

**IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI
CAUSE NO. 2007-EC-01989**

ANDREW THOMPSON, JR.

APPELLANT

V.

CHARLES LEWIS JONES

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
COAHOMA COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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APPELLEE'S STATEMENT REGARDING ORAL ARGUMENT

Appellee, Charles Jones, respectfully submits that oral argument in this case is not necessary and should not be had. The facts and legal arguments are adequately presented in the briefs and record in this election contest appeal and the decisional process would not be significantly aided by oral argument.

A second reason Oral Argument should be denied is the delay that would be caused thereby. Appellant Thompson, under the stay of execution in this case, continues to “hold over” in the office of Sheriff of Coahoma County, under AG Opinion 95-0831 and Miss. Code Section 23-15-193, in spite of the November 2, 2007 ruling by Special Circuit Judge Vollar and the Election Tribunal that a special election is required, and the Writ of Election issued by Governor Barbour on November 14, 2007. As a result of Appellant’s “Emergency Motion to Stay Execution Pending Appeal” and his repeated requests for extensions in this Court, the citizens of Coahoma County – more than 50% of whom who voted in person at the polls having voted for a new Sheriff – continue to live under the law enforcement of Appellant Thompson, more than *eight months* after the vacated election. Appellee respectfully submits that the additional delay that would be caused by Oral Argument is such that the case should be decided expeditiously without oral argument.¹

1

For informational purposes only for the purpose of Oral Argument issue and explanation of the revised titles in the Certificate of Interested Parties, reference is hereby made to the April 17, 2008 article in the Clarksdale PRESS REGISTER at <http://pressregister.com/articles/2008/04/18/news/doc480647218b990675324427.prt> (copy submitted herewith).

CERTIFICATE OF INTERESTED PARTIES

The 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 or the Judges of the Court of Appeals may evaluate possible bases for disqualification or recusal.

1. Circuit Judge Frank G. Vollor
2. Charles Lewis Jones, Petitioner-Appellee
3. Andrew Thompson, Jr., Respondent-Appellant
4. Willie Gregory, former Co-Chair, Coahoma County Democratic Executive Committee, Respondent
5. John Newson, former Co-Chair, Coahoma County Democratic Executive Committee, Respondent
6. Rena Butler, former Secretary, Coahoma County Democratic Executive Committee, Respondent
7. Modena Carter, former Member, Coahoma County Democratic Executive Committee, Respondent
8. Richard T. Phillips, Attorney for Petitioner-Appellee
9. Parker H. Still, Attorney for Petitioner-Appellee
10. W. Ellis Pittman, Attorney for Respondent-Appellant
11. Curt Crowley, Attorney for Respond-Appellant

CERTIFIED, this the 24th day of April, 2008.

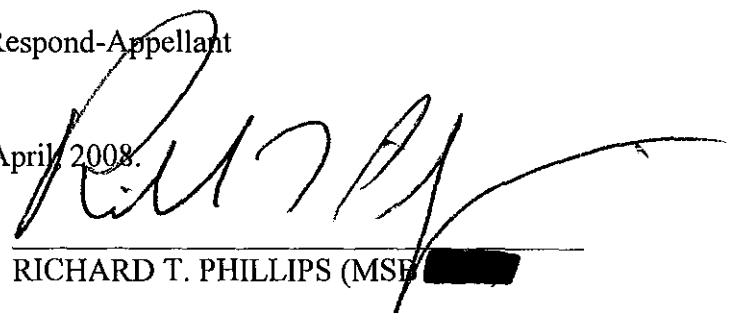


RICHARD T. PHILLIPS (MSE )

TABLE OF CONTENTS

APPELLEE’S STATEMENT REGARDING ORAL ARGUMENT	ii
CERTIFICATE OF INTERESTED PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v-viii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
a. Nature of the Case	2
b. Course of Proceedings and Disposition in Court Below	3
SUMMARY OF FACTS	4
SUMMARY OF THE ARGUMENT	11
ARGUMENT	13
A. STANDARD OF REVIEW	13
B. THE NUMBER OF ILLEGAL ABSENTEE BALLOTS IMPROPERLY COUNTED WITH THE LEGAL BALLOTS DESTROYED THE INTEGRITY OF THE ELECTION AND MADE IT IMPOSSIBLE TO ASCERTAIN THE WILL OF THE VOTERS	14
1. The Illegal Absentee Votes Violate Mandatory Provisions of the Absentee Ballot Law and Should Not be Counted	14
2. Votes Out of Compliance with Mandatory Requirements of the Absentee Ballot Law are Illegal and Not Counted Regardless of Fraud	17
3. It Is Now Impossible to Ascertain the Will of the Voters who Cast Legal Absentee Ballots and a Special Election is Required	21
C. ARE TWO SPECIAL ELECTIONS REQUIRED? A “SPECIAL PRIMARY ELECTION” AND A “SPECIAL GENERAL ELECTION”?	22
D. CONCLUSION	26

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>Anders v. Longmire,</u> 226, 215, 83 So.2d 828, 830 (1955)	13
<u>Blakeney v. Mayfield,</u> 226 Miss. 53, 84 So.2d 427, 428 (Miss. 1956)	25
<u>Blakeney v. Mayfield,</u> 84 So.2d 427, 428 (Miss. 1956)	23
<u>Boyd v. Tishomingo County Democratic Executive Committee,</u> 912 So.2d 124, 128 (Miss. 2005)	13
<u>Boyd v. Tishomingo County Democratic Executive Committee,</u> 912 So.2d 124, 130 (Miss. 2005)	21
<u>Boyd v. Tishomingo County Democratic Executive Committee,</u> 912 So.2d 124, 134 (Miss. 2005)	20
<u>Campbell v. Whittington,</u> 733 So.2d (Miss. 1999)	19
<u>Campbell v. Whittington,</u> 733 So.2d 820, 826 (Miss. 1999)	19
<u>Campbell v. Whittington,</u> 733 So.2d 820, 827 (Miss. 1999)	16, 20
<u>Hatcher v. Fleeman,</u> 617 So.2d 634 (Miss. 1993)	25
<u>Hatcher v. Fleeman,</u> 617 So.2d 634, 640-41 (Miss. 1993)	18
<u>Moore v. Parker,</u> 962 So.2d 558, 567-68 (Miss. 2007)	25
<u>Noxubee County Democratic Executive Committee v. Russell,</u> 443 So.2d 1191, 1197 (Miss. 1983)	21
<u>Riley v. Clayton,</u> 441 So.2d [1322], 1328 (Miss. 1983)	18

