

**IN THE SUPREME COURT OF MISSISSIPPI**

**TOWN OF TERRY, MISSISSIPPI TEMPORARY  
MUNICIPAL DEMOCRATIC EXECUTIVE  
COMMITTEE, ET AL.**

**APPELLANTS**

**VS.**

**CAUSE NO. 2009-EC-01109**

**MARY SMITH, ET AL.**

**APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**




Pursuant to Miss.R.App. 28(a)(1), 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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Town of Terry, Mississippi Temporary Municipal Democratic  
Executive Committee  
*Appellant*
2. Cedric Abston  
*Appellant*
3. Halbert Dockins  
6520 Dogwood View Parkway, Suite B  
Jackson, Mississippi 39213  
Phone: (601) 713-2223  
*One of the Attorneys for Appellant Cedric Abston*
4. Kimberly Banks  
Post Office Box 471  
Jackson, Mississippi 39205  
Phone: (601) 316-3600  
*One of the Attorneys for the Town of Terry, Mississippi Temporary  
Municipal Democratic Executive Committee*

5. Mary Smith  
*Appellee*
6. Election Commission of the Town of Terry  
*Appellee*
7. James K. Guthrie  
Guthrie Law Firm  
540 Keyway Drive, Suite A  
Flowood, Mississippi 39232-0850  
*Counsel for Appellees*
8. Hon. Swan Yerger, Presiding Judge  
Hinds County Circuit Court  
407 East Pascagoula Street  
Jackson, Mississippi 39201

Respectfully Submitted,

APPELLANTS

By:   
HALBERT DOCKINS, MSB#   
Attorney for Cedric Abston  
KIMBERLY BANKS, MSB#   
Attorney for Town of Terry, Mississippi Temporary  
Municipal Democratic Executive Committee

## **TABLE OF CONTENTS**

<b>TITLE</b>	<b>PAGE</b>
CERTIFICATE OF INTERESTED PERSONS	ii-iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
A. PROCEEDINGS BELOW	2
B. STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	6
STANDARD OF REVIEW	7
ARGUMENT	8
1. Whether the lower court erred in finding that the Town of Terry temporary Municipal Democratic Executive Committee And Cedric Abston had notice of the Town of Terry election commission's decision and/or judgment on March 23, 2009.	8
2. Whether the lower court erred in failing to apply Miss. Code Ann. § 11-51-93 to the proceedings below.	9
CONCLUSION	11
CERTIFICATE OF SERVICE	13

## **TABLE OF AUTHORITIES**

### **CASES**

### **PAGES**

<i>City of Jackson v. Perry</i> , 764 So.2d 373, 376 (Miss.2000) .....	7
<i>City of Jackson v. Brister</i> , 838 So.2d 274, 278 (Miss.2003) .....	7

### **OTHER AUTHORITIES:**

Miss. Code Ann. § 11-51-75.....	2, 4, 5, 7, 8
Miss. Code Ann. § 23-15-961.....	4, 7
Miss. Code Ann. § 23-15-963.....	4
Miss. Code Ann. § 11-51-93 .....	7, 9

## **STATEMENT OF THE ISSUES**

The issues that this Court should resolve on appeal are:

1. Whether the lower court erred in finding that the Town of Terry Temporary Municipal Democratic Executive Committee and Cedric Abston had notice of the Election Commission's decision and/or judgment on March 23, 2009.
2. Whether the lower court erred in failing to apply Miss. Code Ann. § 11-51-93 to the proceedings below.

## STATEMENT OF THE CASE

### **A. PROCEEDINGS BELOW**

This action was filed on May 8, 2009 against Mary Smith, individually, and in her official capacity as City Clerk for the Town of Terry, Mississippi, and the Election Commission of the Town of Terry, Mississippi (collectively sometimes referred to as “Appellees”). R. at 1. Appellants Town of Terry, Mississippi Municipal Democratic Executive Committee (hereinafter “TTMDEC”) and Cedric Abston (hereinafter “Abston”) (collectively sometimes referred to as “Appellants”) filed a Petition for Judicial Review of Refusal to Place the Name of Democratic Party’s Candidate for Mayor on the June 2, 2009 Ballot (hereinafter “Petition for Judicial Review”), alleging that Appellees unlawfully disqualified the TTMDEC, therefore disqualifying Abston as a candidate. R. at 8-10.

