

VIRGINIA :

**IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Courts Building**

MARK D. OBENSHAIN,)	
)	
Petitioner,)	
)	
v.)	Case No. CL13-5272
)	
MARK R. HERRING,)	
)	
Respondent.)	

PRELIMINARY ORDER

This matter came before the Court on December 4, 2013, on the Petition for Recount and supporting memorandum filed on behalf of Mark D. Obenshain, Petitioner; on the Response to Petition for Recount filed on behalf of Mark R. Herring, Respondent; and on argument of counsel. It appearing to the Court that Senator Obenshain and Senator Herring are in agreement on certain issues and that the Court has ruled on other matters as to which the parties disagree and that a Preliminary Order should issue, it is ORDERED that:

I. Period Preceding Recount

1. All voting machine keys, poll books, statements of results, voting machine printed return sheets and printout tapes produced by computers and other machines, ballots and other election materials used or produced in connection with the election for Attorney General of Virginia held on November 5, 2013, and previously delivered to the clerks of the circuit courts of Virginia, shall remain in the safekeeping of the clerks to whom they were delivered, who shall assure that such material remains secure and undisturbed. All voting equipment used in the November 5, 2013 general election shall remain secure and undisturbed in the locations where it

presently is situated until released on December 6 by the clerks to the general registrars for programming and testing subject to the terms of this Preliminary Order. The electoral board of each county and city shall continue to ensure the security of the voting equipment.

2. To the extent that they have not already done so, the clerks are hereby ordered to take the following steps: (a) secure all paper ballots and other election materials in sealed boxes (closing and sealing all openings to the boxes); (b) place all of the sealed boxes in a vault or room not open to the public or to anyone other than the clerk and his staff; (c) cause such vault or room to be securely locked except when access is necessary for the clerk or his staff; (d) implement all other security measures, if any, taken by the clerk with respect to trial evidence; and (e) certify in writing to this Court (i) the security measures taken by the clerk following the election through the date of this Order and (ii) the security measures taken pursuant to this Order, said certification to be provided to the Clerk of this Court by not later than 5:00 p.m. on December 6, 2013, via email transmission.

3. To the extent that any clerk may have departed from the foregoing procedures before the entry of this Procedural Order, the clerk also shall so inform the Court in writing, explaining the nature of such departure, by no later than 5:00 p.m. on December 6, 2013, via email transmission. The Clerk of this Court shall immediately email the certification required by Paragraph 2 and 3 of this Order to the parties.

4. Promptly upon request of the representative of either party to this proceeding, the general registrar of each city and county shall provide such representative with access to the following documents from the materials from the November 5, 2013 general election, maintained by the general registrar in his office:

- all statements of results (original and corrected),

- computer print-out sheets and tapes,
- abstracts of votes (original and corrected),
- precinct manual tally sheets,
- a list showing which type(s) of voting equipment was used in which precincts.

5. Promptly upon request of the representative of either party, the clerk of each circuit court shall provide such representative with access to the following documents from the November 5, 2013 general election, from the materials maintained by the clerk in his office: .

- all statements of results (original and corrected),
- computer print-out sheets and tapes,
- abstracts of votes (original and corrected),
- precinct manual tally sheets,
- a list showing which type(s) of voting equipment was used in which precincts.

II. Date & Time of Recount

6. The recount of ballots and redetermination of the votes cast in the November 5 election shall take place in the offices of, or other facilities provided or arranged by, the clerks of the circuit courts of the counties and cities of the Commonwealth (except Fairfax County) beginning at 7:00 a.m. on December 17, 2013, and shall continue thereafter until completed. The recount and redetermination of the votes cast in Fairfax County shall begin at 7:00 a.m. on December 16, 2013, and shall continue thereafter until completed, but in no event later than 11:59 p.m., December 18, 2013. The recount shall be conducted according to procedures and instructions contained in this Procedural Order. Additionally, to the extent not inconsistent with the provisions of this Procedural Order, the recount shall be conducted in accordance with the

State Board of Elections' Virginia Election Recounts, Step-by-Step Instructions (copy attached as **Appendix A**) and its Ballot Examples for Handcounting Paper or Paper-based Ballots for Virginia Elections or Recounts (copy attached as **Appendix B**). The results shall be recorded on forms prepared and submitted to the Court by the State Board of Elections, which shall consult with counsel for the parties as part of such preparation and prior to such submission

III. Court Supervision of Recount

7. The overall recount and redetermination shall be supervised by the Court, which shall be assisted by the State Board of Elections, by local electoral boards and by the general registrars. In each county and city the recount shall be supervised by the Court through pairs of recount coordinators. The recount coordinators shall be the chairman and the secretary of each local electoral board; provided, however, that if they are both Republicans, Senator Obenshain shall designate one of them to serve with the Democratic electoral board member for that jurisdiction.