<u>Rogers v. Holder,</u> 636 So.2d 645 (Miss. 1994)	10,14
<u>Rogers v. Holder,</u> 636 So.2d 645, 647-48 (Miss. 1994)	17
<u>Rogers v. Holder,</u> 636 So.2d 645, 648 (Miss. 1994)	7,18
<u>Rogers v. Holder,</u> 636 So.2d 645, 649 (Miss. 1994)	15,19
<u>Rogers v. Holder,</u> 636 So.2d 645, 649-50 (Miss. 1994)	16
<u>Ruhl v. Walton,</u> 955 So.2d 279 (Miss. 2007)	10,14
<u>Ruhl v. Walton,</u> 955 So.2d 279, 282 (Miss. 2007)	16,18
<u>Ruhl v. Walton,</u> 955 So.2d 279, 282 (Miss. 2007)	15,17
<u>Sinclair v. Fortenberry,</u> 1952, 213 Miss. 219, 56 So.2d 697, 702 (Miss. 1956)	23,25
<u>Smith v. Hollins,</u> 905 So.2d 1267 (Miss. 2005)	7,14
<u>Smith v. Hollins,</u> 905 So.2d 1267, 1270 (Miss. 2005)	13
<u>Smith v. Hollins,</u> 905 So.2d 1267, 1277-78 (Miss. 2005)	25
<u>Straughter v. Collins,</u> 819 So.2d 1244, 1252 (Miss. 2002)	16,17
<u>Wade v. Williams,</u> 517 So.2d 573, 576 (Miss. 1987)	13
<u>Wilbourn v. Hobson,</u> 608 So.2d 1187 (Miss. 1992)	18

MISCELLANEOUS

Mississippi Attorney General No. 1999-0698, 1999 WL 1333476, (Miss. A.G. Dec. 22, 1999) .	7
Mississippi Attorney General No. 95-0831, 1999 WL 779544, (Miss. A. G. Dec. 21, 1995) . .	24
MISS. CODE ANN. §23-15-193	24
MISS. CODE ANN. §23-15-621	5
MISS. CODE ANN. §23-15-621 (Rev. 2001)	20
MISS. CODE ANN. §23-15-627	5,8,9,10,14,15
MISS. CODE ANN. §§23-15-627 and 23-15-635	17
MISS. CODE ANN. §§ 23-15-627, 23-15-631, and 23-15-635	5,9,15
MISS. CODE ANN. § 23-15-631	8,9,10,14,15
MISS. CODE ANN. §§ 23-15-633 and 23-15-635	5
MISS. CODE ANN. §23-15-635 (1972)	15,18
MISS. CODE ANN. §23-15-635 (Rev. 1990)	16,19
MISS. CODE ANN. § 23-15-637	26
MISS. CODE ANN. §23-15-711	5
MISS. CODE ANN. § 23-15-713	6
MISS. CODE ANN. § 23-15-717	7,14,15
MISS. CODE ANN. §§23-15-717, 23-15-715, 23-15-719, and 23-15-635	16
MISS. CODE ANN. §23-15-911	3,4
MISS. CODE ANN. §23-15-921	13
MISS. CODE ANN. §23-15-931	2,3,11
MISS. CODE ANN. §23-15-933	13

MISS. CODE ANN. §23-15-937	11, 22, 24
MISS. CODE ANN. §§23-25-627, 23-25-631, and 25-15-635	2

STATEMENT OF ISSUES

1. Appellee submits pursuant to MRAP 23(b) that the issue presented by the appeal by Thompson on the merits is:

Is an election contestant required to allege and prove actual fraud where there is such a total departure from the mandatory provisions of the election statutes concerning absentee voting as to destroy the integrity of the election and make it impossible to ascertain the will of the qualified voters?

2. The Special Circuit Judge, and the people of Coahoma County, were confronted by a significant second issue raised by Appellant Thompson's November 15, 2007, Emergency Motion to Stay Execution Pending Appeal [Tab 7 ARE; R 66-71] as to which the Circuit Judge sought instructions from this Honorable Court in the Order of November 30, 2007. [Tab 8, ARE; R. 76-78]. That issue, in the words of the lower court, is:

Should there be only one special election, as the Court found contemplated by the election statute, or two elections, a special primary and special general election, as appears contemplated by the Governor's Writ?

STATEMENT OF THE CASE

a. Nature of the Case

This is an appeal of an election contest involving improprieties in the absentee voting process in the August 2007 Coahoma County, Mississippi, Democratic Primary. The Circuit Judge appointed by this Court to hear the case and the Coahoma County Election Commission sitting pursuant to Mississippi Code Section 23-15-931 examined the absentee ballots and found – and the Appellant ultimately stipulated – that close to one-fourth of the absentee votes cast and counted in the election had been cast in violation of mandatory provisions of the Mississippi Absentee Balloting Procedures Law. The Court and the Election Commission found a “total departure from the fundamental provisions of the election code” with regard to violations of mandatory requirements of Sections 23-25-627, 23-25-631, and 25-15-635. Between 103 and 124 illegal absentee ballots cast in the race for Sheriff of Coahoma County in violation of the mandatory provisions of the law were mixed by the Coahoma County Democratic Executive Committee with other absentee votes and included in the count. The Special Circuit Judge, and Election Commission, ordered that a run-off election be held, finding “such a total departure from the fundamental provisions of the election statutes concerning absentee voting” in the race “as to destroy the integrity of the election and make it impossible to ascertain the will of the qualified voters.” Order of November 2, 2007 [Tab 1, ARE; R. 54]. A Writ of Election was issued by the Governor. Appellant Thompson, however, obtained a Stay of Execution pending appeal [Tab 8, ARE; R. 76-78]. He continues to occupy the office of Sheriff during this appeal.

b. Course of Proceedings and Disposition in Court Below

On October 22, 2007, Chief Justice, James W. Smith, Jr., appointed Honorable Frank G. Vollor of the Ninth District, to preside over the election contest petition filed by Charles Lewis Jones (hereinafter “Jones”). On October 26, 2007, a hearing on the election contest was held before Judge Vollor and the Coahoma County Election Commission pursuant to Mississippi Code §23-15-931 and other applicable provisions of the Mississippi Election Code. Miss. Code §§23-15-911, *et seq.* Transcript, page 98 [Hereinafter “T- 98”]. On November 2, 2007, the Court vacated the certification of Andrew Thompson (hereinafter “Thompson”) as Democratic candidate for Sheriff of Coahoma County and requested that the Governor of the State of Mississippi call a special election for office of Sheriff of Coahoma County. Appellee’s Record Excerpts, Tab 1 [Hereinafter “Tab 1, ARE”]. On November 14, 2007, Governor Haley Barbour issued a Writ of Election setting December 11, 2007 as the date for a special primary run-off election for the Democratic nominee for the office of Sheriff of Coahoma County. The Writ also set a “special general election” to take place on January 8, 2008. (Tab 6, ARE).

Thompson appealed and filed a Motion to Stay Execution pending the appeal, asserting that Governor Barbour’s Writ violated Mississippi Law “in that it called for a special democratic primary run-off and a special general election.” Tab 7, ARE, Record page 68 [Hereinafter “R. 68”]. The Court stayed the election pending this appeal, finding “the phrase ‘special election’ means a special election on the usual sense of that term, not a party primary.” The Court ordered that the Writ of Election “should be stayed until the Supreme Court can address in the pending appeal of this case whether there shall be only one special election, as this Court finds as contemplated by the statute by *Blakeney* and by *Sinclair*, or two elections, a special primary and special general election, as contemplated by the Writ.” (Tab 8 ARE, R. 77).

