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RESULTS OF INVESTIGATION INTO USE OF ERRONEOUS VOTER DATA BY SHELBY COUNTY ELECTION COMMISSION IN AUGUST 5, 2010, ELECTION

On August 5, 2010, the Shelby County Election Commission conducted an election involving various federal, state, and local positions. On that day, the Shelby County Election Commission notified the District Attorney for the 30th Judicial District at Memphis (the District Attorney or D.A.) that election officials were experiencing a computer problem that could affect approximately 5000 potential voters. The District Attorney's Office immediately began gathering the information necessary to determine if any criminal investigation would be appropriate. Eventually, the D.A. identified a specific investigative purpose as detailed below. On August 10, 2010, the District Attorney requested that the Tennessee Bureau of Investigation (TBI) assign an agent to investigate matters relevant to a review, specifically including whether (1) any incorrect early voting data loaded into electronic poll books (EPBs) was the result of an intentional act and (2) whether any identifiable voters were intentionally disenfranchised as a result of this error.[1]

On August 11, 2010, a TBI agent was assigned to lead the requested investigation and shortly thereafter began that investigation. This report summarizes the information discovered as a result of those inquiries and explains the conclusions drawn from that information.

During the pendency of this investigation, various other people have made public or direct requests to government officials for investigation of various aspects of the election that culminated on August 5, 2010 (the August election). Though such requests were reviewed, considered, and acted upon if it was determined that they might lead to information that would affect this report, it is not the purpose of this report to address all such claims or to conduct a thorough review of the entire election process.

The focus of the TBI's investigation was limited to the specific investigative purpose identified below.[2] Though public allegations regarding individual efforts or conspiracies to affect the outcome of elections are always troubling, it was beyond the scope of this investigation to review all such allegations. It was neither the purpose nor result of this investigation to determine the

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[1] On August 9, 2010, the Shelby County Election Commission (SCEC) requested in writing that the D.A. "refer an independent agency for review of the August 5th election in Shelby County and specifically, with regards to the processes and procedures surrounding the use of Electronic Poll Books (EPBs) before, during, and immediately following the closing of polls on election night in Shelby County."

[2] Had the TBI encountered credible evidence of crimes outside the identified issues, the TBI or D.A. of course would have made a separate determination as to the efficacy of pursuing such other evidence. No such evidence was discovered.

accuracy or veracity of the election results. The State Coordinator of Elections is conducting a more comprehensive review of the election results and the procedures of the SCEC, and a civil lawsuit alleging fraud in the election sufficient to invalidate the results has already been tried and dismissed in the Shelby County Chancery Courts. The District Attorney defers to those other authorities for determinations related to issues within their purview.

The purpose of the District Attorney's investigation as summarized in this report was to determine if there is sufficient evidence to support charges that during the August election any individual acted criminally in causing certain errors related to the use of electronic poll books and whether any individual used such errors as a means of disenfranchising voters. Ultimately, it is the conclusion of the District Attorney that there is not sufficient evidence to support any such charges.

RELEVANT LEGAL PROVISIONS

State law provides that "[a]n election official or member of a board or commission holding office under this title commits a Class E felony if such person intentionally fails to do any official act required by law or does any illegal act, in relation to any election by which act or omission the votes taken at the election in any precinct are lost, or the electors thereof deprived of their suffrage at such election, or if such person intentionally does any act which renders such election void." Tenn. Code Ann. § 2-19-114. A person intentionally attempting to manipulate an election might violate several other similar statutes, but each, like this statute, requires that such acts be done knowingly in order to constitute a criminal act.

SPECIFIC INVESTIGATIVE PURPOSE

The Shelby County Election Commission is responsible for conducting fair and accurate elections for national, state, and local elections in Shelby County, Tennessee. Pursuant to state law, the SCEC provides voters the opportunity to submit votes before election day in the process commonly referred to as early voting. Each election cycle culminates with an official election day, the last day on which votes can be cast. The most recent two election days were May 4, 2010, and August 5, 2010. During each of those elections, the SCEC used EPBs to assure that people wanting to vote were registered, eligible voters and were at the right polling location. Essentially, a list of eligible voters was loaded into the EPBs during the week preceding each election. On the relevant election day, when any person came to a polling location to vote, an election official checked that person's proof of identification. That official then checked an EPB to make sure that the potential voter was listed as an eligible, registered voter and was at the right polling location.

