

2014-M-967

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NUMBER: 2014-M-967

FILED

IN RE: CHRIS McDANIEL

PETITIONER

JUL 14 2014

Trial Court Case

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Chris McDaniel

v.

Gayle Parker, Circuit Clerk

In the Circuit Court of Harrison County,
Cause Number 24 CI 1:14-CV-186

EMERGENCY PETITION FOR WRIT OF MANDAMUS

COMES NOW, Petitioner, Chris McDaniel, pursuant to Rule 21 of the Mississippi Rules of Appellate Procedure, and files this Emergency Petition for Writ of Mandamus. In so doing, Petitioner respectfully requests that this Court issue its writ:

1. Vacating the July 11, 2014 order of the Honorable Roger T. Clark, judge of the Circuit Court of Harrison County, and
2. Commanding Gayle Parker, Circuit Clerk of Harrison County, to perform the duties of her office in obedience to the requirements of Section 23-15-911 of Mississippi Election Code.

In support of this Petition, Petitioner would show the Court the following:

MOTION 2014-2826

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

Trial Court:

Honorable Roger T. Clark, Judge of the Circuit Court of Harrison County

Parties:

Chris McDaniel, Petitioner

Gayle Parker, Circuit Clerk of Harrison County and defendant below

Counsel:

Mitchell H. Tyner, Sr., Attorney for Petitioner

Steve C. Thornton, Attorney for Petitioner

Michael D. Watson, Jr., Attorney for Petitioner

Tim C. Holleman, Attorney for Defendant

TABLE OF AUTHORITIES

Mississippi Cases

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<i>Moore v. Parker</i> , 962 So.2d 558 (Miss. 2007)	11
<i>Noxubee County Democratic Executive Committee v. Russell</i> , 443 So.2d 1191 (Miss. 1983)	17
<i>Roberts v. Mississippi Republican Party State Executive Committee</i> , 465 So.2d 1050 (Miss. 1985)	11
<i>Sartin v. Barlow</i> , 196 Miss. 159, 16 So.2d 372 (1944)	8, 9, 11, 15, 18
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Mississippi Statutes and Rules

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STATEMENT OF THE ISSUES

- I. A candidate's right to a full examination of original election materials is an essential part of Mississippi's statutory system of assuring election integrity.
- II. The Public Records Act has no application to a candidate's access to original documents authorized by Mississippi Election Code.
- III. Petitioner's notice pursuant to § 23-15-911 is not a public records request.
- IV. Petitioner's petition for mandamus was properly before the Circuit Court.
- V. Petitioner has no adequate remedy in the ordinary course of the law.

STATEMENT OF FACTS

Petitioner is a duly qualified candidate for election to the position of Republican nominee for United States Senator.

Gayle Parker (hereinafter "Parker") is the Circuit Clerk of Harrison County.

On Tuesday, June 24, 2014, the Republican Party of Mississippi held a primary runoff election for United States Senator. Petitioner was one of two candidates whose name was on the ballot.

The Mississippi Election Code requires that ballot boxes and related materials evidencing the results of primary elections be delivered by the county executive committee to the circuit clerk of the county, who is then required to keep them safe and secure. Miss. Code Ann. §§ 23-15-267, 23-15-595, 23-15-911. The Mississippi Election Code further provides that a candidate for office or his duly authorized representative "shall have the right of full examination" of election ballot boxes and their contents, upon three days' notice of his application therefor. This right of full examination may be exercised at any time within twelve days after the canvass and examination of the boxes by, in the case of state-wide party primary elections, the party's executive committee. Miss. Code Ann. § 23-15-911.

On Thursday, July 3, 2014, Petitioner gave Parker a three-day notice of his intent pursuant to Mississippi Code § 23-15-911 to exercise his right of full examination of election records in Harrison County on Monday, July 7, 2014.

When Petitioner's duly authorized representative arrived on Monday, July 7, 2014, Parker and her deputy clerks refused to give Petitioner access to all the election materials from the June 24, 2014 primary runoff election. Though permitting limited access to selected election documentation, Parker refused to permit access to original poll books and voting records used

for the purpose of assuring persons who voted in the June 3, 2014 Democratic primary were not allowed to cast an unlawful vote in the June 24, 2014 Republican primary runoff election. By Parker blocking access to these election records, Petitioner was denied his right to a full examination required by 23-15-911 and was accordingly unable to fulfill the purpose of his examination.

