The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3680

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Walter H. Parham, Esquire
Greenville County Attorney
301 University Ridge
Suite 100
Greenville, S.C. 29601-3660

Dear Mr. Parham:

I am in receipt of your recent letter regarding whether or not a letter issued by this Office on September 24, 1980, was still the existing opinion of this Office on if a write-in vote would take precedence over a vote for a specific candidate.

As I stated in the 1980 letter, only a court of competent jurisdiction could definitely rule on this question. In the intervening years since this opinion there has not been such a determination, the law is as it was in 1980. The underlying issue is always the intent of the voter. If the intent can be ascertained without resorting to speculation, the vote should be counted. However, if a person votes specifically by making a mark in front of a candidate's name and also writes-in another name for that same office it is often, on the face of it, impossible to tell exactly who the voter intended to vote for at the election.

In the case of Brown v. Carr, 130 W.Va. 455, 43 S.E.2d 401 (1947), which was cited in the 1980 opinion, the court was presented with the same situation. Some voters marked a candidate's name with an "X" and then also wrote-in a name for the same office. The court stated

> [i]f we should select the candidate for whom said ballots should be counted, it would be the result of mere speculation and conjecture on our part, because we cannot say that we are free from doubt as to what the voter intended. The contention of relator that the fact that the voter took the trouble to write

> his name in the ticket clearly indicates his intention to vote for him is not tenable, and is not sufficient to overcome the doubt created by the further fact that he also took pains to mark the same ballot for P.J. Carr. Clearly, the 'X' placed before the names of the two candidates in said ballots, if it had been placed before the name of only one thereof, would have definitely expressed the intention of the voter to cast his ballot for the person before whose name he placed the 'X'. . . it is not mandatory that every ballot be counted, and where the voter so acts as to make his intention doubtful, we cannot resort to speculation and conjecture with respect thereto.

Brown, p. 405.

As I stated in the 1980 letter, the Redfearn opinion of the South Carolina Supreme Court addressed a different situation where a person had marked the party circle, indicating a straight party vote and then wrote in the name of one candidate. The write-in in this case counted. This was also the holding in the circuit court in the case of Smith v. Hendrix, which was appealed on other grounds, 265 S.C. 417, 219 SE 2d 312 (1975). Likewise in Brown, the court found it to be a different situation when a person votes straight party and then writes-in a name from the situation when a person votes by an "X" for a specific candidate and then also writes-in a name of a candidate. The court in Brown held as Redfearn did that the separate write-in should be counted. The court stated that on

> . . . one ballot, there is an 'X' above the circle below the party emblem in the democratic ticket, and in the Republic ticket the name 'W. A. Brown' is written with an 'X' in the box before his name. This ballot was not counted for either Carr or Brown. We think it should have been counted for W. A. Brown. The 'X' in the Democratic ticket, if there had been no other mark on the ballot, would have indicated the voter's intention to vote a straight Democratic ticket; but when he crossed to the Republican side of the ballot, and legally marked his ballot for 'W. A. Brown', as he had the right to do, that act amounted to a clear showing of his intent to vote for W. A. Brown.

Brown, pp. 406-407. See also, Redfearn, supra, p. 122.

Therefore, although the law is still not free from doubt the law has not changed since 1980 and the opinion of this Office

would remain the same as it is not clearly erroneous, which is the standard by which we review prior opinions issued by this Office.

Sincerely,

TREVA G. ASHWORTH
Senior Assistant Attorney General

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REVIEWED AND APPROVED BY:

JOSEPH A. WILSON, II
CHIEF DEPUTY ATTORNEY GENERAL

ROBERT D. COOK
EXECUTIVE ASSISTANT FOR OPINIONS