

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Mathis Kearse Wright Jr.,

Plaintiff-Appellee,

vs.

**Sumter County Board of
Elections and Registration,**

Defendant-Appellant.

Appeal Nos.

18-11510 and 18-13510

**Plaintiff-Appellee's
Motion for a Limited
Remand or, in the
Alternative, to Strike
Portions of the
Appellant's Brief that
Rely on Evidence Outside
of the Record**

**Wright v. Sumter County Bd. of Elections and Registration
18-11510 and 18-13510**

**Certificate of Interested Persons
and
Corporate Disclosure Statement**

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3,
counsel for the plaintiff-appellee certifies that the following persons and
entities have or may have an interest in the outcome of this case:

ACLU Foundation, Inc.

ACLU Foundation of Georgia, Inc.

Baker & Hostetler, LLP

Braden, E. Mark

Brady, Robert

Khondoker, Aklima

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McDonald, M. Laughlin

McKnight, Katherine L.

Raile, Richard R.

Reid, Kimberly

Sands, W. Louis

**Wright v. Sumter County Bd. of Elections and Registration
18-11510 and 18-13510**

**Certificate of Interested Persons
and
Corporate Disclosure Statement
(continued)**

Sells, Bryan L.

Stanley, Trevor

Sumter County Board of Elections and Registration

The Law Office of Bryan L. Sells, LLC

There is no nongovernmental corporate party to this proceeding.

/s/ Bryan L. Sells
Bryan L. Sells
Attorney for Mathis Kearse Wright, Jr.,
Plaintiff-Appellee
Dated: November 28, 2018

Plaintiff-Appellee Mathis Kearse Wright, Jr. respectfully moves the Court for a limited remand of this case to the district court in order to allow that court to re-open the record for consideration of the results of the election held on November 6, 2018. In the alternative, Wright moves the Court to strike those portions of Appellant Sumter County's brief which rely on those results, which are outside of the evidentiary record in this case.

Background

This is a Section 2 challenge to the method of electing members of the Board of Education in Sumter County, Georgia. The plaintiff-appellee, Mathis Kearse Wright, Jr., is an African-American resident and registered voter in Sumter County. The defendant-appellant is the Sumter County Board of Elections and Registration ("Sumter County" or the "County"), which is responsible for conducting elections for members of the Sumter County Board of Education. Act No. 87, 2001 Ga. Laws 3865.

Wright filed this action on March 7, 2014. (ECF 1.)¹ After one round-trip to this Court (Appeal No. 15-13628), the district court held a

¹ All ECF citations refer to documents filed in the district court.

trial on remand in December 2017. On March 17, 2018, the Court issued a 38-page order finding, “based on the totality of the circumstances, that the at-large districts of the Sumter County Board of Education dilute African-American voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301.” (ECF 198 at 37.) The district court did not enjoin the County from using the challenged plan or adopt a remedy in its order but noted instead that this case “now moves to a remedial stage.” (*Id.*)

On March 30, the district court granted Wright’s emergency motion for an order enjoining the May 22 school-board election, which was about to be held using the plan that the Court found to be discriminatory. (ECF 204.) In its order, the court indicated that it would enter a further order by July 23 setting forth an interim remedial plan for future school-board elections. (*Id.* at 7.)

The County appealed that injunction. (ECF 207.) That appeal was docketed as 18-11510.

Then on June 21, the district court issued an order modifying the March 30 injunction from which the County had appealed. (ECF 214.) The new order modified the prior order by removing the self-imposed

July 23 deadline for issuing an order regarding new boundaries for the board of education election districts. The court concluded that it lacked jurisdiction to do so because of the pendency of this appeal. The net effect of the June 21 order was to allow the County to hold the next school board election on November 6, 2018, using the election plan that the district court had found to violate the Voting Rights Act.

Wright promptly filed a motion asking the district court to reconsider its June 21 order. On July 23, the district court denied Wright's motion for reconsideration after again concluding that it lacked jurisdiction to issue new boundaries. (ECF 217.) The court also denied without prejudice Wright's request for an order enjoining the November election but stated that it would "... entertain the request [to enjoin the November election] upon Wright's motion on a date closer to the election." (*Id.* at 7). Wright filed a motion making that request eight days later, and the district court expedited the briefing schedule.

On August 9, while the parties were briefing Wright's motion for an injunction in the district court, this Court issued a limited-remand order returning the case to the district court with instructions to issue new boundaries for the November election if it was still feasible to do so.

Otherwise, the district court was instructed to resolve any motions regarding the November election and return the case to this Court.

On Friday, August 17, the district court entered an order concluding that it was not still feasible to issue new boundaries for the November election and that the election should not be allowed to proceed under the boundaries that it had found to be discriminatory. (ECF 237.) The court then issued a longer order explaining its injunction on the following Monday. (ECF 238.)

Later that same day, the County filed an emergency motion asking this Court to stay the district court's August 17 injunction and to allow the school-board election to proceed in November under the unlawful boundaries. The County's appeal of the August 17 injunction was docketed as 18-13510, and the County moved to consolidate that appeal with 18-11510.

