STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	Civil Action No. 2008-CP-21-1243

Frank E. Willis,	)	
	)	
Appellant,	)	
	)	
VS	)	**ORDER**
	)	
Stephen J. Wukela, and the South Carolina Democratic Party Board of State Canvassers of Municipal Primaries,	)	
	)	
Appellees.	)	

PROCEDURAL HISTORY

This matter comes before this Court upon the Notice of Appeal of Frank E. Willis from the June 21, 2008 decision of the South Carolina Democratic Party Board of State Canvassers of Municipal Primaries upholding the City of Florence Election Commission's certification of Stephen J. Wukela as Democratic Party Nominee for Mayor in the November 4, 2008 Municipal General Election. The Appeal was filed with this Court on June 26, 2008 along with a copy of the following:

1. Protest dated June 13, 2008 to Ruth Smith, Putative Chair of the Florence Municipal Democratic Party, *et al.*;

2. Request for Motion to Reconsider dated June 14, 2008 to James W. Tanner, Jr., Chair of the Florence County Election Commission, *et al.*;

3. Amended Protest dated June 18, 2008 before the Florence Municipal Democratic Party, *et al.* of Frank Willis, Protestant, with accompanying Exhibits;

4. Return to Protest of Stephen J. Wukela dated June 20, 2008 with accompanying Exhibits;

5. Bench Memo of Key Election Cases and Law by Protestant Willis dated June 21, 2008;

6. Transcript of hearing conducted before the South Carolina Democratic Party Board of State Canvassers and Municipal Primaries dated June 21, 2008 and accompanying Exhibits.

Also filed with this Court on July 2, 2008 was a Certificate of Service of George Jebaily certifying that on June 14, 2008 Stephen J. Wukela was served by fax a copy of the above Protest dated June 13, 2008, the Motion to Recuse, Disqualify or Refer dated June 13, 2008, and the above Request for Motion to Reconsider dated June 14, 2008.

Also incorporated into the Record of the case was the Return of Stephen J. Wukela to the Appeal of Frank Willis, along with 18 attachments, dated and filed on June 30, 2008, along with a Certificate of Service to W. E. Nettles, George Jebaily, and James B. Richardson, Jr., the latter two being attorneys for Appellant Frank E. Willis. The Reply of Frank Willis dated July 2, 2008 was also entered into the Record.

In addition, after the filing of the Appeal of Frank E. Willis but before the hearing on July 2, 2008, a faxed letter to the undersigned from James B. Richardson Jr. dated July 1, 2008 was entered into the Record. A second letter, which was misdated as July 1, 2008, was e-mailed to the undersigned on July 2, 2008 after the hearing of this Appeal.

At the commencement of the hearing by agreement of counsel two June 10, 2008 Municipal Democratic Primary Ballots for the City of Florence were put under seal so as to maintain secrecy of those Ballots. Two other documents; namely, the envelope of the challenged Ballot of voter Fanika R. George and the envelope of the Provisional Ballot of voter Kim McDowell containing change of address information, were made Exhibits in addition to the above set out voluminous testimony and Exhibits that were presented at the hearing before the

South Carolina Democratic Party Board of State Canvassers of Municipal Primaries (hereinafter referred to as "Board of State Canvassers") on June 21, 2008.

A hearing lasting approximately two hours was held before the undersigned in the Florence County Circuit Court in the 10th Floor Courtroom, to which all parties agreed that they had had adequate notice and during which all parties were given ample opportunity to present oral arguments. The hearing was concluded and the matter taken under advisement at that time so that the Court could review the numerous Briefs and voluminous Record.

STATEMENT OF THE CASE

This matter arose out of a Municipal Democratic Party Primary conducted on June 10, 2008 pursuant to § 5-15-70. By City Ordinance #2008-4 dated February 11, 2008, Frank E. Willis, the Mayor of the City of Florence, hereinafter referred to as "Incumbent Mayor," along with a majority of other city council members of the City of Florence, extended the term of his office for approximately one and a half years in order to synchronize the municipal elections for the City of Florence council seats with the federal, state, and local Democratic primaries and 2008 General Election. Whether or not sitting members of a legislative body can extend their own terms of office without an intervening general election was not challenged.

Realizing that neither the City of Florence Municipal Democratic Party nor the Republican Party had the financial resources necessary to conduct a citywide municipal election, the City of Florence passed Ordinance #2008-4 setting out the method by which the 2008 General Election for the Mayor and two City Council members at-large would be conducted and the method by which political parties could nominate candidates to those respective offices. It specifically directed that the municipal election be conducted pursuant to §5-15-70, that a Municipal Election Commission be appointed pursuant to §5-15-90, and that pursuant to

§5-15-145 the Florence County Election Commission would be imbued with the authority to physically conduct the election. The Municipal Election Commission would certify the results and address any contests of the results, pursuant to § 5-15-80 within two days after declaration of the results of the election. Subsequent appeals from the Municipal Election Commission would thereafter be taken to the Municipal Party Chairman pursuant to §5-15-80.

Subsequently the County Election Commission entered into an agreement with the City Election Commission to provide polling places, ballots, poll managers, poll workers, and to conduct a party primary municipal election simultaneously with the federal, state, and county elections. In other words, in the case at bar, the County Election Commission would conduct a federal, state, and local Democratic Primary on June 10, 2008 pursuant to §7-13-15. Simultaneously, pursuant to the agreement with the Florence Municipal Election Commission, the Florence County Election Commission will physically conduct a Democratic Municipal Primary for the City of Florence pursuant to §5-15-70.

As a result, the June 10, 2008 federal, state, and local Democratic primaries as set out in §7-13-15 were conducted at the same time and place and using the same personnel as the Florence Municipal Primary being conducted pursuant to §5-15-60(3). The County Election Commission notified the participants that individuals who voted in the Republican primary under §7-13-15 would be allowed to vote in the Municipal Democratic primary being conducted under §5-15-60(3).

Title 7-13-1040 specifically outlaws the practice of an individual voting in two different political party primaries on the same day, in that "No person shall be entitled to vote in more than one party primary election held the same day."

The Incumbent Mayor argues that the procedure of allowing voters to cast ballots in the Federal, State and County Republican Primary on June 10, 2008 as well as the Democratic Municipal Primary on the same day is allowed in spite of the clear prohibition in § 7-13-1040. In support of this contention, the Incumbent Mayor cites the U. S. District Court case of Gordon v. City of Charleston, 335 F. Supp. 166 (D.SC 1971). On the contrary, Gordan does not stand for that proposition. In Gordon a candidate challenged the constitutionality of § 23-400.71 of the 1962 Code. That provision contained a voter's oath swearing that the voter had not voted before "at this primary election or in any other party's primary election ... held this year." The District Court found the one year disqualification unconstitutional, but cited, with approval, the "same day" limitation in § 400.79, which is now codified, unchanged, at § 7-13-1040. Incidentally, the Legislature amended § 400.71 in 1972 as § 7-13-1010, removing the one year disqualification.

Notwithstanding the fact that the Republican crossovers would be allowed in violation of § 7-13-1040, the State Democratic Party allowed that method to be used. Relying mainly on §7-17-30, which provides that protests to the state and county elections are made differently from how protests under §5-15-80 for municipal primary elections are made. The State Democratic Party and the State Republican Party did not contest the County Election Commission's decision that a Republican who voted in the Republican federal, state, and county primaries on June 10, 2008 pursuant to §7-13-15 could also vote on the same day at the same polling place in the Democratic Party Municipal Primary elections held pursuant to § 5-15-70.

Said differently, the State Democratic Party did not challenge the Election Commission's decision to allow voters to cast ballots in the Republican Federal, State, and County Primary and the Democratic Municipal Primary on the same day because they regarded the two as two separate elections conducted under different rules.

Neither of the candidates before the Court protested this distinction of the rules governing Democratic Municipal Primaries from all other state and local Democratic primaries. The election proceeded on that basis. This distinction between the rules under which the City Democratic Primary was conducted and the rules under which other elections are conducted was prophetic and its importance will become evident herein.

