

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

BILL NELSON FOR U.S. SENATE,)	
)	
Plaintiff,)	Case No: 4:18cv536
v.)	Tallahassee, Florida
)	November 16, 2018
KENNETH DETZNER, in his)	
official capacity as Secretary)	
of State, and the PALM BEACH)	
COUNTY CANVASSING BOARD, and)	
SUSAN BUCHER, in her official)	
capacity as Palm Beach County)	
Supervisor of Elections)	
official capacity as Florida)	
Secretary of State,)	
)	
Defendants.)	
_____)	

**TRANSCRIPT OF TELEPHONIC HEARING
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1 through 19)**

*Megan A. Hague, RPR, FCRR
Official United States Court Reporter
111 North Adams Street * Tallahassee, Florida 32301
(850) 422-0011 * megan.a.hague@gmail.com*

APPEARANCES:

For Plaintiffs: Perkins Coie, LLP
by: UZOMA NKEM NKWONTA
Attorney at Law
700 13th Street NW, Suite 700
Washington, DC 20005
unkwonta@perkinscoie.com

For Defendant Palm Beach County Canvassing Board and
Susan M. Bucher:

Lewis Longman & Walker, PA
by: NATALIE KATO
Attorney at Law
515 N. Flagler Drive, Suite 1500
West Palm Beach, Florida 33401
nkato@llw-law.com

For Defendant Detzner: Hopping Green & Sams, PA
by: MOHAMMAD JAZIL
Attorney at Law
119 South Monroe Street, Suite 30
Tallahassee, Florida 32301
mohammadj@hgslaw.com

For Intervenor Defendant National Republican Senatorial
Committee:

Holtzman, Vogel, Josefiak, PLLC
by: JASON BRETT TORCHINSKY
Attorney at Law
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
jtorchinsky@hvjt.law

1 **P R O C E E D I N G S**

2 (Call to Order of the Court at 6:00 PM on Friday,
3 November 16, 2018.)

4 THE COURT: Good evening. This is Judge Walker.
5 We're here in Case No. 4:18cv536. This matter was removed
6 from state court this morning. Upon reviewing the docket,
7 in addition to attending to other cases and other duties, I
8 recognize that there could be some -- there might be a need
9 for an evidentiary hearing in this case.

10 I sent out an order requesting information from
11 the parties. I set a deadline of 4 p.m. The parties
12 requested an extension to 5 p.m. I granted that extension,
13 and after granting the extension, I received a response from
14 the plaintiff that there was a need to secure additional
15 information.

16 Given the timing of this action, as well as the
17 deadlines that are implicated associated with the recount, I
18 thought it appropriate to immediately set this matter for a
19 hearing, so we find ourselves here at 6 p.m. on Friday
20 evening.

21 Let me start with having -- who's going to speak
22 on behalf of the plaintiff?

23 MR. NKWONTA: Your Honor, this is Uzoma Nkwonta on
24 behalf of the plaintiff.

25 THE COURT: Welcome, Mr. Nkwonta.

1 Who's speaking on behalf of Defendant Detzner?

2 MR. JAZIL: Mohammad Jazil, Your Honor.

3 THE COURT: Welcome, Mr. Jazil.

4 Who is speaking on behalf of the canvassing board?

5 Do I have anybody that is appearing?

6 Mr. Baumann, are you on the line?

7 Ms. Bucher, are you on the line?

8 All right. Do I have somebody for the National

9 Republican Senatorial Committee on the line?

10 MR. TORCHINSKY: Yes, Your Honor. This is Jason
11 Torchinsky. I'm on the docket, but I haven't entered my
12 notice of appearance yet. And I also have George Levesque
13 on the phone with me. I'm in an area with bad cell phone
14 reception, and he may need to take over in case I have to
15 drop.

16 THE COURT: That's fine. You're both welcome, and
17 I don't care that you've -- whether you've entered a notice
18 of appearance or not. The record will reflect you're
19 present. We'll add your name. To the extent we need to
20 modify the record later, we can.

21 Somebody just dialed in. Who just joined us?

22 MS. KATO: Yes, this is Natalie Kato, counsel for
23 Susan Bucher. I'm texting with my co-counsel, Mr. Baumann,
24 who is at -- physically at the supervisor's office with
25 Ms. Bucher as we speak. She's conducting the manual

1 recount.

