Opinion No. 80-37

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OPINION OF: Jeff Bingaman, Attorney General

BY: Arthur Encinias, Assistant Attorney General

TO: The Honorable Shirley Hooper, Secretary of State, 400 State Capitol, Santa Fe, New Mexico 87503

ELECTIONS

Election officials may not count write-in votes where only the surname is written in.

FACTS

Henry C. Padilla offered himself as an independent write-in candidate for the office of Santa Fe County Sheriff in the 1980 General Election. Write-in votes cast for that office included many variations on the candidate's name, including only the surname "Padilla." There are approximately two hundred registered voters with the surname Padilla in Santa Fe County.

QUESTIONS

May election officials count write-in votes in favor of Henry C. Padilla where only the surname "Padilla" is written in the correct space?

CONCLUSIONS

No.

ANALYSIS

The primary consideration in the interpretation of a disputed ballot is the intent of the voter. See **Bryan v. Barnett,** 35 N.M. 207, 292 P. 611 (1930); **Turner v. Judah,** 59 N.M. 470, 286 P.2d 317 (1955); and compare **Telles v. Carter,** 57 N.M. 704, 262 P.2d 985 (1953). This guiding principle in New Mexico law merely reflects the generally accepted view that the purpose of balloting is to ascertain the intent of the voter. See 29 CJS **Elections** § 180 and Annotation: Validity of write-in vote where candidate's surname only is written in on ballot, 86 ALR 2d 1025 (1962).

OPINION

In ascertaining the intent of the voter, there is no **per se** rule which is applicable in every instance. As our Supreme Court stated in **Telles v. Carter, supra:**

"In cases involving such fundamental problems as the right to vote and the preservation of that right for all, **each case must be weighed closely on its specific facts** and on the specific sections of the applicable statutes." (emphasis added) 57 N.M. at 710.

Thus, the courts look to all the circumstances surrounding the election at issue, in the light of which it is presumed that the voter cast his or her ballot. A survey of the cases across the nation which have touched upon the issue reveal that there are readily identifiable considerations which figure into the ultimate decisions.

Chief among these considerations is whether there is some other candidate or other person residing in the voting district, qualified to be a candidate, who bears the same surname as the candidate who claims the vote. Stated simply, the question *{*193}* is whether there is someone else who could be mistaken for the candidate and thus cast doubt on the intent of the voter in writing in only the surname.

A second consideration is the publicity given to the candidacy of the write-in candidate. If the candidacy has been widely publicized, the inference may arise that the voter knew that an actively campaigning person was a candidate for office, thus increasing the likelihood that the voter intended to vote for that person.

A leading case on this question is **Beck v. Cousins,** 252 Iowa 194, 106 N.W.2d 584 (1960). A mayor's race was at issue and several write-in votes bearing only the words "Beck" or "Mr. Beck" were called into question. In resolving the dispute, the **Beck** court focused on two evidentiary questions:

"One is as to whether or not there was another Mr. Beck in the town of Fayette who could be mistaken for the candidate, or another Mr. Beck on the ballot who was a candidate for any office. The other is the extent and vigor of the campaign carried on by contestant [Beck] which would bring his name to the attention of the voters." 106 N.W. 2d at 586.

The record in that case disclosed that there was no other candidate for any office surnamed Beck, that the candidate and his wife were the only persons residing in the voting district named Beck and that Beck had conducted an extensive and vigorous campaign establishing his uncommon name in the voters' minds. In view of these facts, the **Beck** court had no doubt that the voters who wrote in only the surname "Beck" clearly intended to name candidate Beck as their choice.

These principles also form the basis for the Opinion of the Attorney General No. 80-36, dated November 14, 1980, regarding the District Attorney contest in the Twelfth Judicial District. Under those circumstances it is reasonably certain that voters who wrote in variations of James Weldon's full name or only his surname intended to vote for Weldon as the candidate of their choice.

