IN THE SUPREME COURT OF THE STATE OF DELAWARE

LA MAR GUNN,	)	
	)	
Petitioner-Below, Appellant,	)	No. 717, 2014
	)	
v.	)	
	)	
BETTY LOU MCKENNA,	)	
	)	
Respondent-Below, Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR KENT COUNTY

MurrayPhillips, P.A.

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NATURE OF THE PROCEEDINGS

This is an appeal by Petitioner-Below/Appellant, La Mar Gunn (Gunn), from the December 30, 2014, decision of the Superior Court in and for Kent County declaring a tie in the November 4, 2014, general election for the Office of the Recorder of Deeds for Kent County (the "Election"). (*Ex. A*. p. 2).

Gunn campaigned against Respondent-Below/Appellee, Betty Lou McKenna (McKenna), and was declared the winner of the Election, besting McKenna by two votes. (A57). The Board of Canvass (the "Board") convened on November 6, 2014, to recount the absentee votes and to certify the Election results.[1] Instead of conducting one recount of absentee ballots, as required by Section 5702(e), the Board conducted three recounts, each yielding a different vote differential. (A57-58). The first two recounts widened Gunn's victory margin (A57), but the third recount suddenly showed McKenna as the winner. (A58). The Board certified the third recount. (A59, A71).

On November 13, 2014, Gunn filed an election contest pursuant to Title 15, Chapter 59 of the Delaware Code. (A56-61). The Superior Court ordered the Department of Elections to recount the absentee ballots ("Fourth Recount"). (A3, A76). The Fourth Recount was performed on December 29, 2014, and yielded yet another vote differential, different from each of the prior three recounts. The

[1] 15 *Del. C.* §5702(e) requires the Board of Canvass to perform a hand recount of absentee votes when the vote differential is the lesser of 1000 votes or .5 percent.

Superior Court entered a final order on December 30, 2014, declaring the result of the Election to be a tie. (*Ex. A* p. 2).

On December 31, 2014, Gunn appealed.

SUMMARY OF THE ARGUMENT

I. THE SUPERIOR COURT COMMITTED MULTIPLE LEGAL ERRORS WHEN IT CERTIFIED THE FOURTH RECOUNT.

A. The Superior Court erred when it certified the Fourth Recount because all recounts yielded different results.

The Superior Court held that malconduct, as defined in 15 *Del. C.* §5941(1), exists in a situation where each one of the three recounts yields a different vote differential. Applying the above rule to this case, the Superior Court held that the Board of Canvass committed malconduct by certifying the third recount when each recount yielded a different vote count. It is undisputed that the Fourth Recount also yielded a different vote count. Therefore, it was an error for the Superior Court to certify the Fourth Count.

B. The Court failed to resolve the question about the reduction in the number of "no votes" cast from sixty (60) to fifty-six (56).

When four recounts result in four different vote differentials, it is necessary for the Court to reconcile a change in the "no votes" before certifying the election.

C. The Court failed to address compliance with 15 *Del. C.* §5510 or §5511 so the integrity of the process is in question.

When four recounts result in four different vote differentials, it is necessary for the Court to ensure that there was strict adherence to the Delaware Code relating to the care and custody of the ballots.

II. THE BOARD OF CANVASS' CERTIFICATION OF MCKENNA AS THE WINNER WAS IMPROPER

A. The Superior Court, sitting as the Board of Canvass, pursuant to the requirements of 15 *Del. C.* §5702(e), should have certified the election after the first recount.

There is no statutory provision for multiple recounts. When Gunn was still the winner after the first recount, the Election should have been certified.

B. The Superior Court, sitting as the Board of Canvass, improperly certified the third recount which did not account for two ballots.

15 *Del. C.* §5701 requires that all votes be counted. When the total votes on the record are reconciled with the total machine votes and the total absentee votes, two votes are unaccounted for.

STATEMENT OF THE FACTS

This appeal is about the integrity of the vote tabulation of the November 4, 2014, general election for the Office of the Recorder of Deeds for Kent County.

a. La Mar Gunn wins the Election by two votes but the Board certifies McKenna as the winner after recounting the votes three times.

