agreed with.
14 Those opinions make clear that it is not a
15 punch-through standard, it is not a hanging chad standard.
16 It is the intent of the voter, looking at the entire ballot.
17 We think that if you look at the cases the Supreme
18 Court cites in its opinion, in its opinion, the Florida
19 Supreme Court says, "There are a number of other states that
20 follow the same principle," and they give three examples,
21 Massachusetts, South Dakota, and Illinois.
22 And if you look at those three cases, and you look at
23 what the Supreme Court of Florida says about those cases, I
24 think you also get a sense of what the appropriate criteria
25 is to use to identify the clear intent of the voter. For

1 example, the South Dakota case, the Duffy case that the
2 Supreme Court cites in its opinion today, is a case that the
3 Florida Supreme Court characterizes as holding that if you
4 see a mark of some kind where a voter would ordinarily make a
5 mark in order to vote, then, unless there's something that
6 clearly indicates that that's not a vote, it should be
7 considered a vote.

8The Dellahunt case, which is a Massachusetts case that
9 the Florida Supreme Court also cites in that same paragraph,
10 is a case that holds that where you have an indentation on or
11 near the chad, that should be counted as a vote.

12The Pullen case, which is the third case, this is an
13 Illinois case that the Court cites there, although it doesn't
14 quote the Pullen case in this opinion, it did quote
15 extensively from the Pullen case in its November 21 opinion,
16 also talks about looking for what the reasonable
17 interpretation of what the voter's intent was from the entire
18 ballot.

19So I think that the Supreme Court has made it clear,
20 not only what the standard is, but what, if you need to be
21 specific about particular criteria, what those criteria are.

22So we think that that is something that does not need
23 to delay the process.

24We don't have an objection to them presenting to the
25 Court summaries of evidence. We can present summaries of

1 evidence, too. It will not surprise the Court that there are
2 some pieces of evidence that Mr. Beck did not mention that we
3 think are important for the Court to consider.

4But fundamentally, the Supreme Court of Florida has
5 decided these questions. It has decided that there is go to
6 be a manual recount. It has decided that that is not going
7 to include all of the 6,000,000 ballots. It's only going to
8 include the undervotes.

9It's decided that those counts need to start now. It's
10 decided that those are going to be done as a judicial matter,
11 except to the extent that there are ballots in other counties
12 that can be done there, or can be done here.

13So I guess the bottom line, because we think the
14 opinion is pretty clear, and we just think that it needs to
15 be implemented as quickly as the Court is prepared to do
16 that.

17THE COURT: Well, in terms of who is going to do it,
18 you say you don't care whether it's done by somebody up here,
19 or the Canvassing Board, or the supervisor of elections down
20 in the counties?

21MR. BOIES: That's true, Your Honor. The only
22 qualification is if, in consultation with the Supervisor of
23 Elections of Leon County, the Court were to conclude that the
24 resources here were not sufficient to do it, or it would -- I
25 don't think this could possibly be the case, but if for some

1 reason we couldn't get the ballots up here; that is, if there
2 was any practical consideration that meant that bringing the
3 ballots here would make it unlikely that we were going to get
4 it done, then we would say: Get it done in the counties.

5And I think that's what was motivating the Florida
6 Supreme Court. I don't think the Florida Supreme Court was
7 saying: It has to be done in the counties, because elsewhere
8 in the opinion, they make clear this is a question for
9 judicial resolution.

10But if we could get them here and get them done here on
11 time -- and I think the number is such that you probably
12 could, because I think the 54,000 number is too high.

13And if the number were closer to 40,000, which is what
14 I think it is, I think that is something that could be done
15 in a period of time, if you had enough teams.

16I guess the only other thing I would say is obviously,
17 we don't have any objection to having observers. In the
18 Supreme Court's Bechstrom's case, what happened there was
19 that the Circuit Court had the Clerk of the Court review the
20 ballots with a representative of each side present.

21THE COURT: Clerk of the Court?

22MR. BOIES: In that case, that was the Clerk of the
23 Court. That was the 1998 Bechstrom court case.

24THE COURT: Two observers?

25MR. BOIES: One observer from each side watching it.

1 The only thing that we would ask is that the process not get
2 booked down. The Court is well aware, with lawyers, you can
3 make every ballot a federal case, to coin a phrase.

4And I think that there are enough federal cases already
5 in this matter. And what we need to do is we need to get on
6 with the counting process.

7All we really want is for the count to start soon, and
8 to progress, so that we can fulfill what the Supreme Court
9 has said, which is to get it done on time.