Statement of Facts

On August 7, 2007, the Democratic Primary Election for Sheriff of Coahoma County, Mississippi was held. The Appellee, Charles Lewis Jones (hereinafter Jones) was a candidate for Sheriff of Coahoma County. Appearing on the ballot for office of Sheriff were six candidates, including Jones and Thompson. Six thousand two hundred and thirty-four (6,234) votes were cast at the polls on election day. Jones received two thousand (2,000) votes (32.08%) and Thompson received three thousand one hundred and ten (3,110) votes (49.89%). Based on the vote at the polls a run-off election between Jones and Thompson was necessary. Five hundred and forty-two (542) absentee and affidavit ballots were also cast and counted. When the absentee and affidavit ballots counted by the election officials were added to the votes cast in person, a total of 6,776 votes had been counted in said race. Of these 6,776 total votes counted, 2,135 or 31.51% were counted for Jones, and 3,399 votes or 50.16% were counted for Thompson, giving Thompson a majority by only eleven (11) votes. (Tab 1, ARE. R. 54).

Based on the results prior to the Committee's inclusion of absentee and affidavit ballots, a run-off would have been required in the race for Sheriff between Jones and Thompson. Based on the count with the absentee and affidavit ballots the Democratic Committee allowed to be included in the count, no run-off was required. Thompson was certified by the Committee as winner of the Sheriff's race without a run-off. (R. 3-4).

On August 20 through August 22, 2007, pursuant to Miss. Code Ann. Section 23-15-911, Jones and his attorneys conducted an examination of the contents of the ballot boxes used in the August 7, 2007 Democratic Primary Election. Jones and his attorneys inspected the complete contents of each ballot box. Specifically included was examination of the absentee ballots, and the absentee ballot applications and envelopes. Said items were examined for compliance, or

lack thereof, with the certification requirements and procedures mandated by the Mississippi Absentee Balloting Procedures Law, MCA Sections 23-15-621 *et seq*, and the Mississippi Absentee Voter Law, Sections 23-15-711 *et seq*, (R. 4-7; T.6-7).

The August 20-22, 2007 inspection of the absentee ballots revealed that, of the absentee votes counted by the Democratic Committee in reaching Thompson's eleven (11) vote majority, 244 votes were for Thompson and 76 votes were for Jones, a net gain to Thompson of 168 votes. (R. 4). The inspection also revealed that of the absentee ballots included in the count by the Committee:

- One hundred and three (103) absentee ballots had been cast and counted in violation of the mandatory requirements of §23-15-627 of the Election Code requiring that the absentee ballot application be signed by an official authorized to administer oaths for absentee balloting, (R. 39, Ex.E)
- Twenty-nine (29) absentee ballots had been cast and counted in violation of the mandatory requirements of §§23-15-633 and 635 that the absentee ballot envelopes be signed by an attesting witness, (R. 42, Ex. F), and
- Eleven (11) additional absentee ballots had been cast and counted in violation of mandatory requirements of §§23-15-627, 631, and 635 of the Absentee Balloting Procedures Law. (R. 44, Ex. H).

After examination of the ballots, and amid a flurry of allegations of absentee ballot irregularities in contests by candidates for other offices in the August Coahoma County Democratic primary, Jones filed his sworn petition on August 24, 2007 contesting the Democratic Primary Election. (R. 33-44). Identified in the Petition were the three above lists of illegal absentee votes which had been counted by the Committee (Exhibits E, F and H) plus a list

of fourteen (14) absentee ballots (Exhibit G) cast pursuant to Applications on which no §23-15-713 category was checked. (R. 43).²

On September 5, 2007 the Coahoma County Democratic Executive Committee held a hearing on the petition in Clarksdale. Thompson presented no testimony or evidence at the hearing. His attorney argued only that failure to check the §23-15-713 category for the fourteen votes on Exhibit G was a “mere technicality” which did not require that those votes be thrown out. (R. 46). The objection to the fourteen votes on Exhibit G was subsequently withdrawn as mere “technical irregularities.” (T- 17). The County Democratic Executive Committee did not examine any ballots, applications or envelopes at the September hearing (R. 8; R. 40-42).

On September 18, 2007 having heard no word from the County Committee, Jones’ attorneys wrote the attorney who represented the Coahoma County Democratic Executive Committee at the hearing to inquire whether the committee intended to take any action on the contest. (R. 45-77).

In the letter to the County Committee (R. 45-47), Jones’ counsel stated that even without the 14 technical irregularities on Exhibit G, the illegal votes counted in violation of the mandatory requirements of the Absentee Voting Law, as illustrated in Exhibit E, F and H, required a new run-off. Enclosing the four (4) lists submitted to the Committee at the hearing for use in examining the ballots (Exhibit E, F, G and H), the letter explained:

“Mr. Thompson presented no testimony or evidence at the hearing. His attorney . . . argued that the failure to check the §23-15-713 category (list 3) was a technicality which should not require the votes on the third list to be thrown out. Giving the respondent this for sake of argument, however, a runoff (or new election) is still required as a matter of law because of the 103 votes on list one (application not acknowledged) and the 29 on list two (envelopes not witnessed) alone.

² Appellee subsequently withdrew the objection to the 14 absentee votes on Exhibit G (T- 17).

Regarding the first issue, §23-15-717 of the Mississippi Absentee Ballot Law expressly provides that compliance with §23-15-627 is mandatory: “[The elector] *shall complete* an application form as provided in §23-15-627 . . .” Ballots cast pursuant to an unsworn and unwitnessed §23-15-627 application are *illegal and can not be counted* as shown by the citations of authority we presented at the hearing including: AG Opinion No. 99-0697, December 22, 1999 [election commission may not count absentee ballots obtained due to improper application form] and *Rogers v. Holder*, 636 So2d 645, 648 (Miss. 1994) [votes not in compliance with mandatory provisions of election statutes are illegal and not to be counted.]

List number two identifies 29 absentee voters whose ballots were returned in envelopes lacking the signature of an attesting witness as required by §23-15-631. The Mississippi Supreme Court has ruled as recently as 2005, that such votes violate the statute and must not be counted. *Smith v. Hollins*, 905 So.2d 1267 (Miss. 2005).

Of the absentee votes allowed in the final count, 244 were votes for Thompson and only 76 were votes for Jones. The net gain to Thompson of 168 votes precluded a run-off with Jones by only eleven (11) votes. Even if all 76 absentee votes counted for Jones were among the 143 illegal absentee ballots counted (disregarding those where the voter merely failed to identify a category), there would still be 67 illegal votes for Thompson, which gave him the eleven needed to avoid a run-off. A run-off election is simply required in this situation.”

[September 18, 2007 letter from Attorney for Jones to Attorney for County Democratic Executive Committee, R. 45-47, Exhibit I to Amended Election Contest Petition. (R.. 2 *et seq.*.)]