On November 4, 2014, Petitioner-Below/Appellant, La Mar Gunn ("Gunn") won the Election by two votes. (A57). On November 6, 2014, the Board of Canvass ("Board") convened to certify the Election results, as required by Section 6, Article V of the Delaware Constitution. (A9). Because of the closeness of the vote differential, the Board was required to recount absentee ballots pursuant to 15 *Del. C.* § 5702(e). In contravention of the statutory authority granted by Section 5702, however, the Board conducted not one (1), but three (3) recounts of the absentee ballots, each resulting in a different vote differential.[2] (A57-58, A62, A69). After the first recount, Gunn's lead increased from two to three votes. (A57). After the second recount, Gunn's lead increased from three to seven votes. (*Id*). After the third recount, McKenna was suddenly ahead by two votes. (A58, A69). The Board certified the third recount. (A69).

[2] *See* A27-A29. Inexplicably, the first and second recounts were not conducted on the record and there is approximately a nine hour break in the record.

b. Gunn contests the Election certification to the Superior Court

On November 13, 2014, Gunn filed a Verified Petition in the Superior Court in and for Kent County (A1), contesting the Election results and alleging malconduct pursuant to *Del. C.* §5941(1). (A57-61). In short, Gunn alleged that certifying the third recount, when each recount had yielded a different vote differential, was malconduct. McKenna filed a Motion to Dismiss for lack of standing. (A1). The Court denied McKenna's Motion to Dismiss,[3] and granted Gunn's petition.

c. The Superior Court interpreted Section 5941(1) and ordered a recount

In its December 23, 2014, decision and Order, the Court held that it was malconduct by the Board of Canvass to certify the third recount when three separate recounts yielded three different vote differentials. The Court ordered the Department of Elections to conduct a hand recount of the absentee ballots cast in the Election. (A67-76).

On December 29, 2014, the Department of Elections recounted the absentee ballots for the fourth time.[4] *Ex. A* p. 1. Prior to the fourth recount, when the zip-ties were cut and the ballots removed from the bags (A78), the Gunn and McKenna

[3] The Court granted the Motion to Dismiss as to the lack of standing of the Kent County Republican Committee and the Delaware Republican Party.

[4] The ballots were recounted for the fourth time. The first three recounts were conducted by the Board of Canvass and the fourth recount was conducted by the Department of Elections.

ballots were combined in a seemingly random order – not by the election district. (A81). At the conclusion of the fourth recount, when the total absentee votes were combined with the machine votes, the result was a tie. Pursuant to 15 *Del. C.* §5954(c), the Office of the Recorder of Deeds in and for Kent County was declared vacant.

On December 30, 2014, Gunn appealed.

ARGUMENT ON THE MERITS

I. THE SUPERIOR COURT COMMITTED MULTIPLE LEGAL ERRORS WHEN IT CERTIFIED THE FOURTH RECOUNT.

Question Presented

Whether the Superior Court committed multiple legal errors when it certified the Fourth Recount. This question was argued below at A88-99.

Standard and Scope of Review

The Supreme Court reviews errors of law *de novo*. *Avallone v. State of Delaware/DHSS,* 14 A.3d 566, 570 (Del. 2011).

Merits of the Argument

A. The Superior Court erred when it certified the Fourth Recount because all recounts yielded different results.

15 *Del. C.* §5941 provides that:

> Any person claiming to be elected to an office to be exercised in and for any county, district or hundred may contest the right of any person declared to be duly elected to such office for any of the following causes:
>
> (1) For malconduct on the part of the election officers or clerks holding the election, or any one of them;
>
> (2) When the person whose right to the office is contested was not at the time of the election eligible to such office;
>
> (3) When the person whose right is contested has given to any elector or inspector, judge or clerk of election, any bribe or reward or shall have offered any bribe or reward for the purpose of procuring his or her election;

(4) On account of illegal votes.

