

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION**

FLORIDA DEMOCRATIC PARTY,

CASE NUMBER: CL 00-11078 AB

Plaintiff,

vs.

**PALM BEACH COUNTY CANVASSING
BOARD,**

Defendant.

_____ /

**ORDER ON PLAINTIFF'S EMERGENCY MOTION
TO CLARIFY DECLARATORY ORDER OF
NOVEMBER 15, 2000**

THIS CAUSE came before the Court on November 22, 2000, on an emergency basis, on the motion filed by the plaintiff, **FLORIDA DEMOCRATIC PARTY**, requesting a declaratory order and an injunction against the defendant, **THE PALM BEACH COUNTY CANVASSING BOARD ("Canvassing Board")**. The Court, after examining all pertinent pleadings and legal authority, and after considering the argument of the attorneys, makes the following findings and legal rulings.

BACKGROUND INFORMATION

- 1) On November 14, 2000, the plaintiff filed a Motion for Declaratory Judgment requesting this Court to declare invalid the canvassing board's policy of a per se exclusion of any ballot that does not have a physical perforation showing the separation of one or more corners of the rectangular "chad."
- 2) On November 15, 2000, this Court entered a Declaratory Order holding that:
 - a) no vote is to be declared invalid or void if there is a

clear indication of the intent of the voter;

- b) the present policy utilized by the local election officials restricts the canvassing board's ability to determine the intent of the voter;
- c) the canvassing board has the discretion to utilize whatever methodology it deems proper to determine the true intention of the voter and it should not be restricted in that task;
- d) the policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law; and
- e) the canvassing board has the discretion to consider those ballots and accept them or reject them.

3) On November 21, 2000, the plaintiff filed the instant motion asking the Court to clarify the aforesaid November 15, 2000 order. The plaintiff alleges that the Chair of the canvassing board, in an exchange with a Democratic Party attorney, articulated that the board's current standard for determining voter intent "turns solely on whether the corners of a 'chad' have been perforated, unless there is 'clear and convincing evidence' that an indentation or other perforation indicates the voter's intent to vote."

4) Given said allegation, the plaintiff has requested the Court to enter an injunction ordering the canvassing board (a) to review challenged punch card ballots by applying a "totality-of-the-evidence test" to determine the voter's intent, as opposed to a restrictive "two-corner" standard, and (b) to count indentations as votes, absent other evidence on the face of the ballot that clearly indicates a voter's intention to abstain or vote for another candidate.

ANALYSIS

Section 102.141(1), Fla. Stat. (2000), provides that the county canvassing board shall be composed of the supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commission. Sections 102.141 and 102.166, Fla. Stat. (2000), set forth the procedure to follow in the event a recount of the vote is necessary. In §102.166(4) - (7), the Florida Legislature set forth the procedure for a manual recount.

Section 101.5614(5) provides 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*" (Emphasis added). Conversely, section 101.5614(6) provides that any vote in which the board cannot discern the intent of the voter must be discarded. See Palm Beach County Canvassing Board v. Harris, No. SC00-2346, 2000 WL 1725501 (Fla. Nov. 21, 2000). Further, §102.166(7)(b) provides that "[i]f a counting team is unable to determine a *voter's intent* in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent. (Emphasis added).

Therefore, given the aforesaid language, the Florida Legislature intended to leave any determination concerning the question of voter intent with the canvassing board. As such, the canvassing board has been entrusted by the legislature with making the necessary factual findings concerning voter intent. Given the fact that the canvassing board is composed of three (3) members, it has the ability to make such factual determinations by a majority vote in each instance.

The question before the Court is the standard that the canvassing board must apply in determining the intention of the voters as it examines ballots without a clearly identifiable puncture

through one of the Presidential slots. In addressing this issue, the Florida Supreme Court's ruling in Palm Beach County Canvassing Board v. Katherine Harris, No. SC00-2346, 2000 WL 1725501 (Fla. Nov. 21, 2000), is very helpful. In commenting on the question of the right to vote, the Supreme Court noted:

Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting. . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter. Id. at 39.