PROCEDURAL BACKGROUND

Petitioner filed a Petition For Mandamus with the Circuit Court of Harrison County on July 9, 2014. Parker filed her response the next day, July 10, 2014. An expedited hearing was held before Harrison County Circuit Court Judge Roger T. Clark on July 11, 2014. Judge Clark ruled that Parker could restrict Petitioner's access to election documentation, and more specifically Parker could restrict Petitioner's examination to copies (not originals), with said copies having certain information redacted. Judge Clark further ruled that Parker could require Petitioner to pay the costs of redaction and copying as a prerequisite to examination. A certified copy of Judge Clark's July 9, 2014 order is attached hereto as Exhibit "A."

LAW AND ARGUMENT

- I. A candidate's right to a full examination of original election materials is an essential part of Mississippi's statutory system of assuring election integrity.

Mississippi election law places upon candidates a significant role in the administration of the State's elections. That role includes as one of its principle functions the monitoring of the process as administered by election officials, and that monitoring specifically includes examination of election documentation. This monitoring by candidates serves to hold election officials accountable as well as to keep the process transparent and in compliance with State law.

Several sections of the Mississippi Election Code codify the candidate's role. For example, Mississippi Code § 23-15-577 provides that candidates have the right to be present in the polling place and to carefully inspect the manner of the election. Mississippi Code § 23-15-581 provides that candidates have the right to view and inspect the ballots as and when they are taken from the ballot box and counted, and to view and inspect the tally sheets, papers and other documents used in an election.

Mississippi Code § 23-15-911 provides, as part of the process for contesting elections:

(1) When the returns for a box and the contents of the ballot box and the conduct of the election thereat have been canvassed and reviewed by the county election commission in the case of general elections or the county executive committee in the case of primary elections, all the contents of the box required to be placed and sealed in the ballot box by the managers shall be replaced therein by the election commission or executive committee, as the case may be, and the box shall be forthwith resealed and delivered to the circuit clerk, who shall safely keep and secure the same against any tampering therewith. At any time within twelve (12) days after the canvass and examination of the box and its contents by the election commission or executive committee, as the case may be, any candidate or his representative authorized in writing by him shall have the right of full examination of said box and its contents upon three (3) days' notice

Emphasis added. The importance of the candidate's right of full examination was explained in some detail by this Court in *Sartin v. Barlow*, 196 Miss. 159, 16 So.2d 372 (1944), where the Court announced:

In erecting this [right of a candidate to review election materials] thought was taken of one of the most familiar lessons in human experience, namely, that when in any governmental procedure or other business, there is a device or set-up by which any wrong or fraud or thievery is reasonably certain to be detected, this of itself will furnish the most efficient assurance that no such wrongs or fraud or thievery will be likely to occur. In these precinct boxes all the papers, documents, ballots, etc., which will show forth how the election was conducted and the integrity of the votes and the

count thereof is required to be enclosed and immediately turned over to the circuit clerk, who shall seal the same. Any careful examination of the contents of these sealed boxes, especially when the examination is made with the intensity of inquiry which a candidate would naturally devote thereto, will reveal frauds and irregularities if any were committed. Election managers, knowing that the right exists to examine the boxes and their contents, and this on the part of candidates, will thus have before their eyes the most potent persuasion that perhaps could be devised against the perpetration of wrong, and it has so proved by experience in nearly every county in the state,

This right of examination is, therefore, not one given solely in the personal interest of a candidate, although he may have an incidental interest therein. It is a right by which in its main objective the candidate is made a mere instrumentality in the better assurance of an honest, impartial and lawful election which will truly ascertain the will of the qualified electorate in the choice of those who will act and speak for the people in the transaction of the public business, and hence the right is one affecting the public interest in the highest and fullest sense of that term.

16 So.2d at 375. In this clear language, the Court explained why the candidate's right to a full examination of election materials is more than just an interest of the candidate. It is a key component of Mississippi's statutory election scheme. That right is one of the important tools adopted by the legislature to help assure honest elections; and this Court has repeatedly upheld the candidates' right to that full examination. See *Waters v. Gnemi*, 907 So.2d 307 (Miss. 2005); *Lopez v. Holleman*, 219 Miss. 822, 69 So.2d 903 (1954).

A candidate prohibited from examining original election materials cannot fulfill this important function. If a circuit clerk is allowed to tamper with and manipulate original election documentation before making that documentation available to a candidate, then the candidate's ability to fulfill his function would be completely eviscerated. Examination of original election records plays a pivotal role in assessing and assuring the integrity of an election result, and it also play a critical role in a candidate's ability to prove the elements of an election contest.