Ironically, the same §7-13-810 which governs the challenging of ballots, also recognizes a distinction between protests of state and county elections pursuant to §7-17-30, and protests of municipal primary elections. Title 7-13-810, states:

> ...All challenges must be made before the time a voter deposits a paper ballot in a ballot box or casts his vote in a voting machine, and no challenge may be considered after that time. However, challenges may be made at any time before the opening of return-addressed envelopes and the removal of "Ballot Herein" envelopes from them as to absentee voters. Nothing contained from them affects the right of an elector or qualified watcher to challenge the vote of a person which is fraudulent or when the challenge is based on evidence discovered after the vote is cast. **A candidate may protest an election in which he is a candidate pursuant to §7-17-30 when the protest is based in whole or in part on evidence discovered after the election. This evidence may include, but is not limited to, after-discovered evidence of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.** (emphasis added)

Accordingly, Title 7-17-30, which distinguishes the Florence Municipal Democratic Party from the South Carolina State Democratic Party for the purpose of crossover voting, also distinguishes the Florence Municipal Democratic Party and the South Carolina State Democratic Party for the purpose of allowing the use of "after-discovered evidence" in the processing of a protested vote. That statutory exception to Hill v. South Carolina Election Commission, 304 S.C. 150, 403 S.E.2d 309, applies only to protests made pursuant to §7-17-30, which directs that:

> The county boards shall decide all cases under protest or contest that arise in their respective counties in the case of county officers and less than county offices, **except for primaries and municipal elections**.... (emphasis added)

The theory being cross-over voting was not a statutory violation of §7-13-1040 is based on the premise that the Municipal Democratic Party and the Municipal Republican Party were not included in the definition of political parties to be identical to the State Democratic Party and the State Republican party.

On June 10, 2008, a Democratic Primary was held in the City of Florence, South Carolina, to determine the Democratic candidate for the Office of Mayor of the City of Florence, among other City offices. By virtue of Ordinance No. 2008-04 passed by the Florence City Council on February 11, 2008, the election was conducted by the Florence County Election Commission. (Return of Stephen J. Wukela dated 6/30/08, Exh. 1). The only two candidates in that City Democratic Primary for Office of Mayor were Incumbent Frank E. Willis (hereinafter "Incumbent Mayor") and Challenger Stephen J. Wukela (hereinafter "Certified Democratic Nominee").

After the close of the polls on June 10, 2008, the Commission announced Stephen J. Wukela the unofficial winner by a vote of 1468 votes for Wukela to 1467 votes for Willis. That evening of June 10, 2008, the Commission also announced that there were outstanding and uncounted provisional ballots and that a hearing would be held on Thursday, June 12, 2008, to consider those ballots. A hearing was held on June 12, 2008, before the Florence County Board of Canvassers to consider those provisional ballots and certify the election results. No protests were filed by the Incumbent Mayor up to that point.

At the opening of the hearing, Florence County Board of Canvassers acknowledged that the members of the Florence Municipal Election Commission, including Chairman Dr. Joseph Stukes, were present. The Municipal Election Commission acknowledged that it would be bound by all decisions of the Florence County Board of Canvassers as to the certification of the results of the election conducted by the Florence County Election Commission.

At the conclusion of the hearing, the Florence County Board of Canvassers voted unanimously to certify as official the results as follows:

1469 votes to Stephen J. Wukela, and

1468 votes to Frank Willis.

That vote certified by the Board of Canvassers on June 12, 2008, was not objected to at any point by the Incumbent Mayor before the vote to certify it. Moreover, that vote now included two provisional ballots that were not included on the results on June 10, 2008: One Provisional vote for Frank Willis and One Provisional vote for Stephen J. Wukela. (Return of Stephen J. Wukela dated 6/30/08, Exh. 2).

Given that the election was determined by a margin of less than one percent of the vote, a mandatory recount was held on Monday, June 16, 2008. After that recount, the Board of Canvassers announced that the results were identical to those of the vote certified on June 12, 2008, i.e. Stephen J. Wukela received 1469 votes and Frank Willis received 1468 votes.

No written protest was filed within two days of the day of the declaration of the election results on June 10, 2008 pursuant to § 5-15-80 or within 48 hours of the "closing of the polls" on June 10, 2008 pursuant to § 5-15-130.

Finally, on June 13, 2008, Candidate Frank Willis filed a Protest with the Florence Municipal Democratic Party along with a Motion to Recuse, Disqualify or Refer requesting that the South Carolina Democratic Party accept this Protest for its direct consideration.

Thereafter, on June 18, 2008 at 8:20 P.M., Ms. Ruth Smith, Chairman of the Florence Municipal Democratic Party, requested that the State Party hear this matter directly. (Return of Stephen J. Wukela dated 6/30/08, Exh. 10,) The City of Florence Democratic Party therein specifically set out "The transfer of this responsibility does not in any way extend time for filing protests of the June 10, 2008 City of Florence Democratic Primary."

Subsequently, the South Carolina Democratic Party directed the South Carolina Democratic Party Board of State Canvassers of Municipal Primaries to convene on Saturday, June 21, 2008, at 2:00 PM. The Board of State Canvassers conducted an extensive eight hour hearing resulting in the South Carolina Democratic Party's decision to uphold the certification of the election results which declared Stephen J. Wukela the Democratic Party Nominee for Mayor of Florence in the 2008 General Election. This appeal followed.

STANDARD OF REVIEW

Prior to 1992 political primaries in the State of South Carolina were conducted under the auspices of the right of free association of a political party to nominate a candidate for the General Election. The General Election, of course, was conducted by and paid for by the State of South Carolina through the State Election Commission and the respective County Election Commissions. The political primaries, however, were conducted by and paid for by the respective political parties under the rules of that party.

> Since a primary election is part of process by which political party selects its nominees for general election, determination of contest between candidates in the primary is essentially and fundamentally

> a party matter and is to be resolved by the tribunals created by and within the parties for such purpose (Berry v. Spigner, 84 S.E.2d 381, 226 S.C. 183)
>
> * * *
>
> In determination of contest between primary election candidates, political party tribunals have function of weighing evidence, determining, as would a jury, credence to be accorded witnesses' testimony, and evaluating effect of irregularities or illegalities thus disclosed upon the election result. Berry v. Spigner, 84 S.E.2d 381, 226 S.C. 183)
>
> * * *
>
> ...it was within discretion of committee as to whether it should have appointed an official stenographer to report the proceedings, and also as to whether testimony should have been given by affidavits or by witnesses who were present in person. (Laney v. Baskin, 22 S.E.2d 722, 201 S.C. 246)
>
> * * *
>
> ...it was within discretion of county committee to determine whether protestants, in presence of committee, should have been permitted to examine ballot boxes, and ballots and records therein contained. (Laney v. Baskin, 22 S.E.2d 722, 201 S.C. 246)

It goes without saying that a political party can select its nominee for a general election any way that it chooses. Obviously, the Democratic Party cannot discriminate against individuals because of their race, religion, national origin, or any other constitutionally protected right, but as a general principal of law, the South Carolina Democratic Party can pick it nominees by lottery if that is what its rules provided for.

Review by this Court of the action of the State Democratic Executive Committee is confined to the correction of errors of law and does not extend to consideration of the facts upon which that committee acted, except to ascertain whether the action of the committee was wholly unsupported by evidence. Young v. Sapp, 167 S.C. 364, 166 S.E. 354; May v. Wilson, 199 S.C. 354, 19 S.E.2d 467; Smoak v. Rhodes, 201 S.C. 237, 22 S.E.2d 685; Laney v. Baskin, 201 S.C.

246, 22 S.E.2d 722; Berry v. A. Fletcher Spigner, Jr., et al, 226 S.C. 183, 84 S.E.2d 381 (S.C. 1954).

The law will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. Sims v. Ham, 275 S.C. 369, 271 S.E.2d 316 (1980).

Every reasonable presumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it. Fielding v. South Carolina Election Commission, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991).

A primary election being part of a process by which a political party selects its nominees for the general election, determination of contests between candidates in the primary is essentially and fundamentally a party matter, to be resolved by the tribunals created by and within the party for that purpose. It is their function to weigh the evidence presented in respect of the contest, to determine, as would a jury, the credence to be accorded the testimony of each witness, and to evaluate the effect of the irregularities or illegalities thus disclosed upon the result of the election; and their conclusions are reviewable by the courts only to the limited extent before stated, i.e. confined to the correction of errors of law, and does not extend to consideration of the facts upon which that committee acted, except to ascertain whether the action of the committee was wholly unsupported by evidence. Young v. Sapp, 167 S.C. 364, 166 S.E. 354; May v. Wilson, 199 S.C. 354, 19 S.E.2d 467; Smoak v. Rhodes, 201 S.C. 237, 22 S.E.2d 685; Laney v. Baskin, 201 S.C. 246, 22 S.E.2d 722; Berry v. A. Fletcher Spigner, Jr., et al, 226 S.C. 183, 84 S.E.2d 381 (S.C. 1954).

PROTESTANT'S ISSUES

In his Protest of June 13, 2008, the Incumbent Mayor sets out a number of grounds of protest, to-wit:

1. Complained "Acknowledged" the Procedural Error by Florence County Election Commission During Canvas of Provisional Ballots.

