

## 2018 Recount Deadlines in Florida

*Jim Bonfiglio Campaign v. Detzner (4:18-cv-527)*  
*and Bill Nelson for U.S. Senate v. Detzner (4:18-cv-536)*  
(Mark E. Walker, N.D. Fla.)

After a state judge indicated that she would provide a candidate with relief in an action seeking a deadline extension for a recount in one county, but before the state judge actually ruled, the state's secretary of state removed the action to federal court. After taking evidence from county defendants, the federal judge issued an order declaring that county election officials had discretion to recount the plaintiffs' race for the state legislature ahead of statewide races, because the plaintiffs' race could be recounted more quickly. Based on evidence in this case, Judge Walker determined in a second removed case involving a U.S. Senate race that court relief was not required.

*Subject:* Recounts. *Topics:* Recounts; removal; intervention; matters for state courts.

State actions seeking deadline extensions for recounts—in a state legislature race and in a U.S. Senate race—were removed to federal court, and the recounts were completed on time with limited relief provided by the federal judge.

### *The State Legislature Race*

One week after the November 6, 2018, general election, Florida's secretary of state removed an action filed on the previous day in Florida's circuit court for Leon County, the county that includes the state capital: a candidate for the state legislature and his campaign sought a recount extension for Palm Beach County.<sup>1</sup> Initial election returns showed the plaintiff candidate trailing his opponent by 37 votes out of more than 80,000 votes cast.<sup>2</sup>

Following a case-management conference in state court on November 13, the state judge indicated that she would grant the plaintiffs relief, but the secretary removed the case that afternoon before she could do so.<sup>3</sup>

Judge Mark E. Walker ordered the defendants, which also included Palm Beach County's canvassing board and its supervisor of elections, to respond

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1. Notice of Removal, *Jim Bonfiglio Campaign v. Detzner*, No. 4:18-cv-527 (N.D. Fla. Nov. 13, 2018), D.E. 1; see Daniel Chang, Alex Daugherty & Maya Kaufman, *Dade Finishes Its Machine Recount as Broward Starts Process*, Miami Herald, Nov. 14, 2018, at 1A; Jeffrey Schweers, *Seven Lawsuits and Counting: Tallahassee Is Ground Zero*, Tallahassee Democrat, Nov. 14, 2018, at A6; David Smiley, Kyra Gurney, Steve Bousquet & Emily L. Mahoney, *It's "Prayer Mode" as Legal Decisions and Deadlines Loom*, Miami Herald, Nov. 15, 2018, at 1A.

2. Opinion at 1–2, *Jim Bonfiglio Campaign*, No. 4:18-cv-527 (N.D. Fla. Nov. 16, 2018), D.E. 53 [hereinafter *Jim Bonfiglio Campaign Opinion*].

3. *Id.* at 2–3; see Frances Robles & Patricia Mazzei, *Aging Machines and Legal Wrench Could Make Recount "a Little Messy"*, N.Y. Times, Nov. 15, 2018, at A16.

by 5:00 p.m. on November 14 to the plaintiffs' request for immediate declaratory and injunctive relief.<sup>4</sup> Judge Walker granted motions to intervene filed by the National Republican Senatorial Committee<sup>5</sup> and the campaigns for the Democratic Party's gubernatorial<sup>6</sup> and Senate nominees<sup>7</sup> (races that were also facing recounts).

Following the briefing, Judge Walker determined that he needed evidence from the county defendants "on the status and expected completion dates of the various ordered recounts," so he set an evidentiary hearing for November 15 at 4:00 p.m.<sup>8</sup>

The hearing lasted from 5:12 to 6:23.<sup>9</sup> Judge Walker heard testimony from Palm Beach County's supervisor of elections, but he did not require her to fly to Tallahassee at a time when the time pressure on her work was the very subject of the lawsuit.<sup>10</sup> Nor did he require her to provide testimony from a local courthouse.<sup>11</sup> An advantage of her providing testimony from her election site is that she could take pauses during her testimony to obtain additional information from her staff.<sup>12</sup> The plaintiffs' lawyer was with the witness, and the other lawyers were in the courtroom.<sup>13</sup>

On November 16, Judge Walker granted the plaintiffs limited interim relief.<sup>14</sup> Reluctant to rewrite statutory deadlines, Judge Walker nevertheless recognized that "the extremely limited functionality of Palm Beach County's tabulating machines" would make it difficult for the county to complete recounts for the plaintiffs' race and three statewide races in time.<sup>15</sup> The relief that Judge

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4. Order, *Jim Bonfiglio Campaign*, No. 4:18-cv-527 (N.D. Fla. Nov. 13, 2018), D.E. 4.

Tim Reagan interviewed Judge Walker for this report by telephone on December 12, 2018.

5. Order, *Jim Bonfiglio Campaign*, No. 4:18-cv-527 (N.D. Fla. Nov. 13, 2018), D.E. 5; see Intervention Motion, *id.* (Nov. 13, 2018), D.E. 2.

6. Order, *id.* (Nov. 14, 2018), D.E. 17; see Intervention Motion, *id.* (Nov. 14, 2018), D.E. 13.

7. Order, *id.* (Nov. 15, 2018), D.E. 36; see Intervention Motion, *id.* (Nov. 14, 2018), D.E. 32.

8. Order, *id.* (Nov. 15, 2018), D.E. 42; see Minutes, *id.* (Nov. 15, 2018), D.E. 49 (noting that the hearing ran from 5:12 p.m. to 6:23 p.m.).