But where circumstances differ, a completely contrary result may occur. If, for example, several other persons reside in the voting district, eligible for office, who bear the same

surname as the write-in candidate, then "surname only" ballots may be found invalid even where there was a widely publicized campaign by the write-in candidate.

In **Sievers v. Hannah,** 296 Ill. 593, 130 N.E. 361 (1921), four other persons in the town were eligible for the office of highway commissioner and bore the same surname as the write-in candidate. On these close facts, the **Sievers** court could not hold that ballots containing only the surname were to be counted because the voters' intentions could not be determined with sufficient certainty.

In **State ex rel. Nuccio v. Williams,** 97 Fla. 159, 120 So. 310 (1929), eighteen persons eligible for the disputed office bore the same surname as the write-in candidate. There, the court held that ballots containing only the surname were clearly invalid.

Finally, in **Brown v. Carr,** 130 W.Va. 455, 43 S.E.2d 401 (1947), ballots marked "lawyer Brown" and "Brown" were under scrutiny in an election contest. The facts showed that thirty-two other Browns lived in the voting district who were *{*194}* eligible candidates, two of whom were lawyers -- one being the write-in candidate himself. The **Brown** court held that the sheer number of other persons to whom the votes might be reasonably attributable made it impossible to ascertain which Brown or which lawyer Brown the voters had in mind when casting ballots. This was so even though candidate Brown had waged a highly publicized election campaign.

These last three cases were relied upon by the New Mexico Supreme Court in the case of **Turner v. Judah,** 59 N.M. 470, 286 P.2d 317 (1955). There, a D. B. "Beans" Judah, Jr. announced himself as a write-in candidate for the office of Roosevelt County Sheriff in the 1954 General Election. He conducted a short but active campaign designed to establish his name in the voters' minds and to instruct the voters in the mechanics of write-in voting.

Judah garnered some 2000 votes and won the election. His opponent, however, challenged a number of the write-in votes which contained variations of the initials and name of Judah, all of which had been counted in Judah's favor by election officials.

Interestingly, all ballots marked "Judah, Jr." were validly counted in Judah's favor but none of the ballots marked with variations of the surname "Judah" alone were accepted. The reason that this distinction was made stemmed from the fact that there were, in Roosevelt County, ten persons other than the candidate bearing the surname "Judah", all of whom were qualified registered voters and qualified to hold the office of Sheriff. One of these persons was the candidate's father, registered as David Bruce Judah.

Thus, those ballots which bore only the surname "Judah" but which were additionally marked with a "Jr." established with reasonable certainty that the voters intended their vote for the write-in candidate, the only "Judah, Jr." in the County. However, those ballots which contained the surname "Judah" with no distinguishing features could have been reasonably attributed to any of the ten other Judahs in the County and so the intent of the voter was not reasonably acertainable; these ballots were properly rejected.

The teaching of the **Judah** case is clear and applicable to the facts before us. Where other persons in the voting district bear the same surname as the write-in candidate, and these persons are equally qualified for candidacy, a write-in vote bearing only the surname does not establish with reasonable certainty the voter's intent to vote for the write-in candidate.

The surname "Padilla" is shared by some 200 registered voters in Santa Fe County. As qualified electors, these 200 people are qualified to run for and hold the office of County Sheriff. Thus, write-in votes containing only the surname "Padilla" cannot be attributed with reasonable certainty to Henry C. Padilla in light of the many other persons bearing the same surname. And the fact that Mr. Padilla conducted a public campaign may be a consideration but, as the **Judah** case demonstrates, it is not a dispositive circumstance. See also **Brown v. Carr, supra.**

It must therefore, be concluded that, in the 1980 General Election for the office of Santa Fe County Sheriff, write-in votes containing only the surname "Padilla" may not be counted as votes which were clearly and with reasonable certainty intended for candidate Henry C. Padilla.

ATTORNEY GENERAL

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