IN THE SUPREME COURT OF FLORIDA

CASE NOS: SC00-2373

BEVERLY ROGERS, et. al. v. THE ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA, et al.

Petitioners/Appellants Respondents/Appellees

4TH DCA CASE NO.

FROM THE CIRCUIT COURT, FIFTHEETH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. CL 00-10992 AF

APPELLANTS' INITIAL BRIEF OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Plaintiffs have filed suit challenging the results of the general election for President and Vice President of the United States of America as held in Palm Beach County, Florida. In their Complaint, Plaintiffs have sought declaration that the "butterfly ballot" utilized in Palm Beach County, Florida violates numerous state statutes in such that it was illegal and confusing, thereby resulting in an allocation of votes to candidates different than the candidate for whom the voters intended to vote. At a hearing held on November 15, 2000, Plaintiffs sought to present evidence in support of the claim that the ballot at issue is illegal. Plaintiffs goal was to lay the necessary factual predicate for an ultimate determination that the ballot was illegal and that, therefore, a new election must be ordered, should it be necessary to do so in short order.[1]

On November 20, 2000 the trial court entered an order in which the court found that, regardless of what evidence exists, the court was without authority to order a new election or "re-vote" in Palm Beach County for President and Vice President of the United States

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[1] Attached to Plaintiffs/Appellants' Memorandum of Law as Composite Exhibit A, and included with Plaintiffs/Appellants' Appendix, is a brief overview or summary of some of the evidence which Plaintiffs intend to ultimately present to the Court. Such evidence includes expert testimony by some of the most respected statisticians in the county which establishes with near absolute scientific certainty that a new election by the voters who voted in Palm Beach County, Florida on November 7, 2000, or a statistical reapportionment of the 3,407 Buchanan votes and the 19,120 discarded ballots, would result in a net gain of 11,675 votes for Al Gore. Of course, Plaintiffs/Appellants will also present the testimony of numerous voters who punched the wrong hole due to the confusing nature of the ballot, voters who spoiled ballots but were refused a replacement ballot, voters who were refused instruction, and other violations of the elections statutes which will establish that thousands of voters in Palm Beach County were denied their constitutional right to a fair vote.

of America. The court's ruling was based almost entirely upon federal and state statutes which provide that the general election for President and Vice President of the United States of America should be conducted on the Tuesday after the first Monday in November. Plaintiffs/Appellants respectfully submit that the trial court erred in foreclosing the possibility of such a remedy at this juncture, especially before the evidence has been considered. Therefore, Plaintiffs/Appellants now submit this Petition/Initial Brief and respectfully submit that the overwhelming amount of authority shown herein establishes conclusively that the trial court in fact has the power and authority to order a new election or re-vote if it so chooses.

LEGAL ARGUMENT

A. Florida Law Specifically Provides for the Setting Aside of an Election and Ordering a New Election or Re-vote

This action was filed under Section 102.168, *Fla. Stat.*, which allows for the contest of elections. Section 102.168(8), *Fla. Stat.*, provides that the circuit judge to whom a contest lawsuit is presented "may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined or checked, to prevent or correct any alleged wrong, **and to provide any relief appropriate under such circumstances**." Indeed, this provision is consistent with Article I, Section 21 of the Florida Constitution which deals with access to the courts and which provides that the court shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. This provision, which dates from 1838, was intended to give life and vitality to the maxim, "for every wrong there is a remedy." *Holland v. Mayes*, 19

So. 2d 709 (Fla. 1944). Thus, not only does the election contest statute give the trial court discretion to "provide any relief appropriate under such circumstances," the Florida Constitution has been interpreted to provide that for every wrong there must be an appropriate remedy.

