

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

CASE NUMBER: 2014-M-00967

**IN RE: CHRIS McDANIEL****PETITIONER****PETITIONER'S MOTION FOR  
RECONSIDERATION, HEARING AND CLARIFICATION**

Petitioner, Chris McDaniel, respectfully moves the Court for reconsideration by the entire Court, for a hearing, and for clarification of the Court's July 17, 2014 Order. In support of this motion, Petitioner would show the Court the following:

I. The election records at issue are not poll books.

Exhibit "A" attached hereto is a copy of an election record from a Hinds County precinct, created as part of the 2014 primary elections. The handwritten notations on the document were made by poll workers on June 3, 2014 and June 24, 2014, as indicated. While this document may have begun its paper existence as a list of registered voters, once it was notated on June 3, 2014 and June 24, 2014, it became part of the written record of both the procedure and the results of the primary elections held on those days.

The handwritten notations "VOTED" on Exhibit A were made to indicate that a registered elector came to the poll, signed the signature book and cast a ballot on the respective election day, assuming proper procedure. The handwritten strike-through notations on Exhibit A raise questions. The meaning of the strike-through notations as well as their origin and time of entry may or may not be significant, as discussed below.

Printed across the top of Exhibit A is the title “Democratic Poll Book.” On the morning of June 3, 2014 the document served that purpose for the precinct. It was not a list of all the registered voters in the county, but rather a working paper list of the registered voters in that precinct. By the end of the polling day on June 3 however, this document had become the precinct manager’s **tally list**. The document became a record list of how many electors voted in that precinct on June 3, 2014.

Three weeks later, on June 24, 2014, this same document became the poll book for the Republican party primary runoff election in that precinct. On that day, the document was used in the same way it had been used on June 3, except on June 24 the handwritten “VOTED” notation was placed in the column titled “06/24/2014.” By the end of the polling day on June 24, this document had become the precinct manager’s **tally list** for the June 24 Republican party primary runoff election, all while the document continued to be the tally list of the June 3, 2014 Democratic primary voters.

These election records (a/k/a **tally lists**) serve as a means for double-checking the number of voters tallied by voting machines against the count of voters obtained by physically counting the signatures of electors who signed the signature pages at the precinct. The three provide a 3-way cross check to test the accuracy of each tally method against the other two.

The Responses of the Attorney General and Circuit Clerk Parker in this proceeding obscured the character of these elections records by characterizing them as “poll books” as if they only and solely voter registration lists. This characterization by the Respondents is misleading in several ways. First, the “poll book” given to poll workers in a particular precinct is not the official record of all persons qualified to vote in a particular county. Rather, the papers captioned “poll book” that are given to poll workers are working papers. While that

paper begins with and includes a list of registered voters, only in that precinct, the paper also includes columns and spaces specifically designed to produce a **tally list** of the electors who voted on that specific election date.

Mississippi's Election Code makes clear that "Candidates or their duly authorized representatives shall have the right to reasonably view and inspect . . . the tally sheets, papers, and other documents used in said election." Mississippi Code § 23-15-581. Emphasis added. Mississippi Code § 23-15-591 is explicit that, "There shall also be inclosed in said [ballot] box the **tally list**, the receipt booklet containing the signed names of voters who voted; . . . ." Emphasis added. While the Election Code does not specify any particular form for the tally list, the Code makes clear that it is the responsibility of election officials to make such a tally. As § 23-15-591 further explains, "and the number of ballots voted must correspond with the number of names signed in said receipt booklet." Emphasis added. The Election Code is clear in its requirement that a **tally list** must be kept of the electors who voted, though the Election Code does not specify what, if any, other information is to be included on a **tally list**. Under Mississippi Code § 23-15-911, candidates have a right to view, inspect, and examine these election records as part of the process for contesting an election result.

A candidate tasked with inspecting election records to determine whether illegal votes were cast - illegal due to voting in both the June 3, 2014 Democratic primary and in the June 24, 2014 Republican primary runoff - needs to view the **tally lists** (like Exhibit "A") in conjunction with the signature pages from the precinct. A comparison of the signature pages from the appropriate date with the **tally list** will show whether a strike-through notation is supported (or not supported) by the signature pages. If, for a specific voter, the signature pages indicates he voted on June 3, 2014, but the strike-through notation indicates he did not, then the

strike-through notation is called into question. That strike-through notation becomes very significant when a county executive committee relies on that notation to accept a vote. The number of votes accepted and reported by a county executive committee then depends upon the accuracy of the strike-through notations. A seemingly few erroneous (or fraudulent) strike-through notations, when multiplied by 82 counties, will completely corrupt a statewide election and disenfranchise legal voters of the State of Mississippi. Corruption of the process is then easily accomplished unless there is a method of accountability that tests the accuracy of these strike-through notations. Mississippi Code § 23-15-911 provides such a method of accountability, which when read in conjunction with Mississippi Code § 23-15-575, authorizes candidates to perform such examination of election records so as to test the verity of strike-through notations.