Attached to the Appellants’ Petition for Judicial Review was an **undated letter** purportedly mailed to Terry Johnson<sup>1</sup> from Mary Smith, City Clerk and Lessie Hayes, Shauna White, and Kelsey Blumberg, as Town of Terry Election Commission. R. at 15. R. at 21-22. In that **undated letter**, the Town of Terry City Clerk and the Town of Terry Election Commission purportedly disqualified the TTMDEC because Appellees alleged that TTMDEC was inadequately formed. R. at 15-16. The Town of Terry also disqualified the candidate put forth by the TTMDEC. Id.

On May 19, 2009, a hearing was held on Appellants’ Petition for Judicial Review. At that hearing, after arguments were made with respect to service of process on Appellees, the lower court recessed to resolve service of process issues. T.T. at 103-104. On May 21, 2009, the lower court reconvened. T.T. at 104. At the May 21, 2009

---

<sup>1</sup> Terry Johnson was a member of the Town of Terry Municipal Democratic Executive Committee.

hearing, after hearing arguments from counsel, the lower court ruled that Miss. Code Ann. §11-51-75 is the appropriate and proper statute for which Appellants must appeal. Id. at 141-142. The court further ordered that Appellants needed to file an amendment by May 22, 2009, and furnish the appropriate bill of exceptions to proceed. Id. at 145.

On May 22, 2009, Appellants filed "Plaintiffs' Amended Petition and Appeal for Judicial Review of the Refusal by the Defendants to Place the Name of Democratic Party's Candidate for Mayor on the June 2, 2009 Ballot" (hereinafter "Amended Petition"). R. at 29. Likewise on May 22, 2009, Appellants filed their Bill of Exceptions. R. at 67. Appellees filed a Motion for Amendment of Findings by the Court under MRCP 52 and Motion for Amendment of Judgment under MRCP 59 (hereinafter "Motion for Amendment of Findings") on May 22, 2009. R. at 51.

On May 26, 2009, the court reconvened for a third time in this matter. The court then entered its Order of Dismissal on June 8, 2009, holding that Plaintiffs had ten (10) days from the date of adjournment at which session the municipal authority, specifically the Town of Terry election commission, rendered such judgment or decision. R. at 82. The court further held that the "Plaintiffs were noticed of the Town of Terry Election Commission's decision to disqualify both the Temporary Municipal Democratic Executive Committee and its "candidate" Cedric Abston." R. at 83. And that, "notice was given on March 23, 2009 to Terry Johnson, on behalf of the Temporary Municipal Democratic Executive Committee, and to Cedric Abston." Id.

Appellants timely filed its appeal from this adverse judgment. R. at 89-91.

## **B. STATEMENT OF THE FACTS**

Appellants filed their Petition for Judicial Review on May 8, 2009, because Appellees unlawfully and without authority disqualified the TTMDEC and therefore

disqualified its candidate for the Mayorial race of the Town of Terry on June 2, 2009. R. at 4-13. A hearing on Appellants Petition for Judicial Review was held on May 19, 2009. T.T. at 1. At the May 19, 2009 hearing, an extensive transcript was made with respect to service of process on the Appellees. T.T. at 8. In addition to raising service of process issues, counsel for Appellees also raised issues with respect to the appropriate statute that Appellants should be traveling under. *Id.* After arguments from Appellants counsel and Appellees counsel, the court recessed and directed the parties to provide the court legal authority on procedure, and to reconcile the service of process on Appellees. T.T. at 101-104.

On May 21, 2009, the lower court reconvened. At the May 21, 2009 hearing, counsel for Appellants argued that jurisdiction is proper under Miss. Code Ann. § 23-15-961 ***and other applicable statutes*** and that pursuant to those statutes, the court had the authority to decide service of process and notice to the Appellees. T.T. at 106-107. Moreover, counsel for Appellants argued that there is no direct appeal statute on point because the Town of Terry Election Commission acted outside the scope of their authority. *Id.* at 115. In addition to the arguments with respect to service of process, counsel for Appellees argued an *ore tenus* motion to dismiss, asserting that Appellants' proper statute for appeal of the adverse ruling by the Town of Terry election commission was Miss. Code Ann. §23-15-963. *Id.* at 121-123.