2 THE COURT: All right. Well, let me start,
3 Ms. Kato, with you. I received a response to my order to
4 clarify from the plaintiffs in this action. This is a
5 separate action from the action that Mr. Baumann and
6 Ms. Bucher attended yesterday. That was Case No. 4:18cv527.
7 I entered an order this morning in that case.

8 Then this case, 4:18cv536 was removed from state
9 court this morning. I don't need to recite the entire
10 procedural history again, but the fact of the matter,
11 there's two different cases, but this case also involved the
12 recount in Palm Beach County. And in light of the hearing
13 we had yesterday evening, and the testimony of Ms. Bucher
14 and Mr. Baumann's representations, I assumed this parallel
15 matter would be resolved.

16 I've been told by the plaintiffs' counsel through
17 this supplemental response, ECF Document 20 in the case,
18 that that may not be so.

19 So let me start, having laid a foundation for any
20 reviewing court, that they could easily get up to speed.
21 Let me ask: Mr. Nkwonta, are we still at the same place
22 with the representations you've made in ECF Document 20 or
23 have we learned anything additional?

24 MR. NKWONTA: No, Your Honor. We're still at the
25 same place. As we stated in ECF Document No. 20, the

1 Supervisor of Elections, Ms. Bucher, has yet to reveal the
2 results of the machine recount, and it's still unclear to us
3 which results will be reported by the 18th.

4 THE COURT: All right.

5 Let me ask Ms. Kato -- and I just want to do this
6 in the most efficient way possible, and we can certainly
7 potentially take testimony if we need to as well, but let me
8 get some background information, Ms. Kato, since you're here
9 on behalf of the Palm Beach County Canvassing Board.

10 MS. KATO: Yes.

11 THE COURT: And let me pause by saying this is not
12 an inquisition.

13 MS. KATO: Right.

14 THE COURT: I'm not suggesting you have done
15 anything. I just want to, in the fastest most efficient
16 way, get to the truth and figure out whether or not I need
17 to have a more exhaustive evidentiary hearing.

18 As I understood what had been represented to me
19 yesterday evening, as well as at other hearings that I've
20 conducted, and other matters related to this election, the
21 statutes at issue contemplate that there may not -- there
22 may be a county or counties, plural, that do not complete a
23 mechanical recount in time to meet the deadline for the
24 second unofficial results.

25 The statute goes on to say, but you'll continue

1 the process and I --

2 MS. KATO: Your Honor, if I may, I can -- I
3 apologize for interrupting you, but I know that you want to
4 work expeditiously, and I do, too, and I have been in
5 contact with plaintiff's counsel, Mr. Nkwonta throughout the
6 afternoon, and so maybe I can just explain to you where
7 we're at in the process.

8 THE COURT: Sure.

9 MS. KATO: So we are aware of the statute and as
10 we said -- you know, our representations that we made to the
11 Court last night do hold true, which is that we were going
12 to finish the machine recount and then begin the manual
13 recount and we have done that.

14 The issue that we're having with the plaintiff is
15 that they want us to give them that machine recount number,
16 and I think that there's some discussion or some perhaps
17 disagreement over whether we were obligated to provide them
18 that updated number before we began the machine recount. We
19 were unable to do that.

20 There's a difference between finishing the machine
21 recount and starting the manual recount, and finishing the
22 machine recount, giving the plaintiff or any other party a
23 new number to work with so that they may, you know, for lack
24 of a better word kind of readjust their tallies and then
25 start the manual recount. And so I think that's where the

1 rubber is meeting the road.

2 THE COURT: Well, let me interject because maybe
3 then people are talking past each other and that doesn't
4 necessarily resolve the issue, but one concern of mine,
5 based on my review of ECF Document 20, was the suggestion
6 that -- setting apart disclosing numbers was that, yes,
7 we're going to have the manual recount, and we'll add --
8 we'll find out if there are any votes to add based on the
9 manual recount.

10 There may be some overseas ballots that come in by
11 the deadline that could be added in that number, but what
12 concerned me was the representation that those numbers
13 meaning the manual recount, if any, coupled with any new
14 overseas ballots that were properly postmarked and received
15 by the deadline, what tally that would be added to for the
16 final number to be disclosed on Sunday by noon.

17 MS. KATO: So -- yes, Your Honor. So those
18 numbers will be added to the machine recount numbers that we
19 finished before we began this manual recount. Part of the
20 issue that we're having, and the reason that we have not
21 released those machine recount numbers to the public yet is
22 that we had an internal issue, not with the total number of
23 votes, but with what's called the tally type of vote.

