IN THE CIRCUIT COURT OF JONES COUNTY MISSISSIPPI

CHRIS McDANIEL	PETITIONER
v.	CASE NO. 2014-76-CV08
THAD COCHRAN	RESPONDENT

PETITIONER'S RESPONSE
TO
RESPONDENT'S MOTION TO DISMISS

COMES NOW Petitioner, Chris McDaniel, by and through undersigned counsel, to respond to Respondent's motion to dismiss (hereinafter "Respondent's Motion" or "Motion"), and in support of his Response would show the Court the following:

INTRODUCTION

The Motion rests entirely on *Kellum v. Johnson*, a 1959 case that interpreted the Corrupt Practices Act of 1935. Though parts of the 1935 Act were adopted into the Mississippi Code of 1972, the Legislature in 1986 repealed all of Mississippi's prior election laws and adopted the current "Mississippi Election Code." See Mississippi Code § 23-15-1 and repealed chapters 1 - 13 of Title 23. The new Election Code is codified in Chapter 15 of Title 23. Substantial changes in the law along with subsequent pronouncements of the Mississippi Supreme Court show that *Kellum v. Johnson* does not apply to current Mississippi law.

TIME REQUIREMENTS
IN THE CURRENT ELECTION CODE

A brief overview of time requirements in the current Election Code is necessary to form a basis of comparison with the *Kellum* decision and the statutes it interpreted.

Primary Elections For Single County Offices

Current Election Code § 23-15-597 requires for primary elections for single-county offices that the county executive committees of political parties (hereinafter "CECs") meet on the first or second day after the primary election, canvass the returns, and announce the nominee. This announcement by the CEC is a certification that triggers a 12-day period pursuant to § 23-15-911 within which a candidate may complete a "full" examination of the election-results documentation. *Noxubee County Democratic Executive Committee v. Russell*, 443 So.2d 1191 (Miss. 1983). This 12-day period is tied to the certification by the executive committee, not the date of the election. However, when § 23-15-911 and § 23-15-597 are read together, it is clear that the process of CEC certification and candidate review of election records for a single county primary could take from as little as 2 days up to a maximum of 14 days after the primary election date. If a candidate decides, after reviewing the election documentation, to contest the single-county primary election results, § 23-15-921 requires that the candidate file a petition with the CEC within 20 days after the primary election.[1]

The three Election Code sections, § 23-15-597, § 23-15-911, and § 23-15-921 are coordinated in their application to primary elections for single county offices. Pursuant to them, a candidate would have, after the conclusion of his 12-day document-examination window, a minimum of 6 days and a potential maximum of 18 days (depending on how long it took the executive committee to certify results and the candidate to review election records) to prepare his election-contest complaint and get it filed with the CEC.

[1] By its clear terms, § 23-15-921 does not apply to elections for multi-county or state-wide offices.

Primary Elections For Multi-County And State-Wide Offices

Primary elections for multi-county and state-wide offices are more involved than those for single county offices. As would be expected, the Election Code has different requirements for primaries involving multi-county and state-wide offices than it does for single county offices.

Election Code § 23-15-597 imposes, for primaries involving multi-county and state-wide offices, the additional requirement on the CECs that they must, after meeting on the first or second day after the election to canvass returns, declare the result for their county and transmit the county results to the party's state executive committee within 36 hours after the CEC has declared the county results. This procedure means the CECs are required to report county results to the state executive committee within 4 days after the primary election.

Election Code § 23-15-599 then requires the state executive committee to transmit the state-wide results to the Secretary of State within 10 days from the date of the primary election. This deadline is calculated from the date of the election, not from the date of the CEC's transmittal of results. Under § 23-15-597, a state executive committee should have received the CEC results within 4 days of the date of the primary election. The state executive committee would then have § 23-15-599 at least 6 days to prepare its own certification to the Secretary of State. That these requirements apply to primaries for United States Senator, Election Code § 23-15-1031 makes clear.

The date of the state executive committee's certification to the Secretary of State initiates the 12-day window within which a candidate may examine election-results documentation under § 23-15-911 in state wide elections.[2] In this setting, the candidate's right to examine the documents does not begin until 10 days after the primary election and does not conclude until 22

[2] This is a corollary to the CEC certification initiating the examination period in single county primary elections.

days after the date of the primary election.

If after reviewing the election documentation a candidate decides to contest the results of a state-wide primary election, he must proceed under Election Code § 23-15-923. By clear terms,§ 23-15-923 applies to state-wide primaries, and by those same clear terms distinguishes its applicability from the single-county applicability of § 23-15-921. As discussed above, § 23-15-921 applies only to single-county elections.