In the lower court's ruling on May 21, 2009, the court referenced the **undated letter** addressed to Terry Johnson and stated in the record that that undated letter was not in evidence at this time and there is no authentication with respect to that letter. *Id.* at 144-145. In addition, the lower court ruled that Miss. Code Ann. § 11-51-75 is the appropriate and proper statute for which Appellants must appeal. *Id.* at 141-142. The



court further ordered that Appellants needed to file an amended petition by May 22, 2009, and furnish the appropriate bill of exceptions to proceed. *Id.* at 145.

The lower court reconvened on May 26, 2009 for a third time in this matter. *T.T.* at 147. On May 26, 2009, the court denied Appellees' Motion for Amendment of Findings. *T.T.* at 149. At the hearing, Judge Yerger held that the court stood by its Order entered and the ruling it made, specifically that Miss. Code Ann. § 11-51-75 is the appropriate statute from which Appellants could appeal to the circuit court for judicial review. *T.T.* at 147-148. At the May 26, 2009 hearing, there were also arguments from Appellants and Appellees with respect to the lack of signature of the appropriate party on the Bill of Exceptions. *T.T.* at 155-158. After those arguments, counsel for Appellees raised the issue that even though Miss. Code Ann. § 11-51-75 is the inappropriate statute, since the court was requiring Appellants to follow Miss. Code Ann. § 11-51-75, the Appellants failed to file their Bill of Exceptions within ten (10) days. *T.T.* at 159-160.

Counsel for Appellants argued that apparently the Town of Terry Election Commission convened without any notice to either to the TTMDEC or to Abston and that the actions taken by the Town of Terry Election Commission were done without any statutory authority. *T.T.* at 160. Counsel for Appellants further argued that there was nothing to take exception to besides an undated letter apparently sent to Terry Johnson and copied to Abston. *T.T.* at 163.

At the May 26, 2009 hearing, the lower court ordered that the court needed to hear evidence with respect to how many pages of Appellants bill of exceptions were presented to Lessie Hayes, Election Commissioner and Mary Smith, City Clerk for their signature and why the Bill of Exceptions was not signed. *T.T.* at 184-185. Accordingly, Abston, Brian Opara-Nadi, Mary Smith, Lessie Hayes, and Juan Gray testified with

respect to those issues. T.T. at 187-214. After a brief recess after the testimony, the court reconvened and gave its ruling. T.T. at 220. In its ruling, the court stated that “there were certainly flaws in the procedures that were utilized in this case in the Terry election commission meetings and so on.” Id. The court further without hearing any evidence or testimony from Abston or TTMDEC with respect to notice, found that there was a meeting on March 23, 2009 of the election commission, and that Abston and his counsel were present at that meeting. Id. at 220-221. In addition, the court found that there was correspondence to the head of the democratic executive committee in an undated letter, and that sometime soon thereafter, the undated letter was furnished to Terry Johnson, chairman of the municipal democratic party. Id. at 221.

The court entered its order of dismissal on June 8, 2009, holding that Plaintiffs had ten (10) days from the date of adjournment at which session the municipal authority rendered such judgment or decision. R. at 82. The court further held that the “Plaintiffs were noticed of the Town of Terry Election Commission’s decision to disqualify both the Temporary Municipal Democratic Executive Committee and its “candidate” Cedric Abston.” R. at 83. And that that, “notice was given on March 23, 2009 to Terry Johnson, on behalf of the Temporary Municipal Democratic Executive Committee, and to Cedric Abston.” Id.

### **SUMMARY OF THE ARGUMENT**

The circuit court erred in finding that TTMDEC and Abston had notice of the Election Commission’s “decision” of March 23, 2009. There is no evidence placed in the record with respect to when the TTMDEC or Abston received notice of the Election Commission’s decision to disqualify the TTMDEC, therefore disqualifying Abston. Rather, the only evidence placed in the record was an **undated letter** to Terry

appellate court reviews the trial judge's application of Miss. Code Ann. §§ 23-15-961 and 11-51-75 *de novo*.