Gunn alleged in the Verified Petition Contesting Election that is was improper to certify the third recount when no two recounts rendered the same results. (*See* A56-61.) The argument before the Superior Court was whether, given that no two recounts matched, the Board of Canvass had engaged in "malconduct." Gunn, drawing from language elsewhere in Title 15, specifically 15 *Del.C.* §5942, argued that "malconduct" means "inequality" or "improper conduct." (A62). McKenna argued that an intentional act with bad intent was required. (A71-72). The Court harmonized Sections 5941(1) and 5942 and determined that bad intent was not a necessary element of "malconduct" and that the Board of Canvass only had to be "abnormal" or "inadequate." (*See* A74.) The Court held that malconduct does not require an intentional or malicious act, but rather "need only be action that was incorrect or *deficient.* (emphasis added) (*See* A74). Given the desire to have election results count every single vote cast, the Court ordered the Department of Elections to conduct a hand recount of the absentee ballots cast in the election for Recorder of Deeds. (A76).

The Fourth Recount occurred on December 29. *Ex. A* p. 1. The counters recounted 1549 absentee ballots. (A96). The final tally resulted in a tie and the Court declared the Office of the Recorder of Deeds for Kent County vacant pursuant to 15 *Del. C.* §5954(c). *Ex. A.* p. 2.

However, the same Superior Court held that malconduct, as defined in 15 *Del. C.* §5941(1), exists in a situation where each of the three recounts yields a different vote differential. Applying the above holding to this case, the Superior Court held that the Board of Canvass committed malconduct by certifying the third recount when each recount yielded a different vote differential.

Gunn respectfully submits that the Superior Court correctly held that malconduct exists where each recount renders a different result. Gunn also submits that the Superior Court properly held that the Board of Canvass committed malconduct by certifying the third recount when each recount yielded a different vote differential. Gunn submits, however, that the Superior Court committed an error when it failed to apply its own holding and certified the Fourth Recount which yielded yet another different vote differential. It is undisputed that the Fourth Recount also yielded a different vote count. Therefore, it was an error, in contravention of 15 *Del. C.* §5741, for the Superior Court to certify the Fourth Count as it was also malconduct.

B. The Court failed to resolve the question about the reduction in the number of "no votes" cast from sixty (60) to fifty-six (56)

Gunn avers that by the Fourth Recount it was insufficient to simply recount the votes. In addition to the recount, it was necessary to reconcile the change in the "no vote" total. Specifically, the Court needed to reconcile how the "no vote" tally changed from sixty (60) "no votes" on election night to fifty-six (56) after the

Fourth Recount. Aside from conjectures made as to the cause of the reduction in "no votes," there is nothing conclusive on the Record that explains the vote reduction. (A85-87). Even more troubling is that the same issue was raised on November 6, after the third recount. A review of the November 6 transcript of the Board of Canvass proceedings shows that there was a question as to how this happened.[5] Certifying the tie without an explanation as to the reduction in "no votes" does not instill confidence in the process and, Gunn submits, amounts to legal error in the context of this matter because the integrity of the vote count is of the utmost legal importance.

C. The Court failed to address compliance with 15 *Del. C.* §5510 or §5511 so the integrity of the process is in question.

In addition to having to reconcile the change in "no votes," Gunn argues that the Court had a duty to consider the sections of the Delaware Code pertaining to counting absentee votes by election district and ensuring proper security measures were maintained throughout the process.

15 *Del. C.* §5510(5) provides:

> Once absentee votes have been recorded, an absentee judge shall deposit the voted ballots, rejected ballots, and any absentee vote tally sheet that may have been used, *in a carrier envelope for the election district with whose votes the absentee votes are counted*; provided, however, that each carrier envelope shall contain absentee ballots, rejected ballots, and

[5] "My understanding from speaking with the Department of Elections is there is an inexplicable change of four votes." *See* A-31, line 16. See argument beginning on p. 23.

> tally sheets *for no more than one election district* and only one carrier envelope shall be filled at a time. (emphasis added).

The statute is clear: the ballots must be kept in carrier envelopes *sorted by election district.* Gunn avers that, during the third recount, the ballots were taken out of election district order and sorted into two stacks: one stack for Gunn and one stack for McKenna. After McKenna was declared the winner, the ballots were put in carrier envelopes for each candidate. They were not recombined or put in election district order, but rather, were grouped by candidate so several carrier envelopes contained all Gunn votes and several carrier envelopes contained all McKenna votes. On December 29, the ballots were removed from the carrier envelopes,[6] Gunn and McKenna ballots were combined in carrier envelopes, in a seemingly random order – not by election district.