The Incumbent Mayor claims that an illegal ballot was erroneously counted by the Florence County Election Commission during its canvassing of provisional ballots on June 12, 2008. The Certified Democratic Nominee disagrees that this ballot was illegal and disagrees that it was erroneously counted.

a. The Disputed Ballot was Counted in the Presence of the Opponent's Counsel Without Objection and was Certified by Unanimous Vote of the Board of Canvassers Without Objection.

The Incumbent Mayor argues:

> The Commission voted to count the "fail-safe" ballot of a voter cast in a federal election. The voter had recently moved from Lake City, South Carolina, to Florence, South Carolina, and admittedly was not eligible to vote in the Florence City Democratic Primary. However, when the sealed envelope containing the "fail-safe" federal ballot was unsealed, in the process of counting those ballots accepted by the Commission following the conclusion of the hearing, the envelope contained a marked City Election ballot that was counted in with the other ballots despite the earlier final vote of the Commission limiting the eligibility of the voter to vote only using the "fail-safe" federal ballot.
> (Protest, pp. 5-6).

I find that there is ample evidence in the record considered by the Board of State Canvassers to support their denial of this ground of protest. The evidence of the record reflects that Incumbent Mayor's counsel was present during the counting and made no objection. Further, Incumbent Mayor's counsel was present when the vote was taken by the County Board

of Canvassers to certify the results having been counted and made no objection. Finally, having certified the results after counting and voting in the presence of Incumbent Mayor's counsel without objection, the County Board of Canvassers properly refused to reconsider their certification.

b. The Provisional Ballot Disputed by Incumbent Mayor was Legal and Properly Counted.

The Incumbent Mayor argues: "The voter had recently moved from Lake City, South Carolina, to Florence, South Carolina, and admittedly was not eligible to vote in the Florence City Democratic Primary." (Protest, p. 5)(emphasis added).

I find that there is ample evidence in the record considered by the Board of State Canvassers to support their denial of this ground of protest that the voter was not eligible to vote.

The ballot in question was cast by Officer Kim McDowell of the City of Florence Police Department. Officer McDowell swore by Affidavit (Return of Stephen J. Wukela dated 6/30/08, Exh. 7) as follows:

Officer McDowell registered to vote on March 31, 2000, while a resident of Lake City, South Carolina, in Florence County. She was a registered voter well before the thirty day deadline for registering set out in South Carolina Code §7-5-220. On April 10, 2007, Officer McDowell moved to 1300 Valparaiso Drive #014, within the City of Florence, South Carolina, and also within Precinct Florence 7. Officer McDowell had lived in the City of Florence for more than thirty days before the election on June 10, 2008, as required by South Carolina Code §7-5-610 which sets out the eligibility requirements for voting in Municipal elections. (Return of Stephen J. Wukela dated 6/30/08, Exh.5 (lease); Exh. 6(utility bills); Exh. 7(Affidavit)). That

is simply all that is required for Officer McDowell to have been eligible to vote in the City Democratic Primary on June 10, 2008.

While it is true that Officer McDowell had failed, prior to the election day, to notify the Election Commission of the change in her address from Lake City to the City of Florence, that fact does not disqualify her from eligibility to vote in the City Democratic Party on June 10, 2008. Instead, South Carolina Code §7-5-440 addresses directly a voter's failure to notify the County Board of Registration of a change of address. It specifically provides:

> §7-5-440. Failure to notify county board of voter registration of change in address.
>
> * * *
>
> (B) A qualified elector who has moved from an address in one precinct to an address in another precinct within the same county, ... and who has failed to notify the county board of voter registration of the change of address before the date of an election, at the option of the elector:
>
> (1) must be permitted to correct the voting records and vote provisional ballots containing only the races for federal, statewide, countywide, and municipalwide offices pursuant to the provisions of Section 7-13-830 at the elector's former polling place, upon oral or written affirmation by the elector of the new address before an election official at that polling place; or
>
> (2) must be permitted to correct the voting records and vote at a central location located at the main office of the county board of voter registration in his new county of residence where a list of eligible voters is maintained, upon written affirmation by the elector of the new address on a standard form provided at the central location.
>
> (S.C. Code Ann. §7-5-440, 1976 as amended).

Officer McDowell contacted the Election Commission on June 10, 2008, through her friend, Pat Gibson-Hye. Ms. Hye notified the Commission of Officer McDowell's current address and the address on her voter registration, and asked them whether McDowell was eligible to vote in the City Democratic Primary and how to do so. She was advised by the Election Commission that McDowell was eligible to vote in the City Primary and was directed

by the Election Commission to instruct Officer McDowell to appear at Florence Precinct 7, to provide the Poll Manager with her updated address information, and to cast a ballot at Florence Precinct 7. McDowell did so. She provided the updated address information to the Poll Manager who received the information and provided her provisional ballots for both the County/Statewide and Municipal Primaries. She voted those two paper provisional ballots and the Poll Manager placed those ballots correctly in a sealed envelope marked "provisional ballots". Her ballots were counted by the County Board of Canvassers on June 12, 2008. They were counted properly.

"The misconduct of election officers or irregularities on their part will not justify rejecting the whole vote of a precinct where it does not appear that the result was affected thereby, even though the circumstances may be such as to subject the officers to punishment ***. Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result." 29 C.J.S., Elections, §214, pp. 308, 309; Cf. Smith v. Saye, 130 S.C. 20, 125 S.E. 269. Berry v. A. Fletcher Spigner, Jr., et al, 226 S.C. 183, 84 S.E.2d 381 (S.C. 1954).

A finding by the Board of State Canvassers that Officer McDowell was eligible to vote in the City Democratic Primary and she did so, is not wholly unsupported by the evidence.[1]

2. Claimed Non-qualified Voters.

The Incumbent Mayor argues:

[1]The Incumbent Mayor attempts to connect Officer McDowell's provisional ballot with the provisional ballot cast for Certified Democratic Nominee and counted by the County Board of Canvassers on June 12, 2008. It is, of course, impossible to know who Officer McDowell voted for as it was a secret ballot. As this Court is aware, the Courts and the Democratic Party have long protected the sanctity of the secret ballot.

> Protestant has discovered that at least two persons voted in this primary election who did not, in fact, reside in the precinct in which they voted, and/or did not, in fact, reside in the City of Florence.
>
> (Protest p. 6).

These allegations do not meet South Carolina Code §5-15-80's requirement of notice of the grounds of protest. They do not provide the Certified Democratic Nominee facts sufficient to allow him to respond to the protest and, instead, allege mere conclusions of the Incumbent Mayor. In fact, these allegations are so general and unspecific they do not allow Certified Democratic Nominee to prepare to meet them in any meaningful way. In fact, a finding by the Board of State Canvassers that this allegation was designed as a catch-all, is not wholly unsupported by the evidence, particularly given its "and/or", in the alternative, nature. See Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (S.C. 2007).

a. Incumbent Mayor's Putative Amendment of Protest

The Primary's Municipal Election at issue was held on Tuesday, June 10, 2008. South Carolina Code §5-15-80, sets out the procedure by which a candidate may protest the results of a political party's primary for Municipal office such as the instant election. § 5-15-80 provides:

> ... Protests and contests shall be filed in writing with the municipal party chairman within **two days after the day of the declaration of the results of the election** and the municipal party executive committee shall determine such protests within five days after the filing thereof. ...
> S.C. Code Ann. §5-15-80 (1976)(emphasis added).

After the close of the polls on June 10, 2008, the Commission announced Stephen J. Wukela the unofficial winner by a vote of 1468 votes for Wukela to 1467 votes for Willis. That

evening of June 10, 2008, the Commission also announced that there were outstanding and uncounted provisional ballots and that a hearing would be held on Thursday, June 12, 2008, to consider those ballots.

A hearing was held before the Florence County Board of Canvassers on Thursday, June 12, 2008, at which time the Board declared the results as follows:

1469 for Stephen J. Wukela and

1468 for Frank E. Willis

The Incumbent Mayor filed a protest with the Municipal Party Chairman on June 13, 2008.[2] Thereafter, however, on June 18, 2008, the Incumbent Mayor filed a putative Amended Protest arguing additional grounds. The Certified Democratic Nominee argues that the results were "declared" on election night, June 10, 2008, and that the June 13, 2008 Protest was due on June 12, 2008 and therefore filed out of time. However, even if the Board of State Canvassers found that the results were "declared" on June 12, 2008 after the hearing on provisional ballots, they could have also properly found that this amendment is improper and was clearly filed beyond the deadline set out in §5-15-80, i.e., beyond two days of the declaration of the results.