Another distinctive of § 23-15-923 is that it does not include a time requirement within which a candidate must file his complaint with the state executive committee. As mentioned above, § 23-15-921 has a requirement that for single-county offices an election-contest complaint must be filed within 20 days after the primary election. Section § 23-15-923 does not contain such a requirement.

The absence of a time requirement from § 23-15-923 makes it similar to § 23-15-927. Section § 23-15-927 governs the process of filing a petition for judicial review of an executive committee's decision. Before 2012,[3] § 23-15-927 required only that a candidate file his petition for judicial review "forthwith" after the conclusion of the executive committee's proceeding.[4] Interpreting § 23-15-927, the Mississippi Supreme Court has held that the statute imposes no fixed time limit, but rather the meaning of the term "forthwith" depends upon consideration of the surrounding facts and circumstances and varies with each particular case. *Pearson v. Parsons*, 541 So.2d 447 (Miss. 1989). Filing a petition for judicial review within as many as 41 days after conclusion of the executive committee proceeding has been held to satisfy the

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[3] See Laws 2012, Ch. 476, § 1, eff. Sept. 17, 2012.

[4] There is also no requirement in the Election Code specifying a time within which a state executive committee must conclude its proceeding.

"forthwith" requirement of § 23-15-927. *Smith v. Deere*, 195 Miss. 502, 16 So.2d 33 (1943).

TIMING OF OCCURRENCES
AFTER THE JUNE 24, 2014 PRIMARY RUNOFF

The June 24, 2014 Republican party primary runoff election before this Court falls under the timing requirements of the current Election Code discussed above. The following key dates and factual occurrences should be noted for purpose of evaluating the facts of this case and comparison with *Kellum*:

- June 24, 2014 - the date of the Republican Party primary runoff election.
- June 28, 2014 - two (2) days and 36 hours after the date of the election.
- July 4, 2014 - ten (10) days after the primary runoff election.
- July 7, 2014 - the date the SREC submitted their initial certification of the June 24 runoff election results to the Mississippi Secretary of State.
- July 10, 2014 - the date the SREC amended its certification of the results of the primary runoff election to the Secretary of State.
- July 14, 2014 - twenty (20) days after the primary runoff election.
- July 19, 2014 - twelve (12) days after the SREC's initial certification to the Secretary of State. This is 25 days after the primary runoff election.
- July 22, 2014 - twelve (12) days after the SREC's amended certification to the Secretary of State. This is 28 days after the primary runoff election.

June 28 was the deadline for CECs to have transmitted election results to the SREC. Many CECs ignored this requirement. They did not report their county results to the Republican Party State Executive Committee (hereinafter "SREC") within the time required by § 23-15-597. Pete Perry, chair of the Hinds County Republican Party CEC, did not report the Hinds County results to the SREC until July 7, 2014 (13 days after the primary runoff).

July 4 was the deadline imposed by Election Code § 23-15-599 for the SREC to certify results to the Secretary of State. The SREC did not comply this deadline. The SREC took 13 days to submit its first certification. While July 4 is a legal holiday, § 23-15-599 requires compliance "within" 10 days. The SREC could have complied with this deadline by reporting the results on July 3, 2014. Reasons why the SREC did not comply with this deadline may include (1) that the CECs had not yet gotten their results to the SREC, or (2) the SREC thought that because July 4 was a legal holiday its deadline was extended to the following Monday. Whatever the reason, the SREC's failure to meet the "within 10 days" deadline of § 23-15-599 caused a 3-day delay in the beginning of Petitioner's 12-day window within which to examine election records. This 3-day delay pushed the end-date of Petitioner's 12-day examination window out to 25 days after the June 24 primary runoff election.

On the morning of July 7, Petitioner's duly authorized representatives were ready to begin examining election records pursuant to his notice given as required by Election Code § 23-15-911 and sent on July 3, 2014. However, Petitioner was denied access to election records in multiple counties. Pete Perry, chair of the Hinds County CEC, for example, refused all examination of records on July 7. The ostensible reason given by Perry was that he had not yet certified the Hinds County results to the SREC. Perry's refusal imposed additional delay on Petitioner's ability to examine election records. The denials in other counties forced Petitioner to seek judicial assistance in multiple circuit courts around the state.