24 And the tally type is, as I understand it -- and,
25 again, I'm not the Supervisor of Elections -- the tally type

1 is -- you know, for example, there's votes that came from
2 precincts, there's votes that are absentee ballots, and when
3 we were running those through in a manual re -- or -- I'm
4 sorry -- in the machine recount, those types of ballots were
5 mixed. And so even though the amount of votes cast is
6 correct, the amounts cast per candidate is correct, the type
7 of vote that's cast, we need to -- we need to internally
8 rectify that before we would be comfortable releasing that
9 updated machine recount number.

10 And so that's what we were trying to work on.
11 That's -- based on my conversations with Mr. Nkwonta -- and,
12 again, you know, I do want to stress that we've really been
13 working with the plaintiffs, and they've been up and -- you
14 know, really working with us in good faith, you know.

15 I think that this is one of those kind of smaller
16 things that we can get some clarification on. It's just a
17 matter of day and under their timeline versus our timeline,
18 that's the problem.

19 THE COURT: When do you think you'll have that
20 information?

21 MS. KATO: I can ask my client. I believe that
22 she was finalizing the manual recount, and that's why she's
23 not on the call because she wanted to finish overseeing that
24 process, so probably by some point tomorrow.

25 THE COURT: I understand.

1 Let me then turn to Mr. Nkwonta. Mr. Nkwonta, I
2 understand -- my fear was that we were going to have a much
3 bigger issue, that there was some disagreement about
4 statutory construction and what results were going to be
5 tallied for the final numbers that would be submitted to the
6 state on Sunday at noon.

7 Apparently, according to Ms. Kato, that's -- I'm
8 either -- you either misstated or I misapprehend what is
9 happening. I'm fine with it labeling that I'm -- labeling
10 me as being the one confused, but before we go on to what
11 information, if any, should be released, do you -- do you
12 still have concerns that there's a different number that's
13 going to be submitted, or is this really about disclosing
14 information?

15 Hello?

16 MR. NKWONTA: Hello.

17 THE COURT: Mr. Nkwonta?

18 MR. NKWONTA: Yes, I'm here. May I proceed?

19 THE COURT: Yes.

20 MR. NKWONTA: So two things, Your Honor: This is
21 the first time that we have heard from Palm Beach County or
22 from their counsel that they will be actually including the
23 machine recount figures, and not the figures initially
24 reported on November 10th. So I -- first I want to confirm
25 and clarify on the record that Palm Beach County is

1 representing that they will report the machine recount
2 figures.

3 THE COURT: And, Ms. Kato, I thought you
4 unequivocally just told me that.

5 MS. KATO: That's my -- that is my
6 understanding -- that's my understanding, Your Honor. You
7 know, the way this process works, just so we're clear, is
8 that we have to run the machine recount first, and then the
9 over and under ballots that are rejected as a result of the
10 machine recount, that's what's hand recounted.

11 So my understanding is that you run the machine
12 recount and then you take the over -- the manual recount
13 results and add those to your manual results, and that gives
14 you your manual recount results.

15 MR. NKWONTA: Your Honor, there's really no room
16 for ambiguity here. I mean, the question is pretty simple.

17 THE COURT: Who is this?

18 MR. NKWONTA: This is Mr. Nkwonta on behalf of the
19 plaintiff.

20 THE COURT: Oh, I'm sorry. Your connection is
21 really bad. Are you on a speaker, Mr. Nkwonta? We can
22 barely hear you.

23 MR. NKWONTA: Is this any better?

24 THE COURT: Yes, sir. Thank you.

25 MR. NKWONTA: So what I'm -- as I was saying

1 before, there's really no room for any ambiguity here. The
2 question is which results are you going to report? Is it
3 going to be the initial unofficial results of November 10th,
4 or are you going to report the results of the machine
5 recount? And it's one or the other, so I -- what I don't
6 understand -- what plaintiff doesn't understand, is why we
7 have yet to receive a clear answer on which result is going
8 to be reported.

