

manner as the legislature of such State may direct.” This is clearly consistent with the Florida legislature’s direction, as reflected in decisions like *Beckstrom* and *Craig*, that voiding an election and ordering remedies such as a re-vote should occur where necessary to remedy violations of state election law which permeated the entire election process and in order to reflect the will of the voters.

The possibility of another election after a specified election day is also reflected in Supreme Court case law. In *Foster v. Love*, 522 U.S. 67 (1997), the Court considered an analogous federal law concerning the November date for congressional elections. The Court invalidated a Louisiana law that called for elections that effectively selected the winner of congressional elections in October. The Court explained that an “election” in that context referred to actions “**meant** to make a final selection of an officeholder,” and that Louisiana had violated federal law by concluding the selection “before the federal election day.” *Id.* at 71-72. But the Supreme Court specifically recognized that actions affecting the final selection of officeholders, including another election, could permissibly take place **after the federal election day**, such as where a runoff is required by a state law mandate that the winner must receive a majority of all votes cast. *Id.* at 71 and n.3; See also *Public Citizen, Inc. v. Miller, supra*.

In this case, therefore, Palm Beach County held the election on the date required by law, but due to the nature of the ballot a final and definite selection of the winner was not accomplished, and it is therefore clearly permissible for post-election day relief to be granted, including another election if necessary, to comply with state law. The same conclusion follows under state law. State law provides that the election of federal electors

is to occur on the first Tuesday after the first Monday in November. §103.11, *Fla. Stat.* But state law also specifies the same date for elections for all other federal, state, county, and district officials. §100.031, *Fla. Stat.* Such laws cannot be interpreted to preclude post-election day relief, including voiding elections and ordering re-votes where necessary, or *Beckstrom, Craig*, and Sections 101.111(5) and 102.168, *Fla. Stat.*, would be effectively overruled or repealed. As with federal law, the proper interpretation of the state law election date statutes is that the election “meant to make a final selection of an officeholder” must occur on the date specified, but post-election day relief can be ordered where appropriate to comply with state law and to reflect the will of the voters, including an additional election if necessary.

The learned trial judge in this case erred by mechanically applying a very literal reading of Section 103.11, *Fla. Stat.*, to the point of nullification of *Beckstrom, Craig*, and Sections 101.111(5) and 102.168, *Fla. Stat.* Essentially, the trial court ruled that since Section 103.11 did not specifically reference a run-off election or special election, then none was available to resolve any dispute over the results or conduct of a Presidential election. This was error, as the court should have read Sections 103.11, 101.111 and 102.168 in *para materia*, thereby giving effect to each statute. Chapters 101 and 102 of the Florida Statutes do not exclude in any way from their ambit the United States presidential election. Indeed, if the court’s ruling were correct, then there could never be any election for the United States Senate or Congress after the Tuesday following the first Monday in November. We know this is not true given the cases cited herein where United States congressional seats were finally decided by a special or run-off election conducted

after the Tuesday date. Even the United States Supreme Court has recognized the validity of a post-Tuesday federal election, in the form of a run-off election, in *Foster v. Love*, *supra*.

Moreover, in *Donohue v. Board of Elections of the State of New York*, 435 F. Supp. 957 (E.D. N.Y. 1976), the court specifically considered a request for an injunction to prohibit the certification of presidential election results in the State of New York. The court rejected the defendants argument that "ordering a new presidential election in New York State is beyond the equity jurisdiction of the" court. *Donohue*, 435 F. Supp. at 967. Although the burden of proof on a contesting party is a heavy one, the court refused to preclude the possibility of a new presidential election in New York, since foreclosing such a remedy "would invite attempts to influence elections by illegal means, particularly in those states where no statutory procedures are available for contesting general elections." *Id.* Because the protection of "the integrity of elections particularly Presidential contests is essential to a free and democratic society," the court ruled that the "fact that a national election might require judicial intervention, concomitantly implicating the interests of the entire nation, if anything, militates in favor of interpreting the equity jurisdiction" of the court to include post-election day challenges to Presidential elections. *Id.* at 968. The court ordered an evidentiary hearing to determine whether a new Presidential election in New York was necessary.

