IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC00-2373

ANDRE FLADELL, ET AL.	vs.	PALM BEACH COUNTY CANVASSING BOARD, ETC., ET AL.
Petitioners		Respondents

INITIAL BRIEF OF SECRETARY OF STATE KATHERINE HARRIS, CLAY ROBERTS, DIRECTOR OF THE DIVISION OF ELECTIONS, AND THE ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA

Deborah K. Kearney
General Counsel
Kerey Carpenter
Assistant General Counsel
Florida Department of State
PL-02 The Capital
Tallahassee, Florida 32399-0250
(850) 414-5536

Victoria L. Weber
Donna E. Blanton
David I. Spector
Steel Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

Counsel for Respondents
Katherine Harris, Secretary of State
Clay Roberts, Director of Elections
Elections Canvassing Commission

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STATEMENT OF THE CASE AND FACTS

On November 9, 2000, Plaintiffs Sharon Elkin, Florence Zolotowsky and Alex Zolotowsky filed a Complaint for Declaratory Judgment in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County and named as Defendants Theresa LePore, Supervisor of Elections for Palm Beach County, and Katherine Harris, Secretary of State. Elkins, et al. v. LePore, et al., Case No. CL-00-10988 AB. The Complaint alleged that the nature of the ballot used in Palm Beach County was confusing, misleading and ambiguous. Plaintiffs claimed that they mistakenly voted for Patrick Buchanan and Ezola Foster for President and Vice President of the United States when they intended to vote for Al Gore and Joseph Lieberman. Plaintiffs sought a judgment declaring their rights under Florida law, an order invalidating the ballots they entered on November 7, 2000, and a new election.

Also on November 9, 2000, Plaintiffs Beverly Rogers and Ray Kaplan, individually and on behalf of other similarly situated electors in Palm Beach County filed a Complaint that requested injunctive relief and a claim to set aside election results. Rogers v. Elections Canvassing Commission, Case No. CL-00-10992 AB. The Complaint named as Defendants the Elections Canvassing Commission, Governor Jeb Bush, Secretary of State Katherine Harris ("Secretary"), Clay

Roberts, Theresa LePore, the Palm Beach County Elections Canvassing Commission, Al Gore, and George W. Bush. The Complaint alleged that the ballots used in Palm Beach County were printed in a format that caused Plaintiffs to be confused and resulted in their mistakenly casting votes for Pat Buchanan rather than Al Gore.

In both Rogers and Elkins, the Secretary filed Motions to Dismiss, or in the alternative, motions to transfer for improper venue. In both motions, the Secretary asserted that venue was improper in Palm Beach County.

The trial court denied the Motion to Dismiss in Rogers on November 14, 2000. In addition, the Rogers Plaintiffs made motion to strike the Secretary's Motion to Dismiss on the grounds that she had been voluntarily dropped as a party.[1] On November 17, 2000, the trial court ordered that all cases in which the Secretary was a party would be transferred to Leon County. As a result, the Plaintiffs in Elkins filed their Motion for Clarification and Motion for Hearing on

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[1]The Secretary of State is a named party in Elkins. In Rogers, the Secretary of State was originally named as a Defendant, but Plaintiffs attempted to drop the Secretary of State as a party before to the Court's ruling on the Secretary's Motion to Dismiss. It is the position of the Secretary that she was not properly dropped as a party. This position is supported by the Court's denial of her Motion to Dismiss and the contemporaneous denial of the Plaintiff's Motion to Strike the Motion to Dismiss. Had the Secretary of State been properly dropped as a party, the Motion to Dismiss would have been moot and the Motion to Strike the Motion to Dismiss would have necessarily been granted.

Defendant, Katherine Harris' Motion to Dismiss, Or In The Alternative, to Transfer for Improper Venue on the same day. The trial court then reversed itself on November 22, 2000, and ruled that the Elkins matter would remain in Palm Beach County. (App. 1 at p. 1)[2]

On November 20, 2000, the trial court entered an Order on Plaintiffs' Complaint for Declaratory Injunctive and Other Relief Arising From Plaintiffs' Claims of Massive Voter Confusion Resulting From The Use Of A "Butterfly" Type Ballot During The Election Held On November 7, 2000 (the "Order"). The Order bears the case numbers for five separate cases filed in Palm Beach County, including the Elkins and Rogers cases.