The concept of tallying and keeping votes in election district order is not new. Section 6, Article 5 of the Delaware Constitution refers to publicly ascertaining the state of the election by "determining the aggregate number of votes for each office given *in the election districts of the county."* As a result of the Delaware Supreme Court's opinion in *State ex rel. Smith v. Carey,* 112 A.2d 26 (1955), the absentee voting law was amended to require the actual voting of

[6] That were secured by zip-ties in contravention of 15 *Del. C.* §5511. See argument in next section.

absentee ballots *in the election districts.* (emphasis added) *See State ex rel. Massey v. Terry,* 148 A.2d 102, 103 (Del. 1959).

Gunn submits that great care is to be taken to record votes by election district so that errors are not made. Although the first and second recounts are not on the record of the Board, Gunn avers that the first and second recounts before the Board were tallied in election district order. Gunn won the first and second recounts.

In addition to the requirement that votes be kept in election district order, there is a requirement that certain security measures must be taken when the ballots are transported and held for future proceedings.

15 *Del. C.* §5511(e) states:

> Upon completion of any inspection of votes pursuant to this subsection, absentee ballots shall be returned to the carrier envelopes from which they were removed and the carrier envelopes shall be:
>
> (1) Resealed in a secure manner, or shall be placed in another security envelope, for the purposes of securely protecting the contents thereof from tampering, removal, or substitution without detection; and
>
> (2) Placed in a secure location and held there until such time as it is destroyed or moved for further legal process.

At the close of the third recount on November 6, when the ballots were placed in carrier envelopes that were not specific to election districts, it was required that those envelopes be "resealed in a secure manner" **or** "placed in

another security envelope." *Id.* This did not happen. The transcript of the December 29, 2014, fourth recount opens with the Deputy Court Administrator, Lisa Robinson, stating that someone needed to get a pair of scissors to cut the "zip-tie" that secured the bag that contained the ballots. (A78). Although not described in the record, Gunn avers that the zip-tie was a regular zip-tie that someone could obtain from a local hardware store. Gunn argues that a zip-tie does not meet the requirement of "resealed in a secure manner" because the purpose of the security device is to "securely protect[ing] the contents thereof from tampering, removal or *substitution without detection.*" (emphasis added). A zip-tie may be substituted without detection and therefore is not in compliance with 15 *Del. C.* §5511(1). Further, since the zip-tie was used and it does not fit the requirement of "resealed in a secure manner" the carrier envelopes needed to be "placed in another security envelope" and they were not.

Although the Department of Elections representative indicates that the ballots "have been locked up since that night" (A80) and the Deputy Court Administrator indicates that "I'm the only one who had access to that room," (*Id.*) Gunn argues that these statements only address 15 *Del. C.* §5511(2) and do not address the requirements of 15 *Del. C.* §5511(1).

> The [e]lection [l]aws of this [s]tate . . .reflect great study on the part of our lawmaking bodies to safeguard against the evils accompanying uncontrolled elections. . . They form an integral part of a well-designed plan to safeguard the integrity and purity of the

> ballot from the time the elector receives his ballot through the voting stages until it has been finally counted by the Election Officials

State ex rel. Wahl v. Richards, 64 A.2d 400, 408 (Del. 1949) (Terry, J.) (dissenting).

Gunn submits that in an election where every vote matters, that strict adherence to the requirements of the Delaware Code is not only advisable but required because it is the only way to ensure the integrity of the election process. Gunn submits that, particularly in light of the fact that the fourth recount rendered yet another result, the Court was required to address compliance with 15 *Del. C.* §5510 and §5511 so that there was no doubt as to the validity of the recount and that the Court's failure to do so was legal error.

II. THE BOARD OF CANVASS' CERTIFICATION OF MCKENNA AS THE WINNER WAS IMPROPER

Question Presented

Whether the Board of Canvass certification of McKenna as the winner improper. This was argued below at A37-A50.

Standard and Scope of Review

The Supreme Court reviews questions of statutory interpretation *de novo*. *Freeman v. X-Ray Assocs., P.A.,* 3 A3d 224, 227 (Del. 2010) (citing *Dambro v. Meyer,* 974 A.2d 121, 129 (Del 2009)).