8. In the event that the Democratic member of the electoral board is unable to serve, Senator Herring shall be authorized to name a recount official to act as a recount coordinator. In the event both Republican members are unable to serve, Senator Obenshain shall be authorized to name a recount official to act as a recount coordinator. In the event that an electoral board member is unavailable due to a concurrent recount, the affected party shall be authorized to appoint a recount official to act as a recount coordinator. The electoral boards shall ensure that a voting equipment technician is available as may be necessary, and shall advise the parties of the identity of such technician (including name, address, phone number and business affiliation) by December 13, 2013. Not later than 5:00 p.m. on December 6, 2013, the general registrar of each city and county shall provide his or her telephone and e-mail contact information to the Court,

for delivery to counsel for each party and to the State Board of Elections, so that the general registrar may be reached when necessary before and during the days on which the recount is held.

IV. Location of Recount

9. The recount and redetermination of the vote shall begin at 7:00 a.m. on December 17, 2013, in all localities except Fairfax County in which the recount and redetermination of the vote shall begin at 7:00 a.m. on December 16, 2013. The recount officials, alternates and coordinators shall be summoned to appear in the offices of the circuit court clerks for their respective cities and counties, or at other facilities provided or arranged for by such clerks, to receive such instructions and take such oaths as the Court may prescribe. The recount of ballots and redetermination of votes cast in the November 5, 2013 election shall take place in the offices of, or other facilities provided or arranged by, the clerks of the circuit courts of the various counties and cities of the Commonwealth according to procedures and instructions set forth in this Procedural Order. The offices or other facilities provided or arranged by the clerks shall be of sufficient size for the purposes of the recount and redetermination and shall allow for direct and proximate observation of the recount officials by the recount observers.

V. Recount To Be Uninterrupted

10. The recount shall begin on the dates specified by this Preliminary Order, as soon as the recount coordinators and recount officials have taken their oaths and received their instructions and shall continue without interruption during each day (except one hour for lunch and one hour for dinner, if necessary) until completed.

11. For Fairfax County, the recount shall begin on December 16, 2013. On December 16, the recount shall begin as soon as the recount coordinators and recount officials have taken

their oaths and received their instructions and shall continue without interruption (except one hour for lunch and one hour for dinner, if necessary) until 8:00 p.m., at which time the recount shall adjourn until 7:00 a.m. the following day. The recount officials and recount coordinator shall not adjourn for the day with any precinct partially counted, but shall complete the count of each precinct in which recounting has begun before such adjournment. At the conclusion of any recount activities on December 16, 2013, all election and recount materials shall be delivered to the clerk of the circuit court, who shall secure them overnight (using the same security measures listed in this Procedural Order) and deliver said materials to the recount officials and recount coordinators on December 17, 2013. The recount shall resume on December 17, 2013, with the process described in this subsection to be repeated on that day and on each succeeding day until the recount is completed.

VI. Recount Officials, Alternate Recount Officials, and Recount Coordinators

12. The recount officials and alternate recount officials for each jurisdiction shall be chosen by the candidates from among the officers of election previously appointed in 2013 by the electoral board for that jurisdiction pursuant to Virginia Code § 24.2-115. The number of recount teams and the number of recount officials to be appointed for each jurisdiction shall be determined by subsequent order of this Court. Each of the parties may also name alternate recount officials from among the officers of election. Each recount team shall be comprised of one recount official selected by Senator Obenshain and one recount official selected by Senator Herring.

13. The recount coordinators and recount officials shall be officers of the Court acting under its jurisdiction, and shall be subject to such training as may be provided by the State Board of Elections and/or recount coordinators, using training materials provided by the State Board of

Elections. The parties shall be provided with 36-hours advance notice of all training sessions and shall be given the opportunity to attend. Additionally, the parties shall be provided copies of training materials 36 hours in advance of those materials being provided to recount coordinators and recount officials.

