



# County of Bucks

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December 5, 2016

The Honorable Jeffrey L. Finley, President Judge  
Bucks County Justice Center  
100 N. Main Street  
Doylestown, PA 18901

**RE: PETITION TO RECOUNT  
2016 ELECTION**

Dear Judge Finley:

I will be handling the election recount matter for the Board of Elections tomorrow, along with Senior Assistant Solicitor Donna Snyder. I will have Deena Dean, Director of the Board of Elections, in attendance and available to testify if necessary. I enclose the original, time-stamped copy of the Brief I have filed on behalf of the Board. I believe this was only filed under the first docket number, given Your Honor's Order scheduling the hearing, which included an Order consolidating these matters. That consolidation Order however stated that the consolidation was for purposes of the hearing, without reference to other, possible future proceedings. I don't know if that might prove an issue but I draw it to your attention.

As noted in the brief, four cases are being challenged on procedural grounds. Those Motions to Quash are in the final stages of preparation and will be filed shortly. I intend to file them under their original docket numbers. The Petitions in question are identified in the attached brief, and the grounds for challenge are explained.

I respectfully draw your attention to the Certificate of Service, which notes that with Mr. Heckman's assistance, we have served all interested individuals by e-mail, to the extent we have an e-mail address. I see no sense in putting our staff to the time-consuming process of mailing 80 envelopes

The Honorable Jeffrey L. Finley, President Judge

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on the afternoon before the hearing, when they will never arrive before the hearing. I will have additional copies of the Brief available in the courtroom tomorrow morning.

I checked the first case on the consolidated docket before writing this, and no other attorney had entered an appearance by this time.

Thank you for your consideration and we will see you tomorrow.

Respectfully,

A handwritten signature in black ink, appearing to read 'Sean M. Corr', with a long horizontal flourish extending to the right.

Sean M. Corr, Esquire  
Assistant Solicitor

SMC/js

cc: Stephen G. Heckman, Esquire

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY  
CIVIL DIVISION

IN RE: PETITION TO RECOUNT AND/OR RECANVASS	:	NO. 2016-07319
FOR MULTIPLE VOTING DISTRICTS	:	NO. 2016-07321
	:	NO. 2016-07325
	:	NO. 2016-07326
	:	NO. 2016-07329
	:	NO. 2016-07336
	:	NO. 2016-07337
	:	NO. 2016-07338
	:	NO. 2016-07339
	:	NO. 2016-07340
	:	NO. 2016-07341
	:	NO. 2016-07342
	:	NO. 2016-07343
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	:	NO. 2016-07347
	:	NO. 2016-07348
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	:	NO. 2016-07358
	:	NO. 2016-07359
	:	NO. 2016-07360
	:	NO. 2016-07361
	:	NO. 2016-07362
	:	NO. 2016-07363

**MEMORANDUM OF LAW OF  
BUCKS COUNTY BOARD OF ELECTIONS**

**I. Facts**

Twenty-seven separate petitions have been filed which purport to seek a recanvass<sup>1</sup> for a number of voting districts in Bucks County. Three of the petitions are “duplicate” petitions, in

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<sup>1</sup> Machines are canvassed; ballots are counted. See 25 P.S. §§ 3261 and 3262; 25 P.S. § 3263(a). The Petitions only mention the machines and request a recanvass, in addition to the “forensic analysis” which appears to be the actual

that two petitions have been filed relative to three of the same voting districts. Therefore, although there are twenty-seven open docket numbers, the Court has before it requests which, collectively, purport to seek a recanvass of twenty-four voting districts. There are three hundred four voting districts in Bucks County.

By order dated December 1, 2016, President Judge Finley consolidated all twenty-seven petitions for purposes of a hearing he scheduled for December 6, 2016 at 9:00 AM in the Bucks County Justice Center, Room 420.

It is the duty of the Bucks County Board of Elections to study the Petitions in the context of applicable law, and make an objective, neutral determination as to whether the Petitions are procedurally sound and of sufficient merit to justify the considerable expense and added uncertainty attendant to the requested recanvass. A survey of applicable law therefore follows, in the context of the particular underlying factual allegations upon which the Petitions are founded. It is emphasized that in pursuing this effort, the Board did not have the benefit of any briefs, memoranda of law, or other authority provided by Petitioners, all of whom (at least as of this writing) are unrepresented, and none of whom filed anything in support of their petitions other than a copy of the affidavit of J. Alex Halderman, Ph.D. With certain exceptions as enumerated below, all petitions are identical; and regardless of any deviation among the petitions, all petitions rely solely upon the identical affidavit of Doctor Halderman, in support of the allegations of error in the original canvass.