These points can be further emphasized by comparing the candidate's role to the roles of other participants in the statutory election scheme. For example, the poll workers and precinct managers play important parts in the election process. Most often, they are not elected officials or government employees. Yet, they are given responsibility for handling, viewing, examining, and managing original election documentation. See, for example, §§ 23-15-251, 23-15-441, and 23-15-581. In this role, they are acting not as the general public, but as statutorily authorized participants in the process. Similarly, county executive committee members, while often neither elected official nor government employee, are given statutory authority to handle and view original election materials. See, for example, §§ 23-15-267, 23-15-595.

Neither of these groups could fulfill their statutory roles if they were denied access to the original election material or restricted to copies that had been tampered with or manipulated by a circuit clerk. All these participants in the election process view original election documentation, including documents containing personal information of electors. That personal information is necessary to verify identities, make correct record entries, and to prevent fraudulent voting. For the same reasons, Petitioner must have access to original election documentation in order to distinguish valid from invalid and/or fraudulent votes. Allowing a circuit clerk to manipulate these documents before permitting candidate access would significantly undermine the security and accountability built into the election process by the Election Code.

II. The Public Records Act has no application to a candidate's access to original documents authorized by Mississippi Election Code.

In the court below, Parker argued that Petitioner's examination is regulated by the Mississippi Public Records Act. Mississippi Code § 25-61-1 et seq. This argument obfuscates where clarity has heretofore prevailed. The Public Records Act applies to access to public

records by members of the general public. The Public Records Act does not apply and was never intended to apply to statutorily authorized access to records by statutorily authorized participants in the administration of Mississippi elections.

The right of candidates to examine election results, as codified in the Election Code pre-dates the Public Records Act by fifty years, approximately. The Public Records Act was not enacted until 1983. Whereas, the candidate's right to full examination, now found in § 23-15-911, has been part of Mississippi election laws since about 1935, and addressed by *Sartin v. Barlow, supra*, in 1944.

Nothing in the Public Records Act purports to amend or change the Election Code. Nor is there any implication that the Public Records Act was ever intended to have any effect upon the well-established rights and procedures in the Election Code. Likewise, there is no conflict between the Election Code and the Public Records Act. Nor is there an implication of conflict. If there were such an implication, it would have to be compelling, as repeal or amendment by implication is disfavored by this and other courts. See *Roberts v. Mississippi Republican Party State Executive Committee*, 465 So.2d 1050 (Miss. 1985)(citing *Ex parte McInnis*, 98 Miss. 773, 54 So. 260 (1910)). The two statutes should be read in harmony with each other, to give each the effect specified by the legislature. *Roberts v. Mississippi Republican Party State Executive Committee, supra*.

Since adoption of the Public Records Act in 1983, poll workers, executive committee members, and candidates have been examining original election materials without resort to public records requests under the Public Records Act. Similarly, this Court has decided election dispute cases (where candidates examined election materials pursuant to § 23-15-911) without the Public Records Act being an issue. See *Moore v. Parker*, 962 So.2d 558 (Miss. 2007);

Waters v. Gnemi, 907 So.2d 307 (Miss. 2005). Only when a circuit clerk wants to prevent or stall a candidate's access to records does the Public Records Act become an issue.

In the § 23-15-911 context, a circuit clerk is not producing records or providing copies to the general public. Rather, she is giving access to original election materials to a person authorized by a specific statute to examine those original materials. Poll workers are not restricted, county executive committee members are not restricted, and neither is a candidate's examination of election document restricted by the Public Records Act. When fulfilling their respective statutory roles in the election process, poll workers, executive committee members, and candidates are not acting as simply and solely as members of the general public. Rather, each is fulfilling a statutory function. All the statutorily authorized participants in the election process are acting under the authority of the Election Code. In their respective roles, they are not obtaining access to and examining documents pursuant to the Public Records Act. The Public Records Act does not apply.

Two comparisons further emphasize this point. First, candidates are authorized under another Election Code section to view and inspect the ballots as and when they are taken from the ballot box and counted, and tally sheets, papers and other documents used in an election. Mississippi Code § 23-15-581. Such papers include personal information (such as date of birth) of voters. It is important that such information be present and displayed at appropriate places in election documents (such as poll books), because such information is necessary to enable poll workers, precinct managers, and other participants in the process to verify elector identify, differentiate between family members having the same name and address on the poll books, and otherwise prevent vote fraud. Under Parker's logic, the Public Records Act would prevent candidates from seeing these records until a circuit clerk had made and manipulated copies. If

this were true, however, the Public Records Act would completely repeal that part of § 23-15-581 authorizing the candidate to view and inspect these records “as and when they are taken from the ballot box and counted.”