10We think that if the counting is going to go down in
11 some of the counties, they need to report by tomorrow at the
12 end of the day, what their schedule is for completion, and
13 how much they've gotten done. Many counties ought to be
14 finished tomorrow. And we think that the Court can't wait
15 until Monday to get reports.

16I think the Court is going to have get reports on a
17 daily basis to make sure there is not some problem that we
18 don't know about that is too late, and we can't solve it.

19MR. KLOCK: Your Honor, if I can address a couple
20 points, very quickly. First, Palm Beach County, Mr. Boies
21 referred to as being 127 minutes late. Currently they are
22 17,500 minutes late because they still have not filed a
23 certificate indicating what the additional votes are that
24 were due at five o'clock on the 26th.

25The next point, Your Honor, is for those of us that are

1 local lawyers, generally speaking the stuff that is closer to
2 the end of the order is more significant. And I would
3 suggest that while Mr. Boies thinks the Supreme Court is sort
4 of suggesting you can do it any way you want, I would refer
5 you to the language at the bottom of 38: "Moreover because
6 the venue of an action of an election contest covers more
7 than one county than Leon County, the Circuit Court has
8 jurisdiction to order the supervisor of elections and the
9 Canvassing Boards, as well as the necessary public officials
10 in all counties that have not conducted a manual recount or
11 tabulation of the undervotes in this election, to do so
12 forthwith. Said tabulation can take place in the individual
13 counties where the ballots are located. That is nine lines
14 before the "so ordered" language.

15 In addition to that, Mr. Boies has excellent recall.
16 He indicated to Your Honor, he says, "Because time is of the
17 essence, the Circuit Court, shall commence the tabulation of
18 the Miami-Dade ballots immediately. But if you move on
19 another sentence or two, it says, moreover, since time is
20 also of the essence in any statewide relief, the Circuit
21 Court must consider any statewide relief should also be
22 ordered forthwith and simultaneously with the manual
23 tabulation of the Miami-Dade votes.

24 Two other points, Your Honor, the Florida Supreme
25 Court, in the last paragraph says that that is defined under

1 101.561(5) of the Florida Statutes.

2 And when you compare it to the opinion, a legal vote as
3 it is used there, is one that is decided by the Canvassing
4 Board.

5 So the little adjustment to the Supreme Court's
6 decision, is to go in and have the Court reexamine the 3,300
7 votes that were determined as illegal votes by the Palm Beach
8 County Canvassing Board, and recognizes at the beginning of
9 the Supreme Court's opinion, they are illegal votes forever,
10 Your Honor. So they can never be recounted.

11 And I think the only other point I wanted to mention is
12 with respect to overvotes and undervotes, you also have the
13 problem when you get into the optical scanning votes,
14 Your Honor. You simply can't do what they want to do with
15 the undervotes, because, Your Honor, when you get to the
16 optical scanning, sometimes what folks do is put an X in the
17 box, instead of a complete circle. Sometimes it reads;
18 sometimes it doesn't.

19 It clearly is as important a vote as a dimpled chad or
20 something that is caused by a fingernail rubbing across a
21 ballot, and clearly needs to be looked at. Sometimes, also,
22 Your Honor, they color in the little box, or the little
23 circle, rather, and they write the same name below it.
24 That is considered an overvote by the machine and not
25 counted as well. That needs to be looked at.

1And then the final point I had, Your Honor, was that --
2 that may be it. But these points are very important to be
3 taken into consideration.

4The final point is there needs to be time for appellate
5 review. And the idea of having daily tallies -- the purpose
6 of this drill, Your Honor, is to conduct a complete manual
7 recount. Not to create opportunities for press conferences,
8 two or three times a day to indicate how our guy is doing
9 depending on whether you start at the bottom or the top end
10 of the precincts.

11So all this information has to be tallied at one time,
12 because, otherwise, what it's going to be is a public
13 spectacle which is going to be worse.

14THE COURT: Let me ask you something, because the
15 Secretary, at least it appears, doesn't have a preference for
16 one side or the other. You're a Defendant because that's
17 your job, and you have to certify the results.

18Would you have any problem with, in terms of the
19 logistics of getting results from the other counties, that
20 they do it as they normally would do, which is to send it to
21 your office?

22MR. KLOCK: That would be nine. They know how to do
23 that and they do it. And, Your Honor, with respect to the
24 other arguments that are being made, under 97.012, the
25 Secretary also has the responsibility for the uniformity of

1 elections, and how they're conducted and that kind of thing.

