

IN THE MATTER OF THE GENERAL ELECTION OF NOVEMBER 2, 2010

DAN NEIL	§	HOUSE OF REPRESENTATIVES
CONTESTANT	§	
v.	§	OF THE
	§	
DONNA HOWARD	§	
CONTESTEE	§	STATE OF TEXAS

CONTESTEE'S TRIAL BRIEF

Contestee submits this brief regarding issues related to the trial of the above-captioned matter.

A. *Contestant is Required to Show that Illegal Votes Materially Affected the Outcome of this Election by Clearly and Convincingly Demonstrating that the Illegal Voters Cast Ballots in Election Being Contested*

“Both legislative and judicial precedents indicate that, to overturn an election, the Contestant has the heavy burden of proving by clear and convincing evidence that voting irregularities materially affected the election results.” *Heflin v. Vo*, Report and Findings of Master of Discovery to Select Committee on Election Contests at 9 (Feb. 7, 2005) [hereinafter *Heflin Report*]; accord *Jones v. Morales*, 318 S.W.3d 419, 423 (Tex. App.—Amarillo 2010, pet. denied); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 98 (Tex. App.—Dallas 2010, pet. denied); *Flores v. Cuellar*, 269 S.W.3d 657, 660 (Tex. App.—San Antonio 2008, no pet.); *Olsen v. Cooper*, 24 S.W.3d 608, 610 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In *Johnston v. Peters*, 260 S.W. 911 (Tex. Civ. App.—San Antonio 1924, writ dism’d w.o.j.), the opinion from which this standard originated, the court went on to state that “hold[ing] the election void and order[ing] another . . . should never be done, except in cases where it is shown that

the people have been deprived of the privilege of expressing their will at the polls. The interest of the public is paramount to the interest of individuals, and public policy imposes upon the courts the duty of protecting the public from rather than of thrusting upon it the expense, distractions, and strife of special elections." *Id.* at 916.

In demonstrating that voting irregularities have materially affected the outcome of an election, Contestant "must show that the margin of victory in this race was offset by clear and convincing evidence of excluded legal votes or illegal votes cast in the race that are tied to a particular candidate." *Heflin Report* at 12; *Reese v. Duncan*, 80 S.W.3d 650, 656 (Tex. App.—Dallas 2002, pet denied); *Slusher v. Streater*, 896 S.W.2d 239, 241 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Simmons v. Jones*, 838, S.W.2d 298, 300 (Tex. App.—El Paso 1992, no writ); *Chumney v. Craig*, 805 S.W.2d 864, 870 (Tex. App.—Waco 1991, writ denied); *Medrano v. Gleinser*, 769 S.W.2d 687, 688 (Tex. App.—Corpus Christi 1989, no writ); *Miller v. Hill*, 698 S.W.2d 372, 375 (Tex. App.—Houston [14th Dist.] 1985, writ *dism'd w.o.j.*, 714 S.W.2d 313 (Tex. 1986).

"In a multi-race election the contestant must first show that (1) illegal votes were counted or (2) an election official prevented eligible voters from voting, failed to count legal votes, or engaged in other fraud, illegal conduct or mistake. The contestant must next show the illegal votes were cast in the race being contested." *Reese*, 80 S.W.3d at 656. "Finally, the contestant must show either a 'different result would have been reached by counting or not counting certain specified votes or irregularities were such as to render it impossible to determine the will of the

majority of the voters participating.” *Id.* (quoting *Goodman v. Wise*, 620 S.W.2d 857, 859 (Tex. Civ. App.—Corpus Christi 1981, writ ref’d n.r.e.)). “Only by following the three-step process outlined in *Reese*—determining an illegal vote, tying it to the race, and showing its impact on the race—may a tribunal allow an illegal vote to affect the outcome of an election.” *Heflin Report*, at 15; accord *Miller*, 698 S.W.2d at 375 (holding “that the trial judge abused his discretion in determining that the number of alleged illegal votes affected the outcome of the election for the office of sheriff,” when the contestant “concede[d] that he did not prove any of the illegal voters voted in the election for the office of sheriff”).

Finally, “[a]llowance or rejection of votes by election officials is presumed to be correct.” *Heflin Report*, at 8. Accordingly, “the contestant has a heavy burden of overcoming the presumption that the officials discharged their duty properly in receiving or rejecting a ballot.” *Chumney*, 805 S.W.2d at 865; accord *Jordan v. Westbrook*, 443 S.W.2d 616, 617 (Tex. Civ. App.—San Antonio 1969, no writ). “[T]o overcome the presumption of correctness of an election judge’s ruling, the contestant must show by clear and satisfactory evidence” that the election official erred in accepting or rejecting a ballot. *Tiller v. Martinez*, 974 S.W. 2d 769, 774 (Tex. App.—San Antonio 1998, pet. dismiss’d w.o.j.).