During the 12-day period authorized by § 23-15-911, Petitioner and his authorized representatives examined election records in nearly all of Mississippi's 82 counties. After the conclusion of Petitioner's 12-day period of examining election records, Petitioner and hundreds of volunteers worked promptly and diligently to summarize the findings of that examination into

hundreds of pages of affidavits executed by the knowledgeable representatives. That effort required approximately 13 days to complete, some of which days were spent litigating denials of access to election records. Petitioner filed his election-contest Complaint with the SREC on August 4, 2014. The 13-day period taken by Petition in this matter was more prompt than time periods recognized by the Mississippi Supreme Court as satisfying the "forthwith" requirement of Election Code § 23-15-927. See *Smith v. Deere, supra.*

WHY *KELLUM v. JOHNSON* DOES NOT APPLY

Kellum v. Johnson, 115 So.2d 147 (1959) dealt with two statutory sections that addressed election contests in 1959. The first was Section 3143 of the Mississippi Code of 1942. Although it bears some similarity to current Election Code § 23-15-921, the differences are substantial. Section 3143 was by its language limited to allegations of fraud. Election Code § 23-15-921 is not limited to allegations of fraud, but rather includes and applies to grounds for contesting primary elections that Section 3143 did not. Next, Section 3143 did not include exceptions or other language coordinating it with other election statutes. Election Code § 23-15-921 includes both. Third, Section 3143 did not by its terms apply to legislative districts composed of one county or less. Election Code § 23-15-921 does. Fourth, Section 3143 was not clear as to which county executive committee could accept the subject election dispute petition. The language of Election Code § 23-15-921 indicates which county executive committee. The most significant distinction however is that Section 3143, as it then existed, was repealed in 1986. It was not re-enacted. Rather, a new statute was enacted. That new statute is Election Code § 23-15-921.

The second statutory section *Kellum* dealt with was Section 3144 of the Mississippi Code of 1942. It bears some similarity to Election Code § 23-15-921, but the differences show § 23-15-921 to be a new statute. Section 3144 was by indirect language limited to allegations of

fraud. Election Code § 23-15-923 is not limited to allegations of fraud, but addresses entire classes of other grounds for contesting primary elections that Section 3144 did not. Next, Section 3144 did not include exceptions or other language coordinating it with other election statutes. Election Code § 23-15-923 includes both. Third, Section 3143 did not apply to legislative districts composed of more than one county or parts of more than one county. Election Code § 23-15-923 does. Fourth, Section 3144 applied to flotorial contests. Election Code § 23-15-923 does not. Then, most significantly, Section 3144 as it then existed was repealed in 1986. It was not re-enacted. Rather a new statute was enacted. That new statute is Election Code § 23-15-923.

The *Kellum* decision recognized that, in 1959, Section 3143 governed election contests for primaries for single county and beat offices, while Section 3144 governed election contests for primaries for multi-county offices. The election at issue in *Kellum* was a multi-county office - the office of district attorney. The *Kellum* decision further recognized that Section 3143 contained a time requirement that election contests for single county offices be filed with the CEC within 20 days after the primary election, while Section 3144 did not contain such a time requirement for multi-county offices. The *Kellum* court transported the 20-day deadline from Section 3143 (applicable only to single county elections) and inserted it into Section 3144, thereby having basis for applying a 20-day deadline to the primary election for district attorney there at issue.

Changes in the law since 1959 make it clear that the *Kellum* decision does not apply to current Mississippi law. Those changes are found both in the statutes and in subsequent Mississippi Supreme Court cases.

In the statutes, there are the differences between the old and new noted above. Then, there are structural differences. Former Section 3144 did not provide a method for challenging an election because it did not specify who could file a complaint. Nor did it directly describe the purpose for which a complaint could be filed. These absences could have been one reason the Kellum court felt Section 3144 needed to draw support from Section 3143. Election Code § 23-15-923 is structured completely different, as it addresses both who may file and what must be recited in the complaint. Section 23-15-923 is stands alone and is structurally independent from § 23-15-921.

Additionally, the new sections make clearer the distinction between the single county section and the multi-county section. Former Section 3143 applied to any "county or beat office." Section 23-15-921 applies to any "county or county district office," or "legislative district composed of one (1) county or less." Section 23-15-921 is more clear and specific in limiting its applicability to offices within a single county. The Legislature clearly excluded § 23-15-921 from application to legislative districts composed of more than one county. Similarly, § 23-15-923 is more specific than former section 3144. Former section 3144 applied to "state, congressional and judicial districts." Whereas § 23-15-923 applies to "state, congressional and judicial districts" and to "legislative districts composed of more than one county or parts of more than one county."