Merits of the Argument

Review of the Board of Canvass by the Supreme Court

Before delving into the action of the Superior Court as the Board of Canvass, it is important to establish that this Court has the authority to do so. The Delaware Supreme Court has described the Board of Canvass alternatively as an administrative body as well as a quasi-judicial tribunal.[7] To this end, *State ex rel. Walker v. Harrington I*,[8] is instructive. In *Walker*, the relator filed a petition in the Supreme Court for writ of mandamus to be issued to the Board of Canvass to reconvene and calculate the votes and leave out absentee votes from Camp Upton, NY because they were not legal ballots and the absentee ballots changed the

[7] Randy J. Holland, *The Delaware State Constitution: a Reference Guide* 176 (2002).
[8] 27 A.2d 67 (Del. 1942).

outcome of the race. Although Amici Curiae argued that the Court did not have jurisdiction to review the acts of the Superior Court, the Court held that it had jurisdiction to reach the Board of Canvass by exercising original jurisdiction and issuing a writ of mandamus. The Court stated "We think that 'the' Superior Court sitting as a Board of Canvass is 'the' Superior Court established by said Article IV. Manifestly, under our Constitution, there is but one Superior Court." *State ex rel. Walker v. Harrington I*, 27 A.2d 67, 74 (Del. 1942).

A. The Superior Court, sitting as the Board of Canvass, pursuant to the requirements of 15 *Del. C.* §5702(e), should have certified the election after the first recount.

Gunn contends that the law unambiguously requires one recount of the absentee votes in close elections, not three recounts, as were performed here.

15 *Del. C.* §5702(e) requires that:

> In the event that the number of votes separating a candidate and the closest opposing candidate in an election for State Senator, State Representative, or county office is less than 1,000 votes or one half of 1 percent of all votes cast for the 2 candidates, whichever is less, the Court shall recount the absentee ballots cast in that election at State expense. (emphasis added)

When interpreting a statute, the Court must "ascertain and give effect to the General Assembly's intent." *Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013). First the Court must determine whether the relevant statute is ambiguous." *Id.* at 422. A statute is ambiguous

when it can reasonably be interpreted in two or more ways 'or if a literal reading of its terms 'would lead to an unreasonable or absurd result not contemplated by the legislature" *Id.* (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011). If the Court determines that the statute is unambiguous, it will give the statutory language its plain meaning. *Id.* If the Court determines the statute is ambiguous then it will "consider the statute as a whole, rather than in parts, and read each section in light of all others to produce a harmonious whole." *Id.* (quoting *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011)). The Court presumes "that the General Assembly purposefully chose particular language and therefore construe statutes to avoid surplusage if reasonably possible." *Id.*

In addition to interpreting the words of the statute itself, it is helpful to ascertain the origin and subsequent history of the statute in question. Article 5, §6 of the Delaware Constitution was new to the Constitution of 1897 and provided the process to be followed in the collection of election results and the convening of the Delaware Superior Court in each county to review the results and issue certificates of election.[9]

The 1897 Constitution relevantly provided that:

> In case any voting machine recording tape, voting machine certificate, absentee ballot box, and/or any other document required by law shall not be produced . . . the Court shall have the power to issue summary process against any election officer to bring . . .and

[9] Randy J. Holland, *The Delaware State Constitution: a Reference Guide* 175 (2002).

> to open any absentee ballot box and take therefrom any paper contained therein; and *to recount* the absentee ballots.[10]

Likewise, Section 6, Article 5 of the Delaware Constitution was codified in 1898 and relevantly required that:

> For the purposes of this Section, the Superior Court shall consist in New Castle county of the Chief Justice and the Resident Associate Judge; in Kent county of the Chancellor and the Resident Associate Judge; and in Sussex county of the Resident Associate Judge and the remaining Associate Judge, who shall for the purposes of this act be a Board of Canvass for the respective counties of this State; . . . .and to make a recount of the ballots contained therein, and to correct any fraud or mistake in any certificate or paper relating to such election." (emphasis added).[11]

In 1986, The General Assembly amended Section 5702 to include subsection (c) that required:

> Any candidate for statewide office in a general election may apply to the Court for a recount of all the ballots cast and recorded for such office if the number of votes separating such candidate and the closest opposing candidate is less than 1,000 votes or less than 1/2 of 1 percent of all votes cut for the two candidates, whichever amount is less. Such recount shall thereupon be conducted by the Court at State expense. The request for a recount under this Subsection must be presented before the adjournment of the Court of Canvass for the election in question and any recount that takes place shall not extend beyond the petitioner's contest. (emphasis added)[12]

In 2006, The General Assembly amended Section 5702 again to include the "automatic" recount provisions that are at issue here:

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[10] Del. Const. art. V, §6 (1897).
[11] *See 21 Del. Laws*, c. 38, §23 (1898).
[12] *See* 65 Del. Laws c.519, §1 (1986).

> In the event that the number of votes separating a candidate and the closest opposing candidate in an election for state senator, state representative or county office is less than 1,000 votes or one half of one percent of all votes cast for the two candidates, whichever is less, the Court shall recount the absentee ballots cast in that election at State expense.

Through the years, it appears the word has been changed from a noun to a verb but it has not changed from singular to plural. In addition, Gunn submits that if the General Assembly meant for there to multiple recounts, the General Assembly would have been explicit in its requirements.

Gunn contends that the statute is unambiguous in its requirement for a "recount," not recounts. Therefore, the Board of Canvass should have authorized only one singular recount to be performed, not three recounts.

Here, the Superior Court, sitting as a Board of Canvass, should have prevented the two additional recounts that followed the first recount. Pursuant to the unambiguous requirements of Section 5702, the first recount declaring Mr. Gunn as the winner should have been certified by the Board of Canvass.

B. The Superior Court, sitting as the Board of Canvass, improperly certified the third recount which did not account for two ballots.

Gunn argues that the Board of Elections is required to calculate all votes cast in each election pursuant to 15 *Del. C.* §5701(a) that provides in part:

> The Superior Court shall convene in each county on the 2nd day after the general election at 10 a.m., for the performance of the duties imposed upon it by § 6 of article V of the Constitution of this State and by this chapter. Thereupon the Court, with the aid of such

> of its officers and such sworn assistants as it shall appoint, *shall publicly ascertain the state of the election* throughout the county and in the respective election districts *by calculating the aggregate amount of all the votes for each office* that shall have been given in all of the election districts of the county for every person voted for such office." (emphasis added).

i. The numbers within the vote total do not add up

Based on the numbers in the record, the third recount did not account for two absentee votes. The transcript from the Board of Canvass proceedings on November 6 states that Gunn had 19,246 votes and McKenna had 19,248 votes, making McKenna the winner. Although McKenna argued before the Superior Court that the Board chose to certify the third recount because it was the only one that matched the total number of votes cast counted on Election Night,[13] in fact, the total number after the third recount does not match the total number of votes counted on Election Night. On election night the total number of votes cast was 38,492 comprised as follows:

	GUNN	MCKENNA	
Machine Votes	18,558	18,445	
Absentee Votes	689	800	
Total	19,247	19,245	19247+19245=38492

After the third recount the total number of votes cast was 38,494 votes comprised as follows:

[13] A70.

	GUNN	MCKENNA	
Machine Votes	18,558	18,445	
Absentee Votes	688	803	
Total ON RECORD	19,246	19,248	19246+19248=38494

The total number of votes increased by two between November 4 and November 6. By the third recount, the record reflects that the number of "no votes" reduced from sixty (60) to fifty-six (56). It was suggested that the decrease was the result of additional absentee votes that were not counted on election night because the *scanner* registered a "no vote" but a *person* reviewing it considered it a vote. Assuming that could be the reason, if those four votes were added to the election night total of 38,492, the total number of votes would be 38,496 not 38,494 as recorded in the record.