In the case at bar, the statutes and cases discussed above reveal the legal authority for consideration of a new Presidential election on a local basis. In *Donahue*, the court conducted an evidentiary hearing on the issue, and ultimately declined to order a new

election but only because of the stringent standard to be applied in a civil rights election challenge. The trial judge in this case erred in ruling that he did not have equitable jurisdiction to consider a new election, especially where the court refused to hear evidence as to the nature of the violation. For example, the nature of the illegality involved here - the form of the ballot utilized in all of Palm Beach County - permeated the entire election and was not limited to a small segment of ballots. Thus, the trial court erred in two ways - by ruling that it had no jurisdiction or power to order a new Presidential election in Palm Beach County, and by making such a ruling without a necessary factual predicate.

CONCLUSION

An election is a vehicle by which a selection of a winning candidate is to be achieved. The will and intent of the people is the primary focus in any election challenge. Where that goal is not achieved in an initial election, courts must have available to them a remedy to achieve a fair outcome. The remedies available must be flexible in order to account for unforeseeable or unpredictable circumstances not contemplated in the general election laws. In this regard, courts must be vested with a tremendous amount of discretion to effectuate whatever equitable relief is necessary to give voters a further chance, in a fair election, to express their views.

Given the foregoing legal principles and statutory pronouncements, trial courts must have the power and ability to order new elections if necessary. Various statutes speak to unforeseeable and unpredictable circumstances by which new or special elections may be ordered, and in the various statutes under which this lawsuit was brought, the legislature empowered a circuit court judge to fashion such orders as the judge deems necessary and

to "provide any relief appropriate under such circumstances." This Court has repeatedly held that election results may be invalidated or voided. The only practical and fair remedy which exists when an election is voided or invalidated may be to conduct a new election. As such, the trial court erred in ruling, prior to consideration of any evidence as to the nature of the violations, that under no circumstances could the trial court order a new election. Rather, the trial court should have first conducted an evidentiary hearing to determine whether the butterfly ballot violates Florida election laws, only thereafter to determine whether the court must invalidate and void the Presidential election results in Palm Beach County, Florida, and order a re-vote or new election.

Respectfully submitted,

David H. Krathen, Esq.
Fla. Bar No. 147810
Michael Freedland, Esq.
Fla. Bar No. 128988
LAW OFFICES OF DAVID KRATHEN
888 E. Las Olas Blvd., STE 200
Ft. Lauderdale, FL 33301

Gary M. Farmer, Jr., Esq.
GILLESPIE, GOLDMAN, KRONENGOLD
& FARMER, P.A.
6550 N. Federal Highway, Suite 511
Fort Lauderdale, Florida 33308
Telephone No.: (954) 771-0908

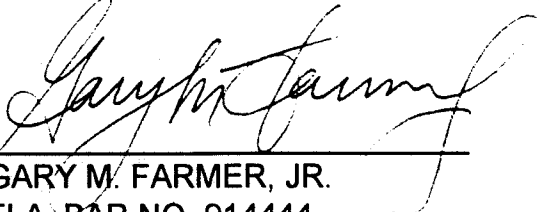
Stephen A. Sheller, Esq.
SHELLER, LUDWIG & BADEY
1528 Walnut St., 3rd Floor
Philadelphia, PA 19102

By: _____


GARY M. FARMER, JR.
FLA. BAR NO. 914444

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2000, a true copy of the foregoing was furnished by facsimile to: SEE ATTACHED SERVICE LIST.

By: 

GARY M. FARMER, JR.
FLA. BAR NO. 914444

SERVICE LIST

David H. Krathen, Esq.
Michael Freedland, Esq.
LAW OFFICES OF DAVID KRATHEN
888 E. Las Olas Blvd., STE 200
Ft. Lauderdale, FL 33301
Phone: (954) 467-6400

Stephen A. Sheller, Esq.
SHELLER, LUDWIG & BADEY
1528 Walnut St., 3rd Floor
Philadelphia, PA 19102

Donald Feldman, Esq.
Henry B. Handler, Esq.
WEISS & HANDLER, PA.
2255 Glades Road, Suite 218A
Boca Raton, Florida 33431
Phone: (561) 997-9995
Fax: (561) 997-5280

