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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 82-604
of	:	AUGUST 13, 1982
GEORGE DEUKMEJIAN Attorney General	:	
Clayton P. Roche Deputy Attorney General	:	

THE HONORABLE JOHN A. DRUMMOND, COUNTY COUNSEL, MENDOCINO COUNTY, has requested an opinion on the following question:

May a person who was defeated in the June 8, 1982, primary election for the office of district attorney run as a write-in candidate for that office in the November general election?

CONCLUSION

A person who was defeated in the June 8, 1982, primary election for the office of district attorney may run as a write-in candidate for that office in the November general election.

ANALYSIS

Nonpartisan offices such as the office of the district attorney appear on the primary election ballot. If any candidate receives a majority of all the votes cast at the primary election, that candidate is elected and the office will not appear on the November general election ballot. In such case the primary election is transmuted into a general election for the nonpartisan office. If, however, no candidate receives a majority of all the votes cast, the two candidates receiving the highest number of votes are "nominated" at the June primary election. Their names will then be printed on the November general election ballot as candidates for that office. In a sense, the November general election is a "run-off" election. (Elec. Code, §§ 6611, 6612;[1] see also *Fields* v. *Eu* (1976) 18 Cal.3d 322, 325 fn. 1; *Immel* v. *Langley* (1959) 52 Cal.2d 104; 36 Ops.Cal.Atty.Gen. 16-17 (1960); 20 Ops.Cal.Atty.Gen. 53, 54 (1952).) Accordingly, those candidates at the June primary election who are neither elected nor nominated can be said to have been "defeated" at that election.

The question presented herein is whether a candidate who was "defeated" at the June 8, 1982 primary election for the nonpartisan office of district attorney may be a write-in candidate for that office at the November general election where no candidate was elected in the June primary election.[2] We conclude that any person having the qualifications for the office of district attorney, including a person who was defeated at the June primary election, may be a write-in candidate for the office at the November general election.

Prior to its amendment by urgency measure effective May 9, 1968, the Elections Code was crystal clear that, as a general proposition, *any* name could be written in for *any* office at *any* election and the clerk was required to count such votes. (See prior §§ 10213, 10228, 10292, 10317, 17072, 17073; see also *McFarland* v. *Spengler*

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[1] All section references are to the Elections Code unless otherwise indicated. The provisions of present section 6611 were also previously contained in Article II, section 2-3/4 of the California Constitution.

[2] The request also presented two other questions. The first of those was whether *any* otherwise qualified candidate for district attorney can run as a write-in candidate at the November general election. The answer to the question is subsumed in our analysis and response to the question set forth above and is clearly yes. The other question was whether, if the answer to either of the foregoing questions was no, the county clerk would be authorized to reject the write-in candidate's papers, or would be authorized to refuse to count the write-in votes. This question has been rendered moot by our conclusions herein.

(1926) 199 Cal. 147, 149-150 for an historical background of write-in voting.)[3] In recognition of this plenary "right" of a voter "to vote for whomsoever he desire[d]" (*Edwards* v. *Jordan* (1920) 183 Cal. 791, 795) this office concluded in 1960 that, despite the abolition of "cross-filing" in 1959, a candidate for a partisan office could receive the nomination of a party to which he did not even belong through the write-in process. (35 Ops.Cal.Atty.Gen. 206 (1960)).[4] We did so by essentially pointing out that despite the abolition of "cross-filing," the Elections Code had not been changed with respect to write-in voting and the requirement that all such votes be counted for the office for which they were cast. Such was the state of the law on write-in votes when, on May 9, 1968, then sections 18600-18604 were added to the code.

In an informal opinion of this office issued in 1972 we summarized the provisions of then sections 18600-18604 *and our understanding of the purpose of such enactment as follows*:

> "Prior to 1968, all write-in votes were canvassed by election officials. In 1968, *apparently in order to obviate the neccesity of counting votes written in of a nonserious and even frivolous nature*, the Legislature enacted sections 18600-18604. In summary, section 18600 requires the counting of write-in votes, unless prohibited by section 18603. Section 18601 and 18602 *require* that any person who desires to have his name counted as a write-in candidate for any particular office file a declaration to that effect with the clerk or registrar no later than eight days before the particular election. Section 18603 prohibits the counting of write-in votes unless the requirements of sections 18601 and 18602 are met and at the time of filing his declaration, the write-in candidate pays the filing fee required by section 6555 . . ." (Atty.Gen. Unpub. Opn. I.L. 72-102; first emphasis added; see also 59 Ops.Cal.Atty.Gen. 414, 415 (1976).)