9 THE COURT: I thought the clear answer was that
10 they're going to use the second machine count numbers, but
11 before they release those numbers publically, they have to
12 reconcile those numbers with the sub-breakdown. They break
13 them down based on absentee ballots and so forth, and that
14 they -- there was a human error, and they mixed some ballots
15 in, and they're trying to get the sub-numbers before they
16 release the overall numbers and that they have every
17 intention of adding the manual recount numbers, if any --
18 and I say, if any. I assume there's some, but if any
19 because it's certainly possible that every over -- every --
20 it's not overstocked. It's --

21 MS. KATO: Overvote.

22 THE COURT: Over -- well, no it's called -- when
23 you send them to the -- outstacked, I'm sorry.

24 MS. KATO: Outstacked, yeah.

25 THE COURT: It's been a long couple of days. It's

1 conceivable that all the outstacked ballots just nobody
2 voted for that race; it's highly unlikely, but I guess it's
3 possible. But assuming that there are numbers, you would
4 add those manual numbers to the second machine count, which
5 is the -- I'm sorry -- the second machine count --

6 MS. KATO: Correct.

7 THE COURT: -- which is the recount. You then add
8 any overseas ballots, and that is the number in the system
9 that you're going to use pursuant to Florida Statutes; that
10 the only time you would not use the machine recount number
11 is if you didn't have a machine recount number because then
12 Florida law says you have to use the original unofficial
13 results if you don't finish the machine recount; is that
14 correct?

15 MS. KATO: That is correct, Your Honor.

16 THE COURT: All right.

17 MS. KATO: And, for the record, we have -- and if
18 I've been ambiguous, I apologize, but in my prior
19 conversations with counsel, I thought I was clear about
20 that.

21 THE COURT: And what I just said, Ms. Kato, you
22 say that's exactly what's going to happen, Judge?

23 MS. KATO: Yes.

24 THE COURT: We are finishing the manual recount
25 right now. We're making sure we have all the sub-numbers

1 and categories for the machine recount, and those -- that
2 will be the final number that's going to be reported on
3 Sunday, those numbers added together. We -- there --

4 MS. KATO: Correct.

5 THE COURT: We will not be using the original
6 first unofficial recount. The only reason why that was done
7 before was because we had not finished our recount at the
8 second unofficial recount deadline; correct?

9 MS. KATO: Correct, and we were required by
10 Florida Statute to use that first report number, as we have
11 discussed, I believe, yesterday.

12 THE COURT: And I've read the statute. Of course
13 every news agency in the country practically is reporting
14 that just because numbers weren't reported for the second
15 unofficial means they're going to be tossed out, which is if
16 it's done, is contrary to Florida law, would be unlawful,
17 and would result in a -- could result in a challenge to the
18 election, but we don't need to go there. It would just be
19 nice if -- anyway, I'll leave it there. It's late in the
20 day.

21 Mr. Nkwonta, I want to make sure -- so for
22 purposes -- I am happy to have an evidentiary hearing. I'm
23 happy to have somebody placed under oath, but what --
24 setting aside, Judge, we want the numbers now -- and I'm not
25 in any way diminishing the importance of that, but that's

1 the second issue -- do you still believe there's a need for
2 clarification?

3 MR. NKWONTA: I do not, Your Honor. Based on the
4 representations on the record, we are satisfied that
5 Palm Beach County has represented that it will be using the
6 machine recount figures, and we will wait for those results.

7 THE COURT: All right. Well, let me then ask
8 you -- and I'm fine. Believe me, I've got my Saturday and
9 Sunday -- my dance card is open, Mr. Nkwonta, and you're on
10 it if you need time on Saturday or Sunday. Do we need to
11 set this matter -- because I understand time is of the
12 essence, and I'll be here at 5 a.m. tomorrow if y'all need
13 to have an evidentiary hearing.

14 And I'm not saying that as a threat. I'll do it
15 at whatever time y'all want. I'm just saying I am available
16 whenever you need me. Do -- is there anything else -- and
17 you're not waiving any right moving forward if something
18 comes up, but at this juncture, is there anything else that
19 y'all need from the Court by way of time and hearing in this
20 Case 4:18cv536?

21 MR. NKWONTA: At this juncture, no, Your Honor.

22 THE COURT: And I want to make plain, Mr. Nkwonta,
23 I will be checking my computer. I -- not all night, but for
24 a good portion of it, and early in the morning, and I
25 understand that an emergency could arise, and I will do my

1 best to monitor as frequently as I -- possibly I can, the
2 docket.

3 But with that said, Mr. Jazil, Mr. Nkwonta says
4 there's nothing further. Is there anything you need to
5 bring up?

6 MR. JAZIL: No, Your Honor. I would only request
7 that -- Your Honor, I just want to be sure that I am
8 available to appear for any hearing that might be scheduled
9 later on this weekend. Is it possible for us also to be
10 contacted by phone in addition to the e-mail on the CM/ECF
11 system, sir?