B. *Being on the Suspense List is Not Clear and Convincing Evidence that Someone is an Illegal Voter*

Contestant has alleged that there are 36 voters who were on the suspense list who failed to execute a statement of residence before voting in person. The Master

has already determined that the mere failure to sign a statement of residence as required by the Texas Election Code does not invalidate an otherwise legal vote. However, Contestant apparently contends that these persons were not otherwise qualified to vote in Travis County. In order to sustain this contention as to any particular voter, Contestant must prove by clear and convincing evidence that the voter had moved out of Travis County prior to the date they voted in the general election.

A person on the suspense list “may vote in the election precinct in which the list is used if the voter satisfies the residence requirements prescribed by Section 63.0011 and submits a statement of residence in accordance with that section.” *Id.* § 15.112. “Before being accepted for voting, the voter must execute and submit to an election officer a statement . . . that the voter satisfies the applicable residence requirements,” and that contains “all of the information that a person must include in an application to register to vote [and] the date the statement is submitted to the election officer.” *Id.* § 63.011(c). While these particular statutory provisions allow election officials to prevent someone from voting who does not comply with them, they are not qualifications to vote.

Article VI, § 1 of the Texas Constitution describes those persons who are not allowed to vote,¹ while § 2 provides that every person subject to none of those

¹ This provision states that the “following classes of persons shall not be allowed to vote in this State . . . (1) persons under 18 years of age; (2) persons who have been determined mentally incompetent by a court, subject to such exceptions as the Legislature may make; and (3) persons convicted of any felony, subject to such exceptions as the Legislature may make.” TEX. CONST. art. VI, § 1(a). It further

disqualifications and “who is a citizen of the United States and who is a resident of this state shall be deemed a qualified voter; provided, however, that before offering to vote at an election a voter shall have registered.” TEX. CONST. art. VI, §§ 1, 2. The voting qualifications prescribed by article VI are contained in section 11.002 of the Election Code,² and none of them require a voter on the suspense list to submit a statement of residence as a qualification for voting.

The Supreme Court has held that “[w]henver the Constitution has prescribed the qualifications of electors, they cannot be changed or added to by the Legislature or otherwise than by an amendment to the Constitution.” *Cameron v. Connally*, 117 Tex. 159, 164, 299 S.W. 221, 223 (1927) (quoting *Koy v. Schneider*, 110 Tex. 369, 378, 218 S. W. 479, 480 (1920)); accord *King v. Carlton Indep. Sch. Dist.*, 156 Tex. 365, 370, 295 S.W.2d 408, 412 (1956) (“The Legislature was not authorized to prescribe any other standard for voters at the adoption election than that of qualified electors as defined by Article VI, Section 2.”). Accordingly, when the Legislature has imposed requirements such as those found in sections 15.112 and 63.0011 of the Code, the Supreme Court has held them to be related to the manner of holding the election and not qualifications for voting. See *Ramsay v. Wilhelm*, 52 S.W.2d 757, 759-

command the legislature to “enact laws to exclude from the right of suffrage persons who have been convicted of bribery, perjury, forgery, or other high crimes.” *Id.* art. VI, § 1(b).

² “In this code, ‘qualified voter’ means a person who: (1) is 18 years of age or older; (2) is a United States citizen; (3) has not been determined by a final judgment of a court exercising probate jurisdiction to be . . . totally mentally incapacitated; or . . . partially mentally incapacitated without the right to vote; (4) has not been finally convicted of a felony or, if so convicted, has [had his voting rights restored]; (5) is a resident of this state; and (6) is a registered voter.

60 (Tex. Civ. App.—Austin 1932, writ ref'd) (holding that statutory provision preventing persons from voting unless they presented their poll tax receipt or an affidavit explaining its loss was “for the guidance of the election judges in testing the qualifications of a voter [and] relates to the manner and form of holding an election, and does not purport to define qualifications of voters”). Accordingly, to show that a voter on the suspense list was not qualified to vote, Contestant must demonstrate by clear and convincing evidence that the voter was not qualified under some other provision of the Election Code.