The second comparison is similar to the first, but applied to the poll workers and precinct managers. These participants are authorized by the Election Code to view, handle and manage election documents containing personal information on voters. See above. These participants could not perform their statutorily authorized and directed roles, if they were prevented from seeing these documents until after a circuit clerk had redacted information selected by the circuit clerk.

In response to Parker’s arguments, Judge Clark ruled that Petitioner was not allowed to examine the election records until after the Circuit Clerk had redacted such records and until after Petitioner had paid the costs of the Clerk’s work on such records in accordance with Mississippi Code § 23-15-165(6) (a) and (b). Not only is Judge Clark’s ruling contrary to Mississippi law, as argued herein, Judge Clark’s ruling is inconsistent with the ruling of the Circuit Court of Jones County issued only days before. A copy of the July 8, 2014 order of the Jones County Circuit Court is attached hereto as Exhibit “B.” The conflict between these two Circuit Court rulings needs to be resolved by decision of this Court.

III. Petitioner’s notice pursuant to § 23-15-911 is not a public records request.

In the court below, Parker argued that Petitioner was required to pay for copies of election records pursuant to provisions of the Public Records Act. Parker estimated that Petitioner would have to pay one thousand dollars (\$1,000.00) before receiving the election records that she deemed would not be released without her redactions.

Parker’s argument is completely misdirected. The misdirection is seen first in the fact

that Petitioner did not request to examine copies, since Petitioner's right under Mississippi Code § 23-15-911 is to examine original records. Second, the Public Records Act does not apply to Petitioner's exercise under Mississippi Code § 23-15-911, as discussed above.

Third, Parker's argument on this point demonstrates another reason why the Mississippi legislature would not apply such a provision to Mississippi's election process. In a state-wide election, such as the one Petitioner is presently involved in, if a candidate were required to pay \$1,000.00 in every county to examine elections records, that candidate would face an immediate hurdle of \$82,000 - just to examine records, which is necessary to discover fraudulent or irregular activities or verify accuracy. As this Court observed in *Lopez v. Holleman*, 219 Miss. 822, 69 So.2d 903 (1954), "In many instances a contestant could not ascertain whether he should contest an election unless he has a precedent opportunity to examine the ballot boxes in question." *Id.* at 835, 907. No other statutory participant in Mississippi's election process is required to pay in order to perform his statutorily authorized functions. The ability of candidates to play their part in assuring the integrity of the election process would then depend on their ability to pay large sums of money. Such illogic and inconsistency are not part of either the Public Records Act or the Election Code.

IV. Petitioner's petition for mandamus was properly before the Circuit Court.

Mississippi Code § 11-41-3 provides that a petition for mandamus "shall be filed in the circuit court of the county in which the tribunal, corporation, board, officer, or person made defendant, or some one or more of them, shall reside or be found; but if the judge of that court be interested, the complaint may be filed in an adjoining circuit court district." Citing sections 11-41-1 and -3, this Court has held, "Petitions for writ of mandamus directed at a defendant other than a trial judge should be filed with the circuit court." *Ivy v. State*, 688 So.2d 223

(Miss. 1997). In *Ivy*, the petitioner asked the Supreme Court to issue a writ of mandamus commanding the circuit clerk to act. The Supreme Court said the petition should have been filed with the circuit court.

In *Sartin v. Barlow*, 196 Miss. 159, 16 So.2d 372 (1944), discussed above, the Court affirmed the trial court's writ of mandamus commanding the circuit clerk to permit the candidate full access to the election materials; and because the circuit clerk's delay had exceeded twelve days, this Court held the twelve-day examination period would begin to run when the Supreme Court's mandate was filed in the circuit court. Then in *Lopez v. Holleman*, 219 Miss. 822, 69 So.2d 903 (1954), this Court elaborated on the source of the circuit court's mandamus power. The Court stated that the power of the circuit court to issue a writ of mandamus commanding a circuit clerk to permit review of election materials is a necessary supplement to the right of a candidate to contest election results. *Id.* at 835, 907. In another election case, *In re Wilbourne*, 590 So.2d 1381 (Miss. 1991) this Court held that the proper procedure was the Circuit Court issuing a writ of mandamus to the circuit clerk commanding the clerk to permit a candidate to inspect election materials.

In the court below, Parker argued that the circuit court did not have jurisdiction to hear Petitioner's petition for mandamus, because exclusive jurisdiction was vested in the Chancery Court by reason of the Public Records Act, specifically Mississippi Code § 25-61-13. This argument is not supported by the Public Records Act, discussed above, or by this Court's long line of cases on this subject.

This Court has repeatedly held that chancery courts in Mississippi do not have the jurisdiction to interfere with political and electoral matters. *In re Bell*, 962 So.2d 537 (Miss.