These significant, material changes in the statutes would, without more, effectively set aside the precedential authority of *Kellum v. Johnson*. Respondent argues that the *Kellum v. Johnson* interpretation was incorporated into re-enactement of these statutes, but Respondent's argument is missing a foundational element of the rule he seeks to employ. Cases relied on by Respondent and others in their line require that a statute be re-enacted without changes. See *Hoy*

v. Hoy, 93 Miss. 732, 48 So. 903 (1909); *Dearman v. Dearman*, 811 So.2d 308 (Miss. App. 2001). Some cases say the statute must be re-enacted without material changes. *Barr v. Delta & Pine Land Co.*, 199 So.2d 269 (Miss. 1967)(cited by Respondent). See generally, *Smith v. Jackson Construction Co.*, 607 So.2d 1119 (Miss. 1992)(Robertson concurring). Given the material changes to the statues at issue, the cases relied on by Respondent on this point do not apply.

More significantly however, the Mississippi Legislature completely repealed the old statutes in 1986 and adopted the current Election Code, including §§ 23-15-921 and 23-15-923. Election Code § 23-15-1111 states "All election laws in conflict with the provisions of this chapter are hereby repealed." The repeal of the former election statutes strips *Kellum v. Johnson* of any precedential authority. *Southern Pacific Transportation Co. v. Fox*, 609 So.2d 357, 362 (Miss. 1992).

Mississippi Supreme Court case law confirms the conclusion that *Kellum v. Johnson* does not apply to the current Election Code. In *City of Natchez v. Sullivan*, 612 So.2d 1087 (Miss. 1992), the Supreme Court held that, "the omission of language from a similar provision on a similar subject indicates that the Legislature had a different intent in enacting the provisions, which it manifested by the omission of the language." *Id.* at 1089. This holding clearly addresses the state of the current Election Code and would implicitly overrule *Kellum v. Johnson* if the repeal of the former statutes had not already stripped *Kellum* of its precedential authority.

The *City of Natchez v. Sullivan* holding accurately describes the Legislature's approach to regulating election contests under the Election Code. The omission of a set time period from § 23-15-923 was intentional and consistent with the omission of a set time period from § 23-15-

927[5] governing the filing of petitions for judicial review. It is also consistent with an absence of any time requirement imposed on the proceedings of the state executive committees. The omission of a set time period from § 23-15-923 was a recognition by the Legislature that while some period of time was needed for a candidate in multi-county elections to examine records and prepare his election-contest complaint, it was not necessary for the Legislature to impose a limit on that time period.

Furthermore, the holding of *City of Natchez v. Sullivan* states a principle of statutory construction that harmonizes various sections of the current Election Code. As noted above, under the current Election Code, state executive committees have 10 days within which to certify results of state-wide primary elections to the Secretary of State. A candidate has under § 23-15-911 a 12-day period to examine election records, but that period does not begin until after the state executive committee has certified the result. Thus, the candidate must wait 10 days after primary election to begin, and then the 12-day period to examine the multiple county election records does not end until 22 days after the subject primary election.

If the Court were to adopt Respondent's argument and apply *Kellum v. Johnson*, it would create an conflict in the statutory scheme. It would impose a requirement that candidates in multi-county or state-wide election contests file their complaint with the state executive committee before the end of their allowed 12-day period to examine election records. In that setting, the candidate would be required to file his complaint 2 days before the end of the examination period. In the real factual circumstances of the instant case, Petitioner would have been required to file 5 days before the end of his 12-day examination period - and for 3 of those

[5] Before it was amended in 2012. After the 2012 amendment, a petitioner does not have to wait for the conclusion of the state executive committee proceedings to file his petition for judicial review in circuit court.

days, Petitioner's loss would have been caused by the state executive committee's failure to meet the requirements of the Election Code. If *Kellum* were applied, it would even be possible for a state executive committee to further reduce a candidate's examination time by delaying its certification. The conflict created by application of *Kellum* would also be contrary to the intent of the Legislature as expressed for single county election contests. As described above, the time frames set forth in the Code sections applicable to single county election contests indicate that the Legislature allowed time for a candidate to prepare his election -contest complaint after the 12-day examination period had expired. The holding of *City of Natchez v. Sullivan* teaches that the Legislature's omission of a time requirement from § 23-15-923 indicates a legislative intent that a candidate in a multi-county election contest similarly have some reasonable time (intentionally not specified) after his 12-day examination period within which to file his election-contest complaint with the state executive committee.

Application of *Kellum v. Johnson* to the current Election Code would actually contradict the principles of statutory construction that *Kellum* embraced. The *Kellum* decision states that it was applying the following principles:

> [D]ifferent parts of a statute reflect light upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act. Hence, a statute should be construed in its entirety, and as a whole.
> . . .
> All parts of the act should be considered, compared, and construed together.
> . . .
>
> Statutes should, if possible, be given a construction which will produce reasonable results, and not uncertainty and confusion.
> . . .
> In construing statutes, the courts should not convict the Legislature of unaccountable capriciousness.