## II. Constitutional Implications.

Petitioner's right to examine election documentation to identify illegal crossover votes is a crucial element in Mississippi's system of enforcing Mississippi Code § 23-15-575. This section serves in part to protect Petitioner's rights of association (or dis-association) under the First Amendment of the United States Constitution. See, *Clingman v. Beaver*, 544 U.S. 581 (2005); *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538 (5<sup>th</sup> Cir. 2008). This Court's decision on Petitioner's right to examine these records under the Election Code therefore deserves a review by the entire court

III. Originals or copies.

The Court's July 17, 2014 Order in this matter did not address whether a candidate is entitled to view originals or was restricted to copies. As can be seen from the discussion above, whenever one of the handwritten strike-through notations is called into question, the nature of the original handwriting becomes very important. One aspect is the color and the nature of the ink used in the original "VOTED" notation compared to the color and nature of the ink used for the strike-through notation. Photocopying of the documents destroys the ability to examine the nature of the original handwriting. If a clerk is allowed to refuse a candidate access to the originals, the candidate will be unfairly prejudiced in his ability to present evidence why a particular vote should or should not be counted. As can be seen from Exhibit A, there is ample means to cover dates of birth on these original records in such a way that still gives candidates the ability to view the original records. The parties to this proceeding need a clarification from the Court in this regard.

Also, the Court's July 17, 2014 Order did not address the cost of copies or other charges associated with the Petitioner's examination. Attached hereto as Exhibit "B" is an example of one county's statement of intent to charge Petition for examination, even of originals. Mississippi Code § 23-15-165(6)(b) does not permit charges for examination of originals. It permits charges for "copies" and only at a charge that does not exceed actual cost of producing those copies. This Court's holding in *Roberts v. Mississippi Republican Party State Executive Committee*, 465 So.2d 1050 (Miss. 1985) teaches that similar language from the Public Records Act means "the actual cost of providing copies of the records." *Id.* at 1054. The Court may have assumed familiarity on the part of government attorneys with the *Roberts v. Mississippi Republican Party State Executive Committee* decision, but the County Attorney from Rankin

County certainly appears to have another calculation in mind. It provides a real and present example of how circuit clerks and their advisers can severely inhibit a candidate's ability to perform his salutatory function under the Election Code. For these reasons, a clarification of the Court's order is needed.

IV. Unintended consequences.

The Court's July 17, 2014 order creates a perturbation in the balance struck by the Election Code. Not only does the Order deny candidates access to unredacted versions of original election records, the Order leaves uncertain what other statutory participants in the election process the circuit clerk may prevent from seeing unredacted versions of these election records. Under the Court's order, a circuit clerk could prevent county executive committee members from seeing these records. Those committee members have several duties authorized by the Election Code, specifically including the duty to canvas election documents and report the results. See Mississippi Code § 23-15-911. Their ability to perform their statutory duties would be severely inhibited, if not effectively prevented, by such action of a circuit clerk. By this means, a circuit clerk could effectively force a county executive committee to contract with a county's election commissioners to perform the duties of the executive committee. This example points out an additional reason why this Court should reconsider its July 17, 2014 Order and conduct an en banc review and order or Rule 33 conference or a Rule 34 oral argument to more fully develop the facts and issues of this case.

V. Voter registration records

Mississippi Code § 23-15-165 is part of Subarticle G, “Statewide Centralized Voter System.” The purposes of this subarticle are, among others, to establish a centralized statewide qualified voter file and to increase the integrity of the voting process. Mississippi Code § 23-15-163. By its language, § 23-15-165(6) applies specifically to “voter registration files.” It does not purport to apply to any other election record. Such other election records would include working papers described above that include any voter information. Also by its specific language, § 23-15-165(6) applies to disclosures “under the Mississippi Public Records Act of 1983.” The section does not apply to disclosures under any other statute.

