

FLORIDA DEPARTMENT OF STATE

Katherine Harris
Secretary of State

November 15, 2000

Honorable Robert W. Lee
County Court Judge
Chair, Broward County Canvassing Commission
201 S.E. 6th Street, Room 6760
Ft. Lauderdale, FL 33301

RE: Request of Broward County Canvassing Board to
Amend Certification of County Returns After
November 14, 2000 Statutory Deadline

Dear Chairman Lee:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Broward County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have con-

cluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).
2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).
3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. 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.")
3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts set forth in your report filed November 13, 2000, and your letter of today's date and assumed that they are true.

The Board states the following additional facts and circumstances that justify an amended certification:

1. Extremely large voter turnout, and the resulting ballots cast, dramatically increased the time required for the initial tabulation.
2. This Board, representing voters in the second largest county in Florida, needs additional time to complete all necessary tabulation, and should be afforded more time than boards representing voters in less-populated counties.
3. The large number of ballots has created additional logistical problems, requiring that ballots be moved to an alternate location for further tabulation. The Supervisor's location can accommodate a very limited number of counting teams.
4. The Board has encountered significant periods of delay, including:

A. The actions of the Board have been materially impacted by numerous lawsuits, including lawsuits filed in state circuit courts in Broward County, Palm Beach County and Leon County, and in federal court in both the Southern District and Middle District of Florida.

B. The actions of the Board have been materially impacted by conflicting opinion letters issued by Cabinet officers. On November 13, 2000, an opinion letter was issued by the Director of the Division of Elections, on behalf of the Secretary of State. On November 14, 2000, a conflicting opinion letter was issued by the Office of the Attorney General. These opinion letters impacted the Board's decision-making process regarding a full manual recount and further impeded the Board's ability to proceed more expeditiously.

C. One of the members of the Board, Supervisor of Elections Jane Carroll, was out of state on a pre-planned family holiday and therefore unavailable from November 9, 2000 through November 12, 2000.

D. The Veterans' Day holiday, observed in Broward County by different governmental agencies on either November 10, 2000 or November 13, 2000, further limited the Board's ability to act.

E. The Board was required by state law to conduct an automatic recount prior to determining the necessity of a full manual recount.

Additionally, the Board, in its report filed with the Division of Elections on November 13, 2000, responded in the negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the Board stated that "2 precincts failed to have ballots in transfer case; ballots retrieved from locked boxes left at precinct." And, the Board responded in the negative to the question of whether the board knew of "any other problems which

the canvassing board feels should be made a part of the official election record.”

**Application of Criteria to Alleged
Facts and Circumstances**

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged facts or circumstances that suggest that there has been substantial noncompliance with the state’s statutory election procedures. The Board has not alleged any facts or circumstances that suggest that Broward County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged large voter turnout and logistical problems associated with that turnout. However, Broward County is a large county and high voter turnout was not unexpected. The Board also has alleged delay in the certification process associated with litigation, a family holiday by the Supervisor of Elections, and the Veterans’ Day holiday. However, I find that these circumstances, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/

Katherine Harris
Secretary of State