The language of §5-15-80 is clear and requires the filing of protests "within two days after the day of the declaration of the results of the election." In fact, the statute does not even use the term "certification" although the vote was certified on June 12, 2008. The statute uses the term "declaration." Further, § 5-15-130 specifically sets out that the protest should be filed "within forty-eight hours after the closing of the polls...." Therefore, a refusal by the Board of

[2]Of note, the Municipal party transferred its responsibilities to the South Carolina Democratic Board of State Canvassers of Municipal primaries. The Municipal Party specifically indicated, however: "The transfer of this responsibility does not in any way extend time for filing protests of the June 10, 2008 City of Florence Democratic Primary." (Exhibit 10).

State Canvassers to consider the Incumbent Mayor's putative Amended Protest as improper and untimely would not have been wholly unsupported by the evidence.

b. Newly Claimed Evidence of Non-qualified Voters

The Incumbent Mayor's Amended Protest of June 18, 2008 contained for the first time the Incumbent Mayor's alleged newly discovered evidence of non-qualified voters.

1. The Evidence is Not Truly "After-discovered" Evidence

The Incumbent Mayor argues that he has discovered new evidence of individuals voting in City elections who were not residents of the City and whose names were not on the rolls of City voters at the Precinct at which they voted, but were recently written in at the end of the City Voters List at those Precincts. Even assuming this is true, is this evidence actually newly discovered? Voter Registration Lists were available to both candidates well before election day. Moreover, the candidates were allowed and, in fact, had poll watchers in the Precincts observing the entire election process. Such watchers were certainly aware of the voting process at the Precincts in question and certainly could have challenged those procedures at any point. They did not. Therefore, a finding by the Board of State Canvassers that this alleged evidence was in no way newly discovered is not wholly unsupported by the evidence in the record.

The primary election for Mayor of the City of Florence was hotly contested as evidenced by the single vote majority win of Stephen J. Wukela, the certified Democratic nominee of the June 10, 2008 Mayoral election. The record before this Court demonstrates that the Board of State Canvassers considered extensive testimony and documentary evidence. Notwithstanding the voluminous record on appeal according to Mr. Steve Love, the acting Director of the

Florence County Election Commission, this was one of the most error free elections that had been conducted by the Florence County Election Commission.

The Incumbent Mayor, of course, was at least partially responsible for moving the Municipal Democratic Primary into the sequence of the federal, state, and local Democratic primaries. The Incumbent Mayor obviously understood that Republicans who were voting in the federal, state, and local primaries would be allowed to cross over in violation of state law and vote in the Democratic Municipal Primary.

The Incumbent Mayor understood that this would be confusing and that the Election Commission poll workers had never conducted such an election before and it would require two sets of registration books, two sets of Declaration of Party Loyalty, which on their face were contradictory. Nonetheless, Incumbent Mayor voiced no protest or objection.

According to the voluminous "Amended Protest," rumors were rampant during the day of the election that individuals were wrongfully being turned away from the polls, that people were voting who were not entitled to vote, that poll workers were giving erroneous and misleading instructions as to Declaration of Party Loyalty. Poll watchers permeated the election polls. The Board of State Canvassers could have found based on the evidence that the Incumbent Mayor was content that the confusion and the rumors and the reports could inure to his benefit and he sat silent.

Steve Love, who was conducting the election as Acting Director of the Florence County Election Commission, noted that this was one of the most error free elections that he had ever seen. There were only two provisional ballots voted and that he received no complaints on election day about any irregularities. Mr. Love testified,

> Q. Okay. What's the importance of a voter getting a provisional ballot? If the poll worker says, I don't believe

you can vote, what's the importance of the voter demanding a provisional ballot?

A. It's to give them an opportunity to vote, and then we'll have to review why that person was not allowed to vote and whether that vote should be counted or not.

Q. Okay. Give everybody a chance to bring in their evidence to show why the vote should be counted. And nobody asked for that opportunity or filed the provisional ballot except Kim McDowell in her ballot and Ms. George when we challenged her vote, right?

A. In the city.

Q. Yeah, in the city. Okay. Okay. At one point in time after the election – after the recount, did you make a statement that this was as close to an error free election as you've seen?

A. Overall, yes.

Q. And why did you say that?

A. Because we had that few of provisional ballots countywide.

Q. Okay. Was there any attempt made by your office to limit the provisional ballots or –

A. No.

Q. Okay. Was there any fraudulent attempt to deny people who were registered to vote in the city from voting in the city?

A. No, sir.

Q. Was there any attempt – fraudulent attempt to have people who were not registered in the city to vote in the city?

A. No, sir.

Q. Okay. Do you have any inclination or any feeling that anybody involved in this process from the – from the poll worker to the poll manager to the watchers, anybody attempted any kind of fraudulent act in this election?

A. I won't call it fraudulent, no.

Q. Okay. All right. Anything they should go to jail for?

A. Close, but not –

Q. All right. Well, what is that?

A. The way that some poll watchers carried themselves about doing their duty.

Q. Poll watchers?

A. Poll watchers.

Q. A poll watcher is supposed to watch the poll, right?

A. Uh-huh.

Q. Is supposed to ensure that his candidate – he represents his candidate at the poll; is that right?

A. Or the party or whatever.

Q. Or the party. And he's supposed to challenge ballots if he thinks there's improper activity going on?

A. True.

Q. As a matter of fact, the candidate has as much responsibility to ensure the election is conducted fairly as you do; is that correct?

A. Well, maybe the races he's running.

(Hearing Tr. 06/21/08, p. 252, line 12 – p. 254, line 25)

* * *

Q. The best time to challenge a person as to whether or not they're eligible to vote is before the vote is cast; is that right?

A. That is the only because if you go to the machine and vote, there's no challenge after that point in time because you've got to do it on a paper ballot.

Q. Do you – When Mr. Lookadoo was testifying – between the two of you do you have any idea how many mistakes exists in your database right now, the municipal election database of the city council?

A. if you could tell me all the addresses in the city limits, I can get that for you, but right now there's no – I have no idea. I – I don't look at it.

Q. Okay. And you wouldn't be looking at it right now if this race wasn't so close?

A. No. when I get a notification of the thing, I get the girls to update it, but don't ask me how many of them are improper up to now. We've got to wait and find out.

Q. Okay. Now, I've got one more question that I really don't understand. These people that were apparently not – not residents of the City of Florence that were handwritten in on the bottom of the poll list, somebody called in to

Election Central to see if they would vote in the City of Florence.

A. Right.

(Hearing Tr. 06/21/08, p. 259, line 5 – p. 260, line 9)

* * *

Q. These first five people over here on this list – is it five? Yeah, I think it's five. I believe the testimony up to this point was those names were handwritten at the end of the polls.

A. Yes.

Q. Okay.

A. I think it was.

Q. Okay. And there were many more that were handwritten at the end of that poll that weren't challenged; isn't that right?

A. There was some. I don't know how many. I haven't looked at it lately.

Q. Okay. Somebody – the poll managers are they trained before they add anybody in that poll list to call down to Election Central?

A. Yes.

Q. And somebody told them those people were in the city?

A. Somebody should have told them. Okay? Now, whether somebody took it on their own initiative do it, I can't answer that, but the procedure is to call down there, and if they're okay to vote in that precinct, they will tell them to add them to it.

Q. Okay. And we don't know whether the database is accurate or not that they're looking at?

A. Well, I told you two there's two of those I couldn't find in the database – well, not the L, the S. The name I was given was not in the database.

Q. Okay. Okay. But nobody at the time these people signed in challenged those ballots?

A. No.

Q. And nobody is accusing anybody of fraud as far as those ballots are concerned?

A. I'm dang sure not. I don't know whether y'all are or not.

(Hearing Tr. 06/21/08, p. 260, line 22 – p. 262, line 9)

In the whole municipal election there were only two provisional ballots cast out of 2937 votes. One of those provisional ballots involved Ms. George, who was alleged to be an honor student, who worked for a hospital as a nurse and, who was vice president of her high school class reunion. It was alleged that while she was in the voting booth she was approached by Al Bradley, a Florence County Councilman, because she needed assistance in deciding who to vote for. That ballot was challenged.

The other provisional ballot involved a Kim McDowell, a City of Florence police officer, who has been registered to vote since March 2003 in Lake City in the County of Florence, and who had moved to the City of Florence and lived on Valparaiso Drive, well within the city boundaries, since April 10, 2007 according to her Lease, and had been paying electric bills at that residence for at least three months according to the electric bills that were submitted into evidence.

Both of these provisional ballots were allowed to be cast and counted.