On November 27, 2000, the District Court of Appeal of the State of Florida for the Fourth District properly classified the consolidated cases as an election contest and certified to the Florida Supreme Court the question of whether a revote in the presidential election is available under Florida and federal law. Two members of the District Court dissented from the certification and joined in an opinion that

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[2] In so ruling, the Court explained, "I don't know what it would hurt to just to have that heard here, and just get it done. I know they probably can't afford to send [their lawyer] to Tallahassee to argue this." (Documents in the Appendix to this brief will be cited herein by reference to the Tab and page number. For example, App. 1, p. 1, would refer to page 1 of the document at Tab 1 of the Appendix.)

explained in part that "[t]he first problem in this case is that it was filed in the wrong trial court." Fladell v. Palm Beach County Canvassing Commission, Case Nos. 4D00-4145, 4D00-4146, and 4D00-4153, Slip Op. at 2 (November 27, 2000).

Respondents herein have filed this brief for the limited purpose of advising this Court on the venue issue[3], and on the existence of a federal Consent Decree that would affect any effort to conduct a revote at this late date.

SUMMARY OF THE ARGUMENT

[3]The order appealed by both the Fladell and Rogers plaintiffs also bears Case No. CL-00-10988 AB, Elkins et al. v. LePore et al., in which the Secretary of State was named as a Defendant and in which the venue issue was squarely before the Court. In addition, the Fourth District Court of Appeal specifically instructed the parties to these appeals to address whether venue was proper in Palm Beach County in light of §§102.1685, Fla. Stat., which mandates that all election contests involving elections pertaining to more than one county must be brought in Leon County. As a result, the Secretary of State felt it appropriate to address the venue issues in this proceeding.

In any contest for an election that covers more than one county, venue is in Leon County pursuant to §102.1585, Fla. Stat. (2000). Also, it is well established that venue against the state or any of its agencies lies in the county where the governmental entity maintains its principal headquarters, and in the absence of waiver or exception, the right to be sued there is absolute.

As to the merits of the certified question, there exists a Consent Decree between the United States of America and the State of Florida that should be considered by this Court when determining whether or not a revote in a presidential race is available under Florida or federal law.

ARGUMENT

I. VENUE FOR THE ACTION BELOW WAS IN LEON COUNTY

A. IN ANY ELECTION CONTEST INVOLVING MORE THAN ONE COUNTY, VENUE LIES IN LEON COUNTY

Venue may only lie in Leon County in these cases as a result of the application of §102.1685, Fla. Stat. It is undeniable that the election for the office of President and Vice President of the United States covered more than one county. Section 102.1685 states:

> *The venue for contesting a* nomination or *election* or the results of a referendum shall be in the county in which the contestant qualified or in the county in which the question was submitted for referendum or, *if the election or referendum covered more than one county, then in Leon County.*

(emphasis added).

This statute is unambiguous and not subject to any difference in interpretation. And, as previously noted, the dissenting opinion from the Fourth District recognizes that venue in this case was in Leon County, not Palm Beach County.

There has been only one other occasion for an appellate court in this state to review the application of §102.1685. In Harden v. Garrett, 483 So.2d 409 (Fla. 1985), this Court stated, "[b]ecause more than one county

was involved in the contested election, the Okaloosa County circuit court then transferred the cause to its *proper* statutory forum, Leon County. §102.1685, Fla. Stat. (1983)." (emphasis added). In Harden, an election contest was brought after a multi-county election for a seat of Florida's House of Representatives. Id. at 410. Certainly, if an election involving a seat in this state's House of Representatives is subject to §102.1685, there can be no question that a statewide election for the President and Vice President of the United States requires its application as well.

There is no question that the issues presented before the lower court pertained to an election contest under §102.168. The Fourth District's opinion in this case recognized this, as did the pleadings filed by the various plaintiffs. As a result, §102.1685 controlled and mandated that any such action involving the November 7, 2000 election be transferred to Leon County. The trial court committed reversible error by its failure to do so.

B. VENUE AGAINST THE SECRETARY OF STATE AND ELECTIONS CANVASSING COMMISSION LIES IN LEON COUNTY

The Florida Constitution provides that the seat of government is the City of Tallahassee, in Leon County, where the offices of the cabinet members "shall be maintained." Art. II, section 2, Fla. Const. Pursuant to

Article IV, section 4 of the Florida Constitution, the cabinet includes the Secretary of State. Pursuant to statute, the Secretary of State is required to reside in Tallahassee, Leon County, Florida. § 15.01, Fla. Stat. Specifically, this Court has held that where the Secretary of State is a party to an action, venue is proper in Leon County. Cardenas v. Smathers, 351 So.2d 21 (Fla. 1977).