This is not the only problem with the vote total in the third recount. The record reflects that there were a total number of 1549 absentee ballots. (A96). On election night, sixty (60) of those absentee ballots did not indicate a vote for either candidate, meaning that 1489 absentee votes indicated a vote for one of the candidates. On November 6, by the end of the third recount, the "no votes" total was fifty-six (56), meaning that the absentee votes that indicated a vote for one of the candidates would necessarily be 1493.[14] Yet the total absentee votes in the third

[14] Necessarily because 56 subtracted from 1549 is 1493.

recount were 1491,[15] with two absentee ballots unaccounted for. The Board of Canvass certified a vote total where the numbers do not add up.

ii. The Board never reconciled the reduction in "no votes" from sixty (60) to fifty-six (56) and should have stayed the certification

The record of November 6 reflects that there was a question regarding the change in "no votes" from sixty (60) to fifty-six (56). (A31). The record reflects that counsel for both candidates *as well as the Department of Elections* did not believe the vote should be certified that evening. (A31-33). The following excerpt from the Board of Canvass transcript is telling:

> Mr. Malmberg: "...My understanding from speaking with the Department of Elections is there is an inexplicable change of four votes. And my understanding of speaking with the Department of Elections is they would like this vote not to be certified for a delay of two days so that can scan the – so they can determine why the hand count of votes differs from the scanned – the electronic scanned votes that occurred and separate those four votes and take a look at those actual ballots and determine whether these are the actual votes or not. So our application is that the vote not be certified at this time and that the Department of Elections be allowed to go through the IT process of taking a look at those votes and separating out the apparent four votes that were not electronically read but were manually read by the Board of Canvass and cull those from the total and take a look at why the electronic reading machine did not read those votes, but the Board of Canvass changed those votes from not voting to an actual vote."

[15]Subtracting the machine votes from the total votes reflected on the record to arrive at the number of absentee votes (which were not reflected on the record) derives the absentee total for each candidate. 19246-18558=688 for Gunn and 19248-18445=803 for McKenna. 688+803=1491

Resident Judge Witham: All right. We'll hear from Mr. Paradee for Ms. McKenna.

Mr. Paradee: Thank you, your Honor. I'm, at this juncture, not entirely clear exactly what happened or how, but certainly, we would, in the interest of the integrity of the process, like to assure that whatever the result is is, in fact, confirmed and accurate. So whatever process the Department and the Board of Canvass need to take to ensure that is fine by us. Whichever way it goes, we just want to make sure that it's right.

Resident Judge Witham: I'd like to hear from a representative from the Board of Elections with respect to this matter. Is anyone here?

Ms. Young: I'm Doris Young. I'm the director for Kent County Elections.

Resident Judge Witham: Would you –

Ms. Young: Doris Young, the Kent County Department of Elections director. I just want to let you know that there were apparently votes that were counted manually that possible did not scan. It is possibly due to maybe not colored in correctly or not colored in dark enough. All ballots have been accounted for. Those counts do equal their total ballot count. *The votes do not.* So the only thing we can do, again, you know, like what is being asked is to rescan them or accept the manual count which would have picked up those ballots that did not scan. (emphasis added)

Resident Judge Witham: All right. Stand by.

After the above, there was a discussion about the security of the ballots and releasing them to the Department of Elections and releasing the Board of Canvass. (A34-35). Fifteen minutes later, the Court reconvened the Board of Canvass on the record for a discussion as to the authority of the Board of Canvass to hold open the

certification until the Department of Elections could rescan the ballots for the purpose of determining exactly which ballots had not been counted in the initial scan on Election Night. Ultimately, the Court held that staying the certification was beyond the authority of the Board of Canvass and that the remedy for the Gunn was to contest the election.

Gunn submits that this was improper. The role of the Board of Canvass is to count and to certify the count. *See State ex rel. Mitchell v. Wolcott,* 83 A.2d 762, 766 (Del. 1951).[16] Gunn argues that if there is a question about the actual count of the votes, it is within the authority of the Court as the Board of Canvass to resolve it and that, in light of all parties wanting the count to be accurate, that the Court could have stayed the certification to ensure that all votes were accurately counted.

[16] "First, the Superior Court is, under the Constitution, still primarily a board of canvass whose function is to count the vote."

Remedy Sought

As it stands, with no record of the first and second hand recounts, it is impossible to declare La Mar Gunn the winner. With the third recount not accounting for two votes – it is unreliable and therefore impossible to declare Betty Lou McKenna the winner. The fourth recount is also flawed because the race was declared a tie without an explanation as to how the vote total changed and without addressing the security of the ballots and compliance with 15 Del. C §5510 and §5511. Gunn submits that the fact that four recounts were conducted with no two counts matching erodes voter confidence.