From April 14 through 29, 2010, the SCEC conducted early voting for the election that culminated on May 4, 2010 (the May election). From July 16 through 31, 2010, the SCEC conducted early voting for the August election. From August 1 through 4, 2010, the SCEC prepared for the August election (the August preparation period). During this period, SCEC staff went through the process necessary to load the list of registered, eligible voters into the EPBs. It was during this process that an error was made. Part of the process includes loading into the EPBs the list of voters who have already voted during the early voting period for the applicable election. Dennis Boyce, a computer system analyst at the SCEC, was responsible for loading this information. According to Mr. Boyce, when he intended to load the list of people who had voted during the early

voting period for the August election, he instead mistakenly loaded the list of people who had voted during the early voting period for the May election. (Hereinafter, Mr. Boyce's incorrect loading of data will be referred to as the EPB error.) Of course, not everybody who voted early in April also voted early in July. Thus on August 5, 2010, when a person had voted early in April but not in July, the EPBs indicated that person had already voted in the August election when in fact that person had not.

Early in the morning of August 5, 2010, SCEC officials began to receive calls from election officials experiencing problems at the polls: An unusual number of people were insisting that they had not voted early for the August election despite the fact that the EPBs were indicating that the individuals had voted early. After receiving the third call about a problem of this nature, Albert Holmes, manager of the Operations Center for the SCEC, recognized that there was possibly a systemic problem and began working to identify and remedy the problem. Nonetheless, in the time that was required to identify and fashion a remedy for the problems caused by the EPB error, it is possible that as a result of the error some voters were told they had already voted and therefore left polling places without voting when in fact they should have been allowed to vote. It was the EPB error and the concern that some voters may have left polls with the erroneous impression that they would not be allowed to vote that was the subject of the investigation summarized in this report. The purpose of the investigation was to determine if any individual intentionally caused the EPB error or failed to correct the error in a way that would violate the criminal laws of the State of Tennessee.

INVESTIGATIVE FINDINGS

As mentioned above, the TBI assigned an agent to lead the inquiries and collection of evidence in this investigation. Among other steps taken, that agent interviewed SCEC employees, reviewed complaints and affidavits of voters and poll workers, reviewed civil complaints filed in related civil lawsuits, interviewed individuals outside the SCEC such as citizens who claimed to have seen voters being disenfranchised and representatives of Election Systems and Software, Inc. (ES&S)[3], and had the SCEC compile and provide certain election data. Significantly, several SCEC employees voluntarily submitted sworn statements.

Initial interviews with employees of the SCEC led to the conclusion that Dennis Boyce was the employee responsible for the EPB error.[4] Mr. Boyce voluntarily submitted a sworn statement explaining the error. He stated that the error was the result of a simple computer error[5], was entirely

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[3] ES&S is the successor company of the company that sold the EPBs and voting machines and software to the Shelby County government. Though ES&S no longer owns the intellectual property rights to the software, it maintains a perpetual license to service the software and in fact does service the software for Shelby County.
[4] The essential purpose of EPBs and some basic concepts related to the operation of EPBs may be helpful to the understanding of this report. The EPBs are essentially nothing more than an electronic version of the list of eligible voters. The EPBs can display this electronic list and allow poll officials to produce an electronic ballot on a voter access card. Those cards can then be inserted into the separate voting machines so that a voter can cast his or her votes. The EPBs do not record votes. Each EPB does record a log showing when a user accessed that EPB and if and when the user took certain actions, but the EPBs cannot be used to alter the electronic list of voters.   The types of actions logged would not include information that would make it possible to determine if and when someone knew that the wrong early voter list had been loaded.
[5] More specifically, at the point where Mr. Boyce was prompted to choose the file containing the August list of early voters, Mr. Boyce chose the wrong file. This process is one many Windows users will be familiar with. The program used by the SCEC prompts the user to choose a file and provides the commonly used file navigation window. In this

accidental, and remained undiscovered until the morning of election day for the August election. The investigation did not reveal any information to refute Mr. Boyce's contention.