12 THE COURT: Here's what I think y'all should all
13 do. I'm going to have my courtroom deputy come on over and
14 she's going to tell you her e-mail address, and y'all are
15 going to write it down, because if I write down a bunch of
16 phone numbers, it's going to be absolutely pointless, and so
17 you can e-mail her.

18 I understand you may not want publically everybody
19 on the planet to have your phone. Since my number has been
20 shared with everybody, particularly those that arguably
21 lack -- or may need psychotropic medications, many of them
22 that have called me -- you know, I -- but I won't do that to
23 y'all.

24 So what I'm going to have you do is just e-mail
25 all of your phone numbers to Miss -- my courtroom deputy.

1 She's going to give you her e-mail address now.

2 THE COURTROOM DEPUTY: It's Victoria underscore
3 Milton, M-i-l-t-o-n, at F-l-n-d as in Northern District, dot
4 US Courts, with an s, dot gov.

5 MS. KATO: Can you repeat that one more time? I'm
6 sorry, I'm trying to take notes on my phone.

7 THE COURTROOM DEPUTY: Sure. Victoria underscore
8 Milton, M-i-l-t-o-n at F-l-n-d dot US Courts, with an S, dot
9 gov.

10 THE COURT: Ms. Kato, did you get that?

11 MS. KATO: I did. Thank you, Your Honor.

12 THE COURT: Mr. Jazil?

13 MR. JAZIL: Yes, Your Honor.

14 THE COURT: Mr. Torchinsky?

15 MR. TORCHINSKY: Yes.

16 THE COURT: All right. Good.

17 And Mr. Nkwonta?

18 MR. NKWONTA: Yes, Your Honor.

19 THE COURT: All right. If y'all will please --
20 otherwise you're going to get electronic e-mails.

21 Actually, Ms. Kato, I will ask you this, because I
22 think we've got Baumann's -- that's your colleague; correct?

23 MS. KATO: Yes.

24 THE COURT: I think we've got his phone number; is
25 that correct?

1 THE COURTROOM DEPUTY: We have just the office.

2 MS. KATO: I believe so. I'm happy to give you
3 mine and, frankly, Your Honor, at this point everybody has
4 my phone number, as well.

5 THE COURT: Yeah, I'd rather you not do that on
6 the record. Anybody could have called in. I don't mind the
7 members of the press obviously having it, but I have no idea
8 who's on this line, and I don't want anybody giving out
9 their phone numbers.

10 So if you will be so kind, Ms. Kato, if you please
11 will e-mail my courtroom deputy -- and I'm specifically not
12 using her name either; not to dehumanize her, but I don't
13 really want her being inundated with hate mail either. So
14 if you could just e-mail her your phone number, as well as
15 your colleague, so if we need to reach you at the last
16 minute, we can, okay?

17 MS. KATO: And that was the number for the e-mail
18 that was just provided; correct?

19 THE COURT: Yes, ma'am. And that is not her full
20 name, so I'm protecting her -- I was trying to maintain some
21 anonymity for her.

22 MS. KATO: Yep. Perfect.

23 THE COURT: Okay. Thank you.

24 Anything further, Mr. Nkwonta?

25 MR. NKWONTA: No, Your Honor.

1 THE COURT: Mr. Jazil?

2 MR. JAZIL: No, Your Honor.

3 THE COURT: Kato?

4 MS. KATO: No, Your Honor.

5 THE COURT: Torchinsky?

6 MR. TORCHINSKY: No, Your Honor.

7 THE COURT: All right. Thank you very much. I'm
8 sure this inconvenienced you, and I'll let you know, I even
9 had to have my court reporter leave her child's dance
10 routine and come all the way back to the courthouse, so
11 we'll do our best to accommodate everyone, but we're trying
12 hard, too.

13 So I hope everybody has a pleasant evening and a
14 good weekend. I know you're all working hard, and best of
15 luck to all of you. Please be safe.

16 Court is in recess.

17 MS. KATO: Thank you.

18 (Proceedings concluded at 6:24 PM on Friday, November
19 16, 2018.)

20 * * * * *

21 I certify that the foregoing is a correct
22 transcript from the record of proceedings in the
23 above-entitled matter. Any redaction of personal data
24 identifiers pursuant to the Judicial Conference Policy on
25 Privacy are noted within the transcript.

23 /s/ Megan A. Hague
24 Megan A. Hague, RPR, FCRR, CSR
25 Official U.S Court Reporter

11/16/2018
Date