2 So that is the reason why the other objection.

3 You're correct, Your Honor, the Secretary does not

4 have, as Secretary, a horse in the race. Nor does the

5 Attorney General.

6 MR.GREENBURG: Your Honor, if I may, this is Murray

7 Greenburg in Miami.

8 MR. DOUGLASS: That's what I was waiting on. It really

9 wasn't, but I wanted to suggest this --

10 MR.GREENBURG: If I may, you have the ballots and all

11 our elections --

12 THE COURT: Mr. Greenburg, can you wait a minute? I'll

13 certainly let you talk. But I got a couple of them standing

14 up there. I won't leave before I let you talk. Okay?

15 MR. BECK: Your Honor, I'd like to address a couple of

16 points Mr. Boies raised.

17 THE COURT: Just one second, I think he's got a

18 procedural point.

19 MR. DOUGLASS: I would suggest, again, we be a little

20 more formal, because we made a presentation, they made a

21 long, long, presentation. We made a presentation. And that,

22 normally, in most proceedings, then the Court takes over and

23 asks questions.

24 We don't want to get into this, again, because Mr. Beck

25 is one of the longest speakers I know, and I would like to

1 ask that -- and he's from Illinois and they do things
2 different there. But I would like to ask the Court to,
3 please, if we could set some structure that would prevent
4 this, where we finish, and they get up, again, because -- if
5 it's just a little thing like the Secretary, he had a point
6 there.

7But, you know, we're going to be here forever. So I'm
8 asking the Court, if we could, consider that, certainly, in
9 future hearings.

10THE COURT: Well, I can consider it right now,
11 actually, because it is almost ten o'clock now, and I need to
12 do something, otherwise we will be talking about what we're
13 ease going to be doing forever.

14MR. BECK: Your Honor, what they did in their
15 presentation --

16THE COURT: Let me stop you, Mr. Beck. I don't want I
17 to argue back and forth and objecting. What I wanted nis
18 input. And if you don't have any more input for me, that's
19 fine. But if you have something that you should tell me I'm
20 going to do, I will listen.

21MR. BECK: I do, Your Honor. I first want to reinforce
22 what the Secretary of State's counsel said, that we also are
23 concerned about running tallies and press conferences. As
24 far as we're concerned, there is no number that comes out of
25 these things until the Court resolves any disputes as to

1 ballots.

2And the Court ought to be releasing the information
3 when it's done with its work, rather than having running
4 voting tallies. So that as soon as, you know, one candidate
5 gets in front of another, all of a sudden people are claiming
6 victory. We ought to have the Court resolve the disputes and
7 then release the results.

8Another item that is also on your plate is you're going
9 to need to hear from us both tomorrow, I would suggest, about
10 how many there are down in Palm Beach.

11Mr. Boies as used the number 215, which the Supreme
12 Court used, but the Supreme Court also noted in a footnote,
13 that we say it's a lower number, and that they take no
14 positions on that. You're going to have to resolve that.

15Your Honor, the Supreme Court says on page 39, when
16 talking about Miami-Dade, about the counting machine
17 registered these as nonvotes and they've never been manually
18 reviewed. We think you have to look at all the nonvotes, not
19 just the subset of undervotes.

20Mr. Boies argued the South Dakota case as if that meant
21 that any kind of dimple or indentation is an indication of
22 intent.

23I have the South Dakota case. What they say about --
24 they talk about two chads in the South Dakota case. And one
25 of them was good old chad number 88, and they say, " Two of

1 the four corners of this chad had been broken and one side is
2 separated." So that's a hanging chad. The other chad was a
3 patterned chad, where they say, "It's important to note that
4 when this ballot is viewed in its entirety, at least four
5 additional chads are partially punched in the same manner."

6 So the only chads that were at issue in the South
7 Dakota case that the Supreme Court referred to, were either
8 hanging chads, or the kind of patterns that we talked about,
9 not the kind of rogue dimples that they want.

10 Judge, in terms of the stages of a recount, and I don't
11 want to bore you with the gory details. I suggest we present
12 you with something in writing about the stages that people go
13 through in a recount.

14 We think, briefly, that the counties ought to cull the
15 nonvotes out from the other ballots, preserving the integrity
16 of the counts, the way I referred to before.

17 We think that the Court should announce what factors
18 are to be examined when determining voter intent, the
19 criteria that are relevant to that determination.

20 THE COURT: I think you're summarizing your previous
21 argument. I've got to get going.

22 MR. BECK: Okay. The last point, Judge, is Mr. Boies
23 was absolutely wrong when he said three times that somehow
24 Governor Bush suggested that the Leon County Supervisor of
25 Elections was the right person for doing the job.