14. Neither party nor the representative of either party (including political parties and campaign committees) shall undertake any in-person, telephonic or electronic training of any recount coordinator, recount official and/or alternate recount official in their duties. No written communications from a party or his representative to any recount coordinator, recount official and/or alternate recount official shall be made *ex parte*, and any such written communication shall be simultaneously served on counsel for the opposing party and filed with the Clerk (except that communications addressing only time and place of the recount, time and place of training, availability to serve and similar administrative matters are not subject to this requirement). Nothing contained herein shall be construed to prevent any party or the representative of any party from encouraging recount coordinators, recount officials and alternate recount officials to participate in such training as may be provided by the State Board of Elections or by recount coordinators.

15. Nothing contained in this Order or in the procedures to be established for the recount shall be construed to prevent the parties or their representatives from communicating directly with recount coordinators and recount officials during the recount, but they are prohibited from interfering with the members of the recount team in any way.

16. Each candidate shall submit to the Court by no later than 5:00 p.m. on December 10, 2013, the names and addresses of the recount officials, alternate recount officials and, where applicable, recount coordinators whom he has chosen to serve. Such persons are hereby

appointed as recount coordinators, recount officials and alternate recount officials, subject to later disqualification by the Court for good cause shown in the event that the other candidate files an objection by no later than 5:00 p.m. on December 11, 2013.

17. The Clerk of this Court is hereby authorized and directed to issue the necessary summonses to compel the attendance of the recount coordinators, recount officials and alternate recount officials chosen by the parties to appear at 7:00 a.m. on December 16 or 17, 2013 (as specified in this Preliminary Order) at the office of the clerk of the circuit court of their respective localities, or at other facilities provided or arranged for by such clerks, to commence the recount of the vote. The summonses shall be on forms prescribed by the Court and shall be issued by the Clerk, who shall mail them directly to the recount coordinators, recount officials and alternate recount officials. The parties are directed to cooperate with the Clerk in completing the summonses, providing address labels and providing such other assistance as will expedite the mailing of such summonses.

VII. Recount Observers

18. Each party is authorized to appoint and is entitled to have present at the recount and redetermination one observer for each team of two recount officials. Persons shall qualify as observers by submitting to the recount coordinators a statement, signed by a representative of or counsel for a party, giving the person's name and authorizing him or her to represent the candidate as a duly-designated observer. A photocopy form authorization shall suffice. Not later than 5:00 p.m. on December 13, 2013, the candidates shall exchange with one another and lodge with the Clerk the form of their respective authorization statements that will constitute the credentials of the recount observers.

VIII. Transportation of Election Materials

19. The Virginia State Police hereby are directed to make preparations to collect the recount materials (including the tabulation forms, any envelopes containing challenged ballots, and all documentation prepared by or filled out by the recount coordinators or officials during the course of the recount and redetermination) from the circuit court clerks in each city and county of the Commonwealth at 5:00 p.m. on the final day of the recount and redetermination in that jurisdiction, or as soon thereafter as such materials may be available, to transport such materials to the appropriate State Police division headquarters, and then to transport the materials immediately to the Clerk of this Court, in the John Marshall Courts Building, regardless of the hour. The Clerk hereby is directed to make provision to receive the forms, envelopes containing challenged ballots, and other materials from the State Police, regardless of the hour, and to maintain these materials securely at all times.

IX. Inclement Weather

20. In the event of snow or other inclement weather, the sheriffs of the counties and cities of Virginia are hereby directed to provide transportation, as needed, to the recount coordinators, recount officials and alternate recount officials to and from their homes and, if necessary, to and from the site of the recount, and to and from the locations of voting machines.

X. Procedures for Recount and Redetermination

21. In each city and county that used optical scan tabulators to determine all or part of the vote cast on November 5, 2013, the general registrar and local election board shall make preparation to use such tabulators in the recount, with the number of tabulators for each such city and county being as follows: not less than one tabulator for every six precincts where optical

scan ballots were used in the election (rounding up all fractions to the next highest number), or a high speed tabulator or scanner.

22. Pursuant to Virginia Code § 24.2-802(D)(3), not later than December 16, 2013, the general registrar of every city and county (except for Fairfax County) is directed to cause the designated number of optical scan tabulators to be programmed to count only the ballots cast in the election for Attorney General and to set aside all ballots containing write-in votes, overvotes, and undervotes in said election. The deadline fixed by the preceding sentence shall be December 15, 2013, for Fairfax County. In the event that the designated number of tabulators cannot be programmed in accordance with the foregoing requirement, the general registrar shall provide immediate notice to the parties and the Court of that fact. The general registrar shall provide each party at least 36 hours prior notice of the location and time that programming will occur, and each party is entitled to have one observer present to observe the programming in addition to legal counsel for each party. Notice to any party, as required by this paragraph, shall be provided to the person and address listed for such party in this Procedural Order.