Under the Election Code, if someone has moved from their registered address, they are still legal voters in their former voting precinct for the general election so long as they have not moved out of the county. TEX. ELEC. CODE § 11.004 (“A registered voter who changes residence to another election precinct in the same county, if otherwise eligible, may vote a full ballot in the election precinct of former residence until the voter's registration becomes effective in the new precinct if the voter satisfies the residence requirements prescribed by Section 63.0011 and submits a statement of residence in accordance with that section.”); *Heflin Report*, at 17 (“Voters who have moved out of the district but stayed within the county are legal voters.”); Tex. Sec’y State, *Qualifying Voters on Election Day: Handbook for Election Judges and Clerks, 2010-2011*, at 14 (2010) (noting that if a registered voter “has moved within the county or is on the S-list and is no longer a resident of the precinct . . . she may vote a full ballot in [the] precinct” of her former residence “if [the] voter’s present residence is in the territory of the political subdivision holding the election,”

which means for “the November election for state and county officers, the voter must still reside in the county”) [hereinafter *Handbook for Election Judges and Clerk*]. Conversely, “[v]oting by a person domiciled outside the county of the district is illegal, even if the person formerly was domiciled in the district.” *Heflin Report*, at 17; *accord Handbook for Election Judges and Clerks*, at 14.

It is the Contestant’s burden, however, to clearly show that a voter actually resided outside of Travis County prior to the date they voted and being on the suspense list does not satisfy this burden. “The fact that . . . persons . . . were on the suspense list in the precinct in which they were registered in . . . is some evidence that these persons no longer reside at their registered address . . . because the primary reason for being placed on the suspense list is having a renewal certificate returned as undeliverable by the postal service.” *Heflin Report*, at 49. However, it is certainly not clear and convincing evidence that they no longer reside at that address, in that “the voter might not have changed residence at all, and the placement on the suspense list [was] solely because of a postal service error or the registrar's clerical error.” Robert A. Junell, Curtis L. Seidlits, Jr. & Glen G. Shuffler, *Consideration of Illegal Votes in Legislative Election Contests*, 28 TEX. TECH L. REV. 1095, 1106 (1997); *accord* TEX. ELEC. CODE § 14.222 (providing that if “the registrar determines that a voter's renewal certificate was returned undelivered solely because of postal service error, address reclassification, or the registrar's clerical error, the registrar shall delete the voter's name from the suspense list, make any

other appropriate corrections in the registration records, and deliver the certificate to the voter”).

Moreover, being put on the suspense list is no evidence that the person has moved out of the county, as opposed to having moved to another address within the county. Unless there is a clerical error, being on the suspense list is merely because of “having a renewal certificate returned as undeliverable by the postal service” *Heflin Report*, at 49, which tells one nothing of what the person’s new address may be, if any. Thus, to satisfy his burden Contestant must come forward with some other evidence that clearly and convincingly demonstrates that the voter resided outside Travis County on the day she voted. Without testimony of the voter themselves, “only voter registration in [another] County that was effective for the November . . . general election provides clear and convincing evidence that a person resided outside [Travis] County on the date of the election.” *Heflin Report*, at 49-50. Other documentary evidence, “such as residential property owned in [another] County” is insufficient to meet Contestants burden in this regard. *Id.* at 49.

C. *Ms. Skrudland’s Mail Ballot Should Not Be Counted*

One of the ballots Contestant claims should be counted is an early mail ballot sent in by Marion Skrudland that was rejected by the Early Voting Ballot Board. While Ms. Skrudland signed the carrier envelope containing her ballot, she did not sign her application for ballot by mail and the witness box is likewise completely blank. Among other requirements, a mail “ballot may be accepted only if . . . neither the voter's signature on the ballot application nor the signature on the carrier

envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness.” TEX. ELEC. CODE § 87.041(b)(2). Except when a witness is utilized, the “law thus requires those who vote early by mail to sign both the application and the carrier envelope.” *Jones*, 318 S.W.3d at 423; *Alvarez v. Espinoza*, 844 S.W.2d 238, 245 (Tex. App.—San Antonio 1992, writ dism’d w.o.j.) (same). Moreover, the “Early Voting Ballot Board must act on the basis of the signatures before it. The board is not expected to contact voters whose signatures do not match, and the code does not require it to do so.” *Alvarez*, 844 S.W.2d at 245.