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goal of the Petitions. There is no mention of the ballots or request for a recount. Thus, only the machines are at issue.

## **II. Discussion of Procedural and Organizational Issues**

### **A. Certain Petitions are Procedurally Deficient and Should Not Be Considered**

The Board of Elections has reviewed each petition individually, and determined that four are procedurally deficient and therefore noncompliant with governing law. As such, in the Board's view, they should not be considered. The individual petitions are Nos. 2016 – 07325; 2016 – 07337; 2016 – 07352; and 2016 – 07357. Separate motions to quash have been filed under each docket number. By way of general description, the first petition is supported by three affidavits, but while two of the affidavits allege an error with respect to Direct Recording Electronic (“DRE”) voting machines, the third affidavit alleges an error with respect to optical scanning voting machines. The petition therefore does not fulfill the statutory requirement of three affidavits supporting the allegation of “an error,” and therefore as a matter of law, it cannot serve as a basis for the relief requested. Additionally, the County of Bucks uses DRE voting machines, not optical scanning machines. The petition is therefore factually inapplicable to the 2016 election.

The second and third petitions have affidavits which all complain of errors with optical scanning machines, while as noted, the County of Bucks uses DRE voting machines. These petitions are therefore also factually inapplicable to the 2016 General election at issue. The final petition is only supported by two affidavits, and therefore it is legally insufficient as a matter of law, under section 3154, which is the section of the Election Code under which the Petition was filed.

### **B. Petition Number 2016-07340 Also References the U.S. Senate Race**

Petition number 2016– 07340 is the only petition in which it appears that the basic form (which was apparently made available to the general public on a website, and was downloaded and used as a template/form, verbatim, by all but this one petitioner) was modified, to include different typeface and a request for additional relief. The additional relief sought is in the form of a request for a recount/re canvass of the U.S. Senate race in the voting district at issue, Northampton Township No. 3. Because the factual basis for the request is identical to the basis for the request in all the petitions – the affidavit of Doctor Halderman – the Board of Elections suggests that this request for additional relief does not change the analysis. But it was deemed appropriate to bring the request for additional relief to the attention of the Court.

**C. There Are Three Duplicate Requests for Three Voting Districts**

There are two petitions with respect to each of the three following voting districts:

- Lower Makefield Twp. South No. 4, Petition Nos. 07356 (Petitioner Marjan Ghaharamani) and 07357 (Petitioner Melissa Beth Hough)
- Newtown Twp. No. 6, Petition Nos. 07343 (Petitioner Stuart Chen-Hayes) and 07363 (Petitioner George J. Skladany)
- Springfield Middle, Petition Nos. 07321 (Petitioner Matthew J. Grochowiak) and 07347 (Petitioner Judith Space)

**D. The Following Organizational Chart Assists in Tracking the BOE’s Analysis**

<u>Docket No.</u>	<u>Name</u>	<u>District<sup>2</sup></u>	<u>Challenged Procedurally?</u>
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<sup>2</sup> Districts are taken from the Petitions and have not been independently verified for accuracy.

07319	Kukowski	Milford	No
07321	Grocowiak	Springfield Middle	No <sup>3</sup>
07325	Rosenthal	Buckingham Upper 1	Yes
07326	Papiernik	Perkasie 2	No
07329	Yarmark	Plumstead 1	No
07336	Rhoads	Doylestown Twp. 5	No
07337	Hough	Lower Makefield 4 South	Yes <sup>4</sup>
07338	Rosenberger	Hilltown	No
07339	Arnold	Middletown Upper 2	No
07340	Winnick	Northampton 3	No
07341	Pfancok	Middletown Upper 9	No
07342	Ercole	New Britain Twp. East	No
07343	Chen-Hayes	Newtown 6	No <sup>5</sup>
07344	Lindsay	Northampton 4	No
07345	Eustis	Warrington 7	No
07346	Toppin	Falls 1-5	No

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<sup>3</sup> Duplicate District with No. 07347.

<sup>4</sup> Duplicate District with No. 07356. No. 07337 is being challenged; No. 07356 is not.

<sup>5</sup> Duplicate District with No. 07363.

