

**JOHN NICKELSON**

\* **FIRST JUDICIAL DISTRICT**

\*

**VERSUS**

\* **CADDO PARISH, LOUISIANA**

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**HENRY WHITEHORN AND R. KYLE  
ARDOIN, IN HIS OFFICIAL CAPACITY  
AS LOUISIANA SECRETARY OF  
STATE**

\* **NUMBER: 647,419**

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\* **DIVISION: B**

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**BRIEF OF PETITIONER**

**NOW INTO COURT** comes Petitioner, John Nickelson, who respectfully files this brief pursuant to the Court's order at the November 30, 2023 trial of this matter.

**INTRODUCTION**

This suit concerns a "highly unusual" result: just a single vote separates two run-off candidates in an election where, among other irregularities, it is uncontested that two voters voted twice. This alone requires a new election under the Louisiana Supreme Court's decision in *Adkins v. Huckabay*, 1999-3605 (La. 2/25/00), 755 So. 2d 206. John Nickelson ("Petitioner") proved at trial that the substantial irregularities far outnumber and outweigh the margin between Petitioner and Defendant Henry Whitehorn ("Defendant"). A new election should be ordered.

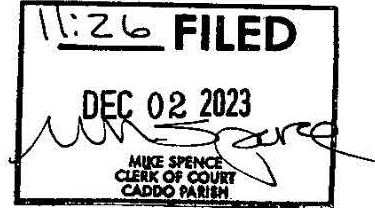
The putative single-vote margin is even more problematic given the number of votes proven to be unlawful, or at best irregular, based upon other defects. From dubious voters to even more questionable patterns and procedures, to varying numbers between the counting of ballots on election night and during the machine recount, there are simply too many substantial irregularities to shrug off in an election this close.

In response, Defendant offered little, resting on the laurels of waiver. But the Petitioner did not waive his rights to have a lawful election in which each voter votes just one time, and the officials overseeing the election consistently enforce the rules. Indeed, it is expected and required by law that each eligible voter casts only one ballot, that some cannot vote because they lack capacity, and that if a voter casts an absentee ballot, certain rules apply—just as they do on election

day. This election deprived the people of Caddo Parish and the Petitioner of these rights.

In addition to the unwaivable irregularities of multiple votes, interdicted voters, and deceased voters, the Board of Election Supervisors failed to fulfill its statutory charge and ensure compliance with the law. This undisputed failure of process likewise constitutes a substantial

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irregularity. Numerous counted absentee ballots were unwitnessed and unsigned, two citizens voted twice, and four interdicts (and at least two deceased individuals) voted. The ballots submitted into evidence also show that multiple witnesses witnessed more than one non-family member's absentee ballot (a practice made illegal to discourage ballot harvesting). As a consequence of each of these substantial irregularities, and all of them collectively, the outcome of the November 18, 2023, election for Caddo Parish Sheriff cannot be conclusively determined.

Petitioner requests that this Court should order a new election.

#### **BRIEF SUMMARY OF THE FACTS**

The trial of this matter focused on the undisputed substantial irregularities found in the voting process for both absentee and in-person voting. The witnesses were credible as to the facts elicited because of their first-hand knowledge (and candid admissions). The Secretary of State's Commissioner of Elections confirmed that two individuals voted twice, and that because of the anonymity afforded every ballot cast—a fundamental principle of our democracy—we cannot ascertain whether and for whom they voted in the Caddo Parish Sheriff race. Consequently, the winner of that race cannot be ascertained.

The Commissioner of Elections also testified that poll workers are trained, and those who review the ballots are provided education, as to what constitutes a legal ballot. The Clerk of Court admitted that he does not believe many Caddo employees attend those trainings—but the Registrar of Voters said the “higher ups” in his office attend. The Clerk and the Registrar both noted

substantial irregularities that the Clerk called “highly unusual” and other members of the Caddo Parish Board of Election Supervisors (the “Board”) called “unique” and “unfortunate.” Two members of the Board, Brenda Traylor and R.J. Johnson, confirmed that the Board relied on staff to cull the ballots, which does not comply with the law—and confirmed that the staff members “missed” a few. Mr. Johnson stated that despite having never seen a candidate attend the opening of the absentee ballots to challenge those ballots, as a Board member he recognizes his duty to challenge any legally defective ballot. Unfortunately, that did not occur with respect to just a sample of the counted ballots, with legally defective ballots entered into evidence as Exhibit J.