In the spirit of protecting Mississippi voters from the public disclosure of private information, this Court may interpret § 23-15-165 broadly so as to apply it to any election record that contains private voter information. Yet, by its language, § 23-15-165 applies only to “voter registration files.” Further, in the context of its enactment, its application may be limited to voter registration files that are part of the Statewide Elections Management System implemented by the Secretary of State. Creation of the “files” referred to in subsection (6)(a) is described in subsection (3). Subsection (6) then refers back to the “voter registration files” created in subsection (3), and provides that certain information is exempt from disclosure under the Mississippi Public Records Act.

It is inconsistent for this Court to adopt a loose interpretation of § 23-15-165(6), and then in the next paragraph apply a very strict interpretation of Mississippi Code § 23-15-911. Section § 23-15-911 provides that a candidate is authorized to examine the contents of ballot boxes after an election. Documents required to be in a ballot box after an election are named in various sections of the Election Code, as addressed in Petitioner’s Supplement. Unfortunately

the Election Code does not provide specific definitions for documents so named. Yet, it is clear from the Election Code that the legislature intended for ballot boxes to contain those records that fulfill the purpose of the named documents and that provide written record of the validity of election processes and results.

The election documentation at issue here (of which Exhibit A is an example) is a **tally list**. It is not a “Poll Book” though it does in part serve the purpose of a poll book. At the end of an election day, and for purposes of memorializing election results, these documents are a **tally list** for counting those electors who voted in the election. From this list, election officials can verify and document their compliance with the requirement of § 23-15-591 that the number of ballots voted must correspond with the number of names signed in said receipt booklet. For casual purposes, the documents like Exhibit A may be referred to as a poll book. Conversely, at the end of the election day, there is little room for dispute that these documents have become the tally list as contemplated by the statute for ballot box materials. These amalgamated documents serve both purposes at different times. However, this Court should not permit government officials to avoid their statutory obligations (and in this case frustrate the efforts of others attempting to fulfill their independent statutory obligations) by clever labeling or naming of election documents. This Court should further interpret the Election Code consistent with the clear intent of the State legislature to empower candidates to review tally lists in order to aid in assuring the integrity of elections.

VI. State-wide importance and long term significance.

As widely reported, Petitioner is in the process of examining (or attempting to gain access to) election records in all of Mississippi’s 82 counties. Approximately 60 of the State’s

circuit clerks gave Petitioner access to all election records necessary to complete his examination as authorized by Mississippi Code § 23-15-911, all without objection or restriction. Out of respect for voter privacy and as a statutory officer in this process, Petitioner protected the private voter information found in these election records. As can be seen from Exhibit A, when photocopies were requested, private voter information was redacted to prevent inadvertent disclosure.

By contrast, approximately 20 county circuit clerks interposed some type of objection to Petitioner's examination. Those objections have ranged from a claim that the 12 day period had expired to the refusal to permit access to the original election records like Exhibit A, with the most common being the latter. In many of the latter cases, access was offered contingent upon payment of excessive charges.

With only 12 days allowed by statute to perform this examination, the delays created by the clerks were detrimental. Petitioner promptly filed petitions for mandamus in nearly all of the 20 counties. When the issues of Petitioner's petition were presented to three circuit court judges (other than Judge Clarke), those court's found Petitioner's position consistent with Mississippi law and issued an order of mandamus commanding the county's circuit clerk to permit Petitioner access to the requested records. See attached Exhibit "C." Judge Clark was the first to rule differently.

This Court's ruling impacts Petitioner's ability to review documents in many counties other than Harrison. It will also affect every election in Mississippi from this point forward, unless the legislature make changes to the statute. Arguably, the Court's ruling on this Petition changes Mississippi Election Law that has been in effect for over 70 years.

Given the significance of the Court's ruling on the issues presented, and its impact on the State, this Court's decision should not be made without fuller consideration of the types of records at issue (like Exhibit A). Upon reconsideration, Petitioner requests that the Court further order that Petitioner be allowed 12 days to complete his examination in those counties where examination has been affected by the clerk's refusal to permit simultaneous access to tally lists and voter signature pages.

VII. Conclusion

For all the reasons set forth herein, Petitioner requests the full Court's reconsideration of the July 17, 2014 panel order in light of the questions raised herein. Petitioner further respectfully requests a Rule 33 conference and/or Rule 34 oral argument to aid the Court in its consideration of this important election integrity issue.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2014.

CHRIS McDANIEL

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CERTIFICATE OF SERVICE

I, Mitchell H. Tyner, Sr., attorney for the petitioner Chris McDaniel, certify that I have this day served a true and correct copy of the above and foregoing PETITIONER'S MOTION FOR RECONSIDERATION, HEARING AND CLARIFICATION upon the following persons:

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