On August 24, this Court granted the County's motion to consolidate but denied the County's motion to stay. As a result, the general election went forward on November 6 *without* any school-board races on the ballot in Sumter County.

The County then filed its brief in the consolidated appeal on November 26. That brief expressly incorporates the earlier brief filed by the County in 18-11510, but it also relies heavily on the results of the November 6 election which are not in the record of this case. (*See* Appellant's Br. at 7-11.) In its statement of the case, the County cites to election results posted on the internet. (*Id.* at 8.) The County's argument section focuses almost exclusively on those results, and a July 28 *New York Times* article, as grounds for this Court to reverse the district court's finding on liability. (*Id.* at 9-11.) The County also draws certain inferences about voting patterns and turnout in the November election from the results in Sumter County, and it relies on those inferences to support its argument on the merits. (*Id.* at 10 ("Plainly, black voters have an equal opportunity to win the countywide vote simply by turning out, *as ostensibly occurred in this election.*") (emphasis added)).

On November 27, Wright filed a motion in the district court to re-open the record in order to test and rebut the County's evidence of the 2018 election. (ECF 246.) The motion notes, however, that the district court lacks jurisdiction to grant the motion while this appeal is pending,

and it therefore asks that court to issue an indicative ruling under Rule 62.1(a) of the Federal Rules of Civil Procedure.

Argument

As this Court has made clear many times, “We do not consider facts outside the record.” *Turner v. Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008). Yet that is precisely what the County is asking this Court to do. The results of the 2018 election are not in the record, and neither are the inferences about voting patterns and turnout that the County wants this Court to draw from those results.

Wright disputes the admissibility, reliability, and accuracy of the evidence and inferences presented in the County’s brief. If this new material is to be considered at all, Wright seeks the opportunity to test and rebut that evidence in accordance with due process. In election cases, that usually means expert analysis of racial voting patterns and turnout.

Re-opening the record in election cases to accommodate new election data is routine if not mandatory. *See Levy v. Lexington Cnty.* 589 F.3d 708, 715 (4th Cir. 2009). In a case challenging the at-large method of electing members of the school board in Lexington County,

South Carolina, the Fourth Circuit held that the district court abused its discretion when it failed to consider the results of two school-board elections that occurred after the trial but before the district court ruled in the plaintiffs' favor on the merits. *Id.* at 714-15. The court of appeals noted that the district court should have re-opened the record even though the school board had only sought to supplement the record: "To allow one side to supplement the record without allowing the opposing party the opportunity to contest the admissibility, reliability, and accuracy of the new evidence, and to offer rebuttal evidence, would implicate due process concerns." *Id.* at 715 n.8.

Those same due process concerns are present here as well, except that the County is effectively asking this Court, and not the district court, for permission to supplement the record. But this Court is not the appropriate body to hear the parties' competing evidence and to make findings of fact in the first instance. "The reviewing court oversteps the bounds of its duty if it undertakes to duplicate the role of the lower court. Appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1306-07 (11th Cir.

2006) (cleaned up). As result, this Court should issue a limited remand under Rule 12.1 of the Federal Rules of Appellate Procedure if the Court determines that evidence regarding the 2018 election is probative and that excluding it would be unjust. *Cf. Levy*, 589 F.3d at 715.

Alternatively, if the Court concludes either that the evidence is not especially probative or that excluding it would not be unjust, then the Court should simply strike the portions of the County's November 26 brief that rely on the evidence outside the record. Wright's position is that the results of the November 2018 election are not probative here because, among other things, there were no school-board races on the general-election ballot, because school-board elections are non-partisan, and because school-board elections are held in May. Allowing the County to introduce new evidence will also lead to yet more delay in this case which is about to enter its fifth year. As a result, this Court could allow this appeal to proceed more or less as scheduled by striking pages 7-11 of the County's November 26 brief.

Conclusion

For the foregoing reasons, this Court should either issue a limited remand with instructions to re-open the case for consideration of the

2018 election *or* strike the portions of the County's brief that rely on evidence outside the record.

Dated: November 28, 2018

/s/ Bryan L. Sells

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Certificate of Compliance

This document complies with the type-volume limit of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because, excluding the cover page, tables, certificates, and signature blocks, this document contains 1,641 words. This document complies with the typeface and type-style requirements of Local Rule 27-1(a)(10) because this document has been prepared in a proportionally spaced typeface using version 16.12 of Microsoft Word for Mac in 14-point Century Schoolbook font.

/s/ Bryan L. Sells

Bryan L. Sells

Attorney for Mathis Kearse Wright, Jr.,

Plaintiff-Appellee

Dated: November 28, 2018

Certificate of Service

I hereby certify that on November 28, 2018, I electronically filed the foregoing **Plaintiff-Appellee's Motion for a Limited Remand or, in the Alternative, to Strike Portions of the Appellant's Brief that Rely on Evidence Outside of the Record** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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