None of the witnesses could explain how even that many defective ballots were counted as votes in this election. The Registrar of Voters and the Clerk both confirmed the confluence before

the Court: while the Board has a statutory obligation to reject ballots that do not comply with the law, it did not consistently do so—and the Board members confirmed that counting certain defective ballots while rejecting others *with the same defects* was a mistake. As various witnesses conceded, unwitnessed and unsigned ballots should have been presented to, and ultimately rejected by, the Board. But this did not occur, and those ballots were counted. Several ballots were also witnessed by the same, non-family member—a violation of the law. The reality is that elections generally do not produce a result this close. The one-vote margin at issue, combined with the proven irregularities that greatly exceed this number, make the result of the November 18, 2023, election impossible to ascertain. A new election is essential for a fair, democratic process.

#### **LAW AND ARGUMENT**

##### **A. THE LOUISIANA SUPREME COURT'S RULING IN *ADKINS V. HUCKABAY* REQUIRES A NEW ELECTION**

Under the Louisiana Supreme Court's decision in *Adkins v. Huckabay*, this Court must order a new election based solely on the evidence establishing that two voters voted twice. In *Adkins*, five improper ballots were incorrectly included in the vote count. 1999-3605 (La. 2/25/00), 755 So. 2d 206, 222. The margin between the candidates in the *Adkins* election was three (3). *Id.* Because (a) the five improperly counted ballots exceeded the three-vote margin of victory, and (b) the constitutional right to secrecy of the ballot prohibited any inquiry into who the voters voted for, the Louisiana Supreme Court found that it was "impossible to determine the result of [the run-off] election." *Id.* As such, the Court found that pursuant to La. R.S. §18:1432, it "must order a new general election between the candidates." *Id.*

In this case, the testimony of the Secretary of State, the Caddo Parish Clerk of Court, the

Caddo Parish Registrar of Voters, as well as the two voter lists and absentee ballot certificates accepted into evidence, all establish and support that there were two voters who voted twice. This resulted in four improperly cast votes. No exercise of due diligence could have prevented this from occurring. Thus, as in *Adkins*, the number of improperly counted votes exceeded the purported margin of victory, and on these ballots alone it is impossible to determine whether Petitioner or Defendant prevailed. A new election is required.<sup>1</sup>

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<sup>1</sup>In prior briefing, Defendant attempted to distinguish *Adkins* by stating that the candidate in *Adkins* was present during the counting of the absentee ballots and objected to the improper ballots. However, Petitioner's presence during the counting of the absentee votes would not, and could not, have prevented the two voters at issue from voting twice.

Defendant asserts two defenses to this issue: (1) that Petitioner somehow waived his objection to all irregularities, including the irregularity of two voters voting twice and (2) that one of the improperly cast ballots may have been pulled from the vote count. Defendant failed to put on relevant evidence, other than counsel's questioning, to support either proposition.

Petitioner could not have known that the governmental actors would not prevent two voters from voting twice. In fact, the Clerk of Court testified that this was "highly unusual." There is no amount of Petitioner's "due diligence" that could have prevented this. A candidate is not tasked with guarding each and every polling location to question each potential voter as to whether they have already voted. In fact, such conduct would be illegal.

Defendant's argument that M.G. (one of the two voters that voted twice) may not have voted twice is foreclosed by the evidence presented at trial—and the lack of any countervailing evidence. Petitioner offered into evidence the list of voters that voted on the day of the election (which show that M.G. voted), as well as M.G.'s detached absentee ballot certificate (which, per the testimony of the Secretary of State and Registrar of Voters, means that M.G.'s absentee ballot was counted). This fact was also confirmed through testimony. Despite the poll workers' statement in the Notice of Irregularities that M.G.'s previously cast absentee ballot would be pulled by the Registrar of Voters, that did not occur.

It must also be noted that Defendant's hyper focus on whether M.G. voted twice is a red herring. At trial, Defendant did not offer any evidence contesting the testimony of the Secretary of State's Commissioner of Elections, the Clerk of Court, and the Registrar of Voters that E.K. voted

twice. This fact alone warrants a new election. Put simply: with a one-vote margin between the candidates, a finding that even one voter voted twice (*i.e.*, two improperly cast votes) mandates a new election under *Adkins*.

**B. THE DEFENDANT MISCONSTRUES THE BURDEN OF PROOF AND WAIVER.**

Throughout the trial, the Defendant's counsel repeatedly "reminded" the Court that the Petitioner has the burden of proof and implied that Petitioner must somehow prove who each improperly cast vote was for. But this is not the law.