237 Miss. at 585-86, 115 So.2d at 149-50. These are long established and often acknowledged principles of statutory construction. See, for example, *Adams v. Yazoo & M.V.R. Co.*, 75 Miss. 275, 22 So. 824 (1897)(A statute must receive such a construction that it will, if possible, make all of its parts harmonize with each other and render them consistent with its purpose and scope.)

Were this court to impose the same time requirement for multi-county contests that the Legislature adopted for single-county contests, it would convict (or more accurately accuse) the Legislature of "unaccountable capriciousness." Such imposition would create an irreconcilable conflict in the statutory scheme where none existed as adopted by the Legislature. It would be confusing to set a time period of 22 days after a primary election within which a candidate may review election records for the purpose of determining whether to file an election contest (the first 10 of which a candidate must wait for the state executive committee to certify the results of an election), but then require the candidate to prepare and file his election dispute complaint within 20 days after the primary election - 2 days before the end of the period allowed for an initial examination of election records.

It is clear from a broader look at the system adopted in the current Election Code that the Legislature is not guilty of such a charge. The different parts of the current Election Code <u>do</u> reflect light upon each other and should be read as a whole. The omission of a specific time requirement from § 23-15-923, in light of a specific time requirement in § 23-15-921, indicates that the Legislature intended to leave unspecified the amount of time a candidate in a multi-county contest has to file his complaint with the state executive committee. It would be obvious to a casual observer (and certainly obvious to the State's legislators) that a candidate for an office covering a single county would not require as much time to discover facts and prepare a complaint as a candidate for a state-wide office. The latter, to prepare his complaint, must

examine election returns for up to 82 counties and then synthesize that examination into an election-contest complaint to be filed with the state executive committee.

PETITIONER'S PROMPT PERFORMANCE

Even though no time limit is specified in § 23-15-923, other elements of the Election Code drive a candidate to act promptly in the circumstances. *Barbour v. Gunn*, 890 So.2d 843 (Miss. 2004) provides a good example. Gunn brought an election-contest complaint before the SREC. The Election Code did not impose upon the SREC a specific time period within which they must hear and decide an election contest. However, when the SREC failed to act on Gunn's complaint with reasonable promptness, Gunn filed a petition for judicial review. The Supreme Court said that the Election Code required the SREC to act with reasonable promptness.

In the present case, Petitioner acted with notable promptitude. He attempted to begin his examination of election records in all of Mississippi's 82 counties on the very day that the SREC said it was going to certify the results. He was thwarted in that effort by denials of access to records. Notwithstanding the obstructions, most of the election records were reviewed within twelve (12) days after the SREC's certification. Then, only 13 days after the SREC's amended certification, the examined county election records had been assimilated and Petitioner's complaint was filed with the SREC. This case is a real-life example why the Legislature did not include a specific number of days within which a candidate for state-wide office is required to file a complaint with a state executive committee. Petitioner accomplished this entire effort (record examination and document preparation) for approximately 82 counties in only 25 days.

CONCLUSIONS

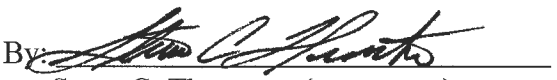
The Mississippi Legislature repealed all prior election laws in 1986 and enacted the current Mississippi Election Code, including Code sections 23-15-921 and 23-15-923. These two sections are conceptually comparable to the 1959 code sections interpreted by *Kellum v. Johnson*, but material differences between the old and the new statutes indicate that the new Election Code sections are not re-enactments of the former Corrupt Practices Act sections. Therefore *Kellum v. Johnson*'s interpretation of the Corrupt Practices Act statutes does not apply or control the interpretation of the newly enacted sections of the Election Code.

The principle of statutory construction articulated by the *City of Natchez v. Sullivan* controls. The Legislature by its omission of a time requirement from § 23-15-923 intended to leave an unspecified, though reasonable, amount of time for a candidate in a multi-county contest to file his complaint with the state executive committee. Petitioner in this matter acted with diligence and promptness to examine election records in nearly 82 counties and assimilate those records into his election-contest complaint filed with the SREC.

WHEREFORE PREMISES CONSIDERED, Respondent's motion to dismiss should be denied.

Respectfully submitted this 25th day of August 2014.

CHRIS McDANIEL

By: 

Steve C. Thornton (MSB #9216)
Mitchell H. Tyner, Sr. (MSB # 8169)

HIS ATTORNEYS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS was sent this date via electronic mail to:

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DATED this 25th day of August, 2014.

Steve C. Thornton