Because Ms. Skrudland did not utilize a witness, she was required to sign both her application and her carrier envelope so that the Board could compare her signatures. Unlike statutes that regulate voting at the polls, the “Legislature has made the manner of casting absentee ballots mandatory, and the courts have held that if the statutory requirements were not complied with, the votes are void and should not be counted.” *Garza v. Salinas*, 434 S.W.2d 153, 155 (Tex. Civ. App. – San Antonio 1968, no writ); *accord Tiller*, 974 S.W. 2d at 775 (“Votes are void and should not be counted if the evidence shows that procedural statutory requirements were not following in the casting of absentee ballots, even if the ballots were rejected for signature discrepancy.”). This rule regarding mail ballots follows from the “‘general rule . . . that the performance of duties placed upon election officials is directory unless made mandatory by statute, while those placed upon the voters are mandatory.’” *Reese*, 80 S.W.3d at 657 (quoting *Fuentes v. Howard*, 423 S.W.2d 420, 423 (Tex. Civ. App.—El Paso 1967, writ dism'd); *accord Prado v. Johnson*, 625 S.W.2d 368,

369 (Tex. Civ. App.—San Antonio 1981, writ dism'd) (same). That is because the voter, as opposed to the election official, is in control of what she mails in to election officials.

In the *Garza* case, a similar situation occurred in which the voter failed to sign the carrier envelope. The appellate court held that in failing to sign one of the required documents, the voter “thereby [made] it impossible for the election officials to compare the signature on the application with that on the carrier envelope as required by” the election laws. *Garza*, 434 S.W.2d at 155. Accordingly, the “election officials properly rejected [the ballot] and the trial court erred in counting” it. *Id.* Likewise, the election officials in this case properly rejected Ms. Skrudland’s ballot.

D. Mr. Cole’s Mail Ballot Should Not Be Counted

Another ballot Contestant contends should be counted is the mail ballot of Terry Cole. However, because Mr. Cole voted from within Travis County and the signatures on the application for ballot by mail and the carrier envelope do not match, this ballot was correctly rejected by the election officials.

In 2009 Congress amended federal law to require, among other things, that states “transmit[] . . . electronically blank absentee ballots to . . . overseas voters with respect to general . . . elections for Federal office.” 42 U.S.C. § 1973ff-1(a)(7) (added by the Military and Overseas Voter Empowerment (“MOVE”) Act, Pub. L. No. 111-84, § 578(a)(1)(C), 123 Stat. 2190, 2321 (2009)). In response to the MOVE Act, the Texas Secretary of State promulgated the rule found at 1 TEX. ADMIN. CODE § 81.39, which deals with emailing balloting materials to overseas voters. Mr. Cole sent a

Federal Post Card Application ("FPCA") in which he requested that his balloting materials be sent to him by email. When he mailed his ballot back to the Travis County Clerk, he did so from within Travis County.

Under the Secretary of State's rule, to be entitled to vote from overseas using an email ballot, an "applicant . . . must provide a current mailing address that is located outside of the United States, and the applicant must be voting from outside of the United States." 1 TEX. ADMIN. CODE § 81.39(b)(3). As previously demonstrated, election laws that relate to what voters must do with respect to voting absentee by mail are mandatory and failure to follow those requirements result in a void ballot. In this case, Mr. Cole voted from within Travis County, and therefore his ballot should not have been counted under the Secretary of State's regulation, which has the force and effect of a statute. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex.1999) ("[A]dministrative rules . . . have the same force as statutes . . .").

But regardless of where Mr. Cole voted from, the signature on his FPCA does not match the signature on the carrier envelope. Chapter 101 of the Election Code allows individuals residing abroad temporarily and who register using the FPCA to vote in federal and state elections under the Code's general early voting by mail provisions. TEX. ELEC. CODE § 101.001(1), (2)(C). ("A person is eligible for early voting by mail as provided by this chapter if" she is "qualified to vote in this state or, if not registered to vote in this state, would be qualified if registered; and . . . domiciled in this state but temporarily living outside the territorial limits of the

United States and the District of Columbia.”); *id.* § 101.002 (“Voting under this chapter shall be conducted and the results shall be processed as provided by [§§ 81.001-87.125] for early voting by mail, except as otherwise provided by this chapter.”). As laid out above, a mail “ballot may be accepted only if . . . neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness.” *Id.* § 87.041(b)(2); *accord* 1 TEX. ADMIN. CODE § 81.39(g)(5) (“The board must compare the applicant's signature as it appears on the carrier envelope . . . with the applicant's signature as it appears on the FPCA. If the board determines that the signatures could have been written by the same person, the ballot shall be accepted.”). In this case, it is clear that signatures could not have been written by the same person, and thus there is no clear and convincing evidence that Board erred in rejecting Mr. Cole’s mail ballot.

E. Contestant Must Prove Any Claims of Double Voting by Clear and Convincing Evidence

Contestant claims that two persons may have voted twice. The law presumes that an individual “did not vote, or attempt to vote” twice. *Heller v. State*, 108 Tex. Crim. 344, 345, 1 S.W.2d 291, 292 (1927). Additionally, any evidence to the contrary must be by clear and convincing evidence. Contestant has alleged that in Precinct 231 there was a malfunction with a voting machine and that the precinct’s signature roster contains one less signature than votes cast. However, it is not uncommon for persons to vote without signing the signature roster. *See Heflin Report*, at 42 (finding

as legal the votes of “nine persons whom Contestant argues are illegal voters due to their failure to sign the signature roster”). Accordingly, Contestant must come forward with more evidence than this to show by clear and convincing evidence that someone voted twice.