1 We say the Court should do it. The Leon County
2 Supervisor of Elections -- I don't know him, and I'm sure
3 he's an honorable man and a good public servant, but he's
4 also a loyal Democrat.

5 Democrats on the Canvassing Boards of Miami-Dade and
6 Broward County made the decision that turned hundreds of
7 nonvotes into votes for Al Gore. And now they're suggesting
8 that a Democrat in Leon County make the determination
9 concerning the Republican counties, and we don't think that's
10 right.

11 THE COURT: I think the Supreme Court is suggesting
12 that the supervisor of elections in the counties may assist
13 the Court in making the count. And I don't think the
14 Democrats are suggesting anything.

15 MR. BECK: I'm suggesting to the Court that it's the
16 Court's decision to make. It was authorized to do that by
17 the Supreme Court. We think it's a bad idea. We don't think
18 that if the concern is with public confidence and the
19 integrity of the election, you should do that.

20 THE COURT: Let me ask all sides on this. The other
21 counties, theoretically, as per the order, would have the
22 Canvassing Board doing the counting, like they normally
23 would, or somebody down there in the counties. What if the
24 ballots were taken to Dade County, and a similar procedure
25 was used there and then report back just like they normally

1 would? Any reason why it has to be done here?

2MR. BECK: You said Dade County?

3THE COURT: Yes. I'm suggesting to you --

4MR. DOUGLASS: I understand.

5THE COURT: Is there any reason why we couldn't take
6 the Dade County ballots down to Miami, and let the people
7 that normally would count them, count them.

8MR. BECK: I think on that one, the Supreme Court was
9 fairly clear. I thought the Supreme Court directed the Court
10 to undertake that task. I think it left open to the Court to
11 undertake the rest of the task, but that one, specifically,
12 was directed to the Court to do it.

13THE COURT: Well, yes. But, theoretically, they asked
14 me to use the supervisor of elections here, or sworn
15 designee. Is there any reason why that couldn't be the
16 Dade County folks?

17MR. BECK: We would object to that. We think the Court
18 ought to be doing that, under the standards articulated by
19 the Court we don't think that's contemplated by the Court's
20 order.

21THE COURT: Anyone else?

22MR. BOIES: Just very briefly, Your Honor. I think we
23 would agree that the Miami-Dade ballots ought to stay here.
24 Our reasons are a little different, but I think the time
25 consumed in sending that number of ballots back down, and

1 then getting the results back, would defeat the purpose of
2 the immediate review.

3THE COURT: Okay.

4MR. BOIES: With respect to Mr. Klock's point in which
5 he said that that, in reference to these ballots being
6 reviewed in the counties, nine lines from the end, it is nine
7 lines from the end, about, maybe a little more, but in those
8 nine lines is where the Supreme Court talks about the Court
9 having the assistance of the supervisor of elections.

10So I think you could use the supervisor of elections,
11 if the adequate resources were there.

12And, third, with respect to the criteria to be used, it
13 seems to me, if you're looking at the Duffy case, which is
14 South Dakota case, the right thing to look at is how the
15 Florida Supreme Court characterized that whole thing.

16THE COURT: Mr. Greenburg, it's your turn. Do you want
17 to say anything.

18MR. GREENBURG: Yeah, but, Judge, let me just say this
19 at this point: We will do whatever the Court wants. We're
20 here to assist the Court, the supervisor, and all the
21 officials here in the county.

22What we need to know -- and I think Your Honor will
23 agree with this -- we need to know soon. Our ballots are
24 there; we're here; we're fine with that.

25(LAUGHTER.)

1MR.GREENBURG: The next plane would require our getting
2 up at 4:30 in the morning, which is fine. But we need to
3 know what you want to do, who you need up there.
4And if it's just going to be legal argument, what time
5 you would want anybody, we will do whatever you want. You've
6 heard enough from all the lawyers, myself included. Just
7 please tell us what you want us to do and we'll do it.

8THE COURT: Thank you. I'm going to take a recess and
9 consult the high authorities and be back with you -- I won't
10 tell you when, but I'll be back before the evening.

11And I'm sorry to make you wait, and I know everybody
12 has been working overtime, but I'll have to come up with
13 something, having had input from you, that I think will work.
14I'll be back to tell you what I think it is.

15(DISCUSSION OFF THE RECORD.)

16 RULING BY THE COURT

17THE COURT: I apologize for keeping you all waiting. I
18 know it's late.

