

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

MEMORANDUM

FROM: Attorney General Jim Hood

A handwritten signature in black ink, appearing to read "Jim Hood".

TO: Circuit Clerks
County Election Commissioners

DATE: October 24, 2008

SUBJECT: Challenged ballot procedures, voter assistance, paper and emergency ballots

I would like to thank all circuit clerks and all election commissioners for their hard work in preparing for what appears will be a record-breaking turnout at the November 4, 2008, General Election.

I am sending this memorandum in order to highlight three potential problem areas which based on our observations and on our conversations with Mississippians statewide could be issues on November 4: challenged ballots, voter assistance, and the availability of paper ballots for affidavit ballot and emergency use.

1. Challenged ballots.

Press reports have circulated that there may be an effort to challenge newly registered voters. Be sure your pollworkers are aware of the proper procedures to use in the event someone challenges a voter at the polls. These procedures can be found in your pollworker training materials and Miss. Code Ann. Sections 23-15-571 and -579.

In particular, be sure to impress on your pollworkers that challenges must be acted on by the pollworkers at the time that the challenges are made and in accordance with law; they cannot simply turn them over to the election commission.

Challenges are sometimes made arbitrarily as part of an effort to disrupt and delay the voting process. Be sure your pollworkers know that when they believe a challenge is frivolous or not made in good faith, they may disregard the challenge and allow the voter to vote normally on the voting device.

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Only some first-time voters who registered by mail are required to show identification at the polls: if the mail-in registrant supplied a copy of acceptable ID with their registration form, or if their driver's license number matched with the Highway Patrol's database, they cannot be required to show ID at the polls. Voters who are required to show ID at the polls will be "flagged" on your pollbooks.

When a voter's name is flagged as being required to show ID, and he cannot meet the requirement that he show such ID, the federal Help America Vote Act (HAVA) provides that he must be permitted to vote by provisional (affidavit) ballot. Miss. Code Ann. Section 23-15-573 (3) (1972) provides that the election commission "shall examine the records and allow the ballot to be counted, or not counted as it appears legal." There is no authority in law to require such voters to bring additional documentation to the election commission in order that the ballot be counted; the voters have already made a sworn statement on the affidavit ballot envelope.

If it is determined a voter must cast an affidavit ballot for failure to show ID and that voter is challenged at the polls, the pollworkers should disregard the challenge. The challenger may provide the election commission whatever evidence he may have substantiating the challenge which they may consider in their decision to count or not count the affidavit ballot.

2. Voter Assistance.

In past elections we have received complaints alleging that poll workers are not enforcing the voter assistance procedure as established by the Mississippi State Supreme Court in *O'Neal v. Simpson*, 350 So.2d 998 (Miss. 1977).

In summary the Court held:

A. Statutes that have as their purpose preservation of secret ballots, such as the voter assistance procedure at Miss. Code Ann. Section 23-15-549, are **mandatory**;

B. That all voters are not entitled to have another person accompany them into a voting booth to assist them in marking their ballots; and

C. That only blind, physically disabled or illiterate voters may have a person accompany them into a voting booth for the purpose of assisting them in marking their ballots and **this only after the voter himself has declared his disability and requested assistance, and the managers of the election are satisfied that the claimed disability exists.**

The Court further held that votes cast by voters who received assistance when they were not qualified to receive such assistance must be voided.

Please note that the Court stated that the term "illiterate" includes voters who may be able to read, but because of their "functional illiteracy" do not know how to mark a ballot for the candidates of their choice.

We ask that you insure that your poll workers are aware of the procedure as set forth above and that they do not allow any voter to receive assistance unless and until the voter himself tells the poll workers that he is in need of assistance and why he is in need of assistance and the poll workers are satisfied that the voter is qualified to receive such assistance.

3. Paper ballots for use as affidavit ballots and emergency (irregular) ballots.

The high likelihood of a record voter turnout brings with it the need for each precinct to be supplied with sufficient paper ballots for use in affidavit ballot situations. This also means that sufficient affidavit ballot envelopes must be supplied to your precincts.

Additionally, where voting device breakdowns and malfunctions may occur, paper ballots must be available on an emergency basis so that voters are not disenfranchised. Make sure your pollworkers are fully aware of paper ballot initialing requirements.

As an absolute last resort, should voting devices break down and all emergency ballots are exhausted, the voter may write out his ballot choices in his own handwriting and submit that as his ballot. See Miss. Code Ann. Section 23-15-371 (1972).