It is well-established that venue against the state or any of its agencies lies in the county where the governmental entity maintains its principal headquarters, and in the absence of waiver or exception, the right to be sued there is absolute. See McCarty v. Lichenberg, 67 So. 2d 655 (Fla. 1967); State ex rel. Ayala v. Knott, 3 So. 2d 522 (Fla. 1941); State Dept. of Transportation v. Gulf-Atlantic Constructors, Inc., 727 So.2d 305 (Fla. 1st DCA 1999).

No party has claimed that the Secretary of State has waived its right to move to transfer venue. In fact, the Secretary of State moved in both Elkins and Rogers to dismiss, or in the alternative, to transfer venue in her initial pleading.

In support of their position, the Elkins Plaintiffs claimed that the home-venue rule did not apply as a suit may be filed in the county where a

state agency action threatens a constitutional right, citing Dyna Span Corporation v. State, 509 So.2d 1234 (Fla. 4th DCA 1987). This concept is known as the sword-wielder doctrine, and at times, while not in this situation, may constitute an exception to the home-venue rule. Dyna Span's application has been limited by the Fourth District Court of Appeal and now only allows venue to lie in an action against a state agency in a county other then Leon County where a specific property right in that county is threatened. See New England Intern. Sur. v. State, 511 So.2d 731 (Fla. 4th DCA 1987). As a result, Dyna Span and the sword-wielder doctrine have no application to either Elkins or Rogers.

As recently as a few months ago, the Fourth District Court of Appeal reviewed the application of the home-venue rule and the application of the sword-wielder doctrine. In Dickinson v. Florida National Organization for Women, Inc., 763 So. 2d 1245 (Fla. 4th DCA 2000), the appellees filed suit in Palm Beach County seeking a declaratory judgment against a state agency. Id. at 1246. The state agency moved to transfer venue to Leon County where its headquarters were located. Id. The Court concluded that, "where the official action being challenged is uniform and statewide, and does not involve an invasion of personal rights of the plaintiff, as in the case here, the

sword-wielder exception would not apply to excuse compliance with the home-venue rule." Id. at 1247. The Court explained that the "sword-wielder" doctrine applies only in those cases where the official action complained of has in fact been or being performed in the county wherein the suit is filed, or when the threat of such action in said county is both real and imminent.. . " Id. (citing Carlisle v. Game and Fresh Water Fish Comm'n, 354 So.2d 362 (Fla. 1977)). The Court determined that because there was no showing that the state agency had taken or planned to take any affirmative action within Palm Beach County, the home-privilege would not be disturbed. Id. at 1248. The Court stated that "[g]iven the lack of affirmative and specific government action in Palm Beach County, the sword-wielder exception does not apply." Id. The Court then reversed and remanded the trial court's previous denial of the motion to change venue. Id. at 1249.

Dickinson is directly on point. There has been no allegation, much less a showing, that the Secretary of State has taken or will take any action in Palm Beach County. It is indisputable that all actions of the Secretary of State and the Elections Canvassing Commission pertaining to the November 7, 2000 election in Palm Beach County occurred in Tallahassee, Leon County including the certification of statewide election results on November

26, 2000, in accord with this Court's prior ruling. As a result, no exception applies which would allow the home-venue privilege to be disregarded and the trial court's refusal to dismiss or transfer venue to Leon County was error.

II. THE CONSENT DECREE BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF FLORIDA AFFECTS ANY DECISION REGARDING THE RIGHT TO A REVOTE

In 1980, the United States Attorney General brought action against the State of Florida to enforce the provisions of the Overseas Citizens Voting Rights Act, 42, U.S.C. §§ 1973 dd et seq. ,and the Federal Voting Assistance Act, 42 U.S.C. 1973 cc (b). (App. 2 at p. 1) On April 2, 1982, a Consent Decree was entered by the United States District Court for the Northern District of Florida in United States of America v. State of Florida, Case No. TCA 80-1055-WS. Id. Pursuant to the terms of this Consent Decree, the State of Florida agreed to mail out ballots to registered voters living abroad at least 35 days prior to the deadline for receipt of absentee ballots for the election at issue. Id. at p. 6.