The Incumbent Mayor did not file any protest as to the election within 48 hours of the closing of the polls as provided by §5-15-130 and § 5-15-80, nor did he file any protest within 48 hours of when he realized that the Florence County Election Commission was announcing to the press and to the assembled parties that Stephen J. Wukela had won the election by a vote of 1468 to 1467.

The record on appeal reflects that when the challenged ballots were processed on the Thursday following the election, both of the provisional ballots were allowed to be voted. The ballots were opened and withdrawn from their envelopes, compiled with the other ballots from throughout the county, and tallied. Still the Incumbent Mayor was confident that at the very least he would have a tied election and be entitled to a runoff pursuant to §5-15-125.

The votes were tallied in the open. The Incumbent Mayor's representatives were present. The Incumbent Mayor received one vote and the challenger received one vote. Those votes were added to the total without objections. The Election Commission voted unanimously to certify the election results without objection. (See below testimony of Steve Love, Acting Director of the County Election Commission) The appropriate documents were signed by all the Election Commission members certifying the election, without objection from the incumbent Mayor. The Municipal Election Commission concurred without objection.

After the confusing election, the Certified Democratic Nominee asserts that the record shows that the Incumbent Mayor sat idly by and did not demand that all voters who were added to the voting lists should have their vote challenged prior to their being cast.

After allowing the election results to be certified without objection, the Incumbent Mayor then objected and orally demanded that the Florence County Election Commission de-certify the election and re-open the contested issues that could have been resolved before the votes were cast. Mr. Love testified,

> Q. Okay. Now, were there any objections made to that proceeding? Any objections made to any of the rulings of the 17 ballots?
>
> A. Not before they were opened.
>
> Q. Okay. Now, were you present when they were opened?
>
> A. Yes, I opened them.
>
> Q. All right. And you withdrew the contents of each one of these envelopes?
>
> A. I opened the envelopes face down --
>
> Q. Facedown?
>
> A. -- went through them, kept everything facedown and shuffled envelopes and ballots.
>
> Q. What was the purpose of keeping them facedown?

A. So I could not go back and say this came out of this envelope and violate any voter's Constitutional right to a secret ballot.

Q. Did anybody object to the opening of any of those envelopes?

A. No.

Q. Did anybody object to the mixing of those ballots?

A. No.

Q. All right. Then what did you do?

A. I took them into a computer room and tallied up the ballots.

Q. Did anybody go with you?

A. Yes.

Q. Did I go with you?

A. I know Steven Grantham was with me. I don't know who was behind me.

Q. I was behind you.

A. I knew you was behind me.

Q. Mr. Rogers was there, and the candidates were permitted to go back there if they wanted to; isn't that right?

A. I was looking at ballots. I don't know who was standing there. I had seen y'all all day.

Q. Suffice it to say you made it available if we wanted to go back there?

A. I didn't keep you from going back there.

Q. Okay. And you tallied one ballot at a time and came up with the names and numbers?

A. Right.

Q. All right. Did anybody object then?

A. I didn't hear anybody object. I don't know.

Q. Did anybody tell you to stop?

A. No.

Q. All right. Did you hear any objections?

A. I didn't hear any.

Q. All right. Then you made your tallies on the grand total?

A. Right.

Q. All right. And the vote changed. Each participant in the mayor's race got one more vote?

A. I went out and read the results of those envelopes first.

Q. Okay.

A. And then I went back in before I ever started changing them.

Q. All right. Did anybody object when you went out and gave the – gave your report?

A. I didn't hear one.

Q. All right. Then you went back in and you tallied them to the – to the overall tally sheet?

A. Right.

Q. Did anybody object to that?

A. I was in the computer room. They might have objected outside.

Q. Did you hear any objections?

A. I didn't hear it, no.

Q. All right. Now, were the members of the Commission – the voting commission present?

A. Yes.

Q. All right. Did any of them tell you, Don't go any further; we've got some objections we've got to decide?

A. No.

Q. All right Now, you've got the totals.

A. Uh-huh.

Q. And each candidate got one extra vote than they had before?

A. Each of the city can – the mayor candidates.

Q. The mayor candidates. Fine. And you reported that?

A. Right.

Q. Did anybody object then?

A. I didn't hear any.

Q. All right. Then it was tallied on a – on a form, the certification form?

A. Yes.

Q. The results were put on the certification form and reviewed with the commissioners?

A. Right.

Q. In the presence of everybody?

A. (Nods head.)

Q. And the commissioners signed the certification?

A. That's correct.

Q. How many commissioners signed it?

A. Six.

Q. Did they all sign it?

A. The six that were there all signed it.

Q. Okay.

A. We have one that was in rehab and couldn't be there because of an injury.

Q. But they had a quorum?

A. Yeah.

Q. All right. Now, you've certified the election, right?

A. That's correct.

Q. And they're up –

A. Excuse. The Board of Canvassers certified the election; I didn't.

(Hearing Tr. 06/21/08, p. 243, line 12 – p. 248, line 7)

Obviously, the Election Commission did not have that authority to de-certify the election results. Instead of filing a timely protest with the Chairman of the Municipal Democratic Party, the Incumbent Mayor moved before the South Carolina State Democratic Party for an order that the State Democratic Party accept his protest for its direct consideration because (1) the Municipal Democratic Party is not duly constituted and (2) in the alternative, that the Municipal Democratic Party had been actively involved in the campaign of his opponent. (Return of Stephen J. Wukela dated 6/30/08, Exh. 18)

The record before the Board of State Canvassers reflects that no actions have been taken by the City Administration, according to Mr. Lookadoo the Director of Urban Planning and Development for the City of Florence, to reform the procedures between the City Administration and the Election Commission so as to accurately designate where the city boundaries are.

Q. Other than individuals, we will call them, out in the electorate complaining about their individual problem, have you done any systematic evaluation of all the boundaries and systemically advised the Election Commission to update all their records?

A. Not as of this election, but as of two years ago, yes.

Q. Two years ago you did?

A. Yes.

Q. All right. So whatever has happened with all these people who are getting bogus information about whether they're in the city or out of the city, that's happened in the last two years?

A. Yes. And we were told two years ago that it was corrected.

Q. All right. Now, since this election - -

A. We have not.

Q. All right. So when you went – when these people send this election back if they decide to send it back, we're going to be dealing with the same records we're dealing with now?

A. Which apparently there's a discrepancy between what's out in the field and what's at the Election Commission.

Q. Do you think any of that is fraudulent –

A. Not from our end.

Q. -- criminal? Excuse me?

A. Not from our end.

Q. Do you have any suspect that it's from the Voter Registration end?

A. I have no idea.

Q. You're not accusing the Voter Registration –

A. Absolutely not.

Q. -- of being fraudulent, are you?

A. No. (Hearing Tr. 06/21/08, p. 110, line 7 – p. 111, line 20)

The Certified Democratic Nominee asserts that if this election is sent back and is as close as it was before, the same issues will arise. The Certified Democratic Nominee suggest that if the South Carolina Democratic Party is ordered to conduct a new election, the court will need to order that every person who appears at the polls be told that if he is not registered in the precinct at which he presents he shall be required by the poll manager to vote a provisional ballot whether or not the voter insists to vote a challenged ballot. Additionally, each individual who appears at the poll whose name is not on the registry, but who is advised by the poll manager after calling the County Election Commission that the voter resides in the City, must nevertheless vote a provisional ballot notwithstanding the representations that were made to the poll manager by the County Election Commission at the time the voter's name is added to the registry.

Additionally, if the matter is sent back for a runoff election then obviously no individual who voted in the Republican primary for state and local offices on June 10, 2008 or voted in the Republican Municipal election on June 10, 2008 should be allowed to vote in that runoff. See Drawdy v. S.C. Democratic Executive Committee, 271 S.C. 415, 420 (providing "Our election laws do not preclude a member of one political party from voting in either the primary or run-off election conducted by a different political party. This privilege is restricted, however, by Section 7-13-1010 which prevents an elector who has voted in one political party's primary or officially participated in that party's nominating convention from crossing over and voting in the primary or run-off election conducted by a different political party."). Drawdy v. South Carolina Democratic Executive Committee, 271 S.C. 415, 247 S.E.2d 806 (S.C. 1978). See also S.C. Code §5-15-125 (run-off to be held in Municipal elections resulting in a tie), §7-13-1040 (no

person to vote in more than one primary per day), §7-13-1010 (voter's oath of compliance with §7-13-1040). The alternative, of course, is to grant the incumbent Mayor what he wants, which is to change the Municipal Democratic Party Primary into a General Election.