07347	Space	Springfield Middle	No
07348	Thomas	Sellersville 1	No
07352	Sears	Nockamixon (Revere)	Yes
07356	Ghahramani	Lower Makefield South 4	No
07357	Quilty	Upper Makefield 3	Yes
07358	Crawford-Coscia	Morrisville 3	No
07359	Thorpe	Middletown Lower 13	No
07360	Cickay	Newtown 3	No
07361	Hall	Tinicum-Tohickon 254	No
07362	Kalb	Lower Makefield 6 South	No
07363	Skladany	Newtown 6	No

**E. The Rules of Procedure and Evidence Should Apply to the Hearing**

While obviously the nature of the proceedings is unusual and the Court is not only within its discretion, but should accommodate the circumstances in an effort to reach a determination on the merits, the Board respectfully reminds the Court that the Board's duties extend to the entire electorate of Bucks County. This obviously includes the hundreds of thousands who voted in the general election, but are not seeking a recanvass or "forensic examination" of the voting machines, despite the fact that according to the official count, the majority of Bucks County voters preferred the candidate who lost the statewide election. These voters have no voice in the current proceedings, other than the Board. The Board necessarily therefore takes the position



that the interests of these voters, as well as the interests of the Petitioning voters, can only be objectively and neutrally considered in one proceeding if the Court employs a focused and determined approach which ensures that one law is applied equally to all voters, whether they are among the 80 who have signed Petitions, or among the over 300,000 who have accepted the results as reported.

This first includes the law of procedure, which due to the flexibility designed into it, should permit the Court to craft an approach which permits all who come forward with competent evidence to present their case.

But it also includes the law of evidence, which has less flexibility. The law of evidence is the true gatekeeper which guards against theories based on intrinsically unreliable devices of false persuasion, such as speculation and hearsay. The law of evidence admits only theories which are supported by personal knowledge, reliable documentation, and hard science. That the Legislature expected the law of evidence to be applied in proceedings under Section 3154 of the Election Code cannot be questioned. The statute requires that a Petition under Section 3154 assert that “[A]n error, although not apparent on the face of the record, *has been committed*. . .” 25 P.S. § 3154 (emphasis supplied). The statute does not contemplate or even tolerate theories based upon conjecture that an error “might have been committed.” The Court has scheduled a hearing, not an argument, and a hearing contemplates the receipt of evidence. Petitioners have a burden of proof to carry and the Board urges that the only fair and impartial way the Court can permit the Petitioners to proceed in their attempt to carry that burden is to call Petitioners to the witness stand and have them testify as to matters within their personal knowledge, as related to the events of the election of 2016. If their factual testimony requires supplementation with expert testimony in order to be made admissible, the expert must testify. A general affidavit,

apparently pulled down from the internet, which states that improper things may have occurred, is an inadmissible hearsay document at best. In this case the absolute dearth of admissible opinion within the affidavit renders the entire exercise, at this point, something which appears better suited for a proper exercise of protected first amendment protest speech than a Court proceeding premised upon sworn testimony that something did, in fact, occur.

The Board will therefore appear, through counsel, in anticipation of a normal hearing proceeding. Petitioners have had more time than the Board to prepare for the hearing, and they are in sole possession of the facts which, they contend, prove that “an error. . .has been committed.” It is only fair and just to require Petitioners to comply with the law as they seek relief under it.

### **III. Discussion of Governing Law**

#### **A. The Underlying Affidavit is Incompetent to Support the Petitions**

As already noted, the standard which governs the factual content of the requisite petition under section 3154 requires the petition to allege “that an error. . . *has been committed.* . .” 25 P.S. § 3154 (e) (emphasis supplied). Petitioners clearly recognize this requirement, as each of them has supplied an affidavit to accompany their petition.

The requirement that a petition which seeks to not only question a result, but trigger a repetition of the process which brought about the result, be supported by more than mere speculation, theory, or dissatisfaction with the result, is hardly new to Pennsylvania law. Therefore, while section 3154 does not have any appellate cases which interpret it specifically in terms of the requisite contents of a petition filed under it, its predecessor statute does. In *In re*

A. 425 (Pa. 1934), the court considered the following statutory language:

Whenever it appears \* \* \*, upon petition of three voters of any district, verified by affidavit, that an error, although not apparent on the face of the returns, has been committed therein, the court of common pleas, board of county commissioners, or other return board, shall, at any time prior to the completion of the computation of all of the returns for the county, summon the election officers of the district, and said officers \* \* \* shall make visible the registering counters of such machine, and \* \* \* shall recanvass the vote cast thereon. \* \* \* If, upon such recanvass, it shall appear that the original canvass of the returns by the election officers was incorrect, the said returns and all papers being prepared by the said court or board shall be corrected accordingly.