The remedy of a new election or re-vote is sought in this case because of numerous statutory violations with regard to the use of the butterfly ballot. The seminal case in Florida jurisprudence on the issue of election contests or protests is *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998). In many ways, *Beckstrom* is factually analogous to the case at bar. *Beckstrom* involved the dispute over the county's absentee ballots, which were critical in that the plaintiff received the majority of votes in the precincts but the incumbent received a sufficient majority of the absentee votes to overcome the plaintiff's precinct vote margin of victory. This Court held that a finding of fraud is not necessary to set aside the results of an election. Rather, where a court in an election contest under Section 102.168, *Fla. Stat.*, finds substantial noncompliance with the statutory election procedures which creates reasonable doubt as to whether a certified election expresses the will of the voters, **the court must void the contested election** even in the absence of fraud or intentional wrongdoing. *Beckstrom*, 707 So. 2d at 725. The Florida Supreme Court went so far as to specifically disapprove of a statement made by the trial court that it did not "have jurisdiction to set aside this election." *Id.* at 727.

This Court had issued a similar decision in *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984). Again, the Court reviewed unlawful election practices regarding absentee ballots and the sale of votes. The Court held that where fraud or wrongdoing has occurred which

clearly affects the sanctity of the ballot and the integrity of the election process, "**courts must not be reluctant to invalidate those elections to ensure public credibility in the electoral process.**" *Bolden*, 452 So. 2d at 566. The Court did not require proof of mathematical certainty of the effect that misconduct may have had on the outcome of the election, but merely required a showing that the misconduct in the case was not inconsequential and was so blatant that it permeated the entire election process. The Court held that where such misconduct occurs "the election must be declared void." *Id.* at 567. The Court's holding was based on the longstanding principle that **a fair election is the paramount consideration whenever there is an election contest.** *Id.* at 566, citing *Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975).

This Court spoke with great passion in *Beckstrom* and *Bolden* about the need to invalidate or void elections when certain misconduct or statutory violations have occurred. If the results of an entire election (as opposed to just some ballots) are to be voided or set aside, there reasonably can be only one remedy – a new election. This appears to be what this Court contemplated in *Beckstrom* and *Bolden*, as it is hard to imagine any other fair remedy. For example, if an incumbent committed fraud such that he or she was able to retain an elected position, and the results of that entire election were voided, no reasonable person would argue that the candidate committing the fraud should be rewarded by that activity such that they would keep their seat by default, without having to at least face another election or a re-vote. Indeed, such a reward to the benefactor of fraud was commented upon by the Third District Court of Appeal in the Miami mayoral race case (*see, infra*). Although in *Bolden* this Court spoke of instances of fraud, in *Beckstrom*

the Court clarified the issue by holding that intentional misconduct or fraudulent activity need not be proved in order to set aside an election. Rather, if a court finds substantial noncompliance with the statutory election procedure and also finds that reasonable doubt exists as to whether a certified election expresses the will of the voters, the court **must void the contested election**. Given the limitless authority vested in trial judges under Section 102.168(8), *Fla. Stat.*, to provide **any relief appropriate under the circumstances,** given the constitutional principle that for every wrong there must be remedy, and this Court's mandate that elections must be voided where a substantial noncompliance with voting statutes has occurred, there really can be no dispute that a Florida trial court has within its powers the ability to order a new election or a re-vote.

The Florida legislature has specifically authorized trial courts to order a re-vote in certain instances. As mentioned above, Section 102.168(8), *Fla. Stat.*, provides that the circuit judge to whom a contest lawsuit is presented "may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined or checked, to prevent or correct any alleged wrong, **and to provide any relief appropriate under such circumstances**." The term "any relief" was not limited or clarified in any way, thus indicating authority for a new election. Chapter 101 of the Florida Statutes deals with general, primary and special elections. Under Section 101.111(5), *Fla. Stat.*, the legislature has provided that "in the event of **unforeseeable circumstances** not contemplated in the general election laws concerning the calling and holding of special primary elections and special elections resulting from court order or other **unpredictable circumstances**, the Department of State shall have the authority to provide for the

conduct of orderly elections." This statutory provision is far-reaching and certainly describes the current state of affairs. The spirit of the rule clearly indicates a broad range of discretion regarding the remedies where "unforeseeable circumstances not contemplated in the general election laws" occur, and where relief is necessary to deal with "other unpredictable circumstances." Certainly county officials did not foresee or predict the circumstances with which we are now faced by virtue of the use of the butterfly ballot, and the aforementioned statute clearly provides authority for a special election to deal with such circumstances.