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[3] This general rule was subject to the qualification that the Legislature can reasonably regulate the write-in process. Thus in *Binns* v. *Hite* (1964) 61 Cal.2d 107 the court upheld legislation whereby an unopposed judge's name need not appear on the ballot unless a petition is filed by voters that there will be a write-in campaign. (See § 25304.) Also, write-in voting for presidential electors requires and had its own special procedures in then section 10229. See now sections 57.5, 6060-6063; 6170, 6171; 6172, 6290; 6375-6376.

[4] Prior to 1959, a candidate for a partisan office could file for and receive not only the nomination of his own party, but also the nomination of any other qualified party as well. The above opinion contains an excellent historical summary of "cross-filing," pointing out that it was ultimately abolished by the requirement that a candidate must have been registered with a political party for at least three months in order to file nomination papers as a candidate of that party. (See now § 6401.)

Within several weeks of the enactment of section 18600-18604 we were presented with precisely the question presented herein, that is, whether a nonpartisan candidate who was an unsuccessful candidate at a primary election could be a write-in candidate at the general election. We stated in an unpublished opinion (Atty.Gen. Unpub. Op. I.L. 68-152):

> "It is our opinion that where there is a run-off election for a non-partisan office anyone, even an unsuccessful candidate at the primary election, can conduct a write-in campaign at the run-off election. See 48 Ops.Cal.Atty.Gen. 29 (1966).
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> "Such write-in votes will not be counted, however, unless the declaration is made and the fee paid as required by Section 18600, et seq., Elections Code, added by Chapter 79, Statutes 1968, which chapter became effective May 9, 1968, as an urgency measure."

This precise informal advice which had been rendered to the County Counsel of Placer County was confirmed shortly thereafter in a published opinion of this office. We stated the facts and conclusion as follows:

> "At the June primary election, there were five candidates for Supervisor for District 5 in Placer County. In the primary, no candidate secured a majority of the votes; thus, there will be a run-off election between the top two candidates at the November 5, 1968, general election. § 6612.
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> "The man who came in third has decided to run as a write-in candidate at the November general election and has indicated his intention to file a declaration stating that he is a write-in candidate for election to Supervisor of the 5th Supervisorial District in Placer County. He has indicated he will pay the fee specified by section 18603. Stats. 1968, ch. 79, effective May 9, 1968. We previously advised your office that an unsuccessful candidate at the primary election could conduct a write-in campaign at the run-off election in November and votes for such a write-in candidate will be counted only if a declaration is filed and the fee paid as required by sections 18600 to 18604. Stats. 1968, ch. 79, effective May 9, 1968. Letter to Honorable Richard V. Smith, County Counsel, County of

Placer, I.L. 68/152, June 19, 1968, L.B. 377, p. 47a." (51 Ops.Cal.Atty.Gen. 226 (1968).)[5]

The foregoing conclusion of this office, rendered virtually contemporaneously with the enactment of prior sections 18600-18604, was in accord with our stated understanding of the purport of this enactment. Such was that these provisions were not intended to *restrict* write-in candidacy, but to merely *regulate* such candidacy in order to obviate the need to count and tabulate the write-in votes which were "written in of a nonserious and even frivolous nature." Thus, unless there have been changes in the Elections Code since 1968 which would require a different conclusion, the "run-off" election for district attorney at issue herein can include write-in candidates, even including a candidate who was "defeated" at the primary election.

Subsequent to 1968, the major opinion of this office reviewing the status of the law on write-in votes in California was 59 Ops.Cal.Atty.Gen. 414 (1976). That opinion updated the main provisions of law on write-in votes and again concluded that a partisan candidate could "cross-file" for the nomination of another party and that write-in votes cast for such candidate should be counted. We noted that the essence of prior sections 18600-18604 was now contained in a new (and since superseded) section 64. We further noted that new provisions of the Elections Code relating to canvassing votes, *including write-in votes* had been added in 1975.[6] We then reasoned in part:

> "The conclusion is that the 1975 addition to section 64 did not intend to change the long standing law that a candidate for his own party's nomination can also be a write-in candidate for another party's nomination.