*Id.* at 426; *quoting* 25 Pa. C.S. 1836 (“The Voting Machine Act”) (repealed as part of the comprehensive 1937 overhaul of the Election Code).

Strikingly similar is the current statute governing the Petitions before the court. It reads:

Whenever it shall appear that there is a discrepancy in the returns of any election district, or, upon petition of three voters of any district, verified by affidavit, that an error, although not apparent on the face of the returns, has been committed therein, or of its own motion or under subsection (g), the county board shall at any time prior to the completion of the computation of all of the returns for the county, summon the election officers of the district, and said officers, in the presence of said board, shall conduct a recount or recanvass of all ballots cast.

25 P.S. § 3154(e). Importantly, both Sections require a Petition be verified by three voters of the election district in question, *and* that the Petition assert that “an error, . . . not apparent on the face of the record,” be the justification for the filing of the Petition. Given the virtual identity of the standards contained in the prior and current statute, case law interpreting the prior statute

remains valid for guiding the Court in determining the requisite contents of Petitions filed under the current statute.

The *Thirty-third Division* Court went on to phrase the question before it as follows:

We are asked to decide whether a petition filed pursuant to this section of the act *is sufficient if it avers that petitioners believe an error has been committed, without specifying the nature or character of the error alleged.* The court below held that a petition in this form was inadequate and refused a recanvass. Petitioners appealed.

*Id.* at 426. The Supreme Court answered the question as follows:

We can find no reason for believing the Legislature intended to provide . . . that a recanvass of the vote in any district should be had *without the averment in the petition of the particular error in the returns warranting a recanvass.* On the contrary, *such a policy would nullify any advantage to be had from the use of voting machines so far as concerns obtaining a speedy and reliable count of the votes and returns thereof.* As pointed out by the court below, *such an interpretation of the act would encourage 'fishing expeditions' and would needlessly prolong the final determination of the result in all elections.*

*Id.* (emphasis supplied). *Accord, In re Contest of Golmar, Sheriff*, 175 A. 510 (Pa. 1934) (“A complaint of an undue [and illegal] election or a false return *must be stated with clearness and precision*, and the petitioners held to the exercise of due diligence to ascertain and specify the facts which, if sustained by proof, would require the court to set aside the result of the election. . . . *[T]he Court 'will not grope in the dark, or follow a contestant on a fishing expedition.'*”) (emphasis supplied).

These legal principles of course are unsurprising. They are entirely consistent with modern rules of evidence, which uniformly hold that neither the court sitting alone as the fact-finder, nor a jury, are permitted to return decisions or verdicts based upon speculation. This is black letter law to which no citation is necessary.

In light of this long-standing, uncontradicted Pennsylvania law, the Board is constrained to urge the Court to dismiss the petitions for lack of an adequate factual foundation. It can be fairly said that the affidavit of Doctor Halderman is speculative in all respects but one: Doctor Halderman assures the reader that if, hypothetically, the voting machines were hacked, an examination of the machines would yield no evidence of that fact, because the hackers would be so clever that their misdeeds would be undiscoverable. Affidavit, para. 8. In effect, Doctor Halderman urges the court to order a fishing expedition in a lake which, he assures the court, contains no fish. The Board of Election's duties to the hundreds of thousands of voters who have accepted the election results as reported, and expect greater efficiency in government, preclude participation in such a venture.

The final irony which cannot be overlooked is the fact that the affidavit of Doctor Halderman refrains from the hypothetical on only one point: he knows how to hack the machines. The Board is prepared to present a testimony of witnesses familiar with the security measures which surround the machines. These include storage in locked buildings, in locked rooms, protected by armed security, covered by surveillance cameras, with no connections to the Internet, no WiFi capabilities, no intra-connection capabilities, and various other uses of seals, disabling devices, and separation of components, all designed to make sure that the machines are only used on election day, in a secure manner, which ensures accuracy. Under these circumstances, it would appear that the most effective way to gain access to the machines for purposes of hacking would be to obtain a court order, such as the one sought with respect to a "forensic analysis," which would finally permit the hacker to get his hands and tools on the machine. While the Board makes no allegations in this regard, this scenario is at least as plausible as the multiple, boot-strapped chain of hypothetical events posited by Doctor

Halderman, all of which would have to occur before the machines could be compromised. And there is not a scintilla of evidence that even one of the necessary hypothetical events occurred, much less the series outlined by Doctor Halderman. The affidavit is simply inadequate as a matter of law to support the grant of the relief requested.