La. R.S. § 18:1401 permits a Petition to contest an election when:

except for substantial irregularities or error, or except for fraud or other unlawful activities in the conduct of the election, he would

have qualified for a general election or would have been elected may bring an action contesting the election.<sup>2</sup>

Here, Petitioner clearly and repeatedly alleged such. At trial, Petitioner, as the plaintiff, has the burden of proving an irregularity. However, Petitioner is not required, and in fact is constitutionally prohibited, from attempting to pierce through the anonymity of a ballot to prove who the improper voter voted for. Once it is established that an improper ballot was counted, the pertinent question under *Adkins* becomes whether, it “impossible to determine the result of election.” *Adkins, supra.*, 755 So. 2d at 222. Importantly, in answering this question, the Supreme Court expressly noted that it was prohibited from inquiring into who the voter voted for. *Id.* Instead, the Court must determine if the number of irregularly cast votes equals or exceeds the margin between the candidates. If it does, as it does in this case, the Court “must order a new election.” *Id.* This holding is based upon the following provision of La. R.S. § 18:1432:

If the trial judge in an action contesting an election determines that: It is impossible to determine the result of election, or the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote, or the number of unqualified voters who were allowed to vote by the election officials was sufficient to change the result of the election if they had not been allowed to vote, or a combination of these factors would have been sufficient to change the result had they not occurred, the judge may render a final judgment declaring the election void and ordering a new primary or general election for all the candidates, or, if the judge determines that the appropriate remedy is the calling of a restricted election, the judge may render a final judgment ordering a restricted election.<sup>3</sup>

Counsel also argued “waiver,” but failed to properly support that argument with anything other than argument of counsel and vague or unrelated testimony. The argument seems to orbit the idea that because Petitioner’s campaign did not challenge the absentee voters four days before the



election, there can be no challenge, period. That is incorrect.

Louisiana law regarding the challenge to voter qualifications does not contemplate the type of irregularities that Petitioner alleged and established. Nor does it require objections to matters that could not have been reasonably objected to through the exercise of due diligence. Here, as outlined below, Petitioner proved irregularities with respect to the election itself, and errors of fact

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<sup>2</sup> La. R.S. § 18:1401.

<sup>3</sup> La. R.S. § 18:1432.

and law by the Board and government actors, beyond that which the reasonable exercise of due diligence by a candidate could have discovered or prevented.

**C. SUBSTANTIAL IRREGULARITIES REQUIRE A NEW ELECTION**

The evidence presented at trial showed that substantial irregularities, error, and unlawful activities occurred. On its face, two individuals voting twice (having four votes instead of two) *exceeds the election margin in this case*. Additionally, with commendable candor, the fact that numerous government officials admitted the mistake of allowing individuals to vote despite the lack of appropriate signatures or the fact of interdiction (or death), the substantial irregularities are obvious and make it impossible to determine the result of this election. This Court, pursuant to *Adkins* and La. R.S. § 18:1432, should order a new election.

**i. The Board of Election Supervisors Failed in Its Duty to Examine Ballots in Accordance with the Law.**

At trial, Petitioner found and offered into evidence four ballots that lacked the witness' name and signature, and two ballots that lacked the voter's name and signature.<sup>4</sup> Despite rejecting 51 similarly unlawful ballots, the staff assigned to work under the Board of Election Supervisors mistakenly overlooked the deficiencies on the ballots referenced above—and counted those votes. The law is crystal clear on this matter—they should have been flagged as noncompliant and presented to the Board of Election Supervisors to adjudicate.<sup>5</sup> However, the Board was not notified of those ballots' deficiencies and permitted to examine them. They were counted, and Board members admitted that their counting was contrary to law. *Of note, Petitioner could not have been "on notice" of those ballots on election day—they were not flagged as irregular or presented for adjudication to the Board.* They were counted just like any other vote—the Parties would be in

the same situation whether a candidate was present for the opening of the ballots, or not.

Caddo Parish Board of Election Supervisors member R.J. Johnson testified that while it was his duty to challenge improper ballots, and while he had done so in the past, he failed to do so in this instance. Mr. Johnson testified that he has *never seen* a candidate do just that. The president of the Board confirmed that it would be improper to count a ballot that did not have the signature of a witness or voter, and apologized, stating she was embarrassed, but could not explain how the

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<sup>4</sup>These six deficient ballots were identified through a review of less than half of the total ballots cast.

<sup>5</sup> The Board is charged to accept valid ballots, and to review and reject invalid ballots, while adjudicating questionable ballots and challenges. *See* La. R.S. § 18:1313, La. R.S. § 18:1313.1, *et seq.*

errors occurred in connection with the election at issue in this case. Because the staff members did not flag or give notice regarding the six unsigned/unwitnessed ballot certificates, the certificate with the voter information and signature was detached from the ballot. The ballot, which itself has no distinguished mark to associate it with a particular voter, was then counted. Thus, given the anonymity of a voting ballot in Louisiana, the six improperly cast votes noted above cannot now be removed from the vote count. Thus, it is impossible to determine the outcome of this election.