I find that all of this testimony and argument was before the South Carolina Democratic Party Board of State Canvassers on June 21, 2008. Six representatives, Executive Committee members, from individual counties, one from each of the congressional districts of South Carolina heard all the evidence that the Incumbent Mayor placed before them between the hours of 2:00 P.M. and 9:00 P.M.

A finding by the Board of State Canvassers that the evidence relied upon by the Incumbent Mayor was of the sort that could have been discovered and may very well have been known by the Incumbent Mayor before the ballots were cast is not wholly unsupported by the record.

The Board of State Canvassers considered all of the arguments and could have properly determined that the Incumbent Mayor's challenge was not after-discovered evidence under the South Carolina Rules of Civil Procedure Rule 60(b)(2) or under §7-13-810.

Therefore, I find that a determination by the Board of State Canvassers that the "newly-discovered evidence" on which the Incumbent Mayor wishes to base his protest could have with due diligence been discovered in time to file the appropriate challenges prior to the votes being cast is not wholly unsupported by the evidence.

2. Even if the alleged evidence qualifies as "Newly Discovered", protests of Municipal Political Parties' Primaries are not permitted where no challenge was made before the voter cast their ballot.

In the case of Hill v. South Carolina Election Commission, 304 S.C. 150, 403 S.E.2d 309, our Supreme Court was confronted with a protest in which the losing candidate argued that there were more ballots cast in particular precincts than there were voters indicated in the Voter Registration Lists at those precincts. The Certified Democratic Nominee argued that because no challenge was made to these votes at the time the ballots were cast, the challenge was barred. The Supreme Court agreed and dismissed the protest.

Similarly here, no challenge was made to any of these ballots before they were cast and, therefore, the Incumbent Mayor's Protest is barred. The Incumbent Mayor argues that Hill was superseded by amendment to South Carolina Code §7-13-810. Section 7-13-810 provides the procedure for challenging votes and indicates:

> ... All challenges must be made before the time a voter deposits a paper ballot in a ballot box or casts his vote in a voting machine, and no challenge may be considered after that time. ...
> S.C. Code §7-13-810 (1976).

After the Supreme Court's decision in Hill, the Legislature in 1996 amended §7-13-810. In relevant part, the Legislature added:

> ... A candidate may protest an election **in which he is a candidate pursuant to §7-17-30** when the protest is based in whole or in part on evidence discovered after the election. This evidence may include, but is not limited to, after-discovered evidence of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.
> S.C. Code §7-13-810 (1976)(emphasis added).

Of note, however, the Legislature specifically provided that their amendment allowing after-discovered evidence in protests applied only to protests in elections "pursuant to §7-17-30."

§7-17-30 provides:

> §7-17-30. Protests and contests.
> The county boards shall decide all cases under protest or contest that arise in their respective counties in the case of county

officers and less than county offices, **except for primaries and municipal elections**.
S.C. Code §7-17-30 (1976)(emphasis added).

By its clear language, §7-17-30 deals with protests in general elections for County and less than County offices "except for primaries and municipal elections." Therefore, the Legislature's amendment of §7-13-810 allowing after-discovered evidence in protests brought pursuant to §7-17-30, does not apply given that §7-17-30 does not apply to protests for "primaries and municipal elections."

The instant Protest is brought pursuant to South Carolina Code §5-15-80 which governs protests in Municipal Political Parties' Primaries as in the case at bar. Pursuant to Hill, after-discovered evidence is prohibited in challenges pursuant to §5-15-80. The Legislature's' post-Hill amendment of ' 7-13-810 applies only to protests made pursuant to §7-17-30 not to protests in Municipal Primary Elections. The Incumbent Mayor asserted that the case of Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (2007), which is the most recent application of the concept of after-discovered evidence, specifically applies § 7-13-810 to Municipal Elections. Gecy, of course, was not a primary but a general election. Moreover, the Protestant in Gecy, unlike here, presented his protest based on after-discovered evidence within forty-eight hours of the closing of the polls as required by § 5-15-130. On those grounds, Gecy is distinguishable from the case at bar.

Therefore, the Supreme Court's decision in Hill v. South Carolina Election Commission governs the Incumbent Mayor's offered after-discovered evidence.

3. Claimed Voter Disenfranchisement

The Incumbent Mayor argues:

> Protestant knows of at least five (5) registered voters who were erroneously left off the list of eligible voters used in the conduct of the June 10, 2008 Democratic Primary or were told by poll workers that they were not eligible to vote because they were not on the list.
>
> (Protest p. 7)

Once again, the Incumbent Mayor's allegations are broad and vague and prohibit the Certified Democratic Nominee from making a meaningful factual response.

Nevertheless, the Certified Democratic Nominee asserts that Allegation No. 3 is insufficient as a matter of law. In particular, in the case of Greene v. South Carolina Election Commission, 314 S.C. 449, 445 S.E.2d 451 (S.C. 1994), the Supreme Court considered an election contest in which a candidate submitted eleven affidavits of voters stating they presented themselves at the poll but the poll manager did not allow them to vote in the district due to error on the registration roll. The Supreme Court found that the protest failed because "**None of the affidavits upon which the [protestant] relies claim that any of those voters requested a challenge ballot and were refused.**" Greene at 451. The Court went on to find:

> The making of a challenge is essential to the preservation of an adequate record upon which appellate review can be had. Fielding v. South Carolina Election Commission, 305 S.C. 313, 318, 408 S.E.2d 232, 235 (1991). Requiring the voter to insist on a challenge ballot at the poll preserves the record and prevents after-the-fact challenges to otherwise proper elections. ... Under the interpretation of the Act urged by Mr. Greene, affidavits of voters who did not bother to vote but were unhappy with the results could be collected for an after-the-fact challenge. **In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required that the voter Ainsist" upon casting a challenge ballot.** S.C. Code Ann. §7-13-830 (Supp. 1993). In Fielding, we noted that a vote may be challenged by a watcher, elector, or manager. Thus, it was incumbent upon Greene's poll watcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote in the District 3 election. As in Hill v. South Carolina Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991), the errors in placing voters in districts to which they did not belong were errors which could have been discovered prior to the election. **Affidavits of voters who did not insist in voting in the District 3 election simply did not rise to the level of a "challenge" which required the issuance of a challenge ballot under the statute.** See Berry v. Spigner, 226 S.C.

183, 84 S.E.2d 381 (1954)(affidavit of voter that poll manager cast voter's vote did not constitute challenge).
Greene v. South Carolina Election Commission, 314 S.C. 449, 445 S.E.2d 451 (S.C. 1994)(emphasis added).

Here, the Incumbent Mayor points to no challenge ballot that was cast but not counted based on errors in the records as to the voters' residence; nor does Incumbent Mayor point to any voters who insisted upon casting a challenge ballot but were refused. As such, and as a matter of law, the Incumbent Mayor's complaints fail.

The Incumbent Mayor argues:

> There was disenfranchisement of registered City voters in the Democratic Mayoral primary election as a result of several errors by the County Commission and/or polling precinct workers. (Protest p. 7).

Once again, the Incumbent Mayor's claims are too vague to allow any meaningful comprehensive factual response. Also, once again, the Incumbent Mayor's claims fail as a matter of law. The Incumbent Mayor offers no claim or affidavit that any voter insisted upon and was refused a challenge ballot. Therefore, his protest fails. Moreover, the Certified Democratic Nominee asserts that the Incumbent Mayor's factual allegations are false based on the record. First, the Incumbent Mayor complains that voters were refused an opportunity to vote in Precinct Delmae 2. On the contrary, Olivia Delaine, Poll Manager at Delmae 2 has sworn by Affidavit (Return of Stephen J. Wukela dated 6/30/08, Exh. 15) that she has resided at 1675 Westview Drive, Florence, South Carolina, the sole street in the Hazelwood Subdivision since July 12, 2005; that 1675 Westview Drive is within the territorial limits of the City of Florence and she pays City taxes.