**B. The Request for a “Forensic Examination” is Barred by Res Judicata**

The final basis for the Board’s position is the fact that the issues raised in the affidavit of Doctor Halderman, and thus the issues raised in all the petitions, are repeat issues which have been exhaustively and thoroughly litigated in Pennsylvania. At this point, there is definitive Supreme Court case law which holds that the machines in question comply with all federal and state requirements relative to accuracy, and thus all questions concerning their accuracy and reliability have not only been answered, but they have been adjudicated. Arguments relative to the machines have been decided, and further arguments are foreclosed.

The case in question is *Banfield v. Cortes*, 110 A. 3d 155 (Pa. 2015). *Banfield* is an exhaustive Supreme Court opinion, which has its roots in a 2006 suit filed before the Commonwealth Court in its original jurisdiction. Although only five Justices participated in the decision, the five unanimously joined in the opinion. The opinion is 20 pages long, and a blow-by-blow comparison of its rulings and holdings to the Halderman affidavit is beyond the scope of this brief. Suffice it to say however that every issue raised in the Halderman affidavit was thoroughly addressed by the Supreme Court, including (at pages 260 - 263) issues of security and vulnerability to tampering. The court held that requiring machines to be tamper-proof holds them to “an impossible standard of invulnerability.” *Banfield* at 260. In so doing, the court specifically rejected the alternatives proposed in the Halderman affidavit, noting that:

[T]raditional paper ballots and optical scanning voting. . . are also vulnerable to tampering as paper ballots can be easily destroyed or altered by an individual intending to manipulate the election result. Moreover, paper ballots may fail to accurately record voter intent as a result of mechanical or human error that leads to the invalidation of votes, in cases where ballots have not been completed in a correct and comprehensible manner, contain an overvote or undervote based on the number of permitted selections in an election, or contain markings that cannot be read by an optical scanner. *As all voting systems are imperfect and not immune from tampering, the Election Code cannot be read to impose a requirement that cannot be achieved.*

*Id.* (Emphasis supplied). Clearly, the Supreme Court is familiar with the term “stuffing the ballot box,” and recognizes it as something with which nostalgia should not be associated.

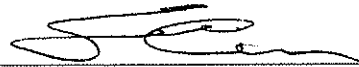
It is finally worthwhile to note that in footnote 4 of the opinion, the Supreme Court identified the Danaher machines used by Bucks County as one of the DRE machines certified for use by the Secretary of State, and thus one of the machines under specific discussion in the *Banfield* opinion. To repeat, the issues raised in the affidavit of Doctor Halderman have been adjudicated, finally, all the way down to the make and model number of the machine. These issues are not subject to relitigation in this or any other case, unless and until the Supreme Court or the Secretary of State changes their view of the situation.

#### **IV. Conclusion**

For the reasons set forth above, the Bucks County Board of Elections requests this Honorable Court dismiss the Petitions for Recanvass. As stated at the outset, the Board is duty-bound to treat all voters in Bucks County with objectivity and neutrality. Using those principles to govern analysis of applicable Pennsylvania law, and fairly applying that law to the facts underlying the petitions, the Board cannot in good conscience agree that the considerable

resources which would be consumed by the recanvassing effort, and the uncertainty that effort would add to the outcome of the 2016 general election, are consistent with the policies contained in the Pennsylvania Election Code, and the many Supreme Court decisions interpreting that code.

RESPECTFULLY SUBMITTED,



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Sean M. Corr, Esquire  
Assistant Solicitor, County of Bucks  
Attorney for the Bucks County  
Board of Elections



IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY  
CIVIL DIVISION

IN RE: PETITION TO RECOUNT AND/OR RECANVASS	:	NO. 2016-07319
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	:	NO. 2016-07362
	:	NO. 2016-07363

**CERTIFICATE OF SERVICE**

I, Sean M. Corr, Esquire, Assistant Solicitor, certify that I served a true and correct copy of the above-captioned Memorandum of Law on behalf of the Bucks County Board of Election, on the 5<sup>th</sup> day of December, 2016 upon all interested parties by electronic mail, to the extent said parties provided email contact information. This service has been made through the office of the Bucks County Court Administration.

Additional copies of this document will be available in the court room tomorrow in the event that any party did not receive this document through electronic mail.

First class mail was not utilized because it would be a physical impossibility for the mail to arrive before the hearing.

  
Sean M. Corr, Esquire