Special Election

> "Voting rights are potentially violated . . . whenever an individual is sworn in as an elected representative without a demonstration that he or she was the choice of a plurality of the electorate. This is so because the possibility is left open that some other candidate actually received more votes than the declared winner, which would mean that each of the votes cast for this other candidate was ignored." *Marks v. Stinson*, 19 F.3d 878, 887 (3d Cir. 1994).

"For the actions of a democratically elected body of representatives to be legitimate, the *electorate must be assured* that each of the representatives was the choice of the electorate." (emphasis added) *Id.* To this end, Gunn submits that a special election may be the proper remedy. This is no small matter. However, in light of the fact that the integrity of the ballots was not maintained, the record was not adequately kept and four recounts resulted in four different vote differentials, it

is impossible to determine who the rightful winner is at this point. "[E]ven in the absence of fraud, where it was not feasible to establish who would have won a properly conducted election, a new election was appropriate to restore the integrity of the electoral process." *Id.*[17]

"Ordinarily, ignorance, inadvertence, mistake, or even intentional wrong on the part of such officers should not be permitted to disenfranchise voters who are innocent of any wrongdoing, if it can be avoided." *State ex rel. Wahl v. Richards,* 64 A.2d 400, 405 (Del. 1949) (citing *McCrary on Elections §§126, 227, 231; Mehling v. Moorehead, 133 Ohio St. 395, 14 N.E. 2d 15).* Gunn submits that if the voters of Kent County do not believe their votes were properly cared for and counted it could disenfranchise voters in the future.

Gunn respectfully submits requests that this Court order the Superior Court to decertify the tie and order a special election so that voters can have confidence that the person that they voted for is in the office.

Remand

Alternatively, Gunn asks this court to remand the proceedings back to Superior Court for the purpose of fact-finding and creation of a record. On remand, testimony could be taken regarding the carrier envelopes and why the

[17] Referring to a decision of the Court of Appeals for the First Circuit in *Griffin v. Burns,* 570 F.2d 1065 (1st Cir. 1978) wherein the Rhode Island Supreme Court directed the decertification of the previously declared winner and the Rhode Island Board of Canvas certified a new winner based solely on the machine cast ballots. A federal civil rights suit was filed and the district court ordered a new election.

ballots were taken out of election district order. Testimony could be taken regarding the security procedures and why the proper tamper detecting seals were not used. All of the tally sheets from the first and second recounts could be gathered and put on the record instead of only having the third and fourth recounts.

There is a potential problem, though, that the Court must be made aware of. There is an issue of potential bias that underlies the recounts of November 6. Specifically, when the Board of Canvass convened, the members were sworn in and the Court publicly inquired as to the existence of any petitions. Counsel for McKenna presented a petition for recount and in the course of addressing the Court made allegations that Gunn, among other things, had improperly solicited absentee ballots. No evidence was submitted and there was no verification of this allegation. Although the petition was ultimately withdrawn because an automatic recount was implicated by statute, Gunn submits that the statement is significant because it was made in front of the volunteers that would ultimately be hand-counting the ballots. Gunn argues that in a criminal context, such a statement could be grounds for a mistrial and that such a statement should have been made during a hearing conducted by the Court outside the presence of the volunteers. It is unknown whether any bias played a role in any of the recounts, but in an election that is already riddled with controversy, Gunn submits that it should be considered by this Honorable Court.

Finally, Gunn respectfully submits that another possible problem with a remand is that once voter confidence has eroded and the integrity of the process has been breached, even with testimony and evidence, it cannot undo what happened. There will always be a question about "what really happened."

CONCLUSION

"The integrity of the election process lies at the heart of any republic." *Marks v. Stinson,* 19 F.3d 878, 887 (3d Cir. 1994). The voters of Kent County, and the voters of Delaware, need to know that the electoral process has integrity. In a public election that had Gunn declared the winner on Election Night by two votes, the winner in a recount where his lead increased from two to three votes, the winner in a second recount where his lead increased from three to seven votes, a loser after a third recount where McKenna goes ahead by two votes (and is certified as the winner) and tied after a fourth recount that was conducted fifty-three days later when the security of the ballots had been compromised, something has to be done.