Ultimately Jones received a letter from Willie Gregory, then Co-Chair of the Democratic Executive Committee saying simply: “After hearing arguments from both sides, the Committee voted to uphold the certification of the August 7, 2007 primary.” (Exhibit K to Amended Election Contest Petition, R 49.)³ Called as a witness at the October 26, 2007 Election Contest hearing before the Election Tribunal consisting of the Special Circuit Judge and the Coahoma County Election Commission, Mr. Gregory admitted under oath that neither he, nor any member of the Democratic Executive Committee, examined any of the absentee ballots at or following the

3

Mr. Gregory is no longer Co-Chair of the Executive Committee. See Statement Regarding Oral Argument and attachment in support thereof.

September 5, 2007 hearing prior to making the decision to simply confirm Thompson as the nominee. (T - 38-39).

On October 4, 2007, Jones filed his sworn and certified Election Contest, contesting the Coahoma County Democratic Executive Committee certification of Andrew Thompson, Jr. as the winner in the Democratic Primary election for Sheriff of Coahoma County, Mississippi, without a run-off. Attaching as exhibits the results of the absentee ballot examination and materials from the County Committee proceedings, Jones showed in his Petition that the number of illegal absentee ballots in the final count was sufficient to change the result of the election, that it was impossible to ascertain the will of the voters because the Committee mixed the illegal ballots with the legal ballots and included them in the count, that Thompson lacked a majority of the legal votes counted, and that the certification of Thompson should be vacated and a special run-off election ordered.

This Court appointed Circuit Judge Frank Vollor of the Ninth Circuit District to hear the election contest. At the hearing by the Special Tribunal on October 26, 2007 Judge Vollor and the Coahoma County Election Commission, in the presence of the members of the County Democratic Executive Committee, candidates Thompson and Jones, their attorneys, other county officials and the public, examined the absentee ballots in open court. (T- 74-76). The Court and the Special Tribunal found in the examination – and the Appellant and his attorney stipulated – that the one hundred and three (103) absentee ballots listed on Exhibit E lacked applications signed by an official authorized to administer oaths for absentee ballots, as required §23-15-627 (T - 77-78); the twenty-nine (29) ballots listed on Exhibit F were in envelopes which were not signed by authorized attesting witnesses as required by §23-15-631 (T - 79); and the eleven (11) ballots listed on Exhibit H, according to the stipulation of Appellant's counsel, "have no

application, application not witnessed as required by statute, or was not in compliance with the statutes for those 11 individuals.” (T- 80). The following stipulations were made in open court at the conclusion of the examinations:

Stipulation as to Exhibit E (103 Absentee ballots. §23-15-627):

“BY THE COURT: I want to see if I get all the wording right. I don’t want to misquote it. Both parties are stipulating that exhibit E contains the names of 103 people, voters, whose application was not signed by one of the clerks or someone authorized to administer oaths and that it should have been signed by, under the law, should have been signed by a clerk or someone authorized to administer oaths. Is that correct?

BY MR. PITTMAN: That’s correct.

BY MR. PHILLIPS: That’s correct. And that those were included in the votes counted.

BY THE COURT: Any objection to that?

BY MR. PITTMAN: No objection to that, that they were included in the votes counted, but we do not stipulate that those 103 votes went to Sheriff Thompson.” (Tab 5 ARE, T. 77-78)

Stipulation as to Exhibit F (29 ballots. §23-15-631):

“BY THE COURT: Let’s dictate this. We’re going to stipulate - - again, I’m not dictating this, I’m trying to frame it the way y’all stipulate it - - that exhibit F contains a list of voters who voted and their envelope was not signed by an authorized attesting witness as required by 23-15-631.

BY MR. PITTMAN: That’s correct.

BY MR. PHILLIPS: Correct, Your Honor.

BY THE COURT: That’s stipulated.” (Tab 5 ARE, (T. 79)

Stipulation as to Exhibit H (11 ballots. §§23-15-627, 631 and 635):

“BY THE COURT: What would you stipulate as to exhibit H? I’m going to let you dictate. I’m not going to try to frame this one.

BY MR. PHILLIPS: Go ahead.

BY MR. PITTMAN: Your Honor, we've made an examination of the ballot boxes of exhibit H which the Petitioner has alleged . . . And we would stipulate that the 1 through 11 voters on exhibit H did either have no application, application was not witnessed as required by statute, or was not in compliance with the statutes for those 11 individuals.

BY MR. PHILLIPS: Okay." (Tab 5 ARE, T. 80)

Following the hearing and conference with the members of the Election Commission sitting on the Tribunal, Judge Vollor issued a written opinion finding:

"The parties stipulated to exhibits E, F, and H attached to the Petition contest. Exhibit E sets forth the names and precincts of one hundred and three (103) absentee voters whose applications had not been signed by an official authorized to administer oaths for absentee balloting in accordance with §23-15-627 MCA. Exhibit F set forth the name and precinct of twenty-nine (29) absentee voters whose envelopes were not signed by an attesting witness in violation of §23-15-631 MCA. Exhibit H contained the names and precinct of eleven (11) absentee voters on the three (3) lists in one hundred and twenty-four (124). These votes were counted and mixed with the other absentee votes so there is no way now to tell who these votes went to."

Order of November 2, 2007 (Tab 1 ARE, 54-55.) [Emphasis added.]
[Copies of Exhibits E, F and H are included in the Appellee's Record Excerpts as Tabs 2, 3 and 4, respectively.]

Citing this Court's decisions in *Rogers v. Holder*, 636 So. 2d 645 (Miss. 1994) and *Ruhl v. Walton*, 955 So. 2d 279 (Miss. 2007), Judge Vollor held "strict compliance with the statutes concerning absentee ballots is mandatory and these votes in violation of the statutes are illegal and should not be counted." (Tab 1 ARE, R. 55). Because the illegal ballots were included in the absentee vote, it was impossible to segregate the illegal votes from the legal votes. The Special Tribunal found "such a total departure from the fundamental provisions of the election statutes concerning absentee voting as to destroy the integrity of the election and make it impossible to ascertain the will of the qualified voters." (Tab 1, ARE, R. 54).

By Order of November 2, 2007, the certification of Thompson as the Democratic candidate for Sheriff was vacated and a special election called for. (Tab 1, ARE, R. 56). It is

from this Order that Thompson appeals.

SUMMARY OF THE ARGUMENT

1. Examination of the absentee ballots from the Coahoma County Democratic Primary Election in open court by the Court and the Election Commissioners revealed – and the Appellant ultimately stipulated – that 124 ballots, almost one-fourth (1/4) of the total absentee ballots included in the count, were illegal ballots which violated mandatory provisions of Mississippi Absentee Ballot Law. These statutory requirements violated were *mandatory*, not *directory*. Such ballots, under direct statutory mandate and unequivocal pronouncements from this Court, are illegal and must not be counted whether or not there is proof of “actual fraud.” The illegal absentee ballots were improperly mixed in with the legal ballots making it impossible to discern the will of the legal voters in the election. Circuit Judge Frank Vollar, appointed by the Court to hear the case with the Coahoma County Election Commission, sitting as the Special Tribunal pursuant to § 23-15-931, found such a total departure from the mandatory requirements of the election statutes concerning absentee voting as to destroy the integrity of the election.