9. Transcript, *id.* (Nov. 15, 2018, filed Nov. 15, 2018), D.E. 52 [hereinafter *Jim Bonfiglio Campaign Transcript*].

10. Interview with Hon. Mark E. Walker, Dec. 12, 2018.

11. *Id.*

12. *Id.*

13. *Jim Bonfiglio Campaign Transcript*, *supra* note 9, at 4–6.

14. *Jim Bonfiglio Campaign Opinion*, *supra* note 2.

15. *Id.* at 2, 5–6 (noting that the statewide races were for senator, governor, and commissioner for agriculture); see Daniel Chang, Elizabeth Koh & Nicholas Nehamas, *Legal Sparring Continues; Recounts Get Uneven Start*, Miami Herald, Nov. 13, 2018, at 1A; David Smiley & Douglas Hanks, *Game On: Recount Ordered in Three Statewide Races*, Miami Herald, Nov. 11, 2018, at A1.

"Adding to the legal woes, Palm Beach County Supervisor of Elections Susan Bucher told [Secretary of State] Detzner that her voting equipment, certified by his office, can't recount ballots in more than one race at one time." Steve Bousquet, *Memories of Chads Hang Over State as Lawyers Line Up*, Miami Herald, Nov. 9, 2018, at 2A; see Robles & Mazzei, *supra* note

Walker ordered was a declaration that the order in which the county conducted the recounts was within the sound discretion of the canvassing board; the recounts did not have to be conducted in the order in which the races appeared on the ballot; and evidence showed that the legislature race could be recounted more quickly than the others because it involved fewer precincts.<sup>16</sup>

The board did vote to reorder the recounts, and it completed the recount for the legislature race on time.<sup>17</sup> The plaintiffs then voluntarily dismissed the action.<sup>18</sup>

### *The U.S. Senate Race*

On the morning of Friday, November 16, the secretary removed another action regarding the Palm Beach County recount, this one filed in state court on the previous day by the ultimately unsuccessful campaign to reelect U.S. Senator Bill Nelson.<sup>19</sup> On the day that the case was removed, Judge Walker granted the National Republican Senatorial Committee's motion to intervene in opposition to the case.<sup>20</sup>

Because of testimony on November 15 in the other case—in which Senator Nelson's campaign had intervened—expressing informed optimism about the completion of the recount in Palm Beach County, Judge Walker ordered the parties to “file briefs no later than 4:00 p.m. on November 16, 2018 to clarify whether there is a live issue in this matter.”<sup>21</sup>

The campaign “respectfully request[ed] that the Court enter an order compelling Palm Beach County to release the results of the machine recount by no later than 6:00 p.m. so as to allow the parties to evaluate those numbers and to report to the Court whether a continuing controversy exists.”<sup>22</sup> Judge Walker set the case for a telephonic hearing at 6:00 p.m.<sup>23</sup>

After conversations among counsel before the hearing and at the hearing, the plaintiff's counsel expressed reassured confidence: “Based on the representations on the record, we are satisfied that Palm Beach County has represented that it will be using the machine recount figures, and we will wait for those results.”<sup>24</sup> On Monday, Judge Walker noted, “During the hearing, the parties

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3 (“Palm Beach County does not own the modern, high-speed tabulation machines required to conduct recounts in multiple races simultaneously”).

16. *Jim Bonfiglio Campaign Opinion*, *supra* note 2, at 6–9.

17. Order Supplement, *Jim Bonfiglio Campaign v. Detzner*, No. 4:18-cv-527 (N.D. Fla. Nov. 19, 2018), D.E. 56.

18. Notice of Dismissal, *id.* (Nov. 19, 2018), D.E. 55.

19. Notice of Removal, *Bill Nelson for U.S. Senate v. Detzner*, No. 4:18-cv-536 (N.D. Fla. Nov. 16, 2018), D.E. 1; Transcript at 3, 5, *id.* (Nov. 16, 2018, filed Nov. 16, 2018), D.E. 24 [hereinafter *Bill Nelson for U.S. Senate Transcript*].

20. Order, *id.* (Nov. 16, 2018), D.E. 4; *see* Intervention Motion, *id.* (Nov. 16, 2018), D.E. 3.

21. Order, *id.* (Nov. 16, 2018), D.E. 12.

22. Response, *id.* (Nov. 16, 2018), D.E. 20.

23. Order, *id.* (Nov. 16, 2018), D.E. 21; *see Bill Nelson for U.S. Senate Transcript*, *supra* note 19, at 3 (“THE COURT: . . . Given the timing of this action, as well as the deadlines that are implicated associated with the recount, I thought it appropriate to immediately set this matter for a hearing . . .”); Minutes, *id.* (Nov. 16, 2018), D.E. 23.

24. *Bill Nelson for U.S. Senate Transcript*, *supra* note 19, at 15.

indicated that Palm Beach County's use of its machine recount totals was appropriate. Accordingly, this Court directs the parties to explain if there remains a justiciable issue in this matter."<sup>25</sup> Ten days later, the campaign voluntarily dismissed its case.<sup>26</sup>

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25. Order, *Bill Nelson for U.S. Senate*, No. 4:18-cv-536 (N.D. Fla. Nov. 19, 2018), D.E. 26.  
26. Voluntary Dismissal, *id.* (Nov. 29, 2018), D.E. 28.