### **ARGUMENT**

#### **I. Whether the lower court erred in finding that TTMDEC and Abston had notice of the Election Commission's decision and/or judgment on March 23, 2009.**

Miss. Code Ann. § 11-51-75 provides that any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal *within ten (10) days* from the date of adjournment at which session the board of supervisors of municipal authorities rendered such judgment or decision. Miss. Code Ann. § 11-51-75. The circuit court committed error when it ruled that Appellants were noticed of the Town of Terry Election Commission's decision to disqualify both TTMDEC and Abston on March 23, 2009. Therefore Appellants Petition for Judicial Review was barred by the ten days as referenced in Miss. Code Ann. § 11-51-75.

Not only are the trial judge's findings in the case at bar not supported by substantial, credible, and reasonable evidence; the trial judge's findings are not supported by *any evidence* in the record and/or trial transcript. Likewise, the only evidence in the record and/or trial transcript is an **undated letter** from the City Clerk and the Election Commission, purportedly copied to Abston, that allegedly disqualifies the TTMDEC as well as its candidate, Cedric Abston. R. at 15-16.

The lower court made the ruling without hearing any evidence from Cedric Abston or TTMDEC with respect to when they received notice of their alleged disqualification. The only purported evidence placed in the record with respect to when Appellants received notice, was counsel for Appellees' statement in the record that the

alleged meeting of the Town of Terry Election Commission was adjourned on March 23, 2009. T.T. at 159. There was no evidence in the record that the TTMDEC was even at the March 23, 2009 meeting. Certainly, an undated letter is not sufficient evidence when notice was provided to the TTMDEC or Abston. Specifically when the trial judge ruled that the undated letter was not authenticated nor was it in evidence. T.T. at 144-145. Therefore the trial judge's finding that TTMDEC and Abston received notice on March 23, 2009 is manifestly wrong and clearly erroneous. Pursuant to Mississippi case law, the lower court committed error, as there is no evidence in the record that supports its finding.

**II. Whether the lower court erred in failing to apply Miss. Code Ann. § 11-51-93 to the proceedings below.**

This matter is an appeal from a disqualification of an elector, namely Cedric Abston, who became aware of his disqualification officially only when he learned his name was not being placed on the June 2, 2009 ballot as a candidate of the TTMDEC.<sup>2</sup> Abston filed his Petition for Judicial Review shortly thereafter, on May 8, 2009.

In its Final Judgment, the trial court incorrectly applied Miss. Code Ann. §11-51-75 (Appeals from judgments or decisions by municipal authorities), to the proceedings below. Miss. Code Ann. §11-51-75 is not applicable to appeals from municipal election commission decisions, but rather to appeals from other municipal authorities and bodies. After incorrectly applying §11-51-75 to the proceedings, the court then applied §11-51-75's statute of limitations, which is 10 (ten) days, rather than the 6 (*six*) months, as mandated by the appropriate statute, Miss. Code Ann. §11-51-93. In applying the

---

<sup>2</sup> Abston officially received notice sometimes shortly thereafter by undated letter approximately two weeks before the final election.

incorrect statute of limitations, the court then found that Abston's appeal to the circuit court by bill of exceptions was untimely. This however, is contradictory as the lower court ordered that Appellants file a bill of exceptions by May 22, 2009.

As decided in *Crider v. Howard*, 295 So.2d 776 (Miss.1974), Miss. Code Ann. §11-51-93 specifically refers to appeals from adverse municipal election commissions. In *Crider*, the Supreme Court stated as follows:

"...the petition does set out facts which raise a question of law as to the validity of the challenged election, and was in fact a good faith effort to appeal to the circuit court. The trial court should have treated the petition as an application for a writ of certiorari, and, if all other essentials for an appeal by certiorari were met within the time required by law [Mississippi Code Annotated §11-51-93 (1972)]. The trial court should have granted a hearing on questions of law shown by the record ordered to be brought up by certiorari. If the record brought up to the circuit court revealed errors of law, the court then could have permitted such amendments as it deemed necessary to bring the legal issues fairly before the court determination."

The facts in *Crider* are almost identical to the facts of the case at bar. The Mississippi Supreme Court in *Crider* held that where a petition for judicial review of election did not comply with the statute requiring bill of exceptions to be filed, but did set out facts which raised question of law as to the validity of the election, the trial court should have treated the petition as an application for writ of certiorari, and, if all other essentials for an appeal by certiorari were met within the time required by law, the trial court should have granted a hearing on questions of law shown by the record. *Crider*, 295 So.2d 776.