Moreover, she swore that on June 10, 2008, she was employed by the Florence County Election Commission as a poll worker at Precinct Delmae 2 located at the Greek Orthodox

Church on Cashua Drive, Florence, South Carolina; that on the morning of June 10, 2008, she went to the Delmae 2 Precinct to commence her duties as a poll worker. Later that morning, she discovered that, according to Delmae 2 Precinct records, neither herself nor her neighbors or sister living on Westview Drive were listed as City residents eligible to vote in the City Primary; that just before lunch, a neighbor of hers, who lives on Westview Drive, came into the poll to vote. Ms. Delaine advised him that he and she both lived in the City and she asked him to call the Election Commission and ask them how to vote a City ballot; he and the Poll Clerk, Mr. Woodall, called the Election Commission for instructions. They advised her that the Election Commission instructed them that residents of Hazelwood Subdivision should go to Delmae 1 located at Delmae Elementary School and vote in the City Primary at that location because there were no City ballots available at Delmae 2; thereafter, that voter left Delmae 2 and indicated his intention to follow those instructions. The Poll Clerk, Mr. B. Lloyd Woodall, advised her to direct all residents of Hazelwood Subdivision to follow the Election Commission's instructions and to present themselves at Delmae 1 to vote City ballots; at her lunch break at approximately 1:45, Ms. Delaine went to Delmae 1 and advised the poll workers there of her address and that she was a registered voter living in the City. She further advised them that her registration indicated that she vote at Delmae 2 but, because of the absence of ballots, the Election Commission had instructed voters like herself to vote at Delmae 1. A Poll Manager at Delmae 1 contacted the Election Commission and confirmed those instructions, and Ms. Delaine voted at Delmae 1 in the City Democratic Primary for Mayor, among other City offices. No voters from Delmae 2 who lived in the Hazelwood Subdivision were refused City ballots; Instead, Ms. Delaine saw to it that each and every resident of Hazelwood Subdivision who presented to vote at Delmae 2 requesting a City ballot was directed, pursuant to the Election Commission's

instructions, to vote in the City ballot at Delmae 1. In fact, she personally called one Hazelwood Subdivision resident to advise them to vote their City ballot at Delmae 1; at no point did any voter insist on voting a challenged ballot.

Further, Mr. B. Lloyd Woodall swore by Affidavit (Return of Stephen J. Wukela dated 6/30/08, Exh. 16):

That on June 10, 2008, he was employed by the Florence Election Commission as a Poll Clerk at Precinct Delmae 2 located at the Greek Orthodox Church on Cashua Drive, Florence, South Carolina. On the morning of June 10, 2008, he went to Precinct Delmae 2 to commence his duties as a Poll Clerk; that sometime that morning, Ms. Olivia Delaine, one of his poll workers, advised him that certain residents of Hazelwood Subdivision within the Delmae 2 precinct, including herself, lived within the City limits. Ms. Delaine indicated she knew so because she paid City taxes. He called the Election Commission and they advised him to send residents of Hazelwood Subdivision to Delmae 1 to cast their City ballots. Mr. Woodall advised Ms. Delaine to advise all residents of Hazelwood Subdivision who presented to follow those instructions, which she did. No voters from Delmae 2 who lived in Hazelwood Subdivision were refused City ballots; instead, he saw to it that each and every one was directed, pursuant to the Election Commission's instructions, to vote at Delmae 1 for their City ballot; At no point did any voter insist on voting a challenged ballot.

Therefore, the Precinct Manager and Poll Manager of Delmae 2 have both sworn that not only did they not refuse challenge ballots for residents of the City of Florence Delmae 2, but they also affirmatively determined that there were such residents in Delmae 2, obtained instructions from the Election Commission as to how to handle those residents, and so instructed those residents who appeared to vote.

Moreover, the Incumbent Mayor challenges, as confusing, the procedure by which the City Election Commission provided for voters to vote in the Party's Primary for the County-State Election and the Party's primary in the Municipal Election. The Incumbent Mayor's complaints about the procedure are particularly ironic given the fact that this procedure was created by the City Council at the Incumbent Mayor's behest and with his vote. Such vote certainly construes a waiver of any complaints to this Party about the procedure which the Incumbent Mayor created. Moreover, and once again, the Incumbent Mayor points to no voter who insisted upon and who was refused the right to cast a challenge ballot.

I find that a finding by the Board of State Canvassers that there was no disenfranchisement of registered City voters would not have been wholly unsupported by the record above set out.

JURISDICTION

This matter is brought before this Court based on the Amended Protest of the Incumbent Mayor dated June 18, 2008 and served upon counsel for the Certified Democratic Nominee of the June 10, 2008 Mayoral primary for the City of Florence on or after June 18, 2008 by a "courtesy copy that has been sent by overnight courier..." (Affidavit of Service on the Amended Protest)

Throughout the Incumbent Mayor's protest appeal to this Court, he has sought a strict interpretation of all the statutes that could in any way be interpreted to invalidate the June 10, 2008 Mayoral election. Title 5-15-80 governs the results of political party primaries: protests and contests in municipal primaries. Title 5-15-130 governs the procedures for contesting the results of municipal elections.

> Ability to contest municipal election is privilege bestowed by state law; there is no common law or federal constitutional right to be afforded hearing in election contest. (Butler v. Town of Edgefield (S.C. 1997) 328 S.C. 238, 493 S.E.2d 838)
>
> * * *
>
> Circuit court had no authority to consider unsuccessful candidate's allegations of election improprieties that were never raised before municipal Election Commission. (Butler v. Town of Edgefield (S.C. 1997) 328 S.C. 238, 493 S.E.2d 838)

On page 4 of the Incumbent Mayor's "Protest" dated June 13, 2008 and on page 3 of his "Amended Protest" dated June 18, 2008, the Incumbent Mayor notes, "The unofficial results of the City election were announced after the polls closed at 7:00 pm on June 10. At that time, there was a reported one vote difference between the Protestant and his Opponent."

Title 5-15-80 provides,

> The results of any political party primary shall be declared by the party conducting the election. Protests and contests **shall** be filed in writing with the municipal party chairman within two days after the day of the declaration of the results of the election... (emphasis added)

Two days after the declaration at a minimum would be 9:00 P.M., June 12, 2008. The only certificates of filing submitted to this Court is a Certificate dated June 13, 2008 of "Protest" and a Certificate dated June 18, 2008 filed with the "Amended Protest," which specifically sets out that the Amended Protest was filed by Hand Delivery on June 18, 2008 with Carol Fowler, Chair of the South Carolina Democratic Party and that a courtesy copy was sent via overnight courier to Ruth Smith, Putative Chair of the Florence Municipal Democratic Party and Stephen J. Wukela, the certified party nominee. This is eight days after the declaration of the results.

In order to give the Incumbent Mayor the benefit of the most expansive time would be to require that §7-17-520 was the operative statute to be applied in this case. Title 7-17-520 provides,

> The protests and contests in the case of county officers and less than county officers shall be filed in writing with the chairman of the county party executive committee, together with a copy for each candidate in the race not later than noon Monday following the day of the declaration by the county committee of the result of the election....

Of course, this §7-17-520 does not apply to municipal elections, §5-15-80 does.

Title 5-15-80 uses the word "declaration" of the results of the election. It does not use the word "certification" of the results of the election. Title 7-17-520 also uses the word the "declaration" by the county committee of the result of the election. It does not use the word "certification" of the result of the election.

The Incumbent Mayor envisions that the appeal from "the party conducting the election" to the "municipal party chairman" as set out in §5-15-80 begins to run the date of the "certification" which was conducted without written protest by the County Election Commission on Thursday, June 12, 2008. The earliest protest filed by the Incumbent Mayor is June 13, 2008 on the Municipal Democratic Party pursuant to § 5-15-80. The Municipal Election Commission has never been served with a written protest pursuant to § 5-15-130.

The Incumbent Mayor asserts that the Legislature obviously meant the 48 hour limitation set out in §5-15-80 only begins after formal certification of the result of the election, although the statute does not provide that. In fact, the statute provides absolutely the converse. Title 5-15-130 sets out specifically "Procedures for contesting result of election" and it provides:

> Within forty-eight hours **after the closing of the polls**, any candidate may contest the result of the election as reported by the

> managers by filing a written notice of such contest together with a concise statement of the grounds therefore with the Municipal Election Commission. Within forty-eight hours after the filing of such notice, the Municipal Election commission shall, after due notice to the parties concerned, conduct a hearing on the contest, decide the issues raised, file its report together with all recorded testimony and exhibits with the clerk of court of the county in which the municipality is situated, notify the parties concerned of the decisions made, and when the decision invalidates the election the council shall order a new election as to the parties concerned. (emphasis added)

There is no such proviso involving federal, state, or county elections. This is a specific proviso involving municipal elections.

The initial Protest, which the Certified Democratic Nominee asserts was not adequate to establish specific objectionable conduct, was not served, according to the Incumbent Mayor's Certificate of Service, until June 13, 2008 at 5:30 P.M., approximately 24 hours late.

It is clear from reviewing the page 243, line 12 through page 248 line 7 of the Transcript of the hearing before the Board of State Canvassers on June 21, 2008 that the issue of whether or not a proper written protest pursuant to § 5-15-80 and § 5-15-130 had been timely filed with the Municipal Election Commission was before the Board of State Canvassers. Suffice it to say, there is adequate evidence in the record of the hearing conducted before the Board of State Canvassers to support a conclusion that, in fact, no concise written protest of the grounds has ever been filed with the Municipal Election Commission in this matter. Albeit, a protest was filed on June 13, 2008, three days after the election, with the Municipal Democratic Party, which basically relies on the assertion that the Incumbent Mayor is entitled to a protest based on "after-discovered evidence." This issue was also considered by the Board of State Canvassers.