23. Not later than December 16, 2013, the general registrar and the recount coordinators shall ensure that the tabulator programmed for use in the recount is tested for accuracy. The deadline fixed by the preceding sentence shall be December 15, 2013, for Fairfax County. The general registrar shall provide each party at least 36 hours prior notice of the location and time that testing will occur and each party is entitled to have one observer present to observe the testing process in addition to legal counsel for each party. The observers and legal counsel shall have an unobstructed view of the testing and shall be permitted to see the displays on any counting device. The general registrar shall obtain, for each ballot style, 24 blank ballots not used in the election from the clerk (the "test ballots"). In the presence of the recount

coordinators and the party observers, the general registrar shall mark the “test ballots” as follows:

- (a) five (5) shall be marked for Mark R. Herring;
- (b) four (4) shall be marked for Mark D. Obenshain;
- (c) three (3) shall be marked for a write-in candidate named “John Doe”;
- (d) two (2) shall be marked for both Mark R. Herring and Mark D. Obenshain (overvote);
- (e) two (2) shall be marked for both Mark R. Herring and a write-in candidate named “John Doe” (overvote);
- (f) two (2) shall be marked for both Mark D. Obenshain and a write-in candidate named “John Doe” (overvote);
- (g) two (2) shall remain unmarked for any candidate in the Attorney General’s election (undervote);
- (h) two (2) shall be marked for the Republican Governor and Lieutenant Governor candidates and shall remain unmarked for all other candidates (undervote); and
- (i) two (2) shall be marked for the Democratic Governor and Lieutenant Governor candidates and shall remain unmarked for all other candidates (undervote).

24. Notice to any party, as required by this paragraph, shall be provided to counsel for the parties listed below.

25. In the presence of the recount coordinators and party observers, each of the “test ballots” shall be run through the tabulator programmed in accordance with this Procedural Order. After the “test ballots” have been run, the general registrar shall print the results from the test run.

26. If the tabulator does not accurately count and set aside “test ballots,” the recount coordinators and general registrar shall require the tabulator to be reprogrammed in compliance with this Procedural Order and shall re-run the “test ballots” as set forth above until the electoral board and general registrar are satisfied that the tabulator is properly programmed.

27. In the event that the recount coordinators and general registrar need additional blank ballots in addition to the “test ballots” provided by the clerk for the testing process, the clerk shall be authorized to provide the electoral board and general registrar the precise number of ballots required, but not more. These blank ballots shall be used solely for the testing function as described in this Procedural Order.

28. Once the electoral board and the general registrar determine that the tabulator has been correctly programmed to count only the votes in the Attorney General’s election and to set aside all ballots containing write-in votes, overvotes, and undervotes, the recount coordinators and the general registrar shall take the following actions in the presence of the party observers:

- (a) immediately reset the tabulator counter back to zero and lock the tabulator;
- (b) print the date and term “TEST BALLOT” across the face of each of the “test ballots” and sign the ballots; and
- (c) return the “test ballots” to the clerk.

29. The clerk shall place the “test ballots” into a separate envelope marked “RECOUNT TEST BALLOTS – DO NOT OPEN,” seal the envelope, and place it into a sealed box of election materials.

30. At 7:00 a.m. on December 17, 2013, the recount coordinators, recount officials and alternate recount officials shall appear in the offices of the clerk of the circuit courts for each of the counties and cities in which they serve (except for Fairfax County), or at such other facilities provided or arranged by the clerk. The recount coordinators, recount officials and alternate recount officials shall appear in Fairfax County at 7:00 a.m. on December 16, 2013. Once all recount officials and any needed alternates are identified, unneeded alternates may be dismissed, subject to recall by the recount coordinators if necessary. The clerks then shall administer the following oath to the recount coordinators and recount officials:

I do solemnly swear (or affirm) that I will perform the duties for this election recount according to law and the best of my ability, and that I will studiously endeavor to prevent fraud, deceit, and abuse in conducting this election recount, so help me God.

31. In the event that, on the day of the recount, the recount coordinators in any jurisdiction determine that some recount officials are not immediately needed, or that some recount officials should stand by, the recount coordinators shall abide by the preferences of each party as to which of that party’s previously designated recount officials shall be given priority in terms of conducting the recount and redetermining the vote. Any designation of such a preference shall be made by each party’s respective recount observers at the time of the recount.