Thompson lacked a majority before the contaminated absentee votes were included in the count. The Tribunal found as a fact, and the Court noted in its opinion, that it is now impossible to segregate the illegal votes from the legal ones or to discern the will of the voters. The Order of November 2, 2007, vacating the certification of Thompson and ordering a special election as statutorily mandated by Miss. Code Section 23-15-937 should be affirmed.

2. As to the second issue presented in this appeal, whether there should be one “special election” as the Special Court deemed contemplated by the statute and prior decisions of this Court, or two, a “special primary” and a “special general” as ordered in the Governor’s Writ, the Appellee Jones respectfully joins in the request of the lower Court and Special Tribunal that

the Supreme Court address the issue in this appeal and declare whichever procedure it deems appropriate in order that the people of Coahoma County may have the opportunity to hold an election as ordered and elect a Sheriff in accordance with the mandatory balloting and election laws of this State.

ARGUMENT

A. STANDARD OF REVIEW

This Court will not disturb the findings of fact in an election contest appeal unless those findings are manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Smith v. Hollins*, 905 So.2d 1267, 1270 (Miss. 2005). For questions of law in an election contest, the Court employs a de novo standard of review and will only reverse for an erroneous interpretation or application of the law. *Id.*; and *Boyd v. Tishomingo County Democratic Executive Committee*, 912 So.2d 124, 128 (Miss. 2005).

Under the statutory procedure set forth for Contests of Primary Elections, Miss. Code Ann. §§ 23-15-921, *et seq.*, where the findings of fact have been concurred in by the Election Commissioners in attendance at the hearing, as here, “the facts shall not be subject to appellate review.” Miss. Code Ann. §23-15-933. This Court has noted “the manifest legislative intent” of this statute is to facilitate speedy appeals in primary election contests. *Anders v. Longmire*, 226, 215, 83 So.2d 828, 830 (1955). The statute governing such appeals “is obviously designed to expedite the appeals process in an election contest.” *Wade v. Williams*, 517 So.2d 573, 576 (Miss. 1987). As this Court stated in *Wade*,: “Our duty is to respect the Special Tribunal’s findings and this Court cannot say that the Special Tribunal was manifestly wrong in its determinations.” *Id.*, [affirming, holding: “Determination of intent [of voters] is by its very nature a fact inquiry.”]

B. THE NUMBER OF ILLEGAL ABSENTEE BALLOTS IMPROPERLY COUNTED WITH THE LEGAL BALLOTS DESTROYED THE INTEGRITY OF THE ELECTION AND MADE IT IMPOSSIBLE TO ASCERTAIN THE WILL OF THE VOTERS.

(1) The Illegal Absentee Votes Violate Mandatory Provisions of the Absentee Ballot Law and Should Not be Counted.

Examination of the absentee ballots by the Court and the Election Commissioners sitting as the Special Tribunal revealed that a total of 124 of the absentee ballots counted by the Coahoma County Democratic Executive Committee (in certifying Appellant by a majority by only 11 votes) violated the mandatory provisions of the Mississippi Absentee Balloting Procedures Law. Such votes are illegal and must not be counted. *Rogers v. Holder*, 636 So.2d 645 (Miss. 1994); *Ruhl v. Walton*, 955 So. 2d 279 (Miss.2007); *Smith v. Hollins*, 905 Sol.2d 1267 (Miss.2005).

Section 23-15-717 of the Absentee Ballot Law requires that an elector applying for an absentee ballot *shall* complete the application as provided in Section 23-15-627. Section 23-15-627 provides that for voters not disabled the Absentee Ballot application *shall* be witnessed by an official authorized to administer oaths. Here it was stipulated that 103 of the absentee ballots which, under the law, should have been signed by an officer authorized to administer oaths, were not so signed. It was also stipulated that those votes were mixed with the other ballots and included in the count. [T. 77-79. Stipulation as to Exhibit E. 103 Absentee Ballots, §23-15-627].

Section 23-15-631 of the Absentee Ballot Law requires that all absentee ballots “*shall* have the attesting witness sign the ‘attesting witness certificate’ across the flap on back of the envelope.” It was stipulated by the Appellant, after examination of the ballots by the Court and the Election Tribunal, that Exhibit F contains a list of 29 absentee ballot voters whose envelopes

were not signed by an authorized attesting witness as required by 23-15-631. [T-79. Stipulation as to Exhibit F. 29 Absentee Ballots, §23-15-631].

Sections 23-15-627, 23-15-631 and 23-15-635, have mandatory requirements which were violated by the eleven voters on Exhibit H whose votes were similarly included in the count. After examination of the boxes at the hearing, the Appellant stipulated that those absentee votes “either have no application, [were] not witnessed as required by statute, or were not in compliance with the statutes.” [T-79. Stipulation as to Exhibit H. 11 Absentee Ballots, §§23-15-627; 23-15-631; and 23-15-635].

The specific provisions of the Absentee Balloting Procedures Law violated here, Sections 23-15-627, 23-15-631 and 23-15-635, are mandatory requirements intended to ensure the integrity of absentee ballots. *Rogers v. Holder*, 636 So.2d 645, 649. (Miss.1994). Violation of those mandatory requirements renders absentee votes illegal. *Id.* at 649-650. Votes not in compliance with these mandatory provisions of the election statutes are illegal and must not be counted. *Ruhl v. Walton*, 955 So. 2d 279, 282 (Miss.2007).

In *Rogers* this Court addressed the requirements of §§ 23-15-717 and 23-15-627 for the signature of an attesting witness on absentee ballot applications. The provision was found mandatory because it is intended to ensure the integrity of the absentee ballot. *Rogers* at 649. The §23-15-635 certificate by an attesting witness on the absentee ballot envelope is likewise mandatory. [“The provisions of §23-15-635 (1972) are also mandatory because intended to ensure the integrity of the absentee ballots.”] *Id.*

As the Court explained in *Rogers*:

“Absentee paper ballots, unlike machine votes, are particularly amenable to fraud; the detailed procedures outlined in the statutes at issue here are designed to protect against fraudulent votes and ensure that absentee ballots actually reflect the will of the voters who cast them. It appears that the Special Tribunal was correct in concluding §§ 23-15-717, 23-15-627, 23-15-715, 23-15-719, and 23-15-635 are mandatory in nature . . . It follows that votes not in compliance with these statutes are illegal.”

Rogers v. Holder, 636 So.2d 645, 649-50 (Miss.1994).

“Votes not in compliance with mandatory provisions of election statutes are illegal.