Eric Liddell, voting machine technician for the SCEC, provided a sworn statement regarding his involvement with the EPBs in the August election. Mr. Liddell said that he received a test database from Mr. Boyce. Mr. Liddell ran certain tests on this database and found no problems. During the August preparation period, Mr. Liddell then received compact flash cards containing the final voter database for the August election. As a result of the EPB error, these cards contained the wrong list of early voters. Mr. Liddell spot-checked as many cards as time would allow but did not detect the EPB error. Considering the size of the database, it is not difficult to understand that this spot-check process might fail to detect the EPB error. Of the people who voted early in April 2010, only 5390 did not vote early in July 2010, yet Liddell was randomly checking people from the entire list of registered voters, a total of 600,349 people. Thus in checking voters in the database, the chance that Mr. Liddell would randomly choose a voter who was improperly listed as having voted early was 5390 out of 600,349, or approximately 0.9 percent.[6] Mr. Liddell also stated that he had no reason to believe that any other SCEC employees intentionally manipulated the voter database. Mr. Liddell's explanation was consistent with the statements of other witnesses who were separately interviewed, and Mr. Liddell appeared to be a credible witness.

Albert Holmes, and Richard Holden, Shelby County administrator of elections, both voluntarily provided statements corroborating the facts recounted by Dennis Boyce and Eric Liddell.

As described above, a limited number of potential voters were affected by the EPB error. From a civil rights standpoint it is not acceptable for the voting rights of any voters to be negatively affected by errors made by the election officials charged with running a fair and accurate election. However, there are no obviously discernible demographic or voting-history patterns to be found within the limited number of voters potentially affected by the EPB error. This fact is significant in determining if criminal behavior occurred. Prior to the August election, SCEC officials expected the total number of votes cast in the election would be approximately 180,000.[7] Yet the EPB error had the potential to affect a maximum of 5390 voters. If one's goal were to skew an election in a particular direction, it would be a poor plan indeed to randomly affect the votes of approximately three percent of the expected turnout, and to do so in a way that was so certain to bring public scrutiny. And the statistics do bear out the assertion by election officials that the effects of the EPB error were random. Of the 5390 people potentially affected by the EPB error, approximately 34 percent had previously voted in the primary election of the Republican Party, approximately 65 percent had previously voted in the primary election of the Democratic Party[8], approximately 30 percent listed their race as white, approximately 43 percent listed their race as black, and approximately 27 percent listed their race as other. Among all 179,466 participating voters in the August election, approximately 44 percent voted in the primary election of the Republican Party, approximately 55 percent voted in the primary election of the Democratic Party, approximately 41 percent listed their race as white, approximately 32 percent listed their race as black, and

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case, the file nomenclature, a nomenclature chosen by the SCEC some time in the past, contributed to the opportunity for such an error to occur. The correct file was named electionid922. The file chosen in error was named electionid921.

[6] The wisdom of using a random process to test the EPBs is beyond the scope of this report. The point here is that Mr. Liddell's explanation that his testing simply failed to detect the error is a reasonable explanation in light of the chosen testing method.

[7] In the end the total number of people who cast votes in the August election was 179,466.

[8] Primary voting statistics for this group are based on the May election.

approximately 27 percent listed their race as other. The apparent randomness of the distribution of the effects of the EPB error is consistent with the claim that the EPB error was an honest mistake made with no intent to affect any particular group. The EPB error does not appear to have given a reasonably foreseeable or significant advantage to any one group.

It might be argued that the EPB error would have a greater effect on one particular demographic because of the particular average tendencies of a group. For example, some might assert that one group or another is on average less likely to challenge authority figures. Such measurements of tendencies become so esoteric that any supportive, purportedly empirical data becomes questionable at its core. It is therefore hard to believe that such an error could have a large enough and certain enough effect on any particular demographic as to be sufficient motivation for an individual to risk criminal sanctions. Of course, it is still possible that an individual might have had the desire to cause random havoc among the electorate with no intended outcome. No evidence gathered during this investigation tends to indicate that any identifiable individual had such a desire.