Gregory F. Barnhart, Esq.
SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
P.O. Box 3626
West Palm Beach, Florida 33402
Phone: (561) 686-5300
Fax: (561) 478-0754

Mark A. Cullen, Esq.
The Szymoniak Firm, P.A.
2101 Corporate Boulevard, Suite 415
Boca Raton, Florida 33431
Phone: (561) 989-9669
Fax: (561) 989-9660

Benedict P. Kuehne, Esq.
SALE & KUEHNE
100 SE 2nd Street
Miami, Florida 33131
Phone: (305) 789-5989
Fax: (305) 789-5987

Barry Richard, Esq.
GREENBERG, TRAUERIG, P.A.
101 E. College Avenue
P.O. Box Drawer 1838
Tallahassee, Florida 32302
Phone: (850) 222-6891
Fax: (850) 681-0207

Gary M. Dunkel, Esq.
Barry Richard, Esq.
GREENBERG, TRAUERIG, P.A.
777 S. Flager Drive
West Palm Beach, Florida 33401
Phone: (561) 650-7900
Fax: (561) 655-6222

John W. Little, III, Esq.
STEEL, HECTOR & DAVIS, P.A.
777 South Flagler Drive
West Palm Beach, Florida 33401
Phone: (561) 650-7200
Fax: (561) 655-1509

Robert M. Montgomery, Jr., Esq.
MONTGOMERY & LARMOYEUX
1016 Clearwater Place
West Palm Beach, Florida 33401
Phone: (561) 832-2880
Fax: (561) 832-0887

Bruce S. Rogow, Esq.
c/o Nova SE University Law School
3305 College Avenue
Ft. Lauderdale, Florida 33314
Phone: (954) 262-6100
Fax: (954) 262-3834

Patrick Lawlor, Esq.
YOUNG & LAWLOR, P.A.
1701 W. Hillsboro Blvd, Suite 203
Deerfield Beach, Florida 33442
Phone: (954) 426-8226
Fax: (954) 481-3631

James C. Mize, Jr., Esq.
Denise D. Dytrch, Esq.
Palm Beach County Attorney
301 N. Olive Avenue
West Palm Beach, Florida 33401
Phone: (561) 355-2225
Fax: (561) 355-4398

Colby M. May, Esq./Stuart R. Roth
1000 Thomas Jefferson Street, NW
Suite 609
Washington, DC 20007
Phone: (202) 337-2273
Fax: (202) 337-3167

LAW OFFICES

GILLESPIE, GOLDMAN, KRONENGOLD & FARMER

A PROFESSIONAL ASSOCIATION
SUITE 511
6550 NORTH FEDERAL HIGHWAY
FORT LAUDERDALE, FLORIDA 33308

TELEPHONE (954) 771-0908
FACSIMILE (954) 771-9880

Gary M. Farmer, Jr.
Board Certified, Appellate Practice

November 20, 2000

FILED
THOMAS D. HALL

NOV 21 2000

CLERK, SUPREME COURT
BY _____

VIA FEDERAL EXPRESS

Tom Hall, Clerk
The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee 32399-1925

Re: *Rogers, et al. v. The Palm Beach Elections Canvassing Commission, et al.*
(4th DCA Case No. to be assigned)

Dear Mr. Hall:

Enclosed please find a copy of Appellants' Initial Brief/Petition for Writ of Mandamus, which arises out of an order entered by the Honorable Jorge Labarga in one of the election contest lawsuits filed in Palm Beach County. As I prepare this letter I am awaiting a decision from the Fourth District Court of Appeal on my Emergency Suggestion for Immediate Resolution by the Florida Supreme Court. Because of the urgent nature of this and related cases, I am providing you with the instant brief in anticipation of an order by the Fourth District granting my Emergency Suggestion for Immediate Resolution by the Florida Supreme Court. Also enclosed is our appendix. If I can be of any further assistance, please do not hesitate to call upon me.

Respectfully submitted,


Gary M. Farmer, Jr.

/tay

Enclosures

cc: Honorable Jorge Labarga (via hand-delivery)
All Counsel of Record (via fax and U.S. mail)