

No. 3-02-526-CV

THOMAS R. PHILLIPS,	§	IN THE THIRD
Petitioner,	§	
	§	
V.	§	COURT OF APPEALS
	§	
DAVID DELAMAR,	§	
Respondent.	§	SITTING IN AUSTIN

Clifford F. William Request to Deny Mandamus

Real Party in Interest, Clifford Fuddy William, asks the court to dismiss the application for mandamus, sanctions against petitioner and to grant William judgment for costs.

A. Introduction

1. Petitioner is the Honorable Thomas R. Phillips; real party in interest is Clifford Fuddy William; real party in interest is Gwyn Shea; respondent is David DeLamar.

2. Petitioner filed an emergency petition for writ of mandamus with the Supreme Court of Texas, case number 02-0772, on August 28, 2002. On August 28, 2002, the Supreme Court of Texas dismissed the petition for writ of mandamus

as moot. Petitioner has apparently refiled his request in this honorable, but lower, court.

3. The court should dismiss this petition because this court does not have jurisdiction to hear the petition; because the action requested does not conform to state law; because this matter concerns issues currently under consideration in the United States District Court for the Southern District of Texas; and because this party has not been served in accordance with the Texas Rules of Appellate Procedure, Rule 9.5(a).

B. Argument & Authorities

I. The Court has no jurisdiction

4. This honorable court does not have jurisdiction to entertain the petition for mandamus for two reasons. First, the petitioners are requesting the court to rule on matters currently before the United States District Court for the Southern District of Texas, Houston Division, case number H-02-2167, Royce Mitchell and Clifford William v. Gwyn Shea, et al. The petitioner was aware of this case having been served via his counsel, Heather Horton, on August 22, 2002.

5. The court does not have jurisdiction on a second count. The Texas Constitution, Art. V, Sec. 11, states as follows:

"No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, or any member of any of those courts shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes."

6. The original petition was dismissed by the Supreme Court of Texas because of a lack of jurisdiction, stating that the motion to expedite was moot. The honorable justices of the Supreme Court of Texas recognized that they are parties to the aforementioned suit currently before the Honorable Judge Nancy Atlas in Federal District Court. The proper remedy for the petitioner was to take the matter to the governor, as stated in the Texas Constitution, Art. V, Sec. 11, *supra.*, or file a motion to dismiss with the Honorable Judge Nancy Atlas. Therefore, this honorable court has no jurisdiction to entertain the petition.

II. Action requested does not conform to law

7. The petition for writ of mandamus should be dismissed because the requested action does not conform to state law. William has not yet been served with his copy of the petition and cannot speak to the exact points in the current petition before this Honorable Court. However, William did receive today, August 29, 2002, two copies of the petition that was dismissed by the justices of the Supreme Court of Texas and will use that as a basis to respond even though he does not know exactly what petitioner demanded or presented as evidence to support the petition.

8. Petitioner sought a mandamus directing Mr. David DeLamar, respondent, to declare William ineligible and to notify the Secretary of State for the State of Texas of William's ineligibility. However, respondent has no authority to make the administrative declaration of inadmissibility in this case. In fact, if respondent were to serve the Secretary of State with an administrative declaration of ineligibility he would do so without any authority under Texas law, exposing himself to possible litigation from William.

9. The Texas Election Code, § 145.003, Administrative Declaration of Ineligibility, states in pertinent part:

"(a) Except for a judicial action in which a candidate's eligibility is in issue, a candidate may be declared ineligible only as provided by this section....

(g) When presented with an application for a place on the ballot or another public record containing information pertinent to a candidate's eligibility, the appropriate authority shall promptly review the record. If the authority determines that the record establishes ineligibility as provided by Subsection (f), the authority shall declare the candidate ineligible."

10. Petitioner states the above Election Code statute as evidence that respondent is or was required to declare William ineligible. The "appropriate authority" to whom the application was submitted last year was the Libertarian Party State Chairman, Mr. Geoff Neale. There can be no presumption of "promptness" on this matter since the entire party, including then-State Chair Neale, were advised at the Libertarian Party State Convention in June of 2001 that William intended to run for the Supreme Court and that he was not licensed to practice law in the State of Texas.

11. Respondent did not become the Libertarian Party State Chairman until after the Libertarian Party State

Convention on June 8, 2002. He was never presented with an application from William for candidacy for any office. The party official responsible for certifying William's name to the Secretary of State was the Convention Chair of the State Convention, not the State Chairman, an entirely different entity. Respondent is not the Convention Chair of the Libertarian Party 2002 State Convention. Petitioner conveniently left out the following Election Code section, §145.003, from his argument:

"(b) A candidate in the general election for state and county officers may be declared ineligible before the 30th day preceding election day by:

(1) the party officer responsible for certifying the candidate's name for placement on the general election ballot, in the case of a candidate who is a political party's nominee;..."