The Court must now turn to the issue of what constitutes a proper protest of a ballot. The general rule of election law in this State is that a ballot must be challenged before it is cast. The

procedure has been established by statute setting out the method by which that ballot is to be intercepted before it enters the ballot box and sealed so as to maintain its secrecy. At a time and place directed by statute, the validity of the ballot will be determined, at which time the ballot, if the challenge is denied, will be anonymously mixed with other like challenged ballots and added to the tally for the election.

The challenging of a ballot does not interrupt the counting of the votes and the announcement of the results of the election. At a subsequent hearing on the challenged ballots, the previously announced vote tally may or may not change. As a general rule unless a vote is challenged before it is cast, it cannot afterwards be challenged. This proposition is dealt with explicitly in Hill. After the Hill case the Legislature amended § 7-13-810, which in pertinent part sets out,

> ...A candidate may protest an election in which he is a candidate pursuant to § 7-17-30 when the protest is based in whole or in part on evidence discovered after the election. This evidence may include, but is not limited to, after-discovered evidence of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.

The Certified Democratic Nominee argues that the amendment does not apply to Municipal Primaries. The Incumbent Mayor asserts that the case of Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (2007), which is the most recent application of the concept of after-discovered evidence, specifically applies § 7-13-810 to Municipal Elections. Gecy, of course, was not a primary but a general election. However, the significance of the concept of after-discovered evidence is set out in Gecy in that the election occurred on November 8, 2005 and that the Protestant timely filed his protest pursuant to § 5-15-130 on November 10, 2005, within 48 hours of the time the polls closed. The fact that evidence of an invalid vote is not discovered until after it is cast does not extend the time for filing a timely protest under § 5-15-130.

The general proposition of law is that, "All challenges must be made before the time a voter deposits a paper ballot in the ballot box or casts his vote in a voting machine, and no challenge may be considered after that time," is statutory in § 7-13-810. The provision that a timely protest, whether filed before the vote is cast pursuant to § 7-13-810, or based on evidence acquired after the vote is cast, does not extend the time for filing the protest in a Municipal Election nor does it relieve the protestant in a Municipal Election of "filing a written notice of such contest together with a concise statement of the grounds therefore with the Municipal Election Commission." (S.C. Code Ann. § 5-15-130)

> Ability to contest municipal election is privilege bestowed by state law; there is no common law or federal constitutional right to be afforded hearing in election contest. (Butler v. Town of Edgefield (S.C. 1997) 328 S.C. 238, 493 S.E.2d 838)
>
> * * *
>
> Circuit court had no authority to consider unsuccessful candidate's allegations of election improprieties that were never raised before municipal Election Commission. (Butler v. Town of Edgefield (S.C. 1997) 328 S.C. 238, 493 S.E.2d 838)

The Incumbent Mayor asserts that pursuant to § 5-15-80 in a Municipal Democratic Primary the time for filing a protest does not begin to run until the election is certified by the Municipal Election Commission and that he has two days from that date to file a written protest asserting after-discovered evidence of invalid ballots. He then asks this Court to interpret "within two days after the date of the declaration of the results of election..." contained in § 5-15-80 as it applies to the Municipal Primaries as different from the requirement of "within forty-eight hours after the closing of the polls" contained in § 5-15-130 involving Municipal General Elections.

The Incumbent Mayor asks that the Court interpret "declaration of the results" as meaning "certification of the election" when applying the two day rule to Democratic Municipal Primaries. There is no question a Municipal Primary is different from a Municipal General

Election. The appeal from a Municipal Primary goes from the Municipal Party Chairman and Municipal Party Committee to the Board of State Canvassers of Municipal Primaries for the respective Party thence to the Circuit Court. The appeal of a Municipal General Election goes from the Municipal Election Commission to the Circuit Court.

Clearly, the issue before the South Carolina Democratic Party Board of State Canvassers was whether or not the after-discovered evidence, which is the basis of the protest of the Incumbent Mayor, was, in fact, after-discovered evidence. There is substantial testimony in the record that the Incumbent Mayor knew of the irregularities or at least the potential for irregularities well in advance of the election and did not challenge any of the ballots of voters who were added in handwriting to the registration rolls, which he asserts were at least in part attributed to voters who were not eligible to vote in the Municipal Election. He did not challenge the vote of Ms. McDowell, nor did he raise any issue involving anyone being deprived of a provisional ballot if they insisted on a provisional ballot, nor of anyone being told they were eligible to vote in the election when they were not until June 13, 2008, three days after the closing of the polls and the declaration of the results of the election.

The Incumbent Mayor also argues that the correct statute to apply in all elections; Municipal Primaries, Municipal Elections, State and Local Primaries, State and Local Elections, is § 7-17-520 for the purpose of determining all protests and contests generally.

The Court in Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (2007), upon which the Incumbent Mayor places great weight, specifically states that,

> ...in the November 8, 2005 municipal election Bagwell filed a timely protest on November 10, 2005 pursuant to § 5-15-130.

Albeit, Gecy involved a municipal election and not a municipal primary. It is clear neither § 5-15-80 which directs your attention to "results of political party primaries; protests and contests" nor § 5-15-130 which directs itself strictly to municipal elections were repealed by the enactment of § 7-17-520.

In both Gecy and Dukes v. Redmond, 357 S.C. 45, 593 S.E.2d 606 (2004), the issue before the Court involved appeals of General Election results from the Municipal Election Commission to the Circuit Court. The Circuit Court has no authority to consider unsuccessful candidates' allegations of election improprieties that were never raised before the Municipal Election Commission. (Butler v. Town of Edgefield, 328 S.C. 238, 245 S.E.2d 838 (1997)

The Circuit Court lacks express or implied authority to conduct a full hearing on election challenges if a hearing is denied by the Municipal Election Commission. Municipal Primary protests and contests shall be filed in writing with the Municipal Party Chairman within two days after the day of the declaration of the results of the election.

Therefore, I find that there is substantial evidence in the record upon which the Democratic Party Board of State Canvassers could have based a finding that the Incumbent Mayor did not, within 48 hours after the announcement of the election results, file any written protest which alleged irregularities or illegalities which would have changed or rendered doubtful the result of the June 10, 2008 Municipal Democratic Primary. Therefore, this Court is without jurisdiction to set aside the Democratic Party Board of State Canvassers' June 21, 2008 decision upholding of the results of the election as certified by the Florence County Election Commission.

I further find that there is also ample evidence in the record upon which the Democratic Party Board of State Canvassers could have based a finding that there was no after-discovered

evidence of ineligible voting that could not with due diligence been discovered prior to the vote being cast, especially considering the known potential for confusion involving crossover voters and the defects in the voter data base at the Florence County Election Commission, which could have been remedied by appropriate challenging of hand written additions of voters to the voter registration list by the poll managers prior to the casting of the ballots, and that the Incumbent Mayor chose not to challenge those ballots until after the results of the election were declared.

CONCLUSION

The election process is the hallmark of our democracy and is an important and serious matter. The integrity of the election process is fundamental to the preservation of our system of government. A municipal primary is particularly important because it deals with the governmental entity which is closest to the people.

The nature of this particular contest and the resulting judicial action, causes strong feelings among the voters, especially where the margin of victory is only one (1) vote.

However, since this matter has reached this forum, a decision must now be made based upon the party rules, the statutory law, and the applicable case law. This court cannot concern itself with personalities, ideology or other matters.

The facts of this controversy and the applicable law will not allow this court to circumvent the will of the people. The voters have spoken and the appeal of Frank Willis is hereby dismissed.

ORDER

IT IS THEREFORE ORDERED that the appeal of Frank E. Willis dated June 26, 2008 is dismissed.

IT IS FURTHER ORDERED that the decision of the City of Florence Municipal Election Commission certifying the June 10, 2008 primary election of Stephen J. Wukela as Florence Democratic Party nominee for the office of Mayor of the City of Florence in the November 4, 2008 City of Florence Municipal General Election is affirmed.

AND IT IS SO ORDERED!

MICHAEL G. NETTLES
JUDGE , TWELFTH JUDICIAL CIRCUIT

At Chambers.

Florence, SC
July 13th, 2008

FILED
2008 JUL 14 AM 10:11
CONNIE REEL-SHEARIN
CP & GS
FLORENCE COUNTY, S.C.

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.