It should not go without note that of the 5390 people potentially affected by the EPB error, 2023 actually voted on election day in the August election by going through the process detailed below. Thus in the end, at most, 3367 people might have been turned away from the poles or discouraged from voting as a result of the EPB error. As detailed below, it is believed that only a miniscule number of people were actually affected in this way. Nonetheless, again by way of comparison, the following statistics were reviewed: Of the 3367 people who were potentially affected by the EPB error but never voted in the August election, approximately 33 percent had previously voted in the primary elections of the Republican Party, approximately 66 percent had previously voted in the primary elections of the Democratic Party, approximately 28 percent listed their race as white, approximately 42 percent listed their race as black, and approximately 30 percent listed there race as other. This demographic breakdown shows no skew toward any particular group large enough to effect the outcome of any of the August races.

Beginning early on August 5, 2010, with the SCEC's public identification of the EPB error and steps voters could take to remedy the situation, there has been substantial media coverage and public invitations for people to bring forward their complaints about difficulties voting in the August election. This public call for information has to date resulted in the submission to the SCEC of 61 complaints, the gathering of 26 affidavits for possible use in Chancery Court proceedings, and the filing with the District Attorney's office of 2 affidavits. In all of these documents, only two voters indicated that they had actually been prevented from voting as a result of a situation likely caused by the EPB error. In fact, only 30 of these documents were even related to the EPB error. Moreover, there is no readily discernible demographic pattern among all of these documents. The people who submitted these 89 documents complained of issues in at least 60 precincts located throughout the county. Though it is surely no point of pride for the SCEC that so many complaints were received, the distribution of the complaints across the county again speaks to the randomness of the affects of the EPB error.

Other than the two people who in fact claimed to have been turned away from the polls as a result of the EPB error, the most significant claims were that people observed others being turned away. None of these claims identified specific individuals who were turned away. Several people claimed to have seen approximately 10 or fewer people being turned away at various different polling locations; one person claimed that he saw at least 30 people being turned away at Gardenview Elementary; and two people claimed that that they saw approximately 105 people being

turned away at Dave Wells Community Center. The TBI made more specific inquiries into the claims regarding Gardenview Elementary and Dave Wells Community Center.

On August 11, 2010, a Mr. Terrence Palmer submitted an affidavit to Ms. Regina Newman, candidate for Shelby County Trustee. Ms. Newman notarized the affidavit. She later provided this affidavit to Shelby County Chancery Court in support of her lawsuit seeking invalidation of the August election. In his affidavit, Mr. Palmer claimed that he worked and voted at Gardenview elementary and that he saw at least "30 people attempting to vote and were told that they early voted and left the polls." He went on to say that only three people returned later to vote.

The TBI attempted to locate and interview Mr. Palmer but was unable to locate him. A relative of Mr. Palmer indicated that Mr. Palmer might have recently moved out of Shelby County. The TBI discovered that Mr. Palmer has been convicted of multiple crimes including misdemeanor drug charges and felony forgery, theft, and robbery charges. Mr. Palmer's credibility appears suspect to say the least. Moreover, his whereabouts are unknown, and it is impossible to verify his affidavit or gather more details than the sparse and bare allegations provided therein. No other witnesses corroborated Mr. Palmer's version of events.

Also on August 11, 2010, a Mr. Joseph Simonton and a person claiming to be Mr. Raymond Suggs provided to Ms. Newman affidavits regarding certain irregularities on August 5, 2010, at the Shelby County polling location for ward 21, precinct 00, which is operated at the Dave Wells Community Center. Ms. Newman notarized both affidavits and later provided them to the Shelby County Chancery Court in support of her lawsuit seeking invalidation of the August election.

The TBI attempted to locate and interview Mr. Raymond Suggs. Ms. Newman was unable to provide information regarding Mr. Suggs' whereabouts, and the TBI was not able to independently locate Mr. Suggs. Furthermore, in the affidavit supposedly submitted by Mr. Suggs, the affiant stated that he votes at the Dave Wells Community Center and that he voted in the August election, but the SCEC has no record of a Raymond Suggs having ever been a registered voter in ward 21, precinct 00. The credibility of the affidavit provided by this person therefore appears to be suspect at best. The inability to verify the details of the assertions in this affidavit was not deemed extremely significant because the assertions were consistent with Mr. Simonton's affidavit.