19Well, we've got two different counts to be concerned
20 with. One is the Dade County ballots that are here in
21 Leon County. The other involves the rest of the counties in
22 the state. This is not perfect, but I'm going to give you
23 what I plan to do with regard to both of those counts. You
24 may have objections to that. You may have questions about
25 it. But because of the lateness of the hour, and the exigent

1 circumstances, I ask that you make your objections in writing
2 and give them to me tomorrow morning through the Court
3 Administrator's Office. And I'll take some action on that
4 and review them at that time.

5First of all, when we do the count, what we're going to
6 be looking at are what are considered nonvotes or undervotes.
7Those would be where a counting machine does not
8 register the vote, or does not register all the vote.

9For the Dade County vote, which is still here in
10 Leon County, we will keep the ballots here and count them
11 here.

12I'm going to ask the supervisor of elections, or his
13 sworn designee, I'm going to ask that Mr. Sancho contact
14 Mr. David Leahy. Do we still have Mr. Greenburg?

15I guess that was a long time for him to wait on the
16 phone.

17I believe he was the attorney indicating they'd be
18 willing to help any way they can. The staff of the Clerk of
19 the Court is available for the purposes of helping in the
20 count, the Supervisor of Elections can work with the
21 supervisor in Dade County to the help count those votes.

22I'm very concerned with the perception of these votes,
23 and whether they're going to be done accurately and fairly.
24 In that respect, I've asked my colleagues here in the Second
25 Circuit to assist in this.

1Theoretically, I guess we've had counts normally with
2 teams of two. Normally there's a Canvassing Board there that
3 would resolve any questions about whether a vote is or is not
4 a vote. That's the way I understand this goes. For those
5 teams of two, I have asked two judges to act as arbiters,
6 basically, if there's a question about that, and those judges
7 can resolve that dispute or question about the ballot.
8If those two Judges can't agree, it will be sent to me
9 and I'll resolve that finally. That's how we'll do the vote
10 here.

11I'm going to have them start tomorrow morning at
12 eight o'clock.

13And I believe the facility will be the Leon County
14 Public Library. They'll have some room there to accomplish
15 that.

16The press will be allowed. We'll make arrangements.
17 Any questions about how to do that should run through the
18 proper administrator's office. The counting that's done
19 there will be open for observation by the parties.

20But what I'd like to do, even though this has been said
21 in many Court cases so far, the voters are the real party in
22 interest. There are two candidates here, that would be
23 Governor Bush and Vice President Gore.

24You can have anybody you want designated for a team.
25 But all the rest of you, I'm sorry, I'm just going to leave

1 it that way. If you can get them to let you there, you can
2 be an observer, as well.

3If we start at eight, my target date -- not my final
4 date -- but I hope to be finished no later than two o'clock
5 p.m. on Sunday, which would be December the 10th.

6As we discussed before, the Secretary of State, and the
7 Divisions of Elections will assist.

8It won't be necessary for ours here, but I'd rather go
9 ahead and probably use that in terms of sending the results
10 that we have here, through the Supervisor of Elections to the
11 Division of Elections for a certification of those results.

12At -- and I want to emphasize: This is not a protest
13 count of votes. This is a count of votes as a result of a
14 contest of an election, under which there is broad powers,
15 apparently, for the trial judge to fashion a remedy.

16So when I say there will be observers at the county,
17 there won't be as you would normally have in a protest, the
18 opportunity to make an objection to each ballot, to mark it,
19 to see it.

20You'll be able to observe. You can make a note on a
21 notepad, if you'd like. You can raise those objections later
22 in writing with me. But in terms of each individual ballot,
23 I want the county to go as smoothly as possible. As I've
24 indicated, there will be at least two other judges available
25 to arbitrate any questions there. But I don't want anybody

1 raising a vocal objection at the time of the voting, or
2 otherwise trying to disrupt the count in any way.
3 Now, for the other counties, just as the Supreme Court
4 has indicated in its order, I would respectfully direct
5 Canvassing Boards in the counties who have not, or have not
6 previously done a manual count of nonvotes or undervotes, to
7 take steps immediately to do so. Specifically, I would
8 request that, by twelve o'clock p.m. tomorrow, Saturday, fax
9 to the Office of the Court Administrator, which I do have
10 that number somewhere, the fax number. Do I have somebody
11 from the Court Administrator's office here? I sure don't
12 want to give out mine. (850) 487-7947.
13 What I'd like faxed there is some indication of the
14 protocol purported or proposed by the Canvassing Board. And
15 this could be the Canvassing Board, but not limited to the
16 Canvassing Board. But such other public officials, including
17 the Supervisor of Elections, and their offices, staff,
18 employees, whatever is necessary in their estimation to do
19 the count required by the Supreme Court with, again, a target
20 date of 2:00 p.m. on Sunday for those results to be sent from
21 there to the Division of Elections for certification.
22 The same procedure would apply in terms of the
23 observers, in terms of the objections, and the indications
24 that I had before as to the vote in Leon County.
25 I'm not going to direct exactly how to do that. I'm