12. The party officer responsible for certifying a candidate's name to the Secretary of State is set by statute, in the Texas Election Code, § 181.068. Party's Certification of Nominees, which states, in pertinent part:

"(a) The presiding officer of each convention held under this chapter shall certify in writing for placement on the general election ballot the name and address of each candidate nominated by the convention."

13. The Convention Chair did in fact certify William's selection by the Libertarian Party as the party's candidate for Chief Justice of the Texas Supreme Court. Moreover, respondent has no lawful authority to issue an administrative notice of ineligibility to anyone selected by the state convention and certified to the Secretary of State of the State of Texas. Therefore, the presumed requested action of the petition is a request for respondent to do that which is not within his authority to do.

14. Petitioner apparently requests, in the alternative, a mandate directing the Secretary of State to declare William ineligible and to remove William from the ballot. Once again, petitioner demands something that is not allowed by any statute. Indeed, petitioner provides no statutory authorization for the Secretary of State to do anything before the close of the polls on election day. This is because there is no authority for the Secretary of State to act before the close of polls on election day.

III. Matter is under consideration of federal courts

15. On June 7, 2002, William filed suit against the State Bar of Texas, and the Justices of the Texas Supreme Court and others, related to the actions of defendants. The case number is H-02-2167. The defendants have acted to prevent William from holding a Constitutionally created office, to wit: Chief Justice of the Texas Supreme Court. William is contesting the very statutes and constitutional amendments under which petitioner seeks to have his petition for writ of mandamus approved.

16. Since the constitutionality of the very statutes and constitutional amendments brought forward by petitioner is in question, issuing of a writ of mandamus, if in fact there were any statutory provisions for action in the first place, would likely be viewed by the Honorable Nancy Atlas, United States District Judge, as an attempt to strip the court of jurisdiction to decide the constitutional issues involved. Moreover, William will be irreparably harmed by the issuance of the writ of mandamus while no harm would come to anyone if the nomination by the Texas Libertarian Party is allowed to stand until the federal courts can rule on the matters brought forward by William.

IV. Party not served in accordance with the rules

17. The Texas Rules of Appellate Procedure, Rule 9.5(a), states that "At or before the time of a document's filing, the filing party must serve a copy on all parties to the appeal or review." William was not aware of any proceeding filed in this court until a call on August 29, 2002, from the court's clerk, Ms. Betty Garcia, at 3:35 P.M. As of the time of this filing, William still has not been served in accordance with the rules. William was told by Ms. Garcia that he had until 12:00 noon on August 30, 2002, to formulate and deliver a response to a petition which he has yet to see.

18. Because there has been no proper service, this petition should be denied for improper service.

C. Other issues

19. Petitioner has apparently not informed this honorable court that the matters made the basis of their request are already under consideration in the United States District Court. Moreover, petitioner has apparently not informed the court that the Supreme Court of Texas has already denied petitioner's petition for writ of mandamus

as "moot," in Case No. 02-0772. Petitioner has omitted obviously important evidence and documents in petitioner's attempt to get this Honorable court to violate William's right to run for constitutional office.

20. Moreover, petitioner has presented a groundless petition since the action desired to be instructed is not allowed under the existing Texas Election Code Statutes.

21. Texas Rule of Appellate Procedure 52.11 provides for sanctions against any party who brings groundless petitions or grossly misstates or omits obviously important and material facts.

C. Conclusion


22. William, a real party in interest in this case, has shown that this Honorable court does not have jurisdiction to grant the petitioner's petition; that there has been no proper service; that the issues under consideration herein are properly before the United States District Court; and, that the action requested by the petition for writ of mandamus are not provided for by any statute.

D. Prayer

23. For these reasons, William asks the court to deny petitioner's petition for writ of mandamus. T.R.A.P. 52.8.

24. Moreover, William asks that the court take notice that petitioner has filed a petition that is both groundless and has omitted obviously important evidence and facts. William asks for sanctions against petitioner and requests attorney's fees in the amount of \$10,000, and whatsoever other relief that the court may find just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on August 30, 2002 a true and correct copy of the above and foregoing document was served on **Thomas R. Phillips**, at the Supreme Court Building, P. O. Box 12248, Austin, Texas 78711, by and thourth his attorney of record Mr. Alan D. Rosenthal, One Houston Center, Suite 2800, 1221 McKinney Street, Houston, Texas 77010 by certified mail, return receipt requested. CMRRR Number **7002 0860 0007 4637 5142**



Clifford F. William