Votes illegally cast are improperly counted.” *Id.* at 648; *Ruhl v. Walton*, 955 So. 2d 279, 282

(Miss.2007). The solid public policy underlying this rule, the potential problem that absentee ballots present to the integrity of the electoral process, has been repeatedly stated by this Court:

“As opposed to voting at the polls, in a public setting where the integrity of the election process can be ensured, absentee voting takes place in a private setting where the opportunity for fraud is greater. To ensure the integrity of the election process through absentee voting, the legislature has seen fit to provide other safeguards. These provisions are mandatory. *Campbell v. Whittington*, 733 So.2d 820, 827 (Miss.1999).” [Emphasis added.]

Straughter v. Collins, 819 So.2d 1244, 1252 (Miss.2002).

Discussing the precise requirements at issue here, the Court continued in *Straughter*:

“Under Miss.Code Ann. § 23-15-635 (Rev.1990), the absent voter must vote his ballot in the presence of an attesting witness, place the ballot in the envelope, and sign the elector’s certificate across the flap. The voter and the witness then swear that this process was followed. These safeguards are all that ensure the integrity of the absentee ballot process. If these mandates are not followed and the integrity of the absentee ballots is questioned, the absentee ballots should not be counted. 733 So.2d at 827 (citations omitted).”

Id.

In the present case, the Court and Election Commissioners sitting as the Special Tribunal found that almost one-fourth (1/4) of all absentee votes counted in the August 2007 Coahoma County Democratic Primary race for Sheriff were illegal ballots. (Tab 1, ARE, R. 56). The Court at the Special Tribunal correctly followed this Court's directions in declaring illegal the 124 votes cast in violation of the mandatory statutory requirements but included in the count by the County Committee. As this Court stated in *Straughter v. Collins*:

“It is imperative that the appropriate elected officials strictly adhere to the statutes concerning absentee ballots. Recent elections appear to have had wholesale disregard for the law regulating the use of absentee ballots. This Court, where called on to do so, will require strict compliance and *we call on others to do likewise.*”

Straughter v. Collins, 819 So.2d, 1244, 1252 (Miss.2002), [Emphasis added.]

(2) Votes Out of Compliance with Mandatory Requirements of the Absentee Ballot Law Are Illegal and Not Counted Regardless of Fraud.

Thompson's only argument, and the sole issue he presents on appeal, is that the Court erred in disallowing the absentee ballots because there was no proof of “actual fraud.” The Court erred in ordering a run-off, argues the Appellant at page 10 of his brief, “as there was no allegation or evidence of fraud or intentional misconduct.” Appellant would be correct in his assertion if the statutes violated were *directory* in nature and not *mandatory*. Absentee ballots such as those here, however, which lack the mandatory certifications required by Sections 25-15-627 and 635 of the Absentee Balloting Procedures Law, are illegal and must not be counted regardless of whether there is proof of actual fraud. *Ruhl v. Walton*, 955 So.2d 279, 282 (Miss. 2007); *Rogers v. Holder*, 636 So.2d 645, 647-48 (1994).

The distinction between *directory* and *mandatory* election statutes was expressly addressed in *Ruhl v. Walton*. “Stated succinctly,” said the Court:

“[i]f the violated statute is *directory* rather than *mandatory* and there is no allegation or proof of fraud, the non-complying ballots are valid and properly counted. *Riley v. Clayton*, 441 So.2d [1322,] 1328 (Miss.1983). Votes *not* in compliance with *mandatory* provisions of election statutes are *illegal*. Votes illegally cast are improperly counted. *Hatcher v. Fleeman*, 617 So.2d 634, 640-41 (Miss.1993).” [Emphasis by the Court.]

Ruhl v. Walton, 955 So.2d 279, 282 (Miss. 2007). To precisely the same effect is *Rogers v. Holder*, 636 So.2d 645, 648 (1994).

Absentee ballots lacking the mandatory certifications required by Section 25-15-635 of the Absentee Balloting Procedures Law, as do the 124 ballots here, are illegal and not to be counted regardless of whether there are allegations or proof of actual fraud. *Id.* As the Court explained in *Ruhl*:

“Miss.Code Ann. Section 23-15-635 has been deemed *mandatory* because “[a]bsentee paper ballots ... are particularly amenable to fraud; the detailed procedures outlined ... are designed to protect against fraudulent cotes and ensure that absentee ballots actually reflect the will of the voters who cast them.” *Id.* at 649. In short, Miss.Code Ann. Section 23-15-635 is mandatory because the potential for illicit voting activity exponentially increases when the light of truth does not illuminate the voting booth. Therefore, all mail-in absentee ballots cast in violation of Miss.Code Ann. Section 23-15-635 were *illegal* and properly rejected by the court.”

Ruhl v. Walton, 955 So.2d 279, 282 (Miss.2007).

Appellant’s reliance on *Wilbourn v. Hobson*, 608 So.2d 1187 (Miss.1992) for his assertion that such violations of the Absentee Balloting Laws are “mere technicalities” is misplaced. “In accordance with *Wilbourn*,” the Appellant asserts, “because there was no evidence of fraudulent or willful misconduct, the absentee ballots should have been counted.” Appellant’s Brief, p. 14. Thompson rests his assertion on his erroneous premise that “The case-

at-hand is factually similar to *Wilbourn*.” Appellant’s Brief, p. 12.

Wilbourn is not factually similar to the case at hand. At issue in *Wilbourn* were *affidavit* ballots voted in person *at the polls*. *Wilbourn* did not involve absentee ballots voted in violation of the Absentee Balloting Procedures law. This outcome-determinative distinction was addressed in *Campbell v. Whittington*, 733 So.2d 820 (Miss.1999). Discussing the distinction between mere “technical irregularities” or “trivial lapses” with regard to ballots *voted in person at the polls*, such as those in *Wilbourn*, and violations of the mandatory requirements for absentee voting, the Court in *Campbell* noted:

“The case *sub judice* is distinguishable from *Wilbourn* for several reasons. *Wilbourn* involved a challenge to affidavit ballots which are cast at the polls on election day. Here the dispute involves absentee ballots cast away from the polls and prior to election day. [C]ontested [here is] the validity and integrity of the absentee ballots.”

Campbell v. Whittington, 733 So.2d 820, 826 (Miss.1999).

“There are valid reasons,” said the Court why exceptions to the requirements for voting in person at the polls “should not be applied in the absentee voting setting.” *Id.* at 827.

Distinguishing the situations, the Court explained:

“As opposed to voting at the polls, in a public setting where the integrity of the election process can be ensured, absentee voting takes place in a private setting where the opportunity for fraud is greater.” *Id.*

Addressing the absentee ballot violations at issue here, the Court continued:

“To ensure the integrity of the election process through absentee voting, the legislature has seen fit to provide other safeguards. These provisions are mandatory. *Rogers v. Holder*, 636 So.2d 645, 649 (Miss., 1994). Under Miss.Code Ann. § 23-15-635 (Rev.1990) the absent voter must vote his ballot in the presence of an attesting witness, place the ballot in the envelope, and sign the

elector's certificate across the flap. The voter and the witness then swear that this process was followed. These safeguards are all that ensure the integrity of the absentee ballot process. *McFarland*, 707 So.2d at 179. If these mandates are not followed and the integrity of the absentee ballots is questioned, the absentee ballots should not be counted." [Emphasis added.]