The power to order a new election or a re-vote was recognized and applied by a trial court judge in Leon County, Florida. In *Craig v. Wallace*, 2 Fla. L. Weekly S517a (2d Jud. Cir., Leon County, September 27, 1994) (Appendix Exhibit B), election officials and/or poll workers breached their statutory duty to provide all eligible voters their right to vote in a primary by failing to provide pages containing the description of a race in numerous voting booths where eligible voters were directed to vote. Because the margin of victory was so slim, the trial court found that the deprivation of these voters' rights permeated the entire the election process and effected the integrity and sanctity of the election. The court further found that both the voters and the losing candidate would be irreparably harmed absent injunctive relief requiring a new election. Therefore, the trial court set aside the results of the election in the particular precincts at question and ordered a new vote.

B. The Federal Statutes Were Misconstrued by the Trial Court, and Federal and State Law Specifying the Date of the Presidential Election is Consistent with this Court's Authority to Order a Re-Vote or Other Post-Election Remedy

The trial court's decision was predicated almost entirely upon a very literal reading of Section 103.11, *Fla. Stat.*, which governs the timing of the presidential election in Florida. Federal law contains a similar provision in 3 U.S.C. Section 1. Analysis of these provisions makes clear that they control simply the date of the election **intended** to result in the final selection of presidential electors, and do not interfere with this Court's authority to order post-election day relief necessary to correct violations of state law and fairly reflect the "will of the voters". *Beckstrom, supra.*

The state statute cited above and referred to by the trial court follows federal directives. With respect to federal law, 3 U.S.C. Section 1, like Section 103.11, *Fla. Stat.*, designates the Tuesday following the first Monday in November for the presidential election. But federal law goes on specifically to authorize each state to resolve "any controversy or contest concerning the appointment of all or any of the electors....**by judicial** or other methods or procedures." 3 U.S.C. §5. As long as the resolution of such post-election day contests occurs at least six days before the date fixed for the meeting of the electoral college (in this year, December 12 prior to the scheduled December 18 meeting), the statute requires that the state's determination "**shall** be conclusive, and **shall** govern in the counting of the electoral votes". *Id.*

The court erred by ignoring the provisions of 3 U.S.C. Sections 2 and 5, which specifically envision situations where the election of Presidential electors meant to be final on the stated Tuesday is not finalized on that date. In such instances states are to finalize the selection of the electors in a manner established under state law, and to be finalized after the stated Tuesday. Here, the manner specified by the Florida legislature is an

election contest under Section 102.168, *Fla. Stat.* Thus, the state statutes do not conflict with the United States Code, and in fact the state statutes were enacted under the authority given to the Florida legislature by the United States Congress. As such, the federal statutes in no way mandate that the final election and selection of electors must, without exception, be completed by the Tuesday following the first Monday in November, and the trial court erred in so holding.

In fact, since there exists a similar set of laws governing United States Congressional elections (mandating a uniform voting day on the Tuesday following the first Monday in November), those cases provide great guidance. The Court is respectfully referred to *Public Citizen, Inc. v. Miller,* 992 F.2d 1548 (11th Cir. 1993) for an example close to home. In Miller, the Eleventh Circuit upheld the legality of runoff election ordered held after federal election day where no candidate in initial election received majority required by state law. As Judge Middlebrooks recently recognized, "federal law gives **states the exclusive power to resolve controversies over the manner in which presidential electors are selected**," controversies which, virtually by definition, will need to be resolved after election day. *Siegel v. Lepore*, No. 00-9009-CIV-MIDDLEBROOKS (S.D. Fla. Nov. 13, 2000), slip op. at 10 n.3, *affirmed, Siegel v. Lepore,* 11th Circuit Case No. 00-15981.

In fact, federal law expressly contemplates that the final selection of electors may not be complete on the specified national election day. 3 U.S.C. Section 2 is entitled "Failure to make choice on prescribed day," and provides that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed **on a subsequent day** in such