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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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June 26, 2000

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Honorable Leland Avery
Hale County Probate Judge
1001 Main Street
Greensboro, Alabama 36744

Absentee Ballots – Absentee Voting – On-site Absentee Voting - Witnesses

Absentee ballots that are not witnessed or notarized should not be opened or counted.

Dear Judge Avery:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. Can absentee ballots that were cast in envelopes that were not witnessed or notarized be opened and/or counted by the Absentee Election Manager and/or other election officials?
2. Can the same ballots that were “summarily” witnessed by agreement be opened and/or counted by the Absentee Election Manager and/or election officials next Tuesday, June 27, 2000?

FACTS AND ANALYSIS

Hale County held on-site absentee balloting at the Hale County Courthouse on Saturday, June 17, 2000, for the run-off election scheduled for Tuesday, June 27, 2000. Your request states as follows:

Approximately 432 ballots were cast at this on-site location. The required affidavit envelope

accompanied each absentee ballot cast. Each affidavit was signed, presumably, by the person who requested to vote on-site absentee; however, less than a dozen of the affidavits were notarized or witnessed on the affidavit envelope. The election officers appointed to the on-site absentee balloting location were overwhelmed with the number of on-site absentee voters, and they decided, along with the poll watchers, that they would “summarily” witness all of the signatures that had not been witnessed on the affidavit envelopes by inserting a sheet of paper with all of the ballots and sealing the ballot box. This sheet of paper basically said that the poll officials “witnessed” all of the affidavits contained in the on-site absentee balloting box. **The election officers did not actually see the voters sign the affidavits that were “summarily” witnessed.** Nevertheless, the election officers and poll watchers all agreed that the votes witnessed in this manner would be counted next Tuesday along with all of the other absentee ballots that were either hand delivered or mailed and witnessed on the envelope containing the ballot.

On-site absentee voting is authorized pursuant to section 17-10-3(c) of the Code of Alabama. ALA. CODE § 17-10-3 (Supp. 1999). This section provides “[s]aid absentee ballots shall be in the same form and must meet the same requirements to be counted as an absentee ballot cast by mail under the provisions of this chapter.” *Id.* Section 17-10-7 of the Code of Alabama prescribes the form of the absentee affidavit envelope. ALA. CODE § 17-10-7 (Supp. 1999). Section 17-10-9 prescribes the procedure for casting an absentee ballot, including the following:

After marking the ballot and subscribing the oath herein required, the voter shall seal his or her ballot in the plain envelope, place that plain envelope inside the affidavit envelope, complete the affidavit, ***shall have a notary public*** (or other officer authorized to acknowledge oaths) ***or two witnesses witness his or her signature to the affidavit***, and shall forward it by United States mail to the addressee or shall hand it to him or her in person.

ALA. CODE § 17-10-9 (Supp. 1999) (emphasis added).

The election officers appointed to work at the on-site balloting location are required by section 17-10-3(j) to "notarize or witness the affidavits of electors casting absentee ballots at such site." ALA. CODE § 17-10-3(j) (Supp. 1999). This section and section (c) also provide that an on-site polling official is not required to witness an affidavit of any person who has not established his identity, if so provided by Alabama law. Alabama law does not require voter identification; thus, no person is required to establish his identity at any polling place, including an on-site polling place.

The procedure for counting absentee ballots is set forth in section 17-10-10 of the Code of Alabama, which states, in pertinent part, as follows:

No poll worker or other election official shall open an affidavit envelope if the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses or a notary public (or other officer authorized to acknowledge oaths) and no ballot envelope or ballot therein may be removed or counted.

The provision for witnessing of the voter's affidavit signature (or mark) in Section 17-10-7 goes to the integrity and sanctity of the ballot and election. No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths) prior to being delivered or mailed to the absentee election manager.

ALA. CODE § 17-10-10 (Supp. 1999) (emphasis added).

Based upon this provision, an affidavit envelope shall not be opened and the ballot shall not be counted if the affidavit is not signed by both the voter and two witnesses or a notary public. Accordingly, any unwitnessed or unnotarized ballots should not be counted by the election officials.

Under the facts you presented, affidavit envelopes were not separately signed by two witnesses or by a notary, but were "summarily" witnessed "by inserting a sheet of paper with all of the ballots which basically said that they 'witnessed' all of the affidavits," but, in fact, the signatures were not witnessed.

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The procedures adopted by the election officials do not, in the opinion of this Office, come close to complying with section 17-10-10 of the Code. The election officials must follow the election procedures that are in the statutes and that have been precleared by the United States Justice Department. If election officials change the procedures for witnessing absentee ballots, these changes constitute a change in voting procedure that must be precleared by the Justice Department. 42 U.S.C. § 1973c. Moreover, the United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates. *Roe v. State of Alabama*, 43 F. 3d 574 (11th Cir. 1995). The election officers did not, in fact, witness the signatures of the voters; therefore, it is the opinion of this Office that these ballots should not be counted. We recommend, however, that the ballots be secured intact for any election contest that may be filed.

CONCLUSION

Absentee ballots that are not witnessed or notarized should not be opened or counted.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

BILL PRYOR
Attorney General

By:



CAROL JEAN SMITH
Chief, Opinions Division

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