On August 20, 1984, the United States District Court for the Northern District of Florida entered an Order finding that a remedial plan contemplated

by the Consent Decree and submitted by Florida's then Secretary of State, George Firestone, satisfied the requirements of the Consent Decree. (Sec'y of State App. 3) The remedial plan included Chapter 83-251, Laws of Florida, and emergency Florida Administrative Code Rule 1C-7.13. Id. Included within Chapter 83-251 at section 6 was an amendment to §101.62, Fla. Stat., requiring the supervisors of elections to mail absentee ballots to overseas voters at least 30 days prior to a general election. And, the emergency rule, now found at Rule 1S-2.013, Fla. Admin. Code, provides that:

> [f]or overseas electors who have requested an absentee ballot for the presidential preference primary, the supervisors of elections shall mail the absentee ballot to the overseas elector at least 35 days prior to the deadline for the receipt of such ballots.

These deadlines, enacted to ensure compliance with federal laws governing voting rights, effectively preclude a revote in the 2000 presidential election prior to the December 12th deadline for ascertainment of the electors or the December 18th meeting of the electors.

CONCLUSION

Venue in election contests involving more than one county is proper only in Leon County. Any attempt to permit a revote at this date would either effectively disenfranchise overseas electors or preclude Florida electors from nominating the presidential electors who will meet on December 18th.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP

BY:_____

Deborah K. Kearney
General Counsel
Florida Bar No. 0334820
Florida Department of State
Tallahassee, Florida 32399-0250
(850) 414-5536

Victoria L. Weber
Fla. Bar No. 0266426
Donna E. Blanton
Fla. Bar No. 948500
215 South Monroe Street, 601
Tallahassee, Florida 32301
(850) 222-2300

David I. Spector
Fla. Bar No. 086540
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, FL
33401-6198
(561) 650-7200

Counsel for Respondents
Katherine Harris, Secretary of State
Clay Roberts, Director, Division of Elections
Elections Canvassing Commission of State of Florida

CERTIFICATE OF FONT SIZE

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

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Victoria L. Weber

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery, mail or fax on this 28th day of November, 2000 to the following:

Barry Richard, Esq.
Gary M. Dunkel, Esq.
Greenberg, Traurig, P.A.
777 S. Flagler Drive, Suite 300 East
West Palm Beach, Florida 33401

Mark A. Cullen, Esq.
The Szymoniak Firm, P.A.
2101 Corporate Boulevard, Suite 415
Boca Raton, Florida 33431

David H. Krathen, Esq.
Michael Freedland, Esq.
Law Offices of David Krathen
888 E. Las Olas Blvd., Suite 200
Ft. Lauderdale, Florida 33301

Gary M. Farmer, Jr., Esq.
Gillespie, Goldman, Kronengold & Farmer, P.A.
6550 N. Federal Highway, Suite 511
Ft. Lauderdale, Florida 33308

Stephen A. Sheller, Esq.
Sheller, Ludwig & Badey
1528 Walnut Street, 3rd Floor
Philadelphia, PA 19102

Kelvin Gibbs
Vincent Gibbs
Cynthia Been Gibbs
Dorothy Gibbs
Ollie Gibbs
Regina Gibbs
1310 West 2nd Street
Riviera Beach, FL 33404

Robert Montgomery, Esq.
Montgomery and Lamoyeux
1016 Clearwater Place
West Palm Beach, 33401-5013

Colby J. May, Esq.
Stuart R. Roth, Esq.
100 Thomas Jefferson Street, NW
Ste. 609
Washington, DC 20007

Dexter Douglass
211 East Call Street
Tallahassee, FL 32302-1674

John D.C. Newton, II
215 South Monroe Street
Suite 705
Tallahassee, FL 32301

Bruce Rogow
Beverly A. Pohl
Bruce Rogow, P.A.

Broward Financial Centre
500 East Broward Blvd., Suite 1930
Fort Lauderdale, Florida 33394

Patrick W. Lawlor, Esq.
Young & Lawlor, P.A.
1701 W. Hillsborr Boulevard
Suite 203
Deerfield Beach, FL 33442

Theresa LePore
Supervior of Elections
Palm Beach County Canvassing Board
Member - P.B.C. Government Center
301 North Olive Avenue
West Palm Beach, FL 33401

David K. Friedman
Donald Feldman
Henry Handler
Weiss & Handler
2255 Glades Rd.
Suite 218A
Boca Raton, FL 33431-7391

Bruce Silver
61 Glades Rd., Suite 201
Boca Raton, FL 33434-4370

David Boies
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite 110
Armonk, NY 10504

_____
Victoria L. Weber