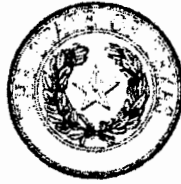


The State of Texas



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Hope Andrade
Secretary of State

November 20, 2008

Mr. Bruce Sherbet
Election Administrator
Dallas County
2377 North Stemmons Frwy, Suite 820
Dallas, Texas 75207

Dear Mr. Sherbet:

You have asked a question regarding the potential recounting of iVotronic ballot images in the race for the Texas House of Representatives, District 105. Specifically, you ask as follows: "In a recount, if a DRE image shows that the voter cast a straight party vote but there is no vote for the candidate of that same party (indicating it was deselected) does the straight party vote override the deselection (thus giving a vote to the candidate that was deselected)?" As explained below, it is the position of this office that the straight party vote does *not* override the deselection.

Under state law, if a voter makes a straight party vote selection, the voter shall have the option to cross-over and cast a vote for a candidate in another party or to cast no vote in a particular race. See, e.g., TEX. ELEC. CODE §§ 52.071, 64.004, 65.007, 65.009, 122.001, 124.001, 124.063. Furthermore, instructional posters approved by this office and used in polling places that contain iVotronic machines explain to voters their rights to cross-over and cast a vote for a candidate in another party or to cast no vote in a particular race. See TEX. ELEC. CODE ANN. § 62.011.

The iVotronic voting systems in Dallas County, which have been approved by this office for use pursuant to its powers under Chapter 122 of the Texas Election Code, are designed so that when a voter votes straight party, the system places an X in each square next to the name of each candidate affiliated with that party, indicating that the voter has selected all the candidates affiliated with that party. To accommodate a voter's desire to vote for all but one or more candidates of a party, the system allows a voter to touch the X next to the name of any candidates from that party for which the voter does not wish to vote, which results in no vote being counted for those candidates.

The federal courts have affirmed the use of this process. The United States District Court for the Western District of Texas carefully considered substantially the same straight party voting process on DRE "eSlate" machines. See *Texas Democratic Party v. Roger Williams*, Case No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007) (J.Sparks). Indeed, that court addressed and

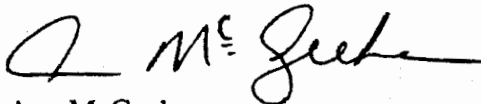
Mr. Bruce Sherbet

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rejected multiple arguments, including constitutional challenges, that some voters seek to cast "emphasis" votes by specifically selecting candidates of a party for which the voters have otherwise voted straight party and that the resulting de-selection and lack of votes counted for those candidates is illegal. *See id.* ("Plaintiffs seek to have this Court assume that anytime a voting record shows no selection beside a race in which a straight party selected has a candidate on the ballot that this resulted from a straight party voter attempting to emphasize his or her voter."). The court concluded that voters engaging in such behavior were equally or even more likely intending to make no selection in a particular race. Critically, the United States Court of Appeals for the Fifth Circuit affirmed the Western District in a *per curiam* opinion "essentially for the reasons given by the district court in its well-considered opinion." *See Texas Democratic Party v. Williams*, 258 Fed.Appx. 194, 2008 WL 2916349, No. 07-51064 (5th Cir. July 30, 2008). For your convenience, I have attached the opinions of the district court and the court of appeals.

For these reasons, it is the position of this office that in recounting ballot images from iVotronic machines, if there is not a specific mark for a candidate in the race for District 105, no vote should be counted for any candidate in that race. If you have other questions regarding the recount, please feel free to contact our office.

Yours truly,



Ann McGeehan
Director of Elections

AM:MN