Accordingly, the trial court erred in applying Miss. Code Ann. § 11-51-75 and rather should have applied Miss. Code Ann. § 11-51-93 to the case at bar.

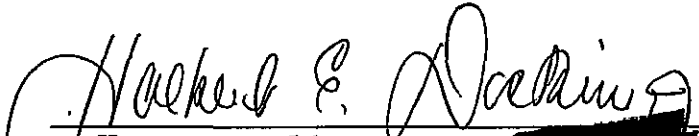

### **CONCLUSION**

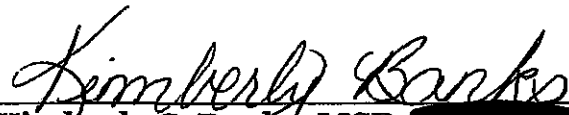
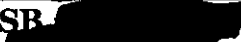
For the above reasons, Appellants requests that this Court reverse the lower court's ruling and render a judgment in favor of Appellants. Specifically, Appellants respectfully submit that this Court should reverse and remand, so that the lower court must make a finding as to notice given to TTMDEC and Abston. In addition this should reverse the lower court's decision, specifically that the lower court apply the appropriate statute, Miss. Code Ann. §11-51-93. Finally, Appellants respectfully request that this Court:

- 1) void the June 2, 2009 mayorial election;
- 2) order a new election for mayor of the Town of Terry to include the candidates (specifically Cedric Abston and the current mayor) party affiliations as they so qualified;
- 3) that the new mayorial election be limited to Cedric Abston and the independent candidate for mayor; and
- 4) declare that Cedric Abston is the sole democratic party nominee for mayor of the Town of Terry Mississippi, as he was unopposed in what should have been the general election.

**RESPECTFULLY SUBMITTED**, this the 19<sup>th</sup> day of January, 2010

Town of Terry, Mississippi Temporary  
Municipal Democratic Executive Committee  
and Cedric Abston, Individually


  
**Halbert E. Dockins Jr. MSB**   
One of the Attorneys for Appellant Cedric  
Abston

  
**Kimberly C. Banks, MSB**   
One of the Attorneys for Appellant Town of  
Terry, Mississippi Temporary Municipal  
Democratic Executive Committee

**Of Counsel:**

**Dockins Turnage & Banks, PLLC**  
6520 Dogwood View Parkway, Suite B  
Jackson, Mississippi 39213  
Phone: (601) 713-2223  
Fax: (601) 713-2225  
www.loohd.com

**One of the Attorneys for Cedric Abston, Individually**

Kimberly Banks, MSB   
Post Office Box 471  
Jackson, Mississippi 39205  
Phone: (601) 316-3600  
Fax: (601) 665-4852  
Electronic Mail: kimcelestejax@aol.com

**One of the Attorneys for Town of Terry, Mississippi  
Temporary Municipal Democratic Executive  
Committee**

**ACKNOWLEDGEMENT OF RECEIPT**

The undersigned Capitol Security Police certifies that he/she received the original and three copies of Appellant's Brief on this the \_\_\_\_\_ day of January, 2010.

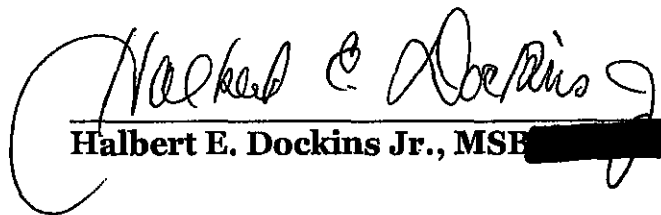
\_\_\_\_\_  
CAPITOL SECURITY POLICE

**CERTIFICATE OF SERVICE**

I, Halbert E. Dockins Jr. and Kimberly C. Banks, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellants Brief on the following:

James Kurt Guthrie, Esq.  
Guthrie Law Firm  
540 Keyway Dr., Suite A  
Flowood, MS 39232-0850

This the 19<sup>th</sup> day of January, 2010.

  
\_\_\_\_\_  
Halbert E. Dockins Jr., MSP# [REDACTED]

  
\_\_\_\_\_  
Kimberly C. Banks, MSP# [REDACTED]