Campbell v. Whittington, 733 So.2d 820, 827 (Miss.1999).

Not every election contest is a personal vendetta with allegations of fraudulent conduct by the opposing candidate, as are many these days. The situation here is similar to that recently noted by this Court in *Boyd v. Tishomingo County Democratic Executive Committee*, 912 So.2d 124, 134 (Miss.2005):

"The real issue presented by this and many other election contests we routinely deal with is a flawed and failed absentee ballot process. The privilege of voting by absentee ballot is created by Miss.Code Ann. § 23-15-621 (Rev.2001), and those administering elections must strictly conform to statutory requirements." *Id.* [Emphasis added.]

Absence of proof of actual fraud does not obviate the fact that absentee ballots voted in violation of the mandatory requirements of the Absentee Ballot Law are illegal and must not have been counted. A special election is required, where, as here, almost one-fourth (1/4) of all absentee ballots voted (far more than necessary to require a run-off in light of the eleven-vote majority certified), were counted in violation of the law making it impossible to ascertain the will of the voters.

(3) It Is Now Impossible to Ascertain the Will of the Voters who Cast Legal Absentee Ballots and a Special Election is Required.

When an election is successfully contested, the Court employs an alternative two-pronged test to determine whether a special election (or as here, a special run-off election) is warranted. *Boyd v. Tishomingo County Democratic Executive Committee*, 912 So.2d 124, 130 (Miss.2005); *Noxubee County Democratic Executive Committee v. Russell*, 443 So.2d 1191, 1197 (Miss.1983). In such a situation “a special election will be required if either (1) enough illegal votes were cast for the contestee to change the election result or (2) the amount of votes disqualified is substantial enough that it is impossible to discern the will of the voters.” *Boyd, supra* at 130 [emphasis added]. Here, as a result of the handling of the Absentee Ballots, it is impossible to discern the will of the voters who cast legal absentee ballots. Without those votes there is no majority and a special run-off election is required.

Public examination of the absentee ballots here showed almost one-fourth (1/4) of the absentee ballots counted by the Committee were illegal. The Appellant stipulated that 124 votes which failed to comply with the mandatory absentee balloting statutes were mixed in and counted with the legal votes. There is now no way to tell which candidates these votes went to. [Order, Tab 1 ARE, R. 55]. The finders of fact, *i.e.*, the Special Court and the County Election Commissioners sitting as Special Tribunal pursuant to the Election Statutes, found “such a total departure for the fundamental provisions of the election statutes concerning absentee voting as to destroy the integrity of the election and make it impossible to ascertain the will of the qualified voters.” *Id* at 54.

Thompson lacked a majority before the contaminated absentee votes were included in the count. It is now impossible to segregate the illegal votes from the legal ones. *Id* at 56. The Tribunal found as a fact, and the Court noted in its opinion, that it is now impossible to discern the will of the voters. No candidate has received a majority of the votes, and a run-off between Jones and Thompson is required.

C. Are TWO Special Elections Required? A “Special Primary Election” and a “Special General Election”?

The Special Court and Tribunal found as a fact that it is impossible to discern the will of the voters in the August 2007 race for Sheriff of Coahoma County. The Court ordered that the certification of Thompson as the Democratic Candidate should be set aside and that a special election is statutorily mandated by Miss. Code Section 23-15-937. (Tab1, ARE; R. 56) The November 2, 2007 Order ordered that the certification of Thompson as the Democratic Candidate “is hereby vacated and the Governor of the State of Mississippi shall call a special election for the Office of Sheriff of Coahoma County.” *Id*.

On November 14, 2007, Governor Haley Barbour issued his Writ of Election to the Election Commissioners of Coahoma County, in accordance with the order that he, as Governor, “call such election pursuant to the authority granted to me under Section 23-15-937, Mississippi Code of 1972, as amended.” (Tab 6, ARE; R. 65). The Governor ordered that there be a “special primary run-off election” to be held on December 11, 2007, and that “all relevant state laws not in conflict with the terms of this Writ of Election shall apply to this special primary run-off election.” *Id*. The November 14, 2007 Writ of Election from the Governor went on to state:

“The winner of the special democratic primary run-off election held on December 11, 2007 shall face the previously qualified independent candidate in a special general election for the Office of Sheriff of Coahoma County, which election I hereby set to take place on January 8, 2008.” (Tab 6, ARE; R. 65).

Using question of whether there should be both a “special general election” and a “special primary election” as ordered in the Governor’s Writ, the Appellant Thompson filed an “Emergency Motion to Stay Execution Pending Appeal” seeking a stay of the special run-off election ordered by the Court. (Tab 7, ARE; R.66-70). A hearing on the motion was held by Judge Vollor on November 29, 2007. As announced by the Court at the hearing, and noted in his Order of November 30, 2007, the Court contacted the offices of the Governor, the Attorney General and the Secretary of State, giving each notice of the hearing, and inviting the respective offices to send counsel to be heard on this issue, but each declined to appear. (Tab 8 ARE; R. 76).

After hearing from counsel from both Thompson and Jones, the Court announced it was of the opinion “that the phrase ‘special election’ means a special election in the usual sense of that term, and not a party primary.” *Id* at 77. The Court stated: “The statute does not contemplate a party primary after the general election. *Blakeney v. Mayfield*, 84 So.2d 427, 428 (Miss. 1956). *Sinclair v. Fortenberry*, 1952, 213 Miss. 219, 56 So.2d 697, 702 (Miss. 1956).” *Id*. To the extent that the Governor’s Writ provides for a special party primary election, in addition to a special general election after the general election has been held, the Court declared, “the Writ of Election issued by Governor Haley Barbour is in violation of this Court’s Order dated November 2, 2007.” (Tab 8 ARE; R. 77)

The Court noted that Thompson's appeal created the possibility of multiple elections depending on whether or not this Court deemed the process ordered in the Governor's Writ in conformance with the requirements of §23-15-937. The Court held, therefore, that:

"In order to avoid the possibility of multiple elections before and after completion of the appeal of this case, the Writ of Election should be stayed until the Supreme Court can address in the pending appeal of this case whether there should be only one special election, as this Courts finds is contemplated by the statute, by *Blakeney* and by *Sinclair*, or two elections, a special primary and special general election, as contemplated by the Writ."

Order of November 30, 2007, [Tab 8 ARE at R.77].

Upon the posting by Thompson of a supersedeas bond of \$500, Thompson's motion to stay was granted, and the Writ of Election stayed "until Thompson's appeal is ruled on by the Mississippi Supreme Court." *Id.*

A consequence of the stay of execution pending this appeal is that, under Miss. Code §23-15-193, which provides that county officers hold offices "for a term of four (4) years *and until their successors are elected and qualified*," as said section has been interpreted by the Mississippi Attorney General in AG Opinion # 95-0831 relating to election contests, Thompson continues to "hold over" as Sheriff of Coahoma County some eight months after the election, in spite of his certification having been vacated and a special election ordered.