2007). “By a long line of decisions this court has held that courts of equity deal alone with civil and property rights and not with political rights.” *Brumfield v. Brock*, 169 Miss. 784, 788, 142 So. 745, 746 (1932). See also, *In re McMillin*, 642 So.2d 1336, 1339 (Miss.1994) (“[c]hancery courts in this state do not have the jurisdiction to enjoin elections or to otherwise interfere with political and electoral matters which are not within the traditional reach of equity jurisdiction.”); *Goodman v. Rhodes*, 375 So.2d 991, 994 (Miss.1979) (Court dissolved injunction because chancery court had no jurisdiction to determine the candidates whose names should appear on the ballot). This case authority, of which the State legislature would have been well aware before adopting the Public Records Act, provides additional reason to conclude with confidence that the State legislature did not intend for the Public Records Act to apply to a candidate’s examination of election records under Mississippi Code § 23-15-911.

V. Petitioner has no adequate remedy in the ordinary course of the law.

Time is of the essence in election proceedings. Statutory deadlines are imposed on all participants to facilitate the extensive coordination required to conduct elections in a timely manner. See, for example, Mississippi Code § 23-15-929. An immediate order of this court is needed to eliminate the risk of delay and prejudice to many participants in this electoral process.

Under Mississippi Code § 23-15-911, a candidate is given twelve (12) days “after the canvass and examination of the box and its contents by the election commission or executive committee.” That the starting point of that twelve (12) day period depends on the type of election is implicit in the statute. If the elections results are canvassed by an election commission, the period starts after that canvass. If the results are canvassed by an executive committee, the period starts after that canvass. An election commission or executive committee has not completed its canvass and examination of election returns in a given race for purposes of

determining when the 12-day period begins until it has certified the returns and declared an official winner. *Noxubee County Democratic Executive Committee v. Russell*, 443 So.2d 1191 (Miss. 1983).

In multi-county and state wide primary elections, all statutory duties of party county executive committees are the responsibility of the party's State Executive Committee. Mississippi Code § 23-15-1051. In multi-county and state-wide primary elections, the party's State Executive Committee presides over county executive committees. County executive committees are charged with performing their statutory duties as in single-county elections. Mississippi Code § 23-15-293. In primaries for U.S. Senator, the party's State Executive Committee is required to certify the vote for the United States Senator to the Secretary of State in the same manner that county executive committees certify the returns of counties in county primary elections. Mississippi Code § 23-15-1031.

On July 1, 2014, the Mississippi Republican State Executive Committee Chairman announced that the Executive Committee would provide the results of the June 24, 2014, Republican Party primary runoff election to the Mississippi Secretary of State on July 7, 2014. The July 7, 2014 date coincides (with allowance for the July 4 holiday) with the 10-day deadline for the State Executive Committee to certify results of primary elections as set forth in Mississippi Code § 23-15-599.

A twelve (12) day period that began on July 7, 2014 would end July 19, 2014. The delay created by Parker's conduct in this matter will have prevented Petitioner from conducting his full examination within the statutory time period. Without that examination, Petition will be deprived of a statutory right, and frustrated in the exercise of his rights to contest an election that is widely ridiculed for its irregularities.

Petitioner has no adequate remedy in the ordinary course of the law. An emergency writ of mandamus from this Court is needed to protect not only the rights and interest of Petitioner, but the interests of all Mississippians in the integrity of the State's elections.

CONCLUSION

For all the foregoing reasons, Plaintiff requests that this Court enter its writ commanding Gayle Parker, the Circuit Clerk of Harrison County, to perform her duty under Mississippi Election Law by permitting Petitioner access to and full examination of all the original election materials from the June 24, 2014 Republican Party primary runoff election, including such poll books and materials necessary to confirm the validity and legality of votes cast in that runoff election. In granting its writ, this Court should further order that Petitioner shall have twelve (12) days from the date of the entry of this Court's writ within which to perform the examination, as was done in *Sartin v. Barlow*, 196 Miss. 159, 16 So.2d 372 (1944).

RESPECTFULLY SUBMITTED this 14th day of July, 2014.

CHRIS McDANIEL

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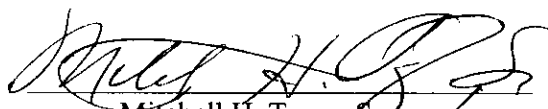
CERTIFICATE OF SERVICE

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 EMERGENCY PETITION FOR WRIT OF MANDAMUS upon the following persons:

Judge Roger T. Clark
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VIA ELECTRONIC MAIL

CERTIFIED this 14th day of July, 2014.


Mitchell H. Tyner, Sr.