Additionally, in commenting on the value of manual recounting, the Supreme Court added:

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this reason Florida law provides a *human check* on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Id. at 16. (Emphasis added).

Thus, despite our increasing reliance on computers and other machines, a "human check" is more likely to deliver a more accurate count of ballots.

In addressing the standard a canvassing board should apply in determining the intent of voters, the Florida Supreme Court offered the following excerpt from the Illinois Supreme Court's decision in Pullen v. Mulligan, 561 N.E.2d 585 (Ill. 1990):

The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those laws are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because the machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.

The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, *where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect* Id. at 18-19. (Emphasis added).

Given said reasoning, the only bright line rule a canvassing board is permitted to have in Florida is that there can be no per se rule excluding any ballot.¹ As aptly phrased by the Florida

¹The decision by the Massachusetts Supreme Court in Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996), may be of assistance to the board. The Court held that a "discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad

Supreme Court in Harris, "[t]he right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice." Id. at 4. The "will of the people is the paramount consideration." Id. at 4.

Therefore, given the aforesaid authority, the canvassing board, as previously articulated in this Court's order of November 15, 2000, cannot have a policy in place of per se exclusion of any ballot; each ballot must be considered in light of the totality of the circumstances. Where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

SUMMARY OF RULING

- 1) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the canvassing board for it to determine the voter's intent.
- 2) The canvassing board has been entrusted by the Florida Legislature with the task of making factual determinations as to the intent of the

is assigned." Id. at 1242. It should be noted that the Delahunt court found unpersuasive the contention that voters may have started to express a preference in a candidate, made an impression on a punch card, but pulled the stylus back because they did not want to express a choice on that particular contest. The Court noted, "[t]he large number of ballots with discernible impressions makes such an inference unwarranted, especially in a hotly contested election." Id. at 1252. See also McCavitt v. Registrars of Voters of Brockston, 434 N.W.2d 620 (Mass. 1982) (the object of election laws is to secure the rights of duly qualified electors and not to defeat them. . . . We resolve 'voting disputes' where at all possible, in favor of the voter."); Darby v. State ex rel. McCollough, 75 So. 411 (Fla. 1917) ("Where a ballot is so marked as to plainly indicate the voter's choice and intent in placing his marks thereon, it should be counted as marked unless some positive provision of law would be thereby violated.").

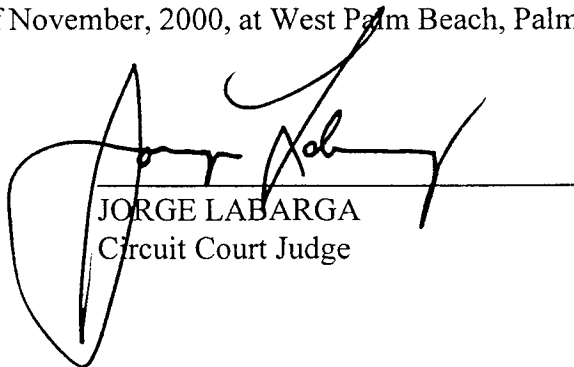
voter in casting a ballot. Since the board is composed of three (3) members, it is in a position to make a determination in each instance by a majority vote.

- 3) The canvassing board cannot have in place a policy which provides for a per se exclusion of any ballot. Each ballot must be considered in light of the totality of the circumstances.
- 4) Since the will of the people is the paramount consideration, and the purpose of our election laws is to obtain a correct expression of the intent of the voters, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect. Conversely, the canvassing board must reject any vote in which it cannot discern the intent of the voter.

Accordingly, given the aforesaid rulings, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Clarification is GRANTED as more fully set forth herein.

DONE AND ORDERED this 22nd day of November, 2000, at West Palm Beach, Palm Beach County, Florida.


JORGE LABARGA
Circuit Court Judge

Copies furnished:

By hand delivery due to the number of interested attorneys, media and citizens.