1 going to leave that to the discretion of the Canvassing
2 Board, in terms of deciding the parameters of who would do
3 the counting and how they'll do it. To my colleagues around
4 the state, my judicial colleagues, I would request that you
5 offer your assistance in the same manner my colleagues here
6 in the Second Circuit have offered, for the reason I have
7 indicated, to give some objectivity and partiality to the
8 process itself, to reduce, to the extent possible any
9 objections to the manner in which it was conducted.
10 I'm not directing that or ordering that, but simply a
11 request. And I'll leave it to the Canvassing Boards to
12 decide how they will best do it. But they will report by
13 twelve o'clock the protocol they intend to use, the estimated
14 time schedule, and I'll review that at that time.
15 The standard to be applied in doing this count is the
16 standard that the Supreme Court has set forth in its recent
17 order.
18 The Supreme Court has twice been given the opportunity
19 and requested to get more specific criteria in terms of how
20 to count ballots manually. They've declined to do so. And I
21 see in that a clear indication that they wish to leave that
22 to the Canvassing Boards and the persons that do the manual
23 counting, guided only by that principle that's laid out in
24 the opinion.
25 I think I indicated, I would ask that the Canvassing

1 Boards in those counties, when they've completed their
2 counts, to forward that through the normal procedures to the
3 Division of Elections for certification.

4 And with that, I know you probably have questions and
5 objection. As I indicated before, if you'll put those down
6 in writing, I will do my best sometime tomorrow morning to
7 reduce this to writing. And if I could get a transcript,
8 that would help me. I would appreciate it. But I need
9 something in writing.

10 MR. BECK: We will put our objections in writing in the
11 morning. I just want to alert the Court that there was an
12 outstanding matter in front of Judge Sauls. We had made a
13 motion to exclude the Miami-Dade ballots on grounds of ex--

14 THE COURT: Mr. Beck, I just said, put all your
15 concerns in writing. I will not hear any thing more tonight.

16 MR. BECK: I'm concerned that the counting is going to
17 begin before the Court hears the evidence on whether the
18 ballots are in shape to be counted.

19 THE COURT: I understand. Any concerns you have, any
20 objections you have, put them in writing. I'll review them
21 in the morning. Put them through the Court Administrator's
22 office. I'll be in touch with the attorneys through the
23 Court Administrator's office. We may meet again, but that's
24 what I'm going to do. Thank you very much.

25 (HEARING CONCLUDED AT 11:49 P.M.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:

COUNTY OF LEON:

I, B. J. QUINN, Certified Realtime Reporter,
Registered Professional Reporter, and Notary Public in and for the
State of Florida at Large:

DO HEREBY CERTIFY that the foregoing deposition was taken before me at the time and place therein designated; that before testimony was taken, the witness was duly sworn; that my shorthand notes were thereafter transcribed, via computer, under my supervision, and the foregoing pages numbered 1, through 66, are a true and correct record of the aforesaid proceedings. I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the day of
OCTOBER, A.D., 2000, IN THE CITY OF TALLAHASSEE, COUNTY
OF LEON, STATE OF FLORIDA.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850)222-5508
My Commission Expires March 20, 2001

CERTIFICATE OF NOTARY

STATE OF FLORIDA:

COUNTY OF LEON:

I, B. J. QUINN, Notary Public in and for the State of Florida at Large, do hereby certify that the witness personally appeared before me and was first duly sworn by me to testify to the truth on the date and time indicated herein.

B. J. QUINN, RPR, CCR, CMR
Certified Realtime Reporter
519 East Park Avenue
Tallahassee, Florida 32301
(850) 222-5508.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ALBERT GORE, JR., AND
JOSEPH I. LIEBERMAN,

vs.

CASE NO. 00-2808

KATHERINE HARRIS, as Secretary,
etc., et al.,

ORDER ON REMAND

This case is before the Court upon remand from the Supreme Court of Florida in **Gore v. Harris**, No. 00-2431 (Fla. Dec. 8, 2000), and upon recusal of the original trial judge. Pursuant to the instructions provided by the Supreme Court of Florida, the Court will immediately tabulate by hand the approximate 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed. The Court will include in such tabulation the additional legal votes for Gore in Palm Beach County and the 168 additional votes from Miami-Dade County.