In his appeal Thompson ignores the issue of whether there should be one "special election" as the Court deemed contemplated by the statute and decisions of this Court, or two, a "special primary" and a "special general" as ordered in the Governor's Writ.

This Court stated in *Blakeney* that “the phrase ‘special election is clearly intended to mean a special election in the usual sense of that term, and not a party primary.” *Blakeney v. Mayfield*, 226 Miss. 53, 84 So.2d 427, 428 (1956). In *Sinclair*, it held since the general election had been held prior to the final decision in the election contest, it was too late for a “special primary” and “a special election” should be ordered. *Sinclair v. Fortenberry*, 213 Miss. 219, 56 So.2d 697, 702 (1952). More recently, similar procedural issues were addressed in *Smith v. Hollins*, 905 So. 2d 1267, 1277-78 (Miss. 2005) [overruling *Hatcher v. Fleeman*, 617 So.2d 634 (Miss. 1993)], and in *Moore v. Parker*, 962 So.2d 558, 567-68 (Miss. 2007) [holding special tribunal erred in ordering a special primary run-off election when it is statutorily mandated that the Governor call such election.].

The Appellee, Jones, expresses no opinion as to which procedure should be employed, but respectfully requests that this Court address the matter and order whichever procedure it deems appropriate. As indicated by the article submitted herewith in regard to Oral Argument, as a public policy matter the citizens of Coahoma County are in need of resolution of the matter. The elections ordered on November 2, 2007, and by the Governor’s Writ of November 14, 2007, were stayed on the Appellant’s motion for the express purpose that the “Supreme Court can address in the pending appeal of this case whether there should be only one special election . . . or two elections, a special primary and special general election.” (Tab 8, ARE; R. 77). The Appellant having failed to address the issue in his appeal, Appellee Jones respectfully requests that this Court decide the issue in order that the special election(s) may be had as promptly as possible.

CONCLUSION

The specific violations of *mandatory* requirements of the Mississippi Absentee Balloting Procedures Law revealed by the examination by the Special Tribunal and stipulated by the Appellant rendered those votes illegal. Because of the manner in which the absentee ballots were handled it is impossible to discern the will of the voters. The Appellant has no majority on the basis of the votes voted in person at the polls. The Court properly ordered that a special election should be had under Miss.Code Ann. § 23-15-637. The ruling of the Court and Special Tribunal should be affirmed and a special election, or elections, ordered by this Court pursuant to the procedure this Court deems appropriate.

Respectfully submitted, this the 24th day of April, 2008.

CHARLES LEWIS JONES

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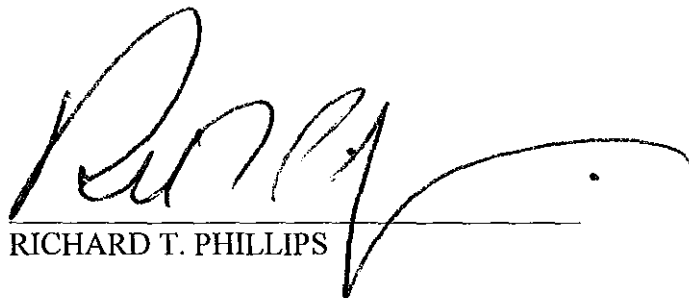
I, Richard T. Phillips, one of the attorneys for the Appellee, do hereby certify that I have this day mailed, posted prepaid by United States mail, a true and correct copy of the above and foregoing Brief of Appellee to:

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This the 24th day of April, 2008.



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News

Local Dem leadership changes

[Print Page](#)

By **ANDY ROSS**, Staff Writer

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Underlying tensions within the Coahoma County Democratic Party surrounding old loyalties and alleged shoddy voting procedures, recently manifested in a new wave of members and officers breaking into the Coahoma County Democratic Executive Committee.

During the county executive committee convention at the County Courthouse March 15, there was an apparent surprise influx of participation that resulted in many new faces on the 30-person committee and every officer position being replaced.

Willie Gregory was replaced as the Committee Chairman by Darron Griffin. Johnny Newson was replaced as vice-chairman by Pearline Newell and Rena Butler was replaced as secretary by Otha Williams. Charles Butler is the new treasurer and Willie Turner Jr. the new parliamentarian.

In Mississippi, county democratic executive committees essentially handle all practical aspects involved with running county elections. Operating voting machines, registration maintenance and counting ballots are but a few of their responsibilities.

According to the constitution of the Mississippi Democratic Party, the "executive committee shall certify party candidates on the county level, shall conduct party primaries, and shall canvass and certify election returns in accord with the election laws of the State of Mississippi."

While all those duties may sound straightforward enough, new officers on the committee say they were motivated to become involved after witnessing numerous instances of improper election protocol taking place over the years.

Griffin alleges names were often illegally purged from voter rolls during elections to benefit certain candidates. He also says the executive committee knowingly strived to keep much of the citizenry in the dark about their rights to participate in the processes of electing committee members every four years.

According to Griffin, the disputed sheriff's primary race last August, presently still pending in Mississippi Supreme Court, is a primary example of shady dealings by former members of the executive committee, and was really the tipping point for jump-starting a movement for change.

"If you keep allowing voter fraud to continue, the voters will loose confidence in the process and will think that it is not even worth it to vote," Griffin said. "They will think it's already decided and their vote doesn't matter."

In the Aug. 7, 2007 primary, incumbent Sheriff Andrew Thompson Jr. narrowly garnered the necessary 51 percent by 11 votes and was declared the winner over candidate and Friars Point Police Chief Charles Jones.

Jones challenged the victory, however, eventually landing the case before Circuit Judge Frank Vollar. In

FOR ORAL ARGUMENT CONSIDERATION ONLY
MRAP 34

October 2007, Vollor determined there were in fact 124 unsigned absentee ballots and voided Thompson's victory.

Governor Haley Barbour then set special election dates which were appealed by Thompson, sending the case to the Supreme Court where it remains.

For new executive committee parliamentarian Willie Turner Jr., the fact that impacts of those events are still being felt is unacceptable.

"With all the experience you had on the executive committee and on the circuit clerk level, having people with 10 or 20 years experience in key positions, there is no way that race should have happened like that and still be in limbo. It is the taxpayers that will be forced to fund a re-election," he said.

Turner says he felt compelled to start participating because he saw such scenarios discouraging new candidates interested in seeking office.

"I want it where everyone will be treated fairly, where if you feel like you want to run you would have a fair chance and your sweat would pay off at the end of the race. Where win or lose you had a fair shake and there wouldn't be any doubt in your mind that something else took place," he said.

Both Turner and Griffin say the new committee lineup will focus on educating the public on rules of voting procedures and keeping voter fraud out. They say the committee will meet on a regular basis and will work closely with churches, schools, and other community institutions to provide hands on, educational training on such procedures as operating voting machines, counting ballots, and voter registration.

"We are putting the speculation to rest, putting a pillow on it," Griffin said. "We are going to be going by the facts, going by the rules, by the laws, so people can learn the right way and don't feel their participation is in vain."

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