Additionally, the Board of Election Supervisors counted the votes of four fully interdicted persons (one by absentee vote) and at least two deceased persons (both by absentee ballot). Importantly, neither the Board of Election Supervisors nor the Registrar of Voters made any effort to prevent this from happening. Mr. Sibley testified that the Office of the Registrar of Voters is very busy in the weeks leading up to election day and that his office **does not** monitor published obituaries or other public records during that time. Mr. Sibley also testified that, despite a legal requirement that notice of full interdiction be sent to his office, he has **never** seen that occur during his tenure. The office also does not check court records for interdictions.

Further, the Board of Election Supervisors accepted (a) three ballots that were each witnessed by I.W., with each of the voters having a different last name and residing at separate residences at a senior living apartment complex, and (b) four ballots witnessed by W.D., with each of the voters having a different last name and no apparent familial relationship. There were no efforts made by either the Board of Election Supervisors or Registrar of Voters to screen ballots that may have been improperly witnessed or to follow up with those individuals that witnessed multiple ballots to ensure that they were related to the voter. Candidates are not provided access to absentee ballot certificates prior to the opening of the ballots on the day of the election. It would

be impossible for a candidate to create a list of all absentee ballot voters and witnesses on the day of the election, and crosscheck the names against each other, to ensure that each witness only served as a witness to one nonfamily member's ballot.

Defendant's position that Petitioner waived any objection to the deficiencies fails to take into account the realities of what occurred, and the standard set forth by Louisiana law. Per Mr. Sibley, the staff members that opened the ballots and reviewed the certificates did not attend training from the secretary of state. Moreover, candidates were not permitted to review the

absentee ballots or certificates received by his office ahead of the election and there was conflicting testimony about whether Petitioner would have been permitted to oversee the opening of the ballots and review of the certificates on the day of the Election.

Notably, there were 7,787 absentee ballots cast in the Election. It is beyond unreasonable to expect that a candidate show up on the day of the election and (1) ensure that all staff members reviewing ballot certificates are properly trained; (2) oversee each of staff members opening each the 7,787 ballots to ensure that each staff member properly applied the law with respect to the prerequisites of a valid ballot; (3) crosscheck the names of each of the 7,787 witnesses to make sure that no witness witnessed more than one non-family member's ballot; (4) write down names of each of the 7,787 voters and compare them to the names listed in recent newspaper obituaries to ensure that none of the persons that cast an absentee ballots are deceased; and (5) identify an absentee ballot cast by a fully interdicted person. In other words, it would have been impossible for Petitioner to challenge the ballots now at issue through the exercise of due diligence. His failure to undertake these impossible tasks did not run afoul of La. R.S. § 18:1315.

**ii. The Board of Election Supervisors Failed to Conduct a Hand Recount, and the Results are Otherwise Unreliable.**

Petitioner requested a hand recount. That request was rejected, and instead, the Board voted to perform a machine recount. When the ballots were run through the machines during the recount, six extra votes appeared, demonstrating the slight variances possible when using a machine count as opposed to a hand count. Generally, six out of 7787 ballots is not a material margin of error: unless there is a one-vote difference.

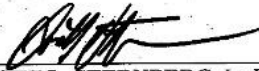
The recount's ability to materialize six new ballots highlights the unreliability of a machine recount—the type of recount the Board insisted upon. The Board's failure to perform a hand recount, despite numerous requests and the obvious statistical problems, is itself irregular and the error revealed therein also supports this Court's ordering a new election.

#### **CONCLUSION**

Louisiana Supreme Court precedent requires a new election: two voters illegally voted twice in an election decided by one vote. It is therefore impossible to determine the result of the election, and a new election is required. Additionally, the numerous substantial irregularities significantly outnumber the one-vote margin between the candidates and taint the election beyond

cure. The voters of Caddo Parish, and Petitioner, are entitled to an election where no voter casts more than one ballot; where absentee ballots are properly culled, with those missing a voter name and signature, or a witness, presented to the Board of Elections Supervisors for proper adjudication; where the Registrar of Voters dutifully employs a mechanism to prevent the counting of votes cast by those fully interdicted (or recently deceased) and the witnessing of multiple non-family member ballots by a single witness. Defendant has offered no compelling evidence demonstrating that the exercise of reasonable due diligence by Petitioner could have cured these problems. This Court must order a new election.

Respectfully Submitted:



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