In accordance with the provisions of Section 102.168(8), Florida Statutes the Leon County Supervisor of Elections or its sworn designees, which may include election officials from Miami-Dade County, will assist the Court with the manual recount. The counting process shall begin at 8:00 a.m. on Saturday, December 9, 2000, at the Leon County Public Library with sufficient two person teams of counters so as to complete

the count by 2:00 p.m. on Sunday, December 10, 2000.

In determining if a legal vote has been cast, the standard to be applied is: if there is a "clear indication of the intent of the voter" then the vote should be counted. If not, the vote should not be counted.¹ If there is a question in this regard as to any ballot, it shall be reviewed and determined by a team of two judges from this circuit, several of which will be on-site. If the two judges do not agree, the ballot will be segregated and reviewed by me for final determination. No partial counts will be done or reported, formally or informally.

For each team of counters, Plaintiff Gore and Defendant Bush may designate one person to act as an observer of the process. This person may not make a verbal objection or challenge to any particular ballot determination nor in any way disrupt or interfere with the counting process. Any objections or challenges shall be in writing and filed with the Clerk of Court.

The Supervisor will report the final results to the Court upon completion, and shall certify the results to the Division of Elections. Any additional votes as determined by this Court in resolving disputed ballots shall be added to these totals for certification by the Division of Elections.

The Court, consistent with the Supreme Court's Opinion, hereby directs that the


¹Some of the parties have requested that I establish specific criteria to utilize in applying this standard. The Florida Supreme Court has been asked at least twice recently to do so and has specifically declined. The only guidance is the language in the statute quoted above.

Supervisors of Election and the Canvassing Boards, with the assistance of any necessary public officials, in all other counties that have not conducted a manual recount or tabulations of the non-votes or undervotes to do so forthwith, said tabulation to take place in the individual counties where the ballots are located. The standard to be applied in determining what is a legal vote, the time targeted for completion, and the method of reporting results, shall be the same as noted above for the counting of the Miami-Dade County votes.

In the interest of promoting the public's trust and confidence in the objectivity and impartiality of the counting process, the counties are urged - but not required - to enlist the services of its judges where appropriate, in a manner similar to the process outlined above. The method and manner of the count shall be determined by the Canvassing Boards.

The Canvassing Boards of the respective counties shall fax to the Court at (850) 487-7947 by noon, Saturday, December 9, 2000, a report as to their proposed protocol for the count and an estimate of the time to complete, and any problems anticipated by the Boards are also directed to advise the Court by 10:00 a.m. on Sunday, December 10, 2000, as to the status of the count, and from time to time as the Boards deem appropriate.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 9th day of December, 2000.


TERRY P. LEWIS, Circuit Judge

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL
CIRCUIT, LEON COUNTY, FLORIDA, CIVIL DIVISION

ALBERT GORE, JR., Nominee of the
Democratic Party of the United States for
the President of the United States, et al.,

Plaintiffs,

CASE NO. 00-2808

v.

KATHERINE HARRIS, as SECRETARY OF
STATE, STATE OF FLORIDA, et al.,

Defendants.

**OBJECTIONS OF SECRETARY OF STATE
AND ELECTIONS CANVASSING COMMISSION**

Under Section 97.012, Florida Statutes, the Secretary of State is the Chief Elections Officer of the State of Florida. It is the Secretary's duty to obtain and maintain uniformity in the application, operation, and interpretation of Florida's election laws. Under Section 102.111, Florida Statutes, the Canvassing Commission certifies the returns of the elections and determines and declares who has been elected for each office. Accordingly, pursuant to the Court's directions, the Secretary of State and the Canvassing Commission hereby submit their objections to the process and standards for the statewide partial manual recount ordered by the Florida Supreme Court in this presidential election and in this Court's order, entered in open Court at 11 p.m. on December 8, 2000, in accordance with the Florida Supreme Court's judgment (the "Order," all collectively the "Procedure") as follows:

1. There is insufficient time, due to the impending federal deadlines to complete any manual recount with any degree of accuracy applying meaningful standards.

2. The Procedure permits no opportunity for meaningful appellate review or for meaningful review by this Court of the decisions and conclusions reached in the various counties conducting the partial manual recounts.

3. Any manual recounts undertaken must be on a statewide basis, and must be of all ballots, not a subset of ballots culled through standardless and undefined exercise of unreviewable discretion of persons and entities not before the Court who are attempting to identify “undervotes” for further review.

4. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the partial manual recount of ballots solely to address voter error.

5. There is no basis in the Florida Statutes in existence prior to November 7, 2000, that would permit a manual recount of ballots in circumstances other than for the reasons and in the manner set forth in section 102.166(4) to (7).

6. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a manual recount in Miami-Dade, Broward, or Palm Beach Counties following the results of the manual test undertaken by each county's canvassing board pursuant to Section 102.166(4) prior to the initiation of the manual counting.

7. To the extent that the Court is ordering a recount of less than all ballots, it must at least consider all ballots including overvotes, undervotes, and any other category of “non-votes.”

8. There is no basis in Florida law in existence prior to November 7, 2000, to undertake only a count of undervotes when those numbers of votes are to be added to additional votes gleaned from a larger selection of votes.

9. The law of Florida in place on November 7, 2000, did not permit the elections supervisor or canvassing board of one county to count the ballots of another county.

10. There is no basis in Florida law in existence prior to November 7, 2000, that would permit Miami-Dade County's ballots to be counted in Leon County outside of the presence of voters from Miami-Dade County and by officials other than those identified in sections 102.166(7).

11. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

12. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the counting by machines or by humans of other than fully punched chads.

13. There is no basis in Florida law in existence prior to November 7, 2000, that would permit some races in Florida to be decided on statewide manual recounts while others are not.

14. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the Miami-Dade Canvassing Board to use a software program that supposedly separated "undervotes" from properly voted ballots when such program has not been approved in advance by the Division of Elections, as required by Florida law.

The Secretary objects to the sorting of ballots based on software that is untested and uncertified by the Florida Division of Elections in violation of preexisting Florida law and practice.

15. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a circuit judge to order ballots to be counted without requiring the counting individuals to measure each ballot against the instructions provided to the voters when using the punch-card and ballot voting devices as required by Florida Statute section 101.46.

16. To permit individuals drawn from the Leon County Circuit Court to sort and make canvassing board decisions for Miami-Dade County votes differentiates Miami-Dade County voters in that their votes are not being counted by fellow county citizens drawn from the same county and they are deprived of local standards that were available to voters in Broward and Palm Beach counties.

17. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the manual recount of all ballots in some counties such as Broward, Palm Beach and Volusia counties while the recount of votes in other counties are being limited to “undervotes.”

18. The Secretary objects to the Procedure and any partial statewide manual recount which results in abrogating the rights of citizens under the equal protection and due process clauses of the United States Constitution.

19. The Secretary objects to the counting of ballots from Miami-Dade County under a process separate and distinct from the process to be applied in the other counties of Florida without meaningful standards.

20. The Secretary objects to conducting a partial manual recount in the absence of any valid, coherent reason for such a recount and without an evidentiary basis supporting the necessity of any recount.

21. The Secretary objects to a manual recount of a less than all the ballots of Miami-Dade County because there is no evidentiary basis to conclude that the subset of ballots culled from Miami-Dade County for a manual recount constitutes votes which have not previously been counted. The process ordered is likely to result in the counting of votes multiple times and therefor the dilution of other votes not so counted.

22. The Secretary objects to the inclusion of the Palm Beach County recount because to this day, no executed return of results from Palm Beach County has ever been submitted and there is, therefore, no legal basis for including such votes in any final tally.

23. There is no basis in Florida law in existence prior to November 7, 2000, that would permit assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on computer punch cards.

24. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the assignment of subjective voter intent based on subjective interpretation of ambiguous, undefined marks on marksense ballots.

25. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a court to establish the procedures for undertaking a manual recount of ballots and in determining voter intent.

26. Any attempt by a court to establish criteria and standards for determining voter intent invades the province of the legislature in the selection of presidential electors.

27. The Procedure intrudes upon the powers and duties of the Secretary and the Commission by stripping both of any but ministerial duties in the election process.

28. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a selective county challenge of a statewide race or the challenge of races that extended beyond any one county without the objector seeking a recount in all of the counties affected by the race.

29. There is no basis in Florida law in existence prior to November 7, 2000, that would permit a contest of undervotes to be initiated in the contest phase over a two-day period with another two-day period being provided for all appellate review.

30. There is no basis in Florida law in existence prior to November 7, 2000, that would permit the circuit court to issue advisory opinions regarding the conduct of the balloting and tabulation process.

31. The Secretary and the Commission object to the procedure to the extent that the Procedure violates Sections 102.141(2), 101.572, or the Florida Sunshine Law.

Dated this _____ day of December, 2000.

Respectfully submitted,

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