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[5] Accordingly, the fact that section 6612 provides that in a "run-off" for a single office the candidates at the general election shall be those two receiving the highest number of votes at the primary election did not preclude a *write-in candidacy*. See also § 10222 on ballot form: "Under the designation of each office shall be printed as many blank spaces . . . as there are candidates to be nominated *or elected* to the office." (Emphasis added.) Furthermore, section 6612 provided as stated above even before the addition of sections 18600-18604 in 1968, when it was crystal clear that *all* write-in votes were to be canvassed for *all* offices.

[6] Section 64 provided:

> "Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file (1) a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office and (2) the number of sponsors' certificates, if any, required by section 6495 for that office. The declaration and the sponsors' certificates, if any, shall be filed with the clerk, registrar of voters, or district secretary responsible for the conduct of the election no later than the 14th day prior to the election for all candidates not required to be certified by the Secretary of State."

"It is noted initially that the 1975 Legislature significantly revised and updated portions of the Elections Code. A new Division 10 of the code relating to canvassing votes and declaring the results of elections was added. § 17000 et seq.; Stats. 1975, ch. 1203. Sections 17100 and 17101 relate to the canvass of write-in votes. Section 17100 provides:

"'Any name written upon a ballot, including a reasonable facsimile of the spelling of such a name, shall be counted, unless prohibited by Section 17101, for the office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written.'

"Section 17101 provides:

"'No name written upon a ballot in any election shall be counted for an office or nomination unless, pursuant to Section 64, there has been filed a declaration and the number of sponsors' certificates required, if any.'

"Other provisions of the code relating to casting or counting write-in votes are sections 6375 et seq. (Presidential write-in), section 10204-10205 (Instruction to Voters, including how to write-in), sections 10207(b), 10222, 10228, 10234(c) (provisions for requisite blank spaces on ballot for write-in votes), section 15832 (tabulation of write-in votes—punch card voting system), section 20084 (recount to include write-in votes), and section 14004(f) (provision for pencils at polls.).

"*Thus, it is seen that whether write-in votes are to be counted for a candidate depends upon whether the candidate complies with section 64 and files a declaration of write-in candidacy and the requisite number of sponsors' certificates, if any*. In the case of an Assembly candidate, section 6495 requires 'not less than 40 nor more than 60' sponsors.

"Accordingly, if an individual is a candidate for his own party's nomination at the direct primary for Assemblyman, with his name to be printed on the ballot, there would seem to be no impediment to his also becoming a write-in candidate for the nomination of another qualified party for the same office, and having write-in votes counted for him *unless* section 6401, quoted at the outset of this opinion, somehow qualifies sections 64, and 17100 and 17101. It is to be recalled section 6401 prohibits the filing of a 'declaration of candidacy for a partisan office . . . by the candidate himself or by sponsors on his behalf' unless at the time of

filing the candidate has been registered as a member of the particular political party for at least three months, and has not been registered with another qualified party within the previous year. . . ." (59 Ops.Cal.Atty.Gen. at pp. 416-417, emphasis added.)

Accordingly, as of 1976 we essentially reasoned that the *sine qua non* for write-in candidacy was merely compliance with the provisions of then section 64 of the Elections Code. No impediment was found by us in section 6401, or elsewhere. Stated otherwise, the law was still essentially as it was in 1968: if an otherwise qualified individual declared as a write-in candidate and filed the requisite papers with the county clerk in a timely fashion, he could have votes counted for him for any office.

Since 1976 the Elections Code has again gone through many changes, including provisions relating to write-in voting. We conclude from an examination of the current provision of the Elections Code that the *sine qua non* for write-in candidacy of an otherwise qualified person for office is still the filing of the requisite declaration papers in a timely fashion. What was once sections 18600-18604 and later section 64 in this respect is now sections 7300-7304. Section 7300 provides:

"Every person who desires to be a write-in candidate and have his or her name as written on the ballot of an election counted for a particular office shall file:

"(a) A statement of write-in candidacy which shall contain the following information:

"(1) Candidate's name.