Contestant also contends that in Precinct 374 an individual voted both an electronic and a provisional ballot. Although this person’s name does appear on the signature roster twice, there is no discrepancy between the number of signatures and the votes cast in this precinct. Additionally, there is evidence that the election judge in this precinct had provisional voters sign in a separate place, and this would further demonstrate that there was no double vote.

F. The Challenged Provisional Ballot Was Correctly Accepted by Election Officials

Contestant challenges the provisional ballot cast in Precinct 374 on the ground that the voter did not provide sufficient information in her affidavit to confirm that she was an eligible voter. This voter’s provisional affidavit stated that she was registered to vote in Precinct 374. Although the affidavit also stated that the voter appeared at the polls without either her voter registration certificate or another form of identification, the affidavit contains the voter’s Texas driver’s license number. Contestant claims that this voter did not cast a legal provisional ballot. However, it is clear that she complied with the statutory requirements for casting a provisional ballot.

When a voter appears at the poll without their voter registration certificate, but they are on the list of registered voters, they are permitted to vote a regular

ballot if they provide a form of identification as set out in § 63.0101 or that is acceptable to the Secretary of State. The Secretary of State has provided by rule that:

Acceptable forms of identification include:

(A) a driver's license or personal identification card issued to the person by the Department of Public Safety or a similar document issued to the person by an agency of another state, regardless of whether the license or card has expired;

(B) a form of identification containing the person's photograph that establishes the person's identity;

(C) a birth certificate or other document confirming birth that is admissible in a court of law and establishes the person's identity;

(D) United States citizenship papers issued to the person;

(E) a United States passport issued to the person;

(F) official mail addressed to the person by name from a governmental entity; [and]

(G) a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the Voter

1 TEX. ADMIN. CODE § 81.172(c)(2); *accord id.* §§ 81.173(c)(2); 81.174(c)(2).

In *Heflin v. Vo*, the Master considered the legality of a voter who had no voter registration certificate, but supplied his driver's license and social security numbers. The Master concluded that "[s]ince the listing of forms of identification is not clearly and specifically exclusive, and driver's license and social security numbers are commonly used in commercial transactions to confirm a person's identity, the master finds that the voter was properly identified and that he cast a legal ballot." *Heflin Report*, at 46. "The rule does not clearly prohibit this kind of identification, and the master believes that no material harm is done to the democratic process by allowing the ballot board decision and the vote to stand." *Id.* Under these

circumstances, Contestant cannot show by clear and convincing evidence that the Board erroneously accepted this provisional vote.

G. *Declarations in Statements of Residence Standing Alone are Clear and Convincing, But Not Conclusive, Evidence of Residence*

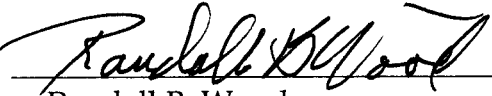
In questioning voters who signed statements of residence ("SOR") indicating that their residence address was outside Travis County, the Master has indicated his uncertainty that the parties can elicit evidence that would contradict the declarations of residency in these documents. However, prior legislative precedents demonstrate that while SORs, standing alone, may constitute clear and convincing evidence of a person's residence they are not conclusive and other evidence may show that the person resides somewhere other than what was indicated in their SOR at the time they voted.

In *Heflin v. Vo*, the parties identified 158 persons who voted in Harris County, but who had filled out SORs indicating that they were residing at the time in another county. *Heflin Report*, at 31. The parties deposed 113 of these voters, 97 of which the parties agreed were illegal voters. *Id.* at 32. Of the 16 voters the parties did not agree on, the Master, looking at the evidence from the depositions, determined that 11 of these voters were illegal, while the remaining 5 were legal voters. *Id.* at 32-33. Of those voters the Master found legal it was determined that, despite having filled out an SOR indicating that they were residing in another county, these voters were in fact still residents of Harris County on the day they voted and were either away temporarily or had actually moved within the County.

Id. at 33. Accordingly, it is clear that SORs are not conclusive and a voter who indicates they had moved to another county may still be shown by other facts to have been a legal resident of Travis County on the day they voted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Contestee's Trial Brief has been delivered via facsimile to the following:

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on this the 31st day of January, 2011.


Randall B. Wood