The TBI did interview Mr. Simonton. According to Mr. Simonton, on August 5, 2010, he was monitoring the Dave Wells Community Center polling location on behalf of Steve Cohen, candidate to become the Democratic Party nominee for the position of United States House of Representatives, Ninth Congressional District. While monitoring the location, Mr. Simonton noticed several visibly disgruntled voters leaving the polling areas. He said that some voters told him they were upset because, even though they believed that they had not voted early for the August election, election officials were not allowing them to vote because election records indicated they had voted early. Mr. Simonton estimated that between 30 and 35 voters said they were erroneously turned away because of this problem. He estimated that 15 of these people returned to the polling location later in the day and were allowed to vote. Also according to Mr. Simonton, other voters said that because of the problems caused by the EPB error, poll officials shut down all voting machines for some time and then resumed operations with only one voting machine. Mr. Simonton estimated that another 75 people left because they did not have time to wait for all machines to become operational

again. Mr. Simonton did say that people told him they had been given the opportunity to vote by provisional ballot or by submitting a failsafe affidavit.[9]

Bonnie Holyfield, a clerical specialist with SCEC, confirmed that one of the two EPBs at the Dave Wells Community Center did become inoperative. Nonetheless, poll officials were able to continue to use the remaining EPB to allow citizens to vote. The officials who would have operated the other EPB checked people on the printed voter roll and helped voters with the failsafe process.

The information provided by Mr. Simonton and confirmed by Ms. Holyfield is consistent with the finding that there is not enough evidence to support criminal charges that someone intentionally caused the EPB error or took advantage of the error. The facts supplied by Mr. Simonton corroborate the belief that the EPB error caused quite a bit of confusion on election day, but they also corroborate the claims that election officials were working to correct the error and to prevent it from adversely affecting voters.

Within the context of this investigation, the most directly relevant and disturbing public allegation has been that the EPB error was discovered before the election day for the August election and was intentionally ignored. Those who have made this public allegation include Randy Wade, candidate for the office of Shelby County Sheriff in the August election, Regina Newman, and Randal Reader, a former voting machine technician for the SCEC. However, Dennis Boyce, who admitted causing the error, swore that the error was an honest mistake not intended to harm anyone or any particular group. Moreover, as detailed below, TBI made a full effort to locate the supposed source of this information and was not able to find credible verification of the allegation.

In interviews with the TBI, all except one of the supposed sources denied ever having provided information supporting the above referenced allegation. Matt Lucas, an information systems technician at SCEC, is the one source who continues to stand by his allegations that SCEC officials knew of the EPB error before election day. However, Mr. Lucas freely admits that his information came from Courtney Isabell, a voting machine technician with the SCEC who self-identifies as a Democrat. Mr. Isabell denies having provided such information.[10]

Finally, it is notable that the SCEC attempted to correct the EPB error by disseminating the correct data via new compact flash cards early on election day of the August election. SCEC officials chose 70 precincts to start this process. These precincts were chosen because of the proximity to the SCEC Operations Center. SCEC employees quickly determined that they did not

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[9] A provisional ballot is a written ballot that is sealed and counted at a later date if SCEC officials are able to determine that the person casting the vote should have been allowed to vote. A provisional ballot is typically used when there is no record that a person is a registered voter. A failsafe affidavit is an affidavit allowing a potential voter to verify under oath that that voter's address has changed. A failsafe affidavit is typically used when the voter's registration record indicates the voter should be voting at a different precinct.

[10] Mr. Isabell in fact explained that he did have a conversation with Mr. Lucas sometime after August 5, 2010, regarding an issue unrelated to the EPB error. Sometime after August 4, 2010, Mr. Lucas had had a conversation with Eric Liddell. In that conversation, Mr. Liddell stated that he had discovered that the wrong precinct split data had been loaded into the EPBs (the precinct split error). Mr. Liddell further stated that he had brought the precinct split error to the attention of SCEC officials and had observed that these data were corrected before the August election day. Mr. Isabell stated that he had no conversation with Mr. Lucas about the EPB error. Mr. Isabell further commented that he could not know with certainty why Mr. Lucas would believe that their conversation was about the EPB error instead of the precinct split error.

have enough time or resources to disseminate the correct data throughout the entire county. SCEC officials therefore decided to abandon this approach.