32. The recount and redetermination of the vote shall consider only votes cast in the election. It shall neither (a) include ballots not cast in the election, including absentee or provisional ballots not counted by decision of a local election board, nor (b) exclude ballots cast in the election. The recount and redetermination shall not take into account (i) any absentee

ballots or provisional ballots sought to be cast but ruled invalid and not cast in the election, (ii) ballots cast only for administrative or test purposes and voided by the officers of election, or (iii) ballots spoiled by a voter and replaced with a new ballot. There shall be only one redetermination of the vote in each precinct, and the eligibility of any voter to have voted shall not be an issue in this proceeding.

33. For purposes of this Procedural Order the provisional votes cast in each city and county shall be counted and either reported separately, or as part of the voters' respective precinct totals, in the same manner as they were counted in the original canvass.

XI. Computation of Statewide Results

34. The Clerk shall be prepared to report to the Chief Judge at 7:00 a.m. on December 18, 2013, which localities' forms have not been received. Thereafter, the State Board of Elections, under the Court's supervision, shall immediately begin tabulating the results for each locality and for the Commonwealth as a whole. Representatives of each candidate shall be afforded an opportunity to examine the challenged ballots in the presence of an officer of the Court while the State Board of Elections is tabulating the results.

35. The tabulation shall be recorded on forms prepared by the State Board of Elections in consultation with counsel for the candidates and approved by the Court. The State Board of Elections shall engage an outside accounting firm to assist it in the tabulation of the vote. The results of the tabulation, together with the forms on which the votes have been recorded shall, upon completion, be delivered to the Court.

XII. Court to Convene

36. The Court shall convene on December 19, 2013 for the purpose of determining all matters pertaining to the recount and redetermination of the vote as raised by the parties. On December 19, 2013 the Court will hear arguments and rule on any challenged ballots and votes. By an appropriate order, the Court will conclude the recount and redetermination by certifying to the State Board of Elections the vote of each of the candidates and declare the person who received the higher number of votes to be elected.

XIII. Compensation and Mileage Expense

37. Recount officials shall be paid a per diem payment equal to two-thirds of the per diem payment which they received for service on election day, November 5, 2013. They should submit their request for per diem payment and mileage on forms supplied by the State Board of Elections. Alternate recount officials who do not serve shall submit their request for mileage on forms supplied by the State Board of Elections.

XIV. Resolution of Disputed Issues

38. Counsel for Senator Herring and Senator Obenshain shall make good faith efforts to exchange and file with the Court by 3:00 p.m., but in no event later than 4:30 p.m. on December 6, 2013, legal memoranda on the several issues about which the parties are in disagreement and, on the same day, cause copies of their memoranda to be delivered by facsimile or e-mail to the chambers of the three judges sitting on this recount Court. Counsel for the parties shall, in like manner, provide copies of their memoranda to the Secretary of the State Board of Elections and to counsel for the State Board of Elections.

39. The full three-judge Court shall convene at such date and time as the Court shall hereafter designate to dispose of any motions and to fix finally the rules of procedure for the recount.

XV. Other

40. It has been represented to the Court that petitions for recount of elections other than Attorney General have been filed in Fairfax County, Manassas Park City, and James City County. The clerk of the circuit court in each of these jurisdictions is directed to bring this Procedural Order to the attention of the recount court empanelled for purposes of these other recounts. In the event of a conflict between this Procedural Order and the order issued by any other recount court, the Court will notify the parties and, if necessary, issue further orders necessary to resolve such conflicts and insure the integrity of all recounts.

41. Wherever this Procedural Order requires delivery of any notice of document to any Party or his counsel, such notice or document shall be provided to the following counsel of record at the email addresses and fax numbers indicated below

(a) Counsel for Mark D. Obenshain:

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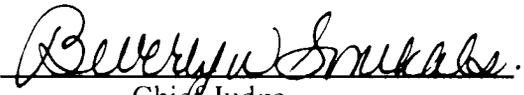
42. The Clerk is directed to send immediately a copy of this Procedural Order to the clerk of the circuit court of each county and city in Virginia and to Colonel W. Steven Flaherty, Superintendent, Virginia State Police. The clerks of the circuit courts of each county and city are directed to provide copies of this Order to their respective sheriffs and to direct their attention especially to Part IX. The Secretary of the State Board of Elections is directed to send a copy of this Procedural Order to the electoral board of each county and city in Virginia.

43. This matter is continued until December 9, 2013 at 9:00 a.m.

Endorsements are waived per Rule 1:13 and objections were noted on the record.

IT IS SO ORDERED.

Date: 12-5-13


Chief Judge