"(2) Residence address.

"(3) A declaration stating that he or she is a write-in candidate.

"(4) The title of the office for which he or she is running.

"(5) The party nomination which he or she seeks, if running in a primary election.

"(6) The date of the election.

"(b) The requisite number of signatures on the nonination papers, if any, required pursuant to Sections 6495, 22836, 23512, or in the case of a

special district not subject to the Uniform District Election Law, the number of signatures required by the principal act of the district."

Section 7301 provides that nomination papers shall be filed at least 14 days before the election. Section 7302 provides that the *form* of the nomination papers shall be substantially the same as for other candidates. Section 7303 requires that signers of nomination papers shall be voters in the area where the candidate is to be elected and that signers for a partisan office shall be affiliated with that party. Finally, section 7304 basically prohibits a filing fee, except for certain city offices (see *Donovan* v. *Brown* (1974) 11 Cal.3d 571). With respect to canvassing write-in votes, sections 17100-17101 still provide as set forth above in 56 Ops.Cal.Atty.Gen. 416, *supra*, except that section 17101 has been amended to cross-reference sections 7300-7304 instead of section 64. In short, sections 17100-17101 provide that write-in votes shall be counted where a candidate has complied with section 7300 et seq. (See also § 56: "Every voter shall be entitled to write the name of any candidate for any public office, including that of presidential elector, on the ballot of any election;" § 52: definition of legally qualified candidates "shall not be construed to prevent a voter from writing in the name of any person for an office at a primary or general election;" §§ 10204, 10207, 10222, 10228 re instructions to voters and form of ballot including necessity for blank spaces for *all* offices at *all* elections.)

Accordingly, although the procedures have changed somewhat for qualifying as a write-in candidate between 1968 and now, we see no significant difference in the law which would justify concluding differently than we did in 1968—that is, that any otherwise qualified individual, including a "defeated" candidate at a primary election, may be a write-in candidate at the general election for a non-partisan office. In short, the law is still as it was in 1968, that is, that voters shall be afforded the right to write-in the name of anyone for any office, subject to reasonable regulation by the Legislature to assure that only serious write-in votes need be counted. The *sine qua non* for counting write-in votes is still merely the filing of the requisite nomination papers with the clerk.

This conclusion is also supported by a very recent decision of the Court of Appeal in the case of *Fridley* v. *Eu* (1982) 131 Cal.App.3d 100. In such case the plaintiff, who had been a write-in candidate at the primary election for the nomination of the Libertarian Party for State Assemblyman, attacked the constitutionality of the requirements of section 6661, subdivision (a), that a write-in candidate at the primary election must have votes equal in number to one percent of the total votes cast for that office at the preceding general election to have his name *printed* on the general election ballot even if he received the majority of votes cast in his party primary. The plaintiff lacked such requisite one-percent. He accordingly was not "nominated" to appear on the

general election ballot for State Assemblyman. In essence, he was a "defeated" candidate at the primary election. In upholding the constitutionality of section 6661, subdivision (a) the court reasoned inter alia,

> ". . . We also note that appellant could have become a write-in candidate on the general election ballot (See Elec. Code, § 7300 et seq.; *Kellam* v. *Eu* (1978) 83 Cal.App.3d 463, 469 [147 Cal.Rptr. 884].)"
> (131 Cal.App.3d at p. 104.)

In short, the court acknowledged that an individual can be a candidate at both the primary election and the general election for the same office. A "defeat" at the primary election in no way constitutes an exhaustion of the electoral process with respect to such candidate.

Finally, we note that when the Legislature desires to preclude an individual who was defeated at a primary election from being a candidate at the general election, it appears to say so specifically. For example, section 6402, subdivision (a) provides:

> "(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for the party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a candidate named by a party central committee to fill a vacancy on the ballot for a general election."

For the foregoing reasons it is concluded that a candidate who was "defeated" at the June 8, 1982 primary election for the office of district attorney may be a write-in candidate for that office at the November general election.

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