Instead of correcting the EPB error by uploading the correct information, SCEC officials had to rely on the fact that before 8:00 a.m. on election day they had notified all polling locations of the problem and had provided instructions for how to verify voters and accommodate them. Specifically, each polling location had a correct printed list of those who had voted early for the August election. SCEC officials instructed election officials at polling locations to use EPBs to determine if a person was a registered voter and was at the right polling location, because this information in the EPBs was correct. Polling officials were then to check the printed list of early voters to accurately determine whether a person had voted early for the August election. As referenced above, 2023 voters who would have been incorrectly identified by the EPBs as having already voted were accurately verified by use of the printed lists and were allowed to vote on the electronic voting machines.

It is impossible to say with certainty exactly how many people were actually discouraged from voting by the effects of the EPB error, but there is little evidence that it was a large number of people. It is now more than two months after the August election. There has been extensive media publicity of related investigations and an election challenge in Chancery Court. The plaintiffs in that lawsuit have made public appeals and proactive efforts to identify voters affected by the EPB error. And the TBI has reviewed complaints filed with the SCEC and affidavits filed by the plaintiffs in the election challenge. Yet despite the claims by many people that they observed others being turned away from the polls, all the efforts by various parties have successfully identified only two specific voters who have made credible claims of being prevented from voting as a result of the EPB error.

CONCLUSION

Based on the TBI's completed investigation, the District Attorney's office has not discovered any credible evidence indicating that any individual intentionally caused the EPB error, nor any credible evidence to indicate the EPB error was used in any way to skew the results of the election. Though it is known that the EPB error actually caused two citizens to abandon their attempt to vote on election day in the August election and that the error may have had a similar effect on several other potential voters, all credible evidence indicates that the error was one that resulted from an honest mistake and one that was earnestly addressed and remedied as quickly as possible once discovered. The District Attorney's office considers the matter closed.

The findings here are not intended to give shelter to those responsible for elections in Shelby County. Without having completed a thorough investigation of the entire election system, it is impossible to offer an opinion regarding the competence with which the August election or other elections have been handled in Shelby County. Nonetheless, facts discovered during this limited criminal investigation do make it clear that more than one method of performing more thorough testing of voter data prior to an election day was available to the SCEC for the August election.[11] It

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[11] Epoch is the software that converts the data from the central voter database maintained by SCEC to the CF cards used to load voter data into the EPBs. Ross Underwood wrote this software. In an interview on October 18, 2010, Mr. Underwood stated that Epoch has certain built-in audit functions. Among those are the ability to produce a report that would indicate the number of people listed in the EPB data as having early voted. Because of the large difference between the number of people who voted early in April 2010 and the number of people who voted early in July 2010, a

is obvious that although electronic systems may have substantial benefits, they also expose the SCEC to the risk of system-wide errors caused by a simple, momentary lapse. With this in mind, it is incumbent upon all responsible officials to make the extraordinary efforts demanded by the citizenry to avoid such lapses.

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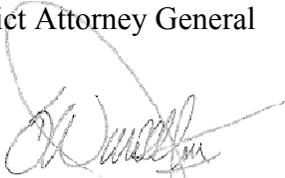
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BYRON WINSETT
Assistant District Attorney

Date: October 25, 2010

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quick review of this report would have made it obvious to anyone familiar with the statistics that the wrong list had been loaded. SCEC officials and employees did not run this audit report before disseminating EPBs for the August 2010 election day. According to Mr. Underwood, it would have taken SCEC officials approximately 15 minutes to produce this report. Based on recent training sessions with SCEC personnel and other recent interactions with them, Mr. Underwood believes that the failure to utilize these reports was simply the result of a lack of proper training and that SCEC officials and employees have now received the necessary training and are fervently seeking even greater knowledge and understanding of the systems they use.